



Issued by The Trucking & Transportation Practice Group

October 6, 2005

PLAINTIFF'S WHIPLASH INJURIES CAUSED RESIDUAL INJURIES WHICH, UNDER THE TOTALITY OF THE CIRCUMSTANCES, CONSTITUTED A SERIOUS IMPAIRMENT OF BODY FUNCTION

Authors:

Audra A. Arndt
Direct: (313) 983-4421
aarndt@plunkettcooney.com

Michael K. Sheehy
Direct: (313) 983-4721
msheehy@plunkettcooney.com

The Michigan Court of Appeals, in a published opinion of *Mable McDaniel v John Tyler Hemker*, 2005 WL 2372802, Court of Appeals Docket No. 263150, released for publication Sept. 27, ruled that under the totality of the circumstances, the plaintiff had suffered a serious impairment of body function as a matter of law under MCL 500.3135.

This opinion is important because it interprets the Michigan Supreme Court's decision in *Kreiner v Fisher*, 471 Mich 109; 689 N.W.2d 611, (2004), specifically with regard to the objective factors that the Kreiner court delineated to assist lower courts in determining if the plaintiff's general ability to conduct the course of his or her normal life has been affected.

In *McDaniel*, the plaintiff was driving her van with two of her children when a pickup truck, driven by the defendant, collided with her vehicle in an intersection. The plaintiff alleged that the defendant had failed to stop at the intersection. The plaintiff could not avoid the accident, and she suffered injuries to her neck, back, head and shoulder.

After hospitalization, the plaintiff filed suit for noneconomic damages. Subsequently, the defendants filed a motion for summary disposition, arguing that the plaintiff's injuries did not affect her general ability to lead a normal life. She did not experience a serious impairment of body function pursuant to MCL 500.3135(7). The trial court granted the defendants' motion, stating that the requirements of *Kreiner* were not met because her impairment was a self-imposed restriction based on real or perceived pain.

On appeal, the Michigan Court of Appeals reversed the trial court's grant of summary disposition finding that the plaintiff's injuries had, in fact, affected her ability to lead her normal life. The appellate court reviewed the entire lower court record and took into consideration the duration of

recuperation, the required assistance from her coworkers when at work, limited ability to do household chores, as well as the pain interfering with her sleep and her intimate relationship with her husband. The doctors' records and affidavits indicated the plaintiff, even with continued use of pain medications, nerve blocks, muscle relaxers and physical therapy, would likely have pain for the rest of her life. The appellate court held that the plaintiff had satisfied the statutory threshold.

When the court compared the plaintiff's life before and after the accident, it was like "day and night. All aspects of her life have been significantly impacted with no meaningful relief in sight." The plaintiff's injuries are continuing and ongoing, with her discomfort and pain remaining. Because of this, the plaintiff's injuries are considered "residual." Based on the physical incapacity to perform activities, a plaintiff's self-imposed restriction should be considered by the court.

Claims of self-imposed restrictions due to pain generally fail because there is no medical testimony to support them. However, if a physician imposes the restrictions, the doctor is not required to offer a medical identifiable basis for imposing them.

The appellate court found that there were, in fact, physician-imposed restrictions in place based on the plaintiff's pain. The plaintiff's board certified physical medicine and rehabilitation doctor had instructed the plaintiff to adjust her activities based on her pain level. The court found the documentary evidence was clear that there was a medically identifiable or physiological basis for the plaintiff's pain and that her doctor had accepted that.

The Michigan Court of Appeals noted that the Kreiner factors were neither meant to be exclusive nor were any individual factors to be dispositive by themselves. Thus, merely because a plaintiff has self-imposed restrictions based on pain does not mean that the plaintiff has not established a threshold injury. The trial court is required to take into consideration all of the factors and the "totality of the circumstances" when determining whether injuries have affected a person's general ability to lead a normal life.

When viewing the case in the "totality of the circumstances," this plaintiff had suffered the necessary threshold injuries constituting a serious impairment of body function pursuant to MCL 500.3135.

The impact of this case is clear: It gives the plaintiff's attorneys support for the argument that whiplash and soft tissue injuries can satisfy the threshold requirements. You can expect to see more trial court decisions appealed to the Michigan Court of Appeals using this opinion as support. The defendant in *McDaniel* has the option of filing an application for leave to appeal to the Michigan Supreme Court.

For a complete copy of the Michigan Court of Appeals ruling on *Mable McDaniel v John Tyler Hemker*, [click here](#).

Editor's note: Thank you to Kevin Barry for contributing to this Rapid Report.
Blmfield.PD.FIRM.689702-1