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STATE OF MICHIGAN

COURT OF APPEALS

JULIA MICKENS,

Plaintiff-Appellee,

v

MEEMIC INSURANCE COMPANY and APRIL NICKERSON,

Defendants,

and

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, also known as SMART,

Defendant-Appellant.

UNPUBLISHED
December 28, 2021

No. 354694
Wayne Circuit Court
LC No. 19-002121-NI

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

BORRELLO, P.J. (*dissenting*).

This case illustrates the unremarkable proposition that the mere fact that an incident is captured on video does not place any conclusion about liability beyond dispute. As in this case, the video is not clear about how certain material events transpired due to the angles of the camera, lack of adequate light, or weather conditions, all of which played a role in making the specific video at issue here particularly difficult to fully comprehend with any degree of certainty. The video undisputedly reflects that it was dark outside and that precipitation was falling. The video shows views from multiple cameras simultaneously, and it is difficult to tell whether, or how accurately, these different views are synchronized given that the cameras appear to be located at different points along the length of the bus. This makes it difficult to accurately ascertain the sequence of events during this incident. Because it is possible to reasonably reach different conclusions from this video evidence, just as witnesses to an event may perceive and remember events differently, I conclude that there are genuine issues of material fact as further explained below, and I would affirm the trial court's ruling. Further, I believe the majority's analysis

fundamentally rests on improper judicial fact finding at the summary disposition stage under the guise of resolving this case as a matter of "law." For these reasons, I respectfully dissent.

I. BACKGROUND

This case arises out of a collision between defendant SMART's[1] bus and plaintiff's SUV that occurred as the two vehicles drove side-by-side through an intersection. April Nickerson, an employee of defendant, was driving defendant's bus at the time. No passengers were on the bus. The bus was equipped with cameras that recorded the accident.

As the majority correctly notes, Nickerson was driving the bus between 6:30 p.m. and 6:45 p.m. on a February evening. However, the majority omits that it was dark outside and that it was raining or snowing at the time. My review of the video leads me to conclude, contrary to the majority's apparent contention that the video is so clear as to make it proper to resolve this case as a matter of law, that the video is inherently *unclear* due to the extremely poor visibility. In fact, all the video makes clear is that it is difficult to see much what actually occurred.

That is not to conclude that the video is useless, to the contrary, the video does show Nickerson driving in the right lane of Valley View Road as she approached the intersection with Evergreen Road. It also shows that Nickerson stopped the bus behind two cars at a traffic light. There were no cars visible in the left lane immediately next to the bus, but the video shows that headlights could be seen behind the bus in the left lane as the vehicles were stopped at the traffic light.[2]

There was a construction barricade in the left lane of Valley View Road, after the traffic light and before the road completely merged with southbound Evergreen Road. Because of this barricade, the left lane was closed and only the right lane was open to use for turning left onto Evergreen Road. Nickerson testified in her deposition that when she stopped the bus at the traffic light, she saw that traffic was reduced to one lane ahead due to the construction. Although it is difficult to tell from the video, Nickerson testified that she stopped the bus with the front half in the right lane and the back half in the left lane so that she was blocking both lanes of traffic.

The video shows that when the traffic light turned green, plaintiff's vehicle began to move forward and pulled alongside the driver's side front window of the bus, approximately even with Nickerson's seat. Nickerson also followed the vehicles in front of her and proceeded through the intersection to make her left turn. Nickerson acknowledged the presence of plaintiff's vehicle alongside her by stating, "That's why I was blocking you." Nickerson testified at her deposition that as she proceeded through the intersection, she maneuvered the bus completely into the right lane. She further testified that "[t]here was a vehicle on the side of me trying to beat—to go around me, and when they saw the construction barricade they hit their brakes hard, and when they did

[1] Because this appeal only involves defendant SMART, and MEEMIC and April Nickerson are not parties to the instant appeal, I will refer to SMART as "defendant."

[2] The video consists of multiple camera views, apparently from separate cameras mounted on different locations on the bus.

they hit the side rear of the bus." The video reflects that plaintiff's vehicle braked as it was alongside the bus and before the construction barricade and that the bus continued past the vehicle as the bus completed its left turn. A scraping sound can be heard on the video as the bus passes plaintiff's vehicle.

However, it is unclear from the video whether either the bus or plaintiff's vehicle strayed from their respective lanes immediately preceding the impact. It is also unclear whether plaintiff's vehicle had come to a complete stop or was still moving forward when the impact occurred. Unlike the majority, I cannot conclude from the video that plaintiff's vehicle undisputedly "drifts out of the left-hand lane into the right-hand lane." I cannot glean from the video--given the poor visibility resulting from combination of the dark and rainy or snow conditions, as well as the nature of the various camera angles, whether plaintiff's vehicle veered into the bus or whether plaintiff's vehicle remained in its lane as the bus veered slightly into plaintiff's lane while the bus turned. As further explained below, resolution of this factual question is of crucial importance, and thus material, to the determination whether governmental immunity applies. Because of this genuine issue of material fact, resolution of this matter on summary disposition is improper.

The trial court denied defendant's motion for summary disposition with respect to governmental immunity, determining that the video and other record evidence established a question of fact to be decided by a jury regarding whether Nickerson was negligent and caused the accident. The trial court further concluded that there was a question of fact regarding the comparative fault of Nickerson and plaintiff, and the trial court denied defendant's summary disposition motion grounded on defendant's argument that plaintiff was more than 50% at fault. The trial court also concluded that there were questions of fact regarding whether plaintiff suffered a serious impairment of body function and denied defendant's motion for summary disposition on that basis. Defendant has challenged all three of these rulings on appeal.

II. STANDARD OF REVIEW

We review de novo a trial court's ruling regarding a motion for summary disposition. *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009). In *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012), this Court explained the relevant standard of review in a case involving a claim of governmental immunity:

> This Court reviews de novo a trial court's decision on a motion for summary disposition. The applicability of governmental immunity and the statutory exceptions to immunity are also reviewed de novo on appeal. MCR 2.116(C)(7) provides for summary disposition when a claim is "barred because of . . . immunity granted by law . . . ." The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. We must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." But when a relevant factual dispute does exist, summary disposition is not appropriate. [Citations omitted; ellipses in original.]

As for a motion under MCR 2.116(C)(10), summary disposition is proper if

> there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. 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. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotations marks and citations omitted).]

III. ANALYSIS

A. MOTOR-VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY

On appeal, defendant first argues that it was entitled to summary disposition on the basis of governmental immunity because the "evidence of record fails to establish any 'negligent operation' of the SMART bus in this case," and the motor-vehicle exception therefore did not apply. Although defendant acknowledges that plaintiff and Nickerson provided conflicting accounts of how the accident occurred, defendant maintains on appeal that plaintiff's version is "totally rebutted by all other evidence of record."

Section 7 of the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides in relevant part that "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The parties in this case do not dispute that defendant is a governmental agency that was engaged in the exercise or discharge of a governmental function. Nonetheless, a governmental agency may still be held liable under the GTLA "if a case falls into one of the enumerated statutory exceptions." *Moraccini*, 296 Mich App at 392. Under what is often referred to as the motor-vehicle exception,[3] "[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the *negligent operation* by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405 (emphasis added).

The issue as framed by the parties' arguments is whether there was evidence creating a question of fact that Nickerson was negligent in operating defendant's bus. Pursuant to MCL 691.1405, there must be evidence of "negligent operation" of the motor vehicle for defendant to be liable.[4] MCL 691.1405; see also *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 436; 824 NW2d 318 (2012). "In order to establish a prima facie negligence claim, a plaintiff must prove four elements: (1) duty, (2) breach of the duty, (3) causation, and (4)

[3] See *Hannay v Dep't of Transp*, 497 Mich 45, 50; 860 NW2d 67 (2014).

[4] There is no dispute that Nickerson was driving defendant's bus and that she was defendant's agent or employee.

damages." *Seldon*, 297 Mich App at 433. The question of duty is a threshold issue of law for the court to decide. *Id.*

Defendant argues that because the left lane in which plaintiff was driving was closed by the construction barricade, Nickerson was the "favored" driver with the right of way driving in the right lane and that plaintiff was the "subordinate" driver with a duty to yield the right of way to Nickerson. Accordingly, defendant maintains, Nickerson did not breach a duty of ordinary care where the evidence shows that plaintiff came from behind Nickerson, attempted to pass the bus on the left, moved into the right lane occupied by the bus after encountering the construction barricade in the left lane, and struck the side of the bus.

However, plaintiff argues that this same evidence—including Nickerson's deposition testimony and the bus video on which defendant relies so heavily—demonstrates that Nickerson occupied more than one lane of traffic, that Nickerson was aware before the accident occurred that plaintiff's vehicle was attempting to pass the bus on the left and that the left lane was blocked by a construction barrier, and that Nickerson failed to allow plaintiff to merge into the right lane as the left lane was ending. Plaintiff maintains that this evidence shows that Nickerson breached her duty of care and that the trial court was therefore correct to rule that there was a question of material fact to be decided by a jury.[5]

Contrary to defendant's argument, even if defendant is correct that Nickerson was the favored driver with the right of way because the lane in which plaintiff was driving was closed ahead of the two drivers, such a conclusion does not necessarily establish *as a matter of law* that Nickerson was not negligent and that defendant was entitled to summary disposition on the basis of governmental immunity. A favored driver with the right of way "is entitled to assume that subordinate drivers will yield [her] the right of way" and "is not bound to anticipate unlawful or negligent acts on their part." *McGuire v Rabaut*, 354 Mich 230, 234; 92 NW2d 299 (1958). However, the favored driver is also "not permitted to lower [her] head, close [her] eyes, and charge blindly through intersections on the theory that such is [her] 'right' simply because [she] is the favored driver." *Id.* at 235. The favored driver retains a "duty to exercise reasonable care under the circumstances." *Id.*

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[5] On appeal, plaintiff does not rely on her alleged version of the accident to which she testified in her deposition (which was substantially different than the version presented by Nickerson and shown in the video) to claim that a question of fact exists. It appears from this omission and the nature of the argument she advances in her brief that she concedes that the video makes clear that the accident did not occur as she claimed it had in her deposition testimony. I therefore do not rely on the description of the accident in plaintiff's deposition to conclude that a question of fact exists. As I understand it, the issue presented to us is whether the video and other evidence, which appears to be more or less consistent and undisputed in describing the accident, provides evidence that Nickerson was negligent such that there is a question of fact regarding her negligence that would make summary disposition inappropriate. As explained in my analysis, I conclude that the trial court did not err by determining that there were questions of fact related to Nickerson's negligence based on this record evidence.

The favored driver is entitled to rely on the assumption that subordinate drivers will yield the right of way to the favored driver until the favored driver becomes "aware, or as a reasonably prudent driver should be aware, that [her] right-of-way is being challenged," at which point a duty arises for the favored driver to exercise due care and "take steps to avoid collision with a subordinate driver who ventures into [her] path." *DePriest v Kooiman*, 379 Mich 44, 46; 149 NW2d 449 (1967) (quotation marks and citation omitted). "The favored driver is thus not required to have [her] car under such control as to be able to avoid collision with a subordinate driver coming illegally into [her] path," but a duty of care for her own protection and with respect to the subordinate driver arises if the favored driver's required continuing observations while driving "reveal, or should reveal to the reasonably prudent [person], an impending danger," and the favored driver's "post-observation negligence, or lack thereof, is measured by [her] actions after this point." *McGuire*, 354 Mich at 236. "If [she], at this point, does not act with reasonable care [she] may be forced to respond in damages, but reasonable care at this point is the care of one confronted with an emergency not of [her] creation, in the light of which [her] actions will be judged." *DePriest*, 379 Mich at 46-47 (quotation marks and citation omitted).

In this case, the video shows plaintiff's vehicle attempting to pass the bus on Nickerson's left as the vehicles were moving through the intersection, and the video also shows the upcoming construction barricade in the left lane. Plaintiff's vehicle was behind and to the left of the bus while the two vehicles were stopped at the red light, but plaintiff's vehicle was approximately even with the front of the bus shortly after the light turned green and before either vehicle reached the construction barricade. Nickerson verbally acknowledges the presence of plaintiff's vehicle on the video by stating, "That's why I was blocking you." Further, Nickerson testified in her deposition that the vehicle alongside the bus was trying to "beat" or "go around" the bus. Accordingly, the video and Nickerson's observations as she drove provide evidence that Nickerson was aware, or that a reasonably prudent driver should have been aware, that Nickerson's right of way was being challenged or that there was an impending danger such that a duty arose for Nickerson to exercise reasonable care to avoid a collision with plaintiff. *DePriest*, 379 Mich at 46-47; *McGuire*, 354 Mich at 236.

Whether Nickerson was negligent depends on her actions after this point. *McGuire*, 354 Mich at 236. The video shows that after Nickerson observed plaintiff's vehicle alongside the front of the bus, Nickerson proceeded with her turn without making any apparent adjustment in her driving. Nickerson testified that she saw the construction barricade and knew that the left lane was closed ahead. The video also shows that plaintiff's vehicle braked as it was alongside the bus and before the construction barricade. The video does not clearly show whether both vehicles stayed inside their respective lanes or if one or both may have strayed from their respective lanes immediately preceding the impact between the two vehicles. Additionally, it is unclear whether plaintiff's vehicle was stationary or moving at the time of impact. The bus was driving forward and completing its left turn as the two vehicles scrapped each other.

"Once a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury. The jury must decide whether the defendant breached the legal duty owed to the plaintiff, that the defendant's breach was the proximate cause of the plaintiff's injuries, and thus, that the defendant is negligent." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992) (citation omitted).

Here, a reasonable jury could decide that Nickerson, after having observed plaintiff attempting to go around her, should have slowed down and let plaintiff merge in front of her so plaintiff could avoid the impending construction barricade. A jury could further conclude that Nickerson's failure to follow such a course of action constituted a breach of her duty of reasonable care that proximately caused the accident.[6] However, a jury could also reasonably conclude that such action by Nickerson would have created further problems for her and other drivers in light of the surrounding traffic and weather conditions[7] and that Nickerson properly continued with her turn because plaintiff had time to stop and wait for a chance to merge safely after the bus had passed. Based on such a finding, a jury could conclude that Nickerson was not negligent and that plaintiff's negligence proximately caused the accident. It is also unclear from the record evidence whether plaintiff drove into Nickerson's lane and hit the bus or whether the bus drifted into plaintiff's lane after plaintiff stopped. These are further factual questions bearing on causation and breach that the jury must resolve in order to determine whether Nickerson acted with reasonable care after observing the danger presented by plaintiff's vehicle. Moreover, in reviewing this motion for summary disposition, we must view the evidence in the light most favorable to plaintiff as the non-moving party. *Moraccini*, 296 Mich App at 391; *Zaher*, 300 Mich App at 139-140. The majority's opinion demonstrates a failure to view the evidence in the light most favorable to the non-moving party.

"If underlying issues of fact exist regarding whether a party is entitled to immunity granted by law, it is proper for the jury to decide those facts." *Regan v Washtenaw Co Bd of Co Rd Comm'rs*, 249 Mich App 153, 163 n 9; 641 NW2d 285 (2002), remanded for reconsideration on other grounds sub nom by *Regan v Washtenaw Co Rd Comm*, 468 Mich 851 (2003); see also *Riddle*, 440 Mich at 96; *Moraccini*, 296 Mich App at 391; *Zaher*, 300 Mich App at 139-140. In this case, because there are unresolved material factual disputes related to determining whether there was negligent operation of the bus as required for the motor vehicle exception to apply and, concurrently, whether plaintiff's claims were barred by governmental immunity, defendant has not

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[6] Defendant's appellate argument on this issue does not include any argument regarding proximate cause and instead focuses solely on defendant's contention that Nickerson could not have breached any duty as a matter of law because she was the favored driver. We have therefore confined our analysis accordingly. Because defendant has failed to show that Nickerson could not be negligent as a matter of law under these circumstances simply because she was the driver with the right of way, defendant has not demonstrated that the trial court erred by denying defendant's motion for summary disposition on governmental immunity grounds.

[7] A driver's general duty of care requires a driver to "make reasonable allowance for traffic conditions, for fog, snow, or other adverse weather conditions, and for curves and road conditions." *DePriest*, 379 Mich at 46 (quotation marks and citation omitted). Although this general duty does not require a favored driver to "anticipate" that her right of way will be challenged by a subordinate driver, the duty to take reasonable steps to avoid a collision with a subordinate driver who actually challenges the favored driver's right of way arises once the favored driver becomes aware or should be aware that her right of way is being challenged. *Id.* (quotation marks and citation omitted).

demonstrated that the trial court erred by denying defendant's motion for summary disposition with respect to the application of governmental immunity.

B. COMPARATIVE NEGLIGENCE

Next, defendant argues that plaintiff's action is barred under MCL 500.3135(2)(b) because there is no question of material fact that plaintiff was more than 50% at fault.

MCL 500.3135 provides in relevant part as follows:

> (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.
>
> (2) For a cause of action for damages under subsection (1) or (3)(d), all of the following apply:
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> * * *
>
> (b) Damages must be assessed on the basis of comparative fault, except that damages must not be assessed in favor of a party who is more than 50% at fault.

As stated earlier, the motor vehicle exception to governmental immunity provides that "[g]overnmental agencies shall be *liable for bodily injury* and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405 (emphasis added). Our Supreme Court has explained the relationship between the motor vehicle exception and the limitations on general tort liability contained in the no-fault act:

> We conclude that the phrase "liable for bodily injury" contained in the motor vehicle exception means legally responsible for damages flowing from a physical or corporeal injury to the body. More simply, "bodily injury" is merely the category of harm for which governmental immunity from tort liability is waived under MCL 691.1405 and for which damages that naturally flow are compensable. Moreover, the restrictions on damages recoverable in third-party tort actions involving motor vehicle accidents set forth in MCL 500.3135 of the no-fault act, MCL 500.3101 *et seq*., apply to cases permitted by the waiver of governmental immunity provided for in the motor vehicle exception. We therefore hold that a plaintiff may bring a third-party tort action for economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements of MCL 500.3135 have been met. [*Hannay v Dep't of Transp*, 497 Mich 45, 51; 860 NW2d 67 (2014).]

Based on this holding in *Hannay*, plaintiff is incorrect in arguing that defendant's claim of error under MCL 500.3135(2)(b) is not related to the trial court's denial of governmental immunity

and thus outside the scope of defendant's appeal as of right. See MCR 7.202(6)(a)(v);[8] MCR 7.203(A)(1).[9] Satisfying the requirements of MCL 500.3135 is necessary for a plaintiff to avoid governmental immunity under the motor vehicle exception. *Hannay*, 497 Mich at 51. Hence, this issue is clearly within the scope of defendant's appeal as of right. MCR 7.202(6)(a)(v); MCR 7.203(A)(1).

"[C]omparative negligence is an affirmative defense . . . adopted . . . to promulgate a fair system of apportionment of damages." *Riddle*, 440 Mich at 98 (quotation marks and citation omitted). "The standards for determining the comparative negligence of a plaintiff are indistinguishable from the standards for determining the negligence of a defendant, and the question of a plaintiff's own negligence for failure to use due care for [her] own safety is a jury question unless all reasonable minds could not differ or because of some ascertainable public policy consideration." *Rodriguez v Solar of Mich, Inc*, 191 Mich App 483, 488; 478 NW2d 914 (1991). "Under this doctrine, a defendant may present evidence of a plaintiff's negligence in order to reduce liability." *Riddle*, 440 Mich at 98. "[B]efore a plaintiff's fault can be compared with that of the defendant, it obviously must first be determined that the defendant was negligent." *Id*. at 99 (quotation marks and citation omitted).

In this case, defendant specifically contends on appeal that the accident was "caused as a result of Plaintiff's own negligence, not as a result of any negligence in the operation of Defendant SMART's bus." However, as discussed earlier, there are questions of material fact to be resolved by a jury regarding whether Nickerson was negligent. As such, there is no basis on which to engage in a comparison of fault between Nickerson and plaintiff even assuming for the sake of argument that plaintiff as the subordinate driver was negligent in causing the situation that gave rise to Nickerson's duty to act with reasonable care to avoid the collision.[10] *Id*. at 98-99.

My discussion in Part III.A. of this opinion explaining the questions of fact regarding Nickerson's negligence also makes evident that there are similar questions of fact with respect to plaintiff's negligence. *Rodriguez*, 191 Mich App at 488. For example, it is unclear from the video whether plaintiff stopped and remained in her lane to let the bus pass, only to be hit by the bus as it turned and veered from its own lane. If a jury were to so conclude, which it reasonably could do, plaintiff's degree of fault would be substantially less than if she had caused the collision by straying from her lane and turning into the bus as defendant claims. Viewing the evidence in a light most favorable to plaintiff as the nonmoving party, there are questions of material fact

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[8] MCR 7.202(6)(a)(v) provides that a final order in a civil case includes "an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity."

[9] MCR 7.203(A)(1) generally provides this Court with jurisdiction over an appeal of right filed by an aggrieved party from a final order as defined in MCR 7.202(6). However, "[a]n appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right." MCR 7.203(A)(1).

[10] Plaintiff does not concede that she was negligent.

regarding the negligence of both parties such that it cannot be concluded as a matter of law that plaintiff was more than 50% negligent. Therefore, defendant has not shown that the trial court erred by concluding that there was a question of fact regarding comparative negligence and denying defendant's motion for summary disposition based on MCL 500.3135(2)(b). *Rodriguez*, 191 Mich App at 488; *Zaher*, 300 Mich App at 139-140.

C. THRESHOLD INJURY

Finally, defendant argues that it was entitled to summary disposition because there was no genuine issue of material fact that plaintiff did not suffer a serious impairment of body function under MCL 500.3135.[11]

MCL 500.3135 provides in pertinent part as follows:

> (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.
>
> (2) For a cause of action for damages under subsection (1) or (3)(d), all of the following apply:
>
> (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. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.
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> * * *

[11] As previously explained, satisfying the requirements of MCL 500.3135 is necessary for a plaintiff to avoid governmental immunity under the motor vehicle exception. *Hannay*, 497 Mich at 51. Accordingly, this issue is also within the scope of defendant's appeal as of right, MCR 7.202(6)(a)(v); MCR 7.203(A)(1), contrary to plaintiff's appellate argument.

> (5) As used in this section, "serious impairment of body function" means an impairment that satisfies all of the following requirements:
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> (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 there are "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."

Here, defendant first argues on appeal that plaintiff cannot demonstrate a serious impairment of body function because plaintiff's medical records from before the accident demonstrate she had pre-existing conditions. Defendant relies on medical records from as much as approximately five years before the accident at issue in this case. However, defendant fails to consider that "[r]egardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition." *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000).

Plaintiff claims she suffered a serious impairment of body function based on injuries to her spine and shoulders. She testified in her deposition that before the accident she did not have aches and pains of the type she experienced after the accident. Plaintiff also submitted post-accident medical records indicating that she did not have complaints of neck or back pain before the accident and that MRI testing completed after the accident at issue in this case showed multiple disc bulges and possible nerve root irritation in her spine, as well as tears in both shoulders. Finally, plaintiff submitted affidavits by her treating doctors indicating that plaintiff's medical records, including the MRIs, showed objective findings of impairment to plaintiff's spine and shoulders that, to a reasonable degree of medical certainty, were caused or aggravated by the subject motor vehicle accident.

Thus, contrary to defendant's assertions that there are no material factual disputes regarding the nature and extent of plaintiff's injuries, I glean from the record a number of unresolved factual issues relative to plaintiff's injuries.

Defendant next argues that plaintiff's alleged injuries consist only of subjective complaints of pain. "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." *Patrick v Turkelson*, 322 Mich App 595, 607; 913 NW2d 369 (2018), citing *McCormick*, 487 Mich at 198. "Medical testimony is generally, but not always, required to make this showing." *Patrick*, 322 Mich App at 607, citing *McCormick*, 487 Mich at 198. As previously discussed, plaintiff's medical records indicate there is a physical basis for her complaints of pain that was observable or perceivable by her treating doctors. In *McCormick*, our Supreme Court held that 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," which is "commonly understood as one observable or perceivable from actual symptoms or conditions." *McCormick*, 487 Mich at 196.

Accordingly, defendant's claim on appeal that plaintiff only relies on subjective complaints of pain is belied by the record evidence. Because there is evidence from which a jury could conclude that plaintiff suffered an objective impairment that had a physical basis that was perceivable by others, plaintiff established a question of fact on this issue such that summary disposition would have been improper. *Id.*

Defendant's arguments center around its contention that plaintiff's claims of injury are not believable because she did not seek medical treatment immediately after the accident and because plaintiff's deposition testimony appeared to be inaccurate as compared to various medical records. However, the record also contains plaintiff's medical records of treatment following the accident in which her doctors document objective findings regarding impairments to her spine and shoulder obtained from MRIs, and the record also contains affidavits from defendant's doctors opining that plaintiff's impairments were caused or aggravated by the subject accident. Thus, defendant's arguments can actually be understood as an invitation for this Court to engage in weighing the relative strength of the evidence and improper fact finding, contrary to the proper standard of review. We may not weigh evidence, make credibility determinations, or engage in fact finding when reviewing a motion for summary disposition, and summary disposition is not properly granted if there is conflicting record evidence. *Patrick*, 322 Mich App at 605-606. Genuine issues of material fact exist regarding whether plaintiff suffered an objectively manifested impairment because "the record, giving the benefit of reasonable doubt to the [plaintiff as the nonmoving] party, leaves open an issue upon which reasonable minds might differ." *Id.* (quotation marks and citation omitted).

Finally, defendant argues that plaintiff did not satisfy the third *McCormick* prong, requiring that the impairment "affects the person's general ability to lead his or her normal life," *McCormick*, 487 Mich at 195. The *McCormick* Court held 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. [*Id.* at 202.]

In this case, plaintiff testified that before the subject accident, she enjoyed walking at the mall and exercising at home. Plaintiff further testified that after the accident, she could exercise "somewhat," but had to slow down and stop sometimes, and she could only walk at the mall for approximately half as long as she could before the accident. Defendant argues on appeal that it was entitled to summary disposition based on plaintiff's failure to satisfy the third *McCormick* prong because the "evidence of record establishes that there was extremely minimal, if any, affect upon Plaintiff Mickens' general ability to lead her normal life after the bus incident versus before."

However, defendant's argument misconstrues the relevant legal standard. The "statute merely requires that a person's general ability to lead his or her normal life has been *affected*, not destroyed," and "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." *McCormick*, 487 Mich at 202. "[T]he 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." *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. Under this standard, plaintiff submitted evidence creating a question of fact regarding whether her general ability to lead her normal life was affected. Merely characterizing the affect is "minimal," which is the extent of defendant's appellate argument, does not demonstrate that the trial court erred by determining that there was a question of fact on this issue. *Id*.

Viewing the evidence in the light most favorable to plaintiff as the nonmoving party, defendant has not established that the trial court erred by denying defendant's motion for summary disposition based on the threshold injury requirement. *Zaher*, 300 Mich App at 139-140.

For the reasons set forth above, I respectfully dissent from the majority opinion and would affirm the trial court's ruling.

/s/ Stephen L. Borrello