STATE OF MICHIGAN

COURT OF APPEALS

EKATERINI THOMAS, Plaintiff-Appellant,	UNPUBLISHED March 20, 2008
v	No. 276984 Macomb Circuit Court
ELIZABETH SCHNEIDER, Defendant-Appellee.	LC No. 05-004101-NI

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argues that the trial court erred by ruling plaintiff's claim did not satisfy the no-fault act threshold, MCL 500.3135, because the evidence did not establish that she suffered a serious impairment of a body function. We affirm.

I. Standard of Review

We review a trial court's decision to grant or deny a motion for summary disposition de novo, viewing the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277-278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that 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).

II. Analysis

The trial court granted defendant's motion for summary disposition based on its conclusion that although plaintiff may have suffered an objectively manifested impairment of an important body function, she failed to establish that the impairment affected her general ability to lead her normal life. Plaintiff argues that the trial court erred because she presented evidence establishing a genuine issue of material fact regarding whether her injuries affected her general ability to live her normal life. We disagree.

Under the no fault act, MCL 500.3101 *et seq.*, a person is "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). The act defines 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." MCL 500.3135(7). To satisfy the no-fault tort threshold at issue in this case, a person injured in an automobile accident must present proof of three statutory components: (1) an objectively manifested impairment, (2) of an important body function, and (3) that affects the person's general ability to lead his or her normal life. *Kreiner*, *supra* at 121. An objectively manifested impairment is one that is "medically identifiable injury or condition that has a physical basis." *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). Qualified medical personnel must be able to objectively verify the injury either visually or through medical testing. *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006).

Whether an injured person has suffered a serious impairment of body function is a question of law for the court if either (1) there is no factual dispute concerning the nature and extent of the person's injuries, or (2) there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a); *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005). Here, the parties do not dispute that plaintiff suffers from a medically identifiable injury or condition of her cervical spine, a body part serving important functions. See *Shaw v Martin*, 155 Mich App 89, 96; 399 NW2d 450 (1986) (holding the movement of one's back is an important body function). But the parties dispute (1) whether the automobile accident at issue caused the condition of plaintiff's cervical spine, and (2) whether the condition causes the pain in plaintiff's neck and right shoulder and arm that she complains about. We conclude the trial court properly analyzed defendant's motion on the basis that even assuming plaintiff could prove the accident at issue caused or aggravated a preexisting objectively verified condition that also caused plaintiff's alleged debilitating symptoms of pain in her neck and right arm, the course and trajectory of the plaintiff's normal life has not been affected. *Kreiner, supra* at 131.

Once a court determines that MCL 500.3135(2)(a) permits it to address the issue of whether the injured person has satisfied the no-fault threshold on a motion for summary disposition, the *Kreiner* Court provides "a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not." *Kreiner*, *supra* at 131. To determine if an individual has suffered a "serious impairment of body function," it must be determined how the impairment has affected the entire course of a plaintiff's normal life. *Id*. Although some of the impairment may interrupt some aspects of a plaintiff's entire normal life, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his normal life has not been affected, so he does not meet the "serious impairment of body function" threshold. *Id*.

In addressing the specific question of whether an impairment affects a person's general ability to lead his or her normal life, the court must first determine subjectively what constitutes a "normal" life on the basis of the injured person's own life. *Kreiner*, supra at 121, n 7. The court must then engage in "a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." *Id*. at 132-133. The court next must engage in "an objective analysis regarding

whether any difference between the plaintiff's pre-and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id*. at 133.

The *Kreiner* Court listed five objective factors to assist trial courts in evaluating whether an impairment has affected a plaintiff's "general ability" to lead or conduct the course of his normal life: "(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." *Id*. at 133. This is a nonexhaustive list of objective factors and the trial court must consider the totality of the circumstances. *Id*. at 133-134. The ultimate question is whether a plaintiff is generally able, "for the most part," to lead his or her normal life. *Id*. at 130, 134. Thus, just "'*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 133. Further, self-imposed limitations based on real or perceived pain are typically insufficient to create a serious impairment of a body function. *Id*. at 133, n17.

We conclude the trial court properly granted defendant summary disposition. The trial court thoroughly reviewed plaintiff's extensive medical history, deposition testimony, and other submitted evidence before it concluded plaintiff had failed to establish a genuine material question of fact existed that the accident at issue caused her to suffer an objectively manifested impairment of an important body function that affected her general ability to lead her normal life. MCL 500.3135(1) & (7); *Kreiner, supra* 131-134. Specifically, the trial court properly determined the dispute regarding the nature and extent of any injuries plaintiff sustained in the accident were not material to the determination of whether plaintiff had suffered a serious impairment of a body function. MCL 500.3135(2)(a)(ii). The evidence submitted to the trial court failed to show any substantial difference between plaintiff's pre- and post-accident life. Thus, plaintiff failed to present evidence that her general ability to lead her normal life was affected. As a result, plaintiff failed to create a genuine material question of fact for trial that she has a serious impairment of bodily function, and the trial court properly granted defendant summary disposition. *Nicke v Miller*, 477 Mich 954; 723 NW2d 908 (2006); *Kreiner*, *supra* at 136.

We find both parties arguments that the trial court erred in its analysis without merit. Plaintiff argues the trial court erroneously shifted the burden of proof on a motion for summary disposition, and defendant argues that the trial court erred by considering (and that this Court may not consider) the deposition testimony of doctors Swetech and Mazhari in reviewing the trial court's decision. Both "technical" arguments fail.

Doctors Mazhari and Swetech were deposed in plaintiff's action for personal injury protection (PIP) benefits against plaintiff's no-fault carrier, State Farm Insurance Company. Defendant argues their depositions may not be considered on a motion for summary disposition under MCR 2.116(C)(10) in this action because defendant did not have the opportunity to cross-exam the doctors. Thus, defendant argues, the doctors' depositions would be inadmissible against her at trial as former testimony MRE 804(b)(1). Defendant relies on MCR 2.116(G)(6), which provides: "Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) *shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion*." (Emphasis added).

Although some case law supports defendant's position,[1] it precedes our Supreme Court's decision in *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). The Court in *Maiden* opined, "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering *the substantively admissible evidence* actually proffered in opposition to the motion." *Id*. at 121 (emphasis added). Subsequently, the Court adopted MCR 2.116(G)(6) on October 3, 2000, which became effective January 1, 2001. 463 Mich clvi. The staff comment notes "that materials submitted in support of or opposition to a motion under MCR 2.116(C)(1)-(7) or (10) may only be considered to the extent that their content or substance would be admissible," citing *Maiden*, *supra*.

The plain text of MCR 2.116(G)(6) does not require that the "affidavits, depositions, admissions, and documentary evidence" submitted in support of a motion under MCR 2.116(C)(1)-(7) or (10) be admissible in evidence; rather, the rule merely requires that submitted material's "*content or substance* would be admissible as evidence." Although the depositions of doctors Mazhari and Swetech would not be admissible in evidence at trial against defendant, the *content or substance* of the doctors' testimony could be admitted in evidence against defendant either through the taking of a properly noticed deposition at which defendant is afforded the opportunity for cross-examination, or by presenting the doctors as witnesses at trial to testify regarding the content or substance of their prior depositions. See *Hosey v Berry*, unpublished opinion per curiam of the Court of Appeals issued April 6, 2006 (Docket No. 257709), 2006 Mich App Lexis 1072, *9-10.

In light of the plain text of MCR 2.116(G)(6), and our Supreme Court's declining to review the specific argument defendant raises here in *Hosey*, we find the trial court properly considered the depositions of doctors Mazhari and Swetech for the purpose of ruling on defendant's motion for summary disposition under MCR 2.116(C)(10) "to the extent that the content or substance would be admissible as evidence." Defendant presents no argument that either doctor would testify differently in this case from what they did in the case against State Farm. Consequently, defendant's argument regarding MCR 2.116(G)(6) fails.

Plaintiff argues that defendant as the moving party bore the burden of proving that plaintiff's general ability to lead her normal life was not affected by the accident and that the trial court erred by placing this burden on plaintiff. We find this argument without merit.

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her. [MCR 2.116(G)(4).]

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[1] See *Marlo Beauty Supply, Inc v Farmer's Ins*, 227 Mich App 309, 321; 575 NW2d 324 (1998).

The first sentence of subrule (G)(4) clearly places the initial burden of going forward on the moving party to "identify the issues as to which the moving party believes there is no genuine issue as to any material fact." In *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), quoting *Celotex v Catrett*, 477 US 317, 331; 106 S Ct 2548; 91 L Ed 2d 265 (1986), our Supreme Court noted two methods for the moving party to satisfy this initial burden: (1) the moving party could submit affirmative evidence negating an essential element of the nonmoving party's claim, or (2) the moving party could demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Here, defendant satisfied its initial burden in both ways. Defendant produced voluminous medical records documenting that plaintiff's pre- and post-accident life were not significantly different. Defendant also argued that the evidence plaintiff produced was insufficient to create a question fact for trial on this point. Once defendant satisfied its initial burden, the burden shifted back to plaintiff as the party having the burden of proof at trial. *Quinto*, *supra*; *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party 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. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id*. at 455 (citations omitted).

The only evidence plaintiff produced that refuted the voluminous medical records which documented plaintiff's pre- and post-accident life was not significantly different was her own deposition testimony. The trial court recognized plaintiff's testimony in this regard but found that "plaintiff's deposition statements are in contravention to medical reports submitted by the parties" and "her extensive medical reports refute these statements and demonstrate that she was frequently treated for various pain throughout her body." Plaintiff argues the trial court erred by not viewing her testimony in the light most favorable to her. We disagree.

It is hornbook law that on a motion for summary disposition asserting that no genuine issue of material fact exists, the trial court may not make credibility determinations. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004). Nevertheless, the trial court properly rejected plaintiff's testimony because a party or witness may not create a factual dispute by submitting an affidavit that contradicts his own sworn testimony or prior conduct. *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006); *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004). "Summary disposition cannot be avoided by conclusory assertions that are at odds either with prior sworn testimony of a party or, as here, actual historical conduct of a party." *Aetna Cas & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993). While this principle is normally applied to preclude the filing of a last minute affidavit to rebut prior deposition testimony, we find it also applies here, where plaintiff's conduct in seeking treatment and her statements for purposes of medical treatment clearly contradict her deposition testimony.

We also note that another panel of this Court declined to extend the principle that a party may not contradict itself unless the prior statements were made under oath or as part of legal proceedings. *Shelby Twp v Papesh*, 267 Mich App 92, 103; 704 NW2d 92 (2005). A close

examination of this case, however, reveals that it is factually distinguished from the instant case, and its opinion on this point is dicta. The issue in *Shelby Twp, supra*, was whether the defendants were engaged in commercial farming operations and thereby, insulated from the plaintiff's zoning regulations by the Right to Farm Act, MCL 286.471 *et seq*. Two years before the township initiated its zoning enforcement action, one of the defendants had written a letter in which she did not specifically state defendants' agricultural activities had a commercial basis. *Shelby Twp, supra* at 95. Noting that the letter was not a sworn statement, the Court declined "to extend the general rule against contradicting deposition testimony with an affidavit in the summary disposition context to prevent a party from contradicting statements that were not made under oath or as part of legal proceedings." *Id*. But the Court also observed, "the statements in the affidavits regarding a commercial aspect to the poultry operation do not directly contradict the statements in the letter." *Id*. Thus, the Court's comment limiting the principle at issue to statements "under oath or as part of legal proceedings" is dicta.

Moreover, the facts of the instant case are clearly distinguished from *Shelby Twp*. First, the probative value of the letter arose not from any positive statement but from a negative inference drawn from what was not stated in the letter. Here, plaintiff's medical records not only are positive evidence of plaintiff's having sought medical treatment, they also contain her own statements regarding her real or perceived pain and physical condition at the time the statements were made. Further, the conduct occurred and the statements were made during a relevant time frame. In addition, while the letter in *Shelby Twp* was at best a declaration against interest, plaintiff's medical records and her statements recorded in them are clearly admissible. See MRE 803(3); MRE 803(4); and MRE 803(6).

Furthermore, in this case, plaintiff could not recall her past medical treatment and effectively adopted her statements in the medical records. The following colloquy from plaintiff's deposition illustrates this point:

> *Q*. My question is this: Before February 2004 did you go to any doctor and complain of any pain in any particular part of your body, say in the two years before the accident?
>
> *A*. She should examine my records because I don't remember.
>
> *Q*. Ma'am, I'm going to ask you again, okay? See if you can remember this. Say, in the two years before the accident did you ever go to the doctor and complain of things like back pain or neck pain or shoulder pain or leg pain, any pain anywhere in your body?
>
> *A*. I don't remember. That's why she should look at the records.
>
> * * *
>
> *Q*. In the five years before the February 2004 accident; so from 1999 up until the February 2004 accident, did you ever have any complaints of pain to your low back?
>
> *A*. Why doesn't she look at my records to see?

Q. I'm asking you, Ma'am: Did you have any complaints of pain to your low back to any doctor in the five years before this accident?

A. I don't remember having any complaints.

Q. Okay.

A. Why don't you look at the records?

In addition, when plaintiff was confronted with specific, pertinent parts of her medical records, she repeatedly answered that she could not remember the incident or complaint.

For all of the foregoing reasons, the trial court properly determined that plaintiff was bound by her conduct and her statements recorded in her medical records. The trial court exhaustively reviewed plaintiff's extensive medical history, deposition testimony, and other submitted evidence. The evidence failed to establish a genuine material question of fact existed that the accident had impaired an important body function that affected plaintiff's general ability to lead her normal life. MCL 500.3135(1) & (7); *Kreiner*, *supra* at 131-134. The evidence submitted, especially plaintiff's medical records, failed to show any substantial difference between plaintiff's pre- and post-accident life. After the burden shifted back to plaintiff, MCR 2.116(G)(4); *Smith*, *supra* at 455, plaintiff failed to present evidence that her general ability to lead her normal life was affected. Consequently, plaintiff failed to create a genuine material question of fact for trial that she has a serious impairment of bodily function; consequently, the trial court properly granted summary disposition to defendant. *Nicke*, *supra*; *Kreiner*, *supra* at 136.

We affirm.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey