Michigan Supreme Court Stands 'Idle' in Addressing McCormick Decision, Even With two Recent Opportunities

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When the makeup of the Michigan Supreme Court became more conservative in January, attorneys across Michigan expected the new majority to reconsider the threshold requirement of a "serious impairment of bodily function." However, much to the surprise of many, given two recent no-fault cases brought before the Supreme Court, it opted not to reconsider its holding in a recent highly publicized case.

The Supreme Court denied leave to appeal in *Brown v Blouir,* 788 NW2d 754 (2011) and *Wiedyk v Poisson,* 798 NW2d 759 (2011). By doing so, the court held its decision in *McCormick v Carrier*, 487 Mich. 180 (2010), which reversed *Kreiner v Fisher,* 471 Mich. 109 (2004), in place.

In denying leave to appeal in *Brown* and *Wiedyk*, each of the nearly identical orders was accompanied by three separate concurrences.

Chief Justice Robert P. Young, Jr., who had joined in the dissent in *McCormick,* argued in his concurrences that although he still believed *McCormick* was wrongly decided, he believed that the Michigan Legislature must act 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." Justice Young stated that this balance was "ignored and eliminated" by the *McCormick* decision.

He went on to state that the court's interpretation of the threshold standard has not been consistent since the adoption of the no-fault system in Michigan, and that this has previously necessitated the Legislature to amend the statutory language to compel the courts to enforce its stated intent to limit recovery of noneconomic damages.

Justice Michael F. Cavanagh, who authored the majority opinion in *McCormick,* wrote to respond to what he characterized as Justice Young's "attack" on the court's holding in *McCormick.* Justice Cavanagh maintained that *McCormick* neither revived the holding in *DiFranco v Pickard,* 427 Mich. 32 (1986) nor did it ignore the will of the Legislature. He maintained that *McCormick "*simply acted to align this court's interpretation of MCL 500.3135 with the statute's text, and, as a result, did not

eliminate the statute's threshold standard for noneconomic recovery."

The author of the *McCormick* dissent, Justice Stephen J. Markman, also concurred. Justice Markman first stated that he believed it was proper to remand the cases to the trial court for reconsideration, because this is the preferred action where a trial court's decision was based upon caselaw that is no longer applicable.

He continued by arguing that he disagreed with Chief Justice Young's assertion that the time had arrived for the Legislature to take up the issue of the statutory threshold for noneconomic damages. Justice Markman stated that the court should wait to reconsider *McCormick* until it is presented with a case in which the plaintiff met the statutory threshold under the *McCormick* analysis but would not have met the threshold under *Kreiner.*

Plunkett Cooney will continue to keep you updated as this area of law develops and as the Supreme Court revs up its docket with applicable no-fault cases.