STATE OF MICHIGAN

COURT OF APPEALS

GREGORY KALLIO,

Plaintiff-Appellant,

v

DAVID P. FISHER and BRUCE G. FISHER,

Defendants-Third-Party Plaintiffs-Appellees,

No. 106784

and

ROBERT WILLIAM RESNER, JR.,

Defendant-Third-Party Defendant-Appellee.

Before: Murphy, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition in favor of defendants. The court found that as a matter of law plaintiff's injuries did not amount to serious impairment of body function, the threshold necessary for recovery of non-economic damages under the Michigan no-fault insurance act, MCL 500.3135(1); MSA 24.13135(1). We affirm.

In DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986), our Supreme Court held that "the question whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer". 428 Mich 38. In this case we agree with the trial court that reasonable minds could not differ that plaintiff's injuries did not constitute serious impairment of body function.

Plaintiff's cause of action arose out of an automobile accident in which he was asleep in the back of defendant Resner's car when it collided with another motor vehicle. Plaintiff was transported to the nearest hospital by private vehicle where he

was admitted to the emergency room at 3:47 a.m. and diagnosed as suffering from an acute cervical spine injury, a sprained right wrist, abrasions, and contusions. Prior to his 5:40 a.m. discharge, plaintiff was advised by the emergency physician to rest, avoid excessive activity, take pain pills as directed, and wear a soft cervical collar for seventy-two hours until he could be seen by his family physician.

Plaintiff did not see his family physician until twelve days later, at which time plaintiff's condition was diagnosed as whiplash injury which limited plaintiff's range of motion in his neck by twenty-five percent. A little over two months later, plaintiff again saw his family doctor who determined that plaintiff's injury had completely healed. At this point plaintiff's only symptom was pain in the left side of his neck. Plaintiff continued to work during this time period as a carpenter and thereafter as a roofer. On the advice of his attorney, 8-1/2 months after the accident plaintiff saw another physician, Dr. Meier. Dr. Meier concluded that plaintiff was suffering from a chronic cervical-dorsal strain which was causally related to the 1986 motor vehicle accident.

We find this case analogous to Johnston v Thorsby, 163 Mich App 161; 413 NW2d 696 (1987). There, the plaintiff suffered lumbosacral strain and was prescribed pain killers. She underwent some physical therapy, and her doctor considered her injuries completely healed. This Court concluded that the plaintiff's injury was not a serious impairment of body function, so that under DiFranco, the issue need not have been submitted to the jury.

Here, plaintiff had only minor complaints following the accident, sought a physician's help only three times (one of which was at the advice of his attorney), and was considered healed by his family physician. As in Johnston, we conclude that reasonable minds could not differ that plaintiff's injuries did

not constitute serious impairment of body function. The circuit court did not err by granting summary disposition to defendant.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin

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MURPHY, J. (dissenting).

I dissent because I believe the majority has not properly applied the holdings in DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986), to the facts of this case.

Initially, a review of some of the pertinent Supreme Court's various holdings in DiFranco is in order. The Court held:

> 1) The question whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer. This is true even where there is no material factual dispute as to the nature and extent of the plaintiff's injuries.
>
> 2) In deciding motions for, and reviewing orders granting or denying, summary disposition, directed verdict and judgment notwithstanding the verdict, the court must view the evidence in the light most favorable to the nonmoving party and determine:
>
> a) whether a material factual dispute exists as to the nature and extent of the plaintiff's injuries, and
>
> b) whether reasonable minds could differ regarding whether the plaintiff had sustained a serious impairment of body function.
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> * * *
>
> 9) Section 3135(1) and Cassidy [Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982)] require the plaintiff to prove that his noneconomic losses arose

> out of a medically identifiable injury which seriously impaired a body function. The interpretation of Cassidy's "objectively manifested injury" requirement adopted in William v Payne, 131 Mich App 403; 346 NW2d 564 (1984), is rejected. [Id., pp 38-40. Emphasis added.]

Based on the foregoing, it is eminently clear that this Court is required to view the evidence in plaintiff's favor even absent a material factual dispute existing as to the nature and extent of plaintiff's injuries. However, in this case there is a material factual dispute between Drs. Belej and Meier as to the nature and extent of plaintiff's injuries. In addition, this Court must be certain that plaintiff's injuries are "so minor" or of a "clearly superficial nature" before it can be said that the serious impairment threshold is a question of law. DiFranco, supra, pp 51-52.

The facts in the case clearly established that on October 22, 1986, plaintiff was wearing his seat belt in the back seat of a car which was struck by another automobile. Plaintiff hit his head and suffered contusions. Plaintiff was taken to a hospital emergency room and diagnosed as suffering an acute cervical spine injury. Plaintiff was prescribed Tylenol #3 and told to wear a cervical collar for seventy-two hours. After returning home on November 3, 1986, plaintiff sought treatment from his physician, Dr. Marco Belej, an internal medicine specialist. Dr. Belej diagnosed plaintiff's condition as a whip lash injury that limited the range of motion in plaintiff's neck by twenty-five percent and a condition which caused much pain.

Some 2-1/2 months after the accident, on January 6, 1987, plaintiff again saw Dr. Belej. At that time, although plaintiff still complained of pain, Dr. Belej felt plaintiff's injury had completely healed.

On July 7, 1987, plaintiff saw another physician, Dr. Maurice Meier, at the request of plaintiff's attorney. Dr. Meier diagnosed plaintiff as suffering from a chronic cervical dorsal strain which was causally related to the October 22, 1986,

automobile accident. In September 1987 at his deposition, plaintiff still complained of pain in his neck and stated that he still wore the cervical collar on occasion. In February 1988, the trial court dismissed plaintiff's complaint.

The majority relies on Johnston v Thorsby, 163 Mich App 161; 413 NW2d 696 (1987), as factually analogous to the instant case. I disagree. The facts in Thorsby as stated by this Court are the following:

> The record in the instant case shows that plaintiff saw a doctor shortly after the accident. Her lower back pain was diagnosed as lumbosacral strain, and she was prescribed Tylenol. Plaintiff then waited two years before seeing any other doctors regarding her alleged accident-related injury to her shoulder. Her treating doctor at the time said that plaintiff might have had a torn rotator cuff, but, if she did, it had long since healed. After plaintiff underwent some physical therapy, the doctor indicated that her shoulder had adequately healed and that he did not anticipate future problems.

One major distinction between Thorsby and this case is plaintiff here has a second opinion from a physician that diagnoses plaintiff as still suffering from a chronic cervical strain. In addition, it appears plausible that plaintiff's injury, initially diagnosed as an acute cervical spine injury, is a more serious injury than one diagnosed as a lumbosacral strain.

The majority also seems to find it telling that plaintiff saw another physician on the advice of his attorney. However, it appears to me that the majority is implying plaintiff is some form of a malingerer and Dr. Meier's diagnosis lacks credibility. I see no reason to impugn the credibility of plaintiff's injury absent some record support for such conclusion. I am also somewhat troubled by the majority's statement that plaintiff "sought a physician's help only three times." I am unaware of any requirement that a person injured in an automobile accident must make extensive visits to a physician to establish that they have possibly suffered a serious impairment of a body function. Simply, I am disturbed at why the majority apparently chooses to discredit Dr. Meier's diagnosis

relative to plaintiff's injury. That diagnosis, in my view, sufficiently establishes a factual dispute regarding the nature and extent of plaintiff's injury.

I also note that this Court in Beard v City of Detroit, 158 Mich App 441; 404 NW2d 770 (1987), lv den 428 Mich 901 (1987), on the basis of the plaintiff's subjective complaints of pain, held that there was a material factual dispute as to the nature and extent of the plaintiff's injuries that raised issues for the jury to decide.

The facts in Beard revealed that the plaintiff's vehicle was struck in the rear by a bus. The plaintiff remembered being thrown backward and maybe also hitting his head on the steering wheel or dashboard. When the ambulance arrived, the plaintiff declined to go to the hospital. An investigating officer stated that the plaintiff complained of injury but exhibited no signs of injury or shock. The plaintiff drove his vehicle home and then went with his wife to a hospital emergency room where he was given a muscle relaxant and a prescription for Tylenol #3. Although he was diagnosed as having suffered a "cervical sprain," x-rays of his skull and spine revealed no fracture or abnormality and he returned home. Id., p 444. Several days later, the plaintiff went to a neurologist for treatment of dizziness and back pain. The neurologist prescribed physical therapy three times a week for about six months. Summarizing the neurologist's deposition, the plaintiff's clinical symptoms during this time were subjective complaints. The only objective finding that supported the plaintiff's complaint was described as one EMG; however, an EMG done two months later did not reveal any problems. A chiropractor noted that the plaintiff suffered extreme sensitivity in the cervical spine area. The chiropractor's prognosis was that no permanent disability was expected. A physician who saw the plaintiff for pain management believed that the plaintiff would not need any restrictions in terms of physical activities. In any event, the

plaintiff suffered depression which was possibly related to the accident.

Based on the foregoing, this Court stated,

> As to plaintiff's physical injuries, his overall impairment was not so "serious" within the meaning of the word as used in the statute that all reasonable minds would have concluded that it was serious. In fact, based on the medical testimony regarding plaintiff's physical injuries, if any party was entitled to a directed verdict, it was defendant. Nonetheless, we cannot alternatively say that all persons would have concluded that plaintiff's impairment was not serious. Thus, the threshold issue was properly submitted to the jury. [Emphasis added.]

If the facts in Beard were sufficient to have a jury determine whether the plaintiff's impairment was serious, I am hard pressed to see how the majority can deny plaintiff the opportunity to have a jury determine if his injury constitutes a serious impairment of a body function.

Based on the foregoing, it is my conclusion that in viewing the evidence in the light most favorable to plaintiff, the question whether plaintiff suffered a serious impairment of body function must be submitted to the trier of fact because: (1) a material factual dispute exists as to the nature and extent of plaintiff's injuries and (2) reasonable minds could differ regarding whether plaintiff sustained a serious impairment of body function. DiFranco, supra, p 38. Therefore, I would reverse the lower court's order granting defendant's motion for summary disposition.

/s/William B. Murphy