

STATE OF MICHIGAN
COURT OF APPEALS

TINA KITCHEN and SEVEN KITCHEN,

Plaintiffs-Appellants,

v

RANDY SCOTT SOYKA,

Defendant-Appellee.

UNPUBLISHED

April 25, 2006

No. 265973

Oakland Circuit Court

LC No. 2004-057824-NI

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's determination that as a result of a motor vehicle accident she has not suffered a serious impairment of an important body function that affects her general ability to lead her normal life. The trial court ruled that because plaintiff had not satisfied the no-fault tort threshold of MCL 500.3135, it must grant defendant's motion for summary disposition. We affirm.

I

On May 28, 2002, a motor vehicle defendant was driving hit the rear of a motor vehicle plaintiff¹ was driving. Plaintiff alleges her shoulder, neck, back, and jaw were injured; she later had surgery on her left shoulder. Plaintiff filed this tort action for noneconomic and excess economic damages, claiming she had suffered a serious impairment of a body function.

Defendant alleges that any injuries plaintiff received in the accident did not limit her range of motion or her strength, and any pain she suffered was the result of mild degenerative joint changes. Defendant contends plaintiff failed to produce any objective evidence that her periodic complaints of shoulder pain could be traced to anything other than degenerative joint disease. Defendant also notes that plaintiff's condition has not prevented her from performing household chores, home maintenance projects such as painting and laying tile, being employed,

¹ The singular plaintiff refers to Tina Kitchen; Steven Kitchen claims only lost consortium.

or engaging in recreational activity, including bowling and volleyball. Defendant moved for summary disposition contending plaintiff had not sustained an objectively manifested injury as a result of the accident, and her ability to lead her normal life was also unaffected.

Plaintiff asserts she has not been able to return to her normal life after the accident. She must work within doctor-imposed restrictions. She can perform household chores, but it causes her pain and discomfort. She also claims to suffer on-going limitations while she is working, playing, and even while she is doing simple things like dressing and sleeping.

The trial court agreed with defendant. It granted defendant's motion for summary disposition by order entered March 17, 2005 for the reasons stated on the record. At the hearing on the motion held March 2, 2005, the trial court stated:

Plaintiff has presented evidence of a shoulder injury. The MRI's and medical records reflect degenerative changes but there is a failure to link the injury to the accident. Plaintiff has testified she has been able to return to her normal life but suffers pain while performing some tasks. Our Supreme Court has held that the ability to perform activities, even though suffering some pain, does not constitute a serious impairment of an important body function that affects the person's general ability to lead their normal life.

The trial court subsequently denied plaintiff's motion for reconsideration finding no palpable error. MCR 2.119(F)(3). The trial ruled that although plaintiff offered evidence of an objectively manifested injury, a March 23, 2005 affidavit of Dr. Shivajee Nallamothe,² plaintiff's own testimony failed to establish the injury affected her "general ability" to lead her normal life.

Plaintiff appeals by right.

II

This Court reviews de novo a trial court's decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005). A motion brought under MCR 2.116(C)(10)

² Dr. Shivajee Nallamothe opined in his affidavit that plaintiff sustained the following objectively manifested injuries in the auto accident: "bursitis of the left shoulder, acromioclavicular joint sprain of the left shoulder, impingement of the left shoulder and cervical myositis."

Because the affidavit was submitted *after* the trial court decided the motion for summary disposition, the trial court could have properly rejected it for purposes of deciding the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Sprague v Farmers Ins Exch*, 251 Mich App 260, 265; 650 NW2d 374 (2002). Likewise, this Court could reject the affidavit. See *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003) (appellate review of a summary disposition decision is limited to the evidence that was presented to the trial court at the time the motion was decided).

tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Both the trial court and this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id.* at 120-121. If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with evidentiary materials that a genuine and material issue of disputed fact exists, and may not rest upon mere allegations or denials in the pleadings. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A trial court properly grants summary disposition pursuant to MCR 2.116(C)(10) “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id.*

With respect to the issue presented here, MCL 500.3135(1) provides: “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.” Further, MCL 500.3135(7) defines “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” Whether an injured person has suffered a serious impairment of body function or a permanent serious disfigurement are questions of law for the court if either (1) there is no factual dispute concerning the nature and extent of the person’s injuries, or (2) there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function or permanent serious disfigurement. MCL 500.3135(2)(a); *Williams, supra* at 507. This Court reviews questions of law de novo. *McDaniell v Hemker*, 268 Mich App 269, 272; 707 NW2d 211 (2005).

III

Plaintiff first argues that the trial court erred by failing to make specific findings of fact regarding its determination that she failed to satisfy the tort threshold of MCL 500.3135. Although plaintiff argues the trial erred in its ultimate conclusion, she asserts that at a minimum, this case should be remanded to the trial court to make findings of fact regarding the factors our Supreme Court listed in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). We disagree.

The parties agree that the trial court in ruling on defendant’s motion for summary disposition found that disputed issues of material fact existed regarding whether plaintiff satisfies the first two elements of the no-fault tort “serious impairment of body function” threshold, that is, (1) whether plaintiff’s injuries are objectively manifested and (2) whether the injuries impair an important body function. Further, the parties agree that the trial court in ruling on defendant’s motion focused its attention on whether plaintiff’s alleged impairment affected her general ability to lead her normal life. MCL 500.3135(2)(a)(ii) permits the court to rule as matter of law when although “[t]here is a factual dispute concerning the nature and extent of the person’s injuries . . . the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.”

In making her argument to remand this case for specific fact finding regarding the *Kreiner* factors, plaintiff relies on *May v Sommerfield*, 239 Mich App 197, 202; 607 NW2d 422 (1999). But this Court remanded that pre-*Kreiner* case to the trial court for a determination whether the trial court granted defendant summary disposition under MCL 500.3135(2)(a)(i) or (ii). Here, the record is clear that the trial court ruled under § 3135(2)(a)(ii).

Once a court determines it may properly address the issue on a motion for summary disposition under either § 3135(2)(a)(i) or § 3135(2)(a)(ii), *Kreiner* provides only “a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not.” *Kreiner, supra* at 131. In addressing the specific question of whether an impairment affects a person’s general ability to lead his or her normal life, the *Kreiner* Court held that § 3135 requires two different types of analysis. First, a *subjective* determination of the plaintiff’s “normal life” through “a multifaceted inquiry, comparing the plaintiff’s life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff’s overall life.” *Kreiner, supra* at 121 n 7, 132-133. Second, “an *objective* analysis regarding whether any difference between the plaintiff’s pre-and post-accident lifestyle has actually affected the plaintiff’s ‘general ability’ to conduct the course of his life.” *Id.* at 133 (emphasis added).

The *Kreiner* Court listed five objective factors to assist trial courts in evaluating whether an impairment has affected a plaintiff’s “general ability” to lead or conduct the course of his normal life: “(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. But the Court did not require trial courts to make specific findings of fact regarding these nonexhaustive factors. Indeed, the Court observed that the “list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves.” *Id.* at 133-134. Because the *Kreiner* factors are intended to serve as part of a “framework” for analysis and because they are themselves not outcome determinative, we need not remand to the trial court for fact finding.

IV

We conclude that the trial court properly ruled as a matter of law under MCL 500.3135(2)(a)(ii) that plaintiff’s alleged impairments resulting from the accident did not affect her general ability to lead her normal life. Consequently, the trial court did not err in granting defendant summary disposition to defendant because plaintiff did not have a serious impairment of body function or permanent serious disfigurement that satisfied the no-fault threshold for sustaining a tort action for non-economic and excess economic damages. MCL 500.3135(1) & (7).

The trial court’s ruling in this case is proper only if accepting plaintiff’s claims regarding her impairments are true, she nevertheless has not established the impairments have affected the course or trajectory of her normal life when viewed in the context of her life as a whole and the relative importance of the impacted aspects of her normal life. *Kreiner, supra* at 130-133. The *Kreiner* Court provided a basic framework for answering this question, *id.* at 131-133:

The starting point in analyzing whether an impairment affects a person’s “general,” i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long. Specific activities

should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor 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.

