STATE OF MICHIGAN

COURT OF APPEALS

NATHANIEL JENKINS and CHERYL JENKINS, Plaintiffs-Appellants,	UNPUBLISHED July 28, 2005
v	No. 260622 Wayne Circuit Court
CLYDE PETERSON, Defendant-Appellee.	LC No. 03-331370-NI

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In this automobile no-fault case, plaintiffs[1] appeal as of right the trial court's grant of summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

I

On July 12, 2003, Nathaniel stopped for a traffic signal and was allegedly struck from behind by defendant. Immediately after the accident, Nathaniel went to the hospital with complaints of shoulder pain. At the hospital, he was diagnosed with chronic shoulder problems. On the following day, Nathaniel returned to a different hospital with complaints of lower back pain, but was released with instructions to rest and avoid strenuous activities. Thereafter, he went to several doctors for treatment of his continuing lower back and shoulder pain. While three different doctors told Nathaniel that he could return to work at varying times,[2] his own

[1] Plaintiffs are husband and wife. Plaintiff Cheryl Jenkins sought compensation for loss of consortium and plaintiff Nathaniel Jenkins sought noneconomic loss benefits under MCL 500.3135.

[2] The discharge instructions from his emergency room visit on July 12, 2003 stated that Nathaniel could return to work after 2 days, but restricted him to no heavy lifting. On July 17, 2003, Dr. Schmitt took him off work until July 28, 2003. On July 28, 2003, Dr. Brandt recommended that plaintiff return to work with restrictions on lifting, bending and stooping. On October 9, 2003, Dr. Lawley wrote that Nathaniel was "capable of returning to his normal and customary job . . . without restrictions as of today's visit." On April 20, 2004, Dr. Drouillard wrote "At this point in time, I do not feel he is disabled. I feel that he can return to work in a janitorial capacity, although repetitive above (sic) overhead work with the left arm should be (continued…)

physician, Dr. Pollina, recommended that he refrain from working. Pollina diagnosed plaintiff with lumbar strain and shoulder pain, which he believed were caused by the accident. Pollina referred Nathaniel to Dr. Schreck for surgery on his shoulder, which was performed on December 22, 2003.

On September 19, 2003, plaintiffs filed their complaint against defendant. On September 8, 2004, defendant moved for summary disposition under MCR 2.116(C)(10). Defendant argued that, as a matter of law, Nathaniel's injuries did not meet the threshold requirement of an objectively manifested impairment of an important body function that affects the course of his overall life. On January 13, 2005, the trial court determined that plaintiffs had presented evidence that Nathaniel's injuries were objectively manifested, but determined that the injuries did not affect his ability to lead his normal life. Therefore, the trial court granted defendant's motion for summary disposition.

II

This Court reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. 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.* at 120.]

This Court also reviews de novo questions of statutory interpretation, such as whether plaintiff's injuries meet the threshold requirements of MCL 500.3135(7). *Sweatt v Dep't of Corrections*, 468 Mich 172, 177; 661 NW2d 201 (2003).

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 body function, or permanent serious disfigurement." As used in this section, "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).

Our Supreme Court has provided a framework to use for determining whether a plaintiff meets the serious impairment threshold. *Kreiner v Fischer*, 471 Mich 109, 131-134; 683 NW2d 611 (2004). First, a 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

(…continued)

avoided."

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, whether plaintiff's injuries constitute a serious impairment of a body function is a matter of law. MCL 500.3135(2)(a); *Kreiner*, *supra* at 132.

When a court decides that the issue is a matter of law, it must then go on to the second step in the analysis and determine whether "an 'important body function' of the plaintiff has been impaired." *Kreiner*, *supra* at 132. 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.* at 132. This involves an examination of the plaintiff's life before and after the accident. The court should objectively determine whether any change in his 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.* at 133. With 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.

III

Plaintiffs first contend that the trial court erred when it determined that, as a matter of law, Nathaniel's injuries did not meet the threshold requirement of a serious impairment of body function. We disagree.

For an injury to constitute an "objectively manifested impairment" under MCL 500.3135(7), the injury must be medically identifiable. *Jackson v Nelson*, 252 Mich App 643, 652; 654 NW2d 604 (2002). After the accident, Nathaniel had an x-ray performed on his shoulder that revealed a bony growth and cysts. In addition, MRI images of his shoulder and lower back revealed physical problems with these areas. Thus, the injuries were objectively manifested impairments. Furthermore, while several doctors described these injuries as chronic and questioned whether the injuries could have been caused by the accident,[3] Nathaniel's physician repeatedly asserted that it was his belief that Nathaniel's condition was exacerbated by

[3] When Nathaniel went to the hospital on the day of the accident, the attending physician wrote that the x-ray revealed a bony growth and cysts but that "none of this is related to the injury today." In his October 9, 2003 report, Dr. Lawley wrote that the changes on the MRI were not "caused or aggravated by [Nathaniel's] described motor vehicle accident but instead were a pre-existing condition." When Dr. Drouillard assessed Nathaniel's x-rays he wrote that the x-ray revealed degenerative changes that "clearly [have] nothing to do with [Nathaniel's] motor vehicle accident." In addition, Nathaniel saw Dr. Raju *before* the accident for shoulder pain and was diagnosed with a rotator cuff tear.

the accident.[4] Our Supreme Court has held that, regardless of the presence of a preexisting condition, "recovery is allowed if the trauma caused by the accident triggered symptoms from that condition." *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000). Hence, if a fact-finder were to find that Nathaniel's symptoms were triggered by the accident, even if related to preexisting conditions, the aggravation could constitute a serious impairment of body function. Finally, injuries to the lower back constitute an impairment of an important body function, *Kreiner*, *supra* at 136, as does an injury that inhibits movement of the shoulder. Therefore, Nathaniel's injuries were objectively manifested and constituted impairments of important body functions. The only remaining question is whether those impairments affected plaintiff's general ability to lead his normal life.

Our Supreme Court has stated that "to 'lead' one's normal life contemplates more than a minor interruption in life." *Kreiner*, *supra* at 130. Instead, "the objectively manifested impairment of an important body function must affect the *course* of a person's life." *Id.* at 130-131. Further, the Court explained,

> 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 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.* at 131.]

The plaintiff's whole life must be considered in making a determination as to whether the threshold has been met. *Id.* at 133 n 16. "Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs a specific activity may not change the fact that the person may still 'generally' be able to perform that activity." *Id.* at 131.

Plaintiffs contend that Nathaniel's inability to work, play basketball, bowl, shoot pool, perform household chores, and the decreased frequency of sexual relations with his wife are evidence that Nathaniel's injuries have affected his general ability to lead his normal life. While we agree that the inability to participate in these activities will often be sufficient to demonstrate that an injury has affected a plaintiff's general ability to lead his or her normal life, under the

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[4] Defendant suggests on appeal that this Court might affirm the trial court's decision on the alternative ground that plaintiffs failed to present objectively manifested evidence that Nathaniel's injuries were caused by the accident. While we recognize the compelling nature of the evidence presented against causation, we do not agree that this serves as an alternative basis for affirming. MCL 500.3135(7) does not require plaintiffs to present objectively manifested evidence of causation, but rather requires only that plaintiffs present evidence of an objectively manifested impairment of body function. Consequently, taking the evidence in the light most favorable to plaintiffs, Nathaniel's physician's opinion that the injuries were exacerbated by the accident were sufficient to create an issue of fact for the fact-finder on the issue of causation. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

unique facts of this case, we do not believe that plaintiffs have met the serious impairment threshold.

As already noted, several doctors saw Nathaniel and determined that he could return to work with few or no limitations. See *supra* note 2. While Pollina did recommend that Nathaniel refrain from working as of August 22, 2003, he did not conclude that Nathaniel was permanently disabled or unable to perform any work whatsoever.[5] Furthermore, Nathaniel testified at his deposition that Pollina only took him off work for eight weeks back around the time he had his MRI and that no doctor had since told him he could not work. He also testified that, despite the fact that there were other jobs that he could perform even with his injuries, he had not attempted to find a different job.[6] From these facts, we conclude that Nathaniel's work restrictions, after the expiration of the eight weeks recommended by Pollina, were self-imposed . Self-imposed restrictions, even if based on real pain, cannot establish a residual impairment. *Kreiner, supra* at 133 n 17. Likewise, given the fact that plaintiff testified that he has not held a job for longer than seven months and that he was unemployed from 1991 to 2001, we cannot conclude that his inability to work for the period covered by physician restrictions constituted an impairment that affected his general ability to lead his normal life.

For the same reasons, Nathaniel's restrictions on his ability to play basketball, bowl, shoot pool, perform chores around the house and the decrease in his sexual relations with his wife cannot constitute an impairment that affected his general ability to lead his normal life. Nathaniel testified at his deposition that he played basketball once or twice a week with "guys" in the neighborhood, but since the accident he has not tried to play. He also stated that he bowled once or twice a month and would shoot pool occasionally. Nathaniel said he has not tried to bowl since the accident and that he has tried to shoot pool, but cannot hold the stick properly. Furthermore, while plaintiff alleges that he can no longer perform chores and that his sex life has suffered terribly, at his deposition he testified that the only activities that he could think of that were affected by his injuries were his ability to play basketball, bowl, and shoot pool. Cheryl also testified at her deposition that she assigned some of the chores to other members of the family because Nathaniel would whine and complain when he had to perform them, but did not say that he could not perform them at all. In addition, she testified that he will still help tidy up the house and make the bed. She also said that her sexual relations with Nathaniel are less frequent, but that they are still able to have sexual relations.

Plaintiffs have not presented any evidence that Nathaniel's inability to play basketball, shoot pool, bowl, or do chores are anything other than self-imposed restrictions. Nathaniel's physician did not restrict him from performing any of these activities and there is no other objectively verifiable evidence that the injuries would prevent Nathaniel from performing these activities. See e.g. *Williams v Medukas,* ___ Mich App ___; ___ NW2d ___ (2005) (noting that

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[5] After August 22, 2003, Pollina noted improvements in both Nathaniel's shoulder and back.

[6] Nathaniel's employment with Jewish Vocational Services was terminated effective September 10, 2003, because he was unable to return to work and, as a probationary employee, was not entitled to medical leave.

plaintiff's physician had not restricted him from shooting baskets or playing golf, but did state that plaintiff's shoulder was healing in a way that would be permanently limited), *Moore v Cregeur*, ___ Mich App ___; ___ NW2d ___ (2005) (noting that plaintiff's physician stated that her vision loss was permanent and would affect her general ability to lead her normal life). Consequently, these subjective self-imposed limitations are inadequate, as a matter of law, to establish that Nathaniel's injuries constituted a serious impairment of body function. *Kreiner*, *supra* at 133 n 17. Furthermore, as already noted, we cannot conclude that the temporary physician imposed work restrictions significantly altered the course of Nathaniel's life. Consequently, even accepting all of plaintiffs' evidence as true, plaintiffs have failed to demonstrate that Nathaniel's injuries have affected his ability to lead his normal life and, therefore, the trial court properly determined that Nathaniel's injuries did not rise to the level of a serious impairment of body function.

IV

Plaintiffs next argue that the decision in *Kreiner*, *supra* is an unconstitutional violation of the Equal Protection clauses of the United States and Michigan Constitutions.[7] Plaintiffs' argument is without merit.

Plaintiffs argue that the *Kreiner* Court unconstitutionally requires different people with the same type of injury to be treated differently based upon the individual circumstances of their life. This, plaintiffs contend, results in the denial of the fundamental right to access the courts for those persons so discriminated against.[8] However, it is not the *Kreiner* Court that requires different treatment for persons with the same injury, it is the statute itself that calls for differing treatment. See MCL 500.3135(7). Hence plaintiffs' argument is actually an attack on the constitutionality of MCL 500.3135(7).

Our Supreme Court has stated that "it cannot be that the mere occurrence of different outcomes between two citizens is in itself sufficient to make an act unconstitutional." *Phillips v Mirac, Inc*, 470 Mich 415, 432; 685 NW2d 174 (2004). On the contrary, "when any statute is passed, the Legislature is almost invariably deciding to treat certain individuals differently from others." *Id.* at 431. Therefore, unless the statute makes a classification based on suspect factors

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[7] See US Const, Am XIV; Const 1963, art 1, § 2.

[8] Plaintiffs cite footnote 19 of *Kreiner* as an example of just such a violation of the equal protection of the laws. This footnote reads:

> We agree with the dissent that the "serious impairment of body function" inquiry must "proceed[] on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations." *Post* at 145. Whether an impairment that precludes a person from throwing a ninety-five miles-an-hour fastball is a "serious impairment of body function" may depend on whether the person is a professional baseball player or an accountant who likes to play catch with his son every once in a while.

such as race, national origin, ethnicity, or a fundamental right, this Court will uphold the legislation as long as it is rationally related to a legitimate government purpose. *Id.* at 432-433.

In this case, the statute treats persons who have injuries that interfere with their general ability to lead their normal life differently than persons who have injuries that do not affect their general ability to lead their normal life. This classification can and will result in some persons being barred from recovery in tort even though other persons with identical injuries will be permitted to recover. However, the classification is not based on one of the suspect factors and the right to recover in tort is not a fundamental right. *Id.* at 434. The statute must be upheld if it is rationally related to a legitimate government purpose. *Id.* at 433. While plaintiffs might disagree with the effectiveness of the legislature's approach or the policy goals behind it, our Supreme Court has already determined that the partial abolishment of common law remedies is rationally related to legitimate government purposes including the prevention of overcompensation for minor injuries and the overburdening of the courts. *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978). Consequently, the statute does not violate the Equal Protection clauses of either the United States or Michigan Constitutions.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot