

# no-fault newsline

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

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## Michigan Court Of Appeals Clarifies the Self-Imposed Restriction Language of *Kreiner* in a Published Opinion

By James Swaim

In *McDaniel v. Hemker*, No. 263150 rel'd 9/27/05; the Michigan Court of Appeals clarified the often-quoted language in *Kreiner* that “self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish [the extent of any residual impairment].”

The plaintiff in *McDaniel* allegedly sustained a serious impairment of body function as a result of head, neck, back and shoulder injuries suffered in a motor vehicle accident. Specifically, she produced evidence supporting that she had missed six to seven months of work, gave up most of her recreational activities, reduced her household chores, and limited her gardening activities. Additionally, plaintiff claimed that her injuries interfered with sleep, led to decreased intimacy with her husband, and required treatment with medications, nerve blocks and physical therapy. The trial court granted summary disposition solely on the conclusion that self-imposed restrictions were involved. The Court of Appeals reversed, finding the plaintiff had sustained a serious impairment of body function under the “totality of the circumstances” and that “comparing *McDaniel*’s life before and after the accident is similar to comparing day to night.”

In reaching its’ decision, the Court noted that “simply because there may be self-imposed restrictions based on pain does not mean that a plaintiff has not established a threshold injury.” Indeed, the Court pointed out that *Kreiner* provided a non-exhaustive list of five objective factors to determine serious impairment, only one of which is “the extent of residual impairment.” As such, the language in *Kreiner* on self-imposed restrictions “is not a general proposition,” but is rather tied to the factor on residual impairment. Ultimately, the totality of the circumstances must be considered in determining whether one has suffered a serious impairment of body function.

### SECRET WARDLE NOTES:

In 2004, the Michigan Supreme Court interpreted the “serious impairment of body function” requirement of the Michigan No-Fault Act, holding the impairment must affect “the person’s general ability to lead his or her normal life.” The Supreme Court further outlined a non-exhaustive list of objective factors to assist in the determination: (a) the nature and extent of the impairment, (b) the type and length of the treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. The decision in *McDaniel* holds that these factors are neither exclusive nor dispositive by themselves. Moreover, the often-quoted language in *Kreiner* precluding evidence of self-imposed restrictions based on pain is limited to the determination of any residual impairment. Based on this decision, judges can be expected to focus on the totality of the circumstances rather than granting or denying summary disposition on the basis of any one factor, including evidence of residual impairment based on self-imposed or physician-imposed restrictions. Additionally, a plaintiff cannot establish the extent of a residual impairment by merely claiming that he or she has restricted himself or herself from engaging in activities or making certain movements because of pain.

## CONTINUED...

As the Court interpreted the *Kreiner* language on self-imposed restrictions to mean that a plaintiff “cannot establish the extent of her residual impairment by claiming she has restricted herself from engaging in activities or making certain movements because she experiences pain.” a corollary, the Court added that *physician-imposed* restrictions based on real or perceived pain can be used by a plaintiff to establish the extent of a residual impairment. There is no requirement that the doctor offer a medical reason for imposing restrictions based on pain. Moreover, self-imposed restrictions can be considered if they are *not* based on real or perceived pain. As an example, the Court suggested a plaintiff could argue she has restricted herself from playing sports because of a cast.

Finally, the Court found that evidence regarding restrictions is not the only way to establish the extent of residual impairment. Expert statements and opinions regarding the medical condition and the likelihood the condition is permanent can be used to show the extent of residual impairment.

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