

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA S. RADZIOWON : CIVIL ACTION
 :
 v. :
 :
 DAMON J. ZARZYCKI : NO. 98-2007

M E M O R A N D U M

WALDMAN, J.

May 11, 1999

This is a negligence action arising from a motor vehicle accident. Jurisdiction is predicated on diversity of citizenship. Plaintiff seeks compensation for pain and suffering associated with injuries sustained in the accident. Presently before the court is defendant's motion for summary judgment.

In considering a motion for summary judgment, the court determines whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. See id. at 256. The movant has the initial burden of demonstrating the absence of

genuine issues of material fact. The non-movant must then establish the existence of each element on which she bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). The non-moving party must present evidence from which a reasonable jury could return a verdict in her favor. See Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

From the evidence of record, as uncontroverted or in the light most favorable to plaintiff, the pertinent facts are as follow.

On June 10, 1997, at approximately 5:20 p.m., on Taylorsville Road in Upper Makefield, Bucks County, defendant's pickup truck rear-ended plaintiff's van as she stopped to allow the car in front of her to make a left turn. Following the accident, plaintiff suffered lower-back pain, neck pain and headaches.

The day after the accident, plaintiff consulted her family doctor, Dr. Jeff Blumenthal. He prescribed anti-inflammatory medication. He did not order x-rays or prescribe physical therapy or other treatment. The medication Dr. Blumenthal prescribed was not effective. In August 1997,

plaintiff consulted another doctor, Dr. Alan Fallick. He prescribed a different anti-inflammatory medication and suggested physical therapy. He did not order x-rays.

Plaintiff's symptoms persisted. On September 9, 1997, she consulted a chiropractor, Dr. David Ramella, who treated plaintiff until September 29, 1997. The chiropractic treatments alleviated her neck pain somewhat, but she continued to have lower back pain and headaches.

On November 24, 1997, plaintiff consulted Dr. Evelyn Witkin, an orthopedist. Dr. Witkin prescribed another pain medication, took x-rays, and recommended an electromyogram and magnetic resonance imaging. The electromyogram was performed by Dr. Gurcharan Singh on November 26, 1997. Dr. Singh concluded that the results of plaintiff's electromyogram were consistent with chronic right L5-S1 radiculopathy. The results of the magnetic resonance imaging, performed at the Lower Bucks Hospital on December 5, 1997, were negative. Plaintiff did not thereafter seek medical treatment for any injuries related to the June 1997 accident.

Plaintiff's chiropractor concluded that her injuries may be permanent and degenerative. Plaintiff has continued to experience occasional pain which limits her ability to do household activities, including carrying a filled laundry basket upstairs. She sometimes experiences pain when she attempts to

walk, sit or stand for extended periods. Plaintiff testified that her injury has interfered with sexual relations with her husband. Plaintiff continues to take Advil and anti-inflammatory medication when her back hurts. Since the accident, plaintiff has not been able to ride a bicycle. Prior to the accident, plaintiff went for bicycle rides of about a mile with her daughter during most weekends.

After her accident, plaintiff continued to work as a route driver for Del/Val Advantage Couriers. In late September 1997, plaintiff left Del/Val to work for Airborne Express. Plaintiff switched jobs because she believed she would have greater job security with Airborne Express. She was also aware that during an initial period of "casual" employment, she would only have to work one or two days per week which would be easier on her back. During her 110-120 day period of "casual" employment, however, plaintiff actually worked a full five-day week during more than five weeks. After completing her "casual" employment period, plaintiff became a full-time driver for Airborne Express. On September 22, 1998, plaintiff switched from full-time to "on-call" status for reasons unrelated to her June 1997 automobile accident.

Plaintiff's job as a delivery driver requires her to drive six to seven hours per day and walk for about an hour in the course of making 30 to 40 deliveries a day. She has to lift

packages of up to 50 pounds between one and five times a day, although in the period immediately following her accident, Del/Val allowed her to avoid heavy lifting because of her injury.

In September 1998, plaintiff reinjured her back lifting a container at work. She saw Dr. Bonner who prescribed hydrocodone, a narcotic pain medication. Prior to the September 1998 injury, plaintiff experienced occasional back pain, depending on how much physical activity she engaged in.

At the time of plaintiff's automobile collision with defendant, plaintiff was covered by an automobile insurance policy with "limited tort" coverage.

Under the Pennsylvania Motor Vehicle Financial Responsibility Law (MFVRL), 75 Pa. C.S.A. § 1701, et seq., insureds who choose "limited tort" coverage pay lower insurance premiums but cannot recover damages for noneconomic loss unless they suffer a "serious injury." The MFVRL defines a "serious injury" as "a personal injury resulting in death, serious impairment of body function or permanent serious disfigurement." See 75 Pa. C.S.A. § 1702. Whether an injury is "serious" is a question of fact which may thus be decided on summary judgment only when reasonable minds could not differ. See Washington v. Baxter, 719 A.2d 733, 740 (Pa. 1998).

Plaintiff does not contend that she suffered a "permanent serious disfigurement." Thus, the only question is

whether she suffered a "serious impairment of body function." In determining whether an injury has caused a "serious impairment of body function," the focus is not on the injury itself but on how it affected a particular bodily function. In determining whether an impairment was serious, the factors to consider include 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. Id.

The Pennsylvania Supreme Court in Washington expressly adopted the "serious impairment of body function" inquiry and guidelines set forth by the Michigan Supreme Court in DiFranco v. Pickard, 398 N.W.2d 896, 901 (Mich. 1986), as the Pennsylvania legislature modeled the MVFRL "limited tort" language on similar language in a Michigan no-fault statute. See Washington, 719 A.2d at 739 & nn. 8-9 (discussing legislative history of Pennsylvania statute). Although the Michigan legislature subsequently amended its definition of "serious impairment of body function," prior decisions of the Michigan courts are thus instructive in defining the term for purposes of the MVFRL.

The Michigan Supreme Court in DiFranco held that:

(1) whether a plaintiff suffered a "serious impairment of body function" is a jury question even when there is no material factual dispute as to the nature and extent of the plaintiff's injuries, so long as reasonable minds could differ as to whether

or not they constituted a "serious impairment of body function," 398 N.W.2d at 900;

(2) relevant factors in determining whether an injury caused a "serious impairment of body function" are the extent to which a body function has been impaired (e.g., 75 percent reduction in back function), the significance of the body function impaired (e.g., a 10 percent permanent reduction in brain function is a more serious impairment of body function than a 10 percent permanent limitation in neck motion), the length of time an impairment lasts, the type of treatment required to rectify the impairment (e.g., an impairment requiring surgical correction may be less serious than one which can be remedied by bed rest), the plaintiff's abilities and activities before and after the accident insofar as it establishes the existence, extent and duration of an impairment of body function, 398 N.W.2d at 914-15;

(3) a plaintiff need not have suffered "catastrophic" injuries to have sustained a "serious impairment of body function," 398 N.W.2d at 901; and.

(4) the relevant inquiry is not the "plaintiff's general ability to lead a normal life," 398 N.W.2d at 901, although "a comparison of 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," 398 N.W.2d at 914-15.

The Court in DiFranco also recognized that the ability to use one's back in lifting is a "body function." 398 N.W.2d at 922-24.

Whether an accident caused a "serious impairment of body function" is a question for the jury "in all but the clearest of cases." Washington, 719 A.2d at 740.

Plaintiff has produced evidence that the June 1997 accident significantly impaired the functioning of her back. She has testified that she has trouble lifting, carrying and riding a bicycle. She has testified that sexual relations with her husband have been impaired. She presented evidence that the impairment may be permanent and degenerative. The court cannot conscientiously conclude that if they found such evidence credible, no rational jury could conclude that plaintiff suffered a "serious impairment of body function " within the meaning of the MVFRL.

V. Conclusion

For the foregoing reasons, defendant's motion will be denied. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA S. RADZIOWON : CIVIL ACTION
 :
 v. :
 :
 DAMON J. ZARZYCKI : NO. 98-2007

O R D E R

AND NOW, this day of May, 1999, upon
consideration of defendant's Motion for Summary Judgment (Doc.
#13) and plaintiff's response thereto, consistent with the
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is
DENIED.

BY THE COURT:

JAY C. WALDMAN, J.