STATE OF MICHIGAN

COURT OF APPEALS

FRANK CAMAJ, Plaintiff-Appellant,	UNPUBLISHED August 24, 2010
v	No. 290664 Macomb Circuit Court
HOME-OWNERS INSURANCE COMPANY, Defendant-Appellee.	LC No. 2007-001651-NF

FRANK CAMAJ, Plaintiff-Appellee,	
v	No. 290711 Macomb Circuit Court
HOME-OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 2007-001651-NF

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ

PER CURIAM.

In Docket No. 290664, plaintiff appeals as of right the trial court's February 2009 order dismissing plaintiff's no-fault case. In Docket No. 290711, defendant appeals as of right the same order. The parties also raise issues regarding prior orders of the court. This Court has consolidated the two appeals. In light of our Supreme Court's recent decision in *McCormick v Carrier*, ___ Mich ___; ___ NW2d ___ (2010), we vacate the trial court's January 2008 order granting defendant summary disposition on the serious impairment threshold issue and remand for further proceedings consistent with *McCormick*'s directives. Likewise, we vacate the portion of the February 2009 order that dismisses plaintiff's uninsured motorist claim because the trial court erred in dismissing the claim while plaintiff's claim for excess work loss benefits was still pending. We therefore remand plaintiff's uninsured motorist claim to the trial court for resolution of the excess work loss issue. Because the trial court did not err in concluding that there was a question of fact regarding whether plaintiff substantially performed his duties under the insurance contract, we affirm in part. Affirmed in part, vacated in part, and remanded.

This is a no-fault case stemming from an incident where plaintiff's car was rear-ended in a hit and run accident. On April 1, 2006, sometime shortly after midnight, plaintiff, 60 years old at the time, was driving home. As he was turning right onto a street, he was rear-ended by a vehicle that fled the scene. Plaintiff sustained injuries to his neck, back, hips, and head. He filed a complaint against defendant, his automobile insurer, alleging in count one that he was wrongfully denied personal protection insurance (PIP) benefits (the PIP claim), and in count two that he was wrongfully denied benefits under the uninsured motorist endorsement of the insurance policy (the uninsured motorist claim for noneconomic damages and excess work loss damages).

Plaintiff first 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).

Uninsured motorist insurance permits an injured motorist to obtain coverage from his own insurance company to the extent that a third-party tort claim would be permitted against the uninsured at-fault driver. *Rory v Continental Ins Co*, 473 Mich 457, 465; 703 NW2d 23 (2005). 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).

Here, finding that plaintiff failed to establish a question of fact regarding whether he suffered a serious impairment of body function, the trial court granted defendant's second motion for summary disposition. The trial court determined that plaintiff did suffer an objectively manifested impairment of an important body function, citing a May 31, 2006, EMG which showed acute and chronic denervation at C5-C6 and C7 which a doctor attributed to the accident. Defendant does not contest this finding. But utilizing the now-reversed *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004), rev'd *McCormick*, *supra*, standard, the trial court determined that plaintiff could not demonstrate that his impairment affected his general ability to lead his normal life. MCL 500.3135(7).

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 utilized 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 have affected his general ability to lead his 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 his pre-accident life as a result of suffering a heart attack and undergoing hip replacement surgery in 2001. Plaintiff claims that at some point prior to the accident, although it is not clear exactly when, he felt capable of returning to work and began looking for a job. Plaintiff claims that just three weeks prior to the accident, he was offered a job managing construction projects. But, as a result of the accident, two doctors found him totally and permanently disabled and unable to return to employment. In the trial court, plaintiff relied on *Benefiel v Auto Owners Ins Co*, 277 Mich App 412; 745 NW2d 174 (2007), vacated 482 Mich 1087 (2008), which was released after oral argument was heard on defendant's motion for summary disposition but was later vacated by our Supreme Court.[1] Both the decision of this Court and our Supreme Court's order in *Benefiel* were issued under the now reversed *Kreiner* framework. To the extent the issues discussed in *Benefiel* are raised in the instant case and revisited in the trial court, we caution the trial court to use the new standards pronounced in *McCormick*.

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[1] 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.

Next, plaintiff argues that the trial court erred in dismissing plaintiff's uninsured motorist claim where a portion of that claim – the claim for excess wage loss benefits – had not been addressed. "Issues of statutory interpretation are reviewed de novo." *Ross v Auto Club Group*, 481 Mich 1, 6; 748 NW2d 552 (2008).

Work loss PIP benefits are payable for work loss "consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." MCL 500.3107(1)(b). With a tort claim, the injured person can recover work loss in excess of the limitations provided in the no-fault act. MCL 500.3135(3)(c). Although failure to prove a threshold impairment defeats a tort claim for noneconomic damages, it does not defeat a tort claim for excess economic damages such as excess work loss. *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 460; 430 NW2d 636 (1988) (stating that an action for excess economic loss can be made without regard to the statutory "threshold of injury").

Plaintiff alleges a claim for PIP benefits (count one), and a claim for benefits under the uninsured motorist provision (count two). Plaintiff's uninsured motorist claim consists of two separate sub-claims: one for noneconomic damages (e.g., pain and suffering, loss of function, etc.) and one for excess economic damages, excess wage loss in particular (i.e., wage loss in excess of the limitations applicable to PIP wage loss claims).

The problem arises in that the trial court's January 23, 2008, opinion and order dismissed plaintiff's claim for uninsured motorist benefits (presumably the entire claim – because no limiting language was used) on the basis that plaintiff failed to prove that he suffered a threshold injury. However, even if plaintiff is determined to not have suffered a threshold injury, his claim for excess work loss is not precluded. *Auto Club Ins Ass'n*, 431 Mich at 460. Plaintiff's claim for excess work loss damages should have remained pending at that point.

Subsequently, in a motion for relief from the court's January 2008 order, plaintiff brought it to the court's attention that his uninsured motorist claim should not have been dismissed in its entirety since there was still an excess wage loss claim irrespective of the threshold injury determination. In its March 2008 opinion and order, the trial court denied plaintiff's motion for relief, but also found that there was a question of fact regarding whether plaintiff was entitled to wage loss benefits.

Things once again became muddled when the court entered its stipulation and order of dismissal in February 2009. The stipulation and order of dismissal stated that the parties stipulated to dismissal of count one of the complaint regarding PIP benefits. The order further provided that the parties' rights to appeal prior orders of the court would not be impaired, and the order of dismissal resolved the last pending claim and closed the case.

Contrary to the trial court's pronouncement, the court's order did not actually resolve all pending claims. Plaintiff's PIP claim was indisputably resolved, however, plaintiff's claim for excess work loss benefits under the uninsured motorist policy was not. The trial court never ruled that plaintiff was not entitled to work loss. In fact, the court denied defendant's motion for summary disposition on the work loss issue and found that a question of fact existed regarding whether plaintiff was entitled to work loss. The trial court erred in dismissing plaintiff's uninsured motorist claim while plaintiff's claim for excess work loss benefits was still pending. Therefore, this case is remanded for resolution of the excess work loss issue.

Finally, defendant argues that the trial court erred in denying its motion for summary disposition on the basis that there was a question of fact regarding whether plaintiff substantially performed his duties under the uninsured motorist policy. Plaintiff's uninsured motorist policy provided as follows: "An occurrence involving a hit and run automobile must be reported to the police within 24 hours of when it takes place." [Emphasis omitted.] Plaintiff admits that he never reported the hit and run to police. He testified in his deposition that he did not have a specific reason for not calling, he just generally is not one to call the police after an auto accident. The accident occurred in the early morning hours of Saturday. Once defendant opened for business on Monday morning, plaintiff reported the accident to defendant. In his affidavit, plaintiff states that defendant's agent assured him that there was no need to file a police report. Defendant does not dispute this contention.

Indisputably, plaintiff did not comply with the provision of the policy requiring him to report the hit and run accident to the police within 24 hours of its occurrence. The critical issue here is whether plaintiff's failure to comply absolves defendant of its duty to provide coverage. Uninsured motorist coverage is optional because it is not compulsory coverage mandated by the no-fault act. *Rory*, 473 Mich at 465. The language of the insurance policy, rather than the no-fault act, controls in determining whether an insured is entitled to uninsured motorist benefits. *Id*. at 465-466.

In support of its position, defendant cites unpublished opinions from this Court holding that the insurer was not obligated to provide coverage where the insured failed to comply with a provision in the insurance policy, including a provision similar to the one at issue here. Notwithstanding the unpublished opinions cited by defendant, the reasoning of plaintiff and the trial court, which is supported by published case law, is more persuasive. The trial court denied defendant's motion for summary disposition, finding that there was a question of fact regarding whether plaintiff substantially performed his duties under the insurance contract. As the trial court pointed out, Michigan follows the substantial performance of contract rule, including in cases of insurance contracts. *Gibson v Group Ins Co*, 142 Mich App 271, 275; 369 NW2d 484 (1985). Although a promisor is obligated to perform as promised, this does not mean that every deviation from the performance promised so goes to the essence of the contract as to privilege the other to refuse to render a reciprocally promised performance. *Id*. Substantial performance, however, there must be. *Id*. A contract is substantially performed when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted has been performed with such approximation that a party obtains substantially what is called for by the contract. *Id*.

Plaintiff's breach was relatively minor and did not deprive defendant of that for which it contracted. The breach did not undermine defendant's rights or jeopardize its defense. Defendant received notice of plaintiff's claim on a timely basis and was able to proceed with its investigation unhindered. Apart from his failure to report the accident to the police within 24 hours, plaintiff complied fully with all other contractual provisions. There is no evidence that defendant was prejudiced by the slight breach. Significantly, defendant does not contest plaintiff's argument that it was not prejudiced. Since the accident occurred when it was dark outside, there were no witnesses, and defendant did not get a look at the driver who rear-ended him, a police investigation would have been of limited usefulness. There is no evidence, nor has defendant argued, that the accident never occurred or that defendant in some way misrepresented

the nature of the accident. Even if the reporting requirement is viewed as a condition precedent to defendant's duty to provide coverage, defendant's claim still fails because it cannot demonstrate the requisite prejudice, for the reasons stated above. See *Koski v Allstate Ins Co,* 456 Mich 439, 444; 572 NW2d 636 (1998) (stating that an insured's failure to comply with a notice provision in the insurance policy does not relieve the insurer of its obligation to provide benefits unless it was prejudiced by the insured's failure to comply). Accordingly, the trial court did not err in concluding that there was a question of fact regarding whether plaintiff substantially performed his duties under the insurance contract.

With regard to the serious impairment threshold issue, we vacate the trial court's January 2008 order granting defendant summary disposition on the issue and remand for further proceedings consistent with *McCormick*. Likewise, we vacate the portion of the February 2009 order that dismisses plaintiff's uninsured motorist claim because the trial court erred in dismissing the claim while plaintiff's claim for excess work loss benefits was still pending. Accordingly, we remand for resolution of plaintiff's uninsured motorist claim (including claims for both noneconomic damages and excess wage loss). Because the trial court did not err in concluding that there was a question of fact regarding whether plaintiff substantially performed his duties under the insurance contract, we affirm in part.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Costs to neither party.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio