

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH RAYES and SANDY RAYES,

Plaintiffs-Appellants,

v

ALLMERICA FINANCIAL, CITIZENS
INSURANCE COMPANY OF AMERICA, and
GREAT WEST CASUALTY COMPANY,

Defendants-Appellees.

UNPUBLISHED

May 23, 2006

No. 257683

Macomb Circuit Court

LC No. 2003-004592-CK

JOSEPH RAYES and SANDY RAYES,

Plaintiffs-Appellants,

v

CELADON TRUCKING SERVICES, INC.,

Defendant-Appellee.

No. 257735

Macomb Circuit Court

LC No. 1999-003820-NI

Before: Davis, P.J., Cavanagh and Talbot, JJ.

TALBOT, J. (*dissenting*).

Because I do not believe that plaintiffs have presented facts establishing an impairment that affects Joseph Rayes' general ability to lead a normal life under the test set forth by our Supreme Court in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), I respectfully dissent.

The facts of *Kreiner* strongly support the trial court's grant of summary disposition in favor of defendants. As in the present case, *Kreiner* had shown an objective manifestation of an impairment to an important body function. Additionally, the condition from which *Kreiner* suffered—radiating pain from the lower back into the hips and legs—was determined to be chronic and probably permanent. *Id.* at 124-125, 136. Most importantly, however, *Kreiner* was able to continue working in the same or similar work in which he had done prior to the accident. *Id.* at 137. *Kreiner* remained self-employed as a carpenter, but was no longer able to perform "roofing work," stand on ladders for an extended period of time, lift over 80 pounds as he had

before, or work more than six hours per day. *Id.* Despite the fact that his injuries clearly impacted his work, the Court concluded, “[l]ooking at Kreiner’s life as a whole, before and after the accident, and the nature and extent of his injuries, we conclude that his impairment did not affect his overall ability to conduct the course of his normal life.” *Id.*

In the present case, there were few specific facts regarding the impact of the impairment on Rayes’ general activities, or even the status of his medical treatment, except for pain medication and the inability to engage in biking, as the case progressed toward summary disposition in August 2004. In his August 3, 2004, affidavit, which was submitted to the trial court, Rayes averred that his ability to participate in activities such as softball, touch football, golf, canoeing, roller blading, water skiing, bicycling, back packing, hiking, and horseback riding had been impaired. This affidavit, however, appears inconsistent with Rayes’ December 15, 2000, deposition testimony that identified only biking as an activity that Rayes could no longer do. Also, Rayes’ averment regarding the impact of his injury on his employment path seems inconsistent with his deposition testimony. For instance, while averring that his job duties at IT Transport included driving a semi-truck and that he was compelled to discontinue his employment, his deposition testimony clearly indicates that he also had administrative responsibilities for IT Transport and that he was permitted to continue in those responsibilities after his accident. Further, although plaintiffs assert in their appeal brief that Rayes was “let go by IT shortly after the accident,” no record support for this assertion is cited. A party may not leave it to this Court to search for a factual basis to sustain or reject a position. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Although Rayes’ impairment may be permanent, when the evidence is viewed in a light most favorable to plaintiffs, it indicates that Rayes has continued to work in positions, like his pre-accident position, involving administrative or supervisory duties. The record does not indicate that he was on a career trajectory toward intensive physical labor at the time of his accident. Rather, he had a job involving both administrative work and physical labor connected to his operation of a semi-truck. He continued to have various forms of administrative and physical job responsibilities after his injury, with perhaps the most intensive physical work arising from his undertaking to start a monument business.

Plaintiffs cite *Williams v Medukas*, 266 Mich App 505; 702 NW2d 667 (2005), and *McDaniell v Hemker*, 268 Mich App 269; 707 NW2d 211 (2005), as authority to support their position that Rayes’ injuries meet the threshold for a serious impairment of a body function. Those cases, however, are distinguishable on the length of time that the plaintiffs were prevented from working because of their injuries. In *Williams*, the plaintiff was completely immobilized for one month after his accident, during which time he was unable to dress himself, eat, or perform hygiene functions without assistance. *Williams, supra* at 506. Additionally, the plaintiffs’ right arm was immobilized for six weeks after the accident, and he could not return to work as a salesman or as a basketball coach for three months after the accident. *Id.* In *McDaniell*, the plaintiff was initially off work for six weeks after her accident; however, after returning to work for approximately for or five months, the plaintiff’s physician restricted her from working for an additional six months because of persistent injuries and pain resulting from the accident. *McDaniell, supra* at 275-276.

In the present case, it is undisputed that Rayes missed only two weeks of work as a result of his injuries, after which time, he continued to manage the administrative aspects of IT

Transport, just as he had done before. Rayes continued in this position until approximately July of 1998, when he began his own business placing permanent monument markers, which involved substantially more physical labor than his position at IT Transport. By November of 2000, Rayes began a new position at Motor City Stamping, where he worked as a production foreman for approximately 50 hours per week through October of 1999. Rayes worked full-time during the summer of 2000 operating a dump truck for Tri-County services before working for two straight years for CKD Outdoor Maintenance. Since July of 2002, Rayes has worked 40 to 60 hours per week, year-round, as a foreman and general manager of landscape construction for Landscape Design. Rayes testified that his reasons for leaving all of these various jobs had nothing to do with his injuries resulting from the May 13, 1998, accident. Unlike the plaintiffs in *Williams* and *McDaniel*, Rayes has continued to work virtually without interruption since the accident. From this evidence, plaintiffs have failed to demonstrate that Rayes' impairment "affect[ed] his overall ability to conduct the course of his normal life." *Kreiner, supra* at 137.

I believe that the trial court correctly concluded:

In this case, the evidence is insufficient to show that plaintiff is not leading his normal life. He works and continues to be employable. Further, plaintiff does not state with specificity the impact of his continuing injury on his general activities, beyond stating that he cannot play with his children as well. This Court would anticipate that the Kreiner Court would find that his injuries were not serious enough. The Kreiner Court was less concerned with the permanent, ongoing aspects of the injury itself as with the degree and impact of the injury on the plaintiff's general ability to show that his general ability to lead his normal life is impaired.

I would therefore affirm.

/s/ Michael J. Talbot