

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

ALISON R. NELSON,

Plaintiff/Appellant/  
Cross-Appellee,

Court of Appeals Nos. 293455 & 294205

vs.

Oakland County Circuit  
Court No. 07-086875 NI

FREDDIE DUBOSE,

Defendant/Appellee/  
Cross-Appellant.

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**DEFENDANT/APPELLEE'S SUPPLEMENTAL AUTHORITY RE:**  
**McCORMICK v CARRIER, MICH (2010), AND**  
**DEFENDANT/CROSS-APPELLANT'S REPLY BRIEF**

**ORAL ARGUMENT REQUESTED**

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES .....	i
COUNTER-STATEMENT OF FACTS .....	1
ARGUMENTS:	
I.    PLAINTIFF IS NOT ENTITLED TO A JUDGMENT NOTWITH- STANDING THE VERDICT AND A NEW TRIAL ON DAMAGES ONLY BECAUSE THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S FINDING THAT PLAINTIFF DID NOT SUSTAIN A SERIOUS IMPAIRMENT OF BODY FUNCTION AS A RESULT OF THE PARTIES' MOTOR VEHICLE ACCIDENT. (Appellant Issues I-III) .....	1
Standard of Review .....	1
Argument .....	4
II.   IF A NEW TRIAL IS ORDERED, PLAINTIFF CANNOT PREMISE HER "SERIOUS IMPAIRMENT" CLAIM ON THE ALLEGED AGGRAVATION OF HER PRE-EXISTING DEGENERATIVE CERVICAL SPINE CONDITION BECAUSE PLAINTIFF'S EVIDENCE ON THE CAUSAL CONNECTION BETWEEN THAT CONDITION AND THE MOTOR VEHICLE ACCIDENT HAS NO FACTUAL BASIS AND IS SPECULATIVE. (Cross-Appellant Issue I) .....	8
Standard of Review .....	8
Argument .....	8
III.  ON RETRIAL, PLAINTIFF CANNOT ELICIT ANY OPINION TESTIMONY THAT SHE SUSTAINED A SERIOUS IMPAIRMENT OF BODY FUNCTION. (Cross-Appellant Issue II) .....	12
Standard of Review .....	12
Argument .....	13
RELIEF .....	16

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INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Anderson v Senger</u> , unpublished opinion per curiam of the Court of Appeals, issued 7/26/07 (Docket No. 266941) .....	14,15
<u>Barnett v Hidalgo</u> , 478 Mich 151 (2007) .....	12
<u>Byrd v Blue Ridge Rural Electric Coop, Inc.</u> , 356 US 525; 78 S Ct 893; 2 L Ed 2d 953 (1958) .....	3
<u>Conservation Dep't v Brown</u> , 335 Mich 343 (1952) .....	3
<u>Craig v Oakwood Hospital</u> , 471 Mich 67 (2004) .....	4,8
<u>Dep't of Natural Resources v Frostman</u> , 84 Mich App 503 (1978) .....	14
<u>DiFranco v Pickard</u> , 427 Mich 32 (1986) .....	3
<u>Dudek v Popp</u> , 373 Mich 300 (1964) .....	14
<u>Dunn v Dunn</u> , 11 Mich 284 (1863) .....	3
<u>Ford v Clark Equipment Co</u> , 87 Mich App 270 (1978) .....	13
<u>Gallagher v Parshall</u> , 97 Mich App 654 (1980) .....	13,14,15
<u>Guerrero v Smith</u> , 280 Mich App 647 (2008) .....	4
<u>Henderson v State Farm Fire &amp; Cas Co</u> , 460 Mich 348 (1999) .....	3
<u>Hook v Rubin</u> , 2008 WL 4386752 (ED Mich, 2008) .....	6
<u>Independence Twp v Skibowski</u> , 136 Mich App 178 (1984) .....	15
<u>Koenig v South Haven</u> , 221 Mich App 711 (1997), <u>rev'd in part on other grounds</u> , 460 Mich 667 (1999) .....	15
<u>Kreiner v Fisher</u> , 471 Mich 109 (2004) .....	3,6
<u>Maldonado v Ford Motor Co</u> , 476 Mich 372 (2006) .....	12
<u>Mawich v Elsey</u> , 47 Mich 10 (1881) .....	3
<u>McCormick v Carrier</u> , ___ Mich ___ (2010) (Docket No. 136738, rel'd 7/31/09) .....	passim
<u>McMullen v Duddles</u> , 405 F Supp 2d 826 (WD Mich, 2005) .....	6
<u>Moll v Abbot Laboratories</u> , 444 Mich 1 (1993) .....	3

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**COUNTER-STATEMENT OF FACTS**

Defendant/Appellee/Cross-Appellant, FREDDIE DUBOSE, submits this brief to:

- (1) Discuss the Supreme Court's recent "serious impairment" decision in McCormick v Carrier, \_\_\_ Mich \_\_\_ (2010) (Docket No. 136738, rel'd 7/31/09) (Issue I) and
- (2) Respond to the arguments presented by Plaintiff/Appellant/Cross-Appellee, ALISON R. NELSON, regarding the issues presented in Defendant's cross-appeal (Issues II & III).

**I. PLAINTIFF IS NOT ENTITLED TO A JUDGMENT NOTWITHSTANDING THE VERDICT AND A NEW TRIAL ON DAMAGES ONLY BECAUSE THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S FINDING THAT PLAINTIFF DID NOT SUSTAIN A SERIOUS IMPAIRMENT OF BODY FUNCTION AS A RESULT OF THE PARTIES' MOTOR VEHICLE ACCIDENT. (Appellant Issues I-III)**

When the parties filed their initial briefs, the Supreme Court had not yet decided McCormick v Carrier. In her reply brief, Plaintiff contends that McCormick requires negation of the jury's finding that she did not sustain a serious impairment of body function. Plaintiff's arguments are based on a fundamental misreading of the Supreme Court's opinion, and a steadfast refusal to recognize that the jury's finding of causation does not require a conclusion that she sustained a serious impairment.

**A. Standard of Review.**

In her appellant brief, page vi, Plaintiff stated that "This Court will 'review the evidence and all legitimate inferences in the light most favorable to the non-moving party'", in determining whether she is entitled to a JNOV. Defendant agreed with that standard of review. (See Defendant's initial brief, 11).

In her reply brief, Plaintiff now claims that:

- McCormick requires that the "serious impairment" issue be decided by the courts as a matter of law under MCL 500.3135(2)(a) because "there was no genuine

dispute regarding the extent of Ms. Nelson's injuries". (Plaintiff/Appellant's Reply Brief, 2-4).<sup>1</sup>

•"[U]pon the special circumstances of this case [courts] must not give the benefit of the doubt to the opponent." (Id., 3).

•The trial court "utilized the wrong standard to address Plaintiff's motion for judgment n.o.v.", and incorrectly stated "that it should determine whether 'reasonable people' could differ on whether there was a serious impairment of body function." (Id., 4 & n 2).

Plaintiff premises this argument on the Supreme Court's discussion of MCL 500.3135(2)(a), which appears at pages 10-11 of its slip opinion. (Plaintiff/Appellant's Reply Brief, 2). Plaintiff omitted the footnotes which accompanied that discussion, undoubtedly because those footnotes explain when courts should not decide "serious impairment" issues.

In the body of its opinion, the Supreme Court summarized the statutory rules that define when "serious impairment" issues should be decided by courts as a matter of law. In footnotes, the Supreme Court stated its willingness to declare MCL 500.3135(2)(a) unconstitutional to the extent it conflicts with judicially created procedural rules governing summary disposition motions:

"Under the plain language of the statute, the threshold question whether the person has suffered a serious impairment of body function should be determined by the court as a matter of law as long as there is no factual dispute regarding 'the nature and extent of the person's injuries' that is material to determining whether the threshold standards are met.<sup>7</sup> If there is a material factual dispute regarding the nature and extent of the person's injuries, the court should not decide the issue as a matter of law.<sup>8</sup> Notably, the disputed fact does not need to be outcome determinative in order to be material, but it should be 'significant or essential to the issue or matter at hand.' Black's Law Dictionary (8<sup>th</sup> ed) (defining 'material fact')."

"<sup>7</sup>Notably, MCL 500.3135(2)(a) could unconstitutionally conflict with MCR 2.116(C)(10) in those cases wherein a court is required to (1) resolve material, disputed facts with regard to issues *other* than the nature and extent of the injury, such as the extent to which the injury actually impairs a body function or the injured party relied on that function as part of his or her pre-accident life, or (2) decide whether the threshold is met even though reasonable people could draw different conclusions from the facts. See *Skinner v Square D Co*, 445 Mich 153,

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<sup>1</sup>Note that Plaintiff never invoked MCL 500.3135(2)(a) in her trial court or appellant briefs as grounds for deciding the "serious impairment" issue in her favor.

161-162; 516 NW2d 475 (1994), and *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 357; 596 NW2d 190 (1999).

"Given that the allocation of decision-making authority between a judge and a jury is 'a quintessentially procedural determination,' *Shropshire v Laidlaw Transit, Inc*, 550 F3d 570, 573 (CA 6, 2008), this potential conflict raises questions as to whether the Legislature may have unconstitutionally invaded this Court's exclusive authority to promulgate the court rules of practice and procedure to the extent that MCL 500.3135(2)(a) is merely procedural. See *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964). We do not reach this issue today because we conclude that there are no material factual disputes affecting the serious impairment threshold determination in this case. Notably, however, the division of questions of law and fact between a judge and a jury is based on longstanding procedural rules, see *Mawich v Elsey*, 47 Mich 10, 15-16; 10 NW 57 (1881), that are intended to promote judicial efficiency. See *Moll v Abbot Laboratories*, 444 Mich 1, 26-28; 506 NW2d 816 (1993). Whether MCL 500.3135(2)(a) serves a purpose other than judicial dispatch is not clear, as the Legislature itself stated that the 1995 amendments were intended, in part, 'to prescribe certain procedures for maintaining [tort liability arising out of certain accidents].' See the title of 1995 PA 222. And, of course, the scope of the rules governing summary disposition are also supported -- if not compelled -- by the right to a jury trial in civil cases. See, generally, *Conservation Dep't v Brown*, 335 Mich 343, 346-347; 55 NW2d 859 (1952), and *Dunn v Dunn*, 11 Mich 284, 286 (1863). Accord *Byrd v Blue Ridge Rural Electric Coop, Inc*, 356 US 525, 537-538; 78 S Ct 893; 2 L Ed 2d 953 (1958). Interestingly, the dissent states that it disagrees with the majority that there could be a conflict between the statute and the court rule, but it also approvingly quotes *DiFranco [v Pickard]*, 427 Mich 32 (1986)] for the proposition that reasonable minds can often differ over the threshold issues in these cases.

<sup>18</sup>This plain reading of the statute is not necessarily inconsistent with the *Kreiner* majority's interpretation of MCL 500.3135(2)(a), see *Kreiner [v Fisher]*, 471 Mich [109] at 131-132 [2004], but neither the majority nor dissent in *Kreiner* discussed the constitutionality of this provision. As noted in footnote 7 of this opinion, however, the manner in which *Kreiner* interpreted the statute may be unconstitutional to the extent that it requires a court to usurp the role of the fact-finder. That issue is not presented on the facts of this case, however."

*McCormick*, slip op, 11-12 & nn 8-9 (italics in original; underlining added).

Although *McCormick's* discussion of MCL 500.3135(2)(a) was made in the context of summary disposition motions, the Supreme Court's "warning" is equally applicable to other situations when a court is asked to decide the "serious impairment" issue as a matter of law -- motions for directed verdict and JNOV. Per *McCormick*, judicial procedural rules "trump" MCL 500.3135(2)(a)'s procedural rules. In the context of deciding JNOV motions, the longstanding judicially created rule is that the evidence (and all legitimate inferences therefrom) must be

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viewed in the light most favorable to the non-moving party (here, Defendant). E.g., Craig v Oakwood Hospital, 471 Mich 67, 77 (2004); Sniecinski v Blue Cross & Blue Shield, 469 Mich 124, 131 (2003); Guerrero v Smith, 280 Mich App 647, 666 (2008). The trial court used that judicial standard in deciding Plaintiff's JNOV motion.

McCormick further holds that a jury must decide the "serious impairment" issue -- even when the nature and extent of the plaintiff's injuries are undisputed -- when "reasonable people could draw different conclusions from the facts". McCormick, supra, 11, n 7. In the context of deciding JNOV motions, the judicially created rule is the same -- ""If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand."" Guerrero, supra. The trial court correctly invoked that rule in denying Plaintiff's JNOV motion.

**B. Argument.**

Plaintiff admits that the parties "hotly disputed" causation, i.e., what injuries were caused by the parties' accident. (Plaintiff-Appellant's Reply Brief, 2, 3). Plaintiff further admits that "there was a dispute as to whether the injuries' impact on Ms. Nelson constituted a serious impairment of body function." (Id., 4). Nevertheless, Plaintiff argues that once the jury answered "yes" to Question #2 -- "Was the defendant's negligence a proximate cause of plaintiff's injury?" -- "the trial court, as a matter of law, should have determined that the injuries constituted a serious impairment of body function." (Id., 1-2).

Plaintiff's argument is based on a faulty premise -- the jury must have found that the accident caused both the injury to her shoulder and the aggravation of the pre-existing degenerative disease in her neck. In arguing that she sustained a serious impairment, Plaintiff combines the treatment and work absences related to both injuries, and emphasizes the predicted 10%-15% future limitation on her neck motion. (Id., 8-9).

Plaintiff could have -- but did not -- request a verdict form that would have required the jury to consider the "causation" and "serious impairment" issues as to each separate injury. Instead, the jury was asked whether Defendant's negligence was a proximate cause of "the

Plaintiff's injury", and whether "the Plaintiff's injury" resulted in a serious impairment of body function. (4/17/09, 158). As more fully explained in Defendant's initial brief, pages 13-19, the jury's answers to those two questions can be logically explained as follows:

- (1) Plaintiff's shoulder injury (and probably a temporary soft-tissue cervical strain) were caused by the accident, **but**
- (2) The accident did not cause an aggravation of Plaintiff's pre-existing degenerative cervical spine condition, **and**
- (3) Neither the shoulder injury, nor the temporary cervical strain, resulted in a serious impairment of body function.

Plaintiff never addresses this interpretation of the jury's findings.

Defendant must also take issue with the following statement -- "That Ms. Nelson was asymptomatic and pain-free prior to the collision could not be genuinely disputed." (Plaintiff-Appellant's Reply Brief, 2). Defendant did dispute Plaintiff's claim that she was "asymptomatic" vis-a-vis her pre-existing neck condition. Plaintiff's medical records established that Plaintiff saw her family physician one and one-half years before the accident for complaints of neck pain and stiffness in her cervical spine. (See Defendant's initial brief, pages 2 & 18, for further discussion.)

Defendant also presented the following evidence to establish that any cervical strain Plaintiff sustained in the accident was temporary, and did not aggravate her pre-existing degenerative condition:

- Three months after the accident, Plaintiff was examined by Dr. Higginbotham for continuing shoulder complaints. The resulting report contained no indication that Plaintiff was experiencing neck pain, or a history of such pain.
- Over two and one-half years after the accident, Plaintiff saw various physicians for increased neck pain and underwent her first cervical spine MRI, which revealed pre-existing degenerative changes.
- Defendant's expert, Dr. Louis Jacobs, testified that the accident did not aggravate Plaintiff's pre-existing condition.

(See Defendant's initial brief, pages 5-6, 8 & 18, for further discussion.)

Plaintiff's continued reliance on Hook v Rubin, 2008 WL 4386752 (ED Mich, 2008), and McMullen v Duddles, 405 F Supp 2d 826 (WD Mich, 2005), is also misplaced. (Plaintiff-Appellant's Reply Brief, 5-6). In both cases, the district court denied the defendant's motion for summary disposition on the "serious impairment" issue. In neither case did the plaintiff ask for or obtain summary disposition on that issue. The Hook and McMullen courts only held that a jury should decide whether the plaintiff sustained a serious impairment. **That has already occurred in this case.**

Finally, Defendant wishes to dispel any notion that this case must be retried because McCormick overruled Kreiner's interpretation of the "serious impairment" definition in MCL 500.3135(7), and adopted a new interpretation. The trial court refused to give Defendant's special jury instructions, which were based on Kreiner's now discarded holdings. (4/17/09, 117-118). Instead, the jury was given the following standard jury instruction per MI Civ JI 36.11 regarding the definition of "serious impairment":

"A serious impairment of body function means an objectively manifested impairment of an important body function that affects the Plaintiff's general ability to lead her normal life. An impairment need not be permanent in order to be serious impairment of body function. In order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis. The phrase 'important body function' has no special or technical meaning in the law and should be considered by you in the ordinary sense of its common usage." (4/17/09, 150).

The afore-quoted jury instruction is perfectly consistent with McCormick's interpretation of the three requirements imposed by MCL 500.3135(7) -- "(1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person's general ability to lead his or her normal life (influences some of the plaintiff's capacity to live in his or her normal manner of living)." McCormick, supra, 34. McCormick also emphasized that "[t]he serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis." Id.

McCormick also reaffirmed that "the serious impairment threshold [is] not met by pain and suffering alone". Id., 15 Moreover, "the focus 'is not on the injuries themselves, but how the injuries affected a particular body function.'" Id. Finally, the proper inquiry is not how the person's normal manner of living has been affected, but rather how "the person's *ability* to live his or her normal manner of living has been affected". Id., 20 (italics in original).

The jury heard extensive evidence regarding Plaintiff's pre- and post-accident abilities to function, including her ability to perform her attorney's job at her pre-accident "achiever" level. As in McCormick, work occupied the major portion of Plaintiff's pre-accident life. While Plaintiff emphasizes the curtailment of her church and bar association activities, the fact that she still engages in those activities establishes her "ability" and "capacity" to continue that aspect of her life. Ultimately, it was the jury's duty to decide whether Plaintiff's post-accident ability to function was sufficiently affected to satisfy the "serious impairment" threshold.

In short, McCormick does not require this Court (or the trial court on remand) to hold that Plaintiff "unequivocally suffered a serious impairment of body function". (Plaintiff-Appellant's Reply Brief, 9). To the contrary, the Supreme Court now wants juries to decide the "serious impairment" issue whenever material factual disputes exist, or when reasonable persons could reach different conclusions. The jury's finding of no serious impairment should not be negated, and "usurped" by Plaintiff's obviously biased view of the evidence.

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**II. IF A NEW TRIAL IS ORDERED, PLAINTIFF CANNOT PREMISE HER "SERIOUS IMPAIRMENT" CLAIM ON THE ALLEGED AGGRAVATION OF HER PRE-EXISTING DEGENERATIVE CERVICAL SPINE CONDITION BECAUSE PLAINTIFF'S EVIDENCE ON THE CAUSAL CONNECTION BETWEEN THAT CONDITION AND THE MOTOR VEHICLE ACCIDENT HAS NO FACTUAL BASIS AND IS SPECULATIVE. (Cross-Appellant Issue I)**

**A. Standard of Review.**

Plaintiff agrees that the de novo standard of review applies, and that Defendant's entitlement to a partial directed verdict requires a review of the evidence and all legitimate inferences in the light most favorable to Plaintiff. (Plaintiff-Appellant's Reply Brief, vi).

**B. Argument.**

Plaintiff argues that "Dr. Bono testified with certainty that the automobile accident aggravated an existing condition" in Plaintiff's neck. (Id., 14-15). Plaintiff maintains that Dr. Bono "should be applauded for his careful and scrupulous testimony" because he was "not a paid expert who will fashion his testimony for the benefit of a party". (Id., 14).

Defendant agrees that Dr. Bono was "certain" about his "causation" opinion, and that he "carefully" answered questions during his deposition. However, Dr. Bono's subjective belief in the correctness of his opinion and his candor are not the proper inquiries.

The first inquiry is whether Dr. Bono's "causation" opinion was based on evidence presented, and facts established, at trial. Craig, 471 Mich at 87; Skinner v Square D Co, 445 Mich 153, 173 (1994); MRE 703. When an expert's causation theory lacks a basis in established fact, and is premised on mere suppositions, an authentic issue of causation is not established. Skinner, supra, 174.

There was one undisputed fact that Dr. Bono cited to support his opinion -- Plaintiff's vehicle was rearended. (Bono Dep, 25-26). However, Dr. Bono also based his opinion on several assumptions which had no evidentiary basis, and were contrary to the evidence presented at trial.

Dr. Bono assumed that Plaintiff had never complained of neck pain prior to the accident:

"Q Now do you have any information to lead you to believe that she complained of this [neck] condition prior to the accident that she was involved in January of 2006?"

\* \* \* \*

"A As far as I know, she did not complain of the symptoms prior to her auto accident.

"Q Now, if she had this degenerative condition before the accident and there were no complaints of pain in the cervical area, what relation would the accident have in causing her to have pain after the accident?"

\* \* \* \*

"A My assumption would be that she had an exacerbation of the degenerative disk disease from a non-painful condition to a painful condition as a result of the trauma in the vehicle." (Bono Dep, 11-12).

That assumption was incorrect. The undisputed evidence established that Plaintiff saw her family physician one and one-half years before the accident for complaints of neck pain and tenderness in her cervical spine. (Trial Ex 2, p 25; 4/17/09, 25-26, 82-83, 85-86).

Dr. Bono also assumed that Plaintiff's head "flipped back" upon impact because she was not prepared for the collision:

"A I'm only speculating that she had a rear-end accident, she was not prepared for the accident, her muscles were not tensed for the impact. And that hyperextension maneuver, where your head flips back, is usually what stimulates neck pain." (Bono Dep, 26).

That assumption was contrary to Plaintiff's testimony that she saw Defendant's car before the impact, and braced herself for the collision. (4/16/09, 100-101, 164-165).

The second inquiry is whether Dr. Bono's opinion was merely speculative. Dr. Bono was never provided with Plaintiff's deposition or many of her medical records (e.g., Plaintiff's emergency room and physical therapy records, and Dr. Higginbotham's report) before he testified. (Bono Dep, 19, 39). Accordingly, Dr. Bono admitted that he had no knowledge of the following relevant facts:

"Q Do you know what happened to her body inside the vehicle?"

"A No.

"Q Do you know of anything she complained of initially after the accident?

"A No." (Id., 20).

\* \* \* \*

"Q Now, again, so, you don't know when following this accident her neck complaints began?

"A As far as I know, 2006, but I might be wrong on that.

"Q And what are you basing that on?"

\* \* \* \*

"A Just her history, January 6, 2006." (Id., 24).

\* \* \* \*

"Q So, the frequency of the [neck] symptoms, whether or not it was just some initial physical pain, along with back pain and other things, you don't really know the course of that pain from the accident leading up to the visit in your office?

"A Correct. I really know the symptoms that she presented to me with on October 7<sup>th</sup> of '08." (Id., 25).

\* \* \* \*

"Q And to the extent that you think it's related to the auto accident, that's, again, because you believe that these neck pain complaints started after the accident and simply increased or grew worse from the accident date leading up to the time that she saw you?

"A I don't know if they 'grew worse.' I don't have that information." (Id., 36).

\* \* \* \*

"Q And does the history that she gave Dr. Higginbotham differ from the history she gave you in any respect?

"A . . . She's had a number of difficulties, upper back pain, thoracic pain, pain around the scapula, right-sided pain.

"So, it appears that he didn't take a cervical history, a neck history.

"Q Did she provide that physician with any neck pain complaint or any history concerning her neck?

"A I don't know other than what you've got on this page right here. On this page there's nothing to suggest any neck complaints." (Id., 39-40).

Because of the gaps in his knowledge, Dr. Bono candidly and repeatedly admitted that he was "speculating", and could not state with a reasonable degree of medical certainty, that the accident aggravated Plaintiff's pre-existing degenerative disc disease. (Id., 20, 25-26, 35).

Plaintiff admits that Dr. Bono's testimony was "a combination of speculation and certainty", but only "regarding the precise mechanics of the accident". (Plaintiff-Appellant's Reply Brief, 13). Notably, Plaintiff never addresses Dr. Bono's incorrect assumptions or his lack of information. Those fundamental problems do not merely go to the "weight" that should be given to Dr. Bono's testimony, as Plaintiff argues. (Id., 10). Those problems instead demonstrate that Dr. Bono's opinion lacked a basis in established fact, and was premised on mere suppositions.

Plaintiff also admits that the "cause in fact" aspect of proximate cause cannot be based on conjectures, and that a plaintiff must present evidence which excludes other reasonable hypotheses with a fair amount of certainty. (Id., 15, 17). Dr. Bono never explained why his opinion was more probable than Dr. Jacobs' opinion that Plaintiff sustained (at most) a temporary cervical strain from the accident. Dr. Bono merely stated that he disagreed with Dr. Jacobs' opinion, based again on his incorrect assumptions:

"A . . . And then he [Dr. Jacobs] says:

""Her present symptomology most likely reflects an underlying degenerative disease and unrelated to the auto accident."

"I agree that she has an underlying degenerative condition but I believe it is related to the auto accident. My understanding is that she wasn't having any pain prior to the auto accident, leading a fairly normal life; yet, the discs were degenerating, and then, since the auto accident, something happens in the car. Again, I can only speculate. Something, some violent activity happens in her neck and then there's the neck pain and the arm pain." (Bono Dep, 34).

In short, Dr. Bono's "causation" opinion was based on only one undisputed fact -- a rear-end collision. That fact is equally consistent with Dr. Jacobs' opinion that Plaintiff only

sustained a temporary cervical strain. Accordingly, Plaintiff failed to establish that her "cause in fact" theory was anything more than a mere possibility.

Plaintiff and/or her attorney could have supplied Dr. Bono with additional relevant information, which could have assisted him in reaching an opinion which he felt comfortable espousing. Since they failed to do so, Dr. Bono candidly admitted that his "causation" opinion was speculative.

Accordingly, Defendant was entitled to a directed verdict to the extent that Plaintiff based her "serious impairment" claim on the aggravation of her pre-existing neck condition, her cervical spine surgery, and related sequelae. If this case is retried, Plaintiff can only premise her "serious impairment" claim on her shoulder injury.

**III. ON RETRIAL, PLAINTIFF CANNOT ELICIT ANY OPINION TESTIMONY THAT SHE SUSTAINED A SERIOUS IMPAIRMENT OF BODY FUNCTION. (Cross-Appellant Issue II)**

**A. Standard of Review.**

Plaintiff focuses on the "abuse of discretion" standard of review in analyzing this issue. That standard becomes applicable only after the evidence at issue is deemed admissible. Determining whether evidence is admissible is a question of law that is reviewed de novo. Barnett v Hidalgo, 478 Mich 151, 159 (2007).

Plaintiff also quotes a now discarded definition of "abuse of discretion" -- "the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." (Plaintiff-Appellant Reply Brief, 23). That standard was based on Spalding v Spalding, 355 Mich 382, 384-385 (1959). The Supreme Court first repudiated the Spalding standard in criminal cases, People v Babcock, 469 Mich 247, 269 (2003), and then in civil cases, Maldonado v Ford Motor Co, 476 Mich 372, 388 (2006).

Under the current definition, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." Barnett, supra, 158. "[A]dmitting evidence that is inadmissible as a matter of law constitutes an abuse of discretion." Id., 159.

**B. Argument.**

Plaintiff relies on MRE 702 and 704, and cases discussing those evidentiary rules in a variety of contexts, in arguing that Dr. Bono could testify that Plaintiff satisfied the statutory definition of "serious impairment of body function". (Plaintiff-Appellant Reply Brief, 19-22). Plaintiff factually distinguishes the four published cases cited by Defendant because they do not address the precise issue presented here. (*Id.*, 22-24). Plaintiff does not address the unpublished cases cited by Defendant, which resolved this precise issue in Defendant's favor. (See Defendant's initial brief, 27-28, for cases).

The rules which Plaintiff cites do not help her position. MRE 702 states:

"If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

MRE 704 states:

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Both of those rules were discussed in a factually and legally "on point" case -- Gallagher v Parshall, 97 Mich App 654 (1980). There, a jury found that plaintiff had not sustained a serious impairment of body function. On appeal, plaintiff argued that a new trial was required because the trial court refused to admit opinion testimony from two treating physicians regarding the seriousness of the impairment of the plaintiff's bodily functions. This Court disagreed.

The Gallagher Court initially explained the interrelationship of MRE 702 and 704:

"We acknowledge that testimony in the form of an opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. MRE 704. However, the testimony must be 'otherwise admissible' under MRE 702 to be allowed into evidence. *Ford v Clark Equipment Co*, 87 Mich App 270, 280; 274 NW2d 33 (1978).

"Before admitting expert opinion evidence, three factors must be established to the trial court's satisfaction. First, the witness must be qualified as an expert in his field. Second, there must be facts which require an expert's interpretation or analysis. Third, the witness's knowledge must be peculiar to experts rather than to lay persons. Dep't of Natural Resources v Frostman, 84 Mich App 503, 505; 269 NW2d 655 (1978). Such a witness is entitled to express an opinion, or conclusion, where that opinion is dependent on professional or scientific knowledge or skill. Id. Where all the relevant facts can be introduced in evidence and the jury is competent to draw a reasonable inference therefrom, opinion evidence will not be received. Dudek v Popp, 373 Mich 300, 306; 129 NW2d 393 (1964)."

Gallagher, *supra*, 656-657 (emphasis added).

Applying those rules, the Gallagher Court concluded that the physicians' "serious impairment" opinions were inadmissible under MRE 702 because the jury was fully capable of reaching its own conclusion on that issue:

"We conclude that the trial court properly excluded the testimony of Dr. Graham. . . . With regard to any opinion testimony by him relative to plaintiff's neck and chest injuries, we likewise conclude that it would not be 'otherwise admissible' under MRE 702, because the jury was fully capable, on the record before them, to determine the question of serious impairment *vel non* with respect to these injuries.

"As to the court's exclusion of the opinion testimony of Dr. Devlin regarding whether plaintiff's stiff neck constituted serious impairment, we are fully in accord therewith. Given the detailed testimony regarding the diagnosis of the injuries and the doctor's explication of the medical terms utilized in such diagnosis, we again conclude that the jurors were capable of reaching their own conclusion thereon unaided by any expert's opinion on the matter."

Gallagher, *supra*, 657-658 (emphasis added).

In addition to the five unpublished cases previously cited by Defendant, Plaintiff has referenced a sixth case supporting Defendant's position -- Anderson v Senger, unpublished opinion per curiam of the Court of Appeals, issued 7/26/07 (Docket No. 266941). (Plaintiff-Appellant's Reply Brief, 21). There, a jury concluded that the plaintiff was injured in the parties' motor vehicle accident, the defendant's negligence was a proximate cause of plaintiff's injuries, but those injuries did not result in a serious impairment of body function. The trial court denied plaintiff's motion for a JNOV or new trial.

On appeal, plaintiff challenged the trial court's refusal to allow questioning of a doctor as to whether plaintiff's injuries met the "serious impairment" threshold. This Court analyzed that issue under MRE 702 and 704 as follows:

". . . 'Testimony in the form of an opinion or inference *otherwise admissible* is not objectionable because it *embraces* an ultimate issue to be decided by the trier of fact.' MRE 704 (emphasis added). Furthermore, *where a trial court determines that expert testimony will assist the trier of fact* in understanding the evidence or determining a fact in issue, the expert may testify in the form of an opinion even where the testimony embraces the ultimate issue to be decided. MRE 702; *Independence Twp v Skibowski*, 136 Mich App 178, 186; 355 NW2d 903 (1984). On the other hand, where a jury is capable as anyone else of reaching a determination, the court may conclude that an expert opinion will not assist the trier of fact. MRE 702; MRE 704; *see also Koenig v South Haven*, 221 Mich App 711, 725-727; 562 NW2d 509 (1997), *rev'd in part on other grounds*, 460 Mich 667 (1999) (holding that where 'a jury is as capable as anyone else of reaching a conclusion on certain facts,' MRE 704 does not permit an expert witness to give an opinion on a matter that 'invades the province of the jury' because such an opinion is not helpful to the jury under MRE 702, and thus, is not otherwise admissible)."

Anderson, COA slip op, 5 (emphasis added).

Applying those rules, the Anderson Court held that the trial court had properly precluded Plaintiff's "serious impairment" questions:

"At trial, the jury heard detailed but conflicting testimony from several doctors regarding the seriousness of plaintiff's injuries. Furthermore, the jury was properly instructed regarding what must be shown to establish that an injury meets the serious impairment of body function threshold. Thus, the jury was in as good a position as an expert to determine whether plaintiff's injuries met the serious impairment of body function threshold, and Dr. Robertson's expert opinion of whether plaintiff's injuries met the serious impairment threshold would not have been helpful to the jury. The trial court therefore did not abuse its discretion when it precluded Dr. Robertson from giving his opinion regarding whether he thought plaintiff's injuries met the serious impairment of body function threshold."

Id. (emphasis added).

The reasoning used, and result reached, in Gallagher and Anderson are equally applicable in this case. The lengthy "serious impairment" hypothetical posed by Plaintiff's attorney, and Dr. Bono's answer, were inadmissible under MRE 702 and 704 and should have been stricken, as a matter of law. If this case is retried, the trial court should be directed to strike that question and answer, and preclude any similar inquiry which might arise.

**RELIEF**

WHEREFORE, Defendant/Appellee/Cross-Appellant, FREDDIE DUBOSE, respectfully requests this Honorable Court to GRANT the relief requested at pages 29-30 of Defendant's Initial Joint Brief.

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