

STATE OF MICHIGAN
COURT OF APPEALS

MIMOZA NECI,

Plaintiff,

and

VERA NECI

Plaintiff-Appellant,

v

VANNICE ARRIN STEEL, JR., CLARA JONES,
and ANITA TERRY,

Defendants,

and

CITIZENS INSURANCE COMPANY OF
AMERICA,

Defendant-Appellee.

UNPUBLISHED

November 13, 2008

No. 277069

Wayne Circuit Court

LC No. 05-523483-NI

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff Vera Neci appeals as of right the trial court's decision granting defendant's motion for summary disposition in this threshold impairment case. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Pertinent Facts

On August 9, 2004, plaintiff, who was 13 years old at the time, was a passenger in a car that was hit while passing through an intersection under a green light. She suffered a fractured humerus in her left arm, which was treated with a splint and pain medication. Plaintiff is right-hand dominant.

At plaintiff's first follow-up appointment on August 12, 2004, she described pain in her left forearm. Her doctor further reduced the fracture and re-splinted her arm. Plaintiff was given restrictions on bending, twisting, lifting, and repetitive movements effective August 9, 2004 through November 4, 2004. Plaintiff's doctor also ordered attendant care to assist plaintiff with bathing, dressing, grooming, feeding, and transfers to the tub, toilet, etc., for a period of time following the injury.¹

As early as August 19, 2004, plaintiff was evaluated as having no pain from the injury. On September 9, 2004, plaintiff was evaluated as having only minimal pain with palpation, and treatment was modified from a coaptation splint to a fracture brace. On October 7, 2004, plaintiff was evaluated as having no pain with palpation. She was given instructions to continue wearing a fracture brace for another four weeks.

On November 4, 2004, plaintiff was diagnosed as having a healed humerus fracture with no pain with palpation. She was no longer required to wear a fracture brace. She was cautioned against heavy lifting for the ensuing four weeks, with activities expected to gradually return to normal. No physical therapy was ordered.

At her next appointment on April 19, 2005, plaintiff was diagnosed as having full range of motion with minimal pain with palpation. At that time, she had occasional symptoms that seemed to be improving and did not require physical therapy. Follow-up was to be on an as-needed basis, and no additional medical treatment occurred.

Although not based on any doctor's advice, plaintiff missed several days of school after the accident because she could not carry her backpack. On those days, she took Advil for pain management. Plaintiff contends that she was required to wear casts and slings for approximately seven months, and used a sling for a period of time thereafter when her arm hurt, which was usually when it was cold outside or she was a passenger in a vehicle. Eventually, plaintiff stopped using the sling altogether. There is no mention in plaintiff's medical records, however, of the need for a fracture brace beyond November 2004, or the use of a sling.

Plaintiff further contends that the injury resulted in an inability to play recreational sports, although she has never played any organized sports, and her doctor told her she would be healed enough to play again a year or two after the injury.² She also claims an inability to lift heavy objects or perform heavy cleaning per her doctor's orders, but the medical evidence does not support any such restriction beyond the previously mentioned four-week restriction.

¹ The authorizing documentation is to some extent inconsistent regarding the number of hours required per day, the dates actually prescribed, and when the attendant care was ordered.

² There is no documentation in plaintiff's medical records with respect to anticipated healing time or any restrictions on physical activity other than during the treatment period as referenced herein.

Plaintiff filed suit alleging that the injuries she sustained in the accident constituted a serious impairment of body function. Defendant moved for summary disposition. The trial court granted the motion, finding that while plaintiff had an objectively manifested injury with varying restrictions for the first six months following the injury, it did not affect her ability to lead a normal life under the changed trajectory of life standard.

II. Law and Analysis

We review de novo a grant of summary disposition and a question of statutory interpretation. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

MCL 500.3135 states in pertinent part:

(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) For a cause of action for damages . . . all of the following apply:

(a) . . . [S]erious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.

A serious impairment of body function is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

Kreiner, supra, set out the requirements for establishing the existence of a serious impairment of body function for which recovery is allowed. To determine an issue as a matter of law, "a court must [first] determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function." *Id.* at 131-132. Second, the court must "determine if an 'important body function' of the plaintiff has been impaired" and is supported by objective manifestation. *Id.* at 132. An impairment of an important body function must be objectively manifested; "[s]ubjective complaints that are not medically documented are insufficient." *Id.* Third, the court "must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." *Id.* This is done in a "multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." *Id.* at 132-133.

Objective factors for evaluating a plaintiff's general ability to lead his or her normal life include, but are not limited to: the nature and extent of the impairment, the type and length of the required treatment, the duration of the impairment, the extent of any remaining impairment, and the prognosis for eventual recovery. *Id.* at 133.

Here, the trial court correctly concluded that the undisputed evidence established that plaintiff sustained an objectively manifested injury, a broken humerus, in the accident. This Court's decision in *Williams v Medukas*, 266 Mich App 505; 702 NW2d 667 (2005), supports the conclusion that the use of an arm is an important body function. The trial court correctly rejected plaintiff's assertion that her injury impaired her general ability to lead her normal life. The court did not trivialize the impact of plaintiff's actual injury, or deny the effects that it undoubtedly had on her; however, plaintiff's restrictions, even if they had been physician-imposed, fell short of what was required to alter her ability to lead her normal life. The court properly held that the temporary restrictions imposed did not affect her ability to lead her normal life under the changed trajectory of life standard, notwithstanding that she was not able to participate in recreational activity and some family responsibilities. For the most part, plaintiff's restrictions were self-imposed. Self-imposed restrictions, based on real or perceived pain alone, are insufficient to establish the extent of residual impairment. *Kreiner, supra* at 133 n 17.

Plaintiff argues that her injuries were very similar to those suffered by the plaintiff in *Williams, supra*, but this comparison fails for several reasons. Williams was involved in a car accident, suffered multiple fractures, and had both arms immobilized for one month. *Id.* at 506. Williams suffered a documented, permanent impairment to his range of motion, and was no longer able to lift his right arm above his head. *Id.* at 508-509. This condition permanently impaired certain aspects of his ability to coach a middle school girl's basketball team, including no longer being able to show his students how to shoot a basketball. *Id.* He was also unable to continue his hobby of golfing several times a week, or engage in activities with his grandchildren, such as play catch, due to the permanent reduction in his range of motion. *Id.* at 509.

Plaintiff errs in contending that her documented impairment was longer than that in *Williams*. While William's period of treatment may have been shorter, he suffered permanent impairment to his range of motion as a result of the injury. Plaintiff's contention that she was unable to participate for a period of time in some activities, like basketball and volleyball at recess, is simply insufficient to demonstrate that her injury affected her general ability to lead her normal life.

Based on the totality of the circumstances, while plaintiff suffered an objectively manifested injury of an important body function, she failed to present evidence that the impairment affected her general ability to lead her normal life. No material issue of fact exists to be resolved.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis