

## News Story

### '*Kreiner v. Fischer*' produces few wins for plaintiffs, even fewer published decisions

By *Todd C. Berg, Esq.*

The sum total of binding precedent in the post-*Kreiner v. Fischer* era boils down to two cases.

Although they fill no more than seven pages — combined — understanding them is critical to understanding what has happened to "serious impairment" litigation in the wake of *Kreiner*.

*Moore v. Cregeur* and *Williams v. Medukas*, aside from their status as the only two "serious impairment" decisions published by the Michigan Court of Appeals in the year since the Michigan Supreme Court decided its landmark no-fault ruling, have the distinction of being counted among the rare plaintiffs' victories in the post-*Kreiner* era.

To date, plaintiffs have won on the threshold issue in only seven out of 53 cases.

As such, *Moore* and *Williams* make the perfect starting point for part two of Michigan Lawyers Weekly's three-part series covering the past year's *Kreiner* jurisprudence.

This installment discusses not only the cases that all "serious impairment" practitioners must know about — the published decisions — but also some of the other notables that comprise the Court of Appeals remaining 51 unpublished cases.

Moreover, the thorny issue of self-imposed versus doctor-imposed restrictions — which some believe to be the most controversial of all core *Kreiner* issues — are addressed here.

Next week's final segment of the series looks to the future of *Kreiner* litigation by parsing out the issues for which review is being sought before the Supreme Court, as well as the merits and drawbacks of currently-pending *Kreiner* reform legislation.

### '*Moore*' & '*Williams*'

In many ways, the two published Court of Appeals decisions seem to represent the high-water mark of what the *Kreiner* court had in mind when it instructed that a person's general ability to lead a normal life is measured against the effects an impairment has had on "the course and trajectory" of that person's life.

From these cases emerges the theme that, if an impairment affects all aspects of a person's life — or at least those aspects which a person held near and dear before the impairment's onset — and the impairment is either permanent or of indefinite duration, the person has likely suffered a serious impairment of body function and, thus, has satisfied the threshold.

For instance, in *Moore*, where the plaintiff suffered retinal damage, the court seemed particularly moved by the wide-ranging effect of the impairment.

After noting testimony from the plaintiff's doctor that the plaintiff's vision had become distorted and that she had lost some of her peripheral vision, the panel observed the plaintiff "had to take special steps [such as using magnifiers, special lighting and retraining] to pursue the activities she routinely pursued in the past."

In other words, "it is [] self-evident that plaintiff's vision loss will affect every aspect of her waking life to some extent," the court concluded.

Additionally, the panel recounted that medical testimony established the plaintiff's impairment couldn't be corrected with glasses, surgery threatened to bring about permanent blindness and the partial loss of her peripheral vision was permanent.

Permanency of impairment also played a significant role in *Williams* where — after having had his arms immobilized for a month following the accident — the plaintiff could no longer lift his right arm above his head.

"Although no evidence showed that Williams' physician restricted him from engaging in various recreational activities, and self-imposed restrictions will not establish a residual impairment, Williams' physician did indicate that Williams lacked full range of motion in his left wrist, and that his right shoulder was healing in such a way that its range of motion would be permanently limited," the panel explained.

Because this prevented Williams from playing golf and showing the students on his middle school basketball team how to shoot a basketball — "sporting activities that require a full range of motion" — the court determined he had suffered a serious impairment of body function.

### **Doesn't mean forever**

It's true that published cases are the only ones to carry precedential value, but they're not the only ones that have a lesson to teach.

As such, what can be learned from the "plaintiff-wins" that follow — all of which predated *Moore* and *Williams* — will benefit both plaintiffs' and defense attorneys by assembling a rough outline of what the Court of Appeals considers a "serious impairment of body function."

In *Cook v. Hardy*, the majority said the plaintiff, who spent six weeks in a leg cast following her accident, had suffered a serious impairment.

According to the judges, even though the time was relatively short, "she could not work, attend school, or engage in any of her usual recreational activities because she was in a hard cast and couldn't move around without crutches."

Noting that her impairment was "significant" and "extensive," the court explained that it did not read *Kreiner* to require that a plaintiff's impairment be permanent.

The dissenting judge pointed out, however, that not only was the plaintiff's impairment "minimal and temporary," there was no evidence of a doctor having restricted her activities. Moreover, the judge said, the plaintiff never claimed the missed activities had been a "significant part of her life" before the accident.

Meanwhile, the majority in *Luther v. Morris* approached the duration of impairment issue much like the *Cook* majority did, explaining that it "read *Kreiner* as indicating that an impairment of short duration may constitute a serious impairment of body function if the effect on a plaintiff's life is extensive and if the impairment has a considerable impact on the plaintiff's life as compared to his or her life before the accident."

In concluding that the plaintiff whose dominant hand was immobilized — her other hand had been affected by a previous stroke — for three weeks after the accident had suffered a serious impairment, the court stated that the "relatively short" duration of the impairment did not outweigh the fact the accident had "left plaintiff virtually unable to do anything for herself, or to undertake tasks in the same manner as she had done before the injury; the impairment was extensive."

### **Proving the pain**

Of the unpublished "plaintiff wins," *Ream v. Burke Asphalt Paving, et al.*, stands out because of its handling of the doctor-imposed restrictions issue.

The court ruled the plaintiff had suffered a serious impairment because a biceps tendon injury was preventing him from participating in activities that had been "an important and meaningful component" of his life — hunting, fishing and softball — two years after the accident.

The majority explained that, even though the plaintiff had no doctor-imposed restrictions on these activities, the doctor's testimony that the plaintiff would require medication for an indefinite period of time "essentially corroborated" the plaintiff's reasons for not participating.

Similarly, in *Behnke v. Auto Owners Ins. Co.*, where the plaintiff suffered neck pain and headaches that were aggravated by physical activity, the court held the plaintiff suffered a serious impairment even though he had no doctor-imposed restrictions.

According to the court, the plaintiff was "effectively foreclosed from doing many activities because they aggravated his injuries and caused intense pain."

Noting the plaintiff's doctor had described the plaintiff's condition as something he would have to live with the "remainder of his natural life," the majority explained "it makes little difference whether a doctor had forbidden him to return to welding or whether he was simply unable to do so because of debilitating headaches. In sum, while we are cognizant of the requirement that the underlying injury be objectively manifested, the statute does not indicate that the consequences of the injury must be objectively manifested."

### **Obstacle or screener?**

From these cases — and a review of the Court of Appeals output — one can readily see that the core *Kreiner* issues are a comparison of pre- and post-accident life, the duration of impairment, and self-imposed versus doctor-imposed restrictions.

But in terms of controversy, the restrictions issue beats the others hands down.

In fact, it's so frequently discussed that its origin in *Kreiner* — footnote 17 — has become a form of shorthand for identifying the issue.

Lansing attorney George T. Sinas, who represented the plaintiff in *Kreiner*, called the body of law regarding restrictions the "single biggest area of misuse."

He explained the footnote has been wrongly interpreted by many courts as an actual requirement for any plaintiff claiming to have suffered a threshold injury.

"There's nothing in *Kreiner* that requires that you have physician-imposed restrictions to have a threshold injury," Sinas asserted. "It's only relevant if the plaintiff is claiming, 'I have residual impairment.'"

Auto no-fault expert Steven M. Gursten of Southfield agreed that courts have missed the mark on the restrictions issue.

The Michigan Supreme Court has "imposed a requirement that is not based upon how real day-to-day medicine is practiced," he declared. "It has created an unrealistic fantasy world in footnote 17, which tells doctors that they have to sit down and write up a list of restrictions."

Moreover, Gursten said the rulings on footnote 17 issues punish people "stuck in managed care or health insurance plans that don't allow a doctor to spend two hours with each patient in order to comply with this new legal requirement of how doctors must practice medicine."

Meanwhile, Detroit attorney Daniel S. Saylor, who represented the defendant in *Kreiner*, countered that the courts' application of footnote 17 has been consistent with the Supreme Court's intent.

"It's too easy for a claimant to fabricate or exaggerate the extent of their limitations," he observed. However, "when a physician has ordered such limitations based on an examination and clinical findings, then the credibility issues are mitigated."

Attorney Mary T. Nemeth, also of Detroit, agreed with Saylor.

Nemeth, who authored the Auto Club Insurance Association's amicus curiae briefs in *Kreiner*, said the distinction between self-imposed restrictions and doctor-imposed restrictions was hardly a new issue.

"For example, the Supreme Court in *DiFranco v. Pickard* reaffirmed its earlier statements in *Cassidy v. McGovern* that a plaintiff's subjective complaints, standing alone, do not satisfy the 'serious impairment' threshold," Nemeth explained.

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