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Gallagher Sharp Newsflash: No Fault Ins. - MI Lowers threshold for non-economical tort liability

On July 31, 2010, the Michigan Supreme Court in *McCormick v. Carriers*, ___ Mich. ___ (docket No. 136738, July 31, 2010) made it easier for plaintiffs to establish "serious impairment of body function" to permit recovery against a third-party for non-economic tort liability under MCL 500.3135. The Court overturned *Kreiner v. Fischer*, 471 Mich 107, 683 NW2d 611(2004), which set the threshold that a plaintiff must meet for non-economic tort recovery. The Court's new three-prong test to establish a "serious impairment of body function" includes (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).

Generally, Michigan plaintiffs in motor vehicle accidents recover their actual damages from their own insurance carrier. Plaintiffs may only recover against a third-party for non-economic damages (i.e. pain and suffering) upon death, permanent disfigurement, or serious impairment of an important body function. The *McCormick* decision is significant because it lowers the threshold that plaintiffs must meet in order to recover against a third-party for non-economic damages.

Under the first prong of the test, the Court held that medical testimony will generally be required to establish an impairment. However, to the extent that *Kreiner* could be read to always require medical documentation, such a reading goes beyond the legislative intent and is incorrect. Under *McCormick*, plaintiffs will be able to establish an objectively manifested impairment without medical documentation.

McCormick does not change the current interpretation of the second prong of the threshold test.

As to the third prong, the Court removed any temporal requirement as to how long an impairment must last in order to have an effect on the person's general ability to live his or her normal life. Under *Kreiner*, a plaintiff had to demonstrate that the impairment affected the course or trajectory of a person's normal life. It was not enough that some aspects of the plaintiff's entire normal life were interrupted by the impairment, and duration of the impairment was important under *Kreiner*. The pertinent question now is if the impairment influences some of the plaintiff's capacity to live his or her normal manner of living. Brief impairments may now meet the statutory definition of a "serious impairment of body function", and thus the threshold for non-economic tort liability recovery under MCL 500.3135 has been lowered.

We anticipate increased litigation for non-economic damages in motor vehicle accidents as a result of this decision. In fact, the Insurance Institute of Michigan issued a news release which stated that this

decision will open the flood gates for lawsuits resulting in higher premiums for motorists.

Insurers and defendants may still obtain favorable results at summary disposition. Care will need to be exercised during the discovery portion of the trial to obtain an accurate picture of the plaintiff's general lifestyle both prior to and after the motor vehicle accident. And while medical documentation is no longer expressly required to show an objectively manifested impairment, it may be difficult for plaintiffs to establish an objectively manifested impairment without it.

The link to the Court's opinion is:

<http://courts.michigan.gov/supremecourt/Clerk/0110/136738/136738%20Opinion.pdf>

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