STATE OF MICHIGAN

COURT OF APPEALS

MARK SPIERS and DORINDA SPIERS,

Plaintiffs-Appellants

v

RICHARD NEIL MORRISON,

Defendant-Appellee.

UNPUBLISHED
September 5, 1997

No. 189692
Grand Traverse Circuit Court
LC No. 94-012369-NI

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiffs Mark and Dorinda Spiers appeal as of right from a judgment of no cause of action in favor of defendant Richard Neil Morrison. We affirm in part and reverse in part.

Plaintiff Dorinda Spiers (hereinafter "plaintiff"[1]) is a thirty-something woman with an extensive history of medical problems, including the onset of diabetes as a teenager, headaches, and pain in her back, neck, right shoulder and right wrist. In October, 1993, plaintiff was involved in a vehicular collision in which the vehicle she was driving was rear-ended by another vehicle (the first collision). Plaintiff filed suit against the driver of the other vehicle, claiming injuries to her back, neck, right shoulder, right arm and right hand resulting in headaches, pain in her back, neck, arm and hand, traumatic carpal tunnel syndrome and shoulder impingement. Plaintiff ultimately settled this case for approximately $12,000.

In January, 1994, plaintiff was involved in another vehicular collision in which the rear tire of defendant's vehicle struck the front bumper of plaintiff's vehicle as defendant attempted to pass plaintiff on the left while plaintiff was making a left turn (the second collision). Plaintiff brought a third-party no-fault suit against defendant, alleging serious impairment of body function,[2] MCL 500.3135(1); MSA 24.13135(1). Specifically, plaintiff claimed that she sustained injuries to her back, neck, right shoulder and right wrist, as well as traumatic bursitis and carpal tunnel syndrome. As relevant to this case, plaintiff claimed that as a result of these injuries she suffered pain and discomfort and was forced to undergo surgery to treat her wrist injury. Plaintiff's theory of the case was that the second collision caused an aggravation of her preexisting conditions.

At the conclusion of plaintiff's proofs at trial, defendant moved for a directed verdict. Defendant contended that under *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986),[3] a plaintiff must establish by medical evidence a physical basis for subjective complaints of pain and suffering, and that no medical evidence of a physical basis for plaintiff's complaints of increased right shoulder pain, right wrist pain, headaches, back pain and neck pain had been presented. Defendant also contended that no evidence had been presented that the second accident caused an aggravation of plaintiff's preexisting injuries.

The trial court granted defendant's motion. Relying on *DiFranco* and *Howard v Feld*, 100 Mich App 271, 273; 298 NW2d 722 (1980), the court reasoned that expert medical testimony was required to establish the aggravation of plaintiff's preexisting condition and its causation by the second collision, that no such evidence had been presented, and that "all we have is the plaintiff's statements of extreme pain. That by itself would not be enough" The court further reasoned that "[e]ven if lay testimony were enough, I don't think that a reasonable juror, based on this whole record of what we have so far, could find that an aggravation of the plaintiff's condition resulted from this second auto accident."

Plaintiff argues on appeal that the trial court erred in granting defendant a directed verdict.

In determining whether a motion for directed verdict was erroneously granted, we review the evidence and the legitimate inferences arising therefrom in a light most favorable to the nonmoving party to determine whether a question of fact existed. *Hunt v Freeman*, 217 Mich App 92, 98-99; 550 NW2d 817 (1996); *Lamson v Martin (After Remand)*, 216 Mich App 452, 455; 549 NW2d 878 (1996); see also *DiFranco, supra* at 38-39. If reasonable jurors could honestly disagree, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hunt, supra* at 99; *Lamson, supra*; see also *DiFranco, supra*. Directed verdicts are disfavored in negligence cases. *Hunt, supra*; *Lamson, supra*.

A cause of action for negligence arising out of a motor vehicle accident requires proof of four elements: (1) a legal duty owed by the defendant to the plaintiff; (2) the breach of such duty by the defendant; (3) a proximate causal relationship between the defendant's breach of duty and the plaintiff's injury; (4) damages suffered by the plaintiff. *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995).

Proof of "proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as "'proximate cause.'"[4] *Skinner v Square D Co*, 445 Mich 153, 163, 516 NW2d 475 (1994). Normally, the jury decides the question of cause in fact. *Nolan v Bronson*, 185 Mich App 163, 169; 460 NW2d 284 (1990). As explained in Prosser & Keeton, Torts (5th ed), § 41, p 269:

> Where the conclusion [of cause in fact] is not one within common knowledge, expert testimony may provide a sufficient basis for it, but in the absence of such

testimony it may not be drawn. But on medical matters within common knowledge, no expert testimony is required to permit a conclusion as to causation.

This Court's opinion in *Howard*, which was relied on by the trial court in determining the causation issue, represents a general application of this rule. See also *Paul v Lee*, ___ Mich ___; ___ NW2d ___ (Docket No. 103069, issued 7/15/97), slip op p 7-8.

Generally, the concept of damages includes an injured plaintiff's right to recover damages for noneconomic losses, including pain and suffering, mental anguish and inconvenience. *DiFranco, supra* at 41. In addition, if a defendant's negligence is proven by a preponderance of the evidence to be a proximate cause of the aggravation of a plaintiff's preexisting condition, the defendant is liable for such aggravation, including "such increase of [the plaintiff's] pain and suffering, increased disability, and expense incurred on account thereof." *Schwingschlegl v City of Monroe*, 113 Mich 683, 686; 72 NW 7 (1897); *McNabb v Green Real Estate Co*, 62 Mich App 500, 518; 233 NW2d 811 (1975), superseded on another ground by the rules of evidence as stated in *Della Pella v Wayne Co*, 168 Mich App 362, 368-370; 424 NW2d 50 (1988).

However, where the negligence action arises out of a motor vehicle accident, § 3135(1) of Michigan's no-fault act[5] establishes certain injury thresholds for the recovery of damages for noneconomic loss. *Stephens, supra*; *DiFranco, supra* at 37, . As relevant to this case, § 3135(1) provides that a defendant driver remains subject to tort liability for damages for noneconomic loss only if the injured plaintiff suffers "serious impairment of body function." *Stephens, supra*; *DiFranco, supra*. In *DiFranco*, our Supreme Court held that "[t]he 'serious impairment of body function threshold requires the plaintiff to prove that his noneconomic losses arose out of a medically identifiable injury which seriously impaired a body function." *DiFranco, supra* at 40, 75. As explained in *DiFranco*:

> [P]laintiffs must introduce evidence establishing that there is a physical basis for their subjective complaints of pain and suffering. Neither [*Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982)[6]] nor § 3135(1) limits recovery of noneconomic damages to plaintiff whose injuries can be seen or felt.
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> As noted in part IX [Determining Whether Plaintiff Suffered A Serious Impairment Of Body Function], medical testimony generally will be required to establish the existence, extent and permanency of the impairment of body function. We disapprove of those cases which have automatically disregarded certain types of evidence merely because it was based upon the plaintiff's subjective complaints or the symptoms of an injury. An expert's diagnosis and the basis for it (e.g., the plaintiff's complaint's, the physician's observations and test results) can be adequately challenged at trial through cross-examination and the presentation of contrary medical evidence. [*DiFranco, supra* at 74-75.]

In this case, the parties' arguments and the trial court's rulings did not focus on the issues whether plaintiff had suffered an impairment of a body function or whether such impairment was serious.

Rather, our review of the record indicates that the arguments and rulings focused on whether plaintiff had presented evidence sufficient to create questions of fact concerning (1) whether plaintiff suffered the aggravation of preexisting conditions; (2) whether, under *DiFranco*, there was a medical basis for such aggravation, and (3) whether the second collision in fact caused such aggravation. Thus, we likewise confine our analysis to these issues.

We first consider the issue of the aggravation of plaintiff's preexisting conditions. At trial, defendant's theory, as indicated by his cross-examination of the witnesses, was that sufficient competent evidence had not been presented to create a question of fact concerning whether plaintiff had suffered any aggravation of her preexisting conditions.

However, expert testimony at trial explained that as a result of plaintiff's diabetes, plaintiff was "at risk for all sorts of stressors in her life," and that persons with diabetes "generally heal more slowly than people who are not diabetic." The record further indicates that plaintiff had a history of complaints dating to 1977 of headaches, neck pain, back pain, and pain in her right wrist and right shoulder. In particular, plaintiff had surgery on her right wrist in May, 1983, for a condition diagnosed as either carpal tunnel or tendinitis. In December, 1991, plaintiff also received a diagnosis of "subacrominal bursitis" (the acromion is one of the bones in the shoulder)

Plaintiff testified that following the first collision her neck was very painful, that her back and shoulders were sore, that she could hardly move her back, and that her right wrist was hurt somewhat. Plaintiff testified that she began getting better and that her pain was getting to be "less and less." Dr. Wright testified that through November and December, 1993, plaintiff continued to complain of neck and upper back pain, but that plaintiff improved and continued to make progress, including being able to do some light housework and life five-pound weights without difficulty.

Plaintiff testified that following the second collision her pain, including her back, shoulder and hand pain, came back much worse than it had been after the first collision, and that the pain did not go away. Plaintiff's "before and after" testimony was properly admitted on this point. MRE 601; MRE 701; *Konieczka v Mt. Clemens Metal Products Co*, 360 Mich 500, 504; 104 NW2d 202 (1960).

Dr. Edward Brophy, an orthopedic surgeon who treated plaintiff following the second collision pursuant to a referral by Dr. Wright, testified that individuals can have aggravations of preexisting conditions, and that trauma can be an aggravating event or an inciting event. Dr. Brophy explained that with an inciting evidence

> a person has never had any particular complaints and an event occurs and subsequent to that they have symptoms and complaints associated with that part. Aggravation of a condition is an individual that's had a history of complaints in a particular area and whether it waxes and wanes or whether it's constant, and then an event occurs *and it's more intense*. *The pain becomes more intense*. It may or may not be waxing and waning any more. It may become unremitting.

Dr. Brophy explained that "unremitting" means that the pain

> doesn't go away, doesn't decrease in intensity. It doesn't just – you don't have any good days and necessarily bad days. It can be a whole spectrum. But an individual that had preexisting complaints and then had an event and then perhaps those events – *or those complaints then changed, they become more intense*.

Viewing this evidence in a light most favorable to plaintiff, we conclude that a question of fact was created concerning whether following the second collision plaintiff suffered noneconomic loss, specifically an aggravation of the pain she had previously been experiencing in her back, neck, shoulder and wrist. *Schwingschlegl, supra* at 686.

With respect to plaintiff's claim of headache pain, we note that, as indicated previously, plaintiff did have a history of headache complaints. The only other evidence adduced on this point was plaintiff's testimony that among the problems she had was that the pain in her neck would go into her head and cause headaches. Plaintiff did not specifically identify the time-frame for these occurrences. However, a reasonable reading of the transcript indicates that plaintiff was discussing the period of time after the first collision but before the second collision. Moreover, Dr. Wright testified that she did not recall plaintiff complaining of headaches following the second collision. However, we assume for the purpose of analysis that a question of fact was created concerning whether plaintiff suffered an aggravation of headache pain following the first collision.

We next consider the issue whether a medical or physical basis existed for the aggravation of plaintiff's preexisting conditions.

At trial, defendant's theory, as evidenced by his cross-examination of plaintiff's witnesses, was that no evidence was presented that plaintiff's subjective complaints of pain and suffering had a physical or medical basis. However, with respect to plaintiff's claims of back, neck and shoulder pain, Dr. Wright testified that following the first collision plaintiff had

> a very limited motion of her cervical spine or neck, and that she had a lot of increased muscle tension in the musculature of her neck and her upper – her shoulders and upper back, and had a lot of what are called tender points. They're just very exquisitely tender areas to touch.

Dr. Wright also testified that a person cannot mimic muscle spasms, and that she could feel that plaintiff was having muscle spasms.

Dr. Scheider testified that plaintiff's chief complaint on January 18, 1994, (before the second collision) was pain and muscle spasm in her upper back and neck, specifically, the right upper trapezius and posterior cervical areas. The right upper trapezius is that part of the trapezius muscle that goes from the base of the skull to the upper shoulders where it attaches into the shoulder joint. The posterior cervical is the back part of the neck musculature. Dr. Schneider testified that she examined plaintiff's cervical spine and discerned that

her cervical rotation was decreased bilaterally, the left more so than the right. The side bending or bending the ear to the shoulder looked fairly normal on that date. She had some restriction – when I placed my hands on her rib cage and have [sic] her breathe in and breathe out, she had some restriction in the lower part of her left rib cage that was not breathing out or exhaling quite as well as it should have, or as it did compared to the right side of her rib cage.

Dr. Schneider diagnosed plaintiff as having somatic dysfunction, i.e., dysfunction of the muscles and surrounding tissues.

Dr. Schneider testified that she further examined plaintiff on January 21, 1994 (before the second collision), for the purpose of discerning asymmetry from side to side in plaintiff's musculoskeletal system, change in the range of motion in plaintiff's spine and extremities, and change in the texture of the soft tissues (the muscles, fascia and ligament) in those areas. Dr. Schneider testified that

> I took a closer look at her shoulder and the upper part of her back and noted that she had some – there was a general increase in her shoulder heights bilaterally pointing to some degree, maybe, of muscle tightness in that area. Again, her upper trapezius muscle . . . felt tight as compared to how a normal muscle would feel, or what we call hypertonic, meaning the tone was greater in those muscles than I felt it should have been. That hypertonicity or increased tone or tension was noted also in the muscles around the thoracic spine, which is the mid portion of the spine. There are really three areas of the vertebral spine: the neck or cervical, thoracic where the ribs attach, and then the lower back or the lumbar spine. And her lumbar spine should be slightly curved and it was noted to be more flattened which indicates to me some pulling by the muscles that is straightening out that curve. I also look for individual vertebra that may not have normal motion and, again, that's basically through palpating or feeling with my hand the position of the vertebra and then taking each vertebra through a range of motion that it should be able to go through, like in bending forward and bending backward. And there were several areas where those vertebra were not moving normally.
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> * * *
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> I did find some areas in the thoracic spine that were restricted in their normal motion.

Dr. Schneider testified that muscle strain is usually the cause of such restricted thoracic spinal motion. Dr. Schneider also testified that the flattening of plaintiff's back is a condition that could cause pain.

Dr. Schneider testified that plaintiff's condition following the second collision

> certainly was no better than prior to that time. And she, again, exhibited areas of increased muscle tension, also some taut ropy bands in the muscle which we refer to as myofascial trigger points.
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> Dr. Schneider explained that the myofascial condition was
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> basically a condition caused by injury to the soft tissues or the skeletal muscles and their surrounding covering over fascia of the body. And skeletal muscles are the muscles that we have control over that move our arms and legs and et cetera. And they are designed to have certain limits by virtue of their design in terms of range of motion. And sometimes when they are injured, for whatever reason, they can form bands in the muscle that feel like kind of a knot in the muscle that cause pain when they're touched, and also can cause referred pain in a characteristic pattern depending on which muscle it is. And those are termed myofascial trigger points because they trigger pain. The term myofascial, the "myo" part of that means muscle and then "fascial" refers to the outer connective tissue that covers all the muscles.

Dr. Schneider testified that the shoulder and neck are closely connected so that a shoulder problem can influence a neck problem and vice versa.

Viewing the evidence in a light most favorable to plaintiff, we conclude that expert medical testimony created a question of fact concerning whether there was a physical basis for plaintiff's complaints of aggravated pain and suffering in her back, neck and shoulder. *DiFranco, supra* at 74-75.

With respect to plaintiff's complaints of pain in her right wrist, we note that Dr. Schneider did not testify concerning a medical or physical basis for this pain. Dr. Wright testified that in Spring, 1994, she referred plaintiff to Dr. Brophy for an orthopedic consult with respect to plaintiff's complaints of carpal tunnel syndrome in her right hand and arm. Dr. Brophy testified that two tests he performed on plaintiff's wrist were highly suggestive of carpal tunnel syndrome. Dr. Brophy testified that in May, 1994, he performed wrist surgery for plaintiff's carpal tunnel problem.

Viewing this evidence in a light most favorable to plaintiff, we conclude that expert medical testimony created a question of fact concerning whether there was a physical basis for plaintiff's complaints of aggravated pain and suffering in her right wrist.

With respect to plaintiff's claims of headaches, we note that no evidence of a physical or medical basis for plaintiff's subjective complaints of headaches were presented. Accordingly, we conclude that the trial court did not err in granting a directed verdict on the claim of aggravated headaches.

Finally, we address the issue of cause in fact. With respect to plaintiff's back, shoulder and neck injuries, plaintiff, Dr. Wright and Dr. Schneider all testified that in January, 1994, and before the second collision, plaintiff complained of increased pain in her back, right shoulder and right arm to the

point that plaintiff believed her condition was back to the way it had been shortly after the first accident. Dr. Wright diagnosed plaintiff's increase of pain as a "re-exacerbation" attributable to "something that she had done, or some exercise that she had done."

However, plaintiff testified that when defendant's vehicle struck her vehicle she

> was jerked to the right just unbelievably with my hands still on the wheel, because I was in the turning position, I was turning the wheel so my hands weren't like this on the wheel, there were more like this. And then when he hit me I just flew to the right with the seat belt on this shoulder, so I went this way.

Plaintiff also testified that the second collision was a harder impact than the first collision.

It appears that the physical basis for plaintiff's subjective complaints of increased pain and suffering in her back, neck and shoulder is muscle strain or dysfunction. We do not believe that the issue whether an automobile collision can in fact cause the aggravation of muscle strain or dysfunction necessarily involves medical questions beyond the scope of lay knowledge. However, we need not decide this issue because, assuming that expert medical testimony is required on this issue, plaintiff did produce a modicum of such evidence. As indicated previously, Dr. Brophy testified that generally a trauma can be an aggravating event. More specifically, when plaintiff's counsel described the second collision for Dr. Wright, she testified that this event "could" aggravate plaintiff's shoulder and neck problems. The trial court rejected Dr. Wright's testimony:

> Now, after discussion and hearing the testimony, and discussing it in oral argument, it does appear that no physician has testified that in his or her opinion that this second auto accident aggravated the plaintiff's condition.
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> The most was that one of the doctors said that trauma could aggravate the plaintiff's condition, not that it did in that doctor's opinion.

However, that Dr. Wright failed to testify that the second collision "did" aggravate plaintiff's neck and shoulder problems, but rather testified only that the second collision "could" aggravate these problems, we believe, goes only to the weight to be accorded the doctor's testimony. We conclude that the trial court erred in rejecting Dr. Wright's testimony out of hand. Viewing the totality of the evidence in a light most favorable to plaintiff, we conclude that a jury question was created concerning whether the second collision in fact caused an aggravation of plaintiff's preexisting neck and shoulder, as well as her back, problems.[7]

With respect to plaintiff's right wrist problems, Dr. Wright testified that carpal tunnel syndrome can have multiple causes, including repetitive use of the hands." Dr. Wright testified that she had formulated no opinion concerning the cause of plaintiff's carpal tunnel syndrome. After counsel described the second collision for Dr. Wright, she testified that "I don't know that it [counsel's description of the second collision] could have anything to do with carpal tunnel."

Dr. Brophy initially testified that the more likely cause of plaintiff's carpal tunnel syndrome was the repetitive use of the hand and wrist at work. After defendant's counsel described plaintiff's lengthy history of complaints with respect to her right wrist, Dr. Brophy testified that this history reinforced his conclusion that the cause of plaintiff's carpal tunnel syndrome in her right wrist was "an accumulation of events that have happened over many years."

We believe that the issue whether an automobile collision can in fact cause the aggravation of carpal tunnel syndrome involves medical questions that are beyond the scope of lay knowledge. *Howard, supra*. Without additional specific testimony to take Dr. Brophy's general testimony (that trauma can be an aggravating event) out of the realm of speculation, we conclude that no question of fact existed concerning whether the second collision in fact caused the aggravation of plaintiff's carpal tunnel syndrome in her right wrist.[8] *Howard, supra*; Prosser, § 41, p 269. Accordingly, we conclude that the trial court did not err in granting a directed verdict on this issue.

Affirmed in part and reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

[1] Plaintiff Mark Spiers' claims are derivative of plaintiff Dorinda Spiers' claims.

[2] Plaintiff also sought compensation for work loss beyond three years. See MCL 500.3135(3)(c); MSA 24.13135(3)(c). At trial, the court granted defendant a directed verdict on this claim. On appeal, plaintiff raises no issue concerning this claim.

[3] With respect to the issues of defining what constitutes a "serious impairment of body function" and allocating the functions of the court and jury in determining whether a plaintiff has suffered such impairment, *DiFranco* modified and overruled in part *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982). However, the Legislature recently codified those portions of *Cassidy* that were either modified or overruled by *DiFranco*. See 1995 PA 222; see also MCL 500.3135(2) and (7); MSA 24.13135(2) and (7). Nevertheless, because plaintiff's cause of action was filed before the effective date of these amendments, we continue to apply *DiFranco* in this case. See 1995 PA 222; MCL 500.3135(2); MSA 24.13135(2).

[4] Generally, the cause-in-fact element requires a showing that, more likely than not, "but for" the defendant's actions, the plaintiff's injuries would not have occurred. *Skinner, supra* at 165. "However, where several factors combine to produce an injury, and where any one of them operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions, more likely than not, were a 'substantial factor' in producing a plaintiff's injuries." *Id*. at 165, n 8.

On appeal, plaintiff argues that the "substantial factor" test should be applied in this case. However, plaintiff did not raise this issue below. Moreover, where plaintiff has already received a

settlement for her injuries arising out of the first collision and sought only to be compensated for her increased pain and suffering in this case, it appears that the parties proceeded below on the assumption that the "but for" test was the appropriate causation standard in this case. However, because this issue was not raised or decided below, we decline to do so on appeal.

[5] MCL 500.3101 *et seq.*; MSA 24.13101 *et seq*.

[6] See note 3, *supra*.

[7] This conclusion also assumes without deciding that the more stringent "but for" test is the appropriate causation standard. See note 4, *supra*. However, the issue of the correct cause-in-fact standard may appropriately be determined when, and if, a retrial occurs.

[8] This conclusion assumes without deciding that the less stringent "substantial factor" test is the appropriate causation standard. See note 4, *supra*.