STATE OF MICHIGAN

COURT OF APPEALS

DEVIN M. BIRCHFIELD,

Plaintiff-Appellant,

v

VANESSA M. CHIODO and LINDA A. CHIODO,

Defendants-Appellees.

UNPUBLISHED
June 25, 2020

No. 348386
Kalamazoo Circuit Court
LC No. 18-000087-NI

Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

MARKEY, P.J. (*dissenting*.)

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants in this automobile negligence case involving the question of whether plaintiff suffered a serious impairment of body function arising out of a motor vehicle accident. Plaintiff claimed that he suffered a back injury in the accident, resulting in back pain that has affected his general ability to lead his normal life. The trial court concluded as a matter of law that any impairment was not objectively manifested, that there was no causal connection between the accident and the alleged impairment, especially considering a pre-accident history of back pain, and that the claimed impairment had not affected plaintiff's general ability to lead his normal life. Plaintiff argues that there exists a factual dispute regarding the nature and extent of his injuries under MCL 500.3135 and *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), precluding summary disposition. I agree with the trial court's ruling to summarily dismiss the action. Accordingly, I respectfully dissent.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). We also review de novo issues of statutory interpretation. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).[1] Aside

[1] MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is

from certain enumerated exceptions, the no-fault act, MCL 500.3101 *et seq.*, abolished tort liability for injuries caused by the ownership, maintenance, or use of a motor vehicle. *Gray v Chrostowski*, 298 Mich App 769, 775; 828 NW2d 435 (2012). MCL 500.3135(1) provides a threshold exception to tort immunity with respect to the recovery of noneconomic damages in limited situations. *Id.* MCL 500.3135(1) states that "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle [but] only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." At the time of the accident and the trial court's ruling, MCL 500.3135(5) defined a "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." 2012 PA 158.

"The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis." *McCormick*, 487 Mich at 215. In *McCormick*, the Supreme Court explained that MCL 500.3135(2) governs a trial court's role in the determination whether a plaintiff suffered a serious impairment of body function. *Id.* at 192. MCL 500.3135(2) provides:

> (a) The issues of whether the injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> (i) There is no factual dispute concerning the nature and extent of the person's injuries.
>
> (ii) 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

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entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State*, 301 Mich App at 377. A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

> person has suffered a serious impairment of body function or permanent serious disfigurement. . . . .

"If there is no factual dispute, or no material factual dispute, then whether the threshold is met is a question of law for the court." *McCormick*, 487 Mich at 215. In construing MCL 500.3135(2), the *McCormick* Court noted that "the disputed fact does not need to be outcome determinative in order to be material, but it should be significant or essential to the issue or matter at hand." *Id.* at 194 (quotation marks omitted).

Under the first prong of MCL 500.3135(5), it must be proven that the injured party suffered an objectively manifested impairment of body function. See *McCormick*, 487 Mich at 195.[2] With respect to this issue, I initially note that the focus is on whether the alleged *impairment* was objectively manifested, not whether the *injury* was objectively manifested. *Id.* at 197; *Patrick v Turkelson*, 322 Mich App 595, 606; 913 NW2d 369 (2018). In this case, the alleged "impairment" is plaintiff's inability to engage in certain physical activities or to hold certain postures without feeling pain. There was documentary evidence in the form of plaintiff's deposition testimony and the medical documentation that would support a determination that plaintiff had an impairment, i.e., back pain. Whether it was "objectively manifested" is a separate question.

After reviewing various dictionary definitions, our Supreme Court in *McCormick* observed "that the common meaning of '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." *McCormick*, 487 Mich at 196. Stated otherwise, "an 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions." *Id.* A plaintiff must submit evidence showing that there is a physical basis for a subjective complaint of pain, which generally requires medical testimony. *Id.* at 198; see also *Patrick*, 322 Mich App at 607 ("Although mere subjective complaints of pain and suffering are insufficient to show impairment, evidence of a physical basis for that pain and suffering may be introduced to show that the impairment is objectively manifested.").

With respect to the issue of causation in the context of a negligence action, a plaintiff must establish both cause in fact and legal cause. *Patrick*, 322 Mich App at 616. Proving cause in fact requires a plaintiff to present substantial evidence showing that more likely than not, the plaintiff's injuries would not have occurred but for the defendant's negligent conduct. *Id.* at 617. Circumstantial evidence and reasonable inferences arising from the evidence can be utilized to establish causation. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). But it is not sufficient to proffer "a causation theory that, while factually supported, is, at best, just as possible as another theory." *Id*. at 164. "[L]itigants do not have any right to submit an evidentiary record to the jury that would allow the jury to do nothing more than guess." *Id*. at 174. A court must dismiss an action when causation remains an issue of pure speculation and conjecture, or the

[2] I note that the *McCormick* Court referred to MCL 500.3135(7), which, at that time, contained the "objectively manifested impairment" language. See 2002 PA 697.

probabilities are evenly balanced at best. *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 124 (2009).

In the instant case, there is evidence that plaintiff has been complaining of back pain for several years, but, ultimately, the record effectively shows only subjective complaints of pain by plaintiff. That is, the record lacks evidence of a "physical basis" for the complaints. See *McCormick*, 487 Mich at 198; *Patrick*, 322 Mich App at 607. None of the medical diagnostic tests revealed a physical basis for plaintiff's asserted lumbar pain, nor was there any testimony or statements by a physician specifically opining that there was a physical basis or reason for plaintiff's pain.[3] The majority relies on a letter by Dr. Smith in which she stated that she had treated plaintiff "for his lower back pain due to a motor vehicle accident on December 2, 2015." This vague statement, if even admissible, however, does not contain any assertion by Dr. Smith that she had identified a physical basis for plaintiff's subjective complaints of pain. Even the medical reports indicating tenderness upon palpation of plaintiff's spine were inadequate because the described tenderness was based on plaintiff's subjective claim of pain or tenderness in response to palpation. I do recognize that on August 24, 2016, a chiropractor noted "mild to moderate muscle spasms [that] were palpated." But even assuming that this finding could be considered evidence of a physical, i.e., objective, basis for *pain*, I conclude that this singular event in the extensive record spanning several years is simply inadequate to sustain the action.[4] Moreover, although there were medical reports containing "diagnoses" or "assessments" of lumbar pain and limited range of motion, there is nothing in these reports suggesting that the diagnoses or assessments were based on anything but plaintiff's subjective claims of pain and movement limitations.[5] The majority relies on a reference in *McCormick* to the plaintiff there having a "reduced range of motion." *McCormick*, 487 Mich at 218. But the plaintiff in *McCormick*

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[3] The medical assessment from plaintiff's visit to Sindecuse Health Center two days after the accident did indicate that plaintiff's pain was "suggestive o[f] disc inflammation." There is, however, no medical test result or other objective finding of disc inflammation, and clearly this comment was merely just what it says, "suggestive," i.e., possibly an explanation. Consequently, I find this statement too tenuous and indefinite to be of any benefit to plaintiff.

[4] The majority relies on *Franz v Woods*, 145 Mich App 169; 377 NW2d 373 (1985), overruled in part on other grounds by *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), superseded by statute in an amendment of MCL 500.3135. The *Franz* panel stated that "we are persuaded that the finding of muscle spasms is an objective manifestation of injury." *Franz*, 145 Mich App at 176. I note, however, that in *Franz*, the "plaintiff complained of frequent spasms" and examination "revealed spasms." *Id.* Here, there is no evidence of frequent spasms, the spasms detected by the chiropractor were *on one occasion* in relation to several years of medical visits and testing, the spasms were only "mild to moderate" on palpation, and there was no accompanying opinion connecting the spasms to the car accident. This was insufficient to create a genuine issue of material fact. I also note that the 1985 *Franz* decision is not binding precedent under MCR 7.215(J)(1).

[5] As stated earlier, an objectively manifested impairment is one observable or perceivable by another person from actual symptoms or conditions. *McCormick*, 487 Mich at 196.

"suffered a broken ankle" as revealed in x-rays. *Id.* at 185, 218. A similar showing has not been made in our case; there certainly were no supporting x-rays or any other objective test results.

In relationship to the trial court's discussion concerning plaintiff's pre-accident back pain and problems, I understand that "the aggravation or triggering of a preexisting condition can constitute a compensable injury." *Fisher v Blankenship*, 286 Mich App 54, 63; 777 NW2d 469 (2009). There was no evidence that plaintiff had complained of back pain for over a year leading up to the accident, after which, he then again alleged back pain. But again, the absence of evidence showing a physical, objective basis for plaintiff's subjective claims of pain should derail his lawsuit.[6]

Finally, plaintiff cites a couple of this Court's unpublished opinions in support of his appeal; however, they are simply inapposite and distinguishable because in both cases there was evidence that medical diagnostic tests actually showed impairments and injuries.

In sum, although there may have been a factual dispute concerning the nature and extent of plaintiff's injuries, the dispute was not material to the determination of whether plaintiff suffered a serious impairment of body function because the dispute did not encompass necessary evidence of a non-subjective, physical basis for plaintiff's subjective complaints of pain linked to the accident. Therefore, while there may have been an impairment, it was not objectively manifested as a matter of law. Accordingly, it was proper for the trial court to decide the issue, MCL 500.3135(2), and I would conclude that the court did not err in summarily dismissing plaintiff's action.

I respectfully dissent.

/s/ Jane E. Markey

[6] To the extent that the evidence of scoliosis, degenerative disc disease, and spondylosis (degenerative arthritic changes to the spine) explained plaintiff's alleged pain, I note there was no evidence that such back ailments were caused or exacerbated by the motor vehicle accident. I recognize that the medical report from Sindecuse Health Center stated that exacerbation from the accident was "suspected," but this statement, again, if even admissible, is simply too vague and indefinite and did not pinpoint a physical basis for the suspicion.