

No-Fault Threshold Assessment of Plaintiff's Pre-accident Lifestyle may Require Consideration of Lifestyle Prior to Pre-existing Disability

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In a recently published opinion, *Benefiel v Auto-Owners Ins. Co.*, --- NW2d ---; 2007 WL 4555245 (Mich. App., Dec. 27, 2007), the Michigan Court of Appeals held that, when a plaintiff had been involved in two separate motor vehicle accidents, the review of the plaintiff's "whole life" for purposes of determining the plaintiff's normal pre-second accident lifestyle should not necessarily be limited to the time between the two accidents.

In *Benefiel*, the plaintiff was involved in two separate motor vehicle accidents within a one-year period. In the first accident, the plaintiff suffered neck, back and shoulder injuries. The plaintiff began a course of physical therapy. While still undergoing physical therapy, the plaintiff was involved in the second accident. After the second accident, the plaintiff claimed that his neck and shoulder pain worsened and now radiated down his left arm. Following a spinal examination, the plaintiff's physician diagnosed significant disc herniation and degeneration and recommended spinal surgery. The plaintiff underwent a procedure that involved anterior discectomy and fusion.

Following the second accident, the plaintiff brought an action for underinsured motorist benefits against his no-fault insurer. The trial court granted summary disposition to the insurance company. The trial court held that the course and trajectory of the plaintiff's life had not been affected by the second accident and, therefore, the plaintiff did not suffer a serious impairment of body function.

The appellate court reversed. After assuming, for purposes of the appeal, that there was no factual dispute as to the nature and extent of the plaintiff's injuries, that an important body function had been impaired and that the injuries were objectively manifested, the court turned to whether the injury affected the plaintiff's general ability to lead a normal life.

The court noted that the parties disputed the proper time frame to consider for purposes of comparing the plaintiff's pre- and post-second accident lifestyle. The defendant argued that the court should consider the plaintiff's life immediately before and since the second accident, whereas the plaintiff argued that the focus should not be on the time between the first and second accident, but rather on

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the plaintiff's entire lifespan before the second accident.

The appellate court declined to adopt the defendant's timeframe. The court observed that while *Kreiner v Fischer*, 471 Mich. 109, 683 NW2d 611 (2004) does not require that the court consider the entire lifespan of the plaintiff, it does not provide a temporal directive limiting the court's inquiry to a review of the plaintiff's life immediately before and after the second accident. The court also noted that the *Kreiner* court did not require that every aspect of a person's life must be affected in order to satisfy the tort threshold, but rather that the plaintiff's whole life be considered to determine if an impairment affects the person's general ability to lead his or her normal life.

The court found that, as a result of the second accident, the plaintiff lost all opportunity to completely heal and recover from the injuries sustained in the first accident. The court found no evidence that the injuries suffered in the first accident resulted in a catastrophic, permanent, residual impairment incapable of healing. The court distinguished the facts in this case from a situation where a plaintiff had sustained an injury in a prior accident that rendered him incapable of complete recovery, such as a broken leg.

In that hypothetical case, the court reasoned, it would be appropriate to limit the inquiry to the plaintiff's lifestyle subsequent to the first accident, as opposed to the other end of the spectrum, such as a broken leg that was in the process of fully recovering when exacerbated by a second accident. Therefore, as in that latter scenario, the court concluded that the review of the plaintiff's "whole life" in order to determine plaintiff's normal pre-second accident lifestyle should not be limited to the timeframe following the first accident.

After reviewing the plaintiff's medical records, work history and recreational activities dating back to before the first accident, the court concluded that the plaintiff had suffered a serious impairment of body function that affected his ability to live a normal life and, therefore, had met the statutory burden.

Furthermore, the court noted that, on remand, the issue of causation may be a question of fact for the jury. The court stated that it is conceivable that the jury could conclude that the defendant negligently caused injury, but be unable to differentiate which injuries were caused by the first and second accidents. If this were to occur, the appellate court stated that the trial court could conclude that the injuries were indivisible and the defendant would be responsible for all injuries and damages sustained by the plaintiff.