

Michigan Supreme Court Reverses Kreiner and Loosens Standard for Third-Party Auto Cases

The Michigan Supreme Court filed its long-awaited decision in the *McCormick v Carrier* matter on July 31, 2010, holding that the interpretation of the Aserious impairment of body function threshold for non-economic tort liability under MCL 500.3135 was wrongly made by the Court in 2004 and reversing *Kreiner v Fischer*, 471 Mich 109 (2004).

1. The proper role of the court in applying the statute required that the court determine whether there has been a serious impairment of body function, so long as there is no factual dispute. 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. The disputed fact does not need to be outcome determinative to be material, it need only be a significant or essential to the issue or matter at hand.

2. When the court decides the threshold issue, it should adhere to the plain meaning of the statutory language. It must be established that the injured person has suffered an objectively manifested impairment of body function. The Court pointed out that it is the impairment not the injury or its symptoms that must be objectively manifested. When considering impairment the focus is not on the injuries themselves but on how the injuries affected a particular body function. Objectively manifested required that there be a physical basis for the subjective complaints of pain and suffering, generally (not always) requiring medical testimony.

a. Once it is determined that there is an objectively manifested impairment of body function, the next question is whether the impaired body function is important. This requires a subjective inquiry on a case by case basis into whether the body function has great value, significance or consequence to the particular plaintiff, depending on the relationship of the function to the person's life;

b. The impairment must affect the person's general ability to lead his or her normal life. This is interpret-

ed to mean that the impairment must influence some of the person's power or skill or capacity to lead a normal life, i.e. to pass life in the person's normal manner of living. This is a person and fact specific inquiry decided on a case by case basis, requiring a comparison of the plaintiff's life before and after the incident. The ability to lead a normal life need only be affected, not destroyed. There is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected, so long as the general ability to live in the normal manner is influenced;

c. Finally, the Court disavowed the *Kreiner* court's interpretation of the statute with respect to a temporal element, holding that the statute does not create an express temporal requirement as to how long an impairment must last, in order to have an effect on the person's general ability to live his normal life. There is no requirement of permanency to meet the threshold.

This new decision represents a return to pre-*Kreiner* jurisprudence on the serious impairment issue, and does away with the stringent test that applied to the threshold question under *Kreiner*. The impairment does not have to alter the trajectory of a plaintiff's life, nor does the impairment have to be for a particular period of time under the new test. It is expected that the plaintiff's bar will hail this case as an opening of the floodgates for automobile litigation. The extent to which it will signal a return to prior, more litigious days, or whether the cautious review of cases required under the discipline of the *Kreiner* opinion will have a hangover effect, remains to be seen.

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