

STATE OF MICHIGAN
COURT OF APPEALS

LEO F. WERDA and MARIE E. WERDA,
Plaintiffs-Appellants,

v

No. 101388

GERALD KRAMER and JANE MARIE KRAMER,
Defendants-Appellees.

Before: Maher, P.J., and Murphy and R.B. Burns,* JJ.

PER CURIAM

Plaintiffs, Leo F. Werda and Marie E. Werda, appeal as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

On August 29, 1986, plaintiffs filed a complaint alleging that Marie Werda was injured and suffered a serious impairment of body function after the car she was operating was rear-ended by defendant Jane Kramer's car. Among these impairments specifically alleged were chest pain relating to a preexisting condition or to musculoskeletal injury and injury to Marie's circulatory system.

Defendants answered denying that Marie suffered from a serious impairment of a body function and moved for summary disposition. The trial court decided the motion on the parties' briefs and attachments without holding a hearing. In granting defendants' motion, the court stated:

"The medical evidence presented to this Court, viewed in plaintiff's most favorable light, does not establish a physical basis for plaintiffs [sic] subjective complaints of pain. The medical diagnosis of the doctors who have examined plaintiff are that plaintiff suffers from chest pain. All of the examining doctors agree that such pain is not cardiac related.

"Plaintiff is not entitled to non-economic loss recovery for subjective complaints of pain without a medically identified physical basis for such pain. DiFranco, 427 Mich at 74-75. Plaintiff has failed to come forward, as required by MCR 2.116(g)(4) and DiFranco, showing there is a material factual dispute

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

upon this question. Thus, reasonable minds could not differ on the question of whether plaintiff suffered a serious impairment of body functions."

Section 3135(1) of Michigan's no-fault automobile insurance law¹ provides for tort liability for non-economic loss only in cases of death, serious impairment of a body function or permanent or serious disfigurement. Plaintiffs' complaint alleges that Marie's chest pain falls into the category of a serious impairment of a body function. Plaintiffs argue that the question should have been submitted to a jury rather than summarily dismissed. We agree.

Our Supreme Court's decision in DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986), is dispositive of this issue. The DiFranco Court articulated the standard of review as follows:

"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 the light most favorable to the nonmoving party, is such that reasonable minds could differ as to the answer. To ensure that the jury fully understands the nature of the threshold inquiry, the jury should be instructed on the following points:

"1) To recover noneconomic-loss damages, the plaintiff must prove that the injuries he sustained in the motor vehicle accident impaired one or more body functions, and that the impairment of body function was serious.

"2) In determining whether the impairment of body function was serious, the jury should consider such factors as the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious." Id., pp 69-70.

In this case, the trial court stressed the non-cardiac origin of Marie's pain and ignored a dispute among the doctors who examined her. While some of the doctors did not believe Marie suffered from a heart problem, one did. The trial court also appears to have ignored plaintiffs' allegations of the origin of the pain as being musculoskeletal, due to the impact of defendants' car hitting plaintiffs' car.

The DiFranco Court stated that the plaintiff must prove that his non-economic losses arose out of a medically

identifiable injury which seriously impairs a body function.

Id., p 75. However, recovery is not limited only to damages for injuries which can be seen or felt by a examining physician. A plaintiff's subjective complaints are not to be automatically disregarded or dismissed as a matter of law by the trial court. The jury should have the opportunity to weigh the testimony of the experts and medical evidence presented by both sides in determining whether the plaintiff's injury is a serious impairment of a body function. No longer must a plaintiff show "objectively manifested injuries" to avoid summary disposition as was required by Cassidy v McGovern, 415 Mich 483, 505; 330 NW2d 22. (1982), reh den 417 Mich 1104 (1983).

The trial court stated that it was analyzing this case under DiFranco. However, its reliance upon Cassidy is obvious when it spoke of Marie's subjective complaints of pain. Under DiFranco the trial court's order granting summary disposition to defendants was in error. Therefore, we reverse and remand this case for submission to a jury.

/s/Richard M. Maher
/s/William B. Murphy
/s/Robert B. Burns

¹ MCL 500.3101 et seq.; MSA 24.13101 et seq.