

STATE OF MICHIGAN
COURT OF APPEALS

REBECCA DENNISE FISCHER,

Plaintiff-Appellant,

UNPUBLISHED
May 10, 2011

v

RONALD ALLAN NEAL and
JEAN ANN NEAL,

No. 295282
Chippewa Circuit Court
LC No. 08-009807-NI

Defendants-Appellees.

Before: RONAYNE KRAUSE, P. J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

In this automobile negligence case, plaintiff Rebecca Dennise Fischer appeals as of right a circuit court order granting summary disposition to defendants Ronald Allan Neal and Jean Ann Neal. Because material questions of fact exist regarding the nature and extent of Fischer's injuries, we reverse the circuit court's order and remand for further proceedings.

Fischer and Ronald Neal¹ had an automobile accident on January 30, 2006. Fischer maintains that that the accident caused her to experience a condition called reflex sympathetic dystrophy (RSD), and she filed a complaint seeking to recover medical expenses and lost wages she had incurred arising from the accident. Following discovery, Neal moved for summary disposition pursuant to MCR 2.116(C)(10) on the ground that Fischer had failed show a serious impairment of body function as required by MCL 500.3135(1) and (7). Neal emphasized that Fischer had not sought medical attention until approximately five hours after the accident, and that her medical records prior to January 30, 2006 suggested preexisting conditions for which she had engaged in "drug-seeking behavior." The exhibits attached to Neal's brief included deposition testimony from Dr. David Gast, who opined that Fischer had not sustained any injuries during the January 2006 accident.

¹ The singular "Neal" will hereinafter refer to Ronald Neal.

Fischer, acting in propria persona, responded by filing a brief attaching several medical records generated by Dr. John P. Ockenfels. The first, dated February 16, 2006, states in relevant part:

Unfortunately, this young lady was in a motor vehicle accident, but she was seatbelted, and is presently having a significant amount of back pain and muscle pain. She has a swollen left neck, which is surprisingly large compared to the right side. As well, she is now having problems with hand discomfort.

In a second record created in November 2006, Dr. Ockenfels described Fischer's condition as follows:

This is a 37-year-old white female who presents with increasing pain and discomfort of her right arm and hand going numb. She has been recently seen by Dr. _____, a psychiatrist who decreased essentially by half her narcotics and as such although she is trying to follow suit with his request and suggestions, she can no longer tolerate the pain or discomfort. She presents in quite severe pain using a cane to the opposite hand and cradling her arm. She has significant pain and discomfort compared to previous examination of same patient, earlier this month by myself where she actually was getting use out of her hand and the pain was just localized to her shoulder whereas the pain had been released [sic] significantly from the hand. Now it is back to where it was and in fact it is getting worse she states

Dr. Ockenfel's "assessment" of Fischer's condition included "[r]eflex sympathetic dystrophy with increasing pain and discomfort, as well as paresthesia."

Fischer also filed with the circuit court the following pertinent deposition testimony of Dr. Ockenfels:

Q. Okay. The injuries [sic] she sustained in the automobile accident was RSD—correct?—the primary injury?

A. I'm sorry?

Q. The primary injury she sustained in the automobile accident was RSD; correct?

A. It has become that, yes.

Q. And in your opinion was it caused by the car accident?

A. It appears to be, yes.

Q. And what types of limitations does she have because of her RSD?

A. Well, certainly she has pretty much severe limitations of use of that shoulder and the arm, because she can't put any pressure on it. Can't have a lot of things—I mean, she no longer wears a bra because of it. She can't even stand a bra, so certainly anything can cause pain associated with that, so she has

limitation as far as that is concerned, decreased grip strength, so basically she can't even use the right arm pretty much anymore.

Q. And would that affect her ability to do chores around the house?

A. Absolutely.

Q. Do you believe that she would need assistance in doing those chores around the house?

A. In order to keep the house up . . . yeah, I do.

Q. Now, I believe that—let me ask you this: We talked earlier, Doctor, about objective manifestations of RSD and I believe you said there was a color difference?

A. Yeah, you start getting a color difference. You can get a sheen associated with it or, you know, when it goes into the other degrees of RSD.

Q. Okay. Is that present with Rebecca Fischer?^[2]

In granting Neal's motion for summary disposition, the circuit court applied the defunct standard set forth in *Kreiner v Fischer*, 471 Mich 109, 130-134; 683 NW2d 611 (2004), rev'd in *McCormick v Carrier*, 487 Mich 180; ___ NW2d ___ (2010), finding that Fischer had not established that that her accident-related injuries qualified as objectively manifested or that her impairment affected her general ability to lead her normal life. In a bench opinion, the circuit court reasoned:

[T]here has been no objectively manifested impairment, medically identifiable injury or condition of a physical basis. So, I mean, understanding that is a medically identifiable injury or condition that has a physical basis. So if the Court finds that an important body function has been impaired, the impairment

² Dr. Ockenfels's answer to the final question, "She's starting to have color change and some changes, yes[,] is not contained in the circuit court record. Fischer included this page as an exhibit to her brief on appeal. We note that on appeal, both parties have submitted medical records and deposition testimony shedding additional light on their arguments, which does not appear in the circuit court record. Generally, "[w]hen reviewing a decision on a motion for summary disposition, this Court will not consider evidence that had not been submitted to the lower court at the time the motion was decided." *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009). The additional, relevant information confirms the existence of significant factual disputes regarding whether Fischer has sustained a serious impairment of body function. However, the *substance* of the additional, improperly submitted material on appeal has played no role in our decision.

has to be objectively manifested and it has to be determined whether the impairment has limited your ability to lead a normal life. That is the step process.

* * *

But in this case, I can't say that you have an objectively manifested injury because there is nothing except your complaints, your subjective complaints, about pain in your arm and pain in your neck. There is only Dr. Ockenfels, maybe Dr. Sing, who has indicated anything other than that. We have no x-rays, CT scans, MRI's. Even Dr. Ockenfels did not, in the emergency room did not find anything in that regard. As a matter of fact, all the neurological exams, motor exams, were normal. They couldn't see anything objectively manifested causing the right arm and neck pain.

* * *

. . . [E]ven Dr. Ockenfels, like I say, hasn't really found anything. Understanding, I don't mean, I don't think there is any question you have pain with regard to your neck and with regard to your arm, but they cannot pinpoint anything causing that.

You say you quit your job voluntarily and I believe you have, so you thought you couldn't work, but no doctor has said to you that you have this objectively manifested problem and you cannot work any longer. So we don't even have that. We just have you saying I have pain and I can't work. I just voluntarily quit. You haven't worked for several years.

* * *

I know you said that you have got this neck and shoulder pain and it is sore and worsened after this accident, but nothing has been done to correct it except offer you pain medications. So I realize you are saying your life is different now, but there is nothing here that suggests that except for you saying it is something that interferes with your normal life. . . .

We review de novo the circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "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." *Id.*

The no-fault act, MCL 500.3101 *et seq.*, subjects a person "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." MCL 500.3135(1). A "serious impairment of body function" constitutes "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).

In *Kreiner*, 471 Mich at 130-134, the Michigan Supreme Court articulated a multistep process to guide a trial court's consideration whether a plaintiff has sustained a threshold injury. The trial court must first review whether a factual dispute exists concerning the nature and extent of the plaintiff's injuries. If there is no dispute, or if a dispute exists that is immaterial to whether a plaintiff has endured a serious impairment of a body function, the court must determine whether "an 'important body function' of the plaintiff has been impaired." *Id.* at 131-132. To merit further inquiry, a court has to find both that "an important body function has in fact been impaired," and that the impairment qualifies as objectively manifested. *Id.* at 132. A plaintiff who has sustained an objectively manifested impairment of an important body function must also show that the impairment affects his or her general ability to lead a normal life. *Id.* "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." *Id.* at 132-133. This analysis must be followed by an objective determination "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. The *Kreiner* Court summarized that "[a]lthough some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, 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." *Id.* at 131.

On July 31, 2010, the Michigan Supreme Court decided *McCormick*, 487 Mich at 184, which overruled the interpretation of MCL 500.3135 in *Kreiner*, 471 Mich 109. *McCormick* announced a new standard for evaluating whether the injuries sustained by a third-party no-fault claimant meet the statutory threshold of serious impairment. *McCormick* instructs that "the threshold question whether the person has suffered a serious impairment of body function should be determined by the court as a matter of law as long as there is no factual dispute regarding 'the nature and extent of the person's injuries' that is material to determining whether the threshold standards are met." 487 Mich at 193, quoting MCL 500.3135(2)(a)(i). A three-pronged analysis dictates whether a plaintiff has established a serious impairment of body function. *Id.* at 215. A plaintiff must show

- (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions)
- (2) of an important body function (a body function of value, significance, or consequence to the injured person)
- (3) that affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living). [*Id.*]

The Supreme Court elaborated in *McCormick*, 487 Mich at 196, that "the common meaning of 'objectively manifested' in MCL 500.3135(7) is an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." *Id.* at 196. The Supreme Court further explained that "an 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions." *Id.* When evaluating whether a plaintiff's injuries have affected the person's general ability to lead his or her normal life, the Supreme Court instructed that "courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a

person is able to lead his or her pre-incident normal life, the person's general ability to do so was nonetheless affected." *Id.* at 202. The plaintiff need only produce evidence

that some of the person's *ability* to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected. Thus, while the extent to which a person's general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person's normal manner of living is, there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected. [*Id.* at 202-203 (emphasis in original).]

"The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis." *Id.* at 215.

Applying the legal principles elucidated in *McCormick* leads us to conclude that a factual dispute exists concerning "the nature and extent of the person's injuries' that is material to determining whether the threshold standards are met." *McCormick*, 487 Mich at 193, quoting MCL 500.3135(2)(a)(i). The parties vigorously dispute the facts surrounding the nature and extent of Fischer's injuries and whether she suffered any injury at all attributable to the January 2006 car accident. The parties further contest whether Fischer's injuries, if any, have affected her general ability to lead her preincident normal life. Because the disputed facts are essential to the issue whether Fischer has met the serious impairment threshold, the circuit court erred by deciding this question as a matter of law. *Id.* at 193-194. Accordingly, we reverse the circuit court's order granting summary disposition to defendants.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher