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Supreme Court Declines to Reconsider *McCormick*

By Jason R. Church

Despite the election of Justice Mary Beth Kelly and the appointment of Justice Brian Zahra to the Michigan Supreme Court, the Court declined to reconsider *McCormick*. Many in the defense community believed it was only a matter of time before the Court overruled the former majority's July 31, 2010 decision in *McCormick v Carrier,* 487 Mich 180 (2010) and reinstated the prior serious impairment standard established by *Kreiner v Fischer,* 471 Mich 109 (2004). It seems they may have to wait a little longer.

On June 24, 2011, the Court issued orders denying the defendants' applications for leave to appeal in *Brown v Blouir* and *Wiedyk v Poisson,* both of which asked the Court to reconsider whether *McCormick* was correctly decided. In his concurring opinion, Chief Justice Young expressed concern that the Court's "interpretation of the threshold standard for noneconomic recovery…has not been consistent for more than a thirty-year span."

SECREST WARDLE NOTES:

Contrary to the expectations of the majority of the defense community, the Michigan Supreme Court has, for now, declined to reconsider its July 2010 decision in *McCormick v Carrier*, 487 Mich 180 (2010). Citing the Court's "teeter-totter" approach to interpreting the no fault act's serious impairment standard over the past 30 years, Chief Justice Young opined that the propriety of *McCormick* should be judged by the Legislature, and not the Court. It remains to be seen whether the Court or the Legislature—or anyone at all—will be the ultimate arbiter of the efficacy of *McCormick*, and when.

Rather than add a new chapter of inconsistency by overruling *McCormick*, Chief Justice Young believes that, at this point, "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 restrictions on access to additional tort recovery." Chief Justice Young concluded his opinion by encouraging the Legislature to take up the issue stating:

> "I encourage the Legislature to judge for itself whether the current interpretation provided in *McCormick* for what constitutes a "serious impairment of body function" is truly the interpretation it originally contemplated. Should the Legislature determine that *McCormick* undermines the "grand compromise" of Michigan's unique no-fault act, as I believe it does, that body may find it necessary to correct this Court's *McCormick* construction that, in my opinion, fails to give meaning to the Legislature's policy choices."

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Despite Chief Justice Young's insistence that the Legislature, and not the Court, should judge the propriety of *McCormick,* it is not altogether clear that the Court will refuse to take action in the future. In a separate concurring opinion, Justice Markman echoed Chief Justice Young's concern over "teeter-totter justice," but nonetheless indicated that he may be in favor of reconsidering *McCormick* if the Court were presented with "a case in which *Kreiner* and *McCormick* compel different outcomes."

What is clear following *Brown* and *Wiedyk* is that the proper standard for determining what constitutes a serious impairment of body function remains a hotly contested issue. What remains to be seen is whether the Court or the Legislature will be the ultimate arbiter of the efficacy of *McCormick,* and when.

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We welcome your questions and comments.

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