

ROBERT C. WILSON, JR.,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 98-00,541
	:	
HELEN JANICE FISHER,	:	
	:	MOTION FOR PARTIAL
Defendant	:	SUMMARY JUDGMENT

**OPINION and ORDER**

The matter presently before the Court concerns Defendant’s Motion for Partial Summary Judgment, filed February 12, 1999 which seeks to preclude Plaintiff from recovering non-economic injuries arising out of an automobile accident.<sup>1</sup>

Plaintiff and Defendant were involved in a motor vehicle accident June 8, 1996, on Route 180 near the Reach Road exit in Williamsport, Lycoming County, Pennsylvania. At the time of the accident, Plaintiff was covered by an insurance policy in which he was a limited tort elector. As such, Plaintiff is precluded from claiming recovery for non-economic damages unless the injury claimed is a “serious injury” under 75 Pa.C.S. §1705(d) of the Motor Vehicle Financial Responsibility Law (“MVFRL”). “Serious injury” is defined as “a personal injury resulting in death, serious impairment of body function or permanent serious disfigurement.” 72 Pa.C.S. §1702.

Essentially, Defendant argues she is entitled to partial summary judgment concerning Plaintiff’s claims for non-economic damages, as Plaintiff has failed to produce sufficient medical evidence that his alleged impairment, lower back injury and resultant pain, is a

“serious injury” under the MVFRL. Plaintiff responds that he has come forward with sufficient evidence to allow the question to be determined by a jury.

Both parties acknowledge the case of *Washington v. Baxter*, 719 A.2d 733 (Pa. 1998) sets forth the standard to be applied to the instant case. In *Washington*, the Pennsylvania Supreme Court reiterated the requirement placed upon a non-moving party in a summary judgment case:

In order to withstand a motion for summary judgment, a non-moving party ‘must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.’

*Washington* at 737, citing *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1042 (Pa. 1996). In the case before it, Plaintiff was a limited tort elector who claimed injury to, and serious impairment of, his right foot. Plaintiff was treated and released the day of the accident. He missed four or five days of work at his full-time job and approximately four weekly shifts at his part time job. Plaintiff received medical treatment again approximately six months after the accident. In a deposition approximately one year after the accident, Plaintiff testified that although his foot causes him pain approximately every other week, he was still able to perform his work duties and was able to engage in his normal activities except for having to utilize a riding mower. *Washington* at 741.

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<sup>1</sup> In the alternative, Defendant requests a Motion in Limine be granted to preclude Plaintiff from presenting any evidence of non-economic damages. Both parties have submitted briefs, supplemental letters and oral argument. Argument was held March 12, 1999.

In its discussion of the appropriate standard to be applied, the Supreme Court rejected the approach of *Dodson v. Elvey*, 665 A.2d 1223 (Pa.Super. 1995), which provided the trial court was to make a threshold determination concerning the seriousness of a limited tort elector's injuries. Instead, *Washington* held the traditional standard for determining whether summary judgment was proper, as enunciated in *Ertel*, was to be used in limited tort cases. The Court concluded that a determination of whether a serious injury had been sustained was to be left to the jury "unless reasonable minds could not differ" whether serious injury had been sustained. *Washington* at 740. In its Opinion, the Court also adopted the definition of "serious impairment of body function" as set forth in *DiFranco v. Pickard*, 427 Mich. 32, 398 N.W.2d 896 (1986). *Washington* at 740. The definition states:

The "serious impairment of body function" threshold contains two inquiries:

- a) What body function, if any, was impaired because of injuries sustained in a 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. (emphasis added)

*Washington* at 740.

The *Washington* Court ruled that, even when the evidence was taken in the light most favorable to the plaintiff as the non-moving party, reasonable minds could not differ on the

conclusion the injury was not serious. The factors the Court pointed to which supported its determination included: the emergency room physician noted the injuries were mild; Plaintiff was discharged after a few hours; he missed only four or five shifts at his jobs; the treatment was not extensive; and, the injury seemed to have had little or no impact on his job performance or personal activities. *Ibid.*

The *Washington* decision was followed by the Superior Court in the case of *Furman v. Shapiro*, 721 A.2d 1125 (Pa.Super. 1998). In that case, the trial court had granted summary judgment to defendants. The injured plaintiff was covered by a limited tort insurance policy and claimed her back was injured in a vehicle accident caused by defendants. Plaintiff was diagnosed at various time after the accident to be suffering from various back conditions, including a bulging disc. Plaintiff alleged her back condition and associated pain impaired her ability to perform several tasks including: preventing her from walking more than a block at a time, lifting heavy objects or bathing her daughter. She further asserted her job, her ability to drive and her household chores were adversely effected as she was unable to remain in one position for an extended period of time. Her back problems had persisted for over three years and she had taken various steps to treat the condition, including physical therapy and home exercises. Finally, a doctor had described the condition as permanent. *Id.* at 1127. The Superior Court concluded that reasonable minds could differ as to whether plaintiff had suffered a serious injury under 75 Pa.C.S. §1702 and remanded the case for trial. *Ibid.*

Viewing the record in the instant case in the light most favorable to Plaintiff, we also must conclude Plaintiff has adduced sufficient evidence which if believed by the trier of fact could cause reasonable minds to differ as to whether Plaintiff has sustained a serious injury. As

in *Furman*, *supra*, Plaintiff has stated his back injury and pain has affected his bodily functions, seriously impairing and restricting his work and daily activities. *See, generally*, Defendant's Supporting Brief, Exhibit B (deposition transcript of Plaintiff); Plaintiff's Response to Partial Motion for Summary Judgment, Exhibit C (Affidavit by Plaintiff).<sup>2</sup> If Plaintiff's claim that his back injuries were caused by the accident and that these injuries have prevented him from gainful work for nearly three years are accepted as true by a jury, the jury could also conclude that such inability to work is a serious impairment of Plaintiff's bodily functions.

Granted, as argued by Defendant, Plaintiff has not presented a definitive, objective medical opinion identifying the cause of Plaintiff's pain. Nevertheless, Plaintiff's case is not entirely without objective medical evidence of an injury. Plaintiff has continued to seek treatment for his back injury since the accident occurred; Plaintiff continued to obtain prescriptions for pain relief at least through September 30, 1998, more than two years after the accident. Plaintiff's Response to Partial Motion for Summary Judgment, Exhibit G. Plaintiff does provide an MRI report which states, in part, there is a "small, rounded focus of increased signal within the L2 vertebral body which is ...most likely a small hemangioma. A similar finding is present within the S1 vertebral body." Plaintiff's Response to Defendant's Motion for Partial Summary Judgment, Exhibit G. Further, "[t]here is mild annular bulging at L5-S1..." *Ibid.* A bulging disc was cited by the appellate Court in *Furman* as part of the diagnosis of plaintiff's condition. However, the report in this case, by Michael Wendel, M.D., concluded there was no "evidence of disc herniation or significant disc disease." *Ibid.*

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<sup>2</sup> We make no finding whether Plaintiff's work disability is in fact a result of the physical injury. We note Exhibit F attached to Plaintiff's Response, which reveals disability for purposes of Social Security was indicated under "Medical Disposition(s)" as meeting "Listing 12.05 C (physical). However, the Exhibit further indicates the Category upon which the disposition is based is "Mental Retardation and Autism."

We acknowledge the various medical reports presented to us contain findings which appear quite adverse to Plaintiff. However, the reports nevertheless provide documentation as to at least two relevant factors this Court must consider, as set forth in *Washington, supra*. The records demonstrate not only the treatment to correct the claimed impairment (which Plaintiff maintains was “required” and Defendant naturally argues was not required) but also the length of time treatment was sought, indicative of length of time the impairment has lasted.<sup>3</sup>

Comparatively, Plaintiff’s case falls short of the medical testimony presented in *Furman*. The absence of such claims in the *Washington* case was deemed significant by that Court.

In summary judgment cases, we must resolve all doubts as to the existence of a genuine issue of material fact against the moving party and grant summary judgment only in those cases that are free and clear from doubt. *Washington* at 737. We cannot say that this is such a case. Accordingly, Defendant’s Motion must be denied.

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<sup>3</sup> We also note the *Washington* case provides that *generally* medical testimony will be needed to establish the existence, extent and permanency of the impairment. The Court did not state medical testimony will *always* be needed.

**ORDER**

*AND NOW*, this 29<sup>th</sup> day of June 1999, based upon the foregoing Opinion, Defendant's Motion for Partial Summary Judgment (or in the alternative a Motion in Limine) is ***HEREBY DENIED.***

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator  
Robert B. Elion, Esquire  
Richard B. Druby, Esquire  
Metzger, Wickersham, Knauss & Erb, P.C.  
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Judges  
Nancy M. Snyder, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)