

## Kreiner/McCormick Update

By David E. Christensen and Alison F. Tomak  
Gursten Koltonow Gursten Christensen & Raitt PC

In the months following the *McCormick v. Allied* oral arguments, many questions have arisen regarding the Michigan Supreme Court's forthcoming opinion. Will *Kreiner* be overturned? If it's not outright overturned, what can we expect in the *McCormick* decision? Will Justice Cavanagh's *Kreiner* dissent be adopted? How will lower courts apply this new decision? The MSC is expected to issue its decision in *McCormick v. Allied* by the end of the term, which ends in July 2010. Anticipating the answers to these questions involves looking at the judicial and legislative events leading up to *McCormick*.

Rodney McCormick suffered a serious ankle injury when a co-worker backed his truck over his ankle. It required two surgeries to repair the injury, and he was restricted from work for one year. McCormick sued for non-economic damages under MCL 500.3135(1). McCormick's employer moved for summary disposition, claiming that McCormick did not suffer a serious impairment of body function under *Kreiner v. Fischer*. The trial court agreed, and McCormick appealed. In a split decision, the Court of Appeals affirmed the trial court's decision. The dissenting judge opined that there was evidence from McCormick's treating physicians that McCormick's life was not "normal" and that he faced the possibility of future problems.

McCormick appealed the appellate court's decision. The Supreme Court initially denied the application for leave to appeal in an Order dated October 22, 2008. Then the composition of the Court changed with Justice Hathaway defeating Chief Justice Taylor in the election of November, 2008. McCormick filed a Motion for Reconsidera-

tion, and the Court reversed itself and granted McCormick leave to appeal in an Order dated August 20, 2009.

During oral arguments held on January 14, 2010, in Lansing, McCormick's counsel urged the Court to reverse the lower court's ruling, as Mr. McCormick had suffered a serious impairment of body function. Further, he argued, the Court should overrule the *Kreiner* decision, as it is a clear example of judicial activism. McCormick's arguments yielded a variety of questions from most of the justices. Justice Robert Young, who signed on to the *Kreiner* majority decision, was perhaps the most active, pressing McCormick's counsel for a standard *he* would have imposed if *Kreiner* were overruled. McCormick argued that the standard is clearly laid out in the statute and it needs no further definition from the Court. Justice Elizabeth Weaver, who is known to be a swing vote on the MSC, characterized the majority opinion in *Kreiner* as "judicial activism" in her questioning.

Recognizing the great importance of *McCormick*, 12 amicus briefs have been filed in this case, including a brief supporting McCormick filed by the Negligence Section. The Negligence Section's brief focused on the section of the no-fault statute that mandates that the judge decide the issue of serious impairment of body function, as a matter of law. MCL 500.3135. This is nearly always a fact-intensive analysis, as the *Kreiner* majority opinion acknowledged. The Negligence Section challenged the constitutionality of this statute on a number of grounds. First, the section's brief argued that the transfer of fact-finding authority from jury to judge under MCL 500.3135(2) (A) is unconstitutional. Judges faced with summary disposition motions



David E.  
Christensen

Alison Faith  
Tomak

*David E. Christensen is a partner at Gursten, Koltonow, Gursten, Christensen & Raitt, PC and a graduate of the University of Michigan Law School.*

*Alison Faith Tomak is an associate at Gursten, Koltonow, Gursten, Christensen & Raitt, PC and a graduate of the University of Detroit Mercy School of Law.*

*You can contact the authors at (248) 353-7598 or by e-mail at [dchristensen@gurstenlaw.com](mailto:dchristensen@gurstenlaw.com) and [atomak@gurstenlaw.com](mailto:atomak@gurstenlaw.com)*

are required to view the evidence in a light most favorable to the non-moving party, and are prohibited from assessing credibility and resolving questions of fact. These limitations are in place precisely to protect the venerable right to a jury trial. Section 3135(2)(a) of the No-Fault Act effectively usurps this right by requiring the judge to decide cases as a matter of law even where factual and credibility issues exist.

Second, the section's amicus brief argued that Section 3135(2) violates the separation of powers clause of the Constitution. Summary disposition procedures contained in MCR 2.116(C)(10), and the cases decided thereunder, sets forth how cases may be disposed of by a judge. For example, a (C)(10) motion may not be granted if there are material questions of fact remaining, or if a reasonable juror could rule in favor of the plaintiff. Section 3135 contradicts with this court rule by relegating to the

judge the intensely credible and factual questions concerning person's ability to live his/her normal life.

Finally, the Negligence Section argued that the *Kreiner* decision should be corrected to eliminate the extra-statutory requirements inserted by the majority's opinion. In attempting to interpret MCL 500.3135(7), the *Kreiner* Court injected requirements above and beyond those outlined by the statute by requiring that the "course and trajectory" of a person's life must be affected to satisfy the serious impairment threshold. The Court simply added (among other factors) a temporal/duration requirement to assist lower courts in determining whether a plaintiff has met the threshold. These stringent judicially-created requirements have made it exceedingly difficult for seriously in-

jured persons to satisfy the threshold.

*Kreiner* led to a tidal wave of appeals of summary disposition decisions. Under the previous *DiFranco* regime, where threshold was decided under standard summary disposition procedures, there were only forty appeals filed over a ten year period. The threshold was ordinarily a jury question. Since *Kreiner* was decided, the changes have been staggering: an examination of 250 unpublished appellate court decisions revealed 51 decisions in favor of plaintiffs, and 198 in favor of defendants, a whopping 79 percent favoring defendants. (Amicus Curiae Brief of the Negligence Section of the State Bar of Michigan at 4). This resulted in the Court of Appeals being the ultimate fact finder in most of these cases. Many attorneys will recall that the Court of Appeals instituted a

special "rocket" docket to handle the immense number of these appeals. It has since been discontinued due to budget constraints.

Even a cursory review of post-*Kreiner* plaintiffs shows the unworkability of this decision and the arbitrary results of having the judge replace the jury.

*Luther v Morris*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 244483). Plaintiff missed 52 days from work following fractured dominant arm. She testified that her arm was in a sling and she required assistance with most activities for about two months. Her left arm was previously weakened. She recovered in two months. There was no evidence of ongoing restrictions.

Continued on next page

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**Kreiner/McCormick Update**  
Continued from page 5

Plaintiff prevailed.

*Guevara v Martinez*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 260387). Plaintiff, a dishwasher, suffered a torn rotator cuff and dislocated shoulder. Plaintiff required a shoulder immobilizer of the dominant arm and five months of physical therapy. He was off work for five months with therapy. No serious impairment was found. Defendant prevailed.

*Cook v Hardy*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2005 (Docket No. 250727). This student suffered a fractured fibula, which was casted six to eight weeks. She missed a vacation and was medically restricted on carrying items while recovering. She could not resume some activities, such as completing an independent study course, for six months. Plaintiff prevailed.

*Swick v Okorn*, unpublished opinion per curiam of the Court of Appeals, issued November 1, 2005 (Docket No. 263478). Plaintiff injured his cervical spine and required neck surgery by a neurosurgeon. Plaintiff was off work from December 2003 to August 2004. The plaintiff had ongoing restrictions from working on ladders or roofs, an integral part of his job as a masonry estimator. Plaintiff was also medically restricted from "strenuous" activities. Defendant prevailed.

*Gagne v Schulte*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 264788). Plaintiff lost one year of work due to her torn anterior cruciate ligament and medial meniscus, which was surgically reconstructed. She had residual instability in the knee. Plaintiff was restricted from recreational activities such as gymnastics, roller blading, ice skating. She possibly could perform

with a knee brace eventually, according to a doctor. Defendant prevailed.

*Welch v Yuhl*, unpublished opinion per curiam of the Court of Appeals, issued April 18, 2006 (Docket No. 266637). This 14-year-old boy had a deeply lacerated hand which damaged several tendons, a blood vessel and nerve. Reconstructive surgery was performed on his hand. Medical restrictions were in place for only two months, and physical therapy was completed in four months. There was testimony of residual pain and weakness in his hand, but there were no ongoing physician-imposed restrictions. Plaintiff prevailed.

*Jones v Wheelock*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 258974). Pedestrian high school student was stuck by car resulting in torn knee ligaments. Reconstructive surgery was required. She was unable to walk without assistance for one month. Physical therapy was required for 10 weeks. She was disabled from work for three months. She had residual pain when standing or walking, and occasional swelling. She dropped out of marching band and basketball due to the injury. Defendant prevailed.

*Hill v Keller*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 2007 (Docket No. 269084). Plaintiff suffered a fractured fibula, fractured pinky finger, concussion, lacerations and deep vein thrombosis, a life-threatening condition. Plaintiff was off work for three months. There was residual pain and numbness in plaintiff's right leg, which was objectively confirmed by an electromyogram (EMG). Consequently, the plaintiff could not water ski or play pool, per self-restrictions. Defendant prevailed.

*Conklin v Shack*, unpublished opin-

ion per curiam of the Court of Appeals, issued July 27, 2006 (Docket No. 268316). Plaintiff suffered a fractured back at T-12 and required a back brace for six months to restrict movement. He missed approximately nine and a half months of work. Plaintiff could not play football or hunt. Defendant prevailed.

*Turk and Stoner v Dula*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2007 (Docket No. 273424). Defendant prevailed. Stoner, an 81-year-old plaintiff, underwent a knee replacement and shoulder surgery. Plaintiff quit her job due to the pain, but she did not obtain a doctor's note, so it was not considered by the Court.

These cases appear irreconcilable. They demonstrate the arbitrary nature of the *Kreiner* and 3135(2)(a) procedure, and reaffirm the wisdom of the Founding Fathers' firm belief in the jury system. It is the best way to determine credibility and facts, bar none.

The status of Michigan no-fault law is dire. A review of the Michigan Constitution and court rules reveals an equally troubling reality: MCL 500.3135 is an unconstitutional affront to the venerable right to jury trial. If the arguments seem esoteric, the numbers are not: *Kreiner* has resulted in the dismissal of 79 percent of victims' lawsuits.

It is one of the primary missions of the Negligence Section to preserve the public's right to a jury trial: both plaintiffs and defendants. We respect Michigan's tri-partite governmental system. We believe that judges should not be permitted to legislate from the bench, and the legislature must respect the Constitution when making law. It is our hope that the decision handed down by the *McCormick* Court this summer will comport with these values.