

STATE OF MICHIGAN
COURT OF APPEALS

FRANKIE HENDERSON,

Plaintiff-Appellee,

v

DENNIS BOND and GLORIA BOND,

Defendants-Appellants.

UNPUBLISHED

October 4, 2007

No. 273210

Ingham Circuit Court

LC No. 06-000133-NI

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendants appeal by leave granted from an order denying their motion for summary disposition pursuant to MCR2.116(C)(10). We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sought noneconomic benefits for injuries she suffered to her neck, back, and shoulder in an automobile accident on February 2, 2005. An MRI revealed that she had suffered a right rotator cuff tear in her right shoulder. Plaintiff underwent surgery for that injury in June 2005, wore a shoulder brace for four weeks, and missed six weeks of work. She underwent physical therapy three times per week for six weeks, and continued physical therapy intermittently until March 2006.

As of plaintiff's deposition on May 11, 2006, she maintained that she had not yet fully recovered. Plaintiff, who is right-handed, alleged that she had continued difficulty performing various household and grooming tasks, and had had to retrain herself to perform certain tasks with her left arm. However, she also indicated that there was nothing she "absolutely [could not] do" around her home. The only activity plaintiff contended that she could no longer enjoy was bowling which before the accident, she enjoyed once or twice per month.

Plaintiff sued to recover noneconomic damages. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10); the trial court denied 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).

Pursuant to 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. A “serious impairment of body function” is “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, [whether] it is . . . material to the determination whether the person has suffered a serious impairment of body function.” If no material question of fact exists regarding the nature and extent of the plaintiff’s injuries, the question is one of law; if there are material factual disputes, a court may not decide the issue as a matter 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 process involves an examination of the plaintiff’s life before and after the accident. The court should objectively determine whether any change in lifestyle resulting from the injury “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 regarding residual impairments, the *Kreiner* Court noted, “[s]elf-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.” *McDaniel v Hemker*, 268 Mich App 269, 282-283; 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 demonstrated the objective manifestation of an injury that impaired an important body function in that she presented record evidence to support her claims of initial back, neck, and shoulder injuries. 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 impairment does not approach those suffered by the plaintiff Straub in the companion case to *Kreiner, supra*, or by the plaintiff Kreiner himself. Straub required surgery, a cast, pain medication, and physical therapy. He returned to full-time work three months after the accident, and eventually rejoined a band for which he played bass guitar. However, he continued to complain of reduced gripping strength in his left hand, along with an inability to straighten one finger or close the hand completely. *Kreiner, supra* at 122-123, 135-136. Kreiner maintained that he continued to suffer mild nerve irritation and a degenerative disc condition several weeks after the accident, underwent three weeks of physical therapy nine months after the accident, and continued seeing a doctor while complaining of back and leg pain almost two years after the accident. *Id.* at 124-125. He had to shorten his work day, could not stand on a ladder longer than 20 minutes, could not lift over 80 pounds, could no longer perform roofing jobs, and had difficulty walking one-half mile. *Id.* at 125-127. Nevertheless, neither Straub nor Kreiner was found to have met the threshold requirements for recovery. *Id.* at 122-127, 135-136.

Here, plaintiff initially suffered chronic, yet relatively minor, effects from the accident. Plaintiff underwent arthroscopic surgery to repair a damaged right rotator cuff, wore a brace for approximately four weeks, and missed six weeks of work. However, she subsequently returned to her employment without any physician-imposed restrictions. Plaintiff's short-term inability to work and reduced daily functioning was not as severe as that of plaintiff Straub, who was found not to have met the threshold for recovery.

Plaintiff describes continued residual impairment, primarily due to the injury to her right shoulder. However, most if not all of her ongoing restrictions are apparently self-imposed. Plaintiff maintained that she could not perform these tasks at least partly because she had a reduced range of motion in her arm. At the time of her deposition, her range of motion had increased, but she noted that it was "still not where I feel I need it to be or where it should be." Her medical records support a conclusion that range of motion problems initially played a role in her impairment. However, her more recent records do not indicate that her continued impairment is due to a decreased range in motion, as opposed to pain, which might otherwise form a basis for finding a threshold injury under *McDaniels, supra*. "Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish [the extent of any residual impairment]." *Kreiner, supra* at 133 n 17; *McDaniels, supra* at 283-284. In any event, these residual effects are not as extensive as the residual effects suffered by plaintiff Kreiner, who was also not found to have met the threshold for recovery under MCL 500.3135.

We find that plaintiff failed to show that the course or trajectory of her normal life was affected as a result of the relatively brief period of hospitalization and recuperation and the real,

yet relatively minor residual effects from the accident. *Kreiner, supra* at 131. See, e.g., *Netter v Bowman*, 272 Mich App 289; 725 NW2d 353(2006).

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood