STATE OF MICHIGAN

COURT OF APPEALS

NINO MUMLADZE,

Plaintiff-Appellant,

v

SUSAN ELIZABETH DOERR, a/k/a SUSAN ELIZABETH DOERR-SHAPACK,

Defendant-Appellee.

UNPUBLISHED
February 23, 2010

No. 285152
Oakland Circuit Court
LC No. 2006-076503-NI

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

PER CURIAM.

Plaintiff appeals as of right from the trial court's entry of judgment in favor of defendant following a trial in which the jury determined that plaintiff had not suffered an injury. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On appeal, plaintiff claims that the jury's determination that she did not suffer an injury was against the great weight of the evidence. We disagree.

Because plaintiff failed to bring a motion for a new trial, she has waived appellate review of this issue. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 464; 633 NW2d 418 (2001). Further, because there is no indication that the jury did not make proper use of its authority to weigh the credibility of witnesses and make factual decisions, a decision not to review a waived assertion of error would not result in a miscarriage of justice. *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997).

Nevertheless, in light of the fact that plaintiff has filed this appeal in propria persona, we will briefly address why the jury's determination is not against the great weight of the evidence. Plaintiff's assertion is based on her claim that the testimony of Dr. Diaz, one of her treating physicians, constitutes undisputed evidence that she was injured. In particular, plaintiff relies heavily on Dr. Diaz's testimony that, in his opinion, her injury resulted from the November 2004 accident because she had no history of back problems until the accident. However, plaintiff failed to inform Dr. Diaz and her treating physicians that she had been in another car accident in July 2005, requiring hospitalization overnight, and at least one of her doctors testified that this subsequent accident could have been the cause of her pain symptoms. The jury makes determinations regarding the credibility of a witness's testimony when making its findings of fact, and the jury was not required to accept Dr. Diaz's testimony as true, especially in light of

plaintiff's admission that she had not told Dr. Diaz and her other physicians that she had been in an intervening car accident. See *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). Therefore, the jury's determination that the plaintiff was not injured in the November 2004 accident was not against the great weight of the evidence.

Moreover, even if the source of plaintiff's injury were not in doubt, the jury could have also determined that plaintiff's injury did not meet the threshold requirement of a serious impairment of an important body function.

A plaintiff may recover noneconomic damages under the no-fault act only where the plaintiff has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). "'[S]erious 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(7). Movement of one's back is considered to be an important body function. *Shaw v Martin*, 155 Mich App 89, 96; 399 NW2d 450 (1986).

To meet the requisite threshold, the impairment of an important body function must affect the course or trajectory of a person's entire normal life. *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004).

> 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. [*Id.* at 132-133 (emphasis in original).]

The court may consider factors such as "(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. Although a self-imposed restriction based on real or perceived pain does not establish the extent of a residual impairment, a physician-imposed restriction based on real or perceived pain can be considered when determining the extent of a residual impairment. *McDanield v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005).

Plaintiff claims that she meets the threshold injury requirement because she can no longer work, she has difficulty sleeping, and her pain affects her ability to perform everyday activities. However, plaintiff's testimony reveals that she is able to walk up the stairs to access her home, and she often helps prepare meals. In addition, although she complains of daily pain, she also acknowledges that taking painkillers relieves some of the pain. Also, while her pain management doctor testified that she should limit herself to lifting 20 pounds or less, he conceded that this recommendation was not the result of testing and that he had never listed such restrictions in plaintiff's chart. Further, none of plaintiff's doctors testified that they imposed

work restrictions on plaintiff. Because plaintiff has only been able to demonstrate self-imposed restrictions and restrictions imposed that were not based on objective tests and were never noted in her medical chart, a jury's conclusion that she has failed to demonstrate that the course of her overall life has been affected by her alleged injury would not constitute a miscarriage of justice. *Kreiner*, *supra* at 130-131.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis