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## **COURT OF APPEALS ADDRESSES NO-FAULT THRESHOLD ISSUES RELATING TO CLOSED HEAD INJURIES AND PERMANENT SERIOUS DISFIGUREMENT**

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In a recent published opinion in a third-party no fault case, the Michigan Court of Appeals clarified that a plaintiff may still meet the serious impairment of body function threshold based on an alleged closed head injury even if she lacks the evidence necessary to qualify for the “automatic” exception for closed head injuries set forth in MCL 500.3135(2)(a)(ii). In the same opinion, the court also ruled that the determination of whether a scar constitutes a permanent serious disfigurement for purposes of the threshold does not necessarily hinge on purely cosmetic considerations.

In *Minter v City of Grand Rapids*, --- N.W.2d ----, 2007 WL 1110748 (Mich.App.), in a 2 to 1 opinion, the appellate court held that the trial court erred when it found, as a matter of law, that a plaintiff’s closed-head injury and a 13 millimeter long facial scar were not a serious impairment of body function or a permanent serious disfigurement.

In this case, the plaintiff was struck by a police vehicle while crossing a street. The vehicle was traveling approximately 20 miles per hour when it struck the plaintiff. As a result of the accident, the plaintiff claimed to have suffered a cervical strain, a broken toe, a closed head injury and a facial laceration above the right eye.

The plaintiff filed suit against the police officer and his employer, the City of Grand Rapids, for non-economic damages. The trial court granted the defendants’ motion for summary disposition, holding that the plaintiff’s injuries did not amount to a serious impairment of a bodily function or a serious disfigurement.

The plaintiff appealed, and the appellate court, while upholding summary disposition as to the plaintiff’s toe and neck injuries, reversed the trial court on the issues of the closed head injury and facial scarring.

Turning first to the closed head injury, the appellate court noted that under MCL 500.3135(2)(a)(ii), a question of fact for the jury is created if a physician who regularly diagnoses or treats closed-head injuries testifies under oath that a serious neurological injury may exist. The plaintiff in this case did not produce such testimony. The court held that the lack of such medical testimony merely precluded the plaintiff from automatically reaching the jury on the issue of the closed head injury, but that the plaintiff could establish the jury question through other means.

Finding that the plaintiff's dizziness, confusion and blurred vision, which she claimed reduced her ability to walk independently, perform routine tasks and engage in social activities "would seem to have at least potentially affected" the trajectory of her normal life, the appellate court reversed the trial court's grant of summary disposition to the defendants' as to the closed head injury.

The appellate court then considered the plaintiff's facial scarring. The court noted that the scar was not merely a cosmetic issue, but rather, if the scar prevented the plaintiff from communicating face-to-face by limiting the range of natural facial expression, the scar could objectively be determined to have a great impact on her life. Therefore, the court reversed that trial court's grant of summary disposition to the defendants' on the issue of facial scarring.

In his concurrence, Judge Peter O'Connell further addressed the plaintiff's scars. Although the scar measured only 13 millimeters, Judge O'Connell noted that pictures of the scars indicated that they sharply contrasted with the plaintiff's skin-tone and would be evident to any person looking the plaintiff in the eye. In Judge O'Connell's opinion, the appearance of the scars, coupled with a physician's testimony that corrective surgery would be needed to improve the appearance of the scars, created a jury question as to whether the plaintiff suffered a permanent serious disfigurement.

In his partial concurrence and dissent, Judge Christopher Murray maintained that the trial court did not err in granting summary disposition to the defendants. Judge Murray criticized the majority for seeming to "gloss over both the facts and the law." He also argued that the majority opinion lowered the threshold requirement set out by the Michigan Legislature and the Michigan Supreme Court in holding that the plaintiff's ability to care for herself and socialize with friends "would seem to have been at least potentially affected" by the injuries. Judge Murray maintained that this was not the same test laid out by the Michigan Supreme Court in *Kreiner v Fischer*, 471 Mich 109; 683 N.W.2d 611 (2001). Judge Murray stated that the proper test is whether or not, despite the impairment, the plaintiff was "for the most part" able to lead a normal life.

For a complete copy of the Michigan Court of Appeals published decision in *Minter v City of Grand Rapids*, --- N.W.2d ----, 2007 WL 1110748 (Mich. App.), [click here](#).