STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH H. BEATTIE, and JULIE BEATTIE,

Plaintiffs-Appellants,

v

CINCINNATI INSURANCE COMPANY, WNS PROPERTIES, LLC, doing business as BC LANES, JAMES JOSEPH ANDERSON, and ELIZABETH ANN ANDERSON,

Defendants-Appellees.

UNPUBLISHED
July 24, 2018

No. 340046
Charlevoix Circuit Court
LC No. 16-053625-NI

Before: RONAYNE KRAUSE, P.J., and GLEICHER and LETICA, JJ.

PER CURIAM.

This automobile negligence and dramshop action stems from a motor vehicle accident caused by defendant James Anderson after he had been furnished alcohol by defendant WNS Properties, LLC, doing business as BC Lanes. Plaintiffs Joseph H. Beattie and Julie Beattie appeal as of right the trial court's order granting BC Lanes summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) on the ground that Julie did not suffer a "serious impairment of body function" as defined by MCL 500.3135(5). On the basis of that ruling, the trial court also granted defendants James and Elizabeth[1] Anderson summary disposition of plaintiffs' automobile negligence claim and defendant Cincinnati Insurance Company summary disposition of plaintiffs' claims for underinsured and uninsured motorist benefits. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS

The events giving rise to this case began at BC Lanes, a bowling alley, on February 6, 2015. That evening, plaintiffs met a group of friends to bowl. One of those friends, Collin Jenks, recognized Anderson at the bar. The two began talking and Jenks learned that Anderson

[1] Elizabeth Anderson's involvement in this action is irrelevant to the issues before the Court. All singular references to "Anderson" refer to James Anderson only.

was upset about his divorce. According to the one of the witnesses, Anderson then "clung" to plaintiffs' group. Witnesses described Anderson as being "off" and having "a lost look in his eye." Several of the women in the group later reported that Anderson's behavior made them uncomfortable. For instance, while two of the women were using the restroom, Anderson opened the door and called out their names. Donald Towns, who was working as a manager for BC Lanes at the time and Anderson's primary server throughout the night, testified that he confronted Anderson about the restroom incident and that Anderson "sarcastically" denied it, but agreed to leave the group alone. Towns continued to serve Anderson, although in time felt obliged to encourage Anderson to "calm down" because he noticed that Anderson was "kind of getting a look in his face." According to Towns, Anderson went from having "a happy face" to having a "plain face" after his contact with plaintiffs' group decreased.

As the group was leaving the bowling alley, Julie noticed Anderson "peering with one eye around the corner of a wall" at "our group." Joseph asked Anderson, "Are you okay?" but, according to Joseph, Anderson "did not respond, did not change his facial appearance, and just simply took a couple steps backwards." Anderson followed the group out the door and made comments suggesting that he intended to follow them to a party, to which Julie responded, "I don't think so." When asked for help in dealing with Anderson, Towns told him, "you go your way so these guy[s] can go their way." Anderson said he was going home and went to his vehicle.

When plaintiffs left the bowling alley in their Jeep, Joseph noticed that Anderson passed a vehicle "to get behind us." Anderson then began striking plaintiffs' Jeep with his own vehicle, eventually pushing the Jeep to the side of the road and causing it to hit a snow bank and roll onto its side. Julie was injured when her hand was trapped between the roll bar and the top of the Jeep.

The claim of impairment underlying this case primarily pertains to Julie's "little finger" of her right hand.[2] Julie sought emergency attention, and x-rays did not show any fractures or dislocations in her right hand or wrist. A later MRI scan showed "[s]light soft tissue thickening" on the surface of her little finger. Dr. Joseph W. Hance diagnosed Julie with a "soft tissue injury" to her right hand, with limited range of motion in some of her right fingers. Julie was referred to an orthopedic surgeon, Dr. Alfred Wroblewski, who also noted a limited range of motion in Julie's right ring and little fingers. When Julie finished a course of physical therapy in October 2015, the occupational therapist observed that Julie had achieved "increase[d] . . . ring and small finger mobility (but still very limited in small finger), and slight improvement in functional use of right hand."

Following the accident, Julie stopped working as a cosmetologist, citing her injury. At the request of Cincinnati Insurance—plaintiffs' no-fault insurance carrier—Julie was examined by Dr. David Frye in October 2015. Dr. Frye concluded that Julie suffered from "[p]osttraumatic right ring and fifth finger PIP joint arthrofibrosis," which he opined was causally related to the accident. However, Dr. Frye also opined that Julie could return to work without restriction.

[2] Julie is right-hand dominant.

Thereafter, Julie saw Dr. Wroblewski, who concluded that Julie sustained a "right hand crush injury with resultant contractures PIP joint small finger with likely additional tendon adhesions between bone and extensor tendon as well as PIP joint contracture." Julie testified that Cincinnati Insurance stopped paying no-fault benefits after receiving Dr. Frye's report and that she stopped receiving treatment for her injury as a result.

In connection with this lawsuit, Julie underwent an independent medical evaluation conducted by Dr. Patrick Ronan, who determined that "Ms. Beattie sustained a bone bruise and soft tissue injury over the ulnar aspect of the dorsal hand related to the motor vehicle accident [on] February 6, 2015." Dr. Ronan observed atrophic changes to Julie's little finger but attributed the atrophy to disuse. Dr. Paul Drouillard also evaluated Julie and opined that she was engaging in "symptom magnification" by acting "as if her right little finger will not bend when, in fact, it will." Dr. Drouillard opined that it was unnecessary for Julie to be wearing "an elastic sleeve" on her finger and that she should be using her finger normally. According to Dr. Drouillard, "[h]er restrictions in motion are mild."

At her deposition Julie stated, "I cannot fully bend my finger all the way. It does not bend at my knuckle. I cannot make a fist." Julie also stated that she experienced intermittent pain in her little finger depending on what she was doing. She maintained that she could not work as a cosmetologist because she could not grip necessary styling tools. Additionally, she could not wash hair or perform pedicures or facials because those tasks require every finger. At the time of her deposition, she was working as a "private companion" for someone diagnosed with Alzheimer's disease, while also performing "light household duties" for that person's husband.

Julie identified several hobbies that she was no longer able to engage in, including cross-country skiing and riding dirt bikes. She stated that she went golfing twice the previous summer, but that was one of the activities that caused her pain. According to Julie, she could mow the lawn if she wore a "noodle" on her right hand, and "[g]ardening is a little bit more of a struggle . . . ."

II. PROCEDURAL HISTORY

Plaintiffs commenced this action on February 24, 2016. In Count I, plaintiffs averred that Anderson negligently operated a motor vehicle. In Counts II and III, plaintiffs sought to recover underinsured and uninsured benefits, respectively, from Cincinnati Insurance. In Count IV, plaintiffs alleged that BC Lanes violated the dramshop act by furnishing alcohol to Anderson while he was visibly intoxicated. In Count V, plaintiffs alleged that BC Lanes was negligent for failing to protect its patrons.[3]

BC Lanes moved the trial court for summary disposition, arguing that plaintiffs could not show that Julie suffered a serious impairment of body function, as required by MCL

[3] Plaintiffs also sought to recover personal injury protection benefits from Cincinnati Insurance, but that claim was settled and is not relevant to this appeal.

500.3135(1), in order to subject a motor vehicle operator to tort liability. According to BC Lanes, plaintiffs' failure to meet the serious impairment threshold meant that it was entitled to summary disposition of plaintiffs' dramshop claim pursuant to *Spalo v A & G Enterprises (After Remand)*, 437 Mich 406; 471 NW2d 546 (1991). BC Lanes alternatively argued that even if Julie suffered a serious impairment of body function, it was still entitled to summary disposition because plaintiffs could not show that Anderson was served alcohol while he was visibly intoxicated. BC Lanes also sought dismissal of plaintiffs' negligence claim because the accident was unforeseeable and did not occur on its premises. James and Elizabeth Anderson and Cincinnati Insurance concurred with BC Lanes' motion.

In response, plaintiffs moved the trial court for summary disposition under MCR 2.116(I)(2) (nonmoving party entitled to judgment). They argued that the evidence undisputedly established that Julie suffered a serious impairment of body function, that there was no factual dispute whether BC Lanes furnished alcohol to defendant Anderson while he was visibly impaired, and that BC Lanes breached its duty of care to plaintiffs by failing to remove Anderson from its premises or call law enforcement.

The trial court granted BC Lanes' motion for summary disposition under subrule (C)(10) on the ground that Julie had not suffered a serious impairment of body function as a matter of law. The court stated that the only "physical manifestation of an objective injury was a suspected bone bruise" and reasoned that "there would need to be a more clear objective medical diagnosis of the condition" to support plaintiffs' claim. The court further held that its ruling called for dismissal of plaintiffs' dramshop claim as well as their claims for underinsured and uninsured motorist benefits.

III. ANALYSIS

On appeal, plaintiffs insist that the evidence established that Julie suffered a serious impairment of body function. We do not agree that the evidence necessarily compels this conclusion, but, after viewing the evidence in a light most favorable to plaintiffs, we hold that it presents a question of material fact precluding summary disposition.

We review de novo a ruling on a motion for summary disposition. *Gray v Chrostowski*, 298 Mich App 769, 774; 828 NW2d 435 (2012). The court rules allow a trial court to grant summary disposition 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." MCR 2.116(C)(10) "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 168; 909 NW2d 38 (2017) (quotation marks and citation omitted).

The no-fault act, MCL 500.3101 *et seq.*, "establishes an injury threshold for tort liability caused by the ownership, maintenance, or use of a motor vehicle." *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995). Specifically, "[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). The no-fault act 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." MCL 500.3135(5). "On its face, the statutory language provides three prongs that 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." *McCormick v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010).

We recently summarized the requirements for an objectively manifested impairment:

> First, an objectively manifested impairment is one "that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." [*McCormick*, 487 Mich] at 196. The inquiry focuses on "whether the *impairment* is objectively manifested, not the *injury* or its symptoms." *Id*. at 197. The term "impairment" means "the state of being impaired." *Id*. (quotation marks and citation omitted). In turn, "impaired" means the state of (1) "being weakened, diminished, or damaged" or (2) "functioning poorly or inadequately." *Id*. (quotation marks and citation omitted). Although mere subjective complaints of pain and suffering are insufficient to show impairment, evidence of a physical basis for that pain and suffering may be introduced to show that the impairment is objectively manifested. *Id*. at 198. Medical testimony is generally, but not always, required to make this showing. *Id*. [*Patrick v Turkelson*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 336061); slip op at 5-6.]

An important body function is one that has value, significance, or consequence to the injured person. *McCormick*, 487 Mich at 199 (quotation marks omitted). To determine whether a person's general ability to lead his or her normal life has been affected, "a comparison of the plaintiff's life before and after the incident" is required. *Id*. at 202.

In evaluating whether a plaintiff has sustained a threshold injury, "the court should determine whether there is a factual dispute regarding the nature and the extent of the person's injuries, and, if so, whether the dispute is material to determining whether the serious impairment of body function threshold is met." *McCormick*, 487 Mich at 215. If there is no material factual dispute, "then whether the threshold is met is a question of law for the court." *Id*.

The parties all maintain that there are no material factual disputes precluding this Court from resolving this issue as a matter of law, but they differ regarding what the ostensibly undisputed facts indicate. It is plaintiffs' position that Julie cannot make a fist with her right hand and cannot fully bend her little finger. If this is true, Julie has suffered an impairment in that she has been "weakened, diminished, or damaged." *Id*. at 197 (quotation marks and citation omitted). Yet defendants rely on Dr. Drouillard's opinion that Julie is engaging in symptom

magnification and urge this Court to doubt the legitimacy of Julie's claimed impairment. Thus, the existence of a material factual dispute regarding whether Julie has suffered an objectively manifested impairment seems readily apparent.

Defendants argue that the Julie has not suffered an objective impairment and is instead relying solely on subjective symptoms. But plaintiffs provided medical records from Julie's physicians showing that the limited range of motion in her right little finger was observed by her doctor and occupational therapist. "Objective," in the context of the serious impairment threshold, means observable by others. *Patrick*, ___ Mich App at ___; slip op at 8. Julie's physicians observed, and thus seemingly confirmed, her impairment. To the extent that the doctors who performed the independent medical evaluations disagreed, there is a question of fact on the matter.

BC Lanes asserts that the x-rays and MRI were the only "objective examinations" of Julie's hand, apparently equating "objective examinations" with hard and indisputable medical evidence. But in *Patrick* we explained that "[t]he fact that some subjective testing methods are incorporated into [the] medical findings does not negate a conclusion that [the injured person's] impairment is objectively manifested." *Id*. Likewise, the examinations performed by Julie's orthopedic surgeon and occupational therapists did not lose their objectivity simply because they relied on Julie's "subjective verifications" of how far she could bend her finger. *Id*. at ___; slip op at 7.

Defendants seem to question the severity of Julie's impairment. As plaintiffs note, however, the objectively manifested impairment analysis focuses on the impairment, not the underlying injury. *McCormick*, 487 Mich at 197. Further, the Legislature defined "serious impairment of body function," and this Court must apply unambiguous statutory language as written. See *Kemp v Farm Bureau Gen Ins Co*, 500 Mich 245, 252; 901 NW2d 534 (2017). This Court is also bound by the interpretation of MCL 500.3135 our Supreme Court set forth in *McCormick*. See *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009). Arguments regarding the severity of Julie's impairment relate to whether Julie's general ability to lead a normal life has been affected.

On that note, we also discern a material factual dispute pertaining to whether Julie's claimed impairment has affected her general ability to lead her normal life. Plaintiffs maintain that Julie can no longer work as a cosmetologist. BC Lanes asserts that none of the cosmetology tasks identified by Julie "require the use of a pinky finger . . . ." Defendants also point to the testimony of one deponent suggesting that Julie continues to cut hair at home. Clearly, there is a factual dispute as to whether Julie can work as a cosmetologist, including whether she is in fact doing so in some capacity. Those disputes are material to whether her impairment has affected her general ability to lead her normal life. See *McCormick*, 487 Mich at 218.

In sum, when viewing the evidence in a light most favorable to plaintiffs, see *Maiden*, 461 Mich at 120, this is not a case where the injured person claimed an impairment solely on the basis of subjective complaints that were not observable by others. To the contrary, Julie's limited range of motion in her finger was observed by her physicians. Defendants' arguments concerning the legitimacy, or authenticity, of Julie's impairment present material questions of fact. There is also a material factual dispute pertaining to Julie's ability to lead her normal life.

Next, plaintiffs take issue with the dismissal of their dramshop claim, arguing that there is no question of fact that BC Lanes furnished alcohol to Anderson while he was visibly intoxicated. Because of the trial court's ruling on the serious impairment threshold, it did not address this issue. In light of our decision concerning the claim of a threshold injury, we decline to decide this issue at this juncture. On remand, the parties may pursue the matter before the trial court as appropriate.

Plaintiffs additionally argue that the trial court erred in granting defendant BC Lanes summary disposition with respect to their negligence claim. Although the trial court ultimately granted BC Lanes summary disposition of all of plaintiffs' claims, the court did not specifically explain the basis for doing so in connection with the negligence claim. However, because the issue presents a question of law, and the record presents all the facts necessary for its resolution, appellate review is not precluded. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). In doing so, we conclude that the trial court correctly dismissed plaintiffs' negligence claim.

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (footnote omitted). "[N]otwithstanding the exclusive remedy nature of the dramshop act, Michigan courts have long recognized that liquor licensees remain liable for breach of independent common-law duties." *Millross v Plum Hollow Golf Club*, 429 Mich 178, 186; 413 NW2d 17 (1987).

> [G]enerally merchants have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties. The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties. . . . [A] merchant is not obligated to do anything more than reasonably expedite the involvement of the police. [*Bailey v Schaaf*, 494 Mich 595, 613-614; 835 NW2d 413 (2013) (quotation marks omitted; first alteration in original), quoting *MacDonald v PKT, Inc*, 464 Mich 322, 338; 628 NW2d 33 (2001).]

In this case, we agree with BC Lanes that one could not reasonably conclude from the evidence offered that Anderson would "aggressively run Plaintiffs off the road after leaving the bowling center." In light of Anderson's limited interaction with plaintiffs while upon the premises, and the lack of any evidence that Anderson became hostile toward plaintiffs in particular, reasonable minds could not find that plaintiffs were in a state of danger foreseeable to BC Lanes. See *Bailey*, 494 Mich at 614. This holds true even if Anderson menaced two women in the women's restroom and reached a state of visible intoxication on the premises, because neither circumstance created a reasonable foreseeability that Anderson would later engage in what is commonly called road rage against plaintiffs. Accordingly, BC Lanes did not breach the

duty to protect its patrons from foreseeable crimes by third parties. See *id*. at 613-614. We therefore affirm the trial court's decision to summarily dispose of plaintiffs' negligence claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Anica Letica