

STATE OF MICHIGAN
COURT OF APPEALS

LINDA BERISHAJ and MICHAEL BERISHAJ,

Plaintiffs-Appellants,

v

NICHOLAS SHKRELI and PREK SHKRELI,

Defendants-Appellees,

and

AUTO CLUB GROUP INSURANCE
COMPANY,

Defendant.

UNPUBLISHED

October 6, 2009

No. 287079

Macomb Circuit Court

LC No. 2007-004053-NO

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

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants-appellees (“defendants”) summary disposition pursuant to MCR 2.226(C)(10) in this action for third party benefits under the no-fault act, MCL 500.3101 *et seq.* We affirm.

Under the no-fault insurance act, MCL 500.3101 *et seq.*, a plaintiff may recover for non-economic damages if he “has suffered death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). A serious impairment of a body function is an “objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.5135(7). The grant or denial of a motion for summary disposition is reviewed de novo. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). In *Kreiner*¹, our Supreme Court outlined three steps to be used in discerning whether a plaintiff had met the statutory threshold.

First, a court must determine that there is no factual dispute concerning the nature and extent of the person’s injuries; or if there is a factual dispute, that it is

¹ See also MCL 500.3135(2)(a).

not material to the determination whether the person has suffered a serious impairment of body function. If a court so concludes, it may continue to the next step. But, if a court determines there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. MCL 500.3135(2)(a)(i) and (ii). [*Kreiner*, *supra* at 131-132 (footnotes omitted).]

The second step outlined in *Kreiner* is as follows:

[The court] must next determine if an "important body function" of the plaintiff has been impaired. It is insufficient if the impairment is of an unimportant body function. Correspondingly, it is also insufficient if an important body function has been injured but not impaired. If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. Subjective complaints that are not medically documented are insufficient. [471 Mich at 132]. [Rather, "a plaintiff's injury must be capable of objective verification by a qualified medical person either because the injury is visually apparent or because it is capable of detection through the use of medical testing." *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006). Muscle spasms will suffice. *Harris v Lemicex*, 152 Mich App 149, 153-154; 393 NW2d 559 (1986), cited with approval in *Guerrero v Smith*, 280 Mich App 647, 663-664; 761 NW2d 723 (2008).]

The third step in *Kreiner* is as follows:

[The court] then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. 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.¹⁶

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. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious

impairment of body function.” Instead, 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.” [*Kreiner, supra* at 132-134 (some footnotes omitted).]

¹⁶ Contrary to the dissent, we do not require that “every aspect of a person’s life must be affected in order to satisfy the tort threshold” *Post* at 154. Rather, in a quite distinct proposition, we merely require that the whole life be *considered* in determining what satisfies this threshold, i.e., whether an impairment “affects the person’s general ability to lead his or her normal life.”

¹⁷ Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point. [See also *McDaniell v Hemker*, 268 Mich App 269, 282-284; 707 NW2d 211 (2005) (physician imposed restrictions based on pain can establish the existence of a residual impairment but the self-imposed analysis goes only to the residual impairment factor, and a self-imposed restriction not based on real or perceived pain can be considered, i.e., if a plaintiff restricts himself or herself because the plaintiff is physically incapable, but not on the basis of pain)].

Plaintiff does not assert that there was a material factual dispute concerning the nature and extent of her injuries. Rather, she argues that the trial court erred in concluding that she did not have an objectively manifested injury and that any impairment did not affect her general ability to lead her normal life.

Plaintiff avers that her ability to walk was impaired, as evidenced by the need to use a wheelchair, a walker, and then a cane to ambulate. Walking is an important body function. *Kern v Blethen-Coluni*, 240 Mich App 333, 342; 612 NW2d 838 (2000). Moreover, plaintiff averred that her ability to move her neck, back and shoulder were impaired. Movements of the neck and back are important body functions, *Netter, supra* at 306, as is the functioning of the shoulder. *Arabo v Turnbull*, 157 Mich App 575, 580; 403 NW2d 470 (1986), vacated on other grounds 428 Mich 877 (1987). The evidence established that plaintiff had muscle spasms in “the left upper and lower extremity” on the day after the accident. An MRI performed approximately three weeks after the accident showed a soft tissue injury of the shin and probable hematoma. Nerve conduction studies and an EMG examination of the upper extremities revealed muscle spasms in the cervical and shoulder areas. An MRI relative to plaintiff’s neck pain was mostly unremarkable, but there was a “mildly centrally protruding disc at the C5-6 level.” Moreover, subsequent nerve conduction studies and an EMG examination were unremarkable except for evidence of spasm in the lumbosacral region and an EMG result showing “minor local spontaneous waves in anterior tibialis left side, probably secondary to muscle damage/contusion.” This evidence established objective manifestation of neck, shoulder, back and leg injuries.

Plaintiff next argues that these impairments had an affect on her general ability to lead her normal life. On appeal, she points to the inability to ambulate without the assistance of a cane; the fact that she was off work and then was medically restricted to a desk job, provided she use a walker; and the fact that her superiors would not let her work because of her medical

condition. The evidence showed that plaintiff began using a cane ten months after the accident and that before this, she used a wheelchair for about five months and then a walker. She worked as a program specialist, which was primarily a desk job, although she had to walk to interact with various people and to attend frequent meetings. Other than her ability to ambulate and do her job before the accident, there was no evidence concerning plaintiff's normal life before the accident. Her ability to walk was impaired and this affected her ability to work. Nonetheless, she returned to work 15 months after her accident and, although she had concentration problems and was unable to attend some meetings due to pain, she was able to perform her job. Based solely on our Supreme Court's decision in *Kreiner, supra*, we are legally compelled to conclude that the trial court did not err in holding that plaintiff failed to establish that her impairments "affected [her] general ability to conduct the course of . . . her normal life."

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello