STATE OF MICHIGAN

COURT OF APPEALS

FRANCES OVERWEG, Individually and Personal Representative of the ESTATE OF HARLAN JAY OVERWEG, Plaintiff-Appellant,	UNPUBLISHED May 9, 2013
v	No. 308785 Kent Circuit Court
TAYLOR REMERO THOMAS, BOBBY GLENN THOMAS and KELLY THOMAS, Defendants-Appellees.	LC No. 09-000482-NI

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

MARKEY, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that the trial court properly granted summary disposition as to plaintiff's claim that she suffered a serious impairment of a body function as provided for by Michigan's no-fault act, MCL 500.3101 *et seq*. Moreover, although I greatly respect Judge Murray, I simply do not believe he correctly analyzed this case.

We all know the old saying about "not seeing the forest for the trees." I think that's precisely the situation here. The many "trees" in this case have rendered the forest invisible. Judge Murray has carefully and correctly cited all the applicable statutes and caselaw. It's the application of this body of law to the facts of this case to which I take issue.

First, in deciding a motion for summary disposition, we must consider all the articulated evidence in a light most favorable to the nonmoving party, here, of course, plaintiff. Only if "there is no genuine issue regarding any material fact" should the moving party be entitled to judgment as a matter of law. There is, however, another very important legal premise that must be kept in mind—one that, unfortunately, seems to be often overlooked: there must be a liberal perspective applied in determining the existence of a genuine issue of material fact. Courts should not readily grant summary disposition. See *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). This proposition stems from an even more basic tenet of our system of jurisprudence: that generally people are entitled to their day in court. I believe that if one carefully adheres to these initial guidelines for deciding whether this fact scenario warranted summary disposition, the conclusion should be that it does not.

Specifically, we are considering whether there is any genuine issue of material as to whether plaintiff suffered a serious impairment of body function. Judge Murray's legal definitions and standards are all correct. Unlike most cases, here, as Judge Murray notes, "there is no material dispute regarding the nature or extent of plaintiff's injuries." *Ante* at 6. Plaintiff has Post-traumatic Stress Disorder (PTSD). *McCormick* advises that a serious impairment of body function be "objectively manifest;" it must be "observable or perceivable from actual symptoms or conditions." *McCormick v Carrier*, 487 Mich 180, 196; 795 NW2d 517 (2010).

Many medical doctors undertook the care and treatment of plaintiff. Their credentials were impeccable and their testimony, widely set forth in plaintiff's brief, is unequivocal that plaintiff was suffering seriously from PTSD after the horrific car accident that killed her husband. Notwithstanding their attempt to diffuse the PTSD diagnosis via an independent medical examination, defendants concede it. Now come the trees.

It was not long ago in medicine that PTSD was debatable, obtuse, and poorly understood. Legally, it was simply some sort of mental disorder if it existed at all. Soldiers and victims of physical or emotional trauma often displayed a sequelae of symptoms that affected them both physically and emotionally. We used to hear of "shell shock" or "battle fatigue." Now this phenomenon is uniformly called PTSD. It is now known that people can suffer post-traumatic distress either with or without some physical injury following a traumatic event. Doctors and mental health care providers all recognize and accept that PTSD involves the brain and some type of change or injury to it. Even the military, long reluctant to concede the reality and severity of PTSD, now routinely accepts the diagnosis and requisite treatments. It is real. It is an injury.

The overwhelming testimony in this case is that Frances Overweg's life changed dramatically because she suffered from PTSD. At all times relevant to our review, she behaved, she functioned, she thought very differently from the way she did before the car accident that killed her husband. Was her skull fractured? No. Was she knocked unconscious for some appreciable period of time? No. Are there MRI (magnetic resonance imaging), PET (positron emission tomography) or CT (computerized axial tomography) scans that show brain damage? No. *Does she function differently in nearly every way than she did before the car accident? Yes.* Was there overwhelming medical and lay testimony that she exhibited the well-known characteristics of PTSD? Yes. I believe that reviewing the evidence in this manner is the proper, wider perspective appropriate to motions for summary disposition. On the other hand, I believe Judge Murray's analysis, despite the proper recitation of the standard of review, in fact, goes to great, unwarranted length to justify finding no genuine issue of material fact as to the existence of body impairment.

Just a few years ago there was a similar case: *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49; 760 NW2d 811 (2008). The plaintiff in *Allen* was involved in an accident and was also diagnosed with PTSD. *Id*. at 51. Ironically, his symptoms appear to have been less severe than Mrs. Overweg's. As in the instant case, Mr. Allen's doctors diagnosed him with PTSD. He, however, had a PET scan—a then brand new, still somewhat experimental, diagnostic tool. The physician who reviewed the PET scan determined that it showed some changes to part of the plaintiff's brain and that the changes were caused by the trauma of the accident, which in turn was responsible for the plaintiff's PTSD. *Id*. at 56-58. A majority of this court, coincidentally

Judges Servitto and I, held the doctor's testimony based on his understanding of PTSD and the PET scan constituted sufficient evidence to create a genuine issue of material fact as to whether the plaintiff had suffered a serious impairment of body function, specifically an impairment of the function of the most important organ of the body: the brain. *Id*. at 58, 60. The dissenting judge argued strongly that PTSD is nothing more than a psychological disorder and that a PET scan was of no import. The analysis set forth in *Allen* regarding PTSD and that an injury to the brain can constitute an impairment of an important body function is equally apropos to this fact scenario, especially in view of the fact that PTSD is far better understood and recognized than it was when *Allen* was decided—a sad irony if plaintiff here is denied her day in court from unnecessarily over-complex legal analysis of a fairly simply worded statute.

Again, like MRIs, CT scans, and the innumerable medical and scientific advances over the years, PET scans are now commonplace medical diagnostic tools. They were not when *Allen* was decided. But the more important point—a "tree"—is that the operation of the brain is the single most important body function of all. The fact that it controls *both* our physical and emotional functioning cannot be medically dissected, and neither should it be legally dissected. Doing so, as is the case here and as the dissenting judge did in *Allen*, creates a total fiction which is then the basis of a legal disposition that defies reality, reason and commonsense. If the brain is injured; it's injured. If it's injured to the point that medical doctors can "observe" and "perceive from actual symptoms or conditions" the injury, can diagnose the injury, and can treat the injury, then such are objective medical findings and should be legally respected. There is nothing about the diagnosis nor the objective manifestation of PTSD in this case that is inconsistent with the requirements set forth in *McCormick, Chouman v Home Owners Ins Co*, 293 Mich App 434; 810 NW2d 88 (2011), or any other recent caselaw. I believe the issue is far more simple and the legal resolution more patent than does Judge Murray.

Additionally, I could not help but be struck by the tenor of the questions and answers regarding Drs. Margolis' and Holstege's diagnoses of plaintiff's PTSD in their depositions. The physicians were patently bewildered, if not a bit disturbed, by defense counsel's attempt to undermine the credibility of their diagnosing plaintiff based on her medical history and her symptoms. In essence, they indicated that when a patient was suffering from PTSD, they neither needed nor were they helped by MRIs, etc. Their independent testimony established that the standard of care for diagnosing PTSD is to observe or perceive the disorder from actual symptoms or conditions. The disconnect between the legal and medical aspects of this unfortunate disorder is the creation of an inaccurate and artificial distinction that the emotional and physical components of human beings are separate and divisible and law's reluctance to accept that *physical* changes—including injuries—can occur to the brain without patent or visible physical trauma. In short, the medical profession recognizes PTSD as an injury to the brain. When I view the evidence in this case in a light most favorable to the plaintiff and with the perspective that a court must be liberal in finding one, *Lash*, 210 Mich App at 101, I conclude that there indeed exists a genuine issue of material fact.

In sum, I cannot agree with Judge Murray's contention that "[w]hile there is no dispute that plaintiff has PTSD, there is no evidence that plaintiff's injury—PTSD—affects a particular body function." *Ante* at 7. The exact opposite is true: PTSD *has* affected plaintiff's brain, *has* been objectively manifested, and *has* had a dramatic, adverse effect on her day-to-day ability to

function on many levels. I would reverse the grant of summary disposition and remand for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey