

LEGAL ALERT

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THIRD PARTY NO FAULT THRESHOLD STANDARD OF KREINER TO BE REVIEWED AND LIKELY REVISED BY MCCORMICK

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The expected consequence of Justice Diane M. Hathaway's surprise defeat of former Chief Justice Clifford Taylor began to emerge on August 20, 2009. On that date, the Michigan Supreme Court issued a three-page Order granting a motion for reconsideration and an application for leave to appeal a March 25, 2008 Court of Appeals decision. That decision denied non-economic damages to a man whose fractured ankle and more than one year disability from work were held insufficient to constitute a threshold injury as a matter of law under MCL 500.3135. The unmistakable implication of this Order is that *Kreiner v. Fischer*, 471 Mich. 109 (2004) will soon come under scrutiny, and will likely be changed as a result of the historic shift of power from the former Governor John Engler appointee Taylor led court to one that is new and less conservative.

The August 20, 2009 Order selecting *McCormick v. Carrier*, an unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008, does not constitute a revolution guaranteed to open a floodgate of litigation. Instead, the majority position of the court expressed in the Order is brief, procedural, and devoid of any direct hint of what is to come. Instead, it is the concurring opinions of Justices Weaver and the dissenting opinion of Justice Corrigan, along with the facts and procedural history of *McCormick*, which provide the basis

on which to begin to interpret the practical implications of this Order.

This brief Alert will "read the tea leaves" of the Corrigan dissent and the responding Weaver concurrence before offering a brief forecast of the practical implications of the expected reversal of *Kreiner*, and the revised interpretation of the threshold standard set forth in MCL 500.3135.

In her dissenting opinion, Justice Corrigan candidly acknowledges the change in politics created by "newly elected Justice Hathaway's vote," and cites an 1883 decision in support of her "call for caution" in overruling a 2004 decision (*Kreiner*), "which sought to bring clarity and finality to a very complex area of law."

In her concurring opinion, Justice Weaver distinguished the 1883 decision and instead relied on the Michigan Court Rule which prohibits "restricting the discretion of the court" to grant reconsideration.

It is no surprise that the Michigan Supreme Court took care to select what even political moderates would agree is an extreme example of too strict an application of the threshold standard. The unpublished non-unanimous (Judge Davis dissenting) decision by Judges Whitbeck and Jansen in *McCormick* was effectively affirmed on October 22, 2008, when

the Chief Justice Clifford Taylor led court voted four to three to deny McCormick's Application for Leave to Appeal. The facts and two-page dissent by Judge Davis on March 25, 2008, which persuaded the newly constituted Michigan Supreme Court, to grant the plaintiff's motions in *McCormick* for reconsideration and for leave to appeal, include:

1. The plaintiff's broken left ankle,
2. The two surgical procedures necessary to repair the injury,
3. The plaintiff's one-year accident-related work disability.
4. The plaintiff's deposition admission that his life was "painful, but normal."
5. Both the treating and independent doctors found "some indication of degenerative joint disease."
6. Plaintiff's restrictions were pain based and not merely self-imposed.
7. Evidence was presented which established that the plaintiff "faces at least the possibility of future problems."
8. Judge Davis' dissent concluded that the defendant's Motion for Summary Disposition should have been denied because of the existence of fact questions on both consideration of the possibility of future problems in the "entire trajectory" of plaintiff's life, and because the plaintiff's life "is not, in fact, normal."

If it is obvious that the August 20, 2009 Order means that a change is coming to the threshold standard, and it is, there is some merit in predicting what that change will be and how to

prepare for it. The degree of change probably depends on both the ideological and political make-up of the new court, and also the quality of advocacy on behalf of the parties. Much of the bar, both plaintiff and defense, has been uncomfortable, if not amazed, by the extent to which the pendulum has swung in favor of defendants on the threshold issue over the past few years.

Now, in anticipation of the new standard that *McCormick* will establish sometime during the first half of 2010, this Order starts the stop of that pendulum, and there is going to be a rise in claims for non-economic damages under Section 3135. New and pending claims will be worth more, because fewer claims will be subject to dismissal on motion for summary disposition.

Until the now heightened uncertainty that began with the election of Justice Hathaway is resolved by issuance of the *McCormick* opinion next year, litigants in third party no fault claims are best advised to be guided by a more expansive reading of the language of the statute ("Serious impairment of body function means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."), and each investigation and analysis of medical issues should be guided by the assumption that claims involving injuries which include broken bones, multiple surgeries, and year long disability are probably not subject to dismissal, and therefore have a higher value than they did prior to issuance of this Order.

We at Smith Haughey will continue to monitor *McCormick* and will keep you posted of new developments.

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