

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DOMINIQUE LAMB,  
  
Plaintiff-Appellant,

UNPUBLISHED  
January 21, 2021

v

PROGRESSIVE MARATHON INSURANCE  
COMPANY, FARM BUREAU INSURANCE  
COMPANY, OLIVIA GROSS, and KIM GROSS,

No. 351304  
Oakland Circuit Court  
LC No. 2018-167218-NI

Defendants-Appellees.

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Before: JANSEN, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

In this no-fault action, plaintiff appeals as of right from the trial court's order granting defendant's, Progressive Marathon Insurance Company (Progressive), motion for reconsideration of the denial of its motion for summary disposition. We affirm.

**I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

This case arises from an incident that occurred on July 20, 2017, in Birmingham, Michigan. Plaintiff had attended a movie in downtown Birmingham, and was walking back to her vehicle with two friends, Brandice Williams and Carmisha Hatton. As the group approached an intersection, they noticed a white vehicle stopped in the right lane waiting at a red light. As plaintiff entered the crosswalk after the pedestrian crossing light came on, defendant, Olivia Gross, the driver of the vehicle, began to turn right. Plaintiff claimed that as Olivia's vehicle approached her, she twisted her body to brace for the impact. Although plaintiff admits she was not hit by the vehicle, she stated she ended up with her hands on the hood as the vehicle came to a stop.

Plaintiff denied injury at the scene and left with Williams and Hatton to Williams's house. There, plaintiff's boyfriend picked her up and took her to Beaumont Hospital in Royal Oak, Michigan, because she was experiencing a headache after the incident. As a result of the incident on July 20, 2017, plaintiff claimed to have injured her neck, back, foot, and arm. She also complained of headaches, memory loss, and confusion.

Plaintiff filed the instant lawsuit, and after discovery, each defendant moved for summary disposition. At issue in this case are Progressive's motion for summary disposition, where it argued that plaintiff failed to establish causation between her claimed injuries and the incident on July 20, 2017, and Olivia and Kim Gross's motion for summary disposition where defendants argued that plaintiff failed to meet the tort threshold to sue for noneconomic damages. The trial court initially granted Olivia and Kim's motion for summary disposition but denied Progressive's motion. Progressive moved for reconsideration, which the trial court granted. This appeal followed.

## II. STANDARD OF REVIEW

"[A] trial court's grant or denial of a motion for reconsideration is reviewed for an abuse of discretion." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 303 Mich App 441, 451; 844 NW2d 727 (2013). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). When a party files a motion for reconsideration, the trial court "has the discretion to give a litigant a 'second chance' even if the motion for reconsideration presents nothing new." *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012).

"Appellate review of the grant or denial of a summary-disposition motion is de novo . . . ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "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." *West*, 469 Mich at 183. "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.*

## III. ANALYSIS

Plaintiff first argues that the trial court should not have granted Progressive's motion for reconsideration because there was a genuine issue of material fact regarding whether plaintiff's injuries were caused by Olivia's vehicle. In support, plaintiff relies on her deposition testimony, her medical records, and the opinion of treating physician Dr. Daniel Feldman. However, we cannot agree.

The Michigan no-fault act states that a provider of personal protection insurance (PIP) benefits "is liable 'to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . .'" *McPherson v McPherson*, 493 Mich 294, 296-297; 831 NW2d 219 (2013), quoting MCL 500.3101(1). Coverage under the no-fault act is only available "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). "Therefore, the first consideration . . . must be the relationship between the injury and the vehicular use of a motor vehicle." *Id.* at 659-660. "Without a relation that is more than 'but for,' incidental, or fortuitous, there can be no recovery of PIP benefits." *Id.* at 660.

“[P]hysical contact is not required to establish that the vehicle was involved in the accident, nor is fault a relevant consideration in the determination whether a vehicle is involved in an accident.” *Turner v Auto Club Ins Ass’n*, 448 Mich 22, 39; 528 NW2d 681 (1995) (quotation marks omitted). However, the plaintiff must establish a “causal nexus” between the accident and the vehicle to recover benefits under the no-fault act. *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392, 395-396; 838 NW2d 910 (2013). “Whether an injury arises out of the use of a motor vehicle must be determined case by case.” *Id.* at 396-397 (quotation marks and citation omitted).

In the trial court, plaintiff opposed Progressive’s motion for summary disposition by relying on plaintiff’s deposition testimony and medical records created after the July 20, 2017 incident. Plaintiff’s testimony established that Olivia’s vehicle nearly hit plaintiff, and in reaction to the near-accident, plaintiff twisted her body to brace for impact and put her hands on the hood of the vehicle. From this, plaintiff *inferred* that her disc bulges and herniations, headaches, foot pain, and memory loss and loss of concentration are all because of the July 20, 2017 incident. However, plaintiff did not present evidence to establish that her injuries were caused by the incident on July 20, 2017. Plaintiff’s medical records, which indeed do establish that plaintiff suffers from migraines and various injuries to her spine, make no connection between those injuries and the July 20, 2017 incident other than plaintiff’s own narrative of what occurred. In other words, plaintiff failed to establish the causal nexus between her injuries and the near-accident. See *id.* at 395-396.

In response to Progressive’s motion for reconsideration, however, plaintiff submitted an affidavit in which Dr. Feldman averred that plaintiff’s injuries were either caused or aggravated by the July 20, 2017 incident. This affidavit was signed after the trial court ruled on the parties’ motions for summary disposition and was not part of plaintiff’s summary disposition briefing. We have previously held that a trial court does not abuse its discretion when it denies “a motion for reconsideration that rests on testimony that could have been presented the first time the issue was argued.” *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); see also *Yoost*, 295 Mich App at 220 (“[A] trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided.”).

In sum, we conclude that plaintiff failed to present any evidence in response to Progressive’s motion for summary disposition to establish that her injuries were caused by the July 20, 2017 incident. Moreover, the trial court was within its discretion to decline to consider plaintiff’s last-minute affidavit and did not abuse its discretion when it granted Progressive’s motion for reconsideration.

For the same reasons, we conclude the trial court did not err when it granted Olivia and Kim’s motion for summary disposition. “To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Cawood v Rainbow Rehab Ctrs, Inc*, 269 Mich App 116, 121; 711 NW2d 754 (2005) (quotation marks and citation omitted). Causation “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). “The cause in fact element generally requires showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred.” *Id.* at 86-87

(quotation marks and citation omitted). “On the other hand, legal cause or ‘proximate cause’ normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.” *Id.* at 87 (quotation marks and citation omitted). “As a matter of logic, a court must find that the defendant’s negligence was a cause in fact of the plaintiff’s injuries before it can hold that the defendant’s negligence was the proximate or legal cause of those injuries.” *Id.*

Without any evidence, plaintiff asserted that her spinal injuries, headaches, memory loss and confusion, and foot pain were all associated with the incident on July 20, 2017. Plaintiff did not submit Dr. Feldman’s affidavit in response to the summary disposition motion filed by Kim and Olivia. Thus, plaintiff failed to establish that any injury—let alone a serious impairment of a bodily function—was the result of the incident on July 20, 2017. See *Patrick v Turkelson*, 322 Mich App 595, 617; 913 NW2d 369 (2018) (quotation marks and citation omitted) (“[A] plaintiff’s evidence of causation is sufficient at the summary disposition stage to create a question of fact for the jury if it establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support.”). Accordingly, we conclude the trial court did not err when it granted summary disposition in Olivia and Kim’s favor.

Affirmed.

/s/ Kathleen Jansen  
/s/ Deborah A. Servitto  
/s/ Michael J. Riordan