

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BARBARA JEAN ROSS,

Plaintiff-Appellant,

v

STATE OF MICHIGAN,

Defendant-Appellee.

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UNPUBLISHED  
October 11, 2012

No. 302717  
Ingham Circuit Court  
LC No. 05-000189-MZ

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

In this third party automobile no-fault case, plaintiff Barbara Jean Ross presented undisputed evidence that her injury had an adverse influence on her capacity to live in her normal manner of living. Because the State of Michigan did not contest that Ross' injury was objectively manifested and affected an important body function, her evidence was sufficient to establish a threshold injury under MCL 500.3135(1). As such, we conclude that the trial court—sitting as the Court of Claims—erred when it granted the State's motion for summary disposition on the basis that Ross failed to establish a threshold injury. Accordingly, we reverse and remand for a trial on the merits.

**I. BASIC FACTS**

Ross, who was 67 at the time of the accident, testified at her deposition that she was driving up to her cottage in January 2004 when she struck a Michigan State Police Trooper. She stated that the trooper made a U-turn in front of her and she tried to avoid hitting him, but struck him anyway. Her car was totaled and the trooper's car was also significantly damaged. Ross said she injured her right wrist in the accident. Another trooper arrived and took her to a hospital in Tawas where she had an x-ray. The x-ray did not show that her wrist had been broken.

Ross said she continued to have pain in her wrist and, for that reason, she sought further treatment after she returned to Livonia. The x-rays taken after she returned also did not show that her wrist had been broken. However, she returned to her doctor approximately three weeks later and had another x-ray, which revealed an undisplaced fracture of the scaphoid bone in her right wrist. Her doctor initially tried to treat the fracture without surgery and prescribed the use of a bone stimulator to encourage healing. But the bone did not heal and, in February 2005, Ross had surgery to correct the fracture. Ross' medical records showed that her surgery was successful, but she testified that she still had a limited range of motion and achiness in her wrist.

In October 2005, Ross sued the State for noneconomic damages arising from the car accident and her resulting wrist injury.

The State moved for summary disposition in September 2009. It argued, in relevant part, that it was entitled to summary disposition under MCR 2.116(C)(10) because Ross failed to establish that her wrist injury amounted to a serious impairment of body function. The trial court agreed and dismissed her claim in an order entered in February 2009.

Ross appealed the trial court's order dismissing her case to this Court. This Court reversed the trial court's decision and remanded the case back to the trial court for review under the revised standard stated by our Supreme Court in *McCormick v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010). See *Ross v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2010 (Docket No. 291077).

The State moved for summary disposition under the revised standard in December 2010. The trial court heard oral arguments and again concluded that Ross' injury did not amount to a serious impairment of body function. The court noted that the standard stated under *McCormick* was not difficult to meet, but nevertheless elected to grant the motion: "And I suppose that I could waste everybody's time and deny the motion for summary disposition. Quite frankly, it's that low of a standard." The court explained that Ross failed to establish a threshold injury because, after she recovered from her surgery, she could basically do everything that she had done before:

The fact that she has chosen to abandon golf because of some minor pain is her choice. It doesn't appear to me that she couldn't play golf. It appears that she doesn't want to go through any kind of additional pain, and if she had such serious pain, I think she would require a lot more therapy, she would be on pain pills, she would be on cold compress, I'd hear a whole lot more, and I'm not.

I think she did the normal healing that she would have if she had fallen off a swing on a playground when she was a lot younger. I'm not hearing anything that people much younger don't go through and I think that she's able to lead her normal life in every way, shape, or form, and I am granting this. You may appeal me.

The trial court signed an order dismissing Ross' case in January 2011. This appeal followed.

## II. ANALYSIS

### A. STANDARD OF REVIEW

Ross argues on appeal that the trial court erred when it dismissed her claim under MCR 2.116(C)(10) on the ground that she failed to establish that she suffered a threshold injury under MCL 500.3135(1). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation and

application of statutes. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006).

## B. ESTABLISHING A THRESHOLD INJURY

With certain exceptions, Michigan’s Legislature abolished tort liability arising from the ownership, maintenance, or use of a motor vehicle. MCL 500.3135(3). One exception is for non-economic loss where the injured person has suffered a serious impairment of body function. MCL 500.3135(3)(b); MCL 500.3135(1). A serious impairment of body function is an “objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7).<sup>1</sup>

In order to establish the existence of a threshold injury, the plaintiff must show that he or she has “(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. For purposes of the motion under consideration here, the State did not contest that Ross’ injury was objectively manifested and involved an important body function. As such, the only question is whether Ross presented evidence sufficient to establish that her injury affected her general ability to lead her normal life.

Our Supreme Court has explained that an impairment affects a person’s general ability to lead his or her normal life if the impairment “influence[s] some of the person’s power or skill, i.e., the person’s capacity, to lead a normal life.” *Id.* at 201. Specifically, the trial court must consider whether the evidence shows that the impairment has had “an influence on some of the person’s capacity to live in his or her normal manner of living.” *Id.* at 202. By referring to the person’s normal life, 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.* Accordingly, if the plaintiff presents evidence that he or she has had to alter his or her normal manner of living as a result of the impairment, the plaintiff has established a threshold injury. Importantly, our Supreme Court held that a person’s impairment need not be permanent in order to qualify as a serious impairment of body function. *Id.* at 203. Indeed, the Court recognized that is entirely possible that, for some persons, a brief impairment might be devastating whereas a permanent impairment may have little effect. *Id.* at 216.

## C. THE EVIDENCE

Turning to the evidence presented on the State’s motion for summary disposition, we conclude that Ross established that her wrist injury influenced her “capacity to live in . . . her normal manner of living.” *Id.* at 202. Ross presented evidence that her wrist was broken and that, despite efforts to get the wrist to heal on its own through the use of a bone stimulator and

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<sup>1</sup> Effective October 1, 2012, this section will be codified at MCL 500.3135(5). See 2012 PA 158.

orthotic devices, she ultimately had to have surgery to correct the fracture. Ross also presented documentation from her physical therapy sessions that showed that she had significant limitations to her ability to lead her normal life prior to the surgery. The notes show that she had had some improvement, but that she still had numerous deficits: she had pain (ranging from four to seven on a scale of one to ten), problems with her range of motion and limitations on her ability to perform hygiene functions (brushing her teeth, combing her hair, putting on clothing, fastening buttons and zippers), prepare meals, lift, and write. These notes plainly establish that Ross' wrist injury altered her normal manner of living in the months preceding her surgery. Further, the surgery itself involved significant limitations; aside from having to have a screw surgically implanted to secure her bone, she had to wear a cast for some time and had additional limitations on the use of her wrist until May 2005. Taken together, this evidence was sufficient to establish a serious impairment of body function. See, e.g., *id.* at 218-219 (concluding that "some of [the] plaintiff's capacity to live in his pre-incident manner of living was affected" where there was evidence that he had had surgery, had months of physical therapy, and could not return to work for 19 months).

Here, the trial court erred by disregarding this evidence and instead focusing on Ross' abilities after her successful surgery. By doing so, the trial court effectively required Ross to prove that her impairments were permanent, which she did not have to do. *Id.* at 203. Even if Ross had had a full recovery after her surgery—which is a matter of dispute—she nevertheless established a threshold injury on the basis of the evidence that she was impaired for more than one year. The evidence that her surgery was successful and that she regained significant function in her wrist goes to the extent of her damages; it does not establish that she did not suffer a threshold injury.

Moreover, we cannot agree with the trial court's cavalier dismissal of Ross' testimony about the continuing effects from her injury. Ross testified that she still has deficiencies in her range of motion in addition to pain and that, as a result, she cannot play tennis or golf. This Court held that—even under the prior test stated in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004)—a plaintiff can establish a threshold injury by showing that he or she can no longer golf as a result a reduced range of motion. See *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005), citing *Kreiner*, 471 Mich at 134 n 19 ("While these limitations might not rise to the level of a serious impairment of body function for some people, in a person who regularly participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function."). She also testified that she has pain that interferes with her ability to dry her hair, work at a computer, lift or carry things, and even to pull her grandchildren in a wagon.

In response to this testimony and evidence, the trial court commented that Ross chose to limit her activities because she did not want to experience pain and that if she really had such pain, there would be evidence of continued therapy and treatments. That is, the trial court appears to have evaluated the credibility and weight of the evidence and then *found* that Ross did not suffer any continuing impairment after her recovery from the surgery. But a trial court may not judge the credibility and weight of the evidence on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). It must instead evaluate the evidence in the light most favorable to the nonmoving party—Ross. *Id.* at 162. Further, assuming that there is a dispute about the nature and extent of Ross' injury—that is, a dispute

about whether she actually has a permanent loss in her wrist's range and motion—that dispute would have to be resolved by a jury, not the court. MCL 500.3135(2)(a). Therefore, the trial court erred to the extent that it dismissed Ross' evidence concerning her continued impairment after her surgery. When this evidence is properly considered, it bolsters the conclusion that she suffered a serious impairment of body function.

### III. CONCLUSION

Ross presented evidence that her broken wrist affected her ability to perform a variety of everyday functions prior to her surgery. Because the evidence showed that her impairment had “an influence on some of [her] capacity to live in . . . her normal manner of living” during the year leading up to her surgery, we conclude that the evidence established that her broken wrist constituted a serious impairment of body function. *McCormick*, 487 Mich at 202. Moreover, when the evidence that she still has some residual impairment is considered in conjunction with the evidence concerning her impairment prior to surgery, there can be no doubt that Ross has met the threshold test stated in *McCormick*. Therefore, the trial court erred when it concluded otherwise.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Ross may tax her costs. MCR 7.219(A).

/s/ Michael J. Kelly

/s/ Douglas B. Shapiro

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WILDER, J. (*dissenting*).

I respectfully dissent from the majority opinion.

**I. BASIC FACTS**

On January 3, 2004, plaintiff's vehicle collided with a vehicle driven by a Michigan State Police Trooper. The trooper made a u-turn in front of plaintiff's vehicle and plaintiff was unable to stop or avoid hitting him. Plaintiff suffered an injury to her right hand and wrist. X-rays taken immediately afterwards did not reveal anything wrong with plaintiff's hand or wrist.

On January 9, 2004, plaintiff was still suffering from pain and discomfort in her wrist so she consulted with Dr. David Mendelson. X-rays revealed no fractures or breaks, so plaintiff was given a wrist splint. However, x-rays taken three weeks later on January 28, 2004, revealed a scaphoid fracture.

Plaintiff underwent surgery in February 2005 to repair the fracture. The surgery went well, but plaintiff continued to experience achiness and a limited range of motion in her right wrist. Plaintiff saw Dr. Mendelson regularly until he medically discharged her on August 19, 2005. During her visits, plaintiff informed Dr. Mendelson that she was experiencing achiness with certain activities.

Prior to the accident plaintiff played golf and tennis once a month during the summer while at her cottage. She also worked two to three days a week at St. Mary's Hospital in Livonia, and had been doing so since she retired in 2003. However, since the accident and the surgery, plaintiff experienced achiness in her wrist with the following:

- When blow-drying her hair, if plaintiff was holding the dryer for a long period she would have problems and switching to her left hand was difficult.
- Doing computer work for two hours or more would cause achiness.
- Carrying or lifting anything heavy would have to be done with the left hand and arm and plaintiff would experience some pain when overdoing heavy work.
- Pulling her grandchildren around in their wagon would cause achiness in plaintiff's hand.
- Vacuuming also caused plaintiff to experience achiness.
- Attempted to play golf and tennis but could not because it was uncomfortable.

After the accident, plaintiff continued to work part-time at the hospital and was only placed on limitations from a physician following surgery in 2005. Plaintiff had not seen Dr. Mendelson since January 2006 and rarely took any medication for the achiness. After the surgery in 2005, plaintiff took nothing stronger than Motrin and only took Motrin for a couple of weeks following surgery.

Plaintiff noted that she lifted patients as part of her job and continued to do so following the accident. The only time plaintiff did not do this was when she was on limitations for six weeks after the surgery. Plaintiff missed only one week of work after the accident. Plaintiff also testified that she experienced psychological pain and suffering since the accident. Specifically, plaintiff testified that she feared driving and although she continued to drive, she was fearful of rush-hour traffic and making left-hand turns across traffic.

Plaintiff filed suit in the Court of Claims, and the trial court granted summary disposition in favor of defendant. Plaintiff appealed, but while oral argument was pending, our Supreme Court decided *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), that announced a new standard for evaluating serious impairments in no-fault cases. This Court then vacated the trial court's order and remanded this matter to the trial court for further proceedings consistent with *McCormick*. *Ross v State of Michigan*, memorandum opinion of the Court of Appeals, issued September 21, 2010 (Docket No. 291077).

Defendant again moved for summary disposition, and the trial court granted the motion.

## II. ANALYSIS

Plaintiff argues, and the majority concludes, that the trial court erred in granting summary disposition in favor of defendant because the trial court erroneously determined that plaintiff established a threshold injury. I disagree, and would affirm.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Generally, under Michigan's No-Fault Act, motor vehicle accident victims are not permitted to seek tort damages against an at-fault driver. However, an at-fault driver "remains subject to tort liability . . . if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). Serious impairment of body function is defined by the Legislature as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). Thus, the term "serious impairment of body function" has three distinct elements: (1) an objectively manifested impairment; (2) of an important body function; and (3) that affects the plaintiff's general ability to lead his or her normal life. *McCormick*, 487 Mich at 195.

The Supreme Court in *McCormick*, which overruled *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), stated that a court may decide as a matter of law whether a plaintiff suffered from a serious impairment of body function if there is no factual dispute about the nature and extent of the injuries. *McCormick*, 487 Mich at 193.

As the majority correctly identifies, the only element at issue was whether plaintiff's injury affected her general ability to lead her normal life. However, I would conclude that the trial court properly determined that plaintiff failed to meet her burden for this element.

A comparison of a plaintiff's life before and after the accident is necessary to determine whether that particular plaintiff's ability to lead his or her life has been affected. *Id.* at 202. The plaintiff's ability to lead his or her normal life only has to be affected, not destroyed. *Id.* This means that a court 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." *Id.* In addition, only some of the person's ability to lead his or her normal life must be affected, there is no minimum as to what percentage of the plaintiff's normal manner of living must be affected. *Id.* at 202-203.

Plaintiff's life changed following the accident, but she did not demonstrate that the accident affected her *general ability to lead her normal life*. Plaintiff continued to work at the same job and perform the same duties that she did before the accident. Further, one of the exhibits submitted to the trial court was plaintiff's self-assessment at her physical therapy. On the form, various tasks were listed with the option of checking "Easy To Do," "Some Difficulty," "Hard to Do," or "Unable To Do." Plaintiff did not identify any tasks as being "Unable To Do" and only listed "Pushing/Pulling" and "Lifting/Carrying" as being "Hard To Do." Plaintiff did testify that she used to play golf and tennis a handful of times per year, but was unable to do so



after the accident. Thus, the evidence submitted shows that plaintiff was still able to do everything she did prior to the accident, with the exception of playing golf and tennis.

Given the record, I would find that the trial court correctly concluded that plaintiff's inability to participate in these occasional and infrequent activities did not affect plaintiff's *general* ability to lead her normal life. Neither the No-Fault Act nor *McCormick* requires a finding that *any* impairment must qualify as a serious impairment of body function as long as the plaintiff is no longer able to engage in *any* activity, regardless of how minor a part of plaintiff's life the activity had been. Even *Williams v Medukas*, 266 Mich App 505; 702 NW2d 667 (2005), which the majority cites, does not support the majority's view. In *Williams*, the plaintiff, who was an avid golfer, was not able to play golf after the accident, when before the accident he played golf two or three times each week. *Id.* at 509. The Court, while finding that the injury affected the plaintiff's general ability to lead *his* normal life, noted that "[w]hile these limitations might not rise to the level of a serious impairment of body function for some people, in a person who *regularly* participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function." *Id.* (emphasis added). The facts here are distinguishable from *Williams* because the plaintiff testified she previously only played golf and tennis once a month during the summer months.

For the above reasons, I respectfully dissent.

/s/ Kurtis T. Wilder