STEPHENS v DIXON

Docket No. 137734. Submitted November 18, 1992, at Detroit. Decided April 5, 1993, at 9:20 A.M.

Shirley Stephens brought an action on November 20, 1990, in the Wayne Circuit Court against C.J. Dixon, seeking damages for serious impairment of body function resulting from injuries suffered as the result of the negligent operation of an automobile owned by Dixon. The plaintiff appeared to have fully recovered from her injuries within a few weeks of the June 1987 accident, but alleged that in February 1989 she began to have neck pain, and that in December 1989 she was diagnosed as having spondylosis of the neck vertebrae, allegedly a latent result of the 1987 accident. The trial court, Sharon Tevis Finch, J., granted summary disposition for the defendant, holding that the three-year period of limitation began to run from the date of the accident and, thus, the action was barred. The plaintiff appealed.

The Court of Appeals *held:*

The period of limitation for a negligence action seeking damages for injuries suffered in an automobile accident and alleging a serious impairment of body function begins to run from the date of the accident unless the plaintiff can show that the injury was latent, that there was no reason to associate any medical conditions with the trauma caused by the automobile accident, and that even with the exercise of reasonable diligence the causal connection between the condition and the accident would have remained unknown. The discovery doctrine is not available where the plaintiff merely misjudges the severity of a known injury or suffers consequent symptoms or ailments reasonably related to the originally known causally connected injury.

Because a latent injury was alleged in this case, the trial court erred in granting the defendant's motion for summary disposition without first considering the discovery doctrine. On remand, the plaintiff must be given the opportunity to persuade the trial court that she is eligible for application of the discovery doctrine.

Reversed and remanded.

have discovered a serious impairment of body function. *Sherrell v Bugaski,* 169 Mich App 10, 16; 425 NW2d 707 (1988). In that case, however, we found that all the necessary elements were present when the plaintiff filed her first lawsuit in 1980 and that her cause of action accrued when she discovered the lower back injuries that formed the basis of her first action. Consequently, the plaintiff's second lawsuit, based on a subsequently discovered herniated disc and filed on May 8, 1986, was barred. With respect to damages that were discovered later, this Court explained that "they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred." *Id.*

In *Hohendorf v Meagher,* 188 Mich App 400; 470 NW2d 418 (1991), a case with almost the same facts as *Sherrell,* the plaintiffs' negligence action, based on soft-tissue back and neck injuries, was filed on April 18, 1984, and was dismissed, apparently because the court found that the injured plaintiff had not sustained a serious impairment of body function. The plaintiffs' second negligence action, based on a recently diagnosed herniated disc, was filed on July 18, 1989, and was also dismissed. On appeal, this Court concluded that the period of limitation for the plaintiffs' cause of action had not been tolled until discovery of the herniated disc. *Id.* at 403.

In arriving at its decision, the *Hohendorf* Court relied on *Gagliardi v Flack,* 180 Mich App 62; 446 NW2d 858 (1989), for the proposition that "in an automobile negligence case, the statute of limitations is not tolled until such time as the plaintiff discovered or should have discovered that his injury constituted a serious body function." *Hohendorf, supra* at 403.

In *Gagliardi,* the plaintiff injured his wrist in an automobile accident that occurred on August 14, 1982. The plaintiff admitted in his deposition that, as a result of his wrist injury, he was totally disabled for six weeks immediately following the accident and partially disabled until wrist surgery was performed on May 7, 1985. *Gagliardi, supra* at 64. When the plaintiff filed his suit on October 24, 1985, he convinced the trial court that the period of limitation should be tolled until such time as he discovered or should have discovered that his wrist injury constituted a serious impairment of body function. However, the majority of the *Gagliardi* panel was not convinced, and expressed disagreement with the application of "the tolling doctrine to the entire spectrum of auto accident injuries," a suggestion that the majority attributed to *Mielke* and *Horan. Id.* at 76.

The apparent split of authority occasioned by *Gagliardi* and *Mielke* was certified to the Supreme Court, and leave to appeal was denied because the Supreme Court was "not persuaded that an actual conflict presently exist[ed] in the Court of Appeals." 433 Mich 923 (1989). The only distinguishing feature that we can find that would be consistent with the Supreme Court order and at the same time reconcile the two lines of authority appears to be a narrow exception that would toll the period of limitation with respect to latent diseases, an exception discussed in *Gagliardi* and recognized earlier by a New Jersey court. *Gagliardi, supra* at 72-73, citing *Mancuso v Mancuso,* 209 NJ Super 51; 506 A2d 1253 (1986).

In *Mancuso,* the plaintiff was involved in an automobile collision and "sustained what appeared to be superficial soft tissue injuries of minimal consequence." *Id.* at 53. Sometime later, the plaintiff began experiencing neurological symptoms, and her problem was diagnosed as Parkinson's

knows, or in the exercise of reasonable diligence should have known, that the injury threshold has been reached under the no-fault statute. In my view, all the elements of a cause of action under the no-fault statute have not occurred and cannot be alleged in a proper complaint until the injury threshold has been met. See *Filcek v Utica Building Co,* 131 Mich App 396, 399; 345 NW2d 707 (1984); *McCann v Brody-Built Construction Co, Inc,* 197 Mich App 512; 496 NW2d 349 (1992). Nor would I distinguish between a latent injury and the misjudging of the severity of a known injury or consequent symptoms or ailments, as Judge CAVANAGH has accomplished so artfully in an effort to reconcile *Mielke* and *Horan*[1] with *Gagliardi* and *Hohendorf.* Nevertheless, I concur because I find the injury in this case to be an appropriate one for utilization of the discovery rule.

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[1] *Mielke v Waterman,* 145 Mich App 22; 377 NW2d 328 (1985), and *Horan v Brown,* 148 Mich App 464; 384 NW2d 805 (1986).