STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY MINTER, Plaintiff-Appellant, v CITY OF GRAND RAPIDS and JOHN EDWARD-RHEEM WETZEL, Defendants-Appellees.	FOR PUBLICATION April 12, 2007 9:00 a.m. No. 273017 Kent Circuit Court LC No. 03-005719-NI Official Reported Version

Before: O'Connell, P.J., and Murray and Davis, JJ.

DAVIS, J.

Plaintiff appeals as of right an order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). The trial court determined that plaintiff did not suffer either a serious impairment of body function or a permanent serious disfigurement, so her claim was barred by the no-fault insurance act, MCL 500.3101 *et seq*. We affirm in part, reverse in part, and remand.

Defendant Wetzel is a police officer employed by defendant city of Grand Rapids. On August 15, 2002, at approximately 5:00 p.m., he was in a police cruiser responding to a request for assistance from another officer. He slowed down to make a left turn despite his view being blocked by an illegally parked vehicle. When he turned, he struck plaintiff, who was legally crossing the street. Wetzel was traveling approximately 15 to 20 miles an hour at the time of the collision, and he does not dispute that the accident was his fault.

Plaintiff was 67 years old at the time; she had a bad back and could not lift things, but she was otherwise self-sufficient and leading a normal life without physical issues. As a result of the accident, she sustained a broken toe, a cervical strain,[1] a closed head injury, and a laceration above her right eyebrow. Plaintiff took Vicodin and wore a special soft shoe for a week to a month, and, by the time of her deposition, her toe had completely healed. Her cervical strain required her to wear a soft collar for two weeks and refrain from heavy lifting, bending,

[1] This strain involved strained muscles in the side of the neck and shoulder, in the area of the upper portion of the spine.

squatting, and housework for three months; she still experienced stiffness six months later, but again, by the time of her deposition, the strain was completely resolved.

Although the laceration has healed, plaintiff still has a scar above her right eyebrow. Apparently, the scar can be reduced but not completely removed. Plaintiff finds the scar embarrassing, and it itches, occasionally becomes numb, and hurts when touched. Plaintiff also contends that the scar prevents her from moving her right eyebrow in a "normal" manner. However, the scar is only approximately 13 millimeters (slightly longer than half an inch) long. Plaintiff was diagnosed with a "mild traumatic brain injury" by her treating allopathic physician as a result of her closed head injury. She reported frequent headaches, occasional dizziness, memory problems, and insomnia. She was prescribed physical therapy, speech therapy, and language therapy, but she was not restricted from any daily activities. Although she completed her treatment and has fewer headaches, she contends that she has more dizziness, as well as confusion and blurred vision. She contends that she is no longer able to walk, dance, or even cross the street comfortably.

The trial court determined that plaintiff did not suffer for any "prolonged" period from her injuries, and her injuries did not affect her ability to live her normal pre-accident life. The trial court also determined that plaintiff's scar was "relatively small" and not "readily noticeable." Therefore, the trial court concluded that plaintiff had not suffered a "serious impairment of a bodily function" or a "permanent serious disfigurement." The trial court therefore granted summary disposition to defendants, and plaintiff now appeals as of right.

A grant or denial of summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all the evidence submitted by the parties in the light most favorable to the nonmoving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden, supra* at 120. We likewise review de novo questions of statutory construction, with the primary goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003), amended on other grounds 468 Mich 1216 (2003). The general purpose of the no-fault insurance act was to partially abolish tort remedies for injuries sustained in motor vehicle accidents and to substitute first-party insurance benefits in the place of tort remedies. *Stephens v Dixon*, 449 Mich 531, 541; 536 NW2d 755 (1995). Under the no-fault insurance act, 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 suffered death, serious impairment of body function, or permanent serious disfigurement. *Id*. at 539; MCL 500.3135(1).

The standard for assessing whether a plaintiff has sustained a serious impairment of body function is set forth in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). This is a threshold standard, requiring "an objectively manifested impairment" that affects the plaintiff's "general ability to lead his or her normal life." MCL 500.3135(7). This analysis is highly plaintiff-specific: for example, a plaintiff who can no longer throw a baseball at 95 miles an hour might or might not be "seriously impaired" depending on whether the plaintiff was a professional baseball pitcher or "an accountant who likes to play catch with his son every once in a while." *Kreiner, supra* at 134 n 19. The overall course of the specific plaintiff's "entire normal life" before and after the accident must be compared. *Id*. at 130-131. Our Supreme

Court has provided a list of factors that "may be of assistance," but emphasized that they are not exclusive. *Id*. at 133-134. The only caveat is that residual impairment cannot be established on the basis of a plaintiff's self-imposed limitations "based on real or perceived pain." *Id*. at 133 n 17; *McDanield v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005). The first step of this analysis requires the court to "determine that there is no factual dispute concerning the nature and extent of the person's injuries," or that the dispute is immaterial. *Kreiner*, *supra* at 131. The court must then determine whether an important body function has been impaired, whether any such impairment is objectively manifested, and, if so, whether the impairment affects the plaintiff's general ability to lead his or her normal life. *Id*.

We agree with the trial court that plaintiff's broken toe and cervical strain do not meet this standard. At most, she had to wear a soft shoe for a month and a soft collar for two weeks, and she had to refrain from activities that she was mostly or completely unable to do anyway. Plaintiff does not experience any ongoing effects of either injury. The trial court properly granted summary disposition regarding plaintiff's broken toe and cervical strain.

It appears to us that the trial court may have concluded that plaintiff was legally unable to establish a serious impairment of body function in the form of a closed head injury based on a diagnosis by her treating allopathic physician (who regularly treats closed head injuries) of "mild traumatic brain injury." If so, this is simply incorrect. The relevant statute, MCL 500.3135(2)(a), provides as follows:

> The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> (i) There is no factual dispute concerning the nature and extent of the person's injuries.
>
> (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but 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. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

If a properly qualified doctor testifies "that there may be a serious neurological injury," there would *automatically* be a jury question. That did not occur here. "The language of § 3135 does not indicate, however, that the closed-head injury exception provides the exclusive manner in which a plaintiff who has suffered a closed-head injury may establish a factual dispute precluding summary disposition." *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000). Therefore, the lack of medical testimony on point only precludes plaintiff from taking advantage of the automatic route to a jury issue, it does *not* necessarily preclude her from establishing a question for the jury by other means.

The parties do not dispute the bare fact that plaintiff sustained a closed head injury. She was 67 years old at the time. The headaches of which she complains are irrelevant under

Kreiner. However, she also asserts that she suffers from dizziness, confusion, and blurred vision; as a result, she has a reduced ability to locomote independently, to perform routine tasks necessary to life, and to engage in the social activities she enjoyed previously. "We note that a self-imposed restriction *not* based on real or perceived pain can be considered." *McDanield, supra* at 283 (emphasis in original). These impairments may or may not be self-imposed, but they arise from dizziness and confusion *in addition to* pain. The "trajectory" of plaintiff's "normal" life, past the age of 70, where her ability to take care of herself and enjoy socializing with friends and family, would seem to have been, at least, potentially affected.

Moreover, defendants apparently dispute some of these complaints, giving rise to a "factual dispute concerning the nature and extent of the person's injuries" that is "material to the determination as to whether the person has suffered a serious impairment of body function." Therefore, the conditions of MCL 500.3135(2)(a) necessary to make the determination one of law for the court are not satisfied. We conclude that, notwithstanding the fact that no allopathic surgeon provided the requisite testimony to satisfy the second sentence of MCL 500.3135(2)(a)(ii), the trial court erred in granting summary disposition with respect to the closed head injury.

The parties do not dispute the existence of plaintiff's scar, which must, by definition, be a "disfigurement" that it is "permanent." By implication from the definition of "serious" used in the context of an injury, a "serious" disfigurement must be a "severe" one. See *Churchman, supra* at 230. However, "seriousness" is based on the physical characteristics of the disfigurement more than the effect it has on a given plaintiff's life.[2] *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985). Furthermore, "the seriousness of a scar . . . is a matter of the common knowledge and experience of the trial bench in the first instance and, if the case goes to it, the jury." *Id*. at 446 n 2. It used to be that seriousness was "a jury question except in the most extreme cases." *Petaja v Guck*, 178 Mich App 577, 579; 444 NW2d 209 (1989). However, 1995 PA 222 made both serious impairment and permanent serious disfigurement initially threshold questions for the court. *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000). Nevertheless, it is only a question of law absent a genuine outcome-determinative factual dispute. We further infer from *Kreiner* that the inquiry should be in the context of the particular individual plaintiff. The emotional effect of any disfigurement is also highly relevant. *Earls v Herrick*, 107 Mich App 657, 668; 309 NW2d 694 (1981). Therefore, although the various factors must be judged in an objective manner, the factors *themselves* are highly subjective. See *Nelson, supra* at 446.

Plaintiff contends that her scar causes her a considerable amount of embarrassment and discomfort, as well as an inability to move her eyebrow in a "normal" manner. Defendants discount the scar as objectively too minor to constitute serious disfigurement. It appears that the parties dispute not only the effect of the scar on plaintiff, but the extent of the damage as well. Assuming that plaintiff's contentions are true, the scar is not only visible, it causes a functional problem with her ability to express emotions or otherwise communicate nonverbally. If the issue were purely a cosmetic one, we would find this to be a much closer question. However, quite

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[2] This does not mean the effect on the plaintiff's life is unimportant.

aside from appearance and embarrassment, a great deal of human face-to-face communication is nonverbal—it involves facial expressions and bodily gestures that are, consciously or subconsciously, attended to and interpreted by others. If plaintiff truly cannot move her eyebrow in a normal or natural manner, that could add to a claim of disfigurement. And if a significant amount of her interaction with others is face-to-face, the scar could *objectively* be determined to have a great effect on her life. We therefore find that the parties' factual dispute regarding the scar is sufficient to give rise to a jury question.

The dissent states that some of our conclusions either ignore the facts or are purely speculative. It is certainly true as a matter of law that a mere "explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference" is not a sufficient basis for a party opposing a motion for summary disposition to survive it. *Bennett v Detroit Police Chief*, 274 Mich App 307, 319; 732 NW2d 164 (2006), quoting *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). However, the purpose of summary disposition is not to deny parties with apparently weak cases the chance to have their day in court and their right to present their cases; rather, the purpose is to avoid pointlessly wasting resources by sending a matter to trial when there is no actual dispute to resolve. *Moll v Abbott Laboratories*, 444 Mich 1, 26-28; 506 NW2d 816 (1993). Indeed, a court is not *permitted* to make findings of fact when deciding a motion for summary disposition. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). This is, of course, obvious, given that, if there is a need to make factual findings, granting summary disposition is, by definition, impermissible under the plain language of MCR 2.116(C)(10).

In effect, summary disposition is intended to facilitate two important Michigan public policies: resolution of disputes on their merits and avoidance of unnecessary expenditures where there is no actual dispute or where the only material dispute is over a point of law. The courts exist to resolve disputes. The dissent observes, correctly, that we are uncertain whether plaintiff can prevail with her claims in the end. However, at the summary disposition stage of proceedings, a party generally has not yet been afforded the opportunity to develop a case as well as possible, so matters will usually be at least somewhat unsettled. We obviously have no way to know whether plaintiff would prevail with her claims at trial; if we did, it would be appropriate to grant summary disposition in her favor. See MCR 2.116(I)(2). Our holding is that some of plaintiff's claims are not so obviously devoid of all arguable merit that she should be denied the opportunity to be heard, to develop her case fully, and to have her day in court. Again, this case comes to us in the posture of a motion to summarily dismiss plaintiff's claims; the question is not whether she *will* prevail at trial, but whether there is more than a "mere possibility" or a "mere promise" that she *could*. *Maiden, supra* at 121. The question before us is not whether plaintiff will satisfy the *Kreiner* requirements at trial. The question is whether there is a genuine factual question whether she could. On the basis of our review of the facts that have been presented to us, we conclude that there is. For that reason, summary disposition was inappropriate.

We affirm the trial court's grant of summary disposition to defendants regarding plaintiff's broken toe and cervical strain, we reverse the trial court's grant of summary disposition regarding the closed head injury and the scar, and we remand for further proceedings. We do not retain jurisdiction.

/s/ Alton T. Davis