STATE OF MICHIGAN

COURT OF APPEALS

MARGIO CASTRO,

Plaintiff-Appellant,

v

TODD RAYNAL DUESETTE and ERICA SHAVONE DUESETTE,

Defendants-Appellees.

UNPUBLISHED
June 4, 2019

No. 341695
Wayne Circuit Court
LC No. 16-014200-NI

Before: TUKEL, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Plaintiff, Margio Castro, appeals as of right the order of the trial court granting summary disposition to defendants, Todd Raynal Duesette and Erica Shavone Duesette, pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS

This case arises from plaintiff's claim that he suffered injuries as a result of defendant Todd Duesette's negligence while driving an automobile. On November 24, 2013, plaintiff was driving his vehicle in Detroit when he was struck by a car driven by Todd Duesette and owned by Erica Duesette. Plaintiff claims that as a result of the accident, he received significant bodily injuries, including injuries to his neck and shoulders.

The passenger in plaintiff's car, Piantong Prommawonsee, initially testified that he did not remember there being a car collision that day, but then stated that he remembered hearing a bang, and felt the car shake. He was not injured, and testified that he did not remember if plaintiff struck any part of plaintiff's body either on the car or on Prommawonsee, and did not recall plaintiff complaining of any pain. After the collision, both men got out of the car to look for damage to the car; he recalled that the car was drivable but did not otherwise remember the extent of the damage. They drove to the police station, as did defendants, to report the collision. The police report from the accident indicates that plaintiff did not report any injury. Prommawonsee did not recall if plaintiff ever mentioned being hurt in the accident.

Plaintiff has a history of both work-related accidents and automobile accidents in which he claimed to have sustained neck and shoulder injuries, as well as other injuries. In 1998, plaintiff was involved in an automobile accident, after which he claimed to have suffered injury to his upper chest and spine. He thereafter sought insurance benefits and disability benefits as a result of the alleged injuries. He attempted to return to his job as a hospital cafeteria worker, but was disabled by low back pain. At that time, plaintiff was diagnosed as having long-standing spondylolitic spondylolistheses (a crack or stress fracture in one of the vertebrae) and radiographic abnormality not caused by the 1998 car accident, but possibly "brought to light" by the 1998 car accident.

In 2003, plaintiff again was involved in a car accident, and sought benefits for claimed injuries to his neck, shoulders, upper and lower back, hips, right knee, both feet, hands, and arms. In 2004, an MRI of plaintiff's left shoulder indicated "findings suggestive of tendinopathy involving predominantly the bursal side of the supraspinatus tendon at its musculotendinous junction. A less likely consideration is a partial tear. . . . Hypertrophy degenerative change of the acromioclavicular joint is identified, as well as cystic change within the humeral head at the site of the insertion of the supraspinatus tendon."

In August 2012, plaintiff reported a workplace injury while working construction, claiming injuries to his right shoulder, right wrist, lower back, and right hip. He eventually returned to work with restrictions. In December 2012, while working at a new construction job, plaintiff again reported a workplace injury, alleging he had injured his right arm, which had been twisted while removing a concrete form.

After the November 2013 collision that is the subject of this case, plaintiff reported to the independent medical evaluator, Mark Kwartowitz, D.O., that after the accident he began having pain in his neck and left shoulder. Dr. Kwartowitz concluded that there was no objective evidence of any injury to plaintiff as a result of the November 2013 collision.

Two days after the November 2013 collision, plaintiff returned to his job, which at that time was a labor-intensive job in the construction industry in which he routinely worked disassembling and moving large amounts of concrete by hand. He resumed his regular schedule of a 40-50 hour work week, and continued to work until shortly before Christmas. He resumed the construction job in April 2014, and worked until April 30, 2014, when he reported that he pulled his neck and right shoulder while at work. Plaintiff reported that while working he heard his neck and shoulder "crack" and that the pain was so severe that he had to be driven to the hospital. He resumed work immediately with a lifting restriction, and on May 20, 2014, returned to work with no restrictions. Plaintiff testified that in July 2014 he was fired from that job because he was unable to perform the work.

Plaintiff also continued his recreational activities of attending dance contests and playing bongo drums after the car collision in November 2013. In March 2016, plaintiff attended the Michigan Dance Challenge, and posed for a photo in which he is "dipping" his wife, supporting her body with his right arm and raising his left arm directly overhead. Although plaintiff appeared at his April 21, 2017 deposition with his left arm in a sling, and although plaintiff testified during his deposition that he had not played the bongos since the November 2013 collision because of the pain from his injuries, in June 2016, he performed live percussion at a

dance venue in Southfield, where he was advertised as a main attraction of the event. In January 2017, he performed percussion at the Neche Lounge in Las Vegas where he reportedly "played the bongos all night" and can be seen playing the drums in a YouTube video.

