STATE OF MICHIGAN

COURT OF APPEALS

KELLI J. ESSEX,

Plaintiff-Appellant,

v

ASHLYN C. KOTH and AMANDA C. KOTH,

Defendants-Appellees.

UNPUBLISHED
September 10, 2020

No. 351169
Bay Circuit Court
LC No. 18-003752-NI

Before: JANSEN, P.J., and K. F. KELLY and CAMERON, JJ.

PER CURIAM.

In this third-party no-fault action, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Kelli J. Essex, was injured in a motor vehicle collision on July 28, 2016 in Bay City, Michigan. Plaintiff was a passenger in a pickup truck driven by Jason Richnak, plaintiff's now partner, when Richnak's pickup truck was t-boned on the passenger side by a vehicle driven by defendant, Ashlyn Koth. Ashlyn had failed to stop at a blinking red light at an intersection. The vehicle driven by Ashlyn was owned by Ashlyn's mother, Amanda Koth.

Plaintiff filed her complaint on November 26, 2018. Plaintiff alleged that Ashlyn breached her duty to plaintiff to "drive carefully, reasonably, and in accordance with the law and rules of the common law" by failing to maintain a proper lookout for other vehicles, driving in a careless or reckless manner, failing to maintain control over her vehicle, driving at an excessive speed, failing to stop within an assured clear distance, failing to obey traffic control signals, and failing to timely brake. Plaintiff alleged that Amanda breached a duty of care owed to plaintiff by negligently entrusting the vehicle, which she owned, to Ashlyn. Plaintiff alleged she sustained "severe, permanent, and painful injuries that resulted in serious impairments of body function and/or serious, permanent disfigurement," and sought noneconomic damages and wage-loss in excess of the statutory limitations.

Following oral and written discovery, defendants moved for summary disposition under MCR 2.116(C)(10), and argued that plaintiff was unable to show she suffered an objectively manifested impairment of a body function, and that impairment affected her ability to lead her normal life. Although plaintiff claimed to suffer from migraine headaches and neck and shoulder pain as a result of the accident, defendants noted that plaintiff admitted to suffering from headaches and shoulder pain before the accident, and that after the accident no material diagnostic testing supported her claimed injuries.

In response, plaintiff maintained she had suffered an objectively manifested impairment, i.e., her continued migraine headaches, and that her headaches continue to affect her ability to lead her daily life. Plaintiff specifically argued that she still required injections and extensive and regular treatment for her headaches, and that she was off of work for over one year because of issues with memory, balance, headaches and related nausea. She further argued that she continues to have difficulty with problem solving, she cannot ride a bike because of the head movement, she cannot take her children to ride amusement rides at the fair because it makes her sick and triggers her headaches, and she can only walk–not trot or run–her horses because too much jostling triggers a headache. Ultimately, the trial court granted defendants'' motion for summary disposition, finding: "I have sympathy for your client, and I understand her predicament here, but I think the law requires these objective findings, and I just don't believe that we have them in this case, and so I'll grant the motion."

Plaintiff filed a timely motion for reconsideration, and again argued that she had suffered an objectively manifested impairment–her headaches–and that the trial court had erred by ignoring headaches that were "objectively documented via medical testing." Plaintiff also raised a new issue, that the trial judge should have disqualified himself under MCR 2.003(C)(b) because he and his wife are friends on Facebook with one of the defendants. As evidence, plaintiff attached an internet screenshot showing that the trial judge and his wife are both Facebook friends with defendant Amanda Koth. Plaintiff argued that because of the trial judge's friendship with one of the defendants, there is "an appearance of impropriety that has eroded the confidence in the integrity and impartiality of the judiciary with respect to this case."

The trial court denied plaintiff's motion for reconsideration. In an order denying plaintiff's motion, the trial court explained:

> In Plaintiff's Motion for Reconsideration, Plaintiff asserts the Trial Judge failed to disclose that he and his wife are Facebook friends with one of the defendants, Amanda Koth. Further, Plaintiff asserts that the Trial Judge should have recused himself because of the undisclosed friendship. The Court disagrees with this assertion. Being Facebook friends with someone is tantamount to saying hello to someone on the street, and as such, does not rise to the level of disqualification under MCR 2.003.
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> After careful review of Plaintiff's Motion for Reconsideration, this court has determined that Plaintiff's Motion does not satisfy the standard set forth in MCR 2.119(F)(3). Specifically, Plaintiff's Motion for Reconsideration presents issues that do not "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."

This appeal followed.

II. OBJECTIVELY MANIFESTED IMPAIRMENT

Plaintiff first argues on appeal that the trial court erred in finding that she had failed to present sufficient evidence of an objectively manifested impairment, and thereby granted summary disposition in favor of defendants. We disagree.

This Court:

> review[s] a trial court's decision regarding a motion for summary disposition de novo. *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich 1, 5-6, 890 NW2d 344 (2016). A motion for summary disposition brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint," *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 768, 887 NW2d 635 (2016), and should be granted when "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).
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> "The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693, 818 NW2d 410 (2012). The court must consider all of the admissible evidence in a light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29, 772 NW2d 801 (2009). However, the party opposing summary disposition under MCR 2.116(C)(10) "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." *Oliver v Smith*, 269 Mich App 560, 564, 715 NW2d 314 (2006) (quotation marks and citation omitted). "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." *Bahri v IDS Prop Cas Ins Co*., 308 Mich App 420, 423, 864 NW2d 609 (2014) (quotation marks and citation omitted). [*Lockwood v Twp of Ellington*, 323 Mich App 392, 400-401; 917 NW2d 413 (2018).]

"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 statutorily 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). Whether an injured person has suffered a serious impairment is a question of law for the trial court to decide if there is no factual dispute surrounding the nature and extent of that person's injuries, or any existing factual dispute is immaterial to determining

whether the aforementioned standard was met. MCL 500.3135(2)(a); *McCormick v Carrier*, 487 Mich 180, 190-191; 795 NW2d 517 (2010).

There are three requirements to establish a serious impairment of a 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. An impairment relates to the impact of the damage caused by an injury, and when evaluating whether an impairment exists, the focus should not be on the injury itself, but rather how the injuries have affected a particular body function. *Id*. It is plaintiff's burden to introduce evidence of a physical basis for his or her subjective complaints of pain and suffering; this is usually done through medical documentation. *Id*. at 198.

The significance of an important body function will vary from person to person, and therefore the inquiry into the third requirement–how the impairment has affected the injured party's ability to live his or her normal life–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*. at 199. In *McCormick*, our Supreme Court articulated that 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. "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*. A plaintiff's ability to lead their normal life need not be destroyed, only affected. *Id*. Further, there is no temporal requirement on the length of the impact of the plaintiff's ability to lead a normal life." *Id*. at 203.

The record evidence in this case established that immediately following the accident, plaintiff went home to rest. Richnak left plaintiff to sleep for several hours, and upon returning found plaintiff difficult to wake. Plaintiff complained of head pain, and Richnak transported plaintiff to Mid-Michigan Medical Center. Plaintiff underwent CT scans of her head and cervical spine and x-ray imaging of her hip and lumbar spine. All scans came back showing normal results and plaintiff was discharged that night. Two days later, plaintiff went to the McLaren Bay Region Emergency Department complaining of headache, nausea, and vomiting following a motor vehicle accident. Plaintiff reported that her symptoms were exacerbated by light and noise, and that she had previously suffered from migraine headaches. Plaintiff was diagnosed as having "[p]ostconcussive symptoms following MVA" and was discharged.

Plaintiff followed up with her primary care physicians at Tuscola Physicians, and was referred for an MRI and to physical therapy for continuing pain in her right shoulder and in her neck, and to a neurologist for her continuing chronic headaches. Plaintiff did undergo an MRI on her cervical spine, but that MRI did not reveal any injury. Plaintiff began treating with Auburn Physical Therapy in September 2016. Roughly one month into physical therapy, plaintiff reported that she "no longer has constant headaches and has actually been able to go a few days without." Indeed, plaintiff reported "a 50% improvement since starting PT." By November 2016, plaintiff reported a 90% improvement, indicated that her pain varies from day to day and from activity to

activity, and reported that her headaches "are less but she does still have them." Plaintiff was discharged from physical therapy in November 2016, having achieved most of her goals and having "reached maximum benefit with skilled services[.]"

Plaintiff began treating with Dr. Khalil M. A. Nasrallah, M.D., at McLaren Bay Regional Neurosciences in May 2017 because of continued migraine headaches. Plaintiff reported nausea, headaches, dizziness, lapse of memory, falls, and excessive worrying as a result of a concussion received in a motor vehicle accident. Dr. Nasrallah began treating plaintiff's migraine headaches with Botox injections after failing to control her headaches with several migraine prophylactic medications. In addition to Botox treatments, plaintiff was prescribed Tylenol 3 for breakthrough headaches. Plaintiff reported an 80% improvement, and indicated that her headaches do not last as long as before. However, after a year and a half of receiving Botox injections, plaintiff reported their effectiveness was decreasing. Dr. Nasrallah discussed increasing plaintiff's dosage, and possibly trying a new, recently FDA-approved self-injection medication at home.

It is plaintiff's position, both in the trial court and here on appeal, that her headaches, neck pain, and right shoulder pain constitute an objectively manifested impairment, and that this impairment has affected her ability to lead her normal life. However, we cannot agree. What plaintiff's argument fails to consider is that before the accident at issue, plaintiff sought treatment for upper extremity pain–specifically pain in her right shoulder and thoracic spine–as early as 2013. In February of 2016, before the accident, plaintiff was referred to physical therapy for right shoulder pain by her primary care physicians. Additionally, medical records show that plaintiff admitted to suffering from migraine headaches before the accident.

The record reflects that after the accident, plaintiff was diagnosed with having post-concussive symptoms after a motor vehicle accident, and she did undergo physical therapy for shoulder and neck pain. Plaintiff also sought neurological treatment for migraine headaches and was treated with Botox injections and Tylenol 3 for breakthrough headaches. However, the critical flaw in plaintiff's argument is that she was not asymptomatic before the accident. Indeed, she suffered from the exact same complaints, and was even referred to physical therapy for shoulder pain months before the accident. In response to defendants' motion for summary disposition, plaintiff failed to present any evidence that the accident exacerbated or worsened any of her preexisting physical symptoms, or that she would not have undergone the same physical therapy or neurological treatment but for the accident. None of plaintiff's diagnostic imaging done after the accident showed the existence of physical injury, and moreover none of her treating physicians averred that her subjective complaints of pain were the manifestation of any injury incurred in or exacerbated by the accident. Even when viewing the evidence in a light most favorable to plaintiff as the nonmoving party, we conclude that plaintiff has failed to produce evidence, which if believed by the finder of fact, could establish that plaintiff suffered a threshold injury as a result of the July 2016 accident. Thus, we conclude that the trial court made no error, as defendants were entitled to summary disposition as a matter of law.

III. JUDICIAL DISQUALIFICATION

Plaintiff also argues on appeal that the trial judge should have disclosed a relationship between one of the defendants and himself, and then recused himself from the case. Plaintiff argued that the trial judge should have recused himself under MCR 2.003(C)(b) for the first time

in her motion for reconsideration. Moreover, plaintiff never filed a separate motion for disqualification accompanied by the consummate affidavit–she only included it as a plea for reconsideration of the trial court's grant of summary disposition in favor of defendants. MCR 2.003(D)(1), (2); *Cain v Dep't of Corrections*, 451 Mich 470, 494; 548 NW2d 210 (1996).

"Where an issue is first presented in a motion for reconsideration, it is not properly preserved" for appellate review. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Thus, where plaintiff failed to preserve this issue in the trial court, this Court reviews this issue only for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Where this issue was raised for the first time in plaintiff's motion for reconsideration, and thus it is unpreserved, this Court could decline to consider this argument now on appeal. *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 561; 912 NW2d 593 (2018). In *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008), our Supreme Court explained:

> Michigan generally follows the "raise or waive" rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal.
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> The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [Footnotes omitted.]

By failing to seek disqualification of the trial court judge prior to her motion for reconsideration, plaintiff has waived this issue.

Moreover, MCR 2.003(D)(1)(a) requires a motion for disqualification be "filed within 14 days of the discovery of the grounds for disqualification[.]" It is unclear when plaintiff discovered the potential friendship between the trial court judge and the defendant, however plaintiff never filed an actual motion for disqualification. Rather, she argued that the trial court judge was Facebook friends with a defendant and therefore his failure to recuse himself from this case was a basis to reconsider the trial court's grant of summary disposition in favor of defendants. Plaintiff also failed to file an affidavit "inclu[ing] all grounds for disqualification that are known at the time the motion is filed" as is required under MCR 2.003(D)(2). Even though plaintiff may have raised the relationship between the trial court judge and a defendant within 14 days of plaintiff's discovery of that relationship, her request that the trial court judge be disqualified was deficient

under MCR 2.003(D)(2). Accordingly, the trial court did not plainly err by denying plaintiff's request that the trial court judge recuse himself under MCR 2.003.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Thomas C. Cameron