

*Little, and Wife v. Rife*

*Motion for partial summary judgment granted - limited tort auto insurance - serious injury*

1. Under Pennsylvania Motor Vehicle Responsibility Law, person may elect "limited tort" option in insurance policy in exchange for reduced premium; under this option, insured may seek recovery for all out-of-pocket expenses but not for pain and suffering unless the injuries were "serious."
2. A serious injury is a personal injury resulting in death, serious impairment of a body function or permanent serious disfigurement.
3. Pennsylvania Supreme Court recently issued long-awaited opinion and set new standard in limited tort cases. *Washington v. Baxter* (October 29, 1998).
4. Under previous case law, courts have made threshold determination of whether a serious injury exists and have not allowed that question to routinely go to the jury. *Dodson v. Elvey*, 445 Pa. Super. 479, 665 A.2d 1223 (1995).
5. Supreme Court set new standard: court must follow traditional summary judgment standard and must leave the determination of whether a serious injury exists to the jury unless reasonable minds could not differ on that issue.
6. In determining whether there is a serious impairment of a body function, court must make two inquiries:
  - a. What body function was impaired?
  - b. Was the impairment serious? The court must consider several factors: the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors.
7. Fractured left fibula bone in ankle is not serious injury: plaintiff had cast for 2 months and was unable to walk on uneven terrain or climb steps for approximately two and a half months and was out of work for four and a half months; however, plaintiff was in the hospital for only two days, was hunting in the mountains making strenuous use of his ankle after only two and a half months and had no more pain at that time; plaintiff had no restrictions on his work duties nor on any recreational activities; even though he underwent another surgery to remove hardware in his ankle, this was done on his own request because he had "a little pain."
8. Court finds that plaintiff's impairment did not substantially affect his daily life for an extended period of time; reasonable minds could not differ on conclusion that plaintiff's injury was not serious. Partial summary judgment in favor of defendant is granted.
9. Court's previous opinion in *Wingate v. Miller*, 13 Franklin Cou. L.J. 255 (1996) was wrongly decided.

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WALKER, P.J., November 17, 1998:

**Factual and Procedural Background**

On July 11, 1996, at approximately 5:25 p.m., Plaintiff Ricky Little was traveling east on Route 30 in Franklin County, Pennsylvania, when Defendant Ellen Rife made a left hand turn directly in front of plaintiff's lane of travel, causing a head on collision. Defendant was charged with violating the Pennsylvania Motor Vehicle Code for failing to yield the right-of-way. Plaintiff was taken to the Chambersburg Hospital by ambulance and then flown by helicopter to the Hershey Medical Center. It appears this was done because of a heart transplant plaintiff had received there five years previously. (See Exhibit C, attached to plaintiff's brief in support of motion for partial summary judgment). Plaintiff incurred three fractured ribs, a laceration on his chin, and a fractured left fibula bone in the ankle. The fractured ankle required plaintiff to undergo surgery. He was hospitalized for two days. After the surgery, he had to wear a cast until mid-September, and an air cast for a period of time thereafter. From October 3, 1996 through November 5, 1996, plaintiff had to undergo physical therapy. The physical therapist, Terri Gostowski, noted in the discharge summary that plaintiff had initially been unable to walk up or down hills and on any uneven terrain, and could not ascend or descend steps. (Exhibit E). The physical therapist further noted that plaintiff had been able to walk on uneven terrain and climb steps without increased pain or the need for an assistive device for the past several weeks and that at the time of discharge he was "asymptomatic for pain." (Exhibit E). Plaintiff agreed with this statement. (Exhibit A, p. 19). Plaintiff further testified at his deposition that he had been hunting and fishing (wearing waders in a stream) in October of 1996. (Exhibit A, p. 19-21). He testified that he had been in the mountains hunting small game and had climbed up in a tree stand for bow-and-arrow hunting, even though it hurt a little bit. (Exhibit A, p. 19-21). He furthermore testified that he was able to walk around in the park again by October 1996. (Exhibit A, p. 21). There were no other recreational activities he could not do by the time of his release from physical therapy. (Exhibit A, p. 21-22).

On October 25, 1996, plaintiff, employed by PennDOT as an equipment operator but working mainly as a "flagger," was permitted to return to work on a "light duty" basis. Because such light duty work was not available, plaintiff did not return to work until December 2, 1996, after having been cleared for "full duty" in late November. He has been able to perform his work since then without limitations.

In September 1997 plaintiff underwent a one-day outpatient surgery to remove the hardware which had been put in his ankle. He was out of work for a short period of time after that. At his deposition, plaintiff testified that he had decided to have the hardware removed because he "had a little pain down there once in a while" and because "it bothered me at work a little bit." (Exhibit A, p. 24). Since the second surgery, plaintiff's ankle has been better, and he has no further complaints. (Exhibit A, p. 23).

At the time of the accident, plaintiff had a motor vehicle insurance policy issued by Allstate Insurance Company. Plaintiff had elected the limited tort option as provided under the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL"). On October 30, 1998, plaintiff and his wife filed a complaint against defendant, claiming both economic and non-economic losses based on the argument that plaintiff sustained "serious injuries" as a result of the collision. On May 22, 1998, defendant filed a motion for partial summary judgment, arguing that plaintiff did not sustain serious injuries. On June 12, 1998, plaintiff also filed a motion for partial summary judgment on this issue. Argument was held on September 3, 1998.

### Discussion

Summary judgment may only be granted where the right is free and clear from doubt. *Drapeau v. Joy Technologies, Inc.*, 447 Pa. Super. 560, 563, 670 A.2d 165 (1996). The moving party has the burden of proving that there is no genuine issue of material fact. *Drapeau*, at 563. The record and any inferences therefrom must be viewed in the light most favorable to the non-moving party. *Id.* Any doubt must be resolved against the moving party. *Id.*

Under the Pennsylvania Motor Vehicle Financial Responsibility Act, a person is permitted to elect the "limited tort" option in his insurance policy in exchange for a reduced premium. Under this option, the insured may seek recovery for all medical and out-of-pocket expenses, but not for pain and suffering or other non-monetary damages unless the injuries suffered are "serious injuries." 75 Pa.C.S.A. § 1705 (d). A "serious injury" is defined as a "personal injury resulting in death, serious impairment of a body function or permanent serious disfigurement." 75 Pa.C.S.A. § 1702.

Defendant, in her motion for partial summary judgment, argues that plaintiff did not sustain a "serious injury" as defined under the law and requests this court to grant partial summary judgment in her favor. Plaintiff, in his motion for partial summary judgment, argues that this court should find, as a matter of law, that a serious injury exists and that the jury must be permitted to consider awarding non-economic losses. In the alternative, plaintiff argues that there is an issue of material fact as to whether there is a serious injury and that it must be decided by the jury.

The main case relied on by almost all courts in deciding this issue was *Dodson v. Elvey*, 445 Pa. Super. 479, 665 A.2d 1223 (1995). This is also the main case relied on by the parties in this case in support of their arguments. However, while the underlying case was pending before this court, the Pennsylvania Supreme Court issued a long-awaited decision in the case of *Washington v. Baxter*, No. 004 M.D. Appeal Dkt (October 29, 1998). The issue before the Supreme Court was whether summary judgment had been properly entered against the appellant, Mr. Washington, who was a limited tort elector, in his action for non-economic losses arising out of a car accident. Because *Washington* sets the new standard in limited tort cases, the case requires substantial discussion.

In *Washington*, appellant had been involved in a car accident in which he sustained injuries, including a cervical strain or sprain of his foot and several cuts and contusions. *Washington*, at p. 1. Appellant was treated at the hospital and discharged after several hours. He worked two jobs, one for forty-eight hours per week and one for approximately three or four hours per week. Appellant was unable to work at his first job for four of five days, and could not work at his other job for approximately one or two months. Approximately five

months after the accident, he was diagnosed with "some type of subtalar joint arthritis or coalition in the right foot." *Washington*, at p. 2. Appellant furthermore had a limited range of motion in one of the joints. One year after the accident, appellant testified that he still had pain about every other week and that his ankle was often swollen.

He had been able to perform his normal job responsibilities. The only thing plaintiff could no longer do after the accident was pushing a lawnmower, requiring him to use a riding mower instead. *Washington*, at p. 3. The trial court granted partial summary judgment in favor of the defendant, finding as a matter of law that the injuries were not serious. The Superior Court, relying on *Dodson*, found that the question of whether the injuries were serious was for the trial judge to decide, and affirmed the lower court's decision. *Washington*, at p. 5.

The Supreme Court thoroughly reviewed *Dodson's* holding that the determination of whether a serious injury under the MVFRL exists should not routinely go to the jury but that the trial court must make this threshold determination. *Washington*, at p. 6-7; *Dodson*, 445 Pa. Super. at 493-494. The *Dodson* court made this determination on the basis of the legislature's intent to decrease the cost of insurance by not allowing limited-tort electors to sue for pain and suffering if they sustained a non-serious injury. The *Dodson* court found that to permit all cases where plaintiffs claim serious impairment of a body function to routinely go to the jury would not rein in costs but rather would prove as expensive as having an unrestricted right to sue. *Dodson*, at 494.

The Supreme Court first noted that the language of the statute is silent as to which entity -the judge or the jury- must make the threshold determination. *Washington*, at p. 9. The Court further noted that the legislature rejected attempts to insert language that the threshold determination had to be made by the judge rather than the jury. *Id.* at p. 10. The Court furthermore pointed out that the Pennsylvania statute was modeled after the Michigan statute, and that the Michigan Supreme Court has held that the threshold determination of whether a plaintiff suffered a serious impairment of body function was to be left to the jury. *Id.* at p. 11, citing *DiFranco v. Pickard*, 398 N.W.2d 896 (Mich. 1986). Therefore, the Pennsylvania Supreme Court held that it was the legislature's intent

that "the traditional summary judgment standard was to be followed and that the threshold determination was not to be made routinely by a trial court judge in matters such as the one before us now, but rather was to be left to a jury unless reasonable minds could not differ on the issue of whether a serious injury had been sustained." *Washington*, at p. 11-12.

With this standard in mind, the Supreme Court reviewed whether the lower court had properly granted partial summary judgment in *Washington*. In determining whether a serious impairment of a body function existed, the Court adopted the definition of that term as set forth in *DiFranco*, which had previously been adopted by the *Dodson* court. *Washington*, at p. 12; *Dodson*, at 499. The "serious impairment of body function" threshold contains two inquiries:

a) What body function, if any, was impaired because of the injuries sustained in the motor vehicle accident?

b) Was the impairment of the body function serious? The focus of these inquiries is not on the injuries themselves, but on how the injuries affected a particular body function. Generally, medical testimony will be needed to establish the existence, extent, and permanency of the impairment . . . In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious.

*Washington*, at p. 12-13.

Applying this standard to the facts of the *Washington* case, the Supreme Court found that, when the evidence was taken in the light most favorable to the appellant as the non-moving party, reasonable minds could not differ on the conclusion that appellant's injury was not serious. The Court made the following findings:

Appellant's injuries as diagnosed by the emergency room physician were mild and he was discharged after a few hours. Furthermore, he missed only four or five shifts at both his full-time and part-time jobs, where he was required to perform most of his work while on his feet. Also, the treatment for his

injuries was not extensive. Finally, although some type of arthritis or coalition is affecting one of the joints in Appellant's right foot, the injury seems to have had little or no impact on Appellant's performance of his job functions and engagement in personal activities. Therefore, although the evidence, when taken in the light most favorable to Appellant, does show that he was injured in the accident, the impairment resulting from that injury was clearly *de minimis*.

*Washington*, at p. 14.

In the underlying case, plaintiff alleges that he has suffered serious injuries, namely a laceration in his chin requiring stitches, three fractured ribs and a fractured left fibula bone in the ankle. Plaintiff alleges that the stitches in his chin have caused a scar which bothers him when he shaves. However, plaintiff has not alleged that the scar on his chin constitutes a "disfigurement" or has caused an impairment of a body function. Thus, the scar cannot be said to constitute a "serious injury." With respect to the broken ribs, plaintiff has not alleged that the ribs have caused a serious impairment of a body function. Therefore, the broken ribs also cannot be a basis for finding that a serious injury exists. This brings the court to plaintiff's last allegation, that plaintiff has suffered a serious impairment of a body function because of the injuries to his ankle. It is with respect to this claim that the court must apply the standard as provided by the Supreme Court.

It is not disputed that plaintiff suffered impairment of a body function, namely the use of his ankle. Plaintiff had been unable to walk up or down hills and on any uneven terrain, and could not ascend or descend steps for approximately two and a half months. Thus, it must next be determined whether the impairment was serious. Pursuant to the factors set forth by the Pennsylvania Supreme Court, this court first examined the extent of the impairment. The evidence, when viewed in the light most favorable to plaintiff, shows that plaintiff had to wear a hard cast for about two months. During this period of time, he had to use crutches and he could not walk on uneven terrain or climb steps. He also could not perform his job duties.

Next, this court considered the length of time the impairment lasted. Plaintiff was out of work for four and a half months, although

he had been cleared for "light duty" after approximately three months. However, the limitations on his other daily activities lasted only for approximately two and a half months. At the time of his discharge from physical therapy early November, plaintiff had already been out hunting and fishing for several weeks. These activities involve fairly strenuous use of the ankle by walking on uneven terrain in the mountains, climbing a tree stand and walking over the slippery, rocky bottom of a stream. He furthermore admitted that he had no more pain at that time. When plaintiff returned to work, he had no restrictions or limitations, and he has been able to perform all his job duties without any problems.

In considering the treatment plaintiff had to undergo to correct the impairment, the evidence shows that plaintiff was in the hospital for only two days. He was flown over to Hershey Medical Center, but it appears that this was done not because of the seriousness of his injuries but because he had previously been a patient there and all his medical records regarding his previous heart transplantation were available there. While plaintiff had to undergo a second surgery, it was only a one-day outpatient procedure and plaintiff underwent it only because he had "a little pain down there once in a while" and because "it bothered me at work a little bit." (Exhibit A, p. 24). Although plaintiff still occasionally experiences pain, he does not need any further medical attention and is not restricted in any work or recreational activities.

This court finds that plaintiff's impairment of the use of his ankle was not severe. While plaintiff was unable to walk on steps or uneven terrain for approximately two and a half months, he was not completely immobilized since he was able to get around with crutches. Plaintiff's limitation in the use of his ankle after the injury prevented him only from engaging in hunting, fishing and taking a walk in the park. Furthermore, the impairment did not last for an extended period of time. Only two and a half months after the accident, he had regained full use of his ankle, and he was able to engage in such strenuous activities as hunting in the mountains and fishing in a stream. Upon his return to work, he was able to perform all his job duties without limitations. This court finds that the limitation did not substantially affect his daily life for an extended period of time. Therefore, this court holds that the evidence, taken in

the light most favorable to plaintiff, clearly shows that plaintiff's injury was not serious.

Plaintiff has pointed out that this court, in an earlier opinion, has allowed the question of whether a serious injury existed to be decided by the jury. *Wingate v. Miller*, 13 Franklin Cou.L.J. 255 (1996). In that case, plaintiff suffered a fracture of the left knee, which required her to wear an immobilizing bracelet for three months, during which time she was out of work. At the time of her deposition she could not walk any distance without pain. *Wingate*, at 257. This court held that the impairment of plaintiff's knee, and her inability to walk and perform her job for three months raised an inference of a serious impairment of a body function sufficient to send it to the jury.

This court has had an opportunity to reevaluate its earlier decision in light of the new standard set forth in *Washington* and hereby overrules its decision in *Wingate*. This court believes that under the factors set forth by the Supreme Court in determining what constitutes a "serious injury," this court's earlier decision was wrongly decided. Looking at the extent of the impairment, the length of time of the impairment and the treatment required to correct the impairment, this court finds that the impairment in the underlying case did not substantially interfere with plaintiff's daily life for an extended period of time. Therefore, this court finds as matter of law that reasonable minds could not differ on the conclusion that plaintiff's injury was not serious. Defendant's motion for partial summary judgment is granted.

#### ORDER OF COURT

November 17, 1998, after consideration of the motions for partial summary judgment filed by both parties, this court finds that it is clear that plaintiff did not sustain a "serious injury" as defined in the Motor Vehicle Financial Responsibility Law. Defendant's motion for partial summary judgment is hereby granted, and plaintiff will be precluded from recovering non-economic damages.

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