

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

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ROY CLARK and RITA CLARK,

Plaintiffs-Appellants  
and Cross-Appellees,

v

File No. 82072

AUTO CLUB, a/k/a DETROIT  
AUTOMOBILE INTER-INSURANCE  
EXCHANGE, a/k/a AAA, and  
KARL ANTHONY BREWER and  
CAROL BREWER, Individually,

Defendants-Appellees  
and Cross-Appellants.

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BEFORE: Beasley, P.J.; Maher and Tahvonen,\* JJ

PER CURIAM

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In this third-party no-fault action the trial court granted summary judgment in defendants' favor, GCR 1963, 117.2(1) and (3) [now MCR 2.116(8) and (10)], having concluded that plaintiff Roy Clark did not suffer a serious impairment of a body function and that plaintiff could not recover for loss of earning capacity without meeting that no-fault threshold, MCL 500.3135; MSA 24.13135. Plaintiffs appeal as of right and we affirm. The trial court also permitted plaintiffs to amend their complaint to seek excess work loss, MCL 500.3135(2)(c); MSA 24.13135(2)(c), concluding that such damages may be recovered without meeting the no-fault threshold. Defendants cross-appeal and we affirm.

Plaintiff Roy Clark was injured when his automobile was struck from the rear by a pickup truck owned by defendant Carol Brewer and driven by defendant Karl Brewer. Plaintiff claimed the impact propelled him into the ceiling of his car, knocked his

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

front seat into a reclining position and forced his car halfway down the next block. Defendant Karl Brewer described a much different accident; one so trifling that plaintiff's car moved barely two feet and no one was thrown about in the car.

Following the accident, plaintiff drove home and was driven to his family doctor by his wife. The doctor prescribed a muscle relaxant in response to plaintiff's complaints of head pain.

Four days later, plaintiff consulted Dr. McCanse, a chiropractor. Dr. McCanse found a misalignment of the spine which he opined could have been caused or aggravated by the accident. (Plaintiff had suffered a back injury in 1959 for which he received chiropractic treatment.) Plaintiff continued treating with Dr. McCanse until just prior to trial in November, 1984.

In June, 1982, Dr. Harshard Doshi, M.D., examined the plaintiff at the request of plaintiff's first-party insurer. The doctor found no muscle spasm and X-rays were normal. The plaintiff could perform all flexibility tests. Dr. Doshi concluded that plaintiff suffered from a stiff neck, but could do any type of work.

In July, 1982, Dr. Edward Westerbeke, M.D., examined the plaintiff. He found lower spine movement or flexibility at 50% of normal and opined that plaintiff probably suffered from a pinched nerve causing a sensory deficit in his ankle. Dr. Westerbeke also found some muscle spasm in the lower spine. These conditions were also diagnosed as temporary and as disabling plaintiff from working in a body shop as he had up to three months prior to the accident.

In November, 1982, plaintiff was examined by Dr. Earl Heller, M.D., again at the request of plaintiff's first party insurer. Dr. Heller found no spasm, tenderness or wasting of the muscle. Leg raising tests were negative and X-rays were normal. The plaintiff had no difficulty walking or lifting himself onto the

examining table. Dr. Heller concluded that plaintiff was suffering from a strain of his neck or cervical spine or lower back. The prognosis was that the condition would improve with time and the doctor believed plaintiff could work.

In April, 1983, plaintiff was seen by Dr. K. S. J. Murkowski, a chiropractor, who conducted a thermographic evaluation revealing dermatomal problems in plaintiff's spine. Palpation resulted in reports of tenderness in the back and neck. The doctor concluded that plaintiff suffered from spinal rotation, vertebral rotation and disc wedging.

In May, 1984, another thermogram was taken; this one by Dr. Richard Huff, D.O. The thermogram revealed no dermatomal problem in the upper body, but did disclose some muscle irritation. Although dermatomal involvement was found in the lower spine, the doctor did not believe that this would impair plaintiff's ability to function in any significant manner.

In October, 1984, Dr. Westerbeke found arthritis in plaintiff's neck.

Prior to trial, defendants moved for summary judgment under GCR 1963, 117.2(3) [now MCR 2.116(C)(10)] contending that plaintiff had not suffered the serious impairment of body function which would serve as the threshold requirement for suing in tort under MCL 500.3135(1); MSA 24.13135(1). The trial court granted partial summary judgment on plaintiff's non-economic claim, finding no dispute as to the nature and extent of the injury and that, as a matter of law, it failed to meet the threshold requirement. Later, defendants further motion for summary judgment based on GCR 1963, 117.2(1) [now MCR 2.116(C)(8)] was heard. Defendants claimed that plaintiff had failed to state a claim upon which relief could be granted because he sought damages for future earning capacity instead of the work-loss damages allowed by MCL 500.3135; MSA 24.13135. The trial

court ruled that earning capacity may not be recovered in the tort action unless the plaintiff first meets the threshold requirement and therefore granted defendant's motion. The trial court however allowed plaintiff to amend his complaint to allege damages for work-loss instead of future earning capacity. Trial was then adjourned pending resolution of this appeal and cross-appeal.

I

The first issue is whether the trial court erred in granting partial summary judgment in favor of defendants on the ground that plaintiff's injuries did not constitute a serious impairment of body function.

Since the Michigan Supreme Court's decision in Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), this Court and trial courts throughout the state have repeatedly grappled with the task of applying Cassidy's general legal precepts to those specific and endlessly varied factual settings in which actual cases arise.

In Cassidy v McGovern, supra, the Supreme Court held that where there is no material factual dispute regarding the nature and extent of the plaintiff's injuries, the existence of a serious impairment of a body function is a question of law to be decided by the Court.

In Williams v Payne, 131 Mich App 403, 409; 346 NW2d 564 (1984), this Court suggested a three-step analysis to assist trial judges in making the legal determination of whether injuries constitute a serious impairment of a body function:

"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."

We agree with the trial court's finding in this case that there is no material dispute as to the nature and extent of plaintiff's injuries. Although the parties of course disagree about the plaintiffs injuries and there effect upon him, the resolution of that disagreement would not be material in deciding the threshold question. In short, looking at the evidence in the light most favorable to the non-moving party, the moving party is entitled to the legal finding he seeks. See Franz v Woods, 145 Mich App 169, 172-173; \_\_\_\_\_ NW2d \_\_\_\_\_ (1985).

In the present case, consideration of the second Williams factor is dispositive on the threshold question, i.e., the trial court correctly concluded that the injury was not "serious". 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 v McGovern, supra, 503. The plaintiff here complained of pain in his neck and lower back, which made doing household chores such as raking leaves difficult. He was able to walk, drive a car, visit friends and take care of himself while his wife is at work. Drs. Heller, Doshi and Westerbeke found the plaintiff was able to work. Dr. Huff testified that plaintiff's injuries were not impairing his ability to function in any significant manner. Plaintiff's injuries consisted of soreness, stiffness, tenderness in the muscles, and pain in his back and leg. Flexibility in the spine area was only fifty percent at one time, however plaintiff was able to perform leg raising and other flexibility tests. We have previously held that muscle spasms, tenderness and limited flexibility do not rise to the level of a "serious" impairment of a body function. Flemings v Jenkins, 138 Mich App 788; 360 NW2d 298 (1984).

Our review of the lower court record satisfies us that the trial judge did not err in concluding that plaintiff did not

suffer a serious impairment of a body function.

## II

The second issue is whether the trial court erred in granting summary judgment in favor of defendants on the ground that loss of earning capacity is a non-economic loss recoverable only if the tort threshold is met.

In Ouelette v Kenealy, 424 Mich 83 \_\_\_\_\_ NW2d \_\_\_\_\_ (1985), the Supreme Court held that damages for loss of earning capacity are not recoverable at all under the no-fault act. Accordingly, the trial court, without the benefit of Ouelette, reached the correct result.

## III

The third issue is whether plaintiff may recover economic loss in excess of the three-year limitation contained in MCL 500.3107(b); MSA 24.13107(b) even though plaintiff has not suffered a serious impairment of a body function. The trial court ruled that plaintiffs may seek excess economic loss damages without meeting the threshold. Most importantly, this ruling permits recovery of work loss benefits beyond three years. By way of cross-appeal, defendants argue that only excess economic loss accruing within three years of the accident is recoverable in a third-party action.

In Cochran v Myers, (Docket No. 77854, rel'd 11-4-85), \_\_\_\_\_ Mich App \_\_\_\_\_; \_\_\_\_\_ NW2d \_\_\_\_\_, this Court rejected defendant's assertion and held (1) that work loss benefits were recoverable beyond three years and (2) that such recovery does not require proof of death, serious impairment of a body function or serious permanent disfigurement. Recognizing that the Supreme Court is Ouelette, supra, 88, declined to address "the applicable limitations period for recovery of excess work loss", we elect

to follow Cochran, supra. The trial court's decision was therefore proper.

AFFIRMED. No costs, neither party having prevailed in full.

/s/ William R. Beasley  
/s/ Richard M. Maher  
/s/ Randy L. Tahvonen