

STATE OF MICHIGAN
COURT OF APPEALS

CARA DENISE MACKLEY,

Plaintiff-Appellant,

v

MATTHEW JOHN GRAY,

Defendant-Appellee.

UNPUBLISHED

March 8, 2007

No. 272409

Saginaw Circuit Court

LC No. 05-056333-NI

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order 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 January 24, 2005. Plaintiff, who suffered injuries in the accident, sued to recover noneconomic damages. Both parties moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that plaintiff's injuries did not meet the serious impairment threshold necessary for recovery. The trial court agreed, and granted defendant's 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 statute, "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), 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." If there are material factual disputes, a court may not decide the issue as a matter of law. *Id.* at 132. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, the question is one of law. *Id.*

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 process 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 the instant case, plaintiff has arguably shown the objective manifestation of an injury that impaired an important body function, given that her physician records support a finding that she injured her neck in the accident, and that she continued to receive treatment for this injury more or less continuously. However, we conclude that plaintiff has failed to show that her initial injuries, when coupled with any residual effects, changed her general ability to lead her normal life under the standard set out in *Kreiner, supra*.

The nature and extent of plaintiff’s initial impairments do not approach those suffered by the plaintiff Straub in the companion case to *Kreiner, supra*, or the plaintiff Kreiner himself. Neither Straub nor Kreiner was found to have met the threshold requirements for recovery. *Kreiner, supra* at 122-127, 135-136.

Here, plaintiff's residual effects may be, as she suggests, permanent. However, despite the affidavit from her treating physician, plaintiff's medical records do not clearly reflect as much. Even if this is the case, plaintiff's treatment regimen and reported ongoing limitations are not extensive. She apparently continues to take medication to help her sleep, uses her muscle stimulation device, and is supposed to continue with home exercise. Plaintiff continues to work full time, with only the minor limitation of standing on a soft surface to alleviate her pain. She is able to perform her pre-accident housework. She has resumed driving. While plaintiff has presented evidence that surgery might be needed in the future, this possibility remains speculative.

The greatest effect the accident has had on plaintiff's life concerns her physical sports activities. Plaintiff presented evidence that she has not returned to the level and intensity of physical activities she previously enjoyed, even though she again participates on a volleyball team. This factor weighs more heavily in plaintiff's case given her active lifestyle. *Williams, supra* at 509. However, this is only one aspect of plaintiff's life. In addition, as noted by the trial court, her claimed limitations appear to be self-imposed and based on real or perceived pain rather than on underlying physical incapacity. Her physician's affidavit provides some support for a finding that plaintiff might be expected to limit her activities due to pain, but does not show that the limitations were physician-imposed. None of plaintiff's treatment records supports a finding that he ever limited her activities. Plaintiff's limitations thus cannot be used to establish a threshold injury. *Kreiner, supra* at 133 n 17; *McDaniels, supra* at 283-284.

Plaintiff has shown that the accident has had some effect on her activities. However, she has not shown that "the course or trajectory of [her] normal life" has been affected so as to meet the threshold requirement. *Kreiner, supra* at 131.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder