STATE OF MICHIGAN

COURT OF APPEALS

PHYLLIS WASHINGTON,

Plaintiff-Appellant,

-vs-

LESLIE L. ALLEN,

Defendant-Appellee,

and

HASTINGS MUTUAL INSURANCE COMPANY,

Defendant,

-vs-

DEBORAH A. JOHNSON,

Third-Party Defendant.

No. 87632

BEFORE: Beasley, P.J.; J. H. Gillis and M. E. Dodge,* JJ.

PER CURIAM

Plaintiff, Phyllis Washington, filed this action in the Ingham County Circuit Court on August 4, 1982, alleging, inter alia, that she suffered a serious impairment of body function as a result of the collision between the car in which she was riding and the car driven by defendant, Leslie L. Allen. In an order dated September 12, 1985, the circuit court granted partial summary disposition to defendant on the grounds that plaintiff did not suffer a serious impairment of body function. Plaintiff appeals as of right from that order.

Immediately following the automobile accident on September 20, 1981, plaintiff was taken to Lansing General Hospital where she complained of pain in her right arm and shoulder, back and head. The examining physician gave her a neck brace and pain killers and released her that day. Five days later, plaintiff was examined by Dr. William Neil, a physician

* Circuit Judge, sitting on Court of Appeals by assignment.

associated with her family doctor, Dr. William C. Carley. Dr. Neil found "diffuse muscle tightness in the right shoulder area". Dr. Carley, who reported Dr. Neil's findings at deposition, indicated that some physicians use that term interchangeably with "muscle spasm", so that Dr. Neil may actually have been referring to muscle spasms. Dr. Carley characterized this sort of finding as objective evidence of plaintiff's problem.

On November 17, 1981, Dr. Mark Ballard examined plaintiff. According to Dr. Carley, the records of that examination reflect objective evidence supporting plaintiff's complaints of pain. Dr. Carley himself examined plaintiff in December, 1981, making no objective findings of abnormalities in plaintiff's health. He saw her again in February, 1982, finding some tenderness over her right shoulder. He referred her to Dr. William Anderson, a chiropractor, who confirmed that plaintiff's injuries at that time were subjective and hard to identify during a physical examination.

Dr. Arnold Eckhouse, a specialist in orthopedics, examined plaintiff in June, 1982. Plaintiff complained of pain in her lower back and hips, which was eased by physical therapy but exacerbated by bending, sitting or standing for long periods. Also, her fingertips occasionally became cold and numb. Dr. Eckhouse found no acute problems and no evidence of muscle atrophy, decreased reflexes, or muscle spasms. In March, 1985, he saw plaintiff again, and again found no objective reason for her continued complaints.

In April, 1983, Dr. Carley saw plaintiff again, as she still complained of pain in her right shoulder. Dr. Carley found a "trigger point", which is presumed to be the site from which a muscle spasm is triggered. This caused him to diagnose plaintiff as having a myofascial syndrome. He did not conclude that the condition was related to the accident, however, because a trigger point can develop spontaneously.

Prior to the accident, plaintiff worked at Spic and Span Cleaning Service, owned by her parents. The work involved

several hours of pushing vacuum cleaners and buffers each day. She never returned to work after the accident because of a burning pain in her right shoulder, neck, back and right arm. At the time of the accident, she was attending Lansing Community College part-time, studying data processing. She continued attending school after the accident, increasing her schedule to full time during one semester. Her grades did not worsen after the accident. At the time of her deposition on February 24, 1983, plaintiff had quit school due to financial reasons, but hoped to return sometime that year. She was working as a sales clerk at Hudson's at the time of her deposition, but was experiencing difficulty due to the pain in her back and thought she would have to quit because of the discomfort.

Plaintiff played tennis once or twice weekly in the summers prior to the accident. After the accident, she did play tennis once, but was sore afterward and now keeps away from it because her arm hurts. She testified that she could not "do a lot of things with my arms".

Tort suits for injuries from automobile accidents are governed by MCL 500.3135(1); MSA 24.13135(1), which provides:

> "A person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement."

In Cassidy v McGovern,[1] the Supreme Court held that when there is no factual dispute regarding the nature and extent of a plaintiff's injuries, or if such dispute is not material to the determination of whether plaintiff has suffered a serious impairment of body function, the court shall rule as a matter of law whether the threshold requirement has been met. Subsequent decisions of this court, which attempt to interpret the meaning of the statute, are based on the Cassidy decision. Here, the trial court decided as a matter of law that the threshold requirement had not been met. Plaintiff argues that this was error because the evidence available, viewed in the light most favorable to the plaintiff, straddles or even mandates a finding

that plaintiff did suffer a serious impairment of body function. We do not agree.

Under Cassidy, the following conditions, if met, determine the presence of a serious impairment of body function: (1) the injury must impair an important body function; (2) the injury must be objectively manifested; and (3) the injury need not be permanent, but must be serious, and permanency is an element of seriousness.[2]

As to the first condition, there is little doubt that the body functions plaintiff alleges to have been impaired would, if proved, be important body functions. Plaintiff testified to difficulty in using her back and right arm. The prior decisions of this court which address the question seem to agree that the ability to move one's back is an important body function.[3] The ability to use an arm, especially the right arm in a plaintiff who is right-handed, may similarly and with little difficulty be viewed as an important body function because of the great many vital purposes for which the arm is used.

