

STATE OF MICHIGAN
COURT OF APPEALS

GARY MARK McMANIGAL,
Plaintiff-Appellee,

UNPUBLISHED
January 11, 2011

v

GEORGE JAN LEVOSINSKI,
Defendant-Appellant.

No. 283030
Oakland Circuit Court
LC No. 2007-080823-NI

ON REMAND

Before: HOEKSTRA, P.J., and FITZGERALD and ZAHRA, JJ.

PER CURIAM.

On February 3, 2009, this Court issued an opinion reversing the trial court's denial of defendant's motion for summary disposition in this automobile negligence case. *McManigal v Levosinski*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket No. 283030). The Supreme Court, after first ordering the matter held in abeyance pending the decision in *McCormick v Carrier*, 487 Mich ___; ___ NW2d ___ (Docket No. 136738, decided July 31, 2010), vacated the judgment of this Court and remanded to this Court "for reconsideration in light of *McCormick*." We reverse.

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 being 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 could 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.

In our original opinion in this case, we set out the statutory and case law applicable at that time:

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. 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. [*McManigal*, slip op at 2-3.]

Thereafter, we set forth our conclusions based on the evidence and the law:

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*. [*McManigal*, slip op at 3-4.]

We reversed the trial court's decision and remanded the case for entry of summary disposition in favor of defendant. *Id.* at 4.

We now reconsider this matter in light of *McCormick*. In *McCormick*, our Supreme Court revisited the issue of what constitutes a threshold injury, i.e., a serious impairment of body function, under MCL 500.3135(1) and MCL 500.3135(7). *McCormick* rejected the *Kreiner* Court's reliance on factors such 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, to determine whether the injury affected the "course or trajectory" of a person's entire normal life, *Kreiner*, 471 Mich at 130-133, and found that "the analysis does not 'lend itself to any bright-line rule or imposition of [a] nonexhaustive list of factors,' particularly where there is no basis in the statute for such factors." *McCormick*, 487 Mich at 216 (citation omitted). *McCormick* requires an examination of the plaintiff's life before and after the accident in order to determine "the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life[.]" *Id.* slip op at 20. The *McCormick* Court held that this comparison requires the consideration of three points:

First, the statute merely requires that a person's general ability to lead his or her normal life has been *affected*, not destroyed. Thus, courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her preincident normal life, the person's general ability to do so was nonetheless affected.

Second, and relatedly, “general” modifies “*ability*,” not “affect” or “normal life.” Thus, the plain language of the statute only requires that some of the person’s *ability* to live in his or her normal manner of living has been affected, not that some of the person’s normal manner of living has itself been affected. Thus, while the extent to which a person’s general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person’s normal manner of living is, there is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected.

Third, and finally, the statute does not create an express temporal requirement as to how long an impairment must last in order to have an effect on “the person’s general ability to live his or her normal life.” [*Id.* at 202-203 (emphasis in original).]

The *McCormick* Court indicated that the review of whether an injury has affected a person’s general ability to lead his or her normal life is a review of whether the impairment “influences some of the plaintiff’s capacity to live in his or her normal manner of living.” *Id.* at 215.

The *McCormick* Court summarized its holding as follows:

[T]he proper interpretation of the clear and unambiguous language in MCL 500.3135 creates the following test.

To begin with, the court should determine whether there is a factual dispute regarding the nature and the extent of the person’s injuries, and, if so, whether the dispute is material to determining whether the serious impairment of body function threshold is met. MCL 500.3135(2)(a)(i) and (ii). If there is no factual dispute, or no material factual dispute, then whether the threshold is met is a question of law for the court. *Id.*

If the court may decide the issue as a matter of law, it should next determine whether the serious impairment threshold has been crossed. The unambiguous language of MCL 500.3135(7) provides three prongs that are necessary to establish a “serious impairment of body function”: (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person’s general ability to lead his or her normal life (influences some of the plaintiff’s capacity to live in his or her normal manner of living).

The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis. As stated in the *Kreiner* dissent, “[t]he Legislature recognized that what is important to one is not important to all[;] a brief impairment may be devastating whereas a near permanent impairment may have little effect. *Kreiner*, 471 Mich at 145 (CAVANAGH, J., dissenting). As such, the analysis does not “lend itself to any bright-line rule or imposition of [a] nonexhaustive list of factors,” particularly

where there is no basis in the statute for such factors. *Id.* Accordingly, because “[t]he Legislature avoided drawing lines in the sand . . . so must we.” *Id.* [*McCormick*, 487 Mich at 215-216 (footnote omitted).]

We conclude that, under the test set out in *McCormick*, plaintiff has not met the serious impairment threshold as a matter of law and, therefore, defendant is entitled to summary disposition.

Plaintiff suffered an objectively manifested impairment, specifically, “an avulsion fracture off of the ulnar base of the proximal phalanx” on his right thumb that was visible on x-rays. The use of the dominant hand can be considered an important body function. Because there is no factual dispute regarding the nature and extent of plaintiff’s injuries, whether the serious impairment threshold is met is a question of law for the court. MCL 500.3135(2)(a)(ii). As the *McCormick* Court noted, this analysis is, by necessity, based on the facts and circumstances of the case. *McCormick*, 487 Mich at 215.

In this case, prior to the accident, plaintiff worked as a manager of an apartment complex,¹ and enjoyed hobbies such as hunting, fishing, bicycle riding, motorcycling, snowmobiling, bowling, and playing pool.

Plaintiff sustained a fractured right thumb on May 31, 2004. He wore a thumb cast for two-and-a-half weeks, and a splint for ten days thereafter. Plaintiff obtained employment as an apartment complex manager in October 2004, and continued in that position until October 2006, when he was laid off for reasons unrelated to the accident. Plaintiff also worked as a painter for approximately ten months in 2006. No evidence indicated that plaintiff’s residual impairment (i.e., his thumb’s restricted range of motion) affected his ability to work.² Plaintiff was unable to do household chores while his thumb was immobilized in the cast and splint, but later was able to resume doing the chores without assistance. Plaintiff indicated that his residual impairment prevented him from bowling, might prevent him from snowmobiling (plaintiff had not engaged in that activity because his snowmobile was not licensed), and bothered him somewhat when fishing and hunting. He did not indicate that his other hobbies were affected by his condition.

In sum, plaintiff’s residual impairment from the accident did not prevent him from working at the same type of employment he held before the accident, and seemingly only prevented him from bowling, one of many hobbies in which he engaged prior to the accident. No evidence indicated that plaintiff participated in bowling with greater frequency than he did

¹ Plaintiff’s employment had been terminated prior to the accident for reasons that are not pertinent to this appeal.

² A December 2007 letter from plaintiff’s physician anticipated that plaintiff’s residual impairment would prevent plaintiff from using vibratory tools or hand tools where constant pressure was needed to control such tools; however, no evidence indicated that plaintiff had attempted to use such tools and had had difficulty doing so.

other hobbies. A person's normal life need not have been destroyed in order to have been affected, and there is no minimum percentage of a person's life which must have been affected in order to determine that an impairment has had an effect on a person's ability to lead his normal life. *McCormick*, 487 Mich at 203. However, in this case, the evidence indicates that plaintiff's ability to bowl was his only activity that was affected in any significant manner by his residual impairment from the accident. On the basis of these facts, we conclude that the objectively manifested impairment of an important body function did not affect plaintiff's general ability to lead his normal life (i.e., it did not influence some of plaintiff's capacity to live in his normal manner of living). *Id.* at 215. To conclude otherwise would, under the facts presented by this case, render any impairment, even one that prevented a person from engaging in an activity only a few times per year, a threshold injury under MCL 500.3135(1). Nothing in the language of the majority opinion in *McCormick* indicates that such a broad result was intended. We conclude that, under the test set out in *McCormick*, the trial court erroneously denied defendant's motion for summary disposition.

Reversed and remanded for entry of summary disposition in favor of defendant. Jurisdiction is not retained.

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