

STATE OF MICHIGAN
COURT OF APPEALS

MADGE SEGRAVES and MERLEN
SEGRAVES,

UNPUBLISHED
February 9, 2006

Plaintiffs-Appellees,

v

JESSICA SAAL and ROBERT SAAL,

No. 254922
Jackson Circuit Court
LC No. 03-002514-NI

Defendants-Appellants.

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion for summary disposition of plaintiffs' automobile negligence claim. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

This case arises from an automobile accident between plaintiff Madge Segraves ("plaintiff") and defendant Jessica Saal ("defendant"). On July 25, 2002, plaintiff's vehicle "t-boned" or broadsided defendant's vehicle at an intersection after defendant failed to observe a stop sign. Immediately following the accident, plaintiff's hand was swollen, her left shoulder had pain, and she could not move her head. She was treated at the emergency room for a left wrist and hand contusion and sprain with pain medication and a left wrist splint. Immediately after the accident, plaintiff was unable to perform her work as a hairdresser or do housework.

Following the accident, plaintiff complained of shoulder pain and a decreased range of motion in her shoulder and was examined by several doctors, including an orthopedic specialist. X-rays taken of plaintiff's left shoulder approximately one month after the accident also revealed "possibly some incongruity with the clavicle being slightly higher than the acromion possibly consistent with a Type II AC separation" and "[s]ome abnormality of the lateral acromion and greater tuberosity possibly consistent with a compression injury." Plaintiff's orthopedic specialist diagnosed her with "AC dislocation/separation" of her left shoulder. Plaintiff treated her shoulder injury by taking pain medication, wearing a shoulder sling for about one month after the accident, undergoing several weeks of chiropractic treatment three times a week, and attending seven sessions of physical therapy. Approximately two months after the accident, although plaintiff still had soreness and pain in her shoulder, she was discharged from physical

therapy because of her apparent progress and was instructed to return to work without restrictions. Plaintiff's orthopedic specialist then ordered her to continue her home exercise program, icing twice daily and taking medication for pain. Approximately eight months after the accident, the orthopedic surgeon's medical report indicated that plaintiff was "doing well" and was no longer taking anti-inflammatory drugs and showed a full range of motion in her shoulder, but exhibited some pain during certain motions.

However, plaintiff testified that approximately 14 months following the accident her shoulder was numb and without feeling and she experienced sharp shoulder pain when she picked up something too heavy and when she laid on her left side. Further, she testified that because of her ongoing pain, after the accident, she reduced her hairdressing customers from approximately eight to ten per day to approximately 20 customers per week, she could no longer salmon fish and, although she was able to complete the housework, she could still use some help.

Defendants moved for summary disposition of plaintiffs' action under MCR 2.116(C)(10), arguing that plaintiff's injuries did not affect her general ability to lead her normal life, and therefore, she failed to satisfy the threshold injury of a serious impairment of a body function. The trial court denied the motion, concluding that plaintiff suffered from an objectively manifested impairment of an important body function, i.e., her left shoulder, which she required in her work as a hairdresser and, based on the totality of the evidence, particularly plaintiff's "cutting down by half" her clientele as a result of her pain, plaintiff's shoulder impairment "ha[d] an effect upon her general ability to lead her life, particularly in working hair."

II. STANDARD OF REVIEW

"This Court reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law." *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).¹

III. ANALYSIS

Under the no-fault act, "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is statutorily defined as "an

¹ Our review of a trial court's summary disposition decision is limited to the evidence that was before the trial court at the time of its decision. *Maiden, supra* at 127 n 9. Accordingly, in reaching our decision, we did not consider the several supplements to the record, including the medical reports indicating that plaintiff had received further treatment, attached to plaintiffs' brief on appeal that were not before the trial court on the day the motion for summary disposition was heard.

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).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004)², Our Supreme Court outlined a "multi-step process" for determining whether a plaintiff meets the serious impairment threshold.

First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If a court so concludes, it may continue to the next step. But if a court determines there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law.

Second, if a court can decide the issue as a matter of law, it must next determine if an 'important body function' of the plaintiff has been impaired. . . . If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. Subjective complaints that are not medically documented are insufficient. If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." [*Id.* at 131-132 (citations omitted).]

First, we find no material factual dispute concerning the nature and extent of plaintiff's injury: a left shoulder separation, and we concluded that the court can decide the issue as a matter of law. *Kreiner, supra* at 132; see also *Williams, supra* at 509 n 1. Additionally, there is no dispute that the shoulder is an important bodily function and plaintiff suffered a "type II separation of her left shoulder, which was medically documented, and therefore objectively manifested. *Kreiner, supra* at 132.

However, "[i]n order to be able to maintain an action for noneconomic tort damages under the no-fault act, the 'objectively manifested impairment of an important body function' that the plaintiff has suffered must affect his 'general ability' to lead his normal life." *Id.* at 129. "The starting point in analyzing whether an impairment affects a person's 'general' i.e., overall,

² Although the decision in *Kreiner* was released in July 2004, after the trial court in this case made its decision, the test is applied retroactively. Typically, decisions are given retroactive effect. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005). Prospective application of a decision is an exception to this rule and is only appropriate in exigent circumstances, such as a decision which overrules clear and uncontradicted case law. *Id.* at 586-587. The decision in *Kreiner* does not present any exigent circumstances to warrant prospective only application.

ability to lead his normal life should be identifying how his life has been affected, by how much and for how long.” *Id.* at 131. “In determining whether the course of the plaintiff’s normal life has been affected, a court should [first] 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.” *Id.* at 132-133. *Kreiner* instructs that it is the effect of the impairment on the course of a plaintiff’s *entire* normal life that a court must consider.

Plaintiff presented evidence of short-term changes, which do not satisfy the no-fault threshold. First, the evidence established that plaintiff’s shoulder impairment affected her ability to work as a hairdresser, albeit not completely. Although she was unable to work immediately after the accident, two months after the accident and the completion of physical therapy, plaintiff’s doctor instructed her to return to work without restrictions. Consequently, it is possible the plaintiff’s condition will continue to improve with more time. See e.g., *Miller v Purcell*, 246 Mich App 244, 250; 631 NW2d 760 (2001)(rejecting the plaintiff’s inability to knit and having to type one handed at times as evidence of serious impairment of body function); *Kern v Blethen-Coluni*, 240 Mich App 333, 344; 612 NW2d 838 (2000)(finding the plaintiff’s testimony “that his activities were unrestricted but his leg ‘kind of bothers me when I run on it too much or sleep on it wrong;’” immaterial to the determination of serious impairment of body function). Furthermore, before the accident the plaintiff used to fish at her daughter’s home. Following the accident she is still able to fish, but was no longer able to salmon fish. Plaintiff’s shoulder injury did not entirely limit her ability to cut hair or to fish, and therefore the impairment did not affect her “general ability” to perform those activities. “[M]inor changes in how a person performs a specific activity may not change the fact that the person may still ‘generally’ be able to perform that activity.” *Kreiner, supra* at 131.

The instant facts are an insufficient basis upon which to hold defendants subject to tort liability under section 3135(1) of the no-fault insurance act. Plaintiff’s impairment is unlikely permanent, her treatment was not extensive and her residual impairment is limited. Furthermore, when comparing the plaintiff’s life before and after the accident, the alleged impairments are self-imposed rather than medically imposed, as she was instructed to return to work without restrictions two months after the accident. Plaintiff failed to establish a serious impairment of body function that affected the general ability to lead her normal life. The trial court erred in denying defendants’ motion for summary disposition.

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

/s/ William C. Whitbeck

/s/ Bill Schuette