STATE OF MICHIGAN

COURT OF APPEALS

MICHELE JACQUELINE COPELAND and
JAMES PHILIP COPELAND, her husband,
individually and as next friend of
JAMES PHILIP COPELAND, JR.,

FEB 23 1987

Plaintiff-Appellants,

v

No. 88172

GAYE BARBARA SMITH,

Defendant-Appellee.

BEFORE: R. S. Gribbs, P.J., D. F. Walsh and Beasley, JJ.

PER CURIAM

Plaintiffs appeal as of right from the Oakland County Circuit Court's April 24, 1985, order granting defendant's motion for accelerated judgment based on the statute of limitations. We reverse.

In reviewing a trial court's decision on a motion for accelerated judgment, we accept all well pled allegations as true and construe them most favorably to the plaintiff; if a factual issue existed, the trial court should not have granted the motion. Accelerated judgment is properly granted where a claim is barred by the statute of limitations. Herman v Ford Motor Co, 119 Mich App 639, 641-642; 326 NW2d 590 (1982), lv den 418 Mich 885 (1983).

The period of limitations applicable to a claim for personal injury is three years, MCL 600.5805(8); MSA 27A.5805(8).

MCL 600.5827; MSA 27A.5827 provides:

"Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, [MCL 6700.5829-600.5838] and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results. P.A. 1961, No. 236, §5827, Eff. Jan. 1, 1963."

This Court has concluded that a cause of action for non-economic loss from a serious impairment of body function does not accrue until plaintiff discovers or should have discovered the serious impairment of body function, Mielke v Waterman, 145 Mich App 22, 26; 377 NW2d 328 (1985), lv den 424 Mich 873 (1986); Horan v Brown, 148 Mich App 464; 384 NW2d 805 (1986).

Plaintiff was injured in an automobile accident on May 5, 1978. After the accident, she complained of headaches. In 1980, plaintiff first experienced an epileptic seizure. We believe that her claim accrued at that time, when plaintiff's epilepsy first manifested itself. See Mielke, supra, 25. Since plaintiff filed suit on September 15, 1981, within three years of the accrual of her claim, the trial court's order granting accelerated judgment to defendant must be reversed. Because we hold that plaintiff's claim accrued within the three-year period set out by the statute, we do not consider her argument that the statute was tolled by the insanity tolling provision, MCL 600.5851; MSA 27A.5851.

Plaintiff also argues that the Supreme Court's decision in Berger v Weber, 411 Mich 1; 303 NW2d 424 (1981), reh den 411 Mich 1155 (1981), should be applied retroactively to this case. We disagree. Berger applies only to causes of action which accrued after March 30, 1981, Hicks v Agney, 413 Mich 556, 559; 321 NW2d 383 (1982).

Lastly, plaintiff argues that the trial court abused its discretion when it granted defendant's motion to bifurcate the trial on the issues of insanity tolling and damages. Because we hold that plaintiff's complaint was timely without reference to the insanity tolling provision, we decline to address this issue.

Reversed.

/s/ Roman S. Gribbs
/s/ Daniel F. Walsh

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

MICHELE JACQUELINE COPELAND and
JAMES PHILIP COPELAND, her husband,
Individually and as Next Friend of
JAMES PHILIP COPELAND, JR., a Minor,

Plaintiffs-Appellants,

-vs- No. 88172

GAYLE BARBARA SMITH,

Defendant-Appellant.
/

BEFORE: R. S. Gribbs, P.J.; D. F. Walsh and Beasley, JJ.

BEASLEY, J. (Concurring)

I concur with the majority, but write separately to indicate my reasons. This case presents close and difficult issues.

First is the question whether, pursuant to the statute of limitations, MCL 600.5805(8); MSA 27A.5805(8), plaintiffs' cause of action accrues on the date the damage is sustained and not on the date when the causes are set in motion, which ultimately produce the injury and damage. To put it more simply, is it the date the injury is discovered or is it the date the accident occurs, upon which the cause of action accrues. To determine the accrual of plaintiffs' claim under the statute, reference must be had to MCL 600.5827; MSA 27A.5827, which provides:

> "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

In Mielke v Watermann, 145 Mich App 22; 377 NW2d 328 (1985), lv den 424 Mich 873 (1986), and Horan v Brown, 148 Mich App 464; 384 NW2d 805 (1986), we held that a cause of action for non-economic losses from serious impairment of body function does

not accrue until plaintiff discovers, or should have discovered, the serious impairment of body function. In Connelly v Paul Ruddy's Equipment Repair, 388 Mich 146, 150; 200 NW2d 70 (1972), the Supreme Court held that in actions for damages arising out of tortious injury to a person, the cause of action accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint. The Supreme Court went on to say that there are four such elements: (1) the existence of a legal duty by defendant toward plaintiff; (2) the breach of such duty; (3) approximate causal relationship between the breach of such duty and an injury to the plaintiff; and (4) the plaintiff must have suffered damages.

A prerequisite for maintaining suit under the no-fault act for non-economic loss arising from the ownership, maintenance and use of a motor vehicle is that the injured person suffered death, serious impairment of body function, or permanent serious disfiguration. MCL 500.3135(1); MSA 24.13135(1). Both Mielke and Horan reason that all of the elements of a plaintiff's cause of action do not accrue until the injury manifests itself in a serious impairment of body function. In Mielke we specifically said that plaintiff's claim accrues only when plaintiff discovers, or should have discovered, the serious impairment of body function and plaintiff could allege these elements in a proper complaint.

However, even if we apply Mielke in the within case, there is a serious question as to when plaintiff discovered, or should have discovered, her serious impairment. In the within case, plaintiff apparently suffered a blow on the head in the accident, lost consciousness and shortly thereafter suffered headaches. She immediately sought and received medical attention and started treatment by way of medication. In fact, there is indication that there was objective confirmation of her injury because an abnormality was detected in the EEG performed in November, 1978. Her headaches were sufficiently severe so that eventually she stopped working at her husband's company and, in

general, she was disabled within six months of the accident. On the other hand, on appeal, plaintiff asserts that her claim did not accrue until July, 1980, at the time of her first epileptic seizure.

The cases indicate that in order to establish serious impairment of bodily function, a claimant must show first, impairment of a body function, that is, an impairment of an important body function, second, by its own terms the statute requires that the impairment be serious, and third, the statute applies only to objectively manifested injuries. Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body.

I believe that when plaintiff began experiencing headaches on a continuing basis and when she quit working and curtailed performance of most of her household responsibilities, it should have been apparent to her that she had a serious impairment of body function. This conclusion is buttressed by the fact that the EEG result, dated November 7, 1978, provided objective documentation of some abnormality. Thus, as of that approximate time period, I believe it reasonable to charge plaintiff with knowledge that she had a serious injury resulting from the car accident.

I recognize that the question is complicated by the fact that none of her treating physicians connected her headaches to the accident. However, there is not any evidence that either Dr. Binns or Dr. Taylor were ever informed that plaintiff had been in a car accident. Consequently, I do not believe that accrual of plaintiff's claim should be delayed because of the failure of her physicians to connect the headaches to an accident that they were not aware of. Consequently, by November, 1978, plaintiff's claim accrued and, accordingly, when she filed suit on September 15, 1981, the statute of limitations had not yet run. Thus, it was error to grant defendant's motion for accelerated judgment on the ground that the statute of

limitations had run. On this analysis I join with the majority in reversing the order that granted defendant's motion for accelerated judgment.

/s/ William R. Beasley