

STATE OF MICHIGAN
COURT OF APPEALS

KATRENIA L. BLACKBURN,

Plaintiff-Appellant,

V

HASTINGS AUTO PARTS, INC., and THOMAS
AARON CUPP,

Defendants-Appellees.

UNPUBLISHED

April 8, 2014

No. 310916

Oakland Circuit Court

LC No. 2011-117950-NI

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

In this action seeking no-fault benefits, plaintiff appeals by right the trial court's opinion and order granting summary disposition in favor of defendants, Hastings Auto Parts, Inc. and Thomas Aaron Cupp. We reverse.

On June 10, 2010, plaintiff occupied her employer's vehicle, and she was stopped at a red light. Defendant Cupp was behind her in the vehicle of his employer, defendant Hastings Auto Parts, Inc. The vehicle driven by defendant Cupp struck plaintiff's employer's vehicle. Plaintiff, a medical assistant, and her passenger, a doctor, continued to work after the accident. The next day, however, plaintiff went to the emergency room for treatment. Ultimately, plaintiff was prescribed multiple medications, physical therapy, and injections. Her doctor, Dr. Martin Kornblum, disabled her from employment. Defendants filed a motion for summary disposition. Defendants did dispute that plaintiff suffered an objectively manifested impairment of a body function and that the body function at issue was important. Rather, defendants only disputed whether the impairment affected plaintiff's general ability to lead her normal life. It was alleged that documentation from the state of Michigan evidencing plaintiff's employment as a daycare provider demonstrated that plaintiff's life had not been affected because she was now engaged in a profession far more demanding than her prior occupation, medical assistant. Further, defendants claimed that plaintiff admitted in her deposition that she was still able to perform household chores and exercise. On the contrary, plaintiff opposed the motion for summary disposition, asserting that there was a factual dispute regarding the impact on her general ability to lead a normal life. In her deposition, plaintiff testified that she was only able to perform light tasks and could no longer travel or perform yard work. She was permanently disabled from work as a medical assistant. Even if plaintiff did receive compensation for daycare services, a claim for work loss still existed because of the disparate salaries. Accordingly, plaintiff asserted

that summary disposition was improper. The trial court granted defendants' motion, holding in relevant part:

As for whether Plaintiff suffered a serious impairment, the Court compares the evidence of Plaintiff's life before and after the accident to determine whether her impairment has had an effect on her ability to lead her normal life . . . Before the accident, Plaintiff worked as a home health aid. Defendants claim that Plaintiff is still able to work and, in fact, has been working since the accident. As support for this claim, Defendants note medical examinations conducted for Plaintiff's employer's workers compensation carrier in August 2010 and September 2011. Defendants also note that in October 2010 the workers compensation carrier sought reimbursement of benefits paid to Plaintiff because she was still collecting a salary. Defendants also cite documents obtained from the State of Michigan showing that Plaintiff operates a day care facility and has received payments from the State for providing daycare. Although Plaintiff and her doctor Martin Kornblum testified that she is disabled from working, there is substantial evidence to the contrary showing that Plaintiff is still working. The Court thus rejects Plaintiff's claim that her injuries from the accident prevent her from working.

As for the effect of the impairment on her personal life, Plaintiff claims that she is able to drive, but cannot drive long distances. Plaintiff claims that she cannot physically play with her grandchildren as before the accident, and is unable to perform certain household tasks like mowing her lawn or pushing a vacuum. However, Plaintiff conceded that she is able to do light housekeeping such as washing dishes or dusting, Plaintiff also admitted that while she uses her gym membership less often than before the accident, she still goes to the gym.

In comparing Plaintiff's life before and after the accident, the Court cannot conclude that Plaintiff's impairment affected her general ability to lead her normal life. Plaintiff thus fails to demonstrate that she suffered a serious impairment of an important body function. Defendant's [sic] motion for summary disposition is granted and Plaintiff's claim is dismissed with prejudice.

From this decision, plaintiff appeals.

A trial court's ruling regarding a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). Initially, the moving party must 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). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id.* "The nonmoving party may not rely on mere allegations or denials in the pleadings." *Id.* The documentation offered in support of and in opposition to the dispositive motion must be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362, 371-372; 547 NW2d 314 (1996).

When an opposing party provides mere conclusions without supporting its position with underlying foundation, summary disposition in favor of the moving party is proper. See *Rose v National Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002).

When ruling on a motion for summary disposition, the court does not assess the credibility of the witnesses. *White v Taylor Distrib Co, Inc*, 482 Mich 136, 142-143; 753 NW2d 591 (2008). “Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial.” *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). When the truth of a material factual assertion made by a moving party is contingent on credibility, summary disposition should not be granted. *Id.* at 136. The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). It is the function of the trier of fact to resolve issues regarding credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003). Inconsistencies in statements given by witnesses cannot be ignored. *White*, 482 Mich at 142-143. When witnesses testify to diametrically opposed assertions of fact, the test of credibility must lie where the system has reposed it – with the trier of fact. *Kalamazoo Co Rd Comm’rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964). Application of disputed facts to the law present proper questions for the jury or trier of fact. *White*, 482 Mich at 143.

The purpose of the no-fault act is “to provide accident victims with assured, adequate, and prompt reparations at the lowest cost to both the individuals and the no-fault system.” *Williams v AAA Michigan*, 250 Mich App 249, 257; 646 NW2d 476 (2002). “Given the remedial nature of the no-fault act, courts must liberally construe its provisions in favor of the persons who are its intended beneficiaries.” *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004) (further citation omitted). Personal protection insurance benefits are also known as “first party” or “PIP” benefits. *McKelvie v Auto Club Ins Ass’n*, 459 Mich 42, 44 n 1; 586 NW2d 395 (1998). “Under the no-fault automobile insurance act, MCL 500.3101 *et seq.*, insurance companies are required to provide first-party insurance benefits referred to as personal protection insurance (PIP) benefits for certain expenses and losses. MCL 500.3107; MCL 500.3108. PIP benefits are payable for four general categories of expenses and losses: survivor’s loss, allowable expenses, work loss, and replacement services.” *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Work loss benefits compensate the injured person for income he would have received but for the accident. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 645, 648-649; 513 NW2d 799 (1994).

“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 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). The question whether an injured party has suffered a serious impairment presents a question of law for the court if there is no factual dispute surrounding the nature and extent of the person’s injuries or any factual dispute is immaterial to determining

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

The plain and unambiguous language of the statute contains three requirements that are necessary to establish a serious impairment of 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. The term “impairment” relates to the impact of damage that arises from an injury. *Id.* at 197. Therefore, when addressing “impairment,” the focus is not on the injuries, but on how the injuries affected a particular body function. *Id.* A plaintiff must introduce evidence demonstrating a physical basis for their subjective complaints of pain and suffering, and this showing generally, but not always, requires medical documentation. *Id.* at 198. Important body function refers to a function of significance and will vary depending on the person. *Id.* at 199. Therefore, the inquiry regarding an important body function 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.*

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. This is a subjective, fact specific inquiry to be resolved on a case-by-case basis. *Id.* “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 incident.” *Id.* The ability to lead a normal life only need be affected, not destroyed. *Id.* There is no temporal requirement on the length of the impact on the ability to lead a normal life. *Id.* at 203.

In the present case, the trial court erred by granting summary disposition. Plaintiff testified that she was disabled from working as a medical assistant. Her doctor provided an affidavit substantiating her contention. She was able to cook and clean before the accident. However, after the accident, she was unable to perform major cleaning or do laundry. For example, plaintiff could sweep a floor without carpeting, but could not push a vacuum. She was unable to shovel snow or perform yard work. Plaintiff needed a brace to walk. Although she admitted to attending the gym two to three times per month, the nature of her visits changed to using the steam room or water exercise. Plaintiff was no longer able to get on the ground and play with her three grandchildren, and her travel was limited because she could not take long trips. Accordingly, plaintiff testified that the accident caused an impairment that affected her general ability to lead her normal life.

On the contrary, defendants asserted that plaintiff was able to work because she filed documents with and was paid by the state for daycare services. Defendants contend that they are entitled to summary disposition because this conflict substantially weighs in their favor. However, as our Supreme Court instructs, the appellate courts do not assess credibility and do not ignore the inconsistencies in witness statements. *White*, 482 Mich at 142-143. Rather, inconsistent statements “create issues of material fact precluding summary disposition.” *Id.* at 142. Here, the trial court erred by weighing the evidence and concluding that there was

substantial contradictory evidence. Upon finding a contradiction involving credibility, the issue presented a question for the jury. *Id.* at 143.

Moreover, we note that defendants merely submitted a document that evidenced plaintiff's isolated payment of approximately \$200 for daycare services. Defendants conclude that plaintiff's daycare services were far more strenuous than her work as a medical assistant, and therefore, her general ability to lead a normal life was not impacted. This document lacks a foundation for such a conclusion. See *Rose*, 466 Mich at 470. The payment of funds record contains no foundation regarding the type of services for which plaintiff received payment. Although defendants conclude that plaintiff obtained a more onerous and demanding job, this determination is not found in the record. Defendants did not depose plaintiff regarding the activity involved in her daycare operation, whether she had assistance, or the degree of supervision required in light of the age of the children. Moreover, defendants did not submit additional evidence of payment for daycare services. It is unclear if plaintiff obtained a license only to conclude that she was physically unable to provide daycare services and ceased her operations. Accordingly, the trial court erred by granting defendants' motion for summary disposition in light of the conflicting evidence. *Lysogorski*, 256 Mich App at 299. Whether plaintiff can succeed at trial in light of the evidence presents an issue for the jury.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Elizabeth L. Gleicher

/s/ Karen M. Fort Hood