STATE OF MICHIGAN

COURT OF APPEALS

HEIDI RANDALL,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 21, 2016

No. 327292
Livingston Circuit Court
LC No. 14-028057-NF

Before: JANSEN, P.J., and O'CONNELL and RIORDAN, JJ.

PER CURIAM.

In this action for first-party no-fault benefits, plaintiff, Heidi Randall, appeals as of right the trial court order granting summary disposition in favor of defendant, State Farm Mutual Automobile Insurance Company, under MCR 2.116(C)(10). We reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

On February 1, 2013, plaintiff was driving on westbound I-96 when she came to a complete stop due to the stop-and-go rush hour traffic. Suddenly, she was hit from behind by a pickup truck. The truck did not push her vehicle forward during the impact, but she noticed after the collision that her vehicle was damaged. Although she felt "excruciating pain from [her] head to [her] neck instantly as soon as [she] was hit," she was not sure if any part of her body, including her head, struck anything inside the vehicle. She did not sustain any cuts or bruises, she did not have any difficulty getting out of her vehicle, and she never lost consciousness.

When plaintiff called the police, she stated that she did not need an ambulance. However, she felt "excruciating pain" as she waited in her vehicle, so she ultimately drove herself to the emergency room. On her way there, she was in "[e]xtreme pain," as she felt numbness on the right side of her head and neck, had a headache or migraine, and felt tightness or swelling in her shoulder.

Plaintiff ultimately sought emergency medical treatment three times in the week following the accident. In the weeks and months that followed, she also sought treatment from (1) her primary care physician, Dr. Johnstone, M.D., a board-certified physician in internal medicine, (2) Dr. Jennifer Doble, M.D., a board-certified physician in physical medicine and

rehabilitation, who has a subspecialty in traumatic brain injuries and rehabilitation after trauma; (3) Dr. Daniel Singer, D.O., a board-certified neurologist, and (4) Dr. Richard Klein, D.D.S. They diagnosed her with a variety of medical conditions, which they believed were causally related to the motor vehicle accident at issue in this case. These conditions included, *inter alia*, a mild traumatic brain injury ("TBI"), post-concussive syndrome, migraine headaches, knots, swelling, and spasms in her neck and trapezius muscle, increased anxiety, and a temporomandibular disorder ("TMD"). The doctors prescribed medication, various types of physical and occupational therapy, replacement services, and attendant care. The doctors also recommended that plaintiff suspend her self-employment as a music teacher in the months following the accident.

In January 2014, plaintiff filed a complaint against defendant, in which she alleged, among other things, that defendant failed to pay personal protection insurance ("PIP") benefits to which she was entitled after she sustained severe and permanent injuries in an automobile accident on February 1, 2013, even though she provided reasonable proof of her entitlement to such benefits.

In December 2014, defendant filed a motion for summary disposition under MCR 2.116(C)(10). Defendant argued that it was entitled to summary disposition because plaintiff was unable to establish that her injuries were caused by, or were casually connected to, the motor vehicle accident at issue. Rather, defendant contended that (1) the medical records indicated that plaintiff's medical issues were related to other or former conditions unrelated to the accident, (2) that the diagnoses of plaintiff's treating physicians were based on plaintiff's own recitation of her medical history and subjective complaints, while all objective factors, including CT scans, MRIs, and X-rays taken after the accident, were normal and indicated no injuries arising out of the collision, and (3) that all of the IMEs, as well as the surveillance evidence, indicated that plaintiff had no ongoing injuries that directly resulted from the accident at issue. Given this evidence, defendant argued that summary disposition was proper on the issue of causation because "there is no showing that any nexus may exist between the subject accident and [p]laintiff's alleged injuries with the exception of a muscle strain/sprain which resolved two months post-accident."

In January 2015, plaintiff filed a response to defendant's motion for summary disposition. She proffered numerous medical records and reports as well as deposition testimony provided by Drs. Johnstone, Doble, and Singer. Plaintiff contended that this evidence, especially her doctors' deposition testimony describing their diagnoses and expressly stating that her injuries arose out of the motor vehicle accident, established a genuine issue of material fact on the issue of causation. Thus, she requested that the trial court dismiss defendant's motion for summary disposition.

The trial court held a two-day hearing on defendant's motion on January 13, 2015, and January 20, 2015. The court ultimately stated on the record that there was no genuine issue of material fact and defendant was entitled to summary disposition, but it indicated that it would subsequently prepare a written opinion.

In April 2015, the trial court entered an opinion and order granting summary disposition in favor of defendant under MCR 2.116(C)(10). After considering all of the evidence presented by the parties, including evidence proffered after the parties submitted and argued their briefs on

defendant's motion for summary disposition, the trial court concluded:

> Plaintiff blames the accident of February 1, 2013 for the medical problems she suffers. However, there is clear proof through medical records and deposition testimony that her problems existed prior to the accident and were not aggravated. Plaintiff attributes hypertension and weight to the accident. Medical records reflect she suffered from both prior to the accident. She claims dizziness, anxiety, depression and blurred vision all of which can be traced back to before the accident. Plaintiff claims she received a TBI from the accident; yet medical records do not support her claim.

The court then summarized the findings of each doctor based on its review of the medical records and deposition testimony. Ultimately, it found:

> The documentary evidence Plaintiff has provided fails to create a question of fact that the automobile accident caused Plaintiff's injuries or aggravated her preexisting conditions. Plaintiff's subjective claim that her injuries were a result of the car accident, together with subjective medical evaluations, are insufficient to create an issue of fact. The burden of establishing causation is on the Plaintiff and the fact an accident occurred does not create a presumption of causation.[1]

II. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant under MCR 2.116(C)(10) because (1) she proffered documentary evidence that demonstrated a genuine issue of material fact for trial, (2) the court failed to view the evidence in the light most favorable to plaintiff, (3) the court's decision was based on erroneous legal and factual determinations, and (4) the court improperly made credibility and factual determinations that were within the province of the jury. We agree.

A. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's grant or denial of summary disposition. *Moraccini v Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Cannon Twp v Rockford Pub Sch*, 311 Mich App 403, 411; 875 NW2d 242 (2015). When reviewing such a motion, this Court may only consider, in the light most favorable to the party opposing the motion, the evidence that

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[1] In February 2015, before the trial court entered its written opinion and order, plaintiff filed a motion for reconsideration under MCR 2.119(F), arguing that the trial court committed a palpable error when it granted summary disposition in favor of defendant because she submitted documentary evidence with her response to defendant's motion that establishes a genuine issue of material fact for trial. She also requested that the trial court enter an opinion and order as it promised during the motion hearing. After it entered the opinion and order granting defendant's motion for summary disposition, the trial court denied plaintiff's motion for reconsideration.

was before the trial court, which consists of "the 'affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties.' " *Calhoun Co v Blue Cross Blue Shield Michigan*, 297 Mich App 1, 11; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). Under MCR 2.116(C)(10), "[s]ummary 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." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "[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." *Bennett v Detroit Police Chief*, 274 Mich App 307, 319; 732 NW2d 164 (2006). However, "[t]his Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

B. ANALYSIS

"Liability for no-fault personal protection benefits is governed by MCL 500.3105." *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392, 394; 838 NW2d 910 (2013). MCL 500.3105(1) provides, "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, subject to the provisions of this chapter." (Emphasis added.) "[A]n injured party may recover if he can demonstrate that the accident aggravated a pre-existing condition." *Mollitor v Associated Truck Lines*, 140 Mich App 431, 438; 364 NW2d 344 (1985).

> Accordingly, MCL 500.3105(1) imposes two threshold causation requirements for PIP benefits:
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> > First, an insurer is liable only if benefits are "for accidental bodily injury . . . ." "[F]or" implies a causal connection. "[A]ccidental bodily injury" therefore triggers an insurer's liability and defines the scope of that liability. Accordingly, a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident.
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> > Second, an insurer is liable to pay benefits for accidental bodily injury only if those injuries "aris[e] out of" or are caused by "the ownership, operation, maintenance or use of a motor vehicle . . . . " It is not any bodily injury that triggers an insurer's liability under the no-fault act. Rather, it is only those injuries that are caused by the insured's use of a motor vehicle. [*Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012), quoting *Griffith ex rel Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005) (alterations in original).]

Additionally, "[r]egarding the degree of causation between the injury and the use of the motor vehicle that must be shown, [the Michigan Supreme] 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 omitted), quoting *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986).

Here, plaintiff proffered evidence on the issue of causation. Thus, whether defendant is liable for any injuries that she may have sustained from the accident is a question of fact. However, the trial court was looking for *objective* evidence.[2] After thoroughly reviewing published and unpublished Michigan caselaw, we find no basis for concluding that plaintiff was required to proffer evidence showing objective manifestations of her injuries in order to establish a genuine issue of material fact on the issue of causation for purposes of MCL 500.3105.[3] Instead, we conclude that, when viewed in the light most favorable to plaintiff, the medical records, reports, and deposition testimony of plaintiff's treating doctors, which were based on plaintiff's subjective complaints of pain as well as the doctors' objective observations, support a

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[2] We reject the trial court's reliance on *Akaazua v Titan Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2011 (Docket No. 298384). The facts of that case are distinguishable from this case. Here, plaintiff's own treating doctors opined that plaintiff sustained injuries as a result of the motor vehicle accident at issue and did not believe, as in *Akaazua*, that plaintiff was either purposefully exaggerating the extent of her injuries or suffering from an unknown and unrelated psychological malady. Cf. *Dengler v State Farm Mut Ins Co*, 135 Mich App 645, 648-649; 354 NW2d 294 (1984) (noting that, even when viewed in the light most favorable to the plaintiff, the plaintiff had not proffered any evidence from which reasonable minds could conclude that the insured's injuries were related to the accident, and that the plaintiff's own experts either declined to express an opinion, admitted that their testimony would constitute pure speculation, or noted that there was only a "remote possibility" that the accident caused the condition at issue).

[3] In concluding that summary disposition was proper in this case given the lack of "objective" evidence, it appears that the trial court mistakenly applied the threshold standard for asserting a claim against a third party for noneconomic damages on the basis of a serious impairment of a bodily function under MCL 500.3135, which requires a showing of "an objectively manifested impairment." See *McCormick v Carrier*, 487 Mich 180, 184, 194-195; 795 NW2d 517 (2010). See also *id*. at 196-198 (further explaining what is required under that standard). We have not found any binding caselaw holding that an injury, for purposes of MCL 500.3105, must be "objectively manifested" in order for a court to conclude that it constitutes an accidental bodily injury arising out of the use of a motor vehicle as a motor vehicle. See *McPherson*, 493 Mich at 297. Likewise, there is no indication in the plain language of MCL 500.3105 or the other provisions of the no-fault act pertaining to PIP benefits that "objective" evidence of an injury, such as that provided through medical test results, is required to demonstrate the existence of an injury and, consequently, to establish causation under MCL 500.3105(1). Compare *McCormick*, 487 Mich at 191-192.

finding that the accident may have caused various injuries that resulted in reasonable and necessary medical expenses and other PIP benefits.

First, plaintiff offered evidence that establishes a genuine issue of material fact as to whether her headaches and brain-related injuries arose out of the accident at issue. Dr. Doble, who has a subspecialty in traumatic brain injuries, testified that she believes that plaintiff sustained a mild TBI from the accident, explaining that neither an MRI nor a CT scan can rule out such an injury, and that it is possible for individuals to sustain mild TBIs without hitting their heads or losing consciousness. She stated that a mild TBI could result from a car accident during which an individual's head is thrown forward and the front and back of the brain is injured from being shaken backwards and forwards. She also testified that an individual may feel fine at the time of the accident, focusing instead on the circumstances at hand, but later notice or develop symptoms, such as pain and clouded cognition, as time passes after the accident due to "the natural course of what happens in a brain injury with the chemical alterations of the brain cells and the stretching of the nerves."

Moreover, the trial court stated that Doble failed to substantiate her finding that plaintiff incurred a TBI "with an analysis of [her] observations or objective findings." However, Doble testified that when she saw plaintiff on March 27, 2013, she specifically observed that plaintiff had "delayed processing" and impaired attention, concentration, memory, and executive functions. Additionally, Doble stated during her deposition that headaches are a symptom of a TBI, and she believed that plaintiff did not have a distinct memory about the automobile accident, which further supported her opinion that plaintiff sustained a mild TBI. Based on these observations as well as her explanation of the development and testing of mild TBIs, the record offers evidence that Doble did not simply state her conclusions, but, instead, made objective observations in addition to plaintiff's subjective complaints of pain that support her medical conclusions. Likewise, given Doble's evaluations and conclusions, she expressly confirmed that it is more likely than not that plaintiff's mild TBI and migraine headaches could be related to the accident at issue.

Additionally, although the trial court concluded that the medical records do not explain the basis of Dr. Johnstone's post-concussive syndrome diagnosis, Johnstone testified that she made this diagnosis following her medical examination of plaintiff after the accident. She also explained that the syndrome results "from some type of trauma to the head or neck region" and that it "can cause . . . confusion, headache, [and] difficulty . . . concentrating[.]"

This evidence establishes a genuine issue of material fact as to whether head-related injuries arose out of the accident. Given the significant evidence regarding the intensity of plaintiff's headaches after the accident, as well as the fact that plaintiff did not report headaches during her appointments with Johnstone prior to the collision, the isolated medical records indicating that plaintiff reported headaches in the three years prior to the accident do not establish, as a matter of law, that plaintiff's headaches—or the exacerbation of her headaches—were unrelated to the accident.

The evidence also creates a genuine issue of material fact as to whether plaintiff's neck and shoulder injuries arose out of the accident. The trial court appeared to conclude in its opinion and order that there is no genuine issue of material fact that plaintiff did not have a

cervical injury, as demonstrated by the knots, swelling, and spasms in her neck and trapezius muscle, within a few months after the incident. During her deposition, Dr. Johnstone testified, "I remember significantly the spasm that she was having [on February 4, 2013]. It was very severe. She was very tender and it was . . . almost a golf ball size of a spasm, swelling, in her trapezius." She testified at her deposition that the swelling and golf ball-sized spasm subsided to a certain extent after April 2013, but plaintiff still had mild spasms in April and May 2013. Dr. Doble also testified that she physically felt spasms in plaintiff's trapezius muscle through October 2013, and "what [she was] feeling superficially [was] indicative of that whole group of muscles in the neck and shoulder being inflamed for a long period of time." In January 2014, Doble could "palpate that trigger point again[, and] [plaintiff] had tenderness not just over the trapezius muscle, but [on] . . . the left side of her neck, as well." Accordingly, Doble provided two trigger point injections on that date. On February 14, 2014, Doble provided Botox injections for plaintiff's migraine headaches and the "one resistant spasm muscle in her shoulder." Singer similarly reported that he observed tension and spasms, or "tissue abnormalities," in the right side of plaintiff's neck and right shoulder following the accident until at least November 2013 and, based on his deposition testimony, possibly until May 2014.

Thus, the objective observations of plaintiff's treating doctors, as well as their opinions that these conditions arose out of the motor vehicle accident at issue, demonstrate that there is a genuine issue of material fact as to whether plaintiff's spasms and muscle-related injuries continued after April 2013 and were caused by the accident. See *Chumley v Chrysler Corp*, 156 Mich App 474, 481-482; 401 NW2d 879 (1986) ("[O]bjective evidence of muscle spasms, such as evidence by medical examination and palpation of the tissues, constitutes objective manifestation of an injury."). Cf. *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 682; 607 NW2d 123 (1999) (noting that "[t]he onset of [plaintiff's] symptoms following the accident certainly provides objective manifestation of th[e] relationship" between the stress of the car accident and the inception of Graves' disease).

The evidence in Dr. Johnstone's medical records and deposition testimony also creates, at a minimum, a genuine issue of material fact with regard to plaintiff's anxiety. Johnstone initially treated plaintiff for anxiety in January 2013, before the motor vehicle accident. As a result, one may reasonably infer that she had, at a minimum, a basis on which to compare plaintiff's exhibitions of anxiety before and after the accident given her observations of plaintiff. See *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010) ("[A] court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists."). In addition to her reports of plaintiff's anxiety throughout her medical records following the accident, Johnstone testified at her deposition that she believed that plaintiff's anxiety was exacerbated by the car accident and resulting pain in light of plaintiff's descriptions of her anxiety and Johnstone's observations of plaintiff's demeanor. Likewise, Doble testified that it was possible for a TBI to cause or exacerbate an underlying psychological disorder, such as anxiety. Although this testimony was contradicted by the IMEs proffered by defendant, such a contradiction is properly resolved by the trier of fact at trial. See MCR 2.116(G)(4).

Contrary to the trial court's conclusions, Klein included a detailed explanation of why he believed that plaintiff's TMD was directly caused by the accident, based on a variety of tests and

physical observations. This explanation establishes a genuine issue of material fact as to causation.[4]

"A court may not make a finding of fact or weigh credibility when ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 637; 808 NW2d 804 (2011); see also *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). Although the IME reports contradicted the findings of plaintiff's treating doctors and suggested that plaintiff was exaggerating or misstating her symptoms in order to achieve personal gain, this evidence creates a genuine issue of material fact that may be properly resolved at trial.

Thus, the trial court's grant of summary disposition under MCR 2.116(C)(10) was improper.

III. CONCLUSION

Because plaintiff established a genuine issue of material fact on the issue of causation, the trial court erroneously granted summary disposition in favor of defendant under MCR 2.116(C)(10).

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[4] Defendant now argues that the opinions of plaintiff's treating doctors constituted inadmissible expert testimony under MRE 702 because they were based solely on plaintiff's subjective complaints, which comprised unreliable data. Pursuant to MCR 2.116(G)(6), "Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)--(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." Defendant did not move in the lower court to exclude, strike, or otherwise preclude the consideration of the deposition testimony presented by plaintiff's treating doctors on that basis,[4] and the trial court did not determine whether plaintiff's doctors were qualified to provide expert testimony under MRE 702. "While a party may waive any claim of error by failing to call [the trial court's] gatekeeping obligation to the court's attention, the court must evaluate expert testimony under MRE 702 once that issue is raised." *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004).

In this case, plaintiff's experts identified scientific knowledge and factual bases for their opinions. Defendant cites no legal authority and proffers no evidence in support of its claim that a patient's complaints of pain or descriptions of particular symptoms constitute unreliable data and that a medical expert may not render an opinion from such data, and we have been unable to find such authority.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Riordan