STATE OF MICHIGAN

IN THE COURT OF APPEALS

JUL 1 1986

SHEILA D. BENNETT, and
ROBERT J. BENNETT, as
next friend of TODD BENNETT,
Plaintiffs-Appellants

-v- NO. 85705

CARL R. OAKLEY,
Defendant-Appellee

BEFORE: Allen, PJ; MacKenzie and Joseph P. Swallow*, JJ.

PER CURIAM.

Did the trial court err on June 23, 1985, by granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10),[1] on grounds that plaintiff Sheila D. Bennett's injuries did not meet Michigan's no-fault threshold for serious impairment of bodily function, MCL 500.3135; MSA 24.13135, as defined by Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983)? We answer this question in the negative and affirm.

Plaintiff was injured August 24, 1981, when the vehicle she was driving collided with defendant's vehicle in the intersection of Lake Lansing Road and Wood Street, Ingham County, Michigan. Defendant, who was making a left turn, pulled into the path of plaintiff's on-coming vehicle. Plaintiff and her son, Todd, who was a passenger in plaintiff's vehicle, were taken by ambulance to Lansing General Hospital.

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[1] Formerly GCR 1963, 117.2(3).

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

At the hospital emergency room, plaintiff was treated and released by her physician, Dr. T. Y. Karikomi. Dr. Karikomi prescribed analgesics and muscle relaxants. Plaintiff returned to Dr. Karikomi on September 8, September 9, and September 22, 1981, still complaining of facial pain and constant headache. Some cervical bed traction was prescribed and Dr. Karikomi extended plaintiff's sick leave from her job at General Motors, Oldsmobile, in Lansing.

Because of plaintiff's continuing headaches and muscle spasms, she was hospitalized from September 25, 1981 until October 3, 1981. On October 16, 1981, she started prescribed isometric exercises and was given manipulative therapy. In November 1981, Dr. Karikomi noted a decrease in plaintiff's range of neck motion to the left. The range of motion was sluggish due to pain and tenderness.

From October through December 1981, plaintiff continued to be treated with analgesics and muscle relaxants and was advised to continue cervical traction from one to two hours a day. Plaintiff stated that the cervical traction was confining and that she used it only for a short time. Dr. Karikomi continued to treat plaintiff on a regular basis during 1982 and 1983. Plaintiff's condition was diagnosed as post-traumatic myofascial pain or myospasms. In August, 1982, Dr. Karikomi examined plaintiff and found palpable paracervical myospasms on the right, an objective finding of a knotting up of segments of the same muscle group on the right side of the neck. Although the range of motion of plaintiff's neck was within normal limits, Dr. Karikomi scheduled an orthopedic consultation at the University Hospital in Ann Arbor, Michigan.

At Ann Arbor, plaintiff was evaluated by Dr. Michele Zembo who found that plaintiff was in no acute distress, had full range of motion of the neck and no palpable paraspinous muscle spasms. X-rays revealed no abnormalities. Dr. Zembo recommended that plaintiff try Motrin, an anti-inflammatory

medication and try a pain clinic to "alleviate her problem". At defendant's request, plaintiff was also examined by Dr. George Ferre, a Hillsdale physician. Dr. Ferre stated examination of plaintiff's neck revealed pain on extreme rotation and tightness in the posterior neck musculature, with tenderness over the greater occipital nerve. According to Dr. Ferre, plaintiff suffered a moderately severe soft tissue injury of the cervical spine which would resolve itself within 18 to 24 months.

At Auto-Owners Insurance Company's request, plaintiff was also examined by Dr. Thomas Allen. In a letter to Auto-Owners, Dr. Allen stated that, at the time he examined plaintiff, he found plaintiff's neck to have a full range of motion. Dr. Allen found no palpable paraspinous muscle spasm and no spasm in the trapezious or rhomboid musculature. X-rays showed no significant abnormalities.

Following the accident, plaintiff's primary complaint was headache and pain in the upper back and neck. She stated that she never had a headache prior to the accident, but after the accident, she began to suffer severe headaches, primarily at the base of the head and the top of the neck. She stated that, although she nearly always felt pain, her headaches occasionally became so severe that she could not tolerate light and was prevented from doing normal activities. Before plaintiff became pregnant, plaintiff took Parafon Forte and Darvon for pain.

Prior to the August 1981 accident, plaintiff worked at General Motors, building Oldsmobile front-end pieces (fascias). However, because of plaintiff's neck injury, plaintiff was able to work only one day before being assigned to a less strenuous job as a tally person, noting problems with nearly completed cars on the assembly line. She terminated her employment on October 16, 1983. While on sick leave in October 1982, her employer classified her as being on "controlled absence" on her record. She further stated that

prior to actually terminating her employment in October 1983, she had planned to leave her job at General Motors as of January 1, 1984, in order to become a full-time homemaker.

When asked if there were hobbies and recreational activities in which plaintiff could no longer engage, plaintiff stated that she could no longer run. Plaintiff testified that she ran about two miles a day prior to the accident, but because the jarring from the running aggravated her injuries, plaintiff was no longer able to run. Plaintiff participated in no other recreational activities either before or after the accident. In discussing her relationship with her husband, she stated that, prior to the accident, she had no intention of remarriage. However, after the accident, plaintiff married Robert Bennett and was "glad I had him to turn to". Bennett adopted plaintiff's son, Todd, and, at the time of her November 1983 deposition, plaintiff was pregnant.

Plaintiff testified that, following the accident, she could do the housekeeping chores she did prior to the accident, except vacuuming. According to plaintiff, the vibration of the vacuum aggravated her neck. Driving a car was an activity plaintiff also chose to avoid. Plaintiff stated that she did not "feel secure" driving and that driving required "too much head-turning". Head-turning was painful for her.

Plaintiffs' complaint, filed July 13, 1983, alleged that both Sheila D. Bennett and Todd Bennett sustained serious impairment of body function and permanent serious disfigurement as a result of the August 24, 1981 accident. The complaint also alleged that, because of his mother's injuries, Todd had sustained damages caused by loss of society and companionship. On April 8, 1985, defendant filed a motion for summary disposition, that there was no issue of material fact regarding Sheila D. Bennett's claim and that defendant was entitled to judgment as a matter of law.

Following the hearing on the motion held May 22, 1985, the trial court rendered an oral opinion granting defendant summary disposition against Sheila D. Bennett. The court's oral opinion was incorporated into a June 3, 1985 order from which plaintiffs appeal of right. Two issues are raised on appeal: (1) Did the trial court err in finding, as a matter of law, that Sheila D. Bennett's injuries did not meet Michigan's no-fault threshold for serious impairment of bodily function, and (2) Did the trial court err by applying an unconstitutionally vague standard rather than the standard mandated by the Legislature for recovery for non-economic loss under Michigan's no-fault act?

I

Contrary to plaintiffs' assertion that a material factual dispute exists, our review of the transcript indicates that the defendant does not dispute the fact that Sheila Bennett incurred a soft tissue injury and that she experienced headaches and neck pain. The only dispute is whether those injuries amount to serious impairment. Since the trial court held these injuries did not meet the Cassidy threshold, we initially must decide by what standard is the trial court's decision to be judged upon appellate review.

Two panels of this Court have held that the correct standard of review in cases involving serious impairment of bodily function is the "clearly erroneous" standard. Kelleher v Kuchta, 138 Mich App 45, 47; 359 NW2d 224 (1984); Walker v Caldwell, Mich App (Docket No. 80687, rel'd 2-4-86). Other decisions have employed the "in a light most favorable to the injured plaintiff and determine whether reasonable minds could differ on whether the impairment suffered was serious" standard of review. Garris v Vanderlaan, 146 Mich App 619, 624; NW2d (1985); dissent of KELLY, J. in Kelleher and cases cited therein. Id, 45. Since the clearly erroneous standard does not apply to questions of law, People v Green, 113 Mich App 699, 706; 318 NW2d 547 (1982); Detroit

Power Screwdriver v Ladney, 25 Mich App 478, 483-484, fn 3; 181 NW2d 828 (1970), we will review the facts in the instant case in a light most favorable to plaintiff in order to determine if the trial court erred in finding no material factual dispute regarding the nature and extent of plaintiff's injuries. Cassidy and Garris, supra. Where there is no material factual dispute, this Court should further determine, as a matter of law, whether there has been a serious impairment of body function. Cassidy.

