

August 2010 - Newsletter



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“As professionals in litigation, Hutchinson & Associates operates a responsive and efficient law firm. We have an impressive track record for winning and settling cases that impact life and death issues.”

Kreiner Overruled

The long awaited Michigan Supreme Court decision in *McCormick v Carrier* has been issued. In a lengthy opinion, the court overruled *Kreiner* and established a new serious impairment test for persons injured as the result of a motor vehicle accident.

Whereas *Kreiner* required an objectively manifested injury, an injured person under *McCormick* must demonstrate “an impairment that is commonly understood as one observable or perceivable from actual symptoms or conditions.” The focus is no longer on the injury itself but, instead, on how the injury affects a body function. Medical documentation of the impairment is not always required.

Next, the injured person must demonstrate that the impairment is “marked by or” has “great value, significance, or consequence” to the specific injured person’s life. This is to

*“In these matters, the only certainty is
that nothing is certain.”*

- *Pliny the Elder (23AD -79AD)*

be determined on a case-by-case basis and will vary dependent upon the injured person's lifestyle.

Finally, the injured person must demonstrate that the impairment “influence some of the injured person's power or skill, i.e., the person's capacity to lead a normal life.” It requires only that some of an injured person's capacity or ability to live his or her normal life has been affected. There is no longer a requirement that the impairment affect the “course or trajectory” of the injured person's entire life. Additionally, there is no time element in this requirement.

Utilizing the new test, the court held that McCormick's injury met the new threshold requirements. McCormick's broken ankle manifested an impairment of body function that was perceivable by others. He was unable to walk, crouch, climb, or lift a certain amount of weight. McCormick's testimony established that these inabilities were of “significance or consequence” to his ability or capacity to work. Finally, the court held that the broken ankle impairment influenced some of McCormick's ability or capacity to live in the normal way he did before the accident.

McCormick's affect on Michigan auto negligence litigation will have to be gauged in the coming months but the ruling clearly expands an injured person's ability to file and maintain a lawsuit for injuries arising out of a motor vehicle accident.



“Wisdom doesn't automatically come with old age. Nothing does - except wrinkles. It's true, some wines improve with age. But only if the grapes were good in the first place.”

- Abigail Van Buren

Hutchinson and Associates has made arrangements to handle any surge in case filings that may occur as a result of this decision just as we did in the late 1990's anticipating tort reform.

No-Fault Act Discovery

In a recently published Court of Appeals decision, an insurer sued a medical facility with a “complaint for discovery” seeking medical records of some of its insureds so it could determine whether there was proper billing and whether the treatment by other providers was reasonable and necessary under the no-fault act. There was no pending litigation involving these insureds. The medical facility had refused to supply records or to have its employees examined under oath. The trial court denied the facility’s summary disposition motion and entered an order compelling discovery.

Although the appellate court agreed with the facility that there was no such thing as a “complaint for discovery”, the court decided that, since the substance of a complaint controls, the lawsuit was actually one for declaratory relief to determine the rights and obligations of the parties under the no-fault act.

Citing § 3158 of the act, the court reasoned that the insurer had a statutory right to demand copies of medical records from providers. There is no requirement that the services provided be billed or that there even be outstanding bills.

“I have made this letter longer, because I have not had the time to make it shorter.”

- *Blaise Pascal (1623-1662)*

§3159 of the act provides that an insurer may obtain a discovery order for such records once there is a “dispute about the right to discover facts” about a claimant’s earnings, history, condition, treatment, and dates and costs of treatment. When the medical provider refused to supply the requested discovery, there was a “dispute” under the statute.

The Court of Appeals affirmed the trial court’s denial of the facility’s summary disposition motion but vacated the discovery order because the insureds were interested parties in the declaratory action and had not been given notice.

Wrongful Conduct Bars Wrongful Death Recovery

The plaintiff’s decedent, Scott, was killed when he and his brother, Salvatore, decided to throw rocks at someone’s house. They gathered rocks and put them in the back of the defendant’s truck. With the decedent and his brother in the back of the truck, the defendant drove past the house. The brothers decided that they would throw the rocks on the count of three as they drove past. The defendant would then drive around the corner, the brothers would jump out of the back, get in the cab, and all would drive away.

Scott’s brother threw a rock which hit a car in the driveway. Although he testified that he did not watch Scott throw a rock, he told the police that Scott also threw a rock toward

“The prejudices of ignorance are more easily removed than the prejudices of interest; the first are all blindly adopted, the second willfully preferred.”

- George Bancroft

the house.

The defendant rounded the corner and Salvatore got in the truck cab but Scott did not. The defendant circled and they found that Scott had fallen out of the truck and sustained fatal injuries.

The defendant moved for summary disposition on the basis of the wrongful conduct rule which provides that a claim is generally barred if a plaintiff's actions are based, in whole or in part, on his own illegal conduct. The illegal conduct must be “serious in nature and prohibited under a penal or criminal statute.” The rule applies only if there is a sufficient causal nexus between the plaintiff's illegal conduct and the damages. However, if both the plaintiff and the defendant participate in the illegal conduct and the defendant's culpability is greater than the plaintiff's, the plaintiff can still seek recovery.

The Court of Appeals decided that Scott was engaged in the wrongful conduct of conspiracy to maliciously destroy property when he was killed. Scott, his brother, and the defendant had entered into a partnership to commit a criminal act. Scott and the defendant were equally culpable in the conspiracy. Both were intoxicated and there was no evidence that Scott acted “under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age.” There was also sufficient nexus between the act and Scott's death. Therefore, the wrongful

*“Four steps to achievement:
Plan purposefully.
Prepare prayerfully.
Proceed positively.
Pursue persistently.”*

- William Arthur Ward

conduct rule applied to bar recovery.

Court of Appeals Upholds Summary Disposition in Service of Process Dispute

In an unpublished opinion, the Court of Appeals upheld a trial court decision granting summary disposition to a defendant, represented by ***Phil Reed***, whom the court ruled had not been served with a summons and complaint. Three lawsuits were involved.

In the first, plaintiff initially sued her no-fault insurer for no-fault benefits and sued the driver of a vehicle for her injuries arising from a motor vehicle accident. The vehicle had been leased by the driver’s employer under a long-term lease and, at the time of the accident, had been in the employer’s possession and exclusive use for many months. Under Michigan’s Owner’s Liability Statute, the lessee-employer was the vehicle owner for purposes of the statute.

The driver was duly served with this first summons and complaint and an answer was filed on his behalf by the Hutchinson firm.

After being advised by letter that the defendant driver was in the course of his employment at the time of the accident and that his employer owned the vehicle, for approval, plaintiff’s first counsel drafted and submitted a proposed amended complaint adding the employer. However, at some point it was decided that the amended

*“A superior man is modest in his speech,
but exceeds in his actions.”*

- Confucius

complaint would not be filed and to dismiss the defendant driver, ostensibly because the plaintiff's injuries did not meet the serious impairment threshold at that time.

Later, plaintiff obtained new counsel and a second lawsuit was filed shortly before the three year statute of limitations ran. This lawsuit again named the driver as a defendant but, instead of suing the employer as vehicle owner under the Owner's Liability Statute, the suit named the vehicle lessor as the owner.

The lessor was served with the summons and complaint and Phil Reed filed an answer on its behalf. In its answer, the lessor denied ownership because, under the Owner's Liability Statute, a lessee under a long term vehicle lease is the vehicle owner for purposes of the statute.

Despite defense inquiries about service on the defendant driver, no information that he was served was provided so no pleadings were filed on his behalf, and no appearances were made. After the statute of limitations ran, the lessor was granted summary disposition since, under the owner's liability statute, it did not own the vehicle.

Before summary disposition was granted to the lessor, plaintiff filed a third lawsuit, again naming the driver as a defendant but this time naming the employer as the vehicle owner. Both the driver and the employer were served with this summons and

*“The road leading to a goal does not
separate you from the destination;
it is essentially a part of it.”*

- Charles DeLint

complaint and Phil Reed responded by filing summary disposition motions for both based upon the running of the statute of limitations. Even though the statute of limitations for the driver had been tolled during the time the first lawsuit was pending, the third lawsuit still had not been timely filed.

Although plaintiff eventually agreed to dismiss the employer because the three year statute of limitations had clearly run, plaintiff vigorously argued against granting summary disposition to the driver. Among numerous positions, plaintiff argued that since the Hutchinson firm represented the driver in the first lawsuit, it continued to represent him during the second and so the driver had notice of the second lawsuit through his counsel. Plaintiff also argued that the driver had been evading service of the second lawsuit because, when plaintiff's process server first went to a house where the driver had resided, someone told him the driver no longer lived there. When the process server returned, he heard someone inside but no one answered the door. He left the summons and complaint on the porch of the house and submitted an affidavit that the driver was evading service.

Despite plaintiff's numerous arguments, the trial court held that the driver was never served in the second case and granted the driver summary disposition in the third case because the statute of limitations had run.

The Court of Appeals upheld the trial court ruling, holding that, despite the Hutchinson



“In every adversity there lies the seed of an equivalent advantage. In every defeat is a lesson showing you how to win the victory next time”

- Robert Collier

firm’s initial representation of the driver in the first lawsuit, its representation ended when the first complaint was dismissed. No pleadings were filed on the driver’s behalf and no one ever appeared for him in the second lawsuit. It added that, although the driver had at one time lived at the house with his mother where the process server left the summons and complaint, he had moved from there months. He had also changed his address with both the secretary of state and the post office before the attempted service. In addition, his mother had sold the house and did not live there when the process server attempted service. Further, the court pointed out that the defendant driver testified that, although he was served with the third summons and complaint, he never saw the second summons and complaint and did not know that he had been sued. Finally, plaintiff never filed a proof of service in the second complaint and never requested an order extending the summons or an order of substituted service.

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