

STATE OF MICHIGAN
COURT OF APPEALS

ADRIANNE WILLIAMS,

Plaintiff-Appellee,

v

DANIEL C. RUSCH and DAVIDSON,
BREED & DOWD, P.C.,

Defendants-Appellants.

UNPUBLISHED

January 27, 2009

No. 282233

Saginaw Circuit Court

LC No. 04-051228-NI

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial on damages, plaintiff was awarded \$144,951.02 in this legal malpractice case. Defendants appeal as of right, challenging only the order granting plaintiff's counter motion for partial summary disposition on liability. The order was based on a determination that, had a no-fault action been timely filed within the limitations period, plaintiff would have prevailed because she suffered a serious impairment of body function as a matter of law. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Under the no-fault insurance act, MCL 500.3101 *et seq.*, a plaintiff may recover for non-economic damages if he or she "has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is an "objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.5135(7). The grant or denial of a motion for summary disposition is reviewed de novo. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

In the lower court, defendants argued only that plaintiff's impairment did not "affect[] [her] general ability to lead . . . her normal life." In their summary disposition brief, defendants conceded that "[i]n the case at bar, plaintiff arguably demonstrates the objective manifestation of an injury inasmuch as the medical records support a conclusion that she injured her back in the accident." At the summary disposition hearing, defendants noted that "the argument is now limited to whether or not [plaintiff's] trajectory to lead a normal life was altered as a result of the auto accident." *Kreiner* indicates that before a court entertains the question of whether an impairment affects the general ability to lead a normal life, it must first determine that there is no

material issue regarding the nature and extent of a plaintiff's injury and that there is an objectively manifested injury of an important body function. *Id.* at 131-132. Because defendants conceded these points below, they cannot now raise them on appeal. See *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001).

In *Kreiner*, *supra* at 132-134, the Court stated:

In determining whether the course of the plaintiff's normal life has been affected, a court should engage 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. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre-and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "any effect" on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.

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. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the 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."

Defendants' argument is based on a disingenuous assessment of plaintiff's impairment. Defendants assert that because plaintiff is able to work full-time, pursued a degree, and was responsible for managing the home for a period after her husband moved, there is no evidence of an affect on the course of her life. Defendants acknowledge plaintiff's residual impairment and continuing limitations, but maintain that the surgery was successful, and that the continuing impairment and limitations are either self-imposed or collectively do not show that her life was significantly affected.

The factors outlined in *Kreiner*, together with other limitations, establish that plaintiff's impairment was serious. Preliminarily, we note that while the duration of plaintiff's impairment was *not* short, even a short impairment can be serious. For the first three years after the accident, plaintiff had ongoing medical treatment, including physical therapy, nerve blocks, and use of a TENS unit. Despite these measures, which at best provided only minimal relief, she ultimately could not work because her right leg was weak and numb from the hip to the foot and she had a great deal of low back pain. Plaintiff said she pretty much just "laid around [and] couldn't do

much.” She was unable to do household chores that involved bending and lifting, and unable to participate in recreational activities, including bowling, basketball, softball, volleyball, walking distances, and shopping for more than an hour, a favorite past-time. Moreover, three years after the accident when more conservative measures failed, plaintiff had a spinal fusion involving a bone graft. Afterwards, she was initially unable to walk primarily due to severe pain from her *left* hip to her toes. She eventually was able to walk with a walker, which she used for about six weeks. She then used a cane for about six months. She had occupational therapy to help her become self-sufficient again. She got a hospital bed to elevate her leg and back, and continued to use the bed. Plaintiff reported that the surgery helped “somewhat” with the back pain, but the numbness in her left leg persisted. She will be required to take Neurontin for the rest of her life, and at the time of her deposition was still using Vicodin as needed for pain. She has been told that her leg will not improve.

Plaintiff pursued a degree and eventually secured full-time employment after her surgery. This job did not require her to be on her feet all day. However, two and one-half years after the surgery, plaintiff reported:

- her left leg is always numb
- after work she’s tired, her leg is painful, and her balance is worse
- she cannot bend more than a 45 degree angle from the waist, which results in, for example, the inability to clean the bathtub; she also has difficulty taking a shower and washing her hair because she cannot be on her feet that long
- the impairment has had an effect on sexual activity
- she has difficulty walking because of balance
- she has difficulty riding in a car for more than two hours

The residual problems are not solely a result of pain, but a result of balance and range of motion issues as well. Based on the totality of these circumstances, we conclude that plaintiff’s short-term and long-term impairment affected her “general ability to conduct the course of . . . her normal life.” Accordingly, the trial court did not err in determining that plaintiff suffered a serious impairment of body function. Coextensively, there was no error in the determination that this legal malpractice action should have proceeded to trial on the damages issue only.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra