

STATE OF MICHIGAN
COURT OF APPEALS

RANDALL BURLING,

Plaintiff-Appellee,

v

TIMOTHY JOHN PERSH,

Defendant-Appellant.

FEB 19 1987

No. 91073

BEFORE: J.B. Sullivan, P.J., R.S. Gibbs and E.C. Penzler*, JJ.
PER CURIAM

Plaintiff filed a complaint against defendant in Wayne County Circuit Court. Plaintiff alleged that she was injured when the vehicle which she was operating was involved in an accident with the vehicle which defendant was driving. Defendant moved for summary disposition, contending that plaintiff's injuries did not meet the threshold standards of serious impairment of body function and permanent serious disfigurement, MCL 500.3135; MSA 24.13135. The trial court granted defendant's motion, and plaintiff appeals as of right.

In granting that part of defendant's motion concerning the issue of serious impairment of bodily function, the lower court applied the standards set forth in Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982). However, the subsequent Michigan Supreme Court decision of DiFranco v Pickard, ___ Mich ___ (Docket No. 74692, decided December 23, 1986) substantially changed those standards and ordered the changes retroactive to cases, such as this, pending on appeal.

Under DiFranco, a trial court ruling on a motion for summary disposition must view the evidence in the light most favorable to the non moving party and submit the issue to the fact finder if reasonable minds can differ as to whether the

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

plaintiff had suffered a serious impairment of bodily function, even if the evidentiary facts are undisputed. The new standards, as summarized in the syllabus attached to *DiFranco*, are as follows:

"Recovery of noneconomic damages was not intended to be limited to catastrophic injuries. The 'serious impairment of body function' threshold is a significant, but not extraordinarily high, obstacle to recovery. Impairment need not be of the entire body function or of an important body function. The threshold requires inquiry into what body function, if any, was impaired because of injuries sustained in a motor vehicle accident, and whether the impairment was serious. The focus of the inquiry is not on the injuries, but on how the injuries affected a particular body function, generally requiring medical testimony to establish the existence, extent, and permanency of the impairment.

"In determining whether an impairment was serious, the extent of the impairment, the particular body function impaired, the length of time of the impairment, the treatment required to correct the impairment, and any other relevant factors should be considered. An impairment need not be permanent to be serious. Nor is it necessary that an injury be seen or felt to permit recovery. Rather, the noneconomic loss must be shown to have arisen from a medically identifiable injury which seriously impaired a body function. When the threshold question is submitted to the jury, the jury should be instructed as to the twofold nature of the inquiry and as to the factors to be considered in determining seriousness."

As the serious impairment issue must be reviewed under these new standards, we remand the case to the circuit court for reconsideration.

Moreover, while *DiFranco* does not directly address the alternative threshold of permanent serious disfigurement, we believe that the standard described for reviewing a motion for summary disposition on the issue of serious impairment is also applicable to cases involving disfigurement. Because this Court grants deference to the observations of trial courts which may personally view the disfigurement, *Kanaziz v Rounds*, 153 Mich App 180, 186; ___ NW2d ___ (1986), we likewise choose to refrain from making an independent ruling on this issue and, instead, ask the trial court to reconsider its decision in light of *DiFranco*.

To assist the trial court, we do, however, offer the observation that the trial court correctly considered only those photographs taken of plaintiff following his cosmetic surgery.

Plaintiff's hypothetical concerning what he may have looked like without the surgery is misplaced. The judiciary will not subject itself to the burden of speculating as to the extent the scars would have healed without the surgery.

Reversed and remanded for reconsideration. We do not retain jurisdiction.

/s/ Joseph B. Sullivan
/s/ Roman S. Gibbs
/s/ Eugene C. Penzien