

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

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STEVEN METIVIER,

Plaintiff-Appellant,

V

FRED KENTON SCHUTT,

Defendant-Appellee.

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UNPUBLISHED

July 31, 2001

No. 216325

Wayne Circuit Court

LC No. 97-704730-NI

Before: Saad, P.J., and White and Hoekstra, JJ.

PER CURIAM.

In this automobile negligence action, plaintiff appeals as of right the trial court's order granting a directed verdict in defendant's favor on the basis that plaintiff did not meet the serious impairment threshold. MCL 500.3135(7). We reverse.

I

Defendant moved for and was granted a directed verdict at the close of plaintiff's proofs, which were heard over the course of three days. The facts presented at trial viewed in a light most favorable to plaintiff are that plaintiff was in a two-vehicle accident on August 17, 1996, just after midnight. Defendant started to turn in front of plaintiff as plaintiff approached an intersection to go through it, defendant then stopped in plaintiff's lane, and the vehicles collided virtually head-on. Plaintiff was twenty-eight years old at the time and unmarried. The accident occurred while plaintiff and his brother, Paul Metivier, were on their way home from work at an auto parts manufacturer, Allied Manufacturing, where plaintiff was an afternoon shift supervisor.

Plaintiff and his brother did not go to the hospital after the accident. Plaintiff went to bed on arriving home and did not get out of bed until around 2:00 in the afternoon, and was in serious pain and not able to move well. He stayed in bed most of the time for the next 3 ½ weeks. Plaintiff saw his chiropractor, Dr. Huminski, on August 20, 1996, and the doctor ordered him to stay off work until September 10, 1996. Dr. Huminski diagnosed plaintiff with acute cervical lumbar subluxations<sup>1</sup> with spasms, cervical hyperflexion, hyperextension injuries and cervical

<sup>1</sup> Random House Webster's College Dictionary (1995), defines "subluxation" as "1. partial dislocation, as of a joint. 2. (in chiropractic) misalignment of one or more vertebrae."

myophasitis, and treated plaintiff twenty-four times between August 20 and December 12, 1996. Dr. Huminski testified that neck x-rays showed mild degenerative changes in plaintiff's mid-cervical spine, and that pre-accident x-rays of plaintiff's neck taken in May 1996 had been negative.<sup>2</sup> Dr. Huminski testified that he related plaintiff's neck problems to the auto accident, and that he referred plaintiff to a dentist, Dr. Fischer, because plaintiff complained of jaw discomfort, popping and clicking.

Plaintiff returned to work 3 ½ weeks after the accident, on September 10, 1996. Plaintiff saw Dr. Fred Fischer, a dentist specializing in cranial mandibular orthopedics on September 11, 1996, with complaints of jaw clicking and popping, problems that plaintiff said he had never had before, and complaints of numbness along the temple areas, and severe headaches. Dr. Fischer examined plaintiff's jaw joints through palpation, and with a stethoscope, and determined plaintiff's jaw was popping on both sides when he closed his mouth, that his jaw deviated to the right side when opened, that the jaw muscles were tender and painful on both sides; he therefore sent plaintiff for a CAT scan of the temporomandibular joint. The CAT scan performed on September 13, 1996 confirmed that plaintiff's jaw discs, which are supposed to act as cushions, were displaced on both sides, with the right side being worse than the left. Dr. Fischer testified that the ligaments were torn and "the bone is now popping on it's bony part," and that this dislocation can result in pain radiating up to the temples.<sup>3</sup>

On December 19, 1996, about one week after plaintiff's twenty-four treatments with Dr. Huminski ended, plaintiff consulted Dr. Laren Lerner, a physician board-certified in physical medicine and rehabilitation, with complaints of neck and mid-back pain, headaches, clicking and popping in his right jaw joint, intermittent dizziness, and complaints that bending, twisting, turning and lifting aggravated his neck and upper back. Dr. Lerner testified that when he examined plaintiff he felt and heard abnormality in plaintiff's right temporomandibular joint, and that it was tender and had a grinding type sound. Dr. Lerner also examined plaintiff's cervical spine (neck) and found a lot of tenderness, and he thus ordered an MRI of that area. The MRI performed on December 30, 1996 revealed that plaintiff's neck was abnormal: there were early or mild degenerative changes in his cervical spine, a mild degenerative marginal spur formation at the C3 and C4 vertebral bodies, and degenerative changes and dehydration at various disc levels including C2-C3, C3-C4, and C4-C5.<sup>4</sup> Dr. Lerner's diagnosis of plaintiff was "chronic

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<sup>2</sup> Plaintiff visited Dr. Huminski intermittently beginning in the early 1990s for lower back pain. Dr. Huminski had never treated plaintiff for neck problems before August 1996.

<sup>3</sup> Dr. Fischer testified that such injuries did not require the jaw actually being hit, and that when the body is hit, the jaw moves along with the skull.

<sup>4</sup> Dr. Lerner testified that he related the MRI findings to plaintiff's auto accident because:

Mr. Metivier is a young man. He was 28 years old at the time of the motor vehicle accident . . . in August of 1996. The MRI study was done at the end of December 1996. So the MRI study was done approximately four months later after the car accident. During this period of time as a result of the trauma to Mr. Metivier's neck and during the motor vehicle accident Mr. Metivier suffered a

(continued...)

cervical and dorsal myofascial [sic] ligamentous strain, chronic right temporomandibular joint dysfunction with left temporomandibular joint dysfunction as well, and chronic post traumatic cephalgia” i.e., headaches. Dr. Lerner testified that the CAT scan ordered by Dr. Fischer showed abnormal results; there being evidence of actual “severe anterior displacement of the right” temporomandibular joint with a grade III over III, and moderate anterior displacement of the left joint with a grade of II over III. Dr. Lerner opined that the CAT scan was one of the best tests to diagnose TMJ disorder because it shows the bones and joint in a cross-sectional picture and whether the TMJ is traumatically injured and displaced.

Dr. Lerner testified that plaintiff needed physical therapy to the jaw, neck and upper back areas, and that plaintiff had twenty-three treatments of intensive outpatient therapy under his supervision from December 19, 1996 until February 10, 1997. The therapy included treatment with hydrocolator packs, ultrasound, massage, therapeutic stretching exercises and electrical muscle stimulation. Dr. Lerner also treated plaintiff with prescriptions of Day Pro, an anti-inflammatory, and Flexeril, a muscle relaxant.

Dr. Gary Galens, a radiologist with a specialty in temporomandibular joint CT’s, reviewed and interpreted plaintiff’s original films and testified that the studies showed anterior displacement of the right and left temporomandibular joint disc, with plaintiff being a grade III (on a scale of I to III, III being the worst) on the right side and grade II on the left side.

After the treatments with Dr. Lerner ended in February 1997 (six months after the accident), plaintiff did not seek additional treatment until August 1998. Plaintiff testified that he did not seek treatment in that time because he had been told that he had reached a plateau and that nothing more could be done, and that the problem with his jaw was permanent, and because he had changed jobs and his Blue Cross medical insurance coverage had thus ended and he could not afford all the costs and treatment. Plaintiff testified that during that 1 ½ year period, he continued to have pain, primarily in the jaw, neck and back of the head, that he self-medicated with Tylenol and ibuprofen quite frequently, and that at times these were almost a staple in his diet. He testified that those medications gave him some relief but did not eliminate the problems.

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(...continued)

hyperextension, hyperflexion, whiplash type injury to his neck in which he had stretching and partial tearing of the muscles and ligaments in his neck causing some injury to the discs which are between the vertebral bones in the neck. This hyperextension hyperflexion injury caused some fluid to be pushed out of the soft discs in the neck. As a result of this there is what was seen on the MRI study which is dehydration changes. That would be a pushing out of some of the fluid that would normally be in the neck as a result of the hyperextension hyperflexion injury. The discs, having lost some of the fluid show up as a dehydration on the MRI. This inflammatory process also produced the degenerative changes which would have been seen to a large extent on the MRI study. The degenerative changes were early and that would also correlate with the patient’s motor vehicle accident approximately four months earlier.

The trial court granted defendant's motion for directed verdict,<sup>5</sup> stating from the bench:

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<sup>5</sup> Defendant argued in its motion for directed verdict that plaintiff's testimony was "inherently incredible." Defendant argued that even when plaintiff was off work he was active, that the doctors did not find him disabled, that he returned to work and had testified "that his job duties remain the same." Defendant argued that plaintiff's physical therapy with Dr. Lerner ended in February 1997 and

then nothing, nothing until his attorney tells him, go back see the doctor because we're going to trial and you better get your act together, get our act together. And I'm obviously dramatically perhaps overstating that, but it's his attorney that's telling him go back and see the doctor. It's not because he needs treatment.

And he was also impeached by telling us that . . . he didn't go back, despite having pain because of insurance, his insurance was in place. That's not the motivation, that's not the reason.

He also testifies . . . with reference to counsel's litany of what you can do, what you can't do. I can't ride a bike. You're riding a bike at 2 o'clock or 1 o'clock in the morning, 20 miles during the week.

One, I submit to the Court that goes back to the inherent credibility.

But secondly, he tells us that he does that after he goes to bars 3 or 4 times a week. I've heard nothing . . . in this record that reasonably or the exercise of minimal amount of common sense could lead us to the conclusion that the standard has been met, a serious impairment of an important body function.

If it was so darn serious, if it was so darn important, where was he getting treatment? Where was he doing things to make it better? He has a duty, he has an obligation to mitigate damages. That's the jury instruction. That's the law in the State of Michigan.

I think this is the case along with all the other cases that might fit this standard of factors as we see, that the legislature was directing its attention at. And I realize it's a tough task for the – whether it's the Bench or from the Bar, perhaps interpreting, but certain times it's pretty darn clear.

And I think the case we cited in our motion originally filed, help in a big way. This is not a serious impairment of an important body function case.

It is a case that is covered by the first-party benefits of the No-Fault Act. And it is not a situation where third party tort recovery is permitted, ought to be permitted or has any place even before the Court.

Plaintiff's counsel argued in response that plaintiff was entitled to a directed verdict. Defense counsel responded by arguing that plaintiff had not established objectively manifested injuries  
(continued...)

Well, I'm ready to rule. Some days it goes to the Defendant to urge this Court to find as a matter of law that there was not a serious impairment of a body function. The existence of a serious impairment of a body function is generally a question of law, unless there is a factual dispute about the nature and extent of the injuries.

Now I'm using the jury instruction SJI 2<sup>nd</sup> 36.11 to decide whether or not this definition that the jury would hear is something that a reasonable juror can find with respect to Plaintiff's claim.

I quote from the instruction; "serious impairment of a body function means an objectively manifested impairment of an important body function that affects Plaintiff's general ability to lead his normal life." It goes on, "an impairment does not have to be permanent in order to be a serious impairment of a body function."

"The amended No-Fault Statute Public Acts 222, provides that the serious impairment of a body is a question of law if the trial judge finds either; 1) there is no factual dispute concerning the nature and extent of the injuries" – and I certainly cannot find that.

And, 2) "there is a factual dispute concerning the nature and extent of the person's injuries but the dispute is not material to the determination of whether the person suffered a serious impairment of a body function."

In order to prove serious impairment of a body function as Plaintiff's counsel correctly points out and there's certainly no dispute from the Defendant, the serious impairment must be objectively manifested, it must be verified by a doctor, it must affect an important body function and it must affect the person's general ability to lead his or her normal life.

I conclude as a matter of law having heard all of Plaintiff's presentation that no reasonable juror could find that this person's general ability to lead a normal life is or has been affected, and therefore, Defendant's motion for directed verdict is granted.

Plaintiff's counsel objected, stating that plaintiff was entitled to a jury trial, and asked the court to reconsider its ruling. The trial court declined. The trial court denied plaintiff's motion for reconsideration. This appeal ensued.

## II

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(...continued)

and that plaintiff's motivation in consulting with doctors in 1998 was that trial was upcoming. Defense counsel argued that "anything that Fischer and Lerner state with reference to August or September [1998] seems to me to be terribly – should be terribly discounted." Defense counsel argued that Dr. Fischer provided plaintiff no treatment in August 1998, i.e., that making plaintiff an orthotic appliance did not constitute treatment.

Plaintiff argues that the trial court erred in granting defendant's motion for directed verdict where there was ample evidence from which a jury could have concluded that he suffered a serious impairment of body function.

Defendant responds that the trial court properly decided the motion for directed verdict as a matter of law under the amended § 3135 because plaintiff failed to present a prima facie case of a threshold injury.

This Court reviews the granting of a directed verdict de novo, viewing the evidence in the light most favorable to the nonmoving party. *Braun v York Properties, Inc*, 230 Mich App 138, 141; 583 NW2d 503 (1998). "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Meagher v Wayne State Univ*, 222 Mich App 700, 707-708; 565 NW2d 401 (1997), citing *Brisbois v Fireboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988). Questions of statutory construction are issues of law this Court also reviews de novo. *Churchman v Rickerson*, 240 Mich App 223, 227-228; 611 NW2d 333 (2000).

The no-fault act 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." MCL 500.3135(1). The Legislature in enacting 1995 PA 222 amended the no-fault act "by codifying the tort threshold injury standards of *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982), overruled by *DiFranco [v Pickard]*, 427 Mich 32; 398 NW2d 896 (1986)," among other things. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). Under the amended act "absent an outcome-determinative genuine factual dispute, the issue of threshold injury is now a question of law for the court." *Kern, supra* at 341.

. . . whether the plaintiff has suffered serious impairment of body function . . . is for the court to decide as a matter of law if there exists no factual dispute with regard to the nature and extent of the plaintiff's injuries, or, where there is such a factual dispute, that dispute is not material to the determination whether the plaintiff has suffered a serious impairment of body function or permanent serious disfigurement. [*Churchman, supra* at 226, citing MCL 500.3135(2)(a)(i) and (ii).]

"Serious impairment of body function" means "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." *Kern, supra* at 340, quoting House Legislative Analysis, HB 4341, December 18, 1995, p 2 and noting its adoption of the standards of *Cassidy, supra*. The *Kern* Court further noted that:

. . . the term "important body function" has special meaning in the law. An important body function is a function of the body that affects the person's general ability to live a normal life. *Cassidy, supra* at 505. . . .

In determining whether the impairment of the important body function is "serious," the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery. [Citation omitted.] Finally, although the injury threshold is a significant obstacle to tort recovery,

*Cassidy, supra* at 503, “an injury need not be permanent to be serious.” *Id.* at 505. [*Kern, supra* at 340-341.]

A

### **Objectively Manifested Impairment**

We conclude that plaintiff presented ample evidence to satisfy the “objective manifestation” requirement of the statute. Dr. Huminski testified that he diagnosed plaintiff with having acute cervical lumbar subluxations with spasms, cervical hyperflexion, hyper extension injuries and cervical myofasitis. He testified that neck x-rays showed mild degenerative changes in plaintiff’s mid-cervical spine. Dr. Fischer testified that plaintiff’s injuries were objectively manifested and medically identifiable, through his clinical examination, stethoscope examination, CAT scan and clinical evaluation. Dr. Fischer testified that plaintiff’s injury was permanent. Dr. Fischer testified that the CAT scan performed on September 13, 1996 confirmed that plaintiff’s discs, which are supposed to act as cushions, were displaced on both sides, with the right side being worse than the left. He testified that the ligaments were torn and “the bone is now popping on it’s bony part.”<sup>6</sup>

Dr. Lerner testified that the MRI performed on December 30, 1996 revealed abnormalities in plaintiff’s neck: early or mild degenerative changes in his cervical spine, a mild degenerative marginal spur formation at the C3 and C4 vertebral bodies, and degenerative changes and dehydration at various disc levels including C2-C3, C3-C4, and C4-C5. Dr. Lerner also testified that the CAT scan ordered by Dr. Fischer showed abnormal results; there being evidence of actual “severe anterior displacement of the right” temporomandibular joint with a grade III over III, and moderate anterior displacement of the left joint with a grade of II over III.

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<sup>6</sup> Dr. Fischer testified that when he saw plaintiff in 1998, plaintiff’s condition had “improved slightly,” but that plaintiff was still having pain in the back of the head, and was still having the temple headaches, although not as severe as when he first saw Dr. Fischer, that he was still having the pain in front of the ears and eyes, and his jaw still bothered him. Dr. Fischer testified that he planned to treat plaintiff in the future, and was making him a bite appliance which he would wear twenty-four hours a day, seven days a week. Dr. Fischer testified that he expected that after six to eight months of wearing the orthotic bite appliance, “some healing process will occur.” As to plaintiff’s future, Dr. Fischer testified:

Well, we have a serious injury here. I feel that Steven is going to be permanently depended [sic dependent] on this mouth brace. Yes, we are going to start wearing it 24 hours a day. I don’t know how we will succeed as far as trying to wean him off the appliance but as far as his physical condition of the job [sic jaw] there’s a definite [sic] serious condition.

He testified that plaintiff would be wearing the bite appliance as a night guard for the rest of his life. He testified that surgery would be a last resort, that surgery would not fix the problem and would leave scar tissue. He testified that although his records did not show it, he tells all patients with plaintiff’s type of injury, including plaintiff, that they are not to lift over ten pounds, and not to do heavy pushing or pulling.

## B

### **Important body function**

Dr. Lerner testified that the neck and jaw are important body functions and that plaintiff had suffered a serious impairment of body function. Regarding the jaw joint and its frequency of use, Dr. Fischer testified that the temporomandibular joint is the most active joint in the whole body, used over one thousand times during the day and a thousand times during the night, including during sleep, when swallowing. He testified that the damage to plaintiff's TMJ joint was debilitating to plaintiff, between the pain it caused, the difficulty it caused with plaintiff's eating, and the headaches.

Defendant's appellate brief states that it does not dispute that "the neck and the back can be, and have been found to be, important body functions as defined under *Cassidy*," citing *Freel v Dehaan*, 155 Mich App 517, 520; 400 NW2d 316 (1986), and *Mekler v Bigam*, 147 Mich App 716, 720; 383 NW2d 95 (1985). Defendant also states that "[p]resumably, the movement of one's jaw could constitute an important body function, although defendant was unable to locate a case that expressly so stated."

## C

### **Impact on plaintiff's general lifestyle**

Dr. Lerner testified that the injury plaintiff sustained affected his ability to lead his normal life as compared to before the accident. Dr. Lerner testified that plaintiff had reported improvement with physical therapy but still reported intermittent pain. Dr. Lerner testified that when plaintiff finished physical therapy his neck had normal range of motion in every direction, although he was still having problems, and that his prognosis was good at that time because the pain had improved after physical therapy. On re-direct examination, Dr. Lerner was asked to explain why if plaintiff was discharged in February of 1997 with a good prognosis and minimal pain, he was still experiencing pain, and he responded:

Well, at the time following physical therapy he had really improved with the cervical spine area, and many times with myofascial injuries to the cervical spine patients improve and they get better. With Mr. Metivier's case, because he had stretching and tearing of the muscles and ligaments of the neck, he actually has recurrent neck pain. In other words, he would improve with physical therapy and that's good. That means that the therapy helped him, however, he still has *persistent tension in his neck and persistent pain in his neck which comes on an intermittent basis especially when he does certain activities it would become worse*. So in Mr. Metivier's case, actually he has a worse prognosis because his having had the benefit of seeing Mr. Metivier just yesterday and a month ago [sic] he actually has persistent problems with his neck. So it's basically a recurrent problem. [Emphasis added.]



Dr. Lerner testified that the accident was over two years ago and that plaintiff's TMJ problems have persisted throughout, which "*says that he has actually a guarded prognosis and has significant severe injuries affecting the jaw and also the neck.*" (Emphasis added.)

Plaintiff's brother, Paul Metivier, who lived and worked with plaintiff at the time of the accident testified that the day after the accident plaintiff did not get up from bed until 2:30, that plaintiff said he was stiff and could barely move, and that the following week plaintiff was complaining about his shoulder and head. Paul testified that before the accident plaintiff built machines at work, and would add fixtures weighing sixty to one-hundred pounds, but that after the accident he would get help for the lifting. Paul testified that before the accident, plaintiff did that lifting and did "pretty much everything else he wanted to do. He wasn't limited." Paul testified that before the accident he and plaintiff would bike-ride, play frisbee and go to a bar two or three times a week, used to go to restaurants, and that "after the accident he pretty much stopped doing that." Paul testified that before the accident, plaintiff biked three or four times a week after work when the weather was nice, for two or three hours. He testified that after the accident they did not go biking for almost 1 ½ years. Once they resumed biking, Paul testified that they did the same route, but a lot slower. Paul testified that for approximately eight or nine months after the accident, plaintiff could not play frisbee, and that after that "he wouldn't get anywhere near the [throwing] distance that he used to."

Paul also testified that before the accident, plaintiff would "pretty much eat anything." He testified that they had the same lunch hour at work and that plaintiff would usually eat a submarine sandwich for lunch before the accident. Paul testified that plaintiff had to stop eating steak after the accident, stopped eating subs, and instead ate soft food like pasta. Paul testified that before the accident they often had company over after work, but that after the accident, plaintiff did not like to have company over as much and he started going straight to bed after work.

Plaintiff testified at trial that he was twenty-nine years old, unmarried, and had been employed at Induction Tech, a machine shop, for about 2 ½ months. Before that he worked at Birmingham Hydraulics for about one year, and before that for Allied Manufacturing for about five years, including in August 1996 when he was in the auto accident. Plaintiff testified that at the time of the accident he was the afternoon shift supervisor at Allied, and was responsible for programming machines, building and designing fixtures, and sometimes repairing and maintaining the machines. Plaintiff testified that he worked in the same department as his brother, Paul. Plaintiff testified that before the crash his jaw felt at 100 %, the first month after the crash at about 40%, and that with physical therapy 60-65%. Regarding his neck, he testified it was at 100% before the crash, about 20% the month after the crash, and about 80% after physical therapy. Plaintiff testified that after his treatments ended in February 1997, he continued to have pain, primarily in the jaw, neck and back of the head, and that he went to see Dr. Fischer in 1998 on Dr. Lerner's recommendation that he be fitted for an orthotic appliance. Plaintiff testified that he was fitted for the appliance about 1 ½ months before the instant trial and was given a short regimen of physical therapy of electric stimulation and heat packs. Plaintiff's appliance was supposed to be ready shortly and he had an appointment with Dr. Fischer. His understanding was that he would wear the appliance twenty-four hours a day, seven days a week.

Plaintiff testified that surgery had been discussed as an option, and that he would have it if it was necessary to relieve the pain.

Plaintiff testified at trial that he does not have pain every day, that he has periodic pains “triggered by a wrong motion or possibly sleeping wrong,” or triggered by unknown things, with the pain being anywhere from a mild headache that lasts for days to a sharp severe disorienting pain that stops him from doing whatever he is doing at the moment. Plaintiff testified that the most severe pains he has are around the jaw and behind the jaw, that his headaches radiate behind the head to the base of the spine, and that the headaches in the temple area are not as severe as those behind the neck. When asked about the impact on his life:

Most immediately it left me bedridden essentially for the next 2 to 3 weeks. I could not move my neck. I had difficulty bending and twisting. Had difficulty opening my jaw, chewing anything. I was having severe headaches for almost the entire period in the month following the accident.

\* \* \*

In September [1996] I was still having problems. They weren’t quite as severe because I had been getting treated. I was still having headaches, head pain, ear pain. I was getting woken at night and still losing sleep.

Plaintiff testified that before the crash he was “doing quite a bit of hands on work with the machinery [at work]. I was building fixtures myself. Designing them, doing a lot of the hard labor on the shop floor,” and that after the accident he “stuck more to the programming design aspects of my job. If I needed to have strenuous labor done I would usually delegate it to someone under me.” Plaintiff testified that after the accident he could not lift everything that he needed to lift, that he would have to get assistance to move large parts and fixtures, or use cranes, and *that he still required that type of assistance.* (Emphasis added.)

Plaintiff testified that before the accident he was an avid biker, that he rode most nights, averaging twenty to thirty miles nightly, and that after the crash he did not bike for 1 to 1 ½ years, and subsequently did not bike nearly as frequently and when he does it is for much shorter trips. He testified that he could not ride with the same intensity or duration that he could before the accident because he could not take the jarring from potholes and road cracks, which would irritate and aggravate his neck and shoulders. He testified that before the accident he played disk golf, which is like golfing with a frisbee, once or twice a week, that for a year after the accident he did not play at all, and that he now goes every other week or every third week, but cannot play as he did before the accident because he cannot take the twisting involved with throwing the disk anymore.

Plaintiff testified that for the first three or four months after the accident he would wake nightly from the pain. He now wakes up less often, but if he moves the wrong way pain still wakes him up. He testified that he had to change his eating habits after the accident, stopped eating things that required a lot of chewing, like steak, and now eats mostly ground meats and softer foods he can chew more easily. He testified that immediately after the accident he did nothing around the house because he was bedridden, but that more recently he has been doing

more chores, including laundry and vacuuming and that “most of the mundane tasks I’m able to perform now.” Plaintiff testified that after the accident his disposition was irritable and angry, he did not want company over, and that his disposition had improved recently. He testified that he gained fifteen to twenty pounds after the accident.

On cross-examination, plaintiff testified that he worked fewer hours at his current job than he did at Allied. He testified that after the accident, he returned to work on September 10, 1996, that he had similar duties as before the accident, but that he was on light duty, not by virtue of Dr. Luminski’s order, but because he restricted himself. He testified that he worked fifty-five to sixty-five hours a week before the accident at Allied, and did so after the accident until he left Allied in April 1997. Plaintiff testified that he was then unemployed for about four months. At his next job, at Birmingham Hydraulic, plaintiff testified that he worked on machinery and stood and walked during the day, but did not do any major lifting. He testified that for the first few weeks at Birmingham Hydraulic he worked fifty hours per week, but then the hours reduced to about forty hours per week. Plaintiff acknowledged that Dr. Lerner and plaintiff’s attorneys had advised him to go in for a follow-up to Dr. Fischer. Plaintiff testified that in August 1998 Dr. Fischer measured him for an orthotic appliance and that he had treated with Dr. Lerner after seeing Dr. Lerner again in August 1998, in September 1998 when Dr. Lerner gave him physical therapy treatments and re-prescribed some drugs.

### III

We conclude that there was a factual dispute concerning the nature and extent of plaintiff’s injuries in the instant case that was material to the determination whether plaintiff had suffered a serious impairment of body function. MCL 500.3135(2)(a)(ii). We also conclude that there was ample testimony that plaintiff’s normal lifestyle was seriously affected by the objectively manifested injuries to his neck, jaw, and back. Although it is true that plaintiff returned to work 3 ½ weeks after the accident, he and his brother testified that he could no longer do the heavy lifting he usually did at work as part of his responsibilities, and Dr. Lerner testified that plaintiff complained that bending, twisting, and lifting aggravated his pain. Plaintiff received intensive outpatient therapy from Dr. Luminski for three months following the accident, and then was treated by Dr. Lerner more than twenty times between December 1996 and February 10, 1997, for the neck, jaw and back.

A reasonable jury could have concluded that plaintiff’s general ability to lead his normal life was affected for a significant time after the accident. See *Kern, supra* at 343 (concluding that the trial court erred in submitting to the jury the question of threshold injury where the nine-year-old plaintiff, who had suffered a serious femur fracture, two surgeries, had been unable to walk for three months, and whose doctor had testified that he should be able to resume unrestricted activities seven months after the accident, rather than rule as a matter of law that the plaintiff had sustained a serious impairment of body function.)

A reasonable jury could also conclude that plaintiff’s general ability to lead his normal life was affected for one year or more after the accident, as plaintiff and his brother testified that plaintiff did not resume bike riding for 1 ½ years because of the pain it caused him, gained fifteen to twenty pounds, could not eat the foods he used to eat because repetitive chewing caused pain,

did not resume heavy lifting at work, suffered headaches, neck and jaw pain during that period, and bending, twisting and lifting caused him pain.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Helene N. White

I concur in result only.

/s/ Joel P. Hoekstra

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SAAD, P.J. (dissenting).

I respectfully dissent. Because MCL 500.3135 provides that the issue of serious impairment is to be decided by the trial court if there is no dispute regarding the facts and because there are no disputed facts, but rather a difference in legal interpretation of the facts, I would affirm the trial court.

/s/ Henry William Saad