

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GARY MARK McMANIGAL,

Plaintiff-Appellee,

v

GEORGE JAN LEVOSINSKI,

Defendant-Appellant.

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UNPUBLISHED

February 3, 2009

No. 283030

Oakland Circuit Court

LC No. 2007-080823-NI

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order denying his motion for summary disposition pursuant to MCR2.116(C)(10). We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sued defendant for injuries sustained in an automobile-motorcycle collision on May 31, 2004. Plaintiff suffered “an avulsion fracture off of the ulnar base of the proximal phalanx” on his right thumb in the collision. A treating physician placed plaintiff’s right hand in a thumb cast for two and one-half weeks, then replaced the cast with a thumb splint for an additional ten days. In a December 21, 2004 letter, plaintiff’s doctor, Corey Haber, D.O., indicated that plaintiff continued to report pain when flexing and extending his thumb. He also stated that the healed fracture had resulted in a mild decreased range of motion of about 15%, and that he thought it a “good likelihood” that plaintiff would suffer from traumatic arthritis in this joint “in the years to come”. As indicated by subsequent reports from Dr. Haber in March and December of 2007, the changes in plaintiff’s range of motion and his continued pain appear to be permanent, as does mildly decreased grip strength.

Plaintiff testified at deposition that, from 1998 until April 2004, he had been employed as a property manager at an apartment complex. His employment ended for reasons unrelated to the accident. In October 2004, he was hired as a property manager at another apartment complex, and he worked at that job until laid off in October 2006. From January to October 2006, plaintiff also worked as a painter. He earned approximately \$75,000 during that period.

Plaintiff testified that he had no trouble performing his job duties as a result of his injury, and that no physician placed any restrictions on the type of work he should perform. However, in a December 15, 2007 letter, Dr. Haber stated that, because plaintiff’s injury involved his

dominant hand and he continued to experience pain and weakness, Dr. Haber anticipated that plaintiff's injury would restrict his ability to use certain hand tools or "vibratory" tools.

Plaintiff maintained that he was unable to do certain things around the house during the time his thumb was in a cast or splint, but he was later able to perform normal household tasks and chores without assistance. Before the collision, plaintiff would hunt, fish, bicycle, ride his motorcycle, snowmobile, bowl, and play pool. Plaintiff resumed most of these activities after the cast and splint were removed. Plaintiff testified that he still hunts, rides a bicycle, fishes, and plays pool, although he noted some changed capacity in his ability to hunt or fish. He still owns and rides a motorcycle. He testified that extreme cold might stop him from snowmobiling, because his thumb hurts in the cold, and because the machine required the full use of his thumb to operate. Nothing about his condition appears to have affected plaintiff's ability to travel.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that plaintiff could not show a serious impairment of body function as required by MCL 500.3135(1). The circuit court denied the motion, finding that plaintiff had demonstrated that his injuries had affected his ability to lead his normal life.

Defendant argues that the trial court should have granted its motion for summary disposition on the ground that plaintiff failed to show that he suffered a threshold injury. We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Pursuant to MCL 500.3135, 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 "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 v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the reviewing court is to determine whether a factual dispute exists "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." *Id.* at 131-132. If there are material factual disputes, a court may not decide the issue as a matter of law. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, the question is one of law. *Id.* at 132.

When a court decides 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." *Id.* When a court finds 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. 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 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.* at 133. The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. 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.*

In addition, “[s]pecific activities should be examined with an understanding that not all activities have the same significance in a person’s overall life.” *Id.* at 131. Thus, where limitations on sporting activities “might not rise to the level of a serious impairment of body function for some people, in a person who regularly participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function.” *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005). However, “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.

Specifically in regard to residual impairments, the *Kreiner* Court noted, “Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.” *Id.* at 133 n 17. However, this Court has held that “[t]he necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment.” *McDaniel v Hemker*, 268 Mich App 269, 283-284; 707 NW2d 211 (2005). A physician need not offer a medically identifiable or physiological basis for imposing restrictions based on pain; however, a recitation of a physiological basis provides support for the conclusion that the restrictions are physician-imposed, rather than self-imposed. *Id.* at 284. In addition, this Court has recognized the difference between self-imposed limitations due to pain, and self-imposed limitations based on physical inability, which can support a finding that the plaintiff has suffered a threshold injury. *Id.* at 283-284.

In this case, plaintiff has arguably shown that he suffered an impairment of an ‘important body function’ and that this impairment was objectively manifested. However, we find that the trial court erred when it held that plaintiff had suffered serious impairment as that definition has been interpreted in *Kreiner*. The nature and extent of plaintiff’s impairment does not approach those suffered by the plaintiff Straub in the companion case to *Kreiner*, or by the plaintiff Kreiner himself, neither of whom was found to have met the threshold requirements for recovery. *Kreiner*, *supra* at 122-127, 135-136. Plaintiff’s thumb was placed in a cast for two and one-half weeks and was splinted for another ten days, with no apparent residual treatment. Thus the “nature and extent of the impairment” and “the type and length of treatment required” were not extensive. Plaintiff’s residual injuries are arguably permanent. The limitations plaintiff suffers are based, at least in part, on physical limitations of his range of motion. However, these residual effects are not extensive. Plaintiff’s injury has to this point had little to no impact on his ability to work. Even crediting Dr. Haber’s recent proposed work limitations as valid, they would not impact plaintiff’s ability to continue to work as the manager of an apartment complex, or as a painter. Plaintiff has shown little impact on his daily activities, such as his ability to perform chores around his home. Nor do plaintiff’s limitations greatly affect his ability to pursue his other interests. Of those listed, his ability to bowl seems the most impacted here, with perhaps his ability to snowmobile being also affected. The effects on the remainder of plaintiff’s activities are minor.

As a result, we find that, while plaintiff can demonstrate an actual injury with ongoing residual effects, he does not meet the stringent standards outlined in *Kreiner*.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Brian K. Zahra