STATE OF MICHIGAN

COURT OF APPEALS

CARL WILKINSON and JEANETTE WILKINSON,

Plaintiffs-Appellees,

v

ANTHONY LEE and GENERAL MOTORS CORPORATION,

Defendants-Appellants.

UNPUBLISHED
June 15, 1999

No. 203218
Oakland Circuit Court
LC No. 94-487015 NI

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

MARKEY, J. (dissenting).

I respectfully dissent.

The majority opinion accurately lays out the major facts in this case, so I will only add any others that are relevant to my analysis.

Defendants first argue on appeal that the trial court erred in denying their motion for a directed verdict or a judgment notwithstanding the verdict on the issue of whether the accident proximately caused the symptoms stemming from plaintiff Wilkinson's brain tumor. I disagree.

As the majority reminds us, directed verdicts are not favored in negligence cases. *Lamson v Martin (After Remand)*, 216 Mich App 452, 455; 549 NW2d 878 (1996). Similarly, when deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Hord, supra*; *Phinney, supra* at 524. Only when the evidence fails to establish a claim as a matter of law should JNOV be granted. *Phinney, supra*.

I have no dispute with the majority's rendition of the applicable law. I simply disagree with their application of it and their conclusion that plaintiff's claim "can survive neither the test of cause in fact nor the test of legal cause."

I believe that plaintiff's claims survive both. Moreover, were every negligence claim analyzed in the manner propounded by the majority, I suggest few would survive.

Here both of plaintiff's and one of defendant's experts testified that the 1992 accident likely precipitated plaintiff's symptoms. The majority incorrectly concludes that the underlying brain tumor is the basic "injury at issue." Certainly it is not. The injury was the head trauma which caused plaintiff's brain to swell and apparently trigger the neurological problems plaintiff began to suffer after the accident. Even defendant's expert conceded that he could not state within any degree of medical certainty that plaintiff's tumor would *ever* have become symptomatic absent the accident. Indeed, plaintiff is a classic example of the victim with the "egg-shell" skull and the axiom that one must take a plaintiff as one finds him. Shall we decline to impose negligence on one who knocks down and breaks the bones of a little old lady who suffers from osteoporosis simply because the inattentive or careless oaf didn't cause her underlying condition? Of course not.

The majority seriously misapprehends and misapplies both the procedural and substantive law that governs this case. When they conclude that the 1992 accident may have "precipitated" or "triggered" the plaintiff's symptoms, they have, in reality, found both sufficient cause in fact and proximate cause to defeat a motion for directed verdict and/or JNOV. Not only is this determination sufficient to create an issue for the jury, but also the jury here already found that defendant's negligence caused plaintiff's injury. Now, concluding otherwise, the majority here has unequivocally and impermissibly substituted their judgment for that of the jury.

Here, Wilkinson and his family testified that he did not experience the afore-described symptoms before the 1992 accident at issue, and that the symptoms started immediately after the accident. Each of these witnesses testified that Wilkinson's symptoms increased in severity over time, commencing after the accident occurred. Moreover, Dr. Guithikonda testified that the trauma of the accident could have precipitated and/or complicated the symptoms Wilkinson experienced. Specifically, Dr. Guithikonda testified that although the accident did not cause the tumor to grow, the trauma of the accident "precipitated" Wilkinson's symptoms because the force of the accident pushed the tumor against plaintiff's brain, causing small microchanges, hemorrhages or friction against the brain. Dr. Guithikonda testified that this conclusion becomes more likely because the symptoms started immediately after the accident. In addition, Dr. Boodin admitted that *he* was speculating when he opined that Wilkinson's symptoms would have begun and intensified even had the accident not occurred.

Viewing this testimony in a light most favorable to plaintiffs, a reasonable juror could and, indeed, did conclude that the accident precipitated or accelerated plaintiff's symptoms of the tumor, symptoms that might never have manifested themselves had plaintiff not suffered the head acceleration-deceleration trauma from the accident. Therefore, the trial court correctly submitted the causation issue to the jury, and did not err in denying defendants' motions for a directed verdict and for judgment notwithstanding the verdict.

Defendants also contend that reasonable minds could not differ on the issue of whether Wilkinson's tumor symptoms and neck injuries constituted a serious impairment of body function. I

disagree. Because this case was filed before "tort reform" took effect on March 28 and July 26, 1996, the issue must be analyzed under the law that existed at the time this action was filed. The majority declined to address this issue because of their conclusion on the causation issue.

Section 3135(1) of the no-fault act, MCL 500.3135; MSA 24.13135, permits plaintiff to sue in tort for noneconomic damages from a negligent owner or operator of a motor vehicle only if the person has suffered: (1) death, (2) serious impairment of body function, or (3) permanent serious disfigurement. MCL 500.3135(1); MSA 24.13135(1); *Stephens*, *supra* at 539. Before March 28, 1996, *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), was the controlling precedent. There, our Supreme Court held that to recover for noneconomic loss damages, the plaintiff had to prove that (1) the injuries he sustained in the accident impaired one or more body functions, and (2) that the impairment was serious. *Id.* at 39, 67. The focus was not on the injuries themselves but on how the injuries affected a particular body function. *Id.* at 67. To determine whether an impairment of body function was serious, the following factors were considered: 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. *Id.* at 69-70; *Owens v City of Detroit*, 163 Mich App 134, 138; 413 NW2d 679 (1987). To be serious, the impairment need not have been of an "important" body function or of the entire body. *DiFranco*, *supra* at 69-70; *Richards v Pierce*, 162 Mich App 308, 314-315; 412 NW2d 725 (1987). A comparison of the plaintiff's abilities and activities before and after the accident may be relevant insofar as it establishes the existence, extent, and duration of an impairment of body function. *DiFranco*, *supra* at 68. An impairment need not be permanent to qualify as serious under the statute. *Id.*; *Richards*, *supra* at 314.

The question whether plaintiff satisfied the no-fault threshold was ordinarily one for the trier of fact. In *DiFranco*, the Court held that if reasonable minds could differ as to whether a particular injury exceeds the tort threshold, the issue is one of fact to be resolved by the jury:

> The question whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer. This is true even when there is no material factual dispute as to the nature and extent of plaintiff's injuries. [*Id.* at 38.]

However, where reasonable minds could not differ as to the seriousness or nonseriousness of the injury, the threshold issue is one of law for the court:

> [I]n certain circumstances, the trial court should decide as a matter of law whether the plaintiff had, or had not, established a threshold injury. Such a decision could be made where "it can be said with certainty that no reasonable jury could view a plaintiff's impairment as serious. If the injury was "so minor" or of a "clearly superficial nature," summary disposition would be appropriate. [*Id.* at 51-52; *Gagliardi v Flack*, 180 Mich App, 62, 69; 446 NW2d 858 (1989) (Citations omitted).]

Finally, pursuant to *DiFranco*, and its progeny, trial and appellate courts, when reviewing motions for directed verdict and judgment notwithstanding the verdict, must view the evidence in the

light most favorable to the nonmoving party, and determine whether: "(1) a material factual dispute exists as to the nature and extent of plaintiff's injuries, and (2) whether reasonable minds could differ regarding whether plaintiff had sustained a serious impairment of body function." *DiFranco, supra* at 38-39; *Beasley v Washington*, 169 Mich App 650, 659; 427 NW2d 177 (1988).

Given the testimony that Wilkinson had severe difficulty performing his job, experienced debilitating symptoms from at least late 1993 to February 1994 and continuing symptoms after the tumor was removed, saw his family physician on at least eight occasions, and underwent surgery to alleviate the symptoms, reasonable minds could differ as to whether plaintiff's tumor symptoms were serious. See *Beard v City of Detroit*, 158 Mich App 441, 449; 404 NW2d 770 (1987). Therefore, I would find that the threshold issue whether Wilkinson's head injuries amounted to a serious impairment of body function was properly submitted to the jury.

Unlike plaintiff's tumor symptoms, however, I believe that reasonable minds would agree that Wilkinson's neck injuries were not "serious." Six days after the accident, he saw Dr. Michael Fugle, an orthopedic surgeon, complaining of severe neck pain. Subsequently, on June 5, 1992, plaintiff saw Dr. Fugle again, at which time Dr. Fugle diagnosed him with "cervical myotis" and "severe cervical spasm" and recommended that he begin physical therapy. Plaintiff began his first session on July 11, 1992. After approximately twelve treatments, consisting of hot pack and neck massages, therapy was discontinued in July 1992. Although plaintiff testified that he continued to complain of neck pain, he did not seek additional treatment. In addition, unlike plaintiff's tumor symptoms, there is no evidence indicating that the neck pain significantly impaired his ability to perform his work. Therefore, considering the factors enunciated in *DiFranco*, including treatment that consisted of no more than hot packs and massages and the absence of evidence indicating that as a result of the injuries a particular body function was impaired, I conclude that reasonable minds would agree that plaintiff's neck injuries did not constitute a serious impairment of body function.

I note that the verdict form does not indicate whether the jury awarded damages to plaintiff based on the tumor symptoms, neck injuries, or both. By failing to request a jury form requiring the jury to differentiate between the injuries, defendants have provided us with no avenue for review. Therefore, I would find that this issue is not properly preserved.

I would affirm.

/s/ Jane E. Markey