STATE OF MICHIGAN

COURT OF APPEALS

ALMIRA PATKOVIC, Plaintiff-Appellant,	UNPUBLISHED July 15, 2008
v	No. 276472 Ingham Circuit Court
STEVEN MICHAEL PERRY, Defendant-Appellee.	LC No. 06-000425-NI

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

In this action seeking noneconomic damages under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right the trial court's order granting summary disposition to defendant. Because plaintiff's injuries have not affected her general ability to lead her normal life, we affirm.

I

On August 18, 2004, plaintiff suffered injuries in an automobile accident caused by defendant's failure to yield the right-of-way. Plaintiff sued defendant seeking to recover noneconomic damages. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff's injuries did not constitute a serious impairment of body function. The trial court agreed, and granted defendant's motion.

II

We review de novo a trial court's decision on a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition is proper under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). In determining whether a genuine issue of material fact exists, we view the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Coblentz, supra* at 567-568.

A

Under the no-fault act, a plaintiff may recover noneconomic damages only if she has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). The issue whether an injured person has suffered a serious impairment of body function is a question of law for the court if the court finds that there is no factual dispute concerning the nature and extent of the person's injuries or "[t]here 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." MCL 500.3135(2)(a).

On appeal, plaintiff contends that there are five material factual disputes concerning the nature and extent of her injuries that should have precluded the trial court from granting summary disposition to defendant.

First, plaintiff argues that because defendant contends her work restrictions are self-imposed, there is a factual issue concerning the presence of physician-imposed work restrictions. The evidence establishes that plaintiff's physicians prohibited her from working for approximately seven months after the accident. Then, in April 2005, when Dr. Joel Bez permitted plaintiff to return to work, he restricted plaintiff from lifting more than ten pounds, from engaging in repetitive bending and twisting, and requiring that plaintiff be allowed to have a sit/stand option. Accordingly, there is no factual dispute that plaintiff was under physician-imposed work restrictions.

Second, plaintiff argues that there is a factual dispute as to the viability of surgical intervention. Although plaintiff's counsel stated at the hearing on the motion for summary disposition that plaintiff is "afraid of having surgery," there is no record evidence indicating that surgery was an option for plaintiff. The only mention of surgery in the medical records is in a January 13, 2006 letter from Dr. Ruth Yoon, in which she noted that plaintiff was "not interested in surgery." This notation, however, does not indicate whether surgery was actually being considered or was recommended.[1] We conclude that because there is no documented evidence indicating that surgery was considered, plaintiff has not established a factual dispute regarding the viability of surgical intervention as a remedy to her injuries.

Plaintiff next argues that there is a factual dispute regarding the underlying basis for her inability to return to work. Defendant asserts that plaintiff has elected not to work, while plaintiff contends that her physician-imposed restrictions prevent her from working, as she is not in a position to request an employer to accommodate her work restrictions. The record reveals

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[1] In her brief on appeal, plaintiff asserts that, at her deposition, she testified that Dr. Scott Kuhnert told her that surgical intervention was not a viable course of action because of her young age. However, the page of plaintiff's deposition containing this statement was not presented to the trial court; therefore, we will not consider this statement in deciding this appeal. See *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990) ("[T]his Court's review is limited to the record presented in the trial court").

that after April 2005, plaintiff only filled out job applications at a hotel and at an engineering firm. Plaintiff testified that she only filled out the job applications because AAA threatened to stop paying her benefits. At the time she filled out the job applications, neither the hotel nor the engineering firm had any open positions. Plaintiff has not provided evidence that she has actually attempted to secure employment but has been unable to do so because of her work restrictions. Accordingly, there no dispute that plaintiff's "inability" to work is a result of her decision not to actively seek employment.

Plaintiff also argues that there is a factual dispute as to the nature, extent, and duration of the treatment she received. The documentary evidence presented to the trial court establishes the nature and extent of plaintiff's treatment. We will not consider counsels' differing views about the nature and extent of plaintiff's treatment as a material factual dispute.

Finally, plaintiff argues that because defendant alleges her injuries are due, in part, to a "slip and fall" occurring after the automobile accident, there is a factual dispute as to the source or cause of her injuries. In a July 2005 progress note, Dr. Yoon noted that plaintiff sought treatment because she had been experiencing severe right back pain after she slipped and fell in a locker room at a swimming pool. On appeal, plaintiff contends the slip and fall never occurred.[2] This factual dispute is not material. Because even if plaintiff sought treatment from Dr. Yoon for injuries relating to the automobile accident, rather than a slip and fall, plaintiff's injuries from the automobile accident, as will be explained *infra*, did not affect her general ability to lead her normal life.

Plaintiff has not demonstrated that, because of the existence of material factual disputes, the trial court was precluded from deciding as a matter of law whether plaintiff suffered a serious impairment of body function.[3]

B

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). Plaintiff claims that because of the pain resulting from the injuries to her back, her general ability to lead her normal life has been affected. In *Kreiner v Fischer*, 471 Mich 109, 133; 683 NW2d 611 (2004), our Supreme Court provided the following nonexhaustive list of objective factors that may be used in evaluating whether the plaintiff's general ability to conduct the course of her 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

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[2] However, we note that, in her response to defendant's motion for summary disposition, plaintiff stated that, in July 2005, Dr. Yoon treated her for injuries sustained when she slipped and fell at a swimming pool.

[3] For the purposes of his motion for summary disposition and this appeal, defendant assumes plaintiff's injuries resulted in an objectively, manifested impairment of an important body function. *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

recovery." "[T]he totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment 'affects the person's general ability to conduct the course of his or her normal life.'" *Id*. at 134.

Plaintiff's impairment consists of injuries to her back. An October 2004 MRI showed a disc bulge at L5-S1. The disc bulge was also seen in an April 2005 EMG and a December 2005 MRI. We note that, while no physician disputed that plaintiff suffered from a disc bulge, the physicians who examined plaintiff disagreed as to whether the disc bulge was the source of plaintiff's pain. For example, Dr. Bez attributed plaintiff's pain to the disc bulge, while Dr. Michael Andary, along with Dr. Michael Maxwell and Dr. Charles Bill could not identify the etiology of plaintiff's pain. In addition, physicians disagreed on whether plaintiff suffered from lumbar radiculopathy. However, given consideration of the other *Kreiner* factors, see *infra*, these disagreements does not support a conclusion that the trial court erred in granting summary disposition to defendant.

Following the accident, plaintiff treated with her family physician, Dr. Richard Britton, for three months, followed by treatment at a pain center for approximately four months. During this course of treatment, plaintiff received numerous prescriptions for pain medications, but she was never hospitalized, did not undergo surgery, and was not required to wear a back brace. Plaintiff attended eight physical therapy sessions, and she received two steroidal injections.

After plaintiff's last visit to the pain center, plaintiff sporadically sought treatment for the injuries to her back. According to the medical records, from April 2005 until July 2005, plaintiff did not seek treatment for any back injuries. Then, on July 26, 2005, plaintiff sought treatment from Dr. Yoon, and Dr. Yoon referred plaintiff to physical therapy. Plaintiff, however, only attended one session before she was discharged. Plaintiff claimed that she was too busy with her children at home to attend the therapy sessions. Plaintiff did not return for further treatment from Dr. Yoon for her back injuries until December 2005. According to the medical records, plaintiff saw Dr. Yoon just one more time in January 2006 for her back injuries.[4]

Plaintiff claims the fact that her physician-imposed work restrictions have never been lifted establishes that her impairment is ongoing. Although there is no evidence in the record to establish that plaintiff's physician-imposed restrictions were ever lifted, we find the restrictions to be of limited value concerning whether plaintiff's impairment is ongoing. The restrictions were imposed by Dr. Bez on April 1, 2005. After she received the work restrictions, plaintiff never returned to the pain center, and there is no evidence in the record to suggest that any physician thereafter reevaluated plaintiff's need for the restrictions. Similarly, there is no

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[4] In May 2005, Dr. Bill examined plaintiff at the request of Dr. Yoon. However, there are no medical records to indicate that plaintiff sought treatment for her back injuries from Dr. Yoon between January and May 2006 or beyond. In her brief on appeal, plaintiff asserts that, at her deposition taken in November 2006, she testified that she last sought treatment from Dr. Yoon for her back injuries a few weeks earlier. However, the deposition page containing this testimony from plaintiff was not presented to the trial court and, therefore, we will not consider this testimony in deciding the appeal. *Amorello, supra*.

evidence in the record to suggest that Dr. Bez intended for the work restrictions to be indefinite. In fact, Dr. Maxwell, who performed an independent medical examination of plaintiff in April 2005, anticipated that plaintiff's work restrictions would remain in place for one to three months.

Plaintiff also claims that her physician-imposed work restrictions, along with her inability to engage in household tasks, recreational activities, and playtime with her two daughters, establishes a residual impairment. However, as stated earlier, plaintiff has not demonstrated that the physician-imposed restrictions prohibited her from obtaining new employment. Plaintiff's inability to obtain employment is based on her decision not to actively seek employment.[5] According to plaintiff, she can no longer engage in certain household activities, such as cleaning the house, cooking meals, and doing the laundry, participate in recreational activities, such as tennis, volleyball, and biking, and play with her children in the yard because of the pain from her back injuries. Although several physicians recognized that plaintiff suffers from pain, no physician prohibited plaintiff from engaging in these activities or even instructed plaintiff to adjust her activities based on her pain level. Thus, plaintiff's restrictions are self-imposed. "Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish" a residual impairment. *Kreiner, supra* at 133 n 17; see also *McDanield v Hemker*, 268 Mich App 269, 283; 707 NW2d 211 (2005) (a plaintiff "cannot establish the extent of her residual impairment by merely claiming that she has restricted herself from engaging in activities or making certain movements because she experiences pain").[6]

Based on the totality of the circumstances, we conclude that plaintiff's injuries have not affected her general ability to lead her normal life.[7] After ceasing treatment with the pain center, plaintiff sporadically sought treatment and, because she was busy at home with her children, she refused to attend physical therapy. Likewise, plaintiff's inability to work and to engage in household and recreational activities are the results of a decision not to actively seek employment and of self-imposed pain restrictions. Accordingly, we affirm the trial court's order granting summary disposition to defendant.

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[5] There is no evidence in the record to suggest that the work restrictions prevented plaintiff from returning to her waitressing job at a local retirement center. Rather, the evidence indicates that plaintiff could not return to her job because it had been filled by someone else.

[6] Plaintiff testified that, for a few weeks following the accident, she could not walk up and down stairs and she was fed in bed. Also, for several months after the accident, plaintiff could not drive or bathe herself. However, at the time of her deposition, plaintiff was able to engage in all of those activities. In addition, no physician restricted plaintiff from engaging in these activities.

[7] We note that there is no indication in the record regarding whether plaintiff will indefinitely suffer from the impairments to her back.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra