

STATE OF MICHIGAN
COURT OF APPEALS

EVA DOMACK,

Plaintiff-Appellee,

v

RILLIE SPINK, GARY SPINK, and PATRICIA
SPINK,

Defendants-Appellants.

UNPUBLISHED

July 20, 2004

No. 245699

Jackson Circuit Court

LC No. 01-003629-NI

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendants appeal by leave granted from an order denying their motion for summary disposition in this tort case arising from a motor vehicle accident. We reverse.

Defendants argue that the trial court erred in denying their motion for summary disposition under MCR 2.116(C)(10) because there is no evidence that plaintiff suffered a “serious impairment of body function” so as to meet the pertinent threshold for suit established by the no-fault act. A decision on a motion for summary disposition is reviewed de novo. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003). In doing so, we view the pleadings and admissible evidence in a light most favorable to the nonmoving party. *Id.*

The no-fault act generally abolishes tort liability arising from the ownership, maintenance, or use of a motor vehicle. MCL 500.3135(3). However, such liability remains for noneconomic loss from an injury that results in “serious impairment of body function.” MCL 500.3135(1). For this purpose, “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.”

To establish that an impairment is “objectively manifested,” “there must be a medically identifiable injury or condition that has a physical basis.” *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), quoting with approval SJI2d 36.11. By using the term “objectively

manifested” in defining serious impairment of body function the Legislature intended to adopt the meaning of that term set forth in *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), and *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982).¹ In this regard, recovery “is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body.” *Jackson, supra* at 650, quoting *Cassidy, supra*, 415 Mich at 505. In determining whether a plaintiff has suffered a serious impairment of a body function, it is appropriate to consider plaintiff’s general lifestyle before and after the injury. *May v Sommerfield*, 240 Mich App 504, 506; 617 NW2d 920 (2000).

In this case, plaintiff did not present objective evidence of an impairment caused by the motor vehicle accident that affected the functioning of her body. Plaintiff’s subjective testimony about pain and other symptoms plainly was not objective evidence. While the radiology report reflecting that at least one white matter lesion was found in plaintiff’s brain and the x-ray showing spinal subluxations are objective findings, there was no evidence that these conditions affected the functioning of her body. Therefore, they did not constitute an objective manifestation of an impairment. The psychologist’s report years after the accident indicating that plaintiff may have suffered impairments of cognitive functioning was not based on evidence of a medically identifiable physical injury attributable to the motor vehicle accident.² Accordingly, while plaintiff avers that she suffered a closed head injury from the accident, she presented no medical testimony or other medical evidence to the effect that she has suffered a

¹ *DiFranco* overruled *Cassidy*. However, by subsequently adopting the current statutory definition of serious impairment of body function “the Legislature returned the determination of threshold injury to the trial judge as it existed under *Cassidy*.” *Kern v Blethen-Coluni*, 240 Mich App 333, 338-339; 612 NW2d 838 (2000).

² For this reason, the present case is distinguishable from *Shaw v Martin*, 155 Mich App 89; 399 NW2d 450 (1986), a case cited by plaintiff. In that case, the plaintiff suffered a large cut on his forehead requiring thirty-two stitches as a result of a motor vehicle accident and about one week after the accident a doctor recommended that the plaintiff see a neuropsychologist. *Id.* at 91. Memory tests that the psychologist had the plaintiff in *Shaw* take formed the basis for an opinion by the psychologist that the plaintiff suffered memory loss. This Court concluded that such evidence of memory loss was evidence of an objectively manifested injury. *Id.* at 94-95. It is evident that the psychologist in *Shaw* examined the plaintiff in that case soon after an accident in which there was objective evidence of a substantial physical injury to the plaintiff’s head. The close proximity between the psychologist’s examination in *Shaw* and the accident in that case provided a reasonable basis for concluding that the memory loss was attributable to the physical injury from the accident. In contrast, the results of the psychological testing in the present case years after the accident cannot reasonably be considered objective medical evidence that cognitive deficiencies found from that testing were a result of the motor vehicle accident. In other words, in *Shaw*, the close proximity between the accident and the psychological testing showing memory loss reasonably supported an inference that the memory loss was due to the accident without relying on further subjective reports of memory loss by the plaintiff. In contrast, the psychological testing years after the accident in this case cannot reasonably support such an inference, but rather plaintiff’s claim of memory loss attributable to the accident would have to rely on her subjective claims of memory loss during the time between the accident and the psychological testing.

serious neurological injury. *Churchman v Rickerson*, 240 Mich App 223, 229-231; 611 NW2d 333 (2000). Thus, there was no evidence to support a finding of serious impairment of body function either under a straightforward application of the definition of that term by MCL 500.3135(7) or under the proviso of MCL 500.3135(2)(a)(ii) that “a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.”

Plaintiff’s reliance on *Kreiner v Fischer (On Remand)*, 256 Mich App 680; 671 NW2d 95 (2003), lv gtd 469 Mich 948; 671 NW2d 55 (2003), is misplaced. In *Kreiner* we held that the plaintiff created a genuine issue of material fact as to whether the significant work restrictions placed on plaintiff because of the auto accident affected his general ability to lead his normal life. However, in that case, unlike the instant one, the plaintiff’s hours were reduced at least 25%, and he had to refuse certain types of carpentry work. *Id.* at 687, n 6. In contrast, before the accident plaintiff worked part-time as a waitress, while after the accident plaintiff worked a part-time position as a waitress, but also thirty hours a week as an administrative secretary. Plaintiff’s testimony that she might miss one day a month in the secretarial position because of headaches does not take this case into the holding of *Kreiner*. Plaintiff has also continued attending part-time the same community college, where her grades exceeded a 3.4 grade point average in the fall of 2001, after the accident.

Plaintiff’s complaints about her horseback riding declining from once every two weeks to only twice since the accident, and her inability to water ski or “tube,” are not sufficient objective manifestations to establish that the injuries impacted her general ability to lead a normal life. MCL 500.3135(1). In light of the objective evidence showing plaintiff’s continued ability to work, go to school, and take care of herself as she had done prior to the accident, we conclude that the relatively minimal decrease in certain social functions, even for a young adult, do not cause these injuries to fall within the statutory framework.

The trial court erred by denying defendants’ motion for summary disposition because there was no evidence to reasonably support a finding that plaintiff suffered a serious impairment of body function as a result of the accident. We therefore reverse the trial court’s order denying defendants’ motion for summary disposition and remand this case for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray