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News Story

Pump up the value

No-Fault expert Steve Gursten offers tips on how lawyers can help clients get the most for their cases

By Natalie Lombardo

Business of Law

In spite of the generally negative effect the Michigan Supreme Court's decision in *Kreiner v. Fischer* has had on plaintiffs' "serious impairment" cases, Steven M. Gursten's no-fault litigation firm is thriving.

And he wants to share the wealth.

Figuratively, that is.

As such, Gursten has provided *Michigan Lawyers Weekly* with his 13 tips for increasing the value of "serious impairment" threshold cases brought under the No-Fault Act.

Gursten, who heads Southfield-based Michigan Auto Law, a law firm that exclusively handles car and truck accident and wrongful-death cases, said his reason for wanting to help is simple.

"If other lawyers are successful with their serious impairment cases, then everyone benefits," he said. "Especially the clients."

Gursten said that with the way *Kreiner* has affected "serious impairment" litigation, it's imperative that lawyers cross every "t" and dot every "i" when they're assembling their clients' cases.

The Michigan Court of Appeals judges alone, he said, are proving to be incredibly demanding in terms of the factual support they want to see for "serious impairment" cases.

According to data gathered by *Lawyers Weekly*, since *Kreiner* was decided in 2004, 188 out of 207 "serious impairment" plaintiffs have lost in Michigan's appellate courts.

But, Gursten said, there was another, equally important, reason that "serious impairment" practitioners need to be at the top of their game.

It's called "Colossus software."

And what it does, Gursten said, is allows the approximately 40 insurance companies writing policies in Michigan to track, by geographic area, and calculate the average settlement for any particular injury.

"Any time a lawyer settles an auto case cheaply, negotiates a completely inadequate settlement, or doesn't document things correctly and gets thrown out of court, the lawyer affects everyone negatively," Gursten said. "Not just his unfortunate client."

In other words, he said, with the Colossus software out there watching, poorly handled cases bring down the average settlement amount for everyone.

But, there are things lawyers can to protect their clients, themselves and their colleagues, Gursten said.

When the "insurance company adjuster recognizes that you're a skilled lawyer who's done what's necessary to take a case to trial and win, the settlement value of your case will increase," he said.

That's where Gursten's 13 tips comes in.

1. Plaintiff's independent medical examination (PME)

A PME has the potential to accomplish two very important things: (1) The exam results may create a factual dispute concerning the nature and extent of a plaintiff's injuries; and (2) The exam may provide the examiner with the opportunity to address the "serious impairment" factors set out by the Supreme Court in *Kreiner*.

Those factors are: the nature and extent of the impairment; time and length of treatment; duration of impairment; extent of any residual impairment and the prognosis for eventual recovery.

2. Medical literature

Providing experts and treatment providers with the most authoritative medical literature allows them to best explain the full extent of a client's injuries, including residual impairments and a future prognosis.

3. Personal injury protection case (PIP)

Suing the plaintiff's insurance company for cutting off payments following the first few months of an accident, refusing to pay or halting benefits all together, is a way to protect the plaintiff, and the third party case as well. That's because judges are looking for things like the plaintiff's amount of time off of work and how long he received replacement services.

4. Continuing medical treatment

Not only will continuing medical treatment help plaintiffs recover, but, by documenting the plaintiffs' injuries, it will help plaintiffs' attorneys satisfy *Kreiner's* "serious impairment" factors.

5. Good deposition testimony

Before going into the deposition, spend time with your client to make sure he or she can articulate how his or her injuries have affected aspects of his or her "normal," pre-accident life, such work, recreation and hobbies, chores, sleep and family activities. Aim for 10-12 examples.

6. Functional capacity testing

The results may show how a seemingly "minor" injury does affect a person's "general ability to lead his or her normal life." Consider using the following tests: AMA Guide to the Evaluation of Permanent Impairment; AMA Guidelines for pain and disability; and Social Security Disability guidelines.

7. Proving "residual impairment"

By having one's expert specifically address an injury's or injuries' long-term effects — through test results and medical literature — a plaintiff's attorney may be able to greatly increase the value of his or her client's case.

8. The economic claim

Because there is no threshold for economic claims, any third party auto negligence claim potentially includes an accompanying claim for economic loss in the form of household services.

Plus, attorneys need to press for reimbursement well above the \$20 per day that plaintiffs' lawyers have gotten in the habit of requesting.

9. The probate case

The need for conservatorship appointments is present in many automobile accident cases, but often ignored by attorneys. Conservatorships and other related probate filings can help document impairment and the affect on an auto accident victim's general ability to lead his normal life.

10. Expert's affidavit

Make sure your expert's opinion affidavit contains the facts supporting his or her opinion, otherwise it may be vulnerable to a defense summary disposition motion under Michigan Court Rule (MCR) 2.116.

11. The order

Don't forget to remind the court of its obligations under *May v. Sommerfield*. According to *May*, a court, in ruling on a "serious impairment" threshold question, must make certain factual as to the nature and extent of the plaintiff's claimed impairments.

12. *Cassidy v. McGovern*

The Supreme Court in *Kreiner* said the "... Legislature largely rejected *DiFranco* in favor of *Cassidy*." Accordingly, plaintiffs' lawyers must understand they can use a *Cassidy* threshold to their advantage. In other words, practitioners should use those cases where serious impairment of body function was found as a matter of law under *Cassidy*. That's because if the facts could satisfy *Cassidy*, they would likely survive the similar, but somewhat lower, "subjective person" threshold that exists post-*Kreiner*.

13. Rethinking your approach

By constructing proofs to show injuries' long-term residual impacts and how likely they are to be permanent, not only will plaintiffs' lawyers increase their chances of surviving summary disposition, but they will likely double, or even triple, the value of their clients' cases.

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