

STATE OF MICHIGAN  
COURT OF APPEALS

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AMY SUE DIETZMAN,

Plaintiff-Appellant,

v

EDNA ELIZABETH GOMMESEN,

Defendant-Appellee.

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UNPUBLISHED

September 16, 2010

No. 293071

Kent Circuit Court

LC No. 08-000594-NI

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this negligence action. The trial court determined that plaintiff failed to satisfy the "serious impairment of body function" threshold test required by the no-fault insurance act to maintain a claim for non-economic tort damages. MCL 500.3135(1). In light of our Supreme Court's recent decision in *McCormick v Carrier*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2010), we vacate the trial court's order granting defendant summary disposition on the serious impairment threshold issue and remand for further proceedings consistent with *McCormick*'s directives. This case has been decided without oral argument pursuant to MCR 7.214(E).

This case arises out of a car accident that occurred on March 31, 2007. Plaintiff was injured in the car accident when defendant failed to stop at a red flashing stoplight and collided with the car that plaintiff was driving. The accident occurred at the intersection of Broadmoor and 44<sup>th</sup> Streets in Kent County, Michigan. Plaintiff was headed north on Broadmoor in a Pontiac Grand Am. The traffic light was flashing yellow for Broadmoor and flashing red for 44<sup>th</sup> Street traffic. Witnesses told police that defendant drove her Mazda through the flashing red light while proceeding westbound on 44<sup>th</sup> Street. Defendant's car collided with the driver's side door and front quarter panel of plaintiff's car. Neither party was responsive at the scene of the accident, and neither had any recollection of the accident. Plaintiff suffered a concussion and injuries to her face, neck, and back.

Plaintiff filed a complaint against defendant alleging that due to defendant's negligent operation of a motor vehicle, plaintiff sustained personal injuries and other damages. Defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that plaintiff failed to satisfy the "serious impairment of body function" threshold test set by the no-fault insurance act in order to maintain an action for non economic tort damages. MCL 500.3135(1).

Following oral argument on the motion, the trial court issued a written opinion and order granting defendant's motion for summary disposition. The trial court determined that while plaintiff "presents a claim that involves 'an objectively manifested impairment of an important body function,'" she "must also show that this impairment affects her 'general ability to lead (a) normal life,' which requires her to establish that 'the course or trajectory' of her normal life has been affected." Ultimately, the trial court concluded that the evidence did not create an issue of fact regarding whether plaintiff suffered a serious impairment of body function because plaintiff failed to satisfy the "trajectory test" set forth in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), and granted summary disposition in favor of defendant. Plaintiff now appeals.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on the basis that, as a matter of law, plaintiff did not suffer a serious impairment of an important body function. This Court reviews de novo the trial court's decision on a motion for summary disposition. *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

Under the no-fault act, a person is subject to tort liability for noneconomic loss caused by the ownership, maintenance, or use of a motor vehicle only when an injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1). A serious impairment of body function is "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).

In this case, the trial court determined that plaintiff did suffer an objectively manifested impairment of an important body function citing plaintiff's concussion/closed head injury that resulted in "mild traumatic brain injury," "intermittent bouts of headaches," "muscle spasms in her neck," and "'moderate to severe cognitive linguistic impairment' characterized by memory and organizational deficits." The trial court also cited plaintiff's nasal bone fracture on her face as well as neck and back injuries. The trial court stated in its conclusion that,

Were it not for the trajectory test prescribed by *Kreiner*, 471 Mich at 130-133, the Court might well be able to conclude that Plaintiff Dietzman's impairment "affects (her) general ability to lead (a) normal life," as contemplated by MCL 500.3135(7).

But utilizing the now-reversed standard set forth in *Kreiner* 471 Mich at 130-131, rev'd *McCormick*, *supra*, the trial court determined that plaintiff could not demonstrate that her impairment affected her general ability to lead her normal life. MCL 500.3135(7).

Indeed, until recently, to meet the requisite threshold, the impairment of an important body function must have affected the course or trajectory of a person's entire normal life. *Kreiner*, at 130-131. In determining whether the course of a person's normal life has been affected under the now-reversed *Kreiner*, a court 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 considering 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. *Id.* at 132-133. This is the *Kreiner* serious impairment threshold analysis that the trial court employed in the instant case. *Id.* But *McCormick* removed these factors stating 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.” *McCormick*, at slip op p 35.

Instead, *McCormick* stated that, “[d]etermining the effect or influence that the impairment has had on a plaintiff’s ability to lead a normal life necessarily requires a comparison of the plaintiff’s life before and after the incident.” *McCormick*, at slip op p 20. In order to do this comparison, according to *McCormick*, courts must consider three points with regard to this comparison. *Id.* at slip op pp 20-21. First,

the statute merely requires that a person’s general ability to lead his or her normal life has been *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, although a person is able to lead his or her preincident normal life, the person’s general ability to do so was nonetheless affected. [*Id.* at slip op p 20.]

Second,

the plain language of the statute only requires that some of the person’s *ability* to live in his or her normal manner of living has been affected, not that some of the person’s normal manner of living has itself been affected. Thus, while the 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, there is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected. [*Id.* at slip op p 20.]

And third,

the statute does not create an express 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.’ [*Id.* at slip op p 21.]

Because the trial court was constrained by the now-reversed *Kreiner* threshold standard and the record is not factually sufficient for us to determine “the effect or influence that the impairment has had on [] plaintiff’s ability to lead a normal life” as a matter of law under *McCormick*, we must vacate the trial court’s grant of summary disposition and remand for further proceedings in light of *McCormick*. *Id.* at slip op p 20.

On remand, we direct the trial court to utilize the following test for “the proper interpretation of the clear and unambiguous language in MCL 500.3135” as pronounced in *McCormick*, at slip op pp 33-34, in its determination of whether any impairment plaintiff sustained as a result of the car accident has affected her general ability to lead her normal life:

To begin with, the court should determine whether there is a factual dispute regarding the nature and the extent of the person’s injuries, and, if so,

whether the dispute is material to determining whether the serious impairment of body function threshold is met. MCL 500.3135(2)(a)(i) and (ii). If there is no factual dispute, or no material factual dispute, then whether the threshold is met is a question of law for the court. *Id.*

If the court may decide the issue as a matter of law, it should next determine whether the serious impairment threshold has been crossed. The unambiguous language of MCL 500.3135(7) provides three prongs that are necessary to establish a “serious impairment of body function”: (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).

The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis. [*McCormick*, at slip op p 34 (internal footnotes omitted.)]

Also on remand, the parties and the trial court should be cognizant of the fact that *McCormick* stated that “[d]etermining the effect or influence that the impairment has had on a plaintiff’s ability to lead a normal life necessarily requires a comparison of the plaintiff’s *life before and after the incident*.” *McCormick*, at slip op p 20 (emphasis added). *McCormick* did not involve a plaintiff with a preexisting impairment and did not further define or elaborate on the meaning of the phrase “life before and after the incident.” *Id.* In the instant case, plaintiff does have a past history of disability and inability to work in her pre-accident life as a result of a heart condition that is now resolved and, most significantly, psychological problems including bi-polar disorder. For a period of time, the accident clearly affected her memory, concentration, and ability to handle on-going life skills, beyond and aggravating that which she experienced prior to the accident due to her bi-polar disorder. Plaintiff claims that she has attempted to resume work as a substitute dental hygienist a couple of times since the accident. However, she claims that she has not signed up for any other work since the accident due to headaches, dizziness, neck, and back pain as a result of the accident. To the extent these issues implicate *Benefiel v Auto Owners Ins Co*, 277 Mich App 412; 745 NW2d 174 (2007), vacated 482 Mich 1087 (2008),<sup>1</sup> we point out that both the decision of this Court and our Supreme Court’s order in *Benefiel* were issued under the now reversed *Kreiner* framework and we caution the trial court to use the new standards pronounced in *McCormick*.

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<sup>1</sup> Our Supreme Court vacated this Court’s opinion stating: “the plaintiff must prove that his preexisting impairment is temporary in order to have his pre-impairment lifestyle considered as his “normal life.” . . . [T]he plaintiff must show either that his preexisting impairment was exacerbated or that his recovery was prolonged as a result of the subsequent accident for which he seeks noneconomic damages. Furthermore, this subsequent impairment must meet the statutory threshold in order for the plaintiff to recover noneconomic damages.” *Benefiel*, 482 Mich 1087.

In sum, we vacate the trial court's order granting defendant summary disposition on the serious impairment threshold issue and remand for further proceedings consistent with *McCormick*.

Vacated and remanded. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Talbot

/s/ Patrick M. Meter

/s/ Pat M. Donofrio