STATE OF MICHIGAN

COURT OF APPEALS

GALINA GARVISH,

Plaintiff-Appellant,

v

DON ANDRE BROWN and ALLSTATE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
December 16, 2021

No. 355730
Macomb Circuit Court
LC No. 2019-002088-NI

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

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant, Don Andre Brown, and dismissing her third-party no-fault action on the ground that plaintiff failed to show that a genuine issue of material fact existed as to whether she sustained a threshold injury caused by the motor vehicle accident.[1] We affirm.

I. BACKGROUND FACTS

This case arises from an October 12, 2016 automobile accident (the October accident) involving plaintiff and Brown. Plaintiff was traveling on Interstate-75 (I-75) when she was rear-ended by Brown's vehicle. Plaintiff did not immediately seek medical treatment; but, days later, consulted with her doctor complaining of back, neck, and left shoulder pain. In the months after the October accident, plaintiff visited a number of doctors and underwent a number of tests, including x-rays, an electromyography (EMG), and magnetic resonance imaging (MRI). Despite receiving physical therapy and other medical treatment, plaintiff's complaints of pain persisted. In May 2019, plaintiff filed the complaint in this case.

[1] The dismissal of plaintiff's no-fault action against Allstate Insurance Company for failure to pay benefits under plaintiff's uninsured/underinsured insurance policy is not challenged on appeal.

The discovery process revealed plaintiff's involvement in two previous automobile accidents. The accident most immediately preceding the accident at issue here occurred on January 18, 2016. Plaintiff was traveling on I-75 when her vehicle hit a concrete barrier and collided with a number of other vehicles (the January accident). After the January accident, plaintiff visited the emergency room with complaints of pain in her neck and left shoulder. X-rays and a CT scan taken of her cervical spine revealed degenerative changes and mild arthritic changes at C1-C2. In the time after the January accident, but before the October accident, plaintiff visited a number of doctors with complaints that included headaches and pain in her back, neck, left shoulder, and right knee. She also participated in physical therapy and completed a number of tests including x-rays and MRIs.

More particularly, three days after the January accident, on January 21, 2016, plaintiff saw her family medical physician, Dr. Jeffry Soffa, and stated that she sustained injuries in the January accident causing pain in her back, neck, left shoulder, and right knee, as well as headaches and nausea. Dr. Soffa's impression was that plaintiff sustained a sprain/strain injury to her cervical, thoracic, and lumbosacral spine. On February 15, 2016, thoracic and lumbar spine x-rays showed severe degenerative disc disease at L5/S1, mild to moderate disc disease throughout her mid thoracic spine, and mild degenerative disc disease throughout her lower thoracic and remainder of her lumbar spine. There was also facet arthrosis at C7 through T2 and L4 through S1, as well as degenerative joint disease at the T9 and T10 costotransverse joints.

On March 18, 2016 an MRI of plaintiff's lumbar spine showed "central/left paracentral/left foraminal/left lateral/far left lateral disc herniation superimposed upon disc bulging with pronounced left greater than right foraminal encroachment with bilateral facet degenerative changes and pronounced degenerative disc disease at L5 Broad based disc herniation with biforaminal encroachment at L4-L5." On May 17, 2016, plaintiff's neurosurgeon, Dr. Clifford Houseman, diagnosed plaintiff with "traumatic rupture of lumbar intervertebral disc, traumatic spondylopathy of lumbosacral region, and lumbosacral disc herniation."

On May 27, 2016, plaintiff had an MRI of her cervical spine which showed "small broad-based right central disc protrusion at C5-C6 without significant canal or foraminal stenosis." On June 10, 2016, plaintiff had an insurance medical examination by Dr. Ryan Beekman, an orthopedic surgeon, and after his exam and review of plaintiff's medical records, he opined that "there is no evidence of acute bony injury to either her left shoulder, right knee, nor her cervical, thoracic, and lumbar spine that was anything more than soft tissue strain and/or sprain, nor is there any evidence of significant neurologic injury." Plaintiff saw Dr. Soffa on July 14, 2016 and September 8, 2016, again complaining of pain in her back, neck, and left shoulder. Dr. Soffa's impression continued to be that plaintiff sustained a sprain/strain injury to her cervical, thoracic, and lumbosacral spine from the January motor vehicle accident.

Plaintiff saw Dr. Houseman on September 20, 2016, and he recommended lumbar fusion surgery at L5-S1, which plaintiff declined. Dr. Houseman provided plaintiff with a patient disability statement which indicated that plaintiff was totally disabled from September 20, 2016 through December 20, 2016, when she would be re-evaluated. On September 23, 2016, Dr. Beekman authored an addendum to his insurance medical examination report after review of additional medical records and concluded that there "is no evidence to suggest that the degenerative changes noted on her previous studies were in any way related to her January 18,

2016 motor vehicle accident as she had no evidence either on physical examination or on the previous studies that she had an acute injury to her cervical and lumbar spine."

On October 12, 2016, plaintiff was in the accident at issue in this case. On October 17, 2016, plaintiff saw Dr. Soffa and advised him that the pain in her back, neck, and left shoulder was worse after this accident. Dr. Soffa's impression was that plaintiff's preexisting sprain/strain injury to her cervical, thoracic, and lumbosacral spine from the January motor vehicle accident was aggravated by this October accident. At plaintiff's visit on November 17, 2016, Dr. Soffa continued to have the impression that plaintiff had a sprain/strain injury. On December 20, 2016, plaintiff returned to Dr. Houseman and he recommended a lumbar laminectomy and fusion at L5-S1. He also recommended an MRI of the lumbar and cervical spine, as well as a CT scan of the lumbar spine.

On January 16, 2017, an MRI of plaintiff's lumbar spine showed "Disc herniations with bilateral foraminal encroachment at L4-L5 and L5-S1." The MRI from March 18, 2016 was compared and the radiologist's impression was: "Disc herniation at L4-L5 and L5-S1 with no longer more prominent left lateral vs right lateral component at L5-S1 with biforaminal encroachment/narrowing at both these levels." Further, on January 16, 2017 an MRI of plaintiff's cervical spine showed "Small central/right paracentral/right foraminal disc herniation with right foraminal encroachment at C5-C6 and broad-based disc bulging lateralizing to the left with mild left foraminal encroachment and mild central spinal canal stenosis at C6-C7. Disc bulging with foraminal encroachment at C3-C4 and C4-C5." The MRI from May 27, 2016 was compared and the radiologist's impression was: "essentially no change from the most recent study[.]"

On January 20, 2017, plaintiff had another insurance medical examination by Dr. Beekman, and after his exam and review of plaintiff's medical records, he opined that plaintiff had preexisting "degenerative cervical spine disease, degenerative lumbar spine disease as well as acromioclavicular arthrosis of the left AC joint." Dr. Beekman further opined that there was "no evidence of a significant acute pathology associated with her motor vehicle accident of October 12, 2016. . . . and "at most she sustained soft tissue sprain/strain of the cervical and lumbar spine." He did not believe that plaintiff "sustained any injury to the left shoulder and her left shoulder symptoms are related to preexisting cervical spine disease." While plaintiff may have experienced a short-term aggravation of her underlying degenerative condition and/or a mild sprain/strain of her lumbar and cervical spine, Dr. Beekman concluded that there was no indication of significant injury and plaintiff was capable of working in an unrestricted capacity.

About three years later, on February 13, 2020, plaintiff had an insurance medical examination by Dr. Joseph Femminineo, a physical medicine and rehabilitation physician. After examination and review of medical records, Dr. Femminineo opined that there was "no clinical evidence to suggest any active cervical or lumbar radiculopathy" and that plaintiff could return to her "pre-accident functional status" with no need for additional treatment. While the imaging studies showed "some early discogenic changes in the lumbar and cervical spine," it did not appear from the report findings "that there was much structural difference between the study done both before and after the accident in October of 2016."

In September 2020, defendant Brown filed a motion for summary disposition under MCR 2.116(C)(10), alleging plaintiff could not establish she sustained a threshold injury that was caused

by the October accident as required under MCL 500.3135 of no-fault act. Rather, plaintiff's problems were caused by her previous motor vehicle accidents and preexisting degenerative conditions. The trial court agreed, concluding that plaintiff failed to present medical evidence attesting that plaintiff suffered a serious impairment of body function that was caused by the October accident. The trial court noted that "the only expert opinion presently before the Court supports Defendant's argument that Plaintiff's symptoms result from a degenerative condition and pre-existed the October 2016 accident. Plaintiff has put forth no evidence from any report or any expert to show that a significant medical difference exists between the MRI reports." And because plaintiff failed to establish a serious impairment of body function that was caused by the October accident, there was no viable basis to recover against Allstate with regard to plaintiff's uninsured/underinsured claim arising from the October accident. Therefore, defendant Brown's motion for summary disposition was granted and the trial court held that if plaintiff did not file a motion to amend her complaint against Allstate, the case would be dismissed in its entirety. After plaintiff failed to file the motion, an order was entered dismissing the case. This appeal followed.

II. SERIOUS IMPAIRMENT OF BODY FUNCTION

Plaintiff argues that a genuine issue of material fact exists as to whether she suffered a serious impairment of body function that was caused by the October accident. We disagree.

A. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Sullivan v Michigan*, 328 Mich App 74, 80; 935 NW2d 413 (2019). "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 and citation omitted).

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996) (internal citations omitted).]

B. LAW AND ANALYSIS

Under Michigan's no-fault act (the 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 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).]

Our Supreme Court in *McCormick v Carrier*, 487 Mich 180, 215; 795 NW2d 517 (2010), set forth a three-pronged test[2] to resolve whether a person has shown a "serious impairment of body function." This test requires:

> (1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects 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*.]

An impairment is "objectively manifested" where it is "observable or perceivable from actual symptoms or conditions." *Id*. at 215. "[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

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[2] The Legislature has since codified this three-pronged test at MCL 500.3135(5), which states:

> (5) "[S]erious impairment of body function" means an impairment that satisfies all of the following requirements:
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> (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 the time this claim accrued, on October 12, 2016, this codification was not in effect. 2019 PA 21 (Effective June 11, 2019).

of pain and suffering . . . [which] generally requires medical testimony." *McCormick*, 487 Mich at 197-198.

At issue in this case is whether plaintiff suffered a serious impairment of body function that was caused by the October accident. In support of his motion for summary disposition, defendant Brown submitted to the trial court several of plaintiff's medical records, as discussed above, including insurance medical examinations by two doctors—Dr. Beekman and Dr. Femminineo—who essentially concluded that plaintiff's impairments arise from preexisting degenerative conditions rather than injuries sustained in the October accident. In other words, while plaintiff may have sustained a soft tissue sprain/strain of the cervical and lumbar spine from the October accident, plaintiff's claimed impairments were not caused by that accident. Further, the MRI of plaintiff's cervical spine from May 27, 2016—before the October accident—and the MRI of plaintiff's cervical spine from January 16, 2017—after the October accident—were compared by the radiologist who concluded that there was "essentially no change." And Dr. Femminineo reviewed the MRIs of plaintiff's lumbar spine and concluded that it did not appear "that there was much structural difference between the study done both before and after the accident in October of 2016."

Because defendant Brown submitted documentary evidence supporting his claim that plaintiff did not suffer a threshold injury that was caused by the October accident, the burden then shifted to plaintiff to establish that a genuine dispute of fact existed in that regard. See *Quinto*, 451 Mich at 362-363. In opposition to Brown's motion for summary disposition, plaintiff argued that she presented sufficient evidence of both new injuries and aggravation of preexisting injuries. With respect to whether plaintiff suffered new injuries, plaintiff directed the trial court to the May 27, 2016 and the January 16, 2017 MRI reports of her cervical spine. But, again, the radiologist compared those reports and concluded there was "essentially no change." Plaintiff also opined that an April 2017 EMG was evidence of a new condition because it showed nerve damage and pain in her back and neck. But there was no testimony that any such nerve damage arose from the October accident rather than the previous January or another motor vehicle accident. With regard to whether she suffered a worsening of her preexisting conditions, plaintiff pointed to her medical records noting her various diagnoses and treatments. But her family medical physician, Dr. Soffa, persistently concluded that plaintiff sustained a sprain/strain injury to her cervical, thoracic, and lumbosacral spine—which existed before the October accident. Despite the MRIs and other diagnostic testing results, Dr. Soffa's impression did not change. In other words, Dr. Soffa did not indicate at any time that the October accident caused any condition that showed up in diagnostic testing—perhaps because, as Dr. Beekman opined, plaintiff primarily had degenerative cervical and lumbar spine disease which was not caused by a motor vehicle accident. Moreover, plaintiff was issued a disability statement indicating that she was totally disabled by Dr. Houseman in September 2016, just before the October accident.

As noted, the existence of an objectively manifested impairment is generally proven through medical testimony. *McCormick*, 487 Mich at 197-198. That is, what impairments were caused—or preexisting conditions aggravated—by the October accident presents a medical question that is beyond the scope of lay knowledge. See, e.g., *Howard v Feld*, 100 Mich App 271, 273; 298 NW2d 722 (1980). In this case, defendant Brown claimed that plaintiff did not suffer a threshold injury caused by the October accident and presented medical evidence in support of his argument. Therefore, it was incumbent on plaintiff to refute that claim with medical evidence like

an affidavit or deposition testimony that specifically attributes a definitive objectively manifested impairment to the October accident. While plaintiff relies on MRI reports, as the trial court noted, the court "clearly lacks the specified training and ability to compare MRI reports and must therefore rely on the expert opinion in the current record." The physicians who rendered any opinion of record regarding plaintiff's MRI reports attributed plaintiff's impairments to her degenerative conditions and not to the October accident. In short, plaintiff failed to present any medical evidence connecting her claimed impairments to the October accident, which is particularly necessary in this case considering plaintiff's extensive medical history and involvement in other motor vehicle accidents. On the record before us, we agree with the trial court that plaintiff failed to establish that a genuine issue of material fact exists regarding whether she suffered a serious impairment of body function that was caused by the October accident. Accordingly, the trial court did not err in granting defendant Brown's motion for summary disposition on this basis. In light of this conclusion, we need not address plaintiff's argument that the alleged injuries affected her ability to lead her normal life.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael F. Gadola