

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD WALTER GOTHE,
Plaintiff-Appellant,

UNPUBLISHED
June 22, 2006

v

BONNIE HARRIET LIVINGSTON,
Defendant-Appellee.

No. 267995
Washtenaw Circuit Court
LC No. 04-001076-NI

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

PER CURIAM.

Plaintiff appeals as of right from the trial court's order entered granting summary disposition to defendant in this automobile negligence action. 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 September 28, 2001. Plaintiff, who suffered injuries in the accident, sued to recover noneconomic damages. Defendant 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 and 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).

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.*

In addition, "Specific 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." *McDaniels 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.

For the purposes of this motion, defendant has conceded that plaintiff had shown the objective manifestation of an injury that impaired an important body function. However, we agree with the trial court that plaintiff's injuries do not affect his general ability to lead his normal life and that he thus cannot show that he is entitled to recover under MCL 500.3135.

Looking at the factors above, plaintiff's initial injuries and treatment were not extensive. He underwent an x-ray, and received a knee brace. He underwent limited physical therapy and

was given pain medication. The nature and extent of plaintiff's initial impairments do not approach those suffered by Straub, in the companion case to *Kreiner, supra*, who was found not to have met the threshold for recovery. *Kreiner, supra* at 122-123, 135-136.

With respect to the duration of impairment, type and length of treatment, and the prognosis for eventual recovery, plaintiff's residual effects may be, as he suggests, permanent. However, plaintiff's medical records do not clearly state as much. Even were this to be the case, plaintiff's medical treatment regimen is not extensive. To date, plaintiff has undergone little treatment past his initial therapy. He no longer requires a brace, crutches, or cane. He continues to take pain medications and a muscle relaxant. There is an indication that plaintiff may be a candidate for future surgery; however, this possibility has not been addressed in much detail.

Plaintiff argues essentially that the extent of any residual impairment is great, especially considering his otherwise limited mobility in prison. However, plaintiff's claimed limitations appear largely self-imposed and based on real or perceived pain. These cannot be used to establish a threshold injury. *Id.* at 133 n 17; *McDaniels, supra* at 283-284. To the extent the restrictions are based on underlying physical incapacity, such as his reported leg spasms or numbness, we find that plaintiff still cannot meet the threshold. Plaintiff arguably cannot play hockey, basketball, or other physically demanding sports. However, plaintiff can participate in the majority of the activities otherwise available. He can walk for an hour without difficulty, use the library, take part in sports as a spectator, and use the gym. He can continue to lift weights, although in a more limited manner. He works in the laundry. He could presumably also work in other positions at the prison, with the exception of acting as a referee in the recreation department.

We view the curtailment of part of plaintiff's recreational activities as having greater significance, because these activities presumably become more central with the loss of other freedoms. However, these activities remain but one particular aspect of plaintiff's life, which is not sufficient to meet the tort threshold, "as long as the injured person is still generally able to lead his normal life." *Kreiner, supra* at 137. Under the circumstances, plaintiff has shown that the accident has had some effect on his activities, even though those activities have themselves been limited due to other factors. However, he has not shown that "the course or trajectory of [his] normal life" has been affected so as to meet the threshold requirement. *Id.* at 131.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette