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

DANIEL MALLOY,

Plaintiff-Appellant,

MAY 8 1987

v No. 89734

WALTER DAY,

Defendant-Appellee.

BEFORE: D. E. Holbrook, Jr., P.J., and M. H. Wahls and G. W. Crockett, III,* JJ.

PER CURIAM

Plaintiff appeals from an order of the Oakland County Circuit Court granting defendant's motion for summary disposition on the basis that plaintiff's injuries arising out of a motorcycle-automobile accident did not meet the no-fault threshold for serious impairment of bodily function pursuant to MCL 500.3135; MSA 24.13135 and as required by Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983).

It is noted that the decision and order appealed from in this case was dated December 31, 1985, and that this matter was pending on appeal on December 23, 1986 when the Supreme Court's decision in DiFranco v Picard, ___ Mich ___ (Docket No. 74692, Rel'd 12/23/86), was released.

In DiFranco, supra, the Court concluded that the Cassidy v McGovern test has proven to be an almost "insurmountable obstacle" to tort recovery, and that only plaintiffs who are bedridden, cannot care for themselves, or are

This two-step threshold inquiry is to be resolved by the finder of fact "whenever the evidence, viewed in the light most favorable to the non-moving party, is such that reasonable minds could differ as to the answer." It is no longer necessary that the impairment be one of an "important" bodily function and additionally soft tissue injuries are not necessarily excluded from plaintiff's right to recovery.

Under DiFranco, an injured plaintiff must introduce evidence establishing a physical basis for a subjective complaint of pain and suffering. An expert's diagnosis, subject to challenge at trial through cross-examination and presentation of contrary medical evidence, will be sufficient to maintain an action. The "serious impairment of body function" threshold required the plaintiff to prove that his or her non-economic losses arose out of a medically identifiable injury which seriously impaired a body function.

The rulings in DiFranco were given limited retroactive effect and such decision applies to:

> "(1) [C]urrently pending appeals in which an issue concerning the proper interpretation of the statutory phrase 'serious impairment of body function' has been raised, and (2) trials in which a jury is instructed after the date of this decision, and (3) cases in which summary disposition enters after the date of this decision."

Since the instant case falls within those cases currently pending on appeal in which an issue concerning the proper interpretation of a statutory phrase "serious impairment of body function" had been raised, the trial court's grant of summary judgment is reversed and this cause is remanded to the trial court for rehearing and redetermination of defendant's