

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN DAVIS,

Plaintiff-Appellee,

and

SONCIRAY DAVIS,

Plaintiff,

v

NATIONWIDE PROPERTY & CASUALTY
INSURANCE COMPANY,

Defendant,

and

BEVERLY YOUNG,

Defendant-Appellant.

UNPUBLISHED
December 2, 2021

No. 355516
Wayne Circuit Court
LC No. 18-013099-NI

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Defendant Beverly Young appeals by delayed leave granted¹ the order denying her motion for summary disposition under MCR 2.116(C)(10). We reverse the trial court order and remand for entry of an order granting defendant summary disposition.

¹ *Davis v Young*, unpublished order of the Court of Appeals, entered December 23, 2020 (Docket No. 355516).

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of an automobile accident that occurred on November 13, 2017, in Detroit. Prior to the accident, from June 2016 to March 2017, plaintiff Kenneth Davis was hospitalized for congestive heart failure. Plaintiff also suffered from long-standing diagnoses of chronic kidney disease, diabetes, hyperlipidemia, hypertension, morbid obesity, peripheral neuropathy, malnutrition, sleep apnea, and chronic right leg swelling. Plaintiff's daughter, plaintiff Sonciray Davis (Sonciray), was his full-time caretaker. On the day of the accident, plaintiff was a backseat passenger in Sonciray's car after she picked plaintiff up from a dialysis appointment. Defendant, driving directly in front of Sonciray, made a sharp U-turn, and Sonciray collided with defendant's vehicle. Plaintiff and Sonciray² filed a complaint on October 8, 2018, in which they brought claims against defendant and defendant Nationwide Property & Casualty Insurance Company.³ Plaintiff died on March 20, 2019, while litigation was in progress.

Defendant moved the trial court for summary disposition under MCR 2.116(C)(10) on June 25, 2020. Defendant argued that neither plaintiff, nor his estate, could show that plaintiff sustained an impairment of an important body function as a result of the accident that affected his ability to lead his normal life. On August 25, 2020, the trial court, without oral argument, denied defendant's motion, merely noting in a form order, "Herniated Disks." Defendant moved the trial court for reconsideration on September 14, 2020, arguing that plaintiff failed to make any arguments—and the trial court failed to address—whether there were any changes in plaintiff's ability to lead his normal life after the accident. The trial court, without oral argument, denied defendant's motion for reconsideration without explanation on October 27, 2020. This appeal followed.

II. PRESERVATION AND STANDARD OF REVIEW

A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the evidence, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party can satisfy its burden of showing there is no genuine issue of material fact in one of two ways: (1) by submitting evidence that negates an essential element of the nonmoving party's claim or (2) by demonstrating the nonmoving party's evidence cannot establish an essential element of the nonmoving party's claim or defense. *Quinto*, 451 Mich at 362. Once the moving party meets that burden, the burden shifts to the nonmoving party to submit evidence establishing that there is a genuine issue of material fact. *Id.* "When reviewing a motion under MCR 2.116(C)(10), this Court 'must consider the

² On November 20, 2019, the trial court granted defendant's October 16, 2019 motion for summary disposition under MR 2.116(C)(10) because Sonciray failed to show her alleged impairments affected her ability to lead a normal life. Plaintiff moved on April 21, 2020, to reinstate the case as to plaintiff (Kevin Davis) only, and the trial court granted this motion on June 5, 2020.

³ On February 12, 2021, the trial court granted the parties' stipulated dismissal of defendant Nationwide.

pleadings, affidavits, depositions, admissions, and other documentary evidence in favor of the party opposing the motion.’ ” *Williamstown Twp v Sandalwood Ranch, LLC*, 325 Mich App 541, 547 n 4, 927 NW2d 262 (2018) (quotation marks and citation omitted). Specifically, the de novo standard of review requires us to review the legal issues at hand without deferring to the trial court. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009).

The de novo standard of review also applies to our interpretation of both Michigan statutes and the Michigan Rules of Court. *State Farm Fire & Cas 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). Legal questions are likewise reviewed de novo. *In re Estate of Moukalled*, 269 Mich App 708, 713; 714 NW2d 400 (2006).

III. LAW AND ANALYSIS

Defendant argues that the trial court failed to properly analyze the elements necessary to meet the no-fault threshold. In particular, defendant claims that plaintiff failed to establish an objectively manifested impairment attributable to the November 13, 2017 accident that affected his ability to lead his normal life. We agree.

As an initial matter, we note that the trial court’s action of merely noting “Herniated Disks” in a form order denying defendant summary disposition was insufficient. The trial court had the duty to analyze whether plaintiff’s claim met the threshold for no-fault benefits, which it completely failed to do. The form order providing no analysis was unacceptable.

The no-fault act, MCL 500.3101, *et seq.*⁴, “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.” *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 “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 would observe or perceive as impairing a body function.” *McCormick*, 487 Mich at 196. Our Supreme Court has provided a three-pronged test for establishing serious impairment of a body function: (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 (1) that “[t]here is no factual dispute concerning the nature and extent of the person’s injuries” or (2) “[t]here is a factual dispute concerning the nature and extent of the person’s injuries” that is not material to the

⁴ The Michigan legislature amended the Michigan no-fault act on June 11, 2019. 2019 PA 21. However, the parties do not dispute the pre-amendment version of the no-fault act applies in this case.

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) (quotation marks omitted), quoting MCL 500.3135(2)(a).

Defendant challenges the first and third prongs of the no-fault analysis: whether plaintiff suffered an objectively manifested impairment, and whether that impairment affected his ability to lead his normal life.

A. OBJECTIVELY MANIFESTED IMPAIRMENT

An objectively manifested impairment is one “that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function.” *McCormick*, 487 Mich at 196.

Plaintiff has not clearly established that he suffered an objectively manifested impairment that is attributable to the accident. For example, plaintiff claimed that he hit his legs during the crash, but never mentioned any bleeding. He said, “it hit the metal from the back seat. I felt the metal.” Sonciray, however, testified that plaintiff “hurt his leg but . . . didn’t know he was bleeding until afterwards.” At the emergency room plaintiff maintained that he had not hit his head, yet Sonciray stated that, immediately after the accident occurred, plaintiff said “[h]e hit his head.” Again, she stated: “[H]e banged his head and then he, yeah, he said he hit his leg too.”

The evidence from plaintiff’s trip to the emergency room the day after the accident casts doubt on his claim that he suffered an objectively manifested impairment. He went to the emergency room complaining of neck, back, and leg pain, but he also stated that he was sent to the emergency room by a pain clinic doctor because of concern for potential infection in his red and swollen legs. Plaintiff has dealt with edema and swelling in both legs for many years, and there is no indication in the record that the swollen nature of his legs on November 14, 2017, was causally related to the accident the day before. The emergency room staff observed a “2 cm abrasion on left lower leg” and a “superficial abrasion of right lower leg.” However, they also observed “moderate to extensive peripheral edema of right lower leg and mild to moderate edema of the left lower leg,” and noted that plaintiff had a number of chronic conditions, including “chronic right leg swelling.” Plaintiff offers no evidence that would distinguish the swelling and edema in his lower legs and the swelling allegedly observed by the pain clinic doctor from any swelling that might have been a result of the November 13, 2017 accident. His claim is also belied by his subsequent visit to St. John’s Hospital on October 26, 2018—almost a full year later—complaining of the exact same thing: lower leg swelling.

Plaintiff further claims the accident “broke skin” on his legs, but this claim is tempered by the emergency room staff’s finding of only small abrasions on his legs the day after the accident. At the October 26, 2018 hospital visit almost a year after the accident, the emergency room staff found that plaintiff had “multiple right lower extremity scars *due to a previous motorcycle accident*” There was no indication that these lower leg scars and skin grafts were related to the small abrasions that were found on plaintiff’s legs the day after the subject accident.

Even if it could be determined that plaintiff sustained objectively manifested impairments, the evidence does not establish such impairments are causally connected to the November 13, 2017 motor vehicle accident. Plaintiff’s impairments after the accident differ very little from the

impairments he experienced before the accident. He has an extensive history of back and leg pain stemming from before the accident, and the neck pain was not substantiated by the medical examination the day after the accident, nor supported by any claim or evidence of neck trauma. Plaintiff presents the January 2018 cervical spine MRI as evidence of neck pain that was caused by the accident, but the stand-alone MRI, without anything to compare it to, does not prove plaintiff's argument since the conditions in the MRI are not attributed to the accident. If plaintiff had, for instance, provided an MRI from before the accident showing no cervical spine problems, his argument might be more convincing. But no such evidence exists. Plaintiff's speculative claim that the neck pain was caused by the accident, which is unaccompanied by any corroborating evidence, does not suffice to establish a causal connection where all other evidence fails to provide one. It states only that the impairment was "after" the accident, not "caused by" the accident.

Plaintiff also argues that his back pain was caused by the accident. He presents the January 2018 lumbar spine MRI as evidence for this conclusion, but this MRI runs into the same causal issues as the cervical spine MRI. Despite a caregiver's apparent corroboration of plaintiff's claim that his back pain started after the accident, the same caregiver also stated that plaintiff complained of back pain before the accident.

Plaintiff's back pain argument is weakened by Sonciray's testimony that she massaged his back both before and after the accident. Plaintiff argues that the failure to resolve the back pain issue suggests the accident caused an objectively manifested impairment, but—as discussed above—it is not at all clear that plaintiff's back pain was caused by the accident or that it did not exist before the accident. When seen in light of plaintiff's long-term chronic medical and pain issues, a clear causal connection between the accident and plaintiff's alleged impairments has not been established. In sum, because of the significant impairments that existed before the accident, all of which were similar to the impairments plaintiff experienced after the accident, it is not clear that the accident caused or exacerbated the impairments. Unlike *McCormick*, in which the plaintiff's injuries stemmed from a single incident, *McCormick*, 487 Mich at 184-188, the injuries in this case have been chronic for months or, in some cases, years.

"[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; 635 NW2d 69 (2001) (quotation marks and citation omitted). "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). Plaintiff's speculative claim that the neck and back pain were caused by the accident, which is unaccompanied by any corroborating evidence, does not suffice to establish a causal connection where all other evidence fails to provide one. Merely because plaintiff asserts that the impairments occurred "after" the accident does not establish that they were "caused by" the accident. Specifically, "[i]n a negligence action, a plaintiff must establish both factual causation, i.e., 'the defendant's conduct in fact caused harm to the plaintiff,' and legal causation, i.e., the harm caused to the plaintiff 'was the general kind of harm the defendant negligently risked.'" *Ray v Swager*, 501 Mich 52, 64; 903 NW2d 366 (2017) (citation omitted). As noted, a theory of causation that is premised on minimal evidence is inadequate. *Skinner*, 445 Mich at 164. "Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." *Id.* "Rather, [there] must [be] substantial evidence

from which a jury may conclude that more likely than not, but for [the challenged] conduct, [the claimed] injuries would not have occurred.” *Id.* at 164-165.

While the conflicting evidence could establish a genuine issue of material fact, plaintiff has failed to establish an objectively manifested impairment caused by the accident.

B. ABILITY TO LEAD A NORMAL LIFE

Even if causation had been adequately established, plaintiff has not demonstrated that the alleged impairments affected his ability to lead his normal life.

Whether or not plaintiff’s ability to live a normal life has been affected “requires a comparison of [his] life before and after the incident.” *McCormick*, 487 Mich at 202. Plaintiff’s symptoms, limitations, and treatments following the accident differ almost imperceptibly from the symptoms, limitations, and treatments he underwent before the accident. Before and after the accident he experienced back pain, lower leg pain, and lower leg swelling. He was on dialysis and constant oxygen support both before and after the accident. He was on disability from March 2017 onward.

There was no significant difference in what plaintiff could do before and after the accident. Ending in March 2017, plaintiff had been hospitalized and in a rehabilitation care facility for nine months because he had congestive heart failure. Sonciray was his full-time caretaker. He was unable to play pool after this hospital stay. He did not drive before or after the November 13, 2017 accident. He struggled to go down the stairs both before and after the accident. Before the accident, plaintiff could not walk or swim without assistance; the same remained true after the accident. His lifestyle remained sedentary, as it was before the accident, revolving mostly around sleeping, watching television, and going to dialysis. Before the accident, plaintiff was unable to do almost any household chores. Sonciray and her mother took care of all such duties for him, including cooking, monitoring his medications, cleaning, grocery shopping, and bathing plaintiff. After the accident, they continued to do all of those things.

Aside from a short span of two months when Sonciray bandaged plaintiff’s legs in an area where pus had been leaking out of the leg, nothing changed. As noted above, there is no evidence of a causal connection between the leaking skin on his legs and the small abrasions observed after the accident. Plaintiff stated that Sonciray and her mother began helping him put his socks and shoes on after the accident, but he also stated that he did not know why he was unable to put on his socks. He claimed that he used to be able to walk around the block once or twice a week with Sonciray, but he did not state whether he had attempted to do so after the accident. He admitted that his congestive heart failure affected his ability to walk around the block, and offers no evidence with which to distinguish the two causes. Plaintiff claimed that his neuropathy got worse after the accident, but he did not offer any details on how or where the neuropathy bothered him, nor did he provide any evidence that the neuropathy was causally linked to the accident.

Michigan caselaw supports the conclusion that the alleged impairments did not affect plaintiff’s normal life. In *McDaniels v Hemker*, 268 Mich App 269, 280-282; 707 NW2d 211 (2005), where the plaintiff lost the ability to do nearly all work and recreational activities as a result of an accident, we noted that comparing her “life before and after the accident is [like] . . .

comparing day to night.” In contrast, a comparison of plaintiff’s life before and after the November 2017 accident shows the same limitations. Unlike the plaintiff in *McCormick*, who returned to work after the accident, *McCormick*, 487 Mich at 186-187, plaintiff has remained on disability since March 2017, and has provided no evidence of any change in his activity levels or abilities; instead, he faced essentially identical physical restrictions as before the accident.

For these reasons, plaintiff has not demonstrated the alleged injuries affect his ability to live his normal life.

IV. CONCLUSION

The trial court order denying defendant summary disposition is reversed, and we remand this matter to the trial court for entry of an order granting defendant summary disposition. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Mark T. Boonstra