

STATE OF MICHIGAN  
COURT OF APPEALS

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BRIAN JOHN DOWELL and KELLY DOWELL,

Plaintiffs-Appellants,

v

BARBARA ANN MARSACK,

Defendant-Appellee.

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UNPUBLISHED

May 22, 2007

No. 274532

Macomb Circuit Court

LC No. 2005-003918-NH

Before: Cooper, P.J., and Murphy and Neff, JJ.

MURPHY, J. (*concurring in part, dissenting in part*).

I concur with the majority that the trial court erred in ruling on defendant's motion for summary disposition that the injuries suffered by plaintiff Brian Dowell (Dowell) did not constitute a serious impairment of body function as a matter of law under MCL 500.3135. The majority remands the case for trial to resolve the question whether Dowell satisfied the statutory threshold necessary to recover noneconomic damages. I would conclude that there is no material factual dispute regarding the nature and extent of Dowell's injuries and that plaintiffs established a serious impairment of body function as a matter of law, thereby precluding resolution of the issue by the trier of fact. Accordingly, I respectfully dissent from that portion of the majority opinion remanding the case for trial on the issue of serious impairment.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Under MCL 500.3135, a person is 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. A "serious impairment of body function" is defined 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).

Under *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004), a court must first 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 function. If the court makes such a conclusion, it may continue to the next step. *Id.* at 132. But, if a court determines that 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. *Id.*, citing MCL 500.3135(2)(a)(i) and (ii).

I conclude that there is no material factual dispute regarding the nature and extent of Dowell's injuries. Dowell, a police officer, was injured when defendant drove her vehicle into Dowell while he was directing traffic at an intersection. The hospital's operative report indicated that Dowell sustained a "bicondylar left tibial plateau fracture," which required surgery described as an "open reduction and internal fixation of the tibial plateau fracture." As noted by the majority, there was irreversible damage to his left peroneal nerve that caused permanent numbness in Dowell's left foot (peroneal nerve paresthesia). The nature of Dowell's injuries, described above, is not factually disputed. Regarding the extent of the injuries, to the degree it differs from that discussed above, Dowell's doctor opined that his knee will "in all medical likelihood . . . progress to traumatic arthritis." The doctor further indicated that "[t]he natural history of [the] injuries lends itself to posttraumatic arthritis and its subsequent treatment."<sup>1</sup> These medical opinions are not countered by defendant with medical evidence to the contrary, nor does defendant even argue in her appellate brief that Dowell's doctor's opinions are unsound or that Dowell's outlook is any different from that suggested by the doctor. Defendant's position is essentially that there is no material factual dispute regarding the nature and extent of Dowell's injuries, and defendant is entitled to summary disposition because plaintiffs failed to establish a serious impairment of body function, in that, there was a failure to show that the impairment affected Dowell's general ability to lead his normal life. See MCL 500.3135(7). I simply see no basis to conclude that there is a material factual dispute regarding the nature and extent of Dowell's injuries.<sup>2</sup>

When a court decides the threshold issue as a matter of law, it must then proceed to the second step in the analysis and determine whether "an 'important body function' of the plaintiff has been impaired." *Kreiner, supra* at 132. If a court finds that an important body function has been impaired, it must then determine whether the impairment was objectively manifested. *Id.* There is no dispute that Dowell suffered an objectively manifested impairment of an important body function. If the court finds that there has been an objectively manifested impairment of an important body function, "it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." *Id.* This process involves an examination of the plaintiff's life before and after the accident. *Id.* The court should objectively determine whether any change in lifestyle "has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id.* at 133. "Merely 'any effect' on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his

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<sup>1</sup> Although the doctor indicated that Dowell "may" need further treatment, such as Cortisone injections, physical therapy, and arthroscopy of the knee, the doctor was fairly conclusive that traumatic arthritis will eventually result.

<sup>2</sup> I recognize that plaintiffs state that the facts "do not lend themselves to [a] judicially resolved conclusion," but we are not bound by plaintiffs' assertions.

life.” *Id.* The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. *Id.* These factors 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.*

In addition, “[s]pecific activities should be examined with an understanding that not all activities have the same significance in a person’s overall life.” *Id.* at 131. Thus, where limitations on sporting activities “might not rise to the level of a serious impairment of body function for some people, in a person who regularly participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function.” *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005).

The majority appears to believe that Dowell suffered a serious impairment of body function, but remands because the nature and extent of the injuries should not be judicially resolved. I conclude that Dowell indeed suffered a serious impairment of body function, but disagree that we should not reach the issue ourselves because of a material factual dispute regarding the nature and extent of the injuries. According to the analytical approach offered in *Kreiner*, *supra* at 131-132, the issue of determining whether a person suffered a serious impairment of body function is not to be addressed by the court as a matter of law until there is a finding that there is no material factual dispute regarding the nature and extent of the injuries. I would make such a finding and then proceed to the serious impairment question on de novo review. With respect to whether Dowell suffered a serious impairment of body function, I would find that he has sustained such an injury as a matter of law based on the facts cited by the majority relative to the affects of the injuries on his life. Dowell underwent surgery, was wheelchair-bound for three weeks following surgery, and then spent several more weeks using crutches, followed by use of a walker and then a cane. In all, it was four to five months before he could just walk on his own. He still walks with great care because of a loose feeling in his knee joint, occasionally limps, sometimes loses his balance, feels periodic pain and stiffness in his knee, and has curtailed pre-accident physical activities. And there is a physiological basis for these complaints and limitations. See *McDaniels v Hemker*, 268 Mich App 269, 284-285; 707 NW2d 211 (2005). Further, Dowell could not work for four months following the accident, at which time he returned to work on a restricted basis, and it was nearly one year after the accident before he could resume his full range of work activities. I would find that these facts alone are sufficient, but additionally, Dowell faces a future of traumatic arthritis and the possibility of significant medical treatment to deal with his health problems.<sup>3</sup>

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<sup>3</sup> To the extent that the majority is concluding that the extent of Dowell’s injuries entails the prognosis of future arthritis and treatment and that the matter is factually in dispute and is material because it has a bearing on the question whether his ability to lead his normal life was affected, I find the prognosis and possibility of treatment uncontested by evidence or argument, and, even if subject to dispute, I would still find that a serious impairment was established as a  
(continued...)

I would find that the trial court erred in granting summary disposition in favor of defendant, that there is no material factual dispute regarding the nature and extent of Dowell's injuries, and that he suffered a serious impairment of body function as a matter of law. Accordingly, I respectfully concur in part and dissent in part.

/s/ William B. Murphy

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(...continued)

matter of law given the totality of the other circumstances.