STATE OF MICHIGAN

COURT OF APPEALS

WAYNE ROY BROWN,

Plaintiff-Appellant,

v

STEPHANIE SUE BLOUIR,

Defendant-Appellee.

UNPUBLISHED
October 14, 2010

No. 291876
Genesee Circuit Court
LC No. 08-088765-NI

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

In this threshold case under the no-fault insurance act, MCL 500.3101 *et seq*., plaintiff appeals as of right from the trial court's order granting summary disposition to defendant. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from an automobile accident that took place in November 2005. According to plaintiff, the parties' cars collided when defendant ran a stop sign. Plaintiff suffered a back injury in the matter, including a herniated disc, treatments for which included physical therapy, spinal nerve-block injections, and prescription oral pain relievers.

Plaintiff filed suit in May 2008, seeking relief "to the extent that the damages are recoverable" under the no-fault act. Defendant moved for summary disposition on the ground that plaintiff's injuries were not sufficiently severe as to allow recovery under the no-fault act. The trial court agreed and granted the motion.

While plaintiff's claim of appeal was pending, plaintiff moved this Court to hold the case in abeyance pending our Supreme Court's decision in *McCormick v Carrier*, ___ Mich ___; ___ NW2d ___ (Docket No. 136738, decided July 31, 2010), which plaintiff recognized as having the potential to change significantly this state's jurisprudence concerning recovery in tort under the no-fault act. In an unpublished order issued July 7, 2010, this Court granted the motion. *McCormick* has now been decided, and so we now review the instant case as guided by the holding in *McCormick*. See *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) ("the general rule is that judicial decisions are to be given complete retroactive effect").

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

MCL 500.3135(1) provides that a person "remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." Subsection (7) states that, "'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." Subsection (2)(a) establishes that whether a person has suffered serious impairment of a body function is a question of law for the court, where there is no factual dispute concerning the nature and extent of the injuries, or where no such factual dispute is material to the question whether the person has suffered serious impairment of a body function.

In granting defendant's motion for summary disposition, the trial court expressly cited *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), and properly applied that case as the then-applicable precedent. However, *McCormick* overruled *Kreiner* as being overly restrictive of an injured party's opportunities to recover in tort under the no-fault act. See *McCormick*, ___ Mich at ___, slip op at 6, 22-27. In the latter, our Supreme Court set forth a new approach for determining whether an injury has resulted in serious impairment of body function.

First, the trial court should determine whether there is a factual dispute regarding the nature and extent of the injuries at issue, and, if so, whether the dispute is material to the question whether the threshold of serious impairment of body function is met. *McCormick*, ___ Mich at ___, slip op at 34. Where there is no such dispute of material fact, the question is one of law for the court. *Id*.

Where the question falls to the court, the court should then determine whether the serious-impairment threshold has been crossed. *Id*. The pertinent statute itself sets forth the three elements involved:

> (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). [*Id*., citing MCL 500.3135(7).]

The question of serious impairment is necessarily a fact-sensitive one. *McCormick*, ___ Mich at ___, slip op at 34. A court should bear in mind that "'a brief impairment may be devastating whereas a near permanent impairment may have little effect.'" *Id*. at 34-35, quoting *Kreiner*, 471 Mich at 145 (Cavanagh, J., dissenting).

In the instant case, plaintiff testified at his deposition that, at the time of the subject accident, he was unemployed, and he described only spotty employment since 2000. This included nominal income from several engagements as a drummer with a band each year, which continued until about a year after the accident. Plaintiff provided documentation that the Social Security Administration declared him fully disabled for purposes of Social Security Insurance benefits. That agency concluded that plaintiff was unable to perform any work, "because of degenerative disc disease in the lumbar spine; chronic bilateral L5-S1 radiculopathy; diabetes; [and] advance peripheral neuropathy. . . ." Plaintiff equates the chronic bilateral L5-S1 radiculopathy with the subject accident, but that is only one of four reasons given, and one of the others, the degenerative disc problem that plaintiff attributed to accidents occurring in 1975 and 1980, is also a back condition. We conclude that, at most, the back injury suffered in the subject accident affected plaintiff's employment situation only minimally.

As noted, plaintiff continued his drumming activities for about a year after the accident. This indicates that the accident did not directly cause him to give it up. Further, plaintiff testified on deposition that it was not so much the actual performing on drums that his pain made problematic, but the loading and unloading of his equipment. In his reply brief, plaintiff plausibly protests, "To rely on third persons to fulfill one's own responsibilities is not leading a normal life." We agree that, to the extent that residual pain resulting from the subject accident, as opposed to earlier or other injuries, has caused plaintiff to give up drumming, the accident has affected his ability to lead his normal life.

Although plaintiff testified to being a serious, daily golfer at one time, he reported that he was only a weekend golfer before the accident. But some weekend golfers are nonetheless ardently serious ones. Although losing a pastime enjoyed once a week may not constitute suffering a change in the trajectory of one's life, when an accident has cost a serious weekend golfer his continuing enjoyment of that avocation, that accident has affected that golfer's ability to lead his or her normal life.

Plaintiff described no household chores he had to discontinue entirely, but several he had to do in different ways, including by attending to them in small pieces. Plaintiff thus described not so much chores he could no longer do at all, but chores that the subject accident and injuries have hampered his ability to perform. See *McCormick*, ___ Mich at ___, slip op at 18-19.

Plaintiff cites medical documentation to show some doctor-imposed restrictions on his activities. In particular, plaintiff documents continued restrictions "to avoid lifting over ten pounds, bending, twisting or working above shoulder level for six months pending improvement" dating from as late as September 2006. But plaintiff brings to light no medically imposed restrictions on his activities since that time, and specifically admitted that no doctor had advised him to refrain from playing golf, the only activity he had given up entirely since the subject accident. *Kreiner*'s requirement that restrictions based on perceived pain be "physician-imposed," not "[s]elf-imposed," 471 Mich at 133 n 17, is no longer in force in light of the overruling of *Kreiner*. Further, *McCormick* admonishes that the no-fault act includes no temporal element for purposes of determining whether injuries have affected a person's ability to lead his or her normal life. ___ Mich at ___, slip op at 21. We therefore conclude that plaintiff's physician-imposed restrictions, when considered together with his own self-imposed restrictions because of lingering pain from the subject accident, militate against the conclusion that the

injuries resulting from the accident have fallen short of affecting his ability to lead his normal life.

For these reasons, we conclude that, although the trial court properly examined the evidence and granted summary disposition to defendant through application of *Kreiner*, the new standard set forth in *McCormick* compels reversal. We therefore vacate the trial court's order granting summary disposition to defendant, and remand to the trial court with instructions to decide defendant's motion anew, as guided by *McCormick*.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens