

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

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JOSEPH RAYES and SANDY RAYES,

Plaintiffs-Appellants,

v

ALLMERICA FINANCIAL, CITIZENS  
INSURANCE COMPANY OF AMERICA, and  
GREAT WEST CASUALTY COMPANY,

Defendants-Appellees.

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UNPUBLISHED

May 23, 2006

No. 257683

Macomb Circuit Court

LC No. 2003-004592-CK

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JOSEPH RAYES and SANDY RAYES,

Plaintiffs-Appellants,

v

CELADON TRUCKING SERVICES, INC.,

Defendant-Appellee.

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No. 257735

Macomb Circuit Court

LC No. 1999-003820-NI

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right from the trial court's order granting summary disposition to defendants under MCR 2.116(C)(10) and dismissing plaintiffs' complaints based on the trial court's determination that plaintiff Joseph Rayes did not sustain a serious impairment of a body function under MCL 500.3135. We reverse and remand.

These consolidated cases arise out of Joseph Rayes' involvement in a motor vehicle accident in May 1998, while employed by I. T. Transport, Inc. In September 1999, plaintiffs Joseph Rayes (hereafter "Rayes") and his wife, Sandy Rayes, filed suit against defendant Celadon Trucking Services, Inc. (Celadon), alleging that Rayes sustained serious and permanent injuries, including nerve, muscle, and ligament injuries, when the semi-truck he was driving was struck from behind by a vehicle owned by Celadon. Sandy Rayes brought a claim for loss of consortium. In October 2003, plaintiffs filed a separate action against defendants Citizens Insurance Company of America (Citizens) and Great West Casualty Company (Great West),

alleging that they were liable under uninsured and underinsured bodily injury endorsements in their respective insurance policies.

In July 2004, Citizens moved for summary disposition under MCR 2.116(C)(10), alleging that Rayes' purported injuries did not constitute a serious impairment of body function under the no-fault act, MCL 500.3135. The trial court, relying on *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), granted Citizens' motion and closed the cases with respect to all defendants. Plaintiffs now appeal as of right. We hold that the trial court incorrectly ruled, as a matter of law, that plaintiffs' injuries could not satisfy the threshold for a serious impairment of body function.

In reviewing these appeals, we have not considered the portions of deposition evidence provided on appeal, which were not submitted to the trial court. Although we review a trial court's grant of summary disposition de novo, *Kreiner, supra* at 129, enlargement of the record on appeal is not permitted. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Under MCL 500.3135(1), a person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle if the injured person suffered a "serious impairment of body function." MCL 500.3135(7) defines "serious impairment" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

Plaintiffs argue that the trial court erred in holding that they failed to show that Rayes' general ability to lead his normal life was affected. Initially, however, although Citizens argues that we may affirm the trial court's decision on the alternative ground that Rayes did not suffer an objectively manifested impairment, and that any injuries were unrelated to the accident, we are required to view the evidence in a light most favorable to plaintiffs. *Corley, supra* at 278; *Moore v Cregeur*, 266 Mich App 515, 519; 702 NW2d 648 (2005). The deposition testimony of Rayes' physician, Dr. Glenn Krieger, indicates that Rayes sustained ligament damage to his spine, which was objectively manifested and related to problems caused by the accident. See *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002) (to be objectively manifested, there must be a medically identifiable injury or condition with a physical basis). Hence, while Citizens was free to argue alternative grounds for affirmance without filing a cross appeal, because we are required to view the evidence in a light most favorable to plaintiffs, we reject Citizens' argument that plaintiffs failed to show an objectively manifested spinal injury. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Thus, we must consider if an important body function was impaired and whether any impairment affects Rayes' general ability to lead his normal life. See *Kreiner, supra* at 131-132.

The ability to move one's back is an important body function. *Chumley v Chrysler Corp*, 156 Mich App 474, 481; 401 NW2d 879 (1986). But because there was a factual dispute whether Rayes had the spinal impairment indicated by Dr. Kreiger, summary disposition was appropriate only if this factual dispute was not material to a determination whether Rayes' general ability to lead his normal life was affected. See *Kreiner, supra* at 132 (a court may not decide, as a matter of law, whether a person suffered a serious impairment of body function if there are material factual disputes). Hence, the dispositive issue before us is whether the spinal impairment affected Rayes' general ability to lead his normal life.

A court must engage in a multifaceted inquiry to determine if an impairment affects a plaintiff's general ability to conduct the course of his or her normal life, "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." *Kreiner, supra* at 132-134. A nonexclusive list of objective factors that may assist a court in evaluating a plaintiff's general abilities are: "(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. The totality of the circumstances must be considered. *Id.* at 134.

In this case, Dr. Kreiger's testimony, if believed, established that Rayes' injuries primarily stemmed from ligament damage to his spine. His injuries resulted in pain, affected his movements, and worsened during the course of treatment. Rayes had years of testing and treatment that included physical therapy, pain medication, anti-inflammatory medication, medication to help him sleep, trigger point injections for muscle spasms, and prolotherapy injections to the damaged ligaments. Dr. Krieger opined that Rayes should be restricted permanently from labor intensive work, especially the type of work that he did at the time of the accident, to prevent the condition from worsening. He testified that Rayes should not do overhead work, repetitive movements such as pushing, pulling or bending, or lift more than ten pounds. He found that Rayes caused more stress on his spine after the accident by undertaking certain work.

Other evidence indicated that Rayes had a variety of different jobs before and after the accident, involving various levels of physical and administrative or supervisory responsibilities. At the time of the summary disposition proceeding in August 2004, Rayes worked as a foreman and general manager for a landscape construction company in which he also had an ownership interest.

Although Rayes' August 3, 2004, affidavit indicates that he had 18 years of pre-impairment work involving strenuous physical activities, his earlier deposition testimony indicated that his pre-impairment work included a managerial position before he was hired by I. T. Transport in 1994, and that the position at I. T. Transport itself included administrative responsibilities. A party may not contrive factual issues by asserting the contrary in an affidavit after damaging deposition testimony. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001). We also note that Rayes' affidavit largely contained conclusory language regarding the impact of the spinal impairment on his recreational activities with his family. An affidavit must set forth with particularity facts that would be admissible as evidence. *SSC Assocs Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Nonetheless, when the totality of the circumstances are considered, plaintiffs presented sufficient evidence to survive summary disposition under MCR 2.116(C)(10). The permanent and progressive nature of the spinal impairment, years of testing and treatment, and other circumstances support a reasonable inference that every aspect of Rayes' life was affected to some degree and will continue to be affected. Viewed in a light most favorable to plaintiffs, the evidence supports a conclusion that the normal course of Rayes' overall life was affected in a significant way. Cf. *McDaniels v Hemker*, 268 Mich App 269, 280-281; 707 NW2d 211 (2005). Because factual disputes concerning the nature and extent of Rayes' injuries are material in determining whether he suffered a serious impairment of body function, summary disposition was inappropriate.

Reversed and remanded. We do not retain jurisdiction.

/s/ Alton T. Davis

/s/ Mark J. Cavanagh