

## News Story

### Crash Victim Meets Serious Impairment Threshold

#### Injuries Affected Normal Activities

By [Lynn Patrick Ingram](#)

A driver who sustained injuries to her neck, back and tailbone after being rear ended at an intersection suffered a serious impairment of an important body function affecting her general ability to lead her normal life, an Oakland County Circuit Court judge has decided.

The at-fault driver argued that the victim had not met the requirements of the statute.

But Judge Richard D. Kuhn disagreed, denying the defendant's motion for summary disposition and granting the plaintiff's cross motion.

"Given the evidence of the impairments' impact on plaintiff's work life, sex life, her ability to sleep, household life, recreational life, her ability to ride in a car, her pain and depression, the court finds that plaintiff has raised a genuine issue of material fact that the impairments affect her general ability to lead her normal life," he found.

Kuhn also granted the defendant's motions for summary disposition with regard to the issues of negligence and proximate cause.

"For the reasons stated by plaintiff, the court finds that the 'sudden emergency' doctrine does not apply to these facts," he noted. "Therefore, defendant has not raised a genuine issue of material fact that he was not negligent."

Furthermore, "defendant has not raised a genuine issue of material fact regarding plaintiff's neck and tailbone injuries, nor has defendant shown that the two subsequent accidents caused those injuries," the judge stated.

The 7-page decision is *Halucha v. Dore*, Lawyers Weekly No. 10-51206.

### Roadmap To Success

Birmingham attorney Howard M. Cohen, who represents the plaintiff, called the ruling a victory for plaintiffs' lawyers who fear they cannot meet the serious impairment threshold.

"In this case, I not only met the threshold, but I shattered it," he said.

However, Bloomfield Hills lawyer Michael F. Condit, who represents the defendant, said he does not think the ruling is as big a victory as Cohen claims.

"This is not a significant event in the law of threshold in the State of Michigan," he said.

"Here, the judge simply applied what he believed to be the law to the facts."

No matter who is right, Cohen said lawyers can learn a lot from his handling of this case.

He advised attorneys to always file a counter-motion for summary disposition when a defendant files a summary disposition motion based on threshold.

In fact, he said he would encourage lawyers to file summary disposition motions on negligence and proximate cause as well.

"I secured affidavits from plaintiff's treating and examining physicians, as well as from the plaintiff and her husband," he said. "The affidavits objectively demonstrated plaintiff's injuries as well as the effect they had on her ability to lead her normal life. This tactic caught the defense off guard."

Auto law expert Steven M. Gursten, of Southfield, agreed that this is an opportunity more plaintiffs' lawyers should use to their advantage.

Gursten, who recently authored an article about filing motions for summary disposition on serious impairment of body function for the Negligence Section of the State Bar, said the opportunity is greater now than ever because "there now exists a body of law that can provide attorneys and the trial court with a clear roadmap as to when a trial judge may grant a plaintiff's motion for serious impairment."

According to Gursten, this map has three parts.

First, plaintiff's counsel must start by showing the trial court some objective manifestation of the plaintiff's impairment, he said.

"That does not mean there has to be objective proof of injury," Gursten counseled. "There only needs to be some proof that can be objectively shown as to what is causing the impairment."

Second, the plaintiff must show that the injury occurred to an important body function.

"This is by far the easiest prong to meet," Gursten observed. "There is also a substantial body of case law from the Cassidy era as to what constitutes an important body function."

Third, the plaintiff must show that a person's general ability to lead his or her normal life has been affected.

This, Gursten said, is by far the most widely misunderstood prong — at least until recently.

"There are now several well reasoned appellate cases that dissect the statutory language of [MCL 500.3135](#) (7) that a trial judge can now use as guidance on whether the plaintiff has suffered an impairment that crosses the new threshold," he explained. "Both *Kreiner* and *Straub* provide factual examples that plaintiffs can then compare their own cases to."

Gursten said attorneys will win these motions by then making an evidentiary record for the trial court to make its "May findings," i.e., a record of how the plaintiff's lifestyle was impaired with specific factual findings as to the nature and extent of the plaintiff's impairments.

Gursten said Cohen's case demonstrates that the effect of these motions can be significant.

"Knowing that a jury will only have to decide damages is a substantial 'value driver' for most insurance companies," he noted.

"It is also very impressive for case evaluators," he added. "It's one more thing that separates your case from the 20 or 30 others that they will be asked to evaluate that day."

Finally, and most importantly, Gursten said, "it eliminates needless risk of a jury finding the case is not a serious impairment of body function."

According to Cohen, with only the damages issue remaining in this case, the parties will facilitate the case as ordered by the judge. He said his client's damages should exceed \$1 million.

But Condit said that, if facilitation does not work, he is ready for trial.

"I wouldn't say the case has been won or lost by anybody yet because the jury hasn't spoken," Condit stated.

### **Rear-End Collision**

Defendant Jeffrey Allen Dore's vehicle rear-ended plaintiff Jennifer Halucha's vehicle while she was stopped at a red light. The plaintiff in turn rear-ended the car in front of her.

The plaintiff sued the defendant for her injuries, claiming she injured her neck, back and tailbone. She also claimed wage loss.

According to the plaintiff, her injuries constituted serious impairments of body function under [MCL 500.5135](#). Under the statute, a plaintiff can only recover non-economic damages for death, serious impairment of body function, or serious disfigurement. The statute defines a serious impairment of body function as "an objectively manifested impairment of an important body function that affects a person's general ability to lead his or her normal life."

The defendant filed a motion for summary disposition, arguing that the plaintiff did not suffer a serious impairment of body function as defined by the statute.

The plaintiff responded with a counter-motion for summary disposition, along with summary disposition motions on the issues of negligence and proximate cause.

The plaintiff offered independent medical evidence of her injuries, including evidence that she treated with a chiropractor and a neurologist — for recurring headaches, inability to sleep and neck/back pain.

In addition, she offered evidence of an MRI that showed a mild bulge/spur complex with mild effacement of anterior thecal sac, but no spinal stenosis. The doctor who diagnosed this condition placed the plaintiff on restrictions for work and activities.

The plaintiff also underwent rehabilitation for her neck and back pain for 13 weeks.

Furthermore, the doctor who saw the plaintiff for her lower back, neck and tailbone pain noted decreased range of motion in the spine and diagnosed her with Cervical Disk disease, Cervical Myofascitis, Lumbrosacral Myofascitis, and Coccydynia.

Finally, the plaintiff offered evidence of a physical exam performed by another doctor indicating that she experienced trauma to the neck and pelvis and that the injuries to the neck were reasonably related to her involvement in the motor vehicle accident.

### **Three-Part Test**

Judge Kuhn broke down his analysis of the plaintiff's cross-motion on the threshold issue into three parts.

First, he addressed whether the plaintiff suffered an objectively manifested impairment.

According to the judge, she did.

"Plaintiff's MRI results and documentation of decreased range of motion are evidence of an objectively manifested injury," he wrote.

Next, Kuhn found that the plaintiff suffered an impairment of an important body function.

"Movement of the neck and back are important body functions," he noted.

Finally, he held that the impairment did in fact affect the plaintiff's general ability to lead her normal life.

He based this finding on the fact that the plaintiff could not work her second job for more than three years, could not perform household chores in a timely fashion, experienced pain and depression daily, could not work out or participate in her regular recreational activities, could not ride in a car for extended periods of time, had to delay starting a family, could not sleep normally, and so forth.

As such, Kuhn denied the defendant's motion for summary disposition, and granted the plaintiff's counter motion.

### **Clean Sweep**

Next, Kuhn addressed the plaintiff's motions regarding negligence and proximate cause.

He rejected the defendant's argument that, although he was negligent per se, he was able to show a sudden emergency.

According to the judge, the plaintiff showed that the "sudden emergency" doctrine was inapplicable to the facts of the case.

Regarding proximate cause, Kuhn held that the defendant failed to raise a genuine issue of material fact regarding the plaintiff's neck and tailbone injuries, and failed to show that the two subsequent accidents in which the plaintiff was involved caused her injuries.

Based on his findings, Kuhn granted the plaintiff's motions on each issue.

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