STATE OF MICHIGAN

COURT OF APPEALS

DEVIN M. BIRCHFIELD,

Plaintiff-Appellant,

v

VANESSA M. CHIODO and LINDA A. CHIODO,

Defendants-Appellees.

UNPUBLISHED
June 25, 2020

No. 348386
Kalamazoo Circuit Court
LC No. 18-000087-NI

Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff Devin Birchfield, then age 20, was rear-ended by defendant Vanessa Chiodo. At the accident scene, Birchfield denied any injury. He began to experience back pain as he drove himself home. Two days later an examiner at the Western Michigan University Health Center, found no obvious abnormality. During the next three years, Birchfield sought treatment for his back pain from a number of medical providers. Despite physical therapy and lumbar injections, the pain persisted. He brought this lawsuit seeking tort damages under MCL 500.3135(1).

The circuit court granted summary disposition to defendants, finding that Birchfield had not sustained a serious impairment of an important body function. Birchfield's evidence suffices to create material questions of fact regarding the nature and extent of his injuries. We reverse the trial court's order and remand for further proceedings.

I. BACKGROUND

On December 2, 2015, Birchfield was an electrical engineering student at Western Michigan University (WMU) and was driving to campus when the accident occurred. He had stopped at a red light. As the light turned green, he lifted his foot from the brake pedal and was

immediately struck from behind by Chiodo's car.[1] Birchfield's vehicle moved forward "in a jarring motion" but sustained no appreciable bumper damage. He recalled at his deposition that the front of Chiodo's vehicle "was pretty smashed up." The police responded to the accident scene and cited Chiodo for failure to stop within the assured clear distance ahead.

Birchfield testified that "after the adrenaline started wearing away," he felt

> like I can't even move my back right now. And so I got to my apartment and I couldn't stand. It was . . . bad. And then I had some pain sitting in my neck. It wasn't as bad, but that was there. So I got home. I laid down for a minute and I was having trouble laying down because of the neck thing. . . . I pretty much just laid down for the entire day.

The next day, he called for an appointment at the student health center.

Birchfield was examined at the health center on December 4, two days after the accident. No positive findings were noted on exam. The record of the visit indicates that Birchfield had a history of recurrent back pain "off and on." The current pain, the examiner wrote, was "suggestive o[f] disc inflammation, suspect exacerbation of same from [motor vehicle accident]." Motrin was prescribed.

Birchfield consulted his own physician, Dr. Channing Smith, about two weeks later. He complained of lower back pain, "especially when bending forward." X-rays ordered by Dr. Smith proved negative for fracture or dislocation. Dr. Smith prescribed an analgesic and physical therapy, and restricted Birchfield from lifting anything over 20 pounds.

Birchfield attended 12 physical therapy sessions and ultimately advised his therapist that although he had obtained significant relief, his lower back pain remained present. Due to the pain, Birchfield was unable to complete his fall 2015 classes; he explained that he "was having trouble even getting out of bed, so trying cognitive work . . ., especially engineering type work, [was] just not happening." He attempted to go back to school part-time for the 2016 winter semester while participating in physical therapy but failed to complete the semester because of the back pain.

During the summer of 2016, Birchfield began receiving chiropractic care. The notes reflect that his lower back was "killing him." The chiropractor observed limited range of motion of Birchfield's lumbar spine in flexion, extension, and side-bending and "mild to moderate muscle spasms" in the lumbar area.

Birchfield returned to WMU in the fall of 2016. In March of 2017, he saw Dr. Jane Beimer, a physical medicine and rehabilitation specialist. She noted that he was "tender to palpation along the midline lumbar spine approximately L4 through S1 region, both midline and paraspinals," and

[1] Defendant Linda A. Chiodo is the owner of the vehicle that struck Birchfield. Her liability, if any, flows from the owner's liability statute, MCL 257.401.

further documented that Birchfield's lumbar range of motion was "mildly reduced in extension with reports of low back pain."

In January 2018, Birchfield began treatment with Barton Wild, M.D., at Southern Michigan Pain Consultants in Portage. He reported low back pain affecting activities of daily living; it interfered with his sleep and created difficulty in getting dressed and out of bed or chairs. Dr. Wild administered six medial branch block injections in the lumbar area. His assessment reads: "Spondylosis w/o myelopathy or radiculopathy; lumbar region."

Birchfield filed this lawsuit in March 2018. During discovery, Dr. Ronald Taylor conducted a defense medical exam and concluded that no objective basis existed for Birchfield's back pain. Another defense physician reviewed Birchfield's x-rays and opined that they revealed degenerative changes of the spine and mild to moderate scoliosis, and no "acute" or "traumatic" abnormalities. At his deposition, Birchfield described that the pain continued to affect his ability to sit, walk and stand, and that he no longer could participate in several hobbies including longboarding, bowling, racquetball, and concert attendance. As to the latter, Birchfield explained that going to heavy metal concerts was "kind of my thing . . . . I love concerts. I'm a metal guy, so they tend to be rough, which is why I've avoided so many of them."[2] After attending a concert a few weeks before his deposition, Birchfield recalled, "by the end of the day . . . like my whole legs were like lit up with pain and the next day it was like hard to even walk around because every time I stepped I had pain shooting all the way down to my ankles." Birchfield also plays the electric guitar but has not been able to carry his gear to play at locations beyond his home.

Defendants moved for summary disposition under MCR 2.116(C)(10), contending that Birchfield "will not be able to cite to any objective evidence of injury to establish a causal connection between the subject accident and his subjective complaints of pain and alleged limitations." Defendants further argued that "even assuming [p]laintiff could show some evidence of a causal connection between objective manifestations and the subject accident, he will not be able to prove that the objective manifestations have impacted his life to the extent required by MCL 500.3135."

The trial court granted defendants' motion for summary disposition, stating that "plaintiff's medical records do not show any objective impairment." The court ruled that Birchfield's impairment claim was wholly based on "subjective symptoms and complaints of lower back pain, but [he] has failed to advance any evidence of an objective impairment causally connected to the subject acts . . . ." The court noted that "plaintiff was already having issues with lower back pain before the accident happened." Nor did the alleged impairment affect Birchfield's general ability to lead his normal life, the court opined:

[2] Based on Birchfield's description, "attending" a heavy metal concert means standing among other concert-goers while all move aggressively, like "moshpits" ("you get swayed or you get rammed up on a barrier, things like that").

> Plaintiff contends that after the accident he missed some school. However, he was able to go back to school and continue securing jobs. Plaintiff also says his social activities have declined due to his pain and his depressed state of mood . . . .
>
> Evidence shows that before the accident, as far back as 2013, plaintiff was complaining about back pain and making it hard to walk, bend or sit.
>
> Given all the evidence this court finds that overall plaintiff's injuries do not precipitate much change in his capacity to live his normal pre-accident manner. It seems to this court that plaintiff was having difficulty - - pain before and after the accident.
>
> Even if the court did find that pain was affecting his normal manner of living[,] there is no evidence presented that the pain was caused by the motor [vehicle] accident itself.
>
> Therefore, for these reasons defendants' motion for summary disposition under 2.116(C)(10) will be and is hereby granted.

Birchfield now appeals by right.

II. ANALYSIS

We review de novo a circuit court's grant of summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "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*, 469 Mich at 183. [*Zaher*, 300 Mich App at 139-140.]

When entertaining a summary disposition motion under subrule (C)(10), the court must refrain from making credibility determinations or weighing the evidence. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

Birchfield created a triable issue of fact that he suffered a serious impairment of an important body function, contrary to the trial court's assessment. Pursuant to MCL 500.3135, an injured person may file a negligence action against another involved in a motor vehicle accident

"if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). MCL 500.3135(2)(a) further provides:

> 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. . . .

At the time of the subject accident, a "serious impairment of body function" was defined by MCL 500.3135(5) as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."[3]

> The unambiguous language of MCL 500.3135[(5)] provides three prongs that are necessary to establish a "serious impairment of body function": (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

[3] Pursuant to an amendment of MCL 500.3135, 2019 PA 21 and 22, made effective June 11, 2019, subsection (5) of the statute now provides:

> As used in this section, "serious impairment of body function" means an impairment that satisfies all of the following requirements:
>
> (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. Although temporal considerations may be relevant, there is no temporal requirement for how long an impairment must last. This examination is inherently fact and circumstance specific to each injured person, must be conducted on a case-by-case basis, and requires comparison of the injured person's life before and after the incident.

capacity to live in his or her normal manner of living). [*McCormick v Carrier*, 487 Mich 180, 215; 795 NW2d 517 (2010).]

Turning to the first prong, *McCormick* held that an objectively manifested impairment "is an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function," i.e., one that is "observable or perceivable from actual symptoms or conditions." *Id*. at 196. The mere existence of pain and suffering, standing alone, does not satisfy the serious impairment threshold; there must be evidence showing "a physical basis for [plaintiff's] subjective complaints of pain and suffering." *Id*. at 197-198 (quotation marks and citation omitted). This showing "generally requires medical testimony." *Id*. at 198. "[W]hen considering an 'impairment,' the focus 'is not on the injuries themselves, but how the injuries affected a particular body function.' " *Id*. at 197 (citation omitted).

Although he was not deposed, Dr. Smith authored two letters of record attesting that the accident caused Birchfield's back pain: "I have treated Devin for his lower back pain due to a motor vehicle accident on Dec. 2, 2015." Other evidence supports that Birchfield has sustained objectively manifested *impairments* due to his persistent back pain. Two different examiners found that Birchfield's range of motion was limited by his pain, and one noted that he experienced observable muscle spasms. A limited range of motion qualifies as an objective impairment. See *McCormick*, 487 Mich at 218 ("Even 14 months after the incident, an FCE report observed that ankle pain and a reduced range of motion inhibited these body functions."). This Court has determined that muscle spasms are objective manifestations of an injury. *Franz v Woods*, 145 Mich App 169, 176; 377 NW2d 373 (1985).[4] This evidence, while not overwhelming, is not so thin as to preclude a reasonable juror from concluding that Birchfield suffered an objectively manifested impairment as a result of the accident.

The circuit court premised its ruling, in part, on its conclusion that Birchfield had complained of back pain in 2013, and that his accident-related injury did not "precipitate much change in his capacity to live his normal pre-accident" life, as he had pain both before and after the accident. Viewed in the light most favorable to Birchfield, however, the record indicates that before the accident, Birchfield was last treated for back pain in September 2013 and had no physician visits related to back pain in the interim. Further, Birchfield testified at his deposition that the 2013 back pain resulted from an injury or a pulled muscle, and resolved with steroid treatment.

When considering a summary disposition motion, a court may not "make findings of fact; if the evidence before it is conflicting, summary disposition is improper." *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003) (quotation marks, citation, and

[4] *Franz* was overruled by *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), but *DiFranco* was subsequently superseded by amendments to MCL 500.3135. And we acknowledge that in *Franz*, the Court evaluated whether the evidence substantiated an objective manifestation of an *injury* rather than an *impairment*, a distinction highlighted in *McCormick*. Despite this distinction, the point remains the same. When a muscle involuntarily contracts (spasms) it is not only painful, but also debilitating.

emphasis omitted). Even assuming that Birchfield has some sort of underlying back problem, exacerbation by a subsequent injury may result in an impairment of body function. See *Washington v Van Buren Co Rd Comm*, 155 Mich App 527; 400 NW2d 668 (1986). Tort damages have long been recoverable in Michigan to compensate for the aggravation of a preexisting condition. See *Schwingschlegl v City of Monroe*, 113 Mich 683; 72 NW 7 (1897); *Mosley v Dati*, 363 Mich 690; 110 NW2d 637 (1961). The pertinent inquiry is whether the plaintiff did, in fact, suffer aggravation of a preexisting condition because of the accident. Here, the letters provided by Birchfield's own physician support that the accident caused the back pain he experienced shortly after the December 2015 accident.

The parties also dispute whether Birchfield's back injury affects his general ability to lead his normal life. The test for determining if an injury has affected a person's general ability to lead a normal life is subjective and fact-specific. *McCormick*, 487 Mich at 202. "Determining 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.*

> There are several important points to note . . . with regard to this comparison. First, the statute merely requires that a person's general ability to lead his or her normal life has been *affected*, not destroyed. Thus, 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.
>
> Second, and relatedly, "general" modifies "*ability*," not "affect" or "normal life." Thus, the plain language of the statute only requires that some of the person's *ability* to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected. Thus, while the extent to which a person's general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person's normal manner of living is, there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected.
>
> Third, and finally, the statute does not create an 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." To begin with, there is no such requirement in the plain language of the statute. Further, MCL 500.3135(1) provides that the threshold for liability is met "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." While the Legislature required that a "serious disfigurement" be "permanent," it did not impose the same restriction on a "serious impairment of body function." Finally, to the extent that this prong's language reflects a legislative intent to adopt this portion of [*People v Cassidy*, 415 Mich 483; 330 NW2d 22 (1982),] in some measure, *Cassidy* expressly rejected a requirement of permanency to meet the serious impairment threshold. *Cassidy*, 415 Mich at 505-506 (noting that "two broken bones, 18 days of hospitalization, 7 months of wearing casts during which dizzy spells further affected his mobility, and at least a minor residual effect one

> and one-half years later are sufficiently serious to meet the threshold requirement of serious impairment of body function"). [*McCormick*, 487 Mich 202-203 (emphases in original).]

Birchfield's back injury did not completely destroy his normal life, does not impact every facet of his life, and has improved although not resolved over time. The legal threshold, however, only requires evidence that his injury *affected* his general ability to lead his normal life, and Birchfield has satisfied that threshold. Birchfield testified that his back pain made it impossible for him to complete two semesters of his electrical engineering program, which set his education back for one full year. Due to the now-chronic pain in his back, Birchfield claims that he is unable to participate in the hobbies he enjoyed before the injury, particularly concert attendance, racquetball and longboarding. The limitations of the activities Birchfield enjoyed "might not rise to the level of a serious impairment of body function for some people," but for Birchfield, who identified a limited range of hobbies and activites, the impairments "may rise to the level of a serious impairment of a body function." *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005).

We emphasize that the evidence presented in this case reveals a factual dispute concerning the nature and extent of Birchfield's back injury, and that the dispute is material to a determination of whether he has suffered a serious impairment. Under the rules governing summary disposition, we may not determine whether Birchfield's evidence is stronger or more persuasive than the evidence presented by defendants, and we may not superimpose our own view of which side should win or lose. Rather, viewed in the light most favorable to Birchfield, the evidence supports that he has limited range of motion and chronic pain due to his back injury, that the impairment is objectively manifested by reduced range of motion and spasms, and that it has affected (and continues to affect) his general ability to lead his normal life.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

STATE OF MICHIGAN

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Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

MARKEY, P.J. (*dissenting*.)

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants in this automobile negligence case involving the question of whether plaintiff suffered a serious impairment of body function arising out of a motor vehicle accident. Plaintiff claimed that he suffered a back injury in the accident, resulting in back pain that has affected his general ability to lead his normal life. The trial court concluded as a matter of law that any impairment was not objectively manifested, that there was no causal connection between the accident and the alleged impairment, especially considering a pre-accident history of back pain, and that the claimed impairment had not affected plaintiff's general ability to lead his normal life. Plaintiff argues that there exists a factual dispute regarding the nature and extent of his injuries under MCL 500.3135 and *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), precluding summary disposition. I agree with the trial court's ruling to summarily dismiss the action. Accordingly, I respectfully dissent.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). We also review de novo issues of statutory interpretation. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).[1] Aside

[1] MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is

from certain enumerated exceptions, the no-fault act, MCL 500.3101 *et seq.*, abolished tort liability for injuries caused by the ownership, maintenance, or use of a motor vehicle. *Gray v Chrostowski*, 298 Mich App 769, 775; 828 NW2d 435 (2012). MCL 500.3135(1) provides a threshold exception to tort immunity with respect to the recovery of noneconomic damages in limited situations. *Id.* MCL 500.3135(1) states that "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle [but] only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." At the time of the accident and the trial court's ruling, MCL 500.3135(5) defined a "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." 2012 PA 158.

"The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis." *McCormick*, 487 Mich at 215. In *McCormick*, the Supreme Court explained that MCL 500.3135(2) governs a trial court's role in the determination whether a plaintiff suffered a serious impairment of body function. *Id.* at 192. MCL 500.3135(2) provides:

> (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

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entitled to judgment or partial judgment as a matter of law." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *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). The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Pioneer State*, 301 Mich App at 377. A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

> person has suffered a serious impairment of body function or permanent serious disfigurement. . . . .

"If there is no factual dispute, or no material factual dispute, then whether the threshold is met is a question of law for the court." *McCormick*, 487 Mich at 215. In construing MCL 500.3135(2), the *McCormick* Court noted that "the disputed fact does not need to be outcome determinative in order to be material, but it should be significant or essential to the issue or matter at hand." *Id.* at 194 (quotation marks omitted).

Under the first prong of MCL 500.3135(5), it must be proven that the injured party suffered an objectively manifested impairment of body function. See *McCormick*, 487 Mich at 195.[2] With respect to this issue, I initially note that the focus is on whether the alleged *impairment* was objectively manifested, not whether the *injury* was objectively manifested. *Id.* at 197; *Patrick v Turkelson*, 322 Mich App 595, 606; 913 NW2d 369 (2018). In this case, the alleged "impairment" is plaintiff's inability to engage in certain physical activities or to hold certain postures without feeling pain. There was documentary evidence in the form of plaintiff's deposition testimony and the medical documentation that would support a determination that plaintiff had an impairment, i.e., back pain. Whether it was "objectively manifested" is a separate question.

After reviewing various dictionary definitions, our Supreme Court in *McCormick* observed "that the common meaning of 'objectively manifested' . . . is an impairment that 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. Stated otherwise, "an 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions." *Id.* A plaintiff must submit evidence showing that there is a physical basis for a subjective complaint of pain, which generally requires medical testimony. *Id.* at 198; see also *Patrick*, 322 Mich App at 607 ("Although mere subjective complaints of pain and suffering are insufficient to show impairment, evidence of a physical basis for that pain and suffering may be introduced to show that the impairment is objectively manifested.").

With respect to the issue of causation in the context of a negligence action, a plaintiff must establish both cause in fact and legal cause. *Patrick*, 322 Mich App at 616. Proving cause in fact requires a plaintiff to present substantial evidence showing that more likely than not, the plaintiff's injuries would not have occurred but for the defendant's negligent conduct. *Id.* at 617. Circumstantial evidence and reasonable inferences arising from the evidence can be utilized to establish causation. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). But it is not sufficient to proffer "a causation theory that, while factually supported, is, at best, just as possible as another theory." *Id*. at 164. "[L]itigants do not have any right to submit an evidentiary record to the jury that would allow the jury to do nothing more than guess." *Id*. at 174. A court must dismiss an action when causation remains an issue of pure speculation and conjecture, or the

[2] I note that the *McCormick* Court referred to MCL 500.3135(7), which, at that time, contained the "objectively manifested impairment" language. See 2002 PA 697.

probabilities are evenly balanced at best. *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 124 (2009).

In the instant case, there is evidence that plaintiff has been complaining of back pain for several years, but, ultimately, the record effectively shows only subjective complaints of pain by plaintiff. That is, the record lacks evidence of a "physical basis" for the complaints. See *McCormick*, 487 Mich at 198; *Patrick*, 322 Mich App at 607. None of the medical diagnostic tests revealed a physical basis for plaintiff's asserted lumbar pain, nor was there any testimony or statements by a physician specifically opining that there was a physical basis or reason for plaintiff's pain.[3] The majority relies on a letter by Dr. Smith in which she stated that she had treated plaintiff "for his lower back pain due to a motor vehicle accident on December 2, 2015." This vague statement, if even admissible, however, does not contain any assertion by Dr. Smith that she had identified a physical basis for plaintiff's subjective complaints of pain. Even the medical reports indicating tenderness upon palpation of plaintiff's spine were inadequate because the described tenderness was based on plaintiff's subjective claim of pain or tenderness in response to palpation. I do recognize that on August 24, 2016, a chiropractor noted "mild to moderate muscle spasms [that] were palpated." But even assuming that this finding could be considered evidence of a physical, i.e., objective, basis for *pain*, I conclude that this singular event in the extensive record spanning several years is simply inadequate to sustain the action.[4] Moreover, although there were medical reports containing "diagnoses" or "assessments" of lumbar pain and limited range of motion, there is nothing in these reports suggesting that the diagnoses or assessments were based on anything but plaintiff's subjective claims of pain and movement limitations.[5] The majority relies on a reference in *McCormick* to the plaintiff there having a "reduced range of motion." *McCormick*, 487 Mich at 218. But the plaintiff in *McCormick*

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[3] The medical assessment from plaintiff's visit to Sindecuse Health Center two days after the accident did indicate that plaintiff's pain was "suggestive o[f] disc inflammation." There is, however, no medical test result or other objective finding of disc inflammation, and clearly this comment was merely just what it says, "suggestive," i.e., possibly an explanation. Consequently, I find this statement too tenuous and indefinite to be of any benefit to plaintiff.

[4] The majority relies on *Franz v Woods*, 145 Mich App 169; 377 NW2d 373 (1985), overruled in part on other grounds by *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), superseded by statute in an amendment of MCL 500.3135. The *Franz* panel stated that "we are persuaded that the finding of muscle spasms is an objective manifestation of injury." *Franz*, 145 Mich App at 176. I note, however, that in *Franz*, the "plaintiff complained of frequent spasms" and examination "revealed spasms." *Id.* Here, there is no evidence of frequent spasms, the spasms detected by the chiropractor were *on one occasion* in relation to several years of medical visits and testing, the spasms were only "mild to moderate" on palpation, and there was no accompanying opinion connecting the spasms to the car accident. This was insufficient to create a genuine issue of material fact. I also note that the 1985 *Franz* decision is not binding precedent under MCR 7.215(J)(1).

[5] As stated earlier, an objectively manifested impairment is one observable or perceivable by another person from actual symptoms or conditions. *McCormick*, 487 Mich at 196.

"suffered a broken ankle" as revealed in x-rays. *Id.* at 185, 218. A similar showing has not been made in our case; there certainly were no supporting x-rays or any other objective test results.

In relationship to the trial court's discussion concerning plaintiff's pre-accident back pain and problems, I understand that "the aggravation or triggering of a preexisting condition can constitute a compensable injury." *Fisher v Blankenship*, 286 Mich App 54, 63; 777 NW2d 469 (2009). There was no evidence that plaintiff had complained of back pain for over a year leading up to the accident, after which, he then again alleged back pain. But again, the absence of evidence showing a physical, objective basis for plaintiff's subjective claims of pain should derail his lawsuit.[6]

Finally, plaintiff cites a couple of this Court's unpublished opinions in support of his appeal; however, they are simply inapposite and distinguishable because in both cases there was evidence that medical diagnostic tests actually showed impairments and injuries.

In sum, although there may have been a factual dispute concerning the nature and extent of plaintiff's injuries, the dispute was not material to the determination of whether plaintiff suffered a serious impairment of body function because the dispute did not encompass necessary evidence of a non-subjective, physical basis for plaintiff's subjective complaints of pain linked to the accident. Therefore, while there may have been an impairment, it was not objectively manifested as a matter of law. Accordingly, it was proper for the trial court to decide the issue, MCL 500.3135(2), and I would conclude that the court did not err in summarily dismissing plaintiff's action.

I respectfully dissent.

/s/ Jane E. Markey

[6] To the extent that the evidence of scoliosis, degenerative disc disease, and spondylosis (degenerative arthritic changes to the spine) explained plaintiff's alleged pain, I note there was no evidence that such back ailments were caused or exacerbated by the motor vehicle accident. I recognize that the medical report from Sindecuse Health Center stated that exacerbation from the accident was "suspected," but this statement, again, if even admissible, is simply too vague and indefinite and did not pinpoint a physical basis for the suspicion.