The applicable law in cases asserting serious impairment of body function is best summarized in Sherrell v Bugaski, 140 Mich App 708, 710-711; 364 NW2d 684 (1984):

> "When considering the seriousness of the injury, the court should be mindful of the other threshold requirements for recovery of noneconomic loss (i.e., death and permanent serious disfigurement), and the legislative reasons for limiting the recovery of noneconomic losses, namely, to prevent overcompensation for minor injuries and to reduce litigation in automobile accident cases. Williams, supra; Braden v Lee, 133 Mich App 215; 348 NW2d 63 (1984). When determining whether a certain injury meets the threshold requirement for recovery of noneconomic loss, the court should apply an objective standard and look to the effect of the injury on the individual's general ability to lead a normal life."

Clearly, plaintiff suffered a cervical strain or soft tissue injury to the neck which resulted in headache and neck pain. Appellee's doctors agreed to that diagnosis. Furthermore, the injury was objectively manifested. Dr. Karikomi, plaintiff's physician, testified:

> "Q. As of 8-23-82, did you find any objective findings, physical findings, to support Sheila Bennett's subjective complaints?
>
> "A. Now I will repeat again, she had palpable paracervical muscle spasms on the right. Tenderness along the trapezius muscle on the right.
>
> "Q. Well, tenderness, is that something that you say is objective or subjective?
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> "A. Both. There are trigger areas that you look for, and you palpate that area. And if you find that the findings are asymmetrical, then that indicates that she has had some injury, past injury, in the area.
>
> "Q. So you found objective findings?
>
> "A. Yes."

Palpable muscle spasms were observed. Self-reported pain and suffering does not meet the threshold requirement for an objectively manifested injury. Williams v Payne, 131 Mich App 403, 410; 346 NW2d 564 (1984). However, where muscle spasms are medically observable, one panel of this Court has found proof of an objectively manifested injury. Franz v Woods, 145 Mich App 169; 377 NW2d 373 (1985). Other panels of this Court (including one member of the present panel) have held to the contrary. Flemings v Jenkins, 138 Mich App 788, 790; 360 NW2d 298 (1984); Morris v Levine, 146 Mich App 150, 154; 379 NW2d 402 (1985).

Giving plaintiff the benefit of the doubt, and assuming arguendo that we follow the Franz panel that the injuries are "objectively manifested", we still find that plaintiffs have failed to establish the seriousness requirement of a serious impairment of bodily function. Admittedly, Sheila Bennett experiences neck pain and headaches which, when they are severe, cause her to be unable to function. Admittedly she nearly always suffers from headaches. However, the only activities in which she is no longer able to regularly engage are running, vacuuming, and driving an automobile. Plaintiff stated that she did not have any other recreational activities, other than running, prior to the accident and that, subsequent to the accident, she gave up running because the "jarring" aggravated her condition. The vibration caused by holding a vacuum also aggravated the pain in plaintiff's neck. Driving a car caused plaintiff to suffer neck pain from turning her head. She stated that her problem with driving was two-fold, that she suffered neck pain and that she was afraid to drive. Thus, any limitation in her normal driving pattern cannot be definitely ascribed to her injury.

Further, nothing in the record indicates that plaintiff was limited from participating in any physical activity by her doctor. Self-imposed limitations do not meet the threshold

requirements for serious impairment. Franz v Woods, supra. Viewing the testimony in its entirety we are not persuaded that plaintiff's injuries had a significant impact on her ability to lead a normal life. Sherrell v Bugaski, supra. Except for vacuuming, plaintiff is able to do the household activities she performed prior to the accident. Plaintiff also stated that her family relationships have not suffered as a result of the accident. In fact, plaintiff married and became pregnant after being injured.

Whether plaintiff's ability to continue her employment at General Motors is indicative of a serious impairment of body function presents a closer question relating to plaintiff's ability to lead a normal lifestyle. Plaintiff did not return to work following the August 24, 1981 accident until November 3, 1981, did not work from July 1982, until October 1982, and in August 1983, requested a doctor's note so that she could be placed on sick leave. However, the testimony also disclosed that her physical ailments in 1983 were related to her menstrual problems as well as neck pain and pregnancy was confirmed in October 1983. Given the fact that she terminated her employment at General Motors not long after becoming pregnant and that she planned to become a full-time homemaker as of January 1, 1984, we are unable to conclude that her injuries were so serious as to constitute a serious impairment of body function.

Although plaintiff suffered pain, she did continue to work during most of the time period between the accident and her voluntary termination of employment. This Court has held that time off from work due to an accident does not change the intrinsic nature or extent of an injury. Franz, supra. Again we note that plaintiff's termination of employment was voluntary, rather than medically mandated, and her absence from work prior to termination was only partially a result of neck pain.

Finally, we observe that plaintiff's injuries were not serious, especially viewed in the light of the other threshold requirements of the no-fault act, namely, death and personal disfigurement. Williams, supra, 409. Nor, as explained above, have the injuries resulted in a significant impact on her ability to bear a child and lead a normal life. Accordingly, as to issue I we find no error.

II

Plaintiffs claim that § 3135 of the no-fault act, as applied by the trial court in the instant case, is unconstitutional. Plaintiffs come to this conclusion on two grounds. First, that the threshold standard for serious impairment of body function applied by the trial court was so vague that it violated the equal protection rights guaranteed by Article XIV of the United States Constitution and Article I, § 2 of the Michigan Constitution. Second, that the right to trial by jury was denied. Whitson v Whitely Poultry Co, 11 Mich App 598; 162 NW2d 102 (1968). Admitting that the constitutional issue was not raised in the trial court, plaintiffs contend that the issue is of such importance that it should be considered on appeal.

Generally, where a plaintiff fails to raise an issue in the trial court, including a constitutional issue, appellate review is precluded. Brookdale Cemetery Ass'n v Lewis, 342 Mich 14, 18; 69 NW2d 176 (1955); Lumber Village, Inc v Siegler, 135 Mich App 685, 692; 355 NW2d 654 (1984); Harris v Pennsylvania Erection & Construction, 143 Mich App 790, 795; 372 NW2d 663 (1985). However, where the question raised is one of law and where it may be decided without reference to disputed material issues of fact, this Court may review the claim. Harris, supra.

However, we need not postulate our opinion on the grounds that the issue was not raised at the trial level. Clearly, the standard employed by the trial court was the standard prescribed by the Supreme Court in Cassidy v McGovern, supra. Equally clearly, the trial court meticulously and almost by rote applied the tests laid down in Cassidy and further detailed in post-Cassidy type opinions of this Court. Just because the standard must be applied on a case-by-case basis (Cassidy, 503) does not mean that the statute is unconstitutionally vague or a denial of equal protection.

We reject the argument that trial by jury has been denied. The right to trial by jury applies to questions of fact. In Cassidy, our Supreme Court held that whether the serious impairment threshold had been met was a question of law, not a question of fact. Cassidy, 502. See also, Burk v Warren (After Remand), 137 Mich App 715, 725; 359 NW2d 541, (1984), lv den 422 Mich 935 (1985). Defendant did not dispute the factual issue relating to the nature and extent of plaintiff's injury. (See issue I). When there is no factual dispute regarding the nature and extent of a plaintiff's injuries, the question of serious impairment of body function is not decided as a question of fact by the jury, but as a matter of law by the trial court. Cassidy, 502. Accordingly, we find no error as to issue II.

The trial court's order granting defendant's motion for summary disposition is affirmed.

/s/ Glenn S. Allen, Jr.
/s/ Barbara B. MacKenzie
/s/ Joseph P. Swallow