MICHIGAN LAWYERS WEEKLY
www.milawyersweekly.com

Viewpoint

Judges make wrong call on Michigan auto accidents

By Steven M. Gursten

Judges, you've got this *Kreiner* case all wrong.

We need to take another look at this "threshold creep" in Michigan's auto accident threshold law, where each "*Kreiner* casualty" seems worse than the last. We have to look at some of these decisions, cases such as *Jones v. Jones* or *Gagne v. Schulte*, that are leading to such shocking and absurd results. Things are simply getting out of hand.

And it is not just us lawyers anymore who are completely bewildered.

As of today, I've counted 200 or so unpublished Michigan automobile accident injury cases where the defendant insurance company has won, and 30 or so auto accident cases where the plaintiff has won.

As our auto law in Michigan becomes more and more restrictive for car accident injury victims, one thing is becoming very clear: a lot of these cases are being wrongfully decided.

You are dropping the ball.

How can 'Kreiner' possibly be worse than 'Cassidy'?

When the Michigan Supreme Court interpreted the statutory definition of serious impairment of body function, found in 1995 PA 222 in *Kreiner v Fischer*, the majority wrote that the legislature's definition of serious impairment of body function was a return to *Cassidy v. McGovern.*

The majority wrote: "(A)s should be evident, and as previous panels of the Court of Appeals have noted, the most uncomplicated reading of the 1995 amendment is that the legislature clearly rejected *[DiFranco v. Pickard]* in favor of Cassidy."

It is another talk for another day about how our Court's majority could ever possibly say that this simple, short and unambiguous statutory definition was a return to *Cassidy*. The point for now is that this interpretation by the majority of our Michigan Supreme Court, no matter how flawed it may be, must be followed. It is still binding on lower courts.

If the Michigan Supreme Court, in *Kreiner v. Fischer*, found that the definition enacted by the Michigan Legislature was a return to *Cassidy* (and those cases decided during the 48 months that constitutes the *Cassidy* era), then cases that survived under Cassidy must survive after PA 222 and *Kreiner v. Fischer*.

Let's compare

Now let's look at *Jones v. Jones*, an unpublished case released by the Michigan Court of Appeals on Nov. 15, 2007. Cynthia Jones is hit by a car, causing severe leg fractures that require a very serious operation with plates and screws surgically inserted. She requires a wheelchair, a walker, and months of in-home nursing attendant care. She testified in her deposition that she still has pain and problems with standing and walking.

How are Cynthia Jones' injuries from her car accident different from Leo Cassidy's injuries after his car accident?

Michigan lawyers who practiced personal injury law during the *Cassidy* era would not refer to this period of time as a particularly friendly era for plaintiff lawyers, but in *Cassidy* the Michigan Supreme Court found that Leo Cassidy's fractures of both bones in his lower leg were indeed a serious impairment of body function. Leo Cassidy did not require surgery. In fact, Leo Cassidy had roughly seven months of disability and he made a very good recovery.

Cynthia Jones, on the other hand, had multiple fractures, required surgery, required surgical hardware, and required in-home attendant care. Not only does the Court of Appeals say that Cynthia Jones' case is *not* a serious impairment of body function as a matter of law, but Cynthia Jones also is denied her day in court. Case dismissed.

Cassidy was clearly a tougher standard than today's law of serious impairment. Under *Cassidy*, an injured car accident victim had to satisfy the "objective person" life impact standard. In PA 222, the Legislature specifically rejected this for a clearly easier "subjective" standard when it wrote the new definition of serious impairment in MCL 500.3135(7).

So how do we get from *Kreiner*, which calls this law a legislative re-enactment of *Cassidy*, to now, when Cynthia Jones' case is thrown out of court?

'Livermore v. Siddique'

Out of over 200 Kreiner casualties, as best I can tell, there is only one case that has made this exact point. *Livermore v. Siddique* is an unpublished decision, released on Feb. 6, 2007, by the Michigan Court of Appeals. The injuries in *Livermore* are similar to *Jones*, and here the Michigan Court of Appeals finally got it right, analyzing the plaintiff's injuries in the context of the *Cassidy* decision.

In *Livermore*, the Court of Appeals held that the plaintiff's fractured femur and hip from her automobile accident, both of which required a hospitalization and surgery, constituted a serious impairment as a matter of law, even though the plaintiff achieved a full recovery within approximately five months of her injuries.

The Court of Appeals reversed the trial court, finding:

"Plaintiff argues that the trial court improperly required that her injury be ongoing and permanent. We agree that the trial court improperly focused on the 'the rest of [plaintiff's] life' rather than 'the course or trajectory of the plaintiff's normal life.' *Kreiner*, supra at 131. The trial court's focus on the future of plaintiff's injury is inconsistent with statements from our Supreme Court, 'that the duration of the impairment is short does not necessarily preclude a finding of a serious impairment of body function[.]' Id. at 134. Further, *Kreiner* embraced language from *Cassidy v. McGovern* ... stating, 'We conclude that an injury need not be permanent to be serious.

Permanency is, nevertheless, relevant. (Two injuries identical except that one is permanent do differ in seriousness.)' ...

"Further, case law supports the conclusion that plaintiff was unable to lead her normal life during this period. In *Cassidy*, for example, the plaintiff suffered two broken bones in his lower right leg. He was hospitalized for 18 days, and '[d]uring the course of the seven months following the accident, [he] wore four casts. ... During much of this time he used a walker, being unable to use crutches because of dizzy spells.' ... However, the plaintiff 'returned to normal and there was no significant residual damage from the injury.' ...

"In *Kern v. Blethen-Coluni* ... the plaintiff suffered 'a serious femur fracture' and was unable 'to walk for three months.' ... This Court noted that '[a]lthough plaintiff had a good recovery; an injury need not be permanent to be serious.' ...

"We conclude that plaintiff's impairment is sufficiently similar to the impairments suffered by the plaintiffs in *Cassidy v. Kern* to meet the threshold requirement of serious impairment of body function. Plaintiff's impairment shares many of the same features as those impairments suffered by the plaintiffs in *Cassidy v. Kern,* including the seriousness of the initial injury (requiring surgery and hospitalization), the extensive treatment required (35 physical therapy sessions) and the inability to walk at all for a significant time, and only later with the help of a walker, crutches, and a cane. ...

"In sum, although plaintiff has recovered from her femoral fractures, because plaintiff presented sufficient evidence to establish that this temporary impairment was sufficiently debilitating to meet the statutory threshold for serious impairment of body function, we reverse the trial court's order granting summary disposition for defendants and remand for further proceedings."

Essentially, we have very similar injuries and disabilities in *Cassidy*, *Livermore* and *Jones* (however, the surgery in *Jones* is worse than the non-surgical injuries suffered by Leo Cassidy, which were still found to be a serious impairment as a matter of law). Yet, with no appreciable difference between these cases, *Livermore* not only survives, but is also found to be a serious impairment of body function as a matter of law. *Jones,* however, is dismissed and denied her day in court.

We live in an uncomfortable era today in Michigan jurisprudence. Many lawyers and many judges believe this an era where partisanship has triumphed over precedent. Whether we agree or not with the *Kreiner* decision, rendered in yet another bitter and divisive 4-3 opinion, the majority's interpretation remains the law and binding on lower courts.

The Michigan Supreme Court said in *Kreiner* that our auto accident threshold law was a return to *Cassidy v. McGovern*. It did not say the Michigan auto accident threshold was worse than *Cassidy v. McGovern*. If this decision remains binding on lower courts, then *Jones*, *Gagne* and dozens of other cases representing people who have been thrown out of court have been wrongly dismissed. If an injury was a serious impairment under *Cassidy*, at the very least it must still be a serious impairment today.

Judges, are you listening?

Steven M. Gursten practices in the areas of auto negligence and no-fault insurance benefits at Gursten, Koltonow, Gursten, Christensen & Raitt, P.C., www.michiganautolaw.com/. Contact him at (800) 968-1001 or sgursten@gurstenlaw.com.

December 10, 2007