

STATE OF MICHIGAN
COURT OF APPEALS

LINDA REAM and TERRY REAM,

Plaintiffs-Appellees,

v

BURKE ASPHALT PAVING, JOHN BURKE,
and CHAN CULBERT,

Defendants-Appellants.

UNPUBLISHED

February 1, 2005

No. 238824

Ingham Circuit Court

LC No. 99-091090-NI

ON REMAND

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In this negligence case arising from a motor vehicle accident, defendants originally appealed as of right from a judgment for plaintiffs that was entered after a jury trial. We affirmed, finding, in part, that plaintiff Terry Ream suffered a sufficient injury to sustain an action for damages under MCL 500.3135(1), a provision of the no-fault act. See *Ream v Burke Asphalt Paving*, unpublished opinion per curiam of the Court of Appeals, issued September 9, 2003 (Docket No. 238824), slip op at 7-8. Defendants appealed the case to the Supreme Court, which subsequently vacated our opinion in part and remanded the case to us “for reconsideration, in light of *Kreiner* [*v Fisher*, 471 Mich 109; 683 NW2d 611 (2004)], of whether Terry Ream experienced a serious impairment of body function.” See *Ream v Burke Asphalt Paving*, ___ Mich ___; 688 NW2d 823 (2004). We once again affirm.

Under the no-fault act, “[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.” MCL 500.3135(1). The act defines “serious impairment of body function” 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).

On appeal, defendants focus on only one facet of the test to determine the existence of a threshold injury. Specifically, they focus on whether the injuries affected Terry Ream’s general

ability to lead a normal life.¹ In *Kreiner*, the Court considered the factors to be considered in determining whether an injury has affected a person's ability to lead his normal life. It stated that

the objectively manifested impairment of an important body function must affect the *course* of a person's life. Accordingly, the effect 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."

The starting point in analyzing whether an impairment affects a person's "general" i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long. 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.

* * *

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (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. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. . . . [T]he totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life." [*Kreiner, supra* at 130-131, 133-134 (emphasis in original; footnotes omitted).]

Before his motor vehicle accident, Terry Ream worked for the Ingham County Road Commission, driving heavy equipment and trimming and cutting trees. He also participated in many outdoor activities, such as hunting, fishing, and softball. The available evidence indicated that these outdoor activities were an important and meaningful component of Terry's life. As a

¹ Given that defendants focus on only the "general ability to lead a normal life" aspect of the test to determine whether a serious impairment of body function occurred, the trial court did not commit an error requiring reversal in resolving the issue of the threshold injury as a matter of law (instead of submitting the issue to the jury). See, generally, *Kreiner, supra* at 132, and MCL 500.3135(2)(a).

result of his motor vehicle accident, Terry suffered multiple abrasions and contusions to his right lower shin and ankle, right wrist abrasions and contusions, an injury to his lower spine, and the tearing of the head of his right biceps tendon. His injuries prevented him from working for two months, and he wore a foam walking cast for some time. Although many of the injuries eventually healed, Terry testified at trial² that he could not participate in activities he had previously enjoyed, such as stream fishing or pheasant hunting, due to his inability to walk over uneven terrain without difficulty and pain. He could no longer hunt from a tree stand or play softball, and he stated that his injuries continued to affect his ability to perform his job as of the date of trial. His treating physician, Dr. Mark Richardson, stated that post-accident arthritic degeneration in Terry's big toe – which would affect Terry's ability to walk without pain – might have been caused by the accident.

Terry also indicated that his biceps injury prevented him from bow hunting because he could no longer pull back his bow and hold it. Richardson essentially corroborated this testimony by indicating that the biceps injury would likely require Terry to take anti-inflammatory medication “chronically” and “indefinitely.” Richardson stated that Terry's biceps injury caused him to lose about half the strength in his arm and that the injury could not be fully repaired without risky surgery. He testified that, with rehabilitation therapy, “[u]sually the patient can recover most of the strength” in the arm.

We conclude that Terry's injuries were sufficient to meet the no-fault threshold for a serious impairment of body function. Indeed, Terry's injuries required him to wear a cast, and he missed two months of work. Although Terry returned to work after two months with no physician-imposed restrictions, Richardson specifically noted during his deposition that, when Terry returned to work, his boss was planning to limit him at first to “driving a truck” because of his injuries. Moreover, Terry's injuries prevented him, at least as of the time of trial, from engaging in numerous recreational activities that he had previously enjoyed, and Richardson testified that Terry will require anti-inflammatory medication “indefinitely.” Further, Terry's biceps injury is not amenable to complete repair without risky surgery, and rehabilitation was or is necessary in order for Terry to regain “most of the strength” in his arm. Viewed as a whole, the circumstances demonstrate that Terry's “general ability to conduct the course of his . . . normal life” has been affected, especially considering the significance that outdoor activities played in Terry's life before the accident occurred.

We note that the *Kreiner* Court stated, in a footnote, that “[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish” the existence of any residual impairment caused by an injury. See *id.* at 133 n 17. However, in analyzing the situation of one of the plaintiffs in *Kreiner*, the Court referred to testimony by the plaintiff – testimony involving residual impairments – that apparently was not corroborated by a physician. Accordingly, the meaning of the footnote in *Kreiner* is not entirely clear to us. At any rate, while there was no testimony in the instant case that Terry Ream's physician had restricted him from various outdoor recreational activities, the physician *did* provide testimony

² The trial began in August 2001, nearly two years after the motor vehicle accident in question.

that tended to corroborate Terry's recreational restrictions. We continue to hold that Terry Ream's injuries satisfied the no-fault threshold.

We note that Terry's situation differs from the situation of Daniel Straub, a plaintiff in *Kreiner, supra*, whose injuries were not sufficient to meet the no-fault threshold. See *id.* at 122-123, 134-136. Indeed, "[b]y the time of Straub's deposition, he could perform all the activities in which he had engaged before the accident, although he was still unable to completely straighten his middle finger. He was also unable to completely close his left hand, which decreased his grip strength." *Id.* at 122-123. Straub "estimated he was ninety-nine percent back to normal" about four months after his accident. *Id.* at 122, 135. By contrast, Terry Ream continued at the time of trial to experience the effects of his injuries and continued to be prevented from engaging in activities he once enjoyed.

Nor is Terry's situation like that of Richard Kreiner, another plaintiff in *Kreiner, supra*. Kreiner, a construction worker, missed no days of work because of his injuries, although he was forced to limit his workdays to six hours as opposed to eight hours.³ *Id.* at 125-126. He had some lifting and work restrictions and "also could no longer walk more than half a mile without resting and could no longer hunt rabbits. He could, however, continue to hunt deer." *Id.* at 126. The Supreme Court concluded the following with respect to Kreiner:

Looking at Kreiner's life as a whole, before and after the accident, and the nature and extent of his injuries, we conclude that his impairment did not affect his overall ability to conduct the course of his normal life. While he cannot work to full capacity, he is generally able to lead his normal life. 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. Considered against the backdrop of his preimpairment life, Kreiner's postimpairment life is not so different that his "general ability" to conduct the course of his normal life has been affected. [*Id.* at 137 (footnotes omitted).]

Considered against the backdrop of his preimpairment life, Terry Ream's postimpairment life *is* sufficiently different such that his "'general ability' to conduct the course of his normal life has been affected." *Id.*

Upon our de novo review,⁴ we conclude that the trial court did not err in concluding that Terry Ream experienced a serious impairment of body function.⁵ Reversal is not warranted.

³ The Supreme Court noted that Kreiner's shortened workdays did not appear to have negatively affected his income level. See *Kreiner, supra* at 126 n 12.

⁴ The trial court decided the threshold injury issue in the context of a motion for a directed verdict. We review de novo a trial court's decision with respect to a directed verdict motion. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002).

⁵ We do not find persuasive the unpublished, non-binding cases cited by defendants on appeal.

Affirmed.

/s/ Patrick M. Meter

/s/ Stephen L. Borrello

STATE OF MICHIGAN
COURT OF APPEALS

LINDA REAM and TERRY REAM,

Plaintiff-Appellees,

v

BURKE ASPHALT PAVING, JOHN BURKE,
and CHAN CULBERT

Defendant-Appellants.

UNPUBLISHED

February 1, 2005

No. 238824

Ingham Circuit Court

LC No. 99-091090-NI

ON REMAND

Before: Meter, P.J., and Talbot and Borrello, JJ.

TALBOT, J. (*dissenting*).

I respectfully dissent. Under MCL 500.3135 a person remains 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. As used in this section, “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.” MCL 500.3135(7).

In *Kreiner v Fischer*, 471 Mich 109, 130-134; 683 NW2d 611 (2004), our Supreme Court provided a three-step framework for determining whether a plaintiff meets the serious impairment threshold. First, it must be determined 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, courts may not decide the issue as a matter of law. In the instant case, no material question of fact exists regarding the nature and extent of plaintiff’s injuries. Rather, defendant merely contends that plaintiff’s injuries have not affected his ability to lead his normal life. Consequently, the issue may be decided as a matter of law. *Id.* at 132.

Where the issue may be decided as a matter of law, the second step in the analysis is to determine whether “an ‘important body function’ of the plaintiff has been impaired.” *Id.* at 132. In this case, objective medical evidence was presented to show that plaintiff suffered significant injuries to his right leg, right arm and back. Defendants did not contend that these injuries did not affect several of Terry Ream’s important body functions. However, they did argue that the

injuries did not satisfy the third part of the analysis because they did not affect his general ability to lead his normal life.

Where a court finds an objectively manifested impairment of an important bodily function, “it then must determine if the impairment affects the plaintiff’s general ability to lead his or her normal life.” *Id.* at 132. The Court explained that:

[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 effect 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 (footnotes omitted).]

Thus, “[w]hile an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff’s life.” *Id.* at 135.

In *Kreiner, supra*, the Supreme Court found that the injuries the plaintiff suffered to his lower back, hip, and leg failed to meet the statutory requirements. *Kreiner, supra*, at 137. It noted that, with the possible exception of roofing work, he continued to be able to work as a self-employed carpenter. *Id.* Although Kreiner stated that he could no longer stand on a ladder for more than twenty minutes, lift anything over eighty pounds, or work more than six hours a day, these limitations did not prevent him from performing his job. *Id.* The Court further noted that, although Kreiner had difficulty walking more than a half mile without resting and could no longer hunt rabbits, he continued to hunt deer. *Id.* After examining Kreiner’s life before and after the accident and looking at the extent and nature of his injuries, the Court concluded that “his impairment did not affect his overall ability to conduct the course of his normal life.” *Id.*

A comparison between the facts of *Kreiner* and those in this case compels the conclusion that Terry Ream’s injuries did not affect his general ability to lead his normal life. He continued to work full time without restrictions. Although he missed two months of work, in the companion case to *Kreiner, Straub v Collette*, the plaintiff also missed two months of work, and the Court characterized it as a “temporary limitation” that did not meet the requirement. *Id.* at 136. Although Ream claims that residual impairments prevent him from performing some activities, such as certain types of hunting and fishing and playing softball, there is no evidence in the record suggesting that Ream’s doctors placed ongoing restrictions on his activities. In regard to residual impairments, the 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. Consequently, under the holding of *Kreiner, supra*, Ream did not meet the threshold for recovery for noneconomic damages under the no-fault act.

/s/ Michael J. Talbot