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**News Story**

**Seriously impairing 'Kreiner'**

**Hathaway's win in MSC race may be beginning of end for much-criticized, landmark case**

**By Todd C. Berg, Esq.**

With Diane M. Hathaway's electoral victory over incumbent Michigan Supreme Court justice Clifford W. Taylor, the end may be near for Taylor's controversial "serious impairment" decision in *Kreiner v. Fischer*.

In a pre-election interview with *Michigan Lawyers Weekly*, then-candidate Hathaway made clear she was unequivocally opposed to Taylor's majority opinion in *Kreiner*, and said she agreed with the dissent.

Serious-impairment specialist Steven M. Gursten of the law firm Gursten Koltonow Gursten Christensen & Raitt PC of Southfield said Hathaway's election to the Supreme Court is "an absolutely extraordinary development." In the Nov. 4 election, Hathaway and Taylor received 1,854,744 and 1,484,924 votes, respectively.

"If you read the dissent in *Kreiner*," said Gursten, "that's the law we're going to be following in the future."

In *Kreiner*, which was decided on July 23, 2004, Taylor authored a four-justice majority opinion that set forth the analysis for determining whether a plaintiff injured in a car accident satisfied the requirements of the Michigan No-Fault Act's "serious impairment of body function" statute, and, thus, could sue for non-economic damages.

The analysis required courts, not juries, to determine whether a person in his post-accident life was generally able to lead his normal pre-accident life. In each case, that determination depended largely on a doctor's testimony as to whether the accident-related injuries prevented the plaintiff from engaging in activities, such as work, that he or she was able to do before the accident.

In a dissenting opinion joined by Justices Elizabeth A. Weaver and Marilyn Kelly, Justice Michael F. Cavanagh accused the majority of reading requirements into the statute "that the Legislature never envisioned."

*Kreiner* has been criticized for making it too difficult for plaintiffs to successfully sue for noneconomic damages under the "serious impairment" statute. Critics say courts have used *Kreiner* improperly to dismiss cases because plaintiffs' post-accident impairments didn't last long enough, or they weren't backed up by doctors.

According to data gathered by *Michigan Lawyers Weekly*, since *Kreiner* was released in 2004, plaintiffs have never won before the Supreme Court, and they've won only 10 percent of the time in the Michigan Court of Appeals. Of the eight legislative attempts to change *Kreiner's* "serious impairment" analysis, six have failed and two are pending. (See "'Kreiner v. Fischer': 'Serious Impairment' Statistics Sheet," below.)

Southfield attorney Wayne J. Miller of Miller & Tischer PC agreed with Gursten.

"Hathaway's election changes everything," he said. "I have no doubt that in cases like *Kreiner*, we'll see dramatically different results."

If Hathaway, who was the Michigan Democratic Party's nominee for the high court, votes with the court's other Democrats, Cavanagh and Kelly, then *Kreiner's* future may be grim, said East Lansing attorney John A. Yeager of Willingham & Cote PC.

"I'd go back and see where Justice Elizabeth A. Weaver's been, both in *Kreiner* and in post-*Kreiner* cases, because that's probably the most important indicator of where things will go," he said. (See, "The swing vote," in this issue of *Michigan Lawyers Weekly*.)

Yeager, who represented the defendant in *Kreiner's* companion case, *Straub v. Collette*, was referring to the fact that, without Taylor, only three of the four justices who signed the *Kreiner* majority opinion will remain: Justices Maura D. Corrigan, Robert P. Young Jr. and Stephen J. Markman.

"If Justice Weaver has said she'd reverse," Yeager, said, "then *Kreiner's* probably in jeopardy."

On several occasions since 2004, Weaver has voiced her continued opposition to the *Kreiner* majority opinion.

For example, in an April 25, 2008, order in *Jones v. Olson*, Weaver, along with Kelly, joined Cavanagh's statement wherein he said he would've granted "leave in this case, so as to overrule *Kreiner*."

And, in her own statement in *Jones*, which was joined by Cavanagh and Kelly, Weaver said she would've granted leave to appeal to reconsider the *Kreiner* majority opinion, which she called "an unrestrained misuse and abuse of the power of interpretation masquerading as an exercise in following the Legislature's intent."

In her May 9, 2008, statement in *Brashers v. Vanderroest*, Weaver said the *Kreiner* majority's interpretation of the "serious impairment" statute needed to be reconsidered and corrected.

Chief Justice Taylor told *Michigan Lawyers Weekly* that, in light of the strenuous opposition to *Kreiner* from the dissenters on the Supreme Court, Hathaway's election may spell trouble for *Kreiner*.

"I suspect they'll take that up," he said.

In a pre-election interview with *Lawyers Weekly*, Hathaway said "I agree with the dissenting opinion in *Kreiner*." (See "Hathaway attacks," *Michigan Lawyers Weekly*, Oct. 27, 2008.)

"*Kreiner* is an example of how Taylor and the other conservative justices on the court change the law and don't follow precedent," she added, echoing some of the concerns voiced in Cavanagh's *Kreiner* dissent.

Hathaway didn't respond to a request for comment for this story.

Although Hathaway made clear she disagreed with the majority opinion, she wouldn't say whether she'd vote to overrule *Kreiner*.

"I'd need to study it more," she said.

By the looks of things, she may soon have that opportunity.

There are three recent appellate unpublished "serious impairment" cases that have not yet been closed, and no applications for leave to appeal have been filed, according to the Michigan Court of Appeals Web site. The cases are: *Powell v. Vushaj*; *Belt v. Maczynski*; and *Branch v. Kravklis*.

And, one "serious impairment" case, in which leave to appeal has been granted, is pending before the Supreme Court.

The case is *Benefiel v. Auto-Owners Insurance Company* and it's scheduled for oral argument in November.

Assuming an opinion is issued before Hathaway is sworn into office on Jan. 1, it is possible the case could subsequently come before her on a rehearing or reconsideration motion.

Lansing attorney George T. Sinas of Sinas Dramis Brake Boughton & McIntyre PC said he's cautiously optimistic that, with a newly constituted court, at some point in the future, *Kreiner* will no longer be on the books.

"Because the situation grows more dire every month, *Kreiner* will hopefully be one of the issues the Supreme Court will want to take up again," said Sinas, who represented the plaintiff in *Kreiner*.

Although he said "nobody should guess what Hathaway will do" with respect to overruling *Kreiner*, Sinas said the justice-elect's views on the case were telling.

"If she said she agreed with the dissent in *Kreiner*," he said, "that's very significant."

*If you would like to comment on this story, please contact Todd C. Berg at (248) 865-3113 or [todd.berg@mi.lawyersweekly.com](mailto:todd.berg@mi.lawyersweekly.com).*

## **'Kreiner v. Fischer': 'Serious Impairment' Statistics**

Michigan Supreme Court "serious impairment" decisions since *Kreiner*: 5

*Behnke v. Auto Owners Ins. Co.* peremptory reversal order (Lawyers Weekly No. 13-60284); unpublished opinion (Lawyers Weekly No. 08-53334)(Ruled for defendant)

*Cook v. Hardy*, peremptory reversal order, (Lawyers Weekly No. 13-60285); unpublished opinion (Lawyers Weekly No. 08-54835)(Ruled for defendant)

*Nicke v. Miller, et al.*, peremptory reversal order (Lawyers Weekly No. 06-61998); unpublished opinion (Lawyers Weekly No. 08-58106)(Ruled for defendants)

*Jones v. Olson*, peremptory reversal order (Lawyers Weekly No. 06-66357); unpublished opinion (Lawyers Weekly No. 08-60488)(Ruled for defendant)

*Minter v. City of Grand Rapids, et al.* (Lawyers Weekly No. 06-66353); published opinion (Lawyers Weekly No. 07-62516)(Ruled for defendant)

Michigan Court of Appeals "serious impairment" decisions since *Kreiner*: 218; 212 unpublished, 6 published

Published cases are:

*Williams v. Medukas* (Lawyers Weekly No. 07-55743)(Leave not sought)

*Moore v. Cregeur* (Lawyers Weekly No. 07-55747)(Leave not sought)

*McDaniel v. Hemker* (Lawyers Weekly No. 07-56876)(Leave denied)

*Netter v. Bowman* (Lawyers Weekly No. 07-60416)(Defines "objectively manifested impairment." See, "'Objectively manifested' standard gets post-'Kreiner' makeover," Oct. 9, 2006)(Leave not sought)

*Minter v. City of Grand Rapids, et al.* (Lawyers Weekly No. 07-62516)(Reversed by MSC order (see above))

*Benefiel v. Auto-Owners Insurance Company* (Lawyers Weekly No. 07-65096)(Leave application pending)

Number of Michigan Court of Appeals cases in which plaintiff met threshold: 20

*Luther v. Morris* (Lawyers Weekly No. 08-54382)(Leave to appeal not sought.)

*Ream v. Burke Asphalt Paving, et al.* (Lawyers Weekly No. 08-54527)(Leave to appeal denied.)

*Amos v. Keller Transfer Line, Inc., et al.* (Lawyers Weekly No. 08-55448)(Leave denied.)

*Williams v. Medukas* (Lawyers Weekly No. 07-55743)(Leave not sought.)

*Moore v. Cregeur* (Lawyers Weekly No. 07-55747)(Leave not sought.)

*McDaniel v. Hemker* (Lawyers Weekly No. 07-56876)(Leave denied.)

*Casey v. Clowers, et al.* (Lawyers Weekly No. 08-57184)(Leave denied.)

*Cornett v. Bowman, et al.* (Lawyers Weekly No. 08-58545)(Leave not sought)

*Welch v. Yuhl, et al.* (Lawyers Weekly No. 08-58994)(Leave not sought)

*Urban v. Jacobson, et al.* (Lawyers Weekly No. 08-60772)(Leave not sought)

*Isbell v. Haight, et al.* (Lawyers Weekly No. 08-61548)(Leave not sought)

*Livermore v. Siddique, et al.* (Lawyers Weekly No. 08-61761)(Leave not sought)

*Smith v. Reed* (Lawyers Weekly No. 08-63486)(Leave not sought)

*Geerdes v. Glupker* (Lawyers Weekly No. 08-64851)(Leave not sought)

*Benefiel v. Auto-Owners Insurance Company* (Lawyers Weekly No. 07-65096)(Leave application pending)

*Laukkanen v. Jason* (Lawyers Weekly No. 08-65369)(Leave not sought)

*Donovan v. Metro Plant Services, Inc., et al.* (Lawyers Weekly No. 08-65837)(Leave denied)

*Ransom v. Utility Contracting Company, et al.* (Lawyers Weekly No. 08-66317)(Leave not sought)

*Anderson v. Alexander* (Lawyers Weekly No. 08-66757)(Leave not sought)

*Richmond v. Stroup* (Lawyers Weekly No. 08-67381)(Leave not sought)

Number of Michigan Court of Appeals cases involving a question of fact regarding the existence of a serious impairment of body function: 12

*Pingle v. Powers* (Lawyers Weekly No. 08-57301)(Leave denied)

*Kornacki v. Gurden* (Lawyers Weekly No. 08-58286)(Leave denied)

*Houston v. City of Detroit, et al.* (Lawyers Weekly No. 08-58803)(Leave not sought)

*Delk v. Phillips, et al.* (Lawyers Weekly No. 08-59316)(Leave not sought)

*Rayes v. Allmerica Financial, et al.* (Lawyers Weekly No. 08-59335)(Leave denied)

*Benedict v. State Farm Mutual Automobile Insurance Company, et al.* (Lawyers Weekly No. 08-61150)(Leave not sought)

*Hamad v. Farm Bureau General Insurance Company of Michigan* (Lawyers Weekly No. 08-61151)(Leave not sought)

*Petrocik v. Dowling* (Lawyers Weekly No. 08-61153)(Leave not sought)

*Hosey v. Berry* (Lawyers Weekly No. 08-61989)(Leave denied)

*Jones v. Suburban Mobility Authority for Regional Transportation, et al.* (Lawyers Weekly No. 08-62594)(Leave not sought)

*Garcia v. Walker* (Lawyers Weekly No. 08-63844)(Leave not sought)

*Branch v. Kravklis* (Lawyers Weekly No. 08-68066)

Number of Michigan Court of Appeals cases where application for leave to appeal to the Michigan Supreme Court have been granted: 1

*Benefiel v. Auto-Owners Insurance Company* (Lawyers Weekly No. 07-65096)(Leave application pending)(Oral argument scheduled for November 2008)

Number of cases with applications for leave currently pending: 1

Number of cases in which the Michigan Supreme Court has ordered oral argument on application for leave: 5

*Behnke v. Auto Owners Ins. Co.* peremptory reversal order (Lawyers Weekly No. 13-60284); unpublished opinion (Lawyers Weekly No. 08-53334)

*Cook v. Hardy*, peremptory reversal order, (Lawyers Weekly No. 13-60285); unpublished opinion (Lawyers Weekly No. 08-54835)

*Nicke v. Miller, et al.*, peremptory reversal order (Lawyers Weekly No. 06-61998); unpublished opinion (Lawyers Weekly No. 08-58106)

*Jones v. Olson*, peremptory reversal order (Lawyers Weekly No. 06-66357); unpublished opinion (Lawyers Weekly No. 08-60488)

*Minter v. City of Grand Rapids, et al.* (Lawyers Weekly No. 06-66353); published opinion (Lawyers Weekly No. 07-62516)

Number of multiple car accident Michigan Court of Appeals cases: 8

*Moceri v. Kondziolka* (Lawyers Weekly No. 08-56782)(Leave not sought.)

*Law v. Novak, et al.* (Lawyers Weekly No. 08-57008)(Leave not sought.)

*Webb v. Reece, et al.* (Lawyers Weekly No. 08-57111)(Leave not sought.)

*Lester v. Castle, et al.* (Lawyers Weekly No. 08-59572)(Leave not sought.)

*Rideout v. Selvidge*, (Lawyers Weekly No. 08-60048)(Leave not sought.)

*Benedict v. State Farm Mutual Automobile Insurance Company, et al.* (Lawyers Weekly No. 08-61150)(Leave not sought.)

*Benefiel v. Auto-Owners Insurance Company* (Lawyers Weekly No. 07-65096)(Leave application pending.)

*Al-Sayad v. Farm Bureau General Insurance Company of Michigan* (Lawyers Weekly No. 08-65598)(Leave not sought.)

Number of cases decided in the context of a summary disposition motion: 202

Legislative efforts to change the *Kreiner* majority opinion's analysis: 8

House Bill 4301 (Introduced Feb. 20, 2007)(Passed House; pending in Senate)

Senate Bill 124 (Introduced Jan. 30, 2007)(Pending in Senate)

Senate Bill 1000 (Introduced Jan. 24, 2006)(Died at end of 2005-06 session)

Senate Bill 618 (Introduced June 21, 2005)(Died at end of 2005-06 session)

House Bill 4940 (Introduced June 15, 2005)(Died at end of 2005-06 session)

House Bill 4846 (Introduced May 31, 2005)(Died at end of 2005-06 session)

House Bill 4739 (Introduced May 5, 2005)(Died at end of 2005-06 session)

Senate Bill 1429 (Introduced Sept. 28, 2004)(Died at end of 2003-04 session)

[Editor's Note: Figures are current through Nov. 6, 2008.]

Hathaway's election to MSC may have put 'Kreiner' in jeopardy

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