

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LARISA BUDNITSKAYA

Plaintiff,

CASE No. 97-72192

v.

HONORABLE AVERN COHN

JAMES E. DREHER

Defendant.

MEMORANDUM AND ORDER
GRANTING MOTION FOR SUMMARY JUDGMENT

I.

This is a personal injury case before the Court on diversity jurisdiction. 28 U.S.C. § 1332(a). Plaintiff Larisa Budnitskaya's (Budnitskaya) automobile was hit from behind by a truck owned by defendant James Dreher (Dreher). Budnitskaya claims that as a result of the accident she suffers from a serious impairment of a body function and is therefore entitled to recover her noneconomic losses. See Mich. Stat. Ann. § 24.13135.

Dreher now moves for summary judgment, averring that there is no genuine issue of material fact regarding the nature and extent of Budnitskaya's injuries. Specifically, Dreher argues, among other things, that Budnitskaya has not satisfied her burden

of showing that an impairment of an important body function has affected her general ability to lead her normal life.

For the reasons that follow, Dreher's motion is GRANTED.

II.

The material facts as gleaned from the papers follow.

A.

On July 22, 1996, Budnitskaya was in a Chevrolet on the ramp exiting Interstate 696 at Hoover Road in Warren, Michigan. After she exited, Dreher's foot slipped off the clutch of his commercial truck, which was following her, and he hit Budnitskaya from behind. Budnitskaya says that Dreher's truck was traveling about twenty miles per hour and hit her four to five times. Dreher has admitted that he was "negligent in the control and operation of [his] vehicle" and that the "negligent control and operation of [his] vehicle was a direct and proximate cause of the accident."

Budnitskaya went to the hospital shortly after the accident. She did not suffer any broken bones, cuts, or bruises from the accident, although she complained of a headache, dizziness, neck and back pain, and nausea. X-rays taken on the date of the accident revealed that Budnitskaya's cervical and thoracic

vertebrae were normal, although there were "some slight degenerative changes seen along the anterior end plate contours of several of the lower thoracic vertebrae." Dr. Mark Rosner, M.D. (Dr. Rosner), diagnosed Budnitskaya with a mild closed-head injury and an acute cervical strain. Dr. Rosner also noted that "palpation of the chest wall does not find any bony tenderness or any pain in the chest wall itself."¹

B.

About two weeks after the accident, a CT scan of Budnitskaya's brain was taken, which showed a "[n]egative CT of the brain without contrast." Subsequently, Budnitskaya was examined by Dr. Kasturi Puri, M.D. (Dr. Puri), who noted that she had neck pain and discomfort, pain down her right shoulder and right arm, difficulty turning her neck to the right and left, and that she experienced sharp pains, headaches, and dizziness. Dr. Puri's impression was that Budnitskaya suffered a cervical sprain and recommended she undergo physical therapy.

Budnitskaya participated in an initial course of physical therapy for about six weeks beginning in September 1996. After

¹ "Palpation" is defined as the "[p]rocess of examining by application of the hands or fingers to the external surface of the body to detect evidence of disease in the various organs." Taber's Cyclopedic Medical Dictionary P-9 (13th ed. 1977).

completing this course, Margaret Davies (Davies), a physical therapist, prepared a progress summary regarding Budnitskaya. Davies noted, among other things, that Budnitskaya's subjective complaints had "definitely decreased," she no longer had any pain in her left arm and shoulder, and had no tenderness in her neck, upper back, chest area, ribs, or sternum. Davies stated that Budnitskaya's remaining problems included mild pain at the base of her neck, as well as pain with protraction of her shoulders in the sternal and rib area, dizziness, and "pain with resisted cervical motions, all motions." Davies stated that she wanted to continue Budnitskaya's physical therapy to rectify the remaining problems.

Shortly thereafter, Budnitskaya participated in another six-week course of physical therapy that ended in March 1997. Davies prepared a "discharge summary," noting that Budnitskaya "remains approx[imately] the same," and "[n]o tenderness or palpation [was] noted." Davies stated that Budnitskaya's remaining problems were that:

1. [Budnitskaya] continues to feel pain in her mid sternal area, around ribs 3, 4, 5. Generally compression or stretching of the area seems to cause the pain.
2. She has difficulty with reaching at end range such as reaching overhead, working in the home, and dusting or cleaning, and lifting her child.

3. She wakes up every morning with discomfort, lasting a couple of hours. Worst pain is rated 4-5/10 on the pain scale. Pain then seems to go away and return only if [she] overstretches or compresses. Overall, she has pain approx[imately] 25% of the day.

4. Occasional shooting pain to her back. She cannot identify the motion that might cause this.

Also in March 1997, Dr. Puri prepared a "Nerve Conduction Report" of Budnitskaya. Dr. Puri's conclusion was that Budnitskaya had a "normal EMG & WCD." Budnitskaya again visited Dr. Puri in July 1997 regarding pain in her chest.

C.

In October 1997, Budnitskaya visited Dr. Leonard Boggs, M.D. (Dr. Boggs). Budnitskaya told Dr. Boggs that "any kind of physical activity with her upper extremities causes severe external pain." Dr. Boggs concluded that:

Physical examination reveals no gross pathology however I do suspect the possibility of an occult sternal fracture. . . . I will schedule the patient for a bone scan to rule out an occult sternal fracture. In the mean time I would recommend restriction of all strenuous vocational, avocational and household activities which would tend to aggravate her condition.

Further, in an affidavit,² Dr. Boggs stated that:

I have reviewed the results [of] Ms. Budnitskaya's bone scan which reveal a fracture of her sternum which, within a reasonable degree of medical certainty, is related to a trauma. Ms. Budnitskaya's complaints of

² The affidavit submitted to the Court is unsigned.

pain are entirely consistent with a fractured sternum. The sternum is located within an area of the body which is constantly affected by the day to day movements in which any individual, including Ms. Budnitskaya, engages as surrounding muscles place pressure on the sternum whenever any movement of the upper body or arms, even breathing is made. A fractured sternum is a very painful condition. When the sternum is fractured, the pressure applied to the sternum by day to day activities which involve the upper body or use of arms causes pain.

The bone scan revealed a fracture in Budnitskaya's sternum, although it was of the type "not normally associated with a recent fracture and is probably developmental or related to old trauma." The radiologist's impression was: "Single focal area of increased activity about the sternum most likely related to previous trauma. . . . The intensity of the activity is not that of a recent healing fracture." Because Budnitskaya has not been involved in any other accidents since the accident with Dreher, she says the fractured sternum is a result of the accident with Dreher.

D.

Budnitskaya, who was 31 years old on the date of the accident, missed about one week of work following the accident. She continued to drive after the accident. Budnitskaya says that for about three to four months after the accident, her husband had to do the household chores, such as laundry, washing and

vacuuming floors, and occasionally cooking. Her husband and a babysitter took care of her children during this period, though Budnitskaya did feed her children. After this period of time, Budnitskaya began to help with the household chores, although she has tried not to overwork herself. Budnitskaya took a vacation to Mexico in December 1996, and went on a two-week vacation to Israel in May 1997. Also in May 1997, Budnitskaya was evaluated by her employer. As a result of the evaluation, which stated that she was doing a fine job, Budnitskaya received a raise in her wages.

III.

Budnitskaya says that due to a closed-head injury and fractured sternum, she has suffered an impairment of an important body function that affects her general ability to lead her normal life. Dreher argues that summary judgment is appropriate as a matter of law because Budnitskaya's impairment is not serious, and she has continued to lead her normal life.

A.

Summary judgment will be granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Fed. R. Civ. P. 56(c). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." In re Dollar Corp., 25 F.3d 1320, 1323 (6th Cir. 1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). In so doing, the Court "must view the evidence in the light most favorable to the non-moving party." Employers Insurance of Wausau v. Petroleum Specialties, Inc., 69 F.3d 98, 101 (6th Cir. 1995).

B.

Pursuant to the Michigan No-Fault Act, Mich. Stat. Ann. § 24.13135(1),

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.

Prior to 1996, the term "serious impairment of body function" was not defined by the statute. Thus, the term defied

precise definition and was left for interpretation on a case-by-case basis by the Michigan courts. See, e.g., Cassidy v. McGovern, 415 Mich. 483, 502 (1982); DiFranco v. Pickard, 427 Mich. 32, 38-40 (1986). In 1996, legislation was enacted to define the term, "serious impairment of body function:"

As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.

MSA § 24.13135(7). This legislation has effectively altered the prior threshold requirements of a no-fault claim for noneconomic damages based on a "serious impairment of body function." To date, no decision from a Michigan court applying this new definition has been published, although it has been noted that this definition presents "a much more formidable hurdle for plaintiff[s]," and plaintiffs "face an increasingly onerous burden" under the new definition. Paisley v. Waterford Roof Truss, Ltd., 968 F.Supp. 1189, 1194 n.8, 1195 n.11 (E.D. Mich. 1997).

The Court therefore is presented with an issue of statutory construction, and finds that a plaintiff must show each of the following three elements:

- (1) an "objectively manifested impairment";
- (2) "impairment of an important body function"; and

(3) the impairment "affects the plaintiff's general ability to lead his or her normal life."

The Michigan Legislature also added the following amendment to MSA § 24.13135 in 1996:

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 or permanent serious disfigurement.

MSA 24.13135(2)(a).³

C.

Summary judgment is appropriate due to the lack of evidence regarding how the impairment of an important body function affected Budnitskaya's general ability to lead her normal life. Indeed, the only evidence Budnitskaya submitted regarding a change in her lifestyle subsequent to the accident was that for

³ Also under MSA § 24.13135(2)(a)(ii), regarding a closed-head injury, "a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury." Although Budnitskaya argues that she suffers from a closed-head injury, she has not offered testimony by a physician in this regard.

three to four months, she was unable to do household chores and take care of her children. Budnitskaya, however, admits that she missed only about one week of work, she continued to drive after the accident, and she was able to feed her children.⁴ After this three to four month period, Budnitskaya testified that, although she was careful not to overwork herself, she started to help with the household chores, and she took care of her children. Budnitskaya's ability to perform her job apparently has not been affected, because she has received a positive evaluation and raise by her employer since the accident. Budnitskaya also traveled to Mexico less than five months after the accident, and took a two-week vacation to Israel about ten months after the accident. Although Dr. Boggs generally stated that a fractured sternum causes pain when the upper body or arms are used, this assertion, without more, does not create a genuine issue of material fact.⁵

⁴ Although the statute does not say that the impairment must be continuous in order to recover, the lack of evidence one way or the other regarding Budnitskaya's general ability to lead her normal life during the three to four month period after the accident mandates that summary judgment be granted.

⁵ Further, the relationship between the accident and fractured sternum is arguably tenuous. Budnitskaya did not complain of pain in her sternal area when she went to the hospital after the accident. X-rays were taken at the hospital,

In sum, under any reasonable interpretation of the phrase "the impairment . . . affects the person's general ability to lead . . . her normal life," Budnitskaya has not offered evidence sufficient to withstand summary judgment. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for plaintiff.'" Mitchell v. Toledo Hospital, 964 F.2d 577, 581 (6th Cir. 1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). "Where the defendant demonstrates that after a reasonable period of discovery the plaintiff is unable to produce sufficient evidence beyond the bare allegations of the complaint to support an essential element of his or her case, summary judgment should be granted." Id. at 582.

SO ORDERED.

and Dr. Rosner diagnosed Budnitskaya with a mild closed-head injury and an acute cervical strain. Dr. Rosner also explained that "palpation of the chest wall does not find any bony tenderness or any pain in the chest wall itself." Moreover, although Dr. Boggs and the radiologist each noted that the fractured sternum was likely related to a trauma, it is ambiguous whether the trauma was in fact her accident with Dreher.



AVERN COHN

UNITED STATES DISTRICT JUDGE

DATED:

JAN 21 1998

Detroit, Michigan