STATE OF MICHIGAN

COURT OF APPEALS

CECILIA PEACE,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee,

and

SHERRE SOLOMON,

Defendant.

UNPUBLISHED
January 21, 2016

No. 323891
Oakland Circuit Court
LC No. 2014-139429-NF

Before: STEPHENS, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

In this action under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right an order granting summary disposition in favor of defendant State Farm Mutual Automobile Insurance Company ("State Farm"). Because MCL 500.3142 does not prevent plaintiff from filing suit without first submitting proof of her personal protection insurance (PIP) claims to State Farm and a question of fact remains with respect to whether plaintiff suffered a serious impairment of a body function, we reverse and remand for further proceedings.

On August 14, 2013, then-63-year-old plaintiff was riding her bicycle on Southfield Road in Southfield, Michigan. Plaintiff started to cross the intersection at Nine Mile Road, at which time Sherre Solomon struck plaintiff with her vehicle. The accident rendered plaintiff unconscious and she was taken to the hospital for treatment. Plaintiff had a laceration above her left eye that required stitches, she had road rash, her left side was swollen, and she experienced pain in her left arm as well as her head. A CT scan performed at the hospital showed soft tissue injury to plaintiff's head and other concerns, prompting plaintiff's admission to the hospital for observation. Plaintiff was hospitalized for two days.

Plaintiff testified at her deposition that, before the accident, she generally did not have any ongoing problems with her neck, back, arms or knee. However, shortly after the accident,

plaintiff sought treatment for recurring pain. Plaintiff underwent multiple MRIs on several body parts. Many of the MRIs showed no signs of trauma. However, an MRI of the cervical region of plaintiff's spine showed diffuse disk bulges and palpable left foraminal broad-based disc protrusion, as well as degenerative disk dehydration and degenerative disk changes. The MRI of plaintiff's knee showed tearing or displacement of the body of medial meniscus. In addition, an EMG and Nerve Conduction study, while mostly normal, showed "increased insertional activity in the bilateral cervical paraspinal muscles" which was "suggestive of nerve root irritation."

At some point, plaintiff was prescribed muscle relaxers, pain killers, and physical therapy, although she did not attend physical therapy because she lacked transportation. Because plaintiff had trouble moving around, for a period of time following the accident, she was unable to engage in her usual tasks, such as cleaning, gardening, and caring for her grandson. Plaintiff was also unable to ride her bicycle, which was plaintiff's primary source of transportation before the accident. Accordingly, her son had to assist her in basic household chores and help with errands such as shopping. Moreover, plaintiff was unable to go to work for three months following the accident. By three months, however, plaintiff was "pretty much able to do all the things [she] did prior to the accident," including going back to work.

As a resident-member of her son's household, plaintiff was covered by her son's automobile insurance policy with State Farm. While plaintiff was mostly reimbursed for her medical expenses, plaintiff filed suit against State Farm seeking PIP benefits for payment of her remaining medical expenses as well as wage loss and replacement services expenses incurred in the three months following her accident. In addition, plaintiff also claimed that she was entitled to uninsured motorist benefits. State Farm moved for summary disposition under MCR 2.116(C)(10), which the trial court granted. The trial court found that there was no genuine issue of material fact as to whether plaintiff had suffered a threshold injury within the meaning of MCL 500.3135 as required to obtain uninsured motorist benefits under the State Farm policy and that plaintiff's claim for PIP benefits must be dismissed because plaintiff failed to produce evidence that she had notified State Farm about the PIP expenses at issue or that State Farm had denied her requests for reimbursement.

On appeal, plaintiff argues that the trial court erred in granting summary disposition. First, with respect to her claim for unpaid PIP benefits, plaintiff claims she presented evidence that she indeed had unpaid expenses that would be compensable under the policy. Second, regarding her claim for uninsured motorist benefits, plaintiff argues that there was an issue of material fact as to whether she had suffered a threshold injury within the meaning of MCL 500.3135.

This Court reviews de novo decisions on motions for summary disposition. *Sherry v East Suburban Football League*, 292 Mich App 23, 26; 807 NW2d 859 (2011). Summary disposition under MCR 2.116(C)(10) is appropriate "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* In reviewing the lower court's decision, this Court must "consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* at 27 (citation and quotation marks omitted). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light

most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

I. PIP BENEFITS

As noted, the trial court dismissed plaintiff's claim for PIP benefits because it concluded that plaintiff had not submitted the expenses at issue to State Farm and plaintiff had not received a denial from State Farm. Contrary to the trial court's reasoning, we are unaware of a provision in the no-fault act that would require plaintiff to submit her expenses to State Farm and wait for a denial of those claims before filing a lawsuit for PIP benefits.[1]

Before the trial court, and on appeal, State Farm relied on MCL 500.3142 for the proposition that, as a prerequisite to file suit, plaintiff had to provide State Farm with reasonable proof of loss and then wait for 30 days, at which time the benefits would be "overdue" if unpaid and plaintiff could file suit at that time. This provision states:

> (1) Personal protection insurance benefits are payable as loss accrues.
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> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.
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> (3) An overdue payment bears simple interest at the rate of 12% per annum. [MCL 500.3142.]

Considering the plain language of this provision, we see nothing in MCL 500.3142 that requires an insured to submit proof of loss to an insurer before filing suit. Instead, while MCL 500.3142 dictates when PIP benefits will be considered "overdue," it does so for purposes of defining

[1] MCL 500.3145 imposes a one-year time limit on the ability to file suit, but it does not require an insured to provide notice or proof of claims to an insurer before suit is filed. Instead, the question of "notice" is only implicated under MCL 500.3145 when an insured files an action beyond the one-year time period following the accident and seeks to employ the tolling provisions found in MCL 500.3145. Because plaintiff's suit was timely filed within the one-year limit imposed by MCL 500.3145, the notice provisions in that statute are inapplicable. Moreover, while parties may agree to notice provisions in an insurance contract, State Farm does not rely on such a provision in this case. See generally MCL 500.3141; *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998).

when an insured may be eligible for interest on overdue benefits. Certainly, plaintiff is not entitled to interest under MCL 500.3142 because it appears that she did not submit reasonable proof of her claims to State Farm and thus PIP benefits are not "overdue." But, we know of no authority to support the proposition that plaintiff's inability to claim interest precludes plaintiff's suit for PIP benefits altogether. Quite simply, MCL 500.3142 does not prohibit plaintiff from filing suit and the trial court erred by dismissing her claim for PIP benefits on this basis.[2]

II. THRESHOLD INJURY

Next, we address plaintiff's claim that she suffered a threshold injury within the meaning of MCL 500.3135 as required to maintain her claim for uninsured motorist benefits under the insurance policy.

"Uninsured motorist coverage is optional and is not mandated by the no-fault act." *Scott v Farmers Ins Exchange*, 266 Mich App 557, 561; 702 NW2d 681 (2005). Therefore, "the policy language governs the coverage and is subject to the rules of contract interpretation." *Id.* Here, the insurance contract provides, in relevant part, the following: "We will pay compensatory damages for bodily injury an insured is *legally entitled to recover* from the owner or driver of an uninsured motor vehicle." Therefore, plaintiff may obtain uninsured motorist benefits from State Farm if she could make a third-party claim against the uninsured at-fault party, which requires a showing of a threshold injury under MCL 500.3135. See *Rory v Continental Ins Co*, 473 Mich 457, 465 & n 10; 703 NW2d 23 (2005) ("Uninsured motorist insurance permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver.").

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[2] On appeal, State Farm also challenges plaintiff's proof of eligible PIP benefits. In particular, at her deposition, plaintiff testified that, to the best of her knowledge, her medical bills had been paid by her health insurer, meaning that there were no outstanding bills to be paid by State Farm. But, in response to State Farm's motion for summary disposition, plaintiff produced documentary evidence, in the form of hospital statements and explanation of benefit forms, to support her claim for PIP benefits. State Farm now argues, for the first time on appeal, that plaintiff's documentary evidence cannot create a question of fact because it contradicts her deposition testimony. Because the issue was not raised or addressed in the trial court, we need not consider this unpreserved issue. See *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). In any event, while it is true that a litigant cannot create a question of fact by offering her own affidavit to contradict her own sworn deposition testimony, State Farm offers no authority to suggest that this rule has been applied to documents other than affidavits or personal statements by the individual attempting to contradict her own testimony, and we think that the documentary evidence presented by plaintiff, consisting of evidence beyond her own personal statements, demonstrates the existence of a question of fact. See generally *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440, 445 (2001); *Drews v Am Airlines, Inc*, 68 F Supp 3d 734, 742 (ED Mich 2014).

Under Michigan's no-fault act, tort liability is generally precluded between parties involved in a motor vehicle accident. MCL 500.3135(3). However, as an exception to this general rule, a person may pursue a tort claim if the person has suffered a threshold injury, i.e., "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1); see also *Gray v Chrostowski*, 298 Mich App 769, 777; 828 NW2d 435 (2012). To determine whether a person has suffered a "serious impairment of body function," the Michigan Supreme Court has promulgated a three part test requiring: "(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).

Regarding the third prong in particular, "[d]etermining 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. When conducting this comparison, it must be remembered that "the statute merely requires that a person's general ability to lead his or her normal life has been *affected,* not destroyed." *Id.* Consequently, "courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person's general ability to do so was nonetheless affected." *Id.* Additionally, courts must focus on whether the individual's *ability* to live her life has been affected, and "there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected." *Id.* at 202-203. Finally, there is no "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 (quotation marks omitted).

In this case, there was evidence to create a question of fact with respect to whether plaintiff suffered an objectively manifested injury of an important body function that affects plaintiff's general ability to lead her normal life.[3] Viewed in a light most favorable to plaintiff, the evidence showed that plaintiff had no chronic pain before the accident, yet recurring pain afterwards that prompted plaintiff to seek medical treatment and take pain medication. Medical tests also showed that, after the accident, plaintiff had documentable injuries to her cervical spine and her knee as well as nerve root irritation.[4] Plaintiff testified that for months after the accident

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[3] Aside from the issue of whether plaintiff suffered a serious impairment of a body function, plaintiff also argues that, under MCL 500.3135(1), she suffered a "permanent serious disfigurement" in the form of a scar. From the picture offered by plaintiff as well as the description provided in the medical records, we conclude that the trial court did not err when it determined that a 5 centimeter scar on plaintiff's face did not rise to the level of a permanent *serious* disfigurement. Cf. *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985). See also *Fisher v Blankenship*, 286 Mich App 54, 66-67; 777 NW2d 469 (2009).

[4] State Farm also argues on appeal that plaintiff's injuries—while objectively manifested—were degenerative in nature, apparently suggesting that the injuries were not caused by the accident. The specific question of causation was not briefed in the trial court as a basis for summary disposition, MCR 2.116(G)(4), and it is insufficiently briefed on appeal. See *McIntosh v*

she was unable to work and to perform many of her normal activities, including chores around the house, gardening, caring for her grandson, and riding her bike, which was her primary method of transportation before the accident. While plaintiff's inability to perform these various tasks lasted only three months, there is no temporal requirement to establishing a serious impairment of a body function. See *id.* Given the evidence presented by plaintiff to establish that she suffered an objectively manifested injury of an important body function that affected her general ability to lead her normal life, the trial court erred by concluding as a matter of law that she had not suffered a threshold injury within the meaning of MCL 500.3135. Consequently, the trial court erred by granting summary disposition on this basis.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto

McIntosh, 282 Mich App 471, 484; 768 NW2d 325 (2009). In these circumstances, we decline to consider this issue.