

STATE OF MICHIGAN  
COURT OF APPEALS

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RICHARD M. GEERDES,

Plaintiff-Appellee,

v

DEBORAH JEAN GLUPKER, and MARK  
FREDERICK HAASE,

Defendants-Appellants.

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UNPUBLISHED  
December 4, 2007

No. 264856  
Kent Circuit Court  
LC No. 02-008670-NI

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

MURRAY, J. (*dissenting*).

In general, “[o]ur courts are ‘reluctant to overturn a jury’s verdict’ where there is ‘ample evidence’ to support the jury’s decision, . . . and will do so only where we are satisfied that allowing the verdict to stand would be inconsistent with substantial justice.” *Clark v Kmart Corp*, 249 Mich App 141, 150; 640 NW2d 892 (2002), quoting in part *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001). In this case, the trial court committed an error of law when it set aside the jury verdict. Additionally, because the trial court properly instructed the jury, and the jury’s verdict was supported by the evidence presented, I would reverse the trial court’s order granting a new trial and reinstate the trial court’s November 18, 2004, judgment of no cause of action rendered after the jury trial.

I. Facts and Proceedings

On September 29, 1999, defendant Deborah Jean Glupker rear-ended plaintiff Richard M. Geerdes’ car while it was stopped at a red light. Plaintiff thereafter filed suit against defendants seeking tort recovery for noneconomic damages pursuant to MCL 500.3135(1) of the no-fault act, alleging that he suffered a serious impairment of body function (sometimes referred to generically as a “threshold injury”) as a result of the accident. The parties engaged in the typical discovery process, and defendants then filed a motion for summary disposition. In that motion defendants argued that plaintiff failed to establish that he suffered a serious impairment of a body function, and therefore the case should be dismissed. The trial court denied defendants’ motion,

opining that there were factual disputes and the jury should determine whether plaintiff suffered a threshold injury.<sup>1</sup> Trial ensued.

Not surprisingly, the evidence presented at trial surrounded whether plaintiff suffered a serious impairment of body function. At the close of plaintiff's proofs, defendant moved for a directed verdict. Defendants' theory of the case and why they believed that plaintiff's proofs were insufficient to establish a threshold injury, were made clear in counsel's argument to the court:

But I think that as far as specifically for my motion for directed verdict, *I don't think the plaintiff is able to establish that he has had a change in his life-style that's sufficient under the No Fault Statute* to satisfy the standard that we have set forth in *Kreiner*.<sup>2</sup> And of course as the Court is aware in *Kreiner*, *Kreiner* has given us a new definition as far as what it means as far as the component of what it means to affect one's person – a person's ability to lead their normal life, and *Kreiner* talks about that the impact must be to such an extent that it must affect the course of a person's life or alter the trajectory of a person's life, although some aspects of a plaintiff's entire normal life may be interrupted by the impairment if, despite those impairments, the course or trajectory of plaintiff's normal life has not been affected, and 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. [Emphasis added.]

Thus, defendants' argument focused on plaintiff's inability to prove that the impairment affected his general ability to lead a normal life.

Plaintiff argued that the test of *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004) was met, and that the jury should decide the case. The trial court agreed. In denying defendants' motion for a directed verdict, the trial court ultimately concluded:

[W]e have plenty of proof here to get the issue of serious impairment to a jury. It's not anywhere near what the statute authorizes me to resolve.

After closing arguments, the trial court instructed the jury, consistent with *Kreiner, supra* at 131, that it must make three separate findings before it concludes that plaintiff suffered a serious impairment of a body function:

And now Michigan law says that a serious impairment of a body function is an objectively manifested impairment of an important body function that affects

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<sup>1</sup> The record does not contain a copy of any written decision or transcript embodying the trial court's decision, but given that the case proceeded to trial, and the trial court instructed the jury on what it needs to find for a serious impairment of a body function, this must have been the conclusion of the court.

<sup>2</sup> *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

the person's general ability to lead his or her normal life. Well, that's better than no definition at all, which is what we started out with, but there's lots of terms in there that need some work. And over the years the courts have come up with what we think are some rules of them, the legislature wanted us to do that, it's not like we did it on our own, to help you understand these things. *So we've got to decide what's an impairment, how is an impairment objectively manifested, what's an important body function, and what does it mean to affect a person's general ability to lead his or her normal life. Those are all the things you need to know in order to be able to answer the question, is there a serious impairment of a body function.* [Emphasis added.]

The trial court went on to instruct the jury regarding what was meant by an "impairment", how it is "objectively manifested", and how such an impairment can affect a person's general ability to lead a normal life.

The jury concluded that plaintiff did not sustain a serious impairment of body function. Specifically, the jury verdict form reflects that the jury answered the following general question in the negative: "Question No. 3: Did the injury sustained by [plaintiff] in the collision with Ms. Glupker's vehicle result in a serious impairment of some body function of his?" Accordingly, the trial court entered a judgment of no cause of action on behalf of defendants.

Plaintiff subsequently moved for judgment notwithstanding the verdict or, in the alternative, a new trial. In an August 17, 2005, opinion and order, the trial court found, contrary to its rulings on defendants' motions for summary disposition and directed verdict, that there was no dispute regarding the nature and extent of plaintiff's injuries, and concluded that it erred when it submitted the threshold injury question to the jury. Instead, the trial court now concluded that plaintiff suffered an objectively manifested impairment of an important body function as a matter of law. The trial court did not address in any detail, however, whether the impairment affected plaintiff's general ability to lead a normal life, and did not indicate whether it was considering the evidence submitted at the summary disposition stage, or the evidence submitted at trial. The trial court concluded:

It was, therefore, error for this Court to have submitted to the jury the issue of serious impairment. Given that there was no factual dispute concerning the nature and extent of plaintiff's paralysis and its underlying physical etiology, and no basis for finding that that [sic] paralysis and its pain were other than a serious impairment, it was this Court's obligation to itself have resolved the issue favorably to plaintiff, not as a traditional directed verdict, but in fulfillment of its legislatively-assigned responsibility. . . . This Court cannot, however, grant judgment for plaintiff. Because a key issue remains unresolved[.] . . . Unfortunately, when the jury reported that it was 'hung' on the issue of cause, the Court allowed it to skip that issue. A new jury must be convened, therefore, to now resolve the issue.

## II. Analysis

Defendants' argument on appeal, as it was in the trial court, is that the threshold injury issue was properly submitted to the jury, and the jury's verdict was not against the great weight

of the evidence. Accordingly, defendant maintains that the trial court erred when it reversed the jury's verdict and granted a new trial on the issues of causation and damages. This Court reviews a trial court's decision to grant a motion for a new trial for an abuse of discretion. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). An abuse of discretion occurs when the trial court's decision results in an outcome that is not within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). In relevant part, under MCR 2.611(A)(1), a trial court can grant a motion for a new trial if the jury's verdict is against the great weight of the evidence presented, or if an error of law occurred during the proceedings.

Under the no-fault automobile insurance act, MCL 500.3101 et seq., tort liability for noneconomic losses is limited to instances in which the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); *Hardy v Oakland Co*, 461 Mich 561, 565; 607 NW2d 718 (2000); *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005). A serious impairment of body function is "an objectively manifested impairment of an important body function that affects the person's general ability to lead his . . . normal life." MCL 500.3135(7); *Kreiner, supra* at 129. Whether a plaintiff has suffered a serious impairment of body function is a question of law to be decided by the trial court, unless there is a material factual dispute concerning the nature and extent of the person's injuries. MCL 500.3135(2)(a); *Kreiner, supra* at 120.

To help determine whether a plaintiff has met the statutory threshold, the *Kreiner* Court developed a "multi-step process . . . meant to provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not." *Kreiner, supra* at 131. This multi-step inquiry entails the following: First, it must be determined if the plaintiff suffered an impairment. Second, if an impairment is found, "the court must next determine if an 'important body function' of the plaintiff has been impaired." *Id.* at 132. Third, if it is found that an important body function has been impaired, the court must next determine if the impairment is objectively manifested. *Id.* Fourth, and finally, if the court "finds that an important body function has been impaired, and that the impairment is objectively manifested, it then *must* determine if the impairment affects the plaintiff's general ability to lead his . . . normal life." *Id.* (emphasis added). The *Kreiner* Court noted:

In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his life. Merely 'any effect' on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life. [*Id.* at 132-133.]

The *Kreiner* Court went on to list five non-exclusive, non-exhaustive objective factors to assist in evaluating whether an impairment has affected a plaintiff's "general ability" to lead or conduct the course of his normal life: "(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." *Id.* at 133. The five factors are not

intended to be individually dispositive, but rather are intended to serve as a framework to apply the totality of the circumstances to determine whether the plaintiff's impairments affect his general ability to conduct the course of his normal life. *Id.* at 133-134.

Here, the trial court properly instructed the jury on the *Kreiner* factors for finding a substantial impairment of a body function. A jury is presumed to follow a judge's instructions, *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993), and as previously discussed, the jury was properly instructed regarding the multi-step process of the serious impairment of an important body function test. Accordingly, the jury is presumed to have considered the fourth and final prong of the serious impairment of an important body function test when it made its determination that plaintiff did not suffer a threshold injury. Indeed, there is nothing in the record to suggest that the jury did not agree with the trial court's conclusion that plaintiff suffered an objectively manifested impairment, but then went on to find that plaintiff's impairment did not interfere with his general ability to lead a normal life.

However, in granting a new trial, the trial court erred by failing to perform the required *Kreiner* analysis before setting aside the jury's verdict and finding as a matter of law that plaintiff suffered a serious impairment of body function. In particular, when making its determination that plaintiff suffered a serious impairment of an important body function as a matter of law, the trial court in large part failed to address the final prong of the serious impairment of an important body function test, i.e., whether plaintiff's objectively manifested injuries affected his general ability to lead his normal life. Nowhere in the trial court opinion is there a discussion regarding how the impairments suffered by plaintiff actually impeded his general ability to lead a normal life. In fact, the trial court fails to mention any of the non-exhaustive factors discussed in *Kreiner*. Indeed, the court's conclusion is contained in two conclusory statements found within one paragraph:

The progressive loss over two years of the use of a limb, culminating in partial paralysis and intense discomfort which required spinal surgery to correct, was the kind of impairment, not minor interruption in life, which satisfies the Michigan no-fault statute. *Kreiner v Fischer* (aft rem), 471 Mich 109 (2004). If paralysis, except, perhaps, very short-term paralysis, is not serious enough to warrant third-party tort recovery, only catastrophic impairments remain subject to such liability, which is not what the Legislature intended. *Kreiner, supra* at 131, fn 14.

Yet a complete analysis, or at least more than what was done here, is necessary before finding a substantial impairment under *Kreiner, supra*.

As previously discussed, once it is found that the threshold injury question should be decided as a matter of law, in order for the trial court to conclude that plaintiff suffered a threshold injury it "must" find that plaintiff suffered an objectively manifested impairment of an important body function that affected his general ability to lead his normal pre-accident life. *Kreiner, supra* at 132. The trial court, however, did not perform a *Kreiner* analysis regarding whether plaintiff's objectively manifested injuries affected his general ability to lead his normal pre-accident life. Instead, the trial court merely stated that plaintiff's temporary "paralysis" "must" be sufficient. However, at no time did plaintiff testify that he suffered from "paralysis"; instead, plaintiff testified to temporary limitations in the use of his right arm, but even that did

not impact his general ability to lead a normal life.<sup>3</sup> Based on the evidence, the trial court's simple conclusion is not a sufficient replacement for the detailed analysis required by the statute and *Kreiner*. Because the court is required to engage in the proper analysis under the statute and *Kreiner*, failure to do so is an error of law that requires reversal.

Moreover, in reviewing the evidence submitted by the parties at trial,<sup>4</sup> there was more than sufficient evidence presented to support the jury's verdict that plaintiff did not suffer a threshold injury. Accordingly, the jury's determination that plaintiff did not suffer a threshold injury was not against the great weight of the evidence and should not have been set aside. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Specifically, the trial evidence revealed that, as a result of multiple automobile accidents that occurred before the one at issue here, at the time of the accident plaintiff already suffered from chronic back pain which prevented him from working, performing simple household tasks, made it difficult for him to drive, stand or sit for extended periods of time, and sleep. Plaintiff repeatedly referred to himself as "disabled" prior to the instant accident. Plaintiff also suffered from neck pain, and radiating pain into his left arm, prior to this accident, and as recently as 1998. Plaintiff no longer performed outdoor yard work, as he had moved to a condominium in 1994 or 1995. Before this accident, plaintiff had not worked for years.

On direct examination, plaintiff testified that after the accident he could not perform many household chores (cleaning, etc), but on cross-examination he testified to essentially the same limitations before the accident because of his back pain. Importantly, during direct examination plaintiff testified that he experienced numbness or tingling in his left and then right arms, with the impact being that sometimes he would inexplicably drop items in his hands. However, plaintiff also testified that the radiating pain in his left arm was gone by April 2000, only seven months after the accident. He also testified at one point that his neck range of motion was normal by July 2001. As for his right arm, plaintiff testified that he could not lift a one-pound weight over his head, and could not throw a ball.

In general, then, plaintiff's testimony, on direct, naturally focused on what limitations he had on his life after the accident compared to before the accident, while during cross-examination plaintiff's pre-accident life was shown to be much like it was after the accident. Thus, the record certainly contained evidence supporting the jury's verdict.

/s/ Christopher M. Murray

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<sup>3</sup> In other words, the impact that his "paralysis" had on plaintiff's life was not, according to defendant's theory, as significant to him as it would be to someone who had no prior impairments or limitations. But because plaintiff had such a vast history of limiting impairments, even to the extent of plaintiff referring to his pre-accident life as being "disabled", it was not enough for the trial court to simply imply that "paralysis" always affects a person's general ability to lead a normal life, and thereby take the issue away from the jury.

<sup>4</sup> Presumably, the trial court only considered evidence presented at trial, for the error of law must have occurred in the trial proceedings.