

STATE OF MICHIGAN
COURT OF APPEALS

LAURIE A. STEWART and SCOTT STEWART,

Plaintiffs-Appellants,

v

BARBARA ANN LIETZKE and VERNON
EUGENE LIETZKE,

Defendants-Appellees.

UNPUBLISHED

August 3, 2006

No. 268302

Eaton Circuit Court

LC No. 05-000447-NI

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

DAVIS, J. (*dissenting*).

I agree with the majority's presentation of the facts and much of their analysis. However, I respectfully disagree with the majority's conclusion that plaintiff's general ability to lead her normal life has not been sufficiently affected to meet the threshold requirement to present her case to the trier of fact. I would reverse.

In the context of automobile accidents, common law negligence principles have been replaced by a no-fault system for obtaining compensation from the injured parties' own insurance companies. *Kreiner v Fischer*, 471 Mich 109, 114; 683 NW2d 611 (2004). However, under MCL 500.3135, common law negligence liability can still be imposed if a motor vehicle causes a "serious impairment of body function," 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." I agree with the majority's recitation of our Supreme Court's explanation of the appropriate analysis courts engage in to determine whether such an impairment exists. I also agree with the majority that "plaintiff has arguably shown the objective manifestation of an injury that impaired an important body function." I cannot agree that she has failed to show that it changed her general ability to lead her normal life.

In *Kreiner*, our Supreme Court found no significant impairment in either plaintiff because, among other things, one of them by the time of his disposition was able to "perform all the activities in which he had engaged before the accident," albeit with somewhat less strength in his non-dominant hand, and the other continued to work even more profitably than before and continued to be able to engage in his preferred form of recreation, though with fewer options. *Kreiner, supra* at 122-123, 125-126 n 12. Thus, the Court held that neither plaintiff's overall life was sufficiently different after the accidents to conclude that their "general abilities" to lead normal lives had been affected. *Id.*, 136-137. The Court observed that "[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." *Id.*, 137.

The majority reasons that plaintiff's impairments do not even rise to the level of those in *Kreiner* because plaintiff is treating her pain and continues to work. Plaintiff is, indeed, treating her pain and continuing to work. However, to stop there ignores our Supreme Court's admonition that all plaintiffs must be individually considered on a case-by-case basis. As our Supreme Court noted, an impairment precluding a plaintiff from throwing a baseball at ninety-five miles an hour might or might not be a serious impairment depending on whether the plaintiff was a professional baseball pitcher or "an accountant who likes to play catch with his son every once in a while." *Kreiner, supra* at 134 n 19.

According to plaintiff's medical records, her ongoing treatment, which she can expect to require for the rest of her life, consists of multiple epidural injections of a corticosteroid on a regular basis. Being dependent on this kind of medical treatment may not rise to the level of, say, dialysis. However, this is by no means a casual or risk-free procedure, which the majority's dismissal as "injections" seems to imply. Her treatment has also involved a number of rhizotomy procedures, where the spinal nerve roots are burned, and it appears that she will continue to require more of these procedures. The majority notes that plaintiff continues to work on the horse farm and give riding lessons but must limit her riding time, and her decreased involvement in strenuous sports appears to be a self-imposed limitation based on pain. This understates testimony that plaintiff had been an avid horse rider since she was a child, but could now no longer ride except on certain horses for limited time, and she gave lessons from the ground. Further testimony indicated that she restricted her involvement in sports due to fatigue and lack of energy, not pain.

It is worth emphasizing that this case is before us on summary disposition, so plaintiff need only show a genuine question of material fact whether "the course or trajectory of [her] normal life" has been negatively affected, when the evidence is viewed in a light favorable to her. Because I believe plaintiff has clearly done so, I would reverse.

/s/ Alton T. Davis