STATE OF MICHIGAN

COURT OF APPEALS

DANIEL WIEDYK,

Plaintiff-Appellant,

v

JOHN PAUL POISSON and TRAVERSE CITY LEASING d/b/a HERTZ,

Defendants-Appellees.

UNPUBLISHED
April 24, 2014

No. 308141
Midland Circuit Court
LC No. 06-009751-NI

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. We vacate and remand for further proceedings.

This matter arises out of an automobile accident that occurred on July 26, 2005, in which defendant John Paul Poisson was at fault and in which plaintiff allegedly suffered serious injuries. However, significantly, plaintiff had previously suffered numerous serious accidents and already had substantial pre-existing impairments as a consequence. The trial court originally granted summary disposition in favor of defendants pursuant to the then-applicable interpretation of MCL 500.5135 under *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004). This Court affirmed. *Wiedyk v Poisson*, unpublished opinion per curiam of the Court of Appeals, issued January 6, 2009 (Docket No. 280214). Our Supreme Court held the matter in abeyance pending, and ultimately vacated on the basis of, *McCormick v Carrier*, 487 Mich 180, 188-214; 795 NW2d 517 (2010), which overruled *Kreiner*, and remanded the matter to the trial court for reconsideration in light of *McCormick*. *Wiedyk v Poisson*, 488 Mich 972; 790 NW2d 826 (2010). On remand, the trial court took additional briefing, held a hearing, and ultimately again granted summary disposition in defendants' favor.

In very broad overview of the history of this case before the Michigan Supreme Court's remand, defendants contended that plaintiff had such overwhelming preexisting injuries and disabilities that the 2005 accident did not practically affect his life. Plaintiff contended the opposite, that his preexisting condition made him all the more vulnerable and a change to his life that would be small to someone without his impairments would be devastating to him. Prior to the first appeal, however, plaintiff's proofs consisted entirely of evidence that he suffered

additional injuries, not how those injuries affected his life, despite being given an explicit opportunity by the trial court to

> see from the Plaintiff is . . . specifically how the course and trajectory of his life, given what it was immediately prior to this accident, how it has been affected. Not that he has new injuries or that his pre-existing injuries have been aggravated but how those, assuming those to be true, how they affect the overall course and trajectory of his life.

In response, plaintiff offered an affidavit from Dr. Gavin L. Awerbuch, M.D., who had been plaintiff's treating physician since September of 2002, which stated "that the quality of his life had been negatively affected and his overall pain has been increased and is chronic." The trial court found that it "cannot say based on this record that the course and trajectory of his life changed at all."

On appeal, this Court affirmed, noting in particular that "the affidavit does not indicate what limitations were new, and Dr. Awerbuch's conclusion that the quality of plaintiff's life 'has been negatively affected' does not substitute for providing facts from which a court may compare plaintiff's life before and after the accident." *Wiedyk v Poisson*, unpublished opinion per curiam of the Court of Appeals, issued January 6, 2009 (Docket No. 280214), slip op at p 2. As noted, our Supreme Court vacated this Court's and the trial court's judgments and remanded "to the trial court for reconsideration in light of *McCormick*." *Wiedyk v Poisson*, 488 Mich 972; 790 NW2d 826 (2010).

On remand, the trial court took additional briefing and held a hearing. Counsel for defendants stated that the parties had agreed not to supplement the record; however, we can find no other evidence or documentation of any such agreement in the record provided to us. It appears that plaintiff added a single document to the record: an affidavit he himself made. In that affidavit, plaintiff states that he suffered a lengthy list of injuries and as a result is unable to engage in another lengthy list of activities. Plaintiff asserted that his affidavit showed that he had in fact suffered additional restrictions on his abilities as a result of the 2005 accident, although the trial court expressed concern about plaintiff's prior representations "to other treaters and Social Security about his activities of daily living before the 2005 accident." Ultimately, the trial court found in relevant part:

> In 2007, this Court concluded that Plaintiff could not prove that the "course and trajectory" of his life had been altered by the 2005 accident as required under *Kreiner*. Specifically, the Court found that plaintiff could not establish causation between the 2005 accident and any change to his pre-accident life. Whether evaluated under *Kreiner* or *McCormick*, the conclusion is ultimately the same.
>
> As set forth more fully above, Plaintiff's pre-accident lifestyle was sedentary, consisting primarily of sleeping, watching television and going to various medical appointments related to his earlier injuries. He did no household chores. He has been completely disabled from working since April of 2002 and has been receiving Social Security disability benefits since June of 2004. In

> August of 2004, his own treating physician concluded that as a result of his prior accidents, Plaintiff would have lifelong pain with permanent physical restrictions on his ability to work and perform activities of daily living and that he would require ongoing medical care and treatment. None of this changed as a result of the 2005 accident.
>
> Under the new test outlined in *McCormick*, there remains no evidence that the 2005 accident affected Plaintiff's general ability to lead his normal life. Summary disposition therefore remains appropriate.

The trial court did not discuss, or even mention, Wiedyk's affidavit. This appeal followed.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and summary disposition is appropriate only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. The non-moving party must show more than a mere possibility that a claim might be supported by evidence at a trial. *Id*., 121.

"Additionally, we only consider what was properly presented to the trial court before its decision on the motion." *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Evidence properly excluded by the trial court will not be considered in deciding a motion for summary disposition pursuant to MCR 2.116(C)(10). See *Edry v Adelman*, 486 Mich 634, 642; 786 NW2d 567 (2010), see also *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion," meaning "the trial court chooses an outcome falling outside the range of principled outcomes." *Edry*, 486 Mich at 639.

To recover in tort under the no-fault act, MCL 500.3101 *et seq*., the injured person must have suffered, in relevant part, an objectively manifested impairment of an important body function that affects his general ability to lead his normal life; if there is no material factual dispute as to the nature and extent of the injuries, this is a threshold question of law for the court. *McCormick*, 487 Mich at 189-194. Questions of law are reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). "Interpreting the meaning of a court order involves questions of law that we review de novo on appeal." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008).

As an initial matter, the change in standards from *Kreiner* to *McCormick* is irrelevant as applies to this case.[1] The trial court found, as did this Court on prior appeal, that "his life after the accident was not significantly different than it was before the accident." *Kreiner*, 471 Mich

[1] We do not address whether the change in standards from *Kreiner* to *McCormick* might or might not be relevant in any other case; this holding is strictly limited to the matter at bar.

at 137. As a practical matter, this is indistinguishable from a finding that the accident had not "influence[d] some of the plaintiff's capacity to live in his or her normal manner of living." *McCormick*, 487 Mich at 215. No real change is simply no real change by any standard. If the record before the trial court at the first grant of summary disposition showed that plaintiff's life was unaffected under *Kreiner*, it would likewise show that his life was unaffected under *McCormick*. Critically, however, the record has not remained static.

The outcome of this appeal turns entirely on the January 5, 2011 Wiedyk Affidavit submitted to the trial court for the first time after remand. While it is not a model of clarity, it states in relevant part that "*[a]s a result of my accident related injuries sustained on 7/26/2005*, I am unable to do the following activities: [list omitted]" (emphasis added). By necessary implication, his affidavit states that he *was* able to engage in those activities prior to the 2005 accident. The list of activities is sufficiently lengthy that, although it does not directly state how plaintiff's ability to lead his life has been affected, it is impossible not to infer a significant degradation thereof. It directly attributes that degradation to the accident and is thus comparative of his life before and after the accident. See *McCormick*, 487 Mich at 202. While it does clearly conflict with other evidence, including the Social Security claim mentioned by this Court in its prior opinion, if taken by itself and believed, the Wiedyk Affidavit clearly shows that plaintiff's ability to do much of anything important to his life has been negatively affected. The fact that his life prior to the 2005 accident was already significantly degraded is of little importance; making a bad situation worse is compensable. *Fisher v Blankenship*, 286 Mich App 54, 63; 777 NW2d 469 (2009). However, it is not clear that the Wiedyk Affidavit was properly added to the record.

With the exception of certain child custody matters, there is no authority stating whether trial courts by default may or may not supplement records after receiving a remanded matter. Rather, "[t]he power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959). Appellate courts in this State sometimes direct trial courts on remand to limit themselves to the existing record, sometimes direct trial courts on remand to supplement the record in some way, and often do not explicitly address the issue of the record at all. "On remand, the trial court may consider and decide any matters left open by the appellate court, and is free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision." *People v Kennedy*, 384 Mich 339, 343; 183 NW2d 297 (1971) (internal quotation omitted). Consequently, if the remand order does not foreclose expansion of the record, the trial court is empowered with the discretion and authority to do so.

Our Supreme Court's remand order in this matter stated, in relevant part, only that "we VACATE the judgments of the Court of Appeals and the Midland Circuit Court, and we REMAND this case to the trial court for reconsideration in light of *McCormick*." *Wiedyk*, 488 Mich at 972. Thus, our Supreme Court did not explicitly direct the trial court to consider additional evidence or to restrict itself to the record as it then existed. Rather, it only directed "reconsideration." Ordinarily, "reconsideration" gives trial courts enormous discretion to review their prior decisions. See *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 679-680; 816 NW2d 464 (2012). The trial court does not abuse its discretion by refusing to consider evidence that could have been presented previously, but the trial court *also*

does not abuse its discretion by "giv[ing] a litigant a 'second chance' even if the motion for reconsideration presents nothing new." *Yoost*, 295 Mich App at 220. Unfortunately, the trial court did not make a record of whether it permitted the supplementation or not.

This becomes a critical issue because, although this Court's review is de novo, it is a de novo review *of the record*. As discussed above, summary disposition is likewise predicated on the record. Although under MCR 2.116(C)(10) it is generally based on evidence submitted by the parties, evidence excluded by the trial court, if the exclusion was proper, should *not* be considered. Because it would have been proper for the trial court to exclude the Wiedyk Affidavit, if the trial court in fact did so, it would have properly granted summary disposition in defendants' favor. Conversely, if the trial court did not exclude the Wiedyk Affidavit, it must be considered along with all of the other evidence in the record, and it appears to raise a genuine factual question as to whether plaintiff's general ability to lead his normal life was affected by the accident.

We are simply unable to discern or infer from the record whether the trial court chose to permit expansion of the record, and in particular whether it considered the Wiedyk Affidavit. We therefore find that we lack the necessary record with which to resolve this appeal. Ordinarily, we would remand to the trial court to clarify whether it had considered the Wiedyk Affidavit; unfortunately, the trial judge who presided over this matter below has now retired. We therefore find that we have no choice but to vacate the trial court's grant of summary disposition altogether and remand to the trial court to "reconsider" the matter anew, as previously ordered by our Supreme Court. We do not dictate any outcome, but we do direct that on remand, the trial court ensure that the record clearly and explicitly states whether it decides to exercise its discretion to permit expansion of the record or decides to exercise its discretion to disallow expansion of the record.[2]

Vacated and remanded for further proceedings. We do not retain jurisdiction. Because we are unable to say with certainty which party should prevail and we deem neither party at fault for that inability, we direct that the parties shall bear their own costs.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

[2] Defendants complain that the trial court erred in making certain findings that favored plaintiff, but makes no serious effort to assert those alleged errors as alternate bases for affirmance, so we deem them abandoned. Defendants meaningfully pursue only the theory that plaintiff's general ability to lead his normal life was not affected by the 2005 accident.