

STATE OF MICHIGAN
COURT OF APPEALS

MICKIE L. MAY AND DAVID MAY,

Plaintiffs-Appellants,

v

MARY JO ZALUCHA,

Defendant-Appellee.

UNPUBLISHED

March 16, 2006

No. 266733

Saginaw Circuit Court

LC No. 04-052536-NI

Before: Smolenski, P.J., Whitbeck, C.J., and O’Connell, J.

PER CURIAM.

In this no-fault case, plaintiffs Mickie May and David May (the Mays)¹ appeal as of right from the trial court’s order granting defendant Mary Jo Zalucha summary disposition under MCR 2.116(C)(10). We affirm.

I. Basic Facts And Procedural History

On November 14, 2002, May and Zalucha were involved in a two-car accident, for which Zalucha admitted being at fault. As a result of the accident, May, who was approximately 30-years-old at the time of the accident, suffered a herniated cervical disk and injuries to her right shoulder. Mark A. Kallus, M.D., treated May at Gratiot Community Hospital Emergency Care following the accident. Kallus x-rayed May’s spine and prescribed medication for her pain.

May followed up with her family physician, Christopher Murray, D.O., in February 2003. Dr. Murray recommended stretching and pressure point therapy. May saw Dr. Murray again in late March. She complained of constant pain that affected her sleeping. Dr. Murray prescribed medication and instructed that she not work for two weeks. He recommended formal physical therapy. May began physical therapy sessions immediately and continued the sessions until June 2003. The therapy provided some relief for May’s pain, but she reportedly continued to experience pain while lifting, pushing, or pulling. In early July 2003, May advised Dr. Murray that she had to take five days off of work due to her pain. Dr. Murray ordered an MRI, which

¹ David May’s claim for loss of consortium is derivative of Mickie May’s injury claims. Thus, our use of the singular “May,” refers solely to Mickie May.

revealed that the “disk space narrowing at C6-7, posterior bulge of the corresponding disc.” In August 2003, Dr. Murray referred May to physiatrist, Alexander Iwanow, M.D.

May reported that further physical therapy sessions actually increased her pain and that pain medications were not helping. Dr. Iwanow examined May’s right shoulder, and he concluded that May had “[i]nternal derangement of the right shoulder with secondary trigger points on the medial border of the right scapula.” He prescribed further pain medication and advised May to keep her right arm at her side. He gave May “a note saying no work with the right arm.” Dr. Iwanow speculated that she may require arthroscopic surgery on the shoulder, so he referred May to Jerome V. Ciullo, M.D. for a surgery consultation. Dr. Ciullo performed surgery on May’s right shoulder in November 2003. May asserts that Dr. Ciullo advised her that she would be unable to use her right arm for six weeks and that she not work during that period.

The Mays filed suit, alleging, in pertinent part, that May’s injuries constituted a serious impairment of body function. Zalucha moved for summary disposition under MCR 2.116(C)(10), arguing that May’s claimed injuries did not meet the no-fault threshold injury requirement of serious impairment of body function as set forth by MCL 500.3135 and *Kreiner v Fischer*.² The trial court ultimately granted Zalucha summary disposition. The trial court found that May failed to show that her injuries affected her general ability to lead her normal life because she failed to provide evidentiary support that she was unable to engage in her normal activities or that her claimed physical limitations were physician rather than self-imposed.

II. Serious Impairment Of Body Function

A. Standard Of Review

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.³ The nonmovant on a (C)(10) motion has the burden of showing that a genuine issue of disputed fact exists and to produce admissible evidence to establish those disputed facts.⁴ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁵ Conjectures, speculations, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact.⁶

² *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

³ MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

⁴ *McDaniel v Hemker*, 268 Mich App 269, 280; 707 NW2d 211 (2005).

⁵ MCR 2.116(G)(4); *Maiden*, *supra* at 120.

⁶ *LaMothe v Auto Club Ins Ass’n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994); *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

We review de novo the trial court's ruling on a motion for summary disposition.⁷ Whether a person has suffered serious impairment of a body function is a question of law that we also review de novo.⁸

B. Established Legal Principles

A person “remains subject to tort liability for noneconomic loss caused by his or her ownership maintenance, or use of a motor vehicle . . . if the injured person has suffered . . . serious impairment of body function”⁹ “[S]erious impairment of body function’ means an objectively manifested impairment of an important body function[.]”¹⁰ The “objectively manifested impairment of an important body function” must affect the plaintiff’s “general ability” to lead his normal life.¹¹ “Although some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if . . . 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” for purposes of establishing a serious impairment.¹² A de minimus effect on the plaintiff’s life is insufficient to meet the inquiry.¹³

Although not an exhaustive list, several objective factors can be considered when determining whether the plaintiff’s “general ability” to conduct the course of his or her 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.”¹⁴ The focus, however, is not on the plaintiff’s subjective pain and suffering, but on injuries that actually affect the functioning of the body.¹⁵ “Self-imposed restrictions,” even if based on real pain, are not sufficient to establish residual impairment; rather, the restrictions must be “physician-imposed.”¹⁶

Where there is no factual dispute concerning the nature and extent of the injuries, or where no such factual dispute is material to the question whether the person has suffered serious impairment of a body function, the question whether a person has suffered serious impairment of a body function is a question of law for the court.¹⁷ Accordingly, “the issue whether plaintiff

⁷ *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

⁸ *McDaniel*, *supra* at 280.

⁹ MCL 500.3135(1); *Kreiner*, *supra* at 129.

¹⁰ MCL 500.3135(7); *Kreiner*, *supra* at 129.

¹¹ *Kreiner*, *supra* at 130.

¹² *Id.* at 131.

¹³ *Id.* at 133.

¹⁴ *Id.*

¹⁵ *Miller v Purcell*, 246 Mich App 244, 249; 631 NW2d 760 (2001).

¹⁶ *Kreiner*, *supra* at 133 n 17.

¹⁷ MCL 500.3135(2)(a).

suffered a serious impairment of body function should be submitted to the jury only when the trial court determines that an ‘outcome-determinative genuine factual dispute’ exists.”¹⁸

C. Applying The Law

May contends that the trial court erred in concluding that she failed to demonstrate that she was able to meet the no-fault threshold injury inquiry of serious impairment of body function. May argues that use of one’s shoulder is unquestionably an important body function. May asserts that, accordingly, “the complete loss of use of one’s dominant arm clearly should meet the threshold.” To support her argument that a significant loss of a particular body function satisfies the threshold injury requirement, May relies on *Moore v Cregeur* and *Williams v Medukas*.¹⁹ In *Moore*, this Court held that although the plaintiff failed to present sufficient evidence that her rib injuries, fractures, and collapsed lung affected her general ability to lead her normal life, she had proven that her permanent vision loss was a serious impairment of body function.²⁰ This Court concluded that the “plaintiff’s inability to perform the activities she performed before the accident without the aid of special devices and significant retraining” constituted a significant change in how that the plaintiff performed those activities, noting that her “vision loss will affect every aspect of her life to some degree[.]”²¹ May argues, however, that the injury need not be permanent,²² noting that in *Williams*, this Court concluded that the plaintiff suffered serious impairment of body function even though he was able to return to work three months following his accident.²³ However, this Court explained that, because the plaintiff’s injuries, which involved a permanent limitation in his range of arm movement, affected his ability to coach basketball by preventing him from shooting a basket, and precluded him from playing golf, his injuries did affect his general ability to lead his normal life.²⁴

Our review of the exhibits and testimony in this case reveals nothing to create a question of fact that May suffered a serious impairment of body function. While we acknowledge May’s claim that she was precluded from using her arm for the six weeks following her surgery, the evidence reveals that May was recuperated six months after her surgery, and there is no indication that May has suffered an ongoing “complete loss” of her arm comparable to those losses sustained in *Moore* and *Williams*.

¹⁸ *Miller, supra* at 247, quoting *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

¹⁹ *Moore v Cregeur*, 266 Mich App 515; 702 NW2d 648 (2005); *Williams v Medukas*, 266 Mich App 505; 702 NW2d 667 (2005).

²⁰ *Moore, supra* at 519.

²¹ *Id.* at 521.

²² See *Kreiner, supra* at 135 (“While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff’s life.”).

²³ *Williams, supra* at 506.

²⁴ *Id.* at 509.

May concedes that although Dr. Murray treated her injuries from February 2003 to August 2003, he did not put any restrictions on her activities until the end of March 2003, when he instructed her not to work for two weeks. Dr. Murray's notes report that on June 27, 2003, May indicated that she noticed "more pain" with lifting, pushing, and pulling maneuvers. Absent a physician's recommendation, May took off five days from work during the first week of July 2003. In August 2003, Dr. Iwanow advised May to keep her arm at her side and that she not work with her right arm. According to May, Dr. Ciullo, who performed the November 2003 surgery on May's shoulder, advised her that she would be unable to use her right arm for six weeks. Dr. Ciullo's post-operative notes state that "[m]aximal improvement is expected in about 6 months[.]"

In April 2004, six months after her surgery, May had an annual exam with Dr. Murray. His notes indicate that May "has been feeling good. Has no complaints. She had surgery on her shoulder a while back and is ready to return to work in a couple of weeks. She is having no particular problems." Further, in March 2005, May completed a physical self-evaluation form for a new job position as a nurse's aide, and she indicated on that form that she was able to lift 50 pounds, stoop, twist, bend, squat, climb stairs, and reach down, up, low, and laterally.²⁵

Although some aspects of May's life have been affected—in her deposition testimony she explained that she is unable to perform various domestic and recreational activities without pain—we conclude that the course or trajectory of her life has not been affected. There are no activities that May has been rendered completely unable to perform. The evidence further shows that May was able to return to work, without restrictions. And while May was restricted from using her arm for a brief time prior to and for several months after her surgery, any residual restrictions on May's ability to perform her daily activities are self-imposed. We, therefore, conclude that May failed to present sufficient evidence to show that her injuries affected her general ability to lead her normal life as defined in *Kreiner*. There is no indication that May suffers from any physical disability that prevents her from engaging in work or other daily activities. While May's injuries may have caused temporary disruption to her daily activities, the residual effects of her injuries have not caused a life altering injury as described in *Kreiner*. Therefore, the trial court did not err in concluding that her injuries did not meet the threshold requirement under MCL 500.3135(1).

We affirm.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Peter D. O'Connell

²⁵ Dr. Murray's annual exam notes and May's self-evaluation form were not provided to the trial court, and, generally, our review is limited to the record of the trial court, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). However, because we find these documents significant and because remand to supplement the record will be a waste of judicial time and resources, we consider the enlarged record without remand. *Hawker v Northern Mich Hospital, Inc*, 164 Mich App 314, 318; 416 NW2d 428 (1987).