

STATE OF MICHIGAN
COURT OF APPEALS

KARLA COLEMAN,
Plaintiff-Appellant,

UNPUBLISHED
August 15, 1995

v

DAVID M. KUCHAR,
Defendant-Appellee.

No. 160111
LC No. 92-426982 NI

Before: Doctoroff, C.J. and White and D.B. Leiber, * JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's grant of summary disposition in favor of defendant on her claim of serious impairment of body function. We reverse and remand for further proceedings.

On December 14, 1991, plaintiff was a passenger in the back seat of an automobile that was rear-ended by an automobile driven by defendant. Plaintiff received emergency treatment at Providence Hospital. The treating physician's diagnostic impression was cervical strain, scalp contusion, and minimal skin breaks resulting from a motor vehicle accident. X-ray studies indicated that plaintiff's skull and cervical spine were normal, with no fractures.

On December 20, 1991, plaintiff began treatment with Dr. Howard Schwartz,¹ who, based on symptoms manifested during his physical examination of plaintiff, diagnosed cervical spine strain, thoracic spine strain, lumbosacral strain, closed head injury, and temporomandibular joint syndrome.

Plaintiff filed the instant suit on January 31, 1992, seeking recovery from defendant under MCL 500.3135(1); MSA 24.13135. Her complaint alleged excruciating and continuing pain and suffering, anticipated to be permanent; excruciating damage and injury to her upper and lower body; severe and permanent disfigurement, serious impairment of body function; and severe restrictions on her normal life-style, including housework and recreational activities.

Dr. Schwartz administered a course of physical therapy from December 20, 1991 to April 17, 1992,² but noted in an April 6, 1992 letter to plaintiff's no-fault insurer that plaintiff had not done well, was disabled from gainful employment, and needed help with household chores. The letter also summarized Dr. Schwartz's findings during his initial examination of plaintiff, and his diagnoses. Dr. Schwartz stated that he believed plaintiff's prognosis was "guarded," and recommended periodic reevaluation.

On March 19, 1992, at the request of plaintiff's no-fault insurer, Dr. Adel El-Magrabi examined plaintiff, and found that plaintiff's "rather extensive and nonspecific" symptoms "could not be verified by any objective finding." Dr. El-Magrabi concluded:

Ms. Coleman has made a full recovery related to the original sprain that she may have sustained in the spine and she is currently capable of returning to her normal day to day

* Circuit judge, sitting on the Court of Appeals by assignment.

activities with no restriction. There is no indication for any further evaluation, treatment or management, therapy or otherwise. There is no anticipated future disability in this regard.

Dr. El-Magrabi also specifically found no indication that plaintiff sustained any traumatic brain injury in the accident and challenged Dr. Schwartz' treatment of plaintiff as inappropriate, and his charges as exaggerated. Plaintiff's insurer subsequently discontinued payment of no-fault benefits.

Defendant moved for summary disposition under MCR 2.116(C)(10) in October 1992. The motion was heard without oral argument. Basing its decision on principles enunciated in DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986), the circuit court concluded that, based on the record before it, reasonable minds could not differ in concluding that plaintiff's injuries did not constitute a serious impairment of body function. Plaintiff now appeals, claiming that under DiFranco, supra, the question whether her injuries constituted a serious impairment of body function should have been submitted to a jury.

When ruling on a motion for summary disposition filed under MCR 2.116(C)(10), the court must review the record evidence and all reasonable inferences therefrom and, without assessing credibility or determining facts, but making all legitimate inferences in favor of the nonmoving party, decide whether a genuine issue of material fact exists to warrant a trial. The test is "whether the kind of record which might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." Skinner v Square D Co, 445 Mich 153, 161-162; 516 NW2d 475 (1994). In a case involving a claim of serious impairment pursuant to MCL 500.3135(1); MSA 24.13135, the issue must be submitted to the jury, even if the evidentiary facts are undisputed, as long as reasonable minds could differ as to whether the plaintiff indeed suffered a serious impairment of body function. DiFranco, supra, at 58. Moreover, the statutory section does not limit recovery of damages to plaintiffs whose injuries can be objectively seen or felt. DiFranco, at 74-75. Rather, the threshold of serious impairment of body function requires a plaintiff to show that his or her non-economic losses arose out of a medically identifiable injury which seriously impaired a body function. Thus, evidence, such as an expert's diagnosis, based on subjective complaints or the symptoms of an injury should not be automatically disregarded because the diagnosis and its basis can be challenged at trial. Id.

In this case, our review of the record is hampered by the fact that neither defendant's memorandum brief supporting his motion for summary disposition nor plaintiff's reply brief are included in the record.

However, on the record before us, we find Dr. Schwartz' letter of April 6, 1992, which indicated his original findings and diagnoses and also indicated that plaintiff had not done well, had a guarded prognosis, and suffered continued disability, was sufficient to defeat defendant's motion. Without some rebutting evidence that Dr. Schwartz conducted a later examination which showed plaintiff's symptoms to have abated and his diagnoses to have changed, whether before or after April 6, the letter indicates that a record could be developed which would meet the evidentiary requirement set forth in DiFranco, and leaves open the issue, upon which reasonable minds might differ, whether plaintiff suffered serious impairment of body function.

The court's summary of the evidence states:

The plaintiff's doctor detected mild muscle spasm which he treated with ultrasound and whirlpools. Within three months, plaintiff's physical exam showed everything to be normal.

Although plaintiff still complained of pain which affected her ability to walk, sit and lift objects, the doctor could find no muscle spasm or other objective physical basis for the pain.

This summary does not clearly indicate whether the physical exam referenced was that performed by Dr. El-Magrabi or one performed by Dr. Schwartz. If it was performed by Dr. Schwartz, that evidence is not part of the record. If it was the exam performed by Dr. El-Magrabi, bearing in mind that DiFranco does not require an objective physical basis, id. at 71-75, those findings are disputed by Dr. Schwartz' April 6 letter, and factfinding would then be necessary.

We remand to the circuit court for development of the record. If the physical exam or exams referred to were performed by Dr. Schwartz, the order of summary disposition shall stand. If the exam or exams were Dr. El-Magrabi's, the summary disposition order shall be vacated. We do not retain jurisdiction.

We concur in the result only.

/s/ Helene N. White

/s/ Martin M. Doctoroff

/s/ Dennis B. Leiber

¹ Plaintiff was referred to Dr. Schwartz by her attorney.

² We rely on defendant's brief for this date: defendant's exhibits do not show documented treatment after January 21, 1992, and Dr. Schwartz's letter of April 6, 1992 indicates that plaintiff was last seen in his office on "2-25-91 [sic]."

³ The docket sheet does not indicate the filing of either brief. Nonetheless, we infer that these were submitted from defendant's reference in his motion to a memorandum brief filed simultaneously with the motion, and from the court's order granting summary disposition, which indicates that the court reviewed the motion and briefs. We note that defendant's motion, standing alone, does not entitle him to summary disposition.