

MAY 17 1987

STATE OF MICHIGAN
COURT OF APPEALS

JOE WOMACK ROSE,

MAR 23 1987

Plaintiff-Appellant,

-v-

No. 91446

CARRIE MARIE FARMER,

Defendant-Appellee.

BEFORE: R.B. Burns, P.J., and R.S. Gribbs and A.T. Davis*, JJ,

PER CURIAM

Plaintiff filed suit seeking recovery of damages for personal injury received in an automobile collision that occurred on April 7, 1985. After concluding as a matter of law that plaintiff's injuries were insufficient to constitute a serious impairment of a body function as required by the no-fault act, MCL 550.3135; MSA 24.13135, the trial court granted summary disposition in favor of defendant.

Immediately following the collision at issue, plaintiff exited his vehicle and walked around the scene "to keep from passing out." Plaintiff was later transported by ambulance to Bixby Hospital in Adrian. X-rays were taken of plaintiff's neck, chest, and back, a diagnosis of lumbar strain was made, and he was released. Two days after the accident, on April 9, 1985, plaintiff consulted his regular physician, Dr. Stringfield, for pain in his neck, back, and chest. Stingfield's examination revealed cervical spine muscle spasm, as well as spasm in the perilumbar spine area, an impaired range of motion in the neck, and stiffness in the lower back on rotation. X-rays of the lumbar spine and thoracic vertebrae revealed subluxation of the thoracic vertebrae and mild degenerative arthritic changes in the cervical and lumbar spine as well as the thoracic vertebrae.

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

At defendant's request, plaintiff was examined by Dr. Kelley. Dr. Kelley concluded that plaintiff's "basic problem is degenerative arthritis of the neck and back." He found it "unusual" that plaintiff still suffered residual symptoms from the accident and found no demonstration of the same in his examination of plaintiff.

Plaintiff has been under the continuing care of Dr. Stringfield, who reported on plaintiff's condition in a letter dated August 12, 1985. At that time, plaintiff had been taking medication and using a TENS unit. He was also receiving physical therapy consisting of lumbar traction, ultrasound treatment, hot packs, and massage. Dr. Stringfield's examination revealed "slight perillumbar spasm." He concluded that "this patient has had no significant improvement and his prognosis is doubtful that he would have much improvement."

Because of pain resulting from the injuries he received in the automobile accident, plaintiff is no longer able to help his wife in their garden. He is unable to drive or ride in a car for longer than 45 minutes to an hour without stopping. He can no longer accomplish certain household tasks, specifically painting, because it requires climbing a ladder.

Defendant filed a motion for summary disposition on November 20, 1985, alleging that plaintiff's injuries failed to meet the statutory threshold of serious impairment of body function according to Michigan's No-Fault Automobile Insurance Act, MCL 500.3135; MSA 24.13135. Following the filing of plaintiff's brief in opposition to the motion, defendant filed rebuttal exhibits, including a July, 1984 medical report of plaintiff that showed a past history of pain and osteoarthritis, as well as spasms in the lower back.

In an opinion and order dated February 19, 1986 the trial judge granted defendant's motion for summary disposition. The trial judge specifically noted the July, 1984 medical report

revealing plaintiff's pre-existing back problems. After reviewing plaintiff's injuries, the trial judge concluded that plaintiff's impairment did not rise to the level of the other threshold requirements, death and serious permanent disfigurement, "especially" where "there has been no evidence presented of any impairment of an important body function."

On December 23, 1986, the Supreme Court released its decision in DiFranco v Pickard, ___ Mich ___; ___ NW2d ___ (Docket Nos. 74692, 74867, 75263, 75291 and 75811), reformulating the test of serious impairment of body function after Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982). In determining whether a no-fault plaintiff has sustained serious impairment of body function, we need now only consider whether plaintiff has experienced an impairment of any body function as a result of injuries sustained in a motor vehicle accident and whether the impairment is serious. (Sl op, p 23). Factors to be considered in determining whether an impairment is serious include, "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." (Sl op, p 25). Where reasonable minds may differ on whether the impairment of body function sustained by a plaintiff is serious, the issue should be submitted to the trier of fact. (Sl op, p 18).

Inasmuch as the trial court's ruling was premised on a test inconsistent with that announced in DiFranco, we conclude that the trial court's grant of summary disposition must be reversed. However, because the parties have not had an opportunity to develop the record in light of DiFranco, and the trial court did not rule on the basis of DiFranco, we decline to determine at this time whether plaintiff has raised an issue of material fact concerning his claim that he suffered a serious impairment of a body function.

Accordingly, this matter is REVERSED and REMANDED to the trial court for further proceedings not inconsistent with DiFranco v Pickard, supra.

/s/ Robert B. Burns
/s/ Roman S. Gibbs
/s/ Alton T. Davis, Jr.