

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN CURBELO,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 23, 2006

No. 264928
Oakland Circuit Court
LC No. 04-059703-CK

Before: Hoekstra, PJ, and Neff and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff argues that genuine issues of material fact existed regarding whether plaintiff suffered a serious impairment of body function. We disagree. We review de novo a trial court's grant of summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion under MCR 2.116(C)(10), we consider the submitted admissible evidence in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A plaintiff may recover non-economic losses only when the plaintiff 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 500.3135(7).

A "multi-step process" is used to determine whether a plaintiff has suffered a serious impairment of body function. *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004). A court must first determine whether there is a factual dispute regarding the nature and extent of the plaintiff's injuries. *Kreiner, supra* at 131-132. If there is no factual dispute, a court may decide whether, as a matter of law, the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a)(i); *Kreiner, supra* at 132. In the present case, the parties did not dispute the nature and extent of plaintiff's injuries. In *Kreiner, supra* at 136, the Supreme Court noted that use of a person's back and leg were important body functions. Here, plaintiff alleged injuries to her back and leg, specifically, the loss of response in her Achilles function bilaterally,

numbness in her lower right leg, and a disc protrusion in her lumbar region. Thus, plaintiff alleged that impairments were to an important body function.

The court must not only determine whether an important body function has been affected, the court must also determine whether it has been “impaired,” and not just “injured.” *Kreiner, supra* at 132. The court must then decide if the impairment of the important body function is “objectively manifested.” *Id.* “[T]o be 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), approving SJI2d 36.11. Subjective complaints unsupported by medical documentation are not enough to prove that the important body function has been impaired. *Kreiner, supra* at 132. Here, two days after the accident, the only notation in the hospital notes did not indicate numbness or lack of response in plaintiff’s legs, or any medically identifiable problem in her lumbar region. Over a month later, after falling down stairs at home, plaintiff saw Dr. Gary Chodoroff, M.D., and complained of pain in her lower back and leg and numbness in her toes on her right foot. Neither the x-rays of plaintiff’s back, the MRI of plaintiff’s back, nor Chodoroff’s interpretation of each on April 28, 2003, indicated any objective evidence of plaintiff’s alleged impairments to her back or legs. Chodoroff only noted degenerative changes in plaintiff’s back. Plaintiff’s subjective complaints of pain and numbness, unsupported by medical documentation, were not enough to prove that an important body function was impaired. *Kreiner, supra* at 132.¹

Moreover, even if plaintiff suffered an objectively verifiable impairment, plaintiff would be unable to show that it affected her general ability to lead a normal life. *Kreiner, supra* at 132. To determine whether a plaintiff’s impairment affected the plaintiff’s general ability to lead a normal life, the court must examine the plaintiff’s life before and after the accident. *Id.* at 132-133. The court should consider the “totality of the circumstances” and examine certain objective factors including “(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” to determine if the impairment “affects the person’s general ability to conduct the course of his or her normal life.” *Id.* at 133-134 (footnotes omitted). “Merely ‘any effect’ on the plaintiff’s life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff’s ‘general ability’ to lead his life.” *Id.* at 133 (emphasis in original).

Viewing the evidence in a light most favorable to plaintiff, plaintiff failed to offer evidence that her alleged impairments stemming from the automobile accident affected her

¹ Plaintiff primarily relies on the MRI performed on June 27, 2005, to objectively show that she suffered impairment to her lower back. However, this MRI was performed over two years after the accident. The April 1, 2003 MRI, performed less than two months after the accident, did not note any disc protrusion at L4-L5. Chodoroff noted in his April 19, 2004, letter to plaintiff’s attorney that, based on his findings, a new MRI was unnecessary because “the prior [April 1, 2003,] MRI showed no positive findings.” Thus, plaintiff failed to offer any evidence that specifically linked the disc protrusion in her lumbar spine, noted only on the June 27, 2005 MRI, to the accident.

general ability to lead her normal life. Plaintiff testified she missed twelve to thirteen weeks of work because Dr. Henry Green, M.D., ordered her to take a leave of absence. If there are physician-imposed restrictions because of real or perceived pain, a doctor need not offer a medically identifiable or physiological basis for imposing the restrictions. *McDaniels v Hemker*, 268 Mich App 269, 284; ___ NW2d ___ (2005), lv pending. However, plaintiff failed to present documentary evidence that Green ordered any type of work stoppage.

Additionally, the work she performed before the accident was similar to the work she performed following the accident. Plaintiff's business partner and plaintiff both testified that their real estate business had actually grown since the accident, and plaintiff could complete most of her work from home or over the phone. With regard to her casino job, plaintiff contended she could no longer stand to deal certain card games at the casino. As a result of a position change, she was permitted to sit while dealing. "[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.

With regard to other activities, plaintiff could walk up stairs at home, prepare meals, shower, brush her hair, do laundry, keep up with housekeeping, go out to dinner, and travel. Plaintiff was discharged from all physical therapy on August 27, 2003, and failed to produce documentary evidence that further physical therapy or treatment was necessary. Aside from the June 27, 2005 MRI, the last documented visit to a physician was on November 11, 2004. The only documented restriction regarding plaintiff's activities was Chodoroff's limitation that she be able to use the escalator at work instead of the stairs. While this was probably inconvenient for plaintiff, it did not prevent her from performing her duties at the casino. *Kreiner, supra* at 131. Any other restriction by plaintiff, including her position switch, was self-imposed instead of physician-imposed. Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish the extent of any residual impairment. *Kreiner, supra* at 133 n 17, commenting on factor (d). Plaintiff did not submit evidence pinpointing a physiological basis for her pain while standing or evidence of a physician-imposed restriction limiting her from doing any other activity. *McDaniels, supra* at 284-285. Viewing the totality of the circumstances, and taking into account all the *Kreiner* factors, we conclude plaintiff failed to establish a genuine issue of material fact regarding whether she suffered an objective, medically verifiable, serious impairment of body function that affected her general ability to lead her normal life.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Donald S. Owens