STATE OF MICHIGAN

COURT OF APPEALS

AUG 3 1 1987

SHARON FRANCINE RAPP,

Plaintiff-Appellee,

v

No. 92155

EDGAR M. ROBBINS, JR., and
MICHIGAN LIMOUSINE SERVICE,
INC., jointly and severally,

Defendants-Appellants.

BEFORE: J.B. Sullivan, P.J., MacKenzie and R.M. Daniels*, JJ.

PER CURIAM

Defendants appeal as of right from a judgment in favor of plaintiff on her tort claim for noneconomic loss under Michigan's no-fault insurance act, MCL 500.3135; MSA 24.13135. We affirm.

The case went to jury trial. Testimony indicated that plaintiff's automobile was struck from behind on July 28, 1981, by a vehicle owned by defendant Michigan Limousine Service and driven by defendant Edgar Robbins, an employee of the Limousine Service. Later that day, plaintiff felt pressure on her face and teeth. She contacted her father, a general surgeon and her family physician, who initially recommended bed rest. Plaintiff's condition did not improve.

Approximately 10 to 14 days following the accident, plaintiff began complaining of severe pain and clicking noises in her jaw and difficulty in opening and closing her mouth. Her jaw would drag and drift to the side. Eventually, plaintiff was referred to Dr. Stuart Davidson, D.D.S., a specialist in temporal-mandibular joint disorders, with whom plaintiff treated on approximately 50 occasions over the following year.

Davidson diagnosed plaintiff's injuries as temporal-mandibular joint arthrosis of traumatic origin with myalgia and disc dysplasia. By video deposition, Davidson explained the diagnosis as follows:

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

"TM joint arthrosis, means that her jaws did not function within the normal parameters; that is, they didn't open and close normally without a waviness, without clicking, without restrictive hindrances, and arthrosis is an inflammation or irritation problem with the jaw, is a dysfunction of the jaw joint itself. Of traumatic origin means, in my opinion, was as a result -- resulted from a type of blow injury that she developed -- that she received in the accident. With myalgia and disc dysplasia was the clicking sound that was exhibited when the patient went through normal opening and lateral movement. She was unable to make hardly any lateral movement at all, which would really make it almost impossible for you to chew. When people chew -- when humans chew, they don't chew up and down. It is sort of a lateral kind of swinging of the jaw. Now, she was unable to do that, and that's also something that is indicative of disc dysplasia or a problem with the cartilage."

Plaintiff's treatment consisted of wearing a bite splint, and physical therapy in the form of electrical muscle stimulation and muscle injections. Although the splint made it very hard for plaintiff to eat or talk, Davidson stated that without the splint, plaintiff's mouth was literally locked.

Davidson felt that absent surgery plaintiff's condition could not be resolved and would deteriorate, resulting in severely arthritic jaw joints. Surgery would involve an incision from the back to the front of plaintiff's ear, removal of the cartilage around the joint, and insertion of artificial discs. Plaintiff's condition would require surgery on both sides. Davidson stated that the surgical procedure would not necessarily cure plaintiff's problems and could itself possibly lead to the need for further surgery over the years. In addition, Davidson explained that the risks attendant to the surgery included the possibility of facial paralysis.

Oral surgeon Dr. John Helfrick, D.D.S., initially examined plaintiff in early September 1982. Helfrick, like Davidson, diagnosed bilateral, internal derangement of the plaintiff's temporal-mandibular joints. Helfrick explained that such a condition causes pain and dysfunction during routine jaw functions and that plaintiff's condition was capable of producing pain even when she was not engaged in the active function of her jaw. By video deposition, he reported that when plaintiff opened her jaw to about two-thirds of normal opening, the jaw would

dislocate. When, by December, 1982, he noted no improvement with the use of splint therapy, Helfrick recommended that plaintiff undergo surgery. Helfrick admitted that the surgical procedures were relatively new and that there was currently "a great deal of discussion going on within [his] specialty regarding the best surgical procedure to deal with these problems". In addition, Helfrick stated that although most operations have been successful in alleviating the clicking noises in the jaws, only about 50 percent result in the elimination of facial pain.

Plaintiff began treating with oral surgeon Dr. Gary Wolford, D.D.S., on December 23, 1982. Wolford also diagnosed internal derangement of plaintiff's temporal-mandibular joints. Plaintiff was last treated by Wolford in July, 1983.

Dr. Lawrence M. Ashman, D.D.S., a specialist in temporal-mandibular joint dysfunction, began treating plaintiff in August 1983. At the initial office visit Ashman noted that plaintiff could only open her jaw to 22 millimeters, in comparison to a normal opening of 40 to 60 millimeters. Plaintiff's jaw was also found to "lock" on the left side as well as to deflect to the left upon opening. Ashman arrived at the diagnosis of "internal derangement of both the temporal-mandibular joints with periods of locking of the left joint causing the periods of hypomobility and muscular hypertenicity". He stated that a person with this affliction would be "very limited" in their ability to use his or her jaw in daily activities such as eating, speaking, etc.

Between August 23, 1983, the date of plaintiff's initial visit to Ashman's office, and April 24, 1984, the date of his video deposition, Ashman treated plaintiff 15 times for her temporal-mandibular joint injuries. During this course of treatment, Ashman constructed a mouth piece which would reposition plaintiff's jaw in an attempt to have the disc and condyle return to proper alignment. The device was prescribed to

be worn by plaintiff 24 hours a day and, possibly, for the rest of her life. Physical therapy was also done on the muscles of plaintiff's face and jaw in an effort to relax them and return the muscle lengths to their natural states.

Ashman's prognosis of plaintiff's injuries after this treatment was, however, only "fair". Due to the extent of the dysfunction, Ashman felt surgical treatment of plaintiff's condition would eventually be required, but he did not believe that surgery would completely correct plaintiff's dysfunction. Plaintiff continued to treat with Ashman through the time of trial.

Plaintiff explained at trial how the temporal-mandibular joint injuries have affected her: (1) eating is very difficult due to the requirement that she have the bite splint in her mouth; (2) food falls out of her mouth and she is unable to taste what she is eating; (3) she has lost considerable weight due to her inability to properly eat; (4) the bite splint caused sores on the roof of her mouth and swelling of her gums; (5) her jaw dislocates when she chews; (6) she suffers severe headaches; (7) she is in constant pain and has "clicking" noises in her ears. Further, plaintiff's mother testified that plaintiff drools when eating and her jaw will sometimes lock up.

Following the presentation of plaintiff's evidence, defendants moved for a directed verdict on the issue of serious impairment of body function, claiming that plaintiff had failed to meet the threshold as required by Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983). The trial court denied the motion.

Defendant's proofs consisted of the video depositions of Wolford and oral surgeon Dr. William Cheslin. Wolford testified that during the time he treated plaintiff, she was never able to open her mouth beyond 60 percent of normal opening. He concluded that conservative treatment would not be successful.

Wolford stated that bilateral arthroplasties (a surgical procedure involving repositioning the discs, exercising stretch tissues and reconstructing the ligaments) had a 50 to 60 percent chance of success with plaintiff. He accordingly recommended that additional surgery be performed on plaintiff, involving a repositioning of her upper jaw, a maxillary osteotomy, as well as a sagittal split osteotomy. He characterized the surgery as "a fairly lengthy procedure" lasting approximately six or eight hours and "more extensive surgery than most people would perform". He noted that the surgeries carried the risks that plaintiff might lose the ability to wrinkle her forehead of close her upper eyelids. If plaintiff did not submit to the surgeries, however, Wolford believed that plaintiff's injuries would reach the stage that her jaw would be permanently locked. Even if she did undergo surgery, Wolford testified to having "some various concerns" about the possibility of a relapse, perhaps necessitating further surgery. When plaintiff decided against surgery, Wolford referred her to Dr. Ashman for further conservative treatment.

Plaintiff was evaluated at defendant's request by Dr. Cheslin on January 8, 1985. Cheslin's examination was difficult due to plaintiff's inability to open her mouth more than 20 millimeters. Nonetheless, Cheslin was able to diagnose that plaintiff was suffering from bilateral temporal-mandibular joint dysfunction. He said that plaintiff complained that her jaw was still "locking" three to four times a week for periods lasting from 15 minutes to one hour. Cheslin did not think that splint therapy would cure plaintiff. He recommended that plaintiff submit to orthodontic surgery and then surgery on the joints.

Following these proofs, plaintiff successfully moved for a directed verdict on the issue of serious impairment. The case was then submitted to the jury on the issues of causation and damages.

On appeal, defendants argue that the trial court erred in granting a directed verdict in favor of plaintiff, and that the court should have granted their motion for directed verdict. Because this appeal concerns the question of whether plaintiff's injuries constitute a "serious impairment of body function" under MCL 500.3135(1); MSA 24.13135(1) and because this appeal was pending on December 23, 1986, the date on which the Supreme Court decided DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986), we apply the standards set forth in DiFranco in resolving this case.

In DiFranco, supra, the Supreme Court modified that portion of Cassidy v McGovern, supra, which held that the trial court must decide whether the plaintiff suffered a serious impairment of body function whenever there is no material factual dispute as to the nature and extent of the plaintiff's injuries. Under DiFranco, the question whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence, viewed in a light most favorable to the non-moving party, is such that reasonable minds could differ as to the answer." DiFranco, supra, p 69.

The DiFranco Court also did away with all three parts of the test previously developed to determine whether an injury is a serious impairment. An impairment need no longer impact on the plaintiff's ability to live a normal life in order to be accounted serious. See DiFranco, supra, pp 62-67. An injury need no longer be objectively manifested in order to constitute a serious impairment of body function. See DiFranco, supra, pp 70-75. The body function impaired need no longer be an important one. See DiFranco, supra, pp 61-62. In place of these tests, the Court substituted the following standard:

> "The 'serious impairment of body function' threshold contains two straightforward inquiries:
> "(1) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?
> "(2) Was the impairment serious?" DiFranco, supra, p 67.

The DiFranco Court explicitly intended that the first inquiry, identifying which body functions were impaired, be a "relatively easy task". DiFranco, supra, p 67. To determine seriousness, which is the more difficult task, the following factors were suggested: (1) the particular body function impaired; (2) the extent of the impairment in quantitative, medical terms; (3) the duration of the impairment; (4) the type of treatment required to rectify the impairment, and (5) any other relevant factors. DiFranco, supra, pp 69-70.

In the instant case, we believe that the trial court, in finding a serious impairment of body function, ruled correctly under Cassidy. The result is no different under DiFranco. From the above testimony, it is manifest that plaintiff's jaw and mouth function was impaired. Moreover, even viewing the evidence in a light most favorable to defendants, it is clear that reasonable minds could not differ that the impairment was serious. Impairment of the mouth and jaw function meant that plaintiff experienced difficulty eating and speaking. Residual problems included pain, headaches, and clicking of the jaw. The medical testimony regarding the extent of the impairment was consistent. Plaintiff's jaw would frequently lock and dislocate, and at most she was able to open her mouth no more than 60 percent of normal opening. All doctors agreed that at a minimum, plaintiff's condition required her to wear a splint or mouthpiece. Further, it was undisputed that plaintiff's jaw dysfunction persisted continuously from the summer of 1981 until the time of trial, in March 1986, and would persist into the future. Finally, experts for both plaintiff and defendant testified that absent surgery, plaintiff's condition could not be resolved and would deteriorate. The experts also agreed that surgical complications were possible, that even with surgical intervention plaintiff's impairment might not be completely corrected, and that the possibility of relapse existed after

surgery. Considering all of these factors, we are satisfied that, viewing the evidence in a light most favorable to defendants, reasonable minds could not differ that plaintiff suffered a serious impairment under DiFranco.

Affirmed.

/s/ Joseph B. Sullivan
/s/ Barbara B. MacKenzie
/s/ R. Max Daniels