STATE OF MICHIGAN

COURT OF APPEALS

WALTER EDWARD KRYZANOSKI,

Plaintiff-Appellant,

v

PHILIP JOSEPH KAULE and MAUREEN KAULE,

Defendants-Appellees.

UNPUBLISHED
February 22, 2011

No. 295430
Kent Circuit Court
LC No. 09-002295-NI

Before: SAAD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In this action to recover noneconomic damages under the no-fault act, plaintiff appeals as of right from a circuit court order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). Because our Supreme Court's decision in *McCormick v Carrier*, 487 Mich 180; ___ NW2d ___ (2010), established a new standard for evaluating third-party claims under MCL 500.3135(1) and (7), we are compelled to reverse the trial court's decision in this regard and remand for further proceedings consistent with *McCormick*'s directives. We reverse and remand.

In May 2008, defendant Philip Joseph Kaule's vehicle struck plaintiff's vehicle at an intersection. Plaintiff suffered a fracture of the third metacarpal of his dominant, left hand, with significant shortening of the middle finger, and separation of the fracture fragments. Plaintiff was in outpatient surgery the following day, and had three screws placed in his hand. Plaintiff wore a splint and underwent eight weeks of physical therapy. Plaintiff filed his complaint in February 2009, claiming that defendant Philip Joseph Kaule's negligence in operating a motor vehicle caused him to suffer injuries constituting serious impairment of body function pursuant to MCL 500.3135(1) and (7). Defendants moved for summary disposition, asserting that plaintiff's injury did not meet the no-fault threshold under *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), because the injury did not impact plaintiff's ability to lead his normal life. The trial court granted the motion. Plaintiff appealed the trial court's order, and in the interim, the Supreme Court released its decision in *McCormick* overruling *Kreiner*.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). "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). "A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The nonmoving party then has the burden to produce admissible evidence setting forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4); *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009).

In Michigan, 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." 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). Whether a person has suffered serious impairment of body function is a question of law for the court if there is no factual dispute concerning the nature and extent of the injuries, or if there is a factual dispute but it is not material to the determination of whether the person has suffered serious impairment of body function. MCL 500.3135(2)(a). The trial court correctly cited as then-applicable precedent *Kreiner*, 471 Mich at 132, which held, in relevant part, that courts must analyze whether any difference between a plaintiff's pre- and post-accident lifestyle has affected his "'general ability' to conduct the course of his life." *Id.* at 132-133. Because the *Kreiner* analysis has been supplanted by *McCormick*'s directives, the trial court's analysis is flawed and the threshold issues must be revisited.

First, "the threshold question whether the person has suffered a serious impairment of body function should be determined by the court as a matter of law as long as there is no factual dispute regarding 'the nature and extent of the person's injuries' that is material to determining whether the threshold standards are met." *McCormick*, 487 Mich at 193. Second, if the court decides there is no material factual dispute, it must then consider whether the plaintiff has "(1) an objectively manifested impairment (2) of an important body function that (3) affects the [plaintiff's] general ability to lead his or her normal life." *Id*. at 195. Regarding the third factor, which is at issue in this case, the Court stated, "the common understanding of 'to affect the person's ability to lead his or her normal life' is to have an influence on some of the person's capacity to live in his or her normal manner of living. By modifying 'normal life' with 'his or her,' the Legislature indicated that this requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis." *Id*. at 202.

The Court added the following:

> . . . 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 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.
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> 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.' [*McCormick*, 487 Mich at 202-203.]

We must determine whether *McCormick* applies retroactively to this case. "[T]he general rule is that judicial decisions are to be given complete retroactive effect. We have often limited the application of decisions which have overruled prior law or reconstrued statutes. Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) (internal citations omitted). The threshold question in determining the application of a new decision is whether the decision in fact clearly established a new principle of law. *Paul v Wayne Co Dep't of Pub Service*, 271 Mich App 617, 621; 722 NW2d 922 (2006). If the answer is yes, then a court must weigh three factors: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. *Id.*

Our Supreme Court clearly established a new principle of law in setting forth new rules for analyzing serious impairment of body function under the statute, but the Court applied its holding in *McCormick* to the facts of that case, indicating that it intended the holding to have retroactive effect. *McCormick*, 487 Mich at 216-219. Regarding the purpose to be served by the new rule, the *McCormick* Court held that *Kreiner* was due to be overruled because it departed from the plain language of MCL 500.3135(7), therefore defying "practical workability" and resulting in confusion and inconsistent interpretation of the statutory language. *Id*. at 211-212. In examining the extent of reliance on the old rule, the Supreme Court noted that *Kreiner* was only six years old and was "contrary to the plain text of the statute, which had been in place since 1995," and it was unlikely that motor vehicle drivers, and the victims of motor vehicle accidents, have altered their behavior in reliance on *Kreiner*. *Id*. at 213. Regarding the effect of retroactive application on the administration of justice, while retroactively applying *McCormick* to pending cases might have an adverse effect on courts and their caseload, the *McCormick* Court noted that "our interpretation of the statute in this case is truer to the statute's text than that of the *Kreiner* majority, and, thus, our interpretation most closely reflects the policy balance struck by the Legislature." *Id*. at 214. Thus, *McCormick* should have retroactive effect in this case. We therefore vacate the trial court's order granting summary disposition to defendants, and remand for further consideration in light of *McCormick*.

On remand it will be incumbent on the trial court to reassess the factual presentation in accordance with the *McCormick* directives. The change in law and the passage of time will necessarily require new briefing should defendants continue to pursue summary disposition. Updated medical information will be especially important.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio