

STATE OF MICHIGAN
COURT OF APPEALS

TAMALA WISE,

Plaintiff-Appellant,

v

JENNIFER CARTER and JOHNNIE CARTER,

Defendants-Appellees.

UNPUBLISHED

March 16, 2006

No. 266382

Wayne Circuit Court

LC No. 04-430831-NI

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of her third-party no-fault insurance case on the ground that, pursuant to MCR 2.116(C)(10), there was no genuine issue of material fact that plaintiff did not suffer a threshold injury under MCL 500.3135. We affirm.

On September 27, 2002, plaintiff's vehicle was rear-ended by defendant Jennifer Carter while allegedly stopped at a yield sign waiting for traffic to clear.¹ On October 4, 2004, plaintiff filed a third-party no-fault insurance action averring that she suffered severe bodily injuries from the collision, including a herniated lumbar disc with nerve root effacement, that interfered with her ability to lead her normal life. Almost a year later, defendants filed their motion for summary disposition, arguing that dismissal was required under MCL 500.3135 because plaintiff could not establish a threshold injury, i.e., a serious impairment, as a result of the collision.

In support of their motion, defendants argued that plaintiff returned to work at a physician's office immediately following the collision and only complained of feeling stiff, for which she was given a sample of Celebrex. Plaintiff did not seek any further medical treatment until December 12, 2002, when she began treatment with the physician to whom she worked for as an office manager, Dr. A. Dianne Obayan. The treatment note indicated the "onset of severe back pain a few days ago," "only antecedent trauma is mva few months ago" and the pain was described as being located in the lower L-S spine which radiated into the left buttock and thigh, with some paresthesia in the left foot. Medication and physical therapy were prescribed. An MRI performed on January 9, 2003, revealed "Moderate to marked degenerative change at L5/S1. Findings consistent with a disc herniation centrally and on the left at L5/S1." Plaintiff returned to Dr. Obayan on April 28, 2003, "due to onset of severe back pain" that radiated into

¹ Defendant Johnnie Carter owned the vehicle involved in the collision.

her legs. Dr. Obayan also noted that plaintiff had had “intermittent back pain since December 2002.”

On June 3, 2003, plaintiff underwent electrodiagnostic testing conducted by Dr. Gary Chodoroff who concluded that the study was normal and that there was no evidence of “ongoing lumbosacral radiculopathy.” In September of 2003, Dr. Chodoroff indicated that he could not explain her persistent symptoms and was “not seeing evidence of significant underlying pathology that could support her pain complaints.” He released plaintiff to unrestricted work but when plaintiff returned to Dr. Obayan, she was placed on “modified duty.” Defendants also provided as exhibits records from an independent medical examination which concluded that the back pain was not related to the collision because disc herniation does not gradually onset. And, defendants provided the medical records from Dr. Steven Hinderer, another of plaintiff’s physicians, who characterized her condition as being “more related to some focal facet arthritis and arthropathy in that area without involvement of the intravertebral disks.” Defendants argued that the medical evidence was conclusive—there was no causal connection between plaintiff’s back condition and the car collision. The disc herniation was caused by an extreme degenerative condition which manifested itself over two months after the collision. And, viewed as a whole, defendants argued, the alleged injury did not affect her overall ability to conduct the course of her life.

Plaintiff responded to defendants’ motion for summary disposition, arguing that there was a genuine issue of material fact as to the causal connection because, contrary to defendants’ claims, plaintiff’s physician related her back condition to the collision and plaintiff testified that she did not suffer from any documented back problems before the collision. And, plaintiff argued, her back problem constituted a serious impairment of an important body function that was objectively manifested and affected her general ability to lead her normal life. The MRI showed the herniated disc in her back, and the back is considered to be an important body function. See *Shaw v Martin*, 155 Mich App 89, 96; 399 NW2d 450 (1986). Further, considering the totality of the circumstances, including all of the physical therapy, medications, epidural injections, work loss and work restrictions, adverse effects on her ability to work, perform many household tasks, and enjoy recreational activities there was, at least, an issue of fact as to whether the injuries have affected her general ability to lead her normal life. Plaintiff’s attachments to her response included the transcript of her deposition testimony, Dr. Obayan’s correspondence indicating that the back condition was caused by the collision, and Dr. Obayan’s affidavit which included the statement that she concluded “within a reasonable degree of medical certainty that as a result of the motor vehicle accident on September 27, 2002, that [plaintiff] suffered a disc herniation at L5/S1 and suffers from Severe Disc Disorder and radiculopathy as a result of the automobile accident.” Therefore, plaintiff argued, defendants’ request for summary dismissal should be denied.

Oral arguments on defendants’ motion for summary disposition were held and the trial court rendered its opinion, holding:

I’m granting your motion finding that there is no genuine issue of material fact, and it has not effected her ability to lead her normal life. I do believe that there’s no genuine issue of material fact about the extent of her injuries, or that there was an objective finding. So, it hasn’t changed the trajectory according to the Kreiner case.

An order dismissing the case was entered accordingly and this appeal followed.

Plaintiff argues that the trial court erred in concluding that she did not suffer a serious impairment of body function under MCL 500.3135. After de novo review, considering the documentary evidence in the light most favorable to plaintiff, we disagree. See *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

Under MCL 500.3135, recovery for noneconomic loss under the no-fault insurance act is only available if the injured person “suffered death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). Here, plaintiff claims to have suffered a serious impairment. 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). The trial court appears to have held that, although plaintiff suffered an “objectively manifested impairment of an important body function,” such impairment did not affect her general ability to lead her normal life. In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), our Supreme Court has interpreted the requirement that the impairment “affects the person’s general ability to lead his or her normal life” as including considerations (1) whether a plaintiff is, for the most part, able to lead his normal life, and (2) the effect, if any, of the impairment on the course or trajectory of the plaintiff’s normal life. *Id.* at 130-131. Such conclusions may be drawn from considering the totality of the circumstances and evaluating objective factors like “(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.” *Id.* at 133.

In this case, plaintiff argues that for a period of four months after the collision she was essentially helpless—she stayed in bed, was unable to work or take care of her children or household. Plaintiff argues that “[e]ven though she partially recovered, the ‘course’ or ‘trajectory’ of her life change during that period.” And, plaintiff argues, she continues to suffer from an inability to sleep or engage in frequent sexual activity, and can no longer participate in several activities including travel, working at home, gardening, and trips to amusement parks. She also rarely goes bowling or to the movies. In support of her claims, plaintiff relies on her own deposition testimony, some medical records, and an affidavit purportedly from her physician, Dr. Obayan. However, the affidavit was not signed by Dr. Obayan therefore it is inadmissible and will not be considered. See MCR 2.114.

After reviewing the admissible evidence plaintiff submitted to oppose defendants’ motion for summary disposition, we agree with the trial court—plaintiff has failed to establish that she suffered an impairment that affected her general ability to lead her normal life. See MCL 500.3135(7). Considering the totality of the circumstances, we conclude that plaintiff, for the most part, is able to lead her normal life and the impairment did not significantly affect the course or trajectory of plaintiff’s life. See *Kreiner, supra* at 134. The collision occurred on September 27, 2002, but plaintiff did not seek medical treatment until December 12, 2002, and she continued to work full-time until May 1, 2003. No evidence of any physical activity restrictions was presented to the trial court. Plaintiff testified that she was off of work from the end of April 2003 until September 2003, at which time she stayed in bed except to get medical treatment. Again, no evidence of any physical activity restrictions was presented and plaintiff admitted that her activities were not restricted by a physician. From September of 2003 until September of 2004, plaintiff worked part-time, six hours a day, five days a week. She began

back to work full-time in September of 2005. Plaintiff testified that before the collision, on the weekends, she would shop, go bowling, go to the movies, and have family over, garden, and swim. She further testified that she has been unable to participate in these activities because of her injuries, although a physician had not restricted her from such participation. Such self-imposed restrictions are not persuasive of the level or extent of impairment. See *Kreiner, supra* at 133 n 17. In short, plaintiff has failed to demonstrate that her general ability to lead her normal life has been sufficiently affected; therefore, summary dismissal was proper.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot