

STATE OF MICHIGAN
COURT OF APPEALS

DIANE JACOBS,

Plaintiff-Appellant,

v

DINA PROVOST,

Defendant-Appellee.

UNPUBLISHED

October 21, 2004

No. 246438

Oakland Circuit Court

LC No. 2002-039005-NI

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), on the basis that plaintiff did not satisfy the “serious impairment of body function” threshold set by the no-fault insurance act in order to be able to maintain an action for noneconomic tort damages. See MCL 500.3135(1). We affirm.

We review de novo decisions on summary disposition motions. *Stanton v Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002). “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a motion brought under this subsection, we consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Id.*

MCL 500.3135(1) provides:

A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

MCL 500.3135(7) defines “serious impairment of body function” as

an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.

We conclude that the question whether plaintiff's impairment affects her general ability to lead her normal life is dispositive in this case.

In the recent case of *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004), our Supreme Court explained that, in determining "whether an impairment affects a person's 'general' i.e., overall, ability to lead his normal life," the starting point "should be identifying how his life has been affected, by how much, and for how long." In this regard, "not all activities have the same significance in a person's overall life," and despite "minor changes" in the performance of a specific activity, one "may still 'generally' be able to perform that activity." *Id.* We must "compare[] the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life," and engage in an "objective analysis regarding whether any difference between plaintiff's pre- and post-accident 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.* Moreover "[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.* at 137.

Our Supreme Court also set out a "nonexhaustive list of objective factors [that] may be of assistance in evaluating whether the plaintiff's 'general ability' to conduct the course of his normal life has been affected: (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.* at 133. The Court noted that "[t]his list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves." *Id.* at 133-134. "[I]n order to determine whether one has suffered a 'serious impairment of body function,' the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment 'affects the person's general ability to conduct the course of his or her normal life.'" *Id.* at 134.

In *Kreiner*, the Court applied the above-listed principles to two plaintiffs, Daniel Straub (a companion case) and Richard Kreiner. Straub's injuries consisted of a closed fracture, open wounds, tendon injuries to two fingers, and a quarter-size wound on the palm of his nondominant hand. *Id.* His treatment consisted of having his wounds sutured, wearing a cast, and taking antibiotics and pain medication. *Id.* at 135. He had outpatient surgery, and the fracture and surgical wounds healed within two months after the accident. *Id.* Following two physical therapy sessions, he discontinued all medical treatment. *Id.* He was off work for eight weeks from his primary job as a cable lineman, but was authorized by his doctor to return two weeks earlier. *Id.* For the next three weeks, during deer season, he worked 20 to 25 hours per week as a cable lineman. *Id.* He was unable to operate his archery shop during the hunting season that year, which would have required repairing bows, making arrows, and processing deer meat. *Id.* at 122. He could not perform household chores or make property repairs for approximately three months following the accident. *Id.* But within four months following the accident, he was able to resume playing bass guitar in a band that performed on the weekends, and reported that he was ninety-nine percent back to normal. *Id.* at 122, 135.

Our Supreme Court concluded:

Given that Straub's injury was not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive, we conclude that Straub's general ability to live his normal life was not affected. There is no medical evidence that Straub has any residual impairment or that the course of Straub's life has been affected. The temporary limitations Straub experienced do not satisfy the statutory prerequisites. Considered against the backdrop of his preimpairment life and the limited nature and extent of his injuries, we conclude that Straub's postimpairment life is not so different that his "general ability" to lead his normal life has been affected. Because the course of Straub's normal life has not been affected, he failed to satisfy the "serious impairment of body function" threshold for recovery of noneconomic damages. [*Id.* at 135-136.]

Of more import to this case, our Supreme Court determined that the other plaintiff, Kreiner, did not meet the threshold for recovery of noneconomic damages because despite the fact that he was unable to work full capacity, he was "generally able to lead his normal life." *Id.* at 137. Kreiner was a self-employed carpenter and construction worker before and after the accident. *Id.* He suffered injuries to his lower back, right hip, and right leg, apparently associated with mild nerve irritation to the right fourth lumbar nerve root in his back and degenerative disc disease with spondylolisthesis. *Id.* at 124-125, 136. He had cortisone injections, pain and anti-inflammatory medication, muscle relaxants, a back support and physical therapy, and was instructed to perform back and muscle strengthening exercises. *Id.* at 124-125. At one point, his neurologist advised him to avoid lifting objects over fifteen pounds and to refrain from excessive bending or twisting. *Id.* at 125. The pain continued for approximately two years but Kreiner ultimately stopped treating with any physician and discontinued pain medication. *Id.* After the accident, Kreiner could no longer work eight-hour days as he had previously, and was forced to limit his workday to only six hours. *Id.* at 126. But despite his limitations, Kreiner's tax returns revealed that the year following the accident was his highest income-earning year, including several years before the injuries occurred. *Id.* at 126 n 12. However, he could not stand on a ladder for more than twenty minutes at a time, could no longer perform roofing work, and was unable to lift anything over eighty pounds. *Id.* at 126, 137. Additionally, he could no longer walk more than half a mile without resting and could no longer hunt rabbits; however, he could continue to hunt deer. *Id.*

