

STATE OF MICHIGAN
COURT OF APPEALS

DAISY MCKINNIE,

Plaintiff-Appellant,

v

KEITH ROBERT RAVEL and
ST. JOSEPH MERCY HOSPITAL,

Defendants-Appellees,

and

JOSEPH STABILE,¹

Defendant-Not Participating.

UNPUBLISHED

October 5, 2004

No. 241842

Macomb Circuit Court

LC No. 00-004251-NI

Before: Neff, P.J. and Wilder and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition and its order denying plaintiff's motion for reconsideration. We affirm.

I. Basic Facts and Procedural History

In June of 2000, plaintiff was injured in a motor vehicle accident. Following the collision, plaintiff presented to Mount Clemens General Hospital, where a CT scan was performed on her head, and x-rays were taken of her arm and hands. On October 5, 2000, Richard Klein, D.D.S. examined plaintiff who complained of frequent headaches, neck pain, and jaw problems. With respect to plaintiff's jaw, Klein noted "clicking" and "jerking," "limited and

¹ The trial court entered a judgment of no cause for action and dismissal with prejudice as to defendant Joseph Stabile.

painful flexion,” and pain on contact. His examination further revealed “right capsulitis, TM[J], and cervicalgia.”² Another dentist confirmed the TMJ diagnosis.

After plaintiff filed the complaint initiating this action, defendants moved for summary disposition under MCR 2.116(C)(10) arguing that plaintiff’s alleged injuries were not objectively manifested and did not affect her ability to lead her normal life, but merely caused plaintiff a greater difficulty in performing certain tasks. Defendants argued that for these reasons, plaintiff’s alleged injuries did not constitute a serious impairment. In response, plaintiff argued that, in determining whether an injury is objectively manifested, the court must consider plaintiff’s subjective complaints and her doctor’s diagnosis. Plaintiff further argued that viewing the evidence in the light most favorable to her, there was a genuine issue of fact as to whether the injuries affected her ability to lead her normal life.

In its opinion granting defendants’ motion, the trial court separated plaintiff’s injuries into two groups. With respect to plaintiff’s head, legs, arms, chest, and back injuries, the court ruled the injuries were not objectively manifested and there was no serious impairment of bodily function. With respect to plaintiff’s jaw, the court opined:

In considering the “nature” of McKinnie’s injuries, the Court is . . . not convinced that she demonstrated an “objectively manifested impairment of an important body function.” . . . Even assuming *arguendo* that Dr. Klein’s evaluation established an “objectively manifested impairment of an important body function,” the Court is not satisfied that she has established that the “extent” of her injuries affects her “general ability to lead . . . her normal life.”

Plaintiff moved for reconsideration. In support of her motion, plaintiff presented Klein’s trial deposition testimony taken after the motion for summary disposition hearing. Plaintiff also presented three new affidavits from her husband and two women who assisted her with housework. The trial court denied the motion.

II. Standard of Review

We review *de novo* a trial court’s decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In evaluating a motion under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions and other documentary evidence in a light most favorable to the nonmoving party and determines whether the moving party was entitled to judgment as a matter of law. *Id.* at 120. Our review is limited to considering the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Com’n*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

² The common acronym TMJ, also referred to as TMD by dentists, stands for temporomandibular joint disorder.

This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609-610; 450 NW2d 6 (1989). “An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion.” *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

III. Serious Impairment

Plaintiff first argues that the trial court erred in granting defendants’ motion for summary disposition. We disagree.

A. Applicable Law

Michigan’s no-fault act (the Act), MCL 500.3101 *et seq.*, generally abolished tort liability with regard to the ownership, maintenance, or use of a motor vehicle. MCL 500.3135(3). But under MCL 500.5135(1), tort liability remains for noneconomic loss if the injured person suffered a “serious impairment of a body function” or “permanent serious disfigurement.” MCL 500.3135(2)(a)(i) and (ii) provide:

(a) The issues of whether an 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 as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. . . . [*Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).]

To qualify as a “serious impairment of a body function”, an injury must be “an objectively manifested impairment of an important bodily function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7). In determining the nature of a plaintiff’s injuries, the trial court must decide if a factual dispute exists regarding whether a plaintiff has an objectively manifested impairment of an important body function. *Kreiner v Fischer*, ___ Mich ___; ___ NW2d ___ (2004). If a court determines that an injury constitutes an objective manifestation of serious impairment, then it must then ascertain whether the impairment “affects the plaintiff’s general ability to lead a normal life.” *Id.* at ___. To do so, a trial court must objectively compare the plaintiff’s lifestyle and activities before the accident to his lifestyle and activities after the accident and resolve the question whether plaintiff’s general ability to lead a normal life has been affected. *Id.* at ___. “Merely ‘any effect’ on the plaintiff’s life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff’s ‘general ability’ to lead his life.” *Id.* at ___.

Our Supreme Court provided a “nonexhaustive list” of objective factors that a court can use to determine whether a plaintiff’s ability to lead his general life has been affected, including

“(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment and (e) the prognosis for eventual recovery.”³ *Id.* at _____. Moreover, “[a]lthough a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one’s *general* ability to lead his normal life.” *Id.* at _____ n. 14 citing *Kreiner v Fischer*, 468 Mich 885; 661 NW2d 234 (2003) (emphasis in original).

B. Analysis

For the purpose of this appeal, defendants do not contest that plaintiff’s TMJ is objectively manifested or an impairment of an important body function.⁴ Rather, they argue that the injury does not affect plaintiff’s general ability to lead her normal life. Plaintiff argues that her deposition testimony, the three affidavits and Klein’s trial deposition, create a genuine question of material fact. But our review is limited to the evidence presented to the trial court at the time the motion was decided. *Peña, supra* at 313 n 4. Further, evidence first presented as part of a motion for reconsideration should not be considered in reviewing a ruling on a motion for summary disposition. *Quinto v Cross and Peters Co*, 451 Mich 358, 367 n 4; 547 NW2d 314 (1996). Accordingly, in reviewing the trial court’s ruling on defendant’s motion, we do not consider the three affidavits and Klein’s trial deposition that plaintiff presented after the trial court granted defendants’ motion.

Based on our review of the appropriate record, the trial court did not err in granting summary disposition. In her deposition when asked, “How has this accident affected your general ability to lead what was your normal life?” plaintiff responded, “It’s made everyday tasks more difficult.” She also offered limited examples of how her injuries changed her life. After the accident, she needed daily help performing household tasks for a week and a half. At the time of the deposition, she still needed help with household chores “once a week.” Her husband helps her more around the house than he did before the accident. She does not perform

³ The Court stressed that these factors are “not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves.” *Id.* at _____.

⁴ The dissent quotes a neurological examination performed on the plaintiff as an example of medical evidence supporting the existence of an injury. However, this letter from Amer Aboukam, M.D. notes only a “possible” whiplash injury, and pain. Aboukasm states no objectively identifiable basis for the statement that plaintiff had a “closed head injury.” While MCL 500.3135(2)(a)(ii) provides, in pertinent part, that “for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury[.]” plaintiff’s evidence does not meet the statutory requirement. There is no evidence Aboukasm is a “licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries,” nor does his letter constitute testimony under oath. It is therefore insufficient by itself to create a material issue of fact. *Churchman v Rickerson*, 240 Mich App 223, 226; 611 NW2d 333 (2000). Moreover, as the trial court noted, neurological tests of plaintiff’s arm and leg failed to show any irregularities.

“anything that involves a lot of lifting or anything.” Although six months after the accident she continued to experience “throbbing” and “stabbing” pain, taking Vicodin and Motrin made her “pretty comfortable for the most part.” Furthermore, on a TMJ work-up questionnaire, she described the pain as only interfering “moderately” with her “life in general.” She also testified she is able to do the same general activities, although she need additional time to complete tasks. Finally, although she has not returned to work, it is uncontested that she has not been declared disabled by any medical professional.⁵

This evidence demonstrates that plaintiff undeniably presented evidence that her injuries and resulting pain have had some effect on her life. But while “a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life.” *Kreiner, supra*. Considering all aspects of plaintiff's life, and comparing her life before and after the accident, the evidence presented reveals that plaintiff's life has continued for the most part as it did before the accident. She is still primarily responsible for her children and household duties. She still performs household tasks, though she requires more assistance than before the accident. Regarding her relationships and emotions, while the four page “Cranio-mandibular Initial Evaluation Report,” notes that “[plaintiff] has become depressed, irritable, . . . her mood swings, . . . and [she suffers] insomnia,” plaintiff testified in her deposition that she only has “a little bit more stress.” Nor does Klein's February 9, 2002, report raise a genuine issue of material fact. As the trial court noted, it does not indicate the frequency of plaintiff's limitations and it implicitly indicates that there are days on which the limitations do not exist.

While plaintiff apparently suffered pain from her injuries, “[r]ecovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body.” *Jackson v Nelson*, 252 Mich App 643, 649-650; 654 NW2d 604 (2002), quoting *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982).⁶ Considering all of the evidence in a light most favorable to plaintiff, we conclude the trial court did not err in ruling that plaintiff's alleged injuries did not affect her general ability to lead her normal life.

IV. Reconsideration

Plaintiff also argues that the trial court abused its discretion by denying her motion for reconsideration. We disagree.

Plaintiff moved for reconsideration of the trial court's decision under MCR 2.119(F). In support, she attached Klein's trial deposition testimony and affidavits from her husband and two women who, as plaintiff testified in her deposition, assisted her with household tasks. MCR 2.119(F)(3) provides as follows:

⁵ “Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain, do not establish [the extent of any residual impairment].” *Kreiner* at ___ n. 17.

⁶ As noted in *Jackson*, the Legislature's amendment of MCL 500.3135 reflected a return to the standards articulated in *Cassidy*.

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The issue raised in plaintiff's motion was ruled upon when the trial court granted defendants' summary disposition motion. Plaintiff failed to demonstrate any "palpable error" by which the court or parties were misled. Plaintiff did not present any new information or argument. Plaintiff only supplemented the record with evidence that could have been, but was not, presented in response to defendant's motion. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly