

STATE OF MICHIGAN  
COURT OF APPEALS

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LARRY ROBERT KNIGHT,

Plaintiff-Appellant,  
Cross-Appellee,

-vs-

No. 86760

CRAIG MICHAEL ELLIOTT,

Defendant-Appellee,  
Cross-Appellant.

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BEFORE: Beasley, P.J.; R. B. Burns and G. D. Lostracco,\* JJ.

PER CURIAM

This appeal concerns the question of whether certain injuries constitute a "serious impairment of body function" under MCL 500.3135(1); MSA 24.13135(1). Because the appeal was pending on December 23, 1986, the date on which the Supreme Court decided DiFranco v Pickard,<sup>1</sup> our resolution of the issues requires that we interpret and apply that recent decision.

This lawsuit arose out of a single vehicle automobile accident on March 24, 1982, in which plaintiff, Larry Robert Knight, was a passenger in a car driven by defendant, Craig Michael Elliott. Plaintiff sought, among other things, recovery for non-economic loss. Under MCL 500.3135(1); MSA 24.13135(1), defendant was not liable for that loss unless plaintiff suffered "death, serious impairment of body function, or permanent serious disfigurement". Plaintiff alleged that he suffered a serious impairment of body function, so as to entitle him to recovery.

At the close of plaintiff's proofs, defendant moved for a directed verdict on the issue of serious impairment. The trial court denied the motion without prejudice to defendant's ability to renew it after the close of all the evidence. Defendant did renew the motion at the close of the evidence, and it was again denied. Plaintiff also moved for a directed verdict on this

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\* Circuit Judge, sitting on Court of Appeals by assignment.

issue, which was also denied. The trial court's position was that there were questions of fact on the issue of serious impairment requiring jury resolution.

The court gave the jury the following instruction on the question of serious impairment of body function:

"Based upon the evidence in this case, you must decide whether the Plaintiff suffered an impairment of bodily function; and, if so, whether the impairment was serious.

"Serious impairment of body function requires that the impairment be of an important body function. The impairment need not be permanent to be serious.

"The operation of the mind and of the nervous system are body functions. Mental or emotional injury which is caused by physical injury or mental or emotional injury not caused by physical injury, but which results in physical symptoms, may be a serious impairment of a body function. To be a serious impairment of a body function, the impairment must be of an important body function, and must be objectively manifested; that is, an objectively manifested impairment is one which is capable of scientific or medical measurement. To be a serious impairment of a body function, the impairment must seriously affect the Plaintiff's ability to perform common day-to-day activities and to lead a normal life." (Emphasis added.)

The highlighted portions of the instruction were given over plaintiff's objection.

The jury determined that, while plaintiff's injuries were proximately caused by defendant's negligence, they did not result in a serious impairment of body function. Based on this finding, the trial court filed a judgment of no cause of action on July 23, 1985. Plaintiff now appeals as of right.

The serious impairment of body function plaintiff claims is brain damage, manifested by a number of symptoms and problems. He also claims brain dysfunctions resulting in unreliable memory, difficulty with language, trouble making choices and trouble communicating. There was conflicting testimony regarding these issues at trial.

Dr. Emmanuel Tanay, a psychiatrist, testified that, in his opinion, there was no doubt that plaintiff suffered permanent brain damage as a result of the accident. He also said that the injury was manifested by prolonged unconsciousness, post-traumatic epilepsy, personality changes, memory impairment and evidence of diplopia, or double vision.

Dr. Kenneth Adams, Director of the Division of Neuropsychiatry at Henry Ford Hospital, testified that plaintiff suffered a brain dysfunction as a result of the accident. He indicated that plaintiff's memory was unreliable, that his ability to relate sounds and symbols smoothly was very much compromised, and that that language difficulty was having significant effects on his decision making ability and communication.

Dr. John Hall, plaintiff's treating physician, testified that plaintiff suffered extensive right-side scalp and temporal lacerations, along with brain swelling, and a basilar skull fracture. Plaintiff also complained of double and blurred vision. For weeks after the accident, plaintiff continued to complain of double vision when gazing downward and could not completely lower his left eye. He concluded, two months after the accident, that plaintiff had possibly suffered left-side brain damage. Plaintiff's left eye had a rotation abnormality.

Dr. William Anderson, a specialist in physical medicine and rehabilitation, testified that he thought, based on his examination of plaintiff following the accident, that there was "a probability, or at least a possibility", that plaintiff was suffering a mild seizure disorder. The deposition testimony of Dr. Douglas Wacker, which was read into evidence, indicated that he had found evidence of double vision upon examining plaintiff. The deposition testimony of Dr. George Ristow, also read into evidence, indicated that he had diagnosed a cerebral concussion and found right-side hyporeflexia which was, in and of itself, indicative of left hemisphere brain injury.

The testimony of defendant's experts was in some ways contradictory to plaintiff's witnesses. Cpt. Meketa Schlega, a flight surgeon with the United States Air Force, testified that plaintiff passed a "red lens" test designed to discover double vision. In addition, Dr. Ristow, whose testimony is mentioned above, found nothing to suggest double vision.

The deposition testimony of Dr. Gurmail S. Dhaliwal, a neurologist, indicated his diagnosis of an injury to one of the nerves supplying the eye muscles. However, he did not believe that any of plaintiff's complaints were consistent with a seizure disorder. Neurological review was unremarkable, except for limitation of downward movement of the left eye. An electroencephalogram was normal.

Finally, the deposition testimony of Dr. Arnold Berkman, a neuropsychologist, indicated that he had tested plaintiff for brain function and performed a general psychological evaluation. After testing, he concluded that plaintiff presented no evidence of brain damage.

After the accident, plaintiff finished his final semester at college, receiving approximately the same grades he obtained prior to the accident. He then attended Michigan State University, taking engineering classes in order to pursue his career goal of becoming an Air Force pilot. Plaintiff did poorly and dropped out. At that time he said he was still experiencing trembling, memory problems, double vision and difficulty in communication and decision making. He also said that the engineering courses he took that term were harder than courses he had taken previously.

At the time of the accident, plaintiff was a hot air balloon pilot. He resumed piloting the balloon two or three months after his accident. Approximately one and one-half years later, he bought the ballooning business from the owner. Since September, 1983, he has been working for Balloon Corporation of America as a pilot. He says he still has problems with double vision, but can alleviate them by moving his entire head to look downward.

Plaintiff argues that the trial court should have granted his motion for directed verdict. Defendant argues that the judge correctly allowed the jury to determine the serious impairment issue. In the alternative, defendant argues that if the issue of serious impairment should not have been submitted to

the jury, the error was harmless because the injuries could not have amounted to a serious impairment of body function, so that the correct result was the same as the one reached by the jury.

In DiFranco, supra,<sup>2</sup> the Supreme Court modified that portion of Cassidy v McGovern,<sup>3</sup> 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. The court held:

"If 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."

The 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.<sup>4</sup> An injury need no longer be objectively manifested in order to constitute a serious impairment of body function.<sup>5</sup> The body function impaired need no longer be an important one.<sup>6</sup> 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?"

The court explicitly intended that the first inquiry, identifying which body functions were impaired, be a "relatively easy task". To determine seriousness, which is the more difficult task, the fact finder is to consider 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. If reasonable minds could differ as to whether the impairment was serious, when the evidence is viewed in the light most favorable to the non-moving party, then the question must be submitted to the trier of fact.<sup>8</sup>

We have no difficulty, in light of these guidelines, determining that the trial court was correct in its decision to give the matter to the jury. There was diametrically opposed testimony as to what damage, if any, plaintiff sustained. There was conflicting testimony as to his abilities following the accident. There was conflicting testimony as to his vision. The length of time, treatment required and other factors were far from certain. This was a case clearly requiring jury determination under DiFranco.

However, in DiFranco, the court went on to lay out the way the jury should be instructed in a serious impairment case:

"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."

The DiFranco court pointed out<sup>10</sup> that these instructions are substantially more detailed than those contained in SJId 36.01, which reads as follows:

"The law in Michigan provides that plaintiff may recover \*(non-economic loss) damages in this case if [he / she] suffered serious impairment of body function. Based upon the evidence in this case, you must decide whether plaintiff suffered an impairment of body function and, if so, whether that impairment was serious.

"Serious impairment of body function requires that the impairment be of an important body function.

"An impairment need not be permanent to be serious."

The instructions given in the within case naturally could not anticipate the standards the DiFranco court would require. More than this, however, the trial court's instructions went beyond SJId 36.01. They not only required that the impairment be of an important body function, but further required that the injury be objectively manifested and seriously affect the plaintiff's ability to lead a normal life. Thus, the instructions contained all three of the requirements rejected by DiFranco, whereas SJId 36.01 would have contained only one. Had the jury

been given the completely different set of instructions outlined by DiFranco, it is entirely possible that they would have concluded that there was a serious impairment of body function before them.

Since briefs were filed and oral argument had prior to DiFranco, the parties have not discussed the jury instructions on appeal but, of course, they were not bound to anticipate the Supreme Court's DiFranco decision. Plaintiff did object in the trial court to the instructions under discussion, unlike the parties in DiFranco and two of its companion cases, Burk v Warren and Paupore v Rouse. The issue of jury instructions seems to be an integral part of the DiFranco decision, notably that portion of the decision recommending that the question be submitted to the jury whenever reasonable minds could differ as to the seriousness of the impairment. The court speaks not merely of jurors, but of "[p]roperly instructed jurors".<sup>11</sup>

In discussing the limited retroactive application of its decision, the Supreme Court held:

"Since several of today's holdings are new or inconsistent with those articulated in Cassidy, our decision applies to the five cases before us as well as to: (1) currently pending appeals in which an issue concerning the proper interpretation of the statutory phrase 'serious impairment of body function' has been raised, and (2) trials in which a jury is instructed after the date of this decision, and (3) cases in which summary disposition enters after the date of this decision."<sup>12</sup>

There is no question that this case comes under the first of these three categories, but not under the other two. Nonetheless, the whole DiFranco decision applies to this case. We assume that the entire DiFranco decision applies to all of the cases enumerated by the court in the quotation above. That being the case, because the jury instructions given here were plainly incorrect under DiFranco and because the DiFranco instructions might well have resulted in a different verdict, we believe we must reverse and remand for a new trial.

REVERSED and REMANDED.

/s/ William R. Beasley  
/s/ Robert B. Burns  
/s/ Gerald D. Lostracco

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- 1        Mich        ;        NW2d        (1986) [Docket Nos. 74692, 74867,  
      75263, 75299, 75811, Decided December 23, 1986].
- 2        Id., sl op at p 17.
- 3        415 Mich 483; 330 NW2d 22 (1982).
- 4        DiFranco, supra, sl op at pp 20-23.
- 5        Id., sl op at pp 25-29.
- 6        Id., sl op at pp 19-20.
- 7        Id., sl op at p 23.
- 8        Id., sl op at pp 24-25.
- 9        Id., sl op at pp 24-25.
- 10       Id., sl op at p \_\_, fn 52.
- 11       Id., sl op at p 16.
- 12       Id., sl op at p 29.