Our Supreme Court concluded that Kreiner's "life after the accident was not significantly different than it was before the accident." *Id.* at 137. He was still able to perform all the work he did before, with the possible exception of roofing work. *Id.* Our Supreme Court concluded:

Looking 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. While he cannot work to full capacity, he is generally able to lead his normal life. 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.*]

In the instant case, there is no factual dispute concerning the nature and extent of plaintiff's injuries that is material to the determination whether plaintiff suffered a serious impairment of body function. See *id.* at 131-132. Accepting plaintiff's representation of her injuries as valid, we find, based on *Kreiner*, that her impairment did not affect her overall ability to conduct the course of her normal life because "for the most part" she is able to lead her normal life. Accordingly, the impairment did not affect her *general* ability to lead her normal life, and we need not reach the question whether an "important body function" of plaintiff was impaired or whether plaintiff's impairment was objectively manifested.

Plaintiff's pre-accident and post-accident life must be compared. On September 4, 1999, plaintiff was injured when her car was rear-ended by defendant's vehicle. She had previously been injured in an accident in February 1995, which resulted in neck, back, and arm pain, pinched nerves, and migraine headaches. Approximately 2½ weeks after the 1999 accident, plaintiff went to the emergency room complaining of "ever increasing neck and back pain." Plaintiff reported that she had not immediately gone to a doctor, but had instead self-medicated with muscle relaxants until she consumed her supply. When advised that a C-spine of her neck was negative for fracture, plaintiff "became angry" and "stormed out" of the hospital. Defendant's independent medical examiner stated that the hospital record showed grossly exaggerated complaints of pain that were indicative of drug-seeking behavior.

Before the 1999 accident, plaintiff was employed at a banquet center where she engaged in administrative work, part-time bartending, and assisting wait staff. Plaintiff returned to work a few days after the 1999 accident, but did not return to her regular schedule of 32 to 35 hours per week until a few weeks later. As of January 31, 2000, plaintiff continued to work despite continuing pain in her neck and lower back. Plaintiff claimed that for the first six months following the accident, she was only able to do administrative work, and was unable to bartend or assist wait staff because of her inability to stand on her feet. She said there were periods following the accident when she could not work her regular schedule, and would have a day off "here and there." She testified that in October 2001, her doctor advised her to reduce her work schedule because of her back pain. According to plaintiff, "the doctor and [my boss] both have noticed that I cannot do the job I did before in the same amount of time span so, therefore, I'm going back to part-time." Specifically, plaintiff maintained that she was unable to assist wait staff, and was therefore relegated to office work, which was also unsatisfactory because she was unable to sit for long periods of time.

Plaintiff stated that following the accident, she could not go camping or jet skiing. However, she did not frequently participate in these activities before the accident. She identified heavy housecleaning and lifting her grandchildren as other activities she could no longer perform. However, she was able to continue acting as guardian for her grandchild. After the accident, she continued to travel, took up gardening, and was able to engage in sexual activity to the same extent as before the accident. She was off work for a few days following the accident, but returned to her previous schedule of 32 to 35 hours per week within a few weeks. She represented that due to continuing pain she was not performing all of the same duties at work, and was therefore "going back to part-time." While it appears that plaintiff's ability to perform her job was affected by the injuries sustained in the 1999 accident, like *Straub* and *Kreiner*, her life after the accident was not significantly different than it was before the accident. She already worked a part-time schedule of 32 to 35 hours per week, and while she allegedly could not work

to this full capacity, she was nonetheless generally able to lead her normal life. As our Supreme Court noted, “[a] negative effect on a particular aspect of an injured person’s life [such as their work] 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.* at 137.

Accordingly, we find that plaintiff’s postimpairment life is not so different that her “general ability” to lead her normal life has been affected. Because plaintiff failed to establish that her impairment affected her general ability to conduct the course of her normal life, she did not satisfy the “serious impairment of body function” threshold for recovery of noneconomic damages. Accordingly, the trial court properly granted summary disposition in favor of defendant.

We affirm.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter