STATE OF MICHIGAN

COURT OF APPEALS

DANIEL JOHN MCCARTHY,

Plaintiff-Appellant,

v

LIAM PAUL-CLARK DOCHERTY, THE DAVEY TREE EXPERT COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
April 23, 2020

No. 348072
Oakland Circuit Court
LC No. 18-164050-NI

Before: GADOLA, P.J., and STEPHENS and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals the trial court's orders granting summary disposition of his third-party action against defendants Docherty and The Davey Tree Expert Company and his first-party claim against defendant State Farm Mutual Automobile Insurance Company. We affirm the dismissal of his third-party claim. As to his first-party claim, we reverse in part, and remand this case to the trial court for further proceedings.

I. THIRD-PARTY SUIT AND SERIOUS IMPAIRMENT OF A BODY FUNCTION

On June 22, 2017, plaintiff was leaving work when he was involved in a head-on collision with a tree-removal truck operated by defendant Docherty in the course of his employment with defendant Davey Tree. He sued both in negligence alleging non-economic damages. He alleged injuries to his low back, right hip and shoulders. For purposes of their motion for summary disposition, defendants did not dispute the first two prongs of the threshold test set out in the no-fault act, MCL 500.3101 *et seq*. However, defendants assert that any claimed injuries have not affected plaintiff's general ability to lead his normal life because plaintiff's medical records from before the accident reveal that his present limitations were fully present before the crash. The trial court agreed and found that the injuries from the accident had not resulted in a serious impairment

of a body function in light of the significant limitations in functioning that existed prior to the crash. We affirm.[1]

"Tort liability is limited under the Michigan no-fault insurance act." *Patrick v Turkleson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). Under MCL 500.3135(1), 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." Accordingly, to satisfy the threshold requirement for tort liability, plaintiff was required to establish that he suffered a serious impairment of body function. In ruling on a motion challenging the sufficiency of the evidence to establish a serious impairment of body function, the trial court must first "determine whether there is a factual dispute regarding the nature and 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." *McCormick v Carrier*, 487 Mich 180, 215; 795 NW2d 517 (2010), citing 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." *McCormick*, 487 Mich at 215. To meet the "serious impairment of body function" threshold under MCL 500.3135(5), an injured person must show

> (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.]

"The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis." *Id.* "[T]o 'affect the person's general ability to lead his or her normal life' is to have influence on some of the person's capacity to live in his or her normal manner of living." *Id*. at 202. "[T]his requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis," and "[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." *Id*.

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[1] We review de novo a trial court's decision to grant summary disposition. *Patrick v Turkleson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. (quotation marks and citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Plaintiff also challenges the trial court's orders denying his motions for reconsideration. We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014). "An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes." *Id.*

Plaintiff alleged that his ability to lead his normal life was affected because of aggravation of pre-existing pathology in his low back and right leg. However, the proofs put forward by plaintiff do not establish such a change in his ability to function and lead his normal life.[2] In his deposition, plaintiff described his limitations in some detail. However, all the limitations he described were present and repeatedly recorded in his pre-accident medical records.

Specifically, plaintiff testified at deposition that since the accident he can only walk or stand for five minutes without discomfort, that he cannot easily complete household chores such as vacuuming, making the bed, and cleaning the bathroom all at one time, though he has not required assistance from anyone to do so. He also stated that, since the accident, he has difficulties squatting, climbing stairs, and bending. Plaintiff did not dispute that he maintained his full-time working hours and ability to read and watch television after work, as before the accident. We agree with defendants that plaintiff's medical records demonstrate that all of these impairments were present pre-accident to essentially the same degree as post-accident.

According to the medical records, plaintiff's lower back and right leg difficulties began at least a year prior to the accident when he was 72 years old. He began receiving treatment for these complaints no later than March 2017. On May 19, 2017, about one month *before* the crash, he was evaluated by a physical therapist. On that date, the therapist conducted a full evaluation and described plaintiff's complaints and her observations in detail. According to the pre-accident physical therapy records, plaintiff complained of chronic symptoms involving his right hip, right leg, and lower back causing "considerable abnormal pain" and impairment of his mobility. The pre-accident records described plaintiff as having complaints of pain, stiffness, weakness, tingling in his right leg, and difficulty walking and standing. He told the therapist that he had difficulty getting in and out of his car after walking, standing in church or in a checkout line, climbing stairs, or walking for more than three minutes, and also that he avoided lifting. Plaintiff further reported that although he once walked five to seven miles each day, he was progressively less able to walk even for purposes of routine activities. Objective tests supported plaintiff's complaints of back pain and revealed an abnormally diminished range of motion along with functional losses. Plaintiff informed her that he had more than a one-year "history of pain, stiffness, weakness, and difficulty walking" and "tingling" on his right side, and complained of a level of pain that the physical therapist described as "[p]retty much where you're starting to get miserable and seek some help." On objective testing, plaintiff had reduced strength in all his lower extremity muscles. He could not fully squat and was unable to unilaterally squat. The therapist reported that plaintiff was "struggling" with "severely impaired standing and walking." She summarized as follows: "Mr. McCarthy presents with chronic, progressive lower back pain with right radiculopathy. Impairments include core weakness, decreased [lower extremity] strength and range of motion contributing to gait deviations. Functional losses include moderate impaired car transfers, stair climbing and severely impaired standing and walking."

[2] To the degree that defendants dispute "the nature and extent" of plaintiff's injury, the dispute "is not material to the determination whether the person has suffered a serious impairment of body function." MCL 500.3135(2)(a)(*ii*).

Plaintiff also alleges that he suffered injuries to his shoulders as a result of the accident.[3] He testified that he cannot raise his elbows above his head and that when he lays on his shoulder while sleeping it becomes aggravated. Plaintiff described confronting "mild" pain while dressing himself, and explained, "I can get over it because I know I have to get to work." Plaintiff described using his arms to wash his hair while showering as "painful," but not so much as to prevent him from doing it. Plaintiff further reported that he "basically can't do any lifting now" except for such "minimal things" as lifting his briefcase as part of going to work. According to plaintiff, he could not reach "very high" to put things away in a cabinet because of the condition of his shoulder, and so tended to keep thing "low rather than reaching up," and while shopping sometimes asked others to retrieve items from the shelves for him.

Even assuming that plaintiff's shoulder impairment was caused by the accident,[4] his testimony did not create a question of material fact regarding the effect of the shoulder impairment on his general ability to lead his normal pre-accident life. After the accident plaintiff quickly resumed living his normal life of working full-time as an accountant, watching television and reading in the evenings, and otherwise engaging in his daily living activities, albeit with some pain. As with plaintiff's other impairments, there was no evidence that the shoulder impairment affected his ability to perform his work, and the impairments described do not rise to a level that it affects his ability to lead his normal life.

In sum, the physical therapy records, as well as the physical therapist's testimony, show that plaintiff experienced very similar pre- and post-accident functional limitations relating to his back and leg impairments. Further, plaintiff's present symptoms as testified to at his deposition were in nearly all respects the same as the symptoms he had before the accident. His shoulder problems, assuming they were caused by the accident, are not sufficient to meet the threshold requirements. The trial court correctly granted defendants Docherty and Davey Tree summary disposition of plaintiff's negligence claim, and correctly denied plaintiff's motion for reconsideration of the matter.

II. PIP BENEFITS

Plaintiff argues that the trial court erred by summarily dismissing his claim for payment of PIP benefits. Plaintiff's claim is two-fold. He first argues that defendant State Farm, his no-fault

[3] Plaintiff's testimony suggests injuries to both shoulders. However, other than reports of pain in the week following the crash, the record does not indicate any further complaints or treatment for the left shoulder. When he did see an orthopedic surgeon after the accident, all the treatment provided was directed at his right shoulder.

[4] Plaintiff was first seen post-accident by an orthopedist for his shoulder on February 14, 2018, more than six months after the accident. The physician noted that according to plaintiff, "the problem started one month ago" and that the onset was "sudden" though later in the report he notes that plaintiff stated that his complaints are "since being involved in a motor vehicle accident."

insurer, is responsible for his medical bills to the extent that payments from his health care insurer were not accepted as payment in full by the provider.

It is well-settled that under a coordinated policy, the no-fault insurer is responsible to pay those amounts that the health insurer is not required to pay. See *Tousignant v Allstate Ins Co*, 444 Mich 301, 307; 506 NW2d 844 (1993); *Sprague v Farmers Ins Exch*, 251 Mich App 260, 270; 650 NW2d 374 (2002). Accordingly, State Farm remains liable for PIP benefits not covered, or otherwise not paid, under plaintiff's medical plan.[5] Indeed, State Farm does not dispute its potential liability for accident-related expenses for plaintiff's care that Blue Cross/Blue Shield of Michigan (BCBSM) was not required to pay. State Farm argues, however, that plaintiff failed to submit reasonable proof that BCBSM was not required, or otherwise refused, to pay the PIP benefits he is looking to State Farm to cover, or that the attendant expenses related to the subject accident.

Plaintiff offered, with his response to the motion for summary disposition, several unpaid or partially paid invoices, along with some medical records and his deposition testimony. Although plaintiff did not present this claim in an organized manner, many of these invoices plainly show that BCBSM made partial payments, including insurance discounts, for plaintiff's medical services. It can be reasonably inferred that BCBSM did not deem itself obliged to pay the remaining amounts, leaving State Farm potentially liable under the coordinated benefits policy if the expenses were for treatment that was reasonably necessary and related to the accident. In this respect, many invoices plaintiff submitted indicate the nature of the service provided, and when considered along with the medical records as well as plaintiff's testimony, a trier of fact could reasonably infer that the medical treatment reflected in at least some of the invoices was accident related.

We therefore conclude that the evidence presented was sufficient to create questions of material fact regarding whether State Farm was liable for payment of outstanding medical bills not paid in full by BCBSM. Viewing the invoices and medical records in the light most favorable to plaintiff, it can be reasonably inferred that some of the PIP benefits he sought from State Farm were not the obligation of BCBSM, but were for reasonably necessary accident-related treatment. "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Patrick*, 322 Mich App at 605 (quotation marks and citation omitted). For these reasons, the trial

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[5] Specifically, the pertinent provision from the policy with State Farm states as follows:

> If benefits are shown as "Coordinated" . . . any remaining amount [of PIP coverage] will be further reduced for you or any resident relative by any amount paid or payable to that person under any:
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> a. vehicle or premises insurance;
>
> b. individual, blanket or group accident or disability insurance; or
>
> c. medical or surgical reimbursement plan.

court erred in granting summary disposition of plaintiff's claim for selected PIP benefits against State Farm, and in denying plaintiff's motion for reconsideration in that regard.

Plaintiff also argues that he is entitled to reimbursement from State Farm for the medical benefits BCBSM paid for his accident-related treatment pursuant to BCBSM's right of subrogation. We disagree.

"MCL 500.3109a permits an individual to coordinate his or her no-fault insurance policy and other health and accident insurance policies at a reduced premium rate." *St John Macomb Oakland Hosp v State Farm Mut Auto Ins Co*, 318 Mich App 256, 263; 896 NW2d 85 (2016). "When an individual chooses to coordinate his or her no-fault and health insurance coverage, the health insurer becomes primarily liable for medical expenses," and "the no-fault insurer is not liable for medical expenses that the health insurer is required to pay for or to provide." *Id.*

In addition to failing to provide any legal authority for this argument, plaintiff failed to provide any factual support for his assertion that BCBSM has a right of subrogation against State Farm or himself. Further, plaintiff did not include with his response to the motion the contractual provisions on which he relies regarding the nature and extent of any asserted contractual right to subrogation. Although plaintiff subsequently submitted a "subrogation letter" from BCBSM with his motion for reconsideration indicating that BCBSM had paid $1,095 to date on behalf of plaintiff and was seeking reimbursement of the amount, such amount would not be recoverable from plaintiff or State Farm. Subrogation does not apply when there is a coordinated no-fault policy. If BCBSM were allowed to seek reimbursement from State Farm, State Farm would effectively be the primary insurer. That result is plainly at odds with the purpose of coordinated no-fault polices. Given the lack of any legal authority or factual support for plaintiff's claim seeking reimbursement of accident-related medical expenses paid by BCBSM pursuant to BCBSM's right of subrogation, the trial court did not err in granting summary disposition of plaintiff's claim. Further, even considering the BCBSM letter, we do not believe plaintiff's claim has substantive merit, and so conclude that denial of the attendant motion for reconsideration in that regard was proper.

III. CONCLUSION

We affirm the trial court's orders with respect to defendants Docherty and Davey Tree. We affirm in part, and reverse in part, the court's orders with respect to defendant State Farm, and remand this case to the trial court for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro