

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN A. OWENS,

Plaintiff-Appellee,

FEB 19 1987

v

No. 88944

CITY OF DETROIT, and
ROBERT C. WILLIAMS, JR.,

Defendants-Appellants.

BEFORE: R.M. Maher, P.J., and J.H. Shepherd and Allen*, JJ.

PER CURIAM

Defendant appeals by leave from the November 1, 1985 order of summary disposition entered by the Wayne County circuit court in favor of the plaintiff on his tort claim for noneconomic loss under Michigan's no-fault automobile insurance act, MCL 500.3135; MSA 24.13135.

For the purpose of the motion for summary disposition, neither the negligence of the defendants nor the extent of plaintiff's injury was disputed by the parties. Plaintiff's injuries were incurred as he exited from a bus owned by the defendant city and operated by the defendant Williams. At the moment he exited, defendant was struck by a bicycle, operated by a third defendant whose liability has been settled. In the course of the collision, defendant's and the cyclist's heads collided. Plaintiff was thrown to the pavement, resulting in injuries to his eye and teeth.

According to the parties' stipulation, plaintiff received approximately fifty stitches in the area of his eye immediately after the collision. After healing, plaintiff was left with a visible two-inch scar in the area of one eye. Because of additional, internal scarring, the eye continues to droop and water some five years after the accident.

*Retired Court of Appeals Judge, sitting on the Court of Appeals by assignment.

The parties also stipulated that plaintiff's four front teeth were broken in the collision and ultimately had to be removed. Plaintiff was subsequently fitted with a partial plate, but continues having trouble talking and eating.

Defendants' motion was filed under § 3135(1) of the no-fault act, which provides:

"A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1); MSA 24.13135(1).

Defendants alleged that plaintiff's injuries amounted to neither a "serious impairment of body function" nor a "permanent serious disfigurement" and that plaintiff's claim for noneconomic damages was therefore precluded under the act. In accordance with Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), the trial court found as a matter of law that plaintiff's injuries did not constitute serious impairment of body function, but also found as a matter of law that the loss of teeth did constitute permanent serious disfigurement. We will consider each of these issues separately.

I. Serious Impairment of Body Function.

In Cassidy v McGovern, supra, our Supreme Court set forth a three-part standard for determining whether injuries meet the no-fault threshold of serious impairment of body function as required by § 3135 of the act: (1) the injury must be objectively manifested; (2) an important body function must be impaired by the injury; (3) the impairment of the body function must be serious. Cassidy, supra, Kosak v Moore, 144 Mich App 485, 488; 375 NW2d 742 (1985). Since the trial court's decision, our Supreme Court has reviewed and repudiated Cassidy. DiFranco v Pickard, ___ Mich ___ (No 74692, rel'd 12-23-86). Under DiFranco, the first two Cassidy requirements, objective manifestation and important body function, have been eliminated. DiFranco also liberalizes the third Cassidy requirement of

"seriousness". While a "serious" impairment under Cassidy was to be commensurate with death or permanent serious disfigurement, Kosak, supra, at 488-89, DiFranco expressly rejected any notion that a serious impairment must be catastrophic.

The DiFranco Court instead explained that the meaning of serious impairment must be viewed in light of the effect on the plaintiff's body functions, rather than the affect of the injury on plaintiff's life or life-style. DiFranco, supra, slip op at 24. Three relevant factors were suggested for evaluating the seriousness of the impairment of body function: (1) the extent of the impairment in quantitative, medical terms; (2) the duration of the impairment; and (3) the type of treatment required to rectify the impairment. DiFranco, supra, at 23-24. Under DiFranco, the question of whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence, viewed in a light most favorable to the non-moving party, is such that reasonable minds could differ. DiFranco, supra, at 24.

We believe that the trial court, in finding no serious impairment of body function, ruled correctly under Cassidy. However, the result is different under DiFranco. Since this appeal was currently pending at the time of DiFranco's release, we are required to apply the new standard rather than Cassidy. DiFranco, supra, at 29.

Turning first to the injury to plaintiff's teeth, we observe that there was no stipulation as to the extent of the impairment in quantitative medical terms. However, the impairment was of an extensive duration in that the broken teeth were not extracted for over a year and plaintiff has continuing problems with eating or speaking. Moreover, the treatment apparently involved surgical removal of the teeth and replacement with a prosthesis. Thus, we hold that reasonable minds could differ as to the seriousness of the impairment under DiFranco, viewing the evidence most favorably toward the plaintiff.

Applying the same, DiFranco, standard to plaintiff's eye injury, we would also reverse the trial court. Again, there is no evidence as to the extent of the impairment in quantitative, medical terms. However, plaintiff has continuing symptoms, including a drooping of the eyelid and watering of his eye. Furthermore, treatment required fifty stitches in the area of the eye and, in view of the continuing symptoms, more extensive treatment may be required. We again hold that, viewing the evidence most favorably toward the plaintiff, reasonable minds could differ as to whether the impairment was serious.

We must therefore reverse the trial court's ruling as to the seriousness of the impairment and remand for further proceedings consistent with this opinion.

II. Permanent, Serious Disfigurement.

As an alternative basis for his claim for noneconomic damages under the no-fault act, MCL 500.3135; MSA 24.13135, plaintiff alleged that his injuries constitute a permanent serious disfigurement. While DiFranco does not directly address this alternative threshold, we believe that its comments on the term "serious" are generally applicable to cases involving disfigurement. Thus, we again note that the term must not be considered commensurate with death or catastrophic injury. DiFranco, *supra*, at 18-19.

Defendants primarily cite two cases in support of their contention that the loss of four front teeth is not permanent, serious disfigurement: Jakubiec v Kumbier, 134 Mich App 773; 351 NW2d 865 (1984) and Shortridge v Bailey, 145 Mich App 547; 378 NW2d 544 (1985). However, Jakubiec involved only a question of serious impairment of body function, not disfigurement. Shortridge, on the other hand, did allege disfigurement, but the teeth were restored through a combination of root canal surgery and etch material buildup. The Shortridge Court therefore had no difficulty in finding that there was no permanent disfigurement.

We believe that the loss of four front teeth, repaired only with the use of a removable plate, is clearly distinguishable from Shortridge or Jakubiec.

More to the point is McAdoo v United States, 607 F Supp 788 (ED Mich, 1984). In McAdoo, the federal district court ruled that the loss of teeth, replaced only by a partial plate, would not result in permanent serious disfigurement as the term is used in the Michigan no-fault automobile insurance act. MCL 500.3135; MSA 24.13135. However, the McAdoo ruling was merely obiter dictum, since the claim was not preserved in plaintiff's complaint or in the final pretrial order, but was only raised by plaintiff in oral arguments. In any case, we would decline to follow the McAdoo reasoning, since it does not take into account any factors other than superficial cosmetics.

Here, as plaintiff explained in the trial court, the plate fits poorly and will fall out if he keeps talking. He also had difficulty eating with the plate. We believe that plaintiff's appearance while speaking or eating is more significant than his appearance as he momentarily bares his teeth for the trial court's perusal. Furthermore, it seems plain that the plate must be removed for cleaning and quite possibly for vigorous activity. Obviously the replacement of plaintiff's front teeth with a plate is not a catastrophic blow to his appearance. The trial court noted that plaintiff, at least at the time of the hearing, was a "pretty good looking fellow." However, considering the full spectrum of plaintiff's life, we believe that reasonable minds could differ as to whether plaintiff's injury constitutes permanent, serious disfigurement.

However, we do not affirm the trial court's order of summary disposition for the plaintiff under this theory. The trial court's ruling implies that the issue of permanent serious disfigurement may not be submitted to the jury, since, under Cassidy the question was one of law. However, under DiFranco,

"serious" is a jury question except in the most extreme cases. We do not believe that this disfigurement falls into the extreme at which reasonable minds could not differ. Thus, applying DiFranco by analogy, we reverse the trial court's ruling on this theory insofar as it grants summary judgment to plaintiff.

III. Remedy.

We have applied the only facts at our disposal to the legal standard newly articulated by our Supreme Court. While we have concluded that defendants' motions should properly have been denied under this standard, it also appears from the record that defendants' stipulations were only for the purpose of a summary disposition motion under Cassidy. We therefore remand to the trial court for further proceedings, but do not preclude defendants from bringing their summary judgment motion anew, based either upon newly stipulated facts or the actual facts of record as presented in depositions, affidavits or other methods acceptable under applicable court rules.

Remanded. We do not retain jurisdiction.

/s/ Richard M. Maher
/s/ John H. Shepherd
/s/ Glenn S. Allen, Jr.