STATE OF MICHIGAN

COURT OF APPEALS

SHERRY BIDOUL,

Plaintiff-Appellant,

V

OLD SCHOOL LIMO, LLC, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
April 14, 2011

No. 296276
Macomb Circuit Court
LC No. 2008-004993-CK

Before: DONOFRIO, P.J., AND CAVANAGH AND STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant State Farm's motion for declaratory relief and finding that plaintiff did not suffer a serious impairment of body function as required by MCL 500.3135. We vacate and remand for further proceedings.

Plaintiff was injured on June 8, 2007, when she slipped and fell on the steps of a bus owned by defendant Old School Limo, LLC, and fractured her ankle. Although numerous other issues were decided in the trial court, the only matter at issue here is whether plaintiff suffered a threshold injury.

Plaintiff had surgery, which included the application of plates and screws, four days after her fall. She used crutches for six to eight weeks and then wore a "moon boot" for six months. She missed a week of her work as a general manager of a restaurant. She had difficulty doing household chores while she was on crutches. She testified that she still sometimes needed help carrying a load of laundry or a vacuum cleaner up or down stairs. She also stated that, as of the date of her deposition, she still had to take double steps when going up or down stairs, could not walk her dogs as often as she used to, did not use ladders at work as she used to, could not wear high heels, and had problems getting on and off her husband's motorcycle.

Plaintiff sued State Farm for both personal injury protection (PIP) benefits and uninsured motorist (UM) benefits because paying customers were excluded from Old School Limo's insurance coverage. Her PIP claim was dismissed because it was precluded by worker's compensation, and State Farm sought dismissal of the uninsured UM claim, arguing that plaintiff would not have been able to collect from Old School Limo because she had not suffered a threshold injury and because she had signed a waiver contract. The trial court denied summary

disposition on the waiver theory because it was not clear whether plaintiff had signed the contract in her individual capacity or as an agent of her employer, but the court failed to address the threshold injury issue. State Farm then moved for declaratory judgment on the ground that plaintiff had not suffered serious impairment of an important body function. The trial court agreed, finding that plaintiff "failed to demonstrate that [the injury] impacted the overall trajectory of her life."

On appeal, State Farm argues that plaintiff does not meet the threshold injury requirement set forth in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), and has less adverse effect on her life than the plaintiffs in *Kreiner*. Therefore, under her policy, plaintiff cannot only recover UM benefits because she is not legally entitled to recover damages from the uninsured motorist.

We review de novo a trial court's ruling in a declaratory judgment action. *Toll Northville Ltd v Twp of Northville*, 480 Mich 6, 10; 743 NW2d 902 (2008). We find this case needs to be remanded because the law in this matter has been changed after the trial court made its decision. "Serious impairment of body function" is defined by the Legislature as "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 the recently released *McCormick v Carrier*, 487 Mich 180; ___ NW2d ___ (2010), our Supreme Court abandoned the test set forth in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), and implemented a different test. *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*, 487 Mich at 202. In order to do this comparison, courts must consider three points with regard to this comparison. *Id*. 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*.]

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 202-203.]

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 203. Courts are no longer to apply the list of "factors" identified in *Kreiner*, as defendant argued in the trial court. *Id*. at 215-216.

Notably, the plaintiff in *McCormick* suffered a nearly identical injury, and had similar effects on his lifestyle, as this plaintiff. 487 Mich at 185-187. "He . . . testified that his life is 'painful, but normal,' although it is 'limited,' and he continues to experience ankle pain." *Id*. at 187. The *McCormick* Court held that he met the serious impairment threshold as a matter of law.

In this case there is no material dispute regarding the nature or extent of the injury. Defendant acknowledges that plaintiff suffered a "manifest injury and some measure of impairment." Defendant appears to concede that the injury to the ankle was to an important body function. The crux of the argument and the court's ruling was that the injury did not meet the *Kreiner* standard regarding her ability to live her life. However, when applying the *McComrick* standard, this plaintiff has presented evidence that she suffered an injury that had an effect on her ability to lead a normal life. Therefore, the trial court's decision must be vacated and the case remanded for further proceedings in light of *McCormick*.[1]

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

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[1] Defendant's alternative argument, that plaintiff signed an agreement waiving Old School Limo's liability, is not properly before the Court. Defendant did not cross-appeal, and plaintiff did not raise this issue in her application. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993). Moreover, what defendant asks is that this Court affirm the second order based on an implicit reversal of the first order. This would impermissibly enhance the decision for defendant beyond that rendered by the trial court. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).