

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTINA VINCENT,

Plaintiff-Appellant,

v

HARRY WITZ,

Defendant-Appellee,

and

TAMARA OWENS and STATE FARM
MUTUAL AUTO INSURANCE COMPANY,

Defendants.

UNPUBLISHED
November 22, 2005

No. 263075
Wayne Circuit Court
LC No. 03-340280-NO

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of her third-party no-fault insurance action. We affirm.

On December 11, 2000, plaintiff's vehicle was rear-ended by defendant Harry Witz while she was coming to a stop at a red light.¹ On December 9, 2003, plaintiff filed a third-party no-fault insurance action and, almost a year later, defendant filed his motion for summary disposition. Defendant argued that dismissal was required under MCL 500.3135 because there was no genuine issue of material fact that plaintiff's injuries did not constitute a serious impairment of an important body function that affected her general ability to lead her normal life. See MCR 2.116(C)(10). In support of his motion, defendant set forth plaintiff's medical treatment as including (1) an emergency room visit on the day of the accident for mild neck and knee pain for which x-rays were found to be normal, (2) a September 15, 2001, MRI of her cervical spine for pain and headaches which was found to be normal, and (3) some appointments

¹ Defendant Tamara Owens owned the vehicle but claims against her were subsequently dismissed by stipulation; therefore, we refer to Witz as "defendant."

with her physician, Dr. Randy Kay, at which she complained of neck and back pain that were reported as “better” by December 21, 2000. Defendant attached excerpts from plaintiff’s deposition, as well as some of her medical records in support of his motion. Defendant also submitted reports generated from two independent medical examinations that occurred in September of 2004, which failed to reveal evidence of impairment associated with the accident. Defendant also argued that any such impairment plaintiff claimed to have experienced did not affect her ability to work and perform normal activities of daily living.

Plaintiff’s counsel failed to file a timely response to defendant’s motion but appeared at oral argument and argued that plaintiff sustained injuries to her head, neck and low back. Plaintiff’s counsel indicated that an EMG was positive for C5-C6 radiculopathy and that plaintiff had been noted to have muscle spasms and dizziness. Counsel also argued that plaintiff was off of work for two months following the accident and at various times after the accident. The trial court referenced the emergency room medical record diagnosis of acute cervical and knee sprains and the negative MRI conducted nine months after the accident, and concluded that plaintiff did not suffer a serious impairment of a body function. The case was dismissed and an order was entered accordingly.

Subsequently, plaintiff filed a motion for reconsideration and requested that the court clarify its order of dismissal as to whether it included plaintiff’s claim for economic damages, in addition to her claim for noneconomic damages. Plaintiff also requested reconsideration of the trial court’s conclusion that plaintiff did not suffer a serious impairment. Plaintiff attached as an exhibit a brief in opposition to defendant’s motion for summary disposition, as well as its attachments that included various medical records and an insurance adjuster’s log.

Plaintiff also filed a motion for relief from the order of dismissal in light of new evidence that she had ongoing physical disabilities and a poor prognosis for recovery as indicated in the affidavit of her neurologist, Dr. Haranath Policherla, with whom plaintiff began treating on August 9, 2004. Defendant responded to plaintiff’s motion for relief from the order of dismissal, arguing that plaintiff was merely presenting the same evidence that was rejected previously by the court. The trial court agreed, and denied plaintiff’s motion for relief from the order, affirming the dismissal.

On appeal, plaintiff first argues that the trial court improperly failed to rule as to her claim of economic damages filed pursuant to MCL 500.3135(3)(c). Although plaintiff requested clarification of the court’s order of dismissal in her motion for reconsideration and her counsel raised the issue during oral argument on her motion for relief from the order of dismissal, the trial court did not address the issue. Appellate consideration of an issue raised before the trial court but not specifically decided by the trial court is not precluded if the necessary facts are provided by the lower court record. *Peterman v State Dep’t of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994); *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 444; 695 NW2d 84 (2005). Because the necessary facts are provided by the record, we will address and resolve this issue.

Pursuant to MCL 500.3135(3)(c), plaintiff's complaint included a claim for economic loss in excess of the allowable expenses and work loss limits of her personal protection insurance benefits provided by MCL 500.3107. Review of the records submitted by plaintiff to the lower court fails to support her claim for any such economic loss. In fact, plaintiff had advised her insurance adjuster in January of 2002 that she was no longer seeking treatment and felt better. It appears that plaintiff began employment as a rehabilitation assistant in February of 2002. In April of 2002, plaintiff advised the insurance adjuster that she was feeling better. In August of 2003, she advised the adjuster of her job at the rehabilitation facility and indicated that it required extensive lifting. In August of 2003, she returned to Dr. Kay complaining of headaches. In June of 2004, she returned to Dr. Kay complaining of dizziness. In August of 2004, she saw a neurologist, Dr. Haranath Policherla, who diagnosed C5-C6 radiculopathy. The record evidence indicates that plaintiff was able to maintain almost consistent full-time employment, as well as provide care and assistance to her developmentally disabled sister and her disabled father. In sum, plaintiff failed to produce evidence showing a material dispute on the issue whether she was entitled to allowable expenses and work loss benefits in excess of those provided by MCL 500.3107.

Next, plaintiff argues that her claim for noneconomic loss pursuant to MCL 500.3135 was improperly dismissed because she suffered an objectively manifested impairment of an important body function. After de novo review, considering the documentary evidence in the light most favorable to plaintiff, we disagree. See *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 461; 646 NW2d 455 (2002).

A "serious impairment of body function" is "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). Here, the trial court held that plaintiff did not suffer a serious impairment of a body function. We agree. The record evidence does not tend to establish that plaintiff suffered an objectively manifested impairment of an important body function. After seeking some initial treatment after the accident, plaintiff's treatment course was very sporadic. In fact, her insurance claim file was closed in May of 2001 but, in August 2001, plaintiff contacted the insurance adjuster and complained of headaches, as well as neck and back pain. She sought some treatment from Dr. Kay and an MRI of her neck was completed in September of 2001 which was negative.

In January of 2002, plaintiff told the insurance adjuster that she was no longer treating. In February of 2002, she started a job as a rehabilitation assistant which required extensive lifting. In April of 2002, she indicated to the insurance adjuster that she felt better and that her treatment was complete. In August of 2002, the insurance claim file was closed again. Dr. Kay's medical records support plaintiff's assertions of good health, illustrating that plaintiff did not seek treatment from January 30, 2002, until October 9, 2002, and then not again for alleged accident-related injuries until August 12, 2003. In August of 2003, plaintiff contacted her insurer and complained of having headaches. According to Dr. Kay's records, she also began experiencing anxiety attacks in August which were not associated with the accident. In June of 2004, plaintiff first complained of dizziness to Dr. Kay. Plaintiff did not begin treatment with a neurologist until August of 2004, almost four years after the accident, at which time he rendered a C5-C6 radiculopathy diagnosis.

In light of the evidence of record, viewed in a light most favorable to plaintiff, we conclude that plaintiff failed to establish a genuine issue of material fact as to whether she sustained “an objectively manifested impairment of an important body function” that was proximately caused by the accident. See MCL 500.3135(7); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Therefore, the matter was properly dismissed.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood