

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

DAWN KORB,

Plaintiff,

v

File No. 98-17579-NI
HON. PHILIP E. RODGERS, JR.

ROBERT SNYDER, and GRAND TRAVERSE
DINNER TRAIN, AL JONES, and TUSCOLA AND
SAGINAW BAY RAILWAY COMPANY, INC., a
Michigan Corporation, jointly and severally,

Defendants.

Lee B. Steinberg (P20955)
Attorney for Plaintiff

Dennis K. Taylor (P32649)
Attorney for Defendant Snyder

James Wernstrom (P23071)
Attorney for Defendant GT Dinner Train

Phillip B. Maxwell (P24872)
D. Estelle Lopez (P55432)
Attorney for Tuscola and Saginaw Bay
and Jones

DECISION AND ORDER GRANTING
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION
ON THE ISSUE OF SERIOUS IMPAIRMENT OF AN IMPORTANT BODY FUNCTION

INTRODUCTION

Plaintiff Dawn Korb filed this action against Robert Snyder ("Snyder"), the Grand Traverse Dinner Train ("GTDT"), Engineer Al Jones ("Jones"), and the Tuscola Saginaw Bay Railway ("TSBR") for injuries she sustained when Defendant Robert Snyder drove off the road and hit an embankment in order to avoid striking the GTDT that was stopped across the Summit City Road crossing. On December 31, 1997, Plaintiff Korb was a passenger in the sport utility vehicle being

driven by Defendant Snyder northbound on Summit City Road. The GTDT was traveling east toward the Summit City Road crossing. The GTDT owned the train but contracted with Defendant TSBR to provide engineers to operate the train.

As a result of the accident, the Plaintiff suffered personal injuries. She claims that, because of the Defendants' negligence she has suffered back and lower extremity injuries which have resulted in a serious impairment of an important body function, namely Reflex Sympathetic Dystrophy.

The Plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) on the issue of serious impairment of an important body function. The Defendant GTDT filed a response as did the Defendants TSBR and Jones. The Defendants claim that the Plaintiff's motion is premature. They contend that the medical records upon which the Plaintiff relies have not been authenticated, do not establish the nature and extent of the Plaintiff's injuries, and fail to show a proximate causal link to the claimed negligence.

STANDARD OF REVIEW

M CR 2.116(C)(10)

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was most recently set forth in *Smith v Globe Life Ins Co*, 460 Mich. 446; 597 NW2d 28 (1999) as follows:

This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418,

420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

AUTHORITIES AND ANALYSIS

Serious Impairment of an Important Body Function

Pursuant to MCL 500.3135(2)(a) the issue of whether an injured person has suffered serious impairment of body function is a question 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.

* * * * *

The issue which is generated by this motion is whether the Plaintiff's injury constitutes a "serious" impairment of a body function or, in other words, whether the Plaintiff's injury has affected her ability to lead her normal life such that the Legislature intended that the Plaintiff be compensated within the confines of a third-party tort claim.

When Michigan adopted the no-fault act, it segregated motor vehicle claims into two broad categories. The first-party claim is one for medical expenses, replacement services and up to three years of wage loss benefits. These first-party benefits are provided without regard to fault. The other cause of action is one for noneconomic damages and was retained in the form of a third-party action. However, not every third-party claim is legally cognizable. The Michigan Supreme Court provided

the following concise description of the distinction between first and third party claims and their relationship to the purposes of the no-fault act:

A basic understanding of the mechanisms by which the no-fault act seeks to improve upon traditional tort liability is important to the resolution of the issues in this case.

Through the insurance made compulsory under the act, the Legislature assured adequate recovery without regard to fault for economic losses. Medical expenses are covered, as are basic wage losses. By specifying who is to pay and how much is to be paid, litigation concerning these matters generally becomes unnecessary, especially since negligence is no longer an issue. The problem of undercompensating serious injuries is remedied to the extent that recovery for economic loss is assured.

The act does not, however, assure payment for all economic losses, nor for noneconomic losses. This is significant, for it shows a policy determination on the part of the Legislature that a specified recovery for basic economic losses is of primary importance. Nevertheless, it is apparent that an injured person may suffer significant losses other than those for which the act guarantees recovery without regard to fault. For economic losses beyond those for which payment was assured, the traditional tort remedy was left intact. However, the traditional tort remedy for noneconomic losses for which no payment was assured under the act was not left wholly intact.

Cassidy v McGovern, 415 Mich 483, 499; 330 NW2d 22 (1982).

To be compensable then, a third-party claim must rise to the threshold level required by the act; i.e., there must be a death, a serious impairment of a body function or a permanent serious disfigurement.

The two foremost decisions on the no-fault threshold are *Cassidy v McGovern, supra*, and *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986). In *Cassidy*, Justice Coleman authored a landmark opinion. Among other significant holdings, *Cassidy* established that in the absence of a material factual dispute, the issue of serious impairment raised a question of law for the court. *Cassidy, supra*, p 502. *Cassidy* discussed the serious impairment requirement as a “significant obstacle” to the maintenance of a legal claim for noneconomic loss and held that it must be viewed in the context of the companion conditions of death and permanent serious disfigurement. *Id.* at 503. With regard to the case at hand, *Cassidy* further stated that in the analysis of serious impairment an objective standard should be used which “looks to the effect of an injury on the person’s general

ability to live a normal life.” *Id.* at 505. Elaborating on this point, the *Cassidy* Court wrote as follows:

Another significant aspect of the phrase “serious impairment of body function” is that it demonstrates the legislative intent to predicate recovery for noneconomic loss on objectively manifested injuries. Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body. Leo Cassidy’s injuries were not general aches and pains, but rather two broken bones. Thus his injuries fall within the classification “impairment of body function.” *Id.* at 505.

Following *Cassidy*, the Michigan Court of Appeals published a number of opinions which addressed the serious impairment aspect of the no-fault threshold requirement. Perhaps the most significant of these was in *Williams v Payne*, 131 Mich App 403; 346 NW2d 564 (1984). The important issue which the *Williams* Court grappled with was whether the *Cassidy* requirement of “objectively manifested injuries” meant the objective measurement of an injury or establishing a plaintiff’s pain through the patient’s limited activities. In holding that “objectively manifested injuries” meant medically substantiated pain and suffering, the *Williams* Court wrote as follows:

... the *Cassidy* opinion did not expressly designate which standard of manifestation to employ, objective medical measurements of injury or a patient’s complaints of pain substantiated only by the patient’s limited activity. We conclude that Mrs. Williams’ injuries are not “objectively manifested” within the meaning of *Cassidy*. Medically unsubstantiated pain will always be present in a tort action for pain and suffering. The Legislature could not intend so low a threshold for avoiding the no-fault acts for proscription against tort actions. General pain and suffering is not sufficient to meet the threshold. *Cassidy v McGovern*, 415 Mich 505. As the Supreme Court pointed out in *Cassidy*, the “serious impairment of body function” standard:

Should be considered in conjunction with the other threshold requirements for a tort action for noneconomic loss, namely, death and permanent serious disfigurement. MCL 500.3135; MSA 24.13135. The Legislature clearly did not intend to elect two significant obstacles to a tort action for noneconomic loss and run quite insignificant obstacle. 415 Mich 503.

Additionally, the *Cassidy* decision spoke of “objectively manifested injuries,” not symptoms. Mrs. Williams’ injuries do not meet the “objectively manifested” requirement. (Emphasis in original.) *Williams, supra*, p 410.

Following the publication of the *Williams* opinion, the Supreme Court again addressed the “serious impairment of body function” threshold exhaustively and thoroughly in *DiFranco, supra*. The *DiFranco* Court acknowledged *Cassidy* and *Williams* and overruled each. As a general proposition, *DiFranco* held that the “serious impairment of body function” threshold was designed to eliminate suits based on clearly minor injuries and those injuries which do not seriously affect the ability of the body, in whole or in part, to function. *Id.* at 60. The *DiFranco* Court rejected *Cassidy’s* holding that the body function impaired must be an important one. *Id.* at 61-62. Further, *DiFranco* overruled the *Cassidy* holding that the impairment must affect the person’s general ability to live a normal life by stating that the requirement had become “an insurmountable obstacle” as applied by the Court of Appeals. *Id.* at 66.

Also, and most importantly with respect to the case at hand, *DiFranco* rejected the requirement of an objectively manifested injury and stated that, “The *Williams* interpretation of *Cassidy’s* objectively manifested injury language has proved to be an almost insurmountable obstacle for recovery of noneconomic damages in soft tissue injury cases.” *Id.* at 73. The *DiFranco* Court’s discussion of *Williams* is insightful with respect to the interpretation of the legislative action which followed *DiFranco*. This discussion is as follows:

Defendants urge us to adopt the *Williams* Court’s interpretation of *Cassidy*. They believe that an injury which cannot be directly demonstrated through the use of accepted medical tests or procedures, but must be diagnosed on the basis of the plaintiff’s subjective complaints, a physician’s clinical impressions, or the symptoms resulting from the injury, is not objectively manifested. Their reasoning is as follows:

A physical examination yields subjective complaints and objective findings. Subjective complaints are those perceived only by the patient which cannot be otherwise measured, e.g., pain, nausea, and blurred vision. Objective findings are those which the physician can see for himself, e.g., swelling and inflammation. Some procedures involve a combination of subjective complaints and objective findings, e.g., range-of-motion tests, where the doctor manipulates the patient’s body until the patient complains of pain or is unable to move further. Doctors use subjective complaints and objective findings to form clinical impressions and diagnoses. To verify these clinical impressions, the doctor usually orders tests, such as x-rays, arthrograms, CAT-scans, blood tests and the like.

Defendants argue that the injury itself (e.g., broken bones, torn cartilage, etc.) must either be directly perceivable (i.e., the doctor must be able to see, hear, or touch the injury), or the nature and extent of the injury must be demonstrated through a medically accepted test. Symptoms or effects caused by the injury (e.g., spasms, swelling, and pain) are supposedly insufficient to satisfy *Cassidy*'s requirement of objectively manifested injuries.

Thus, broken bones seen on x-rays clearly satisfy defendants' interpretation of *Cassidy*. However, injuries to soft tissues generally cannot be seen or felt. Seeing or feeling the symptoms of torn or stretched muscles or ligaments (e.g., spasms) is not enough. Nor are plaintiff's subjective complaints of pain or limited motion. Therefore, defendants believe that, in most cases, soft tissue injuries cannot be the basis of a finding that the plaintiff suffered a serious impairment of body function because these injuries are not objectively manifested. *Id.* at 71-72.

The *DiFranco* Court rejected this analysis. This Court believes that the preceding review of the Supreme Court's historical treatment of the "serious impairment" issue is instructive with respect to the interpretation of the subsequent legislative action.

P.A. 1995 No. 222 significantly amended the provisions of the no-fault act bearing upon tort liability for noneconomic loss. MCLA 500.3135; MSA 24.13135. Nine years after the publication of the *DiFranco* opinion, it is evident that the Legislature chose to substantially overrule it. Substantive amendments to the legislation restored the *Cassidy* holding that the issue of serious impairment of body function was a question of law for the court, if there was no factual dispute regarding the nature and extent of the person's injuries or if there was a factual dispute, the dispute was not material to the determination as to whether the person had suffered serious impairment of body function or permanent serious disfigurement.

The Legislature also specifically defined "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."¹ Thus, the Legislature expressly restored the *Cassidy* holding

¹ (7) 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.

that serious impairment should be measured with respect to the effect of the injury on the person's general ability to live a normal life, *Cassidy*, *supra* at p 505, and the *Cassidy* requirement that the impairment be both objectively manifested and affect an important body function. *DiFranco* was rejected by the Michigan Legislature.

It would be error to look to *DiFranco* as relevant precedent for the interpretation of an objectively manifested impairment. By its own holding, *DiFranco* rejected this requirement. Rather, *Cassidy* and *Williams* provide the analytical point of departure for the determination of the legislative requirement of "objectively manifested impairment of an important body function." In assessing whether Plaintiff's injuries can satisfy the tort threshold, *Cassidy* instructs trial courts to review serious impairment of body function in the context of the other threshold requirements which include death and permanent serious disfigurement. *Cassidy* at p 503. Serious impairment, said the *Cassidy* Court, is a "significant obstacle to maintaining a tort action for noneconomic loss." The *Williams* Court built upon this holding by requiring that subjective complaints of pain and suffering be medically substantiated. *Williams*, *supra*, pp 409-410.

Considered in the light of the historical period in which this legislation was passed, the Legislature was not responding to a perceived social problem in a vacuum. Rather, with full knowledge of *DiFranco*, the Legislature chose not to adopt *DiFranco*'s definition of an objective manifestation; i.e., a medically identifiable injury and evidence which establishes that there is a physical basis for subjective complaints of pain. Instead, the Legislature required that there be an "objectively manifested impairment." The holding in *Williams* which was overruled by *DiFranco* implicitly recognized that some patients with subjective complaints of dysfunction would not be compensated despite the availability of a clinical diagnosis to support their complaints until such time as confirmation of the diagnosis existed in the form of medical tests or procedures. By overruling *DiFranco*, it seems evident that the "objectively manifested impairment" means the diagnosis must be capable of scientific verification independent of the patient's subjective complaints. In other words, the Legislature could not have intended to bootstrap "objective manifestation" by simply having a patient report her subjective complaints and limitations.

In the instant case, the medical records attached to the Plaintiff's motion include the records of her primary physician, Dr. Patrick Friedli, in which he states: the Plaintiff "sustained a left lower

leg reflex sympathetic dystrophy from a motor vehicle accident on December 31, 1997” and has “depression secondary to her injury.” The records evidence that the Plaintiff has seen numerous physicians and psychologists, has been treated at the Munson Medical Center Pain Clinic, has been hospitalized on several occasions for lumbar sympathetic blocks, has tried several different pain medications, and has had extensive physical therapy. The records of the numerous physicians show that the Plaintiff has consistently presented with the same symptoms: severe pain in her left buttock and lower extremity; discoloration of the skin on her left extremity; temperature of her left lower extremity cooler than her right lower extremity; obvious non-pitting edema; and accelerated hair growth on the left lower extremity. The most recent reports indicate that the Plaintiff has developed an abnormal walking pattern with a marked antalgic limp of the left leg due to the Reflex Sympathetic Dystrophy and is “ambulating with a cane.” Dr. Friedli concludes that “[i]t is likely that her condition will be chronic and permanent.” Dr. Friedli’s diagnosis of Reflex Sympathetic Dystrophy was confirmed by Dr. Jay Jones when he saw the Plaintiff for a clinical evaluation and possible electrodiagnostic evaluation.

The Defendants had an independent medical examination performed by Dr. Lawrence M. Rubens in May of 1999. Among other things, Dr. Rubens states:

I was unable to accurately assess ranges of motion of the back due to pain.

I could not test ranges of motion of the left lower extremity due to severe pain.

Her gait was noted to display a marked antalgic limp of the left leg,

* * * * *

The entire left lower extremity was very cold with mild edema about the left ankle.

* * * * *

The three-quarter inch difference in the thigh and calf measurements represents atrophy and is consistent with the injury sustained by the examinee.

* * * * *

The positive objective findings include the temperature difference and the three-quarter inch uniform muscle atrophy throughout the left lower extremity compared to the right.

* * * * *

Ms. Korb has not reached maximum medical improvement. She does need further treatment and possibly implantable neurostimulator or implantable morphine pump. Ms. Korb is unable to return to work pending further treatment.

In their response to the Plaintiff's motion, the Defendants assert that the Plaintiff's motion is premature because the medical records have not been "authenticated," they have not deposed the doctors, there is no expert testimony regarding proximate causation, and "there is no final and permanent diagnosis as the nature and extent of the Plaintiff's injuries." In addition, they claim that the Plaintiff and her boyfriend, Defendant Snyder, are "not qualified to make a determination of the nature extend [sic] and/or permanence of any of Plaintiff's injuries."

First, a finding of serious impairment does not require that the Plaintiff's injuries be permanent. See, SJI2d 36.11. Furthermore, the Plaintiff and Defendant Snyder are qualified to testify regarding how the Plaintiff's injuries have affected her ability to lead her normal life. As discussed above, such testimony is relevant to the material issue of whether she suffered a "serious" impairment of an important body function. This testimony has not been refuted in any Defendant's response to this motion.

Second, the disability, including the impairment of the legs and ability to walk or run is an important body function. No Defendant disputes this issue.

Third, the diagnosis of Reflex Sympathetic Dystrophy is a medically identifiable condition with objective manifestations of impairment. No Defendant disputes this conclusion.

Rather, each Defendant disagrees that Plaintiff's current condition is the proximate result of the negligence she attributes to them. The Defendants refer to pre-existing complaints of pelvic pain and an absence of medical testimony on causation. While Plaintiff has provided medical records and deposition testimony to support her motion, the Defendants have not provided the Court with *any* documentary evidence which would establish that a genuine issue of disputed fact exists regarding the nature and extent of the Plaintiff's injuries. *Quinto, supra*. It cannot be disputed that the medical records evidence that the Plaintiff has a serious impairment of an important body function with very limited, if any, hope for improvement.

The Defendants' objection to the authentication is specious. The Defendants have received records directly from providers and well know that a duplicate is admissible absent a genuine issue as to authenticity. MRE 1003. Further, proximate causation is a distinct issue from serious impairment.

That the Plaintiff experienced serious impairment of body function after this accident is beyond the pale of responsible disagreement. The duration of the impairment and proximate cause are questions of fact for the jury. If SJ12d 67.02A is the verdict form to be utilized here, question #4 would be answered "yes" by the Court.

CONCLUSION

For the reasons stated herein, the Plaintiff's motion for partial summary disposition on the issue of serious impairment of an important body function is granted. MCR 2.116(C)(10).



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

12/16/99