STATE OF MICHIGAN

COURT OF APPEALS

CORDELL E. COLEMAN,

Plaintiff-Appellant,

v No. 86328

THOMAS N. DAVIS and
TOM DAVIS & SONS DAIRY,
a Michigan corporation,

Defendants-Appellees.

BEFORE: MacKenzie, P.J., and Bronson and R.A. Benson*, JJ.

PER CURIAM

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition, apparently pursuant to MCR 2.116(C)(10), on the grounds that (1) plaintiff's injuries failed as a matter of law to meet the threshold requirement to establish a serious impairment of body function under MCL 500.3135; MSA 24.13135 in order to recover noneconomic damages, and (2) plaintiff failed as a matter of law to establish loss of wages in order to recover economic damages under MCL 500.3135; MSA 24.13135. We conclude that summary disposition was properly granted as to plaintiff's claim for noneconomic damages but that the trial court erred in granting summary disposition as to the claim for economic damages.

On September 23, 1981 plaintiff's automobile was struck from behind by a milk truck owned by defendant Dairy and driven by defendant Davis. Plaintiff was approximately 53 years old at the time of the accident and was employed by Michigan Wisconsin Pipeline as an employment and placement specialist. Following the accident, plaintiff received emergency and follow-up treatment for pain in her neck, back, and knees but was not hospitalized. She missed two to three

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*Circuit Judge, sitting on the Court of Appeals by assignment.

weeks' work.

Plaintiff has suffered back pain since the accident. Prior to the accident she golfed, went on long walks, rode a bicycle, and skipped rope; since the accident she finds these activities too painful. Plaintiff is able to drive and do household chores, but is unable to "hurry or run". Plaintiff apparently treats with a chiropractor, Dr. Yellen, twice a week. In his opinion, not objectively substantiated, plaintiff suffers from seriously impaired body functions. Neurologist M. Zafar Mahmud in 1982 reported the results of an electromyographic evaluation of plaintiff as follows:

> "Normal motor conduction velocities and distal latencies. Diminution in the amplitude of the evoked potentials of the right common peroneal nerve and presence of denervation in the distribution of this nerve is indicative of resolving right common peroneal nerve palsy. No evidence of root lesion is seen on this study."

According to plaintiff and her secretary, Vanessa Roberson, after the accident plaintiff encountered continual difficulty performing her job due to pain and aching. Although she received pay increases and succesfully completed a work-related course, plaintiff's coemployees took over a good deal of her work. Following a personnel cut, plaintiff decided she was unable to perform her job adequately and took early retirement on June 30, 1983 at age 55. She averred that before the accident she had planned on working until age 62. Plaintiff's annual salary at the time of retirement was $28,700; she now receives $14,000 annually in retirement benefits. In her complaint plaintiff sought the difference between these incomes from three years after the accident until the date she had intended to retire.

Plaintiff first argues that the trial court erred when it determined as a matter of law that plaintiff did not suffer a serious impairment of bodily function. We disagree.

Where there is no material factual dispute as to

the nature and extent of a plaintiff's injuries, courts are to decide as a matter of law whether there has been a "serious impairment of body function" under Michigan's no-fault act, MCL 500.3135(1); MSA 24.13135(1). See Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983). Serious impairment of a body function is decided on a case-by-case basis under a three-part test: (1) the impairment must be of an important body function; (2) the impairment must be serious; and (3) the injuries must be objectively manifested. Williams v Payne, 131 Mich App 403, 409; 346 NW2d 564 (1984). To determine whether an injury meets the threshold requirement of impairment of an important body function, the plaintiff's ability to lead a normal lifestyle must be considered. Simple difficulty or inconvenience in daily life does not meet the threshold. Morris v Levine, 146 Mich App 150; 379 NW2d 402 (1985). There must be a general inability to live what objectively can be determined to be a normal lifestyle. Morris, supra. Whether an impairment is serious should be viewed in light of the other threshold requirements found in the no-fault act: death or permanent serious disfigurement. Williams, supra, p 410. The legislative intent in creating thresholds for recovery was to allow only the catastrophically injured victim to recover. Workman v DAIIE, 404 Mich 477; 274 NW2d 373 (1979).

Although the parties disagree about plaintiff's injuries and their effect upon her, we agree with the trial court that there is no material dispute as to the nature and extent of plaintiff's injuries. See Clark v Auto Club Ins Ass'n, 150 Mich App 546; ___ NW2d ___ (1986). A review of the record makes it apparent that plaintiff has not satisfied the threshold for recovery of noneconomic damage because she not shown an objectively manifested injury constituting a

serious impairment of body function. First, plaintiff's medical evidence is either unsubstantiated by objective measurement of her injuries or fails to establish the pain of which she complains was caused by injuries she sustained as a result of the accident. Second, the only thing that plaintiff has shown to affect an important body function is her own complaints of aches and pains. This is insufficient. See Franz v Woods, 145 Mich App 169; 377 NW2d 373 (1985). Finally, even assuming that we can infer that plaintiff's pain affected an important body function, we do not believe that plaintiff has established the seriousness requirement. The fact that plaintiff eventually retired from her job because of the pain associated with the physical activity involved does not change the nature or extent of her injury. Routley v Dault, 140 Mich App 190, 195; 363 NW2d 450 (1984), lv gtd 422 Mich 935 (1985), Franz, supra. Nor does plaintiff's reduction in social and athletic activities objectively establish seriousness. Kucera v Norton, 140 Mich App 156, 159; 363 NW2d 11 (1984), Franz, supra. In short, plaintiff has not shown an inability to perform common day-to-day activities which could be considered on a par with death or serious permanent disfigurement. Summary disposition was properly granted on plaintiff's claim for noneconomic damages.

Nevertheless, we are persuaded that the trial court erred in granting summary disposition on plaintiff's claim for economic loss damages for a period in excess of the three-year limitation contained in MCL 500.3107(b); MSA 24.13107(b). MCL 500.3135; MSA 24.13135.

A motion brought under MCR 2.116(C)(10) tests whether there is factual support for a plaintiff's claim. A court, in deciding such a motion, must consider the pleadings, affidavits, depositions, admissions, and

documentary evidence available to it and give the nonmoving party the benefit of every reasonable doubt. The motion must not be granted unless the court is satisfied that it is impossible to support the claim at trial because of some deficiency which cannot be overcome. Dzierwa v Michigan Oil Co, ___ Mich App ___; ___ NW2d ___ (Docket No. 86190, rel'd 6/2/86).

Recovery of work loss benefits under MCL 500.3135; MSA 24.13135 does not require proof of serious impairment of a body function. Cochran v Myers, 146 Mich App 729; 381 NW2d 800 (1985); Clark, supra. However, economic losses under MCL 500.3135; MSA 24.13135 are recoverable only for actual work loss, and not for lost earning capacity. Ouellette v Kenealy, 424 Mich 83; 378 NW2d 470 (1985). Actual work loss constitutes loss of income from work an injured person would have performed if he or she had not been injured. Id. at 87. Loss of earning capacity, on the other hand, has been defined as what an injured person could have earned but for the injury. Prince v Lott, 369 Mich 606, 610; 120 NW2d 780 (1963).

In the instant case, the trial court granted summary disposition as to plaintiff's claim for economic damages because "I do think that the question of alleged economic loss allegedly sustained through the early retirement, is a loss of future earning capacity". We cannot agree. Plaintiff presented an affidavit stating that she had always planned to work until age 62. A fair reading of plaintiff's affidavit and the affidavit of Vanessa Roberson is that plaintiff entered into retirement in 1983 at age 55 because her pain precluded her from performing her job adequately. Viewing this evidence in a light most favorable to plaintiff, we believe that there exists a question of fact as to whether, but for her injuries, plaintiff would have

performed her work until age 62.

In MacDonald v State Farm Mutual Ins Co, 419 Mich 146, 151-152; 350 NW2d 233 (1984), the Supreme Court stated:

"Our no-fault act is patterned after the Uniform Motor Vehicle Accident Reparations Act, and § 3107(b) of our act, in relevant part, is virtually identical to § 1(a)(5)(ii) of that act. See 14 ULA, Civil Procedural & Remedial Laws, Uniform Motor Vehicle Accident Reparations Act, pp 50, 54. As we have explained previously, by adopting the language of such a model act, it is evident that the Legislature 'was cognizant of, and in agreement with, the policies which underlie the model acts' language'. Miller v State Farm Mutual Automobile Ins Co, 410 Mich 538, 559; 302 NW2d 537 (1981). The drafter's comments to § 1(a)(5) of the UMVARA, and by extension to § 3107(b) of the no-fault act, are in part, as follows:

"'"Work loss", as are the other components of loss, is restricted to accrued loss, and thus covers only actual loss of earnings as contrasted to loss of earning capacity. Thus, an unemployed person suffers no work loss from injury until the time he would have been employed but for his injury. On the other hand, an employed person who loses time from work he would have performed had he not been injured has suffered work loss * * *. Work loss is not restricted to the injured person's wage level at the time of the injury. For example, an unemployed college student who was permanently disabled could claim loss, at an appropriate time after the injury, for work he would then be performing had he not been injured. Conversely, an employed person's claim for work loss would be appropriately adjusted at the time he would have retired from his employment".

"A reading of both the clear language of § 3107(b) and the drafter's comment to the uniform act leads us to conclude that work-loss benefits are available to compensate only for that amount that the injured person would have received had his automobile accident not occurred. Stated otherwise, work-loss benefits compensate the injured person for income he would have received but for the accident. In the present case, plaintiff would have worked and earned wages for two weeks, until the date of his heart attack. After that date plaintiff would have earned no wage even had the accident not occurred and, therefore, is ineligible for work-loss benefits after that date under § 3107(b)."

Here, in light of plaintiff's evidence that she would have continued to work at full wage until age 62 but for her injuries, summary disposition on plaintiff's claim for economic loss was improper.

Affirmed in part, reversed in part and remanded for further proceedings.

/s/ Barbara B. MacKenzie
/s/ Robert A. Benson

Judge Bronson not participating.