

STATE OF MICHIGAN  
COURT OF APPEALS

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ALISON R. NELSON,

Plaintiff-Appellant/Cross-Appellee,

v

FREDDIE DUBOSE,

Defendant-Appellee/Cross-  
Appellant.

FOR PUBLICATION  
February 1, 2011

No. 293455  
Oakland Circuit Court  
LC No. 2007-086875-NI

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ALISON R. NELSON,

Plaintiff-Appellant,

v

FREDDIE DUBOSE,

Defendant-Appellee.

No. 294205  
Oakland Circuit Court  
LC No. 2007-086875-NI

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Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

JANSEN, P.J. (*concurring*).

I must agree with the majority's conclusion that reasonable jurors could honestly have disagreed concerning whether plaintiff's injuries rose to the level of a "serious impairment of body function," and that the trial court therefore did not err by denying plaintiff's motion for judgment notwithstanding the verdict (JNOV). *Guerrero v Smith*, 280 Mich App 647, 666; 761 NW2d 723 (2008).

I write separately because, although I cannot say with absolute certainty that plaintiff sustained a "serious impairment of body function" *as a matter of law*, I believe that the jury's determination that plaintiff's shoulder condition did not constitute a threshold injury was against the great weight of the evidence. The overwhelming weight of the evidence at trial established that plaintiff's shoulder injury *did* affect her "general ability to lead . . . her normal life" within the meaning of MCL 500.3135(7). After the automobile accident but before her shoulder surgery, plaintiff was unable to work as many hours as she had before the accident. This is

because she was required to arrive late for work or leave work early to accommodate her physical therapy schedule. Thereafter, following her shoulder surgery, plaintiff's arm was in a sling for several weeks.<sup>1</sup> Plaintiff testified that she could not use a computer as well as before the accident, that she could not sit for long periods of time as she had before the accident, and that her attention level had been altered due to prescription pain medication. In addition, plaintiff testified that she was unable to participate, to the same degree as before the accident, in her extensive professional activities, travel, and golf. Following the accident, plaintiff also quit volunteering for her church and drastically reduced her involvement in other community activities. The uncontroverted evidence established that plaintiff's shoulder injury kept her from various activities that were important to her.

Plaintiff moved for a new trial pursuant to MCR 2.611(A)(1)(e) on the ground that the jury's verdict was against the great weight of the evidence. The trial court denied this motion, allowing the jury's verdict to stand. For the foregoing reasons, I believe that the trial court abused its discretion by denying plaintiff's motion for a new trial. *Guerrero*, 280 Mich App at 666. In my opinion, the "overwhelming weight of the evidence" in this case, *id.*, tended to establish that plaintiff's shoulder injury affected her "general ability to lead . . . her normal life" within the meaning of MCL 500.3135(7), and therefore constituted a "serious impairment of body function" sufficient to satisfy the threshold of MCL 500.3135(1).

The obvious problem with this is that the propriety of the trial court's ruling on plaintiff's motion for a new trial has not been presented for appellate review and is not properly before this Court. MCR 7.212(5); MCR 7.212(7); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007); *In re JS & SM*, 231 Mich App 92, 98; 585 NW2d 326 (1998), overruled in part on other grounds *In re Trejo*, 462 Mich 341 (2000). As a consequence, I must reluctantly concur with the result reached by the majority in this case.

/s/ Kathleen Jansen

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<sup>1</sup> Moving one's arm is an important body function. See *Williams v Medukas*, 266 Mich App 505, 506; 702 Mich App 667 (2005).