

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

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EMMA O'KEEFE,

Plaintiff-Appellant,

V

AUTO CLUB INSURANCE ASSOCIATION,

Defendant,

and

FRANCIS KIRCHOFF,

Defendant-Appellee.

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UNPUBLISHED

November 10, 2009

No. 287644

Oakland Circuit Court

LC No. 2007-086190-NF

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition in favor of defendant Kirchoff in this personal injury action. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On October 7, 2006, Kirchoff backed her car into one driven by plaintiff. Plaintiff did not seek treatment immediately, but later contended that she suffered neck and back injuries in the accident. Plaintiff sued to recover noneconomic damages for the injuries. Defendant moved for summary disposition, 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 trial court agreed, concluding that while plaintiff had suffered an objectively manifested impairment sufficient to satisfy the statute, plaintiff had not demonstrated an effect on her general ability to lead her normal life sufficient to show that she had 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).

As to whether an injury constitutes a serious impairment, 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.” *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.* 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.” *Kreiner, supra* 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.

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.

Defendant concedes, at least for the purpose of this appeal, that plaintiff suffered objectively manifested back and neck injuries as a result of the accident. The medical history contained in the file supports this, at least to an extent that there is a question of fact regarding whether her back and neck injuries were caused or exacerbated by the accident. However, we find that the trial court erred when it determined that plaintiff's injuries had not affected her normal life to the extent necessary to show a threshold injury under *Kreiner*.

The nature and extent of the initial impairment, and the type and length of treatment plaintiff required, were not extensive here. Plaintiff did not seek treatment immediately, and her crash was not severe. In addition, her entire course of treatment appears to have consisted, apart from diagnostic tests, of one physical therapy session of a treatment regimen that was ended "for personal reasons", two cervical epidural steroid injections, and treatment with pain and muscle relaxant medications.

However, plaintiff's residual impairments appear to be permanent, and reportedly have affected all aspects of her life. Plaintiff performed her own yard work before the accident, but had not attempted to perform yard work since the accident, leaving it to her grandson. She routinely performed her own housework prior to the accident, with occasional help from her granddaughter; after the accident, she received help from her granddaughter three times per week. Her granddaughter cooked for her on Sunday morning, and dusted and vacuumed. Plaintiff still cooked, but apparently had not tried to bake since the accident because she was afraid that her neck would bother her. As to other activities, plaintiff testified that she and her grandchildren used to do everything together. Since the accident, she continued to see them frequently. However, she maintained that she now had trouble reading to them or doing puzzles with them for lengthy periods because of her neck pain. She had trouble reading for pleasure for long periods, also due to neck pain. She could apparently control the pain with medication, but would have to lie down if it was not time for her to take a pain pill. Since the accident she had not used the treadmill because she was afraid that she would get hurt. She used to go camping before the accident; since the accident, she had camped twice. She did not go on walks because she thought that her back or neck would give out. Plaintiff also testified that she and her husband no longer enjoyed marital relations as they had in the past.

The trial court's determination that this plaintiff did not meet the threshold of injury was solely based upon a finding that her restrictions were self-imposed. Under *Kreiner*, her self-imposed limitations cannot be used to establish a threshold injury. "Stated differently, [plaintiff] cannot establish the extent of her residual impairment by merely claiming that she has restricted herself from engaging in activities or making certain movements because she experiences pain." *McDaniels, supra* at 283. The court is required to construe all evidence in the light most favorable to the party opposing summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466-467; 760 NW2d 217 (2008). Plaintiff argues that her physician's letter stating that plaintiff needed attendant care services for house and yard work constitutes a physician-imposed limitation on her activities. The letter does not explicitly restrict plaintiff's activity, but it is a reasonable inference that if a physician prescribes attending care services for house cleaning, laundry, shopping and garden work he has determined that plaintiff cannot do these things without assistance.

Under the circumstances, we find that the trial court incorrectly determined that plaintiff has not established a threshold injury.

Reversed and remanded. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Donald S. Owens