STATE OF MICHIGAN

COURT OF APPEALS

BARBARA JEAN ROSS, Plaintiff-Appellant,	UNPUBLISHED October 11, 2012
v	No. 302717 Court of Claims
STATE OF MICHIGAN, Defendant-Appellee.	LC No. 05-000189-MZ

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

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