

# Appellate Court Answers McCormick Retroactivity Question

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Since the Michigan Supreme Court's landmark no-fault insurance law decision this summer in *McCormick v Carrier*, 487 Mich. 180 (2010), which reversed *Kreiner v Fisher*, 471 Mich. 109; 683 NW2d 611 (2004), and lessened the burden plaintiffs face in establishing a serious impairment of bodily function, questions have arisen as to how Michigan courts will apply *McCormick*, and whether the decision would be applied retroactively.

In several recent cases, the Michigan Court of Appeals has clearly answered the question by retroactively applying the holding in *McCormick* and remanding cases to the trial court for reconsideration in light of the recent holding.

Of the seven cases that have been remanded since the appellate court's ruling, three were memorandum opinions that simply vacated the trial courts' granting of summary disposition to the defendants on the grounds that the courts had relied upon the now-reversed *Kreiner* standard in determining that the plaintiffs had failed to meet the serious impairment of an important body function threshold. *Kamicka v Eagling*, 2010 WL 3187883 (Aug. 12, 2010); *Ross v State*, 2010 WL 3658015 (Sept. 21, 2010); *Trieb v Powell*, 2010 WL 3768116 (Sept. 28, 2010).

However, in four other cases, the court provided a more detailed analysis of the serious impairment threshold under *McCormick*.

In *Camaj v Home-Owners Ins. Co.*, 2010 WL 3385992 (Aug. 24, 2010), an uninsured motorist case arising out of a hit-and-run accident, the trial court found, as a matter of law, that the plaintiff did not suffer a serious impairment of an important body function and, therefore, granted summary disposition to the defendant.

The trial court did find that the plaintiff suffered an objectively manifested impairment of an important body function based on an EMG that showed a neck injury that a physician attributed to the accident. However, the court held that the plaintiff could not show that the impairment affected his general ability to lead his normal life under the *Kreiner* standard.

The appellate court vacated the order because the trial court had relied upon the now-reversed *Kreiner* threshold standard, and the record was not factually sufficient to determine, as a matter of law, under *McCormick* “the effect or influence that the impairment has had on the plaintiff’s ability to lead a normal life.”

On remand, the appellate court instructed the trial court to utilize the test laid out in *McCormick*. First, the court must determine if there is a material dispute regarding the nature 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. 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.

Next, if the issue may be decided as a matter of law, the trial court should determine whether the serious impairment threshold has been crossed. MCL 500.3135(7) provides three prongs 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 court noted that the serious impairment analysis is inherently fact and circumstance specific and must be conducted on a case-by-case basis. The court stated the parties and the trial court should be cognizant of the fact that *McCormick* stated that “[d]etermining the effect or influence that the impairment has had on a plaintiff’s ability to lead a normal life necessarily requires a comparison of the plaintiff’s *life before and after the incident*.”

The court in *Dietzman v Gommesen*, 2010 WL 3604394 (Sept. 16, 2010) similarly vacated the trial court grant of summary disposition to the defendant because the trial court had relied upon the now-reversed *Kreiner* threshold standard, and the record was not factually sufficient to determine “the effect or influence that the impairment has had on the plaintiff’s ability to lead a normal life” as a matter of law under *McCormick*.

The court in *Brooks v Anderson*, 2010 WL 371856 (Sept. 23, 2010) held that the trial court erred in granting the defendant summary disposition as the appellate court concluded, on the present record, that the plaintiff had met the serious impairment threshold.

The plaintiff suffered a jaw injury that caused him to constantly drool and interfered with his ability to eat. However, the court did not preclude that the defendant could still show there was an issue of material fact on the threshold issue, because the record was not developed pertaining to the jaw injury or that it pre-dated the accident.

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The court cited to *McCormick* for the proposition that in determining the effect or influence that an impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident and, therefore, the court declined to hold, as a matter of law, that the plaintiff had met the threshold.

The court in *Hinson v TGI Friday's, Inc.*, 2010 WL 3666756 (Sept. 21, 2010), a dram shop action in which the defendant asserted the defense that would have been available to the intoxicated driver, held that the plaintiff had failed to establish a serious impairment of bodily function.

The appellate court applied the legal standards laid out in *McCormick*, noting that "[i]t is undisputed that this court must follow the precedents the Michigan Supreme Court establishes, even when those precedents reverse previously well-established law" and reversed the trial court grant of summary disposition to the defendant by holding that the plaintiff had satisfied the three prong test found in MCL 500.3135(7) at least as to some of her claimed injuries and, therefore, met the serious impairment threshold.

The court stated that there was no factual dispute that the plaintiff suffered hip and leg fractures. It then held that the impairment was objectively manifested as the plaintiff presented evidence that she was required to have surgery on her femur, was hospitalized for nearly two weeks, was still experiencing pain two weeks following her discharge from the hospital and still required use of a wheelchair at that time.

Next, the court held that walking is indisputably an important body function and as the plaintiff was hospitalized for two weeks and required the use of a wheelchair for six weeks, she had satisfied the second prong of the analysis.

Finally, the court turned to the third prong of the serious impairment test, which is the objectively manifested impairment of an important body function must affect the general ability of the plaintiff to lead his or her normal life. The court stated that the plaintiff produced evidence that showed her injuries affected at least *some* of her general ability to live her normal life in that she underwent surgery, was hospitalized, and after leaving the hospital she used a wheelchair.

Furthermore, the plaintiff engaged in activities such as dancing, basketball and household chores prior to the accident. After the accident her ability to engage in these activities was "significantly reduced, if not eliminated."

As Michigan's courts continue to apply the new *McCormick* analysis, Plunkett Cooney will continue to monitor developments and will provide updates concerning significant decisions.