

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

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BRIAN FISHER and KIM FISHER,

Plaintiffs-Appellees,

v

DERRICK BLANKENSHIP, GREG NICKEL,  
and LEANNA G. NICKEL,

Defendants-Appellants,

and

ESURANCE INSURANCE COMPANY,

Defendant.

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FOR PUBLICATION

October 22, 2009

No. 285852

Macomb Circuit Court

LC No. 2007-000662-NI

Advance Sheets Version

Before: M. J. KELLY, P.J., and K. F. KELLY and SHAPIRO, JJ.

K. F. KELLY, J. (*dissenting.*)

I dissent. I do not disagree with the majority that there is no factual dispute regarding the nature and extent of plaintiff's<sup>1</sup> injuries: He fractured one front tooth and it was replaced with an implant. And, over three years after the accident, this implant and additional front teeth were replaced with a partial denture.<sup>2</sup> I do, however, disagree with the majority's conclusion that plaintiff suffered a serious impairment of body function or a permanent serious disfigurement as contemplated under § 3135(1) of the no-fault act, MCL 500.3135(1). Contrary to the majority, I would hold that the trial court erred by denying defendants' motion for summary disposition because plaintiffs failed to show a threshold injury under § 3135(1) of the act. Accordingly, I would remand for entry of judgment in defendants' favor.

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<sup>1</sup> Because Kim Fisher's claims are derivative in nature, "plaintiff" refers to Brian Fisher only.

<sup>2</sup> Fisher testified that he would have needed the dental work performed eventually, even absent the fracture to the front tooth resulting from the accident. Several of his back teeth had already been replaced.

## I. Standard of Review

Our review of a trial court's decision on a motion for summary disposition is *de novo*. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 423; 766 NW2d 878 (2009). Summary disposition under MCR 2.116(C)(10) should be granted where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

## II. Serious Impairment

MCL 500.3135(1) states in relevant part: "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.*" (Emphasis added.) "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). It follows that to determine whether a person has suffered a serious impairment of an important body function, courts must consider whether a plaintiff is generally able to lead the normal life he or she led before the accident. *Kreiner v Fischer*, 471 Mich 109, 132-133; 683 NW2d 611 (2004). This analysis is highly plaintiff-specific: for example, a plaintiff who can no longer throw a baseball may or may not be "seriously impaired" depending on whether the plaintiff was a professional baseball player or "an accountant who likes to play catch with his son every once in a while." *Id.* at 134 n 19. The overall course of the specific plaintiff's "entire normal life" before and after the accident must be compared because "[m]erely '*any effect*' on the plaintiff's life is insufficient because a *de minimis* effect would not, as objectively viewed, affect the plaintiff's '*general ability*' to lead his life." *Id.* at 133 (emphasis in original). Accordingly,

[i]n determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. [*Id.* at 132-133.]

Our Supreme Court has articulated a non-exhaustive list of objective factors to assist courts in evaluating whether a plaintiff's general ability to conduct his or her normal life has been affected. *Id.* at 133. Those 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.*]

Turning to the facts of this case, it is my opinion that there is no genuine issue of material fact that plaintiff did not suffer a serious impairment of body function. Plaintiff *admitted* at his deposition that his injuries do not affect his ability to perform the normal tasks of daily life. No physicians or dentists have restricted his activities in any way. He remains employed as a machine operator at Textron Fasteners, the same job he held before the accident, and he conceded that the condition of his mouth did not affect his ability to perform his job functions. He missed a couple days of work because of the dental work involved, but otherwise did not

miss any work because of the accident. He takes no medication for pain. He continues to perform his usual household chores. He continues to engage in his favorite hobby: building home theatres. There is no effect on his usual social life. Plaintiff is able to eat as much as he did before the accident and his weight has remained constant. While plaintiff suffers some difficulty and discomfort in removing and replacing his new upper dentures,<sup>3</sup> the record is devoid of any indication that this affected his ability to conduct the course of his normal life.

Objectively viewed, and based on *plaintiff's own testimony*, there is no “difference between the plaintiff’s pre- and post-accident lifestyle [that] has actually affected the plaintiff’s ‘general ability’ to conduct the course of his life.” *Id.* at 133.<sup>4</sup> On this record, the trial court clearly erred by denying defendants’ motion for summary disposition.

### III. Permanent Serious Disfigurement

The record also demonstrates no genuine issue of material fact that plaintiff did not suffer a permanent serious disfigurement. With regard to determining whether an injury is a “permanent serious disfigurement” under § 3135(1), the disfigurement must, at least, be severe. *Minter v Grand Rapids*, 275 Mich App 220, 228; 739 NW2d 108 (2007), rev’d in part 480 Mich 1181 (2008). The seriousness of a disfigurement “depends on its physical characteristics rather than its effect on [a] plaintiff’s ability to live a normal life.” *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985); *Minter, supra* at 228, 242-243. While the emotional impact of a disfigurement on a plaintiff is relevant, that subjective factor must be reviewed in an objective manner to determine whether the disfigurement is truly serious or severe. *Minter, supra* at 229; *Nelson, supra* at 446. A plaintiff’s embarrassment or sensitivity about his or her appearance are subjective reactions to a condition that must be objectively judged by the trial court, and such reactions do not always create a question of fact. *Nelson, supra* at 446. And determining the seriousness<sup>5</sup> of a disfigurement is a matter of common knowledge and experience for the courts unless there is a question regarding the nature and extent of the disfigurement. MCL 500.3135(2)(a); *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000); *Nelson, supra* at 444, 446.

Here, viewing the evidence in a light most favorable to plaintiff, he has suffered at most a permanent disfigurement:<sup>6</sup> he fractured one tooth and it was removed and replaced with an

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<sup>3</sup> At the time of his deposition, plaintiff had only had the denture for four months.

<sup>4</sup> The majority’s attempts to favorably compare the facts of the instant case to *Caiger v Oakley*, 285 Mich App 389; \_\_\_ NW2d \_\_\_ (2009), is unavailing. In *Caiger*, as a result of injuries, the plaintiff lost his employment, continued to suffer chronic pain, remained medically restricted from continuing his trade, and was permanently prevented from engaging in his hobby of woodworking. Comparatively, the effect of plaintiff’s injuries in this case is minuscule.

<sup>5</sup> Although MCL 500.3135(2) does not define “serious,” it is defined in Black’s Law Dictionary (5th ed) as “important; weighty; momentous; grave; great . . . .”

<sup>6</sup> I have assumed for sake of argument that plaintiff’s condition is permanent. Black’s Law Dictionary (5th ed) defines “permanent” as “[c]ontinuing or enduring in the same state . . . without fundamental or marked change, not subject to fluctuation . . . fixed . . . .” Here, plaintiff’s disfigurement—his missing teeth—was remedied with a denture so that he no longer

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implant. Eventually, plaintiff also had to have the implant removed, along with additional front teeth, and replaced with a denture four to nine years earlier than he would have had to otherwise. While plaintiff is dissatisfied with his appearance when wearing his partial upper denture, an objective review of the physical characteristics of the disfigurement shows that plaintiff's condition is quite far from serious. Simply put, his missing teeth, and a subsequent use of a denture, do not rise to the level of a serious or severe disfigurement. This is because the disfigurement he has suffered has been fixed so that the impairment is no longer a deformity. In fact, photographs of plaintiff wearing his denture depict a normal-looking man with straighter-than-average front teeth.

Plaintiff complains of his appearance when wearing the denture. But even when objectively considering his subjective reaction, plaintiff's disfigurement cannot be considered serious. As noted, pictures of plaintiff depict a normal-looking man. Further, plaintiff conceded at his deposition that his denture looks better than his old teeth, and his friends have told him that his new teeth looked better than his originals. Thus, even by his own testimony, plaintiff does not suffer from a disfigurement severe enough to be considered "serious" within the meaning of § 3135(1). Defendants' motion for summary judgment should have been granted on this basis as well.

#### IV. Conclusion

The trial court erred in denying defendants summary disposition, and the majority now compounds that error. Particularly with respect to the issue of serious impairment, the majority is clearly not happy with the requirements of *Kreiner*. However, until modified or changed by either the Legislature or our Supreme Court, it remains the law and this Court is required to apply it in an intellectually honest manner. I would reverse and remand for entry of judgment in defendants' favor.

/s/ Kirsten Frank Kelly

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suffers from the disfigurement; in other words, the condition was fixable. Moreover, this disfigurement, as caused by the accident, was also not permanent in the sense that he would have had to have the denture by the time he was 50 to 55 years old to remedy pre-existing conditions. Thus, the disfigurement as caused by the accident only lasted four to nine years.