

STATE OF MICHIGAN
COURT OF APPEALS

MINT ANN RITCHIE,

Plaintiff-Appellant,

v

KURT M. CROTEAU,

Defendant-Appellee,

and

FARM BUREAU INSURANCE COMPANY,
ALLSTATE INSURANCE COMPANY, and
MICHIGAN AUTOMOBILE INSURANCE
PLACEMENT FACILITY,

Defendants.

UNPUBLISHED

October 15, 2020

No. 351140

Alpena Circuit Court

LC No. 18-008535-CH

Before: LETICA, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Plaintiff, Mint Ann Ritchie, appeals as of right the trial court's order granting defendant's, Kurt Croteau, motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) on plaintiff's claim for automobile negligence.¹ We affirm.

I. BACKGROUND

Plaintiff has an extensive history of physical and mental-health issues. In 2001, plaintiff qualified for Social Security disability benefits backdated to December 1, 1998 because she was

¹ The claims against Farm Bureau Insurance Company, Allstate Insurance Company, and Michigan Automobile Insurance Placement Facility were dismissed upon stipulations made by both parties; thus, they are not relevant to this appeal.

unable to work. The Social Security Administration determined that plaintiff suffered from obesity, degenerative disc disease of her lumbar spine, facet joint arthropathy, a herniated disc of the lumbosacral spine, chronic post-traumatic stress disorder (PTSD), major depressive disorder, panic disorder with agoraphobia, bipolar disorder, and a personality disorder. Plaintiff has not worked since.

In March 2015, plaintiff underwent a total right-knee replacement. Before this surgery, plaintiff reported issues with prolonged walking, standing, using the stairs, aching in her knees, and enduring pain at night.

On July 28, 2017, plaintiff underwent a total left-knee replacement. Two weeks before that surgery, her treating physician noted that plaintiff had chronic symptoms for 20 years. Moreover, plaintiff's symptoms were moderate, poorly controlled, and aggravated by bending, climbing, and exertion. Two weeks after plaintiff's surgery, her treating physician noted that plaintiff had mild symptoms that were aggravated with exertion. He also noted that plaintiff's knee was in good position and alignment. He further noted that plaintiff's range of motion was 100 degrees of flexion and 0 degrees of extension and described her as having an active, pain-free range of motion.

On August 10, 2017, defendant, while backing up in a parking lot, struck the rear of the parked vehicle in which plaintiff was a passenger. Plaintiff stated that her left leg hit the console and front dashboard of the car and her right wrist hit the dashboard as well. Plaintiff recalled that the vehicle felt like it was pushed forward, but she was not sure how far forward. Plaintiff did not lose consciousness. Plaintiff described defendant as being "extremely loud and anxious" and he appeared to be blaming plaintiff for the accident. Thereafter, plaintiff vomited out of the car's window and felt pain, nausea, and fear. Plaintiff later testified that she experienced a panic attack when her daughter took her home after the accident and that she also experienced trouble bending her leg. Plaintiff's daughter noticed that plaintiff's left-knee incision had been disturbed and plaintiff testified that her left knee was newly red and swollen.

Five days after the accident, plaintiff's physician noted that plaintiff had a range of motion of 0 to 95 degrees and that plaintiff's artificial left knee was "in good position and alignment with no evidence of periprosthetic fracture from recent [motor vehicle accident] 2.5 weeks" after her left knee was replaced. In the weeks following, plaintiff's treating physician noted that plaintiff was on schedule, doing "well clinically," and could walk without the assistance of a walker by September 21. Plaintiff was discharged from physical therapy in October 2017.

Through the rest of 2017 and 2018, plaintiff received mental health treatment and treatment for her knee issues, primarily focused on her right knee. However, on August 31, 2018, a doctor ordered an MRI of plaintiff's left knee because of "[l]eft knee pain/buckling." The impression was:

The patient has a total knee arthroplasty in place which causes significant susceptibility artifact limiting evaluation of the structures of the knee joint. Correlation with radiographs/CT may be helpful for specific evaluation of the knee arthroplasty in this setting.

A small nonspecific 9 mm well-defined T1 hypointense/T2 hyperintense lesion is seen anteriorly, in the distal metaphysis of the femur which is partially obscured by susceptibility artifact. It demonstrates no associated marrow edema and overall has the appearance of a nonaggressive bone lesion.

The visualized portions of the quadriceps/patellar tendons are grossly intact.

There is a small knee joint effusion, partially visualized. Clinical correlation is recommended for its etiology.

Plaintiff also testified that the accident impacted her nightmares, as “[i]n some of them I’m trapped and I have people – okay, I have men yelling at me. And in a lot of them I freeze and I can’t get away. Or I try and run and I get hurt running.”

On October 22, 2018, plaintiff filed a six-count amended complaint against all defendants. Relevantly, against defendant Croteau, Count II alleged negligence and that his negligence had caused plaintiff to suffer serious injuries. After a period of discovery, defendant moved for summary disposition under MCR 2.116(C)(10).

After a hearing, the trial court issued an opinion and order granting defendant’s motion. The trial court reasoned that, while there was a genuine factual dispute regarding the nature and extent of plaintiff’s injuries, it was immaterial as to whether she had an impairment of a body function. The trial court concluded that plaintiff failed to provide evidence that distinguished the limitations caused by her pre-existing conditions and the limitations allegedly caused by the accident.

This appeal followed.

II. DISCUSSION

On appeal, plaintiff argues that she demonstrated an objectively manifested impairment of a body function arising out of the accident through medical evidence and deposition testimony. We disagree.

A. STANDARD OF REVIEW

“A trial court’s decision regarding a motion for summary disposition is reviewed de novo.” *Sullivan v Michigan*, 328 Mich App 74, 80; 935 NW2d 413 (2019). Defendant moved for summary disposition under MCR 2.116(C)(10). “Under MCR 2.116(C)(10), summary 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.” *Piccione v Gillette*, 327 Mich App 16, 19; 932 NW2d 197 (2019) (quotation marks omitted). We “must review the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Id.* (quotation marks omitted). “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.” *Id.* (quotation marks omitted). A court may not “make findings of fact; if the evidence before it is conflicting, summary disposition is improper.” *Id.* (quotation marks and emphasis omitted). Additionally, “courts may not resolve factual disputes or determine credibility

in ruling on a summary disposition motion.” *White v Taylor Distrib Co*, 275 Mich App 615, 625; 739 NW2d 132 (2007).

B. ANALYSIS

Under Michigan’s No-Fault Act, MCL 500.3101 *et seq.*, “[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.” MCL 500.3135(1). The statute relevantly provides that:

(a) 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 either of the following:

(i) There is no factual dispute concerning the nature and extent of the person’s injuries.

(ii) 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).]

In turn, the 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 . . . her normal life.” MCL 500.3135(5).²

Our Supreme Court has set forth a three-part test to determine whether an individual has demonstrated a “serious impairment of a body function.” *McCormick v Carrier*, 487 Mich 180, 215; 795 NW2d 517 (2010) (quotation marks omitted). First, the plaintiff must demonstrate “an objectively manifested impairment” that is “observable or perceivable from actual symptoms or conditions.” *Id.* Second, the plaintiff must demonstrate that the impairment is “of an important body function (a body function of value, significance, or consequence to the injured person).” *Id.* Third, this impairment must affect “the person’s general ability to lead his or her normal life (influences some of the plaintiff’s capacity to live in his or her normal manner of living).” *Id.* “In making th[is] determination, there is no bright-line rule or checklist to follow.” *Gillette*, 327 Mich App at 20 (alterations and quotation marks omitted). “Instead, whether someone has suffered a serious impairment is inherently fact-and circumstance-specific and the analysis must be conducted on a case-by-case basis.” *Id.* (alterations and quotation marks omitted).

First, the focus for an objectively manifested impairment concerns how the injuries affected the functioning of the plaintiff’s body, and not on the injuries themselves. *McCormick*, 487 Mich at 197. In short, in order to be “objectively manifested” the injuries must affect the functioning of the plaintiff’s body. *Id.* at 197-198. “[T]he objectively manifested requirement signifies that

² The No-Fault Act was amended by 2019 PA 21 and 22, but the pre-amendment version applies here.

plaintiffs must introduce evidence establishing that there is a physical basis for their subjective complaints of pain and suffering and that showing an impairment generally requires medical testimony.” *Id.* at 198 (quotation marks omitted). Moreover, a plaintiff may claim aggravation for a pre-existing condition as a basis for recovery, as long as “the trauma caused by the accident triggered symptoms from that condition.” *Wilkinson v Lee*, 463 Mich 388, 394-395; 617 NW2d 305 (2000).

Plaintiff alleges that the accident caused the following impairments: (1) re-injury to her left knee and left-knee replacement, associated swelling, loss of range of motion, and functional difficulties; (2) acute aggravation of pre-existing neck and back strain; (3) aggravation of sleep dysfunction and nightmares; (4) aggravation of PTSD and associated symptoms; and (5) MRI-confirmed small nonspecific 9 mm defined T1 hypointense/T2 hyperintense lesion with joint effusion. Here, plaintiff failed to present objective evidence that the subject accident caused any of these alleged impairments, either physical or mental, in order to establish tort liability.

“In 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). A causation theory based on only slight evidence is inadequate. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). “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.

As to plaintiff’s listed physical impairments, there is no objective medical evidence that the accident caused these conditions or aggravated any of the pre-existing ones. As to the alleged aggravation of plaintiff’s back and neck strain, there is no medical evidence plaintiff points to demonstrating that these were objectively issues after the accident. Although plaintiff testified that her neck and lower back were aggravated after the accident, she has not had any tests, scans, or x-rays relating to these alleged aggravations. Our review of the objective medical record after the accident also reveals no mention of plaintiff’s back or neck being a source of concern after the accident, let alone any back or neck pain caused by the accident. Plaintiff’s mere subjective complaints of back and neck pain post-accident are not sufficient to demonstrate objectively manifested impairments. *McCormick*, 487 Mich at 198.

As to the findings from the MRI on plaintiff’s left knee on August 31, 2018 that were ordered because she complained of left knee pain and buckling, there is simply no indication from the record that these conditions, although objectively manifested, were related to plaintiff’s accident. Rather the record demonstrates that plaintiff has had chronic knee pain since 1997, and that her knees had deteriorated so badly that both required a total replacement. It is impossible to determine whether plaintiff’s conditions noted in the August 2018 MRI, a year after the accident, were related to the accident or related to one of her chronic knee problems that long pre-dated the accident because the MRI makes no mention of the accident at all. *Skinner*, 445 Mich at 164-165.

As to plaintiff’s claim that the accident aggravated her recovery after her left-knee replacement, although the objective medical record makes mention of the accident, plaintiff’s

subjective complaints of setbacks and increased pain after the accident are not supported objectively. *Wilkinson*, 463 Mich at 394-395; *McCormick*, 487 Mich at 197-198. Relatedly, plaintiff cannot demonstrate that the long-term continued pain in her left knee, and the limitations stemming from it, related to the accident. *McCormick*, 487 Mich at 197-198. Objective medical evidence demonstrates that the area around plaintiff's recent knee replacement was swollen and irritated immediately after the accident, and that her treatment providers were concerned about the potential impact of the accident on plaintiff's left knee. Plaintiff also reported an increase in pain to her treatment providers. However, outside of a slight decrease in her range of motion for a few weeks following the accident, there is no indication that the accident objectively manifested itself to cause the extreme pain and setbacks plaintiff testified she subjectively experienced. Medical examination of plaintiff's left knee directly after the accident showed no harm to plaintiff's artificial knee. And despite the claims of plaintiff and her family members, there is no indication from plaintiff's medical records that plaintiff's physical-therapy progression was negatively impacted by the accident. Approximately one month after the accident, plaintiff's physician informed plaintiff that her left knee was healing well and that she was doing "well clinically." Moreover, plaintiff no longer needed to use a walker to bear weight or ambulate. Shortly after, plaintiff was discharged from physical therapy with noted improvement. Simply put, plaintiff's records never noted that the accident had any real impact on plaintiff's recovery from her left-knee replacement.

Plaintiff also mentions issues with her long-term recovery, particularly in her inability to walk properly and bend over. However, the record demonstrates that plaintiff's knee conditions had been chronic for many years. Despite plaintiff's and her family members' claims to the contrary, there is no evidence that plaintiff's subsequent falls and issues moving up and down the stairs were directly related to the accident. Plaintiff's treatment providers noted that plaintiff's right knee had given her issues in 2018. Indeed, plaintiff's issues with walking and bending were noted far before the accident, and none of her treatment providers ever connected plaintiff's post-accident movement issues to the accident. Absent evidence demonstrating that the condition of plaintiff's left knee deteriorated because of the accident, and not because of her chronic conditions, plaintiff cannot establish the causation necessary to recover on the basis of her left knee condition. *Wilkinson*, 463 Mich at 394-395. Therefore, plaintiff has failed to demonstrate any objectively manifested physical impairment of a body function.

As to plaintiff's claim that the accident aggravated her mental disorders, particularly her difficulty sleeping, nightmares, and PTSD symptoms, the record also lacks evidence demonstrating that the accident caused any of these. As an initial matter, we have held that mental or emotional injuries, caused by either physical injury or resulting in physical symptoms, may be an impairment of a body function. See *Luce v Gerow*, 89 Mich App 546, 548-550; 280 NW2d 592 (1979); M Civ JI 36.02. Plaintiff does not allege that the accident caused her mental injuries, as she stated that defendant's behavior *after* the accident occurred aggravated her nightmares and PTSD symptoms. Moreover, plaintiff does not allege that the physical injuries she allegedly suffered as a result of the accident caused her any emotional or mental distress. Therefore, plaintiff cannot demonstrate that the accident caused her either physical injury or any mental injury resulting physical symptoms.

However, even assuming that plaintiff's sleep disturbances were a physical symptom of mental distress caused by the accident, plaintiff has failed to demonstrate any objective

aggravation of her mental conditions after the accident. Plaintiff has suffered from severe mental health issues, first documented in 1997, due to abuse she suffered as a child. These issues included nightmares, sleep disturbances, and other PTSD-related symptoms. These symptoms were severe enough for plaintiff to receive social security disability benefits, in part, because of these issues in 2001. Although plaintiff testified that defendant's actions directly after the accident invaded her nightmares and increased her PTSD symptoms, there is no clinical indication of this. Plaintiff's examination in October 2017, two months after the accident, made no mention of the accident as an aggravating factor. Plaintiff informed her mental healthcare provider that the accident had occurred, but did not mention that it was invading her mental state, despite mentioning another recent incident that had upset her. Absent any clinical indication that the accident aggravated plaintiff's already severe mental conditions, she cannot recover on this basis. *Wilkinson*, 463 Mich at 394-395. Therefore, plaintiff has failed to demonstrate an objectively manifested emotional or mental impairment.

Lastly, plaintiff is incorrect that the trial court improperly made a credibility determination when it determined that plaintiff's pre-existing conditions were not aggravated by the accident. *McCormick*, 487 Mich at 198, directs courts to determine whether a plaintiff's subjective determination that she suffered from an impairment is supported by objective medical evidence. Thus, the trial court did not err by looking to the objective record evidence, rather than simply relying upon plaintiff's subjective testimony, to determine whether there was a genuine issue of material fact on the question of whether plaintiff suffered from an impairment as a result of the accident.

Given plaintiff's failure to demonstrate an objective impairment of a body function, plaintiff was not eligible to recover for defendant's alleged negligence and the trial court properly granted defendant's motion for summary disposition. See MCL 500.3135(5). We need not address the remaining *McCormick* prongs.³

Affirmed.

/s/ Anica Letica
/s/ Kirsten Frank Kelly
/s/ James Robert Redford

³ However, upon our own independent examination of the record, we also agree with the trial court that plaintiff failed to meet *McCormick*'s third prong because there is no evidence that plaintiff's ability to live her normal life, pre-accident, had been impacted.