

STATE OF MICHIGAN
COURT OF APPEALS

JULIE GARCIA,

Plaintiff-Appellee,

v

JACK A. DOYLE, Personal Representative of the
Estate of DALE ANDREW DOYLE,

Defendant-Appellant.

UNPUBLISHED
January 27, 2011

No. 281233
Saginaw Circuit Court
LC No. 06-061949-NI

ON REMAND

Before: O'CONNELL, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

Plaintiff commenced this automobile negligence action against the decedent defendant in 2006. Defendant moved for summary disposition of the case, which the circuit court denied. This Court granted defendant's delayed application for leave to appeal from the circuit court's summary disposition ruling, and reversed. *Garcia v Doyle*, unpublished opinion per curiam of the Court of Appeals (Docket No. 281233), issued 11/25/08. In October 2010, the Michigan Supreme Court vacated this Court's opinion and remanded the case "to the Court of Appeals for reconsideration in light of *McCormick*[*v Carrier*, 487 Mich 180; ___ NW2d ___ (2010)]." *Garcia v Estate of Doyle*, ___ Mich ___ (Docket No. 138019, entered 10/26/10). Having applied the statutory interpretation of MCL 500.3135 set forth in *McCormick*, 487 Mich at 215-216, to the circumstances of this case, we now affirm the circuit court's denial of summary disposition to defendant.

I

We reprint the summary of the underlying facts and procedure contained in our prior decision, *Garcia*, slip op at 1-2:

During a September 20, 2005 automobile collision, plaintiff sustained an incomplete, stable, nondisplaced fracture of her seventh cervical vertebra's endplate. An emergency room physician prescribed plaintiff pain medication and applied a neck collar. Approximately a month later, a neurosurgeon examined plaintiff and recommended continued immobilization of her neck. In November 2005, the neurosurgeon allowed plaintiff to remove the collar. On December 19,

2005, the neurosurgeon determined that the vertebral fracture had healed and released plaintiff to work without restrictions. Plaintiff received no further treatment for her neck injury.

Before the accident, plaintiff worked as a car wash manager. During the three months that plaintiff's neck injury rendered her unable to work, the car wash filled her management position. When plaintiff returned to work at the car wash, she accepted a position "working with [the] brushes," "[s]crubbing cars." Subsequently, she transferred to a cashier's post. Plaintiff has not missed any work since December 21, 2005.

At her deposition, plaintiff described continuing shoulder pain "if I overexert myself in that area." Plaintiff conceded that she continued to enjoy a variety of recreational activities, including taking field trips with her daughter, playing with her children in the yard, walking, and biking. Plaintiff testified that she remained able to perform virtually all other activities, including yard work and household chores. But due to her injury, plaintiff no longer used the trampoline with her children or pursued her previous hobby, working on cars, although she still continued to actively participate in a billiards league.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff could not establish that she had sustained a serious impairment of body function, and that her injuries did not affect her ability to lead her normal life. On September 24, 2007, the circuit court issued an opinion and order denying defendant's motion. The circuit court found that plaintiff raised a genuine issue of material fact regarding whether she had suffered a serious impairment of body function. The circuit court noted that plaintiff's cervical fracture resulted in the loss of her management position, thus substantially reducing her income. The circuit court summarized in relevant part as follows:

"[A]lthough the injury Plaintiff sustained as a result of this accident may have been relatively short in duration, the evidence that Plaintiff lost her management position as a result of this injury, suggests that it had much more than a "de-minimis" effect on her general ability to lead her normal life."

II

We again 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.*

III

We turn to the governing statute, MCL 500.3135, and the interpretation of this statute by our Supreme Court in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), which

controlled our prior decision. Our earlier decision in *Garcia*, slip op at 3-4, summarized as follows:

The Legislature has limited tort liability for noneconomic loss to cases in which an injured plaintiff has suffered “a serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). A “serious impairment of body function” means “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his ... normal life.” MCL 500.3135(7).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the Michigan Supreme Court articulated a multistep process to guide a trial court’s consideration whether a plaintiff has sustained a threshold injury. *Id.* at 131. The trial court must first determine 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 demonstrate 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.

We previously applied the *Kreiner* analysis to the facts presented in *Garcia*, slip op at 3-4, and concluded:

Plaintiff argues that because “recreational activities played a major role in her life” and she remains unable to pursue several of them, she has established a threshold injury. Specifically, plaintiff identifies as the recreational activities curtailed by her injury her inability to play billiards for six weeks, to use the trampoline, and to work on cars. This Court has recognized that limitations on recreational activities “in a person who regularly participates in sporting activities that require a full range of motion” may constitute a serious impairment of body function. *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005). However, “[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.” *Kreiner*, [471 Mich] at 137. Factors considered to determine whether a plaintiff has established an impact on her general ability to lead a normal life include the following: “(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. “Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.” *Id.* at 133 n 17. The *Kreiner* Court stressed that “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.’” *Id.* at 134. Although an impairment of short duration may qualify as a serious impairment of body function, “the more extensive the nature and degree of the impairment, the lesser the need for a lengthy or permanent duration of impairment in order to qualify an impairment as a serious impairment of body function.” *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412, 424; 745 NW2d 174 (2007), [vacated 481 Mich 885 (2008)].

After applying the *Kreiner* factors, we conclude that plaintiff has failed to demonstrate a genuine issue of fact that the cervical fracture has altered her general ability to lead her normal life. Plaintiff’s fracture healed completely within six weeks after her injury. The sole treatment provided for plaintiff’s injury consisted of pain medication and a cervical collar she had to wear for less than three months. Plaintiff has provided no evidence that a physician restricted her activities in any manner after December 19, 2005. Her current inability to work on cars is an entirely self-imposed limitation, unrelated to any actual lingering physical incapacity. Furthermore, plaintiff’s inability to play billiards for six weeks, or to use the trampoline, constitute de minimus impacts on her normal life. The nature and extent of plaintiff’s residual impairments are notably less serious than those of the plaintiffs in *Kreiner*, who both failed to meet the threshold requirements for recovery.

Plaintiff contends that her continued need for prescription pain medication and muscle relaxants evidences physician-imposed restrictions tending to establish residual impairments. However, plaintiff admitted that she rarely needs the pain medication and continues to participate in the vast majority of her preaccident activities, despite that some pain may accompany extensive effort. In light of the record evidence, we conclude that plaintiff has failed to establish that the cervical fracture has affected her general ability to conduct her normal life, and that the circuit court should have granted defendant’s motion for summary disposition.

IV

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) that (3) 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 202, that when evaluating whether a plaintiff’s injuries have affected the person’s general ability to lead his or her normal life, “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.” 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.* (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.

V

Applying the principles elucidated in *McCormick*, as the Supreme Court has instructed us to do, leads us to conclude that plaintiff has made a sufficient showing of a “serious impairment of body function” to avoid summary disposition. MCL 500.3135(1), (7). We initially observe that because the parties do not dispute the facts surrounding the nature and extent of plaintiff’s injuries, we may decide as a matter of law whether plaintiff’s injuries meet the serious impairment threshold. MCL 500.3135(2)(a)(i). The September 2005 collision caused plaintiff to suffer an objectively manifested impairment, specifically, a fracture of the C7 vertebra visible on a CT scan. A fracture in this area adversely impacts an important body function. *Netter v Bowman*, 272 Mich App 289, 306; 725 NW2d 353 (2006) (“[M]ovements of one’s back and neck are important body functions.”), overruled in part on other grounds in *McCormick*, 487 Mich at 197 n 11. As the *McCormick* Court noted, this analysis is, by necessity, based on the facts and circumstances of the case. *McCormick*, 487 Mich at 215.

The question then becomes whether the facts and circumstances show that plaintiff's impairment affected her general ability to lead her normal life. *McCormick*, 487 Mich at 215. Before the accident, plaintiff worked as a car wash manager, and enjoyed hobbies like working on cars and playing billiards. After plaintiff endured the C7 vertebra fracture on September 20, 2005, she wore a cervical collar for two months and could not work for three months. During this recovery period, the car wash filled plaintiff's management position. Plaintiff returned to work without restrictions at the car wash in December 2005, but did not resume her management position, and therefore made less money. Within several months, plaintiff took a different job as the manager of a bar, where she earned approximately \$10,000 less per year than she had in her car wash management position. Plaintiff testified that following her recovery she could perform household chores as she had before the accident, and had the ability to play with her children, although she did not jump on the trampoline with the children as she had done prior to the accident. Plaintiff resumed playing billiards six weeks after the accident, but never resumed working on cars because that activity caused her muscles to become inflamed and painful.

In summary, plaintiff permanently lost her car wash management position because she was unable to work for three months after the accident, and she has experienced a significant income reduction. Furthermore, the accident prevented plaintiff from ever resuming her hobby of working on cars, which currently places substantial strain on her muscles. We conclude that, viewed in the light most favorable to plaintiff, these facts demonstrate that her objectively manifested impairment of an important body function affected her general ability to lead her normal life "(influence[d] some of . . . [her] capacity to live in . . . her normal manner of living)." *McCormick*, 487 Mich at 215. Consequently, the circuit court properly denied defendant's motion for summary disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher