STATE OF MICHIGAN

COURT OF APPEALS

VALERIE ZAVALA, individually and as Next Friend and Guardian of ARTURO ZAVALA,

Plaintiffs-Appellants,

v

MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY, also known as MICHIGAN ASSIGNED CLAIMS PLAN,

Defendant,

and

TRINITY CAB COMPANY, UNIDENTIFIED DRIVER OF TRINITY CAB COMPANY, and TRINITY CAB COMPANY'S UNIDENTIFIED NO-FAULT INSURANCE CARRIER,

Defendants-Appellees.

UNPUBLISHED
November 18, 2021

No. 355020
Wayne Circuit Court
LC No. 18-014126-NI

Before: STEPHENS, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Plaintiffs, Arturo Zavala and Valerie Zavala, appeal as of right the July 17, 2020 order granting partial summary disposition to defendant[1] Trinity Cab Company (Trinity) under MCR 2.116(C)(10) (no genuine issue of material fact). We reverse and remand for proceedings consistent with this opinion.

[1] On March 11, 2019, the trial court entered a stipulation and order dismissing Michigan Automobile Insurance Placement Facility as a defendant.

I. BACKGROUND

Arturo was an adult male with cerebral palsy and type 2 diabetes. The type 2 diabetes affected his eyesight. He was diagnosed with "diabetic retinopathy"[2] and "tractional retinal detachment"[3] in his left eye in 2012. His right eye was prosthetic, having been injured when he was young. Valerie was Arturo's mother and caregiver. On November 6, 2017, Valerie and Arturo were at Walmart. Valerie called defendant Trinity Cab to take them home. Both Valerie and Arturo were in the backseat. Arturo was belted in, Valerie was not. In their complaint for personal injury protection (PIP) benefits before the trial court, plaintiffs alleged that Trinity's cab driver drove negligently through the parking lot and almost hit a pole. Valerie rolled forward twice. Valerie claims that she suffered a cracked tooth and pain in her knees from the incident. The defendant did not contest the cracked tooth but asserted that both it and any knee injury failed to meet the statutory threshold of injury. As conservator and guardian, Valerie also claims that Arturo's injuries in the incident caused him to became legally blind. In the complaint, it was alleged that Arturo's blindness and Valerie's painful knees required assistance from others to accomplish the tasks of daily living.

After discovery, Trinity moved for summary disposition of plaintiffs' claims under MCR 2.116(C)(10). It argued that no genuine issue of material fact existed concerning the incident in the cab being causally related to Arturo's alleged eye injuries as required under MCL 500.3105. Trinity argued that its' medical expert denied that the incident was a cause of the decline in Arturo's eye health and that even Arturo's own examining ophthalmologist testified that it would be speculative to relate the eye's regression to the vehicle incident. Trinity further argued that Valarie suffered neither a serious impairment related to the cab ride nor a serious and permanent disfigurement. Plaintiffs argued to the contrary, that Arturo's ophthalmologist had offered an opinion upon which a reasonable jury could find that the deterioration of his eyesight was causally related to the accident. Plaintiffs also asserted that Valerie's fractured tooth constituted a permanent disfiguration as a matter of law under *Fisher v Blankenship*, 286 Mich App 54; 777 NW2d 469 (2009), and that the pain in her knees affected her general ability to lead a normal life.

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[2] "Diabetic retinopathy" is defined as "a diabetes complication that affects eyes. It's caused by damage to the blood vessels of the light-sensitive tissue at the back of the eye (retina). At first, diabetic retinopathy might cause no symptoms or only mild vision problems. But it can lead to blindness." https://www.mayoclinic.org/diseases-conditions/diabetic-retinopathy/symptoms-causes/syc-20371611#:~:text=Diabetic%20retinopathy%20(die%2Duh%2D,or%20only%20mild%20vision%20problems. (Accessed 9/28/2021).

[3] The Mayo Clinic describes retinal detachment as a complication of diabetes when "[t]he abnormal blood vessels associated with diabetic retinopathy stimulate the growth of scar tissue, which can pull the retina away from the back of the eye. This can cause spots floating in your vision, flashes of light or severe vision loss." https://www.mayoclinic.org/diseases-conditions/diabetic-retinopathy/symptoms-causes/syc-20371611#:~:text=Diabetic%20retinopathy%20(die%2Duh%2D,or%20only%20mild%20vision%20problems. (Accessed 9/28/2021).

The trial court granted the motion. The court found that the medical testimony on the issue of causation of the eye condition was speculative. As to Valerie's claims, the court determined that there was no evidence that the tooth loss constituted a serious disfigurement; nor was there evidence that the knee injury affected her general ability to lead a normal life. The court noted that as to the claim for replacement services to care for Arturo, that Valerie continued to receive home provider care payments for Arturo after the accident. This appeal followed.

II. STANDARD OF REVIEW

We review motions for summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(10), tests the factual sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers 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." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016). "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." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

A. ARTURO'S CLAIM

Plaintiffs argue that the trial court erred when it found that there was no genuine issue of material fact concerning whether Arturo's new retinal detachment and blindness was unrelated to the vehicle incident. We agree.

Under MCL 500.3105(1), "an insurer is liable to pay benefits for accidental bodily injury arising out of the operation, maintenance or use of a motor vehicle as a motor vehicle[.]" A no fault insurer is only liable to pay benefits 1) that "are causally connected to the accidental bodily injury arising out of an automobile accident", and 2) "only if those injuries aris[e] out of or are caused by the ownership, operation, maintenance or use of a motor vehicle...." *Douglas v Allstate Ins Co*, 492 Mich 241, 257; 821 NW2d 472 (2012) (quotation marks and citation omitted). The Legislature "chose to provide coverage only where 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.' " *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986). However, a showing of direct or proximate causation is not required. *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578, 582; 751 NW2d 51 (2008). "[T]he use of the motor vehicle need only be one of the causes of the injury; there may be other independent causes." *Id*. at 585. "[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).

In a negligence action, the issue of causation is generally reserved for the factfinder unless there is no dispute of material fact. *Patrick v Turkelson*, 322 Mich App 595, 616; 913 NW2d 369 (2018).

> The causation element of a negligence claim encompasses both factual cause (cause in fact) and proximate, or legal, cause. Factual cause "generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." Proximate cause, by contrast, "normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." A plaintiff must necessarily establish factual cause in order to establish proximate cause. While factual causation may be established with circumstantial evidence, the evidence must support "reasonable inferences of causation, not mere speculation." [*Powell-Murphy v Revitalizing Auto Communities Envtl Response Tr*, 333 Mich App 234, 245-246; 964 NW2d 50 (2020) (internal citations omitted)].

Circumstantial evidence of causation is evidence that would "facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). A 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." *Id*. at 163. Thus, to be circumstantial evidence of a cause, the facts or conditions require "a reasonable likelihood of probability rather than a possibility," and "such evidence must exclude other reasonable hypotheses with a fair amount of certainty ." *Id*. at 166.

The trial court found, based on the testimony of Dr. Xihui Lin, Arturo's ophthalmologist, that it was speculative to relate the deterioration of the eye and new retinal detachment to the vehicle incident. We disagree. Upon consideration of the whole record, and giving the benefit of reasonable doubt to plaintiffs, reasonable minds could differ as to whether the vehicle incident caused or aggravated the progression of Arturo's eye problems.

Arturo was diagnosed with retinal detachment and lens dislocation of the left eye years prior to the 2017 accident. A 2012 surgery stabilized those conditions until at least May 2017, which is the last documented visit Arturo had with an ophthalmologist before the accident. Arturo visited the Kresge Eye Institute in November 2017, after the accident, with a complaint of floaters. Lin testified that floaters were early signs of a new retinal tear or hemorrhage. He stated that in Arturo's case, a new retinal tear or hemorrhage could have been caused by any type of trauma. Lin gave multiple examples of such trauma including, worsening blood sugar, falling, getting into a fight, being hit in the head, and vigorous shaking of the head. The record indicates that Arturo's condition was stable in May 2017 and had been stable for three to four years prior. Lin testified that something occurred around the time frame of the accident that disturbed that stability. He noted that diabetic changes and severe shaking or trauma could cause the destabilization of Arturo's eye. There was no evidence in the record that Arturo's diabetic condition changed, that he was involved in a fight, or fell down in the time period between the cab incident and the emergence of floaters. While neither Valerie nor Lin could testify as to the impact of the accident on Arturo, Arturo testified he hit his head in the cab, which he described as "bang on my eye". Thus, there was only one documented traumatic event between the May 2017 and November 2017 eye appointments—the vehicle incident. Reasonable minds could disagree as to whether this event

sufficed as trauma causing or contributing to a new retinal tear or hemorrhage. Lin testified that it would not be pure speculation to relate what happened to Arturo's eye to the accident because Arturo "had new symptoms after it was documented that he had new floaters." While the doctor also testified that he would be partly speculating if he stated with a degree of medical certainty that Arturo's new symptoms were related to the November 2017 incident, "medical certainty" is not the required standard of causation.

We understand that Trinity's expert, Dr. Sheldon Gonte, opined that Arturo's left eye was destined for retinal detachment. However, he concurred with Lin that falling and sudden movements could worsen the retinal detachment. He offered other events such as natural disease progression, the diabetes retinopathy, the uveitis, or just being post-op from cataract surgery, as all possible causes of Arturo's retina detachment and decreased vision. Again, there was no evidence of other trauma or diabetic instability, outside of the affirmative testimony that the cab incident was a significant traumatic event. Based on this evidence, a genuine issue of material fact exists regarding whether the vehicle accident aggravated Arturo's preexisting conditions or caused his new injuries.

Plaintiffs additionally argue that Trinity failed to challenge Arturo's loss of vision as a threshold injury under MCL 500.3135 and that they are entitled to partial summary disposition on that issue. Trinity counters that plaintiffs waived this issue on appeal for failure to include it in their statement of questions presented. We agree that plaintiffs waived this issue. MCR 7.212(C)(5) requires the appellants' statement of questions involved to

> stat[e] concisely and without repetition the questions involved in the appeal. Each question must be expressed and numbered separately and be followed by the trial court's answer to it or the statement that the trial court failed to answer it and the appellant's answer to it. When possible, each answer must be given as "Yes" or "No"

There is no mention of Arturo's PIP claim for medical bills or attendant care in plaintiffs' first issue on appeal. "An issue not contained in the statement of questions presented is waived on appeal." *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Consequently, plaintiffs have waived this issue on appeal.

B. VALERIE'S CLAIMS

Under Michigan's no-fault insurance act, a plaintiff may recover for noneconomic damages if she has suffered "serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). "The issues of whether the injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds" that either: (1) "There is no factual dispute concerning the nature and extent of the person's injuries." (2) "There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function or permanent serious disfigurement." MCL 500.3135(2)(a).

Plaintiffs argue that the court erred in dismissing Valerie's claim that the pain in her knees constituted a serious impairment. We disagree.

A serious impairment of body function is defined 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). To establish a "serious impairment of body function", a 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). "[A]n 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions." *Id*. at 196. "[W]hen considering an 'impairment,' the focus 'is not on the injuries themselves, but how the injuries affected a particular body function.' " *Id*. at 197 (citation omitted). " [M]ere subjective complaints of pain and suffering are insufficient to show impairment[.]" *Patrick v Turkelson*, 322 Mich App 595, 607; 913 NW2d 369 (2018). Instead, "evidence of a physical basis for that pain and suffering may be introduced to show that the impairment is objectively manifested." *Id*.

With regard to the second prong, a body function will be considered "important" depending on its "value," "significance," or "consequence" to the injured person. *McCormick*, 487 Mich at 199. The third prong requires that the impairment of an important body function "affect[ ] the person's general ability to lead his or her 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. Further, MCL 500.3135(5) requires only that a person's "general ability to lead his or her normal life has been *affected*, not destroyed." *Id*.

Valerie offered sworn testimony in support of her claim that she was unable to provide care for her son and that she had difficulty with activities of daily living. Thus, she met the burden of going forward as to her claim that her ability to lead her normal life was affected. There is no contest to the use of one's knee as an important body function. However, the record is devoid of proof of any impairment that was objectively manifested. It is worthy to note that Valerie suffered from knee pain before the vehicle incident however, that is not dispositive of her claim. "[T]he aggravation or triggering of a preexisting condition can constitute a compensable injury." *Fisher v Blankenship*, 286 Mich App 54, 63; 777 NW2d 469 (2009). "Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition." *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000). Valerie testified that she went to Southshore Oakwood Hospital the day after the vehicle incident for pain and swelling in both her knees. The medical record from that visit notes the physical examination where she displayed a normal range of motion and no swelling. The imaging done at the hospital on that date demonstrated degenerative conditions. She was released with a diagnosis of knee contusion. There are no notations in her medical records of any objective manifestation or aggravation of her previous condition, much less aggravation occasioned by the cab incident. Valerie testified that her primary care physician told her she needed surgery on her right knee to stop the pain. However, the record contains no admissible evidence that a physician determined that surgery was needed. Neither was there an explanation as to why surgery was needed. Valerie's subjective complaints of pain alone were insufficient to show a serious impairment. *Patrick*, 322 Mich App at 607.

Plaintiffs also argue that the trial court erred in dismissing Valerie's claim that she suffered a permanent serious disfigurement with the loss of a tooth. We disagree.

The Legislature has not defined "permanent serious disfigurement." However, our courts have defined "disfigurement" as "something that mars, deforms, or defaces the person's appearance." *Fisher*, 286 Mich App at 66. "[T]he disfigurement is permanent if it will exist perpetually or is otherwise 'long-lasting,' and will be considered serious if it is 'significant' or 'not trifling.' " *Id*. In determining whether a change in appearance meets the disfigurement threshold, we focus "on the physical characteristics of the injury rather than the effect of the injury on the plaintiff's ability to lead a normal life." *Id*. "Finally, whether an injury constitutes a serious disfigurement must be determined with regard to the injured person's appearance while engaged in a 'full spectrum' of life activities rather than in an isolated 'perusal' of the injured person's immediate appearance." *Id*. at 67. Further, "courts must consider the effect of the disfigurement on the injured person's appearance without the use of devices designed to conceal the disfigurement . . ." *Id*. at 69.

Plaintiffs rely on *Fisher v Blankenship*, *supra*, to argue that Valerie's loss of a tooth constituted a permanent serious disfigurement. In *Fisher*, the plaintiff was rear ended and pushed into the vehicle in front of him, causing him to strike his mouth and nose on the steering wheel. One of the plaintiff's teeth was "pushed all the way back". *Fisher*, 286 Mich App at 57. The plaintiff's dentist recommended removal of the fractured tooth. However, because the plaintiff had pre-existing dental issues in the surrounding teeth, the plaintiff's dentist decided that all of the plaintiff's top front teeth needed to be removed and replaced with a partial upper denture. Consequently, the plaintiff had to have 14 teeth removed. *Id.* A panel of this Court held that the plaintiff's loss of teeth marred or deformed his overall appearance, that the loss of teeth was a disfigurement, and that the disfigurement was permanent. *Id*. at 67. The Court found that the plaintiff's permanent disfigurement was also serious because the plaintiff could not be reasonably expected to appear in public without his dentures, and that when he used his dentures, his upper lip protruded, he drooled, and his speech was impaired. *Id*. at 69.

Fisher does not support the proposition that "[t]he removal of teeth has been found to represent a permanent, serious, disfigurement as a matter of law." *Fisher*, like many cases, was fact-dependent. In *Fisher*, the plaintiff suffered a cracked tooth in his accident. The treatment for that cracked tooth required removal of **all** of his upper teeth and the use of a dental appliance. Thus, the injury in *Fisher* resulted in a permanent injury and one which without the denture installation negatively altered the plaintiff's physical appearance upon casual observation. Valerie, like the *Fisher* plaintiff, suffered a cracked tooth that was extracted. It was however, a singular tooth and her dentist bonded that tooth to the one next to it. No picture was appended to the plaintiffs' responsive brief to the MCR 2.116(C)(10) motion upon which the court could determine if there was a colorable claim of disfigurement. The failure to produce evidence supporting their claim was fatal.

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

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Deborah A. Servitto