

STATE OF MICHIGAN
COURT OF APPEALS

VICTORIA DENISE BLAKE,

Plaintiff-Appellant,

v

RAYFORD LEE EVANS and LM GENERAL
INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED

May 14, 2020

No. 348307

Wayne Circuit Court

LC No. 18-002286-NI

Before: JANSEN, P.J., and METER and CAMERON, JJ.

PER CURIAM.

In this action under the no-fault act, MCL 500.3101 *et seq*, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. On appeal, plaintiff argues that the trial court erred because there was evidence that plaintiff's injuries were related to the motor vehicle accident, and that plaintiff's injuries affected her life. We affirm.

I. BACKGROUND

This case arises out of injuries that plaintiff allegedly sustained in a motor vehicle accident that occurred on June 13, 2017. The accident occurred when defendant Rayford Lee Evans turned left at an intersection in front of plaintiff, which caused plaintiff to crash into the passenger side of Evans's vehicle. The airbags in plaintiff's vehicle deployed, but plaintiff was able to get out of the driver's seat and walk to the backseat of the vehicle to check on her four-year-old niece. Although plaintiff complained that she hurt her back and shoulder in the accident, plaintiff refused medical treatment at the scene, and went to urgent care the next day. The urgent care medical records establish that plaintiff complained of pain in her right arm, wrist, and hand from the accident, but denied any neck or back pain.

On June 21, 2017, plaintiff went to her primary care physician, Dr. Raad Toma, complaining of shoulder and back pain. Dr. Toma ordered x-rays of plaintiff's shoulders and lumbar spine, which revealed that plaintiff's shoulders and lumbar spine were normal. Plaintiff saw Dr. Jeffrey Parker on June 30, 2017, complaining of neck and back pain. On July 5, 2017, plaintiff lost her balance walking down some stairs in her home, fell, and fractured her ankle.

Plaintiff visited Dr. Parker on August 4, 2017, who diagnosed plaintiff with a cervical sprain with radicular features, a lumbar sprain with radicular features, and a left ankle fracture. Dr. Parker opined that the cervical and lumbar sprains “developed following [plaintiff’s] motor vehicle accident on June 13, 2017.” On September 26, 2017, an MRI was performed for plaintiff’s lumbar spine, which showed plaintiff had disc bulges at her L4-L5 and L5-S1 vertebrae. On February 23, 2018, Dr. Parker discharged plaintiff because of plaintiff’s improvement.

On June 20, 2018, more than one year after plaintiff’s motor vehicle accident, plaintiff presented to Dr. Louis Radden, complaining of neck and back pain. After examining plaintiff, Dr. Radden opined that plaintiff had cervical and lumbar disc herniations, cervical and lumbar sprains or strains, and cervical and lumbar facet syndrome.

Plaintiff filed a complaint against defendants, asserting a claim of negligence against Evans, and a claim for underinsured motorist benefits against LM General Insurance Company. Defendants¹ filed a motion for summary disposition under MCR 2.116(C)(10), arguing that there was no issue of fact that plaintiff did not suffer an objectively manifested impairment arising out of the accident. Defendants asserted that plaintiff’s injuries were not caused by the accident because the testing performed immediately after the accident did not show evidence of an injury. Additionally, plaintiff suffered a serious, intervening ankle injury. Defendants further argued that plaintiff did not establish that she suffered an objectively manifested impairment because plaintiff only presented subjective complaint of pain without establishing a physical basis for her pain. Finally, defendants argued that plaintiff’s injuries did not affect her daily life because, although she experienced some pain and uncomfotableness, plaintiff was able to perform the activities she engaged in before the accident.

Plaintiff filed a response to defendants’ motion for summary disposition, arguing that she suffered objective impairments to her body functions that affected her ability to lead a normal life. Specifically, plaintiff asserted that she submitted evidence to establish the following injuries: cervical disc herniations at C5-6, disc bulge and herniation at L4-S1, detached labrum and tearing of the labrum in the right shoulder, spasming in the neck and lower back, decreased flexion in the cervical spine, and decreased lumbar extension and flexion. Additionally, Dr. Radden’s affidavit stated that plaintiff’s injuries were related to her automobile accident. Plaintiff’s injuries also prevented her from leading her preaccident lifestyle.

At the hearing on defendants’ motion for summary disposition, the trial court concluded that there was no evidence that plaintiff suffered an objective impairment that was caused by the accident. Instead, plaintiff first showed objective evidence of an impairment after she broke her ankle when she slipped and fell on the stairs. Accordingly, the trial court granted summary disposition in favor of defendants. This appeal followed.

¹ Although defendant Evans brought the initial motion for summary disposition, defendant LM General Insurance Company concurred in the motion for summary disposition. Therefore, we will refer to the motion as “defendants’ motion for summary disposition,” and will refer to the arguments therein as “defendants’ arguments.”

II. DISCUSSION

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendants because there was evidence that plaintiff's injuries were related to the motor vehicle accident. Plaintiff also argues that her injuries affect her ability to lead a normal life. We disagree.

This Court reviews a trial court's decision to grant or deny summary disposition de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "[T]he circuit court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "A motion for summary disposition under MCR 2.116(C)(10) shall be granted if there is no genuine issue regarding any material fact and the movant is entitled to judgment as a matter of law." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 398; 919 NW2d 20 (2018). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The Michigan no-fault insurance act limits tort liability. *Patrick v Turkelson*, 322 Mich App 595, 606; 913 NW2d 369 (2018). However, 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." *Id.*, quoting MCL 500.3135(1) (emphasis omitted). Indeed, "an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." MCL 500.3105(1). An insurer's liability is limited to "injuries that are caused by the insured's use of a motor vehicle." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005), citing MCL 500.3105(1).

For purposes of this appeal, plaintiff only alleges that she suffered a serious impairment of 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 his or her normal life." *Patrick*, 322 Mich App at 606, quoting MCL 500.3135(5). Accordingly, MCL 500.3135(5) "provides three prongs that are necessary 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." *McCormick v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010). "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." *Patrick*, 322 Mich App at 607.

Plaintiff asserts that the trial court failed to consider evidence of medical testing that established plaintiff's injuries. Plaintiff cites to medical records from the urgent care center, Dr. Toma, and Dr. Parker, which plaintiff asserts establish that her injuries were caused by the accident. The urgent care records state that plaintiff presented to urgent care, complaining only of pain in her right arm, wrist, and hand, and that plaintiff denied any neck or back pain. The records from Dr. Toma establish that plaintiff received x-rays on her shoulders and back because of

plaintiff's complaint of pain in those areas. However, Dr. Toma's findings from the x-rays establish that plaintiff's shoulders and lumbar spine were normal. These medical records fail to establish that plaintiff suffered any injury to her shoulder, neck, or back before plaintiff fractured her ankle.

Regardless, plaintiff asserts that she testified that her shoulder and back were hurting immediately after the accident. Plaintiff's testimony was directly contradicted by the records from the urgent care, which state that plaintiff denied any neck or back pain. Accordingly, plaintiff's subjective complaints were insufficient to establish that her impairments were objectively manifested. *Patrick*, 322 Mich App at 607. Further, the police report listed plaintiff's injury level at zero, and plaintiff testified that she declined any medical treatment at the scene of the accident. Plaintiff also asserts that Dr. Parker's initial evaluation documented plaintiff's complaints of neck and back pain, and concluded that plaintiff's pain arose from the accident. However, plaintiff did not proffer Dr. Parker's initial evaluation as evidence in the trial court. Therefore, this evidence cannot be used to create an issue of fact to reverse the trial court's grant of summary disposition. See *Maiden*, 461 Mich at 121 (emphasis added) ("The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence *actually proffered* in opposition to the motion."). See also *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal.").

Plaintiff also argues that the trial court disregarded MRI results that showed a tear in plaintiff's shoulder and herniations in her neck, as well as an affidavit from Dr. Radden stating that plaintiff's injuries were caused by the motor vehicle accident. However, plaintiff did not see Dr. Radden for treatment until more than one year after plaintiff's accident, and nearly one year after plaintiff's fractured ankle. This passage of time is important not because it requires a plaintiff to undergo medical testing within three weeks of an accident, as plaintiff suggests, but instead, this testing was done nearly one year after plaintiff fractured her ankle. Simply put, testing done after the motor vehicle accident, but before plaintiff fractured her ankle, did not show evidence of an injury. Conversely, the testing done after plaintiff fractured her ankle did show evidence of injuries. Accordingly, plaintiff failed to proffer evidence to establish that her injuries were caused by the accident, and the trial court properly granted summary disposition in favor of defendants. Because summary disposition was appropriate on the basis of a lack of causation, we need not address plaintiff's remaining argument that her injuries affected her life.

III. CONCLUSION

The trial court properly granted summary disposition in favor of defendants because there was no evidence of medical records establishing that plaintiff's injuries were caused by the motor vehicle accident. Instead, the medical records establish that plaintiff's injuries arose after plaintiff fractured her ankle. Therefore, there was no issue of fact that plaintiff failed to establish that the accident caused her injuries.

Affirmed.

/s/ Kathleen Jansen

/s/ Patrick M. Meter

/s/ Thomas C. Cameron