

STATE OF MICHIGAN  
COURT OF APPEALS

ANN PATRICIA JOHNSTON and RICHARD  
E. JOHNSTON,

Plaintiffs-Appellants,

-v-

No. 87657

MARGARET ANN THORSBY,

Defendant-Appellee.

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BEFORE: D.F. Walsh, P.J., and M.J. Kelly and C.W. Simon\*, JJ.

PER CURIAM

Plaintiffs appeal from an order granting summary disposition of their claim for noneconomic damages arising out of an automobile collision that occurred on June 30, 1981. On September 3, 1985, the circuit court held that plaintiffs had failed to meet the threshold provided by MCL 500.3135; MSA 24.13135 and Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983), and dismissed plaintiff's complaint with prejudice. Plaintiffs appeal by right.

Cassidy, however, has been overruled by DiFranco v Pickard, 427 Mich 32; \_\_\_ NW2d \_\_\_ (1986), which sets forth a new test for determining whether a no-fault plaintiff has sustained a serious impairment of body function under MCL 500.3135(1); MSA 24.13135(1). DiFranco has limited retroactive application, but applies to appeals pending when the decision was released, such as the instant case. Id., p 75. We find that the lower court record in the instant case is sufficient for this Court to decide this case under the new standard set forth in DiFranco.

When reviewing orders granting or denying summary disposition, this Court is required under DiFranco to make the following determination:

"a) whether a material factual dispute exists as to the nature and extent of the plaintiff's injuries, and

"b) whether reasonable minds could differ regarding whether the plaintiff had sustained a serious impairment of body function." Id., p 39.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Whenever the evidence would cause reasonable minds to differ as to whether the plaintiff suffered a serious impairment of body function, the question must be submitted to the trier of fact. Id., p 38.

The record in the instant case shows that plaintiff saw a doctor shortly after the accident. Her lower back pain was diagnosed as lumbosacral strain, and she was prescribed Tylenol. Plaintiff then waited two years before seeing any other doctors regarding her alleged accident-related injury to her shoulder. Her treating doctor at the time said that plaintiff might have had a torn rotator cuff, but if she did, it had long since healed. After plaintiff underwent some physical therapy, the doctor indicated that her shoulder had adequately healed and that he did not anticipate future problems.

We find that reasonable minds could not differ regarding whether these facts indicated that plaintiff had sustained a serious impairment of body function as a result of the auto accident. Plaintiff's waiting two years for treatment and her doctor's diagnosis that plaintiff's shoulder had healed indicate that plaintiff's injury, if caused by the accident, was not a serious impairment of body function. Having made this determination, we find that under DiFranco, this issue need not have been submitted to the jury. Therefore, the trial court properly granted defendant's motion for summary disposition.

AFFIRMED.

/s/ Daniel F. Walsh  
/s/ Michael J. Kelly  
/s/ Charles W. Simon, Jr.