

STATE OF MICHIGAN
COURT OF APPEALS

CHERYL MONA MCKINNEY,

Plaintiff-Appellant,

v

CHRISTOPHER JON GRIFFIN and CITIZENS
INSURANCE COMPANY,

Defendants-Appellees,

and

ESURANCE INSURANCE COMPANY,¹

Defendant.

UNPUBLISHED

November 19, 2020

No. 350354

Genesee Circuit Court

LC No. 18-110457-NI

Before: JANSEN, P.J., and FORT HOOD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right, the trial court’s grant of summary disposition in favor of defendant, Citizens Insurance Company (Citizens), who denied plaintiff’s claim for personal injury protection (PIP) benefits. On appeal, plaintiff also challenges the trial court’s prior grant of summary disposition in favor of defendant, Christopher Jon Griffin (Griffin), which disposed of plaintiff’s third-party negligence claim. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of an automobile accident that occurred on April 24, 2017. Plaintiff was riding in the front passenger seat of her friend’s vehicle when Griffin ran a red light and struck the vehicle. After the accident, plaintiff stated her back was hurting, she was shaking, she had an

¹ Esurance Insurance Company was dismissed as a party to the lower court proceedings.

“extreme headache.” Plaintiff was transported to Hurley Medical Center for “minor injuries.” Plaintiff did not miss any time off of work because of the accident.

As a result of the accident, plaintiff claims to have sustained injuries to her neck, lower back, right leg, and both shoulders. Before the accident, plaintiff would walk five miles a day; now she can no longer walk long distances because of the pain in her lower back and right leg. Plaintiff’s back pain also restricts her from driving long distances. Because of the pain in her right shoulder, plaintiff has difficulty typing and she is restricted from lifting more than 10 pounds. Plaintiff also stated she cannot wear high heeled shoes anymore because of her right leg pain and the clothes she wears “have to be stretchy so [she] can get them over [her] arm and get them over her head[.]” Plaintiff stated she is not prescribed any pain medications for her injuries and that she takes Aleve as needed.

Griffin moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had been involved in a workplace accident before the automobile accident, and it was in the workplace accident that plaintiff sustained the injuries at issue. In support of his position, Griffin relied on the medical opinion of Dr. Paul J. Drouillard, D.O., an orthopedic surgeon, who conducted independent medical evaluation of plaintiff in January 2019. Dr. Drouillard opined that plaintiff’s complained of injuries were actually degenerative injuries that were not related to the automobile accident. Griffin also submitted plaintiff’s medical records which failed to link plaintiff’s injuries to the accident. Thus, Griffin argued, plaintiff had failed to establish a negligence claim because she should not establish causation, and was not entitled to third-party recovery under the no-fault act because she was unable to establish that she suffered a serious impairment of a bodily function as a result of the accident at issue.

The trial court agreed with Griffin, and granted his motion for summary disposition. Specifically, the trial court found:

And with respect to causation, I find that the plaintiff cannot link the injuries to the accident. There are no opinions from doctors that her injuries are acute or accident related. There are MRI reports that merely report what is seen, not an opinion as to cause, however. There’s no evidence that plaintiff’s explanation could be more likely. Now it’s not for the Court to decide if its more likely, but it is for the Court to decide that a reasonable juror could or could not find plaintiff’s argument more likely. And so, with that, I’m going to say that I find defendant’s causation theory is at best just as possible as another theory. I find also, that evidence presented on this theory does not rise to the level such that a jury would conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred. So for those reasons, I am going to grant the motion for summary disposition for defense.

An order granting Griffin’s motion for summary disposition was entered on March 25, 2019.

Citizens also moved for summary disposition under MCR 2.116(C)(10), arguing that the trial court had already determined that plaintiff had failed to establish that the accident at issue had caused her injuries. Thus, Citizens argued, plaintiff was not entitled to receive PIP benefits. The

trial court agreed, again finding that plaintiff had failed to establish causation, and granted summary disposition in favor of Citizens in an order dated August 9, 2019.

Plaintiff filed two prior appeals in this case. On June 6, 2019, plaintiff appealed the trial court's order granting summary disposition in favor of Griffin. However, this Court dismissed plaintiff's appeal for lack of jurisdiction because the trial court's order did "not dispose of the claims with regards to Citizens Insurance Company." See *McKinney v Griffin*, unpublished order of the Court of Appeals, entered June 14, 2019 (Docket No. 349263). Plaintiff filed a second appeal on July 15, 2019, however that application was denied as moot "in light of the claim of appeal filed by plaintiff in Docket No. 350354" which is the instant appeal. See *McKinney v Griffin*, unpublished order of the Court of Appeals, entered October 24, 2019 (Docket No. 349764).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Defendants' moved for summary disposition under MCR 2.116(C)(10). Summary disposition under MCR 2.116(C)(10) is appropriate where, "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "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). "[R]eview is limited to the evidence that has been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009), citing *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Innovative Adult Foster Care, Inc*, 285 Mich App at 476.

III. ANALYSIS

On appeal, plaintiff argues the trial court erred when by granting Citizens' and Griffin's motions for summary disposition where plaintiff submitted sufficient evidence to establish that she sustained injuries in the April 24, 2017 automobile accident, and that those injuries resulted in a serious impairment of body function. Following a thorough review of the record, we cannot agree.

Plaintiff filed a complaint asserting a claim for PIP benefits against Citizens and a negligence claim against Griffin. "Under personal protection insurance 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[.]" MCL 500.3105(1). "Because benefits are only payable for accidental injury arising out of the ownership, operation, maintenance, or use of a vehicle and benefits include allowable expenses, the allowable expenses must be causally connected to the accidental bodily injury arising out of an automobile accident." *ZCD Transp Inc v State Farm Mut Auto Ins Co*, 299 Mich App 336, 340; 830 NW2d 428 (2012) (quotation marks and citation omitted). "Regarding the degree of causation between the injury and the use of the motor vehicle

that must be shown, this Court has established that an injury arises out of the use of a motor vehicle as a motor vehicle when the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or but for.” *McPherson v McPherson*, 493 Mich 294, 297; 831 NW2d 219 (2013) (quotation marks and citation omitted).

The elements of negligence are “(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant’s breach was a proximate cause of the plaintiff’s damages.” *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). “[T]he plaintiff must prove that the driver’s conduct was both a cause in fact and a legal cause of his injuries.” *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). “To establish cause in fact, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.” *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997). “To establish legal cause, the plaintiff must show that it was foreseeable that the defendant’s conduct may create a risk of harm to the victim, and . . . [that] the result of that conduct and intervening causes were foreseeable.” *Id.* at 648. A causation theory on the basis of only slight evidence is inadequate. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). “Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory.” *Id.* “Rather, [there] must [be] substantial evidence from which a jury may conclude that more likely than not, but for [the challenged] conduct, [the claimed] injuries would not have occurred.” *Id.* at 164-165. The plaintiff bears the burden of setting forth specific facts to demonstrate that the defendant caused his or her injuries. *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004).

We first must briefly address plaintiff’s claim that the trial court, in granting Citizens’ and Griffin’s motions for summary disposition “denied [p]laintiff her legal right to develop the record or have the facts determined by a jury.” This argument is unpersuasive because the trial court did not dismiss plaintiff’s case until after the period for discovery had closed. Therefore, plaintiff had sufficient time to develop the record and submit evidence to establish the elements required to prove her claim. See *Oliver v Smith*, 269 Mich App 560, 567-568; 715 NW2d 314 (2006) (finding the trial court’s grant of summary disposition was premature because discovery had not been completed). Moreover, plaintiff fails to allege what additional evidence would be provided to establish her claims. “A litigant’s mere pledge to establish an issue of fact cannot survive summary disposition under MCR 2.116(C)(10).” *Maiden*, 461 Mich at 121.

In the trial court, Griffin and Citizens argued that plaintiff had failed to demonstrate that her alleged injuries were caused by the April 24, 2017 automobile accident. “The moving party may thus satisfy its burden under MCR 2.116(C)(10) by submit[ting] affirmative evidence that negates an essential element of the nonmoving party’s claim, or by demonstrat[ing] to the court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim.” *Lowrey v LMPS & LMPJ Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) (quotation marks and citation omitted). Griffin and Citizens supported their arguments with the independent medical examination report of Dr. Drouillard, who, after examining plaintiff and plaintiff’s medical history, opined:

On clinical examination today, there is no evidence here of any functional impairment and no evidence of a traumatic injury. She may continue working as

she has been doing. She does not require any treatment related to the event of April 24, 2017. She does not need work restrictions, assistance with activities of daily living, household assistance, attendant care, transportation services, or case management. The anomalies in her shoulder are degenerative in nature and not traumatic in origin. I do not believe she requires any further treatment or diagnostic testing. I do not believe surgery is indicated for her right shoulder in regards to the event of April 24, 2017.

The burden then shifted to plaintiff to establish that a genuine issue of material fact existed regarding whether the accident caused her injuries. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Plaintiff argues she submitted sufficient evidence in response to Citizens' and Griffin's motions for summary disposition to establish a question of fact regarding whether the automobile accident was the cause of her injuries. Plaintiff argues the police report confirms that she suffered injuries after the accident. However, the police report was insufficient to establish that plaintiff was injured in the accident. The police report only provides that plaintiff was "transported for minor injuries." The police report does not indicate what type of injury plaintiff may have sustained and does not constitute a verifiable medical opinion. Therefore, the police report is insufficient to support plaintiff's assertion that the accident caused her injuries.

Plaintiff argues her medical records also establish that her injuries were caused by the accident. However, plaintiff does not specify which medical reports related her injuries to the subject accident, and further, the medical records plaintiff relied on in the trial court failed to establish that her injuries were caused by the accident. Although plaintiff did not address Griffin's argument that the accident did not cause her injuries, plaintiff attached the report from Hurley Medical Center on the day of the accident, medical records from plaintiff's primary care physician, MRI scans of her shoulders and lumbar spine, and medical reports from Procure Injury and Rehab Centers (Procure) in her response to Griffin's motion for summary disposition. The report from Hurley Medical Center indicates that plaintiff complained of a headache, "which is improving spontaneously," and denied neck pain "or pain in any of the extremities." The physician concluded that "[p]hysical exam reveals no evidence of traumatic injuries," and determined that any imaging or scans of plaintiff's shoulders and back were unnecessary. Plaintiff was treated with Tylenol and ibuprofen, "and discharged home in stable condition." Contrary to plaintiff's argument, the report from Hurley Medical Center does not establish that plaintiff had sustained injury to her neck, shoulders, and right leg as result of the accident.

The reports from plaintiff's primary care physician also do not establish that plaintiff sustained injuries as a result of the accident. Instead, the medical reports from plaintiff's primary care physician show that in the three months after the automobile accident, plaintiff denied having any neck, back, or shoulder pain. Specifically, three days after the accident, plaintiff underwent an examination with her primary care physician and plaintiff reported "[n]o joint pain, redness or swelling. No back pain. No numbness, tingling or weakness in any of the extremities." Plaintiff was also evaluated by her primary care physician on May 18, 2017, and July 13, 2017, and the reports state that plaintiff's muscles, spine, and joints were normal.

Plaintiff treated with Procure from August 4, 2017 through November 26, 2018, for shoulder pain and pain in her right leg. Plaintiff attached these reports to her response to Griffin's motion for summary disposition, however, plaintiff did not provide any of these reports in her brief

on appeal. The reports indicate plaintiff had been involved in an automobile accident on April 24, 2017. However, none of the reports contain a statement from any of the treating physicians indicating that plaintiff sustained a specific injury from the accident. Further, plaintiff started treating with Procure one month after undergoing an evaluation with her primary care physician where plaintiff denied any neck or shoulder pain. Therefore, the reports from Procure are only an evaluation of plaintiff's complaints that began in August 2017, and do not represent or provide a medical opinion regarding the cause of her complaints.

The MRIs of plaintiff's shoulders and lumbar spine, taken on September 23, 2017, also do not relate any of plaintiff's injuries to the accident. The MRI of plaintiff's right shoulder showed "[p]artial thickness tear undersurface of the distal rotator cuff tendon," a "[g]rade 2 SLAP tear of the glenoid labrum," and "AC degenerative change with mild impingement on the supraspinatus." The MRI of plaintiff's left shoulder showed "[u]ndersurface distal rotator cuff tendon partial-thickness tear," and "AC joint degenerative change with mild impingement on the distal supraspinatus." The MRI of plaintiff's lumbar spine showed "no disc herniation. There are mild facet changes posteriorly however at L3-L4, L4-L5 and L5-S1. Evaluation of the extraspinal included soft tissue structures demonstrates a somewhat irregular appearing 1.5 cm cyst in the posterior right kidney." The MRI reports do not state that any of the irregularities were caused by the automobile accident or any type of trauma. Indeed, the trial court found the MRI reports only show "what is seen, not an opinion as to cause." In addition, as part of the IME, Dr. Drouillard reviewed the MRIs and stated the MRIs of plaintiff's shoulders only showed degenerative changes and did not indicate any "acute traumatic injury." Dr. Drouillard further explained that the MRI of plaintiff's lumbar spine showed "[n]o evidence of any bony injury, muscular injury, ligament injury, or tendon injury. The anomalies here represent minor degenerative changes without evidence of a traumatic injury."

Procure provided plaintiff with disability certificates on May 23, 2018, June 19, 2018, and August 29, 2018, restricting plaintiff from lifting more than 10 pounds and doing housework. The certificates indicate plaintiff had been diagnosed with bilateral shoulder rotator cuff tears and right leg sprain, and that the date of her injury was April 24, 2017. However, the certificates do not actually state that the April 24, 2017 automobile accident was the cause of her injury. Plaintiff also received these disability certificates after the MRIs of her shoulders had been performed, which showed that her shoulder problems were degenerative in nature. In addition, plaintiff only provided these reports in response to Griffin's motion for summary disposition, but failed to explain how the disability certificates showed that her injuries were caused by the automobile accident. Plaintiff did not attach the disability certificates in response to Citizens' motion for summary disposition.

Finally, plaintiff argues that her deposition testimony establishes she sustained injuries as a result of the automobile accident. When a motion under MCR 2.116(C)(10) is made and supported by sufficient documentation, "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or [other documentary evidence], set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). As discussed, plaintiff failed to present any evidence from a medical professional or an expert to rebut Dr. Drouillard's assessment that plaintiff's condition was degenerative in nature. In fact, plaintiff did not present a single opinion from a doctor linking her injuries to the accident. Therefore, plaintiff

failed to establish the accident caused her injuries and summary disposition in favor of Griffin and Citizens was proper.

Plaintiff further argues the trial court incorrectly granted Citizens' and Griffin's motions for summary disposition because causation is a question of fact for a jury. "While causation is generally a matter for the trier of fact, if there is no issue of material fact, then the issue is one of law for the court." *Holton v A+ Assoc Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003). "[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." *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003).

Here, the trial court did not improperly weigh evidence or make findings of fact. Griffin moved for summary disposition arguing the IME report and the MRIs showed that plaintiff's injuries were degenerative in nature, and not caused by the automobile accident. Plaintiff failed to respond to Griffin's causation argument in her response to Griffin's motion for summary disposition, and throughout the lower court proceedings, plaintiff failed to present any medical records or opinions from her doctors that established plaintiff's injuries were caused by the accident. Because plaintiff failed to establish a genuine issue of material fact whether the accident caused her injuries, the issue of causation was properly decided by the trial court. *Holton*, 255 Mich App at 326.

Plaintiff also argues the trial court erred when it granted summary disposition in favor of Griffin because she did, in fact, suffer a serious impairment of a body function as a result of the accident. A plaintiff may pursue a claim for a "serious impairment of body function" caused by another person's negligent use of an automobile. MCL 500.3135(1). MCL 500.3135(5) defines a serious impairment of an important body function as "an objectively manifested impairment of an important body function that affects the person's ability to lead his or her normal life." To establish a serious impairment of body function, there must be (1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his normal life. *McCormick v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010). An objectively manifested impairment is one that is observable from actual symptoms or conditions. *Id.* at 195-196. "If there is an objectively manifested impairment of body function, the next question is whether the impaired body function is 'important.'" *Id.* at 198. The question of whether a body function will be considered important depends on its "value, significance, or consequence," to the injured person. *Id.* at 199. "Therefore, this prong is an inherently subjective inquiry that must be decided on a case-by-case basis, because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person's life." *Id.* If there is an objectively manifested impairment of a body function and that function is important to that person, the court must determine whether the impairment affects the person's general ability to lead his normal life. *Id.* at 200. "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 incident." *Id.* at 202.

We conclude that the trial court did not err in determining that plaintiff failed to demonstrate a serious impairment of a body function as a result of the accident. Plaintiff has established a question of fact whether she suffered from greater impairments now than she did before the accident. However, as discussed, the only evidence causally linking those greater

impairments to the accident are plausible inferences, which is insufficient to overcome Dr. Drouillard's expert medical testimony that any injury to plaintiff's shoulders and back are not the result of the accident. Although plaintiff's MRI diagnostic reports document some anomalies and injuries, plaintiff has provided no medical diagnosis or documentation linking those findings to the accident. Accordingly, the trial court correctly determined there was no genuine issue of material fact regarding plaintiff's ability to demonstrate that she suffered an objectively manifested impairment arising from the April 24, 2017 automobile accident.

Affirmed.

/s/ Kathleen Jansen

/s/ Karen M. Fort Hood

/s/ Amy Ronayne Krause