

STATE OF MICHIGAN
COURT OF APPEALS

CHARMAIN ANTOINETTE MOORE,

Plaintiff-Appellant,

UNPUBLISHED
November 29, 2012

v

KARL TREPkowski and NICHOLAS
TREPkowski,

No. 307880
Saginaw Circuit Court
LC No. 08-003477-NI

Defendants-Appellees.

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order that granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we reverse and remand the matter to the trial court for further proceedings consistent with this opinion.

On May 2, 2006, plaintiff was driving through an intersection when defendant Nicholas Trepkowski, who was driving in cross traffic, turned right at a red light and struck plaintiff's vehicle, causing it to spin into oncoming traffic and be struck again by another car. Plaintiff was hospitalized, and the treating physician found that she had suffered two fractures to her right wrist. Plaintiff reported that at her shoe sales job she was using her "left wrist for the most part due to right wrist pain." Plaintiff still reported pain in her wrist and went to a different doctor who recommended surgery. Surgery was performed and a bone fragment was removed and chondral fraying was debrided. Plaintiff returned to her doctor complaining of persistent pain and swelling, but the examination found no actual swelling. By July 2007, plaintiff's doctor reported that maximum healing had occurred and that plaintiff was at risk for permanent pain.

In her deposition, plaintiff stated that, during her recuperation period through April of 2007, she was unable to work and that her mother provided care for her, including grooming and cleaning. Plaintiff claimed that continued pain has impaired her ability to do things she did prior to her injury, such as style her relatives' hair and proficiently use a computer. As a consequence, plaintiff stated that her job prospects were diminished. Plaintiff admitted, however, that she sometimes grooms her own hair now and that, in October 2007, she joined the National Guard, completing some seven months of physical training, exercise, and other activities such as

firearms' training. Plaintiff did not see a physician for her wrist during her National Guard training. Plaintiff reported that she is currently not under any medical restrictions and is employed caring for a disabled child.

This is the second time this case is before this Court.¹ Previously, a panel of this Court remanded to the trial court to apply the standard set forth in *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010). On remand, the trial court applied the *McCormick* standards and granted defendants' renewed motion for summary disposition. Plaintiff again appeals the order that granted of defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

A trial court's decision to grant a motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo to ascertain whether the movant is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The record is reviewed in a light most favorable to the nonmoving party to determine whether the evidence established the existence of a genuine issue of material fact for trial. *Id.*

Defendants concede in their brief that plaintiff's broken wrist was an objectively manifested impairment of an important body function; however they maintain that the injury did not affect plaintiff's general ability to lead her normal life. Thus, this appeal's sole issue is whether plaintiff's injury meets the "serious impairment of body function" definition as used in the no fault act (the act), MCL 500.3101 *et seq.*

The relevant portion of the act is as follows:

(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.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious

¹ *Moore v Trepkowski*, unpublished memorandum opinion of the Court of Appeals issued July 14, 2011 (Docket No. 296355).

disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

* * *

(7) As used in this section, “serious impairment of body function” means an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life. [MCL 500.3135.²]

The act allows for additional tort recovery if “the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” Plaintiff argues that she has suffered a serious impairment of body function. MCL 500.3135(7) further defines a “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”

Courts have attempted to elicit tests and further define what “affects her general ability to lead her normal life” means. The Michigan Supreme Court addressed this matter in *McCormick*, which overruled the previous standard set forth in *Kreiner v Fisher*, 471 Mich 109; 683 NW2d 611 (2004) and is the controlling law for this appeal. According to the *McCormick* Court,

Under the plain language of the statute, 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. If there is a material factual dispute regarding the nature and extent of the person’s injuries, the court should not decide the issue as a matter of law. Notably, the disputed fact does not need to be outcome determinative in order to be material, but it should be “significant or essential to the issue or matter at hand.” Black’s Law Dictionary (8th ed.) (defining “material fact”). [*McCormick*, 487 Mich at 193-194 (footnotes omitted).]

The parties dispute the duration and severity of plaintiff’s injury; however because the injury itself and many of the results are not contested, the disputed facts are not “significant or essential” to the determination of whether the injury threshold has been met.

² MCL 500.3135 has been amended effective October 1, 2012. Section (7), which defines “serious impairment of body function,” has been renumbered as section (5). Because plaintiff’s cause of action accrued prior to October 1, 2012, the amended statute is not applicable to this case. See *Abraham v Jackson*, 189 Mich App 367, 370; 473 NW2d 699 (1991). In any event, the only substantive change to the statute was to increase from \$500 to \$1,000 the amount that a person may sue the responsible party for damages not covered by insurance, which is not at issue in the instant case.

Next, *McCormick* directs the analysis of whether a “serious impairment of body function” has been met by evaluating the parts of the statutory definition found in MCL 500.3135(7). *McCormick*, 487 Mich at 194. The statute is broken into three “prongs” and, as mentioned above, only the third prong concerning “whether the injury affects the person’s general ability to lead her normal life” is in dispute. The *McCormick* Court considered the plain meaning of the statutory words to conclude that “the plain text of the statute and these definitions demonstrate that 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.” *McCormick*, 487 Mich at 202. Accordingly, to be eligible for a tort remedy, only a plaintiff’s *ability* to live their normal life need be affected by the injury. “[T]here is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected.” *Id.* at 203. Additionally, our Supreme Court held that because the Legislature included the words “permanent disfigurement” in the act, it should be assumed to have intentionally omitted any time requirement from the definition of a “serious impairment of body function.” *Id.* at 203. Thus under *McCormick*, a plaintiff’s injury is a “serious impairment of body function” if some of the plaintiff’s ability to live his or her normal life is affected, without regard to the duration of the effect or to the amount of the affect in relation to the plaintiff’s whole ability to live his or her life.

Our review of the record evidence presented to date leads us to conclude that plaintiff has demonstrated that her “pre-incident manner of living was affected” by her injury. Plaintiff was unable to do many normal things while in her cast, and her mother nursed plaintiff during the recoveries from plaintiff’s two surgeries. Plaintiff missed work and presented unrefuted testimony that her ability to groom her hair and use the computer was affected by her injury. Because the injury itself and a sufficient amount of the resulting effects on plaintiff’s general ability to live her life are not in dispute, the trial court erred in ruling as a matter of law that plaintiff did not suffer a serious impairment of a body function. MCL 500.3135(2). Although the duration of the affect of plaintiff’s injury is in dispute, because there is “no quantitative minimum” aside from a “momentary impairment” under *McCormick*, plaintiff is entitled to present her tort claim to the trier of fact in this case.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, is entitled to costs. MCR 27.219(A).

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens