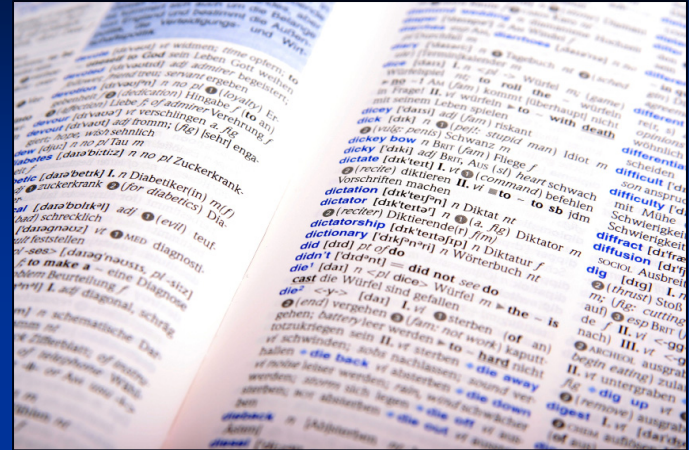


McCormick v. Carrier The Unraveling of a “Threshold” – One Dictionary at a Time



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Mark L. Dolin ♦ 248.324.2620 ♦ mldolin@kopkalaw.com

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Today's Speaker:

Mark L. Dolin



Mark Dolin regularly handles a variety of insurance defense matters including personal injury, professional liability, medical malpractice, catastrophic claims, Michigan No-Fault, trucking liability, coverage, employment law, automobile liability cases. He has extensive trial experience in personal injury, medical and dental malpractice litigation and professional negligence-related areas and has tried cases to verdict in Illinois State Court and Illinois Federal Court, Michigan State Court and Michigan Federal Court.

Introduction

- The opportunity to overturn *Kreiner*
- Justices fail to define “serious”
- Advocating subjective versus objective evidence of injury
- Developing global litigation strategies to minimize its practical effect.
- The defense’s challenge



The History of “The Threshold”

- In 1973 the Michigan Legislature adopted the No-Fault Insurance Act, MCL 500.3101 *et seq.* The act created a compulsory motor vehicle insurance program under which insureds may recover directly from their insurers, without regard to fault, for qualifying economic losses arising from motor vehicle incidents. In exchange for ensuring certain and prompt recovery for economic loss, the act also limited tort liability.



The History of “The Threshold”

- The act created threshold requirements in MCL 500.3135(1), which has remained unchanged in all key aspects since the act was adopted. That subsection currently provides that “[a] person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” The act did not originally define this phrase. Accordingly, it initially fell to the Court to do so, and the result was a series of differing opinions.

The History of “The Threshold”

- In **1995** however, the Legislature intervened. It amended MCL 500.3135 to define a “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7). The Legislature also expressly provided that whether a serious impairment of body function has occurred is a “question of law” for the court to decide unless there is a factual dispute regarding the nature and extent of injury and the dispute is relevant to deciding whether the standard is met. MCL 500.3135(2)(a).

The History of “The Threshold”

- In **2004** the Supreme Court interpreted the amended provisions in *Kreiner*.
- In **2010** the Supreme Court in *McCormick* overturned *Kreiner*.



Analysis of *McCormick v Carrier*

- **HOLDING:** We hold that *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), was wrongly decided because it departed from the plain language of MCL 500.3135, and is therefore overruled. We further hold that, in this case, as a matter of law, plaintiff suffered a serious impairment of a body function. Accordingly, we reverse and remand the case to the trial court for proceedings consistent with this opinion.

Analysis of *McCormick v Carrier*

- **FACTS:** On January 17, 2005, a co-worker backed a truck into plaintiff, knocking him over, and then drove over plaintiff's left ankle. X-rays showed a fracture of his left medial malleolus. Two days later metal hardware was surgically inserted into his ankle to stabilize plaintiff's bone fragments. The metal hardware was removed in a second surgery on October 21, 2005.
- Beginning on January 16, 2006, plaintiff returned to work as a medium truck loader for several days, but he had difficulty walking, climbing, and crouching because of continuing ankle pain. Plaintiff returned to work on August 16, 2006, 19 months after he suffered his injury. He volunteered to be assigned to a different job, and his pay was not reduced. He has been able to perform his new job since that time.

Analysis of *McCormick v Carrier*

- He was a “weekend golfer” and frequently fished in the spring and summer from a boat that he owns. He testified that he was fishing at pre-incident levels by the spring and summer of 2006, but he has only golfed once since he returned to work. He stated that he can drive and take care of his personal needs without assistance and that his relationship with his wife has not been affected. He stated that he has not sought medical treatment for his ankle since January 2006, when he was approved to return to work without restriction. He further testified that his life is “painful, but normal,” although it is “limited,” and he continues to experience ankle pain.

Majority's Analysis & Justification

A QUESTION OF LAW OR FACT UNDER MCL 500.3135(2)



■ The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

- i. There is no factual dispute concerning the nature and extent of the person's injuries.
- ii. There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.

Majority's Analysis & Justification

A QUESTION OF LAW OR FACT UNDER MCL 500.3135(2)



■ “Material Fact”

- “The disputed fact does not need to be outcome determinative in order to be material, but it should be ‘significant or essential to the issue or matter at hand.’” *Black’s Law Dictionary (8th ed)*.

Majority's Analysis & Justification

A “SERIOUS IMPAIRMENT OF BODY FUNCTION” UNDER MCL 500.3135(1) AND (7)

- “On its face, the statutory language provides three prongs that are necessary to establish a ‘serious impairment of body function’: (1) an objectively manifested impairment (2) of an important body function that (3) affects the person’s general ability to lead his or her normal life.”



Majority's Analysis & Justification

A “SERIOUS IMPAIRMENT OF BODY FUNCTION” UNDER MCL 500.3135(1) AND (7)

- a. An Objectively Manifested Impairment;
- b. Of An Important Body Function;
- c. That Affects The Person's General Ability To Lead His Or Her Normal Life.



Conclusion

We hold that *Kreiner* should be overruled because the *Kreiner* majority's interpretation of MCL 500.3135 departed from the statute's clear and unambiguous text. Applying the unambiguous statutory language, we hold that as a question of law, in this case, plaintiff established that he suffered a serious impairment of body function. Thus, we reverse the Court of Appeals and remand the case to the trial court for proceedings consistent with this opinion. [KELLY, C.J., and WEAVER (except for the part entitled "Stare Decisis"), and HATHAWAY, JJ., concurred with CAVANAGH, JJ]

Defense Concerns & Strategies to Minimize McCormick's Effects

- Cautiously seek summary disposition, although a soft tissue benchmark must be set in an effort to minimize volume. The definition of “serious” must be emphasized!
- Be prepared to defeat plaintiff's motion for a threshold determination as a matter of law.
 - Notably, the jury instructions should remain relatively intact, and therefore McCormick's effect should be nominal if plaintiff's threshold motion is defeated.

Defense Concerns & Strategies to Minimize McCormick's Effects

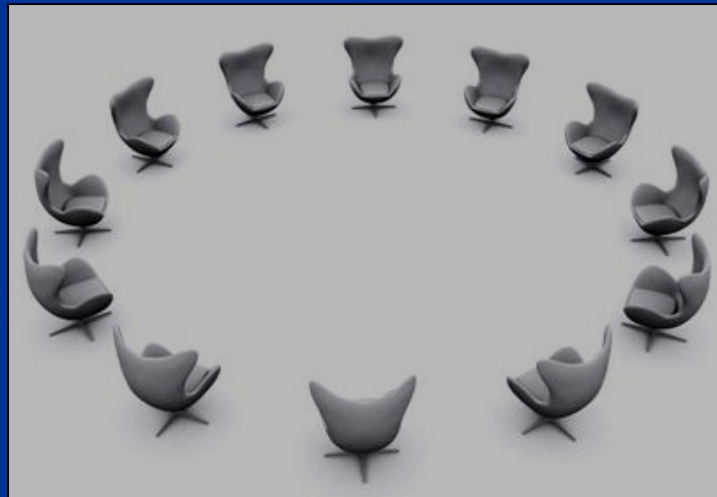
- Discovery efforts must serve to create a material question of fact regarding the true nature and extent of the plaintiff's injuries.
- Plaintiff's claims will undoubtedly be riddled with subjectivity, therefore, objective evidence to the contrary should serve not only to diminish plaintiff's credibility but enhance the trial court to rule that a threshold determination is a question for the trier of fact.

Defense Concerns & Strategies to Minimize McCormick's Effects

■ Discovery efforts and tools to consider:

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- Video surveillance
 - Master Trace
 - Facebook
 - MySpace
 - Twitter
 - Pharmaceutical history
 - Health insurance history
 - Litigation history
 - Social Security Disability records
 - Employment/Workers' Compensation history
 - Independent Medical Examinations
 - Neuro-radiological reviews
 - Expert/medical affidavits pertaining to proximate cause
 - Ex Parte conferences with treater

Musical Chairs On The Michigan Supreme Court And The Effect On The Threshold



Robert Abramson
Kopka, Pinkus, Dolin & Eads

KREINER OPINION: 2004

- 7 justices on the Michigan Supreme Court
- Majority opinion rendered by four republicans:
 - Clifford W. Taylor
 - Maura D. Corrigan
 - Robert P. Young, Jr.
 - Stephen J. Markman

NOVEMBER 2008 ELECTION

- Democrat Diane Hathaway elected, beats out incumbent republican Clifford Taylor
- Democrats now have the majority

JULY 2010: MCCORMICK DECISION

- Majority opinion rendered by four democrats:
 - Cavanagh
 - Kelly
 - Weaver
 - Hathaway

AUGUST 2010: RESIGNATION OF JUSTICE

- Democrat Justice Weaver resigns
- Democrat governor Jennifer Granholm appoints a democrat. Alton Davis

NOVEMBER 2, 2010: ELECTION

- Republican Robert Young re-elected
- Republican Mary Beth Kelly elected, beats out the Democrat just appointed, Alton Davis
- Republicans have a 4-3 majority again

NOVEMBER 5, 2010: KPDE WINS THRESHOLD MOTION

- Motion for summary disposition granted by Judge Amy Hathaway in Wayne County Circuit Court
- Plaintiff claimed a closed head injury
- Did not affect her general ability to lead her normal life

JANUARY 2011

- **January 5:** Robert Young, a republican, named Chief Justice
- **January 6:** Justice Corrigan, a republican, stepped down to head the Michigan Department of Human Services
- **January 10 (yesterday):** Newly elected republican Governor Rick Snyder appoints republican and Michigan Court of Appeals Judge Brian Zahra to the Supreme Court

FUTURE OF THE COURT

- Zahra is pro-defense
- With Zahra in, the Republicans maintain the 4-3 majority they enjoyed in 2004
- Tide will shift back to the defense again.....

Thank You For Your Time! Questions?

Mark L. Dolin
33533 W. Twelve Mile Road
Farmington Hills, MI 48331
Tel: 248.324.2620 Fax 248.324.2610
mldolin@kopkalaw.com www.kopkalaw.com



KOPKA PINKUS DOLIN & EADS, LLC

Our Locations



Illinois

100 Lexington Drive
Suite 100
Buffalo Grove, IL 60089
Phone 847-549-9611
Fax 847-549-9636

200 N. LaSalle Street
Suite 2850
Chicago, IL 60601
Phone 312-782-9920
Fax 312-782-9965



Michigan

33533 W. Twelve Mile Road
Suite 350
Farmington Hills, MI 48331
Phone 248-324-2620
Fax 248-324-2610

138 Ridge Street
Suite 202
Sault Ste. Marie, MI 49783
Phone # 906-632-7785
Fax # 906-632-7789



Indiana

9801 Connecticut Drive
Crown Point, IN 46307
Phone 219-794-1888
Fax 219-794-1892

10333 N. Meridian Street
Suite 475
Indianapolis, IN 46290
Phone 317-818-1360
Fax 317-818-1390

Park Place at Edison Lakes
3510 Park Place West
Mishawaka, IN 46545
Phone 574-288-3270
Fax 574-288-3280

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- Insurance Defense
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- Professional Liability
- Real Estate
- Retail & Restaurant
- Toxic Tort & Environmental Liability
- Workers' Compensation

KPDE Areas of Insurance Defense

- Automobile Accident
- Commercial Premises
- Construction
- Coverage
- Defense Litigation
- Dental Malpractice
- Errors & Omissions
- Fraud Defense
- Legal Malpractice
- Medical Malpractice
- Medicare Set Aside
- Nursing
- PIP
- Premises Liability
- Products Liability
- Property Damage
- Subrogation
- Trucks and Railroads
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- Workers' Compensation