

STATE OF MICHIGAN
COURT OF APPEALS

GERTA ERIKA NELLIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

KRISTEN ELAINE VICKERY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

September 22, 2005

No. 261444

Ingham Circuit Court

LC No. 04-000029-NI

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Plaintiff appeals, and defendant cross appeals, from an order of the circuit court granting summary disposition in favor of defendant. We affirm.

Plaintiff was injured as the result of a multi-vehicle accident in which defendant's vehicle rear-ended plaintiff's vehicle. While defendant's liability for the accident is not at issue, whether plaintiff suffered a serious impairment of body function entitling her to a recovery for noneconomic damages is at issue. The trial court concluded that there was no genuine issue of material fact that plaintiff's injuries did not constitute a serious impairment of body function. We agree.

We review the grant or denial of summary disposition de novo. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). In determining whether summary disposition is appropriate in a serious impairment case, a court must utilize a multi-step approach. First, the court must determine if there is a factual dispute regarding the nature and extent of the injuries. Second, if there is no dispute or if the dispute is not material to resolving the issue, the court must determine if it can decide as a matter of law whether an important body function has been impaired and if the impairment is objectively manifested. Finally, if an important body function has been impaired and is objectively manifested, the court must determine if the impairment affects the plaintiff's general ability to lead a normal life. *Kreiner, supra* at 131-133.

The trial court concluded that there was a dispute regarding the nature and extent of plaintiff's injuries, as well as whether those injuries were caused by the accident or were preexisting. But, the trial court concluded that that dispute was immaterial because, in any event, plaintiff had not established that the injuries impaired her ability to lead a normal life.¹ In our de novo review, we agree with the trial court.

Kreiner, supra at 133, supplied the following nonexhaustive list of factors to consider in evaluating whether the plaintiff's ability to lead a 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.

The Court noted that the extent of residual impairment is not established by self-imposed restrictions based on real or perceived pain as opposed to physician-imposed restrictions. *Id.* at 133 n 17.

In her deposition, plaintiff described the limitations that her injuries have caused. With respect to employment, she returned to work a few weeks after the accident and continues to work full-time at forty hours a week, though she does occasionally need to take a sick day. Her physician, however, has restricted her to forty hours per week and she no longer works overtime as she regularly did in the past. Plaintiff also testified that before the accident she golfed twice a week and that she gave it up after the accident having golfed once and "it just didn't work" because of the twisting involved. She indicated that the one round of golf was a few months after the accident and that the back problems occurred after she was finished golfing, not during the round.

Plaintiff also testified that her injuries restrict her ability to travel. Specifically, she described a trip to Europe and a trip to Hawaii, the flights for both of which were "absolute nightmares" because of the prolonged sitting. Plaintiff states that she is unable to sit for prolonged periods of time because it causes pain in her legs and back. Plaintiff also indicated that she had recently booked another trip to Europe for shortly after her deposition, but was considering canceling it. She also indicated that she has curtailed her shorter trips to Midwest destinations, which she would take a couple of times a year, because she cannot be assured of having a comfortable bed to sleep in, which is now essential. She did indicate that she would most likely resume travel to Chicago when her daughter moves back to Chicago from Europe.

Plaintiff also stated that she enjoyed playing cards with friends, having a monthly euchre game as well as a monthly bridge game before the accident. But she has stopped playing bridge

¹ The trial court also indicated that it was skeptical that the injuries were objectively manifested, but focused on the question whether plaintiff's ability to lead a normal life was impaired because the summary disposition motion was based on plaintiff's ability to lead a normal life. In fact, defendant's summary disposition motion raised issues with regard to both whether the injuries were objectively manifested and plaintiff's ability to lead a normal life.

because of the length of time it requires her to sit. She continues to play euchre, perhaps with greater frequency. She also testified that she has given up line dancing, which she used to do, and, although she has not had the opportunity to go camping with her grandchildren following the accident, she would decline any such opportunity and intends to give away her camping equipment. Plaintiff also testified that another of her hobbies, sewing, is affected because she cannot stay at it for long periods of time and must take more frequent breaks to move around.

Finally, plaintiff states that she not able to walk as far as she would like. After resuming her walks following the accident, she was able to work up to doing two-and-a-half mile walks, but no longer than that.

Like the trial court, we are not persuaded that plaintiff has established that her injuries preclude her general ability to lead a normal life. Indeed, the Court in *Kreiner* concluded that Mr. Kreiner did not meet the threshold and his limitations, if anything, were greater than plaintiff's. Plaintiff is able to work eight hours a day, while Kreiner was restricted to six hours. Plaintiff can walk up to 2-1/2 miles, while Kreiner indicated that he could only walk a half-mile at a time. While plaintiff has suffered some restrictions on her social activities, so did Mr. Kreiner who, for example, gave up rabbit hunting. As the Court noted, a "negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Kreiner, supra* at 137.

While plaintiff does attribute to her injuries the need to limit some activities, those limitations do not preclude her general ability to lead a normal life. Moreover, we note that the restrictions on her social activities are entirely self-imposed out of fear of pain, which *Kreiner* specifically states is insufficient to establish residual impairment. In fact, in some cases plaintiff either has not even attempted an activity (such as camping) before concluding that she would be unable to engage in the activity again or, such as with golf, tried it once shortly after the accident and has not tried again to see if she'd be able to resume the activity without excessive discomfort.

For these reasons, we conclude that plaintiff has not met the threshold to seek a tort recovery. The trial court properly granted summary disposition in favor of defendant.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello