# STATE OF MICHIGAN

# COURT OF APPEALS

FAYETTE WASHINGTON,

Plaintiff-Appellant,

v

KARL REYNOLDS,

Defendant-Appellee.

UNPUBLISHED
February 18, 2003

No. 237537
Wayne Circuit Court
LC No. 00-014446-NI

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition to defendant in this automobile negligence case. We affirm but remand for modification of the trial court's order.

On May 4, 2000, plaintiff filed a complaint alleging that defendant, on March 18, 1999,[1] failed to stop for a traffic light and crashed into plaintiff's vehicle. The complaint alleged that plaintiff suffered severe and permanent injuries "to her ribs, back, shoulders, neck, back [sic] and spine, as well as the muscles, cords, nerves, tendons and other fibers contained therein . . . ." The complaint further stated that plaintiff "has had the need for assistance from others in doing things for her that she normally would do for herself but cannot do, because of the accident-related injuries . . . ."

On June 26, 2001, defendant moved for summary disposition under MCR 2.116(C)(10), alleging that plaintiff's lawsuit was not viable because she did not suffer a serious impairment of a body function as required by MCL 500.3135. Specifically, defendant alleged that plaintiff's complaints of back pain and dizziness were not "objectively manifested," as required by statute and case law. Defendant attached to his summary disposition motion several documents relating to plaintiff's alleged injuries. In an emergency room record from the day of the accident, Nancy Finzel, D.O., noted "[a]cute contusion of the chest" as the potential diagnosis and further notes that plaintiff "is . . . in no apparent distress." Finzel further noted, "There is no guarding or rigidity appreciated. Extremities are unremarkable."

[1] Subsequent documents demonstrate that the accident actually occurred on March 12, 1999.

In a hospital progress note dated March 15, 1999 (three days after the accident), Wendy Miller, M.D., listed several symptoms under the headings "subjective and "objective." Under the "subjective" heading, Miller stated, in part:

> There was no loss of consciousness. She did not hit her head on the steering wheel or windshield. She followed up at the Royal Oak Beaumont Hospital emergency center . . . and an x-ray of the chest was done. The following day she developed significant mid back discomfort below the shoulder blades bilaterally. she also noted worsening of her symptoms of lightheadedness and some "staggering" gait at times. She followed up with the Hutzel Hospital emergency center last night. Laboratory studies were done which revealed normal CBC and glucose. . . . She denies any numbness, tingling, or weakness of her extremities. There has been no significant headache. No nausea or vomiting. No change in vision.

Under the "objective" heading, Miller stated, in part:

> In general, she appears obese, pleasant, in no acute distress. . . . There is no cervical lymphadenopathy. There is no cervical spine tenderness. Chest is clear to auscultation bilaterally. She has moderate tenderness to palpation over the bilateral subscapular areas. There is no spine tenderness to her palpation.

Miller advised plaintiff to be off work until her next examination in four days.

In another hospital progress note dated April 12, 1999, R. Stewart Robertson, M.D., noted under the "subjective" heading that plaintiff came in

> complaining of continued pain in the mid back. She states that she is unable to pick up anything heavy because of the pain, and she has been unable to work. She states that her low back has improved somewhat, but she is not able to pick up anything heavy without great discomfort any longer. She states that she has occasional dizziness, although it has improved markedly. The dizziness is basically confined to the nighttime when she is driving. Otherwise she has no other similar problems.

Under the "objective" heading, Robertson noted no abnormalities except for "mild palpatory tenderness over the mid thoracic spine in the region of T6-T7." He instructed her to remain off work for a week.

In a physical therapy report dated September 17, 1999, John Maltese, Jr., stated that plaintiff had completed five weeks of physical therapy and "has made good improvements with her neck and low back, but is still having problems with her mid back." Maltese noted that he had suggested an "MRI or CT scan," but plaintiff declined because of claustrophobia. Maltese noted that plaintiff "still cannot return to work secondary to pain." He further noted:

> Exam today shows no vertebral percussion tenderness. She has paraspinal muscle tenderness in the cervical through the lumbar area, more so in the thoracic area. Extension of the back reproduces pain. Range of motion of the shoulders are fair

> and pain free. Neurovascularly she is intact with good strength, sensation, and reflexes.

Maltese instructed plaintiff to remain off work until she could see a spine surgeon.

In an orthopedic center report dated October 12, 1999, Jeffery Fischgrund, M.D., stated that plaintiff was complaining of "mid thoracic pain, as well as pain in the lumbar area." Fischgrund noted, "At this point, there do not appear to be any significant injuries. We will, however, send her for a bone scan to rule out any other processes."

In a report dated October 6, 1999, Joseph Femminineo, M.D., who conducted an independent medical examination at the request of plaintiff's insurance company, stated that plaintiff was complaining of "aching, burning, throbbing" pain in her mid-to-low back. Femminineo stated, "Objective findings on today's date, other than some volitionally restricted range of motion of the lumbar spine, the rest of the examination is benign." Femminineo indicated that plaintiff could return to work with a twenty-five pound lifting restriction and with "no prolonged . . . bending, stooping or twisting."

In a supplemental report dated November 9, 1999, Femminineo stated that plaintiff had received a "CT scan," which was normal. He further stated that "[l]ow back x-rays apparently showed no evidence of any significant abnormality with the exception of a questionable non-united transverse process at L1."[2] Femminineo stated that plaintiff could return to work with no restrictions.

In a hospital progress note dated January 13, 2000, Dr. Robertson noted that plaintiff was complaining of back pain that "began 10 days ago" and that "is in a different place, being lower than her previous pain." Robertson indicated in a later report that the new back pain was not a result of the accident.

In a report dated February 24, 2000, Joe Weiss, M.D., who performed another independent medical examination on plaintiff, noted plaintiff's complaints of back pain and recommended that she have additional diagnostic tests – a "CT study" and an "EMG study" – performed on her spine. Weiss wrote, "I suspect that she has a disc protrusion, as well as, some underlying lumbar spinal canal stenosis."

A report from March 3, 2000, by G.R. Weiner, D.O., indicated that an "EMG examination" occurred and was within normal limits.

Defendant also attached to its summary disposition motion excerpts from the charts of one of plaintiff's general physicians, Mushin Al-Rawi, M.D. Although largely illegible, the charts appear to offer a diagnosis on January 8, 2001, of degenerative disc disease in plaintiff's spine.

On July 13, 2001, defendant filed a supplemental exhibit to his motion for summary disposition. This exhibit, a report dated June 26, 2001, by Nathan Gross, M.D., who performed

---

[2] As noted *infra,* this condition was considered a "normal variant."

yet another independent medical examination on plaintiff, stated that "[h]er physical examination does not reveal objective abnormalities to correlate to her ongoing complaints."

On July 13, 2001, plaintiff filed a response to defendant's motion for summary disposition. Plaintiff stated that under SJI2d 36.11, "In order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis." Plaintiff argued that she met the "objectively manifested" standard because she suffered a cervical, thoracic, or lumbar sprain. She further argued that her injuries impaired her ability to move her back and that movement of the back is an important body function.

Plaintiff attached to her responsive brief certain documents that had not been attached to defendant's summary disposition brief. In a hospital progress note dated June 30, 1999, Dr. Robertson stated, under the "objective" heading, that "Palpation of her back reveals complaints of tenderness on light palpation over the paraspinal area, from the neck almost to the sacrum." In a hospital progress note dated March 25, 1999, Dr. Robertson stated, "Palpation of her back and neck reveals pain to the left of the midline over the lower thoracic vertebrae. This tenderness is mild but present." In a medical report dated July 1, 1999, Henrietta Juras, M.D., indicated "[m]ild degenerative change in the thoracic spine." In an x-ray report dated March 25, 1999, Harry Tabor, M.D., noted, with respect to plaintiff's spine, "I see no evidence of fracture, dislocation, or other significant abnormality. Incidental note is made of transverse process of L1 which is ununited, but this is a normal variant." In a disability report dated June 30, 1999, Dr. Robertson listed "cervical through lumbar soft tissue injury" as a diagnosis.

Plaintiff also attached to her responsive brief excerpts from her deposition, in which she testified that cannot play with her children, ride her exercise bicycle, or go grocery shopping, among other things, because of her injuries.

The trial court ruled for defendant, stating, among things, that "[t]he type of restricted movement described by plaintiff and her treaters is restriction by pain. By definition, pain is subjective and thus plaintiff is restricting her own movement due to pain, that is subjective, not objective."

The proposed order submitted by defendant indicated that the court had granted summary disposition to defendant and dismissed the case in its entirety. Plaintiff then filed an objection to entry of the order, stating that defendant's motion for summary disposition had actually been a motion for *partial* summary disposition because it dealt only with plaintiff's claims for noneconomic loss, whereas plaintiff also raised the issue of economic loss in her complaint, arguing that she was entitled to economic damages for more than three years beyond the accident. In response, defendant argued that the proposed order was correct because (1) in her response to defendant's motion for summary disposition, plaintiff did not argue that her claims for economic loss should survive the motion; (2) plaintiff presented no documentary evidence that she is still disabled and entitled to continuing economic benefits; and (3) Dr. Gross concluded that plaintiff could be active without restrictions, thus negating a claim for continuing economic damages. Plaintiff responded by filing a medical report dated June 28, 2001, in which Dr. Al-Rawi indicated that plaintiff had been unable to work from March 12, 1999, until at least the date of the report. Plaintiff argued that this demonstrated the ongoing nature of her disability.

The trial court ruled for defendant, stating, among other things:

> The defendant's motion does states that defendant seeks summary disposition in the form of a judgment of no cause of action. It is true that it did not brief separately the issue of whether there was an issue of fact as to wage loss beyond three years. Plaintiff did not respond to this issue at all in the original brief, and in fact, the matter was not mentioned until plaintiff in fact lost the motion and defendant sought to enter the order. The court believes that plaintiff did, in fact, waive this issue. However, for purposes of the record, I believe it is appropriate to indicate how I would rule on the merits of this matter.

The court then stated that plaintiff presented no evidence of an objective manifestation of injury potentially lasting more than three years after the accident. Accordingly, the court essentially held that even if plaintiff had not waived the economic damages issue, it would nonetheless rule for defendant.

On appeal, plaintiff first argues that the court improperly dismissed her claim for noneconomic damages because her injured back substantially impaired her lifestyle and because "[t]he trial judge must consider as an objective manifestation of injury, a doctor's diagnosis of muscle strain and a doctor's basis for that diagnosis." We disagree.

We review a trial court's grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a motion for summary disposition granted under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to determine if any genuine issue of material fact exists. *Wilcoxon, supra* at 357-358. We resolve all legitimate inferences in favor of the nonmoving party. *Id*. at 358.

MCL 500.3135(1) states that a defendant remains liable for noneconomic loss "if the injured person has suffered . . . serious impairment of body function. . . ." MCL 500.3135(7) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead her or her normal life." Plaintiff contends that whether an "objectively manifested" impairment exists is determined by looking to the standard set forth in SJI2d 36.11 and in *DiFranco v Pickard*, 427 Mich 32, 70-75; 398 NW2d 896 (1986), superceded in part by statute as stated in *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000). In *DiFranco*, the Supreme Court rejected an analysis set forth in *Williams v Payne*, 131 Mich App 403, 409-410; 346 NW2d 564 (1984). In *Williams*, this Court, citing to *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982), developed a rule in which "objective manifestation" required direct demonstration of the injury through medical tests and procedures. *Williams, supra* at 409-410. The *DiFranco* Court rejected the requirement of injuries measurable by tests, stating:

> We agree that *Williams* misinterpreted *Cassidy*. The *Cassidy* Court was concerned that plaintiffs could recover noneconomic damages merely by testifying that they had suffered extreme pain following a motor vehicle accident. Recognizing that the Legislature only permitted recovery for injuries which seriously impair body functions, the Court required plaintiffs to establish that they had suffered such an injury. In other words, plaintiffs must introduce evidence establishing that there is a physical basis for their subjective complaints of pain

and suffering. Neither *Cassidy* nor § 3135(1) limits recovery of noneconomic damages to plaintiffs whose injuries can be seen or felt.

> As noted in Part IX, 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 complaints, the physician's observations, and test results) can be adequately challenged at trial through cross-examination and the presentation of contrary medical evidence. The "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. The Cassidy Court required no more than this. [*DiFranco, supra* at 74-75.]

Defendants, citing *Kern, supra* at 338, contend that this standard from *DiFranco* was essentially overruled by the 1995 statutory amendments to the tort threshold injury standards. See 1995 PA 222. In *Kern,* the Court did indicate that 1995 PA 222 "overturned the Supreme Court's *DiFranco* decision by codifying the tort threshold injury standards of *Cassidy* . . . ." *Kern, supra* at 338. However, the amendments to the no-fault act, while overturning certain aspects of *DiFranco,* did not necessarily overturn *DiFranco's* discussion of the "objectively manifested" injury requirement.

The interplay between the 1995 PA 222, *DiFranco*, and *Cassidy*, and *Williams* was discussed recently in *Jackson v Nelson,* 252 Mich App 643, 648-654; 654 NW2d 604 (2002). In *Jackson, supra* at 652, this Court stated, "We believe that the Legislature's use of the phrase 'objectively manifested' was intended to adopt the meaning of that term as set forth in *Cassidy* and *DiFranco*, and had our Legislature intended a new interpretation, it would have adopted specific language clarifying that intent." The *Jackson* Court held, "SJI2d 36.11, which states in pertinent part that '[i]n order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis,' is an accurate reflection of the law." *Jackson, supra* at 653.

In light of *Jackson,* we reject defendant's suggestion that *DiFranco* is completely inapposite to the instant case. Indeed, the standards set forth in both *Cassidy* and *DiFranco,* as summarized by SJI2d 36.11, govern. The relevant question, then, is whether plaintiff sufficiently demonstrated "a medically identifiable injury or condition that has a physical basis." SJI2d 36.11. We conclude, upon our de novo review, that plaintiff did not meet this threshold. Indeed, none of the evidence in the lower-court record demonstrates a medically-identifiable injury. The doctors consistently reported an absence of injury and normal tests. While Dr. Al-Rawi made a possible diagnosis of "degenerative disc disease" and Dr. Juras also noted "[m]ild degenerative change in the thoracic spine," neither of these doctors related the degenerative changes at issue to the automobile accident. Additionally, while Dr. Robertson listed "cervical through lumbar soft tissue injury" as a diagnosis, this was made on a disability report relating to plaintiff's work ability and was not reiterated in Robertson's many hospital progress reports. Indeed, and significantly, plaintiff does not even refer to this diagnosis in the text of her appellate brief. Robertson consistently noted in the hospital progress reports that plaintiff complained of

tenderness in her back but did not offer a medically-identifiable injury or condition with a physical basis. Moreover, the notations by Dr. Weiss, which plaintiff cites in her appellate brief, were nothing more than his *suspicions* of a disc protrusion or "underlying lumbar spinal canal stenosis." Plaintiff cites on appeal a report referencing a potential abnormality in plaintiff's knees, but this report similarly noted "probable" degenerative changes in the knees, and nothing related these or other knee conditions to the automobile accident or demonstrated a seriously disabling knee injury. In fact, the complaint refers to plaintiff's "ribs, back, shoulders, neck, back [sic] and spine" but does not refer to her knees. The evidence simply did not rise to the standard required by the case law. Indeed, plaintiff's complaints were more akin to "general aches and pains," for which noneconomic damages are not recoverable. See *Cassidy*, *supra* at 505. We therefore conclude that the trial court did not err in granting summary disposition to defendant on the issue of noneconomic damages.

Next, plaintiff argues that the court improperly granted defendant summary disposition with regard to her claim for economic damages when defendant's motion for summary disposition addressed only the issue of noneconomic damages. Plaintiff contends that she did not waive the issue of economic damages because she was not required to address in her responsive summary disposition brief an issue not raised by defendant. However, plaintiff fails to cite any authority at all in support of her argument and therefore has therefore waived the issue for purposes of appeal. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Even assuming, however, that plaintiff is correct that the trial court erred in the "waiver" analysis, we note that the trial court allowed plaintiff additional time, post-judgment, to address the issue of economic damages. The court reviewed plaintiff's additional brief and medical information and concluded that she failed to present sufficient evidence of economic damages continuing more than three years past the accident. We agree that plaintiff's evidence was insufficient. Indeed, although plaintiff presented a report dated June 28, 2001, by Dr. Al-Rawi indicating that plaintiff was disabled for an "undetermined" time, there was simply no indication that the disability would last through March 2002. Nonetheless, given the procedural irregularities surrounding the dismissal of plaintiff's claim for economic damages, we conclude that the best remedy is to allow plaintiff to re-file a claim for economic damages if she can produce evidence that her disability is persisting for more than three years after the accident. In other words, we modify the court's order with respect to the economic damages claim to be a dismissal without prejudice.

Affirmed but remanded for modification of the trial court's order. We do not retain jurisdiction. We decline to allow costs, neither party having prevailed in full.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter