

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOHN BRANDON RUBENSTEIN,

Plaintiff-Appellant,

v

CHRISTINE DENSEL and JAMES DENSEL,

Defendants-Appellees,

and

DAIMLERCHRYSLER INSURANCE  
CORPORATION,

Defendant.

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UNPUBLISHED

July 11, 2006

No. 267180

Oakland Circuit Court

LC No. 04-062620-NI

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants Christine and James Densel in this automobile negligence action.<sup>1</sup> We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff suffered injuries in a motor vehicle accident and sued to recover noneconomic damages. MCL 500.3135. 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 found that plaintiff had shown by medically identifiable evidence that he suffered from temporomandibular joint disorder (TMD) and injuries to his neck that occurred from the accident or were aggravated by it, and that plaintiff had thus presented an objective

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<sup>1</sup> The first party claim against defendant DaimlerChrysler Insurance Company was dismissed by stipulation.

manifestation of an impairment to an important body function. However, the trial court then found that plaintiff had failed to demonstrate that his general ability to lead his normal life had been affected by the injury, and granted defendants' motion.

Plaintiff argues that the trial court erred in granting summary disposition to defendants. We disagree. 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 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; 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." *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, "[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.” *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.

In this case, physician records support a conclusion that plaintiff injured his neck in the accident. Physician reports have also connected plaintiff’s jaw symptoms, or at least the exacerbation of these symptoms, to the accident. Thus, plaintiff has arguably shown the objective manifestation of an injury that impaired 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*.

Plaintiff’s initial injuries were not as serious as those suffered by the plaintiff Straub in the companion case to *Kreiner*, *supra*, or to the plaintiff Kreiner himself. *Kreiner*, *supra* at 122-127, 135-136. Plaintiff initially complained of head, back, and jaw pain. He underwent chiropractic treatment and was later given a bite splint. Plaintiff reports continued pain and stiffness. He also reports suffering headaches and having difficulty eating certain foods. However, the trial court correctly noted that plaintiff has shown only a minor effect on his prior activities. His injuries have not impacted his actual current or future employment. He does not present evidence of severely curtailed pre-accident physical activities. *Williams*, *supra* at 509. He maintains that he cannot perform pre-accident heavy carpentry work or heavy landscaping as he did prior to the accident. However, he continues to be able to perform household chores, such as mowing the lawn, cooking, and doing laundry. He continues to be able to golf on a limited basis, and to go mountain biking with his brother. While his jaw pain may impact his ability to eat certain foods in a particular way, he does not have difficulty eating in general.

In addition, plaintiff has not presented any evidence that he is actually physically unable to participate in a wider range of activities. See *McDaniels*, *supra* at 283. Rather, plaintiff’s reported inability to engage in some of his pre-accident activities appears to be entirely self-imposed limitations based on pain. The only physician-imposed restriction was the three-month disability slip provided by Dr. Klein so that plaintiff would not have to pay his monthly gym membership, and also a pre-August 2004 lift/bend restriction.<sup>2</sup> Plaintiff’s alleged continued self-

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<sup>2</sup> The disability certificate dated June 24, 2004, was effective through October 30, 2004 when plaintiff began working for Re/Max.

imposed pain limitations cannot establish a threshold injury. *Kreiner, supra* at 133 n 17; *McDaniels, supra* at 283-284.

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/ Kirsten Frank Kelly  
/s/ Jane E. Markey  
/s/ Patrick M. Meter