

STATE OF MICHIGAN
COURT OF APPEALS

LYDIA ARGUMENDO,

Plaintiff-Appellant,

and

DAVID ARGUMENDO,

Plaintiff,

v

THOMAS ALAN COSSOU,

Defendant-Appellee.

UNPUBLISHED

March 11, 2003

No. 238465

Saginaw Circuit Court

LC No. 00-035996-NI

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff Lydia Argumendo appeals as of right the trial court's order granting defendant's motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A vehicle driven by plaintiff was struck head-on by a vehicle driven by defendant. Plaintiff was taken to the hospital, where x-rays revealed that she had suffered a fracture of the fifth carpal bone of her left hand. On several occasions during the following year plaintiff consulted Dr. Barry, a plastic and reconstructive surgeon. She underwent physical therapy, which improved the range of motion in her hand. X-rays showed that seven months after the accident the fracture had healed, but a bone spur had developed. An EMG and nerve conduction studies were normal. More than one year after the accident plaintiff returned to Dr. Barry, still complaining of pain in her hand. Dr. Barry indicated that he had nothing further to offer her in terms of treatment. X-rays taken nearly three years after the accident revealed that the bones in plaintiff's left hand were osteoporotic.

Plaintiff and David Argumendo filed suit alleging that the injuries plaintiff sustained in the accident resulted in a serious impairment of body function. David Argumendo sought damages for loss of consortium. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's hand injury, while objectively manifested, did not constitute a serious impairment of body function and did not affect her ability to lead her normal

life. Defendant noted that in her deposition plaintiff testified that she was able to button her blouse, drive a car, and tend to her personal grooming, albeit with some assistance.

In response, plaintiff argued that a factual dispute existed concerning the nature and extent of her injury, and that the dispute was material to the determination as to whether she had suffered a serious impairment of body function. Plaintiff noted that in her deposition and an affidavit she stated that she could not grip or lift heavy objects, vacuum, use a keyboard, operate a lawnmower, do many household chores, or sew. The trial court granted the motion, finding that plaintiff's injury did not constitute a serious impairment of body function because she could lead her normal life.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

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). For an impairment to be objectively manifested, there must be a medically identifiable injury or a condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 652-653; 654 NW2d 604 (2002). Whether a person has suffered a serious impairment of body function is a question of law for the court if there is no factual dispute concerning the nature and extent of the injuries, or if there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a). Otherwise, the determination whether the plaintiff suffered a serious impairment of body function is a question of fact for the jury. *Kreiner v Fischer*, 251 Mich App 513, 515; 651 NW2d 433 (2002).

In determining whether the impairment of the important body function is serious, the court should consider factors such as the extent of the injury, the treatment required, the duration of the disability, and the extent of residual impairment and prognosis for eventual recovery. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). In assessing the extent of the injury, the court may compare the plaintiff's lifestyle before and after the injury. *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000).

Plaintiff argues the trial court erred by granting defendant's motion for summary disposition. We agree and reverse the trial court's decision. Plaintiff had an objectively manifested injury in the form of a fracture of the fifth carpal bone of her left hand. The initial injury resulted in a bone spur. The fracture healed, and physical therapy improved the range of motion in plaintiff's hand. Dr. Barry opined that plaintiff might be required to take anti-inflammatory medication for the rest of her life, but no evidence showed that she would require any further treatment. Plaintiff testified that she continued to have pain and swelling in her hand. Lingering pain, in and of itself, does not create an issue of fact as to whether an injury has resulted in a serious impairment of body function. See *Kallio v Fisher*, 180 Mich App 516, 518-519; 448 NW2d 46 (1989). Plaintiff did not have any physician-imposed restrictions on her activities. Dr. Barry opined that she should be able to engage in activities such as doing household chores, driving, etc.

However, plaintiff testified in her deposition and stated in her affidavit that her injury affected her in the following ways: She used to be ambidextrous but now had to rely on her right

hand; she used to be able to lift a lot of heavy things, but could do so no longer because her hand gave out; she could not open jars as before; she used to sew a lot, but now was unable to maneuver her hands; she used to mow the two-acre lawn at her home, but no longer had the strength or dexterity; she struggled with the simple task of opening a bag of potato chips; she could no longer do or needs help doing many household chores, including vacuuming and laundry; sometimes she is able to tie her shoes, but her husband often has to do it because her hand is swollen or numb. A question of fact existed as to whether plaintiff's injury affected her ability to lead her normal life. The trial court erred by determining that the issue of whether plaintiff suffered a serious impairment of body function was a question of law under the circumstances. MCL 500.3135(2)(a); *May, supra*. The evidence required that the determination whether plaintiff suffered a serious impairment of body function be made by the jury. *Kreiner, supra*.

Reversed.

/s/ Helene N. White

/s/ Joel P. Hoekstra