

STATE OF MICHIGAN  
COURT OF APPEALS

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SHARON ANN LOCKWOOD and DAVIE  
LOCKWOOD,

UNPUBLISHED  
February 21, 2003

Plaintiffs-Appellants,

v

DENNIS ARNOLD WNUK,

No. 237088  
Lapeer Circuit Court  
LC No. 00-027977-NI

Defendant-Appellee.

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Before: Bandstra, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the judgment granting summary disposition to defendant pursuant to MCR 2.116(C)(10). In this case involving injuries suffered by Sharon Lockwood in a motor vehicle accident caused by defendant, plaintiffs challenge the trial court's ruling that Mrs. Lockwood did not meet the threshold level for serious impairment of a body function under MCL 500.3135. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. GENERAL BACKGROUND

The car accident occurred on August 25, 1999. Plaintiff<sup>1</sup> claimed that as a result of the accident, she suffered a closed-head injury, cervical strain, a contusion to the left clavicle, a contusion to the left hip, and soft tissue trauma to the abdominal wall, including damages to her ileostomy.<sup>2</sup> She asserted that internal injuries were caused by the seatbelt during the accident. Plaintiff indicated that she had to leave her job as a social worker and had difficulties doing daily tasks at home due to cognitive problems caused by the accident. She also began to suffer severe headaches, and her ileostomy started leaking, bleeding, and having obstruction problems. Plaintiff had extensive medical problems prior to the accident, including Crohn's disease,<sup>3</sup>

<sup>1</sup> Discussion of "plaintiff" in the singular refers to Sharon Lockwood for purposes of this opinion.

<sup>2</sup> Mrs. Lockwood had an ileostomy that resulted from numerous gastrointestinal surgeries unrelated to the accident. An ileostomy involves a surgically created opening in the abdominal wall through which digested food passes, which is utilized after removal of the colon and rectum.

<sup>3</sup> Crohn's disease is a chronic inflammatory bowel disease that causes scarring and thickening of  
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hypothyroidism, polycystic ovarian disease, and hypertension, as well as undergoing a craniotomy<sup>4</sup> for a meningioma.<sup>5</sup>

## II. DEFENDANT’S MOTION FOR SUMMARY DISPOSITION

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiffs failed to show evidence of a serious impairment of body function caused by the accident.

The trial court, ruling from the bench, first addressed the standards applicable to a (C)(10) motion and serious impairment of body function, and it then ruled:

Notwithstanding that plaintiff’s injuries impaired [her] ability to work, such injuries were not within purview of provision[s] of this section allowing tort recovery where no medical abnormalities were found, x-ray results were negative and no neurological disorder was found and thus [her] injuries were not objectively manifested. Generally pain and suffering is not sufficient to meet [the] threshold for “serious impairment of body function” under [the] no-fault provision allowing tort liability. [Citation omitted.]

The trial court proceeded to specifically address each one of plaintiffs’ claims. With regard to a left knee injury, the court found that there was no documentary evidence that established a physical basis for the subjective complaints of pain and suffering, and that post-accident tests which showed that plaintiff’s patella had an abnormal lateral tilt mimicked tests taken prior to the accident.

With regard to soft tissue damage to the abdominal wall, the trial court discussed plaintiff’s ileostomy and her claim that the accident resulted in difficulty in providing proper collection of waste matter. The trial court found that there was no evidence indicating that the condition was caused by the accident. Additionally, the court found that the condition was not serious enough, and that it had not affected plaintiff’s life other than causing some inconveniences. The court noted that there was no doubt that plaintiff suffered from pain.

With regard to headaches and the alleged closed-head injury, the trial court found no evidence linking the condition with the accident because plaintiff had headaches before the accident, and there was no evidence to show that the headaches were objectively manifested or serious enough under the statute. Additionally, in relation to the closed-head injury claim, plaintiffs failed to present any evidence by a licensed allopathic or osteopathic physician that there was a serious neurological injury.

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the intestinal walls and frequently leads to obstruction.

<sup>4</sup> A craniotomy is the surgical opening of the skull usually for operations on the brain.

<sup>5</sup> A meningioma is a hard, encapsulated tumor that grows along the meninges, i.e., the three membranes covering the brain and spinal cord.

With regards to the cervical sprain and contusions to the left clavicle, chest, and left hip, the trial court found that the injuries were insufficiently severe and permanent to allow recovery. The court concluded by ruling that general pain and suffering are insufficient to establish a serious impairment of body function if not predicated on objectively manifested injuries affecting the functioning of the body.

### III. LAW REGARDING SERIOUS IMPAIRMENT OF BODY FUNCTION

Pursuant to the no-fault act, a plaintiff injured in a motor vehicle accident may only recover noneconomic losses if he or she suffered “death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1); *Kreiner v Fischer*, 251 Mich App 513, 514-515; 651 NW2d 433 (2002).

The *Kreiner* panel stated that under MCL 500.3135, the issue of whether a person has suffered serious impairment of body function is a question of law for the trial court to decide if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person’s injuries.

(ii) There is a factual dispute concerning the nature and extent of the person’s injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. [§3135(2)(a); *Kreiner, supra* at 515.]

Issues of law, including statutory interpretation, as well as rulings on motions for summary disposition, are reviewed by this Court de novo. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 582-583; 640 NW2d 321 (2001).

In *Kreiner, supra* at 515, this Court held:

We read MCL 500.3135(2) as requiring a trial court to determine, as a matter of law, whether a plaintiff has suffered serious impairment of body function where there is no factual dispute, or where the facts are in dispute, but the disputed facts are not outcome-determinative with respect to a proper resolution of determining serious impairment. *Kern v Blethen-Coluni*, 240 Mich App 333, 341-342; 612 NW2d 838 (2000). Because MCL 500.3135(2) is not all encompassing, the Legislature apparently intended that in limited circumstances, a jury would resolve material or outcome-determinative factual disputes, and in so doing, would determine whether a plaintiff suffered a serious impairment of body function. See *Kern, supra* at 341-344. [Footnote omitted.]

MCL 500.3135(7) provides that “‘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 or her normal life.”

The definition of serious impairment found in MCL 500.3135(7) can be broken down into three requirements that must be established. *Kreiner, supra* at 516-517. “First, there must

be an objectively manifested impairment.” *Id.* at 517. Next, the impairment must be of an important body function. *Id.* Finally, the impairment must affect an individual’s general ability to lead his or her normal life. *Id.* This third and final prong of the statutory definition requires only that the impairment “affect[] the person’s general ability to lead his or her normal life.” MCL 500.3135(7); *Kreiner, supra* at 518.

#### IV. ANALYSIS

We begin our analysis by reviewing the documentary evidence submitted by plaintiffs to determine if there was an outcome-determinative factual dispute.<sup>6</sup> Following the accident, plaintiff was transported to Lapeer Regional Hospital, and the hospital medical report indicated that she suffered a cervical strain, a contusion to the left clavicle and chest, and a contusion to the left hip and knee.

Plaintiff subsequently saw numerous health care professionals for her medical problems allegedly related to the accident. A medical report from Dr. Jason Bodzin, a general surgeon, provided:

[Plaintiff] was wearing a seat belt and had significant seat belt trauma to her left upper chest from the shoulder strap and most likely also internally from the lap portion of the belt. She has had no nausea or vomiting, but is having abdominal pain, mostly behind the stoma<sup>7</sup> and inferior to the stoma. She states that she has had an episode of obstruction that lasted several hours yesterday. She is also having a hard time because of ostomy leakage. The ostomy itself seems to be retracting more than usual. . . .

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<sup>6</sup> MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363.

<sup>7</sup> A stoma is a surgical opening in an organ constructed to permit passage of fluids or waste products to the outside of the body. When a surgeon performs an ileostomy, he or she attaches the bottom of the small intestine to the stoma.

Examination shows a healthy-appearing lady in no distress. . . . Exam of the abdomen reveals a soft, flat abdomen. There is no mass. The stoma appears healthy. There is no sign of local trauma. The soft tissue around the stoma feels perfectly supple. There is no hematoma. There is tenderness beneath the stoma on palpation. Bowel sounds are normal.

IMPRESSION: Probable soft tissue trauma to the abdominal wall.

On a follow up visit to Dr. Bodzin, plaintiff complained of a bulge in her lower abdomen that was expanding and possible causing stoma leakage, and the doctor concluded that there was “an easily reducible ventral hernia below the umbilicus in the midline wound and extending over to the right side of the midline.”

A week after repair of the hernia, Dr. Bodzin reported:

Her ileostomy is working well, but she continues to have blockages intermittently. She has some mild to moderate abdominal pain in the wound area. Her knees are bothering her; otherwise, she has no joint complaints. . . .

Examination of the abdomen reveals a hematoma beneath the wound. The wound itself is clean. There is no sign of any infection. It is healing well. There is tenderness in the area surrounding the wound. . . .

IMPRESSION: Post-status ventral herniorrhaphy – recovering reasonably well.

PLAN: Expect the hematoma to resolve over time. . . .

Plaintiff also underwent a neuropsychiatric evaluation with Dr. Bradley Klein, a D.O. [doctor of osteopathy], and in his report he indicated:

As a direct result of her involvement in the above-referenced accident, Ms. Lockwood reports headaches on a daily basis; jaw pain; neck, shoulder and back pain; increased anxiety; being easily depressed; as well as significant forgetfulness. She feels “absentminded” and has to recheck herself constantly. In addition, she notices significant difficulties articulating her thoughts and remembering what she reads.

She was polite and cooperative throughout the evaluation. Her sensorium was clear. She was alert and oriented in all three spheres. Information which she provided is considered to be reliable in nature. I did not detect any evidence of malingering or secondary gain from injuries described above. To the contrary, she presents as a highly motivated individual seeking a return to her premorbid level of functioning. Her affect was constricted in range and depth. Mood was dysthymic. During my evaluation, I noted difficulties in areas of general processing of information, expressive language functioning, as well as in areas of short-term memory.

Diagnosis: Traumatic Brain Injury.

Recommendation: It is recommended that Ms. Lockwood undergo a neuropsychological, cognitive, occupational, and speech-language assessment to clarify the degree of cognitive deficits she experiences secondary to incurring a traumatic brain injury in a 8-25-99 motor vehicle accident.

Plaintiff subsequently submitted to a cognitive evaluation through Dr. Klein's office, which showed some deficits.

It is recommended that Ms. Lockwood attend cognitive rehabilitation sessions to address deficits in areas where she is functioning below premorbid status. These include: reading retention/comprehension, speed of information processing, visual selective attention, sustained attention, and divided attention. Through treatment, she will have the opportunity to not only strengthen her dysfunction, but also to learn compensatory strategies to better manage her deficits.

In another evaluation through Dr. Klein's office, plaintiff complained of her inability to complete daily activities in a safe and independent manner. She described difficulty with tasks such as dishwashing, cooking, paying bills, grocery shopping, balancing the checkbook, taking medications, and house cleaning because of forgetfulness and the inability to focus and concentrate. The evaluation indicated that plaintiff was no longer functioning "as previous secondary to residual physical, cognitive, visual, perceptual, and emotional deficits as a result of the August 1999 accident."

Defendant submitted numerous medical records, reports, and evaluations which opined that plaintiff did not demonstrate signs of neuropsychological impairment or signs supportive of traumatic brain injury.<sup>8</sup> Defendant also submitted documentary evidence indicating that any cognitive impairments plaintiff may have are consistent with the history of meningioma and the craniotomy and not the result of the accident. MRI and CT scans indicated evidence of a prior surgery with a craniotomy defect seen in the left temporal-frontal-parietal region, along with encephalomalacia of the left temporal lobe, probably post-traumatic in nature, with no intracranial hemorrhage being seen. Plaintiff does not cite any MRI or CT scans in support of her position. Plaintiff could not recall if she hit her head during the accident or if she lost consciousness.

Limited to the documentary evidence presented by plaintiffs, the only two alleged injuries that can conceivably give rise to a finding that Mrs. Lockwood suffered a serious impairment of body function relate to the abdomen and head. There was no documentary evidence presented indicating how the other various strains and contusions affected plaintiff's general ability to lead her normal life, nor was evidence presented establishing impairment of an

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<sup>8</sup> I am not necessarily in disagreement with Judge Griffin's discussion regarding the admissibility of the documentary evidence presented below; however, as noted by Judge Griffin, neither party objected to the submission of the evidence, and plaintiff consented to the use of the medical reports. Therefore, the evidence should be considered.

important body function based on those injuries. The trial court properly dismissed any claim predicated on strains and contusions not related to the alleged abdominal and head injuries. However, we find that the trial court erred with regards to the abdominal and head injuries because there was a genuine factual dispute that was outcome-determinative.

We shall first address the closed-head injury, which allegedly created cognitive defects impairing plaintiff's ability to function at work and at home. Defendant argues, and the trial court agreed, that MCL 500.3135(2)(a)(ii) precludes consideration of the closed-head injury claim because plaintiffs failed to present the testimony, given under oath, of a licensed allopathic or osteopathic physician opining that there may be a serious neurological injury. We disagree.

MCL 500.3135(2)(a) addresses the situations in which the trial court shall make the determination of whether an injured person suffered a serious impairment of body function. Section 3135(2)(a)(ii) provides, in pertinent part, as follows:

However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

This provision merely mandates jury consideration of the serious impairment question, as opposed to the trial judge, where there is testimony under oath from an allopathic or osteopathic physician; it does not preclude consideration of whether there is an outcome-determinative factual dispute with regard to an alleged closed-head injury where such testimony is not submitted to the trial court. *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000). The *Churchman* panel stated:

The language of §3135 does not indicate, however, that the closed-head injury exception provides the exclusive manner in which a plaintiff who has suffered a closed-head injury may establish a factual dispute precluding summary disposition. In the absence of an affidavit that satisfies the closed-head injury exception, a plaintiff may establish a factual question under the broader language set forth in subsections 3135(2)(a)(i) and (ii) . . . .

Here, plaintiffs presented evidence in the form of a medical diagnosis by Dr. Klein that Mrs. Lockwood suffered a "traumatic brain injury." Cognitive tests and evaluations conducted by Dr. Klein's office showed that plaintiff suffered deficits in mental processes, thereby forming the basis of the diagnosis. Defendant's own expert, Lisa E. Metler, Ph.D., opined that plaintiff suffered mild to moderate impairment on multiple cognitive tests, although she also opined that the results were consistent with the history of a craniotomy.<sup>9</sup> Additionally, statements made by plaintiff, as noted in the numerous medical reports, indicated great difficulty in performing normal daily activities and the occurrence of daily headaches, along with the need to leave her employment. We find that minimally there is a question of fact, which is outcome-

<sup>9</sup> Dr. Metler's report also indicated that plaintiff complained about the inability to plan meals, difficulty in bathing and dressing, driving only on a limited basis, and curbing her social activities following the accident.

determinative, regarding whether plaintiff suffered an objectively manifested impairment of an important body function<sup>10</sup> that affected plaintiff's general ability to lead her normal life.

The trial court found, with regard to the closed-head injury, an absence of proof showing a serious impingement on plaintiff's ability to lead her normal life; however, the need to establish a serious impingement was rejected in *Kreiner, supra* at 518, wherein this Court held that all that is necessary under MCL 500.3135 is an impairment that *affects* a person's general ability to lead his or her normal life. Regardless, the medical reports indicate complaints by plaintiff reflecting a significant inability to lead her normal life.

The trial court further ruled that plaintiffs failed to submit evidence linking Mrs. Lockwood's condition to the car accident, as opposed to her preexisting medical problems. However, statements made by plaintiff to medical personnel clearly indicate that her alleged cognitive defects and problems arose after the accident. We find that sufficient enough to leave the matter in the hands of a jury for a determination whether plaintiff's present condition arose out of the accident or previous medical problems and procedures.

Defendant implicitly challenges the credibility of Dr. Klein and his conclusions; however, that is a matter for the jury to determine.

With regard to the abdominal injury that allegedly affected plaintiff's ileostomy, we also find a genuine issue of fact that is outcome-determinative. We once again reject the trial court's findings that any affect on plaintiff's life was insufficiently serious and the court's finding that there was no evidence linking her condition to the accident. Plaintiffs presented documentary evidence indicating soft tissue trauma to the abdominal wall, abdominal pain and tenderness after the accident, significant obstruction and leakage in relation to the ileostomy occurring after the accident, a ventral hernia that required repair, and an abdominal hematoma. Dr. Bodzin noted that "[t]he ostomy itself seems to be retracting more than usual[.]"

Therefore, there was sufficient evidence to create an issue of fact whether plaintiff suffered, as a result of the accident, an objectively manifested impairment of an important body function that affected the general ability to lead her normal life.

Reversed and remanded for proceedings consistent with this opinion. We retain no jurisdiction.

/s/ William B. Murphy

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<sup>10</sup> It is beyond dispute that brain function is an important body function.