

STATE OF MICHIGAN
COURT OF APPEALS

LENETTA CRIGLER,

Plaintiff-Appellant,

v

MERLE ANN BRYAN,

Defendant-Appellee.

UNPUBLISHED

April 29, 2004

No. 246174

Macomb Circuit Court

LC No. 2002-000105-NI

Before: Cavanagh, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiff sustained injuries in a motor-vehicle accident on November 4, 2000. Her car was rear-ended by an automobile driven by defendant; plaintiff's vehicle was totaled as a result of the accident. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), concluding that plaintiff failed to demonstrate that a genuine issue of material fact existed with respect to whether plaintiff suffered a serious impairment of body function under MCL 500.3135 of the Michigan No-Fault Act, MCL 500.3101 *et seq.* Particularly, the trial court found that plaintiff failed to present sufficient evidence reflecting an objectively manifested injury or impairment. Plaintiff appeals as of right. We hold that sufficient documentary evidence was submitted to create an outcome-determinative factual dispute concerning whether plaintiff suffered an objectively manifested impairment arising out of the accident; therefore, the trial court's ruling summarily dismissing the claim for noneconomic damages is reversed. We affirm, however, the dismissal of plaintiff's claim for excess wage loss. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). Issues of law are also reviewed de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a

nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363.

Plaintiff's complaint alleged, in part, that she "sustained injuries to her neck, back, and spine as well as the muscles, cords, nerves, tendons and other fibers contained therein; that she sustained severe, serious and permanent and incurable injuries to her upper and lower portions of her body as well as her head, neck, back, and spine including TMJ and closed head injury along with cervicogenic headache" A plaintiff may recover for noneconomic losses arising out of a motor-vehicle accident only where the plaintiff has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1); *Kreiner v Fischer (On Remand)*, 256 Mich App 680, 682; 671 NW2d 95 (2003), lv gtd 469 Mich 948 (2003). The issue whether a person has suffered a serious impairment of body function is a question of law for the trial court to decide where the court finds that there is no factual dispute concerning the nature and extent of the person's injuries, or where there is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a); *Kreiner, supra* at 682-683.

MCL 500.3135(7) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." The statutory definition of serious impairment found in § 3135(7) can be broken down into three requirements that must be established in order to find a serious impairment of body function. *Kreiner, supra* at 684. First, there must be an objectively manifested impairment. *Id.* Second, the impairment must be of an important body function. *Id.* Third, the impairment must affect a person's general ability to lead his or her normal life. *Id.* The focus here is on whether plaintiff presented sufficient evidence of an objectively manifested impairment. For an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). An injury need not be permanent to constitute a serious impairment of body function. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

The trial court granted the motion for summary disposition because it was not convinced that plaintiff had demonstrated anything more than subjective complaints of pain and because, in regard to a closed-head injury, plaintiff failed to submit a supporting affidavit of a licensed allopathic or osteopathic physician. We agree with the trial court regarding any claim predicated on a closed-head injury, see MCL 500.3135(2)(a)(ii)(requiring testimony or affidavit by a licensed allopathic or osteopathic physician who regularly diagnoses and treats closed-head injuries). But we disagree with the court's conclusion that plaintiff had only shown subjective manifestations of pain.

Plaintiff submitted documentary medical evidence that indicated that she had experienced “bilateral paraspinal spasms to the lumbar and sacral vertebrae” and “cervical and thoracic spasms.” Where muscle spasms are medically observable, there exists proof of an objectively manifested injury. See *Bennett v Oakley*, 153 Mich App 622, 630; 396 NW2d 451 (1986); *Franz v Woods*, 145 Mich App 169, 176-177; 377 NW2d 373 (1985).¹ Defendant states on appeal:

For purposes of this appeal only, Defendant will not contest Plaintiff’s assertion that her neck and back muscles were strained during the accident, and that those initial injuries were objectively manifested. Physicians at John Glancy Memorial Hospital detected muscle spasms along Plaintiff’s neck and back shortly after the accident. Dr. James also detected spasms in Plaintiff’s neck during her initial visit on November 30, 2000, and during a few subsequent visits. For purposes of this appeal only, Defendant will assume that muscle spasms are an objective manifestation of a soft tissue injury. Well within one year of the accident, however, physicians were no longer detecting muscle spasms.

Considering defendant’s appellate concession and *Bennett*, the question becomes whether the objectively manifested impairment, or, in other words, the medically identifiable injury or condition with a physical basis, need exist for a particular time period in order to support a finding that a party has suffered a serious impairment of body function. In *Kern, supra* at 341, this Court stated that “[i]n determining whether the impairment of the important body function is ‘serious,’ the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, *duration of disability*, and extent of residual impairment and prognosis for eventual recovery.” (Emphasis added; citation omitted.) We first note that these factors are not specifically listed in the statutory definition of serious impairment of body function. Indeed, as to duration of disability, there is no temporal framework included in the definition of serious impairment of body function. MCL 500.3135(7) simply provides that there be an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life. It does not provide that the objectively manifested impairment must be ongoing and continue for some minimal required time period. “[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). The *Kern* panel set forth factors to be considered and specifically discussed duration of disability. We are bound by that decision. MCR 7.215(J)(1).

In *Kern, supra* at 343, this Court concluded:

The present case similarly involves a serious femur fracture and plaintiff’s inability to walk for three months. Walking is an important body function. Although plaintiff had a good recovery, ‘an injury need not be permanent to be serious.’ In light of the seriousness of the initial injury, the treatment required,

¹ We note that some panels of this Court have held to the contrary. *Morris v Levine*, 146 Mich App 150, 154; 379 NW2d 402 (1985).

and the duration of disability, we hold that plaintiff sustained a serious impairment of body function. [Citation omitted.]

Here, plaintiff presented sufficient evidence to support a finding of an objectively manifested impairment, i.e., injury or impairment of plaintiff's back² as evidenced by objectively identifiable muscle spasms, other medical documentation, and plaintiff's accompanying testimony, that she endured for several months, which we find sufficient as to duration under *Kern*. Factual questions and issues remain for the trier of fact with respect to whether plaintiff's pain and muscle spasms arose out of the accident, whether the spasms were an indication of a back and neck problem serious enough to actually impair plaintiff's functioning, and whether a soft tissue injury was in fact the cause of plaintiff's alleged limited functioning.³

Additionally, plaintiff presented a medical report by Dr. Rottenberg, which provided, in part:

² The movement of one's back is an important body function. *Shaw v Martin*, 155 Mich App 89, 96; 399 NW2d 450 (1986).

³ Our concern in these types of cases is the appropriateness of dismissing an action where there are medically identifiable injuries with a physical basis but yet are not ongoing, and where there are subjective complaints of pain that are ongoing. If there was never a medically identifiable injury or condition with a physical basis, then the subjective complaints become highly questionable and dismissal is appropriate. But where it is evident that identifiable injuries with a physical basis existed at one time, continuing subjective complaints of pain become reasonably believable. For example, if a party suffers a broken leg in a car accident, you have a medically identifiable injury with a physical basis, and the statute is satisfied on the "objectively manifested impairment" and "important body function" prongs. After the fracture heals, and let us assume it heals in a short timeframe, subsequent subjective complaints of leg pain or leg immobility/limitations could reasonably be found to be true by a trier of fact in light of the prior broken leg. Should the plaintiff in that situation have his or her claims of pain and immobility precluded unless they are associated with the broken leg only at the time x-rays reveal that the leg remains broken or beyond that timeframe? Logic suggests that it should go beyond that timeframe if the plaintiff is deemed credible and medical opinion is introduced that the pain and immobility could be associated with the prior broken leg despite the nonexistence of a currently medically identifiable injury or physical basis. The medically identifiable injury gives a sound basis as to why a party may be suffering pain not only at the time the injury is identifiable but afterwards. A body that appears healed on review of medical tests does not necessarily return to the same pre-accident condition simply because of the extreme complexity of the human body such as the interplay between bones, muscles, joints, ligaments, tendons, et cetera. These thoughts aside, we analyze this case on the language enunciated in MCL 500.3135 and the principles espoused in existing, controlling case law as reflected above.

X-rays of the cervical spine revealed C5-6 disc space narrowing. Thoracic spine films showed a kyphosis with a mild lower right curve. Lumbosacral spine films showed an increased lumbosacral angle with some L4-5 and posterior L5-S1 disc space narrowing.

* * *

By history, this individual was in her usual state of health when she was involved in a motor vehicle accident on or about November 4, 2000. As a direct result of that accident, the patient suffered traumatic injury with muscular problems affecting her head, neck, and back as well as her lower back. She also appears to have some disc pathology in her neck and lower back that historically was caused by the injury in the accident. She has continued to experience posttraumatic headaches since the accident.

The objective manifestations of a back injury can be established through x-rays indicating an abnormal spine. *Sherrell v Bugaski*, 140 Mich App 708, 711; 364 NW2d 684 (1984). Although Dr. Rottenberg suggested additional objective diagnostic testing and a psychological evaluation, it does not take away from the above-referenced diagnosis for purposes of analyzing whether a genuine issue of material fact exists. Further, the indication that Dr. Rottenberg could not ascertain through the x-rays the cause of the observed disc narrowing does not mandate summary dismissal where plaintiff's claims of debilitating back pain arose directly after the accident, thereby creating a factual issue on causation.⁴

Sufficient documentary evidence was submitted to create an outcome-determinative factual dispute concerning whether plaintiff suffered an objectively manifested impairment arising out of the accident. Accordingly, the trial court's ruling summarily dismissing the claim for noneconomic damages is reversed.

Finally, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition because her claim for excess wage loss does not require a finding of a serious impairment of body function. Damages for work loss in excess of the daily, monthly, and three-year limitations are recoverable in tort under the no-fault act without regard to whether the plaintiff suffered serious impairment of body function. MCL 500.3135(3)(c); *Ouellette v Kenealy*, 424 Mich 83, 85-86; 378 NW2d 470 (1985). We note that the trial court's opinion and order, while dismissing the case, did not specifically address this claim, nor was it addressed by plaintiff in her brief challenging summary disposition, thus creating a preservation issue. Nonetheless, plaintiff failed to submit evidence establishing that she would indeed suffer a wage loss beyond three years from the date of the accident, and speculation and conjecture are

⁴ We note that plaintiff also submitted evidence that Dr. Gaston diagnosed her as having TMJ dysfunction, chronic myofascial pain syndrome, cervicogenic and traumatic headaches, and post-concussion syndrome. However, we cannot ascertain from the medical records whether the findings are predicated on objective medical testing or solely plaintiff's subjective complaints, and plaintiff does not elaborate on the issue.

insufficient to satisfy plaintiff's burden. *Detroit v General Motors Corp*, 233 Mich App 132, 139-140; 592 NW2d 732 (1998). Accordingly, dismissal of the excess wage loss claim was proper.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ William B. Murphy

/s/ Michael R. Smolenski