As to the second condition, what constitutes an objective manifestation of an injury is not clear. This court has generally held that broken bones are objective manifestations, as in Esparza v Manning,[4] while holding that simple pain is not an objective manifestation, as in Vreeland v Wayman.[5]

In the within case, the only arguably objective manifestation of injury is Dr. Neil's finding of "diffuse muscle tightness", which may refer to a palpable muscle spasm. In Flemings v Jenkins,[6] a panel of this court held that medical findings of muscle spasms did not constitute objective manifestations of injuries. Flemings has been followed in the case of Morris v Levine,[7] but it has also been explicitly rejected on this point in cases where the muscle spasm is palpable, that is, can be felt by the physician.[8]

Our position on this question is based on the objective manifestation requirement itself. The best rationale for such a

requirement is the policy of compensating only those injuries which can be measured by a doctor or some other independent person, rather than those which, like simple pain and suffering, can only be felt and measured by the plaintiff. When the doctor can determine the extent of the injury using his own five senses and without plaintiff telling him that it hurts, this is an objective manifestation. Thus, we agree with Harris and Franz that a muscle spasm, when a doctor can feel it, is an objective manifestation of an injury. If Dr. Neil's finding in fact referred to a palpable muscle spasm which he himself felt, the finding constituted an objective manifestation of injury and fulfilled the second condition of the Cassidy test.

The final condition is the most difficult. Seriousness is a cloudy and value-laden concept, difficult to define in objective terms. In an effort to "pin down" this concept, some panels have held that to be serious within the meaning of the statute, an injury must impair the plaintiff's ability to lead a normal life.[9] This might be an answer if "normal life" were not as shady a term as "serious impairment" and if the Cassidy court had not used the term "normal life" already. In Cassidy, the Supreme Court discussed the plaintiff's ability to lead a normal life, but specifically in the context of deciding whether the body function impaired was an important one, not whether the impairment was serious:

> "Walking is an important body function that for Leo Cassidy was impaired by his broken bones. This conclusion is not affected one way or another by the fact that Leo Cassidy is a potato farmer who must be on his feet for long hours. We believe that the Legislature intended an objective standard that looks to the effect of an injury on the person's general ability to live a normal life. Walking is an important body function, the serious impairment of which constitutes the 'serious impairment of body function'." Cassidy, supra, at p 505.

Following this logic, this court has on occasion used the "normal life" standard to determine whether a body function is important, rather than whether an impairment was serious, as in Salim v Shepler.[10] If we follow the Supreme Court reasoning and assess the impact on a plaintiff's ability to lead a normal life when determining the importance of a body function, it would

be redundant to repeat the same test in assessing a different condition defined in Cassidy. The effect would be to turn a three-part test into a two-part test, which we are not inclined to do. The condition of an important body function has already been met in this case, and so we need not consider the impact on plaintiff's ability to live a normal life any further.

We prefer the test of seriousness suggested by the Supreme Court itself in Cassidy, inexact as it may be. The court said that the threshold should be considered in conjunction with the other threshold requirements for a tort action for non-economic loss, namely, death and permanent serious disfigurement.[11] While this test may not do much to give an objective meaning to the concept of seriousness, we do not believe that seriousness can or should be given objective meaning except inasmuch as it relates to the other thresholds in the statute.

Plaintiff herein cannot play tennis as well as she used to and she may have to change jobs. On the other hand, it does not appear that she is unfit for most jobs, and the job she may eventually get, computer operator, might be considered by many to be a better paying and more fulfilling job than the one she had prior to the accident. Her performance in school was unaffected by the accident and, while she complains of pain in her back, neck, shoulder and arm, there seems to be little of a non-strenuous nature that she cannot do. When we think of a serious impairment of an important body function such as the use of an arm, we imagine the inability to write, or to pick up a child, or cook to feed oneself. When we think of a serious impairment of an important body function such as the use of the back, we imagine the inability to carry packages, or to bend to pick up something which has fallen. We imagine, in other words, impairments of the basic uses of these body functions which make them important to us. The more difficult, sophisticated or specialized the lost use of the body function becomes, and the fewer people who would or could have engaged in such a use even

without an injury, the less likely it is that we will find the loss of the use to be a serious impairment. The impairment in this case is not serious.

AFFIRMED.

/s/ William R. Beasley
/s/ John H. Gillis
/s/ Michael E. Dodge

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1 415 Mich 483, 502; 330 NW2d 22 (1982).

2 Id. at pp 504-506.

3 See Harris v Lemicex, 152 Mich App 149, 153; NW2d (1986); Kucera v Norton, 140 Mich App 156, 159; 363 NW2d 298 (1984), lv grtd 422 Mich 935 (1985).

4 148 Mich App 371; 384 NW2d 168 (1986).

5 141 Mich App 574; 367 NW2d 362 (1985).

6 138 Mich App 788, 790; 360 NW2d 298 (1984).

7 146 Mich App 150, 154; 379 NW2d 402 (1985).

8 See Harris v Lemicex, supra, at pp 153-154, fn 2; Franz v Woods, 145 Mich App 169, 176; 377 NW2d 373 (1985).

9 See Kosack v Moore, 144 Mich App 485, 489; 375 NW2d 742 (1985); McDonald v Oberlin, 127 Mich App 73, 76; 338 NW2d 725 (1983).

10 142 Mich App 145, 148-149; 369 NW2d 282 (1985).

11 Cassidy, supra, at p 503.