

STATE OF MICHIGAN
COURT OF APPEALS

SARAH J. LUTHER,

Plaintiff-Appellant,

v

JAMIE M. MORRIS and MICHAEL MORRIS,

Defendants-Appellees.

UNPUBLISHED

January 18, 2005

No. 244483

Muskegon Circuit Court

LC No. 01-041095-NI

ON REMAND

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

The Michigan Supreme Court, in lieu of granting leave to appeal, has remanded this case to us for reconsideration in light of its opinion in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). *Luther v Morris*, __ Mich __; 688 NW2d 282 (Docket No. 125668, order entered October 29, 2004). We again reverse the trial court's dismissal of the action.

I. Our Original Opinion

We shall begin by quoting the pertinent portions of our original opinion in this case for contextual and background purposes.

Plaintiff appeals as of right a judgment granting defendants' motion for summary disposition in this action involving a motor vehicle accident in which plaintiff was injured. The trial court ruled that, under MCL 500.3135, plaintiff's injuries did not constitute a serious impairment of body function. Particularly, the trial court found, as a matter of law, that the threshold requirement of serious impairment of body function was not met because the impairment did not affect plaintiff's general ability to lead her normal life. Therefore, plaintiff was not entitled to any recovery for noneconomic loss. We conclude, as a matter of law, that plaintiff's objectively manifested impairment did indeed affect plaintiff's general ability to lead her normal life. Accordingly, plaintiff established a serious impairment of body function and the trial court's judgment is reversed.

On July 23, 2001, plaintiff was driving her car north on M-120 in Muskegon Township. At the same time, defendant Jamie Morris was driving his motor vehicle heading south on the same stretch of road. Morris crossed the centerline and entered plaintiff's lane of traffic, colliding with plaintiff's car. A

second collision occurred when a vehicle following directly behind plaintiff's car rear-ended plaintiff as a result of the first collision.

Defendants did not dispute the extent of the injuries sustained by plaintiff in the accident as identified in medical records. The medical records reveal that plaintiff suffered a fractured-dislocated elbow along with other various injuries. Specifically, the emergency room record contains the following diagnosis by the treating room physician:

Motor vehicle accident with right elbow fracture dislocation, chest wall contusion, bilateral forearm contusion as well as a total of 2.0 centimeters of left laceration [to finger] with repair.

A consulting doctor, who examined plaintiff later in the day on the date of the accident, opined:

On physical examination, her elbow is obviously dislocated, swollen, tender, deformed. . . . Her x-ray demonstrates a posterior elbow dislocation. There is a fracture but it is difficult to identify what is fractured as the x-ray is not entirely clear. This was reduced under IV sedation and placed in a posterior OCL splint.¹

Plaintiff underwent surgery on her injured elbow, and she spent three days in the hospital. Plaintiff testified in her deposition that, as a result of the accident, she missed about a month or more of work as an automobile parts inspector. The records reflect that plaintiff actually missed approximately fifty-two days of work. Plaintiff additionally testified that following the accident she lived with her sister for about three weeks. When asked by counsel what her sister had to do for her, plaintiff responded: "She had to do everything for me." During this time period, plaintiff's injured arm was supported by a sling. Plaintiff was unable to drive for several weeks following the accident. To make matters worse for plaintiff, she is right-handed (injured arm), and due to a prior stroke, the use of her left hand is significantly limited. Plaintiff testified that she did everything with her right hand, which made the injury to the right elbow debilitating. With respect to plaintiff's immobility and limitations in the weeks after the accident, defendants never disputed the fact that she was immobile and limited and required the care of her sister for this period of time.

¹ The records also indicate that plaintiff had a bruised knee. Plaintiff's deposition testimony reflects that she complained of headaches and stomachaches following the accident. Further, plaintiff complained of occasional sharp, severe pain in her elbow, and a limited range of motion.

The documentary evidence also indicated that plaintiff, as a result of the elbow injury, was unable to hold a coffee pot, dropped objects at home, needed the assistance of coworkers to carry heavy items at work, could not bow hunt, had difficulty taking the garbage out, washing dishes, and bathing, and suffered pain on lifting herself out of bed in the morning.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff could not show that she suffered an impairment that affected her general ability to lead her normal life. Defendants expressly conceded that the elbow injury was objectively manifested and concerned an important body function, and defendants continue to maintain this position on appeal. The trial court granted defendants' motion for summary disposition, ruling that "[t]he injuries recited do not . . . sufficiently affect . . . her general ability to lead her normal life." The trial court appeared to view the effect of the impairment on plaintiff's life in terms of her life at the time of summary disposition, a year after the accident. In light of the trial court's ruling and defendants' arguments, our focus is on whether the impairment affected plaintiff's general ability to lead her normal life.

* * *

Here, there can be no dispute that for the first month or two following the accident, plaintiff's elbow impairment and other injuries affected her general ability to lead her normal life. Plaintiff could not work at all for about fifty-two days,² she was unable to drive, and her mobility and range of motion was so limited that she depended fully on the care of her sister. Multiple aspects of plaintiff's life were indeed affected, and the trial court erred in focusing on plaintiff's condition at the time of the hearing. We opine, however, that within a couple of months of the accident, although she still had physical ailments, problems, and some limitations, plaintiff's ability, in general, to lead her normal life had returned. The question thus becomes whether the time period during which plaintiff's impairment affected her general ability to lead her normal life was sufficient to conclude that she had suffered a serious impairment of body function.

In *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000), this Court stated that "[i]n determining whether the impairment of the important body function is 'serious,' the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, *duration of disability*, and extent of residual impairment and prognosis for eventual recovery." (Emphasis added; citation omitted.) We first note that these factors are not specifically listed in the statutory definition of serious impairment of

² Plaintiff had been employed in the job for 36 years.

bodily function. Indeed, as to duration of disability, there is no temporal framework included in the definition of serious impairment of body function. MCL 500.3135(7) simply provides that the objectively manifested impairment of an important body function must affect the person's general ability to lead his or her normal life. It does not provide that the impairment must affect one's general ability to lead his or her normal life for some minimal required time period, and as pointed out by the Supreme Court, the effect need not be serious. "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The *Kern* panel did hold that an injury need not be permanent to constitute a serious impairment of body function. *Kern, supra* at 341. The *Kern* Court set forth factors to be considered and specifically discussed duration of disability. We are bound by that decision.

In *Kern, id.* at 343, this Court concluded:

The present case similarly involves a serious femur fracture and plaintiff's inability to walk for three months. Walking is an important body function. Although plaintiff had a good recovery, "an injury need not be permanent to be serious." In light of the seriousness of the initial injury, the treatment required, and the duration of disability, we hold that plaintiff sustained a serious impairment of body function. [Citation omitted.]

Here, plaintiff suffered a "right elbow fracture dislocation," requiring surgery and the placement of her arm in a sling, and precluding use of the arm, which is an important body function. This was a serious injury, especially where plaintiff already had limited use of her left hand. And although plaintiff has made a fairly good recovery, her injury need not be permanent. We recognize that the timeframe in which the plaintiff in *Kern* was disabled is slightly longer than the period in the case at bar; however, we find it long enough to support a finding that plaintiff sustained a serious impairment of body function.[] Accordingly, the trial court erred in finding that plaintiff had not suffered an impairment that affected her general ability to lead her normal life. Moreover, we find that as a matter of law plaintiff suffered a serious impairment of body function in light of the undisputed facts. Therefore, plaintiff has met the legal threshold necessary to make a claim for noneconomic damages.

[*Luther v Morris*, unpublished opinion per curiam of the Court of Appeals, issued February 5, 2004 (Docket No. 244483), slip op at 1-4.]

II. Our Opinion on Remand

Under the no-fault act, a plaintiff may recover noneconomic losses only where the plaintiff has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). The issue whether a person has suffered a serious impairment of body function is a question of law for the trial court to decide where the court finds that there is no factual dispute concerning the nature and extent of the person's injuries, or where there is a factual dispute concerning the nature and extent of the person's injuries, but the

dispute is not material to the determination whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a). MCL 500.3135(7) defines “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.” The only issue presented here is whether plaintiff’s injury affected her general ability to lead her normal life.

The effect of an impairment on the course of a plaintiff’s entire normal life must be considered. *Kreiner, supra* at 131. “Although some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if, despite those impingements, 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 and he does not meet the ‘serious impairment of body function’ threshold.” *Id.* The *Kreiner* majority further ruled:

In determining whether the course of 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 plaintiff’s overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between 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.” [*Id.* at 132-134 (emphasis in original).]

Here, plaintiff suffered a “right elbow fracture dislocation” and missed approximately fifty-two days of work. Following the accident, she lived with her sister for about three weeks, and plaintiff’s sister did “everything” for her. Plaintiff’s injured arm, which was her dominant arm, was supported by a sling, and she was unable to drive for several weeks. The evidence also indicated that plaintiff was unable to hold a coffee pot, dropped objects at home, needed the assistance of coworkers to carry heavy items at work, could not bow hunt, had difficulty taking the garbage out, washing dishes, and bathing, and suffered pain on lifting herself out of bed in the morning. Defendants do not dispute the fact that plaintiff was immobile and had limitations requiring her sister’s care for several weeks after the accident. Within a couple of months of the

accident, plaintiff, while still experiencing some physical ailments, difficulties, and limitations, was essentially able to return to her normal life.

Although the *Kreiner* Court spoke of “aspects of a plaintiff’s entire normal life,” “the course or trajectory of the plaintiff’s normal life,” and “affected aspects on the course of plaintiff’s overall life,” we do not read this language as suggesting that plaintiffs must be affected for the remainder of their lifetime, or a majority of their lifetime, in order to qualify as suffering a serious impairment of body function. *Kreiner, supra* at 131-134. Were we to read the language in that manner, it would conflict with our Supreme Court’s pronouncement that impairments of short duration can be sufficient to establish a serious impairment of body function under the right circumstances. *Id.* at 134. The Supreme Court did not rule, in the context of considering such factors as the prognosis for eventual recovery and the duration of the impairment, that if there was a finding that recovery was likely before the end of one’s lifetime, or that the impairment would not last the duration of one’s lifetime, a serious impairment of body function could not be found. It did not render such a holding because the statutory language would have been offended had the Court done so. We read *Kreiner* as indicating that an impairment of short duration may constitute a serious impairment of body function if the effect on a plaintiff’s life is extensive and if the impairment has a considerable impact on the plaintiff’s life as compared to his or her life before the accident. Of course, once the serious impairment of body function is established, the jury is free to assess the extent of non-economic damages that will fully compensate a plaintiff for the injury.

We hold that plaintiff suffered a serious impairment of body function as a matter of law. It is true that the duration of plaintiff’s impairment was relatively short; however, the undisputed evidence indicates that she could not work, could not drive, was unable to hold a coffee pot, dropped objects at home, could not bow hunt, had difficulty taking the garbage out, washing dishes, and bathing, suffered pain on lifting herself out of bed in the morning, and plaintiff’s sister had to do “everything” for her. Thus, although the impairment was short-lived, the impairment left plaintiff virtually unable to do anything for herself, or to undertake tasks in the same manner as she had done before the injury; the impairment was extensive.

In *Kreiner*, the Court rejected the plaintiff’s claim, relative to the companion case of *Straub v Collette*, of serious impairment of body function, stating:

Straub’s treatment consisted of having his wounds sutured, wearing a cast, and taking antibiotics and pain medication. Four days after the accident, outpatient surgery was performed on the fingers and palm. The treatment was not significant or long-term. Within two months, the fracture and surgical wounds had healed. . . . Plaintiff estimated he was ninety-nine percent back to normal by mid-January 2000 [injury occurred in September 1999]. Given that Straub’s injury was not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive, we conclude that Straub’s general ability to live his normal life was not affected. [*Kreiner, supra* at 135-136.]

In contrast to *Straub*, the effect of the injury on plaintiff's functioning in the case at bar was pervasive and the extent of the injury was more debilitating.³ Accordingly, plaintiff suffered a serious impairment of body function.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ William B. Murphy

³ We also note that in *Straub, supra* at 134, the Court pointed out that the injury was to the plaintiff's nondominant hand, where here the injury was to plaintiff's dominant arm. The effect of this distinction is self-evident.