

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TALWINDER SINGH,

Plaintiff-Appellant,

v

JEFFREY NATHAN BARYLSKI,

Defendant-Appellee.

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UNPUBLISHED

August 13, 2020

No. 350184

Monroe Circuit Court

LC No. 18-141413-NI

Before: MARKEY, P.J., and K. F. KELLY and TUKEL, JJ.

PER CURIAM.

In this action for no-fault benefits, plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendant and denying plaintiff's motion for reconsideration. Finding no errors warranting reversal, we affirm. This appeal is decided without oral argument, MCR 7.214(E)(1)(b).

**I. BASIC FACTS AND PROCEDURAL HISTORY**

Plaintiff resided in Ohio with his wife and two daughters. At the time of the accident, plaintiff worked for a trucking company known as Three Star Transportation (Three Star) and had an Ohio commercial driver's license. Plaintiff owned and registered his own tractor-trailer in Ohio, but had a lease relationship with Three Star and was paid by the trip.

On April 16, 2018, plaintiff was travelling on I-75 northbound at a rate of 64-65 miles per hour (mph) when his trailer was struck suddenly from behind and items in the cab of the truck fell to the floor. Plaintiff and defendant, also a tractor-trailer driver, pulled over to the side of the road. The police and an ambulance came to the scene, but neither man left the scene in the ambulance. Plaintiff was bleeding from the back of his head, and he received treatment at the scene. Plaintiff's truck and the trailer were damaged in the accident and had to be repaired.

Three days after the accident, plaintiff sought treatment from his primary care physician for neck, shoulder, and back pain. The doctor prescribed painkillers and advised plaintiff to go to the hospital for an x-ray, but he did not because of a lack of insurance. His employer sent him to an attorney, and plaintiff was referred to other doctors. At the time of his deposition, plaintiff had

not taken any painkillers for over a year. Additionally, he did not have the recommended surgery or injections and had not seen a doctor in over six months. However, after the accident, plaintiff hired someone to mow his lawn, and his doctor instructed him “not to pick up something heavy.” Plaintiff had a gym membership and went “every now and then.” A doctor did not recommend that plaintiff stop or reduce his driving, but plaintiff reduced his trips because he “cannot drive long.” Plaintiff wore a back brace that was given to him by his doctor. After the accident, his hands felt numb, and he experienced buzzing in his ears when he slept. At his deposition, plaintiff was asked about cargo, bobtail, and semitruck insurance, but he merely stated that the information was in the truck.

When asked to compare his life before and after the accident, plaintiff testified that he “cannot pick up my kids and play with them,” cannot lift heavy weights, and had to hire someone to do his lawn work. Plaintiff clarified that he played with his children, but could not pick them up. He also argued with his wife about performing household chores, such as mowing the lawn and doing laundry, because he preferred to rest. After driving for four hours, plaintiff experienced “stabbing” back pain, and he wore a neck brace.

Plaintiff did not work for 2 ½ months after the accident. Although he earned the same rate of pay, plaintiff drove less trips. Previously, plaintiff left on a Monday, traveled to 48 states, and returned on Friday or Saturday. Now, he took two trips a week and traveled from Cincinnati to Michigan. However, since the accident, he had also travelled to Windsor (Canada), Kentucky, and Indiana. Plaintiff’s “home terminal” was in Michigan, and he drove his truck into Michigan more than 30 days a year. Plaintiff did not know if the truck had no-fault insurance coverage because “my company is the one who provided me the cargo insurance and the insurance.” At the time of the accident, plaintiff had three personal vehicles that were insured with Nationwide.

Defendant filed two separate motions seeking partial summary disposition pursuant to MCR 2.116(C)(10). First, defendant asserted that plaintiff could not recover non-economic damages because of the failure to obtain no-fault insurance. In the second motion, defendant claimed that plaintiff could not demonstrate the threshold standard to support a serious impairment of an important body function. Defendant submitted medical records that demonstrated plaintiff suffered a disc protrusion, but there was no nerve root impingement and no identified causal correlation between the protrusion and the accident. Plaintiff did not file a brief in opposition to the motion for summary disposition pertaining to the lack of no-fault insurance. However, plaintiff opposed the motion for summary disposition addressing the threshold injury, contending that sufficient evidence was presented to submit the issue to a jury. In addition to deposition testimony, plaintiff submitted an affidavit wherein he opined that he had the “most knowledge” regarding his “change in life” as a result of the accident. The affidavit further provided:

5. In comparing my life before and after the car crash, I had no troubles with a regular sleeping pattern. However, since the car crash, I have suffered from nightmares and sweating during my sleep cycle. This was not existent prior to the car crash.
6. Prior to the car crash, I was able to consistently show up for my employment and my performance was above average. However, since the subject car crash, I was unable to drive a commercial semi-truck long distances and as such, lost out

on a significant amount of income, specifically, over \$22,500.00 in business income. This effected [sic] my financial security and increased stress and anxiety as bill [sic] began to pile up.

7. Prior to the car crash, I was able to play both an active and physical role in my children's lives. However, since the car crash – and due to my continued neck and back pain – I have been unable to play a more intimate role with my children. Since the crash, they are missing parental support from their father. A role I am no longer able to sufficiently provide since the car crash.

8. That, due to the above mentioned – I can attest to the truth and fact that I have experienced physical conditions which affected my general ability to lead a normal life. This is due to the car crash I was involved in on April 16, 2018.

At the hearing on the dispositive motions, plaintiff's counsel acknowledged that a response to the dispositive motion addressing non-economic damages for failure to secure Michigan no-fault insurance was not filed, and he conceded that issue. Accordingly, the trial court granted that motion. Although the trial court concluded that plaintiff demonstrated an injury, it also found that plaintiff did not demonstrate a serious impairment of important body function that affected his ability to lead a normal life when comparing plaintiff's activities and lifestyle before and after the accident.

Plaintiff moved for reconsideration, alleging that the trial court erred in holding that the threshold injury was not established because a factual conflict was presented regarding the nature and extent of his injuries that was contingent on the credibility of witnesses. Second, plaintiff alleged that the trial court committed palpable error by dismissing his non-economic damage claim for failing to secure a no-fault policy of insurance because he recently learned that a Michigan no-fault insurance policy through Auto-Owners was in effect that covered the "commercial motor vehicle driven by [plaintiff] at the time of the accident, a fact unknown" when the trial court ruled on the summary disposition motions. However, the trial court denied the motion for reconsideration, concluding that plaintiff merely presented facts and legal theory that could have been submitted before the hearing and did not demonstrate a palpable error regarding the threshold injury.

## II. APPLICABLE REVIEW STANDARDS

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018). Summary disposition is appropriate pursuant to MCR 2.116(C)(10) where there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition challenged under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(4), (G)(5); *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 68; 919 NW2d 439 (2018).

The documentation offered in support of and in opposition to the dispositive motion must be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

“The affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion.” *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). “A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact.” *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995). When the opposing party provides mere conclusions without supporting its position with underlying foundation, summary disposition in favor of the moving party is proper. See *Rose v National Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002). Further, a party may not contrive a factual issue by asserting the contrary in an affidavit after providing damaging testimony in a deposition, and a trial court does not err by disregarding a contradictory affidavit. *Kaufman & Payton PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993).

This Court reviews the trial court’s decision addressing a motion for reconsideration for an abuse of discretion. *K & W Wholesale, LLC v Dep’t of Treasury*, 318 Mich App 605, 611; 899 NW2d 432 (2017). An abuse of discretion occurs when the decision falls outside the range of reasonable and principled outcomes. *Frankenmuth Ins Co v Poll*, 311 Mich App 442, 445; 875 NW2d 250 (2015).

### III. THRESHOLD INJURY

First, plaintiff contends that the trial court improperly granted summary disposition when the issue of serious impairment presented a factual issue for resolution by a jury. We disagree.

“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). “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). The question whether an injured party has suffered a serious impairment presents a question of law for the court if there is no factual dispute surrounding the nature and extent of the person’s injuries or any factual dispute is immaterial to determining whether the standard was met. MCL 500.3135(2)(a); *McCormick v Carrier*, 487 Mich 180, 190-191; 795 NW2d 517 (2010).

The plain and unambiguous language of the statute contains three requirements that are necessary to establish a serious impairment of body function: “(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*, 487 Mich at 195. “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.” *Id.* at 196. The term “impairment” relates to the impact of damage that arises from an injury. *Id.* at 197. Therefore, when addressing “impairment,” the focus is not on the injuries, but on how the injuries affected a particular body function. *Id.* A plaintiff must introduce evidence demonstrating a physical basis for his subjective complaints of pain and suffering, and this showing generally, but not always, requires medical

documentation. *Id.* at 198. Important body function refers to a function of significance and will vary depending on the person. *Id.* at 199. Therefore, the inquiry regarding an important body function is “an inherently subjective inquiry that must be decided on a case-by-case basis, because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person’s life.” *Id.*

The phrase “affect the person’s ability to lead his or her normal life” means “to have an influence on some of the person’s capacity to live in his or her normal manner of living.” *Id.* at 202. This is a subjective, fact specific inquiry to be resolved on a case-by-case basis. *Id.* “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 accident.” *Id.* The ability to lead a normal life only need be affected, not destroyed. *Id.* There is no temporal requirement on the length of the impact on the ability to lead a normal life. *Id.* at 203.

As noted, the *McCormick* Court established that to demonstrate a serious impairment of body function, a party had to demonstrate an objectively manifested impairment of an important body function that affects a person’s general ability to lead his normal life. An objective manifestation requires evidence of actual symptoms or conditions that someone other than the injured person would observe or perceive. Although we conclude that plaintiff arguably presented an objective manifestation of an important body function because the MRI revealed disc protrusions at C3-C4 and L1-L2, this evidence was insufficient to present a factual question for the jury. The *McCormick* Court noted that impairment relates to damages arising from an injury, and this showing generally must be established with medical documentation. In the present case, plaintiff demonstrated a disc protrusion in the MRIs, but did not establish through medical documentation that it caused him pain and required him to work less hours. Rather, plaintiff presented a subjective opinion of his injuries and did not present a medical opinion that work restrictions were necessary. There also must be an effect on the person’s ability to lead his normal life which means an influence on some aspect of the person’s capacity to live in a normal manner. *McCormick*, 487 Mich at 202. Again, in his deposition, plaintiff reported that he worked less hours, he did not pick up his children, and he did less housework. Physically, he testified that his hands went numb and he heard buzzing in his ears when he went to sleep. However, plaintiff had not treated with any physician since it was recommended that he have surgery and there was no recent documentary evidence to support his claims; again, there were no work and physical restrictions placed on plaintiff by a physician to mirror his claim of impairment.

To seemingly avoid the import of his deposition testimony, plaintiff submitted an affidavit that he experienced nightmares and sweating during sleep, he could no longer enjoy an “intimate” relationship with his children because of his neck and back injuries, and he worked fewer hours, creating financial stress, and therefore, his physical conditions affected his general ability to lead a normal life. In his deposition, plaintiff was asked about his ability to sleep, and he merely cited a buzzing during sleep, not nightmares and sweating. Further, in his deposition, he merely cited an inability to pick up his children, not a lack of an intimate relationship. Irrespective of whether the difference between the deposition testimony and the affidavit can be deemed a contradiction as opposed to a supplementation, the trial court did not err in granting summary disposition because plaintiff failed to present objective evidence of an impairment that affected his general ability to lead a normal life. The affidavit did not contain particular facts and a foundation to support the threshold, *SSC Assoc Ltd Partnership*, 192 Mich App at 364, but contained conclusory statements

that were devoid of detail, *Quinto*, 451 Mich at 362, and the affidavit lacked foundational facts, see *Rose*, 466 Mich at 470. Specifically, plaintiff did not delineate the frequency and duration of his nightmares and sweating such that it could be deemed to impact his ability to lead a normal life. Further, he concluded that the conditions were correlated to the accident without any medical foundation or opinion. Although plaintiff's affidavit also concluded that he did not have an "intimate" relationship with his children because of the accident, he did not set forth underlying facts to support that statement. In his deposition, plaintiff merely stated that he could not pick them up. However, a medical foundation or doctor imposed lifting restriction did not support that conclusion. Finally, although it was undisputed that plaintiff worked fewer hours and that he attributed it to pain from the accident, plaintiff did not present any evidence that he was restricted to working part-time as a result of the accident. Indeed, plaintiff had not been to the doctor since surgery was recommended at least six months prior to his deposition. Under the circumstances, the trial court correctly concluded that plaintiff failed to meet the serious impairment threshold to warrant a submission of the issue to a jury.

#### IV. RECONSIDERATION

Plaintiff further asserts that the trial court improperly denied his motion for reconsideration by failing to consider that he recently uncovered evidence of a Michigan no-fault insurance policy and that his medical evidence established a factual issue regarding injury. Again, we disagree.

The trial court does not abuse its discretion by denying a motion for reconsideration premised on facts or legal theory that could have been pled or argued before the trial court's original order. *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 738; 405 NW2d 157 (1987). The trial court also properly denies a motion for reconsideration if the evidence could have been produced, with reasonable diligence, at the time of the court's initial ruling. *C D Barnes Assocs v Star Heaven LLC*, 300 Mich App 389, 425; 834 NW2d 878 (2013).

Specifically, plaintiff contends that the trial court erred by summarily denying his request for reconsideration without analyzing whether plaintiff exercised reasonable diligence in securing evidence of a no-fault policy. The accident occurred on April 16, 2018, and plaintiff sought medical treatment in June 2018. Plaintiff's complaint was filed on October 9, 2018. Plaintiff's deposition was taken on April 5, 2019, during which plaintiff asserted that any insurance information was "in the truck." On May 21, 2019, defendant moved for summary disposition of the claim for noneconomic damages for the failure to secure a Michigan no-fault policy. In light of the above, the trial court did not err in denying the motion for reconsideration. First, the information regarding insurance was available at the time the motion for summary disposition was filed, but it was not presented and argued after defendant moved for summary disposition. In light of the procedural history and information availability, plaintiff cannot demonstrate that the trial court improperly failed to exercise discretion and, in turn, grant the motion for reconsideration.

More importantly, with the motion for reconsideration, plaintiff did not attach a Michigan no-fault policy of insurance. Rather, Auto-Owners as the insurance company for Three Star wrote plaintiff's counsel and concluded that insurance coverage was not available through Three Star. Rather, the representative for Auto-Owners opined that plaintiff would have to pursue any automotive insurance benefits from his personal vehicle insurer, Nationwide. Thus, to date,

plaintiff has never presented a Michigan no-fault policy of insurance secured by himself or his employer that would afford him coverage.

Furthermore, this accident did not involve a car. Rather, the accident involved two tractor-trailers. The insurance coverage varies for the “rig” versus the trailer. “Generally, a ‘bobtail’ policy is a policy that insures the tractor and driver of a rig when it is operated without cargo or a trailer.” *Integral Ins Co v Maersk Container Serv Co, Inc*, 206 Mich App 325, 331; 520 NW2d 656 (1994); see also *Besic v Citizens Ins Co*, 290 Mich App 19, 22 n 1; 800 NW2d 93 (2010). “The tractor and trailer are two separate motor vehicles within the meaning of the no-fault act.” *Jasinski v Nat’l Indemnity Ins Co*, 151 Mich App 812, 819; 391 NW2d 500 (1986). Because plaintiff did not present the insurance policies that covered the respective tractor, trailer, and his personal vehicles to allow for an analysis of the availability of Michigan no-fault coverage, plaintiff failed to demonstrate entitlement to relief on reconsideration.

Affirmed.

/s/ Jane E. Markey  
/s/ Kirsten Frank Kelly  
/s/ Jonathan Tukel