In November 2016, plaintiff filed his complaint initiating this case and alleging that as a result of Todd's negligence in the November 2013 collision, plaintiff sustained severe and permanent injuries, including injuries to his neck and shoulders. Defendants moved for summary disposition, arguing that plaintiff had not established that his alleged injuries were caused by the accident, and also failed to establish that he had suffered serious impairment of body function. The trial court granted defendants' motion for summary disposition, and thereafter denied plaintiff's motion for reconsideration. Plaintiff now appeals to this Court.

II. DISCUSSION

Plaintiff contends that the trial court erred in granting defendants summary disposition of his negligence claim. Plaintiff argues that the trial court incorrectly determined that he failed to demonstrate that his alleged injuries were caused by the car collision and that he suffered a serious impairment of body function. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). In so doing, we review the entire record to determine whether the moving party was entitled to summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

When reviewing an order granting summary disposition under MCR 2.116(C)(10), this Court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 520; 895 NW2d 188 (2016). Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. When a motion is made and supported under MCR 2.116(C)(10), the burden shifts to the nonmoving party to show, by affidavits or other documentary evidence, that there is a genuine issue of material fact. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the nonmoving party does not make such a showing, summary disposition is properly granted. *Id*. at 363.

B. CAUSATION

Michigan's no fault act, MCL 500.3101 *et seq*., limits tort liability. *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010). However, a person may pursue a claim for a "serious impairment of body function" caused by another person's negligent use of a motor vehicle. MCL 500.3135(1). That statutory section provides, in relevant part:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

* * *

> (5) As used in this section, "serious impairment of body function" means 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(1), (5).]

The elements of negligence are "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Thus, to establish a claim of negligence in the ownership, maintenance, or use of a motor vehicle under MCL 500.3135(1), the plaintiff must demonstrate, in addition to the other factors, that the defendant's negligence was the proximate cause of the plaintiff's alleged injuries. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

" 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). To establish cause in fact, the plaintiff must demonstrate that but for the defendant's actions, the plaintiff's injury would not have occurred. *Weymers v Khera*, 454 Mich 639, 645-646; 563 NW2d 647 (1997). To establish legal cause, the plaintiff must demonstrate that it was foreseeable that the consequences would arise from the defendant's actions, creating a risk of harm to the victim. *Id*. at 648. If a plaintiff establishes factual causation, he must then establish legal cause, that is, that the harm caused "was the general kind of harm the defendant negligently risked." *Ray v Swagger*, 501 Mich 52, 64; 903 NW2d 366 (2017) (quotation marks and citation omitted). However, if the plaintiff fails to establish factual causation, legal causation is not relevant.[1] *Id*. at 64.

The plaintiff bears the burden of setting forth specific facts to demonstrate that the defendant caused his injuries. *Craig*, 471 Mich at 87. A plaintiff establishes cause in fact sufficient to create a genuine issue of material fact if the plaintiff establishes "a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support." *Patrick v Turkelson*, 322 Mich App 595, 617; 913 NW2d 369 (2018) (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).

In this case, defendants moved for summary disposition, contending that plaintiff had failed to demonstrate that his alleged injuries were caused by the November 2013 collision.

[1] In this case, the trial court did not reach the question of legal causation, concluding that plaintiff had not presented evidence sufficient to create a question of fact that the November 2013 collision was the cause in fact of plaintiff's alleged injuries.

Defendants supported their assertions with the report of Dr. Mark Kwartowitz, D.O., who, after examining plaintiff and plaintiff's medical history,[2] reported:

> After review of the medical records, physical examination, and radiographic review, I am unable to conclude with any degree of certainty that Mr. Castro's ongoing LEFT shoulder complaints are causally related to the motor vehicle accident from November 24, 2013. At the time of the evaluation, Mr. Castro denied any prior complaints or injury to his LEFT shoulder. After review of the medical records available to me, this is obviously untrue. MRI imaging prior to the motor vehicle accident is essentially unchanged from his most recent MRI. Thus, I cannot with any degree of medical certainty say that there is any evidence of distinct pathology introduced to Mr. Castro's LEFT shoulder from the motor vehicle accident of November 24, 2013.
>
> Mr. Castro does also have prior history and treatment as well as MRI imaging to the RIGHT shoulder and I see no evidence of acute, separate or distinct pathology introduced to the RIGHT shoulder from the motor vehicle accident of November 24, 2013.

Plaintiff then had the burden to show through documentation, in response to defendants' motion for summary disposition, that a genuine issue of material fact existed as to whether his alleged injuries were caused by the November 2013 collision. To do so, plaintiff presented his treatment records from Active Body Physical Therapy, and argued that these records represented an opinion by the physical therapists at Active Body that his injuries arose from the November 2013 collision. According to plaintiff, four Treatment and Assessment Plans created by Active Body indicated that plaintiff's neck and shoulder injuries were the direct result of the 2013 collision. A review of the four reports, however, suggests that the reports are simply evaluations of plaintiff's condition by the treatment staff at Active Body and do not represent a medical opinion of causation.

Plaintiff also submitted to the trial court the report of S.W. Bartol, M.D., an orthopedic surgeon who had examined plaintiff on behalf of Allstate Insurance Company on February 18, 2014, for the purpose of determining plaintiff's eligibility for certain benefits.[3] Dr. Bartol stated

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[2] Although the dissent urges that plaintiff's pre-accident complaints were confined to his *right* shoulder, Dr. Kwartowitz reported that plaintiff's medical history also included complaints of injury to his *left* shoulder, in stark contrast to what plaintiff reported to him. This conclusion is supported by the record, which includes a 2004 medical assessment of plaintiff's claim that as a result of a 2003 car accident, he injured, among other things, his left shoulder.

[3] The record in this case indicates that Dr. Bartol examined plaintiff exclusively for the purpose of determining plaintiff's entitlement to statutory accident benefits under Ontario's Insurance Act. Dr. Bartol's report does not suggest that he made a determination of causation relevant to Michigan's no-fault act, nor did he offer an opinion in that regard. In fact, Dr. Bartol was not deposed in this case, presumably because he was not designated as plaintiff's expert witness regarding causation.

in his report that there was a causal relation between the collision and plaintiff's injuries, but also stated: "There is no evidence of any medical condition that predated the motor vehicle accident that has been exacerbated by the accident." The report indicates that it is based in part on plaintiff's history as reported by plaintiff. Dr. Bartol's report is not sufficient to create a genuine issue of material fact on the issue of causation. Plaintiff's medical history clearly demonstrates that plaintiff suffered from preexisting neck and shoulder conditions, and necessitates comparison of the medical evidence before and after the November 2013 collision to ascertain whether plaintiff's condition changed as a result of the November 2013 collision. Dr. Bartol's report demonstrates that his opinion was made without this necessary comparison of the medical evidence. Rather, Dr. Bartol simply accepted plaintiff's word that he had no preexisting condition and that his symptoms were related to the November 2013 car collision.

In response to defendants' motion for summary disposition under MCR 2.116(C)(10), plaintiff had the burden to show that a genuine issue of material fact existed as to whether the November 2013 collision was the cause in fact of his alleged injuries. To do so, plaintiff was required to establish a logical sequence of cause and effect, *Patrick*, 322 Mich App at 617, and mere speculation is inadequate to meet this burden. See *Sniecinski*, 469 Mich at 140. Because plaintiff's assertion of cause and effect in this case is purely speculative, the trial court correctly determined that plaintiff failed to establish cause in fact.[4]

C. SERIOUS IMPAIRMENT OF BODY FUNCTION

As noted, under the no-fault act, a person may pursue a claim for a "serious impairment of body function" caused by another person's negligent use of a motor vehicle. MCL 500.3135(1). That statute defines a serious impairment of 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). This Court has noted that the "aggravation or triggering of a preexisting condition can constitute a compensable injury." *Fisher v Blankenship*, 286 Mich App 54, 63; 777 NW2d 469 (2009).

In *McCormick*, our Supreme Court explained that under the statute the three prongs necessary to establish "serious impairment of body function" are: (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. The Court also explained that, initially, "the court should determine whether there is a factual dispute regarding the nature and the extent of the person's injuries and, if so, whether the dispute is material to determining whether the serious impairment of body

[4] We sense that the dissent disagrees. Nonetheless, although we protect with zeal the "bedrock principle" that summary disposition is not warranted when there is a genuine issue of material fact, we remain cognizant that a plaintiff bears the burden of proving that the defendant caused his injuries, that causation cannot be proved with speculation or conjecture, and that, when a motion is made and supported under MCR 2.116(C)(10), the burden shifts to the nonmoving party to demonstrate that there indeed is a genuine issue of material fact. If the plaintiff fails to meet these requirements, summary disposition is properly granted. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

function threshold is met. . . . If there is no factual dispute, or no material factual dispute, then whether the threshold is met is a question of law for the court." *McCormick*, 487 Mich at 215 (citation omitted).

The first prong of the test, an objectively manifested impairment, "is commonly understood as an impairment 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). 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." *Id*. at 196.

Regarding the second prong, a body function will be considered important depending on its "value, significance, or consequence" to the injured person given the relationship of the function to that person's life. *Id*. at 199, 215. The third prong, whether the impairment of an important body function affects the person's general ability to lead a normal life, is a subjective inquiry requiring comparison of the plaintiff's life before and after the accident. *Id*. at 202. The plaintiff's general ability to lead his pre-accident normal life need only be affected, not destroyed; the focus is on whether the impairment affected the plaintiff's ability to maintain his normal manner of living. *Id*. at 202-203.

In this case, plaintiff failed to demonstrate before the trial court that he had a serious impairment of body function. With respect to the first prong of the test, defendant argued before the trial court that plaintiff had not demonstrated an objectively manifested impairment. Defendants relied in part on the report of Dr. Kwartowitz that plaintiff's medical records and imaging studies are identical before and after the November 2013 collision. Defendants also submitted work records suggesting that plaintiff was able to perform the same job immediately after the collision as he had before the collision, and continued with his hobbies of dancing and professional bongo performance. Plaintiff did not thereafter refute this evidence by presenting evidence that plaintiff has an impairment that is objectively manifested.

With respect to the second prong of the test, whether the impairment is important to the injured person given the relationship of the function to that person's life, a neck and shoulder impairment arguably would be important to anyone, and perhaps particularly so to someone working in the construction industry and engaging in dancing and professional musical performance. Plaintiff, however, has not demonstrated that this important body function is impaired.

With regard to the third prong, whether the impairment of an important body function affected plaintiff's general ability to lead a normal life, plaintiff failed to demonstrate that his general ability to lead his pre-accident normal life was affected. In fact, the evidence suggests that plaintiff's life was not affected at all. Although plaintiff in his deposition testified regarding the things he could not do, the evidence demonstrates that after the accident, he continued to work his regular work schedule until April 2014, when he reported that while working he heard his neck and shoulder "crack" and that the pain was so severe that he had to be driven to the hospital. He resumed work immediately with a lifting restriction, and on May 20, 2014, returned to work with no restrictions. Plaintiff also continued his recreational activities of dancing and

playing bongo drums, attending in March 2016 the Michigan Dance Challenge, and performing percussion at dance venues in 2016 and 2017.[5] Because there appears to be no change in plaintiff's general ability to lead his normal life, the trial court did not err in granting defendants summary disposition, concluding that there was no genuine issue of material fact that plaintiff had not suffered a serious impairment of body function.[6]

Affirmed.

/s/ Jonathan Tukel
/s/ Michael F. Gadola

[5] The dissent suggests that plaintiff's January 2017 Las Vegas bongo performance is more sedate than his bongo-playing in a pre-accident video, illustrating that plaintiff suffers an impairment. In reality, the January 2017 Las Vegas performance is miraculous; while wearing a sling on his arm during his deposition in April 2017, just three months after his Las Vegas performance, plaintiff testified that he had not played the bongos since the accident in November 2013, being prevented from doing so by pain. It appears that the only impairment supported by the January 2017 bongo performance video is an impairment of plaintiff's memory.

[6] Our dissenting colleague writes, without apparent irony, that the majority opinion would serve as a good outline for defendant's closing argument at trial. We are content to allow the reader of these competing opinions to judge which of them is in the nature of advocacy for one of the parties, and which is a more reasoned and dispassionate analysis of the facts and law.

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Before: TUKEL, P.J., and SHAPIRO and GADOLA, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent. Plaintiff was injured in an automobile collision on November 24, 2013, and thereafter brought suit against the allegedly at-fault driver. The trial court dismissed the suit concluding that (1) there was no evidence that the collision was a cause of plaintiff's left shoulder rotator cuff tear or his left shoulder labral tear; and (2) that the alleged injury to the left shoulder did not affect plaintiff's ability to lead his normal life. My colleagues agree with the trial court on both counts. In my view, their conclusions are inconsistent with the record evidence and the bedrock principle that summary disposition under MCR 2.116(C)(10) is not to be granted when there is a question of material fact. Turning that basic principle on its head, the majority overlooks facts inconsistent with its conclusion, engages in speculation and draws all inferences in the moving party's favor. The majority opinion may serve as a good outline for the defendants' closing argument at trial, but it wholly fails to provide grounds for summary disposition.

I. CAUSATION

The majority concludes that there is no evidence that the November 2013 accident was a cause of plaintiff's left shoulder full-thickness rotator cuff tear and labral tear. It reaches this conclusion despite the fact that the pre-accident imaging studies contained in the record do not show these injuries while post-accident imaging studies do, and despite the explicit conclusion of

an examining physician—selected and paid by an insurance company—that the accident was a cause of these injuries.[1]

The collision occurred on November 24, 2013, when a vehicle driven by defendant Todd Duesette and owned by defendant Eric Duesette struck the left side of plaintiff's car. Plaintiff began several months of physical therapy shortly thereafter. In the initial assessment sent to plaintiff's primary care physician, the therapist noted that "after careful examination, it appears that Mr. Castro is experiencing symptoms consistent with traumatic rotator cuff impingement . . . ." The examination revealed reduced range of motion in several planes of the left shoulder and "left shoulder impingement."

On February 13, 2014, at Allstate Insurance Company's request, plaintiff underwent an "Insurer Examination" including a functional abilities evaluation conducted by a physician and kinesiologist chosen by the insurer. He was found to have reduced left shoulder motion and muscle strength and a "positive apprehension sign," a finding that suggests a possible rotator cuff tear. In response to the insurer's questions, the physician's report stated that Mr. Castro's reported complaints correlated with "objective findings" and advised that "further investigation is required to rule out a left shoulder rotator cuff tear . . . ." The report went on to state that "[b]ased on his functional testing and physical examination," in the interim "he should avoid heavy lifting, above shoulder level activities, and repetitive reaching . . . ." (Quotation marks omitted). The examining doctor opined that "Mr. Castro is not capable of returning to his employment at this time."

As part of the insurer examination, on February 18, 2014, plaintiff was also examined by Dr. S.W. Bartol, an orthopedic specialist. In response to the insurer's questions concerning plaintiff's condition and its cause, Dr. Bartol stated that plaintiff "does have some functional limitations and physical restrictions at this time [and] evidence of ongoing impairment affecting the left upper extremity." He opined that plaintiff "is not capable of returning to his pre-accident employment at this time" and recommended that plaintiff's work duties be restricted to exclude heavy lifting or overhead work. Dr. Bartol also recommended an MRI (magnetic resonance imaging) and MRA (magnetic resonance arthrogram) of the left shoulder in order to determine the exact nature of the pathology.

The MRI report described the left rotator cuff as having a "high grade partial thickness tear" as well as "an inferior labral tear."[2] The MRA report revealed a "[f]ull thickness tear of

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[1] The majority is less certain, however, as to what did cause the injuries, first suggesting that they pre-existed the accident, but then concluding that they occurred after the accident.

[2] According to WebMD, the labrum is a

> thick band of tissue surrounds your shoulder socket and keeps your shoulder joint stable. . . .

supraspinatus tendon with near complete thickness tear of the infraspinatus tendon [and an] [u]ndisplaced inferior labral tear."

Dr. Bartol again saw plaintiff at the insurer's request on September 9, 2016. He confirmed that the medical imaging showed both labral and rotator cuff tears. After examining plaintiff, he opined that "[p]rognosis with respect to the shoulder injury is poor. Further improvement is not expected without surgical intervention." He also stated that "[t]he current complaints are consistent with the mechanism of injury [i.e., the auto accident] and correlate with objective findings." He stated that as a result of the labral tear Mr. Castro "is not able to participate in normal work activities" and that "[h]e is not capable of working at his previous duties in an unrestricted fashion." Regarding the rotator cuff tear, he concluded that plaintiff had "pre-existing rotator cuff tendinopathy" in his left shoulder that "likely predisposed him to a full thickness tear in the left shoulder, . . . *the full thickness tear probably occurred at the time of the motor vehicle accident*. *The labral pathology in the left shoulder is, in my opinion, specifically attributable to the motor vehicle accident*." (Emphasis added).

The majority concedes that Dr. Bartol reached this conclusion and stated it in his written report. Inexplicably, however, the majority simply dismisses all of Dr. Bartol's conclusions by asserting that he was not aware of plaintiff's pre-accident left shoulder tendinopathy. The majority is mistaken, however, because, Dr. Bartol refers specifically to that pre-existing tendinopathy in his report. The majority then goes on to speculate that *if* Dr. Bartol was aware of plaintiff's pre-existing pathology he would completely change his opinion and conclude that the accident played no role in plaintiff's impairments. Notably, however, defendants did not obtain an affidavit from Dr. Bartol indicating that his opinion had changed or that he was unaware of the prior pathology. The majority merely assumes that upon learning of other information (that he appears to already have) Dr. Bartol would completely alter his opinion. This is at best an inference drawn in favor of the moving party and really amounts to nothing more than speculation. Given the standards that apply to a motion under 2.116(C)(10) it would seem necessary to have at least *some* evidence that Dr. Bartol no longer holds his stated opinions. Without it, the majority's assurance that Dr. Bartol will abandon his opinions appears to rest

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> Your shoulder has three bones: the scapula (shoulder blade), humerus (upper arm bone), and clavicle (collarbone). They work together in a ball-and-socket joint where the arm connects to your trunk.
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> Your shoulder's labrum isn't a bone. It's soft tissue that helps connect the socket part of the scapula (called the glenoid) with the head of the humerus. If the labrum tears, there's not enough cushion between those bones.

The article describes common symptoms of a labral tear as including: catching, locking, or grinding, an unstable feeling in the shoulder, a loss of strength and reduced range of motion. <https://www.webmd.com/pain-management/labrum-slap-tear#1> (accessed April 30, 2019).

solely on divination. The bottom line is that the *only* evidence before us of Dr. Bartol's opinion are his reports that clearly support plaintiff's claim.[3]

In addition, the majority obfuscates the medical record when it states prior to the accident, plaintiff suffered from "preexisting neck and shoulder conditions." That is true—the medical records show that plaintiff had complained in the past about "shoulder" problems. However, the records of his treating physicians reveal that the shoulder problems for which he saw his doctors were—on every occasion—of the *right* shoulder, not the *left* shoulder. In 2005, he saw his doctor for *right* shoulder pain and underwent several months of treatment; however, no problems were reported regarding the *left* shoulder. In 2007, an ultrasound revealed a partial tear in the *right* shoulder.[4] And the records of plaintiff's primary care doctors from 2000–2010 describe right shoulder problems, not left shoulder problems.

Having side-stepped Dr. Bartol's findings and opinions, the majority then inflates the content of a report from Dr. Mark Kwartowitz. Dr. Kwartowitz conducted an insurance medical examination in 2017. In his report he agreed that plaintiff has a left rotator cuff tear[5] with reduced range of motion and strength. His conclusion as to causation is very carefully worded. He did not conclude that the collision was not a cause of these injuries. Rather, he stated, "I cannot say with any degree of medical certainty that there is any evidence of distinct pathology introduced to Mr. Castro's Left Shoulder from the motor vehicle accident." He reached this non-conclusive double-negative based on his assertion that pre- and post-collision imaging revealed no change and because, as he stated, plaintiff had not revealed the pre-existing problems to him.

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[3] The majority also attempts to sidestep this evidence by noting that the insurer examination concerned benefits determined under Ontario's Insurance Act. Putting aside the lack of evidence to support this statement, it is difficult to understand how diagnosis of an injury and opining as to its cause(s) is rendered meaningless because the insurance claim was governed by Canadian law.

[4] The medical records show rare left shoulder complaints prior to the accident. In 1998, plaintiff was injured in an auto accident and treated for some time for low back pain. Immediately after the accident plaintiff complained of a bruise on his left shoulder from the seat belt, but the records do not show any ongoing left shoulder complaints thereafter. Three years later, plaintiff came to see his doctor in early 2001 indicating that he had fallen and injured a shoulder, but the doctor's note does not indicate which shoulder. In any event, there are no records of any follow-up treatment for this injury. Indeed, when examined a year later, the physician noted that in both shoulders plaintiff had "full range of motion in all planes, no impingement, and excellent strength." Plaintiff was in another auto accident in January 2003. He again had a bruised left shoulder from the seat belt that was diagnosed as a "left shoulder girdle strain," but the injuries he reported to his doctor were: "sore neck, chest, lower back, knees." In 2005, plaintiff went to his doctor for *right* shoulder pain and right elbow pain. In 2007, he had an ultrasound of the *right* shoulder which revealed a suspected partial tear. In 2012, he was injured at work when he twisted his *right* shoulder. There are no further left shoulder complaints or treatment referred to in any of plaintiff's medical records from 2005 through 2013.

[5] Which by 2017 had begun to atrophy.

The first of these claims is clearly inaccurate and the second is dubious. The radiology records indicate that the first time plaintiff was ever imaged with a left labral tear was *after* the collision. As to the rotator cuff tear there is a question of fact. The majority refers to a 2004 MRI showing "[f]indings suggestive of tendinopathy . . . . A less likely consideration is a partial tear. There is no evidence of full thickness tear seen."

That plaintiff had a tendinopathy prior to the accident is neither new nor dispositive. Perhaps more to the point, reliance on this alleged 2004 MRI report as grounds to dismiss plaintiff's case is improper given that the actual report of such a study is not found anywhere in the record. The MRI is described in defendants' brief's statement of facts. However, in violation of briefing requirements,[6] no reference to the record or exhibits is provided. Dr. Kwartowitz states that he based his conclusion that there was a 2004 MRI from a statement referring to such a study in the report of chiropractor Dr. Jeffrey Middledorf who conducted an insurance examination following a 2003 accident. However, the study is not in the record before us. Moreover, Dr. Middledorf's own conclusion in 2004 was not consistent with the existence at that time of any serious shoulder pathology. Having reviewed the MRI, he opined that there was "no objective evidence clinically or radiographically of any residual injury to his spine or left shoulder from the January 1, 2003 accident."

In sum, there is substantial evidence that the labral tear to plaintiff's left shoulder was caused by the accident and no evidence that it occurred earlier. There are no references in any pre-accident medical records to even the possibility that plaintiff had such an injury. Dr. Bartol opined that plaintiff had significant rotator cuff pathology before the accident but that the full-thickness rotator cuff tear was the result of the accident. In response defendants cite only to Dr. Kwartowitz's conclusion that he cannot reach a conclusion.

No doubt defendants have fodder from which to dispute the cause of plaintiff's rotator cuff injury. However, to suggest that there is not a question of fact requires that we ignore virtually all the medical evidence in the case. Even assuming that plaintiff's left rotator cuff was already partially torn prior to the collision, it does not reduce, let alone eliminate, the role of the instant accident after which he was shown to have a full-thickness tear and a labral tear. Where there is a pre-existing condition, "the aggravation or triggering of a preexisting condition can constitute a compensable injury." *Fisher v Blankenship*, 286 Mich App 54, 63; 777 NW2d 469 (2009).

In addition to claiming that plaintiff's left shoulder problems were caused by events 10 or 15 years before the auto accident, the majority also asserts that the injury occurred after the accident, i.e., that the injuries were the result of an incident at work in April 2014. However, the majority overlooks that during the time after the collision in November 2013—but before the work incident in April 2014—plaintiff had been diagnosed with rotator cuff and labral tears, had received several months of physical therapy and had missed substantial time from work.

[6] See MCR 7.212(C)(6) and (D).

Defendants have not proffered a single medical opinion to support their claim that the left rotator cuff and labral tears were the result of the April 2014 workplace incident. And given this lack of support in the record, the majority must exaggerate the contents of the record concerning that incident. The majority states that "[p]laintiff reported that while working he heard his neck and shoulder 'crack' and that the pain was so severe that he had to be driven to the hospital." This description is inaccurate and misleading. The incident report merely provides that plaintiff reported that his "neck and shoulder was [sic] sore at the end of the day"; the report does not indicate which shoulder plaintiff was referring to. Most significantly, contrary to the majority's paraphrasing, the report does *not* say that he heard his shoulder crack. The report instead states that "later that night . . . the worker felt a spasm *in his neck* whereas he felt it crack." (Emphasis added).

The majority argues that the auto accident could not have injured plaintiff's shoulder because he attempted to resume his job. His wage records show that he returned to work for two weeks following the auto accident then did not work for a week and then returned to work for three more weeks after which he determined that he could not continue. He again tried to return to work in April 2014 and was assigned to lighter work such as "directing the trucks" and "driving a bobcat," and he testified that he used his right arm for most activities during this time. When asked to explain why he attempted to return to work despite his injuries from the accident, he testified:

> I had just bought my house so I was afraid to lose my house so I was working with the pain. And I didn't want to tell anybody that I was injured because . . . in construction they find out that you're injured, they let you go.

Despite this evidence the majority concludes that the *only* possible explanation for plaintiff's brief return to work was that he was fully able to perform his job and that his inability to continue must be due to a new, unrelated injury. This is no more than speculation without support from any doctors and is inconsistent with the medical records, plaintiff's testimony and his work records. To the degree the evidence can be read to support the majority's view it merely creates a question of fact for the jury, not grounds for summary disposition.

II. SERIOUS IMPAIRMENT

In addition to causation, defendants sought summary disposition on the grounds that plaintiff's impairments did not rise to the level of a serious impairment of a body function.

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). Where there is a factual dispute concerning what injuries were sustained in the accident, summary disposition based on the serious impairment threshold may not be granted unless "the dispute is not material to the determination whether the person has suffered a serious impairment." MCL 500.3135(2)(a)(*ii*). In other words, to obtain summary disposition when there is a dispute regarding the impairment, the defendant must show a lack of serious impairment *based on the injuries that the plaintiff claims*.

The no-fault act defines "serious impairment of 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). "On its face, the statutory language provides three prongs that are necessary to establish a 'serious impairment of body function': (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).

First, 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." *Id*. at 196. "In other words, an 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions." *Id*. The majority concludes that plaintiff fails the first prong of the serious impairment analysis because he briefly returned to work following the accident and continued to play bongo drums. However, these arguments pertain to whether the impairment affected plaintiff's ability to lead his normal life, not whether the impairment was objectively manifested. For the reasons discussed, plaintiff produced sufficient evidence to create a material question of fact as to whether he suffered an objectively manifested impairment. Namely, the medical imaging showed left shoulder full-thickness rotator cuff tear and labral tear. Thus, the claimed impairment is plainly observable by others, and the only question is whether the impairment was caused by the auto accident.

Next, an important body function is one of value, significance, or consequence to the injured person. *McCormick*, 487 Mich at 199. The majority does not seriously dispute that plaintiff's neck and shoulder function is important given his sources of income. Yet the majority concludes that plaintiff "has not demonstrated that this important body function is impaired." This again misses the mark. Although there is a question of fact as to causation, that has no bearing on whether the claimed impairment affects an important body function. Clearly, the functioning of plaintiff's neck and shoulder is important.

"Finally, if the injured person has suffered an objectively manifested impairment of body function, and that body function is important to that person, then the court must determine whether the impairment 'affects the person's general ability to lead his or her normal life.' " *Id*. at 200.

> [T]he common understanding of to "affect the person's ability to lead his or her normal life" is to have an influence on some of the person's capacity to live in his or her normal manner of living. By modifying "normal life" with "his or her," the Legislature indicated that this requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis. 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.]

"[T]he statute does not create an express temporal requirement as to how long an impairment must last in order to have an effect on 'the person's general ability to live his or her normal life.' " *Id*. at 203.

Plaintiff asserts that his general ability to lead his normal life has been affected because he can no longer perform the physical labor by which he had earned his living. That he cannot do so is not disputed. Dr. Bartol stated that plaintiff should be restricted from heavy lifting, overhead work and any activities that involve extension/rotational movements of the shoulder joint. He also opined that plaintiff is "not able to participate in normal working activities" and that even with surgery "a return to his previous occupation is unlikely." Plaintiff's inability to work in construction is relevant to whether his impairment has affected her general ability to lead a normal life. See *id*. at 218 (holding that the plaintiff's impairment affected his general ability to lead a normal life when "his capacity to work, the central part of his pre-incident 'normal life,' was affected."). Dr. Kwartowitz, on whose report the majority relies, offers no opinion as to plaintiff's ability to perform his job or any other activities.

Further, plaintiff is limited in athletic activities and in his ability to play and perform music. Plaintiff was a bongo player. It was both his primary hobby and a source of additional income. The use of his left shoulder is generally limited given his injuries.

The majority references a January 24, 2017 video of plaintiff playing bongo drums and suggests it shows that he is not limited. In fact, the video supports plaintiff's claim. Prior to his injury he was known as the "crazy bongo player," and a video of him playing bongos before the accident demonstrates considerable skill and speed. The video of plaintiff playing the bongos in 2017 is very far from "crazy"; indeed, it appears extremely sedated. In the video, plaintiff never raises his hands above his diaphragm and plays relatively slowly.

For these reasons, plaintiff has demonstrated at least a question of fact that the tears to his left rotator cuff and left shoulder labrum have affected his general ability to lead his normal life.

III. CONCLUSION

The majority opinion is wrong on the facts and on the law. Its review of the record is incomplete and unreliable; it gives the non-movant the benefit of all inferences; and it assumes facts that do not exist and ignores facts that do. Summary disposition was improperly granted and this case should be remanded for trial.

/s/ Douglas B. Shapiro