

STATE OF MICHIGAN
COURT OF APPEALS

DENIS J. DONOVAN, JR.,

Plaintiff-Appellant,

v

METRO PLANT SERVICES, INC., and
LAQUITA HILL,

Defendants-Appellees.

UNPUBLISHED

March 6, 2008

No. 275373

Wayne Circuit Court

LC No. 05-506577-NI

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) in this action involving a motor vehicle accident that allegedly resulted in plaintiff suffering a serious impairment of body function, as required to recover noneconomic damages under MCL 500.3135. The trial court found that plaintiff had not met the serious impairment threshold as a matter of law because there was a failure to show that the injuries affected plaintiff's general ability to lead his normal life, MCL 500.3135(7). We reverse and remand for further proceedings.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (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 with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "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). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Under MCL 500.3135(1), 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

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.” MCL 500.3135(7).

Under *Kreiner*, *supra* at 131-132, a court must first determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If the court makes such a conclusion, it may continue to the next step. *Id.* at 132. But, if the court determines that there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. *Id.*, citing MCL 500.3135(2)(a)(i) and (ii).

If the court can decide 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.” *Kreiner*, *supra* at 132. If a court finds that an important body function has been impaired, it must then determine whether the impairment was objectively manifested. *Id.* If the court finds that there has been 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. *Id.* The court should objectively determine whether any change in lifestyle “has actually affected the plaintiff's ‘general ability’ to conduct the course of his life.” *Id.* at 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.* (emphasis in original). The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. *Id.* 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.* “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.

Importantly, an impairment of short duration may constitute a serious impairment of body function if its effect on the plaintiff's life is extensive. *Williams v Medukas*, 266 Mich App 505, 508; 702 NW2d 667 (2005). The *Kreiner* Court emphasized that an impairment of short duration does not necessarily preclude a finding that a plaintiff suffered a serious impairment of body function. *Kreiner*, *supra* at 134. Commenting on that aspect of *Kreiner*, this Court in *Benefiel v Auto Owners Ins Co*, __ Mich App __; __ NW2d __ (2007)(Docket No. 273664), slip op at 7, stated that “the more extensive the nature and extent of the impairment, the lesser the need for a lengthy or permanent duration of impairment in order to qualify an impairment as a serious impairment of body function.” This principle is applicable in the context of this case.

Here, plaintiff experienced left shoulder pain following the accident that progressively worsened and became more severe over the course of several months until it became necessary for plaintiff to undergo arthroscopic shoulder surgery. The orthopedic surgeon prescribed a three-month session of physical therapy to begin four weeks after the surgery, and plaintiff did participate in physical therapy. But the defining period of time for purposes of our analysis is the one- to two-month period immediately after the surgery. With respect to a portion or all of that time period, and in some cases beyond, the documentary evidence submitted by plaintiff

reflected that he could not, or could but only with great pain and difficulty, work, drive, bathe himself, dress himself, tie his own shoes, brush his hair, clean, cook, mow, do laundry, and he was unable to raise his left arm more than six inches away from his thigh. He was generally unable to engage in normal daily activities or his usual routine. Further, plaintiff had to purchase a reclining chair in which to sleep because he could not sleep laying flat, and plaintiff needed assistance getting up from the recliner. Indeed, plaintiff was forced to rely on his fiancée, father, and friends to assist him with basic tasks associated with daily living, including the simple task of buttoning his clothes. The question becomes whether these facts were sufficient for purposes of showing that the impairment affected plaintiff's general ability to lead his normal life. Looking at the plain meaning of the words used in MCL 500.3135(7) ("affects the person's general ability to lead his or her normal life"), and those words only, the initial response would be a resounding "yes." The statutory language has no express, and we believe no implicit, time component. However, we must take into consideration the interpretation of those words as set forth in *Kreiner* and its progeny.

Plaintiff's period of impairment was clearly one of short duration, but it was also extensive with respect to the limits it placed on plaintiff's life. The impairment was all-encompassing, touching on virtually every aspect of plaintiff's daily activities. *Kreiner*'s reference to impairments of short duration and the possibility that such impairments could satisfy the threshold for recovering noneconomic damages most certainly was meant to address cases in which the short-lived impairment severely or completely hampered nearly all aspects of a plaintiff's life. And this was recognized in *Benefiel, supra*, slip op at 7. If the language in *Kreiner* is not given such an interpretation, the statement that impairments of short duration can qualify as a serious impairment of body function loses all meaning and is rendered nugatory, which clearly was not the intent of the Court. We do note that the discussion of short-duration impairments in *Kreiner*, as well as the Court's emphasis that an impairment need not be permanent, appear to be somewhat at odds with other language in the opinion that refers to the "course" or "trajectory" of a plaintiff's normal life, to the plaintiff's "entire" normal life, and to the requirement that the injury be of "sufficient duration to affect the course of a plaintiff's life." *Kreiner, supra* at 130-135.¹ It would appear to this panel that the course or trajectory of a person's life can be affected, if even momentarily, by a devastating, yet short-lived impairment, and the reference to one's "entire" normal life was clearly directed at requiring an effect on work, home, and recreational activities, i.e., most or all aspects of a person's life. Until the Supreme Court decides to clarify some of the apparent contradictions in *Kreiner*, we find it necessary to give some meaning to the language concerning impairments of short duration. It appears to this panel that an impairment that effectively limits the ability to carry out all of one's normal activities (work, home, and recreational) meets the threshold despite the fact that the impairment may be of short duration, although in such a situation the amount of damages tied to the impairment would generally be lower because of the brief period involved.

¹ It is difficult to divine what period of time constitutes "sufficient duration" to permissibly allow an impairment of "short" duration to qualify as a serious impairment of body function.

Defendants did not present any evidence that countered plaintiff's evidence regarding the nature and quality of his life for the period of short duration after the surgery. In their appellate brief, defendants state, "Following surgery, Plaintiff's ability to care for himself was apparently restricted for a limited number of weeks, and Plaintiff did not return to work as a U.S. Marshal for a limited number of months." Accordingly, and based on our observations and the facts stated above, we find as a matter of law that the impairment affected plaintiff's general ability to lead his normal life. Defendants proceeded below, and proceed on appeal, on the assumption that defendant Hill was negligent and liable relative to the accident and that plaintiff can show an objectively manifested impairment that was proximately caused by the accident, but this is only for the purpose of analyzing the serious impairment issue in the context of the factor requiring an effect on plaintiff's normal life. Defendants clearly indicate that should their narrow argument fail on this point, they vehemently challenge the claim that plaintiff suffered an objectively manifested impairment that was proximately caused by the accident, as well as challenging defendant Hill's liability for the accident. Therefore, on remand, only if Hill is found negligent and liable for the accident, and only if it is proven that the accident proximately caused plaintiff's left shoulder injury, as objectively manifested, and the need for surgery, judgment is to be entered in favor of plaintiff in the amount determined by the trier of fact.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ William B. Murphy

/s/ Stephen L. Borrello