

# no-fault newslines

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

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## Supreme Court Overrules *Kreiner* In Eleventh-Hour Decision

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In *McCormick v Carrier*, \_\_\_ Mich \_\_\_, (2010), the Michigan Supreme Court overruled *Kreiner v Fischer* “because it is inconsistent with the statute’s plain language and this opinion.”

In *McCormick*, Plaintiff’s medial malleolus was fractured when his left ankle was run-over by a truck on 1-17-05. He underwent surgery and hardware installation on 1-20-05, and the hardware was removed on 10-21-05. Plaintiff’s treating surgeon released him to return to work as a medium duty truck loader on 1-12-06 without restrictions. Plaintiff returned to work on 1-16-06, but his boss told him to cease work when he complained of pain. Plaintiff underwent a functional capacity evaluation (FCE) in March of 2006, which found various physical limitations. Plaintiff filed his lawsuit on 3-24-06. Plaintiff underwent another FCE on 4-1-06 at his own request, which found that he could return to work without restrictions, but noted that he still had limited (but improved) range of motion in his left ankle. In May of 2006, an IME doctor found that Plaintiff complained of foot pain, but the doctor found “no objective abnormality to correspond with his subjective complaints. On 8-16-06, Plaintiff volunteered to be assigned to a different job, and received the same pay. He has been able to perform his new job since that time.

Plaintiff testified that his “normal life” before the accident consisted of working 60 hours a week as a medium duty truck loader, golfing on the weekends and fishing from his boat. Since he was returned to work without restrictions by his own doctor in January of 2006, he admitted that his life was “painful, but normal.” He had not had any further treatment since January of 2006, his relationship with his wife was unaffected, he could drive and take care of himself, had only golfed once, and had fished.

### SECRET WARDLE NOTES:

The new threshold seems tantamount to no threshold at all. The case-by-case analysis and the new mandate that the injury needs to merely influence “some” of a person’s normal life is heavily weighted in favor of claimants. We predict that many new questionable claims will be filed, and many will need to be resolved by a jury before some equilibrium is re-established.

While *McCormick* does not expressly address retroactive effect, it will likely be applied retroactively. The general rule is that decisions are to be applied retroactively, and are only applied prospectively as an “extreme measure.”

The threshold fight is far from over. In Footnote 7, the Court held that “notably, MCL 500.3135(2)(a) could unconstitutionally conflict with MCR 2.116(C)(10)” to the extent a court has to “resolve material, disputed facts with regard to issues other than the nature and extent of the injury” or “decide whether the threshold is met even though reasonable people could draw different conclusions from the facts.” We anticipate that many cases will also challenge the constitutionality of the threshold statute itself.

Justice Weaver was the swing vote in *McCormick* and in most decisions of our “new” Supreme Court. She has severed her ties with the Republican party and declared herself an independent for her re-election campaign this fall. She will likely run against Democratic and Republican nominees for her seat.

## CONTINUED...

After a perfunctory dissertation on judicial review, statutory construction and the history of the “threshold standard,” the Court held that under the plain language of MCL 500.3135(2), “the threshold question whether the person has suffered a serious impairment of body function should be determined by the court as a matter of law as long as there is no factual dispute regarding ‘the nature and extent of the person’s injuries’ that is material to determining whether the threshold standards are met. 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 New Test – A Case-By-Case Analysis Of “Some” Affect:

To begin with, the court should determine whether there is a factual dispute regarding the nature and the extent of the person’s injuries, and, if so, whether the dispute is material to determining whether the serious impairment of body function threshold is met. MCL 500.3135(2)(a)(i) and (ii). If there is no factual dispute, or no material factual dispute, then whether the threshold is met is a question of law for the court.

If the court may decide the issue as a matter of law, it should next determine whether the serious impairment threshold has been crossed. The unambiguous language of MCL 500.3135(7) provides three prongs that are necessary to establish a “serious impairment of body function”: (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person’s general ability to lead his or her normal life (influences some of the plaintiff’s capacity to live in his or her normal manner of living).

The serious impairment analysis is inherently fact- and circumstance- specific and must be conducted on a case-by-case basis. As stated in the *Kreiner* dissent, “the Legislature recognized that what is important to one is not important to all; a brief impairment may be devastating whereas a near permanent impairment may have little effect.” ... As such, the analysis does not “lend itself to any bright-line rule or imposition of a nonexhaustive list of factors,” particularly where there is no basis in the statute for such factors. Accordingly, because “the Legislature avoided drawing lines in the sand . . . so must we.”

Here, the Court found that Plaintiff had a threshold injury since “at least some of Plaintiff’s capacity to live in this manner was affected,” citing 19 months off of work, two surgeries, multiple months of physical therapy, periods of non-weight bearing, and interruption in his hobbies.

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