

STATE OF MICHIGAN
COURT OF APPEALS

ERIC DUMIRE,

Plaintiff-Appellant,

v

WAYNE L. EVENER, GRAND RIVER
DELIVERY, LLC, and JERRY L. HERENDEEN,

Defendants-Appellees.

UNPUBLISHED
October 15, 2020

No. 350270
Lenawee Circuit Court
LC No. 18-005989-NI

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendants. For the reasons set forth in this opinion, we reverse the trial court's grant of summary disposition to defendants and remand this matter to the trial court for further proceedings consistent with this opinion.

I. BACKGROUND

This appeal arises from an accident that occurred in Lenawee County on October 17, 2017. On that date, plaintiff's vehicle was struck by a semitrailer truck being driven by defendant Wayne L. Evener, and owned by defendants Grand River Delivery, LLC, and Jerry L. Herendeen. During the course of litigation, Evener admitted he was at-fault. After the accident, plaintiff sought medical care at the Bixby Hospital emergency room. An x-ray performed at the hospital showed plaintiff suffered a three-millimeter fracture to his left elbow. As a result of the fracture, plaintiff testified that he was unable to carry out his work as a self-employed handyman for a week and his doctor recommended plaintiff avoid lifting, pushing, or pulling with his left arm for three weeks. Over the next several months, plaintiff's medical records indicated he enjoyed a normal range of motion with his left arm and did not require significant medical treatment for the injury. However, the medical records also demonstrate plaintiff continued to experience pain when using the left arm to lift heavy objects or when he applied pressure to the area.

Plaintiff filed suit in the trial court alleging he suffered a serious impairment of a body function as defined under MCL 500.3135(5), and various tort claims against defendants as

permitted by MCL 500.3135(1). After discovery, defendants sought summary disposition under MCR 2.116(C)(10), asserting plaintiff had not suffered a serious impairment of a body function. Defendants argued plaintiff's medical records did not clearly show plaintiff suffered an impairment, and that plaintiff failed to provide evidence the alleged impairment affected his ability to lead his normal life after the accident. Plaintiff opposed defendant's motion, arguing he provided sufficient evidence to establish that he suffered an objectively manifested impairment to an important body function that affected his ability to lead his normal life. Specifically, plaintiff asserted the continued pain experienced because of his fractured left elbow required him to self-restrict his activities after the accident.

The trial court found there was no factual dispute concerning the nature and extent of plaintiff's injuries; thus, it could determine, as a matter of law, whether the injuries constituted a serious impairment of a body function. The trial court agreed that plaintiff suffered an objectively manifested impairment—the fractured left elbow—and this impairment met the low threshold for affecting an important body function. However, the trial court found plaintiff had not provided evidence the impairment had a lasting effect on plaintiff's ability to lead his normal life, specifically stating that “[t]he Court does not feel that plaintiff has established any lasting effect on plaintiff's ability to lead his normal life, therefore I do feel that . . . summary disposition is appropriate.” On that basis, the trial court proceeded to grant defendants' motion for summary disposition. This appeal ensued.

II. ANALYSIS

Defendants moved for summary disposition under MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Defrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 366; 817 Mich 504 (2012).

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A motion pursuant to MCR 2.116(C)(10) is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. 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. [It is well settled that the circuit court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition. Moreover, a court may not make findings of fact; if the evidence before it is conflicting, summary disposition is improper. [*Patrick v Turkelson*, 322 Mich App 595, 605-606; 913 NW2d 369 (2018) (quotation marks, brackets, and citations omitted).]

In determining whether a party was entitled to summary disposition this Court's “review is limited to the evidence that had been presented to the circuit court at the time the motion was decided. Courts are liberal in finding a factual dispute sufficient to withstand summary disposition” *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

Michigan’s no-fault act, MCL 500.3101, *et seq.*, generally limits tort liability. *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010). However, under MCL 500.3135(1) an individual “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.” At issue in this case is whether plaintiff sustained a serious impairment of a bodily function because of the accident. Under MCL 500.3135(5)(a) through (c), an impairment qualifies as a “serious impairment of a bodily function” when it meets three 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. [MCL 500.3135(5)(a) through (c).]

In construing this statute, our Supreme Court has determined “three prongs . . . are necessary to establish a ‘serious impairment of body function’: (1) an objectively manifested impairment (2) of an important body function that (3) affects the person’s general ability to lead his or her normal life.” *McCormick*, 487 Mich at 195 (footnote omitted). A trial court can only decide whether a plaintiff has incurred a serious impairment of body function, as defined under MCL 500.3135(5), as a matter of law under two circumstances: (1) if “there is no factual dispute concerning the nature and extent” of the plaintiff’s injuries or (2) if a factual dispute concerning the nature and extent of the injuries “is not material to the determination whether the person has suffered a serious impairment of body function” MCL 500.3135(2)(a)(i), (ii). If there is a genuine issue of material fact concerning the nature or extent of a plaintiff’s injuries, then summary disposition is not appropriate, and the question must be left to the jury. *Patrick*, 322 Mich App at 608 (citation omitted).

Plaintiff correctly asserts that a genuine question of material fact exists concerning the extent and nature of plaintiff’s injuries, limitations, and ability to lead his normal life. In the trial court and this Court, defendants have asserted that plaintiff suffered a questionable fracture to his elbow that did not require medication, physical therapy, surgery, or other medical treatment. Further, defendants contend that the existence of plaintiff’s injury is not proven as evidenced by the report provided by their independent medical expert (IME),¹ which states that the fracture to plaintiff’s left elbow cannot be confirmed or excluded on the basis of the x-rays plaintiff underwent

¹ In the vernacular of defendants, an independent medical examination is a medical exam where the doctor is selected and paid for by defendants.

at the hospital after the accident. By contrast, plaintiff asserts that his medical records show he suffered a fracture to his left elbow and the injury prevented him from working at all for a period of one week and required (and continues to require) him to self-limit his personal and work activities for at least two months after the accident.

Our review of the record shows there were significant contradictions concerning the extent and nature of plaintiff's injuries. Plaintiff's records from the Bixby Hospital emergency room indicate x-rays taken the day of the accident show plaintiff suffered a three-millimeter fracture to his left elbow. This diagnosis was largely confirmed the next day when plaintiff had a follow-up appointment with Dr. Richard Giovannone, who observed that plaintiff experienced some pain when extending and flexing his injured elbow and recommended plaintiff avoid lifting, pushing, or pulling with his left arm for three weeks after the appointment. And, records from an emergency room visit as recently as November 2018, also state plaintiff continued to experience pain when using his left arm. However, plaintiff's medical records also demonstrate, even the day after the accident, that plaintiff experienced a normal range of motion with his left elbow and did not require an arm sling for comfort. At a follow-up appointment a month after the accident, the case notes indicate plaintiff's left elbow enjoyed a full range of motion without pain or discomfort and there was no evidence of instability or tenderness to the area. This latter assertion conflicts with at least one of plaintiff's interrogatory answers, in which he stated his use of his left arm was limited for almost two months after the accident.

Even considering this evidence in the light most favorable to plaintiff, the record and the briefing in this matter demonstrates contradictory evidence concerning the extent and nature of plaintiff's injuries. This contradictory evidence, in turn, creates a genuine issue of material fact concerning the extent and nature of any alleged impairment suffered by plaintiff. *Patrick*, 322 Mich at 615. "When there is a genuine issue of material fact regarding the nature and extent of a person's injuries, the threshold question of whether there was a serious impairment of body function is for the jury and may not be decided as a matter of law." *Id.* at 608 (citation omitted). Given the contradictory record evidence regarding the nature and extent of plaintiff's injuries, the trial court erred when it proceeded to address, as a matter of law, the question of whether plaintiff suffered a serious impairment of body function. As a result, the trial court's decision to grant summary disposition in favor of defendants constituted error.

This was not the sole error committed by the trial court when granting defendants summary disposition. As plaintiff's correctly argue, the trial court also erred by applying the wrong legal standard in assessing the third prong of the *McCormick* test and, when assessed against the correct standard, a genuine issue of material fact exists whether plaintiff's impairment affects his ability to lead his normal life.

Here, the trial court found that plaintiff provided sufficient evidence to establish the first two prongs of the *McCormick* test—namely, that plaintiff sustained an objectively manifested impairment to an important body function. *McCormick*, 487 Mich at 215. While defendant contests these two findings, our review of the record supports these two findings. Concerning the first prong, "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." *Patrick*, 433 Mich App at 606 (quotation marks and citation omitted). "Medical testimony is generally, but not always, required to make this showing." *Id.* at 607 (citation

omitted). While the evidence is somewhat minimal, the record shows plaintiff provided objective medical evidence that he suffered a three-millimeter fracture to his elbow as a basis for his pain and that this condition—to some extent—“weakened, diminished, or damaged” his left elbow or caused it to function “poorly or inadequately.” *Id.* (quotation marks and citations omitted). Concerning the second prong, “the important-body-function inquiry is an inherently subjective one. The focus is on whether the body function has great value, significant [sic], or consequence, and the relationship of that function to the individual’s life must be considered.” *Id.* (quotation marks and citations omitted). It is undisputed that plaintiff was, at the time of the accident, a self-employed handyman and the trial court could reasonably infer the impairment of plaintiff’s left arm and elbow, arising out of the accident, affected a function important to plaintiff’s employment and general ability to function. We note that the evidence supporting both these factors is minimal and was countered by defendants. However, viewing the evidence in the light most favorable to plaintiff, a genuine question of material fact could exist concerning these two prongs, if not an actual finding that plaintiff has established these findings.

However, our agreement with the trial court ends regarding its analysis of the *McCormick* test’s third prong—whether the impairment affected plaintiff’s ability to lead his normal life. *McCormick*, 487 Mich at 200. The trial court found plaintiff had not established this third prong because he had not shown the impairment had “a lasting effect” on his ability to lead his normal life. The trial court’s use of this standard—that the plaintiff must prove the accident had “a lasting effect” on his ability to lead a normal life---constituted error. This Court has consistently held that the third prong of the *McCormick* test requires only “the impairment *affect* the person’s *ability* to live in his or her normal manner of living.” *Patrick*, 322 Mich App at 607 (emphasis original; citation omitted). Further, MCL 500.3135 “does not require a person’s ability to lead a normal life to have been destroyed or for the impairment to last a certain period of time.” *Id.* (citation omitted); see also *Piccione as Next Friend of Piccione v Gillette*, 327 Mich App 16, 21; 932 NW2d 197 (2019) (quotation marks and citation omitted) (“There is no express temporal requirement as to how long an impairment must last in order to have an effect on a person’s general ability to live his or her normal life.”). Thus, plaintiff was not required to show that the impairment had “a *lasting* effect” on his ability to lead his normal life, simply that the impairment had *some* effect. See also *Patrick*, 322 Mich App at 607 (quotation marks and citation omitted) (“[T]here is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected.”).

Viewed in the light most favorable to plaintiff, the evidence in the record shows that plaintiff’s ability to lead his normal life was affected. “To show that the impaired person’s ability to lead his or her normal life was affected, we compare the person’s life before and after the injury.” *Piccione*, 327 Mich App at 21 (citation omitted). Plaintiff’s medical records demonstrate he was unable to work, at all, for a week and was directed by Dr. Giovannone to limit certain activities for at least two months after the accident. Further, records from plaintiff’s visit to the Bixby Hospital emergency room in November 2018, indicated plaintiff was continuing to experience pain in his left elbow and arm, especially when putting pressure on the area. According to plaintiff’s deposition testimony and interrogatory answers, this continued pain required him to self-limit and restrict work and everyday activities after the accident. Again, while the evidence available concerning the extent to which the impairment affected plaintiff’s ability to lead his normal life is minimal, the evidence does permit the inference that plaintiff’s ability to lead his normal life was “affected even though it was not completely destroyed.” *Piccione*, 327 Mich App at 23. Further,

while the period of time that plaintiff's impairment affected his ability to lead his normal life could be as short as two months, or even a week, after the accident, an impairment need not be permanent. *McCormick*, 487 Mich at 203. Thus, the fact that the impairment may have only lasted a short period of time does not affect the analysis concerning whether the impairment affected plaintiff's ability to lead his normal life. *Piccione*, 327 Mich App at 23. As a result, the trial court erred in its application of the *McCormick* test.

Though the trial court committed error by applying the wrong standard to determine whether the serious impairment affected plaintiff's ability to lead his normal life, plaintiff must still demonstrate that a genuine issue of material fact exists concerning this third prong, making summary disposition inappropriate.

In their brief on appeal, defendants assert that plaintiff's self-imposed restrictions on the basis of real or perceived pain after the accident cannot establish the extent of an impairment. In support of this assertion, defendants rely on this Court's decision in *McDaniell v Hemker*, 268 Mich App 269, 282-284; 707 NW2d 211 (2005). However, this Court's holding in *McDaniell* expressly relied on the factors contained in *Kriener v Fischer*, 471 Mich 109; 683 NW2d 611 (2004) overruled *McCormick*, 487 Mich 180. The *Kriener* factors were expressly overruled by our Supreme Court's decision in *McCormick*, 487 Mich at 184, 207-209. Thus, considering the subjective nature of the inquiry into whether an impairment has affected an individual's ability to lead his normal life, *id.* at 215, an individual's self-imposed restrictions and limitations can serve as evidence that an impairment has affected this ability. As a result, defendants' argument is without merit.

Our review of the record available to the trial court at the time of summary disposition leads us to conclude that plaintiff demonstrated sufficient evidence to create a question of fact as to whether the alleged impairment affected the ability of plaintiff to lead his normal life. As discussed earlier, the admitted medical records indicate plaintiff suffered a fracture to his left elbow and he was directed by Dr. Giovannone to avoid pushing and pulling heavy items in the course of his work. Plaintiff also testified in his deposition that the impairment to his elbow caused pain when moving or lifting items. Further it is undisputed that, at the time of the accident, plaintiff was self-employed as a handyman and, according to plaintiff, the injury to his elbow impacted his ability to work. Hence, it was reasonable for the trial court to infer that plaintiff's use of his left arm and elbow were an important bodily function, both for his everyday living and his work as a handyman. Thus, considering the evidence in the light most favorable to plaintiff, impairment of plaintiff's left elbow would have affected a bodily function important to plaintiff—namely, the use of his left elbow and arm. Considering the existence of these factual issues, the trial court erred in granting summary disposition to defendants.

Reversed and remanded to the trial court. We do not retain jurisdiction. Plaintiff having prevailed in full may tax costs. MCR 7.219(A).

/s/ Brock A. Swartzle
/s/ Kathleen Jansen
/s/ Stephen L. Borrello