

STATE OF MICHIGAN
COURT OF APPEALS

HAMID NASSAR,

Plaintiff-Appellant,

v

HAIDAR MOHAMAD-KHALIL BAZZI,

Defendant-Appellee.

UNPUBLISHED

November 13, 2008

No. 280861

Wayne Circuit Court

LC No. 06-633102-NI

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) and dismissing plaintiff's claim for damages for an alleged serious impairment of an important bodily function under the Michigan no-fault insurance act, MCL 500.3101 *et seq.* We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E). A motion pursuant to MCR 2.116(C)(10) which tests the factual sufficiency of the plaintiff's complaint, provides as follows:

This Court reviews de novo a trial court's decision on a motion for summary disposition. . . .The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. [*Robinson v Ford Motor Co*, 277 Mich App 146, 150-151; 744 NW2d 363 (2007) (citations omitted).]

The Michigan no-fault insurance act states that in order to maintain a cause of action for non-economic damages arising out of an individual's ownership, use, or maintenance of a motor vehicle, a plaintiff must demonstrate that he "suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is "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).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the Supreme Court set forth the standards for assessing whether a plaintiff has sustained a serious impairment of body function. In determining whether a plaintiff has suffered a serious impairment of body function, the trial court must consider the following: (1) whether an important body function of plaintiff

has been impaired; (2) whether the impairment is objectively manifested; and (3) whether the impairment affects the plaintiff's general ability to lead his or her normal life. *Id.* at 132. For an impairment to be objectively manifested, there must be a medically identifiable injury or a condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). Medically unsubstantiated pain is not an objectively manifested injury. *Kosack v Moore*, 144 Mich App 485, 488; 375 NW2d 742 (1985).

Under *Kreiner*, to determine whether a person is generally able to lead his or her normal life, a court must consider whether the objectively manifested impairment has affected the overall course of the plaintiff's life. *Kreiner, supra* at 130-131. The court must examine how, to what extent, and for how long the plaintiff's life has been affected by the impairment, looking at plaintiff's life both pre- and post-accident. *Id.* at 131-133. In addition, the court may consider such factors as the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery. *Id.* at 133-134.

A plaintiff is not required to establish that *every* aspect of his life has been affected in order to satisfy the tort threshold. *Id.* at 133 n 16. However, "[m]erely 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.* at 133. (internal quotations and emphasis removed). Self-imposed restrictions do not establish that an injury has affected a person's ability to lead his or her normal life. *Id.* at 133 and n 17.

Plaintiff argues that the trial court erred in finding that his impairment has not affected the overall course of his life.

The evidence does not establish that plaintiff's injuries have adversely affected his general ability to pursue his profession. Plaintiff has maintained employment as a cook, a job that requires him to be on his feet most of the time. While plaintiff testified that he took some time off work after the accident, the record is silent with regard to the amount of time that he missed. In addition, there is no indication in the record that plaintiff's absence from work was at the direction of his physician.

Nevertheless, pursuant to the authority of *Williams v Medukas*, 266 Mich App 505; 702 NW2d 667 (2005), we find that plaintiff presented sufficient evidence that his injury has affected his ability to lead his normal life. In *Williams*, although the plaintiff returned to his job, his inability to lift his right arm above his head adversely affected his basketball coaching and prevented him from playing golf and catch with his grandchildren. *Id.* at 508-509. While the plaintiff's physician did not explicitly restrict him from engaging in these activities, the physician had indicated that his range of motion would be permanently limited. *Id.* at 509. The *Williams* Court concluded that, while the limitations might not rise to the level of a serious impairment of body function for some people, these impairments could rise to the level of a serious impairment of a body function for a person who regularly participates in sporting activities that require a full range of motion. *Id.* Accordingly, this Court stated, "Given Williams' participation in teaching basketball and his love of golf, which he can no longer pursue, we must conclude that the limitations imposed by Williams' injuries affect his general ability to lead his normal life." *Id.*

In the present case, there is ample evidence in the record that plaintiff's ability to pursue his normal recreational activities has been adversely affected by his injuries. Plaintiff testified that, before the accident occurred, he ran two or three miles almost every day. He also played volleyball once a week and basketball once a month. In addition, plaintiff did a type of Swedish exercise two or three times a week, and went salsa dancing every Thursday. Moreover, plaintiff mowed the lawn and engaged in planting activities with his father. Since the accident, plaintiff testified that he has not been able to participate in any of these pastimes.

As in *Williams*, there is no evidence that plaintiff's physician specifically restricted him from engaging in these recreational activities. However, plaintiff's treating physician repeatedly advised plaintiff "to refrain from any strenuous vocational or unvocational [sic] activities, which may exacerbate his painful condition." A doctor's instruction that the patient should adjust his activities based on his pain level constitutes a physician-imposed restriction. See *McDaniel v Hemker*, 268 Mich App 269, 284-285; 707 NW2d 211 (2005). Moreover, plaintiff's physician's records indicate that plaintiff's range of motion has been limited.

We conclude that the trial court erred in failing to consider the effect of plaintiff's injury on his recreational activities. Plaintiff has presented sufficient evidence from which a fact finder could conclude that his injury has affected the overall course of his life. Given plaintiff's regular pre-accident participation in physical activities such as running, exercising, and dancing, which he can no longer pursue, the limitations imposed by plaintiff's injuries affect his general ability to lead his normal life. See *Williams, supra* at 508-509.

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

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis