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ETHEL L. WINGATE, Plaintiff vs. DAMON MATTHEW
MILLER and FEDERAL EXPRESS CORPORATION,
Defendants Franklin County branch, Civil Action - Law A.D.
1995 - 477

Wingate v. Miller & Federal Express

*Motor Vehicle Financial Responsibility Law Limited Tort
Option- "Serious Injury" - Summary Judgment*

1. In order to introduce evidence of non-economic damages under the MVFRL where the plaintiff has selected the "limited tort option", the plaintiff must present a factual question establishing a "serious injury."
2. Serious injury may include "serious impairment of body function. "
3. If a plaintiff has presented enough of a factual question as to whether there has been a serious impairment of body function, such that reasonable minds may differ, the question becomes one for the jury.
4. In making the determination concerning the factual question of serious impairment, the court should look to the following factors: 1) extent of impairment, 2) the particular body function impaired, 3) the length of time the impairment lasted, 4) the treatment required to correct the impairment, and 5) any additional factor which is relevant. *Dodson v. Elvey* __ Pa. Super. __, 665 A.2d 1223 (en banc 1995).
5. The plaintiff established record evidence of a fracture in the knee area, requiring immobilization through removable braces, which did not permit her to work from September 5, 1994 to December 1994 (by doctor's order), which is enough to create a jury question on the seriousness of the injury.

Gregory R. Reed, Esquire, Counsel for Ethel L. Wingate,
Plaintiff

Karl R. Hildabrand, Esquire, Counsel for Damon Matthew
Miller and Federal Express Corporation, Defendants

OPINION AND ORDER

WALKER, P.J., April 18, 1996

Factual Background

Plaintiff, Mrs. Wingate, was stopped along Route 75 in Franklin County when defendant Miller, driving in the course of his employment for defendant Federal Express, drove his vehicle into the rear of Mrs. Wingate's car, forcing it into the next lane of travel. Mrs. Wingate was taken to the emergency room by ambulance. Mrs. Wingate suffered bruises and injuries consistent with such an accident, including neck and back pain, and also

including a fracture in the area of the knee, in particular the left tibial plateau. As a result, she had to wear an immobilizer for six to eight weeks, and a smaller brace for an additional period. Because her work with mentally handicapped patients allegedly involves occasionally demanding physical movement, Mrs. Wingate's doctor ordered her not to work, and she did not work from the date of the accident, September 5, 1994 until December 1994. She alleges continued pain and restriction of movement from this injury.

Discussion

The defendants have moved for a motion in limine to exclude evidence of non-economic damages because they allege plaintiff has not presented evidence of a serious injury. The issue before the court is whether the plaintiff has presented enough in the record to support the allegation of serious injury so that the issue may be properly presented to the jury under the limited tort option of the insurance policy in force. This court finds the plaintiff has met the threshold burden.

Under the limited tort option, a plaintiff is precluded from proving non-economic damages unless he or she has sustained a "serious injury." 75 Pa.C.S. § 1705(d). The statute defines a serious injury as "[a] personal injury resulting in death, serious impairment of body function or permanent serious disfigurement." 75 Pa.C.S. § 1702. The most recent interpretation by the Superior Court to be brought to this court's attention is the case of *Dodson v. Elvey*, ___ Pa.Super. ___, 665 A.2d 1223 (en banc 1995). In *Dodson*, the Superior Court laid out the inquiry as to whether an injury qualified as a serious injury as involving two different analyses, one by the trial court and one by the jury.

The trial court's role is to determine whether the plaintiff has presented an issue of material fact on the issue, such that reasonable minds may differ as to whether a serious injury in fact occurred. This determination is based on the facts of record, and must include objective manifestations of the injury, not merely subjective complaints of pain. These objective manifestations must be shown by objective medical evidence. If the plaintiff has not presented enough, then the court will preclude the proof of non-economic damages. Conversely, if the plaintiff has

conclusively established the presence of a serious injury, then the plaintiff is allowed to prove non-economic damages, and the issue of serious injury is also kept from the jury. It is only where there is an issue of fact that the court will give the jury the question of serious injury. *Id.* at ___, 665 A.2d at 1232.

In order to determine the question of whether an injury is serious or not, where the allegation is that the injury was a serious impairment of a body function, the Superior Court provided the following four factors: 1) the extent of the impairment, 2) the particular bodily function impaired, 3) the length of time the impairment lasted, and 4) the treatment required to correct the impairment. In addition, any additional factor which is relevant to the inquiry may be used. *Dodson* at ___ 665 A.2d at 1233-1234, quoting *DiFranco v. Pickard*, 427 Mich. 32, 39, 398 N.W.2d 896, 901 (1986).

Applying these factors to the present case, the plaintiff suffered a fracture of the left tibial plateau (knee), and Dr. Turchi required her to use an immobilizing brace on the knee. During this period, which lasted from the date of the accident, September 5, 1994 to December 1994, the plaintiff was apparently unable to walk normally, and she suffered from swelling of the knee joint. As of the date of her deposition, she testified that she cannot walk for any distance without pain developing. Most telling to the court was the fact that Dr. Turchi ordered her "off work until further notice" on September 21, 1994 (*Wingate Deposition*, Exh. 4). She missed three months of work.

Mrs. Wingate works helping mentally handicapped persons with assisted living. Some of her duties may involve lifting the client, or some other physical manipulation. Therefore, spending time on crutches, unable to walk would preclude employment. This factor, in combination with the others listed above, establishes enough of a fact question to let the evidence before the jury.

Defendants argue that the determination of whether Mr. Wingate's condition constitutes a serious impairment of body function rests on her physical condition now. The court agrees that currently she has relatively minor impairment, due according to several diagnoses to arthritis. However, neither the Legislature

nor higher courts interpreting the statute have so limited the term by adding permanency of the impairment as a precondition to providing non-economic damages. This court accordingly declines to do so as well. The impairment of Mrs. Wingate's knee, and her ability to walk and perform her job, for a period of approximately three months, raises an inference of a serious impairment of a body function to send this issue to a jury.

Accordingly, the court must deny the motion in limine.

ORDER OF COURT

April 18, 1996, for the reasons stated in the above opinion, the defendants' motion in limine regarding non-economic damages is denied.

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