

STATE OF MICHIGAN
COURT OF APPEALS

CRYSTAL G. WILSDORF,

MAR 16 1989

Plaintiff-Appellee,

v

No. 95312

ROBIN M. DEERE and JEFFREY CALE,
jointly and severally,

Defendants-Appellants.

Before: Sullivan, P.J., Wahls and Cavanagh, JJ.

PER CURIAM.

In this automobile negligence case, defendants, Robin M. Deere and Jeffrey Cale, appeal by leave granted from an August 25, 1986, order of the Washtenaw Circuit Court denying their motion for summary disposition and granting in part summary disposition in favor of plaintiff, Crystal G. Wilsdorf, pursuant to MCR 2.116(C)(10). The trial court found that the scar on plaintiff's forehead, which required eighteen stitches and was sustained in a July 29, 1984, accident involving a car owned by defendant Cale and driven by defendant Deere, constituted a "serious" disfigurement under the no-fault act, MCL 500.3135; MSA 24.13135. That provision subjects a defendant to tort liability for noneconomic loss caused by his ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or "permanent serious disfigurement." The trial court specifically reserved judgment on the permanency of plaintiff's disfigurement. We reverse and remand this case for further proceedings.

On appeal, defendants argue that the trial court erred in "granting partial summary disposition for plaintiff on the issue of serious disfigurement, because no reasonable person could disagree that plaintiff's small scar does not rise to the threshold of permanent serious disfigurement." Defendants emphasize that plaintiff's scar is no longer than 1 1/2 inches

and, located near the hairline on the right side of the head, is partially obscured by hair.

At the time the trial court in this case issued its order, precedent provided that, "if there is a factual dispute as to the nature and extent of a plaintiff's injuries, but the dispute is not material to the determination whether plaintiff has suffered a serious impairment of body function, the [trial] court shall rule as a matter of law whether the threshold requirement of MCL 500.3135; MSA 24.13135 has been met." Cassidy v McGovern, 415 Mich 483, 502; 330 NW2d 22 (1982). While the present case was pending on appeal, this precedent was modified, the Supreme Court holding, "[i]f reasonable minds can differ as to whether the plaintiff suffered a serious impairment of body function, the issue must be submitted to the jury, even if the evidentiary facts are undisputed." DiFranco v Pickard, 427 Mich 32, 58; 398 NW2d 896 (1986). In DiFranco, the Supreme Court stated that its holding marked a return to the rules articulated in Advisory Opinion re Constitutionality of 1972 PA 294, 389 Mich 441; 208 NW2d 469 (1973). That advisory opinion stated, regarding the statutory phrases, "serious impairment of body function" and "permanent serious disfigurement," that:

"juries or judges sitting without juries frequently have and do interpret comparable phrases bearing upon various facets of the law. Such findings result from denominated fact questions and thus are within the exclusive province of the triers of fact. Only when interpretation approaches or breaches permissible limits does it become a question of law of the Court.

* * *

"Clearly the subject phrases 'serious impairment of body function' and 'permanent serious disfigurement' as used in §3135 of this act are comprised of no less commonly used or understood words of the English language, nor is the language presently before the Court less precise than that which has been adopted to express other standards for determining tort liability. The phrases are within the province of the trier of fact and are sufficient for legal interpretation." 389 Mich 477-478, 481.

While the DiFranco case and the cases consolidated with it dealt solely with the issue of serious impairment of a body function, the Supreme Court's analysis applies equally to the issue of permanent serious disfigurement. See Owens v City of Detroit, 163 Mich App 134, 139-141; 413 NW2d 679 (1987). In

DiFranco, the Supreme Court stated that its new rule would be applicable to, among other cases, "currently pending appeals in which an issue concerning the proper interpretation of the statutory phrase 'serious impairment of body function' has been raised. By analogy, its new rule would also be applicable to cases pending on appeal, such as the instant case, in which an issue concerning the proper interpretation of the statutory phrase 'permanent serious disfigurement' has been raised. Id. Thus, we will apply the DiFranco rule to the case at bar.

In Owens, supra, the plaintiff, among other injuries, sustained the loss of his four front teeth, necessitating the use of a plate which made eating and speaking more difficult. This Court did not affirm the trial court's order of summary disposition in favor of the plaintiff, however, because "reasonable minds could differ as to whether plaintiff's injury constitutes permanent, serious disfigurement." 163 Mich App 141. The Owens panel stated:

"under DiFranco, 'serious' is a jury question except in the most extreme cases. We do not believe that this disfigurement falls into the extreme at which reasonable minds could not differ. Thus, applying DiFranco by analogy, we reverse the trial court's ruling on this theory insofar as it grants summary judgment to plaintiff." 163 Mich App 141.

In the present case, the trial court could not discern plaintiff's scar in photographs of plaintiff's head proffered by defendants. Moreover, the scar, described as being no longer than 1 1/2 inches, is near plaintiff's hairline and is partially covered by her hair. The trial court acknowledged, after viewing plaintiff's scar in the courtroom, that little, if any, discoloration existed. Nevertheless, the court could discern evidence of a scar "when we are close to her." Finally, the trial court itself stated that it was "not proposing that there is not, at least, enough seriousness there that she should be able to go to a jury on that point."

We believe that the issue of the seriousness of plaintiff's disfigurement, as well as its permanency, should be submitted to a jury because the disfigurement clearly is not what

one would find in "the most extreme cases" and because it does not "fall[] into the extreme at which reasonable minds could not differ." Owens, supra, p 141; Earls v Herrick, 107 Mich App 657, 664, 668; 309 NW2d 694 (1981). Submission of the issue of the seriousness of plaintiff's disfigurement to the jury also is consistent with the trial court's apparent desire that plaintiff "should be able to go to a jury on that point."

Accordingly, we reverse the order of the trial court and remand the case for proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

/s/ Joseph B. Sullivan
/s/ Myron H. Wahls
/s/ Mark J. Cavanagh