

STATE OF MICHIGAN  
COURT OF APPEALS

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ROBIN YATES,

Plaintiff-Appellant,

v

BERRY SODERGREN,

Defendant-Appellee,

and

PROGRESSIVE CASUALTY INSURANCE  
COMPANY, PROGRESSIVE MARATHON  
INSURANCE COMPANY, and PROGRESSIVE  
INSURANCE COMPANY,

Defendants.

UNPUBLISHED  
March 15, 2018

No. 338817  
Wayne Circuit Court  
LC No. 16-010990-NI

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Before: MURRAY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this no-fault insurance case, plaintiff appeals as of right an order granting summary disposition in favor of defendant, Berry Sodergren, under MCR 2.116(C)(10) on the ground that plaintiff did not sustain a serious impairment of body function. We conclude that plaintiff suffered a serious impairment of body function or, at a minimum, there is a factual issue regarding whether plaintiff suffered a serious impairment of body function. Therefore, we reverse the trial court's order granting summary disposition in defendant's favor and remand for further proceedings.

On May 5, 2014, plaintiff was injured when her vehicle was struck by a vehicle driven by defendant. Plaintiff was taken by EMS to Detroit Receiving Hospital where she complained of neck, back, and shoulder pain. At the hospital, nothing was found that required immediate treatment and plaintiff was discharged with instructions to follow up with her personal physician. Plaintiff's personal physician, Dr. John Verbovsky, diagnosed her with neck strain and instructed her not to return to her job as a security officer until June 4, 2014. Plaintiff subsequently saw Dr. Raymond Edison for pain management. Dr. Edison diagnosed plaintiff with cervical sprain, back pain, and right shoulder pain. He recommended that plaintiff undergo physical therapy for six weeks, three times a week. The medical records show that plaintiff engaged in physical

therapy for six months, from June 2, 2014 until December 26, 2014, although she did not attend physical therapy in July or October. Dr. Edison ordered MRIs, which were done on October 21, 2014. Based on the images, he concluded that plaintiff's diagnoses were cervical strain and a small rotator partial tear.

Plaintiff was examined by defense medical examiner Dr. Zachary Endress, from ExamWorks, who stated in his report that plaintiff had a normal-looking cervical spine and had full range of motion in her cervical spine and right shoulder. After reviewing all of plaintiff's medical records, Dr. Endress concluded that plaintiff had made a full recovery, needed no further treatment, had reached maximum medical improvement and preinjury status, could continue working in her current job, and had no work restrictions or restrictions on other activities.

Plaintiff was also seen by defense medical examiner, Dr. Phillip Friedman from ExamWorks. In Dr. Friedman's report, he noted that plaintiff reported that her current pain level was 3 or 4 out of 10, which was down from 7, as she had stated it was earlier. He noted that as he examined her neck, she felt tenderness "to the base and extended to the midline." His impression was that he did not see any evidence of active cervical or lumbar radiculopathy, and he believed that she "more likely than not has an exacerbation of an existing condition." He further stated he did "not believe that she has any evidence of any acute traumatic injury" and "she likely was depressed and treatment of that symptom could help her residual physical complaints." He did, however, find that she had not reached her preinjury status, and that she had not reached maximum medical improvement.

Plaintiff filed this action for noneconomic damages, alleging that she suffered a serious impairment of body function.<sup>1</sup> Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had not provided evidence to meet the necessary threshold under MCL 500.3135(1) and (5). After hearing arguments from both sides, the trial court granted summary disposition in defendant's favor, and this appeal followed.

Plaintiff argues that the trial court erred by determining as a matter of law that she did not suffer a serious impairment of body function. We agree.

A trial court's decision on a motion for summary is reviewed de novo on appeal. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). "A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim." *Mich Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). In deciding such a motion, a trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the record evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

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<sup>1</sup> The parties later stipulated to dismiss Progressive from this action, and only Sodergren remained as a defendant.

Under Michigan’s no-fault insurance act, MCL 500.3101 *et seq.*, a person remains subject to tort liability for noneconomic loss caused by use of a motor vehicle only if the injured person suffers death, permanent serious disfigurement, or serious impairment of body function. MCL 500.3135(1). This case involves the third instance in which an injured person can recover—serious impairment of a body function. MCL 500.3135(5) defines “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.”

In *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), our Supreme Court held that three prongs are necessary to establish a serious impairment of body function: (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. *Id.* at 215. MCL 500.3135(2) sets forth the limitations in which the trial court is to decide the serious impairment question as a matter of law. This section states:

(a) The issues of whether the 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 whether the person has suffered a serious impairment of body function or permanent serious disfigurement. . . .

In his motion for summary disposition, defendant did not dispute the first two prongs of the test set forth by *McCormick*. Instead, defendant claimed that plaintiff failed to establish that there was a genuine issue of material fact regarding whether her injuries affected her general ability to lead her normal life. Defendant claimed that the evidence indicated that plaintiff was able to do the same things before and after the accident, and therefore the accident did not have an impact on plaintiff’s capacity to live her normal life. In *McCormick*, the Court held that whether the third prong is fulfilled is a fact-specific inquiry to be resolved on a case-by-case basis. *McCormick*, 487 Mich at 202. Further, whether the plaintiff’s normal life is affected is determined by comparing the plaintiff’s life before the injury with her life after the injury. *Id.*; *Nelson v Dubose*, 291 Mich App 496, 498-499; 806 NW2d 333 (2011).

In this case, prior to the accident, plaintiff worked as an executive security officer for Allied Marketing at the Ford Motor Company headquarters building in Dearborn. She worked Wednesdays through Sundays from 3:00 to 11:00 p.m. Her personal physician, Dr. Verbovsky, wrote a medical slip stating that she could return to work on June 4, 2014. In her deposition, plaintiff testified that she returned to work sooner than that because she needed the money, and in addition, she was afraid she would get fired if she did not return. Since plaintiff was in a

union, the union was able to get her reassigned to a desk job, which was physically less demanding than her previous position.<sup>2</sup> The desk job entailed answering dispatch calls and responding to e-mails. She received the same pay and worked the same number of hours, 40 hours per week.

Plaintiff testified that before the accident, other than working full time, her activities consisted of bowling on a bowling team, watching her six-year-old granddaughter on Mondays and Tuesdays, driving her mother to appointments and errands, and drawing. Before the accident, plaintiff had bowled on a bowling team in a league for four years and had an average score of 175. She bowled every Tuesday and Saturday at 10:00 a.m., year-round. After the accident she could no longer bowl, as she was right handed and had trouble lifting heavy things with her right hand. When her granddaughter was at plaintiff's house on Mondays and Tuesdays, plaintiff would often draw with her before the accident but could no longer draw as she could not use her right hand to draw. Plaintiff tried drawing for her granddaughter with her left hand but found it was not the same. Various household tasks were difficult for plaintiff after the accident. She testified that her back problem had not really improved at all. When she vacuumed or mopped, she had to stop periodically because of back spasms. She could not pick up a skillet with her right hand when cooking. She had to use her left hand when lifting anything heavy. Plaintiff also could not tie her shoes because of back spasms, so her mother helped when she was available and plaintiff purchased slip-on shoes. At the time of plaintiff's deposition, she was still regularly taking Motrin for pain.

On this record, we conclude that there is sufficient evidence to establish that the cervical and lumbar strain and torn rotator cuff injuries plaintiff suffered did affect plaintiff's general ability to lead her normal pre-accident life. Before the accident, plaintiff's primary activity was working at her job as a security officer for 40 hours a week and her secondary activity was bowling in a bowling league two days a week, year round. Both of these activities were severely impacted and/or curtailed altogether. With regard to her job, plaintiff was unable to return to work in the same position she had before the accident. Plaintiff testified that because her level-2 job duties required her to pick up 40-pound fire extinguishers, which she could not do, she was in danger of being fired. Fortunately, the union she was in made it possible for her to be reassigned to a desk job. Plaintiff's pre-accident recreational activity of bowling was curtailed altogether. Plaintiff testified clearly that she was unable to bowl anymore because of her injury. Plaintiff also has trouble with doing housework, lifting the heavy pans required for cooking, drawing with her granddaughter, and tying her own shoes. Under *McCormick*, 487 Mich at 215, the third prong of MCL 500.3135(5) has been met. At a minimum, there is a question of fact concerning the extent to which plaintiff's injuries impacted her ability to live her normal pre-accident life. Therefore, the trial court erred in granting summary disposition in defendant's favor under MCR 2.116(C)(10).

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<sup>2</sup> Plaintiff testified at her deposition that she could not pick up the 35 to 40 pound fire extinguishers that she was required to do once a month to maintain her previous level-2 job as a security officer.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood