

STATE OF MICHIGAN
COURT OF APPEALS

CESCILY SPIKES,

Plaintiff-Appellant,

v

JOSHUA SMITH and RIZZO ENVIRONMENTAL
SERVICES,

Defendants-Appellees,

and

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

Before: STEPHENS, P.J., and O'BRIEN and REDFORD, JJ.

STEPHENS, J. (*dissenting*).

The majority affirmed the trial court's determination that that plaintiff did not present evidence to support a finding that her presenting conditions were causally linked to the 2016 accident. However, Drs. Richard Fessler and John Marshall at the Michigan Head & Spine Institute both linked her motor vehicle accident to her presenting injuries. In the context of a (C)(10) motion for summary disposition, "a court may not weigh the evidence before it or make findings of fact; *if the evidence before it is conflicting*, summary disposition is improper." *Lysorgorski v Bridgeport Charter Twp*, 256 Mich App 297 299; 662 NW2d 108 (2003) (quotation marks and citation omitted); *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). After plaintiff's October 2016 consultation with Dr. Fessler, he wrote:

The patient with neck pain, cervical disc bulges, and upper extremity weakness caused or aggravated by her motor vehicle accident. Secondly, the patient with left upper extremity shoulder weakness and pain caused or aggravated by her bus

accident. Finally, the patient with lumbar disc herniation with lumbar radiculopathy and back pain caused or aggravated by her bus accident.

The majority relies on the plaintiff's acknowledgment that she failed to give those physicians her complete medical history. That failure certainly undermines the reliability of the physicians' assertion that the accident was a cause of pain and limitation. However, at the MCR 2.116(C)(10) motion, the sole issue is whether the plaintiff has presented competent evidence on causation. The fact that the plaintiff failed to supply Drs. Fessler and Marshall with information does not render either licensed physician incompetent to testify consistently with his office note. The majority writes:

The record reflects that plaintiff's postaccident treating physicians lacked knowledge of plaintiff's preexisting conditions. Consequently, they lacked the ability to and did not comparatively analyze plaintiff's conditions to determine the cause and origin of her presenting conditions

This analysis is a credibility finding.

My second disagreement with the majority also arises from this permissive fact-finding. The majority affirmed the trial court's determination that the plaintiff failed to meet her burden of coming forward with competent evidence on *McCormick's* "objective manifestation" prong. 487 Mich at 195. In reaching this conclusion, the majority first acknowledges that there is objective evidence of injury. However, they then discount the relevance of the objective evidence of injury noting:

These maladies, however, were all diagnosed and treated before the accident. Plaintiff's medical record [sic] do not indicate that plaintiff's cervical and lumbar spine, knees, feet, or hand conditions arose from the 2016 accident. The evidence also does not establish that these preexisting conditions were necessarily aggravated by the 2016 accident. Plaintiff complained about the same conditions to various physicians and sought treatment for them for approximately 10 years before the accident. Moreover, plaintiff's complaints regarding her conditions do not appear to have perceptively changed following the accident.

Because the underpinning of this analysis is based upon the erroneous analysis of evidence of causation, it too is flawed.

Finally, the majority upheld the trial court's dismissal of the plaintiff's case based upon her failure to meet the third prong of the *McCormick* test; proof that she suffered an impairment of an important body function that affected her general ability to lead her normal life. This is a subjective standard. The trial court based its determination on two pieces of evidence: (1) Social Security Administration (SSA) records, and (2) the surveillance video. The SSA records included judicial admissions from the plaintiff that she suffered several maladies and was subject to limitation pre-accident. The plaintiff notes that the administrative hearing officer did not find the plaintiff to be severely disabled. However, it is not the administrative fact finding based upon the Social Security Administration's heightened standard for relief that is appropriately relevant here. Instead, it is the plaintiff's averments under oath, that she had difficulty standing, bending, etc., that is relevant.

In her deposition in this case, plaintiff recites a number of disabilities that mirror those in the social security application and other papers. She also recited other disabilities including her inability to perform the activity of daily living such as bathing. The surveillance video was recited by the trial court in its ruling. The court appropriately notes that the plaintiff was seen walking, standing, and carrying a purse. Both the social security file and the surveillance video undermine the plaintiff's credibility. They are powerful impeachment tools. However, they do not render her testimony under oath inadmissible. They do not even directly address some of the claimed disabilities, including bathing. This is again a resolution of a fact question and best left to the triers of fact rather than law.

For these reasons, I would have denied summary disposition to defendants.

/s/ Cynthia Diane Stephens