

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM DAVID SMART,

Plaintiff-Appellant,

v

FRANK ROBERT KOWALESKY,

Defendant/Cross Defendant-
Appellee,

and

JUDY LEE KOWALESKY,

Defendant-Appellee,

and

BENOIT ENTERPRISES, INC. d/b/a
WILLABEE'S RESTAURANT & LOUNGE,

Defendant-Cross Plaintiff.

UNPUBLISHED
October 25, 2011

No. 298395
Chippewa Circuit Court
LC No. 09-010377-NI

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff William David Smart appeals from the trial court's order granting defendants, Judy Lee Kowalesky and Frank Robert Kowalesky, summary disposition in plaintiff's action for no-fault benefits under MCL 500.3135. We vacate and remand for further proceedings in light of *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010).

I. BASIC FACTS

In 2007, plaintiff sustained injuries when the vehicle he was driving collided with a vehicle driven by Frank Kowalesky and owned by Judy Lee Kowalesky. Plaintiff suffered a broken left foot in the accident. He filed suit, alleging that he sustained a serious impairment of body function as a result of the accident.¹

Plaintiff was off work for 90 days after the accident. His foot was in a cast for three to four weeks, and then in an orthopedic boot. Plaintiff returned to custodial work without restrictions. He worked 40 hours per week and was on his feet frequently, performing such tasks as setting up tables and chairs in conference rooms, performing maintenance work on kitchen equipment, installing new heating/air conditioning units, and carrying out woodworking projects. Plaintiff walked with a limp, but did not use a cane. His ankle was stiff and difficult to bend. He had a permanent numb feeling along his arch and toward the front of the bottom of his foot. The pain in his left foot was “always there,” and on a scale of one to ten, began at five or six in the morning and went down to about three during the day. Plaintiff took extra-strength Aleve and Tylenol, usually in the morning, to manage the pain. Fusion surgery was an option if plaintiff’s pain became intolerable.

Plaintiff testified that but for his foot injury, he would be more active. He tried to carry out basic maintenance around the house and could cut the grass using his riding lawn mower, but using the clutch on the mower hurt his foot. Plaintiff maintained a smaller garden than he did before the accident. He still hunted, but now used a blind instead of walking. Plaintiff had not bowled “for a few years” since the accident. Plaintiff used to enjoy participating in “all of” the tractor pull events, but now only participated in such events at a particular fair. When asked about his decreased participation in the tractor pull events, plaintiff responded that he did not “feel up to it,” stating that “[s]ince my wife passed away too I have lost interest in . . . doing a lot of stuff.” Plaintiff used to like to take walks and ride his bicycle, but no longer did either because he walked enough at work and pushing the pedals on his bike hurt his foot. Plaintiff also claimed that he used to help his brothers on their farms, but now could only drive the tractor “for a little bit.” Plaintiff stated that he used to march with Vietnam veterans in parades, but no longer did so.

Plaintiff’s treating physician imposed no restrictions on plaintiff’s home or recreational activities as of July 2, 2007. However, plaintiff thereafter began to develop a flat foot deformity in that the heal bone could not interact with the “posterior tibial tendon” to give arch to the foot. Plaintiff also developed a “valgus deformity,” which means the heal bone is “tipped out” of position and, therefore, prevented from moving and interacting with other tendons. Plaintiff

¹ Plaintiff filed a dramshop action against defendant Benoit Enterprises, Inc., d/b/a Willabee’s Restaurant & Lounge, alleging that Benoit sold or furnished alcoholic beverages to Frank Kowalesky even though it knew or should have known that he was visibly intoxicated. Benoit filed a cross-claim against Frank Kowalesky. Plaintiff’s claim against Benoit was dismissed with prejudice pursuant to stipulation, and the cross-claim is not involved in this appeal.

began to develop subtalar arthrosis, which is early arthritis caused by the dissolution of cartilage and has a high probability of becoming severe arthritis.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that under the standard set out in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), plaintiff's injuries did not rise to the level of a serious impairment of body function, and that plaintiff's general ability to lead his normal life had not been affected. Plaintiff asked the trial court to stay the matter pending the outcome of *McCormick v Carrier*, under which plaintiff argued that he met the threshold for serious impairment of body function. The trial court agreed to wait 45 days for the outcome of the *McCormick* decision, but indicated that if *McCormick* was not decided within that period, it would grant defendants' motion under *Kreiner*. On May 13, 2010, the trial court entered an order granting defendants' motion and dismissing plaintiff's claim. Plaintiff now appeals as of right.

II. STANDARD OF REVIEW

A trial court's decision to grant a motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo to ascertain whether the movant is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We review the record in a light most favorable to the nonmoving party to determine whether the evidence established the existence of a genuine issue of material fact for trial. *Maiden*, 461 Mich at 118.

III. ANALYSIS

A person is subject to tort liability for noneconomic damages arising out of "the use of a motor vehicle only if the 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 defined 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). MCL 500.3135(7). If no factual dispute exists "concerning the nature and extent of the person's injuries[.]" or if a factual dispute exists "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[.]" the issue of whether the person has suffered a serious impairment of body function is a question of law for the court. MCL 500.3135(2)(a)(i) and (ii).

In *Kreiner*, our Supreme Court set out guidelines for determining whether a person has suffered a serious impairment of body function:

In order to be able to maintain an action for noneconomic tort damages under the no-fault act, the "objectively manifested impairment of an important body function" that the plaintiff has suffered must affect his "general ability" to lead his normal life. Determining whether the impairment affects a plaintiff's "general ability" to lead his normal life requires considering whether the plaintiff is "generally able" to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.

....

In addition, to “lead” one’s normal life contemplates more than a minor interruption in life. To “lead” means, among other things, “to conduct or bring in a particular course.” Given this meaning, the objectively manifested impairment of an important body function must affect the *course* of a person’s life. Accordingly, the effect of the impairment on the course of a plaintiff’s entire normal life must be considered. Although some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if, despite these impingements, the course or trajectory of the plaintiff’s normal life has not been affected, then the plaintiff’s “general ability” to lead his normal life has not been affected and he does not meet the “serious impairment of body function” threshold. [*Kreiner*, 471 Mich at 130-131 (footnotes omitted).]

Although the trial court concluded that plaintiff suffered an objectively manifested impairment of an important body function, the trial court concluded that plaintiff did not meet the threshold requirement for establishment of a serious impairment of an important body function set out in *Kreiner*. Thereafter, and while plaintiff’s appeal was pending in this Court, our Supreme Court overruled *Kreiner* in *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010).

The *McCormick* Court set out the following standard for determining whether a plaintiff has suffered a serious impairment of body function:

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.

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). [*McCormick*, 487 Mich at 215 (footnote omitted).]

The *McCormick* Court stated the following regarding the determination whether a person’s general ability to lead his or her normal life has been affected:

There are several important points to note, however, with regard to this question. First, [MCL 500.3135(1)] 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 pre-incident normal life, the person's general ability to do so was nonetheless affected.

Second, and relatedly, "general" modifies "*ability*," not "affect" or "normal life." Thus, 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.

Third, and finally, 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." To begin with, there is no such requirement in the plain language of the statute. Further, MCL 500.3135(1) provides that the threshold for liability is met "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." While the Legislature required that a "serious disfigurement" be "permanent," it did not impose the same restriction on a "serious impairment of body function." [*McCormick*, 487 Mich at 202-203 (footnote omitted).]

McCormick overruled the *Kreiner* Court's interpretation of MCL 500.3135. The trial court's decision was based on case law that has been overruled. For that reason, we vacate the trial court's order granting summary disposition in favor of defendants and remand this case to the trial court for further proceedings in light of *McCormick*.

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

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly