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## Court of Appeals Offers Clearest Statement to Date on Retroactive Effect of *McCormick*

By Drew Broaddus

The standard for bringing a tort action under MCL 500.3135 of the No-Fault Act changed significantly on July 31, 2010 when the Michigan Supreme Court issued *McCormick v Carrier*, 487 Mich 180 (2010). Prior to *McCormick*, to meet the § 3135 threshold, there needed to be an impairment of an important body function which affected the “course or trajectory of a person’s entire normal life,” per *Kreiner v Fischer*, 471 Mich 109 (2004). In determining whether the course of a person’s normal life has been affected under the *Kreiner* test, courts had to compare the plaintiff’s life before and after the accident and evaluate the significance of any changes on the course of the plaintiff’s overall life. This involved consideration of factors such as the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery.

However, *McCormick* removed these factors, finding that “the analysis does not lend itself to any bright-line rule or imposition of [a] nonexhaustive list of factors, particularly where there is no basis in the statute for such factors.” Instead, *McCormick* stated that, in order to determine “the effect or influence that the impairment has had on a plaintiff’s ability to lead a normal life,” courts must compare “the plaintiff’s life before and after the incident.” In order to do this comparison, according to *McCormick*, courts must consider three points. First, the statute merely requires that a person’s general ability to lead his or her normal life be *affected*, not destroyed. Thus, courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether – even though the person is able to lead his or her pre-incident normal life – the person’s general ability to do so was nonetheless affected. Second, the statute only requires that some of the person’s *ability* to live his or her normal life be affected, not that some of the person’s normal manner of living has itself been affected. In other words, *McCormick* recognizes that “the

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Although *Sikkenga* is one of a handful of Court of Appeals’ opinions discussing *McCormick*, it is not especially helpful. The Court of Appeals did not actually apply the *McCormick* test. Instead, it instructed the trial court to do so on remand.

*Sikkenga* clearly applied *McCormick* retroactively, but did not engage in any real discussion of the issue. The *McCormick* opinion did not expressly address its retroactive effect. However, the general rule is that decisions are to be applied retroactively, and are only applied prospectively as an “extreme measure.”

Justice Weaver was the swing vote in *McCormick*, as she was in several other decisions issued between January 2009 and August 2010. She left the Court shortly before the 2010 election, and her seat is now held by Justice Mary Beth Kelly, who is considered more conservative. It is uncertain how the current composition of the Court will influence *McCormick*’s application going forward.

## CONTINUED...

extent to which a person's general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person's normal manner of living is." However, "there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected." Third, the statute does not create an express temporal requirement as to how long impairment must last in order to have an impact on "the person's general ability to live his or her normal life."

While the *McCormick* majority ostensibly sought to clarify the § 3135 threshold by emphasizing the statute's plain language, the opinion left several questions unanswered including "Did the *McCormick* test apply retroactively?" Otherwise stated, did *McCormick's* interpretation of § 3135 apply to cases pending as of July 31, 2010? Another opinion released by the Supreme Court on that date, *Bezeau v Palace Sports & Entmt, Inc*, 487 Mich 455 (2010), arguably suggested that *McCormick* should have only prospective application, i.e., its interpretation of § 3135 should apply only to cases filed after July 31, 2010.

On June 14, 2011, the Court of Appeals offered its clearest statement to date on *McCormick's* retroactivity in *Sikkenga v Townsend*, unpublished per curiam opinion (case no. 297195). In *Sikkenga*, plaintiff filed an action under § 3135 in 2009. The suit arose out of a 2007 automobile accident. Defendant moved for summary disposition in February 2010, four months before *McCormick*, when *Kreiner* was still controlling. Defendant's motion for summary disposition was granted under *Kreiner*. The Court of Appeals vacated the trial court's order and remanded for reconsideration in light of *McCormick*. The following language in the *Sikkenga* opinion makes clear that, at least in the eyes of this panel, *McCormick* has full retroactive effect stating:

"At the time the trial court rendered its decision, the application of this statute was controlled by *Kreiner*. However, in July 2010, our Supreme Court issued *McCormick*.... The *McCormick* decision overruled the *Kreiner* Court's interpretation of MCL 500.3135. Because the trial court utilized the now-overruled *Kreiner* standard, the trial court's grant of summary disposition must be vacated and the case remanded for further proceedings in light of *McCormick*."

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