STATE OF MICHIGAN

COURT OF APPEALS

CAROL ANN WESCON, Plaintiff-Appellant,	UNPUBLISHED February 6, 2007
v	No. 272059 Wayne Circuit Court
LAWRENCE JEROME GOEBEL, Defendant-Appellee.	LC No. 05-518313-NI

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant in this tort action arising from an automobile accident. Because plaintiff has not shown that the trial court erred in granting summary disposition on the threshold issue of whether she suffered a serious impairment of body function, we affirm. This case is being decided without oral argument under MCR 7.214(E).

A grant of summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). The documentary evidence submitted by the parties is viewed in the light most favorable to the party opposing the motion. *Id*. Summary disposition under MCR 2.116(C)(10) is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Under MCL 500.3135(1), tort liability remains for noneconomic loss caused by a person's use of a motor vehicle "only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." Serious impairment of body function is statutorily defined as "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). A person is generally able to lead his or her normal life if the person is "for the most part" able to lead his or her normal life. *Kreiner v Fischer*, 471 Mich 109, 130; 683 NW2d 611 (2004). Consideration of the following nonexhaustive factors might assist in evaluating whether a plaintiff's general ability to lead 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." *Id*. at 133. However, "the totality of the circumstances must be considered." *Id*. at 134. Moreover, "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." *Id*. at 132-133.

Considering first plaintiff's work activities, despite her deposition testimony indicating negative effects of her claimed impairment, tax return documents related to her part-time work as a cosmetologist reflect that her gross receipts (rounded to whole dollars) from her work dropped only from $8,417 in the year of the accident to $8,017 the following year, and then increased the next year to $9,193. Thus, even presuming the accuracy of plaintiff's testimony about reducing her work hours and needing to pay for some assistance for her work, the uncontradicted evidence reflects that she was able to not only maintain but also to increase her income. Accordingly, it cannot reasonably be concluded that plaintiff's general ability to work was impacted in a way that is significant in terms of assessing the effect of her claimed impairment on her general ability to lead her normal life. *Kreiner, supra*, at 137 (noting in concluding that a plaintiff's general ability to conduct the course of his normal life had not been affected that, although he was forced to limit his workday to six rather than eight hours and restrict his ability to work in other ways, he did not contend "that these limitations prevent him from performing his job"). Indeed, our Supreme Court has expressly disapproved the view that any effect on one's ability to work would suffice to establish a serious impairment of body function. *Id*. at 138 n 23.

Regarding medical restrictions on plaintiff's recreational and household activities, a chiropractor at one point restricted plaintiff from vacuuming, lifting over ten pounds, bending, or stooping for eight weeks. Such restrictions in place for a period of only eight weeks lack significance in determining whether plaintiff's general ability to lead her normal life was affected because they were not "of sufficient duration to affect the course of a plaintiff's life." *Kreiner, supra,* at 135. Another chiropractor stated in an affidavit that she restricted plaintiff from lifting anything over ten pounds and from walking for more than ten minutes, and advised plaintiff that "she must rest when normal daily activity aggravates her back and to avoid activities that cause pain."[1] Importantly, "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain" do not establish the extent of residual impairment for purposes of evaluating whether a plaintiff's general ability to conduct the course of his or her life has been affected. *Id*. at 133 n 17. For purposes of discussion, we presume that the restrictions on lifting and walking are of indefinite duration, and that restrictions imposed by a chiropractor should be treated the same as those imposed by a physician. However, the restriction from walking for more than ten minutes is not automatically sufficient in itself to affect a plaintiff's general ability to lead his or her normal life. The *Kreiner* Court concluded that, despite the fact that one of the plaintiffs in that case had "difficulty walking more than a

[1] This affidavit further includes a statement indicating that these restrictions on plaintiff's activities are ones "affecting her general ability to conduct the course of her normal life." This statement, clearly framed with reference to legal principles articulated in *Kreiner*, *supra*, is entitled to no weight. While a chiropractor may be competent to describe the nature of medical conditions and attendant restrictions, whether such medical conditions and restrictions affect a person's general ability to lead his or her normal life under MCL 500.3135(7) and *Kreiner*, *supra*, is a legal question outside the expertise of a health professional. See *In re Susser Estate*, 254 Mich App 232, 240; 657 NW2d 147 (2002).

half mile without resting," his ability to lead his normal life was not affected. *Id*. at 137. Further, the restriction to avoid activities causing pain is not entitled to any weight. Considering such a broad and vague restriction would effectively allow a plaintiff to elevate any self-imposed restriction due to real or perceived pain into a restriction imposed by a health professional, thereby effectively obliterating the distinction drawn in *Kreiner, supra*, between self-imposed restrictions and physician-imposed restrictions.[2]

Plaintiff testified that before the accident she engaged in downhill skiing, baseball, bowling, ballroom dancing, arts and crafts, and riding a dune buggy in the sand. However, plaintiff indicated that she had not been on a baseball or softball league for years before the accident, and merely would like to be able to throw the baseball with her grandson. She also stated that she could not throw a baseball because it would be too painful, and would not downhill ski because she did not want to risk exacerbating her back condition. To the extent that plaintiff is complaining that her impairment precludes her from engaging in occasional recreational activities with her grandson such as playing catch with a baseball, this would not have been an important or regular enough a part of her life to have significant weight in terms of generally affecting her ability to lead her normal life. *Kreiner, supra,* at 134 n 19 (noting that whether an impairment of a person's ability to throw a fastball is a serious impairment of body function "may depend on whether the person is a professional baseball player or an accountant who likes to play catch with his son every once in a while"). Further, while it does seem fair to infer from plaintiff's restriction from walking for more than ten minutes that she could not engage in downhill skiing, there is no evidence to reasonably indicate that downhill skiing was a major part of her life so that the loss of this one recreational activity could affect her general ability to lead her normal life. *Id*. at 137 ("A negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life.").

Plaintiff also indicated that she had not gone bowling since the accident because of her concern about pain. She testified that she had tried ballroom dancing since the accident, but could not do it because it hurt. Plaintiff testified that she could not sit for prolonged periods to do crafts without aching, and that she could not lift rocks to paint them. Plaintiff indicated that she loved to golf, but had not tried to do so since the accident. However, these self-imposed restrictions were not required by plaintiff's medical restrictions against lifting over ten pounds or walking over ten minutes. While plaintiff's restrictions might limit her ability to partake of these hobbies, they would not preclude her from doing so. *Kreiner, supra,* at 137 (concluding that a plaintiff's impairment did not affect his general ability to lead his normal life where in part he could no longer hunt rabbits but could still hunt deer). Similarly, plaintiff's claimed limitations

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[2] It is true that in *McDanield v Hemker*, 268 Mich App 269, 284-285; 707 NW2d 211 (2005), this Court indicated that some "fairly open-ended" restrictions that depend to some degree on a plaintiff's "pain tolerance and her own assertions of pain" might properly be considered as physician-imposed restrictions. But the chiropractor's vague restriction to plaintiff to avoid activities causing pain goes beyond depending to some degree on plaintiff's own assertion of pain. Rather, it relies entirely on plaintiff's subjective perception of pain.

in her ability to perform household tasks should be discounted because they are plainly not activities requiring one to lift over ten pounds or walk for more than ten minutes at a time.

Plaintiff analogizes her circumstances to those of the principal plaintiff in *McDanield v Hemker*, 268 Mich App 269; 707 NW2d 211 (2005), who this Court determined to have suffered an impairment affecting her general ability to lead her normal life. *Id*. at 280. But *McDanield*, *supra*, is distinguishable because the plaintiff in that case was out of work for six to seven months due to injuries, and a medical diagnosis projected that she would most likely have pain for the rest of her life, giving her "a life of pain and discomfort." *Id*. at 281. In contrast, plaintiff here did not suffer a significant impact on her work life and a review of the record finds no similar diagnosis indicating that plaintiff would suffer from severe pain for the rest of her life.

In sum, plaintiff has not established that she provided evidence of an impairment affecting her general ability to lead her normal life under the standards articulated in *Kreiner*, *supra*. Accordingly, plaintiff has not shown that the trial court erred by granting summary disposition in favor of defendant. In light of this analysis, it is unnecessary to reach defendant's alternative argument regarding causation.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio