

STATE OF MICHIGAN
COURT OF APPEALS

LUCY DEWITT,

Plaintiff-Appellee,

V

PHILIP PAWLOSKI,

Defendant-Appellant.

UNPUBLISHED

May 22, 2007

No. 274740

Sanilac Circuit Court

LC No. 05-030695-NI

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order denying his motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On June 6, 2004, defendant's vehicle struck the rear of plaintiff's vehicle, which was stopped in traffic. Plaintiff maintained that she felt neck pain after the accident, but did not immediately seek treatment. Approximately five weeks later, she reported tenderness in her neck. A CT scan was negative for fracture or dislocation. Plaintiff began chiropractic treatment in August 2004. During a session on February 8, 2005, plaintiff's chiropractor performed a cervical manipulation. Plaintiff immediately suffered hypertension, vertigo, dizziness, headache, nausea, and vomiting. She was transported to a hospital by ambulance. She was discharged; however, her symptoms continued. Doctors performed an evaluation of her head and neck, determined that the latest manipulation had torn a hole in her right vertebral artery, and found that her symptoms were caused by subarachnoid bleeding. She was scheduled for arterial bypass surgery, but during the surgery her doctors decided against completing the planned procedure because of problems with blood flow, the inadequate size of the actual artery, and because a donor artery "was not found to be reasonable for the bypass procedure." There was an indication that her body was apparently healing the tear on its own. Plaintiff was discharged on February 26, 2005, and told that she could return to work on March 15, 2005, with restrictions "as tolerated." Plaintiff was advised that she could return to work without restrictions on May 3, 2005.

Plaintiff testified in her deposition that she continued to suffer a numb spot on the back of her head where she had surgery, and she also continued to experience neck stiffness, headaches, dizziness, and muscle spasms. She took a prescription muscle relaxant or over-the-counter pain relievers as needed. She could perform indoor household chores and could play golf weekly, but

chose not to mow grass or shovel snow because it bothered her neck. Plaintiff conceded that the restrictions on her activities after May 3, 2005, were self-imposed.

Plaintiff sued to recover noneconomic damages. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). During a hearing on the motion, defendant's attorney conceded, for purposes of the motion, that plaintiff's injuries, including those that occurred after the chiropractic manipulation, were causally related to the accident. Defendant's appellate argument on the issue of causation is thus rejected in light of the concession below. However, defendant did argue that plaintiff's injuries did not meet the threshold standard for a serious impairment of body function. The trial court denied the motion. This Court granted leave to appeal.

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).

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. 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).

Under *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004), a court must first determine that there is no factual dispute 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 the court makes such a conclusion, it may continue to the next step. *Id.* at 132. But, if a court determines that 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.*, citing MCL 500.3135(2)(a)(i) and (ii).

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." *Kreiner, supra* at 132. If a court finds that an important body function has been impaired, it must then determine whether the impairment was objectively manifested. *Id.* If the court finds that there has been an objectively manifested impairment of an important body function, "it then 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. *Id.* 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 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 life." *Id.* The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. *Id.* 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. *Id.*

In addition, “[s]pecific activities should be examined with an understanding 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, as long as 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.” *McDaniell v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005). A physician need not offer a medically identifiable or physiological basis for imposing restrictions based on pain. *Id.* at 284. In addition, this Court 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. The *McDaniell* panel read *Kreiner*’s footnote 17 in context, indicating that simply because there may be self-imposed restrictions based on pain it does not mean that the plaintiff failed to establish a threshold injury. *McDaniell, supra* at 285. All the factors mentioned in *Kreiner* must be viewed under the totality of the circumstances. *McDaniell, supra* at 285.

In the instant case, plaintiff demonstrated the objective manifestation of an injury that impaired an important body function, in that she presented record evidence to support her claims of an initial and an aggravated neck injury. Given defendant’s concession below, we also review all of plaintiff’s subsequent injuries as if they were proximately caused by the automobile accident. We conclude, however, that plaintiff has failed to show that her initial and aggravated injuries, when coupled with any residual effects, changed her general ability to lead her normal life under the standard set forth in *Kreiner, supra*.

The nature and extent of plaintiff’s impairment do not approach, or are comparable to, those suffered by the plaintiff Straub in the companion case to *Kreiner, supra*, and by the plaintiff Kreiner himself. Straub required surgery, a cast, pain medication, and physical therapy. He returned to full-time work three months after the accident, and eventually rejoined a band for which he played bass guitar. However, he continued to complain of reduced gripping strength in his left hand, along with an inability to straighten one finger or close the hand completely. *Kreiner, supra* at 122-123, 135-136. Kreiner maintained that he continued to suffer mild nerve irritation and a degenerative disc condition several weeks after the accident, underwent three weeks of physical therapy nine months after the accident, and continued seeing a doctor while complaining of back and leg pain almost two years after the accident. *Id.* at 124-125. He had to shorten his work day, could not stand on a ladder longer than 20 minutes, could not lift over 80 pounds, could no longer perform roofing jobs, and had difficulty walking one-half mile. *Id.* at 125-127. Nevertheless, neither Straub nor Kreiner was found to have met the threshold requirements for recovery. *Id.* at 122-127, 135-136.

Here, plaintiff initially suffered chronic, yet relatively minor, effects from the accident. Certainly, she suffered a serious injury when her right vertebral artery was dissected. And, for a relatively short period of time thereafter, she needed a great deal of assistance from her daughter to perform household chores and related activities. However, plaintiff recovered fully within three months, and returned to her employment without any physician-imposed restrictions. Her residual impairment, including chronic neck stiffness and headaches, does not limit her ability to perform everyday activities; instead, she chose not to perform some activities because they triggered or exacerbated her neck stiffness and headaches. “Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish [the extent of any residual impairment].” *McDaniel*, *supra* at 282. Based on the documentary evidence argued and presented, plaintiff’s self-imposed limitations cannot be used to establish the extent of any residual impairment. Plaintiff has shown that the accident had some effect on her activities, but she also testified that she can perform indoor household chores, and she plays golf weekly. Contrary to the trial court’s conclusion, we find that, on this record, plaintiff failed to show that the course or trajectory of her normal life was affected as demanded by the majority in *Kreiner*. *Kreiner*, *supra* at 131; see also *Netter v Bowman*, 272 Mich App 289; 725 NW2d 353 (2006) (the plaintiff’s soft tissue injuries that she suffered in the car accident, which led to the premature birth of her twins, did not affect her ability to lead her normal life where she was fully recuperated within six months).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff