

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS PERKOWSKI and CHERYL
PERKOWSKI a/k/a CHERYL PERKOWSKI,

UNPUBLISHED
March 16, 2006

Plaintiffs-Appellants,

v

NIKE NMN DAKA and QUICKWAY
DISTRIBUTION SERVICES,

No. 265732
Ingham Circuit Court
LC No. 04-001374-NI

Defendants-Appellees.

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition pursuant to MCR2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case arises out of a motor vehicle accident that occurred on December 12, 2003. Plaintiff Thomas Perkowski had pulled his vehicle onto the shoulder of the road. He was sideswiped by a semi truck driven by defendant Daka, who apparently temporarily lost control of the truck. The truck was owned by defendant Quickway Distribution Services.

Plaintiffs filed suit to recover noneconomic damages.¹ Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's injuries did not meet the threshold standard for a serious impairment of body function. The trial court agreed and granted summary disposition to defendants.

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. As used in this section, "serious impairment

¹ Plaintiff Cheryl Perkowski alleged a derivative claim predicated on loss of consortium.

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 so finds, “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.*

In the instant case, plaintiff has arguably shown the objective manifestation of an injury that impaired an important body function, given that physician records support a conclusion that he injured his back and neck in the accident.

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*. Plaintiff’s initial injuries were not as serious as 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. Here, while plaintiff was given pain medicine and participated in physical therapy, he did not require immediate medical treatment or surgery, and did not miss work.

Plaintiff continues to work full time, although he reports that his ten-hour workdays are shorter than those he maintained prior to the accident. Plaintiff continues to be able to engage in virtually all facets of his building and real estate businesses. He maintains that he is physically limited from participating in the building of homes; however, this assertion is contradicted by defendant’s photographic evidence showing plaintiff engaging in actual construction work. Some of the activities shown, such as carrying full sheets of plywood, require considerable back strength. Plaintiff also continues to be able to sit and draft for lengthy periods of time, albeit while wearing a brace to alleviate some of his pain. Plaintiff did assert that he could no longer

perform heavy foundation concrete work. However, even were we to accept that testimony as true, plaintiff's overall ability to perform the tasks needed for the builder portion of his career has not been appreciably diminished.

In addition, while plaintiff is more limited in his role as a hockey coach, he continues to coach and to skate. He does not present evidence of severely curtailed pre-accident physical activities or of an otherwise highly active lifestyle. Nor have the remainder of his usual life activities been appreciably affected.

Under the circumstances, while plaintiff has shown that the accident has had some effect on his activities, he has not shown that "the course or trajectory of [his] normal life" has been affected so as to meet the threshold requirement. *Kreiner, supra* at 131. The trial court did not err when it granted summary disposition to defendants.

Affirmed.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra