

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE WISNER,

Plaintiff-Appellant,

v

ZACHARY DANIEL SOCCORSI, DIANA
LYNN SOCCORSI, ELLIOT TAYLOR OSAK,
and PAUL OSAK,

Defendants-Appellees.

UNPUBLISHED

April 27, 2004

Nos. 238011, 238357

Macomb Circuit Court

LC No. 99-004679-NI

Before: Talbot, P.J., and White and Murray, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right the circuit court orders granting defendants' motions for summary disposition under MCR 2.116(C)(10) in this third-party no-fault action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I

Plaintiff was involved in two automobile accidents. On March 24, 1998, plaintiff was stopped behind several cars at a red light, when defendant Daniel Soccorsi rear-ended her vehicle. Plaintiff's vehicle then struck the vehicle in front of her.

Plaintiff testified that pain in her entire neck began shortly after the accident, and later a headache started. She and her mother went to Dr. Ferris, who prescribed Motrin 800 and said plaintiff more than likely had suffered whiplash. Pain in both her shoulders began the evening of the accident, and the following day she came home after a half day of school because of the pain. She began experiencing numbness in both arms and tingling in the elbow and hands. Dr. Ferris began chiropractic adjustments of plaintiff's shoulders. The adjustments helped, and Dr. Ferris told her to continue the Motrin 800 and to use cold compresses.

Plaintiff testified that the tingling and numbness in her arms gradually went away, but that her headaches never went away, and that her neck stiffness gradually got worse. About once a week, she would have to lie down until the headaches and neck pain went away, and the pain prevented her from doing anything. The longest headache was around two days long.

Until May of 1998, plaintiff worked part-time as a sales person, about twenty hours a week. She left that employment in May of 1998, but not as a result of the accident. In the summer of 1998, plaintiff worked about ten hours a week at a law firm, doing filing. She testified that her pain continued through the summer of 1998.

On June 23, 1998, plaintiff woke up unable to walk or stand, and experiencing shooting pain from her neck into her lower back, and a sore throat. She saw Dr. Ferris, and then Dr. Shafer. Plaintiff testified that no trauma of any kind prompted the pain on this day.

For the seven months following June 23, 1998, plaintiff had chiropractic adjustments two to three times weekly. She testified that gradually her mid-back pain almost went away, but that her lower back and neck problems remained. She testified that she has not been able to exercise since the first accident, and that before the first accident she had exercised every other day, doing both cardiovascular and strength training. Plaintiff also testified she has not helped with household chores since the first accident, with the exception of laundry.

In September 1998, plaintiff returned to school, and worked part-time as a desk clerk at a fitness center, twenty to twenty-five hours a week.

II

Plaintiff's second accident occurred on January 14, 1999. The roads were icy and, as she rounded a corner, going about 10 mph, a vehicle driven by defendant Elliot Taylor, also rounding the corner, came into her lane and struck her vehicle on the front left side. Plaintiff's car was not driveable after the accident, and she did not go to school that day. She saw Dr. Shafer that afternoon, for stiffness in her arms, shoulders and neck. Dr. Shafer took x-rays.

Plaintiff testified that the arm pain she experienced after the second accident was different than the arm pain she felt after the first accident, the latter of which had gone away by the time of the second accident. By January 1999 (before the second accident), her headaches had gotten better; they occurred less often and were less intense. However, the pain in her lower back and neck continued. After the second accident, her headaches returned and she would have to lie down until they went away, although they were not as intense as the previous summer.

In February 1999, plaintiff started treating with Dr. Rottenberg, in part because Dr. Shafer's chiropractic adjustments were not helping any more. Dr. Rottenberg ran tests, and over a course of months, gave her approximately twelve anti-inflammatory shots in the right shoulder. After a few days, the shots would help with the pain, but the pain always returned a month later.

In the summer of 1999, plaintiff went through physical therapy, including neck traction, neck and right shoulder massages, home exercises and hot packs. She stopped physical therapy in September 1999, but only because the insurance company would not pay for it. The problems with her left shoulder cleared up but the right shoulder pain continued, and went from the top of her neck into her arm at times.

Plaintiff testified that the pain in her right arm and right shoulder prevented her from doing her daily household chores, so that she could not help her mother; she would be in pain if

her arm or shoulder were in one position for too long; she could not exercise well; and that knots in her shoulders and neck would at times cause numbness or tingling in her arm.

Plaintiff saw Dr. Rottenberg until January 2000, and had her last anti-inflammatory shot at that time. She then switched family doctors to Dr. Zalla, who prescribed Vioxx, an anti-inflammatory. Plaintiff testified that taking Vioxx and other anti-inflammatory medication caused her to get ulcers and to be hospitalized from January 27 through January 29, 2000. At that time she missed six days of school. When she was tested a month later, the ulcers had gone away.

After January 2000, she took no more anti-inflammatory medication, and was prescribed Prilosec and several other drugs. When asked [at her May 1, 2000 deposition] if she was still having problems that she felt resulted from either one of her accidents, she responded that “pretty much every day” she experienced:

The neck and shoulder and lower back pain. I can't sit for a long time. I can't stand for a long time. I can't walk for periods of time. If I sit [,] about 20 minutes later I have to get up and move or stretch. Walking, if I walk some distance I have to sit down and relax and then I could get back up and walk again. I still can't exercise, daily chores, lifting anything.

Plaintiff testified that the pain did not vary depending on her level of activity.

Plaintiff's second deposition

At her second deposition on April 5, 2001, plaintiff, then nineteen years old, testified that since her first deposition, she had treated with Dr. Nandi for her digestive problems. After her hospitalization in January 2000 for peptic ulcers, she returned to the hospital in July of 2000, for stomach problems. Plaintiff testified that Dr. Nandi told her after the January 2000 hospitalization that her ulcers were caused by the non-steroidal anti-inflammatory (NSAID) pain medication she had been taking. She underwent three endoscopies since January 2000, and had missed six days of school then.

In June 2000, plaintiff started having extreme nausea before and after she ate, with vomiting and dry heaving. She lost fifteen pounds in two weeks. Dr. Nandi performed another endoscopy and found a hiatal hernia. Plaintiff testified that she was told that hiatal hernias are present from birth, but that hers would not have acted up absent the gastrointestinal problems she had in January 2000. Plaintiff testified that she still had problems because of the hernia, including lack of appetite because of occasional bouts of nausea, as a result of which she had lost thirty lbs. Before she had these stomach problems, she ate spicy or seasoned foods two to four times a month, possibly more. Fatty foods now bother her and she stopped eating them as well, including McDonald's, which give her stomach pains or diarrhea.

Plaintiff testified at her second deposition that she last had stomach pain a couple of months ago. She testified that she weighed 140 lbs. now, and had weighed 170 lbs. in December of 1999. She testified that she had used her gym membership from September to November 2000, but had to stop because of back and neck pain. Plaintiff testified that she was on medications for her stomach, including Protonix and Reglan (each once daily), and that she was

on a very bland diet. Plaintiff testified that Dr. Nandi had told her she would have to remain on stomach medication for over a year, and that she was scheduled for a six-month checkup with Dr. Nandi in August 2000.

Plaintiff testified that since September 1999, she was an education student at U of M, Dearborn. She took nine credit hours of course work the first semester, and twelve credit hours the second semester. She was still a waitress at Tony's Pizzeria, working about twelve to fifteen hours a week.¹ Also, since October 2000, she had been working at U of M Dearborn's admissions office, and currently did so for one day a week (eight hours).

III

The Soccorsi defendants' second² motion for summary disposition, filed on July 5, 2001, argued that plaintiff's allegations of neck pain, back pain, headaches and bilateral shoulder pain from the March 1998 accident did not rise to the level of "objective manifestations" and thus could not go to a jury as a matter of law. This second motion was filed after plaintiff's second deposition on April 5, 2001, but before Dr. Nandi, plaintiff's gastroenterologist, was deposed on August 24, 2001. Defendants' second motion made no mention of plaintiff's ulcers and digestive problems.

Plaintiff's response to the Soccorsi defendants' motion admitted that subjective neck, back, and shoulder pain, and headaches and dizziness do not constitute objectively manifested injuries, but stated that "[p]laintiff's treating physician had diagnosed the following objective medical findings with regard to [her] continued cervical, shoulder, and lumbar complaints:"

- A. Cervical muscle spasms;
- B. Trigger points noted in the trapeze [sic trapezius] as well as left sternocleidomastoid muscle;
- C. Positive bi-lateral hyper-abduction tests;
- D. Decreased pin-prick sensation in the left ulnar distribution;
- E. Decreased pin-prick sensation in the right median nerve distributions;
- F. Positive right Phelans test;

¹ Plaintiff had changed part-time jobs in August 1999, from the fitness center to a pizzeria, because it offered better pay. She worked at the pizzeria about twenty hours a week from August 1999 to January 2000, when she was hospitalized for ulcers.

² The Soccorsi defendants filed their first motion for summary disposition in January 2001. After the case was mediated, plaintiff developed severe gastrointestinal problems and was diagnosed with peptic ulcers and a hiatal hernia. As a result, the circuit court granted additional time for the parties to redepose plaintiff. After redeposing plaintiff in April 2001, the Soccorsi defendants filed their second motion for summary disposition, in July 2001.

G. L3-L5 and L4-L5 disc space narrowing;

H. Somata [sic somato]-sensory evoked potential testing, indicating mild left parietal cortical slowing with mild cervical cord condition abnormality, and;

I. Somata [sic somato]-sensory evoked potential testing, indicating right greater than left parietal cortical slowing and minimal left peripheral slowing, representing sensory nerve root involvement and mild left lumbo-sacral radiculopathy.

In support of her response to defendants' motion, plaintiff attached medical records and a letter to plaintiff's counsel from Dr. Nandi dated March 28, 2001, which stated:

This is a letter on behalf of my patient Ms. Wisner regarding her ulcers, which were noted in January of 2000. Ms. Wisner was admitted to hospital during January, at which time I performed a consultation due to her severe epigastric discomfort. Due to her symptoms, an upper endoscopy was performed on January 28, which revealed an ulcer approximately 6 to 7 mm in size in the proximal antrum without any active bleeding. In the distal antrum, there were multiple erosions, which were appreciated without any active bleeding. Biopsies were performed, which demonstrated chronic inflammation. There were no organisms compatible with H. Pylori.³ **There was chronic inflammatory cell infiltrate. These biopsies; however, were not pathognomonic⁴ of NSAID use; however, at the time of her initial epigastric pain, Ms. Wisner did admit to using NSAIDs, which can be a cause for peptic ulcer disease.** A repeat upper endoscopy was performed on February 22, which revealed no evidence of any further ulcerations after she was treated with Proton pump inhibition.

I hope this letter serves to clarify Ms. Wisner's condition. If you have any further questions, please do not hesitate to call me. [Emphasis added.]

Beaumont Hospital's pathologic report regarding the biopsies taken on January 28, 2000 stated:

MICROSCOPIC: Sections contain portions of gastric mucosa with chronic inflammatory cell infiltrate within the lamina propria. Absent are organisms compatible with helicobacter pylori.

The circuit court dismissed plaintiff's claim. On the date set for trial, plaintiff's counsel agreed to allow the Osak defendants to move for summary disposition without filing a written motion. The circuit court granted the motion, its order of dismissal stating:

³ Webster's College Dictionary (7th ed) defines "pylorus" as "the opening between the stomach and the start of the intestine in most vertebrates." Pylori is the plural of pylorus.

⁴ Webster's College Dictionary (7th ed) defines "pathognomonic" as an adjective meaning "characteristic or diagnostic of a specific disease."

. . . . considering the law of the case as stated in the Opinion and Order . . . of October 30, 2001, and that the injuries alleged to be caused by the [Osak defendants] are the same injuries alleged by plaintiff to have been caused by the negligence of [the Soccorsi defendants], and, considering that this Court has found in its Opinion and Order of October 30, 2001, that said injuries do not meet the no-fault threshold, Defendants [Osak] motion for Summary Disposition is granted pursuant to MCR 2.116(C)(10).

IV

Under MCL 500.3135, a person remains subject to tort liability for noneconomic loss caused by his use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. Whether an injured person has suffered serious impairment of a body function is a question of law if there is no factual dispute concerning the nature and extent of the person's injuries, or if there is a dispute that is not material to the determination. MCL 500.3135(2)(a). "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." *Kern v Blethen-Coluni*, 240 Mich App 333, 340; 612 NW2d 838 (2000), quoting House Legislative Analysis, HB 4341, December 18, 1995, p 2. The *Kern* Court further noted:

In determining whether the impairment of the important body function is "serious," the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery. [Citations omitted.] Finally, although the injury threshold is a significant obstacle to tort recovery, *Cassidy [v McGovern]*, 415 Mich 483, 503; 330 NW2d 22 (1982)], "an injury need not be permanent to be serious." *Id.* at 505. [*Kern, supra* at 340.]

The circuit court concluded that plaintiff's testimony at deposition that Dr. Nandi "diagnosed her ulcers and hiatal hernia as being caused by the NSAID's is classic hearsay," and "contrary to Dr. Nandi's true conclusion," as stated in his March 28, 2001 letter, quoted *supra*. On appeal, plaintiff does not respond to the court's determination that her deposition testimony is hearsay, nor does plaintiff address the court's determination that Dr. Nandi's *letter* stated that biopsies revealed that plaintiff's ulcers were not indicative of use of NSAID's.⁵ Rather, plaintiff

⁵ Plaintiff was hospitalized in January 2000 with peptic ulcers, and was hospitalized again that summer, at which time a hiatal hernia was diagnosed. These are objectively manifested injuries. Plaintiff testified at deposition that Dr. Nandi told her the peptic ulcers were caused by prolonged use of NSAID's, and that her hiatal hernia would not have acted up but for the prolonged use of NSAID's and the resulting peptic ulcers. Medical records submitted below refer to plaintiff's use of NSAID's in their discussion of her peptic ulcers. However, the biopsies Dr. Nandi performed of the areas surrounding plaintiff's ulcers, were not indicative of NSAID use. Dr. Nandi's letter, quoted *supra*, so states. Plaintiff's ulcers were healed two months later, in March 2000, and we gather from the record before us that the ulcers never returned, although plaintiff did begin suffering from a hiatal hernia.

argues on appeal that Dr. Nandi in his *deposition testimony* opined that the NSAID's caused plaintiff's peptic ulcers.

The first problem with plaintiff's argument is that Dr. Nandi's deposition testimony was not submitted to the circuit court and is thus not properly considered on appeal. The second problem is that even if the deposition were properly before this Court and we were to consider it, the portions of testimony plaintiff points to do not link plaintiff's NSAID use to her peptic ulcers. Rather, although somewhat obtusely put, Dr. Nandi testified at his deposition that at the time he performed plaintiff's first endoscopy (i.e., before he performed any biopsies of the ulcers), he opined that plaintiff's gastric distress was probably brought on by her having taken NSAID's. The biopsies, though, revealed no link between the two.

In addition, even if there were some link between plaintiff's peptic ulcers and her NSAID use, there is no dispute that the ulcers were healed within several months. Under these circumstances, we conclude that the circuit court did not err in concluding that plaintiff failed to provide evidence that she suffered a serious impairment of an important body function regarding her peptic ulcers and hiatal hernia.

Plaintiff's medical records evidence that she suffered from muscle spasms and palpable trigger points, among other things. These are objectively manifested injuries. The circuit court concluded that plaintiff did not establish that the muscle spasms, disc space narrowing or slowed nerve conduction affected her general ability to lead a normal life. Again, we find no error.

Although plaintiff testified that she could not walk or stand for long without pain, and could not lift or do housework as she had before the accidents, no doctor restricted plaintiff from physical activity. Plaintiff missed a week or two of school all together and clearly experienced severe pain, yet she continued with full loads in high school and, later, attended college as well as worked part-time. Under these circumstances, we cannot conclude that it was error to dismiss plaintiff's claims on the basis that she failed to establish a serious impairment of an important body function.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Christopher M. Murray