STATE OF MICHIGAN

COURT OF APPEALS

EVELYN LESTER and FRANK LESTER,

Plaintiffs-Appellants,

v

ANGELIC MORNINGSTAR, JULIO RENALDO VEGA, and NICOLE ANNE VEGA,

Defendants-Appellees.

UNPUBLISHED
April 4, 2006

No. 258368
Kent Circuit Court
LC No. 03-009911-NI

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In this threshold case under the no-fault act,[1] plaintiffs appeal as of right from the circuit court's order granting summary disposition to defendants. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

According to plaintiffs' complaint, in June 2002, defendant Nicole Vega was driving a car owned by defendants Angelic Morningstar and Julio Vega, when she unlawfully failed to yield the right of way to, or turned in front of, a car in which plaintiff Evelyn Lester was riding, resulting in a collision. Plaintiff[2] was involved in a second, similar, accident in May 2003, and plaintiffs commenced this negligence action five months afterward.

Defendants moved for summary disposition on the ground that plaintiffs failed to offer sufficient evidence to create a question of material fact concerning whether plaintiff had experienced any objective manifestation of injury from the accident involving them. In opposing the motion, plaintiffs' attorney framed the question as "[w]hich accident caused that injury," and asserted, as the "entire thrust" of his argument, that the question of the objective manifestation of an injury was not yet before the court because "the very first step enunciated in *Kreiner* is that in order for the Court to rule as a matter of law on the issue of serious impairment, there must not

[1] MCL 500.3101 *et seq.*

[2] Because plaintiff Frank Lester's interest in this case is derivative of that of plaintiff Evelyn Lester, in this opinion references to the singular "plaintiff" will refer exclusively to the latter.

be a . . . material question as to the nature and extent of the injury." In granting defendants' motion, the trial court explained, "I believe that there has to be some objective manifestation of injury after the first accident prior to the second so that causality can be determined; otherwise, I'm just sort of left with speculation and conjecture."

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

MCL 500.3135(1) provides that 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(7) states that "'serious impairment of body function' means 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(2) establishes that whether a person has suffered serious impairment of a body function is a question of law for the court, 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. Accordingly, "the issue . . . should be submitted to the jury only when the trial court determines that an 'outcome-determinative genuine factual dispute' exists." *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001), quoting *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

Our Supreme Court set forth the trial court's initial inquiry in connection with the no-fault threshold by stating, "First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries . . . ," then, "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." *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004).

Plaintiffs point to this wording and argue that "a determination that no factual dispute exists is required before the Court addresses the objective manifestation and the person's ability to lead a normal life issues." But *Kreiner*, *supra*, makes plain that a cause of action will not stand unless the alleged injury has produced certain effects. The wording employed takes the form of a sequence of inquiries for stylistic convenience, not to indicate that the second listed inquiry cannot be undertaken unless and until the first has been firmly resolved.

Where the nature and extent of the injuries pose closer questions, a trial court may nonetheless dismiss a case if there is no evidence of an objectively manifested impairment of

body function. The alternative would be to convene juries to decide close questions on certain elements in cases that are already mortally flawed for want of any such question on others. Or, even less implied by the wording of *Kreiner, supra*, to remove the question of evidentiary support concerning the manifestations of injuries from the court's initial inquiry simply because the court cannot decide the other elements as a matter of law.

For these reasons, we read *Kreiner, supra*, as setting forth certain strict requirements for restoration of tort liability under the no-fault act, not as demanding that a court's inquiry into the existence of those requirements follow a strict sequence. The trial court properly proceeded directly to the question whether plaintiffs could point to any objective manifestation of injury.

Plaintiffs cite earlier cases for the proposition that "[t]he affect on the injured person's lifestyle need not alter, significantly change, significantly disable, or significantly restrict, or significantly impact the person's general ability to lead his or her normal life." But *Kreiner, supra*, indicates that the conditions reinstating tort liability under the no-fault act are not lightly to be found. "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. *Id*. at 131. The focus is not on the plaintiff's subjective pain and suffering, but on injuries that actually affect the functioning of the body. *Miller, supra* at 249. Residual impairments based on perceived pain are a function of "physician-imposed restrictions," not "[s]elf-imposed restrictions." *Kreiner, supra* at 133 n 17.

"[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Conjecture occurs where one selects one from "two or more equally plausible explanations" of an occurrence "arising out of the evidence." *Buckeye Union Fire Ins Co v Detroit Edison Co*, 38 Mich App 325, 331-332; 196 NW2d 316 (1972). In this case, plaintiffs point to no medical evidence that plaintiff suffered any impairment of body function during the thirteen months that separated her two accidents. Given that the reports of serious diagnoses and treatments for plaintiff's shoulder pain, and of lifestyle adjustments allegedly resulting therefrom, all date from after the second accident, the first accident in fact seems less likely than the second to be the cause of any condition affecting plaintiff's normal life at present.

Plaintiffs state that plaintiff "continued to complain of pain in her right shoulder when she was involved in a second accident," which "exacerbated all of her previous injuries," but do not assert that plaintiff suffered any physician-imposed restrictions on her activities based that pain before that second accident. Because the first generated no medical evidence suggesting an objectively manifested impairment of an important body function occurring over the thirteen months that followed, the second rendered it impossible to trace any such manifestation to the first except through recourse to speculation or conjecture.

Because speculation or conjecture do not suffice to oppose a motion for summary disposition brought under MCR 2116(C)(10), the trial court properly granted summary

disposition in this instance.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra