

Court of Appeals, State of Michigan

ORDER

Audrey Branch v Lyudmila Kravklis

Docket No. 280946

LC No. 2006-075976-NI

Deborah A. Servitto
Presiding Judge

Pat M. Donofrio

Karen M. Fort-Hood
Judges

On the Court's own motion, the opinion issued October 21, 2008 is hereby VACATED.
and a replacement opinion is attached.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 30 2008

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

AUDREY BRANCH,

Plaintiff-Appellant,

v

LYUDMILA KRAVKLIS,

Defendant-Appellee.

UNPUBLISHED

October 30, 2008

No. 280946

Oakland Circuit Court

LC No. 2006-075976-NI

Before: Servitto, P.J. and Donofrio and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition in this automobile negligence action. Because we conclude that, on this record, factual disputes may exist concerning the nature and extent of plaintiff's contested injuries that may be material to determining whether plaintiff has suffered a serious impairment of body function, we vacate and remand in order for the trial court to revisit the issues involved in accordance with the framework provided in *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004) and *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412; 745 NW2d 174 (2007). This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I

Plaintiff was injured in an automobile accident when defendant allegedly ran a red light and collided with plaintiff's vehicle. At plaintiff's deposition, counsel agreed that the accident occurred on January 30, 2004. Plaintiff testified at deposition that she was proceeding through the intersection on a green light when defendant rammed into the driver's side door of her car. Plaintiff struck the center console. She had neck pain and a burning sensation throughout her body. She was placed on a backboard with her neck immobilized and transported to the hospital, where she specifically denied back pain. She was diagnosed with hip contusions and neck strain, given pain medication, and discharged with a cervical collar. Plaintiff testified that on leaving the hospital, she had neck and back pain and numbness in the left knee but the burning sensation had resolved.

At the time of the accident, plaintiff had a history of bilateral shoulder pain and back pain. A 2002 MRI and CT scan of the back showed only a minor abnormality. A 2003 ultrasound of the right shoulder showed osteoarthritic degenerative changes and a partial tear of the rotator cuff for which surgery and physical therapy were recommended. Plaintiff testified

that corrective surgery had been scheduled for February 2004, but was canceled by the doctor for reasons she could no longer recall. A CT scan of the neck showed small protrusions at C3-C4 and C4-C5 and some spur formation. Plaintiff also suffered from fibromyalgia.

In the days following the accident, plaintiff began to experience numbness in her arms and legs. She had pain in the right shoulder and lower back; the back pain radiated into the hips and right leg. Plaintiff had trouble sleeping in bed and took to sleeping in a reclining chair. Plaintiff who, at the time of the accident, worked part time as a dental assistant and full time at a bank, was off work one week, during which time she consulted her family doctor. On her own initiative, plaintiff began treating with a chiropractor. There are no records of any medical treatment rendered between January 31 and November 7, 2004.

On November 10, 2004, plaintiff consulted Dr. Muzaffar Awan regarding radiating bilateral shoulder pain and radiating low back pain. He noted that plaintiff had just had an MRI, the results of which were not yet available. On examination, he detected limited range of motion in the cervical spine and moderate palpable muscle spasms along the lumbosacral spine. He diagnosed cervical myofascitis with possible cervical radiculopathy, lumbosacral myofascitis with possible lumbar disc herniation and radiculopathy, and shoulder pain. He recommended physical therapy, continued chiropractic treatments, and an EMG. The MRI of the lumbar spine showed mild degenerative changes at T11-T12, mild disc space narrowing and desiccation at L3-L4, and a slight bulge at L4-L5. The EMG was done on November 19, 2004. The results were “consistent with right L4-5 radiculopathy” or, according to plaintiff, a pinched nerve. Plaintiff attended a course of physical therapy, which helped to relieve her hip pain.

In January 2005, plaintiff returned to Dr. Awan with complaints of low back pain with numbness in the left knee and right shoulder pain with numbness in the right hand. He noted tenderness in the muscles of the cervical and lumbosacral spine and limited range of motion. He diagnosed cervical and L4-L5 radiculitis and lumbosacral strain. He recommended that plaintiff discontinue physical therapy and continue with chiropractic treatments.

In March 2005, plaintiff began treating with Dr. Kyle Anderson for right shoulder pain that she reported as having worsened after the January 2004 accident. Another MRI of the right shoulder, like the one from 2003, showed degenerative changes and a partial tear of the rotator cuff, although Dr. Anderson stated that the tear had progressed and attributed its worsening to the accident. In August 2005, plaintiff underwent arthroscopic surgery to repair the rotator cuff tear, following which she engaged in physical therapy.¹ She was off work six weeks. Dr. Anderson imposed unidentified “significant restrictions” on plaintiff and advised her “to avoid any use of that right arm.” Plaintiff stated that the restrictions included “no prolonged standing, limited reaching and pulling, no overhead lifting, and no lifting over 10 pounds.” Because of her limitations, her employers would not let her return to work until October.

¹ Plaintiff testified that at the same time she was in physical therapy for her shoulder, the numbness in her left knee went away and the knee became painful.

In February 2007, plaintiff returned to see Dr. Anderson with renewed shoulder pain and left knee pain. Plaintiff stated that she injured the knee in the 2004 accident, but had ignored it to take care of her shoulder injury. An MRI showed a degenerative meniscus tear for which surgery was recommended. Dr. Anderson also recommended an ultrasound to assess the shoulder. The ultrasound showed no new injury. In April 2007, plaintiff underwent arthroscopic surgery to repair the meniscus tear in the knee, following which she engaged in physical therapy. She was off work for two weeks.

Shortly before the knee surgery, plaintiff consulted Dr. Lawrence Kurz regarding her neck and lower back pain. He noted “mild paraspinal cervical lumbar tenderness” and limited range of motion in the cervical and lumbar spine. He diagnosed pain and possible right lumbar radiculopathy.

In July 2007, plaintiff saw Dr. Patrick Stephens for an IME. She complained of neck pain, radiating low back pain, and shoulder pain. Dr. Stephens opined that because plaintiff had pre-existing neck and back problems, it was most likely degenerative in nature. The accident may have aggravated the symptoms but any residual problems should have been resolved within a year. He also opined that as plaintiff had a preexisting rotator cuff tear for which surgery was recommended, any shoulder problems were not caused by the accident, although he agreed that the restrictions imposed by Dr. Anderson were appropriate and should be continued indefinitely. He further opined that the degenerative meniscus tear in plaintiff’s knee was not related to the accident. He believed that her current pain symptoms were related to degenerative disc disease as opposed to any injuries that may have been caused by the accident.

Plaintiff testified that her work at the dental office varied from zero to two days a week depending on whether she was needed; it was the dentist’s decision and unrelated to plaintiff’s ability to work. The restrictions on plaintiff’s movement necessitated a change of duties at the bank. Her rate of pay was unaffected, but the hours she worked may have been reduced. Dr. Anderson recommended that plaintiff seek alternative employment “if she is having trouble staying on her work restrictions.” Plaintiff testified that she continues to experience muscle spasms and swelling in her right shoulder and has occasional radiating low back pain, knee pain, and numbness, particularly with prolonged walking or sitting and traversing stairs. She developed a cyst on the back of her knee, for which she wears a brace on occasion. She treats with a chiropractor every other week and takes pain medication and a muscle relaxant. Back surgery had been discussed. Plaintiff testified that she used to work in her garden and go out dancing twice a week. As a result of her injuries, plaintiff no longer did these things. She could not lift bags of groceries or run the vacuum cleaner, she did less cooking than she used to, could not wear high heels like she used to, and did not engage in sexual relations with her husband as often as before. Overall, her “life in general is not the same,” but “I can’t put it in words.”

III

Plaintiff filed a complaint alleging that defendant operated a motor vehicle in a negligent manner and caused that vehicle to strike plaintiff’s vehicle. Plaintiff asserted that “as a direct and proximate result of the negligence” of defendant plaintiff “has sustained injuries which injuries have caused Plaintiff pain, disability and mental anguish as well as serious impairment to those body functions so involved[.]” Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant did not dispute that there was at least a question of fact

whether plaintiff sustained objectively manifested injuries that impaired an important body function. Defendant contended only that plaintiff's minor limitations did not affect her general ability to lead her normal life. However, as part of that argument, she contended that plaintiff's shoulder and knee injuries were not causally related to the accident and thus not compensable. Plaintiff filed a combined response and cross-motion for summary disposition, arguing that she had sustained a serious impairment of body function. She had undergone two surgeries and may need a third, she had permanent restrictions on the use of her right shoulder and may have to change jobs, and she continues to experience pain for which she takes medication and receives medical treatment.

During oral arguments on the motions the trial court queried whether plaintiff had an objectively manifested impairment. The trial court did not answer this question and instead treated it as a matter of causation and ruled that "neither the shoulder injury for which surgery was recommended before the accident, or the knee injury for which plaintiff did not seek medical attention until 2007, rise to the threshold level." Regarding whether plaintiff's injuries affected her general ability to lead her normal life, the trial court ruled as follows:

As to plaintiff's work history, plaintiff missed a week of work at the dental office due to the accident and then returned to her normal hours until eight months after the accident when she had her shoulder surgery, after which she was off for six weeks because she had restrictions, and that's the plaintiff's deposition at 15.

She stated that it is basically her employer's decision that she doesn't work as often now, and that's deposition page 21.

As to her work at the bank, the plaintiff had worked there full time since 1996 and only missed one week of work after the accident; was off for six weeks after her surgery. She now works six days a week in operations from 7:00 p.m. to about 5:00 or 6:00 a.m., and that's page 24 of her deposition.

In regard to how the alleged injuries affected plaintiff's life, she testified that she doesn't work in her garden now; that's page 83. She can't dance; that's page 84. She must wear low heels; page 86. She has problems going up and own stairs; that's page 88. She can't put her groceries in the car when she goes shopping; that's page 89. She can't do some types of housework, but can do laundry; that's page 90. And she takes medication for her pain.

Based on all the evidence presented this Court finds that plaintiff did not present sufficient evidence to support a finding that she suffered an impairment that affected the general ability to lead a normal life. Plaintiff only missed a week of work after the accident. The six weeks that she took off and the resulting restrictions were for shoulder surgery that was recommended before the accident and this is not attributable to the accident. So then the time off and restrictions due to her knee injury was [sic] for an injury for which she did not seek treatment until three years after the accident and thus is not attributable to the accident.

In addition, the changes in plaintiff's job duties were not due to any injuries caused by the accident. She still works for two employers and holds two

jobs. This Court is further satisfied that none of the changes that plaintiff raised as to her pre- and post-accident lifestyle have actually affected her general ability to conduct the course of her life and therefore defendant's motion is granted.

Plaintiff now appeals as of right.

IV

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West, supra*.

V

A person is subject to tort liability for automobile negligence if the injured person "suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is 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). Whether a person suffered a serious impairment of body function is a question of law for the court if there is no factual dispute about the nature and extent of the plaintiff's injuries or there is a factual dispute but it is not material to the determination whether the plaintiff suffered a serious impairment of body function. MCL 500.3135(2)(a).

In *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004), the Court established a "multi-step process . . . to provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not." The first step requires the court to determine if there is a factual dispute regarding the nature and extent of the plaintiff's injuries. *Id.* at 131-132. If there is no factual dispute or there is a factual dispute but it is not material to the determination whether the person has suffered a serious impairment of body function, the court may continue to the next step, which considers whether the plaintiff suffered an objectively manifested injury that impaired an important body function. If, however, 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. *Id.* at 132.

If an important body function has been impaired and the impairment is objectively manifested, the next question is whether the impairment affected the plaintiff's general ability to lead her normal life. *Kreiner, supra* at 132. In answering this question, the court is to compare the plaintiff's life before and after the accident and consider "the significance of any affected

aspects on the course of plaintiff's overall life." *Id.* at 132-133. Factors to consider include "(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. "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 normal life." *Id.* (emphasis in original; footnote omitted). In other words, "[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." *Id.* at 137. The extent of a residual impairment is not established by self-imposed restrictions based on real or perceived pain. *Id.* at 133 n 17. However, self-imposed restrictions based on actual physical inability as opposed to pain may be considered a residual impairment. *McDaniel v Hemker*, 268 Mich App 269, 283; 707 NW2d 211 (2005).

Plaintiff contends that whether her injuries were causally related to the accident are questions of fact involving both the nature and extent of her injuries, and proximate causation, and thus, the trial court should not have considered them. The record reveals that there may be a factual dispute regarding the nature and extent of plaintiff's injuries either individually or taken together. Plaintiff's torn rotator cuff injury was objectively manifested by both a pre-accident ultrasound and a post-accident MRI. Plaintiff's surgeon, Dr. Kyle Anderson, stated that the MRI showed "progression of the tear" since the previous test before the accident and attributed that progression to the accident. Also, there is no dispute that plaintiff suffered an objectively manifested injury to her knee, that being the meniscus tear shown by the MRI. However, that tear was first diagnosed in 2007, three years after the accident. Plaintiff did testify that her knee began to hurt right after the accident at issue, but there is no medical evidence of a knee injury that existed before 2007, and no medical opinion linking the tear to the accident. Further, there is no dispute that plaintiff had objective evidence of a back injury, that being bulging discs and radiculopathy as shown by an MRI and EMG. While this record does not contain evidence that these objective findings were causally related to the injury, defendant did not dispute the causation element.

After reviewing the record, we conclude that there may be factual disputes regarding the nature and extent of plaintiff's injuries either individually or taken together. Though it is incumbent on the trial court, under *Kreiner, supra*, to determine if there is a factual dispute regarding the nature and extent of the plaintiff's injuries, the trial court failed to engage in this analysis. *Kreiner, supra* at 131-132. Here, while the trial court did query whether plaintiff had an objectively manifested impairment, the trial court did not engage in the proper analysis and never answered the question. The record reveals that the trial court improperly jumped to a conclusion based on causation principles when it ruled that "neither the shoulder injury for which surgery was recommended before the accident, or the knee injury for which plaintiff did not seek medical attention until 2007, rise to the threshold level." The trial court's conclusory statement regarding threshold, unsupported by any analysis, falls well short of the rigid framework provided by our Supreme Court in *Kreiner* specifically to "separat[e] out those plaintiffs who meet the statutory threshold from those who do not." *Id.* at 131. Moreover, the trial court's holding in this regard was hasty because there is objective evidence on the record in the form of

pre- and post-accident MRI reports that showed a “progression of the tear” in plaintiff’s shoulder that Dr. Anderson attributed to the accident. The objective test results and Dr. Anderson’s statement are clearly evidence of causation.²

Courts may not make findings of fact or weigh credibility in deciding a summary disposition motion. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Based on the record before us containing competing medical evidence regarding the existence and causes of various contested injuries and impairments, we conclude that the trial court erred when it failed to make a determination regarding the presence of material questions of fact on the record and the nature and extent of those injuries that may be material to the determination of whether plaintiff had suffered a serious impairment of body function. *Kreiner, supra* at 131-132. Moreover, while the trial court found that plaintiff’s injuries have not affected the trajectory of her life, that analysis is wholly premature in light of the possibility that material justiciable issues of fact regarding the nature and extent of plaintiff’s injuries may yet exist on the record. *Kreiner, supra*. We are not in a position to make these determinations and rulings for the first time on appeal. For that reason we express no opinion whatsoever on whether the evidence suggests a fulfillment of the *Kreiner* factors or even whether material questions of fact actually do exist on this record. Accordingly, we vacate the trial court’s previous order and remand the matter to the trial court to apply the *Kreiner* framework to the facts of this case. Because this case specifically involves issues related to the possible aggravation of a previously existing injury, we direct the trial court on remand to apply *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412; 745 NW2d 174 (2007) to the facts of this case if necessary. *Benefiel* had not been decided at the time the trial court made this determination, thus the trial court shall receive new or supplemental briefs from both parties providing analysis of the key *Kreiner* and *Benefiel* issues. In addition, the parties shall provide to the trial court any updated medical information and any missing medical information so that the trial court can complete the tasks required of it on remand.

Vacated and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood

² “Proof of causation requires both cause in fact and proximate cause.” *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). A plaintiff must adequately establish cause in fact in order for proximate cause to become a relevant issue. *Helmus v Michigan Dep’t of Transportation*, 238 Mich App 250, 255-256; 604 NW2d 793 (1999). The cause in fact element generally requires a showing that “but for” the defendant’s actions, the plaintiff’s injury would not have occurred. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). The issue of proximate cause is generally a question of fact. *Meek v Dep’t of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000). If, however, “the facts bearing upon proximate cause are not in dispute and reasonable persons could not differ about the application of the legal concept of proximate cause to those facts,” the issue is a question of law for the court. *Paddock v Tuscola & SB R Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997).