

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FRANCES OVERWEG, Individually and Personal  
Representative of the ESTATE OF HARLAN JAY  
OVERWEG,

Plaintiff-Appellant,

v

TAYLOR REMERO THOMAS, BOBBY GLENN  
THOMAS and KELLY THOMAS,

Defendants-Appellees.

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UNPUBLISHED  
May 9, 2013

No. 308785  
Kent Circuit Court  
LC No. 09-000482-NI

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for partial summary disposition pursuant to MCR 2.116(C)(10). We affirm.

**I. BACKGROUND**

On October 31, 2008, plaintiff lost her husband, Harlan Jay Overweg, in an automobile accident. That day, plaintiff was driving home on southbound US-131 in her vehicle, while Harlan was following her in his vehicle. Suddenly, plaintiff observed defendant Taylor Remero Thomas, who was driving northbound on US-131, lose control of his vehicle and cross the median into southbound US-131. Taylor narrowly missed crashing into plaintiff's vehicle before he slammed into Harlan's vehicle. Plaintiff immediately stopped her vehicle, exited, and ran to Harlan's vehicle. Plaintiff saw that Harlan was pinned under some debris, covered in cuts and bruises, and unconscious. Plaintiff attempted to lift the debris that was crushing Harlan, but, she was unable to free him. Once EMS arrived, plaintiff watched as CPR was unsuccessfully performed on Harlan. Plaintiff rushed to the hospital with Harlan, and watched the unsuccessful attempts to revive him. Harlan never regained consciousness and he passed away. In April 2009, plaintiff was diagnosed with post-traumatic stress disorder (PTSD) and major depressive disorder.

Plaintiff initially filed her complaint in January 2009 against Taylor and his parents, and in January 2011, she filed an amended complaint alleging negligence, gross negligence, owner liability, and negligent infliction of emotional distress. Subsequently, defendants filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) regarding the gross negligence

and negligent infliction of emotional distress claims. Defendants argued that plaintiff failed to satisfy the no-fault threshold requirement of MCL 500.3135 necessary to bring a tort claim because her PTSD was not a serious impairment of a body function as defined by MCL 500.3135(7), i.e., it was not an objectively manifested impairment of an important bodily function that affected plaintiff's overall ability to lead her normal life. Moreover, defendants asserted that even if plaintiff met this threshold, there was no genuine issue of material fact regarding the negligent infliction of emotional distress claim because there was no evidence that plaintiff suffered a severe mental injury or actual physical harm. Also, there was no evidence to support plaintiff's gross negligence claim.

In response to defendants' motion, plaintiff asserted that the no-fault threshold of MCL 500.3135 was satisfied because PTSD was a severe mental disturbance. Therefore, plaintiff suffered actual physical harm and her injury was a serious impairment of a body function because it was an objectively manifested impairment of an important bodily function that affected her ability to lead her normal life.

On September 30, 2011, the trial court issued a thorough and well-written opinion and order granting defendants' motion for partial summary disposition. The trial court determined that plaintiff did not overcome the no-fault threshold under MCL 500.3135 because she failed to present evidence that satisfied the standard of MCL 500.3135(7). The trial court concluded that there was no evidence that plaintiff's PTSD and major depressive disorder were objectively manifested impairments. It also found that there was no evidence of an impairment of an important bodily function or that plaintiff's general ability to lead her normal life was affected. Moreover, even if plaintiff was able to overcome the threshold of MCL 500.3135, the trial court found that plaintiff's negligent infliction of emotional distress claim failed because there was no evidence that plaintiff's mental anguish and shock resulted in actual physical injury. The trial court also found that plaintiff's gross negligence claim failed because her allegation was premised on ordinary negligence.

After the trial court granted partial summary disposition on the negligent infliction of emotional distress and gross negligence claims, the parties reached a settlement agreement regarding the remaining counts. The trial court accepted the terms of the parties' settlement agreement and in January 2012 issued a final order closing the case. Plaintiff now appeals as of right the trial court's order granting defendants' motion for partial summary disposition.<sup>1</sup>

## II. ANALYSIS

### A. THE NO-FAULT THRESHOLD:

#### SERIOUS IMPAIRMENT OF A BODY FUNCTION

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<sup>1</sup> Plaintiff does not appeal the portion of the trial court's order dismissing her gross negligence claim.

Plaintiff asserts that PTSD satisfies the no-fault threshold of MCL 500.3135,<sup>2</sup> and thus, she should be allowed to pursue a tort claim for damages against defendants. This Court reviews the trial court's ruling on a motion for summary disposition de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When deciding a motion for summary disposition under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In her brief on appeal, plaintiff cites to *Samhoun v Greenfield Constr Co, Inc*, 163 Mich App 34, 39; 413 NW2d 723 (1987), for an overruled and outdated summary disposition standard. Since at least 1999, courts have no longer been required to determine "whether the kind of record which might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds may differ." See *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).

In general, the no-fault act<sup>3</sup> provides statutory insurance benefits to victims of motor vehicle accidents that are a substitute for the tort remedies available at common law. *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978). Therefore, before a party may proceed on a negligence claim to recover for noneconomic loss arising from an automobile accident, he or she must first overcome the no-fault threshold requirement of MCL 500.3135(1), which states that: "(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."

Under the plain language of the statute [MCL 500.3135], 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. [*McCormick v Carrier*, 487 Mich 180, 193; 795 NW2d 517 (2010) (footnote omitted).]

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<sup>2</sup> MCL 500.3135 was amended by 2012 PA 158, effective October 1, 2012. We cite to MCL 500.3135 as it existed prior to the 2012 amendments because it was the statute in effect at the time of the accident, but we also note that this amendment does not impact our analysis because the relevant statutory language remains the same in both versions of the statute.

<sup>3</sup> Statutory interpretation is a question of law that is reviewed de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

MCL 500.3135(7)<sup>4</sup> provides guidelines for determining whether an injury meets the threshold requirement of a serious impairment of a body function. Specifically, it states that there is a serious impairment of a body function when there is an objectively manifested impairment of an important bodily function that affects an individual's ability to lead his normal life. MCL 500.3135(7); *McCormick*, 487 Mich at 194-195. "Whether someone has suffered a serious impairment is 'inherently fact-and circumstance-specific and [the analysis] must be conducted on a case-by-case basis.'" *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011), quoting *McCormick*, 487 Mich at 215. "Therefore, the evidence must establish (1) an objectively manifested impairment of a body function, (2) that is significant or important to the specific injured person, and (3) that affects that specific person's general ability to lead his or her particular normal life." *Id.* "[T]here is no bright-line rule or checklist to follow in making that evaluation." *Id.*

To begin, we note that because defendants accepted plaintiff's facts as true for purposes of their motion for partial summary disposition, there is no material factual dispute regarding the nature or extent of plaintiff's injuries. Thus, this Court can determine whether the no-fault threshold standard was met as a matter of law. *McCormick*, 487 Mich at 193. We conclude that plaintiff fails to overcome the no-fault threshold because the evidence does not establish the serious impairment of a body function. MCL 500.3135(7).

First, the evidence presented does not establish an objectively manifested impairment. "Objectively manifest" means an impairment that is "observable or perceivable from actual symptoms or conditions." *McCormick*, 487 Mich at 196. An impairment is not the injury itself. Rather, "an injury is the actual damage or wound, [while] an impairment generally relates to the effect of that damage." *Id.* at 197. Thus, the court must determine "*how the injuries affect[] a particular body function.*" *Id.* (quotation marks and citation omitted). (Emphasis added.) An objectively manifested impairment must have a physical basis for pain and suffering that can be established by evidence. *Id.* at 197-198.

There is no evidence establishing that plaintiff has an objectively manifested impairment. While there is no dispute that plaintiff has PTSD, there is no evidence that plaintiff's injury—PTSD—affects a particular body function. Dr. Lori Jo Holstege diagnosed plaintiff with PTSD caused from the automobile accident. Holstege testified that plaintiff suffers from physical ailments or symptoms as a result of PTSD, including: sleep deprivation, flashbacks and nightmares, heightened anxiety, loss of appetite, being easily startled, and decreased activity. However, this testimony does not establish that a particular body function has been affected by plaintiff's PTSD. Indeed, while Holstege testified that PTSD can cause trauma to the brain and that plaintiff's brain suffered an actual physical injury from the PTSD, she also admitted that she could not find any objectively manifested impairment of plaintiff's cognitive or physical function.

Likewise, Dr. Philip Margolis diagnosed plaintiff with PTSD but failed to provide evidence that plaintiff suffered from an objectively manifested impairment. According to

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<sup>4</sup> This is now MCL 500.3135(5) under the current statute, 2012 PA 158.

Margolis, plaintiff suffered from a severe mental disturbance and has psychiatric problems that interfere with her daily life, including: loss of sleep, phobia, anxiety, isolation, hyperarousal, avoidance, flashbacks, disattachment, and loss of concentration. He also stated that plaintiff exhibited physical manifestations resulting from PTSD, including: crying, trembling, and being startled, but could not establish that a particular body function had been affected by PTSD.

Additionally, plaintiff's own deposition testimony belies her assertion that she has an objectively manifested impairment that affects a particular body function. At her deposition, while plaintiff complained of usually feeling physically exhausted, she testified that she suffered from "mental injuries" resulting from the automobile accident, including: memory loss, an inability to focus, lack of concentration skills, being easily startled, and impatience. Likewise, plaintiff's daughter, Tonya Nicholas, observed many emotional and behavioral changes in plaintiff since the automobile accident, but Nicholas's testimony fails to show that plaintiff's PTSD affects a particular body function. Nicholas testified that plaintiff is mundane, numb, anxious, apathetic, worried, very irritable, sad, lonely, has mood swings, sometimes behaves impulsively or overacts, and is not emotionally supportive towards other family members.

To summarize, the evidence presented by plaintiff does not establish an objectively manifested impairment because plaintiff failed to show how her PTSD has affected a particular body function. The record merely highlights plaintiff's emotional or behavioral changes since the automobile accident. While there is no dispute over plaintiff's diagnosis of PTSD, this diagnosis alone—without supporting evidence to establish that the PTSD affected a particular body function—fails to create a genuine issue of material fact regarding whether plaintiff has an objectively manifested impairment.

Even if we were to conclude that plaintiff established an objectively manifested impairment, plaintiff could still not overcome the no-fault threshold because plaintiff failed to show an objectively manifested impairment of an important body function. Whether the objectively manifested impairment is of an important body function "is an inherently subjective inquiry that must be decided on a case-by-case basis, because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person's life." *McCormick*, 487 Mich at 199. Holstege and Margolis stated that there was no evidence that plaintiff's body suffered the impairment of an important body function. Plaintiff testified that she suffered from "mental injuries" and she never suggested that these mental infirmities caused her the impairment of an important body function. Similarly, Nicholas testified that plaintiff had emotional or behavioral changes since the accident, but she did not present evidence showing the impairment of an important body function. Consequently, there is no evidence that plaintiff suffered from an objectively manifested impairment of an important body function.

Finally, even assuming plaintiff overcame the first two prongs, there is no evidence that the objectively manifested impairment of an important body function would affect plaintiff's ability to lead her normal life. Whether the objectively manifested impairment of an important body function affects an individual's general ability to lead his normal life means whether it

is to have an influence on some of the person's capacity to live in his or her normal manner of living . . . . 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. [*McCormick*, 487 Mich at 202.]

“[T]here is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected[.]” and “the statute does not create an express temporal requirement as to how long an impairment must last in order to have an effect on ‘the person's general ability to live his or her normal life.’” *McCormick*, 487 Mich at 203.

There is no evidence that plaintiff's general ability to lead her normal life has been affected. Neither Holstege nor Margolis placed driving, work, or any other restrictions on plaintiff. In fact, Holstege thought part-time work may be beneficial to plaintiff. Plaintiff chose not to take the medication prescribed to her to help her PTSD, continues to read and comprehend various books, can organize and communicate her thoughts and feelings to other people, can agree to social plans, keeps her doctors' appointments, and does not require assistance in her daily household chores or in handling her finances. The trial court correctly granted defendants' motion for partial summary disposition because plaintiff cannot establish that she suffered a serious impairment of a body function as required to overcome the no-fault threshold of MCL 500.3135.<sup>5</sup>

## B. THE BYSTANDER CLAIM:

### NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Because plaintiff did not meet the no-fault threshold, there is no need to consider her negligent infliction of emotional distress claim. MCL 500.3135(1). “Under the no-fault act, a prerequisite for maintaining a suit for noneconomic loss arising from the ownership, maintenance or use of a motor vehicle is that the injured person suffer death, serious impairment of body function or permanent serious disfigurement.” *Horan v Brown*, 148 Mich App 464, 467; 384 NW2d 805 (1986). Consequently, “the threshold level is an essential element of damages without which the plaintiff is unable to proceed.” *Id.* at 467-468. See also 1 Atkinson, White & Slank, *Torts: Michigan Law & Practice* (2d ed), § 4.10, p 4-12 (“The requisite proofs of motor vehicle negligence are essentially the same as for a typical negligence case, except that in addition to proving the basic elements of negligence (duty, breach, causation, and damages), the plaintiff must establish a threshold injury of death, permanent serious disfigurement, or serious impairment of a body function.”). Therefore, plaintiff's assertion that by establishing her tort claim she also satisfies the no-fault threshold is backwards. Plaintiff must first overcome the no-fault threshold before she can seek to establish the elements of her tort claim. *Horan*, 148 Mich App at 467-468; *Byer v Smith*, 419 Mich 541, 546; 357 NW2d 644 (1984). She has failed to do so.

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<sup>5</sup> *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49; 760 NW2d 811 (2008), does not apply to this case because the *Allen* Court dealt with whether PTSD met the definition of “bodily injury” under the governmental immunity statute, and not whether PTSD met the no-fault threshold.

Affirmed.

/s/ Christopher M. Murray