STATE OF MICHIGAN

COURT OF APPEALS

LAURIE WHITAKER,

Plaintiff-Appellant,

v

TAYLOR ROSE RIGEL and RODNEY WAYNE RIGEL,

Defendants-Appellees,

and

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant.

UNPUBLISHED
June 17, 2021

No. 354842
Monroe Circuit Court
LC No. 19-142416-NI

Before: GLEICHER, P.J., and CAVANAGH and LETICA, JJ.

PER CURIAM.

In this third-party action arising under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition and dismissing the case.[1] We affirm.

I. BACKGROUND FACTS

This case arises from a September 21, 2017 automobile accident between plaintiff and defendant, Taylor Rose Rigel. Plaintiff was stopped at a red light when her vehicle was rear-ended by a vehicle driven by Taylor. Plaintiff did not seek medical attention at the scene and drove herself home. Later, plaintiff's sister drove her to the hospital. Plaintiff was admitted to the

[1] The case against Progressive Marathon Insurance Company was dismissed by stipulation of the parties; therefore, we refer to Taylor and Rodney Rigel as "defendants."

hospital under its "trauma service." Plaintiff stayed in the hospital two nights and underwent a number of tests including X-rays, computerized tomography (CT) scans, and magnetic resonance imaging (MRI). Upon discharge, plaintiff was diagnosed with "acute strain of the neck muscle" and "[l]umbar stenosis."

In September 2019, plaintiff filed the complaint in this case alleging negligence against defendant Taylor and negligent entrustment against defendant Rodney. Specifically, plaintiff alleged that as a result of the September 2017 accident, she sustained a serious impairment to her neck, back, arms, and legs. As part of the discovery process, defendants acquired a number of plaintiff's medical records from before the September 2017 accident. These records revealed an extensive history of back, hip, leg, and knee issues, along with other medical conditions which prevented plaintiff from working (since 2014) and participating in recreational as well as sexual activities. Defendants also required plaintiff to complete an independent medical examination, after which the physician opined that plaintiff had a history of chronic degenerative changes in her spine and there were "no documented objective neurological deficits to suggest any substantial aggravation of her preexisting disease process from the rear-end accident." In other words, there were no objective findings that causally linked plaintiff's pain complaints to the accident; rather, her symptoms arose from preexisting degenerative osteoarthritic conditions of her spine and knees.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff could not demonstrate the threshold injuries necessary for recovery under the no-fault act or that any such alleged impairment affected her general ability to lead her normal life. Plaintiff disagreed, arguing that she had proven the necessary elements for a claim, including aggravation of her prior back issues that affected her ability to live her normal life. The trial court agreed with defendants, noting that plaintiff must present "evidence that there is a physical basis for her subjective complaints of pain and suffering" which "generally requires medical testimony." And the court could find no medical testimony that supported plaintiff's claim of a threshold injury. To the contrary, the medical testimony presented was that of the independent medical doctor who opined that this accident did not exacerbate plaintiff's many preexisting conditions or cause threshold injuries. Therefore, the trial court granted defendants' motion for summary disposition and dismissed plaintiff's complaint. Plaintiff moved for reconsideration, which the trial court denied. This appeal followed.

II. SERIOUS IMPAIRMENT OF BODY FUNCTION

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition because there was evidence that she had objectively manifested impairments caused by the accident and these impairments affected her ability to lead her normal life. We disagree.

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Sheridan v Forest Hills Pub Sch*, 247 Mich App 611, 620; 637 NW2d 536 (2001). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The reviewing court considers the evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact and the moving party is

entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). But a mere possibility that the claim might be supported by evidence at trial is insufficient to defeat a motion for summary disposition. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

B. LAW AND ANALYSIS

Under the no-fault act "[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). And, the no-fault act states, in pertinent part:

> (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 *McCormick v Carrier*, 487 Mich 180, 215; 795 NW2d 517 (2010), our Supreme Court set forth a three-pronged test to determine whether a person has shown a "serious impairment of body function." The Legislature has since codified this three-pronged test at MCL 500.3135(5), which states, in pertinent part:

> (a) It is objectively manifested, meaning it is observable or perceivable from actual symptoms or conditions by someone other than the injured person.
>
> (b) It is an impairment of an important body function, which is a body function of great value, significance, or consequence to the injured person.
>
> (c) It affects the injured person's general ability to lead his or her normal life, meaning it has had an influence on some of the person's capacity to live in his or her normal manner of living. [MCL 500.3135(5).]

At issue in this case are subsections (a) and (c).

Looking to the first prong, an impairment is "objectively manifested" when it 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. In other words, it must be "observable or perceivable from actual symptoms or conditions." *Id.* "[T]he aggravation or triggering of a preexisting condition can constitute a compensable injury." *Fisher v Blankenship*,

286 Mich App 54, 63; 777 NW2d 469 (2009). "[P]ain and suffering alone" is insufficient to meet this threshold—rather, a plaintiff must "introduce evidence establishing that there is a physical basis for their subjective complaints of pain and suffering . . . [which] generally requires medical testimony." *McCormick*, 487 Mich at 197-198 (citation omitted).

As an initial matter we note—as the trial court noted—that plaintiff failed to produce "medical testimony" evincing a "physical basis" for her complaints of pain and suffering. See *id*. Plaintiff's motion for reconsideration included an exhibit purporting to be an affidavit by Dr. Ryan Szepiela stating that plaintiff's current pain "is directly related to the injuries she suffered in the September 21, 2017 motor vehicle collision." However, this "affidavit" was neither signed nor notarized. Further "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." *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012). Plaintiff's unsigned and unsworn affidavit included with her motion for reconsideration did not satisfy the requirement that she "introduce evidence establishing that there is a physical basis for [her] subjective complaints of pain and suffering . . . ." *McCormick*, 487 Mich at 197-198. Moreover, on appeal plaintiff presents a letter from Dr. Szepiela in an effort to show that plaintiff's pain was worsened after the accident. However, this letter was not provided to the trial court, and thus, we cannot consider it on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal.").

We agree with the trial court that there was not a question of fact as to whether plaintiff suffered an objectively manifested impairment of an important body function. While plaintiff admitted she suffered from a back condition before the accident, plaintiff argued that

> [she] never made complaints about her mid back before the subject collision, and therefore never had a prior thoracic MRI. Furthermore, [p]laintiff's prior MRIs did not indicate [plaintiff] suffered from a broad based disc bulge at L3-L4 or L5-S1 before the subject collision. In addition, [plaintiff's] prior cervical MRI did not indicate she had a disc bulge or neuroforaminal narrowing at C5-C6 or C6-C7.

Although the postaccident imaging studies indicated the existence of plaintiff's disc conditions, these studies did not establish that the accident caused these conditions. Indeed, several of plaintiff's preaccident medical records note a "degenerative" condition of plaintiff's back. This suggests that plaintiff's back condition would worsen over time. In the absence of medical testimony attributing the worsening of plaintiff's allegedly "new" back conditions to the September 2017 accident, plaintiff fails to create a question of fact as to an "objectively manifested [injury that] is observable or perceivable from actual symptoms or conditions by someone other than the injured person." MCL 500.3135(5). This is particularly true in light of the conclusion reached by the physician who conducted an independent medical examination and opined that plaintiff's "symptoms are to a reasonable degree of medical probability arising from the continued stress to the low back which is a function of her weight and degenerative osteoarthritic conditions of the spine (cervical, thoracic, lumbar spondylosis) which preexisted the automobile accident." Thus, the trial court did not err when it held that plaintiff failed to introduce evidence "establishing that there is a physical basis for her subjective complaints of pain and suffering." Because we conclude that the trial court did not err when it found that plaintiff failed to establish the first prong

of the *McCormick* test, we need not consider plaintiff's second argument that her alleged accident-related injuries affected her normal life, and we decline to do so. Accordingly, we affirm the decision of the trial court granting defendant's motion for summary disposition.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Anica Letica