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News Story

End of an era?

'McCormick v. Carrier' challenges 'Kreiner'

By Carol Lundberg

Michigan Supreme Court

The Michigan Supreme Court granted leave to appeal an automobile no-fault case that could, some say, overturn the case that set a new no-fault act threshold for serious impairment of a body function.

The Court issued the Aug. 20 order in *McCormick v Carrier*, which challenges *Kreiner v Fischer, 471 Mich 109 (2004)*. Under *Kreiner*, a plaintiff must show "an objectively manifested impairment," which affects his "general ability to lead his or her normal life" as a precondition before he or she can sue for non-economic damages.

"If, despite [the impairments] the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected and he does not meet the 'serious impairment of body function' threshold," according to *Kreiner, supra* at 131.

"Hopefully this is the case," said personal injury lawyer Steven M. Gursten, of Southfield-based Michigan Auto Law (Gursten, Koltonow, Gursten, Christensen & Raitt PC). "Since the leave order, there have been four other cases held in abeyance [pending the *McCormick* decision]."

The original promise of no-fault insurance included a trade-off, Gursten said.

"We were supposed to have generous first-party benefits that cover medical care for life and wage loss for three years," he said. "The tradeoff was the weeding out clearly frivolous and de minimis injuries. The irony here is that everyone knows we've gone so far beyond de minimis injuries. These are major, serious injuries."

Guaging pain, time

In this case, Rodney McCormick was injured in 2005 while he was working in Flint. A co-worker backed a truck over his ankle.

McCormick's ankle was badly broken, and he couldn't stand or walk. The injury required him to have two surgeries, and when McCormick returned to work a year later, his employer put him on a less physically demanding duty at his same rate of pay.

In the lower courts, it was determined that because McCormick was working, and he was still able to fish and golf (even though he said he did so with considerable pain), the course and trajectory of his life had not been altered, and his injury was not keeping him from leading his normal life, so he was not entitled to non-economic compensation using the *Kreiner* standard.

Justice Maura D. Corrigan wrote a dissent to the order granting McCormick's appeal.

She noted that on Oct. 22, 2008, the court decided 4-3 to deny the plaintiff's application for leave to appeal the Court of Appeals' decision, which had resolved in favor of the defendant.

"Now, although neither the law nor the facts of his case have changed, plaintiff seeks reconsideration of our order. He and his amici seek to take advantage of the intervening change in this Court's membership to reopen an otherwise final case. They have succeeded," Corrigan wrote.

It's overdue, said Gursten, recalling the names associated with what he calls the "victims of the *Kreiner* decision - *Benefiel* [*v. Auto-Owners Insurance Company*], *Plaggemeyer* [*v. Lee*], *Gagne* [*v. Schulte*]. These are real people who suffered real injuries and real pain."

But how much pain and how much time the pain persists is likely to be at the heart of the *McCormick* decision, said John J. Bursch, chair of the appellate group at Warner Norcross & Judd LLP's Grand Rapids office, who also wrote an amicus brief in *Benefiel*.

"In this case, the 'how much' is a broken ankle, and the 'how long' is a year," Bursch said.

'Tweaking around the edges'

Even though Bursch thinks the Court will relax the *Kreiner* standard a bit, he doesn't think that the Court will overturn it in such a way that throws out the decision entirely.

"It's the tweaking around the edges that the Court is likely to examine and change," he said. "For the most part, both liberal and conservative judges have differed in the application of the *Kreiner* test, but not the test itself."

Despite all the controversy around *Kreiner*, Bursch said the decision did add some needed guidance to no-fault cases.

"*Kreiner* established that there is a standard for how a plaintiff's life has been affected, by how much it has been affected, and for how long it's been affected," he said. "Even though there are no bright line rules on those issues, *Kreiner* did add focus to the extent that it added those factors for the lower courts to evaluate."

But adding that focus was an attempt to fix something that wasn't really broken, say some.

"Allowing judges to make the determination has been a failure," said David S. Mittleman, of Lansing-based Church Wyble PC.

"It was always pretty easy to determine two of the three levels of injury," Mittleman said. "Death is easy to determine. A permanent serious disfigurement is also pretty easy. But a serious impairment of body function has been trickier. In 1995, the legislature defined it as an objectively manifested impairment of an important body function that affects the ability to lead his or her life."

That seemed to work, he said, until 2004, when the slim majority in the Supreme Court added language, like "the course and trajectory must be altered" and that the victim must be unable to lead his or her normal life, and that the plaintiff has to meet the standard before being able to sue for non-economic damages.

"That raised the threshold from a reasonable showing to beyond a reasonable doubt," Mittleman said. "Then *McCormick* comes along. In March 2008, the Court of Appeals ruled in the defendant's favor, but Judge Alton Davis dissented, saying that with an injury like that, a judge should not summarily take away Mr. McCormick's ability to have a jury make a determination. The impact of his case could possibly level the playing field."

Possible equalization

Michigan's no-fault system is substantially out of balance since *Kreiner*, said George T. Sinas of Lansing-based Sinas, Dramis, Brake, Boughton & McIntyre PC; Sinas wrote a brief for *McCormick* on behalf of the Coalition Protecting Auto No-Fault.

"That balance was almost perfectly achieved in the no-fault original legislation," Sinas said. "*Kreiner* thwarted its purpose and intent."

There have been approximately 230 unpublished Court of Appeals decisions that implemented *Kreiner*, he said. In 187 of those, the injured persons lost.

"That's tipped too far," Sinas said.

John Yeager, who argued the defense side in *Kreiner*'s companion case, *Straub v. Collette*, is eager to see how, or if, the Court tweaks the *Kreiner* standard.

"The difficulty lies in combining the concepts of severity [of the injury] and duration [of the impairment], and stating a test in a coherent manner that will allow summary disposition on the legal issues in the majority of case," he said. "Eliminating litigation is one of the pillars of *Shavers* [*v. Attorney General*]," which held that Michigan's No-Fault Act's partial abolition of tort remedies was constitutional.

Yeager has examined Justice Elizabeth Weaver's opinions, post-*Kreiner*, since she holds what he calls the court's "swing vote," between three pro-*Kreiner* justices and three judges opposed to *Kreiner*.

"While permanency [of the injury] is at issue, and Justice Weaver disagrees with that as a test, still it seems to me that some significant duration of effect is implicit, in even the cases where she has sided with the defense post-*Kreiner*," Yeager said. "*McCormick* seems to be a year case [because McCormick was unable to work for a year], so if it is reversed, I will be intrigued to see the test that explains it and predicts cases of lesser duration."

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