

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA JEAN ROSS,

Plaintiff-Appellant,

v

STATE OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
October 11, 2012

No. 302717
Ingham Circuit Court
LC No. 05-000189-MZ

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

In this third party automobile no-fault case, plaintiff Barbara Jean Ross presented undisputed evidence that her injury had an adverse influence on her capacity to live in her normal manner of living. Because the State of Michigan did not contest that Ross' injury was objectively manifested and affected an important body function, her evidence was sufficient to establish a threshold injury under MCL 500.3135(1). As such, we conclude that the trial court—sitting as the Court of Claims—erred when it granted the State's motion for summary disposition on the basis that Ross failed to establish a threshold injury. Accordingly, we reverse and remand for a trial on the merits.

I. BASIC FACTS

Ross, who was 67 at the time of the accident, testified at her deposition that she was driving up to her cottage in January 2004 when she struck a Michigan State Police Trooper. She stated that the trooper made a U-turn in front of her and she tried to avoid hitting him, but struck him anyway. Her car was totaled and the trooper's car was also significantly damaged. Ross said she injured her right wrist in the accident. Another trooper arrived and took her to a hospital in Tawas where she had an x-ray. The x-ray did not show that her wrist had been broken.

Ross said she continued to have pain in her wrist and, for that reason, she sought further treatment after she returned to Livonia. The x-rays taken after she returned also did not show that her wrist had been broken. However, she returned to her doctor approximately three weeks later and had another x-ray, which revealed an undisplaced fracture of the scaphoid bone in her right wrist. Her doctor initially tried to treat the fracture without surgery and prescribed the use of a bone stimulator to encourage healing. But the bone did not heal and, in February 2005, Ross had surgery to correct the fracture. Ross' medical records showed that her surgery was successful, but she testified that she still had a limited range of motion and achiness in her wrist.

In October 2005, Ross sued the State for noneconomic damages arising from the car accident and her resulting wrist injury.

The State moved for summary disposition in September 2009. It argued, in relevant part, that it was entitled to summary disposition under MCR 2.116(C)(10) because Ross failed to establish that her wrist injury amounted to a serious impairment of body function. The trial court agreed and dismissed her claim in an order entered in February 2009.

Ross appealed the trial court's order dismissing her case to this Court. This Court reversed the trial court's decision and remanded the case back to the trial court for review under the revised standard stated by our Supreme Court in *McCormick v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010). See *Ross v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2010 (Docket No. 291077).

The State moved for summary disposition under the revised standard in December 2010. The trial court heard oral arguments and again concluded that Ross' injury did not amount to a serious impairment of body function. The court noted that the standard stated under *McCormick* was not difficult to meet, but nevertheless elected to grant the motion: "And I suppose that I could waste everybody's time and deny the motion for summary disposition. Quite frankly, it's that low of a standard." The court explained that Ross failed to establish a threshold injury because, after she recovered from her surgery, she could basically do everything that she had done before:

The fact that she has chosen to abandon golf because of some minor pain is her choice. It doesn't appear to me that she couldn't play golf. It appears that she doesn't want to go through any kind of additional pain, and if she had such serious pain, I think she would require a lot more therapy, she would be on pain pills, she would be on cold compress, I'd hear a whole lot more, and I'm not.

I think she did the normal healing that she would have if she had fallen off a swing on a playground when she was a lot younger. I'm not hearing anything that people much younger don't go through and I think that she's able to lead her normal life in every way, shape, or form, and I am granting this. You may appeal me.

The trial court signed an order dismissing Ross' case in January 2011. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

Ross argues on appeal that the trial court erred when it dismissed her claim under MCR 2.116(C)(10) on the ground that she failed to establish that she suffered a threshold injury under MCL 500.3135(1). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation and

application of statutes. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

B. ESTABLISHING A THRESHOLD INJURY

With certain exceptions, Michigan’s Legislature abolished tort liability arising from the ownership, maintenance, or use of a motor vehicle. MCL 500.3135(3). One exception is for non-economic loss where the injured person has suffered a serious impairment of body function. MCL 500.3135(3)(b); MCL 500.3135(1). A serious impairment of body function is 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).¹

In order to establish the existence of a threshold injury, the plaintiff must show that he or she has “(1) an objectively manifested impairment (2) of an important body function that (3) affects the person’s general ability to lead his or her normal life.” *McCormick*, 487 Mich at 195. For purposes of the motion under consideration here, the State did not contest that Ross’ injury was objectively manifested and involved an important body function. As such, the only question is whether Ross presented evidence sufficient to establish that her injury affected her general ability to lead her normal life.

Our Supreme Court has explained that an impairment affects a person’s general ability to lead his or her normal life if the impairment “influence[s] some of the person’s power or skill, i.e., the person’s capacity, to lead a normal life.” *Id.* at 201. Specifically, the trial court must consider whether the evidence shows that the impairment has had “an influence on some of the person’s capacity to live in his or her normal manner of living.” *Id.* at 202. By referring to the person’s normal life, the Legislature “indicated that this requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis. Determining 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.* Accordingly, if the plaintiff presents evidence that he or she has had to alter his or her normal manner of living as a result of the impairment, the plaintiff has established a threshold injury. Importantly, our Supreme Court held that a person’s impairment need not be permanent in order to qualify as a serious impairment of body function. *Id.* at 203. Indeed, the Court recognized that is entirely possible that, for some persons, a brief impairment might be devastating whereas a permanent impairment may have little effect. *Id.* at 216.

C. THE EVIDENCE

Turning to the evidence presented on the State’s motion for summary disposition, we conclude that Ross established that her wrist injury influenced her “capacity to live in . . . her normal manner of living.” *Id.* at 202. Ross presented evidence that her wrist was broken and that, despite efforts to get the wrist to heal on its own through the use of a bone stimulator and

¹ Effective October 1, 2012, this section will be codified at MCL 500.3135(5). See 2012 PA 158.

orthotic devices, she ultimately had to have surgery to correct the fracture. Ross also presented documentation from her physical therapy sessions that showed that she had significant limitations to her ability to lead her normal life prior to the surgery. The notes show that she had had some improvement, but that she still had numerous deficits: she had pain (ranging from four to seven on a scale of one to ten), problems with her range of motion and limitations on her ability to perform hygiene functions (brushing her teeth, combing her hair, putting on clothing, fastening buttons and zippers), prepare meals, lift, and write. These notes plainly establish that Ross' wrist injury altered her normal manner of living in the months preceding her surgery. Further, the surgery itself involved significant limitations; aside from having to have a screw surgically implanted to secure her bone, she had to wear a cast for some time and had additional limitations on the use of her wrist until May 2005. Taken together, this evidence was sufficient to establish a serious impairment of body function. See, e.g., *id.* at 218-219 (concluding that "some of [the] plaintiff's capacity to live in his pre-incident manner of living was affected" where there was evidence that he had had surgery, had months of physical therapy, and could not return to work for 19 months).

Here, the trial court erred by disregarding this evidence and instead focusing on Ross' abilities after her successful surgery. By doing so, the trial court effectively required Ross to prove that her impairments were permanent, which she did not have to do. *Id.* at 203. Even if Ross had had a full recovery after her surgery—which is a matter of dispute—she nevertheless established a threshold injury on the basis of the evidence that she was impaired for more than one year. The evidence that her surgery was successful and that she regained significant function in her wrist goes to the extent of her damages; it does not establish that she did not suffer a threshold injury.

Moreover, we cannot agree with the trial court's cavalier dismissal of Ross' testimony about the continuing effects from her injury. Ross testified that she still has deficiencies in her range of motion in addition to pain and that, as a result, she cannot play tennis or golf. This Court held that—even under the prior test stated in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004)—a plaintiff can establish a threshold injury by showing that he or she can no longer golf as a result a reduced range of motion. See *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005), citing *Kreiner*, 471 Mich at 134 n 19 ("While these limitations might not rise to the level of a serious impairment of body function for some people, in a person who regularly participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function."). She also testified that she has pain that interferes with her ability to dry her hair, work at a computer, lift or carry things, and even to pull her grandchildren in a wagon.

In response to this testimony and evidence, the trial court commented that Ross chose to limit her activities because she did not want to experience pain and that if she really had such pain, there would be evidence of continued therapy and treatments. That is, the trial court appears to have evaluated the credibility and weight of the evidence and then *found* that Ross did not suffer any continuing impairment after her recovery from the surgery. But a trial court may not judge the credibility and weight of the evidence on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). It must instead evaluate the evidence in the light most favorable to the nonmoving party—Ross. *Id.* at 162. Further, assuming that there is a dispute about the nature and extent of Ross' injury—that is, a dispute

about whether she actually has a permanent loss in her wrist's range and motion—that dispute would have to be resolved by a jury, not the court. MCL 500.3135(2)(a). Therefore, the trial court erred to the extent that it dismissed Ross' evidence concerning her continued impairment after her surgery. When this evidence is properly considered, it bolsters the conclusion that she suffered a serious impairment of body function.

III. CONCLUSION

Ross presented evidence that her broken wrist affected her ability to perform a variety of everyday functions prior to her surgery. Because the evidence showed that her impairment had “an influence on some of [her] capacity to live in . . . her normal manner of living” during the year leading up to her surgery, we conclude that the evidence established that her broken wrist constituted a serious impairment of body function. *McCormick*, 487 Mich at 202. Moreover, when the evidence that she still has some residual impairment is considered in conjunction with the evidence concerning her impairment prior to surgery, there can be no doubt that Ross has met the threshold test stated in *McCormick*. Therefore, the trial court erred when it concluded otherwise.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Ross may tax her costs. MCR 7.219(A).

/s/ Michael J. Kelly

/s/ Douglas B. Shapiro