

STATE OF MICHIGAN
COURT OF APPEALS

PAUL J. BLATT and FAYE RUTH BLATT,

Plaintiffs-Appellants,

v

JERILYNNE MARY LYNN,

Defendant-Appellee.

UNPUBLISHED

June 22, 1999

No. 209686

Lapeer Circuit Court

LC No. 96-023291 NI

Before: Zahra, P.J., and Saad and Collins, JJ

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff Paul Blatt filed this third-party no-fault action when his car was rear-ended by an auto driven by defendant. Plaintiff¹ alleges that he sustained ongoing neck, back, shoulder, and emotional injuries.

I

This appeal concerns the retroactive application of a statutory amendment. Plaintiff was involved in an automobile accident on August 31, 1995. On March 28, 1996, a legislative amendment to Michigan's no-fault automobile insurance statute, MCL 500.3101 *et. seq.*; MSA 24.13101 *et. seq.*, took effect. 1995 PA 222. Prior to March 28, 1996, the language of MCL 500.3135; MSA 24.13135 required a party to suffer a serious impairment of a body function in order to seek non-economic damages, but the act did not define the term. In 1995, the Legislature extensively amended the no-fault statute to specifically define a serious impairment of a body function and to make the existence of a serious impairment a question of law for the court to resolve in most instances. Although plaintiff's accident took place before the amendment became effective, he filed his complaint after March 28, 1996. The trial court applied the amended statute when it decided defendant's summary disposition motion, and concluded that plaintiff had not suffered a serious impairment of a body function for the purposes of the no-fault act.

On appeal, plaintiff argues that the trial court erred in applying the amended version of MCL 500.3135; MSA 24.13135, erred in concluding that plaintiff did not suffer a serious impairment of a body function under the amended statute, and finally, erred in ruling that amended language was not unconstitutional. We affirm.

II

Initially, plaintiff argues that the trial court erred in applying the amended version of MCL 500.3135; MSA 24.13135 retrospectively. Questions of statutory construction, including retrospective application, are reviewed de novo. *Michigan Basic Property Ins Ass'n v Ware*, 230 Mich App 44, 48; 583 NW2d 240 (1998); *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

The amended statute provides:

For a cause of action for damages pursuant to subsection (1) [i.e., for noneconomic damages for death, serious impairment of body function, or permanent serious disfigurement] *filed on or after 120 days after the effective date of this subsection*, all of the following apply:

(a) 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. . . . [MCL 500.3135(2); MSA 24.13135(2) (emphasis added).]

The statute further provides that the term “serious impairment of body function” means 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); MSA 24.13135(7).

Generally, statutes are presumed to operate only prospectively. *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 647 n 10; 433 NW2d 787 (1988). The Michigan Supreme Court in *In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558, 570-572; 331 NW2d 456 (1982), outlined a number of considerations used when determining the retroactivity of a statute, including whether there is specific language in the new act which dictates that it should be given retrospective or prospective application, (*Hansen-Snyder Co v General Motors Corp*, 371 Mich 480; 124 NW2d 286 [1963]), whether the law takes away or impairs vested rights acquired under

existing law, (*Ballog v Knight Newspapers, Inc.*, 381 Mich 527, 533-534; 164 NW2d 19 [1969]); and whether the statute is remedial or procedural, in which case it will be given effect where the injury or claim is antecedent to the statutory enactment (*Rookledge v Garwood*, 340 Mich 444; 65 NW2d 785 [1954]).

The language of the amended provisions states that the amendment will apply to actions “filed on or after 120 days after the effective date”. The effective date of this amendment is March 28, 1996; the 120-day period ended on July 26, 1996. Plaintiff filed his complaint on September 6, 1996. Contrary to plaintiff’s argument that the amendment is silent with respect to retroactivity, this language indicates that the amendment will apply to actions filed after July 26, 1996, though the cause of action occurred before July 26, 1996.

Furthermore, it is well established that the general rule of prospectivity does not apply to statutes or amendments that are remedial or procedural. *Thompson v Merritt*, 192 Mich App 412; 417; 481 NW2d 735 (1991). “A statute is remedial or procedural if it is designed to correct an existing oversight in the law or redress an existing grievance or is intended to reform or extend existing rights.” *Id.* When a statute is uncertain “any amendment adopted which serves to clarify that uncertainty is ordinarily given retroactive effect.” *Allstate Ins Co v Faulhaber*, 157 Mich App 164, 167; 403 NW2d 527 (1987). For example, in *Truby v Farm Bureau General Ins of Michigan*, 175 Mich App 569, 575; 438 NW2d 249 (1988), this Court would not retroactively apply an amendment to the no-fault statute which eliminated personal protection benefits to a particular class of injured persons, because the amendment diminished existing rights. In contrast, in *Faulhaber, supra*, the Court retroactively applied an amendment to the no-fault statute which provided a definitive statute of limitations in reimbursement actions. The Court concluded that the amendment “did not create a new substantive right for insurance companies, but instead simply provided for a definitive statute of limitations in reimbursement actions” in order to clarify an ambiguity in the statute and provide for uniformity. *Id.*, 167.

Here, the statutory amendment is procedural. The statute does not create or abolish substantive rights, but rather assigns the trial court the role of determining whether the plaintiff has alleged facts which establish a serious impairment of body function or permanent serious disfigurement, and clarifies the meaning of the term “serious impairment of body function.” MCL 500.3135; MSA 24.13135; 1995 PA 222. This amendment is comparable to the amendment in *Faulhaber*, which did not implicate existing rights, but instead clarified the law by specifying the statute of limitations. *Id.*, 167. Accordingly, the trial court did not err in applying the amendment retroactively.

We reject plaintiff’s contention that the amendment cannot be applied retroactively because it abrogates his vested rights. Generally a statute, or amendment to a statute, which nullifies previously vested claims or rights will be given only prospective application. *Karl, supra* at 571. Here, plaintiff had no vested rights which were infringed upon by the amended statute. A right cannot be considered a vested right, unless it is something more than a mere expectation based upon an anticipated continuance of the present general laws. *Minty v Bd of State Auditors*, 336 Mich 370, 390; 58 NW2d 106

(1953). A vested right is one that gives the holder legal or equitable title to the present or future enforcement of a demand, or a legal exemption from a demand. *Detroit v Walker*, 445 Mich 682, 699; 520 NW2d 135 (1994). Certainly, plaintiff had no vested right to a jury trial under the pre-amendment language of the no-fault statute. Plaintiff had a mere expectancy of surviving summary disposition. Furthermore, a plaintiff's right to a jury trial is not affected by the statutory amendment. The statute simply requires the trial court to decide a threshold issue as a matter of law before the issues of fact reach the jury. Therefore, the trial court did not err in giving the amendment retrospective application.

III

Plaintiff contends that questions of fact bar summary disposition even under the amended statute. Under the amended language of MCL 500.3135(7); MSA 24.13135(7), courts are now required to analyze three considerations in addressing a claim of serious impairment of a body function: objective manifestation, important body function, and lifestyle effect. MCL 500.3135(7); MSA 24.13135(7). Under these elements there is no question of fact that plaintiff's injuries were not objectively manifested, did not affect an important body function and had little or no effect of his lifestyle. Although they pre-date the amendment to the statute, plaintiff's failure to meet the threshold is supported by *Kallio v Fisher*, 180 Mich App 516, 519; 448 NW2d 46 (1989); *Johnston v Thorsby*, 163 Mich App 161, 163; 413 NW2d 696 (1987).

The concept of objective manifestation is not a new one in the analysis of threshold injuries, the concept being utilized to some extent by *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982), and *DiFranco v Pickard*, 427 Mich 32, 70-75; 398 NW2d 896 (1986). The Supreme Court most recently discussed the objective manifestation issue in *DiFranco*, which held that plaintiffs must introduce evidence establishing a physical basis for their subjective complaints of pain and suffering. *Id.*, at 74-75. Plaintiff fails to satisfy this requirement, as he has never had any objective manifestation of injuries other than a shoulder separation diagnosed a year after the accident.

The issue of important body function was a recurring litigation dispute even before the amended statute; therefore, this Court is not completely without guidance as to its meaning. The new wording of the statute is akin to the idea raised by *Cassidy supra* at 505:

The language "impairment of body function" is ambiguous regarding whether the impairment must be of any body function or of the entire body function. On the one hand, if any body function were to be considered the intended meaning, arguably a serious impairment of the use of the little finger would meet the threshold requirement. On the other hand, if an impairment had to be of the entire body function, then arguably only life-threatening injuries would satisfy the requirement. We believe that neither of these options accurately reflect the legislative intent and that impairment of body function is better understood as referring to important body functions. [*Id.*, at 505.]

Under the new language of the no-fault act, reasonable minds could not differ that plaintiff did not suffer an objectively manifested impairment of an important body function that affected his general

ability to lead his normal life; therefore, plaintiff did not meet the serious impairment of body function threshold. Assuming, arguendo, that the injuries to plaintiff's neck, back, shoulder, and psyche impair important body functions, plaintiff fails to meet the other components of the amended statute: the injuries have had negligible effect on his ability to lead a normal life. This is evidenced by plaintiff's failure to seek immediate medical treatment after the accident; his successful continuation of his career post-accident, including pay raises and good evaluations; his continued frequent attendance at a gym; his lack of need for prescribed medications, other than Motrin and Flexeril shortly after the accident; his failure to seek any medical services between December 11, 1995 and August 7, 1996; the absence of a claim for replacement services from his own no-fault insurer; the successful completion of physical therapy; and plaintiff's failure to seek therapy for panic attacks until August 26, 1996, nearly a year after the accident. This evidence demonstrates that, while plaintiff did suffer injuries and had resulting pain from the accident, these injuries did not rise to the level of the serious impairment of a body function. The trial court correctly ruled that plaintiff failed to establish a serious impairment of a body function.

IV

Finally, plaintiff argues that the amended no-fault statute is unconstitutional and a legislative usurpation of the Supreme Court's power. As noted above, plaintiff had no vested rights that were abridged by the amended no-fault statute, therefore the legislation did not unconstitutionally impair his interests. In addition, plaintiff did not file a timely claim for a jury trial, but instead relied on defendant's request for a jury trial. His argument relating to the limitation on our Supreme Court's power to dictate court procedures is thus moot.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins

¹ Mrs. Blatt is also a party to this action, but her claims are derivative to that of her husband. We use the term "plaintiff" only in reference to Mr. Blatt