

STATE OF MICHIGAN
COURT OF APPEALS

JERILYN NADINE GURLEY,

Plaintiff-Appellant,

v

RUSSELL CHARLES GARTHA and CITY OF
SOUTHFIELD,

Defendants-Appellees.

UNPUBLISHED

January 13, 2022

No. 356988

Oakland Circuit Court

LC No. 2019-178374-NI

Before: BOONSTRA, P.J., and CAVANAGH and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order granting summary disposition in favor of defendants, City of Southfield (the City) and Officer Russell Charles Gartha. On appeal, plaintiff argues that the trial court erred in ruling that (1) plaintiff’s injuries were not caused by the motor vehicle accident, or alternatively, the injuries did not amount to an objectively manifested serious impairment of body function to warrant benefits under the no-fault act, MCL 500.3101 *et seq.*; and (2) Gartha was entitled to governmental immunity under the Governmental Tort Liability Act, MCL 691.1401 *et seq.* We affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. FACTS AND PROCEDURAL BACKGROUND

This case arises from a motor vehicle accident at the intersection of Eight Mile Road and the Southfield Freeway in the City of Southfield.

In May 2019, Russell Gartha, a Southfield police officer, was operating a vehicle owned by the City. Gartha received a call from another officer, requesting backup assistance with a traffic stop at Eight Mile Road and Northland Road. In response to the call, Gartha drove southbound on the Southfield Freeway, exiting the freeway at Eight Mile Road. At the intersection, Gartha turned left onto eastbound Eight Mile Road, driving toward the Eight Mile Road and northbound Southfield Freeway frontage road intersection. Meanwhile, plaintiff was driving her vehicle on the northbound Southfield Freeway frontage road. Plaintiff was stopped at a red light at the Eight Mile Road intersection. The traffic light turned green and plaintiff began to enter the intersection.

At the same time, Gartha, traveling at about 35 miles per hour, entered the intersection on a “solid red” light without “emergency lights or sirens,” saw plaintiff enter the intersection, and pressed his brakes. However, Gartha’s and plaintiff’s vehicles collided in the intersection. Plaintiff stated that she was okay when asked by Gartha. Southfield Police Officer Dennis Koczara arrived at the accident scene shortly thereafter to document the accident. After about 45 minutes, plaintiff’s daughter arrived at the scene and drove plaintiff home.

The next day, plaintiff began to experience pain in her neck and eyes, and had a headache. Plaintiff went to Providence Hospital and underwent a CT scan of her head and neck, “which were both unremarkable.” Shortly thereafter, plaintiff was treated by Dr. Louis Radden for neck pain, who prescribed her Motrin 800 medication. Additionally, plaintiff was referred to and was treated by Dr. Daniel L. Lin for her blurry vision and dry eye, who prescribed her eyedrops and different glasses, and Dr. Tessy C. Jenkins for nerve damage and pain in her neck, who prescribed her pain medication.

Plaintiff filed a complaint against defendants, alleging that Gartha operated the vehicle in a grossly negligent and inattentive manner, in violation of duties owed under the Michigan Vehicle Code, MCL 257.923 *et seq.* Because the City was the owner of the vehicle driven by Gartha, plaintiff further alleged that the City was vicariously liable under MCL 257.401, and for the gross and negligent entrustment of its vehicle to Gartha. Plaintiff alleged that she sustained serious and grievous injuries:

To her spine, neck, back, knees, head, eyes, and to the muscles and ligaments in said areas, and to the legs, knees, ankles and arms, and injuries generally throughout the entire body, plus emotional sequelae, and sustained injuries and aggravations to pre-existing conditions whether known or unknown at the time.

In answer, defendants denied the allegations, asserting that plaintiff did not sustain a serious impairment of body function that warranted no-fault benefits and, regardless, plaintiff’s claims were barred by governmental immunity.

Defendants moved for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10). Defendants argued that plaintiff failed to demonstrate her injuries crossed the no-fault threshold, i.e., a serious impairment of body function affecting her ability to lead a normal life, or present evidence her injuries were causally related to the accident. Specifically, defendants asserted that no medical experts were identified that linked plaintiff’s injuries to the accident; instead, the expert witnesses established that plaintiff’s injuries were degenerative and failed to reveal any abnormal conditions related to the accident. Likewise, defendants argued that plaintiff’s subjective claims of injury and pain were not objectively verified by an expert witness to establish a serious impairment of body function that actually affected her ability to lead her normal life. Defendants also argued that the record did not support that Gartha’s conduct, in responding to a call for backup, amounted to gross negligence and, therefore, Gartha was entitled to governmental immunity.

In response, plaintiff argued that the injuries documented by her treating physicians, Dr. Radden, Dr. Lin, and Dr. Jenkins, established an objectively manifested and serious impairment which affected her ability to lead her normal life. Plaintiff also asserted that defendants’ medical

experts agreed that plaintiff suffered from a chronic pain disorder, cervical strain, multiple spinal anomalies, and posttraumatic headaches. Moreover, plaintiff asserted that a clear question of fact regarding causation arose from Dr. Jenkins's affidavit, which established that plaintiff suffered injuries from the accident that were not preexisting conditions. Plaintiff further argued that Gartha was grossly negligent by operating his vehicle in a reckless manner and in violation of several vehicle emergency operation protocols, which Gartha himself admitted was negligent. Plaintiff pointed to the traffic crash report, prepared by Sergeant Aaron Hughley and Officer Koczara, which stated that Gartha engaged in hazardous behavior by disregarding the red light without emergency lights or sirens activated.

The trial court, without a hearing, granted defendants' motion for summary disposition. While recognizing defendants' concession that Gartha was negligent, the trial court concluded that "reasonable minds could not differ in concluding that Gartha was not grossly negligent; that his conduct was not so reckless as to demonstrate a substantial lack of concern for whether an injury results." The trial court thus determined that Gartha was entitled to governmental immunity. The trial court also determined that plaintiff's providers' records did not establish causation because they only showed "degenerative changes" and "mild cognitive impairment not related to the accident." Further, the trial court concluded that Dr. Jenkins's affidavit was inadmissible "because she was not identified as an expert and her affidavit was created and produced after the close of discovery, essentially to attempt to create a question of fact as to the TBI," after the motion for summary disposition was filed. As a result, the trial court reasoned that there was a factual dispute as to the nature and extent of plaintiff's injuries "but the dispute is not material to whether the plaintiff has suffered serious impairment of a body function, because [p]laintiff has not shown that she suffered an objectively manifested impairment."

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 229; 964 NW2d 809 (2020). Under MCR 2.116(C)(7), summary disposition is appropriate "because of . . . immunity granted by law." Under MCR 2.116(C)(10), summary disposition is appropriate when "there is no genuine issue as to any material fact."

Further, this Court reviews questions of law, including the applicability of governmental immunity, de novo. *Wood v Detroit*, 323 Mich App 416; 917 NW2d 709 (2018). Likewise, this Court also reviews de novo whether the trial court properly interpreted and applied the relevant statutes. *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019).

B. GOVERNMENTAL IMMUNITY

Plaintiff argues that the trial court erred in concluding that Gartha was entitled to governmental immunity because his conduct rose to the level of gross negligence. We disagree.

An employee of a governmental agency is immune from tort liability for an injury to a person if the employee "is acting or reasonably believes he or she is acting within the scope of his

or her authority[.]" the "governmental agency is engaged in the exercise or discharge of a governmental function[.]" and the employee's conduct "does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(a)-(c). Gross negligence is statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). This standard requires "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). "It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Id.* "Although questions regarding whether a governmental employee's conduct constituted gross negligence are generally questions of fact for the jury, if reasonable minds could not differ, summary disposition may be granted." *Wood*, 323 Mich App at 424.

There is no dispute that defendant, a police officer for the City of Southfield, was acting within the scope of his authority in the exercise of a governmental function at the time of the accident. But, plaintiff contends Gartha's conduct constituted gross negligence which was the proximate cause of her injuries.

We acknowledge that Gartha attempted to proceed through the intersection despite the fact that the light was red and he did not have his emergency signal activated. These facts, as Gartha himself admits, indicate that he acted negligently. However, we agree with the trial court that Gartha was not grossly negligent. He believed that he had a clear line of sight through the intersection and was following a police vehicle immediately before him. This shows that Gartha did not enter the intersection recklessly, but instead had thoughtful, valid reasons for believing that doing so was safe. Moreover, Gartha slowed his vehicle before entering the intersection in an attempt to reduce the likelihood of causing an accident. In light of these facts, particularly the fact that Gartha slowed his vehicle, it cannot be said that he exhibited "a singular disregard for substantial risks" to others. See *Tarlea*, 263 Mich App at 90. Therefore, Gartha was not grossly negligent, and the trial court did not err in granting him summary disposition on this basis.

Defendants acknowledge in their motion for summary disposition that plaintiff claimed that the City was liable "under the motor vehicle exception of Governmental Immunity (under MCL 691.1405)." MCL 691.1405 provides that "[g]overnmental agencies shall be liable for bodily injury . . . 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" Thus, our conclusion that Gartha was not grossly negligent does not dispose of this case because MCL 691.1405 allows for ordinary negligence claims against the governmental agency, the City of Southfield.

C. CAUSATION AND IMPAIRMENT OF BODY FUNCTION

Plaintiff argues that the trial court erred in ruling that there was no question of fact that her injuries were not causally related to the accident, and further, that the trial court erred in alternatively ruling that there was no question of fact that her injuries did not amount to an objectively manifested serious impairment of body function. We agree.

“Tort liability is limited under the Michigan no-fault insurance act.” *Patrick v Turkelson*, 322 Mich App 595, 606; 913 NW2d 369 (2018). 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.” MCL 500.3135(1).¹ “A ‘serious impairment of body function’ is defined by MCL 500.3135[(5)] as ‘an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.’ ” *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011), quoting MCL 500.3135[(5)].

“Whether someone has suffered a serious impairment is inherently fact-and circumstance-specific and [the analysis] must be conducted on a case-by-case basis.” *Chouman*, 293 Mich App at 441 (quotation marks and citation omitted). “Therefore, the evidence must establish (1) an objectively manifested impairment of a body function, (2) that is significant or important to the specific injured person, and (3) that affects that specific person’s general ability to lead his or her particular normal life.” *Id.* “However, there is no bright-line rule or checklist to follow in making that evaluation.” *Id.*

With regard to the first requirement, 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 v Carrier*, 487 Mich 180, 196; 795 NW2d 517 (2010). While mere subjective complaints of pain and suffering are insufficient to establish an 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. With regard to the second requirement, the focus is on whether the body function “has great value, significance, or consequence,” and the relationship of that function to the person’s life must be considered. *Id.* at 199. Lastly, with regard to the third requirement, the impairment affects the person’s ability to lead a normal life if it has “an influence on some of the person’s capacity to live in his or her normal manner of living.” *Id.* at 202. This is also a subjective inquiry that does not require a “quantitative minimum as to the percentage of a person’s normal manner of living that must be affected.” *Id.* at 202-203.

To summarize, plaintiff must establish a question of fact that her injuries at issue, such as the alleged spinal damage, were caused by the motor vehicle accident with Gartha. See MCL 500.3135(1). If she is able to do so, plaintiff must then establish a question of fact that those injuries amounted to a “serious impairment of body function” as defined by MCL 500.3135(5).

With regard to the first question, we conclude that trial court erred in ruling that none of plaintiff’s injuries were causally related to the accident. Shortly after the accident, plaintiff sought medical services from Dr. Radden for her neck and back pain, headaches, dizziness, and memory loss. An MRI revealed:

¹ The Legislature’s recent amendments to MCL 500.3135, 2019 PA 21 and 2019 PA 22, have not materially changed this provision of the statute, and the quoted language herein is the language that was in effect at the time of the accident. See 2012 PA 158.

Cervical disc herniation at C4-5, C5-6 and C6-7; disc bulge at C7-T1; cervical facet syndrome; cervical sprain/strain.

Lumbar disc bulge at L4-S and LS-51, lumbar facet syndrome, lumbar sprain/strain.

On the basis of this MRI and other treatments, Dr. Radden repeatedly concluded in his medical records that plaintiff's "injuries [were] related to the motor vehicle accident." Further, Dr. Radden wrote that "[a]s a result of the injuries received in this accident, I have disabled [plaintiff] from" housework such as carrying groceries and recreational activities that include "prolonged standing or sitting." Dr. Radden's medical opinion in this regard was sufficient to establish a question of fact as to whether plaintiff suffered spinal injury that was caused by the accident at issue and that may have resulted in a serious impairment of body function.

Defendants contend that plaintiff's spinal injuries were not causally related to the accident because they were preexisting and the result of a degenerative condition. Specifically, defendants point to a 2015 vehicle accident where plaintiff was rear-ended by another vehicle. The hospital records from the day of the prior accident indicated plaintiff was experiencing "pain in her arms and hands" but "[n]o neck or chest or belly pain." Additionally, plaintiff did not report "cervical, thoracic, or lumbar spine tenderness" or neck pain; and, as a result, the emergency physician concluded there was "[n]o serious injury." We acknowledge that plaintiff may not be able to overcome such evidence at trial but nonetheless conclude that she sufficiently showed causation through Dr. Radden's medical records to create a question of fact necessary to defeat defendants' motion for summary disposition.²

With regard to the second question, whether plaintiff established a question of fact as to a "serious impairment of body function" as defined by MCL 500.3135(5), we conclude that the trial court erred in ruling that plaintiff failed to do so. In addition to Dr. Radden's medical records, plaintiff herself explained that her ability to sit, travel in a vehicle for long distances, complete housework and yardwork, wear high heels, and volunteer with her church as she did before the accident were substantially impaired after the accident as a consequence of her injury. Although defendants argued that plaintiff's injuries may have been caused by a preexisting degenerative

² In her brief on appeal, plaintiff identifies other evidence in the record that allegedly shows causation. Most of this evidence, however, at most merely indicates that plaintiff suffered some medical injuries in the accident but does not link those injuries with the "serious impairment of body function" required by MCL 500.3135(5). In other words, for example, it is not sufficient for plaintiff to summarily show that she suffered a particular disc bulge in her spine. She must also show that the disc bulge caused a "serious impairment of body function."

To the extent that plaintiff argues that Dr. Jenkins's affidavit creates a question of fact in this regard, she fails to challenge the trial court's reason for disregarding it, and we need not address this issue. See *Loutts v Loutts*, 309 Mich App 203, 210; 871 NW2d 298 (2015). Finally, to the extent that plaintiff argues that Dr. Fabiano's diagnosis of a "pain disorder" creates a question of fact in this regard, we agree with defendants that the mere subjective report of pain cannot establish entitlement to damages under MCL 500.3135(5). See *McCormick*, 487 Mich at 198.

condition or prior motor vehicle accident, the evidence offered by plaintiff was nonetheless sufficient to avoid summary disposition.

As noted previously, *McCormick* provides that a “serious impairment of body function” under MCL 500.3135(5) requires three elements: (1) “an objectively manifested impairment,” (2) “of an important body function,” and (3) “affects the person’s general ability to lead his or her normal life.” *McCormick*, 487 Mich at 215. Concerning the first element, as explained, Dr. Radden’s medical records established a question of fact as to an objectively manifested impairment. See *Guerrero v Smith*, 280 Mich App 647, 663; 761 NW2d 723 (2008) (noting that muscle spasms and loss of normal lordotic curve, i.e., the cervical spine, may qualify as objective manifestations of injury). Concerning the second element, the use of one’s back and associated abilities to move are important body functions that may be impaired by a motor vehicle injury for the purposes of MCL 500.3135. See *Harris v Lemicex*, 152 Mich App 149, 153-154; 393 NW2d 559 (1986). Plaintiff has established a question of fact in this regard. Concerning the third element, the injury allegedly affected plaintiff’s general ability to lead her normal life as evidenced by plaintiff’s deposition testimony and medical records, the fact that Dr. Radden continued to recommend physical therapy through October 2020, plaintiff’s inability to perform household tasks or participate in preaccident activities for over six months, and plaintiff’s residual back and neck pain. Because there is no express temporal requirement regarding how long the impairment must last and no requirement of permanency to meet the serious impairment threshold, plaintiff’s inability to lead her normal life since the accident occurred arguably amounted to a serious impairment of body function for the purposes of MCL 500.3135(5). See *McCormick*, 487 Mich at 203.

Accordingly, the trial court erred in granting summary disposition to defendants on the issue of causation and serious impairment of body function under MCL 500.3135.

III. CONCLUSION

The trial court correctly ruled that Gartha was entitled to governmental immunity. The trial court erred in ruling, however, that both defendants were entitled to summary disposition on the basis that plaintiff did not show causation or serious impairment of body function under MCL 500.3135. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.³

³ Defendants argue that the trial court ruled that plaintiff could not present any expert testimony at trial because she did not identify any experts in her answers to interrogatories, and as a result, the trial court correctly granted defendants summary disposition on this basis as well. Further, defendants argue that the trial court’s ultimate dismissal of the case must necessarily be affirmed because plaintiff fails to challenge this particular ruling. However, we do not clearly read the trial court’s written opinion in the manner advanced by defendants, and such issues may be further explored on remand.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Michael J. Riordan