

STATE OF MICHIGAN
COURT OF APPEALS

CAROL LIVERMORE and JESSE LIVERMORE,

Plaintiffs-Appellants,

v

AYESHA FARHAT SIDDIQUE, a Minor, and
SAJID SIDDIQUE,

Defendants-Appellees,

and

RAFIA SIDDIQUE,

Defendant.

UNPUBLISHED

February 6, 2007

No. 259480

Wayne Circuit Court

LC No. 03-328552-NI

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants summary disposition under MCR 2.116(C)(10). We reverse and remand.

This case arises out of a March 22, 2002, car accident in which plaintiff Carol Livermore¹ suffered a broken femur and hip, and other less serious injuries.

We review de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must view the parties' evidence in a light most favorable to the nonmoving party and grant summary disposition only if the moving party is entitled to judgment as a matter of law. *Id.* at 539-540; see MCR 2.116(C)(10) and (G)(4).

¹ Because Jesse Livermore's claims are entirely derivative of Carol Livermore's claims, the singular term "plaintiff" is used to refer to Carol Livermore.

I Serious Impairment of a Body Function

Under the no-fault act, MCL 500.3101 *et seq.*, tort liability for noneconomic losses is generally limited to instances in which the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); *Hardy v Oakland Co*, 461 Mich 561, 565; 607 NW2d 718 (2000).

MCL 500.3135(1) provides:

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(7) defines “serious impairment of body function” as:

[A]n objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.

The issue whether an injured person has suffered a “serious impairment of body function” is a question of law for the court to decide if there is no factual dispute concerning the nature and extent of the person’s injuries, or there is a factual dispute concerning the nature and extent of the person’s injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a)(i) and (ii). Here, there is no material dispute regarding the nature and extent of plaintiff’s primary injuries: fractures to her femur and hip. Further, there is no dispute that these injuries were objectively manifested.²

The question is whether plaintiff’s injuries affect her general ability to lead her normal life. In *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004), our Supreme Court addressed this question and stated that:

the effect of the impairment on the course of a plaintiff’s entire normal life must be considered. Although some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff’s normal life has not been affected, then the plaintiff’s “general ability” to lead his normal life has not been affected and he does not meet the “serious impairment of body function” threshold.

The Supreme Court in *Kreiner* further stated that:

In determining whether the course of the plaintiff’s normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff’s life before and after the accident as well as the significance of any

² *Netter v Bowman*, 272 Mich App 289, 305; ___ NW2d ___ (2006).

affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "any effect" on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life." [*Id.* at 132-134.]

In applying the above objective factors to plaintiff's injuries, there is no question that plaintiff's injuries to her leg and hip wholly impaired her ability to walk. Plaintiff's injuries first required five days of hospitalization for surgery on her femur fracture, which involved the installation of a metal rod to secure the fracture. The later discovered second fracture to her hip also required surgery. Plaintiff attended 35 sessions of physical therapy. She was bedridden for two months, though able to use a wheelchair during the last month. Two months after the surgery, she began using a walker, which she used for one month. Afterwards, plaintiff graduated to crutches and was able to drive. After one month of crutches, she only needed to use a cane, which she used for three months. Around five months after the accident, plaintiff's doctor lifted medical restrictions, allowing plaintiff to resume activities as tolerated. Plaintiff's fractures fully healed, and, notwithstanding the metal rod in plaintiff's leg, the extent of any residual impairment to plaintiff's injuries is minimal. Further, her prognosis for eventual recovery is clearly excellent.

The trial court issued a ruling from the bench, stating, in part, that:

Kriener doesn't say that the injury has to impair your life for some period of time, for a year or 2 years. It says how does it impact the general course of the rest of the life. And given the facts as I understand them and I don't think there is any serious dispute, . . . it's clear [plaintiff] does not meet the threshold.

Plaintiff argues that the trial court improperly required that her injury be ongoing and permanent. We agree that the trial court improperly focused on "the rest of [plaintiff's] life" rather than "the course or trajectory of the plaintiff's normal life." *Kreiner, supra* at 131. The

trial court's focus on the future of plaintiff's injury is inconsistent with statements from our Supreme Court, "that the duration of the impairment is short does not necessarily preclude a finding of a 'serious impairment of body function[.]'" *Id.* at 134. Further, *Kreiner* embraced language from *Cassidy v McGovern*, 415 Mich 483, 506; 330 NW2d 22 (1982), stating, "We conclude that an injury need not be permanent to be serious. Permanency is, nevertheless, relevant. (Two injuries identical except that one is permanent do differ in seriousness.)" *Kreiner, supra* at 118 n 5.

Further, case law supports the conclusion that plaintiff was unable to lead her normal life during this period. In *Cassidy*, for example, the plaintiff suffered two broken bones in his lower right leg. He was hospitalized for 18 days, and "[d]uring the course of the seven months following the accident, [he] wore four casts During much of this time he used a walker, being unable to use crutches because of dizzy spells." *Cassidy, supra* at 492. However, the plaintiff "returned to normal and there was no significant residual damage from the injury." The Court held that plaintiff's "two broken bones, 18 days of hospitalization, 7 months of wearing casts during which dizzy spells further affected his mobility, and at least a minor residual effect one and one-half years later are sufficiently serious to meet the threshold requirement of serious impairment of body function." *Id.* at 505.

In *Kern v Blethen-Coluni*, 240 Mich App 333, 343; 612 NW2d 838 (2000), the plaintiff suffered "a serious femur fracture" and was unable "to walk for three months." Specifically, the "[p]laintiff wore the fixator for eleven weeks, during which time he was incapable of walking. During this eleven-week period, plaintiff was either carried, used a wheelchair, or 'hobbled' on his other leg." *Id.* at 335. This Court noted that, "[a]lthough plaintiff had a good recovery, 'an injury need not be permanent to be serious.'" *Id.* at 343, quoting *Cassidy, supra* at 505. This Court held that, "[i]n light of the seriousness of the initial injury, the treatment required, and the duration of disability, . . . [the] plaintiff sustained a serious impairment of body function." *Id.*

We conclude that plaintiff's impairment is sufficiently similar to the impairments suffered by the plaintiffs in *Cassidy* and *Kern* to meet the threshold requirement of serious impairment of body function. Plaintiff's impairment shares many of the same features as those impairments suffered by the plaintiffs in *Cassidy* and *Kern*, including the seriousness of the initial injury (requiring surgery and hospitalization), the extensive treatment required (35 physical therapy sessions), and the inability to walk at all for a significant time, and only later with the help of a walker, crutches, and a cane.

We agree, however, with defendants that evidence of plaintiff's temporal mandibular joint (TMJ) condition, depression, and frequent falls failed to independently satisfy the statutory threshold. Plaintiff told Dr. Lawrence Ashman that her TMJ prevented her from carrying out her usual activities for only two days in a six-month period, and she rated the severity of the TMJ condition at "one" on a zero-to-ten scale. She also did not present any evidence of debilitating depression. Dr. Rosalind Griffin found that plaintiff experienced sadness because of her incapacity, but the sadness was alleviated as her normal life returned. Plaintiff did not present any evidence that her propensity to fall prevented her from leading her normal life.

Furthermore, the evidence failed to demonstrate that plaintiff's TMJ condition or falls were causally connected to the accident. Plaintiff suffered from TMJ before the accident, and the evidence failed to show that her relapse was triggered by the accident. Dr. Ashman

concluded, without explanation, that the accident caused her recurrence of TMJ because there were no symptoms before the accident. In the absence of a factual or scientific explanation, Dr. Ashman's opinion is based on the logical fallacy of post hoc, ergo propter hoc, or the mistaken assumption that the occurrence of a prior event causes the occurrence of a subsequent event. See *Tipton v William Beaumont Hosp*, 266 Mich App 27, 37; 697 NW2d 552 (2005). The evidence also failed to demonstrate that the accident was the cause of plaintiff's tendency to fall. Dr. Raymond Noellert acknowledged that he did not have sufficient information regarding a causal connection.

We disagree that evidence of plaintiff's "irrevocable loss of avocation," namely her gardening and volunteer work, serves as proof of a continuing serious impairment within the meaning of MCL 500.3135(1). Plaintiff told Dr. Griffin that she was gardening again, and she has volunteered since her accident by cooking soup for the sick, and helping with smoking cessation and women's rehabilitation programs. If this is a significant reduction from her previous level of activity, plaintiff failed to submit any evidence explaining why her injuries prevented her from doing more volunteer work.

In sum, although plaintiff has recovered from her femoral fractures, because plaintiff presented sufficient evidence to establish that this temporary impairment was sufficiently debilitating to meet the statutory threshold for a serious impairment of body function, we reverse the trial court's order granting summary disposition for defendants and remand for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio