STATE OF MICHIGAN

COURT OF APPEALS

SHARON MARTIN and JOSEPH MARTIN,

Plaintiff-Appellant,

v

ROBERT SOUTHHORN, DTE ENERGY CO., and MICHIGAN CONSOLIDATED GAS CO., d/b/a MICHCON,

Defendants-Appellees.

UNPUBLISHED
April 11, 2006

No. 259275
Wayne Circuit Court
LC No. 03-334898-NI

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

In this serious impairment of body function 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).

Plaintiff's motor vehicle was struck from the rear by a truck driven by defendant Southhorn and owned by defendant MichCon, whose parent company is DTE Energy Co. Plaintiff sought medical treatment soon thereafter, and asserts that the accident left her with cervical myositis and a bulging disc.

Plaintiff filed suit, initially complaining of serious impairment of body function and severe permanent disfigurement. However, plaintiff did not assert disfigurement at the dispositive motion hearing below, and does not do so on appeal; therefore, we deem that theory abandoned. The trial court granted summary disposition to defendants on the ground that plaintiff failed to offer sufficient evidence to show that any injuries attributable to the accident seriously affected her ability to lead her normal life, citing *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

[1] MCL 500.3101 *et seq.*

We review a trial court's decision on a motion for summary disposition de novo. *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).

MCL 500.3135(1) provides that a person remains subject to tort liability for motor vehicle negligence caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered a serious impairment of body function. A serious impairment of body function is defined to mean 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). Whether a person has suffered serious impairment of a body function is a question of law for the court when there are no factual disputes concerning the nature and extent of the injuries, or regardless of the dispute, the dispute is not material to the serious impairment determination. MCL 500.3135(2) 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's decision in *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.

Plaintiff complains that continuing pain causes her "difficulty performing the most basic household chores such as cooking, grocery shopping and cleaning." With these words, plaintiff complains of merely reduced capacity to attend to those normal everyday activities, and not an outright disability. This assertion, taken at face value, suggests inconvenience and the need to adjust, rather than a change in the trajectory of plaintiff's life. She additionally complains that her injuries have left her "unable to participate in hobbies and activities such as riding motorcycles, playing softball, wallyball, work[ing] out and play[ing] with her kids." Upon further review, plaintiff's participation in the hobbies and activities described were self restricted before the accident in question at times and subject to self imposed restrictions after this accident. She still participates and interacts with her children. Under these circumstances, curtailment of such hobbies does not change the trajectory of her life.

Plaintiff repeatedly asserts that her injuries have seriously impaired her ability to work as a photographer and babysitter. Her pre-accident employment history is neither well documented, nor tax perfected. Plaintiff's part time on-call employment as a photographer's assistant necessarily ended when the photographer died shortly after the accident. However, at the motion

hearing below, the trial court elicited from plaintiff's attorney that plaintiff had described herself as unemployed at the time of the accident. The court concluded that because plaintiff "was unemployed before the accident and after the accident, clearly her lifestyle was unchanged." Plaintiff does not squarely attempt to refute that particular.

Moreover, plaintiff attributes all her limitations or disabilities to pain, yet has little to show in the way of physician-imposed restrictions. What there is relates to her employment prospects. But plaintiff's deposition testimony indicates that her immediate pre-accident history included, at best, spotty, occasional employment. Accordingly, in the absence of evidence that plaintiff was actually offered employment that she would have accepted but for medically imposed restrictions, any such restrictions actually noted are merely hypothetical.

Plaintiff states that she had "attempted to work at a dentist office approximately 1 year following this accident and was unable to complete even one week of work due to her back pain." However, plaintiff neither provides a specific citation to support this contention, nor asserts that any medical orders were involved in her discontinuation of any such employment.[2]

Plaintiff states that when she first presented herself to her doctor after the accident, the latter "prescribed pain medications and disabled Plaintiff from her employment as a photographer and babysitter." However, plaintiff fails to specify the page, of several consisting of all-but-illegible handwritten notes, within the exhibit cited for this proposition where any such specific medical instruction may be found.

Plaintiff cites a document, dated May 22, 2003, which includes her physician's indications, "Last day of work 7/22/02," and "She is still disabled." However, in light of plaintiff's admission that she was not in fact employed at the time of her accident, her doctor's reference to the date when she first approached him for treatment after the accident reflects plaintiff's own assertions, not any medical determination on the doctor's part. The description "still disabled" likewise reads more as a confirmation of plaintiff's own representations than as a medical directive.

Plaintiff also cites an evaluation, conducted for purposes of her insurance coverage, which includes the statement that because of her symptoms, "she has not been able to return to her duties as a journalistic photographer." The evaluation further indicates as follows:

> [Plaintiff] does have cervical and lumbar strain that appears to be related to her motor vehicle collision of July 23, 2002. I feel she is temporarily disabled from performing the job duties of a journalistic photographer, as she describes them, for two months from the time of this evaluation. In the interim, I believe she is able to work in a sit-down position with a sit/stand option, or light duty work as a photographer . . . .

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[2] Plaintiff provides as an exhibit a prescription pad acknowledgment of disability, 10 months post accident as utilized in a no-fault PIP claim, but nothing of evidentiary significance.

We note that this evaluation describes only partial disability from employment. Moreover, the evaluation is descriptive, not prescriptive, as indicated by the disclaimer on the first page, "[plaintiff] understands that this evaluation does not entail a patient/physician relationship. No medications were given. No prescriptions rendered."

In sum, plaintiff is able to point to some physician-reported disabilities concerning apparently hypothetical employment, but no actual physician-imposed restrictions at all, let alone any that truncated or prevented any employment opportunity actually existing at the time.

The trial court found and so do we that, "Although some aspects of a plaintiff's entire normal life may be interrupted by her impairments, if . . . the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead her normal life has not been affected" for purposes of establishing a serious impairment. *Kreiner, supra.* 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. For these reasons, the trial court properly granted summary disposition to defendants.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio