

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KELLY OGDEN-SCHUETTE,

Plaintiff,

vs.

CASE NO. 98-74393
HON. LAWRENCE P. ZATKOFF

NORMANDIN IRENCE, and
SGT 2000, INC., jointly and
severally,

Defendants.

OPINION AND ORDER

AT A SESSION of said Court, held in the
United States Courthouse, in the City of
Detroit, State of Michigan, on

DEC 2 1999

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on defendants' Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. Plaintiff has responded and defendant has replied. The Court finds that the facts and legal arguments are adequately presented in the parties' briefs and the decisional process would not be significantly aided by oral argument. Therefore, pursuant to E.D. Mich. Local R. 7.1(e)(2), it is hereby ORDERED that the motions be resolved on the briefs submitted. For the reasons set forth below, defendants' motion is denied.

II. BACKGROUND

This is a third party automobile negligence action arising from a motor vehicle accident occurring on January 2, 1997. Plaintiff is seeking non-economic losses pursuant to Michigan's No-Fault Insurance Act ("Act") for injuries sustained in that accident. Mich. Comp. Laws § 500.3135. Under the Act, plaintiff must show that she has suffered a serious impairment of a body function. The parties dispute the cause, nature, and extent of plaintiff's injuries. Further, defendant claims that plaintiff has not objectively manifested an impairment of an important body function that affects her general ability to lead a normal life.

On January 2, 1997, Kelly Ogden-Schuette (hereinafter "plaintiff"), was driving her car on the outskirts of Ann Arbor in Pittsfield Township. As she was crossing Michigan Avenue (US-12) with a green light, defendant Normandin Irenee (hereinafter "Irenee"), driving a semi truck and trailer owned by defendant SGT 2000, Inc. (hereinafter "SGT 2000"), ran a red light, running over plaintiff's car. Plaintiff's car was dragged over 300 yards down the road. Both defendants are residents of Canada. Plaintiff hit her head on the left side, and lost consciousness for approximately 5-10 minutes. She was taken to the University of Michigan Emergency room, where upon physical examination her vital signs were normal, as were her musculoskeletal and neurologic exams. The plaintiff was then discharged home in good condition without requiring any treatment. Plaintiff returned to the emergency room three days later complaining of nausea, vomiting, and dizziness. At that time a CT scan of the head showed a small contusion in her brain that resulted in no treatment. On January 24, 1997, plaintiff returned to University Health Services and reported feeling better, but that she still experienced nausea, trouble with perception, and difficulty processing information. Again, she was discharged home without requiring any treatment. However, an

appointment with a neurologist was scheduled on an outpatient basis.

On January 27, 1997, plaintiff saw neurologist Dr. Sarah Nath from the University of Michigan Neurology Clinic. Dr. Nath's physical examination of plaintiff was normal as was the neurologic exam. Dr. Nath stated that the patient presented with a "constellation of symptoms, which are commonly seen in post concussive syndrome, and almost always resolve themselves within months of the head injury." It is important to note that plaintiff suffered and continues to suffer from depression, an illness for which she had been taking medication (Prozac). Plaintiff argues that her depression has worsened since the accident and has contributed to the stagnation of her symptoms.

Dr. Nath arranged for plaintiff to follow up in two to three weeks. Plaintiff did not return for the scheduled appointment as instructed. Plaintiff asserts that the reason for her missed appointments (she also missed a scheduled appointment with her primary care physician) was because her symptoms had not worsened. However, plaintiff did seek treatment from Dr. Nath on April 14, 1997. Dr. Nath's April exam reflected that plaintiff reported an overall improvement and that her exam "remains normal, as it was in January." Then, due to a persistence of symptoms, plaintiff went to the University of Michigan Neuropsychology Division for neuropsychological testing.

On May 13, 1997, plaintiff saw neuropsychologist Dr. Kenneth Adams for testing. Dr. Adams stated that the testing is designed to assess general intellectual achievement and neuropsychological functioning. According to Dr. Adams, the results of the tests showed that plaintiff suffered from a host of somatic problems as well as anxiety and depression. He determined that the plaintiff's ailments were the result of traumatic brain injury, received as a consequence of

the auto accident, and due to some significant psychological issues and problems.

Plaintiff did not return to Dr. Nath until May 14, 1998. At that time, Dr. Nath noted that plaintiff had undergone neuropsychological testing, and summarized that plaintiff had normal cognitive function but had significant difficulty with coping skills that were likely exacerbated by the motor vehicle accident. An EMG was also ordered to determine if plaintiff sustained any nerve dysfunction. The EMG test was normal. Therefore, Dr. Nath urged plaintiff to seek counseling. Plaintiff scheduled to follow up with Dr. Nath in one month's time. However, Dr. Nath subsequently left the University of Michigan so plaintiff saw Dr. Kirk Levy instead.

On October 5, 1998, plaintiff saw Dr. Levy. He conducted an examination, which turned up normal, and also noted the normal EMG and nerve conduction studies. Plaintiff did not seek any further neurological or neuropsychological testing. It is important to note that plaintiff has sought chiropractic care, which began approximately one year and five months after the accident on May 15, 1998. According to plaintiff, the chiropractor provides adjustments and massages.

As a result of the accident, plaintiff alleges that she suffered a traumatic brain injury, which has resulted in various and ongoing symptoms, including, post-concussive syndrome, severe headaches, nausea, vomiting, dizziness, difficulties with balance and coordination, difficulties with concentration and focus, short term memory impairment, numbness and tingling in her hands and feet, problems with cognition and with thinking in sequences, as well as a host of others. Plaintiff claims that as a result of the accident and injury she has suffered a marked decrease in her overall cognitive ability that constitutes a serious impairment of a body function.

Plaintiff specifically cites to neuropsychiatric testing with Dr. Renee Lajiness-O'Neill. The first test was administered in 1997. The results of that test revealed that plaintiff's full scale IQ was

116 (Verbal scale of 119 and Performance scale of 109). Also, a Wide Range Achievement Test (WRAT-3) was administered, which is a measure of academic screening. That test showed that plaintiff displayed high average reading (word recognition/sight reading) with a standard score (SS) of 106, in spelling an SS of 118 and in arithmetic an SS of 109. The second test, administered in September of 1999, showed a marked improvement in plaintiff's abilities. Her full scale IQ increased to a 135 (Verbal scale of 145 and Performance scale of 114). The second WRAT-3 test also showed a marked improvement, with an SS of 106 for word recognition/sight reading, an SS of 123 for spelling and an SS of 124 for arithmetic.

Dr. Lajiness-O'Neill did note that plaintiff's processing speed was "well below what would be expected given the patient's intellectual potential." Additionally, the Dr. pointed out that plaintiff's symptoms "may result from the neuro-behavioral sequelae that are frequently observed in TBI (traumatic brain injury)." Dr. Lajiness-O'Neill also noted, in both reports, that the plaintiff's pre-injury methods of coping clearly appeared to be negatively impacting plaintiff's adjustment following the injury. Both reports recommended that plaintiff continue psychotherapy to assist with the adjustment issues. Furthermore, plaintiff's own therapist, Jane Hassinger, found that the "tremendous residual fright and trauma [of the accident] has contributed to the onset of depression."

III. STANDARD OF REVIEW

Summary judgment is appropriate only where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511 (1986) (citations omitted). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in light most favorable to the non-moving party. Id. at 2510.

A moving party who does not have the burden of proof at trial may properly support a motion for summary judgment by showing the court that there is no evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). If the motion is so supported, the party opposing the motion must then demonstrate with "concrete evidence" that there is a genuine issue of material for trial. Id.; Frank v. D'Ambrosi, 4 F.3d 1378, 1384 (6th Cir. 1993). Although the nonmoving party's evidence in opposition to summary judgment need not be of the sort admissible at trial, he must employ proof other than his pleadings and own affidavits to establish the existence of specific triable facts. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Ashbrook v. Block, 917 F.2d 918, 921 (6th Cir. 1990). The court must draw all inferences in a light most favorable to the nonmoving party, but the court may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Agristor Financial Corp. v. Van Sickle, 967 F.2d 233, 236 (6th Cir. 1992) (quoting Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

IV. ANALYSIS

Defendants argue that plaintiff's injuries were pre-existing conditions that were not aggravated by the automobile accident. Defendants also argue that even if the court finds that injuries were aggravated by the automobile accident, as a matter of law, plaintiff's injuries do not constitute serious impairment of body functions pursuant to Michigan's No-Fault Insurance Act, Mich. Comp. Laws § 500.3135.

M.C.L. § 500.3135(1)(a) provides that "a person remains subject to tort liability for non-economic 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." Further, the Act provides that:

The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

- (i) There is no factual dispute concerning the nature and extent of the person's injuries.
- (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function

In considering whether the statutory threshold injury requirement has been met to recover non-economic damages in a Michigan tort action, the plaintiff must establish both that a body function was impaired due to the collision with defendant and that the impairment was serious.

DiFranco v. Pickard, 398 N.W.2d 896, 901 (Mich. 1986). Section 500.3135(7) further clarifies the plaintiff's burden by defining '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."

The Michigan Supreme Court has held that for an injury to exceed the tort threshold of "serious impairment of body function" it was necessary for the injury to be "objectively manifested." The requirement that the injury be "objectively manifested" means that threshold injuries must be subject to "medical measurement." Williams v. Payne, 131 Mich. App. 403, 409-410, 346 N.W.2d 564 (1984). Recovery is allowed only for such "verifiable" injuries. Mere subjective complaints unsupported by "objective" findings are insufficient. Id.

First, the Court finds that there is a factual dispute concerning the nature and extent of the plaintiff's injuries. The Court also finds that this dispute is material to the determination of whether plaintiff has suffered a serious impairment of body function. Therefore, since reasonable minds can differ as to whether plaintiff suffered a serious impairment of a body function the issue must be submitted to the jury. DiFranco, 398 N.W.2d at 901.

Plaintiff does establish that her accident has led to a serious impairment of an important body function that affects her general ability to lead a normal life. The Court points out that plaintiff was seriously injured as a result of the accident, and that her injuries do meet the threshold required by Michigan law. According to her medical records, plaintiff's injuries could be classified as severe and persistent. Furthermore, the record establishes that the persistence of her symptoms are both the result of the auto accident, and stem from a worsening preexisting condition. Specifically, plaintiff's depression and her inability to cope or deal with adjustment as discussed by Dr. Lajiness-O'Neill and Dr. Nath. As plaintiff's neuropsychological testing demonstrates, she has shown an improvement in her overall cognitive ability since the accident. The IQ and WRAT-3 tests both demonstrate an improvement in her overall intellectual ability. Her 1999 scores have improved significantly from her original scores in 1997.

However, a twenty point improvement in her full scale IQ and improvements in her reading, spelling, and arithmetic scores illustrates that plaintiff suffered a serious decline in her cognitive reasoning as a result of the accident, and her diminished processing speed further illustrates this fact. The lingering effects of the accident remain, according to her doctors, are a result of the auto accident and the exacerbation of a pre-existing condition. Therefore, the Court finds that plaintiff has demonstrated that as a result of the auto accident, her injuries could meet the threshold required for recovery of non-economic damages under Michigan law.

IV. CONCLUSION

Accordingly, for the reasons stated above, defendants' motion for summary judgment is DENIED.

IT IS SO ORDERED.

Date: DEC 2 1999



LAWRENCE P. ZATKOFF
CHIEF UNITED STATES DISTRICT JUDGE

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