

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

CALVIN N. WAISANEN and
RUTH ALMLI-WAISANEN,

Plaintiffs-Appellees

MAR 31 1987

-v-

No. 88168

LISA HEID and HENRY POZZA,

Defendants-Appellants.

BEFORE: Cynar, P.J., M.J. Kelly and J. Hathaway*, JJ.

PER CURIAM

Plaintiffs filed this action under Michigan's no-fault law alleging serious impairment of body function, MCL 500.3135(1); MSA 24.13135(1). Defendants filed a motion for summary disposition pursuant to both MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, and MCR 2.116(C)(10), no genuine issue as to any material fact. The Dickinson County Circuit Court declined to rule on the latter claim, but denied the motion based on failure to state a claim. Defendants sought, and were granted, leave to appeal that ruling in this Court. Plaintiffs filed a motion to affirm, which we denied because we did not find the question presented by this case to be so insubstantial that formal submission should be precluded, MCR 7.211(C)(3)(a).

Plaintiffs' complaint alleged that defendant Heid, driving an automobile owned by defendant Pozza, crashed into plaintiff Calvin's automobile and that, as a result, Calvin "sustained injuries and serious impairment of body function, including, but not limited to, damage to the bone of his right thumb, said injury causing severe pain". Plaintiff Ruth, Calvin's wife, alleged that the injury to Calvin's thumb has caused her "severe mental anguish, humiliation, nervousness, loss of love, society, companionship and support from her husband to which she is accustomed."

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

In response, defendants filed their motion for summary disposition, claiming that an injury to plaintiff's thumb could not constitute serious impairment of body function. Plaintiffs opposed the motion, claiming that evidence would show that the thumb injury met the threshold requirement of serious impairment. They attached a letter from a hand surgeon who had examined plaintiff, as well as plaintiff's affidavit listing the number of days he had missed work, "due to my thumb injury".

The trial judge ruled that, because discovery was not complete, a ruling on whether there was a genuine issue as to any material fact would be premature. As to the other ground for summary disposition, the judge ruled that it was not the intent of the Legislature or the appellate courts to say that a thumb injury could never meet the threshold for serious impairment. He made clear that he was not ruling whether plaintiff's case as a matter of law met the threshold for serious body function.

A tort action for noneconomic loss can be maintained under the no-fault statute 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).

A motion for summary disposition pursuant to MCR 2.116(C)(8) challenges the legal sufficiency of a plaintiff's claim and is to be considered by an examination of the pleadings alone. State Farm Mutual Automobile Ins Co v Salinas, 127 Mich App 546, 549; 339 NW2d 480 (1983), lv den 422 Mich 958 (1985). The motion tests the legal basis of the complaint, not whether it can be factually supported. Martin v Metropolitan Life Ins Co, 140 Mich App 441, 447; 364 NW2d 348 (1985). Unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover, the motion under this subrule should be denied. Id.

In this case, plaintiff pled a serious impairment of body function due to injury to his thumb. (Defendants' claim

that plaintiffs' complaint did not state a cause of action as plaintiffs' allegations were conclusory rather than factual is without merit. Binder v Consumers Power Co, 77 Mich App 343; 258 NW2d 221 (1977), lv den 402 Mich 839 (1977).) A motion for summary disposition under MCR 2.116(C)(8) tests whether an injury to the thumb can ever reach the threshold of serious impairment of body function.

The trial court based its ruling on this motion on cases decided under Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982). The Supreme Court recently reconsidered the serious impairment issue and set forth new standards for evaluating serious impairment, which supersede Cassidy standards. DiFranco v Pickard, 427 Mich 32; ___ NW2d ___ (1986). The DiFranco Court specified that its holding applied to currently pending appeals. Id., p 75. We therefore vacate the order of summary disposition and remand for further proceedings consistent with DiFranco. We do not retain jurisdiction. No costs.

/s/ Walter P. Cynar
/s/ Michael J. Kelly
/s/ James A. Rathaway