

STATE OF MICHIGAN
COURT OF APPEALS

DORSHA MAGEE,

Plaintiff-Appellant,

v

RYAN EMMETT YOUNG,

Defendant-Appellee.

UNPUBLISHED

October 29, 2020

No. 352650

Oakland Circuit Court

LC No. 2018-167626-NI

Before: METER, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Plaintiff was involved in a motor vehicle accident and brought suit against the other driver, defendant, alleging that she suffered a “serious impairment of body function” as defined by MCL 500.3135(5). She appeals the trial court’s decision to grant defendant’s motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

I. BACKGROUND

On April 27, 2017, plaintiff’s vehicle was rear-ended by defendant’s vehicle while driving on a boulevard. At the time of the accident, plaintiff had been receiving disability benefits since 2014. Plaintiff said that after the accident her body, specifically her back and head, were aching and sore. She was taken to the emergency room where x-rays were taken and found to be normal.

Plaintiff claimed injuries to her head, neck, back, right shoulder, and right leg resulting from the accident. She was prescribed physical therapy, and she testified that all of her claimed injuries resolved in November 2017. In August 2018, she sued defendant for negligence. In moving for summary disposition, defendant relied on plaintiff’s lengthy history of prior injuries and limitations. In a written opinion and order, the trial court determined that plaintiff failed to

established a genuine issue of material fact that she suffered a serious impairment of body function, and later denied plaintiff's motion for reconsideration. Plaintiff now appeals.¹

II. APPLICABLE LAW

Under the no-fault act, MCL 500.3101 *et seq.*, tort liability is limited. *Patrick v Turkelson*, 322 Mich App 595, 606; 913 NW2d 369 (2018). "A person remains subject to tort liability . . . only if the injured person has suffered . . . [a] serious impairment of body function . . ." MCL 500.3135(1). Whether a serious impairment has occurred is a question of law for the court in either of two circumstances. First, if "there is no factual dispute concerning the nature and extent of the person's injuries." MCL 500.3135(2)(a)(i). Second, if such a factual dispute "is not material to the determination whether the person has suffered a serious impairment of body function." MCL 500.3135(2)(a)(ii).

"Serious impairment of body function" is defined by statute 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(5). In order to establish a serious impairment of a body function, the plaintiff must show "(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). Whether an individual meets this threshold is an "inherently fact- and circumstance-specific" analysis. *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011).

An objectively manifested impairment is generally "observable or perceivable from actual symptoms or conditions." *McCormick*, 487 Mich at 196. The plaintiff must proffer evidence of "actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." *Id.* The plaintiff must introduce evidence of a physical basis for the pain and suffering to show that the impairment is objectively manifested. *Id.* at 197-198. "Medical testimony is generally, but not always, required to make this showing." *Patrick*, 322 Mich App at 605. Mere subjective complaints are not enough to demonstrate an impairment. *Id.* Plaintiff must also demonstrate that defendant's conduct was the cause of her alleged injuries. See *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

Because defendant does not dispute that the back, neck, shoulder, and leg perform important body functions, if an objectively manifested impairment is established in this case the next question is whether it affected plaintiff's general ability to lead a normal life. *McCormick*, 487 Mich at 200. The impairment must have "an influence on some of the person's capacity to live in his or her normal manner of living." *Id.* at 202. To determine whether a person's general

¹ A trial court's decision to grant summary disposition is reviewed de novo. *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

ability to lead his or her normal life has been affected, “a comparison of the plaintiff’s life before and after the incident” is required. *Id.*

IV. ANALYSIS

We conclude that plaintiff has not demonstrated an objectively manifested impairment caused by the April 27, 2017 accident.²

We will begin by reviewing plaintiff’s significant history of prior injuries. Plaintiff first sought social security disability benefits in 2007, at the age of 25, claiming to have back pain that limited her ability to bathe, cook meals and stand for a period of time and that she used crutches or a wheelchair when shopping. According to plaintiff, this claim was denied. In 2012, plaintiff fell and injured her back and left knee. She fell again in May 2013, twisting her knee. Both incidents occurred while plaintiff was at work, and she does not dispute that she filed corresponding claims for worker’s compensation.

In October 2013, plaintiff was involved in a motor vehicle accident from which she claimed that she suffered injuries to her middle back, neck and shoulders. In 2014, plaintiff sought disability benefits for back pain and work stress. She claimed that she could not lift more than 5 pounds and that she needed to get dressed while sitting down due to back pain. She further reported using a walker and brace. Her claim was approved, and she was found to have been disabled since May 22, 2013.

Plaintiff was involved in another motor vehicle accident in June 2015 that she claims caused headaches, neck pain and upper, middle, and lower back pain. In 2016, plaintiff received steroid injections in her back and physical therapy. She reported severe limitations to her providers, including the inability to sit, stand, or walk without assistance. She also claimed that she was unable to clean, drive, or dress herself. In January 2017, plaintiff was diagnosed with numerous conditions, including: radiculopathy, lumbosacral region; radiculopathy, cervical region, ligament sprains in the cervical and lumbar spine, muscle spasm of back, and low-back pain.

We next consider plaintiff’s medical records from the date of the accident forward as to her head, neck and back, right leg and right shoulder. A CT scan of plaintiff’s head on May 17, 2017, was normal, and there is no other evidence that would support a claim of impairment relating to the head. X-rays of plaintiff’s lumbar and thoracic spine on May 4, 2017, were also normal. An MRI of plaintiff’s lumbar spine taken on August 18, 2017, showed no disc herniation,

² The trial court initially ruled that plaintiff did not suffer an objective impairment as a result of the accident, but upon reconsideration the court found a question of fact on that issue. However, the court nonetheless denied the motion for reconsideration because plaintiff failed to adequately explain how any impairment resulting from the accident affected her ability to lead her general life. As an alternative ground for affirmance, defendant argues that plaintiff failed to show an objectively manifested impairment. See *McLean v Dearborn*, 302 Mich App 68, 79 n 2; 836 NW2d 916 (2013) (“A party on appeal is not precluded from urging an alternative ground for affirmance.”) (quotation marks and citation omitted).

foraminal narrowing or spinal stenosis. Plaintiff was referred to the Michigan Orthopaedic Institute for treatment where she was examined by Dr. Lawrence Kurz, M.D., on September 26, 2017. Dr. Kurz examined plaintiff's cervical, thoracic and lumbar spine and found no tenderness, spasm or masses. Dr. Kurz also found that the range of motion for plaintiff's cervical and lumbar spine were within normal limits.

The only imaging that provides any support for plaintiff's claimed back and neck impairment is an MRI of her cervical spine taken on July 13, 2017, which was read as showing some straightening of the "normal cervical lordosis," which "could indicate muscle spasm." However, an MRI of plaintiff's cervical spine taken in January 19, 2016, also showed "straightening of the cervical lordosis. And while plaintiff's physical therapist noted post-accident that plaintiff "has moderate tenderness from C2 and C4 and also right cervical paraspinals through C2 through C6," plaintiff has a substantial history of back complaints and was diagnosed with a cervical strain three months before the accident at issue. Accordingly, plaintiff fails to show that the accident at issue in this case caused any claimed impairment relating to her back or neck.

Plaintiff also claims injury to her right hip. An X-ray of plaintiff's hip taken on July 27, 2017, was negative for any acute process. Plaintiff was prescribed physical therapy for her right shoulder, neck, and back pain. In therapy, she was informed that her right hip was rotated, and she claimed that the physical therapist strained her right hip. Given that history, plaintiff's primary physician, Dr. Robert Ricketts, D.O., opined in a September 18, 2017 letter, "I do not believe her right hip pain is related to the accident." Thus, plaintiff's claim that her hip injury was caused by the April 2017 accident is without merit.

The only remaining claimed impairment relates to plaintiff's right shoulder. The post-accident timeline for this alleged impairment injury is as follows. On June 15, 2017, plaintiff reported severe shoulder pain to Dr. Ricketts, and when asked to raise her arms, she stopped at 90 degrees on the right arm, reporting pain. However, on examination, the right shoulder was "non tender" and "rotator cuff testing [was] not performed due to pain." Dr. Rickett's impression was that plaintiff suffered a right shoulder injury from the accident.

An MRI of plaintiff's right shoulder was taken on June 17, 2017; the interpreting physician concluded that "[t]here may be a small partial-thickness tear along the articular tendon," but otherwise found the MRI unremarkable. On June 30, 2017 plaintiff was seen at Troy Orthopaedic Associates by Dr. Nicholas Dutchshen, M.D., who reviewed the MRI and found no shoulder tear:

The MRI of the shoulder was viewed and interpreted by myself today. The glenohmeral joint appears maintained. The AC joint is normal. The superior labrum appears normal. The anterior labrum appears normal. The subscapularis appears normal. The supraspinatus appears normal. The infraspinatus appears ok. There is no retraction of the rotator cuff. There is no atrophy of the rotator cuff tendons. There is moderate bruising.

Plaintiff was seen again by Dr. Ricketts on July 28, 2017. Dr. Ricketts did not examine plaintiff's right shoulder, but he provided her a no-driving note at her request for pain in her right shoulder and neck.

On August 18, 2017, plaintiff went to the Beaumont Hospital emergency room for hip pain. The examining physician, Dr. Martin Trampler, M.D., indicated that plaintiff was malingering regarding her hip and shoulder symptoms:

Prior to exam patient was able to tolerate all physiologic positions without pain including ambulating on her own to the bathroom and back and transferring without pain or issue. When completing physical exam patient became tender to palpation in right shoulder and right hip despite normal physiologic usage without any pain. Additionally, patient's shoulder heights were approximately equal while seated and then after standing to evaluate low back pain patient voluntarily was side bending to exaggerate right shoulder interior to left shoulder. Patient's legs then proceeded to "give out."

Dr. Trampler also observed that during the exam plaintiff "would unnaturally contort in an attempt to over emphasize areas of discomfort then return to normal again as soon as she was distracted."

On August 24, 2017, plaintiff saw Dr. Matthew Siskosky, M.D., an orthopedic surgeon, for a second opinion regarding her shoulder. Dr. Siskosky reviewed plaintiff's MRI and like Dr. Dutchenshen found that "[t]he rotator cuff is intact, with no overt evidence of substantial tear. No overt displaced labral tearing." Dr. Siskosky tested plaintiff's shoulder and found "full active ROM and good strength with rotator cuff testing." Dr. Siskosky had this to say about plaintiff presenting with a lowered right shoulder:

The patient is concerned that her shoulder "drops." When standing, the shoulder girdle on the right volitionally is held in a lower position. Of note, when seated, the shoulders are held symmetrically. The patient is very adamant about correcting this problem. Ultimately, I feel that this is volitional—whether intentional or not.

On October 5, 2017, plaintiff visited Dr. Paul Shapiro, M.D.,³ of the Michigan Orthopaedic Institute, for another opinion on her shoulder. Dr. Shapiro did not have access to the MRI of plaintiff's shoulder but three x-rays taken that day were negative for acute bony pathology or arthrosis. Range-of-motion testing of plaintiff's shoulder was limited by her report of pain, but Dr. Shapiro observed that plaintiff "has good rotator cuff strength." Dr. Shapiro gave plaintiff a cortisone injection to help her with pain.

In sum, plaintiff fails to show that there is a physical basis for her subjective complaints of pain. No medical imaging or testing supported her claimed shoulder impairment, and two physicians observed malingering or symptom magnification relating to her right shoulder. At an initial visit plaintiff's primary physician noted his impression of a "shoulder injury," but no objective basis for that initial nonspecific diagnosis was ever discovered in subsequent imaging or

³ No relation to any judge on this panel.

examinations by multiple physicians. For these reasons, we conclude that plaintiff failed to meet the “serious impairment” threshold as a matter of law.⁴

Affirmed.

/s/ Patrick M. Meter
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan

⁴ Because we conclude that plaintiff did not establish an objectively manifested impairment caused by the accident, and therefore did not suffer a serious impairment of bodily function, we need not address plaintiff’s argument that her claimed impairments affected her general ability to lead her normal life.