

STATE OF MICHIGAN
COURT OF APPEALS

CLAUDIA EBERHARD, RANDALL EBERHARD,
and AARON EBERHARD and NATHAN EBERHARD,
by their Next Friend, RANDALL EBERHARD,

May 13, 1993

Plaintiffs-Appellants,

v

No. 140039; 140450

KENNETH CAMPBELL, and ROSALIND R. CAMPBELL,

Defendants-Appellees.

Before: Griffin, P.J., and Reilly and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right a judgment entered in favor of defendants in this personal injury action. We affirm in part and reverse and remand in part.

Plaintiffs were involved in an automobile accident that occurred on October 18, 1989. All plaintiffs with the exception of Randall Eberhard sustained various bodily injuries in the accident. Plaintiff Claudia Eberhard suffered a mild concussion, cervical strain, and numerous fractured ribs. Claudia also sustained a three-inch laceration on her left knee. Ten-year-old Aaron Eberhard suffered a mild concussion and sustained a four-centimeter laceration on his chin. The laceration on Aaron's chin has left a noticeable scar. Finally, four-year-old Nathan Eberhard suffered a mild closed head injury which plaintiffs claim caused Nathan to lapse in and out of consciousness following the accident.

Plaintiffs filed the instant lawsuit against defendants to recover noneconomic damages for their injuries. Plaintiff, Randall Eberhard, sought recovery for loss of consortium stemming from the injuries to his wife, Claudia. After five days of trial, the circuit court ruled that plaintiffs had failed to prove they had suffered threshold injuries that would permit third-party recovery under the no-fault act. Accordingly, the circuit court granted defendants' motion for a directed verdict and dismissed the case. Plaintiffs now appeal claiming that the threshold issue should have been submitted to the jury.

The No-Fault Automobile Insurance Act has abolished tort liability for noneconomic damages except in cases where the accident results in death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); MSA 24.13135(1). Under DiFranco v Pickard, 427 Mich 32, 69; 398 NW2d 896 (1986), the question whether the plaintiff suffered a serious impairment of body function or permanent serious disfigurement must be submitted to the trier of fact whenever the evidence, viewed in a light most favorable to the nonmoving party, is such that reasonable minds could differ. Petaja v Guck, 178 Mich App 577, 579; 444 NW2d 209 (1989); Beasley v Washington, 169 Mich App 650, 659; 427 NW2d 177 (1988). Whether an impairment is "serious" is a question for the jury except in the most extreme cases, Petaja, *supra*, and involves consideration of a number of factors, including 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. DiFranco, *supra*, at 69-70.

Applying this standard to the present case, we agree with plaintiffs that the circuit court erred when it directed a verdict in favor of defendants against plaintiff Claudia Eberhard. Viewing the evidence in a light most favorable to plaintiffs, reasonable minds could conclude that Claudia's bodily injuries, particularly her rib fractures, resulted in a serious impairment of body function in the form of restricted motion. Compare DiFranco, *supra* at 75-78. Accordingly, we reverse the judgment in favor of defendant with respect to

Claudia Eberhard and remand this matter for a new trial. Furthermore, because Randall Eberhard's claim for loss of consortium is derivative, Rusinek v Schultz, Snyder & Steele Lumber Co., 411 Mich 502, 508; 309 NW2d 163 (1981), the judgment against Randall Eberhard is also reversed.

We also agree with plaintiffs that the trial court erred in directing a verdict with respect to the claims of Aaron Eberhard. Plaintiffs sought to establish that Aaron suffered both a serious impairment of body function and a permanent serious disfigurement. The latter claim stems from a visible scar on Aaron's chin that measures approximately three centimeters in length and two millimeters in width. Defendants concede in their brief that there was testimony below that the scar was permanent and would always be visible to some degree.

In Petaja, supra at 579-580, a panel of this Court held as a matter of law that a small, "hardly discernible" scar immediately below the plaintiff's lip did not constitute a permanent serious disfigurement. In the present case, we find the issue close. After reviewing the evidence, however, particularly the photograph introduced as plaintiffs' exhibit twelve, we are persuaded that the threshold issue pertaining to the scar on Aaron's chin should not have been resolved as a matter of law. Viewing the photograph and the other evidence regarding the effect of the scar in a light most favorable to plaintiffs, we conclude that reasonable minds could differ regarding whether Aaron suffered a permanent serious disfigurement. Accordingly, we reverse the judgment in favor of defendants on Aaron's claim of serious permanent disfigurement.

Whether Aaron suffered a serious impairment of body function also presents a close question. At the outset, we reject plaintiffs' contention that Aaron's loss of consciousness and mild concussion alone establish a serious impairment. See DiFranco, supra at 68. However, regarding the trauma to Aaron's jaw, testimony showed that Aaron was unable to consume solid food for a week. Thereafter, for a period of up to four weeks, Aaron was restricted to consuming only soft foods. The temporary limitations on Aaron's ability to use his mouth for eating plainly constitute an impairment of body function. DiFranco, supra at 84. The question thus becomes whether this impairment can be classified as serious. Although the record does not contain medical evidence establishing any residual impairment, we cannot say that all persons would conclude that Aaron's impairment was not serious. Compare DiFranco, supra at 81. Accordingly, we conclude that the trial court also erred in directing a verdict for defendants on Aaron's claim of serious impairment of body function.

We turn finally to the injury suffered by plaintiff Nathan Eberhard. Nathan suffered a mild closed head injury, commonly known as a concussion, from which he has fully recovered. The primary basis for the claim of serious impairment is Nathan's loss of consciousness. In DiFranco, supra at 68, our Supreme Court observed:

A person who is rendered unconscious for several minutes at the scene of the accident has suffered a substantial impairment of brain functioning during those minutes. If there are no further problems, the impairment overall does not appear serious. A permanent impairment is more serious than a temporary impairment of like character. However, the fact that the plaintiff eventually makes a complete recovery should not negate the fact that he endured a serious impairment of body function for a significant period of time. A permanent impairment may or may not be serious, depending on the extent of the impairment and body function affected.

In the present case, Randall Eberhard testified that Nathan was rendered unconscious immediately following the collision. Another witness, Cynthia Stapleton, testified that she was told by paramedics to hold Nathan and keep him awake because he suffered a head injury and "kept drifting off." Stapleton testified that while she held Nathan, he kept crying and "drifting off," although Stapleton was unsure if Nathan was actually losing consciousness. Randall further testified that when he saw Nathan several hours later at Butterworth Hospital, Nathan appeared to be unconscious as he was not aware of the presence of others in the room.

Plaintiffs argue that this testimony establishes that Nathan was "in and out of consciousness for a period of about six to twelve hours." This assessment of the record is not quite accurate. Although there was testimony that Nathan was initially unconscious and later "drifted off," we cannot determine the duration or

frequency of any subsequent periods of unconsciousness. Furthermore, the hospital records indicate that although he appeared sleepy, Nathan was easily awakened, alert when awake, and appropriately reactive. We conclude that plaintiffs' evidence that Nathan suffered periods of temporary unconsciousness does not alone create a jury question on the issue of serious impairment of body function.

Plaintiffs also argue that Nathan suffered a serious impairment of body function in that he began to wet the bed for several weeks following the accident. However, plaintiffs have not directed us to record evidence linking Nathan's incontinence to injuries sustained in the accident. Medical testimony is generally needed to establish the existence of a serious impairment. DiFranco, supra at 39.

On the basis of the foregoing, we reverse the judgment in favor of defendants with regard to the claims of Claudia, Randall, and Aaron Eberhard, and remand this matter for a new trial. Consistent with our disposition, we vacate the award of costs in favor of defendants. The judgment with regard to Nathan Eberhard is affirmed.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Maureen Pulte Reilly
/s/ E. Thomas Fitzgerald