

# no-fault newsline

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

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## Sounds of a Distant Drummer: Three Unpublished Court of Appeals Opinions Hold That Plaintiffs Suffered A Serious Impairment of Body Function as a Matter of Law.

By Michael Taylor

In Michigan, a person is immune from tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle unless the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. "Serious impairment of body function," a requirement for the recovery of non-economic damages under the No-Fault Act, is defined by statute [MCL § 500.3135(7)] as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

Following a period of uncertainty regarding the interpretation of MCL § 500.3135(7), in 2003, our Supreme Court clarified the issue in deciding if an asserted injury "affects the person's general ability to lead his or her normal life," a court must objectively consider the *overall* or *broad* effect of the impairment on the *entire course* of a plaintiff's life in *Kreiner v Fischer*, 471 Mich 109, 683 NW2d 611 (2004).

Currently, there are no published (precedentially binding) Court of Appeals opinions interpreting the *Kreiner* decision. However, the Court has decided several cases after the Supreme Court issued its ruling. The holdings in these cases were reported in unpublished opinions, and while courts are not required to follow unpublished decisions, the opinions suggest how the Court of Appeals might apply current no-fault law.

While the vast majority of the post-*Kreiner* opinions have been favorable to the defense, three decisions of the Court of Appeals concluded that the plaintiff did demonstrate a "serious impairment of body function." The decisions in each of these cases turned on the issue of whether the plaintiff's alleged injury affected the plaintiff's general ability to lead his or her normal life.

The cases are:

*Luther v Morris*, 2005 Mich App LEXIS 72 (Unpublished Michigan Court of Appeals Opinion No. 244483, January 18, 2005);

*Ream v Burke Asphalt Paving*, 2005 Mich App LEXIS 216 (Unpublished Michigan Court of Appeals Opinion No. 238824, February 1, 2005); and,

*Cook v Hardy*, 2005 Mich App LEXIS 507 (Unpublished Michigan Court of Appeals Opinion No. 250727, February 24, 2005).

Judges Markey, Murphy and Talbot reconsidered their original decision in *Luther v Morris* following a remand by the Supreme Court, and again reversed the trial court's decision to dismiss the case. The *Luther* Court, over the dissent of Judge Talbot, agreed that the plaintiff's alleged fractured or dislocated elbow constituted a serious impairment of body function because it concluded that her

### SECRET WARDLE NOTES:

Currently, MCL § 500.3135(7), as interpreted by the Supreme Court in *Kreiner v Fischer*, is the law in Michigan. Unpublished opinions, such as those included here, while not binding precedent, are valuable illustrations of how Michigan law can be interpreted and applied by various panels of the Michigan Court of Appeals. They also indicate trends of thought regarding legal issues, and may predict the likelihood of further clarification by the Supreme Court. Interestingly, the panels deciding all three of the cases cited focused on the issue of the effect of the claimed serious impairment of body function on the plaintiff's life. The *Kreiner* Court emphasized that the impairment must affect the course or trajectory of the plaintiff's life. The cases here indicate that the required degree of impact on a plaintiff's general ability to lead his or her normal life remains open to interpretation at the Court of Appeals level. These cases may signal a departure from the *Kreiner* requirement that the impairment must affect the entire course of an individual's life when there is no question that an objective injury was sustained which impaired an important body function. This concept that the impairment need not be permanent to meet the threshold was established by the Michigan Supreme Court in *Incarnati v Savage*, 419 Mich 541 (1984).

## CONTINUED...

injury affected the plaintiff's general ability to live her normal life.

The majority declined to interpret the *Kreiner* decision as requiring that any asserted injury must adversely alter the remainder of a plaintiff's life. Instead, Judges Markey and Murphy "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."

*Ream v Burke Asphalt Paving* was decided by Judges Meter, Borrello, and Talbot. In *Ream*, the defendants had appealed the Court of Appeals' earlier decision affirming the trial court's entry of judgment on a jury verdict. The Supreme Court vacated the judgment of the Court of Appeals, and remanded the case for reconsideration in light of the *Kreiner* decision.

The *Ream* case involved a plaintiff who claimed that the injuries allegedly sustained in an automobile accident, particularly the tearing of the head of his right biceps tendon, was a serious impairment of body function.

The plaintiff was off work for two months following the accident, after which he returned without restrictions. Although many of the injuries healed, the plaintiff claimed that he could not participate in recreational activities that he previously enjoyed, like bow hunting and stream fishing.

The plaintiff claimed that the injury to his biceps prevented him from drawing a bowstring. The injury required him to take anti-inflammatory medication, and that he had lost about half of the strength in his right arm. The plaintiff's physician testified that the arm could not be repaired without surgery, but with rehabilitation therapy, persons with injuries similar to the plaintiff's could recover most of the strength in an injured arm.

Judges Markey and Borrello (Judge Talbot again dissented from the majority view) were convinced that the restrictions on Plaintiff's recreational activities met the threshold and constituted a serious impairment of body function. The Court was persuaded that the recreational activities were an important part of the plaintiff's life, and that his post-accident life was different enough from his pre-accident life to demonstrate that the plaintiff suffered a serious impairment of body function.

Even though the *Ream* Court agreed that there was no evidence that the plaintiff's doctor restricted him from participation in recreational activities, "the physician *did* provide testimony that tended to corroborate [the plaintiff's] recreational restrictions." In arriving at its conclusion that the plaintiff's injury was sufficient under the No-Fault Act, the Court opined that the *Kreiner* Court was unclear when it stated that "self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain, do not establish" a serious impairment of body function. Accordingly, the Court of Appeals affirmed the trial court's entry of the jury's verdict in the plaintiff's favor.

Please note that the records of the Michigan Court of Appeals show that leave to appeal to the Michigan Supreme Court has been filed in *Ream v Burke Asphalt Paving*.

The final case, *Cook v Hardy*, was decided by Judges Neff and Cooper over the dissent of Chief Judge Zahra. In *Cook*, the plaintiff suffered multiple right leg fractures. Although the duration of the plaintiff's impairment was about two months, the Court observed that the injury limited some of her activities for over six months. Judges Cooper and Neff concluded that "[u]nder the totality of the circumstances in this case, including the seriousness and extent of the fractures, the nature and extent of treatment with casting and crutches, and the lifestyle alterations, all support a finding that plaintiff suffered a serious impairment of body function as a matter of law."

The Court reversed the trial court's decision to grant the defendant's motion summary disposition, and remanded the case for entry of summary disposition in favor of the plaintiff.

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