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‘McCormick’ survives, for now

Supreme Court denies opportunity to reconsider threshold decision

By Brian Frasier, Esq.
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When the Michigan Supreme Court’s balance of power shifted again in January, many attorneys expected that reconsidering Summer 2010’s McCormick v. Carrier decision would be among the new court’s first orders of business.

Such expectations have turned out to be wrong.

In the orders denying leave to appeal in Wiedyk v. Poisson (Lawyers Weekly No. 06-76108, 7 pages) and Brown v. Blouir (Lawyers Weekly No. 06-76106, 7 pages), the high court declined the opportunity to reconsider McCormick.

As a result, McCormick will survive this court term, said Farmington Hills-based Michigan Auto Law attorney Steven M. Gursten, as Chief Justice Robert P. Young Jr. opted to “punt the ball to the Legislature.”

The two cases — one of which had “almost no factual record of the underlying injuries,” the other in which the plaintiff suffered a serious back injury requiring ongoing treatment — were “hardly the type of facts that would cause someone to say that McCormick needs to be changed now,” he said.

“What these justices did was say, because of those two reasons, it’s just too premature to act now and we’re going to leave it to the Legislature.”

The court is going to wait for a case in which McCormick made a difference, said Troy-based Garan Lucow Miller P.C. attorney Daniel S. Saylor.

“As [Justice Stephen J.] Markman put it, they should wait for a case where it’s clearly outcome determinative,” he said. “That was one of the problems with McCormick. Under McCormick, the plaintiff prevails, but it wasn’t really certain that they wouldn’t have prevailed under Kreiner [v. Fischer]. I think [McCormick] was a bad case for them to take in the first place.”

Saylor, who along with Sarah Nadeau, also of Garan Lucow, represented the defendant in Brown, said the lower courts will have to decide the cases based on McCormick before the Supreme Court would consider it.

“In [Brown], we know the defendant would win under Kreiner, because the trial court already said so,” he said. “It remains to be seen whether the defendant would lose under McCormick. It seemed pretty clear that would be the case the way the Court of Appeals wrote it, but they didn’t have a trial court decision yet and the Court of Appeals didn’t [specifically] say that the defendant loses under McCormick.”

Three concurrences

The orders, which are identical, feature three separate concurring opinions from Young, Markman and Justice Michael F. Cavanagh.

In his concurrence, Young invited the Michigan Legislature to intervene in the threshold debate to “preserve the no-fault act’s compromise” between no-fault benefits and tort restrictions.

Cavanagh, who also wrote the majority opinion in McCormick, not surprisingly wrote that the case was correctly decided and shouldn’t be reconsidered. He restated the argument from McCormick (Lawyers Weekly No. 06-73760, 113 pages) that it is simply a textual reading of the threshold statute.

Markman, who wrote the main dissent in McCormick, wrote that reconsidering the decision less than a year later is premature because the courts haven’t had the chance to apply it to these cases.

Gursten criticized Young’s concurrence, saying, “the cynics among us might question [him] and his motivations.”

He added, “There’s a remarkable hypocrisy here that Justice Young, who campaigns and declares himself to anyone who will listen as a textualist, made essentially a public policy argument as to why McCormick had to be overturned in those two cases.

“It’s very surprising and a little bit shocking that a textualist would resort to that type of argument without, as Justice Markman observed, any specific facts to support his now policy argument, [and] without addressing any of Justice Cavanagh’s arguments that McCormick was a textualist correction of Kreiner, specifically of the judicially made additional laws and hurdles like the temporal and durational requirements that weren’t found under the statute or the legislative history.”

Markman’s concurrence shouldn’t be taken as a sign that McCormick was correctly decided in his eyes, Gursten said.

“Trust me, I think Markman would be very inclined to overturn McCormick, but as he himself said, it’s just too premature at this point,” he said.

“There’s no evidence of abuse from cases coming up under McCormick that serve as an example of frivolous auto accident court cases that the propaganda machine from the insurance companies and the fear mongers warned us would happen in the days after McCormick was decided.”

Saylor said he thinks it’s just a matter of time before the court ultimately decides to reconsider McCormick.

“Both in order to have a case in that posture and to let a little more time go by, because now, less than 12 months out from McCormick – Markman talked about ‘“teeter-totter” [justice]’ — it does look distasteful to have it keep going back and forth,” he said. “But maybe after another year or so, it won’t look like the teeter-totter won’t be moving so quickly. Maybe then they’ll feel like it’s up for the court to do its job if they feel certain McCormick is wrong.”

Saylor agreed with Markman that a legislative fix isn’t necessarily the answer because the Legislature’s previous two attempts to define the threshold haven’t settled the issue.

“There’s no certainty that it would solve anything,” he said.

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Concurrences

“We have reached the point again where the Legislature must speak if it wishes to preserve the no-fault act’s compromise between the provision of quick, generous insurance benefits without proof of fault and the act’s restriction on access to additional tort recovery. No one actually attempts to justify having both the most generous automobile insurance benefits in the nation and a tort system where virtually any auto injury would satisfy the noneconomic damages exception to no-fault. …

“It is a particularly unfortunate development when the Legislature must act to countermand a decision of the Supreme Court where this Court refused to enforce the unambiguous language used in the no-fault statute after a prior corrective legislative amendment. The deconstruction of the Legislature’s work product that took place in McCormick is strikingly similar to the deconstruction DiFranco [v. Pickard] achieved in the past that also necessitated a legislative correction.”

– Chief Justice Robert P. Young Jr.

“Impassioned hyperbole aside, an unbiased reading of McCormick aptly illustrates that McCormick did not resuscitate DiFranco … nor did it turn a blind eye to the will of the Legislature. Indeed, McCormick’s analysis faithfully applied the clear and unambiguous language of MCL 500.3135. … Thus, as plainly evidenced by McCormick’s scrupulous statutory interpretation, McCormick applied the text of the statute, even where it conflicted with the principles announced by the DiFranco majority. I enthusiastically invite readers and the Legislature to review the full text of McCormick to determine the accuracy of Chief Justice Young’s claim that McCormick essentially represents a mere reinstatement of DiFranco.”

– Justice Michael F. Cavanagh

“Neither the trial court nor the Court of Appeals has had an opportunity in this case to apply McCormick. The lower courts have only determined that plaintiff cannot satisfy the ‘serious impairment’ standard of Kreiner v. Fischer …. If, on remand, the lower courts determine that plaintiff also cannot satisfy the ‘serious impairment’ standard of McCormick, then there will be no need at that juncture to reconsider McCormick. I would wait until this Court is confronted with a case in which Kreiner and McCormick compel different outcomes before concluding that this Court is no longer prepared to interpret what the Legislature meant by its ‘serious impairment’ standard until the Legislature has ‘spoken’ again. …

“Finally, given the Chief Justice’s accurate summation of the history of the ‘serious impairment’ standard, it is not clear what is to be achieved by imposing upon the Legislature the obligation to again ‘speak’ its intentions concerning our no-fault laws. As [Young] himself recognizes, the Legislature has already done this repeatedly, and just as repeatedly, has been reversed by this Court. …

“I am fully cognizant of the risks of ‘teeter-totter’ justice implicated by this case, and abhor this, but this Court must seriously reflect upon whether such ‘teeter-tottering’ is always to stop in a position that preserves decisions of this Court that are the most resistant to the repeatedly expressed will of the Legislature.”

– Justice Stephen J. Markman