

STATE OF MICHIGAN
COURT OF APPEALS

BURTON KEELEAN,
Plaintiff-Appellant,

UNPUBLISHED
August 18, 2005

v

DEREK FRANDON MACK,
Defendant-Appellee.

No. 262174
Macomb Circuit Court
LC No. 2004-000081-NI

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In October 2002, plaintiff, a retiree in his early 80s, was injured when defendant struck his vehicle from behind. Plaintiff struck his head on the dashboard. The armrest of plaintiff's seat also struck his lower back when the impact broke his seat. His pre-existing back problems¹ were exacerbated by the accident. He underwent a "trigger pain injection" for his lower back and unsuccessfully attempted physical therapy. An MRI taken in March 2004 showed a "right paracentral disc herniation" at the same area of plaintiff's earlier surgeries.

Plaintiff filed suit alleging that, as a result of defendant's negligent driving, he suffered serious impairment of a body function. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's injuries did not satisfy the serious impairment of body function standard under Michigan's No-Fault Act, MCL 500.3135. The trial court granted the motion.

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).

¹ Plaintiff had undergone three prior back surgeries due to degenerative disc disease.

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).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), our Supreme Court provided a framework for determining whether a plaintiff meets the serious impairment threshold. First, a 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.” *Id.* at 131-132. If there are material factual disputes, a court may not decide the issue as a matter of law. If no material question of fact exists regarding the nature and extent of the plaintiff’s injuries, the question is one of law. *Id.* at 132.

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 then must determine if the impairment affects the plaintiff’s general ability to lead his or her normal life.” *Id.* This 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. “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.* at 133. The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. 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.*

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.

In the instant case, the actual extent of the injuries caused by the accident are difficult to separate from plaintiff’s earlier extensive back injuries. For purposes of this appeal, we consider the evidence in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and assume that plaintiff’s increased pain and movement restrictions were attributable to the accident. As such, plaintiff has arguably shown that he suffered an objectively manifested injury of an important body function.

However, we conclude that plaintiff has failed to show that his initial injuries, when coupled with any residual effects, changed his general ability to lead his normal life under the standard set out in *Kreiner*, *supra*. First, plaintiff’s initial injuries were not as serious as those suffered by the plaintiff Straub in the companion case to *Kreiner*, *supra*, and those injuries were

found not to have met the threshold requirement. *Kriener, supra*, at 135-136. Plaintiff here did not undergo surgery or wear a cast as the result of his injuries.

In addition, plaintiff does not continue to suffer the degree of long-term effects suffered by the plaintiff Kreiner. *Id.* at 136-137. Kreiner stated that his employment as a construction worker was affected by the accident. He maintained that he could no longer stand on a ladder longer than twenty minutes, could no longer lift in excess of eighty pounds, and was forced to limit his workday to six hours. He stated that he had difficulty walking more than one half-mile without resting, and could no longer hunt rabbits, although he continued to hunt deer.² *Id.* at 137.

Here, when compared to Kreiner's circumstances, plaintiff's ongoing limitations are minor. Plaintiff continues to suffer pain from the accident. However, he can still drive, hunt, and perform at least some of the limited household chores he used to perform. Plaintiff testified that he could no longer engage in his woodworking hobby. 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." *Id.* at 137. In addition, the limitations on this recreational activity are self-imposed by plaintiff, and thus do not establish the existence of a serious impairment of body function under *Kreiner, supra*. *Id.* at 133 n 17. In short, plaintiff continues to be able to do almost everything he once could, although with more difficulty. Plaintiff has lost some mobility and a degree of self-sufficiency, but his lifestyle has not appreciably changed. Bound by *Kreiner, supra*, we conclude that, "considered against the backdrop of his preimpairment life," plaintiff's "postimpairment life is not so different that his 'general ability' to conduct the course of his normal life has been affected." *Id.* Therefore, we affirm the trial court's grant of summary disposition.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens

² Apparently, Kreiner alleged that these limitations were permanent.