

STATE OF MICHIGAN
COURT OF APPEALS

DELPHINE RUGG,

Plaintiff-Appellant,

v

DELFIN DIVINA and DIVINA DIVINA,

Defendants-Appellees.

UNPUBLISHED

October 21, 2021

No. 355628

Macomb Circuit Court

LC No. 2019-005239-NI

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

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

I. BACKGROUND

The accident occurred on May 20, 2017. Plaintiff complained of neck pain but declined treatment at the scene. Three days later, plaintiff sought treatment at her primary care clinic where she was seen by Dr. Curtis Hunt for complaints of neck pain. X-rays of her lumbar and cervical spine showed degenerative changes but no evidence of fracture. She was diagnosed with a cervical strain and her physician recommended physical therapy. Rather than obtaining physical therapy at that time, plaintiff sought treatment at Precise Chiropractic for her neck pain beginning in August 2017. The health information form completed at the chiropractor's office on August 15, 2017 lists her "primary complaint" as "neck injury/lower back aches," and states that these injuries were "the result of an accident or injury" and that they began the "day after accident." The form noted a "secondary complaint" as "upper right arm pain" with "occasional stabbing pain or aches," and indicated that these injuries, unlike her neck and back injury, were "the result of work." She also indicated that she had prior treatment for her upper right arm, namely physical therapy and heat. The form also directed plaintiff to "list any additional accidents or injuries in the past year"

and she provided: “Possible rotator cuff injury Refused MRI – No confirmation – Decided physical therapy.”¹

On August 21, 2017, plaintiff’s chiropractor noted that plaintiff described bilateral “stabbing pain to shoulder.” On September 12, 2017, an “updated patient history” indicated the primary complaint as “neck right side of body, hip buttock” and a secondary complaint of low back pain, all of which she attributed to the auto accident. In September, plaintiff also reported pain in the right shoulder on one occasion and in her right arm on two occasions.

In February 2018, approximately nine months post-accident, plaintiff returned to her primary care clinic where she was seen by Dr. Colleen Kennedy. Plaintiff reported that chiropractic treatment had resolved the stiffness in her neck but that right “shoulder/arm neck pain” had now developed. Dr. Kennedy’s assessment was “neck pain or cervicalgia.” and no shoulder diagnosis was offered. Plaintiff returned to Dr. Kennedy on February 22, 2018, at which time Dr. Kennedy noted pain over the right anterior shoulder and bicep. The doctor’s assessment was right “shoulder pain” and she provided pain and steroidal medication.

Plaintiff was prescribed physical therapy and was initially seen at Orthopedic Spine & Sports Therapy on March 6, 2018; her primary complaint was recorded as “neck pain that spreads into the right arm.” The physical therapist noted that the “right shoulder pain is pronounced and may indicate shoulder pathology in addition to cervical.” The physical therapist’s assessment of plaintiff was that she had significant limitation in neck and shoulder mobility and strength that affected her ability to work as a self-employed housekeeper. On March 16, 2018, limited use of plaintiff’s right shoulder was again noted. Plaintiff was discharged from Orthopedic Therapy in June 2018 when she failed to schedule further appointments.

Plaintiff returned to Dr. Kennedy in June 2018, again reporting pain “mainly at the right shoulder.” Dr. Kennedy ordered an MRI, but plaintiff did not follow through with this recommendation at that time, and from September 2018 to December 2018, she received additional physical therapy for her shoulder at Neil King Physical Therapy where she displayed symptoms such as difficulty with overhead activities, consistent with a rotator cuff tear. Plaintiff testified that she stopped cleaning homes in December 2018 because of her shoulder pain.

The shoulder MRI was conducted on January 3, 2019 and revealed a large full-thickness rotator cuff tear. On January 23, 2019, she was seen by an orthopedic surgeon who recorded: “Patient states she was injured back in 2017, work comp.” Surgery to repair the rotator cuff was performed in February 2019 with mixed results.

In December 2019, plaintiff brought suit. She alleged that defendant driver’s negligence caused the crash, that the accident caused a right shoulder rotator cuff tear and cervicalgia and that the injuries resulted in a serious impairment of a body function.

¹ Because the medical records do not show that an MRI was recommended following the car accident or that plaintiff engaged in physical therapy between the date of the crash and her first appointment at the chiropractor, these notations must refer to a time before the accident.

In October 2020, defendants moved for summary disposition under MCR 2.116(C)(10). Defendants argued that plaintiff did not suffer a threshold injury caused by the May 2017 auto accident considering the medical records indicating that the shoulder injury predated that auto accident. Defendants also relied on plaintiff's deposition testimony that her right shoulder injury was the only one she was claiming as a result of the auto accident. Defendants alternatively argued that any injury that plaintiff suffered from the accident did not affect her general ability to lead her normal life. In response, plaintiff argued that summary disposition was improper under MCL 500.3135(2) because defendants were disputing the nature and extent of plaintiff's injuries and whether those injuries were in fact caused by the auto accident. Plaintiff also argued that there was at least a question of fact as to whether her ability to lead her normal life had been affected.

After hearing oral argument, the trial court first ruled that, given plaintiff's deposition testimony, there was no material question of fact that plaintiff's shoulder injury, rather than injuries to her neck, "is what affected her general lifestyle." The court then ruled that plaintiff failed to establish question of fact that her shoulder injury was caused by the auto accident, noting the absence of a physician's opinion that the accident caused the shoulder injury. Accordingly, the court granted defendant's motion for summary disposition.

II. ANALYSIS

Plaintiff argues that the trial court erred by granting summary disposition to defendants. We disagree.²

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).

Plaintiff argues that summary disposition was improper in this case because there are disputes regarding the nature and extent of her injuries and whether those injuries were caused by the auto accident. Plaintiff fails to recognize, however, that causation, as an element of negligence, is separate from whether the claimant suffered a serious impairment of body function. See e.g., *Patrick*, 322 Mich App at 615-616 (after holding that there was a material dispute regarding the nature and extent of the plaintiff's injury precluding summary disposition of the serious-impairment inquiry, this Court addressed the defendants' alternative argument regarding

² 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).

causation). Accordingly, even if plaintiff suffers from a serious impairment of body function, defendants are entitled to summary disposition if the evidence does not create a question of fact as to causation.

Although the medical records contain complaints of neck pain and limitations, it is clear that plaintiff's shoulder injury is her primary and disabling complaint. As noted, the trial court ruled that there was no material question of fact that plaintiff's torn rotator cuff was not caused by the auto accident. Plaintiff does not address the trial court's causation ruling, and therefore she is not entitled to appellate relief. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004) (When an appellant fails to dispute the basis of the trial court's ruling, this Court . . . need not even consider granting plaintiffs the relief they seek.) (quotation marks, citation, and alteration omitted). Even setting that aside, we see no error in the trial court's ruling.

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Cawood v Rainbow Rehab Ctrs, Inc*, 269 Mich App 116, 121; 711 NW2d 754 (2005) (quotation marks and citation omitted). Causation is comprised of factual causation and legal causation, also known as proximate cause. *Ray v Swager*, 501 Mich 52, 64; 903 NW2d 366 (2017). Factual causation means that "the defendant's conduct in fact caused harm to the plaintiff," while legal causation requires that "the harm caused to the plaintiff was the general kind of harm the defendant negligently risked." *Id.* (quotation marks and citations omitted). "Establishing cause in fact requires the plaintiff to 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." *Patrick*, 322 Mich App at 617 (quotation marks and citation omitted).

To begin, no physician has opined that plaintiff's torn rotator cuff was caused or worsened by the auto accident. We recognize that even in the absence of a physician's finding of causation "a plaintiff's evidence of causation is sufficient at the summary disposition stage to create a question of fact for the jury if it establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories . . ." *Patrick*, 322 Mich App at 617 (quotation marks and citation omitted). However, plaintiff has not provided evidence of "a logical sequence of cause and effect." Following the accident, plaintiff did not report significant shoulder pain for many months, during which she continued to work as a housekeeper, and she has not provided any testimony that offers a logical link between her shoulder injury and the accident.³ She also identified many different dates of onset of her shoulder injury. In the absence of medical testimony or medical records or some other evidence showing the connection between the accident and the

³ As noted, there are post-accident medical records that refer to the possible existence of a rotator cuff tear resulting from a work injury before the car accident. However, because plaintiff testified she had not suffered a pre-accident work injury and defendants have not submitted any records of diagnosis or treatment of shoulder pathology prior to the car accident, a question of fact remains whether plaintiff's rotator cuff injury predated the auto accident. Accordingly, we do not rely on the indirect evidence of a prior injury set out in her post-accident records. However, whatever the cause of the rotator cuff tear, plaintiff has not come forward with evidence to causally link it to the auto accident.

shoulder injury, we conclude that the claim concerning causation of her rotator cuff injury does not rise above speculation. See *id.* at 617 (“[C]ausation cannot be established by mere speculation”). Given that, and considering plaintiff’s failure to address the causation issue separate from the serious-impairment threshold, we find no error in the trial court’s decision to grant summary disposition of plaintiff’s complaint as it pertains to her shoulder injury. See MCR 2.116(G)(4) (“When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party . . . must . . . set forth specific facts showing that there is a genuine issue for trial.”).

Even though plaintiff testified that she was only claiming a shoulder injury as a result of the accident, she maintains on appeal that she also suffered cervicgia or a neck strain from the auto accident. But, assuming that plaintiff’s cervicgia was caused by the auto accident, the trial court did not err by determining that it was her shoulder injury that affected plaintiff’s ability to lead her normal life.⁴ Plaintiff testified that she was forced to stop her housekeeping business in December 2018, and she was unequivocal that her shoulder injury was the reason why she could no longer work:

Q. Okay. Do you plan on resuming your housekeeping business at all?

A. Oh, no. Can’t do it anymore. I can’t even do my own place. Takes me days to finish where I used to do it in one day.

Q. Is that because of your shoulder?

A. Um-hum.

Q. Any other reason?

A. Yes.

Q. Yes. There is another reason, or is that the only reason?

A. That’s the only reason.

Thus, although a diminished capacity to work supports a finding that the third serious impairment prong is satisfied, see *McCormick v Carrier*, 487 Mich 180, 219; 795 NW2d 517 (2010), plaintiff was unable to work solely because of her shoulder injury and, for the reasons discussed, plaintiff fails to establish a material question of fact as to whether her shoulder injury was caused by the auto accident.

⁴ To determine whether a person’s general 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. *McCormick v Carrier*, 487 Mich 180, 202; 795 NW2d 517 (2010). The impairment must have “an influence on some of the person’s capacity to live in his or her normal manner of living.” *Id.*

As to the effect on plaintiff's recreational activities, she testified that she and her husband "weren't big on recreation. . . . We didn't do too much." Plaintiff used to swim before the accident and indicated that her pain would prevent her from doing so now, but she had not "tried it actually." Plaintiff had access to a pool at her condo before the accident, but she did not have access to a pool at her new home. Before the accident plaintiff would occasionally volunteer with her church for construction projects; after the accident, she tried to volunteer but could only do so for a half an hour. Even if these post-accident changes were caused by plaintiff's overall injuries, we cannot conclude that limits on these occasional activities, standing alone, are significant enough to affect plaintiff's general ability to live her normal life.

In sum, plaintiff failed to establish a question of material fact whether her torn rotator cuff was caused by the motor vehicle accident. She also failed to demonstrate a question of material fact whether her non-shoulder limitations affected her general ability to lead her normal life. Accordingly, the trial court did not err by granting summary disposition to defendants under MCR 2.116(C)(10).

Affirmed. As the prevailing party, defendants may tax costs. MCR 7.219(A).

/s/ Douglas B. Shapiro

/s/ Stephen L. Borrello

/s/ Colleen A. O'Brien