

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WOODROW ALLEN BYERS,

Plaintiff-Appellant,

v

DOUGLAS EDWARD CARPENTER and  
KELLEY LYNN CARPENTER,

Defendants-Appellees.

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UNPUBLISHED

June 15, 2010

No. 291168

Barry Circuit Court

LC No. 06-000609-CK

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's denial of his motion for directed verdict and judgment notwithstanding the verdict in this auto negligence case. We affirm in part, reverse in part and remand for further proceedings.

This appeal arises from a motor vehicle accident that occurred on June 10, 2005, in Barry County. Plaintiff was driving a motorcycle, which collided with the Ford Escort being driven by defendant Douglas Carpenter.<sup>1</sup> Due to his injuries, plaintiff was transported by ambulance. At the emergency room, plaintiff was diagnosed with: (a) "status post trauma," (b) "left-sided rib fractures," (c) "left-sided pneumothorax," (d) "left-sided subcutaneous emphysema," and (e) "left-sided femur fracture."<sup>2</sup>

Plaintiff underwent his first surgery on June 11, 2005, for insertion of a chest tube and "an open reduction and internal fixation of a femur fracture, as well as a basilar cervical left femoral neck fracture." On June 15, 2005, plaintiff underwent a second surgery comprised of "an open reduction with internal fixation of the left arm and proximal humerus using a locking plate." Plaintiff was precluded from weight bearing, necessitating the use of a wheelchair. Beginning June 30, 2005, ongoing physical therapy was prescribed.

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<sup>1</sup> Defendant Kelley Lynn Carpenter is identified in as the titled owner of the Escort.

<sup>2</sup> X-rays showed "a fracture involving the greater trochanter and neck of the proximal femur."

Plaintiff “underwent a shoulder manipulation and cortisone injections” while under general anesthesia, on September 20, 2005, to resolve problems with shoulder stiffness and movement and continued physical therapy. On January 6, 2006, Dr. Michael Jabara performed an additional surgery on plaintiff “for a close manipulation, Trans Arthroscopic Surgery and Sub Acromial Decompression with hardware removal on his left shoulder.” Dr. Jabara continued to prescribe physical therapy for plaintiff and indicated that, due to the shoulder injury, plaintiff was “incapacitated from employment.” Plaintiff continued to be evaluated and treated by Dr. Jabara, who noted on November 1, 2006, “an ACL deficient knee on the left,” which “is an injury that appeared back at the time of his accident.”

Approximately two weeks later, plaintiff underwent another surgery to remove hardware from his left femur in addition to an “anterior cruciate ligament reconstruction left knee” with “partial medial meniscectomy.” Physical therapy was again prescribed post-surgery. At a follow-up visit on January 10, 2007, Dr. Jabara noted that plaintiff was without complaints following ACL reconstruction and was ambulating “without a limp” and with “full range of motion.” Despite ongoing complaints of left knee pain, Dr. Jabara on September 15, 2008, recommended continued weight training and opined that “[c]ontinued left knee pain likely patellofemoral secondary to quadriceps atrophy” with ongoing strength training.

In contrast, on December 5, 2007, Dr. David Frye conducted an independent medical examination of plaintiff. Dr. Frye acknowledged plaintiff’s humerus and neck fractures and ACL reconstruction, but opined that plaintiff “has reached maximum medical improvement.” While admittedly unfamiliar with the job requirements or duties of an apprehension bounty hunter, Dr. Frye opined that plaintiff could return to his former employment without restrictions. Dr. Frye questioned the existence of a relationship between the accident and plaintiff’s left knee injury due to the absence of a notation by the surgeon while performing the “rodding of the femur” of the existence of any blood in the knee during the procedure, which would be indicative of a rupture of the anterior cruciate ligament or a medial meniscus tear.

After the close of proofs following several days of trial, plaintiff filed a written motion seeking a directed verdict on the issue of serious impairment. The trial court denied plaintiff’s motion based on its review of *Kreiner v Fisher*, 471 Mich 109, 129; 683 NW2d 611 (2004) and its progeny but opining, “it seems to me personally that his injuries would rise to that level.” The case was submitted to the jury, which determined plaintiff and defendant to have been equally negligent in causing the accident. The jury awarded plaintiff \$23,215 in economic damages from June 10, 2008, through the trial but denied future economic damages. On the non-economic section of the jury verdict form the following question was posed: “Did plaintiff Woodrow Byers’ injuries result in serious impairment of a body function or permanent serious disfigurement?” The jury responded in the negative.

Plaintiff petitioned the trial court for judgment notwithstanding the verdict (JNOV) or for a new trial. The trial court indicated some confusion in case law regarding what cases should proceed to a jury and the need for appellate clarification to assist trial judges in these determinations. Although the trial court recognized that “Plaintiff does have a very strong argument . . . for a new trial or a judgment contrary to the verdict” based on a history of case law regarding femur fractures “satisfying the threshold as a matter of law,” it denied plaintiff’s motion indicating the existence of a question regarding plaintiff’s knee injury and its relationship

to the accident. The trial court indicated its disagreement with the jury verdict in failing to find a serious impairment of body function.

As discussed in *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499-500; \_\_\_ NW2d \_\_\_ (2009):

This Court reviews de novo a trial court's decision with regard to both a motion for a directed verdict and a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). Motions for a directed verdict or JNOV are essentially challenges to the sufficiency of the evidence in support of a jury verdict in a civil case. See *Napier v Jacobs*, 429 Mich 222, 229-230; 414 NW2d 862 (1987). This Court reviews challenges to the sufficiency of the evidence in the same way for both motions: we “review the evidence and all legitimate inferences in the light most favorable to the nonmoving party.” *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). “Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted.” *Id.*, citing *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). If reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury. *Sparks v Luplow*, 372 Mich 198, 202; 125 NW2d 304 (1963).

To the extent that this Court’s review involves statutory interpretation of the no-fault act, such legal issues are also considered de novo. *Kreiner*, 471 Mich at 129.

In accordance with MCL 500.3135(1), “A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” In this appeal, the only issue concerns whether plaintiff’s injuries, as a matter of law, met the threshold requirement to establish a serious impairment of body function. The statute defines “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.” MCL 500.3135(7). As mandated by our Supreme Court’s seminal decision in *Kreiner*, 471 Mich at 131, a multi-step process has been delineated “as a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not.”<sup>3</sup> Specifically, as a first step:

a court must determine that there is no factual dispute concerning the nature and extent of the person’s injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body

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<sup>3</sup> We acknowledge that our Supreme Court has granted leave to appeal in *McCormick v Carrier*, 485 Mich 851; 770 NW2d 359 (2009), which challenges the *Kreiner* Court’s interpretation of the threshold for serious impairment of a body function of the no-fault act.

function. If a court so concludes, it may continue to the next step. But, if a court determines there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. MCL 500.3135(2)(a)(i) and (ii). [*Id.* at 131-132 (footnote omitted).]

Next:

[I]f a court can decide the issue as a matter of law, it must next determine if an "important body function" of the plaintiff has been impaired. It is insufficient if the impairment is of an unimportant body function. Correspondingly, it is also insufficient if an important body function has been injured but not impaired. If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. Subjective complaints that are not medically documented are insufficient.

If a 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 or her normal life. 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 (footnote omitted).]

As a means of evaluating whether an individual's "general ability" to conduct the course of his normal life has been affected," the *Kreiner* Court provided a "nonexhaustive list of objective factors" to be considered, which include: "(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. None of these individual factors are to be considered dispositive, rather "in order to determine whether one has suffered a 'serious impairment of body function,' the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment affects the person's general ability to conduct the course of his or her normal life." *Id.* at 134. Notably, an injury need not be permanent to comprise a serious impairment of body function. "[A]n impairment of short duration may constitute a serious impairment of body function if its effect on the plaintiff's life is extensive." *Williams v Medukas*, 266 Mich App 505, 508; 702 NW2d 667 (2005). See also *Kreiner*, 471 Mich at 118 n 5, citing *Cassidy v McGovern*, 415 Mich 483, 506; 330 NW2d 22 (1982), overruled on other grounds *DiFranco v Pickard*, 427 Mich 32, 58; 398 NW2d 896 (1986).

Applying *Kreiner's* objective factors to the undisputed evidence presented in this case, there is no question that plaintiff's initial injuries to his shoulder and left leg impaired his ability to walk, and thereby, to perform both his job and various recreational activities for an extended time period. It is undisputed that plaintiff evidenced objectively manifested injuries involving: several fractured ribs, a pneumothorax, a fractured shoulder and a fracture of the left leg femur in two places. Plaintiff was hospitalized and underwent four separate surgeries and/or procedures under general anesthesia from the day following the accident to January 2006 to correct and treat these injuries. The surgery to repair plaintiff's fractured left femur involved the insertion of a 16" stainless steel intermedullary rod.<sup>4</sup> A metal plate and screws were also implanted in plaintiff's left shoulder through a surgical procedure and remained in place for approximately six months until removed during another surgery. Plaintiff was initially precluded from weight bearing and required to use a wheelchair. From the date of the accident until mid-September 2006, plaintiff participated in 96 sessions of physical therapy. He remained on medical restrictions, which precluded his return to work for at least one year because of these injuries. However, it is the general consensus of all medical practitioners that these injuries have successfully healed.

Following determinations in other published cases by this Court, the impairments suffered by plaintiff due to these injuries were sufficient to permit the trial court to conclude, as a matter of law, that plaintiff met the threshold requirement of a serious impairment of body function. For instance, in *Kern v Blethen-Coluni*, 240 Mich App 333, 343; 612 NW2d 838 (2000), the plaintiff also incurred a "serious femur fracture," which impeded his ability to ambulate for a three month period. Despite ultimately obtaining a good recovery, the plaintiff in *Kern* was determined to have sustained a serious impairment of body function based on the use of an "external fixator attached to the outside of his right femur" for eleven weeks precluding his ambulation. This Court determined, "in light of the seriousness of the initial injury, the treatment required, and the duration of disability, we hold that plaintiff sustained a serious impairment of body function." Similarly, in *LaHousse v Hess*, 125 Mich App 14, 18; 336 NW2d 219 (1983), this Court found, "as a matter of law, plaintiff suffered a serious impairment of her ability to walk. She was hospitalized for five days with her left leg in traction. For three months afterwards, she was unable to move herself about without the aid of a wheelchair, a walker or crutches."

Due to the similarity of plaintiff's injuries to those involved in *Kern* and *LaHousse*, plaintiff's impairments were sufficient, as a matter of law, to meet the requisite threshold to establish a serious impairment of body function. Such a determination is also consistent with the application of the criteria established by *Kreiner* to the undisputed medical history of plaintiff, including the severity or seriousness of plaintiff's initial injuries which required hospitalization and multiple surgeries, the extensiveness of the treatment required comprising months of ongoing participation in physical therapy and his inability to ambulate without an assistive device for a period of time or engage in his employment and other typical recreational pursuits

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<sup>4</sup> Despite healing of the left femur fractures, the metal rod remains in plaintiff's leg and would require another surgery for its removal.

imposed through medical restrictions. Although the trial court correctly recognized this at the motion for directed verdict, unfortunately it turned the matter over to the jury, constituting error.

However, a question of fact did exist with regard to plaintiff's left knee injury and subsequent ACL reconstruction and the relationship of this condition to the accident. Contradictory evidence was submitted regarding when plaintiff's left knee complaints initiated and whether any subsequent impairment was attributable to the motor vehicle accident. Because this aspect of plaintiff's claim comprised a "factual dispute concerning the nature and extent of [plaintiff's] injuries" which was "material to the determination whether [plaintiff] suffered a serious impairment of body function," the trial court could not find, as a matter of law, that the knee injury met the statutory threshold to establish a serious impairment of body function. *Kreiner*, 471 Mich at 131-132. As such, it was appropriate for this aspect of plaintiff's claim to be handled by the jury.

Thus, although plaintiff has recovered from his various injuries, because sufficient evidence was presented to establish that his femoral fractures and left shoulder injuries were of such a nature and extent to meet the statutory threshold for a serious impairment of body function, the trial court erred in failing to grant plaintiff's request for a directed verdict with regard to these injuries. Following the *Kreiner* Court's multi-step analysis, the trial court could also have determined as a matter of law that plaintiff demonstrated that the impairment was of an "important body function." *Kreiner*, 471 Mich at 132. As previously determined by this Court, "[w]alking is an important body function." *Kern*, 240 Mich App at 343. Further, it is not subject to dispute that plaintiff's injuries were "objectively manifested" through x-rays, surgical reports, etc. However, further proceedings are necessitated consistent with *Kreiner* to determine whether the impact of those impairments has affected "plaintiff's general ability to lead his . . . normal life." *Kreiner*, 471 Mich 132-133. In addition, we note that the trial court did not err in submitting the issue pertaining to plaintiff's left knee injury to the jury as a genuine issue of fact existed regarding the relationship of this injury to the accident. As such, the jury's verdict finding plaintiff's left knee injury did not comprise a serious impairment of body function should be upheld.

We affirm in part, reverse the trial court's ruling denying the grant of a directed verdict in favor of plaintiff, as his humerus and femur injuries met the statutory threshold to establish a serious impairment of an important body function and remand this matter to the trial court for further proceedings in accordance with this opinion and the jury's determination of fault attribution. We do not retain jurisdiction.

/s/ Donald S. Owens  
/s/ Peter D. O'Connell  
/s/ Michael J. Talbot