

STATE OF MICHIGAN  
COURT OF APPEALS

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WOLF P. TYTSCHKOWSKI,

Plaintiff-Appellant,

v

No. 97303

SUSAN PONDER and BAILEY PONDER, jointly  
and severally,

Defendants-Appellees.

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Before: Holbrook, Jr., P.J., and MacKenzie and N. A. Baguley,\*  
JJ.

PER CURIAM

Plaintiff appeals from the judgment of no cause of action entered on his claim for personal injuries sustained in an automobile accident. The judgment resulted from the jury finding by special verdict that plaintiff did not sustain either a serious impairment of body function or a permanent serious disfigurement.

Plaintiff argues that the trial court should have ruled that the "serious impairment of body function" and "permanent serious disfigurement" requirements, MCL 500.3135(1); MSA 24.13135(1), were satisfied as a matter of law rather than submitting the question to the jury. The trial court decided plaintiff's motion under the then prevailing standard. See Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982). However, the Supreme Court substantially rewrote the standards for determining a serious impairment issue in DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986), and further made its holdings retroactively applicable to the instant case, which was pending on appeal at the time that DiFranco was decided, id., 40, 75. The overall impact of the DiFranco holdings is that more cases will be jury-submissible. See Morse v Loomis, 158 Mich 519; 405 NW2d 404 (1987). We have reviewed the serious impairment

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

question presented by this case and conclude that plaintiff's motion for summary disposition as a matter of law was properly denied. We also deem the DiFranco standard to be applicable by way of analogy to the determination of whether plaintiff has sustained a permanent serious disfigurement. Morse, supra; Owens v Detroit, 163 Mich App 134, 139-141; 413 NW2d 679 (1987). Because reasonable minds could differ on this issue, we conclude that this question was also properly submitted to the jury. Therefore, we affirm the decision of the trial court to deny plaintiff's motion for summary disposition.

Plaintiff also claims instructional error. In accordance with SJI2d 36.01, the trial court instructed the jury that "[s]erious impairment of a body function requires that the impairment be of an important body function." This proposition of law was expressly disavowed in DiFranco, supra, 61-62. Because DiFranco is applicable to this case, we are constrained to reverse the judgment and remand for a new trial. Although defendants argue that plaintiff's failure to object to the instructions forecloses appellate review, we find this to be at odds with the retroactivity provision of DiFranco. Moreover, we are persuaded that it would be manifestly unjust to hold that the issue is waived because plaintiff did not anticipate the DiFranco decision or object to an instruction that was unobjectionable under the then existing state of the law. Therefore, we find appellate review to be proper and conclude that a new trial is necessitated by the instructional error. See Strach v St John Hospital Corp, 160 Mich App 251, 281-282; 408 NW2d 441 (1987), lv den 429 Mich 885 (1987).

Affirmed in part; reversed in part; and remanded for further proceedings in accordance with this opinion.

/s/ Donald E. Holbrook, Jr.  
/s/ Barbara B. MacKenzie  
/s/ Norman A. Baguley