

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

KENNETH WILLIAM FRAKI  
and JUANITA FRAKI,  
Plaintiffs-Appellants

NOV 12 1986

-v-

ERIC MICHAEL SEITTER,  
Defendant-Appellee

and

NO. 91461

ERIC MICHAEL SEITTER,  
Counter-Plaintiff

-v-

KENNETH WILLIAM FRAKI,  
Counter-Defendant

BEFORE: Allen, PJ; Cynar and Robert C. Livo,\* JJ.

PER CURIAM.

Plaintiffs Kenneth William Fraki and Juanita Fraki appeal by right from the March 20, 1986 order in which the trial court determined that neither plaintiff had incurred a serious impairment of body function. Based on this ruling, the trial court granted defendant Eric Michael Seitter's motion for summary disposition brought pursuant to MCR 2.116(C)(10), and dismissed the plaintiffs' complaint. Plaintiffs raise two issues: (1) Did the trial court err reversibly in refusing to await the transcript of a video deposition before granting summary disposition; (2) Did the trial court err in finding that neither plaintiff suffered a serious impairment of body function? We will address these issues sequentially.

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\* Circuit Judge sitting on the Court of Appeals by assignment.

manifested, (2) serious, and (3) it must impair an important body function. Cassidy, 504-505.

By objective manifestation, it is meant that an injury must be capable of medical measurement. Williams v Payne, 131 Mich App 403, 409-410; 346 NW2d 504 (1984). With regard to seriousness, the injury must significantly impair the plaintiff's general ability to lead a normal life. This is measured by an objective standard. Cassidy, 505; Bennett v Oakley, Mich App (Docket No 85705 rel'd 7-1-86). Permanency of the injury is relevant but not necessary to a finding of seriousness. Cassidy, 505-506; Guerrero v Schoolmeester, 135 Mich App 742, 747; 356 NW2d 251 (1984), lv den 422 Mich 880 (1985); Wood v Dart, Mich App (Docket No 85057, rel'd 9-9-86). Finally, the impairment of the plaintiff's ability to lead a normal life must be significant. This is measured by comparison to the other two thresholds found in the no-fault act, death and permanent serious disfigurement, and in light of the legislative reasons for limiting the recovery of noneconomic losses, namely, the prevention of overcompensation for minor injuries and the reduction of litigation in automobile accident cases. Cassidy, 503; Wood, supra, Routley v Dault, 140 Mich App 190, 193; 363 NW2d 460 (1984), lv grtd 422 Mich 935 (1985).

We review a trial court's decision regarding serious impairment by viewing the evidence in a light most favorable to the injured plaintiff, and determining (1) whether there is a factual dispute as to the nature and extent of the plaintiff's injuries and if not, (2) whether reasonable minds could differ on the question of whether a serious impairment of body function exists.<sup>2</sup> Akin v Slocum Mich App (Docket No 82995, rel'd 6-10-86); Bennett, supra; Garris v

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<sup>2</sup> Given this standard of review, we note that plaintiffs cannot claim any prejudice in regard to issue I, as Dr. Wiater's deposition was introduced into the record below and will be considered on appeal.

Vanderlaan, 146 Mich App 619, 624; 381 NW2d 412 (1985);  
Guerrero, supra, 747.<sup>3</sup>

Kenneth Fraki asserts that three of his injuries constitute a serious impairment of body function. There is no claim of a factual dispute regarding the nature and extent of these injuries. Accordingly, we need only determine as a matter of law whether a serious impairment of body function exists.

Plaintiff suffered a trauma induced condition of the knees which was diagnosed as chondromalacia, a roughening of the cartilage that covers the underside of the kneecap. This condition was objectively manifested as it could be discerned from x-rays which depicted degenerative changes in the knees, see Williams v Payne, 409, and from the existence of crepitus, a grinding in the kneecap which was revealed in the last 30 degrees of extension of each knee. Moreover, we believe that there was impairment of an important body function as proper knee movement is essential to walking, running and a variety of other movements related to locomotion. See, Esperanza v Manning, 148 Mich App 371, 375; 384 NW2d 168 (1986). However, viewing the evidence in the light most favorable to Fraki, we cannot conclude that his impairment was serious.

Plaintiff first complained of the knee problem approximately one year after the accident. Thereafter, he underwent 16 physical therapy treatments during a five or six week period. Following these treatments, plaintiff's only complaint was some minimal stiffness in the knee upon arising in the morning. His knees did not prevent him from driving or working. In fact, he worked an average of 48 hours per week. Moreover, he testified that the only activities he felt limited in performing were mowing the lawn, which he

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<sup>3</sup> But see, Kelleher v Kuchta, 138 Mich App 45, 47; 359 NW2d 224 (1984), and Walker v Caldwell, 148 Mich App 827, 831; 385 NW2d 703 (1986) (holding that serious impairment cases should be decided under a clearly erroneous standard of review.

did in any event, and kneeling and climbing stairs. We do not view this as a significant impairment. See Wood, supra. Moreover, although Dr. Wiater predicted that plaintiff would more likely than not develop degenerative arthritis which would interfere with his ability to perform his customary occupation, the seriousness of an injury must be measured by its effect on common day-to-day activities, and not on extrinsic considerations such as the nature of one's employment. Ulery v Coy, Mich App (Docket No 88870, rel'd 7-22-86).

Kenneth Fraki also suffered from a damaged joint compartment in his left wrist, accompanied by tendon damage and a narrowing of the joint space. This injury was objectively manifested by a swelling of the left wrist and x-rays. See Pullen v Warrick, 144 Mich App 356, 365; 375 NW2d 448 (1985). Assuming, arguendo, that this involved an important body function, we do not believe that this arose to the level of seriousness necessary to overcome defendant's immunity from suit. Plaintiff engages in all activities which are incidental to a normal life. He works, drives, and engages in social activities. He occasionally experiences difficulty in lifting heavy objects, in shoveling snow and in dressing. However, plaintiff's difficulties are not so significant that they could be analogized to the other thresholds for recovery, death and serious permanent disfigurement. Therefore, we see no error in the trial court's ruling with regard to this injury.

Finally, Kenneth Fraki sustained soft tissue injuries to both shoulders. The proper functioning of a shoulder is an important body function. Ulery, supra. Moreover, soft tissue injuries can give rise to a serious impairment. Vreeland v Wayman, 141 Mich App 574, 576; 367 NW2d 362 (1985). Nonetheless, the impairment must be objectively manifested. Plaintiff's injuries were not so manifested. His neurological studies and x-rays were normal, and an arthrogram revealed no shoulder ligament tears. There was no evidence

of fractures or dislocations. Two doctors found that he had full range of motion in his shoulders but Dr. Wiater testified that plaintiff was "perhaps mildly limited in his full rotation." Further, there was some tenderness in plaintiff's shoulders. However, tenderness is not sufficient to give rise to an objective manifestation. Franz v Woods, 145 Mich App 169, 175; 377 NW2d 373 (1985). Moreover, limited rotation is deemed objective manifestation only if it is verified by a passive range of motion test. Shaw v Martin, Mich App (Docket No 86197, rel'd 10-6-86). In the present case, there was no evidence as to whether the range of motion test was passive or active. Thus, based on the evidence before us we cannot conclude that plaintiff's injury was objectively manifested.

Plaintiff Juanita Fraki maintains that an injury to her left arm, specifically, a fracture of the left humerus near the left shoulder, constituted a serious impairment of body function.<sup>4</sup> This injury was objectively manifested by x-rays, which revealed a comminuted fracture about one inch from the shoulder joint that extended downward for approximately three inches. Moreover, this injury involved an important body function, the proper use of the arm and shoulder. Ulery, supra; Burk v Warren (After Remand), 137 Mich App 715, 725; 359 NW2d 541 (1984), lv grtd 422 Mich 935 (1985). The significant question is therefore whether this important body function was seriously impaired.

Plaintiff's arm was placed in a hanging cast following the October 28, 1984 accident. This cast was replaced by one supported by a strap around her neck on November 8, 1984. She wore the second cast until December 18, 1984, when it was replaced by a sling. The sling was worn until February

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<sup>4</sup> Although plaintiff Juanita Fraki also apparently fractured six ribs and has a scar with associated numbness on her right temple, she does not argue on appeal that these injuries constituted a serious permanent disfigurement or a serious impairment of body function.

7, 1985.

For the first month after the accident, plaintiff was required to sleep in a sitting position, did little or no housework, and remained home from work. When she returned to work as a bookkeeper, she could not lift the heavy ledgers and was forced to type one-handed. Moreover, plaintiff could not drive herself to work, and she needed help in dressing, bathing, and attending to her personal hygiene.

In February 1985, plaintiff began tri-weekly sessions with a physical therapist which continued through October, 1985. Her physical therapist testified that at the beginning of these sessions plaintiff had little, if any, function in her left shoulder. He stated:

" \* \* \* the general limitations were so severe that she could barely move her arm up in front of her or out to the side, and certainly could not get her arm behind her back or raise her hand up to get to [the] back of her head or comb her hair. That's probably the easiest way to explain the limitations she had. They were rather severe."

Plaintiff's physical therapist went on to explain that her range of motion in the left arm was so severely limited that "it was surprising that the woman was even able to wash under her arms." However, at the conclusion of physical therapy in October 1985, plaintiff had regained approximately 80 to 90 percent of the function in her arm.

Plaintiff's arm injury clearly had an impact on her ability to perform common day to day activities for what appears to be at least a four to twelve month period. We note that the temporary nature of this injury is a consideration to be weighed in determining its seriousness. We acknowledge that this injury presents a close question. However, since the standard for summary disposition is whether reasonable minds could differ on the question of whether a serious impairment of body function exists, we believe that this close question must be resolved in plaintiff's favor. Accordingly, we hold that defendant was not entitled to summary judgment

on this issue. Compare, Harris v Lemicex, 152 Mich App  
149; NW2d (1986); Freel v Dehaan, Mich App  
(Docket No 87947, rel'd ).

Affirmed as to Kenneth Fraki; reversed as to Juanita  
Fraki and remanded for trial.

/s/ Glenn S. Allen, Jr.  
/s/ Walter P. Cynar  
/s/ Robert C. Livo