* * *

In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's “general ability” to conduct the course of his life. Merely “any effect” on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's “general ability” to lead his life.

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's “general ability” to conduct the course of his 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 impairment¹⁷, and (e) the prognosis for eventual recovery.

17. Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.

The *Kreiner* Court further held that, “[t]his list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves.” *Id.* at 133-134. Rather, “in order to determine whether one has suffered a ‘serious impairment of body function,’ the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment ‘affects the person’s general ability to conduct the course of his or her normal life.’” *Id.* at 134. This question must be answered on a case-by-case basis after a fact-specific inquiry into the circumstances of each particular case. *Id.* at 134 n 19.

Defendant relies on *Kreiner* to support his position that the trial court did not err in granting him summary disposition. Plaintiff relies on three post-*Kreiner* decisions by this Court, *McDaniell*, *Williams*, and *Moore v Cregeur*, 266 Mich App 515; 702 NW2d 648 (2005), to support of her argument to the contrary. We briefly survey these cases in the order decided.

In *Williams*, the plaintiff suffered a fractured right shoulder and a fractured left hand in a motor vehicle accident. After three months, the plaintiff was able to return to unrestricted work as a salesman and resumed coaching a middle school girls’ basketball team. *Williams*, *supra* at 506. Doctors opined that the plaintiff lacked full range of motion in his left wrist and that the range of motion his right shoulder would be permanently limited. *Id.* at 509. These impairments

prevented the plaintiff from demonstrating how to shoot a basketball, play golf, and precluded activities with his grandchildren, such as playing catch. This Court noted that while these impairments “might not rise to the level of a serious impairment of body function for some people,” in light of the plaintiff’s coaching basketball and his love of golf,³ which he could no longer play, the Court concluded that the plaintiff’s accident-caused limitations affected his general ability to lead his normal life. *Id.*

As a result of an automobile accident, the plaintiff in *Moore* suffered multiple rib fractures, a collapsed right lung, and detached retinas in her eyes. Subsequent eye surgery was partly successful, but complications developed that resulted in permanent loss of visual acuity, a deterioration in her vision to 20/60, and a partial loss of peripheral vision. *Moore, supra* at 516-517. The trial court granted defendant summary disposition because it found that plaintiff had failed to present sufficient evidence that the injuries affected the plaintiff’s general ability to lead her normal life. The plaintiff admitted in her deposition that she had adjusted to her vision loss, but she also claimed many things were more difficult for her to do after the accident. *Id.* at 520. For example, the plaintiff noted she had difficulty reading, taking pictures, cross-stitching, and she could no longer hunt. This Court rejected the defendant’s suggestion that, “because [the] plaintiff can still pursue all these activities, albeit with the aid of devices such as magnifiers and special lighting, or with retraining, the injuries do not rise to the level of affecting [the] plaintiff’s general ability to lead her normal life.” *Id.* The *Moore* Court reasoned, “[t]he fact that [the] plaintiff has had to take special steps to pursue the activities she routinely pursued in the past is clear evidence that her vision loss has affected her general ability to lead her normal life.” *Id.* at 521. In the context of the plaintiff’s whole life, and observing that the plaintiff’s vision difficulties “will affect every aspect of her life to some degree and will affect certain specific activities, such as hunting, even more,” the *Moore* Court concluded that the plaintiff’s vision loss affected her general ability to lead her normal life. *Id.*

The *McDaniels* Court considered the meaning of *Kreiner’s* footnote 17 on which the trial court had granted the defendant’s motion for summary disposition, finding that the plaintiff’s self-imposed restrictions based on real or perceived pain did not establish a cognizable residual impairment as a matter of law. *McDaniels, supra* at 272. Absent this interpretation of *Kreiner*, the trial court would have found a trial necessary “on the issue of the impairment affecting [the plaintiff’s] general ability to lead her normal life because of the evidence showing that she had given up most of her recreational activities and some of her gardening, that she had lost time from work, and that her relationship with her husband was negatively affected.” *Id.*, n 2.

This Court found that footnote 17 was tied directly to a determination of *Kreiner* factor d, “the extent of any residual impairment.” *Id.* at 282, 284. The Court interpolated footnote 17 based on its placement, reading it as providing, “‘Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish [the extent of any residual impairment].’ The necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment.”

³ The plaintiff played golf two or three times a week before the accident. *Williams, supra* at 509.

Id. at 282-283. Thus, “the extent of . . . residual impairment cannot be proven by way of self-imposed restrictions based on real or perceived pain.” *Id.* at 283. This is “because the nature of pain tends to be subjective and therefore inherently questionable.” *Id.* at 284. But where “there are physician-imposed restrictions based on real or perceived pain, footnote 17 does not require that the doctor offer a medically identifiable or physiological basis for imposing the restrictions.” *Id.* at 284. The Court recognized that in some cases, restrictions may not be truly physician-imposed where a doctor’s restrictions are based on a patient’s subjective tolerance for pain and the pain lacks an identifiable medical or physiological basis. *Id.* at 284-285. Further, *Kreiner* factor d is but one of several nonexclusive factors, none of which by themselves are dispositive of the ultimate question to be answered based on the totality of the circumstances, “whether an impairment has affected ‘the person’s general ability to lead his or her normal life’ as required by MCL 500.3135(7).” *McDaniel*, *supra* at 285.

Viewing the evidence in a light most favorable to plaintiff and applying the principles discussed in *Kreiner* and its progeny to the present case, we conclude under the totality of the circumstances that the trial court correctly ruled that the objectively manifested impairment of an important body function that plaintiff alleges as a result of the accident does not affect her “general ability to lead . . . her normal life.” MCL 500.3135(7); *Kreiner*, *supra* at 132-134.

Plaintiff injured her left shoulder, neck, and hips in the automobile accident. She was unable to work for a little over year at her seasonal, low-wage, part-time employment at a greenhouse, but she then obtained a more permanent job as a gas station clerk working about the same number of hours at a slightly higher hourly wage. Plaintiff testified that before the accident she had worked at a series of jobs for months at a time with a month or two of unemployment between jobs. She collected about \$8,000 in no-fault work-loss benefits from her insurance carrier. With respect to her injuries, plaintiff testified that her hip problem was resolved by physical therapy but her neck and shoulder continued to bother her.

When Dr. Nallamothu, plaintiff’s treating physician, released plaintiff to work, he imposed a five-pound lifting restriction. Regarding this restriction, plaintiff testified:

Q. Do you ever have to lift anything more than five pounds at Marathon?

A. I try not to. I try to do it with my right arm.

Q. Are you still able to do it though?

A. Yes.

Q. Do you require any special accommodations to work there?

A. No.

Plaintiff also testified that she could perform her household chores but she sometimes experienced pain. She testified she experienced pain when she turned her neck to the left or “if I try to lower my neck to my left shoulder.” Regarding her ability after the accident to perform household chores, plaintiff testified:

Q. What type of problems are you having with the left shoulder?

A. It hurts to sweep, mop, lifting.

Q. Anything else?

A. That's about it.

* * *

Q. What other type of problems do you have because of your neck and left shoulder that we haven't already talked about?

A. My household chores.

Q. Can you be specific?

A. Carrying my laundry. Taking the trash out if it's too heavy. Sweeping, mopping, getting on my hands and knees to scrub my floors.

Q. You are still able to do those activities - -

A. Yes

Q. - - they cause you pain?

A. Exactly.

Plaintiff also testified that post-accident pain limited her participation in recreational activities. For example, she asserted that pain bothered her when she bowled or played volleyball. But she bowled in a league both before and after the accident. Plaintiff explained that she must be careful while bowling and that she uses her dominant right hand. She tried to play volleyball a couple of times after the accident, but "it didn't work real well." On the other hand, before the accident, plaintiff had played volleyball with friends only "every once in a blue moon." Plaintiff also testified she had not played softball after the accident but had played with family "every couple of months" before the accident.

Plaintiff's other asserted limitations must be viewed in the context of pre-accident life. After living the first thirty-four years of her life in Arizona, plaintiff moved to Michigan about a year-and-a-half before the accident. Plaintiff married her husband, an emergency medical technician and volunteer fireman, after moving to Michigan but before the accident. Plaintiff testified that although she could not hunt with a bow, she had not hunted since moving to Michigan, not because of impairment but because she had sold her gun before moving. Plaintiff stopped camping after moving to Michigan because she "[j]ust never found the time."

Plaintiff argues on appeal that doctor-imposed lifting restrictions have prevented her from serving as a volunteer firefighter, but there is no evidence plaintiff ever sought to serve as a

volunteer firefighter in Michigan. Rather, plaintiff's testimony indicates that she ceased being a volunteer firefighter before moving to Michigan.

In addition, plaintiff argues that the trial court erred by focusing on her testimony to the exclusion of the medical evidence she presented. But plaintiff's testimony demonstrates the lifting restriction imposed by her doctor have not prevented her from working or engaging in non-work activities. Rather, the medical reports support the conclusion that plaintiff's accident-caused injuries have not impaired her body functions. Although medical reports document that plaintiff sustained cervical strain and problems with her hips, which physical therapy resolved within weeks, magnetic resonance imaging (MRI) testing on November 3, 2002, and surgery performed on plaintiff's shoulder on December 23, 2002, uncovered only degenerative changes, not traumatic injuries. Although the medical reports document plaintiff's persistent complaints of pain, physical examinations of plaintiff both before and after her surgery demonstrated that she possessed full range of motion of her left shoulder, her neurovascular status was intact, and she had no sensation loss. Before her surgery, Dr. Nallamothou reported on August 27, 2002, that plaintiff possessed good abduction strength, good external rotation strength, and good grip strength. Thus, although the medical reports repeat plaintiff's claims that certain movements were painful, her range of motion, strength, and grip remained intact. The medical reports are therefore consistent with plaintiff's testimony: she could perform activities that she had performed before the accident, but certain movements might be painful.

In sum, doctor-imposed imposed restrictions have not established that plaintiff has an "objectively manifested impairment of an important body function that affects [her] general ability to lead . . . her normal life." MCL 500.3135(7). Unlike the plaintiff in *Moore*, here, plaintiff can perform her job without special accommodation, aides, or training. Further, pain-induced, self-imposed restrictions, which according to plaintiff's testimony precluded her from playing softball and volleyball, cannot establish plaintiff has a residual impairment. *Kreiner, supra* at 133 n 17; *McDaniell, supra* at 283. Further, unlike golfing to the plaintiff in *Williams*, plaintiff's testimony indicates that softball and volleyball were a relatively minor part of her pre-accident life. Although plaintiff was off work for a little over a year after the accident, she had experienced unemployment before the accident for months at a time. Viewed in the context of plaintiff's entire life, neither the inability to work for a year, nor limitations on playing softball or volleyball, have prevented plaintiff from being generally able to lead her normal life.

Similarly, plaintiff lived with the pain of migraine headaches before the accident and continued to live with them after the accident. Although plaintiff claimed her headaches increased after the accident, she also denied that her headaches were caused by the accident. Moreover, although plaintiff claim many movements cause her pain, the no-fault threshold is not satisfied by subjective complaints of pain which cannot establish a residual impairment. *McDaniell, supra* at 282-283. "Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body." *Kreiner, supra* at 118 n 5, quoting *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982).

Finally, plaintiff argues her surgical scar is a "permanent serious disfigurement." But she fails to highlight any evidence that the scar is particularly hideous, painful, or otherwise limits her "general ability to lead . . . her normal life." MCL 500.3135(1) & (7). Accordingly, her claim in this regard fails as a matter of law.

Considering the totality of circumstances, plaintiff's alleged accident-caused impairments have not affected her general ability to conduct the course of her normal life. MCL 500.3135(7); *Kreiner, supra* at 134. Accordingly, the trial court did not err by granting defendant summary disposition pursuant to MCL 500.3135(2)(a)(ii).

We affirm.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello