

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH WATCHOWSKI and MICHAEL
WATCHOWSKI,

UNPUBLISHED
March 28, 2006

Plaintiffs-Appellants,

v

MICHAEL J. CHARDER, JEFFRY J.
CHARDER, LAURA CHARDER, and GMAC
INSURANCE,

No. 258292
Genesee Circuit Court
LC No. 03-076820-NI

Defendants-Appellees.

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff¹ Deborah Watchowski appeals as of right from the trial court's order granting defendants' motion for summary disposition. We affirm.

Plaintiff was in her vehicle turning right into a farm to purchase raspberries when a vehicle driven by defendant Michael Charder struck her.² Plaintiff was taken to the hospital where she complained of neck pain, but x-rays did not reveal any deformity or subluxation. Plaintiff was told to report to her family doctor in four to five days. Approximately eleven months after the accident, plaintiff went to a doctor, complaining of neck pain from the accident, which was exacerbated following a ski trip. Further medical testing revealed a small disc herniation. However, plaintiff was treated conservatively with ibuprofen and physical therapy. Plaintiff only took five days off from work following the accident and received a promotion.³

¹ Plaintiff Michael Watchowski is Deborah's husband. Because his claims are derivative in nature, we will use the singular plaintiff to refer to Deborah only.

² The complaint alleged that the other named defendants were owners of the vehicle involved in the accident.

³ In her deposition, plaintiff testified that she received a promotion. In her affidavit filed with the response to the dispositive motion, plaintiff alleged that she did not receive a promotion. A party may not create an issue of fact by submitting an affidavit that contradicts prior testimony. *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972). Additionally, plaintiff's counsel did not

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Although plaintiff alleged that her neck and back pain impacted her general ability to live a normal life, plaintiff continued to take trips and engage in activities. However, the duration of her activities was limited because of her pain. The trial court granted defendants' motion for summary disposition.

Appellate review of a summary disposition decision is de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence when the motion is based on MCR 2.116(C)(10). *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 119, 123; 597 NW2d 817 (1999).

Tort liability for automobile accidents was abolished in favor of the no-fault act, 1972 PA 294, to provide a person injured in an auto accident with certain economic compensation from his own insurance company without regard to fault. *Kreiner v Fischer*, 471 Mich 109, 114; 683 NW2d 611 (2004). In exchange for the payment of economic loss benefits from one's own insurance company, an injured person's ability to sue the negligent owner or operator of a motor vehicle for bodily injury is limited. *Id.* at 115. A tort suit against a third party for noneconomic damages is only permitted when the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. *Id.*; See MCL 500.3135(1). A serious impairment of a body function is composed of "an objectively manifested impairment, of an important body function, and that affects the person's general ability to lead his or her normal life." *Kreiner, supra* at 121.

In *Kreiner*, the Supreme Court set forth the analysis to determine when noneconomic damages against a third party may be obtained for a serious impairment of a body function. If there is no factual dispute concerning the nature and extent of a person's injuries, the court may decide the issue as a matter of law. The court must determine if an important body function has been impaired. It is insufficient if an important body function has been injured, but not impaired. The impairment must be objectively manifested, subjective complaints will not succeed. Once it is concluded that an important body function is impaired and objectively manifested, the court must determine if the impairment affects the general ability to lead his normal life. Any effect, such as a de minimus effect, on one's life is insufficient. Rather, the court may examine the

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engage in any questioning during the deposition. In her affidavit, plaintiff explains some of the testimony given during her deposition, concluding that she is qualifying the testimony and correcting misrepresentations of the record by defense counsel. We need not decide whether these portions of the affidavit contradict the deposition testimony. The evidence, viewed in the light most favorable to plaintiff, failed to create a question of fact or preclude summary disposition in favor of defendants.

nature and extent of any impairment, the treatment required, the duration of the impairment, any residual impairment, and the prognosis for recovery. *Kreiner, supra* at 131-134.

The *Kreiner* plaintiff was a self-employed carpenter and construction worker who was injured in an automobile accident. Medical testing revealed a mild nerve irritation and degenerative disc disease. At various times during a near two-year period following the accident, the plaintiff consulted his doctor because of radiating pain from his back into his leg. The plaintiff's symptoms were aggravated by bending, sitting, or standing for lengthy periods of time. The plaintiff was treated with muscle relaxants, strengthening exercises to be performed at home, physical therapy, and a back support. He was told to refrain from excessive bending or twisting and to avoid lifting objects weighing over fifteen pounds. *Id.* at 124-126. The plaintiff was forced to limit his workday to six hours and stopped performing roofing work. He was unable to walk a half a mile without resting and could no longer hunt rabbits, but was able to hunt deer. *Id.* at 126.

The *Kreiner* Court concluded that the plaintiff's medically documented injuries to his back, hip, and leg constituted an impairment of an important body function that was objectively manifested. However, the Court concluded that his impairment "did not affect his overall or broad ability to conduct the course of his normal life. In fact, his life after the accident was not significantly different than it was before the accident." *Id.* at 137. The plaintiff continued in the same line of work. Although there were limitations on lifting heavy objects and a reduced workday, the plaintiff did not allege that he was precluded from performing his job. The Court noted that there were restrictions on his hunting hobby. However, "[a] negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Id.*

Similarly, in the present case, plaintiff identified an objective manifestation of an impairment of a body function. Plaintiff's neck and back injury were verified by medical testing, and her mobility was limited as a result. However, plaintiff failed to demonstrate a serious impairment of a body function because she continued to engage in activities that she enjoyed before the accident, although the duration of the activities were limited. Plaintiff only missed five days of work following the accident. She continued to take vacations, golf, and ski. However, she limited the activity time because of the accident. Like the *Kreiner* plaintiff, our plaintiff continued to drive and set up displays for work, but modified the amount of materials she carried because of the accident. She did not allege that she was precluded from performing her job functions. The treatment for the injury was conservative, and one medical opinion indicated that her condition should resolve and improve without surgery. Accordingly, applying the test delineated in *Kreiner, supra*,⁴ the trial court properly granted defendants' motion for summary disposition.

⁴ In her brief on appeal and in her affidavit, plaintiff alleges that one of her doctors has now recommended that she have back surgery. Plaintiff did not present deposition testimony or an affidavit from the medical doctor delineating this change in her medical condition. As previously stated, a genuine issue of material fact must be established by admissible
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Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

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documentary evidence, not hearsay. *Maiden, supra.*