

STATE OF MICHIGAN
COURT OF APPEALS

BLANCA SIERRA-BURKES,

Plaintiff-Appellant,

v

TROY AGGREGATE CARRIERS, INC.,

Defendant-Appellee,

and

CHARLES E. ROSE, JR. and JOHN DOE,

Defendants.

UNPUBLISHED

August 12, 2021

No. 355513

Wayne Circuit Court

LC No. 19-011181-NI

Before: SAWYER, P.J., and BOONSTRA and RICK, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court’s order granting summary disposition in favor of defendant Troy Aggregate Carriers, Inc.¹ in this third-party automobile negligence action. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On April 27, 2017, plaintiff was driving on I-96 when, according to plaintiff, she discovered that her windshield had been chipped by a rock that had fallen “from the side of the truck she was behind and struck her windshield.” Plaintiff waved for the driver of the truck to pull over and, when he did so, plaintiff parked her car, exited it, approached the driver, and requested that he pay for the damaged windshield. The driver refused, stating that his employer would not pay for damage from road debris. According to plaintiff, the driver got back in his truck and pulled

¹ Defendant Charles E. Rose, Jr. was dismissed from this action by stipulation. It does not appear that defendant John Doe was ever specifically identified, and he is not a party to this appeal. We thus use “defendant” in this opinion to refer solely to defendant Troy Aggregate Carriers, Inc.

forward toward plaintiff's car, hitting her with the side of the truck or bumper and causing her to fall. Plaintiff called 911 and was transported by ambulance to a hospital. A medical examination of plaintiff performed at the hospital revealed no evidence of injury, and plaintiff was observed walking without assistance. No criminal charges were filed against the driver of the truck, which was owned by defendant.

In August 2019, plaintiff filed suit under the no-fault act, MCL 500.3101, *et seq*, arguing that the alleged incident (the incident) had seriously injured her, had exacerbated her existing injuries, and that defendant, as the owner of the vehicle that had struck plaintiff, was liable for her injuries. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff was unable to make the required showing under the no-fault act that the incident had caused an objectively manifested injury resulting in serious impairment of an important body function affecting her ability to lead her normal life. The trial court granted defendant's motion, finding that plaintiff had failed to present evidence that "the impairments to her cervical spine are related to the accident." This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We "review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. "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." *Id.* We review de novo issues of statutory interpretation. *State Farm Fire & Casualty Co v Corby Energy Servs, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006); *Webb v Holzheuer*, 259 Mich App 389, 391; 674 NW2d 395 (2003).

III. ANALYSIS

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree.

The no-fault act "created a compulsory motor vehicle insurance program under which insureds may recover directly from their insurers, without regard to fault, for qualifying economic losses arising from motor vehicle incidents."² *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010). Under MCL 500.3135, a party is liable for loss caused to another party if "his or her ownership, maintenance, or use of a motor vehicle" has caused that party to experience "death, serious impairment of a body function, or permanent serious disfigurement." MCL 500.3135(1). MCL 500.3135(5) defines "serious impairment of a body function" as an "objectively manifested" impairment of an "important body function" that affects the person's

² The Legislature amended the no-fault act on June 11, 2019. 2019 PA 21. However, the parties agree that the pre-amendment version of the no-fault act applies in this case.

“general ability to lead his or her normal life.” MCL 500.3135(5)(a) through (c). In other words, it is “an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person observed or perceived as impairing a body function.” *McCormick*, 487 Mich at 196.

Our Supreme Court has stated that a serious impairment of a body function consists of (1) an objectively manifested impairment (2) of an important body function (3) that affects the person’s general ability to lead his or her normal life. *Id.* at 190. Whether a person has suffered serious impairment of a body function or permanent serious disfigurement are questions of law for the court if the court finds either that “there is no factual dispute concerning the nature and extent of the person’s injuries” or “there is a factual dispute concerning the nature and extent of the person’s injuries” that is not material to the determination of whether the person has suffered a serious impairment or serious disfigurement. *Patrick v Turkelson*, 322 Mich App 595, 607-608; 913 NW2d 369 (2018), quoting MCL 500.3135(2)(a).

In this case, plaintiff argues that the incident caused or exacerbated her chronic neck pain, necessitating surgery. However, it is not clear that plaintiff suffered *any* impairment of a body function as a result of the incident. Such an impairment must be evidenced by actual symptoms or conditions that “someone other than the injured person observed or perceived as impairing a body function.” *McCormick*, 487 Mich at 196. Yet the emergency room staff found “no obvious injury/swelling/trauma” immediately after the incident, and X-rays of plaintiff’s right leg and hip showed “no fracture or dislocation.” The staff concluded there was “no visible evidence of injury.”

Plaintiff made several contradictory statements regarding the basic facts of the incident, such as the alleged impact she received from the truck and her subsequent fall or loss of balance. She represented to a treating physician that she had fallen and caught herself with her outstretched hand, but she informed hospital staff on the day of the incident that she “did not fall over or lose her balance” and “took one step and was fine.” Additionally, plaintiff’s argument on appeal focuses on her neck pain, but her complaint when arriving at the hospital on the day of the incident was that her right leg was in pain.

Moreover, a comparison of plaintiff’s condition before and after the incident further suggests that the incident did not cause her to suffer an objectively manifested impairment of an important body function. Plaintiff has a long history of chronic pain and mental illness. Before the incident, she described her back and leg pain as “constant.” She also experienced “chronic” neck pain that had been bothering her for at least six months before the incident. After the incident, in addition to several episodes of depression, plaintiff continued to experience back and neck pain. However, X-rays showed no acute fractures, and her physician concluded there were no “MRI findings that strongly correlate with the symptoms she is having and the patient agrees that her mental health is contributing to her pain and disability.” An October 30, 2017 evaluation indicated that plaintiff “experience[d] persistent neck and . . . low back . . . pain, both of which are associated with emotional disruption and coping difficulties.” In short, because plaintiff’s significant impairments existing before the incident were all similar to the impairments plaintiff experienced after the incident, it is not clear that the incident caused any impairments, or any exacerbation of any existing impairments. Unlike *McCormick*, in which the plaintiff’s injuries stemmed from a single incident, *McCormick*, 487 Mich at 184-188, plaintiff’s conditions were chronic for months or, in some cases, years.

Plaintiff argues that incident caused her to undergo cervical spine surgery in June 2019. In particular, she notes that the preoperative report by Dr. Daniel Fahim, M.D. (Dr. Fahim) states that the injury to her neck was a “traumatic cervical disc herniation with radiculopathy after MVA [motor vehicle accident].” But “[p]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact.” *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001), quoting *Libralter Plastics v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). “Mere speculation or conjecture is insufficient to establish reasonable inferences of causation.” *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 140; 666 NW2d 186 (2003). This statement by Dr. Fahim, which was not accompanied by any explanation or data, does not suffice to establish a causal connection without other corroborating evidence. The preoperative report states only that the injury was “after” the incident, not “caused by” the incident. And the statement is contradicted by plaintiff’s own statement that her neck pain was chronic and had been bothering her for at least six months before the incident, as well as the May 30, 2017 MRI results attributing her cervical spine pain to long-term degeneration. It is also contradicted by the findings of Dr. Steven Kalkanis, M.D. (Dr. Kalkanis), who performed an independent medical examination of plaintiff in 2020. Dr. Kalkanis noted that “it is not clear if any acute injury actually occurred” as a result of the incident:

The cervical and lumbar surgeries performed by Dr. Fahim in 2019, in my opinion, were both indicated and appropriate, but indicated on the basis of her chronic degenerative changes and multiyear history of chronic neck and back pain, *and not because of any acute trauma sustained in the 2017 incident*, especially given the lack of any physical exam findings, the lack of any documentation of any acute traumatic injury in the emergency room or follow-up records, and the lack of any acute findings on any of the imaging studies. [Emphasis added]

Plaintiff’s arguments are also contradicted because her condition improved *after* the incident. After undergoing gastric bypass surgery, plaintiff reported that her chronic pain had reduced significantly and her depression had alleviated. This improvement after a procedure that was entirely unrelated to treatment for a motor-vehicle injury casts doubt on plaintiff’s claim that her ailments were caused by the 2017 incident.

In sum, plaintiff’s chronic, long-term pain, combined with the lack of any physical evidence of an injury caused by a motor vehicle, lead to the conclusion that plaintiff did not suffer an objectively manifested injury or exacerbation as a result of the incident in 2017. Plaintiff did not demonstrate a causal link between the 2017 incident and any chronic pain she did suffer, and did not present evidence of “an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person observed or perceived as impairing a body function.” *McCormick*, 487 Mich at 196.

Plaintiff also argues that defendant did not address the issue of causation in its motion for summary disposition, and therefore the trial court should not have granted summary disposition on that basis. We disagree. The trial court’s decision was on the basis of plaintiff’s failure to present a genuine issue of material fact regarding whether the incident had caused a serious impairment of a body function. This issue was the subject of defendant’s motion for summary disposition. Plaintiff had an opportunity to respond to defendant’s motion for summary

disposition, and although it was her responsibility to present evidence rebutting defendant's arguments, she failed to do so. "[W]here the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted." *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993); see also MCR 2.116(I)(1).

For these reasons, the trial court did not err by concluding that plaintiff had failed to provide evidence of a serious impairment of a body function that was caused by the 2017 incident. Because we affirm the trial court's decision on this issue, we need not address whether plaintiff's claimed injuries affected her ability to live a normal life.

Affirmed.

/s/ David H. Sawyer
/s/ Mark T. Boonstra
/s/ Michelle M. Rick