

STATE OF MICHIGAN
COURT OF APPEALS

GLORIA CARLISLE,

Plaintiff-Appellant,

v

KEITH RYAN WRIGHT and BENTON
CONSTRUCTION CORPORATION,

Defendants-Appellees,

and

GMAC INSURANCE COMPANY,

Defendant.

UNPUBLISHED
February 13, 2014

No. 310762
Oakland Circuit Court
LC No. 10-112812-NI

Before: JANSEN, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Plaintiff, Gloria Carlisle, appeals as of right an order granting summary disposition in favor of defendants, Keith Ryan Wright and Benton Construction Corporation, in this third-party claim arising from an automobile accident.¹ We reverse and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

On October 24, 2008, plaintiff, then aged 75, turned right onto eastbound Huron Street from Paddock Road and was struck by a vehicle driven by defendant Wright and owned by defendant Benton Construction. Plaintiff asserts that she had the green light while Wright ignored a red light and struck her vehicle.

After the accident, plaintiff's daughter took her to the emergency room for treatment where plaintiff was diagnosed with a neck and shoulder sprain. Plaintiff later followed up for

¹ Plaintiff's first party claim against GMAC was settled.

treatment with her primary doctors. In the months following the accident, plaintiff also experienced a rapid cognitive degeneration, with difficulties in concentrating, expressing herself and remembering things. Plaintiff brought suit against defendants, arguing that she had suffered a serious impairment of a body function.

Defendants moved for summary disposition, contesting liability for the accident and also contesting plaintiff's ability to meet the threshold injury requirement for bringing her action. The trial court granted the motion, finding:

While Plaintiff's deposition testimony is confusing as to the circumstances surrounding the accident, the Court finds that there are sufficient facts presented to create a question of fact regarding negligence. However, the Court finds that summary disposition is appropriate because Plaintiff has not demonstrated an objectively manifested impairment of an important body function resulting from this accident. The Court notes that although Plaintiff alleges a closed head injury, the requirements of MCL 500.3135(2) have not been satisfied.

The trial court denied plaintiff's motion for reconsideration. Plaintiff now appeals as of right.

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred in granting summary disposition in defendant's favor where there were questions of fact as to the nature and extent of her injuries. We agree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint by considering the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). A mere possibility that the claim might be supported by evidence at trial is insufficient to withstand a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006). Moreover, this Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

MCL 500.3135(1) provides that "[a] person 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 suffered a serious impairment of a body function. 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 her normal life. MCL 500.3135(7); *McCormick v Carrier*, 487 Mich 180, 190; 795 NW2d 517 (2010).

The determination whether a plaintiff has suffered a serious impairment of body function is a question of law for the court only if there is no factual dispute concerning the nature and extent of a plaintiff's injuries or 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); *McCormick*, 487 Mich at 192-193. Before determining the issue as a matter of law, a trial court must determine whether there is a factual dispute regarding the nature and extent of the injuries. *McCormick*, 487 Mich at 215.

McCormick clearly sets forth the three statutory requirements 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.” *Id.* at 195. “Objectively manifested” is “an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function.” *Id.* at 196. Because the term “impairment” relates to the impact of damage that arises from an injury, the focus is how the injury affected a particular body function, not the actual injury. *Id.* A plaintiff must introduce evidence demonstrating a physical basis for subjective complaints of pain and suffering, which generally, but not always, requires medical documentation. *Id.* at 198. “Important body function” refers to a function of significance and will vary depending on the person. *Id.* at 199. Therefore, the inquiry regarding an important body function is “an inherently subjective inquiry that must be decided on a case-by-case basis.” *Id.*

The phrase “affect the person’s ability to lead his or her normal life” means “to have an influence on some of the person’s capacity to live in his or her normal manner of living.” *Id.* at 202. This is a subjective, fact specific inquiry to be resolved on a case-by-case basis. *Id.* “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 accident.” *Id.*

Plaintiff asserts that her head, neck and back injuries were objectively manifested. We agree that there is a question of fact as to the nature and extent of plaintiff’s injuries and that the trial court erred in granting defendant summary disposition. The medical reports that plaintiff submitted to substantiate her claim were sufficient to raise a genuine issue of material fact as to whether she suffered an objectively manifested impairment of an important body function. She saw at least three different physicians. Dr. Anthony Emmer, a neurologist, opined that plaintiff suffered from some preexisting conditions as to her back, but that these conditions “may have been clinically silent and aggravated by the motor vehicle accident.” After a neuropsychological examination of plaintiff, Dr. Louis Dvorkin, a neuropsychologist made the following finding: “Diagnostic impression is of Mild Cognitive Impairment that was significantly exacerbated by an acutely destabilizing and traumatic neurological event in the form of a cerebral concussion.” Dr. William M. Leuchter, another neurologist, determined that plaintiff had a “mild head injury with post concussive phenomenon,” a possible “atypical seizure, chronic subdural hematoma or traumatic brain injury--[i.e.] Intracranial hemorrhage, confusion or other.” Based upon the information received from plaintiff, Dr. Leuchter ultimately found “[p]sychophysiologic sequelae of motor vehicle accident.”

Thus, even if some of her injuries were preexisting, plaintiff provided medical support that those injuries were exacerbated by the motor vehicle accident and thus she demonstrated a question of fact as to whether she suffered an objectively manifested impairment of a body

function. An aggravation of a preexisting condition can constitute a compensable injury. *Fisher v Blankenship*, 286 Mich App 54, 63; 777 NW2d 469 (2009).

Additionally, even though the trial court properly rejected plaintiff's late-submitted affidavit regarding her alleged head injury under MCL 500.3135, this Court has previously noted that "[t]he language of § 3135 does not indicate . . . that the closed-head injury exception provides the exclusive manner in which a plaintiff who has suffered a closed-head injury may establish a factual dispute precluding summary disposition. In the absence of an affidavit that satisfies the closed-head injury exception, a plaintiff may establish a factual question under the broader language set forth in subsection 3135(2)(a)(i) and (ii) . . ." *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000).

Finally, without filing their own claim of appeal, defendants argue that summary disposition was appropriate where there were no genuine issue of material fact as to liability for the accident. "[A]n appellee need not take a cross appeal in order to urge, in support of relief afforded him below, reasons other than those adopted by or those rejected by the lower court." *Middlebrooks v Wayne Co*, 446 Mich 151, 166; 521 NW2d 774 (1994). On the record before the trial court, we decline defendants' invitation to affirm on alternate grounds. Plaintiff's deposition testimony was confusing, but can in no way be construed an admission of fault. There are clearly factual issues regarding liability.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto