

STATE OF MICHIGAN
COURT OF APPEALS

LAURIE A. STEWART and SCOTT STEWART,

Plaintiffs-Appellants,

v

BARBARA ANN LIETZKE and VERNON
EUGENE LIETZKE,

Defendants-Appellees.

UNPUBLISHED

August 3, 2006

No. 268302

Eaton Circuit Court

LC No. 05-000447-NI

Before: Davis, P.J. and Sawyer and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendants in this automobile negligence action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

This case arises out of a motor vehicle accident that occurred on January 16, 2003. Plaintiff Laurie Stewart (hereinafter plaintiff)¹ sued to recover noneconomic damages for the injuries she sustained. After the accident, plaintiff complained of pain in her neck and back and numbness in her left arm; she had bruising on her lower back, right hip and left leg. Plaintiff underwent a series of steroidal injections and was prescribed various muscle relaxants and anti-inflammatory medications by her primary care physician, Dr. Hallak. She also underwent physical therapy for a period of time. About six months after the accident, plaintiff began facet block (injection) therapy with Dr. Ferro after he diagnosed her with radiculopathy (a pinched nerve), cervicalgia (neck and shoulder pain) and facet syndrome. Plaintiff testified that she would have to undergo the injection therapy approximately every four months for the rest of her life but that they relieved her of most of her pain. She stated that she was able to "go to work and drive and do all of the things I have to do."

¹ Plaintiff Scott Stewart filed a derivative claim for loss of consortium.

Plaintiff also testified that she was able to continue performing house and yard work although she required the help of her family sometimes. She stated that she had to adapt her way of performing chores and driving so as not to trigger neck pain. Plaintiff's husband, Scott Stewart, testified that he did have to take over more of the household chores after plaintiff's accident and that he did more of the heavy lifting and physical labor involved with running their horse farm. Stewart also testified that his wife was able to give riding lessons to students although she could only ride for short periods of time and that she had to be careful when doing so. He also stated that his wife was not able to partake in activities she used to enjoy such as mountain biking and swimming.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's injuries did not meet the serious impairment threshold necessary for recovery. The trial court agreed.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

III. ANALYSIS

The plaintiff's injuries did not meet the serious impairment threshold necessary for recovery. Under MCL 500.3135, a person is subject to tort liability for noneconomic loss caused by his use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. As used in this section, "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).

Under *Kreiner v Fischer*, 471 Mich 109, 131-32; 683 NW2d 611 (2004), the reviewing court is to determine whether a factual dispute exists concerning the nature and extent of the person's injuries, or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If there are material factual disputes, a court may not decide the issue as a matter of law. *Id.* at 132. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, the question is one of law. *Id.*

When a court decides the issue as a matter of law, it must then proceed to the second step in the analysis and determine whether an "important body function" of the plaintiff has been impaired. *Id.* When a court finds an objectively manifested impairment of an important body function, it must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. *Id.* This process involves an examination of the plaintiff's life before and after the accident. The court should objectively determine whether any change in lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. *Id.* at 132-133. Any effect on the plaintiff's life is insufficient because a de minimis effect would not affect the plaintiff's general ability to lead his life, as objectively viewed. *Id.* at 133. The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination that 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.*

In addition, it should be considered that not all activities have the same significance in a person's overall life. *Id.* at 131. Thus, where limitations on sporting activities "might not rise to the level of a serious impairment of body function for some people, in a person who regularly participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a 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 if the injured person is still generally able to lead his normal life. *Kreiner, supra* at 137.

Specifically in regard to residual impairments, the *Kreiner* Court noted, "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. However, this Court has held that "[t]he necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment." *McDaniel v Hemker*, 268 Mich App 269, 283-284; 707 NW2d 211 (2005). A physician need not offer a medically identifiable or physiological basis for imposing restrictions based on pain; however, a recitation of a physiological basis provides support for the conclusion that the restrictions are physician-imposed, rather than self-imposed. *Id.* at 284. In addition, this Court has recognized the difference between self-imposed limitations due to pain and self-imposed limitations based on physical inability, which can support a finding that the plaintiff has suffered a threshold injury. *Id.* at 283-284.

In *Kreiner*, the plaintiff Kreiner's injury did not affect his ability to conduct the course of his normal life. *Kreiner, supra* at 137. There, his lower back, right hip and right leg were injured after he was involved in an auto accident. *Id.* at 136. Kreiner had to cut back the hours he worked in a day but was still able to earn a living and generally lead a normal life. *Id.* at 137. In Kreiner's companion case, *Straub v Collette*, the plaintiff Straub's injury also did not affect his ability to conduct the course of his normal life. *Id.* at 135-136. There, Straub underwent surgery to repair tendons in his hand that were injured during an automobile accident. *Id.* at 135. While he missed eight weeks of work, he had regained almost full functionality of his hand at the time of the case and there was no evidence of any residual effects. *Id.* at 135-136. In this case, plaintiff has arguably shown the objective manifestation of an injury that impaired an important body function, given that physician records demonstrated that she injured her neck and back in the accident, and because she continued to receive treatment for this injury more or less continuously. However, we conclude that plaintiff has failed to show that her initial injuries, when coupled with any residual effects, changed her general ability to lead her normal life under the standard set out in *Kreiner*.

The nature and extent of plaintiff's initial impairments do not approach those suffered by the plaintiff Straub in the companion case to *Kreiner, supra*, or by the plaintiff Kreiner himself. *Kreiner, supra* at 122-127, 135-136. Plaintiff sustained damage to her cervical disc and other bruising. She underwent no initial treatment and missed only two weeks of work. She has had to undergo several outpatient procedures to help relieve her pain. Still, plaintiff has not shown a

comparable initial impairment or medical treatment to plaintiff Straub or Kreiner, who both were found not to have met the threshold for recovery. *Id.* at 135-137.

Plaintiff's residual effects may be, as she suggests, permanent. However, plaintiff's medical records do not clearly state as much. Even were this to be the case, plaintiff's treatment regimen and reported ongoing limitations are not extensive. She receives injections to control her pain approximately once every four months. Plaintiff continues to work full time, and can perform her pre-accident house and yard work. She maintained that she had to adapt her way of performing chores and driving so as not to trigger neck pain, but can continue performing these activities. Plaintiff also admits that she assists with running the horse farm and gives riding lessons.

According to her husband's testimony, plaintiff cannot fully participate in the heavier work involved in taking care of the horses and must limit her riding time. She has also lost the interest, if not the ability, to participate in strenuous sports, such as mountain biking. But as noted by the trial court, her claimed limitations appear entirely self-imposed and based on real or perceived pain rather than underlying physical incapacity. These cannot be used to establish a threshold injury. *Id.* at 133 n 17.

Under the circumstances, plaintiff has shown that the accident has had some effect on her activities. However, she has not shown that "the course or trajectory of [her] normal life" has been affected so as to meet the threshold requirement. *Id.* at 131.

Affirmed.

/s/ David H. Sawyer

/s/ Bill Schuette