STATE OF MICHIGAN

COURT OF APPEALS

DEANN BROWN,

Plaintiff-Appellant,

v

DOUGLASS DEBASSIGE,

Defendant-Appellee,

and

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendant.

UNPUBLISHED
December 22, 2020

No. 350972
Ingham Circuit Court
LC No. 18-000593-NI

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

Plaintiff, Deann Brown, appeals as of right the trial court's order granting defendant Douglass Debassige's motion for summary disposition under MCR 2.116(C)(10).[1] The trial court ruled that plaintiff had not demonstrated serious impairment of a body function, as required to proceed on an automobile-negligence claim against defendant under the Michigan no-fault insurance act. We reverse the trial court's order and remand for further proceedings.

I. BACKGROUND

On June 29, 2017, Debassige drove his vehicle through the front of plaintiff's house, dislodging the front door, causing it to land on top of her. Plaintiff visited a hospital emergency

[1] Plaintiff settled with Defendant Farm Bureau Mutual Insurance Company of Michigan (Farm Bureau) and it is not a party to this appeal. "Defendant" as used in this opinion refers to Debassige unless otherwise indicated.

room that day to seek treatment for a neck sprain and contusions of her hip, rib, foot, and shoulder. Plaintiff attended physical therapy in September and October 2017, where she reported significant improvement. However, as of May 2019, plaintiff continued seeking medical treatment and reported severe lower back and shoulder pain. Plaintiff's medical records indicated that for well over a year after the accident plaintiff continued to suffer pain that limited her range of motion and ability to perform certain activities.

Plaintiff worked as a night supervisor for a janitorial service before the accident happened and although the accident affected her ability to perform certain tasks, her employer accommodated her limitations. Her employer terminated her in December 2018 for an unrelated incident. Plaintiff testified that before the accident she spent her free time swimming, walking, camping, and riding on the back of a motorcycle. She testified that the accident significantly limited her ability to swim and walk, prevented her from riding a motorcycle, and reduced her camping trips. Further, activities that she previously did involving use of her left arm to lift or do other physical motions were limited because of ongoing chronic left shoulder pain that medical treaters attributed to the accident.

Plaintiff sued Debassige and Farm Bureau on September 4, 2018.[2] Debassige moved for summary disposition under MCR 2.116(C)(10) on the grounds that plaintiff failed to establish that she suffered an objectively manifested injury or that the accident affected her ability to lead her normal life. Following a hearing, the trial court granted Debassige's motion. The trial court concluded that plaintiff established the existence of genuine issues of fact regarding whether she suffered an objectively manifested impairment of an important body function but she failed to establish an issue of fact that the accident affected her general ability to lead her normal life. This appeal ensued.

II. STANDARD OF REVIEW

We review de novo challenges to a trial court's decision on a motion for summary disposition. *Wood v Detroit*, 323 Mich App 416, 419; 917 NW2d 709 (2018). Under MCR 2.116(C)(10), summary disposition is appropriate when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When reviewing such a motion, we consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). We consider the record evidence itself as well as all reasonable inferences drawn from it. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). When the record leaves open an issue upon which reasonable minds may differ, a genuine issue of material fact exists. *Johnson*, 502 Mich at 761. We also review de novo the proper interpretation and application of a statute. *Wood*, 323 Mich App at 419.

[2] Farm Bureau insured plaintiff who sought unpaid personal protection insurance (PIP) benefits from it.

III. ANALYSIS

Michigan's no-fault insurance act limits tort liability. *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010). However, "[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." MCL 500.3135(1). Plaintiff argues that she suffered serious impairment of a body function that has affected her general ability to lead her normal life.

To establish a serious impairment of body function, a plaintiff must show "(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. The trial court ruled that plaintiff had established genuine issues of material fact as to the first two prongs but not the third prong of the test. Plaintiff now appeals the trial court's ruling that she did not establish a genuine issue of material fact as to the third prong.

Under MCL 500.3135(5)(c)[3] a serious impairment of body function means an impairment that:

> affects the injured person's general ability to lead his or her normal life, meaning it has had an influence on some of the person's capacity to live in his or her normal manner of living. Although temporal considerations may be relevant, there is no temporal requirement for how long an impairment must last. This examination is inherently fact and circumstance specific to each injured person, must be conducted on a case-by-case basis, and requires comparison of the injured person's life before and after the incident.

In *McCormick*, our Supreme Court noted several important guiding principles to follow when undertaking the preaccident-postaccident comparison. First, a plaintiff need only show that his or her "general ability to lead his or her normal life has been *affected*, not destroyed." *McCormick*, 487 Mich at 202 (emphasis in original). "[C]ourts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person's general ability to do so was nonetheless affected." *Id*. Second, a plaintiff must show only that some of his or her "ability to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected." *Id*. "[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. Third, under MCL 500.3135(5)(c), there is no "express temporal requirement

[3] The Legislature amended MCL 500.3135(5) effective June 11, 2019, "to codify and give full effect to the opinion of the Michigan supreme court in *McCormick v Carrier*, 487 Mich 180 (2010)." See 2019 PA 21, enacting § 2; 2019 PA 22, enacting § 1. These amendments came into effect after the accident occurred and plaintiff brought suit, but before the summary disposition hearing.

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.' " *Id.*

In this case, viewing the evidence in the light most favorable to plaintiff,[4] the trial court erred by concluding that plaintiff's injuries did not affect her general ability to lead her normal life. Over a year and a half after the accident, plaintiff testified during her deposition that, before the accident, she spent her time working, riding on the back of a motorcycle, walking her dog, camping at a trailer she owned, and swimming. Plaintiff testified that her injuries prevented her from performing some of her usual janitorial tasks that required her to use both arms because she had problems with her left arm and shoulder. Although her employer accommodated her physical needs by limiting her use of certain machinery that required both arms for operation, respondent never returned to her preaccident physical condition. Further, after the accident, plaintiff went camping less frequently, and when she did camp, she could no longer walk around or serve food like she used to do. She also testified that since the accident she has been completely unable to ride on a motorcycle, walk her dog, take walks without experiencing leg problems, or swim.

Plaintiff's medical records reported that she experienced "a loss of motion," "a loss of sensation," and pain that became "worse with activity." Plaintiff's physical therapy records from 2019 indicate that her injuries limited her ability to wash herself, dress herself, and perform tasks around her house without assistance. The records also indicate that she was unable to walk, sit, or stand for more than a brief amount of time. The medical records describe significant effects on plaintiff's social life and ability to sleep. While a May 2019 evaluation revealed improvement in several areas, it still described limitations on plaintiff's social life, ability to perform household tasks such as lifting objects and vacuuming, and ability to sleep. Plaintiff testified at her deposition to such limitations. On June 21, 2019, one of plaintiff's doctors signed an Attendant Care Disability Certificate. This certificate stated that plaintiff needed help with at least some of the

[4] Defendant argues that plaintiff's Attendant Care Disability Certificate is an expansion of the record on appeal, and should not be considered by this Court. "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) (citation omitted). This document was attached as an exhibit to plaintiff's brief supporting her motion for reconsideration, which was filed before a final decision had been made by the trial court. The trial court considered the Attendant Care Disability Certificate when ruling on plaintiff's motion for reconsideration and made no indication that the document was an unpermitted expansion of the record. In *Farmers Ins Exch v Farm Bureau Ins Co*, 272 Mich App 106, 117; 724 NW2d 485 (2006), we held that *an argument* is not properly preserved for review when a party raised it for the first time in its motion for reconsideration. Conversely, the document here was a piece of evidence being used to support the same argument that plaintiff had presented at the summary disposition stage. Plaintiff's claim of appeal referenced the September 18, 2019 final order that dismissed the case, while the Attendant Care Disability Certificate was attached to plaintiff's July 30, 2019 motion for reconsideration. The Attendant Care Disability Certificate is properly considered by this Court.

activities of daily life every day for at least two hours a day, and described her as "disabled and in need of attendant care."

The record indicates that plaintiff presented evidence that the injuries she sustained affected her daily life after the accident. She discussed with several different medical professionals such limitations while seeking treatment. The fact that a doctor has not restricted plaintiff's activities is not fatal to plaintiff's case. See *Piccione v Gillette*, 327 Mich App 16, 22; 932 NW2d 197 (2019) (weighing evidence of activities the plaintiff was cautious about participating in, even absent a doctor's restriction, and finding that the plaintiff had presented a fact question as to whether his general ability to lead his normal life was affected by his impairment).

The trial court ruled that plaintiff failed to prove "a true general inability to lead" her normal life. It is worth emphasizing that plaintiff need only show that her general ability to lead "her normal life has been *affected*, not destroyed." *McCormick*, 487 Mich at 202. In this case, plaintiff presented evidence that established that a genuine issue of material fact existed regarding whether her injuries affected her general ability to lead her normal life establishing a serious impairment of bodily function. Therefore, the trial court erred by granting summary disposition in favor of defendant.

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

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford