

CHRISTOPHER J. FORE, VS. RICKY W. FOSTER, C.P.  
C.D. Franklin County Branch, No. A.D. 1994-49

A plaintiff subject to the Limited Tort Option of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") sought to recover for noneconomic loss sustained when as a pedestrian he was struck by an automobile. Defendant filed a motion for summary judgment on the noneconomic losses.

The Court held that it was the Court's role to make an initial determination as to whether the plaintiff's injuries are "serious" as defined in section 1702 of the MVFRL. The Court determined that pain and limitation of movement in the neck, back, and shoulder which had persisted nearly three years, along with a permanent visual deformity of the thigh, which was also painful, and frequent headaches could be reasonably perceived as "serious" injury. A jury question was deemed to exist and summary judgment on the issue was denied.

1. It is the duty of the Court to make an initial determination of whether a plaintiff's injuries are "serious" within the parameters of section 1702 of the MVFRL.
2. Where reasonable minds could differ as to the seriousness of an injury under the MVFRL, the question should be submitted to the trier of fact.
3. The factors used to determine whether injuries constitute a serious impairment of body function or permanent serious disfigurement are: (1) the extent of the impairment; (2) the particular body function impaired; (3) the length of time the impairment lasts; (4) the treatment required; and (5) other relevant circumstances.
4. Existence of continued pain and limited movement in the neck, back and shoulder, and frequent headaches, which all persisted nearly three years after the accident, along with a permanent visible deformity of the leg which also caused persistent pain and numbness, creates a jury question as to whether plaintiff's injuries were serious under the MVFRL.

*Richard M. Golomb, Esquire, Attorney for Plaintiff*  
*William A. Addams, Esquire, Attorney for Defendant*

OPINION AND ORDER

HERMAN, J., August 4, 1995:

The plaintiff filed this action to recover damages for personal injuries he sustained when as a pedestrian, he was struck by an automobile driven by the defendant. The

defendant filed an answer with new matter and the plaintiff was deposed. The defendant thereafter filed a motion for partial summary judgment. Counsel submitted briefs to the Court and argument was held on March 2, 1995. This matter is ready for decision.

The plaintiff is subject to the Limited Tort Option of the Pennsylvania Motor Vehicle Financial Responsibility Law ("MVFRL") as amended on February 7, 1990. 75 Pa. C.S. §1705(d) of the MVFRL provides in relevant part:

(4) Limited tort alternative. --Each person who elects the limited tort alternative remains eligible to seek compensation for economic injuries sustained in a motor vehicle accident as the consequence of the fault of another person pursuant to tort law. *Unless the injury sustained is a serious injury, each person who is bound by the limited tort election shall be precluded from maintaining an action for any noneconomic loss. . .*

(emphasis supplied). "Serious injury" is defined in section 1702 as a "personal injury resulting in death, serious impairment of a body function or permanent serious disfigurement." The limited tort option provides that in exchange for lower insurance premiums, an insured may elect to waive his right to sue for noneconomic loss. "Noneconomic" loss is defined in section 1702 as "pain and suffering and other nonmonetary detriment."

The issue before us is whether the Court or the trier of fact should decide whether a plaintiff's injuries are "serious" within the parameters of section 1702 of the MVFRL. The Superior Court has recently held that it is the Court's role to decide *initially* if a question exists for the trier of fact as to whether the plaintiff's injuries are serious. If the Court finds such a question exists, it is left to the trier of fact to decide whether the injuries are serious enough to overcome the threshold presented by section 1705(d)(4). *Kennedy v. Beckley and Kennedy*, No. 02335 Philadelphia 1994, dated April 13, 1995.

The MVFRL is based on the Michigan No-Fault Insurance Act, the latter being interpreted by the Michigan Supreme Court in *DiFranco v. Packard*, 427 Mich. 32, 398 N.W.2d 896 (1986). The *Kennedy* court followed the *DiFranco* analysis:

The question whether the plaintiff suffered a serious impairment of a body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer.

*Kennedy*, at 10, citing *DiFranco*, 398 N.W.2d at 900 (emphasis in original). The *Kennedy* court found that reasonable minds could not differ in reaching the conclusion that Kennedy did not sustain a "serious injury" as defined by the MVFRL.

Kennedy suffered a compression fracture of the lumbar vertebra and an abdominal ileus<sup>1</sup> for which he spent four days in a hospital. He had four follow-up visits to an orthopedic surgeon and had residual back pain for approximately seven months. Aside from running and heavy lifting, he was able to resume all other activities once he was released from the hospital. His fractured vertebra had completely healed after 11 months. The court found that he had not sustained a "serious impairment of body function."

... Kennedy did not present sufficient evidence of a serious impairment of body function to survive the trial judge's initial determination of whether a jury question existed. Since reasonable minds could not differ that Kennedy did not sustain a serious impairment of body function, we find that it was proper for the trial court to rule as a matter of law that Kennedy did not sustain a "serious injury."

*Id.* at 11. (emphasis supplied).

<sup>1</sup>An ileus is an obstruction of the bowel. Stedman's Medical Dictionary, Third Unabridged Lawyers' Edition, 1972, p. 618.

The accident in the instant case occurred on March 25, 1992. The plaintiff exited his brother's car and was standing outside the passenger side door when the defendant backed up his vehicle and struck the plaintiff, injuring him. He was thrown some distance from the car and knocked out. He was treated in the hospital room for contusions to the right side of his body, including his right elbow and right thigh. He was also suffering from a cerebral concussion. For approximately two months after the accident, he went to a rehabilitation center for physical therapy aimed at strengthening and relaxing the muscles of his neck, right shoulder and right leg. He continued exercising at home for several more months. On August 18, 1992, he was examined by neurologist Dr. Mohammad Aslam who reported to the plaintiff's family doctor that the plaintiff continued to experience frequent headaches and cervical strain which he treated with over-the-counter pain medications. The headaches were often accompanied by dizziness. The quadriceps muscle of the right thigh was injured, with numbness in the area of an indentation in the skin. Dr. Aslam projected that the post-concussion symptoms would gradually pass in a matter of a few weeks to a few months.

On September 2, 1992, the plaintiff consulted Dr. Michael D. Hall, a plastic and reconstructive surgeon, about the deformity of his upper right thigh measuring 3.0 by 7.0 cm. in dimension and 1.0 in depth. The area was bruised but not scarred. The plaintiff was concerned about the disfigurement and numbness in the indented area but Dr. Hall advised him that any surgical procedure undertaken to correct the indentation would result in a scar being left on that spot. Dr. Hall believed the indentation to be a permanent visual deformity but not one which would impair the leg's function.

The plaintiff consulted Dr. Aslam again on September 21, 1993 complaining of continued aches, pains and stiffness in his neck and right shoulder. He also complained of headaches and having to take Extra Strength Tylenol or Motrin on a regular basis. His right quadriceps muscle was atrophied but seemed

"very much improved". Plaintiff still needed to exercise regularly to relieve these complaints and Dr. Aslam projected that it could be 2-3 years until the plaintiff recovers completely.

Regarding the leg muscle, the doctor commented that "There is still localized atrophy of the right quadriceps muscle which I think is going to persist although, ultimately, there is a good likelihood he will retain almost a normal function of the quadriceps muscle."

The plaintiff's right leg still features an indentation where he was struck by the defendant's car. He continues to experience numbness in that area and slight pain after running for a while. He plays softball in the summer and basketball in the winter but cannot finish the entire games and his softball throwing range has decreased because of discomfort and movement limitation in his neck and right shoulder. He is right-handed and must exercise regularly to relieve these symptoms. He also continues to have headaches regularly.

A motion for summary judgment may be granted only where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035(b). The Court must examine the entire record in the light most favorable to the non-moving party and grant the motion only in those cases which are clear and free from doubt. *Elder v. Nationwide Insurance Co.*, 410 Pa. Super. 290, 599 A.2d 996 (1991); *Penn Center House, Inc. v. Hoffman*, 520 Pa. 171, 533 A.2d 900 (1989).

The seriousness of the plaintiff's injuries is a matter about which reasonable minds could differ. The most recent medical report by Dr. Aslam indicated that the leg atrophy problem is persistent and that the plaintiff will most likely regain "almost normal" function of the quadriceps muscle within 2 or 3 years. At the December 14, 1994 deposition, the plaintiff was still complaining of pain, numbness and weakness in the leg. (N.T.

plaintiff's deposition, December 14, 1994, p. 30). The visible indentation is a permanent feature of that leg. Dr. Aslam also reported plaintiff's frequent and significant pains in the neck and up into the back of the head. Dr. Aslam was concerned about cervical radiculopathy<sup>2</sup> and performed nerve testing with "equivocal findings." The plaintiff also continued to have a limited range of motion in the cervical spine. The plaintiff stated that he still has neckaches and headaches in the areas affected by the accident. (N.T. p. 28). He still experiences some limitation in his shoulder as well. (N.T. pp. 30-31).

We have considered the following factors set forth in *DiFranco v. Packard*, 427 Mich. 32, 398 N.W.2d 896 (1986) and adopted in *Kennedy v. Beckley* in determining whether the plaintiff's injuries constitute a "serious impairment of a body function or permanent serious disfigurement": (1) the extent of the impairment; (2) the particular body function impaired; (3) the length of time the impairment lasted or lasts; (4) the treatment required; and (5) other relevant circumstances regarding the injury. *Id.* at 8.

Regarding the leg problem which persists until the present time, the plaintiff continues to have pain, numbness and muscle atrophy in a part of the body necessary for walking and running. It is unclear from the medical reports whether these problems will resolve themselves with time or will require additional attention. There is no question that the leg has a permanent indentation which is a visible deformity; reasonable minds could differ as to whether this is a "serious disfigurement."

The neck and headache problems also persist and occur frequently and require the plaintiff to take pain medications on a regular basis. Dr. Aslam's testing for cervical radiculopathy

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<sup>2</sup>Radiculopathy is a disease of the spinal nerve roots. Stedman's Medical Dictionary, Third Unabridged Lawyers' Edition, 1972, p. 1058

yielded ambiguous findings and he recommended that the plaintiff continue with physical therapy at home for the neck and shoulder pain and stiffness. These continuing problems distinguish this case factually from *Kennedy*, in which the plaintiff enjoyed a complete recovery from his injuries in 11 months. It is possible that reasonable minds could disagree as to whether the instant plaintiff's injuries are "serious" under the MVFRL. Since a jury question exists, a grant of summary judgment on this issue is improper.

For the reasons stated herein an appropriate Order of Court will be entered as part of this Opinion.

### ORDER OF COURT

**NOW** this 4th day of August, 1995, the defendant's motion for partial summary judgment is **DENIED**.

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