

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

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WAYNE COTTRILL, Individually and as Next  
Friend of JEREMY COTTRILL, and SALLY  
COTTRILL,

Plaintiffs,

and

SALLY COTTRILL as Next Friend of ANTHONY  
KELSEY,

Plaintiff-Appellant,

v

CRAIG KENNETH SENTER,

Defendant-Appellee,

and

FENTON LANES INC.,

Defendant.

UNPUBLISHED  
June 23, 2009

No. 285216  
Genesee Circuit Court  
LC No. 06-084724-NI

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Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

In this threshold case under the no-fault act, MCL 500.3101 *et seq.*, plaintiff, Sally Cottrill, as next friend of Anthony Kelsey, a minor, appeals as of right from the trial court's

orders dismissing her claims and closing the case.<sup>1</sup> We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant, Craig Kenneth Senter, was allegedly driving under the influence of alcohol when he crossed the centerline and struck head on a vehicle in which Anthony Kelsey was a passenger. Anthony, then in the eighth grade, suffered fractures in his left arm, right foot, and to three ribs. Anthony required household services and attendant care for one month, during which he was under medical orders not to use his right foot or left arm. After that period, he was allowed to resume weight-bearing activities, but was still disabled from participation in sports. Plaintiff asserts that the medical records show that a parent “reported that Anthony experienced a brief loss of consciousness prior to the arrival of the EMS,” but there is no objective medical evidence of this, or that Anthony was ever diagnosed with, or treated for, a traumatic brain injury.<sup>2</sup>

Anthony testified at deposition that he missed attending school for two months during the eighth grade, but nonetheless completed the school year on time and advanced to the ninth grade. Anthony reported that he had recovered fully from his injuries, but for minor residual pain in his ribs, which he did not expect to continue much longer. He testified that, because of his “ribs and . . . doctors” he was not playing football currently, but that he looked forward to participating in this sport the following year.

The trial court held that the injuries and impairments did not change the trajectory of Anthony’s life, and thus could not justify recovery in tort under the no-fault act. “We review a trial court’s decision on a motion for summary disposition de novo as a question of law.” *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). “In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

MCL 500.3135(1) provides that 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.” Subsection (7) states that, “‘serious impairment of body function’ means an objectively manifested impairment of an important body function that affects the person’s

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<sup>1</sup> This appeal relates to the litigation stemming from Anthony Kelsey’s injuries only, because the parties stipulated to dismissal of defendant Fenton Lanes, and all remaining parties have otherwise settled their claims.

<sup>2</sup> Plaintiff states that “Jeremy . . . sustained a mild complicated traumatic brain injury,” but Jeremy Cottrill is the other minor involved in the accident, so that item is inapt for present purposes. Plaintiff further asserts that Anthony required “[o]ngoing occupational therapy for visual disturbance,” but the exhibit cited shows that this also concerned Jeremy Cottrill, not Anthony Kelsey.

general ability to lead his or her normal life.” Subsection (2)(a) establishes that whether a person has suffered serious impairment of a body function is a question of law for the court, where there is no factual dispute concerning the nature and extent of the injuries, or where no such factual dispute is material to the question whether the person has suffered serious impairment of a body function.

Our Supreme Court’s decision in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), indicates that the conditions reinstating tort liability under the no-fault act are not lightly to be found. “Although some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if . . . the course or trajectory of the plaintiff’s normal life has not been affected, then the plaintiff’s ‘general ability’ to lead his normal life has not been affected” for purposes of establishing a serious impairment. *Id.* at 131. The focus is not on the plaintiff’s subjective pain and suffering, “but on injuries that actually affect the functioning of the body.” *Miller v Purcell*, 246 Mich App 244, 249; 631 NW2d 760 (2001).

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff’s “general ability” to conduct the course of his normal life has been affected: (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. [*Kreiner, supra* at 133 (footnote omitted).]

Plaintiff cites authority for the proposition that an impairment need not be permanent to qualify as one changing the trajectory of the injured person’s life. In fact, *Kreiner* advises, “While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff’s life.” *Kreiner, supra* at 135. We hold that, although it is no minor matter for a middle-school student to miss two months’ schooling, the interruption in this instance affected the trajectory of that school year, not of Anthony’s life in general. His own deposition testimony confirms that Anthony progressed normally in school despite that setback.

The treatment or therapies Anthony needed consisted of X-rays, casts, crutches, and a few follow-up examinations to monitor his progress. These treatments involved no surgery, overnight hospitalization, or heavy medication.

Concerning the prognosis for eventual recovery, plaintiff merely states, “Similar to the extent of any residual impairment analysis, a prognosis for eventual recovery need not include permanent injuries to a serious impairment of body function.” Plaintiff does not suggest that Anthony suffers from any residual impairment, or otherwise has not fully recovered. Again, Anthony’s own deposition testimony indicates that he fully recovered except for experiencing some minor and temporary rib pain.

This record indicates, as a matter of law, that Anthony Kelsey’s injuries and resulting impairments fall far short of the threshold required by *Kreiner* to subject defendant to tort

liability under the no-fault act. Accordingly, we find that the trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot

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Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent and conclude that plaintiff suffered a serious impairment of a body function as defined by MCL 500.3135(7).

In this case, defendant, a drunk driver with a blood alcohol of .30, crossed the centerline at high speed and struck the car in which plaintiff, an eleven year old boy was a passenger. Plaintiff lost consciousness for a short period. He was taken to the hospital emergency department following the accident and treated thereafter by an orthopedic specialist and his pediatrician. He was initially diagnosed with a left distal ulna (wrist) fracture, a left hand fracture, and three foot fractures. One of the foot fractures was comminuted and shortened.

Later, he was seen for difficulty breathing at which time he was diagnosed with rib fractures caused by the crash.

Plaintiff's arm and his foot were both casted. He was prescribed household and attendant care services for one month. His physician barred him from any use of the right foot or left arm for one month and restricted plaintiff from any weight bearing on the right leg, preventing him from walking. He was permitted to start weight bearing one month following the crash, but was not permitted to run or participate in sports for a longer period. Plaintiff missed two months of school as a result of his injuries. He was not permitted to play football in the 2006-2007 season although plaintiff was hopeful that he would be able to play the next year. At his deposition he reported that although he no longer had pain in his foot or arm, he continued to have pain from his rib fractures.

MCL 500.3135(1) provides that a person remains subject to tort liability for noneconomic loss caused by his use of a motor vehicle if the injured person has suffered a serious impairment of body function. MCL 500.3135(7) 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 normal life."

Plaintiff's multiple fractures were objectively manifested per imaging studies and his physician's observations and testing. His inability to walk and perform other basic activities of living were objectively manifested and constituted impairments of important body functions. He was unable to walk or use his left arm for over one month, unable to attend school for two months and for a longer period was unable to participate in sports and recreational activities normal for children. Thus, I would conclude that his general ability to lead his normal life was affected. In addressing this issue, we are to consider "how [plaintiff's] life has been affected, by how much, and for how long." *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004). The *Kreiner* Court went on to state that "specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life" and "that the duration of the impairment is short does not necessarily preclude a finding of a serious impairment of a body function." *Id.* at 131, 134. Further, the Court noted that a "de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability to lead his [normal] life" and that the effect must be more than a mere "minor interruption." *Id.* at 130, 133. In *Nicke v Miller*, 477 Mich 954; 723 NW2d 908(2006) the Supreme Court further addressed the issue of duration of the impairment, holding that "an impairment that satisfies the *Kreiner* standard need not be permanent or of any particular duration." *Id.*

While it appears that plaintiff has largely recovered from his injuries, he was unable to walk or use his left arm for at least one month and unable to participate in running or sporting activities for an extended period of time. He also missed two months of school, which is a significant period of time in the life of an eleven year old and his family. Being unable to walk and use one arm as well as being limited by rib fractures undoubtedly affects the ability to lead one's normal life and certainly even more so for an active eleven year old. While the duration of these limitations was thankfully limited, the extent of the limitations was substantial and the duration was not de minimis. For these reasons, I conclude that plaintiff did suffer a serious impairment of body function as set forth in MCL 500.3135(7) and would reverse the trial court.

/s/ Douglas B. Shapiro