

STATE OF MICHIGAN  
COURT OF APPEALS

RENATE SUSAN MILLER and  
MARK MILLER,

NOV 26 1986

Plaintiff-Appellees,

v

No. 86913

SHERYL ANN STROHS,

Defendant-Appellant.

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BEFORE: R.S. Gribbs, P. J., H. Hood and R. Ferguson\*, JJ.

PER CURIAM

Defendant appeals by leave granted from the circuit court's order vacating an earlier judgment for defendant which had found that, as a matter of law, plaintiff did not sustain a serious impairment of body function under the Michigan no-fault act, MCL 500.3135; MSA 24.13135. The only new evidence presented by plaintiff in support of her motion for reconsideration was her affidavit alleging that her condition had worsened since the taking of her deposition. We find that the trial court erred in concluding that there was a question of fact as to whether plaintiff's injuries met the threshold for recovery.

Plaintiff was deposed on February 27, 1984, approximately two and a half years after the accident. At her deposition, she testified that EMS personnel examined her at the scene of the accident, put a neckbrace on her and took her to the hospital. She stayed at the hospital for approximately two to three hours during which time she was x-rayed, examined and given a neckbrace. When she left the hospital, her neck and shoulder area were hurting, but she was not having any problems with either of her arms. She did have headaches after she left the

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

either of her arms. She did have headaches after she left the hospital. Plaintiff returned her job as a waitress approximately two to three weeks after the accident and was still employed at the same restaurant as of the time of her deposition.

Since the accident, plaintiff almost always has neck pain, pain in her back of her head, pain in front of her ears, pain in both shoulders and headaches which occur once every two weeks or so. Plaintiff had help with her housework for approximately two to three weeks following the accident. Since that time, she has done all of the housework herself with occasional help from her husband. She still drives, she swam every other day during the summer of 1983, she went skiing approximately two months before the date of her deposition, and rode her bicycle frequently during the previous summer.

At her deposition, plaintiff admitted that other than the time immediately after her accident she had not missed any other time from work. She expressed difficulty in lifting items around the house and stated that mainly her problems were with pain. Plaintiff began treating with a chiropractor approximately one week after the accident. About eleven months later the chiropractor reported:

"Pertaining to my patient, Renate Miller, please be advised that her condition was considered fully rehabilitated and stabilized after May 06, 1983."

Subsequently, on January 7, 1985, the chiropractor described the soft tissue injuries to plaintiff's cervical spine and opined that in his opinion her condition "is permanent and chronic and essentially incapable of total rehabilitation." Dr. Cohen, a rehabilitationist who saw plaintiff in the summer of 1983, detected "slight limitation of motion in all planes" of the cervical spine. A neurologist who examined plaintiff in April, 1985, diagnosed "damage to the fifth cervical nerve root on the right side witnessed by the diminution of pinprick over the right shoulder in the distribution of the fifth cervical nerve and the

decreased biceps reflex on the right side." The neurologist testified that plaintiff's injury would not interfere with swimming or biking, but will interfere with her performance of housework. He also thought that plaintiff should not continue to work as a waitress. Plaintiff will have to alter her activities but will not be prevented from doing them even though she will continue to experience pain.

Plaintiff's affidavit in support of her motion for reconsideration was dated approximately one month after the trial court's original grant of summary disposition and alleged that she has been severely restricted in any and all activities. The affidavit continued:

"She can no longer participate in any of the activities she tried following this accident, i.e., swimming, skiing, or boating. Further, she has not been able to return to her employment as a waitress; further she has become incapacitated and restricted by her pain and discomfort caused by the nerve root involvement; further, she cannot use her arm to do any heavy lifting or pushing without risk of continuous damage to the fifth cervical nerve root."

The seminal cases setting forth the standard by which serious impairment of body function under MCL 500.3135; MSA 24.13135 is measured are Cassidy v McGovern and Herman v Haney, 415 Mich 483 (1982); 330 NW2d 22, reh den 417 Mich 1104 (1983). In Cassidy, the Supreme Court stated that:

"[W]e conclude that the meaning of 'serious impairment of body function' is a matter to be determined by statutory construction. We hold that when there is no factual dispute regarding the nature and extent of a plaintiff's injuries, the question of serious impairment of body function shall be decided as a matter of law by the court. Likewise, if there is a factual dispute as to the nature and extent of a plaintiff's injuries, but the dispute is not material to the determination whether plaintiff has suffered a serious impairment of body function, the court shall rule as a matter of law whether the threshold requirement of MCL 500.3135; MSA 24.13135 has been met." 415 Mich 502.

The Supreme Court, in Cassidy, went on to state that the meaning of "serious impairment of body function" will have to be developed on a case-by-case basis. Id. at 503. In Williams v Payne, 131 Mich App 403, 409; 346 NW2d 564 (1984), this Court suggested the use of the following standards:

"First, 'impairment of body function' actually means 'impairment of important body functions'. Cassidy v McGovern, 415 Mich 504. Second, by its own terms, the statute requires that any impairment be 'serious'. MCL 500.3135(1); MSA 24.13135(1); McKendrick v Petrucci, 71 Mich App 200, 210; 247 NW2d 349 (1976). Third, the section applies only to 'objectively manifested injuries'. Cassidy v McGovern, 415 Mich 505."

In the case at bar, there is no material factual dispute regarding the nature or extent of plaintiff's injuries. Defendant does not dispute the medical evidence or testimony, nor does she dispute plaintiff's future prognosis. Rather, the dispute centers on whether plaintiff's injuries, as diagnosed by the neurologist meet the threshold requirement of the no-fault act. Therefore, whether plaintiff suffered a serious impairment of a body function was properly presented for disposition on defendant's motion for summary judgment.

In the instant case, the body function impaired is the use of the right arm to push or lift. We agree for purposes of this appeal that the use of plaintiff's arm in this manner is an important body function. We also assume for purposes of this motion that the neurologist's testimony was sufficient to establish an objectively manifested impairment. However, we must conclude that the trial court was correct in granting summary disposition in the first instance because plaintiff's proofs fail to establish that her impairment is "serious" within the meaning of the statute.

To determine whether an injury meets the threshold requirement of impairment of a important body function, the plaintiff's ability to lead a normal life-style must be considered. Simple difficulty or inconvenience in daily life does not meet the threshold. Morris v Levine, 146 Mich App 150; 379 NW2d 402 (1985). There must be a general inability to live what objectively can be determined to be a normal life-style. Morris, supra.

Whether an injury is serious must be considered in light of the other two alternative thresholds established in the

no-fault act, i.e., death and permanent serious disfigurement. Cassidy, supra 503. Recently, in Walker v Caldwell, 148 Mich App 827, 832; 385 NW2d 703 (1986), this Court agreed plaintiff had not met the "serious impairment of body function" threshold despite suffering a minimal compression fracture of the L-3 vertebra. We held that where the only permanent effects resulting from plaintiff's injury are that she cannot bend and lift as she once did and she may have to take pain medication from time to time, there is no evidence that her ability to lead a normal life has been significantly affected.

In the instant case, in arguing the motion for reconsideration, the only new evidence which was not available when the trial court initially granted defendant's motion for summary disposition was plaintiff's assertions in her affidavit that her condition has worsened and that she could no longer swim, ski, do any heavy lifting or return to her employment as a waitress. These allegations do not demonstrate that palpable error occurred when the court originally granted defendant's motion.

The case at bar is similar to Franz v Woods, 145 Mich App 169; 377 NW2d 373 (1985), where this Court held that plaintiff failed to make a threshold showing of serious impairment of body function. There, plaintiff complained of back and neck pain with shooting pains radiating into her legs and occasional numbness in her left arm. Plaintiff also claimed that she had some disability with daily activities, including housework, and contended that prior to the accident she engaged in different types of athletic activities which she could no longer do. Additionally, plaintiff asserted that she had to quit her jobs as bowling center manager and waitress because of her injuries.

In the within case, the assertions in plaintiff's affidavit that she is limited in her ability to lift, push and

pull with her right arm are insufficient even when viewed in a light most favorable to plaintiff to create a material factual dispute as to whether she suffered a serious impairment of body function. Plaintiff relied at oral argument upon this Court's recent decision in Harris v Lemicex, 152 Mich App 149; \_\_\_\_ NW2d \_\_\_\_ (1986). In Harris, plaintiff asserted in her affidavit that she could not perform her day-to-day household activities, and the majority held that this affidavit coupled with the medical opinions was marginally sufficient to defeat defendant's summary judgment motion (Warshawsky dissenting). However, we note that in Harris, plaintiff's deposition had not been submitted on appeal and "the only sworn statements as to the impact of her injury on plaintiff's life-style" were contained in her affidavit. Id at 153, fn 1. In the instant case by contrast, plaintiff's deposition directly refutes the generalized statements in her self-serving affidavit that she has physical restrictions to the extent that she cannot lead a normal life.

Plaintiff's proofs fail to disclose a general inability to live what would objectively be determined a normal life-style. The most that can be said is that, because of her injuries, she will have to structure her social and vocational activities more carefully to avoid aggravating her neck and arm. That is not sufficient to establish a serious impairment of body function. Since plaintiff has failed to meet the threshold requirements of the no-fault act, defendant is entitled to judgment as a matter of law.

Reversed and remanded for entry of judgment in favor of defendant.

/s/ Roman S. Gribbs  
/s/ Harold Hood  
/s/ Robert R. Ferguson