

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT BAKER and KATHRYN BAKER,

Plaintiffs-Appellants,

v

GERALD WILLIAM PENT and DART  
TRANSIT,

Defendants-Appellees.

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UNPUBLISHED

June 24, 2010

No. 290778

Kalamazoo Circuit Court

LC No. 07-000463-NI

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

In this no-fault automobile insurance action, plaintiffs Robert and Kathryn Baker appeal as of right from the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendants Gerald Pent and Dart Transit. We affirm.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

**A. THE ACCIDENT**

On September 10, 2005, Robert and Kathryn Baker were traveling in their vehicle westbound on I-94 near US-131 in Kalamazoo County. Robert Baker was driving and brought the vehicle to a stop as he approached a construction zone. Robert Baker was in the process of starting to accelerate again when Gerald Pent, who was a commercial truck driver operating his vehicle under the authority of Dart Transit, rear-ended the Bakers' vehicle. On the scene, Kathryn Baker told the police that she was not injured and did not need medical attention. Robert Baker also did not request medical attention. Kathryn Baker was 71 years old at the time of the collision. Robert Baker was 73 years old at the time of the collision and weighed approximately 290 pounds.

**B. KATHRYN BAKER'S CLAIMED INJURIES**

Two days after the accident, Kathryn Baker saw Dr. Bruce S. Barbour, her primary care physician, regarding neck and chest pain from the accident. At that examination, Kathryn Baker also described feeling very anxious and having nightmares, which prevented her from sleeping. Dr. Barbour prescribed Pamelor for anxiety and noted possible post-traumatic stress syndrome. Kathryn Baker saw Dr. Barbour again in late September and continued to complain of anxiety

and sleeping problems. Notably, Kathryn Baker admitted during her deposition that approximately 20 years ago she was hospitalized for about one week for depression. She indicated that the reason for her depression was that her nerves just got the best of her.

Kathryn Baker testified that, before the collision, she possessed no knee pain and was never treated for knee pain. However, within two weeks of the collision, she felt increasing knee pain. In February 2006, Kathryn Baker saw Dr. Barbour, complaining of bilateral knee pain, which she asserted began four months before and was constant. Kathryn Baker noted that the context of the pain was from the accident. She reported that walking aggravated her knee pain and that she would sometimes fall. Kathryn Baker further reported that she would use Vicoden ES for pain, but not every day. In addition, Kathryn Baker stated that she was still having problems sleeping. Dr. Barbour noted mild effusion on the right medial knee, "with tenderness along medial aspect of inferior glenicular process." In addition, he noted posterior effusion on the right knee. X-rays revealed mild bilateral medial compartment narrowing on both knees.

In February 2006, Kathryn Baker returned to Dr. Barbour and complained that her knee pain was worsening with bending and sitting. Kathryn Baker asserted that she used Tylenol for pain. Dr. Barbour noted that her right knee had a tender tibial tubercle and that there was "tenderness with mild swelling on the medial aspect of her right knee." Further, he noted that Kathryn Baker did not have psychiatric/emotional problems and was sleeping better using Lexapro. Dr. Barbour performed a joint injection in her right knee in March 2006.

In May 2006, Kathryn Baker started seeing a psychiatrist, Dr. Manzar Rajput, for posttraumatic stress disorder. He prescribed Ativan to help her sleep and Lexapro as an antidepressant, which also helped her sleep.

In January 2007, Kathryn Baker went to Dr. Robert M. Doane, complaining of pain in her knee. Kathryn Baker's symptoms consisted of swelling, limping, and pain when climbing stairs and getting out of a chair, as well as stiffness while sitting. She also claimed that her quality of life was significantly deteriorating. Dr. Doane indicated that the x-ray showed "2 mm of decreased joint space in the left [sic] knee medial compartment on standing views." The impression provided "medial compartment arthrosis left [sic] knee." Dr. Doane provided a Supartz injection into her knee. Dr. Doane's records reflect that Kathryn Baker returned for another Supartz injection into her right knee about a week later. Kathryn Baker received a total of ten Supartz injections to her right knee. Subsequently, Kathryn Baker received three Depomedrol, Marcaine, and Lidocaine injections into her right knee.

In August 2007, Kathryn Baker underwent a knee diagnostic arthroscopy, arthroscopic partial medial and lateral meniscectomy, and a debridement of chondroplasty of medial and femoral condyle. The operative findings were a "[c]omplex tear of the posterior horn of the medial meniscus and the central portion of the lateral meniscus and degenerative fissure tear and grad IV chondromalacia in the medial femoral condyle and tibial plateau." Subsequently, Kathryn Baker received four more Depomedrol, Marcaine, and Lidocaine injections into her right knee as well as five more Supartz injections into her right knee. Moreover, in September 2007, the diagnosis was "[d]egenerative arthritis right knee; Rupture medial meniscus right knee."

In February 2008, Kathryn Baker underwent surgery again on her right knee. The diagnosis was “[e]nd stage right knee medial compartment arthrosis,” and the procedure performed was a right medial compartment arthroplasty. Kathryn Baker subsequently participated in physical therapy on nine occasions.

In approximately June 2008, Kathryn Baker stopped taking Ativan, her anti-anxiety medication, and started to only take Lexapro sporadically. Kathryn Baker testified that she was only seeing Dr. Rajput about once every month to two months. She further indicated that she did not like to drive because of panic attacks. Dr. Rajput encouraged Kathryn Baker to start driving, but ultimately agreed with Kathryn Baker’s decision to not drive, indicating that she should be restricted from driving due to the psychological implications from it. Kathryn Baker also admitted that her son’s divorce caused her a significant amount of stress. Dr. Rajput testified that he thought that Kathryn Baker’s post-traumatic stress disorder symptoms were secondary to the accident and that he thought that Kathryn Baker would need psychological treatment for the rest of her life.

At the beginning of November 2008, Kathryn Baker saw Dr. Barbour for her annual physical, and he said that everything looked good. In addition, Dr. Doane told her to return to him in a year for an annual check-up. Kathryn Baker testified that neither Dr. Barbour nor Dr. Doane have placed any restrictions on her.

Kathryn Baker indicated that how much she sees her grandchildren has not been affected by the accident and that she can see her grandchildren as much as she wants. Further, Kathryn Baker indicated that she is able to watch her grandchildren bowl and perform in plays and that the accident has not prevented her from doing these things. Kathryn Baker further indicated that she and Robert Baker still run their same errands together and still visit friends and family just as they always have. Kathryn Baker testified that she, and sometimes Robert Baker, meet a mall walking group Monday through Saturday at Jackson Crossing Mall. Kathryn Baker subsequently clarified that, since the accident, she only walks with her group approximately twice a week and that she walks approximately one-half of a mile at that time. Kathryn Baker indicated that she walks in spite of her knee and that Robert Baker will walk as well, although he walks very slowly. Kathryn Baker also continues to play bingo once or twice a week and has continued to do so for approximately ten years, although she indicated that she has not played in the last year mainly due to the fact that she always has “something going at that time” and just does not have time to go. Kathryn Baker further testified that she and Robert Baker continue to play euchre with their relatives. She also still enjoys doing crossword puzzles, although she indicated that she had not done any in the last couple of days because she has been too busy.

Kathryn Baker explained that her typical day consists of going to the mall to walk with her friends. After she returns home, she does housework, and then it is time for supper. After supper, she and Robert Baker watch television together. Kathryn Baker testified that she does the cooking and laundry, while Robert Baker runs the sweeper, cleans the bathrooms, dusts, and sometimes cooks. Kathryn Baker also indicated that they both do work outside the house; although, lately, they have not been able to do that so they hired someone else to do the lawn work and snow shoveling. Kathryn Baker indicated that the accident has affected her in such a way that she cannot plant flowers anymore, she cannot climb stairs very well, cannot get down on the floor to clean the floor, and has a hard time getting out of chairs.

### C. ROBERT BAKER'S CLAIMED INJURIES

In August 2005, three weeks before the accident, Robert Baker saw Dr. Doane, complaining of increasing right knee pain. Robert Baker indicated that the pain was exacerbated by ambulatory activity, that stairs were becoming more difficult, and his walking tolerance was minimal. Further, night pain disturbed his sleep and there was recurrent swelling. It was indicated that steroid injections were tried in the past. Robert Baker indicated that his quality of life was significantly deteriorating due to the pain. Robert Baker also received an injection of Depomedrol, Marcaine, and Lidocaine into his right knee. On that day, x-rays were taken and a report was prepared. The report reflected that Robert Baker's history involved chronic joint pain and pain in his right knee.

In October 2005, after the accident, another x-ray was performed. That x-ray showed evidence of joint effusion in the right knee and mild patellofemoral joint osteoarthritis. Robert Baker subsequently received ten Supartz and five Depomedrol, Marcaine, and Lidocaine injections in his right knee over a period of many months.

In May 2006, Robert Baker began seeing Dr. Rajput. Robert Baker indicated that he felt "awful nervous" since the accident. Further, Robert Baker reported to Dr. Rajput that he was feeling significantly depressed as well as hopeless and helpless. He also felt financially stressed due to the need to buy a new vehicle and the increase in his insurance premiums. Robert Baker admitted that he went through a bout with depression 40 years before which required hospitalization, and then he saw a psychiatrist for a short time, but stated that he had been fine since. Dr. Rajput diagnosed Robert Baker with depression. Dr. Rajput indicated that because Robert Baker previously suffered from depression, he was vulnerable to it. Dr. Rajput also noted that he was not aware of another trigger for Robert Baker's current depression other than the automobile accident. Moreover, Dr. Rajput testified that he thought that Robert Baker needed psychiatric treatment for the rest of his life.

In July 2006, Dr. Doane indicated that Robert Baker would need to consider knee replacement. In addition, Dr. Doane indicated that arthroscopic surgery could be tried "however he has bone on bone arthrosis sanded [sic] is not likely to be ineffective or lasting with that." Moreover, in January 2007, Dr. Doane's notes reflected that Robert Baker would consider knee arthroscopy if his pain returned after the injections. In fact, Robert Baker testified that Dr. Doane told him that sooner or later, he was going to have to have his knee replaced. Moreover, in July 2007, Dr. Doane's records revealed that Robert Baker was in need of replacement services to help him care for his yard.

As of November 2008, Robert Baker was only meeting with Dr. Rajput once a month. In addition, Robert Baker indicated that his only physical limitations with regard to the injury to his knee were that it took a long time for him to go up and down stairs and there was pain when he did. Robert Baker also indicated that the biggest impact the accident has had on his life involved the fact that it took him longer to walk and do things around the house. He also indicated that he could not mow the grass anymore and that he could no longer drive on I-94 because Kathryn Baker kept thinking that someone was going to hit them. Robert Baker admitted that no physician had placed any restrictions on him.

## D. PROCEDURAL HISTORY

Gerald Pent and Dart Transit moved for summary disposition under MCR 2.116(C)(10), arguing that the Bakers had failed to raise a genuine issue with respect to any material fact regarding the meeting of the no-fault threshold of serious impairment of body function.

After hearing oral arguments on the motion, the trial court entered its order in favor of Pent and Dart Transit. In its written opinion accompanying the order, the trial court first noted that there was no dispute regarding the circumstances of the accident or that Pent and Dart Transit were at fault. But the trial court concluded that, after reviewing the Bakers' pre- and post-accident lives, it was "apparent that [their] ability to lead their normal lives ha[d] not been significantly impacted by the accident."

More specifically, with respect to Robert Baker, the trial court concluded that there was no dispute that he had suffered objective injuries. The trial court then concluded that Robert Baker's injuries clearly involved important body functions "as they relate to Mr. Baker's knee and psychological welfare." But, after reviewing the factors associated with determining whether a plaintiff's general ability to conduct his normal life has been affected, the trial court concluded that Robert Baker's knee problems and mental health issues were pre-existing conditions; that he did not have any post-accident, physician-imposed restrictions; and that, therefore, his "pre- and post-accident life ha[d] not been dramatically altered." With respect to Kathryn Baker, the trial court concluded that there was no dispute that she had suffered objective injuries of important body functions. But, after reviewing the factors associated with determining whether a plaintiff's general ability to conduct her normal life has been affected, the trial court concluded that Kathryn Baker was "generally able to lead [her] normal [life] in spite of [her] injuries." The Bakers now appeal.

## II. SUMMARY DISPOSITION

### A. STANDARD OF REVIEW

The Bakers argue that summary disposition on the threshold issue of serious impairment of body function was improper because both Robert and Kathryn Baker raised genuine issues of material fact regarding whether their injuries resulted in a serious impairment of body function. The Bakers argue that, not only do they both have objective findings confirmed by medical expert testimony, diagnostic testing, examination, and surgical findings, they both have had their lives altered by the collision.

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. It is not sufficient for the parties to promise to offer factual support for their claims at trial.<sup>1</sup> The moving party must specifically identify the undisputed factual

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<sup>1</sup> *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Smith v Globe Life Ins. Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).

issues and support its position with documentary evidence.<sup>2</sup> The non-moving party then has the burden to produce admissible evidence to establish disputed facts.<sup>3</sup> The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.<sup>4</sup> “The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment.”<sup>5</sup> We review de novo the trial court’s ruling on a motion for summary disposition.<sup>6</sup>

## B. NO FAULT

Under Michigan’s no-fault automobile insurance act,<sup>7</sup> a plaintiff may recover noneconomic damages in a civil action from a negligent driver for injuries sustained in an automobile accident only if the plaintiff has suffered “death, serious impairment of body function, or permanent serious disfigurement.”<sup>8</sup> “[S]erious 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.”<sup>9</sup>

The issue whether an injured person has suffered a serious impairment of body function is a question of law for the court (1) if the court finds that there is no factual dispute concerning the nature and extent of the person’s injuries or (2) if “[t]here 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.”<sup>10</sup> Initially, we conclude that Pent and Dart Transit have, for purposes of this appeal, effectively admitted the nature and extent of the Bakers’ injuries.<sup>11</sup> For that reason, we conclude there is no factual dispute concerning the nature and extent of the Bakers’ injuries in this case.

Since there is no factual dispute concerning the nature and extent of the Bakers’ injuries, we must next determine whether they have shown objectively manifested impairments of important body functions.<sup>12</sup> “[I]n order for an impairment to be objectively manifested, there

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<sup>2</sup> MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120.

<sup>3</sup> *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

<sup>4</sup> MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

<sup>5</sup> *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

<sup>6</sup> *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006); *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

<sup>7</sup> MCL 500.3101 *et seq.*

<sup>8</sup> MCL 500.3135(1).

<sup>9</sup> MCL 500.3135(7).

<sup>10</sup> MCL 500.3135(2)(a).

<sup>11</sup> See *Fisher v Blankenship*, 286 Mich App 54, 61; 777 NW2d 469 (2009).

<sup>12</sup> *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004).

must be a medically identifiable injury or condition that has a physical basis.”<sup>13</sup> The Bakers both assert that they have psychological problems, as well as injuries to their knees as the result of the automobile accident. Our review of the record reveals that both Kathryn and Robert Baker suffered objectively manifested impairments to their respective knees and objectively manifested mental or emotional injuries. The movement of one’s knee is an important body function,<sup>14</sup> and the operation of the mind and nervous system are important body functions.<sup>15</sup> Additionally, “[m]ental or emotional injury which [is] caused by physical injury or mental or emotional injury not caused by physical injury but which results in physical symptoms may be a serious impairment of body function.”<sup>16</sup>

The question then arises whether the impairment of body functions affected either Robert Baker’s or Kathryn Baker’s general ability to lead his or her normal life. We find that no genuine issues of material fact exist on this issue. In *Kreiner v Fischer*, the Michigan Supreme Court provided a nonexhaustive list of objective factors that may be used in evaluating whether a plaintiff’s general ability to conduct the course of his or her normal life has been affected. These factors 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.”<sup>17</sup> In determining “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.’”<sup>18</sup>

With regard to the assertion that Kathryn Baker’s psychological problems have affected her general ability to lead her normal life, the evidence reveals that Kathryn Baker reported feeling anxious and having problems sleeping after the accident. Pamelor was initially prescribed for her. Subsequently, she began using Ativan to help her sleep and Lexapro as an anti-depressant, which also helped her sleep. In approximately June 2008, Kathryn Baker stopped taking Ativan and started to take Lexapro sporadically. In November 2008, Kathryn Baker testified that she was only seeing Dr. Rajput about once every month to two months. She indicated that she does not like to drive because of panic attacks, and although Dr. Rajput encouraged Kathryn Baker to start driving, he ultimately agreed with Kathryn Baker’s decision to not drive, indicating that Kathryn Baker should be restricted from driving due to the psychological implications from it. Dr. Rajput testified that Kathryn Baker would need psychological treatment for the rest of her life.

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<sup>13</sup> *Jackson v Nelson*, 252 Mich App 643, 652-653; 654 NW2d 604 (2002), quoting SJI2d 36.11.

<sup>14</sup> *Caiger v Oakley*, 285 Mich App 389, 394; 775 NW2d 828 (2009).

<sup>15</sup> *Guerrero v Smith*, 280 Mich App 647, 665; 761 NW2d 723 (2008).

<sup>16</sup> *Id.*

<sup>17</sup> *Kreiner*, 471 Mich at 133.

<sup>18</sup> *Id.* at 134.

With regard to the assertion that Kathryn Baker's knee problems affected her general ability to lead her normal life, the evidence showed that Kathryn Baker began having knee pain a few weeks after the accident, which was aggravated by walking, and she would sometimes fall. Kathryn Baker would sometimes use Vicoden ES for pain. In February 2006, Kathryn Baker complained that her knee pain was worsening with bending and sitting. Kathryn Baker was using Tylenol for pain. A year later, Kathryn Baker continued to complain of pain in her knee. Kathryn Baker's symptoms consisted of swelling, limping, pain when climbing stairs and getting out of a chair, as well as stiffness while sitting. In August 2007, Kathryn Baker underwent knee surgery. Over the course of her treatment, Kathryn Baker received approximately 15 Supartz injections and seven Depomedrol, Marcaine, and Lidocaine injections into her knee. In February 2008, Kathryn Baker underwent surgery again. She subsequently participated in physical therapy on nine occasions. At the beginning of November 2008, Kathryn Baker saw her primary care physician, and he said that everything looked good. In addition, Dr. Doane, who performed the knee surgery, told Kathryn Baker to return to him in a year for a check-up. She was not given any restrictions.

Despite the above evidence, we conclude that Kathryn Baker's life after the accident was not significantly different than it was before the accident. Kathryn Baker indicated that, basically, she cannot plant flowers anymore, cannot climb stairs very well, cannot get down on the floor to clean the floor, and has a hard time getting out of chairs. Self-imposed restrictions, as opposed to physician-imposed restrictions, that derive from real or perceived pain, do not establish the existence of a residual impairment.<sup>19</sup> On-going discomfort and minor problems with standing and walking are also generally not serious enough to overcome the threshold.<sup>20</sup> Further, "minor changes in how a person performs a specific activity may not change the fact that the person may still 'generally' be able to perform that activity."<sup>21</sup>

Moreover, the record demonstrated that Kathryn Baker was able to still see her grandchildren and watch them bowl and perform in plays. She also continued to run errands with Robert Baker, meet with her walking group, play bingo when she had the time, play euchre, and enjoy doing crossword puzzles. Further, she still cooked, performed housework, and did the laundry. Thus, any interruptions to Kathryn Baker's life as a result of pain did not affect the course of her normal life. Moreover, although Dr. Rajput ultimately agreed with Kathryn Baker's decision not to drive, indicating that Kathryn Baker should be restricted from driving due to the psychological implications from it, Dr. Rajput's testimony also provided that he would like to see Kathryn Baker trying to start to drive more. And, there was no specific testimony regarding how Kathryn Baker not being able to drive would affect her ability to lead her normal 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" her normal life.<sup>22</sup> In

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<sup>19</sup> *Kreiner*, 471 Mich at 133 n 17.

<sup>20</sup> *Id.* at 137; *Kern v Blethen-Coluni*, 240 Mich App 333, 343-344; 612 NW2d 838 (2000).

<sup>21</sup> *Kreiner*, 471 Mich at 131.

<sup>22</sup> *Id.* at 133.

sum, there was no genuine issue of material fact that Kathryn Baker's general ability to lead her normal life was not affected by her objectively manifested impairment of an important body function.

With regard to Robert Baker's psychological problems, the evidence revealed that eight months after the accident, Robert Baker told Dr. Rajput that he felt "awful nervous" since the accident. He further reported that he was feeling significantly depressed. Dr. Rajput diagnosed Robert Baker with depression. Dr. Rajput testified that Robert Baker needed psychiatric treatment for the rest of his life. However, as of November 2008, Robert Baker was only meeting with Dr. Rajput once a month.

With regard to Robert Baker's knee problems, he received approximately ten Supartz and five Depomedrol, Marcaine, and Lidocaine injections in his right knee over a period of many months. Further, Dr. Doane indicated that sooner or later Robert Baker would need to have his knee replaced. However, no physician has placed any restrictions on him. Robert Baker indicated that his only physical limitation has been that it takes a long time for him to go up and down the stairs and that it takes him longer to walk and do things around the house. Ongoing discomfort and minor problems with standing and walking are not generally serious enough to overcome the threshold.<sup>23</sup>

Moreover, the record also reflects that Robert Baker was generally able to lead his life in the same way that he led his life before the accident. Although Dr. Doane's records revealed that Robert Baker was no longer able to mow the grass, according to the record this is the only activity that Robert Baker is no longer able to do. And, as already noted, "[m]erely '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.<sup>24</sup> In all other aspects, Robert Baker was able to lead his life in the same way as he was before the accident. Robert Baker was still able to do chores around the house, such as running the sweeper, cooking, dusting, and cleaning the bathrooms. He also continued to run errands with Kathryn Baker, play euchre, and participate with their walking group. In sum, there was no genuine issue of material fact that Robert Baker's general ability to lead his normal life was not affected by his objectively manifested impairment of an important body function.

We affirm.

/s/ David H. Sawyer  
/s/ Richard A. Bandstra  
/s/ William C. Whitbeck

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<sup>23</sup> *Id.* at 133 n 17.

<sup>24</sup> *Id.* at 133.