

STATE OF MICHIGAN
COURT OF APPEALS

LISA A. CHASE,

Plaintiff,

and

JEFFREY M. CHASE,

Plaintiff-Appellant,

v

SUSAN B. POMILIA, ALYSSA K. POMILIA,
GEORGE M. DEMAR, and CARL F. DEFILIPPO
III,

Defendants-Appellees.

UNPUBLISHED

May 18, 2010

No. 289680

Macomb Circuit Court

LC No. 2007-003979-NI

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

In this action to recover noneconomic damages under the no-fault act, MCL 500.3101 *et seq.*, plaintiff Jeffrey M. Chase appeals as of right the trial court's November 12, 2008, order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court held that plaintiff failed to establish a serious impairment of body function. Reversed and remanded.

I

Plaintiff was involved in a motor vehicle accident on the evening of December 3, 2005. The road conditions were snowy and slippery. Plaintiff was driving westbound on Clinton River Road in Clinton Township, Michigan. His wife and daughter were also in the vehicle. Defendant Alyssa K. Pomilia, who was driving eastbound on Clinton River Road, lost control of her vehicle. Pomilia's vehicle crossed the center line and struck the driver's side front corner of plaintiff's vehicle. The collision caused plaintiff's vehicle to spin and, as it was spinning, Pomilia's vehicle struck it a second time. Almost immediately, defendant Carl F. DeFilippo III's vehicle rear-ended plaintiff's vehicle.

Plaintiff's wife and daughter, as well as Pomilia, were injured in the accident and received emergency treatment. Plaintiff did not receive any treatment at that time. Five days after the accident, on December 8, 2005, plaintiff visited his family doctor, Dr. Louis Schwartz, complaining of pain in his neck, shoulder, rib, and back. Dr. Schwartz discovered that plaintiff had a broken collarbone. Plaintiff underwent pain treatment until December 2006, when Dr. Schwartz ordered an MRI of plaintiff's lower back and upper pelvic area. The MRI revealed two herniated discs and three bulging discs in his lumbar spine. At that point, plaintiff could no longer walk and was in constant pain. On February 13, 2007, Dr. Soo performed surgery on plaintiff's back, which entailed an L4-S1 bilateral laminectomy and discectomy with decompression of L4-5 and S1 nerve roots with fusion.

After the surgery, plaintiff used a walker for three months. At his deposition, plaintiff testified that after those three months of recovery, he was able to walk unassisted, but still suffers from lower and upper back pain, as well as increased depression. Dr. Schwartz and Dr. Soo agreed that plaintiff suffered back injuries that were the direct result of the December 3, 2005, car accident, continues to suffer persistent pain and will likely continue to suffer back pain throughout his lifetime, "continues to be restricted in his daily activities," "is currently restricted from any prolonged, repetitive, or strenuous activities involving reaching or stretching, pushing or pulling, as well as lifting bending, stooping, turning, twisting, walking, standing, or climbing," "continues to require household assistance," and "will likely continue to require future medical treatment over the course of his lifetime due to traumatic back injuries suffered." During discovery for this case, plaintiff was medically evaluated by Dr. Philip Friedman, who concluded:

[Plaintiff] is a 49-year-old gentleman who has a long history of depression and chronic low back pain. He is currently status post lumbar spinal fusion of L4 to S1. Clinical examination is consistent with prior fusion. He does have some altered dynamics of back movements but an objectively normal neurological examination. It is of note that in April of 2007, he had reported to Dr. Soo that he was 100% improved. Dr. Soo documents an essentially normal neurological examination.

* * *

At this time, I believe the claimant is likely at maximum medical improvement as is related to his lumbar spine fusion.

Plaintiff testified that he walks unassisted, drives his car, and does not have a disabled person's parking permit. He is not employed, but he has not been employed since approximately 2003. At the time of the accident, he received Social Security disability benefits for his depression. He does not need assistance with personal hygiene. He is limited in lifting, and whenever he does light work such as grocery shopping, laundry, or taking out the trash, he feels pain for the next day or two. He used to golf and bowl, but can no longer do those activities. He cannot work on their family's condominium, which they purchased "as is" in anticipation of plaintiff performing work on it, because he can no longer paint or lay carpet. He cannot work on his car. He is exhausted mentally and physically after performing only a few tasks or running a few errands. He does very limited housework and does not do any meal preparation. He and his family used to go on vacations, but they have not done so since the accident. He has not ridden

his bike or gone fishing since the accident. He owns a 14-foot boat, but “can’t do anything with it,” so he will have to sell it. He used to engage in recreational activities with his children, but is now limited to driving them places. He now walks his dog close to home instead of taking it for a walk every day in the park. He has problems bending, lifting, standing, carrying, and twisting that he did not have before. Plaintiff further testified that his depression has increased since the accident:

The way that I help myself with depression is to get up and get around and do things, like the apartment I was going to redo, you know. You feel good at the end of the day when you do something. It’s not my choice. I’m not happy that I don’t go to work every day and I’m on disability. I would rather be doing something, but, you know, I can’t do that and

* * *

Now I basically just sit around and think about things I should be doing and don’t feel good enough to get up and do them, okay. Until—also when I wake up and I’m in pain, then there’s no way that I’m going to get up and be able to have a good day. Depression was like, you know, 30/70 chance that I’d be able to get up and do anything anyways if I was—you know, that day, but this has pretty much killed that. I haven’t done anything I don’t have to do like drive a kid around or whatever except gone to my sister-in-law’s house one time since the accident. Nothing for enjoyment or socializing or anything. They will still go, and I’ll just stay home, because most of the time I’ve been just not well enough to go like socialize and communicate with other people.

During discovery, defendants obtained plaintiff’s Social Security records. Plaintiff filled out an application for benefits in October 2004, approximately 14 months before the accident. On his function report, dated November 2004, plaintiff wrote that he spent many days in bed or lying around the house doing nothing. On other days, he did grocery shopping, cleaning or repairs around the house, watched television, read a little, played chess, or went to the doctor. He attempted to help with his children, and walk and feed their dog. All of those activities were very inconsistent. He did not make any real meals, but occasionally barbecued. He used to golf and bowl, but did not do that anymore. Sometimes he could not sleep, and other times he slept for days. Plaintiff wrote that he felt numb, had no personality, and no longer socialized. As a part of his application for benefits, a psychologist evaluated plaintiff. In addition to the information in the function report, the psychological evaluation indicated that plaintiff used to golf, fish, and camp, but no longer did those activities. Plaintiff indicated that he owns a 14-foot boat but has not taken it out in years. Plaintiff was awarded Social Security benefits in May 2005. The decision stated that plaintiff had major depression, general anxiety disorder, and polyneuropathy. A disability determination and transmittal, dated June 2005, stated that plaintiff’s primary diagnosis was “disorders of back (discogenic and degenerative).” Plaintiff admitted at his deposition that he has had arthritis in his back for several years. In a self-

evaluation dated September 21, 2005, just over two months before the accident, plaintiff wrote that he was “active but depressed.”

Plaintiff filed suit against defendants in September 2007.¹ Defendants subsequently moved for summary disposition under MCR 2.116(C)(10), alleging that plaintiff’s injuries are not serious impairments of body function because they have not affected his general ability to lead his normal life. The trial court granted defendants’ motion, holding that plaintiff failed to establish a change in his employment, home life, or avocation, or any other meaningful change in his pre- and post-accident life. Plaintiff filed a motion for reconsideration, which the trial court denied. He now appeals as of right.

II

Plaintiff argues that the trial court erred in holding that he failed to establish a serious impairment of body function and granting defendants summary disposition. We agree.

We review a trial court’s decision on a motion for summary disposition de novo on the basis of the entire record 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). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all the admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120; MCR 2.116(G)(6). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120.

Under MCL 500.3135(1), a “person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” Subsection (7) states that “‘serious impairment of body function’ means an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” Whether a person has suffered serious impairment of body function is a question of law for the court, where there is no factual dispute concerning the nature and extent of the injuries, or where no such factual dispute is material to the question whether the person has suffered serious impairment of body function. MCL 500.3135(2)(a). Accordingly, “the issue . . . should be submitted to the jury only when the trial court determines that an ‘outcome-determinative genuine factual dispute’ exists.” *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001), quoting *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

In *Kreiner v Fischer*, 471 Mich 109, 121; 683 NW2d 611 (2004), our Supreme Court held that a serious impairment of body function is shown where the injury (1) is objectively manifested, (2) involves an important body function, and (3) affects the plaintiff’s general ability

¹ Plaintiff’s wife, Lisa A. Chase, initially joined in the suit against defendants. She has since dismissed her claims.

to lead his or her normal life. See MCL 500.3135(7). The first two factors of the *Kreiner* test are not at issue in this appeal. With respect to the third, *Kreiner* explained that proper consideration of the factor involves examining the totality of the plaintiff's circumstances before and after the accident. *Kreiner*, 471 Mich at 132, 134. "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 'general ability' to lead his normal life has not been affected." *Id.* at 131. *Kreiner* provided a nonexhaustive list of factors to be used when evaluating whether impairments affect the plaintiff's general ability to lead his or her normal life. *Id.* at 133. Specifically, courts should consider "(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.* (footnotes omitted).

In *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412, 413; 745 NW2d 174 (2007), vacated 482 Mich 1087 (2008), the plaintiff was involved in two motor vehicle accidents in one year. Reversing the trial court, this Court concluded that the plaintiff's general ability to lead his normal life was affected by the injuries he sustained in the second accident. *Id.* at 431. Our Supreme Court held that this Court properly reversed the trial court because there were disputed issues of fact, but vacated this Court's opinion because the analysis was "improperly premised on the plaintiff's 'normal life' as it existed prior to his first accident." *Benefiel v Auto-Owners Ins Co*, 482 Mich 1087; 759 NW2d 814 (2008). The Court held:

A plaintiff who has suffered successive injuries bears the burden of proving that his current injury was caused by the subsequent accident (and not by some independent occurrence). Therefore, the plaintiff must prove that his preexisting impairment is temporary in order to have his pre-impairment lifestyle considered as his 'normal life.' It follows that, in this situation, the plaintiff must show either that his preexisting impairment was exacerbated or that his recovery was prolonged as a result of the subsequent accident for which he seeks noneconomic damages. Furthermore, this subsequent impairment must meet the statutory threshold in order for the plaintiff to recover noneconomic damages. [*Id.* (citations omitted).]

In this case, plaintiff suffered a broken collarbone, two herniated discs, and three bulging discs in his lumbar spine as a result of the accident on December 3, 2005. He underwent pain treatment for one year. When plaintiff's condition became so severe that he could no longer walk and was in constant pain, he underwent back surgery. After the surgery, plaintiff used a walker for three months. After those three months of recovery, he was able to walk unassisted, but still suffers from lower and upper back pain. Although Dr. Friedman concluded that plaintiff had an objectively normal neurological examination and "is likely at maximum medical improvement as is related to his lumbar spine fusion," Drs. Schwartz and Soo agreed that plaintiff continues to suffer persistent back pain and will likely continue to suffer back pain and require future treatment throughout his lifetime. They agreed that plaintiff is restricted in his daily activities, including "any prolonged, repetitive, or strenuous activities involving reaching or stretching, pushing or pulling, as well as lifting bending, stooping, turning, twisting, walking, standing, or climbing," and requires household assistance.

It is undisputed that before the accident, the activities plaintiff engaged in were limited. He received Social Security disability benefits for major depression, general anxiety disorder, and polyneuropathy, and had not worked since approximately 2003 because of his depression. When plaintiff applied for benefits in 2004, he indicated that he spent many days sleeping or lying around the house doing nothing. On other days, he grocery shopped, cleaned or made repairs around the house, watched television, read, played chess, went to the doctor, made very light meals, and occasionally barbecued. He attempted to help with his children, and walk and feed their dog. He engaged in all of those activities on a very inconsistent basis, depending on how he felt emotionally. Plaintiff indicated that he used to golf, bowl, fish, camp, take out his boat, and socialize, but did not do so anymore. Plaintiff has not presented any evidence indicating that his condition was temporary or improving in any way, other than a self-evaluation dated just over two months before the accident, on which plaintiff wrote that he was “active but depressed.” Plaintiff admitted at his deposition that he had arthritis in his back before the accident, and a June 2005, Social Security record stated that his primary diagnosis was “disorders of back (discogenic and degenerative).”

Since the accident, plaintiff has not returned to work, done any of the recreational activities he used to enjoy, or socialized. He does not require assistance walking, driving, or with personal hygiene, and attempts to help around the house, grocery shop, drive his children where they need to go, and take care of their dog. Looking solely at this evidence, it appears that plaintiff’s life was relatively unchanged by the injuries he sustained in the accident. But, while plaintiff’s life was limited before the accident, it is more severely limited as a result of the accident. Plaintiff had some back pain before, but now suffers from persistent lower and upper back pain, making it difficult for him to bend, lift, stand, carry, and twist. Indeed, plaintiff’s doctors have restricted him from any prolonged, repetitive, or strenuous activities involving those motions, as well as others. While plaintiff used to participate in activities such as cleaning or household repairs, depending on how he felt emotionally, he now suffers from severe back pain for one or two days after doing any light work such as laundry, taking out the trash, or lifting grocery bags. He intended to renovate his family’s condominium, but can no longer paint or lay carpet because of his back pain. He cannot work on his car or walk the dog for long distances. Plaintiff’s depression has also been exacerbated as a result of his back condition. Before the accident, plaintiff attempted to cope with his depression by engaging in activities around the house such as cleaning, house repairs, or car repairs—activities that now cause him to suffer severe physical pain. Plaintiff’s inability to perform simple tasks such as these without pain has only increased his depression.

This case is comparable to *Anderson v Alexander*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277980), one of the cases cited by plaintiff on appeal. In that case, the plaintiff suffered several spinal injuries, and ultimately suffered permanent loss of mobility in his spine, as a result of a motor vehicle accident. *Id.* at 1. Before the accident, the plaintiff received Social Security disability benefits for a lower-back injury. *Id.* at 2. The plaintiff presented evidence that the accident “‘significantly aggravated’ any prior degenerative conditions, and ‘caused him restrictions in terms of bending, movement, and other functions of his cervical spine.’” *Id.* He also provided a list of activities in which he could no longer engage as well as he could before the accident. *Id.* Reversing the trial court, this Court held:

The gravamen of the trial court’s conclusion was that plaintiff was in poor physical condition prior to the accident, so the fact that he is in poor physical condition after the accident is insufficient to demonstrate “serious impairment.” We believe that the trial court’s reasoning is mistaken. The mere fact that plaintiff was no longer young and was already unable to work because of a lower back injury does not necessarily mean that further back injury cannot affect the trajectory of the remainder of his life. Indeed, an injury that a completely healthy person might deem minor could, perhaps nonintuitively, have a tremendous relative impact on a person who already has limited mobility. The significance of plaintiff’s well-established preexisting frailties and limitations could well be that an ostensibly small additional—which the permanent fusion of part of plaintiff’s spine and the loss of flexibility resulting therefrom certainly is, at a minimum—is nevertheless large enough to significantly impair what little such a plaintiff has left to lose.

It is not disputed that plaintiff’s “normal life” before the accident was fraught with challenges. It is also not disputed that the accident resulted in another significant challenge being added to that burden. When plaintiff’s “whole life” before the accident is compared to his “whole life” after the accident, we believe that plaintiff’s additional spinal injury has affected his “general ability” to lead his life. [*Id.* at 3.]²

Considering the totality of plaintiff’s circumstances before and after the accident, plaintiff’s general ability to lead his normal life, or the course or trajectory of his normal life, has been affected by the injuries he sustained. *Kreiner*, 471 Mich at 121, 131-132, 134. Before the accident, plaintiff engaged in only a few activities, and even then, his activity level depended on how he felt emotionally. As a result of the accident, however, even those few activities cause plaintiff to suffer severe back pain, which has also exacerbated his depression. Plaintiff’s doctors agree that he will likely continue to suffer back pain and require future treatment throughout his lifetime because of the injuries he sustained in the accident. Accordingly, we conclude that plaintiff has established a serious impairment of body function.

We reverse the trial court’s order granting summary disposition to defendants and remand for entry of an order granting summary disposition to plaintiff on the issue of serious impairment of body function and further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Jane M. Beckering

² Although we are not precedentially bound by unpublished opinions of this Court, we find the reasoning in *Anderson* persuasive.

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Before: METER, P.J., and MURRAY and BECKERING, JJ.

MURRAY, J. (*dissenting*).

The majority opinion reverses the trial court's order granting defendant's motion for summary disposition, and rules that plaintiff has established a serious impairment of body function as a matter of law under MCL 500.3135(7). In doing so, the Court primarily relies upon the Supreme Court order in *Benefiel v Auto Owner's Ins Co*, 482 Mich 1087; 759 NW2d 814 (2008), and the admittedly nonbinding unpublished split decision in *Anderson v Alexander*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277980). In my view, however, this case is properly resolved under the still binding decision of *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), and under that decision the trial court's thorough opinion should be affirmed.

In my view, the majority does not properly adhere to the standards set forth in *Kreiner*. In that case, the Supreme Court held, *inter alia*, that a serious impairment of body function is proven when the injury affects the plaintiff's general ability to leave his or her normal life. See MCL 500.3135(7) ("serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to live his or her *normal life*") (emphasis added). Under this standard, which is based on the text of the statute, "[a]lthough some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite

those impingements, the course of trajectory of the plaintiff's normal life has not been affected, and the plaintiff's 'general ability' to lead his normal life has not been affected" *Kreiner*, 471 Mich at 131. The *Kreiner* Court provided the following instruction on deciding this issue:

[T]o "lead" one's normal life contemplates more than a minor interruption in life. To "lead" means, among other things, "to conduct or bring in a particular course." Given this meaning, the objectively manifested impairment of an important body function must affect the *course* of a person's life. Accordingly, the affect of the impairment on the course of a plaintiff's entire normal life must be considered. 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 "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 130-131, quoting *Random House Webster's Unabridged Dictionary* (2001) (emphasis in original, footnote 14 omitted).]

The record in this case is full of undisputed evidence that the trajectory of plaintiff's normal life has not been affected by the automobile accident. As the trial court noted in its opinion, well before the accident in this case, plaintiff had been determined disabled by the Social Security Administration. In his application for those benefits, which were largely based upon a psychological disability, plaintiff indicated that he could not do virtually all the things he now claims he could not do because of the accident. For instance, for many years before the accident plaintiff had not worked, golfed, fished, boated, or even done many household chores. Indeed, he admittedly stayed in his bedroom on and off for many days, in large part because of his depression. His same life pattern continued after the accident, albeit with some more pain. However, plaintiff's normal life trajectory remains the same. The trial court's conclusion in this regard is worth repeating:

While Plaintiff asserts the subject accident has caused new complaints of back pain and additional depression, the Court finds there is insufficient evidence that Plaintiff's general ability to live his normal life was affected by any alleged serious impairment of body function. Plaintiff has not shown a change of employment. He has not shown a change in his home life. He has not shown a change in avocation. While Plaintiff asserts in his response brief that he had been improving from the time of his application for Social Security benefits up to the time of the subject accident, he does not present specific evidence of the alleged improvements. Instead, it appears from the evidence presented that his pre- and post- accident life remains the same. Despite the presence of any accident-related impingements, the course or trajectory of plaintiff Jeffrey Chase's normal life has not been affected. Therefore, 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.

The trial court's opinion is consistent with the holding in *Kreiner*, as well as the result in *Minter v City of Grand Rapids*, 480 Mich 1182; 747 NW2d 229 (2008) adopting the dissenting opinion in *Minter v City of Grand Rapids*, 275 Mich App 220, 233-243; 739 NW2d 108 (2007). For these reasons, I would affirm the learned trial court's decision and order granting defendant's motion for summary disposition.

/s/ Christopher M. Murray