

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

KENNETH C. LOVELL, JR. and
DEBORAH C. LOVELL,

Plaintiffs-Appellants,

v

No. 85675

HENRY ARNOLD MILLER and
SHIRLEY G. MILLER, jointly^d
and severally,

Defendants-Appellees.

BEFORE: D. F. Walsh, P.J., J. B. Sullivan and N. A. Baguley*,
JJ.

PER CURIAM

Plaintiff Kenneth Lovell was injured when the truck in which he was riding was struck by a car driven by defendant Henry Miller on the main street of Mesick, Michigan, on October 23, 1979. Plaintiffs sued for damages for noneconomic loss, which may be awarded only for serious impairment of body function, death or permanent serious disfigurement. MCL 500.3135; MSA 24.13135. After a two-day jury trial during which both sides presented expert testimony, the trial court granted defendants' motion for directed verdict, finding as a matter of law that plaintiffs had failed to prove that plaintiff's injuries rose to the level of serious impairment of body function. Plaintiffs appeal that ruling.

Whether plaintiff's injuries meet the statutory threshold of serious impairment is for the court to rule as a matter of law, if there is no factual dispute relating to the nature and extent of plaintiff's injuries. Cassidy v McGovern, 415 Mich 483, 502; 330 NW2d 22 (1982). Whether the threshold has been met should be considered in conjunction

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Circuit Court Judge sitting by assignment.

with the other threshold requirements for noneconomic loss, death and serious disfigurement, and the legislative reasons for limiting the recovery for noneconomic losses, i.e., to prevent overcompensation for minor injuries and to reduce litigation in automobile accident cases. Cassidy, supra, Routley v Dault, 140 Mich App 190, 193; 363 NW2d 450 (1984), lv gtd 422 Mich 935 (1985).

This Court has set out three criteria which must be met to constitute serious impairment of body function: (1) It must be an important body function which is impaired; (2) the impairment must be serious; (3) the injuries must be objectively manifested. Kucera v Norton, 140 Mich App 156, 159; 363 NW2d 11 (1984), lv gtd 422 Mich 935 (1985). Serious pain and suffering does not meet the threshold. Cassidy, supra, 505, Vreeland v Wayman, 141 Mich App 574, 576-577; 367 NW2d 362 (1985).

Viewing the evidence in the light most favorable to the plaintiff, the trial court found that plaintiff's complaints of persistent back pain were genuine, that the pain was debilitating to plaintiff and sufficient in plaintiff's mind to keep him from normal activities of life, and that the functioning of the back is an important body function.

The pain interfered with plaintiff's normal lifestyle, prevented a sexual relationship with his wife, interfered with his relationship with his young son, kept him from working for a long time. But, summarizing the testimony of the experts, the court found no objective evidence of an injury--no neurological deficit, no atrophy, no loss of range of motion, only third-hand testimony of some nerve root irritation. The judge concluded that, when compared to the seriousness of the other tort liability exceptions, death and permanent serious disfigurement, plaintiff's injuries did not meet the threshold of serious impairment.

Plaintiffs argue on appeal that the court ignored objective evidence of plaintiff's injury, and that based on the evidence presented, the court should have found that the injury was serious enough to prevent him from normal activities of everyday life.

The trial court correctly ruled that a plaintiff's ability to move his back is an important body function. Argenta v Shahan, 135 Mich App 477, 489; 354 NW2d 796 (1984), rev'd on other grounds 424 Mich 83 (1985). That the pain from which plaintiff suffers seriously affects his normal lifestyle is also supported by the evidence. Plaintiff's wife testified he has been sleeping on the floor since 1979 because even a bed with a firm mattress is too uncomfortable. Plaintiff no longer participates in any sports, which were a major aspect of his social life before the accident. He can no longer pick up his young son or play with him. His father now does the snow shoveling, yard work, furniture moving and other chores he used to help with. On doctor's orders, plaintiff was out of work for two years.

Critical to plaintiffs' case was, as the trial court observed, the lack of objective evidence of plaintiff's injuries. Plaintiffs argue on appeal that the judge overlooked testimony from Dr. DeCosta that plaintiff showed "significant restriction of lateral bending of cervical spine", and decreased range of motion of flexion and extension. These appear however to have been restricted due to plaintiff's pain, which this Court has not considered objective manifestation of a soft-tissue injury. Salim v Shepler, 142 Mich App 145; 369 NW2d 282 (1985), Franz v Woods, 145 Mich App 169, 175; ___ NW2d ___ (1985).

In most serious impairment cases involving soft tissue injuries, this Court has found that muscle spasm, tenderness and limited flexion do not rise to the level of objective manifestation of injury necessary for serious impairment.

Fleming v Jenkins, 138 Mich App 780, 790; 316 NW2d 298 (1984).

The exception is where plaintiff's expert has specifically testified that these results are totally objective. Argenta v Shahan, supra.

Contrary to plaintiffs' argument, the judge did mention the testimony suggesting nerve root involvement, but he pointed out that this came in third-hand, from Dr. Danek's report through Dr. McClay to Dr. Bartone, and the court did not consider it "significant".

After carefully reviewing the entire record we are not persuaded that the trial court erred in granting defendant's motion for directed verdict.

Affirmed.

/s/ Daniel F. Walsh
/s/ Joseph B. Sullivan
/s/ Norman A. Baguley