

STATE OF MICHIGAN
COURT OF APPEALS

DARRYL LEE MONTPETIT,

Plaintiff-Appellant,

v

CHAZ ALLEN HOPKINS and KAREN HOPKINS,

Defendants-Appellees.

UNPUBLISHED

May 27, 2021

No. 353807

Iosco Circuit Court

LC No. 19-001667-NI

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM.

In this third-party automobile negligence action, plaintiff appeals as of right the trial court's ruling granting defendants' motion for summary disposition. For the reasons set forth in this opinion, we reverse.

I. BACKGROUND

This case arises out of an automobile accident involving plaintiff and defendant Chaz Allen Hopkins that occurred on March 28, 2018. According to the police report, the vehicle that Chaz was driving collided with the vehicle driven by plaintiff when Chaz made a left turn without yielding to plaintiff's right of way.¹

Plaintiff had previously been involved in a motorcycle accident in 2010, in which he suffered injuries to his neck, back, right hand, and right shoulder. Following that accident, plaintiff had undergone surgery on his neck, right hand, and right shoulder. At the time of the 2018 accident that is the subject of this case, plaintiff was on social security disability for his neck, back, right shoulder, and right hand injuries stemming from the 2010 motorcycle accident. These injuries caused plaintiff to have difficulty standing for long periods of time, bending, and lifting. At the

¹ Liability is not at issue in this action.

time of the 2018 accident, plaintiff was still continuing to experience neck and back pain, and he had been prescribed pain medication to treat those symptoms.

Plaintiff testified that during the March 28, 2018 crash, his “whole body twisted to the right” at the point of impact, his chest hit the steering wheel, and his head hit the windshield. He was wearing his seat belt, and the airbags did not deploy. Plaintiff further testified that at the scene of the accident, he felt pain in his chest, head, neck, and lower back. Plaintiff also claimed to have hurt his left hip in the accident. He also was in “shock” and “disbelief.” Plaintiff declined to be taken to the hospital.

The next morning, plaintiff woke up with “intensive pain” in his neck and lower back, as well as a headache and difficulty breathing. His father took him to the hospital, where plaintiff reported that he was experiencing lower back pain and neck pain radiating to the back of his head but denied experiencing headache, nausea, vomiting, or shortness of breath. The notes from this visit also indicate that plaintiff reported that he had chronic neck, lower back, and shoulder pain from a previous motorcycle accident. A CT scan of his cervical spine and x-rays of his thoracic and lumbar spines revealed postsurgical changes and possible muscular spasm in the cervical spine, mild degenerative changes in the lower thoracic spine, and palpable muscle spasm and mild degenerative changes in the lumbar spine with similar appearance to plaintiff’s 2017 examination. These medical notes also contain the conclusion that “Patient’s pain appears to be acute exacerbations of his chronic pain secondary to MVA.”

On August 14, 2018, plaintiff entered physical therapy at MidMichigan Rehabilitation Center. Despite treatment during multiple sessions over the course of approximately a month, plaintiff was still experiencing pain that “severely limit[ed] all activities and sleep” and returned to his doctor for further testing. On September 27, 2018, MRI scans taken of plaintiff’s cervical spine showed prior surgical changes “present at C5/C6 level,” “Broad-based subligamentous extrusion of the disc material . . . present at C2/C3 level,” and disc bulges “at C3/C4 level” and “C7/T1 level.” Plaintiff and his physician embarked on a series of injections. In the visit notes from plaintiff’s visit with Dr. Paul LeClair on November 15, 2018, LeClair noted plaintiff’s history of chronic neck and low back pain but indicated that plaintiff had “developed increased neck pain and also low back pain” following plaintiff’s most recent 2018 motor vehicle accident. LeClair also discussed the findings from plaintiff’s September 27 MRI scans.

In a January 6, 2020 letter, LeClair opined that plaintiff suffered aggravation of his chronic conditions as a result of the March 2018 accident, stating as follows:

Kindly be advised that our office has been treating [plaintiff] for injuries he sustained in the above noted motor vehicle accident [of March 28, 2018]. We are treating [plaintiff] for aggravation of some of his pre-motor vehicle accident conditions, in addition to the herniated discs at C2-3, and L4. These conditions were caused by the above-referenced accident, and were not present prior to the accident.

[Plaintiff]’s accident related treatment has included treatment and pain injections to the most affected areas, in addition to his left hip which is also directly related to referenced accident.

Plaintiff maintained that he continues to have residual pain caused by the March 28, 2018 accident in both his neck and his back that limits his ability to walk, bend, go hiking, go fishing, and do household chores. After the 2010 accident but before the 2018 accident, plaintiff was able to fish sometimes and go for short hikes of a “couple miles or so.” Plaintiff testified that after the 2018 accident, he could not hike as far without stopping to rest. When asked at his deposition if there was anything he could do before the 2018 accident that he could no longer do, plaintiff responded, “long hikes, spend[ing] time—a long period of time out fishing. You know, walking my dog.” Plaintiff explained that although he had gone fishing since the 2018 accident, he could not go very often because it was “kind of hard for me to get in and out of the boat.” Plaintiff also continued to ride his four-wheeler.

Plaintiff initiated this action, claiming that defendants’ negligence² had caused his injuries. Defendants moved for summary disposition,³ arguing that plaintiff had failed to demonstrate a genuine issue of material fact regarding whether he suffered a serious impairment of body function or suffered a sufficient aggravation of a preexisting condition as a result of the motor vehicle accident.

The trial court announced its ruling from the bench as follows:

I don’t think that the plaintiff has established a serious impairment, really hasn’t met the—the elements of that. We do have, in this instance, the 2010 accident, which, unfortunately, left [plaintiff] seriously disabled, (inaudible) so. He had to deal with daily pain from them [sic] on out. The documentation showing that he provided to the federal and state government with regard to disability, the checklist where he went through all of the things he had difficulty with, I certainly don’t think he could—well, let me back up. I don’t think there is a demonstration of an objective manifest impairment. He was impaired before this particular accident. At the time of the accident he, basically, said to the emergency personnel, “I’m fine”. He did go to the Emergency Room the next day, was looked over. They said he was fine. I understand that it has been difficult in the medical profession to get appointments, that sometimes there is a lag time, that you have to have a referral, and you can’t get the doctor to do it. I understand that. But, the fact of the matter that this is six months later, the MRI that shows the herniated disc, its so far in time from the accident itself, when the plaintiff himself said prior to the accident, and I understand there can be a shock situation, you think you’re fine and maybe a couple of days later, you are not. But this is six months later and in all that time he is living his life. I don’t know what could have happened to the man that would have resulted in herniated disc, but I think that MRI is too distant in time from the accident itself for anybody with any real medical certainty to say that that was the

² Plaintiff alleged that defendant Karen Hopkins owned the vehicle that Chaz was driving at the time of the accident.

³ Although defendants’ motion cited both MCR 2.116(C)(8) and (10), defendants indicated at the motion hearing that the motion was pursuant to (C)(10), and the trial court clearly considered the documentary evidence submitted by the parties. We therefore treat this motion as one under MCR 2.116(C)(10).

causation from that accident. So, I don't think there is a demonstration of an objective manifest impairment and I certainly don't think that there has been a demonstration that the impairment—any impairment hadn't affected the ability to lead their life normally. Unfortunately, [plaintiff's] normal was dealing with multiple disabilities and I don't think there has been any demonstration whatsoever that that changed from the time before this accident until the time after. So, I'm going to grant the Motion for Summary Disposition.

The trial court subsequently entered an order granting defendants' motion for summary disposition "for the reasons stated on the record." This appeal followed.

II. STANDARD OF REVIEW

"Appellate review of the grant or denial of a summary-disposition motion is de novo, and the court views the evidence in the light most favorable to the party opposing the motion." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Summary disposition may properly be granted under MCR 2.116(C)(10) if "[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." "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." *West*, 469 Mich at 183. "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted). At the summary disposition stage, a court may not weigh the evidence, make credibility determinations, or make factual findings because conflicting evidence on material issues makes granting summary disposition improper. *Id.* at 605-606.

III. ANALYSIS

Plaintiff argues that the circuit court erred in granting summary disposition to defendants because there are genuine issues of material fact whether plaintiff sustained a serious impairment of body function as a result of the March 28, 2018 accident, which affected his ability to lead his normal life. Plaintiff contends that the trial court's ruling was based on impermissibly making findings of fact in deciding the motion.

Under MCL 500.3135(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." The "serious impairment of body function" standard is the only type of threshold injury that is at issue in the present case. Pursuant to MCL 500.3135(5),⁴

⁴ MCL 500.3135(5) previously provided: "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(5), as amended by 2012

“serious impairment of body function” means an impairment that satisfies all of the following requirements:

(a) It is objectively manifested, meaning it is observable or perceivable from actual symptoms or conditions by someone other than the injured person.

(b) It is an impairment of an important body function, which is a body function of great value, significance, or consequence to the injured person.

(c) It 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 v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010), our Supreme Court held that the Legislature in MCL 500.3135 had set forth “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.” In this case, only the first and third prongs are at issue.

Considering the first prong, our Supreme Court held that the phrase “objectively manifested” means “an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function,”

PA 158. In the body of our opinion, we have quoted the current version of this statutory provision that took effect shortly after plaintiff initiated this action but well before the trial court issued its summary disposition ruling in this case. See 2019 PA 21; 2019 PA 22. However, as is evident from our discussion below of *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), the language of the recently amended version of MCL 500.3135(5) merely reflects the *McCormick* Court’s holding regarding the applicable standards for determining whether there was a serious impairment of body function. *McCormick* was decided in 2010 and we are undoubtedly bound by *McCormick* in resolving the instant case. Accordingly, we discern no substantive difference in also applying the current version of MCL 500.3135(5) considering its consistency with the holding in *McCormick*. Although we do not decide any potential retroactivity issues because they have not been formally presented or briefed by the parties on appeal, it appears that the current statutory language would apply in this case and we discern no retroactivity problem in doing so. See *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 570-571; 331 NW2d 456 (1982) (stating that “[a] statute is not regarded as operating retrospectively [solely] because it relates to an antecedent event” and that “[a] retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past”) (quotation marks and citations omitted; alterations in original).

i.e. an impairment that is “observable or perceivable from actual symptoms or conditions.” *Id.* at 196.

In this case, at the time of the 2018 accident at issue, plaintiff suffered from preexisting neck and back pain as a result of a 2010 motorcycle accident and plaintiff was on social security disability as a result of his preexisting conditions. However, the record also contains evidence in the form of medical records for plaintiff, a letter from one of plaintiff’s treating physicians, and plaintiff’s own testimony that plaintiff’s preexisting conditions were further aggravated by the 2018 accident. The record of plaintiff’s hospital visit from the day after the accident attributed plaintiff’s neck and back pain to an exacerbation of his preexisting chronic conditions. There was evidence that plaintiff then pursued a course of physical therapy without success in alleviating his increased impairment before being subjected to MRI scans.

A plaintiff’s recovery may be based on the *aggravation* of preexisting conditions. See *Wilkinson v Lee*, 463 Mich 388, 395-396; 617 NW2d 305 (2000) (“Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition.”). Furthermore, there was evidence that the aggravation of plaintiff’s conditions that constituted his impairment was observable in MRI images that showed disc extrusions and bulges that were *separate and distinct* from the changes attributable to his prior neck surgery that were also shown in the MRI images. A jury could reasonably conclude from such evidence that the impairment was observable or perceivable from actual symptoms or conditions by someone other than plaintiff. MCL 500.3135(5)(a); *McCormick*, 487 Mich at 196.

While the evidence that plaintiff was already on social security disability at the time of the 2018 accident, could not work, and was on prescription pain medication for his symptoms may suggest that his conditions were not aggravated by the 2018 accident, we do not weigh the strength of the evidence or resolve evidentiary conflicts on summary disposition. *Patrick*, 322 Mich App at 605-606. It is apparent from the trial court’s ruling that its decision was based on its view of the relative strength and credibility of the parties’ evidence, and the trial court erred by justifying its summary disposition ruling with impermissible findings of fact. *Id.* Viewing the evidence in the light most favorable to plaintiff as the nonmoving party, a genuine question of material fact exists whether plaintiff suffered an objectively manifested impairment. MCL 500.3135(5)(a); *McCormick*, 487 Mich at 195-196.

Regarding the third prong, the *McCormick* Court explained as follows:

Therefore, 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. By modifying “normal life” with “his or her,” the Legislature indicated that this requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis. 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.

There are several important points to note, however, with regard to this comparison. First, the statute merely requires that a person’s general ability to lead

his or her normal life has been *affected*, not destroyed. Thus, courts 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.

Second, and relatedly, "general" modifies "*ability*," not "affect" or "normal life." Thus, the plain language of the statute only requires that some of the person's *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. Thus, while the extent to which a person's general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person's normal manner of living is, there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected.

Third, and finally, 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." To begin with, there is no such requirement in the plain language of the statute. Further, MCL 500.3135(1) provides that the threshold for liability is met "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." While the Legislature required that a "serious disfigurement" be "permanent," it did not impose the same restriction on a "serious impairment of body function." [*McCormick*, 487 Mich at 202-203 (emphasis added).]

In this case, the trial court seemingly concluded that because plaintiff had preexisting disabilities, his normal manner of living could not be further affected by the 2018 accident. However, the trial court ignored the record evidence that plaintiff could not go for as long of hikes or fish as frequently as he had between 2010 and 2018 because it was difficult to get in and out of the boat. Viewing the evidence in the light most favorable to plaintiff, there is a genuine question of material fact regarding whether plaintiff's impairment affected his general ability to lead his normal life. MCL 500.3135(5)(c); *McCormick*, 487 Mich at 195. Notably, "there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected." *Id.* at 203. The trial court therefore erred with respect to the third prong as well.

Because there were genuine issues of material fact, the trial court erroneously granted defendants' motion for summary disposition. Accordingly, we reverse.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff having prevailed is entitled to costs. MCR 7.219.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ James Robert Redford