

STATE OF MICHIGAN  
COURT OF APPEALS

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JON PAUL HEWITT, a Minor, by his Next  
Friend, RENEE HEWITT,

UNPUBLISHED  
March 25, 2003

Plaintiff-Appellant,

and

DOMINIC HEWITT, a Minor, by his Next Friend,  
RENEE HEWITT,

Plaintiff,

v

GARY D. BUCKLEY, JR., EXPEDIENT  
PROCESS SERVING, and HERNDON &  
HERNDON INVESTIGATIONS, INC.,

No. 238211  
St. Clair Circuit Court  
LC No. 00-002801-NI

Defendants-Appellees.

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Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendants' motion for summary disposition in this third-party no-fault action. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Under MCL 500.3135 a person remains subject to tort liability for noneconomic loss caused by his use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. Whether an injured person has suffered serious impairment of body function is a question of law if there is no factual dispute concerning the nature and extent of the person's injuries, or if there is a dispute that is not material to the determination. MCL 500.3135(2)(a).

In *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000), this Court noted:

In determining whether the impairment of the important body function is "serious," the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, duration of disability, and extent of

residual impairment and prognosis for eventual recovery. [Citations omitted.] Finally, although the injury threshold is a significant obstacle to tort recovery, *Cassidy [v McGovern]*, 415 Mich 483, 503; 330 NW2d 22 (1982)], “an injury need not be permanent to be serious.”

As in the instant case, the plaintiff in *Kern* was a minor. The plaintiff suffered a serious femur fracture after being struck by a vehicle while riding his bicycle. He was hospitalized for six days, and underwent surgery for installation of an external fixator, which he wore for eleven weeks. The plaintiff was unable to walk for that time period, and had to be either carried, or used a wheelchair or hobbled on his other leg. A second surgery was performed to remove the fixator device. *Kern, supra* at 335. This Court held that “[i]n light of the seriousness of the initial injury, the treatment required, and the duration of disability,” plaintiff had, as a matter of law, sustained a serious impairment of body function. *Id.* at 343.

In the instant case, plaintiff was sixteen years old in December 1999 when his vehicle was struck head-on by another vehicle. Plaintiff’s injuries included loss of consciousness, a punctured lung, lacerated spleen, fractured right wrist, and fractured nose. He was hospitalized for eight days, during which he required a chest tube insertion for a right pneumothorax<sup>1</sup>, he had his right arm in a cast for six weeks, and wore a splint and underwent physical therapy for an additional six weeks. Plaintiff missed one month of school. Subsequently, plaintiff suffered ongoing right wrist pain, pain in both knees, weakness in gripping with his right hand, and other symptoms, was referred to Dr. Dietz, and was diagnosed with a torn ligament and arthroscopic surgery was recommended.

In response to defendants’ motions, plaintiff submitted below the medical report of the doctor that examined plaintiff *on behalf of defendants*, Dr. Heithoff, who noted that 1 ½ years had passed since the accident and plaintiff was still suffering persistent symptoms, which he, Dr. Heithoff, doubted would resolve on their own and would require treatment:

Based on the history, I agree completely with Dr. Dietz. I agree this is probably a torn TFC ligament and arthroscopy surgery is indicated.

If the arthroscopic surgery is unsuccessful, ulnar shortening osteotomy may be necessary.

\* \* \*

The prognosis is unknown. These can usually be treated successfully, but on occasion are quite problematic.

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<sup>1</sup> The term “pneumothorax” refers to “the presence of air or gas in the pleural cavity.” The “pleura” is “one of a pair of serous membranes each of which covers a lung and folds back to line the corresponding side of the chest wall.” *Random House Webster’s College Dictionary* (1995).

Based on a year and a half time lapse between now and the original injury with the level of his persistent symptoms, I doubt this problem will resolve on its own and it will require treatment as described above.

Medical records submitted below dated April 2000 stated that plaintiff reported decreased strength in his right wrist since the accident, and that his right wrist flexion was ten degrees less than the left, and right wrist extension was five degrees less than the left. Those records also stated that, as a result of his knees having banged against the dashboard in the accident, plaintiff had left and right knee chondromalacia patella,<sup>2</sup> and that he had pain in both knees while going up and down stairs, squatting, and playing basketball. Medical records dated October 10, 2000, stated that plaintiff's right wrist pain persisted and that he had weakness in gripping with that hand.

We conclude that there was ample evidence that plaintiff suffered extensive residual impairment as a result of his injuries, and that his prognosis for recovery was guarded. Defendant's own expert noted that 1 ½ years post-accident plaintiff continued to suffer persistent symptoms and that surgery was indicated. "[A]n injury need not be permanent to be serious," *Kern, supra* at 341, quoting *Cassidy, supra* at 505. Under these circumstances, we conclude that the circuit court erred in concluding that plaintiff's general ability to lead his normal life was not affected. *Kern, supra*.

Reversed.

/s/ Helene N. White  
/s/ Joel P. Hoekstra

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<sup>2</sup> The term "chondroma" refers to "a benign cartilaginous tumor or growth," and "patella" to the kneecap. *Random House Webster's College Dictionary* (1995).

At the October 8, 2001 hearing on defendant's motion for summary disposition, plaintiff's counsel advised the court, but submitted no documentary evidence or affidavit to support, that plaintiff would undergo surgery the following week for a deviated septum, and was also going to undergo another surgery to his wrist. Defense counsel responded that plaintiff's arguments included facts not of record.