

STATE OF MICHIGAN
COURT OF APPEALS

FRANCINE SHINEW,

Plaintiff-Appellant,

v

STEVEN BOWERMAN and
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED

April 13, 2006

No. 258084

Kent Circuit Court

LC No. 02-011105-NI

Before: Kelly, P.J., Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's decision granting summary disposition to defendant State Farm Mutual Automobile Insurance Company¹ pursuant to MCR 2.116(C)(10). We reverse.

Plaintiff was injured when Bowerman's vehicle allegedly crossed the center line and struck a truck in which she was a passenger. The truck left the road and rolled over. The drivers of both vehicles were uninsured, so plaintiff filed a claim for uninsured motorist benefits from her insurer, defendant, which denied plaintiff's claim. Plaintiff filed suit against Bowerman, and alleged that his negligence caused injuries to her head, neck, back, and foot that constituted a serious impairment of body function. Plaintiff also filed suit against defendant, alleging that it breached her insurance contract by denying her claim for uninsured motorist benefits because her injuries exceeded the threshold under the no-fault act. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), and argued that plaintiff did not establish that she suffered a serious impairment of body function to recover non-economic damages. Defendant also argued that the accident did not cause plaintiff to sustain any objectively manifested, medically identifiable head, neck, middle back, and aggravated lower back injuries, and that her foot injury, although arguably objectively manifested, did not affect her general ability to lead her normal life.

¹ Defendant Bowerman is not a party to this appeal. Hereinafter the singular 'defendant' refers to State Farm.

The trial court ruled that “there frankly appears to be no material dispute” concerning the nature of plaintiff’s injuries. The trial court ruled that the head, neck, back, and feet all involved important body functions, and that plaintiff suffered impairments of all of them, but that her head, neck, and lower back injuries were not objectively manifested. The court reasoned that these injuries were primarily diagnosed by plaintiff’s subjective complaints of pain, that the diagnostic procedures used relied on plaintiff’s complaints of pain, that there was no x-ray, MRI, cat-scan, or other test demonstrating these injuries, that plaintiff’s injuries appeared to be continued worsening of preexisting conditions, and that any aggravation of a preexisting condition was not objectively manifested. The trial court ruled that plaintiff’s objectively manifested foot injury did not affect her general ability to lead her normal life, but that “her injuries and conditions, or aggravations thereto not objectively manifested (e.g. head, neck and back pain) probably did, and may well continue to do so to this day. Unfortunately for plaintiff, however, *Kreiner* makes [it] clear that the statutorily mandated threshold must be strictly construed.”

Plaintiff argues that the trial court erred by ruling that, as a matter of law, plaintiff’s head, neck, and back injuries were not objectively manifested impairments. We agree. We review the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to a judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

Plaintiff argues that the her head, neck, and back injuries meet the serious impairment threshold because they were objectively manifested, medically identifiable impairments of an important body function. Plaintiff does not challenge the trial court’s ruling regarding her foot injury.

Uninsured motorist insurance permits an injured motorist to obtain coverage from her own insurance company to the extent that a third-party claim would be permitted against the uninsured at-fault driver. *Rory v Continental Ins Co*, 473 Mich 457, 465; 703 NW2d 23 (2005). “Uninsured motorist benefits are not statutorily required by the no-fault act, and the language of the insurance policy controls.” *Cruz v State Farm Mut Auto Ins Co*, 241 Mich App 159, 167; 614 NW2d 689 (2000). It is the contract provisions of the insurance policy, and not the requirements under the no-fault act that determine the insurer’s obligation to provide coverage to a plaintiff. *Berry v State Farm Mut Auto Ins Co*, 219 Mich App 340, 346; 556 NW2d 207 (1996). Neither plaintiff nor defendant included a copy of the uninsured motorist provision of plaintiff’s insurance policy; however, it is apparent from defendant’s arguments in support of its motion for summary disposition that plaintiff would be entitled to coverage only if she established a threshold injury as defined under the no-fault act, MCL 500.3135(1).

A person is subject to tort liability for noneconomic loss caused by the 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. As used in this section, “serious impairment of body function” is defined as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), our Supreme Court set forth several guiding principles for the determination of whether a plaintiff alleging a serious impairment of body function meets the statutory threshold for third-party tort recovery. First, a court must determine whether a factual dispute exists “concerning the nature and extent of the person’s injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function.” *Id.* at 131-132. If there are material factual disputes, a court may not decide the issue as a matter of law. *Id.* at 132. When a court decides the issue as a matter of law, it must determine whether “an ‘important body function’ of the plaintiff has been impaired.” *Id.* For an impairment to be objectively manifested, there must be a medically identifiable injury or a condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 652; 654 NW2d 604 (2002). If a court finds that an important body function has been impaired, “it then must determine if the impairment affects the plaintiff’s general ability to lead his or her normal life.” *Kreiner, supra* at 132. All that is at issue in this appeal is whether the trial court was correct in finding that plaintiff’s injuries were not objectively manifested.

Plaintiff argues that her head and neck injuries, which consist of occipital neuralgia and a cervical strain/sprain, are objectively manifested. Plaintiff contends that her neck injury was objectively manifested because Michigan courts recognize muscle spasm as an objective manifestation of an injury. We note that the decisions in *Bennett v Oakley*, 153 Mich App 622, 630; 396 NW2d 451 (1986), and *Franz v Woods*, 145 Mich App 169, 176-177; 377 NW2d 373 (1985), overruled on other grounds in *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), superceded in part by 1995 PA 222, both stated that medically observable muscle spasms; for example, those felt by palpation, are evidence of an objectively manifested injury. Plaintiff’s argument fails because there is no evidence that plaintiff’s physician, Dr. Lisa Pullum, observed muscle spasms through palpation.

Plaintiff also argues that her cervical strain/sprain neck injury is objectively manifested because Pullum detected muscle tenderness along the cervical spine, plaintiff’s range of motion was decreased, and the April 6, 2000, MRI detected a loss of normal cervical lordosis. We find that plaintiff has presented sufficient evidence that her head and neck injuries were objectively manifested, medically identifiable injuries. Although an MRI conducted about five months after the accident indicated that plaintiff’s cervical spine was of “[s]atisfactory appearance,” it also indicated a slight loss of the normally seen cervical lordosis, or inward curvature, of plaintiff’s spine. This loss of normal cervical lordosis was also noted on a subsequent MRI.

The objective manifestations of a spine injury can be established through x-rays indicating an abnormal spine. *Sherrell v Bugaski*, 140 Mich App 708, 711; 364 NW2d 684 (1984).² Pullum testified that occipital neuralgia occurs with a flexion/extension injury caused

² We note that panels of this Court have disagreed regarding whether a lack of cervical lordosis is an objectively manifested impairment or merely an objectively identified symptom of an impairment. See *DiFranco v Pickard*, 427 Mich 32, 73 n 56; 398 NW2d 896 (1986). However, in *Guerrero v Schoolmeester*, 135 Mich App 742, 750; 356 NW2d 251 (1984), this Court’s finding that the plaintiff’s lack of cervical lordosis was not objectively manifested was
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by a hit to the back of the head. Pullum further stated that the occipital neuralgia could be caused by the collision, the rollover, or a combination of the events during which plaintiff hit her head. Pullum testified that plaintiff's neck pain and the slight loss of normal cervical lordosis was caused by muscle spasm, which was caused by a flexion/extension or whiplash injury, that affects nerves, muscles, ligaments, and joints. She further explained her diagnosis by stating that a severe muscle spasm can actually straighten a person's normal cervical curve, and that straightening was seen on plaintiff's MRI report. Additionally, a finding that both plaintiff's head and neck injuries were objectively manifested by the MRI report is proper because Pullum testified that they had the same underlying cause. Plaintiff submitted sufficient evidence to support a conclusion that these injuries were objectively manifested.

We now turn to plaintiff's lower back injuries. The record demonstrates that plaintiff has a long history of lower back problems, which include reflex sympathetic dystrophy (RSD) of the lower extremities, lumbar radiculopathy on the left side, epidural adhesions, post-laminectomy syndrome in the lumbar region, myofascial pain syndrome, lumbar spondylosis, and degenerative disc disease.

Medical records demonstrated that plaintiff did not suffer an acute injury to her cervical or lumbar spine following the accident. However, Pullum, a specialist in chronic and cancer pain management who treated plaintiff's lower back for three years before the accident, opined that the accident worsened or aggravated plaintiff's lower back condition and caused new injury to the lumbar facet joints. Pullum stated that plaintiff's previous lumbar laminectomy left a weakened area in her back. She also testified that plaintiff had epidural scar tissue, and that the force of the collision and rollover can irritate the nerve roots encased by those adhesions, can worsen the radicular symptoms in plaintiff's leg, and can irritate and cause muscle spasm and pain to soft tissue structures just as in plaintiff's neck; in this case, it affected the facet joints in plaintiff's back. Pullum explained that her treatment for the facet joint pain differed from treatment that plaintiff received before the accident, and included lumbar facet injections and cryolysis of the medial rami nerves, which froze the nerves going to the facets. Plaintiff did not receive lumbar facet injections following this procedure.

Recovery is permitted in the case of a preexisting injury or condition if the trauma caused by the accident triggered symptoms from that condition. *Wilkinson v Lee*, 463 Mich 388, 394-395; 617 NW2d 305 (2000). Plaintiff suffered from several lower back maladies before the accident occurred, including some that were degenerative in nature. Plaintiff presented evidence indicating that she experienced a significant increase in the pain caused by her preexisting back problems. Pullum opined that the accident aggravated plaintiff's preexisting back conditions. Another specialist, Dr. Girish Juneja, noted tenderness in plaintiff's thoracic and lumbosacral paraspinal areas, and that her "[r]ange of motion is markedly restricted by more than 50%

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predicated on the fact that "there were no objective findings of the cause of the loss of lordosis, with several potential factors." In the present case, plaintiff's lack of cervical lordosis was indicated from an MRI taken only five months after the accident although several previous MRIs had indicated no loss of cervical lordosis, and plaintiff sustained no intervening injuries. *Guerrero* is, therefore, not controlling, and we find this Court's reasoning in *Sherrell* persuasive.

secondary to pain.” This evidence is sufficient to support a conclusion that plaintiff’s new and aggravated lower back injuries were objectively manifested.³

Sufficient documentary evidence was submitted to demonstrate that plaintiff’s injuries were objectively manifested impairments. Accordingly, we reverse the trial court’s ruling dismissing plaintiff’s claim for noneconomic damages on this basis.

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

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Michael J. Talbot

³ We note that

[p]anels [of this Court] have also disagreed as to whether the conclusions drawn from range-of-motion tests are an objective manifestation of an injury. Some panels have summarily disregarded the results of these tests, especially if the plaintiff’s x-rays were normal and no neurological problems were discovered. Other panels have distinguished between “active” and “passive” range-of-motion tests. Under this approach, the results of an active test (i.e., a test where the plaintiff moves her body until she feels pain) are not considered an objective manifestation of an injury because the plaintiff can control the test results. However, the limitation of movement observed in passive tests is considered an objective manifestation of an injury. [*DiFranco, supra* at 73 (footnotes omitted).]

Although Juneja’s records of plaintiff’s physical examinations do not indicate whether the range-of-motion tests performed on plaintiff were “active” or “passive,” we believe that Juneja’s assessment, coupled with Pullum’s testimony regarding the changes in plaintiff’s treatment before and after the accident, as well as the cause of that change, evidence a “medically identifiable injury” or a condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 652; 654 NW2d 604 (2002).