STATE OF MICHIGAN

COURT OF APPEALS

RYAN CHAMBERS,

Plaintiff-Appellant,

v

WERNER W. LEHMANN and ANDREWS UNIVERSITY,

Defendants-Appellants.

UNPUBLISHED
September 20, 2005

No. 262502
Berrien Circuit Court
LC No. 03-003378-NI

Before: Smolenski, P.J., and Murphy and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this action involving plaintiff's claim for noneconomic damages arising out of an accident in which plaintiff, while operating a motorcycle, was struck by a vehicle driven by defendant Lehmann. Lehmann was employed by defendant Andrews University at the time of the accident, and the vehicle driven by Lehmann was owned by Andrews University. The accident occurred on the grounds of the campus. The trial court found as a matter of law that plaintiff had not suffered a serious impairment of body function, thereby failing to establish the threshold requirement necessary to pursue noneconomic damages under MCL 500.3135. We affirm.

I. Allegations

On May 8, 2003, plaintiff filed a complaint against the two defendants, alleging that Lehmann, while driving a vehicle owned by Andrews University and during the course of his employment with Andrews, neglected to observe a stop sign and proceeded through an intersection where he struck plaintiff's motorcycle. The accident occurred on May 10, 2000, at which time plaintiff was a student at Andrews University. Plaintiff alleged that Lehmann was liable for the injuries incurred by plaintiff on the basis of negligent operation of a motor vehicle and that Andrews University was vicariously liable.[1] Plaintiff asserted that he suffered serious

[1] In Lehmann's response to plaintiff's request for admissions, Lehmann conceded that he failed to yield the right of way; however, he maintained that plaintiff was exceeding the speed limit at
(continued…)

impairment of body function, and more specifically, "acromioclavicular dislocation left shoulder, traumatic chestwall syndrome, bilateral traumatic patellar chondrosis, and multiple trauma[.]" Plaintiff sought economic and noneconomic damages.

II. Motion for Summary Disposition and the Trial Court's Ruling

On October 5, 2004, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff did not have a legitimate claim for economic losses and that, with respect to noneconomic damages, he failed to establish a serious impairment of body function where the accident did not produce an "objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." See MCL 500.3135(7). Defendants relied heavily on *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), along with medical documentation and plaintiff's deposition testimony. This evidence will be explored later in this opinion as part of our analysis.

Plaintiff responded to the motion, arguing that he suffered injuries to both knees, "an acromioclavicular dislocation of the left shoulder," and was suffering from traumatic chest-wall syndrome. On the issue of serious impairment, plaintiff attached only his personal affidavit in support of the response to defendant's motion for summary disposition. Plaintiff further argued that the knee injuries were the most serious of the injuries and that the knee injuries were comprised of two components, a torn meniscus and ACL laxity.[2] Plaintiff maintained that he was an avid participant in snowboarding, mountain-biking, and rollerblading, all of which he had to give up entirely because of the injuries to his knees. He also asserted that the injuries affected his work in a bike shop by preventing him from reaching overhead and stooping on a regular basis, and he contends that the injuries prevented him from completing a college course and obtaining a degree in graphic design that would have gone along with his degree in architecture, thereby leaving him grossly underemployed and necessitating a delayed effort to obtain a graphic design degree. Plaintiff argued that he endured four years of physical therapy, consumed medication for pain, and that, ultimately, surgical intervention was required. However, ACL and meniscus problems continue, and they are permanent in nature. We shall discuss the specifics of plaintiff's affidavit below as part of our analysis.

Defendants argued that long stretches of time had elapsed during which plaintiff failed to obtain medical assistance or treatment, although plaintiff had initially sought and received

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the time of the crash. Issues concerning negligence are not the subject of this appeal.

[2] Meniscus is "a wedge of cartilage between the articulating ends of the bones in certain joints." *Random House Webster's College Dictionary* (2001). ACL stands for "anterior cruciate ligament," which is defined as follows: "a cruciate ligament of each knee that is attached in front to the more medial aspect of the tibia, that passes upward, backward, and laterally through the middle of the knee crossing the posterior cruciate ligament to attach to the femur, that functions to prevent hyperextension of the knee and to keep the femur from sliding backward in relation to the tibia, and that is subject to sports injury especially by tearing[.]" *Merriam-Webster Medical Dictionary* (2003).

treatment directly following and soon after the accident.[3] The trial court, relying on *Kreiner*, ruled in relevant part:

> And in this situation the nature and extent of the impairment here are factors in the Court's judgment that in the absence of – in the absence of other evidence that does not appear in the record, the nature and the extent of the impairment here as far as the time between the accident and when treatment was sought by this Plaintiff does not inure to the Plaintiff's benefit. There – he saw Dr. Kolettis almost immediately after the accident. Dr. Kolettis did not place restrictions for a prolonged period of time – if I recall correctly, it was about six to eight weeks – and then didn't place any other restrictions on the – on the Plaintiff. In addition, then we have a very prolonged period of time, the – you know, in – measured in . . . years in which the Plaintiff does not seem to seek any sort of treatment for his . . . injuries until he sees the one doctor who then decides that surgery is necessary.
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> The Court is – based on this record and all the facts and circumstances the Court has in front of it, the restrictions that the Plaintiff is being placed under, such as a reduction in the amount of his athletic activity, in the Court's judgment does not meet the threshold of – of a change in the course or trajectory of the Plaintiff's normal life under the [*Kreiner*] standard.
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> To the extent that a class was not taken at Andrews University, it seems to me that the reason why that class wasn't completed was in part judgments made by the Plaintiff that were – that were not directly connected to the nature of his knee injury. He made some judgments as to what was best for him in terms of his education and his potential ability to find a job, but the Court doesn't connect that to the severity of the knee injury, which in the Court's judgment is required in order to conclude that the knee injury changed the course or trajectory of the [plaintiff's] life. . . . [T]he Court finds that under the [*Kriener*] standard that the Plaintiff does not have a serious impairment of body function because the injury has not changed the course or trajectory of his life . . . . So the motion for summary disposition is granted.

On November 17, 2004, an order granting defendants' motion for summary disposition was entered relative to the issue of noneconomic damages and serious impairment for the reasons articulated by the trial court from the bench during the hearing on the motion. On April 14, 2005, a consent judgment in plaintiff's favor in the amount of $1,350 was entered in regard to plaintiff's claim for economic losses. This resolved the last pending claim and closed the case at the trial court level. Plaintiff thereafter appealed as of right to this Court.

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[3] At oral argument, plaintiff's counsel argued that plaintiff had failed to obtain follow-up care for a significant period of time due to insurance disputes regarding coverage and plaintiff's lack of ability to cover medical costs. Counsel could not point to any evidence in the record supporting his contention.

III. Appellate Analysis

A. Overview of Plaintiff's Arguments

Plaintiff first argues that he indeed suffered a serious impairment of body function under the three-part statutory test and that there was evidence presented sufficient to survive summary disposition on the issue. He maintains that the injuries affected his general ability to lead his normal life because the injuries affected and impacted his college education, his employment, his physical activities, and his physical well-being for the remainder of his life. Plaintiff next argues that MCL 500.3135 must be read *in pari materia* with MCL 500.3009, which directs that vehicle owners carry a minimum of $20,000 in insurance coverage for bodily injury or death of one person in any one accident, and, therefore, if there is an injury valued at $20,000, it must meet the threshold requirement of a serious impairment of body function. Plaintiff points to the fact that mediation, or case evaluation as it is now called, resulted in a finding favorable to plaintiff in the amount of $100,000. According to plaintiff's logic, he thus suffered a serious impairment of body function. Finally, plaintiff argues that *Kreiner* was wrongly decided where our Supreme Court ruled that MCL 500.3135 requires that an injury affect the course or trajectory of a plaintiff's life.

B. Standard of Review and Summary Disposition Tests

This Court reviews de novo a trial court's ruling to either grant or deny a motion for summary disposition. *Kreiner, supra* at 129. Questions of statutory interpretation are likewise reviewed de novo. *Id.* Further, questions of law in general are reviewed de novo. See *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue in respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). "Where the burden of proof . . . on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003)(citations omitted).

C. Law and Discussion

Under the no-fault act, a plaintiff may recover noneconomic losses only where the plaintiff has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). The issue whether a person has suffered a serious impairment of body function is a question of law for the trial court to decide where the court finds that there is no factual dispute concerning the nature and extent of the person's injuries, or

where there is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a). 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." The effect of an impairment on the course of a plaintiff's entire normal life must be considered. *Kreiner, supra* at 131. "Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected and he does not meet the 'serious impairment of body function' threshold." *Id.* The *Kreiner* majority further ruled:

> In determining whether the course of plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing 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. Once this is identified, the court must 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. 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.
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> The following nonexhaustive list of objective factors 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. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in 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 132-134 (emphasis in original).]

The trial court did not conclude that plaintiff failed to provide sufficient evidence to show an objectively manifested impairment of an important body function. Rather, it is clear to this panel that the trial court's ruling rested solely on a finding that plaintiff failed to show that any impairment affected his general ability to lead his normal life. The court touched on the limited medical documentation regarding the placement of restrictions and indicated that the documentation dealt with treatment provided early on, with plaintiff then failing to seek medical treatment for a lengthy period of time before finally undergoing surgery. However, it appears that the essential component of the trial court's ruling was its conclusion that the diminishment of athletic activity did not equate to a change in the course or trajectory of plaintiff's normal life.

Furthermore, the court did not accept that the injuries had any actual bearing on plaintiff's failure to earn a degree in graphic design. The trial court did not address the effect of the impairment on plaintiff's employment.

On the basis of the record before us, we hold that reversal is unwarranted. Plaintiff has simply failed to provide sufficient and proper documentary evidence showing that there exists a genuine issue of material fact in regard to the necessary showing that the impairment affected his general ability to lead his normal life.

First, with respect to the particulars of the surgery, its aftermath, and plaintiff's claims of permanent knee instability and a prognosis of a lifetime of weakness and difficulty, the only evidentiary support is plaintiff's affidavit, yet there is no indication that plaintiff is a doctor or has the background or competence to discuss these matters. There is no medical documentation even reflecting that the surgery actually took place, let alone medical documentation on the specifics of the surgery or showing that the nature of the injuries despite the surgery are such that plaintiff will have to endure a lifetime of pain, instability, and weakness. Indeed, the report by Dr. Westerbeke suggests the contrary. Whether plaintiff's injuries will remain with him for his lifetime and questions regarding the seriousness of enduring injuries are all matters possibly within the scope of knowledge held by an expert in a relevant field of medicine such as a doctor engaged in the practice of orthopedics for our purposes here. See *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003)("Expert testimony is necessary to establish the standard of care because the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service . . . ."). Plaintiff is not equipped by common knowledge to aver as he did in his affidavit with regard to medical issues. *Id.*; see also MRE 702.

With respect to plaintiff's schooling and the impact of the injury allegedly depriving him of earning a degree in graphic design, the affidavit is factually insufficient and speculative. In his affidavit, plaintiff does not provide any insight or facts specifically explaining why he could not finish the color course, what efforts were made to complete the course, why he thereafter did not have "time" to retake *one* course in a two-year period, and why he could not have delayed graduation by a semester to retake a single extra course in order to obtain the degree. There is no explanation why he can not go back to Andrews University and take the course now so that a graphic design degree can be obtained. We have difficulty understanding how it is necessary to take classes for at least two years (until 2006) at the new school plaintiff is attending in order to, in essence, make up for one failed class in the spring of 2000. Plaintiff's documentary evidence, lacking in sufficient detail and raising many unanswered questions, does not support a finding that the impairment affected plaintiff's general ability to lead his normal life. Any relationship of this issue to future lost employment fails for the same reasons and because of the purely speculative nature of the argument.

Next, with respect to snowboarding, mountain-biking, and rollerblading, there is no medical documentation restricting plaintiff from taking part in these activities. Dr. Westerbeke stated, "It is my opinion that he does not require continuing medical treatment for these conditions, nor any restrictions related to his knee problems." Thus, any restrictions are self-imposed. The *Kreiner* Court stated that "[s]elf-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. Because of the limited context in which the

preceding quote from *Kreiner* is found, it does not appear to us that the Court was indicating that self-imposed restrictions are never worthy of consideration, especially in situations where there is clear proof of an objectively manifested impairment. Regardless, we find it unnecessary to explore the matter further because, assuming that plaintiff's self-imposed restrictions can be considered, plaintiff does not provide specific information on how much of his daily life had actually been devoted to the activities in question, and under the demanding standards set forth by the majority of our Supreme Court in *Kreiner*, we cannot conclude that the impairment affected plaintiff's general ability to lead his normal life for the reasons proffered by plaintiff.

With respect to the injuries' impact on plaintiff's work life, plaintiff conceded in his deposition that his one-time job at Target was not affected by the impairment. Furthermore, regarding his previous job with the painting company, plaintiff, while stating that he imposed some restrictions on himself, never indicated that he could not do the work required of him, nor that he lost time or pay on the job because of his injuries. In regard to the job at the bike shop, there is no evidence that plaintiff cannot perform his duties or that he has lost time or pay on the job because of the injuries. He simply avers, without further explanation in relation to relevancy to the particular position he holds at the shop, that the knee injuries have affected his work by preventing him from reaching overhead and stooping on a regular basis. The bottom line is that plaintiff continues to be employed.

In sum, on this record, the trial court did not err in finding that the impairment did not affect plaintiff's general ability to lead his normal life.

Plaintiff next argues that MCL 500.3135 must be read *in pari materia* with MCL 500.3009(1), which directs that vehicle owners carry a minimum of $20,000 in insurance coverage for bodily injury or death of one person in any one accident, and, therefore, if there is an injury valued at $20,000, it necessarily meets the threshold requirement of a serious impairment of body function.[4] Plaintiff points to the fact that the case evaluation resulted in an evaluation favorable to plaintiff in the amount of $100,000. Accordingly, plaintiff contends that he has suffered a serious impairment of body function. Plaintiff's argument is seriously flawed.

Two statutes that relate to the same subject or share a common purpose are *in pari materia* and must be read together as one law. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The purpose of the *in pari materia* rule is to give effect to the intent of the Legislature as found in harmonious statutes. *Id.* Where two statutes can be construed in a manner that avoids conflict, such construction should control. *Id.*

Here, although MCL 500.3009 and MCL 500.3135 both address residual tort liability in a broad sense, the relevant portion of MCL 500.3009 specifically addresses the subject of minimum insurance coverage necessary to lawfully operate a vehicle, and the relevant portion of MCL 500.3135 deals with the subjects of serious impairment of body function and the situations

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[4] Plaintiff also ties in MCL 500.3131, which provides that residual liability insurance shall cover bodily injury and shall afford coverage for vehicle liability retained by MCL 500.3135.

in which a party may remain liable in tort for noneconomic damages. Assuming application of the *in pari materia* rule, the statutes can be read harmoniously. MCL 500.3135(7) defines "serious impairment of body function" without any reference whatsoever to the dollar value placed on the injury, and plaintiff's argument is directly contrary to the clear language of MCL 500.3135(7). Simply because one must be insured in accordance with the $20,000/$40,000 statutory minimums does not mean that an injury valued at $20,000 or more must necessarily be deemed a "serious impairment of body function." There is no direct correlation between the statutorily-mandated insurance coverage or the value of an injury and a "serious impairment of body function." Moreover, the case evaluation amount relied on by plaintiff has no meaning outside the context of MCR 2.403, which governs case evaluations and which makes evaluations relevant only as to potential sanctions following a verdict. MCR 2.403(J)(4) provides that "[s]tatements by the attorneys and the briefs or summaries are not admissible in any court or evidentiary proceeding." And MCR 2.403 does not contain any language suggesting that an evaluation amount is admissible for consideration at trial or for purposes of summary disposition. Plaintiff's argument is devoid of any legal merit.

Regarding plaintiff's argument that *Kreiner* was wrongly decided where our Supreme Court stated that MCL 500.3135 requires that an injury affect the course or trajectory of a plaintiff's life, we, as the lower appellate Court in this state, are not in a position to overrule *Kriener* and are legally obligated to abide by and apply *Kreiner*. Even though we also have serious reservations about the ruling in *Kreiner*, our Supreme Court has spoken, and its decision represents binding precedent that must be followed.

IV. Conclusion

The trial court did not err in ruling that plaintiff failed as a matter of law to show that he had suffered a serious impairment of body function. Moreover, plaintiff's argument concerning the *in pari materia* rule was properly rejected by the trial court as it is devoid of merit. Finally, we are not permitted to reject or overrule *Kreiner* as suggested by plaintiff.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Alton T. Davis