

News Story

Woman's no-fault claim meets noneconomic damages threshold

By **Todd C. Berg, Esq**

A woman who claimed the pain from her automobile accident-related injuries prevented her from leading her normal, pre-accident life by interfering with her ability to work, garden and engage in athletic activities will have her case for noneconomic damages heard by a jury, the Michigan Court of Appeals has ruled.

The trial court had dismissed the woman's "serious impairment of body function claim" pursuant to the defendant's summary disposition motion, reasoning that, under footnote 17 of *Kreiner v. Fischer*, she "does not have a residual impairment as a matter of law because her impairment is a self-imposed restriction based on real or perceived pain."

The Court of Appeals disagreed, reversing and remanding the woman's case.

"We hold that, under the totality of the circumstances, [the plaintiff] suffered a serious impairment of body function as a matter of law under [MCL 500.3135](#), where plaintiffs established the existence of an objectively manifested impairment of an important body function that affected and affects [the plaintiff's] general ability to lead her normal life," Judge William B. Murphy wrote. "[C]ontrary to the trial court's findings ... there were physician-imposed restrictions in place based on pain."

The judge went on to explain that the trial court's residual impairment/self-imposed restriction analysis was representative of how courts and litigants have been giving *Kreiner's* footnote 17 too narrow an interpretation.

"Read in the context of the placement of the footnote, the footnote can be construed as providing, 'Self-imposed restrictions, as opposed to physician imposed restrictions, based on real or perceived pain do not establish [the extent of any residual impairment],'" Murphy stated. "The necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment."

He added that "footnote 17 does not require that the doctor offer a medically identifiable or physiological basis for imposing restrictions based on pain."

The 10-page decision is *McDaniel v. Hemker*, Lawyers Weekly No. 07-56876.

True to 'Kreiner'

Big Rapids attorney Mark J. Warba, who represents the plaintiff, praised the court for setting the record straight on the fact that the restrictions issue is not the lynchpin of serious impairment litigation but, instead, is merely a caveat to one of the several factors included in the *Kreiner*

court's nonexhaustive list of factors to consider when determining whether a plaintiff's general ability to lead a normal life has been affected.

"The *McDaniel* court interpreted footnote 17 in a manner and fashion consistent with the Supreme Court's framework in *Kreiner*," he stated.

Lansing attorney Steven A. Hicks, who represented the plaintiff at oral argument, agreed, noting *McDaniel* has put to rest any notion there's a short cut way of deciding serious impairment cases.

"There is no litmus test for determining whether something affected someone's general ability to lead her normal life," he stated. "You have to do the totality of the circumstances test. You can't just look at restrictions as being thumbs up or thumbs down."

Auto no-fault expert Steven M. Gursten of Southfield said the significance of the decision — which provided serious impairment litigation much needed doses of both common sense and reality — could not be overstated.

"Before *McDaniel*, there was a string of decisions dismissing good cases because of the lack of physician-imposed restrictions, even though, in the real world, doctors don't impose a long list of 'physician-imposed restrictions,'" he asserted.

Gursten declared that *McDaniel* has clarified that no longer should cases be dismissed "because of this fantasy world disconnect with how medicine is actually practiced by most treating doctors in the real world and this unrealistic expectation of physician-imposed restrictions."

Franklin attorney John A. Lydick, who represents the defendant, did not respond to requests for comment.

Going too far

Meanwhile, defense practitioner Judith A. Moskus of Ann Arbor said she agreed that the court was correct in reiterating that *Kreiner's* "general ability" factors must all be given equal weight, but suggested the court went to far with footnote 6, which reads that "footnote 17 [of *Kreiner*] does not require that the doctor offer a medically identifiable or physiological basis for imposing restrictions based on pain."

If this is what the *Kreiner* court had meant to say in footnote 17, then that's what it would have said, she insisted.

But it didn't and by rewording the Supreme Court's language, Moskus said *McDaniel* has moved further away from the Supreme Court's intent, which was to combat the subjectivity inherent in a plaintiff's complaints of pain.

"It is hard to believe that the court in *Kreiner* was simply inviting a plaintiff to go to a doctor, make complaints of pain that the doctor dutifully records and then restricts the plaintiff on that basis," Moskus observed. "We all know that there are plenty of doctors out there who will do just that."

However, Hicks rejected this notion, insisting the opinion has done precisely what other cases have failed to do — protect against unverifiable assertions of pain without sacrificing plaintiffs' meritorious claims.

McDaniel stands for the proposition that there "needs to be some corroborating evidence for these subjective complaints of pain," he declared.

Of the forms this corroboration may take, Hicks explained it may show up as testimony from the doctor, medical documentation or even affidavits, as in this case.

Nevertheless, Moskus advised that defense practitioners need to watch carefully how *McDaniel's* footnote 6 is construed by the courts.

"This attempt to negate a check on the trial courts' attempt to regulate what constitutes a threshold injury is problematic," she announced. "We lose the ability to limit the types of impairments that meet the threshold if the test or criterion is so easily met."

Finally, Moskus said there was one additional lesson defense practitioners should learn from this ruling, given the significant documentary evidence assembled by the plaintiff.

"No matter how favorable the recent caselaw, spend the money and gather the necessary medical and other evidence needed to support or rebut a motion for summary disposition," she urged.

The 'after' life

Plaintiff Mable Lorraine McDaniel suffered head, neck, back and shoulder injuries as a result of having been involved in a car accident with defendant John Tyler Hemker in September 2000.

For the first six weeks after the accident, the plaintiff's doctor restricted her from work because of the pain she was experiencing.

She returned to work in November 2000, but was restricted in April 2001.

Then, in November 2001, the plaintiff was approved to return to work full time, but in December 2001, she returned to her doctor complaining of head and neck pain.

For the next several years, the plaintiff continued to see her doctor, who concluded that, as a result of the accident, she would continue to experience neck pain and headaches for a long period of time.

"[T]here are certain activities which she may not be able to do, or if she does, she probably will have pain and discomfort," the doctor swore in an affidavit.

Meanwhile, the plaintiff explained her pain interfered with her work and recreational activities.

As such, she sued in 2003 and her case was dismissed pursuant to the defendant's summary disposition motion.

The plaintiff appealed.

Serious impairment

Judge Murphy began his analysis by stating that a person who has been injured in an automobile accident cannot recover noneconomic damages under the No-Fault Act unless she can show she

has suffered an "objectively manifested impairment of an important body function that affects the person's general ability to lead a normal life."

He explained the determination is measured against the "totality of the circumstances," with consideration given to *Kreiner's* "nonexhaustive list" of factors which includes: 1) the nature and extent of the impairment; 2) the type and length of treatment required; 3) the duration of the impairment; 4) the extent of any residual impairment; and 5) the prognosis for eventual recovery.

Quoting *Kreiner*, Murphy emphasized the list of factors was "not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves."

Residual impairment

After applying these principles to the plaintiff's case and concluding that there could be "no legitimate or honest dispute that the course or trajectory of [the plaintiff's] normal life has been inextricably affected," the judge turned to the issue of residual impairment as the panel's last course of business.

"We have intentionally left ["the extent of any residual impairment" factor] for last because it is directly tied to the footnote that appears to have been the sole basis for the trial court's resolution of this case, and which has created much confusion and contention in the bench and bar in this state," Murphy stated.

Noting the plaintiff's condition qualified as a "residual impairment," the judge explained that, even though footnote 17 prohibits the use of self-imposed restrictions based on real or perceived pain to establish the extent of a residual impairment, doctor-imposed restrictions based on pain are acceptable.

Moreover, the restrictions need not have a "medically identifiable or physiological basis."

Finally, Murphy clarified that "footnote 17 is not a general proposition enunciated by our Supreme Court," but merely a footnote to one of the several, nondispositive factors that courts are invited to consider when evaluating whether plaintiffs have satisfied the serious impairment threshold.

Decision in a nutshell

The Issue: Was a woman who claimed the pain from her automobile accident-related injuries prevented her from leading her normal, pre-accident life by interfering with her ability to work, garden and engage in athletic activities entitled to have her case for noneconomic damages heard by a jury?

The Ruling: Yes. The Court of Appeals determined that her injuries had affected her general ability to lead her normal. In particular, the court acknowledged that the plaintiff's physician-imposed restrictions based on the plaintiff's complaints of pain established the extent of her residual impairment.

The Impact: The extent of a residual impairment is only one of several factors in the Supreme Court's nonexhaustive list of factors that courts should consider in determining whether a plaintiff has satisfied the serious impairment threshold for bringing a noneconomic damages claim under the No-Fault Act. Moreover, the extent of a residual impairment may be established by physician-imposed restrictions based on a plaintiff's complaints of pain.

The Case: *McDaniel v. Hemker*, Lawyers Weekly No. 07-56876.

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