

STATE OF MICHIGAN

COURT OF APPEALS

DALE D. THAYER, Individually
and as Next Friend of JAMES
EDWARD THAYER,

Plaintiff-Appellant,

and

No. 88535

JEANNE THAYER, Individually
and as Next Friend of JAMES
EDWARD THAYER,

Plaintiff,

v

BRIAN J. VANDERLIP and
WAYNE VANDERLIP,

Defendants-Appellees.

BEFORE: Sawyer, P.J., G.R. McDonald and H.J. Szymanski*, JJ

PER CURIAM

Plaintiff Dale D. Thayer appeals from the circuit court's decision granting summary disposition on Count III of plaintiffs' complaint, which set forth a claim of negligent infliction of emotional distress.

According to the allegations of the complaint, James Thayer, the son of the plaintiffs, was walking along the side of a road when he was struck by an automobile operated by one of the defendants. Dale Thayer, James' father, was apprised of the accident. It was his observation of his severely injured son moments later that produced the alleged emotional distress asserted as the basis for damages in Count III.

Plaintiffs filed a complaint for injuries in three counts: (1) James' personal injuries; (2) loss of consortium; and (3) negligent infliction of emotional distress. Since the first two counts were resolved by consent judgment, this appeal pertains only to the claim for emotional distress.

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

Plaintiff argues that the circuit court erred by deciding that the serious impairment threshold for recovery of non-economic injuries, MCL 500.3135(1); MSA 24.13135(1) applied to injuries sustained by Dale Thayer rather than those sustained by James Thayer. Since the tort of negligent infliction of emotional distress is premised upon the negligent vehicle collision, plaintiff argues that the tort is analogous to the derivative recovery for consortium, which is recoverable without regard to the serious impairment threshold. See Rusinek v Schultz, Snyder & Steele Lumber Co, 411 Mich 502; 309 NW2d 163 (1981). We conclude that the circuit court properly applied the serious impairment threshold to Dale Thayer's alleged mental distress claim.

MCL 500.3135(1); MSA 24.13135(1) sets forth the serious impairment standard of the no-fault act:

"A person remains subject to tort liability for non-economic 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."

In Luce v Gerow, 89 Mich App 546; 280 NW2d 592 (1979), one of the plaintiffs, a passenger in an automobile involved in an accident, claimed "mental injury" resulting from witnessing the collision and the injury sustained by the other plaintiff. The passenger plaintiff did not sustain serious physical injuries. In holding that a claim for mental distress was actionable under the no-fault act, the Court indicated that the serious impairment standard was directly applicable to the plaintiff's mental distress. Thus, the person sustaining mental distress was deemed to be an "injured person" for purposes of the no-fault act, and proper resolution of her claim turned on whether the injuries constituted a "serious impairment of body function."¹

Likewise, we do not accept plaintiff's contention that negligent infliction of emotional distress is no different than a claim for consortium. Unlike consortium, the bystander claim premised upon viewing another's physical injuries is a direct

action for recovery of damages sustained by the claimant; it is entirely independent of the claim for physical injuries. See Perlmutter v Whitney, 60 Mich App 268, 271-273; 230 NW2d 390 (1975). Cf., Kusinek, supra.

Accordingly, the circuit court's determination that Dale Thayer was the "injured person" for which the serious impairment standard must be satisfied was a proper basis for summary disposition. Since, however, the court's application of the serious impairment standard was in accordance with the interpretation then prevailing under Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983), we find it necessary to remand for reconsideration of this question in light of our Supreme Court's subsequently issued opinion in DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986).

We vacate the order of summary disposition granted by the court below and remand for further proceedings in conformity with DiFranco. We do not retain jurisdiction. No costs.

/s/ David H. Sawyer
/s/ Gary R. McDonald
/s/ Henry J. Szymanski

FOOTNOTE

¹We do not mean to intimate that the holding of the Luce decision is a valid application of the serious impairment standard in light of the prevailing interpretation of that standard by our Supreme Court. See Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982); DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986). The operative point that we glean from Luce concerns which party's injuries the standard is applied to when a claim for negligent infliction of emotional distress is asserted.