

STATE OF MICHIGAN
COURT OF APPEALS

CARMELLA ROSE MILLER,

Plaintiff-Appellant,

v

BRANDON NICHOLAS LEE COOPER, NICK
W. BONGARD, and MICHIGAN MILLERS
MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED

February 9, 2010

No. 289114

Mecosta Circuit Court

LC No. 07-018017-NI

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

PER CURIAM.

In this threshold case under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right the trial court's order granting summary disposition to defendants. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

According to plaintiff, she was driving her car on the evening of February 3, 2006, when defendant Brandon Cooper, driving a car owned by defendant Nick Bongard, entered her pathway and caused a head-on collision. Plaintiff suffered injury to her left shoulder and right knee, each eventually requiring surgery, and a laceration and other damage to her face, which also required surgery.¹

Plaintiff filed suit, alleging negligence against Cooper, owner liability against Bongard, and claiming underinsured motorist benefits against her insurer, defendant Michigan Millers Mutual Insurance Company. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). After hearing arguments and engaging in a detailed analysis of the documentation submitted and the applicable law, the trial court granted the motion.

¹ Plaintiff was treated in the emergency room after the accident and received sutures in her lower lip due to facial trauma. X-rays taken at that time revealed no fractures. Plaintiff underwent arthroscopic knee surgery on September 13, 2006, arthroscopic shoulder surgery on March 16, 2007, and surgery to excise scar tissue on her lower lip on April 16, 2007.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

MCL 500.3135(1) provides that 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." Subsection (7) states that, "'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." Subsection (2)(a) establishes that whether a person has suffered serious impairment of a body function is a question of law for the court, where there is no factual dispute concerning the nature and extent of the injuries, or where no such factual dispute is material to the question whether the person has suffered serious impairment of a body function. Accordingly, "the issue . . . should be submitted to the jury only when the trial court determines that an 'outcome-determinative genuine factual dispute' exists." *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001), quoting *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

Our Supreme Court's decision in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), indicates that the conditions reinstating tort liability under the no-fault act are not lightly to be found. "Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if . . . the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected" for purposes of establishing a serious impairment. *Id.* at 131. The focus is not on the plaintiff's subjective pain and suffering, but on injuries that actually affect the functioning of the body. *Miller*, 246 Mich App at 249, quoting *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982). Residual impairments based on real or perceived pain are a function of "physician-imposed restrictions," not "[s]elf-imposed restrictions." *Kreiner*, 471 Mich at 133 n 17.

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. [*Id.* at 133 (footnotes omitted).]

In this case, at deposition plaintiff testified that her knee surgery required eight weeks' recuperation, elaborating that for the first three weeks she wore a brace around the clock, and could bathe only as best she could from the sink or with another's assistance. Then, for the five weeks that followed, she could still not put weight on her knee, and still could not do any household chores and so engaged others to walk her dogs, do her shopping, shovel snow, and drive her to appointments. Plaintiff added that for the three weeks after that, as she went about doing laundry, or washing dishes, she would frequently have to sit down.

Concerning her shoulder, plaintiff testified that as time passed after the accident she realized that she could not raise her arm as far as she could before because of pain, or a burning sensation, and added that this affected her sleeping and occasionally induced her to take as many as six aspirin tablets at a time. Plaintiff complained that this too affected her ability to walk her dogs, and also that numbness interfered with her ability to dress herself. About six months after the knee surgery, plaintiff underwent shoulder surgery, and a recuperation period of ten weeks followed. During that time, according to plaintiff, she required intensive pain therapy, needed help bathing, and engaged others to walk her dogs, mow the lawn, do the laundry, dishes, and grocery shopping, and to drive her to appointments. Plaintiff added that, during this time, she was obliged to sleep sitting in a recliner with her foot on a stool.

Concerning her mouth, plaintiff testified that she had to buy special toothpaste to avoid an unpleasant burning sensation, and that for about a week she could manage only a liquid diet.

Plaintiff described herself before the accident as very active, with no pain in her knee or shoulder. She had worked as a hospice-type volunteer, but could no longer do that because she lacked the arm strength to attend to patients. Plaintiff testified that she had formerly enjoyed renting a kayak a few times a month, but has not gone kayaking since the accident because she knows it will cause her shoulder and arm to ache afterwards.

In explaining its decision to grant summary disposition in this case, the trial court painstakingly reviewed the documentary evidence, then applied *Kreiner* and related authority. That plaintiff suffered objectively manifested impairment of important body functions was never at issue. This case hinged on whether those injuries affected the course or trajectory of plaintiff's normal life. The trial court noted that plaintiff had returned to most of her pre-accident activities, and that even where she had not there were no physician-imposed restrictions involved. The court concluded as follows:

[B]ased on the relatively aggressive *Kreiner* case . . . , I think my conclusion must be that I should grant the motion for summary disposition on the basis that the period of true disability here for [plaintiff], the eight and ten-week recovery periods, maybe some periods just before the actual decision to recommend surgery; those periods of time, and the fact that even as she was recuperating, I believe within about halfway between those periods she was taking on more and more of what had been her historic daily living activities, that she would not be I think determined to have that serious impairment to meet the threshold.

I do acknowledge what was said about the kayaking. That kayaking, some help required to walk the dogs and maybe some limitation on maybe rolling a person over [when helping with hospice-type care]; . . . I still don't find that her overall life: getting up in the morning, cooking, cleaning, gardening, going about her business, driving to her medical appointments and things like that have been so substantially affected . . . that the *Kreiner* threshold requirements have been met. [Italics supplied.]

Plaintiff insists that *Kreiner* was wrongly decided and invites this Court to deviate from it. We must decline the invitation. Our duty, as an intermediate appellate court, is to apply our Supreme Court's dictates conscientiously. See Const 1963 art 6, § 1. We are bound by stare

decisis to follow the Court's decisions. *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). Because *Kreiner* remains seminal and binding, the trial court properly applied it, as will we.²

Plaintiff argues that the trial court overemphasized the temporary nature of the disabilities connected with her injuries. However, the court never suggested that it thought an injury or disability had to be permanent, or even of great duration, to be actionable. Instead, the court properly regarded the duration of impairments as but one factor to consider. And it properly regarded the combination of impairments described, and their durations, as falling short of changing the trajectory of plaintiff's life generally. See *Kreiner*, 471 Mich at 133.

In addition, as the trial court noted, residual impairments attributed to perceived pain involved self-imposed restrictions in this circumstance, not physician-imposed ones. See *id.* at 133 n 17.

Plaintiff also contends that defendants mischaracterized in the trial court plaintiff's pre-accident medical history and lifestyle and overemphasized plaintiff's lack of employment and receipt of disability benefits for unrelated reasons before the accident. The court was obliged, however, to compare plaintiff's pre- and post-accident circumstances to evaluate whether the accident changed the trajectory of her life. Our reading of the opinion below shows no excessive, or otherwise erroneous, consideration of plaintiff's pre-accident limitations.

For these reasons, we conclude that the trial court properly granted defendants' motion for summary disposition.

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering

/s/ Jane E. Markey

/s/ Stephen L. Borrello

² As of the date of this opinion, *McCormick v Carrier* (Docket No. 136738) remains pending before the Michigan Supreme Court, wherein the plaintiff challenges the *Kreiner* Court's interpretation of the no-fault act's threshold for serious impairment of a body function.