

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE BEHNKE,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE CO,

Defendant-Appellee,

and

ESTATE OF KAREN MCLEAN,

Defendant.

UNPUBLISHED

September 16, 2004

No. 248107

Chippewa Circuit Court

LC No. 01-005523-NI

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

I. Overview

Plaintiff Bruce Behnke was injured in a car accident and sued to recover noneconomic damages for his injuries. After a bench trial, the trial court concluded that Behnke had not suffered a serious impairment of an important body function, and therefore entered a judgment of no cause of action. We conclude that Behnke established that he suffered a serious impairment of an important body function, and therefore reverse.

II. Basic Facts And Procedural History

This case arose from an accident that occurred on May 29, 1998 when Karen McLean drove her car into the rear end of Behnke's truck while it was stopped at a red light. According to Behnke, the impact jolted the truck and caused his neck to be thrown, causing him momentary paralysis, a sensation like an electrical shock, and a feeling that "something snapped." Behnke and McLean pulled their vehicles into a nearby gas station where McLean, who seemed drunk, gave Behnke a carbon copy of a check containing her name and address before leaving the scene. The police later apprehended McLean. McLean was uninsured, and the parties stipulated that Auto Owners had issued an applicable uninsured motorist policy. McLean's negligence was uncontested.

After giving a report to police, Behnke went home, but his neck became increasingly stiff and very sore with a swelling on the right side, and his head began to ache. The next morning,

Behnke could hardly move his neck, and had a headache so intense it caused him to be sick to his stomach. Behnke went to the emergency room, where his neck was X-rayed and he was given a soft cervical collar and Motrin; however, neither of these items eased his pain.

Behnke, who was employed as a welder, went to work on Monday, June 1, but left early due to a severe headache. Behnke called his doctor, Robert Graham, D.O., and reported that he was experiencing neck pain and an inability to turn his head. When Dr. Graham examined Behnke on June 2, he felt a swelling in Behnke's neck that indicated a trauma to the muscle or ligament. Dr. Graham attempted to manually move Behnke's head, but found that his range of neck motion was limited.

Dr. Graham also examined the reports of the X-rays from Behnke's emergency room visit. The X-rays indicated a "straightening of the normal cervical lordosis," meaning that the spine's normal curvature had been straightened. Dr. Graham explained that when this curvature is straightened, "the integrity of the supportive structures are lost," causing the anatomical relationships among the surrounding tissues to be distorted or rearranged. Dr. Graham stated that this condition could have been caused by hyperextension of Behnke's neck when his truck was rear-ended, but he could not be sure because he had seen no X-rays of Behnke's back before the accident.

The X-rays also revealed that Behnke's C4 and C5 vertebrae were "blocked," that his C5 and C6 vertebrae were closer together than they should have been, and that there was evidence of sclerosis, which indicated that inflammation had occurred at that site. Dr. Graham explained that the blocked vertebrae and narrowed interspaces were preexisting conditions that were unrelated to the accident, but further explained that abnormal motion could have caused the previously asymptomatic conditions to become aggravated and painful.

On June 12, 1998, Behnke returned to Dr. Graham after experiencing increased neck pain and a continued inability to turn his head without pain. Dr. Graham ordered Behnke not to return to work pending the results of an MRI, which were received June 22, 1998. The MRI report indicated that the straightening of Behnke's spine was, at least to some degree, the result of his blocked vertebra at C4-5, which was congenital and existed before the accident. Dr. Graham ordered defendant to remain off work pending the results of a consultation with neurosurgeon J. Eric Zimmerman, M.D.

Dr. Zimmerman examined Behnke on July 8, 1998. According to Dr. Zimmerman, Behnke's chief complaint was neck pain. Dr. Zimmerman put Behnke's neck through the normal range of motion and found nothing abnormal except pain and popping of joints. Dr. Zimmerman also noted congenital blocked vertebrae, degenerative changes at the C5-6 and 6-7 vertebrae, and "spondylitic," or inflammatory, ridge and facet degeneration that would not have happened within a month or two of the exam. Dr. Zimmerman found no root or cord compression, and found that Behnke's craniocervical junction was normal. Dr. Zimmerman performed two tests that ruled out nerve involvement; specifically, he found nothing to suggest

radiculopathy¹ or myelopathy.² Dr. Zimmerman referred Behnke back to Dr. Graham because he could offer no treatments or surgery. Dr. Graham allowed Behnke to return to work without restrictions on July 27, 1998.

Behnke returned to Dr. Graham on October 21, 1998 complaining of neck pain and headaches. Dr. Graham classified the headache as a “tension headache,” and noted that he was not sure “whether this was related to his lifestyle or his type of work.” Dr. Graham noted that tension headaches are consistent with the type of injury Behnke sustained, explaining that there are nerves called “occipital nerves” that pass through the neck muscles as they exit the skull, and if the neck muscle is spastic or tense, it puts pressure on these nerves. Dr. Graham testified that bright lights and noise could aggravate this type of headache, which he said could become painful enough to cause unconsciousness. Dr. Graham testified that he believed the headache originated from the trauma Behnke sustained in the accident, and was aggravated by his activities. Dr. Graham prescribed Behnke painkillers as well as an antidepressant medication, and recommended that he perform only light-duty work.

In June, 1999, Behnke was involved in a second car accident that caused his neck to be stiff and sore on one side, but this soreness went away after a week or two. In June, 2000, Behnke was laid off from his welding job; however, his headaches continued to worsen after he stopped working.

On September 11, 2000, Behnke made an appointment with Dr. Graham to address a severe cervical spasm he suffered during sexual intercourse that nearly caused him to lose consciousness. Dr. Graham testified that during the examination he could feel the muscle spasm with his hands and could tell that Behnke’s range of motion was decreased. Dr. Graham again identified Behnke’s condition as a muscular tension that put pressure on his occipital nerve, and testified that the condition was caused by the straightening of Behnke’s spine during the accident. Dr. Graham observed that Behnke’s symptoms had not improved and he was healing poorly, which he felt was typical of the type of injury he had sustained as well as the aging process.

Behnke saw Dr. Graham on October 8, 2001, and again on January 22, 2002, complaining of numerous daily headaches in the occipital area and seeking a referral to a neurologist. Dr. Graham said that surgical intervention was “out of the question,” and the only thing he could do for Behnke’s condition was to prescribe chronic treatment for pain relief, including physical therapy. Dr. Graham explained that when a person suffers a myofascial (muscular) strain, the connective tissue is stretched and does not always return to its normal configuration. In Dr. Graham’s opinion, Behnke’s condition was permanent, and he predicted that Behnke likely would suffer increasing arthritis and neck pain for the rest of his life.

¹ Radiculopathy is a “disease or abnormality of a . . . spinal nerve root from the point where it merges with the spinal cord . . . to the point where it joins its companion root . . . to form a spinal nerve.” Schmidt, *Attorney’s Dictionary of Medicine* (1962).

² Myelopathy is “any disease of the spinal cord.” Schmidt, *Attorney’s Dictionary of Medicine* (1962).

However, Dr. Graham did not tell Behnke that he could not engage in his usual activities, including full-time employment, and he did not recall whether Behnke complained of being unable to engage in his usual activities.

On November 21, 2001, Behnke again saw Dr. Zimmerman after suffering a severe muscle spasm during sexual intercourse. Dr. Zimmerman testified that Behnke's neurological examination was normal, but that myofascial injuries, which are not neurological but muscular, can cause headaches. Dr. Zimmerman concluded that Behnke's problems were myofascial rather than neurological, that surgery would not help, and that a "coital trigger mechanism" caused the symptoms. Dr. Zimmerman agreed that myofascial injury can become chronic if it is aggravated over time, and that welding, which requires turning and twisting of the neck while wearing a helmet, could cause such aggravation. Dr. Zimmerman testified that he could give no opinion whether the accident caused Behnke's symptoms, but would defer to the opinion of his treating doctor, Dr. Graham.

Dr. Susan Anderson, a neurologist, examined Behnke on April 22, 2002. Behnke reported having headaches that increased with activity, and rated them ten out of ten for severity. Dr. Anderson testified that Behnke had taken the prescription medications Relafen, Arthrotec, Vioxx, Vicodin, Ultracet, and Darvocet as well as the over-the-counter medications Aleve, Advil Migraine, and Tylenol. Of these, Behnke told Anderson that the Aleve worked best. Dr. Anderson performed several tests, including an MRI, and found a partial congenital fusion, degenerative disc disease, and "significant central canal stenosis [narrowing] without any obvious cord compression."

Dr. Anderson concluded that significant stenosis and degenerative disc disease were the likely cause of the majority of his headaches. Dr. Anderson testified that Behnke's congenital fusion and degenerative disc disease could cause symptoms including occipital neuralgia³ as the result of trauma, such as rapid extension or flexion of the head and neck. Although Dr. Anderson indicated that this could be caused by a rear-end impact and that his complaints were consistent with that scenario, she could not say with certainty that the accident caused his symptoms because she had not seen him until four years after the accident. Dr. Anderson explained that her tests were intended only to rule out autoimmune disease problems, tumors, vascular abnormalities such as aneurysms, and conditions that could be fixed surgically. Dr. Anderson noted that Behnke had a combination of occipital neuralgia, including "migrainous and chronic daily headache" and orgasm-related headaches.

Dr. Anderson testified that she would not recommend that Behnke pursue his career as a welder because of the "combination of the constant flexion position of the head" and "the head gear that they need to wear." Anderson stated that the "extreme exacerbation of his head pain while working" was "consistent with the degenerative disc disease and stenosis," and that welding "would most assuredly exacerbate the problem." Dr. Anderson treated Behnke with occipital nerve block injections and recommended reducing his caffeine intake.

³ Occipital neuralgia is pain that originates in the occipital nerve. See Schmidt, *Attorney's Dictionary of Medicine* (1962).

After Behnke and his wife gave deposition testimony regarding Behnke's headaches and their effect on his life, Auto-Owners moved for summary disposition, arguing that Behnke's injuries did not constitute a serious impairment of an important body function, which is required to pursue a claim of non-economic loss arising from a motor vehicle accident. After a motion hearing at which both Behnke and his wife testified, the trial court denied the motion. In so doing, the trial court expressed skepticism that a jury would find that Behnke suffered a serious impairment of a body function, but concluded that the couple's testimony regarding the effects of the injury on their sexual activity alone was enough to preclude summary disposition.

At the bench trial, Behnke testified that he had been a professional welder for twenty-five years and was very good at his job. Behnke stated that welding is very physical job that requires lifting heavy steel as well as extensive head and neck movements while wearing a heavy welding helmet for hours at a time. Behnke explained that he continued working as a welder after the accident because it was his job, he had obligations, and he enjoyed it, so he tried to "tough it out."

Behnke described himself as an "outdoorsman" who liked gardening, sports, hunting, snowmobiling, and scuba diving. Before the accident, Behnke would spend twice a week at his mother's motel doing landscaping and outdoor maintenance, including tree planting, driveway resurfacing, and snowplowing. Behnke would also take his wife dancing, hiking, and sightseeing, help her with housework, and have sexual intercourse at least five times a week. Behnke testified that he was unaware of his congenital spinal defects until the X-rays taken after the accident, and that he had not previously had any symptoms such as neck pain or headaches.

Behnke testified that after the accident, his neck swelling eventually subsided with the exception of a knot that swells the more he uses his neck. Behnke also experienced headaches that increased the more active he was. As Behnke described it:

As this swelling occurs it causes a headache in the back of my neck that goes from the back of my neck all the way forward into my head and gets excruciating. It's made me sick to my stomach. It keeps me from doing anything whatsoever. I don't want to see, hear any noise. I don't want to see any light. I . . . don't want anybody touching me. All I want to do is go somewhere dark, cold and quiet and not move.

These headaches last from 4 to 6 hours. Behnke testified that if he caught the headaches early, painkillers sometimes relieved his pain. However, Behnke stated that of the various prescription medications he had tried, including Motrin, Tylenol 3 with codeine, Relafen, Zanaflex, Indomethacin, Vioxx, Flexeril, Keflex, and Arthrotec, none had been very effective, although the Flexeril occasionally allowed him to fall asleep. Moreover, while these medications initially provided some relief, Behnke testified that he had become immune to their effects. Behnke received some traction therapy, but it made the pain worse. Behnke also received nerve-blocking injections from Dr. Anderson on three occasions, but found that the relief was "very short term." On Dr. Anderson's advice, he reduced his caffeine intake, but his headaches did not stop.

After Behnke was laid off from his welding job, his headaches worsened. Behnke took a seasonal job overseeing and assisting a snow removal crew, and although his tasks required painful neck movement, he was allowed to take breaks. When that job ended, Behnke went to work as a sawyer for a truss-building company, where he worked full time guiding lumber into a

large sawing machine. Behnke explained that he does not have to lift the lumber; he only has to move it while a balancing apparatus supports its weight. Behnke testified that although it requires less neck movement than welding did, the work occasionally caused headaches in the afternoon that were sufficiently severe that he would have to stop working until his medication took effect, which usually took about a half hour.

Behnke testified that his headaches have become more severe, and he sometimes has them daily. Behnke testified that during these headaches he cannot drive, weld, garden, or engage in any normal activity. Behnke described experiencing popping and grinding in his neck as well as spasms that cause a temporary paralysis and feel like an electric shock, and stated that he still has a limited range of neck motion.

Behnke testified that the current status of his neck and headaches made him physically unable to work as a welder, and that his doctor advised him not to return to work as a welder if he was recalled. Although Behnke was taking only an over-the-counter medication, he exceeded the recommended dose of two pills a day by taking six to eight pills. Behnke testified that his injuries had been “devastating” to his marriage because his headaches increased during sexual intercourse, and he estimated that at least a third of the time he would have to stop “in the middle of making love.”

Behnke indicated that he told Dr. Graham he had been having headaches well before the first instance of headache complaint appeared in the doctor’s records. With regard to the portion of his medical history that showed a history of migraine headaches, Behnke explained that he told Dr. Zimmerman that he had migraine headaches because migraines are the most serious type of headache and his headaches were “excruciating,” and he felt it was the best way to describe them.

Angela Behnke also testified at trial. She and Behnke were married in 1999, but had lived together since 1995. She confirmed that Behnke was “energetic” and “constantly on the move” before the accident, and that you “couldn’t get him to stay indoors.” Angela Behnke testified that he was very proud of his accomplishments as a welder, and had taken her on a tour of the city to show her welding projects he had done.

On the night of the accident, Angela Behnke saw swelling on Behnke’s neck and told him to go to the emergency room, but it was Memorial Day weekend, so Behnke decided to wait. She testified that the swelling around the knot eventually subsided, but that Behnke’s headaches got progressively more frequent and intense, causing him to avoid light, movement, and touch. She told the trial court that Behnke has had to stop doing many of the activities he enjoyed because they caused him too much pain. Further, she indicated that Behnke used to be “fun-loving” but has become depressed, frustrated, and ornery. She testified that she believed that the injuries from the accident caused his personality changes.

After taking testimony from Behnke and his wife and reading the depositions of Drs. Graham, Zimmerman, and Anderson, the trial court made the following findings:

[A]lthough plaintiff suffers from headaches and neck pain, the medical evidence is inconclusive as to the cause. However, no further treatment is necessary from a neurological standpoint.

As a result of the accident plaintiff was never hospitalized nor underwent surgery. He was off work for eight weeks, but has since worked full time both as a welder and a sawyer. He went to physical therapy on one occasion and did not return. No doctor has placed plaintiff on medical or work restrictions. Further, the headaches and neck pain do not limit range of motion other than such motion normally associated with headaches and occasional neck pain. Currently, plaintiff takes non prescription medication for his headaches.

Under these circumstances, the Court concludes that plaintiff's myofacial [sic] strain does not constitute a serious impairment of an important body function.

But even assuming the plaintiff has suffered an objectively manifested injury that impaired an important body function, the injury does [sic: not] affect plaintiff's ability to lead his normal life.

The evidence established that plaintiff has continuing intermittent neck pain and headaches. However, his ability to work has not been medically restricted, even though the pain sometimes causes him to take additional breaks. Plaintiff has no physician-imposed restrictions on his daily activities and plaintiff is still able to work, drive, socialize, travel, take care of himself and otherwise engage in the normal activities of life. Plaintiff also testified that while engaging in sexual relations with his wife, he occasionally experiences severe spasms. But, plaintiff also testified he has a very good intimate relationship with his wife despite these recurring spasms. Although these minor lifestyle changes are undoubtedly frustrating, they do not affect plaintiff's ability to lead his normal life.

No evidence has demonstrated that plaintiff suffered an objectively manifested injury of an important body function as a result of the accident. His general ability to lead his normal life was not significantly altered by this injury.

Accordingly, the trial court entered a judgment of no cause of action.

III. Applying The Correct Legal Standard

A. Standard Of Review

Whether the trial court correctly applied the legal standard contained in MCL 500.3135 presents a question of statutory interpretation that we review de novo.⁴

⁴ *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

B. MCL 500.3135(7)

Under MCL 500.3135(1), “[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” The Legislature has defined “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”⁵ This definition “contains the following components: an objectively manifested impairment, of an important body function, and that affects the person’s general ability to lead his or her normal life.”⁶ The Supreme Court has clarified that while “a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one’s *general* ability to lead his normal life.”⁷

Behnke argues that the trial court erred in evaluating whether the impairment he suffered was “serious” rather than whether it affected his general ability to lead his normal life. After correctly stating the three components of the statutory definition, the trial court did state the test for “determining whether the impairment of the important body function is ‘serious,’” which, as Behnke correctly points out, is not the correct analysis to determine whether the statutory threshold has been met. However, a review of the trial court’s analysis makes clear that it did not base its determination on a finding that Behnke’s impairment did not have a serious effect on his life.

The trial court began its analysis by stating that it did not believe that the injury “affect[ed] plaintiff’s ability to lead his normal life,” as MCL 500.3135(7) requires. After making its findings of fact with respect to the impact of the injury on Behnke’s life, the trial court acknowledged that Behnke suffered “minor lifestyle changes” that were “undoubtedly frustrating,” but concluded that “they do not affect plaintiff’s ability to lead his normal life,” and that his “general ability to lead his normal life was not significantly altered by this injury.” The trial court referred to the correct test at the beginning and conclusion of its analysis, and did not make reference to whether the effect of Behnke’s impairment was “serious” anywhere in that analysis. Accordingly, we conclude that the trial court applied the correct legal analysis to determine whether Behnke suffered a serious impairment of a body function.

IV. Meeting The Tort Threshold

A. Standard Of Review

The standard of review for determining whether the tort threshold has been met is set forth by statute:

⁵ MCL 500.3135(7).

⁶ *Kreiner v Fischer (After Remand)*, ___ Mich ___; ___ NW2d ___ (2004), slip op at 11-12.

⁷ *Kreiner v Fischer*, 468 Mich 884, 885; 661 NW2d 234 (2003).

The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.^[8]

We review de novo questions of law.

B. Serious Impairment Of Body Function

As noted, the statutory definition of "serious impairment of body function" consists of three components. We address each in turn.

1. Objectively Manifested Impairment

For an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis.⁹ The trial court did not make a separate finding with respect to this element. Instead, the trial court stated that an MRI had "revealed congenital defects and degenerative changes not associated with the accident"; noted that most of Behnke's visits to Dr. Graham were for complaints of neck pain, which Dr. Graham attributed to arthritis; and observed that Behnke had returned to work without restrictions and relied on over-the-counter pain medications for his headaches. The trial court concluded that under those circumstances, Behnke's "myofascial strain does not constitute a serious impairment of an important body function."

The trial court went on to say that "even assuming the plaintiff has suffered an objectively manifested injury that impaired an important body function, the injury does [sic: not] affect plaintiff's ability to lead his normal life." We infer from this statement that the trial court concluded that the injury was not objectively manifested, did not affect an important body function, or both; however, because the elements were not specifically addressed, we cannot determine which of these conclusions it reached.

Our review of the record indicates that Behnke met his burden to show an objectively manifested injury. This Court has held that muscle spasms or contractions are objective

⁸ MCL 500.3135(2); *Kern v Blethen-Coluni*, 240 Mich App 333, 341-342; 612 NW2d 838 (2000).

⁹ *Jackson v Nelson*, 252 Mich App 643, 652-653; 654 NW2d 604 (2002).

manifestations of injury.¹⁰ Dr. Graham testified that he could feel Behnke's muscle spasms during his September, 2000 examination.

Auto Owners argues that there was no evidence of muscle spasms until that examination, which took place after Behnke had been in a second car accident. Even assuming that the muscle spasms were caused by the second accident and not the first, however, there were other objective manifestations of injury that occurred immediately after the first accident and before the second accident. First, Dr. Graham testified that on June 2, 1998, he determined that Behnke had a limited range of neck motion by attempting to manually move Behnke's head. A plaintiff's limited range of motion may be an objectively manifested injury if a doctor diagnosed it using a passive range of motion test.¹¹ "Passive movement" is defined as "the movement of a limb, or any part of the body, accomplished with the aid of another person (or a mechanical device), rather than by the use of the person's own muscles."¹² Because Dr. Graham diagnosed Behnke's limited range of motion by a passive test, it can properly be considered an objective manifestation of his injury.

Second, Dr. Graham characterized Behnke's symptoms as objective manifestations of injury because he could feel swelling in Behnke's neck at the June 2, 1998 examination. Although Auto Owners asserts that a single instance of neck swelling is insufficient to constitute an objective manifestation, it cites no legal authority for this proposition.

Third, aggravation of the objectively manifested congenital defects in Behnke's spine suffice to fulfill this element. The Michigan Supreme Court has held that a plaintiff may recover noneconomic damages under MCL 500.3135 if the trauma caused by the accident triggered symptoms from a preexisting condition. In *Wilkinson v Lee*,¹³ the plaintiff was diagnosed with neck strain after his vehicle was rear-ended.¹⁴ Although he initially missed only two days of work, over the following year and a half, he began to experience symptoms including neck pain, severe headaches, nausea, and loss of consciousness.¹⁵ The plaintiff was eventually diagnosed with a brain tumor. According to medical experts, the accident neither caused nor accelerated the growth of the tumor, but the trauma from the accident could have "precipitated or accelerated the symptoms of the tumor."¹⁶

¹⁰ See *Harris v Lemicex*, 152 Mich App 149, 393 NW2d 559 (1986); *Franz v Woods*, 145 Mich App 169; 377 NW2d 373 (1985), overruled on other grounds, *DiFranco v Pickard*, 427 Mich 32, 398 NW2d 896 (1986).

¹¹ *Shaw v Martin*, 155 Mich App 89, 96-97; 399 NW2d 450 (1986); *Salim v Shepler*, 142 Mich App 145; 369 NW2d 282 (1985).

¹² Schmidt, *Attorney's Dictionary of Medicine* (1962).

¹³ *Wilkinson v Lee*, 463 Mich 388; 617 NW2d 305 (2000).

¹⁴ *Id.* at 389.

¹⁵ *Id.* at 390.

¹⁶ *Id.*

The jury returned a verdict in the plaintiff's favor, but a divided panel of this Court reversed, holding that there was no evidence of causation because the defendants could not reasonably have foreseen that their conduct would trigger symptoms from the plaintiff's as yet undiagnosed brain tumor.¹⁷ On appeal, the Supreme Court agreed with the panel's dissenting judge that a tortfeasor must take the plaintiff as he is, even if a preexisting condition makes him unusually susceptible to injury.¹⁸ Accordingly, the Supreme Court held that the plaintiff could recover.¹⁹

In this case, Dr. Graham's deposition testimony indicated that he believed the accident caused the straightening of Behnke's lordotic curve, and he also testified that a whiplash-type motion could have caused Behnke's asymptomatic congenital cervical conditions to become symptomatic. Dr. Graham diagnosed Behnke's condition as tension headaches resulting from a muscular tension that put pressure on his occipital nerve, and Dr. Graham testified that the condition was caused by the straightening of Behnke's spine.

Dr. Anderson agreed that Behnke's congenital fusion and degenerative disc disease could cause symptoms including occipital neuralgia as the result of trauma, such as rapid extension or flexion of the head and neck. Although Dr. Anderson indicated that this could be caused by a rear-end impact and that his complaints were consistent with that scenario, she could not say with certainty that his symptoms were caused by the accident because she had not seen him until four years after the accident. In any case, *Wilkinson* establishes that, contrary to Auto Owners' argument, Behnke may recover for injuries that were caused by aggravation of a preexisting condition.

We are aware that various panels of this Court have reached different conclusions with respect to whether a straightening of the spine's normal curvature or "lordosis" is objectively manifested. In *Guerrero v Schoolmeester*,²⁰ this Court held that a doctor's testimony that loss of lordosis was present was insufficient absent an objective manifestation of the cause of that loss. However, in three other cases, this Court held that X-ray results showing loss of cervical lordosis constituted an objective manifestation of injury.²¹ Moreover, testimony indicated that Behnke's lordosis was caused, at least in part, by Behnke's congenital cervical blockage, and Auto Owners adopted this position on appeal. Auto Owners does not dispute that Behnke's congenital cervical blockage was objectively manifested. Accordingly, either Behnke's loss of lordosis or its underlying cause was objectively manifested.

In sum, because Behnke's injuries, or their underlying causes, were objectively manifested by a palpable swelling, a passive range of motion test, and X-rays of congenital

¹⁷ *Id.* at 392.

¹⁸ *Id.* at 393-395.

¹⁹ *Id.* at 395.

²⁰ *Guerrero v Schoolmeester*, 135 Mich App 742, 748-750; 356 NW2d 251 (1984).

²¹ See *Sherrell v Bugaski*, 140 Mich App 708; 364 NW2d 684 (1984); *Chumley v Chrysler Corp*, 156 Mich App 474, 481; 401 NW2d 879 (1986); and *Shaw, supra* at 97.

cervical defects that were aggravated by the accident, we conclude that the trial court erred in finding that this element was not met.

2. Important Body Function

“An important body function is a function of the body that affects the person’s general ability to live a normal life.”²² Auto-Owners concedes that, had Behnke’s injuries been objectively manifested, they would have affected an important body function. Accordingly, this element is not in dispute.

3. Effect On General Ability To Lead One’s Normal Life

Behnke argues that the trial court erred in determining that his injuries did not affect his general ability to lead his normal life. In the combined cases of *Kreiner v Fischer (After Remand)* and *Straub v Collette (After Remand)*,²³ the Michigan Supreme Court issued a ruling that extensively addresses this element. In so doing, the Court held that determination whether the element is met “requires considering whether the plaintiff is ‘generally able’ to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.”²⁴ Adopting the dictionary definition of “generally” as “for the most part,” the Court concluded that “determining whether a plaintiff is ‘generally able’ to lead his normal life requires considering whether the plaintiff is, ‘for the most part’ able to lead his normal life.”²⁵

Next, the Court determined that “to ‘lead’ one’s normal life contemplates more than a minor interruption in life”; rather, “the objectively manifested impairment of an important body function must affect the course of a person’s life. Accordingly, the effect of the impairment on the course of a plaintiff’s entire normal life must be considered.”²⁶ The Court clarified:

Although some aspects of a plaintiff’s entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff’s normal life has not been affected, then the plaintiff’s “general ability” to lead his normal life has not been affected and he does not meet the “serious impairment of body function” threshold.^[27]

The Court instructed that a reviewing court should begin its inquiry by “identifying how [the plaintiff’s] life has been affected, by how much, and for how long,” taking care to examine

²² *Kern v Blethen-Coluni*, 240 Mich App 333, 340-341; 612 NW2d 838 (2000).

²³ *Kreiner (After Remand)*, *supra* and *Straub v Collette (After Remand)*, ___ Mich ___; ___ NW2d ___ (2004).

²⁴ *Id.*, slip op at 23-24.

²⁵ *Id.*, slip op at 24.

²⁶ *Id.*, slip op at 24-25.

²⁷ *Id.*, slip op at 25.

specific activities “with an understanding that not all activities have the same significance in a person’s overall life” and bearing in mind that “minor changes in how a person performs a specific activity may not change the fact that the person may still ‘generally’ be able to perform that activity.”²⁸ This will entail “a multifaceted inquiry, comparing the plaintiff’s life before and after the accident as well as the significance of any affected aspects on the course of plaintiff’s overall life.”²⁹ The reviewing court must then conduct “an objective analysis regarding whether any difference between plaintiff’s pre- and post- accident lifestyle has actually affected the plaintiff’s ‘general ability’ to conduct the course of his life.”³⁰ The Court cautioned that “[m]erely ‘any effect’ on the plaintiff’s life is insufficient because a *de minimus* [sic] effect would not, as objectively viewed, affect the plaintiff’s ‘general ability’ to lead his life.”³¹

The Court offered the following nonexhaustive list of objective factors to assist in evaluating whether the plaintiff’s “general ability” to conduct the course of his normal life has been affected: “(a) the nature and extent of the impairment, (b) the type and length of treatment required (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery.”³² The Court explained that this list of factors “is not meant to be exclusive[,] nor are any of the individual factors meant to be dispositive by themselves.”³³ Rather, a reviewing court must determine whether, considering “the totality of the circumstances,” the impairment “affects the person’s general ability to conduct the course of his or her normal life.”³⁴

We begin our analysis, then, by determining the extent to which these five factors are present in this case.

(a) Nature And Extent Of The Impairment

Behnke’s impairments consisted of tissue, muscle, and vertebral damage that caused him to suffer neck pain and intense headaches that were exacerbated by physical activity. While we recognize that these impairments did not render it *impossible* for Behnke to engage in most of his usual physical activities in the same way that, for example, the amputation of a limb or severe brain damage might have, the impairments did render it extremely painful to do so. In other words, while Behnke was not physically foreclosed from doing some activities, he was effectively foreclosed from doing many activities because they aggravated his injuries and caused intense pain.

²⁸ *Id.*, slip op at 25-26.

²⁹ *Id.*, slip op at 27.

³⁰ *Id.*, slip op at 27-28.

³¹ *Id.*, slip op at 27-28.

³² *Id.*, slip op at 28 (footnotes omitted).

³³ *Id.*, slip op at 28-29.

³⁴ *Id.*, slip op at 29.

(b) Type And Length Of Treatment Required

The medical testimony indicated that surgery would not remedy Behnke's injuries. Although Dr. Graham prescribed physical therapy, he explained that it was not a cure, and that at best it would provide some temporary relief. Dr. Graham concluded that the only available treatment for Behnke was chronic pain relief.

(c) Duration Of The Impairment

Dr. Graham ordered Behnke to stop working on June 3, 1998, then returned him to work on July 27, 1998 with no restrictions. After Behnke reported experiencing more headaches and neck pain on October 21, 1998, Dr. Graham recommended that Behnke perform only light-duty work. Trial testimony indicated that Behnke's impairment had worsened, not improved, over the course of time, and would likely continue indefinitely.

(d) Extent Of Residual Impairment

Testimony indicated that Behnke's residual impairments would continue to limit his activities. Dr. Graham testified that Behnke's injury physically limited his career choices, and specifically stated that it would be "less aggravating" to Behnke's injuries if he would discontinue working as a welder. Dr. Zimmerman likewise indicated that welding could aggravate Behnke's condition and cause it to become chronic. Finally, Dr. Anderson testified that she would not recommend that Behnke pursue his career as a welder because the "combination of the constant flexion position of the head" and "the head gear that they need to wear" "would most assuredly exacerbate the problem." Apart from vocational limitations, Behnke testified that he was unable to pursue his usual recreational activities, help maintain his mother's motel, or engage in sexual intercourse without incurring painful headaches a significant amount of the time.

In a footnote, the Supreme Court indicated that "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point," that is, the extent of residual impairment. Indeed, Auto Owners argues that Behnke has no physician-imposed restrictions and is able to work full time. In our view, however, this point is not dispositive. First, although Behnke's doctors did not forbid him to return to his welding job, they did advise him against it. Second, if the salient question under the statute is whether Behnke's injury affected his ability to lead his normal life, it makes little difference whether a doctor had forbidden him to return to welding or whether he was simply unable to do so because of debilitating headaches. In sum, while we are cognizant of the requirement that the underlying *injury* be objectively manifested, the statute does not indicate that the *consequences* of the injury must be objectively manifested.

(e) Prognosis For Eventual Recovery

Dr. Graham testified that Behnke's condition was likely permanent, and he expected Behnke to have "increasing arthritis and maintaining a painful neck syndrome probably the remainder of his natural life."

Bearing these factors in mind, we find that Behnke's life changed substantially as a result of his injury. Before the accident, Behnke had been a professional welder for twenty-five years.

Behnke described himself as an “outdoorsman” who liked gardening, sports, hunting, snowmobiling, and scuba diving. Behnke would spend twice a week at his mother’s motel doing landscaping and outdoor maintenance, including tree planting, driveway resurfacing, and snowplowing. Behnke would also take his wife dancing, hiking, and sightseeing, help her with housework, and have sexual intercourse at least five times a week.

After the accident, Behnke explained that physical activity caused him such excruciating headaches that they keep him “from doing anything whatsoever,” and that when the headaches occur, he is extremely sensitive to light, sound, and touch, and only wants to “go somewhere dark, cold and quiet and not move.” Behnke testified that he would be unable to work as a welder in his present condition, and his doctors all agreed that working as a welder was inadvisable. According to his wife, Behnke had been “energetic,” “fun-loving,” and “constantly on the move” before the accident, but after the accident, he had to stop doing many of the activities he enjoyed because they caused him too much pain. As a result, she indicated that Behnke has become depressed, frustrated, and ornery.

In our view, the case at bar is easily distinguishable from *Straub*. In *Straub*, the plaintiff suffered injuries to his non-dominant left hand that required a cast, surgery, and physical therapy.³⁵ The plaintiff was able to resume all his previous activities, including full-time work, within four months of the accident, although he remained unable to straighten his middle finger or to completely close his left hand.³⁶ The plaintiff himself estimated that “he was ninety-nine percent back to normal by mid-January 2000.”³⁷ The Supreme Court found that the plaintiff’s general ability to live his normal life was not affected because his “injury was not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive.”³⁸ In the case at bar, by contrast, Behnke is not expected to recover from the effects of his injury, and the effects of that injury will limit his ability to engage in activities that require movement of the head and neck.

Whether the case at bar is distinguishable from *Kreiner* is a much closer question. In *Kreiner*,³⁹ the plaintiff, who had been a carpenter for twelve years, suffered pain in his lower back, right hip, and right leg after a car accident.⁴⁰ The pain was not eased by physical therapy, nerve block injections, or pain medication.⁴¹ The plaintiff’s doctor advised him to avoid lifting anything over fifteen pounds and to avoid unnecessary bending and twisting.⁴² Although the plaintiff continued to work as a carpenter, some of the tasks he performed were painful, which

³⁵ *Straub v Collette*, 254 Mich App 454, 455; 657 NW2d 178 (2002).

³⁶ *Id.*

³⁷ *Straub (After Remand)*, *supra*, slip op at 31.

³⁸ *Id.*, slip op at 32.

³⁹ *Kreiner*, *supra*, 251 Mich App 513.

⁴⁰ *Id.* at 517.

⁴¹ *Id.*

⁴² *Id.*

limited the amount of time he could work to six hours a day. The plaintiff could no longer do roofing work, could only do ladder work for twenty minutes at a time, could not lift more than eighty pounds, could not walk more than one-half mile, and could no longer participate in certain types of recreational hunting.⁴³

The Supreme Court ruled that the plaintiff's life after the accident

was not significantly different than it was before the accident. He continued working as a self-employed carpenter and construction worker and was still able to perform all the work that he did before, with the possible exception of roofing work. His injuries did not cause him to miss one day of work.

The Court also noted that although the plaintiff could no longer hunt rabbits, he could still hunt deer.

Here, by contrast, Behnke was required to miss several weeks of work because of his injuries. Although Behnke could eventually return to full-time work, unlike the plaintiff in *Kreiner*, he could not do so in the capacity in which he had worked before the accident. Both Behnke and his wife testified that Behnke enjoyed working as a welder and took great pride in his welding skills. All three of the testifying physicians indicated that Behnke should not return to welding in light of his injuries. Although Behnke is currently working full time, his job duties are limited to feeding lumber into a cutting machine.

Most importantly, in light of the testimony of both Behnke and his wife, we are unable to conclude that Behnke's life, unlike that of the plaintiff in *Kreiner*, is "not significantly different than it was before the accident." That testimony indicated that whereas Behnke had been a successful welder, active outdoorsman, and an "energetic," "fun-loving" husband, he is now unable to work as a welder or maintain his active lifestyle, which has caused him to become a frustrated and depressed person. Moreover, Behnke testified that his injuries had been "devastating" to his marriage because his headaches increased during sexual intercourse, and he estimated that at least a third of the time he would have to stop "in the middle of making love." We are convinced that these changes have altered the course of his life, causing him to change from a generally active person who excelled at a skilled job to being a generally inactive person with an unskilled job. Considering the totality of the circumstances in this case, we hold that the trial court erred in concluding that Behnke did not suffer a serious impairment of an important body function.

Reversed.

/s/ William C. Whitbeck
/s/ Stephen L. Borrello

⁴³ *Id.* at 518-519.

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE BEHNKE,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE CO.,

Defendant-Appellee,

and

ESTATE OF KAREN MCLEAN,

Defendant.

UNPUBLISHED

September 16, 2004

No. 248107

Chippewa Circuit Court

LC No. 01-005523-NI

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

GRIFFIN, J. (*dissenting*).

This case involves a routine and highly ordinary cervical soft tissue strain, commonly known as a whiplash injury. The majority holds that, as a matter of law, plaintiff's alleged whiplash constitutes a *serious* impairment of body function under our Michigan no-fault automobile tort threshold. MCL 500.3135(1). I respectfully disagree and, therefore, dissent.

I. Findings of Fact

Following a non-jury trial, the Honorable Nicholas J. Lambros rendered findings of fact and conclusions of law. The majority appears to review both de novo, although "findings of fact by the trial court may not be set aside [on appeal] unless clearly erroneous." MCR 2.613(3).

The trial judge rendered the following findings of fact, which in my view are not clearly erroneous and are critical in determining whether plaintiff's alleged injury constitutes a serious impairment of body function:

Plaintiff, Bruce Behnke, was 44 years old at the time of the May 1998 accident and was employed full time as a welder at Olofsson Company earning approximately \$10.81 per hour. Plaintiff missed eight weeks of work after the accident and subsequently he left Olofsson Company in June, 2000, for reasons unrelated to the May 1998 accident. In January, 2001, plaintiff was employed by

Burton's Excavating doing snow removal which included shoveling snow from roofs, and earned \$10.00 per hour. In May, 2001, plaintiff was employed by Wendrick's Truss Company where he continues to work as a sawyer cutting and stocking lumber used to build trusses. He works 40 hours a week and earns \$9.75 per hour.

The accident on May 29, 1998, occurred when plaintiff's vehicle, a half-ton four-wheel drive full size Dodge Ram Pickup was struck from behind by a vehicle driven by Karen McLean, while plaintiff's vehicle was stopped at an intersection. Plaintiff was thrown about awkwardly in the vehicle causing shock to the right side of his neck. He refused medical treatment at the scene. The impact of the collision caused \$400.00 worth of damage to plaintiff's bumper. The following day, plaintiff presented himself to the emergency room at War Memorial Hospital complaining of stiffness, soreness, and swelling on the right side of his neck and headaches. He was diagnosed with acute cervical strain, prescribed Motrin and discharged.

Subsequently, plaintiff was experiencing the same symptoms, so he went to his family doctor, Dr. Robert Graham, D.O. on June 2, 1998. Dr. Graham performed a physical examination and ordered an MRI examination. The MRI revealed congenital defects and degenerative changes not associated with the accident.

Plaintiff returned to Dr. Graham for further consultations four more times in 1998, five times in 1999, twice in 2000, and twice in 2001. During plaintiff's last visit in 1998, Dr. Graham returned plaintiff to work without restrictions. Three of plaintiff's visits in 1999 were unrelated to the accident and on the fourth visit, plaintiff complained of neck pain. On the two visits in 2000, plaintiff complained of cervical spasm and pain while engaging in sexual relations. Dr. Graham concluded the symptoms were due to arthritis of the spine.

On July 8, 1998, plaintiff was examined by Dr. J. Eric Zimmerman, M.D., a neurosurgeon, at the request of Dr. Graham. Dr. Zimmerman concluded that plaintiff had facet degenerative changes but did not show any spinal cord or root compression. Plaintiff's neurological exam was normal, his strength and reflexes were normal, and there was nothing to suggest radiculopathy or myelopathy. It was Dr. Zimmerman's opinion that plaintiff suffered myofascial strain. Plaintiff visited Dr. Zimmerman once again on November 21, 2001, complaining of severe myospasm which occurred during sexual relations. Once again, plaintiff's neurological exam was normal. He had degenerative changes to his spine which were not associated with plaintiff's May, 1998 accident. All testing was negative and plaintiff's strength was normal. Dr. Zimmerman again opined myofascial strain and referred plaintiff to a neurologist.

Plaintiff was examined by a neurologist, Dr. Susan Anderson, M.D. on two occasions in 2002. She ordered an MRI which revealed degenerative disc disease and central canal stenosis. Dr. Anderson opined that plaintiff's headaches

were caused by these conditions and prescribed Indomethacin which, for the most part, resolved plaintiff's pain at that time.

In this case, *although plaintiff suffers from headaches and neck pain, the medical evidence is inconclusive as to the cause.* However, no further treatment is necessary from a neurological standpoint.

As a result of the accident plaintiff was never hospitalized nor underwent surgery. He was off work for eight weeks, but has since worked full time both as a welder and a sawyer. He went to physical therapy on one occasion and did not return. No doctor has placed plaintiff on medical or work restrictions. Further, the headaches and neck pain do not limit range of motion other than such motion normally associated with headaches and occasional neck pain. Currently, plaintiff takes non-prescription medication for his headaches.

* * *

The evidence established that plaintiff has continuing intermittent neck pain and headaches. However, his ability to work has not been medically restricted, even though the pain sometimes causes him to take additional breaks. Plaintiff has no physician-imposed restrictions on his daily activities and plaintiff is still able to work, drive, socialize, travel, take care of himself and otherwise engage in the normal activities of life. Plaintiff testified that when the headaches and neck pain occur, he is less active and limits his usual activities. At that point, he self-medicates with over the counter pain medications. Plaintiff also testified that while engaging in sexual relations with his wife, he occasionally experiences severe spasms. But, plaintiff also testified he has a very good intimate relationship with his wife despite these recurring spasms. *Although these minor lifestyle changes are undoubtedly frustrating, they do not affect plaintiff's ability to lead his normal life.*¹ [Emphasis added.]

II. No-Fault Tort Threshold

Michigan's no-fault automobile tort threshold, MCL 500.3135(1), provides:

A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

In *Cassidy v McGovern*, 415 Mich 483, 503; 330 NW2d 22 (1982), the Supreme Court stated:

¹ This finding is a mixed finding of fact and conclusion of law.

In determining the seriousness of the injury required for a “serious impairment of body function,” this threshold should be considered in conjunction with the other threshold requirements for a tort action for noneconomic loss, namely, death and permanent serious disfigurement. MCL 500.3135; MSA 24.13135. *The Legislature clearly did not intend to erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant obstacle.* [Emphasis added.]

In regard to the tort threshold and the intent of the Legislature, we have stated: “One of the obvious goals of a scheme of no-fault automobile reparations is to keep minor personal injury cases out of court.” *McKendrick v Petrucci*, 71 Mich App 200, 211; 247 NW2d 349 (1976). Furthermore, in 1995, the Michigan Legislature amended § 3135 of the no-fault act in a number of important respects. *Kern v Blethen-Coluni*, 240 Mich App 333; 612 NW2d 838 (2000). Critical to the present appeal is the term “serious impairment of body function” that is now specifically defined as follows:

As used in this section, “serious impairment of body function” means an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life. [MCL 500.3135(7).]

Recently, in *Kreiner v Fischer*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 124120, 124757, issued July 23, 2004), slip op, p 12 n 8, our Supreme Court noted: “. . . [T]he most uncomplicated reading of the 1995 amendment [to § 3135 of the no-fault act (1995 PA 222)] is that the Legislature largely rejected *DiFranco* [*v Pickard*, 427 Mich 32; 398 NW2d 896 (1986)] in favor of *Cassidy*.” [Citations omitted.]

Under the new statutory definition of “serious impairment of body function,” three criteria must be met for an injury to exceed the threshold: (1) an *objectively* manifested impairment of (2) an *important* body function that (3) affects the person’s *general ability* to lead his or her normal life. The first and second criterion precisely follow the *Cassidy v McGovern* standard. However, the final criterion is a modification of the former *Cassidy* purely objective test, which focused on “the person’s general ability to live *a normal life*.” *Cassidy, supra* at 505 (emphasis added). The modified test is now both objective and subjective in that it tests whether the person’s “general ability” to live *his normal life* has been affected by the objectively manifested impairment of an important body function. *Kreiner, supra*.

III. General Ability to Lead His Normal Life

Regarding the third prong, the *Kreiner* Court offered the following guidance:

Determining whether the impairment affects a plaintiff’s “general ability” to lead his normal life requires considering whether the plaintiff is “generally able” to lead his normal life. *If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.* [*Kreiner, supra*, slip op, p 24; emphasis added.]

In the present case, the trial judge found that plaintiff was “generally able” to lead his normal life, despite occasional headaches and neck pain. In particular, the court made the following findings of fact:

As a result of the accident plaintiff was never hospitalized nor underwent surgery. He was off work for eight weeks, but has since worked full time both as a welder and a sawyer. He went to physical therapy on one occasion and did not return. No doctor has placed plaintiff on medical or work restrictions. Further, the headaches and neck pain do not limit range of motion other than such motion normally associated with headaches and occasional neck pain. Currently, plaintiff takes non-prescription medication for his headaches.

* * *

The evidence established that plaintiff has continuing intermittent neck pain and headaches. However, his ability to work has not been medically restricted, even though the pain sometimes causes him to take additional breaks. Plaintiff has no physician-imposed restrictions on his daily activities and plaintiff is still able to work, drive, socialize, travel, take care of himself and otherwise engage in the normal activities of life. Plaintiff testified that when the headaches and neck pain occur, he is less active and limits his usual activities. At that point, he self-medicates with over the counter pain medications. Plaintiff also testified that while engaging in sexual relations with his wife, he occasionally experiences severe spasms. But, plaintiff also testified he has a very good intimate relationship with his wife despite these recurring spasms. *Although these minor lifestyle changes are undoubtedly frustrating, they do not affect plaintiff’s ability to lead his normal life.* [Emphasis added.]

Based on the evidence presented, these findings of fact are not clearly erroneous. MCR 2.613(C). Further, after applying *Kreiner* to these facts, I would hold that the lower court did not err in concluding that plaintiff is generally able to lead his normal life.²

IV. Proximate Cause

Also, regarding plaintiff’s failure to sustain his burden of proving proximate cause, the trial court found: “. . . [a]lthough plaintiff suffers from headaches and neck pain, the medical evidence is inconclusive as to the cause.” Again, because this finding of fact by the trier of fact was not clearly erroneous, it must be affirmed. MCR 2.613(C). Proximate causation is normally an issue for the trier of fact. *Derbeck v Ward*, 178 Mich App 38, 44; 443 NW2d 812 (1989). Here, after seeing and hearing the witnesses, the trial judge ruled that plaintiff failed to sustain

² “Absent an outcome-determinative genuine factual dispute, the issue of threshold injury is now a question of law for the court. MCL 500.3135.” *Kern, supra* at 341. Here, the trial court’s finding of fact is reviewed for clear error, MCR 2.613(C), while its ultimate legal conclusion is reviewed de novo. *Id.* at 344 n 3.

his burden of persuasion as to proximate cause. Such a finding of fact should not be lightly discarded, particularly when plaintiff's alleged injuries are based on subjective complaints.

V. Objectively Manifested Impairment

Finally, because the first and second prongs of the statutory definition reiterate the *Cassidy* standards, *Cassidy* and its progeny are instructive in deciding whether an injury is objectively manifested and whether it impairs an important body function. *Kern, supra* at 340. In the present case, plaintiff seeks recovery of noneconomic damages for his alleged headaches and neck pain. In my view, the alleged injuries are not objectively manifested and, therefore, not compensable under § 3135 of the no-fault act.

As noted by the trial court judge, on July 8, 1998 (approximately five weeks post-accident), plaintiff was examined by a neurologist, Dr. J. Eric Zimmerman, M.D. Significantly, "plaintiff's neurological exam was normal, his strength and reflexes were normal, and there was nothing to suggest radiculopathy or myelopathy." At no time since the accident has any objective evidence been produced in support of plaintiff's subjective complaints of headaches.

In *Williams v Payne*, 131 Mich App 403, 409-410; 346 NW2d 564 (1984), we held that for an injury to be objectively manifested, it must be subject to medical measurement:

Additionally, Mrs. Williams' soft tissue injuries were not subject to medical measurement. Thus, they are not "objectively manifested" in a scientific or medical context. The symptoms of her injuries, however, have found objective manifestation: pain makes certain activities difficult. The *Cassidy* opinion did not expressly designate which standard of manifestation to employ, objective medical measurements of injury or a patient's complaints of pain substantiated only by the patient's limited activities. We conclude that Mrs. Williams' injuries are not "objectively manifested" within the meaning of *Cassidy*. Medically unsubstantiated pain will always be present in a tort action for pain and suffering. The Legislature could not intend so low a threshold for avoiding the no-fault act's proscription against tort actions. General pain and suffering is not sufficient to meet the threshold. *Cassidy v McGovern*, 415 Mich 505.

* * *

Additionally, the *Cassidy* decision spoke of "objectively manifested injuries," not symptoms.

Here, plaintiff's alleged headaches are not subject to medical measurement and, therefore, are not a compensable "objectively manifested impairment." *Id.* In addition, plaintiff's neck pain is also not an objectively manifested impairment because the alleged injury is not medically documented.

During the *Cassidy* era, the *Williams v Payne* line of authority held that temporary tightening of a muscle through a muscle spasm, tenderness, and temporary limited flexion were manifestations of potential *symptoms*, not objective manifestations of *injury*. The cases that followed *Williams v Payne* include *Flemings v Jenkins*, 138 Mich App 788, 790; 360 NW2d 298

(1984) (“The medical findings of muscle spasm, tenderness and limited flexion do not rise to the level of objective manifestations of injuries which generally support a finding of ‘serious impairment of body function.’”); *Morris v Levine*, 146 Mich App 150, 154; 379 NW2d 402 (1985) (“ . . . even if plaintiff’s injuries were sufficiently serious, the medical findings of tenderness, spasms, and limited range of motion do not rise to the level of objective manifestations of injuries which generally support a finding of serious impairment of body function.”), and *Clark v Auto Club Ins Ass’n*, 150 Mich App 546, 553; 389 NW2d 718 (1986) (“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 50% 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.”).

A second line of authority³ also developed under *Cassidy* that disagreed with the *Williams v Payne* interpretation of *Cassidy* and held that its medical measurement standard proved to be “an almost insurmountable obstacle to the recovery of noneconomic damages in soft tissue cases.” See *Garris v Vanderlaan* (Ravitz, J. dissenting), 146 Mich App 619, 627-628; 381 NW2d 412 (1985). These lower threshold decisions included *Shaw v Martin*, 155 Mich App 89; 399 NW2d 450 (1986); *Harris v Lemicex*, 152 Mich App 149; 393 NW2d 559 (1986); *Franz v Woods*, 145 Mich App 169; 377 NW2d 373 (1995); and *Salim v Shepler*, 142 Mich App 145; 369 NW2d 282 (1995). This second line of authority held that muscle spasms (muscle contractions) and limited range of motion resulting from a passive range of motion test were objective manifestations of a serious impairment of body function.

Four years after rendering *Cassidy v McGovern*, the Supreme Court, in *DiFranco v Pickard, supra*, overruled *Cassidy* and also overruled the *Williams v Payne* “medical measurement” standard. In discarding the requirement that injuries be objectively manifested, the *DiFranco* Court explained:

In Williams v Payne, 131 Mich App 403, 409-410; 346 NW2d 564 (1984), the Court of Appeals distinguished objectively manifested injuries from objectively manifested symptoms. After concluding that plaintiff wife’s soft tissue injuries to her thumb had not seriously impaired any important body function, . . .

Defendants urge us to adopt the Williams Court’s interpretation of Cassidy. They believe that an injury which cannot be directly demonstrated through the use of accepted medical tests or procedures, but must be diagnosed on the basis of the plaintiff’s subjective complaints, a physician’s clinical

³ During this era, the Court of Appeals did not have a conflict resolution rule, and, therefore, decisions that conflicted were allowed. Beginning November 1, 1990, published decisions of the Court of Appeals became precedentially binding on subsequent panels of the Court, first by operation of AO 1990-6, and now through MCR 7.215(J).

impressions, or the symptoms resulting from the injury, is not objectively manifested. Their reasoning is as follows:

A physical examination yields subjective complaints and objective findings. Subjective complaints are those perceived only by the patient which cannot be otherwise measured, e.g., pain, nausea, and blurred vision. Objective findings are those which the physician can see for himself, e.g., swelling and inflammation. Some procedures involve a combination of subjective complaints and objective findings, e.g., range-of-motion tests, where the doctor manipulates the patient's body until the patient complains of pain or is unable to move further. Doctors use subjective complaints and objective findings to form clinical impressions and diagnoses. To verify these clinical impressions, the doctor usually orders tests, such as x-rays, arthrograms, CAT-scans, blood tests, and the like.

Defendants argue that the injury itself (e.g., broken bones, torn cartilage, etc.) must either be directly perceivable (i.e., the doctor must be able to see, hear, or touch the injury), or the nature and extent of the injury must be demonstrated through a medically accepted test. Symptoms or effects caused by the injury (e.g., spasms, swelling, and pain) are supposedly insufficient to satisfy Cassidy's requirement of objectively manifested injuries.

Thus, broken bones seen on x-rays clearly satisfy defendants' interpretation of *Cassidy*. However, injuries to soft tissues generally cannot be seen or felt. Seeing or feeling the symptoms of torn or stretched muscles or ligaments (e.g., spasms) is not enough. Nor are plaintiff's subjective complaints of pain or limited motion. Therefore, defendants believe that, in most cases, soft tissue injuries cannot be the basis of a finding that the plaintiff suffered a serious impairment of body function because these injuries are not objectively manifested.

The Court of Appeals has not always accepted this rigid distinction between injuries and symptoms. As a result, panels have disagreed on whether certain manifestations of soft tissue injuries, such as muscle spasms,⁵³ swelling,⁵⁴ tenderness,⁵⁵ and loss of lordosis,⁵⁶ satisfy *Cassidy*. Panels have also disagreed as to whether the conclusions drawn from range-of-motion tests are an objective manifestation of an injury. Some panels have summarily disregarded the results of these tests, especially if the plaintiff's x-rays were normal and no neurological problems were discovered.⁵⁷ Other panels have distinguished between "active" and "passive" range-of-motion tests. Under this approach, the results of an active test (i.e., a test where the plaintiff moves her body until she feels pain) are not considered an objective manifestation of an injury because the plaintiff can control the test results.⁵⁸ However, the limitation of movement observed in passive tests is considered an objective manifestation of an injury.⁵⁹

The Williams' interpretation of Cassidy's "objectively manifested injury" language has proved to be an almost insurmountable obstacle to recovery of noneconomic damages in soft tissue injury cases. Judge Ravitz, dissenting in

Garris v Vanderlaan, 146 Mich App 619, 627-628; 381 NW2d 412 (1985), roundly criticized the *Williams* Court's reasoning:

* * *

We agree that Williams misinterpreted Cassidy. The *Cassidy* Court was concerned that plaintiffs could recover noneconomic damages merely by testifying that they had suffered extreme pain following a motor vehicle accident. Recognizing that the Legislature only permitted recovery for injuries which seriously impair body functions, the Court required plaintiffs to establish that they had suffered such an injury. In other words, plaintiffs must introduce evidence establishing that there is a physical basis for their subjective complaints of pain and suffering. Neither *Cassidy* nor § 3135(1) limits recovery of noneconomic damages to plaintiffs whose injuries can be seen or felt. [*DiFranco, supra* at 70-75; emphasis added.]

⁵³ Muscle spasms were found to be objective manifestations of soft tissue injuries in *Bennett*, n 34 *supra*, *Harris*, n 41 *supra*, pp 153-154, and *Franz*, n 39 *supra*, p 176; but not in *Clark*, n 47 *supra*, p 553, *Morris*, n 40 *supra*, p 154, and *Flemings v Jenkins*, 138 Mich App 788, 790; 360 NW2d 298 (1984).

⁵⁴ Swelling was found to be an objective manifestation of injury in *Pullen*, n 32 *supra*, p 365.

⁵⁵ Tenderness was deemed an objective manifestation of injury in *Bennett*, n 34 *supra*; but not *Clark*, n 47 *supra*, *Morris*, n 40 *supra*, *Franz*, n 39 *supra*, p 177, and *Flemings*, n 53 *supra*.

⁵⁶ Although loss of lordosis (i.e., the natural curvature of the spine) can be seen on x-rays, *Guerrero*, n 40 *supra*, p 750, held that the cause of the loss (i.e., torn or stretched muscles and ligaments) was not objectively manifested. In other words, loss of lordosis is only an objectively manifested symptom of a soft tissue injury. *Sherrell*, n 46 *supra*, p 711, reached a contrary conclusion.

⁵⁷ See *Morris*, n 40 *supra*, p 154; *Flemings*, n 53 *supra*; *Williams v Payne*, 131 Mich App 411.

⁵⁸ See *Franz*, n 39 *supra*, p 175; *Salim*, n 44 *supra*, p 149.

⁵⁹ See *Galli*, n 48 *supra*, p 318; *Argenta*, n 48 *supra*, pp 488-489.

The Legislature, by enacting 1995 PA 222, overruled *DiFranco v Pickard* and restored the requirement that a threshold injury be “an objectively manifested impairment.” MCL 500.3135(7). One of the issues in the present case is whether the *Williams v Payne* “medical

measurement” standard has also been reinstated by the revival of the objectively manifested impairment test. In *Kreiner, supra*, slip op, p 27, our Supreme Court stated that, under the 1995 amendment, injuries must be “medically documented” to exceed the tort threshold:

If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. *Subjective complaints that are not medically documented are insufficient.* [Emphasis added.]

In evaluating whether plaintiff Kreiner’s injuries were objectively manifested, the Supreme Court noted that the plaintiff’s nerve irritation was medically confirmed and documented by an electromyography (EMG). *Kreiner*, slip op, p 17. Based upon the positive EMG, the Supreme Court concluded: “First, we find that Kreiner’s medically documented injuries to his lower back, right hip, and right leg constitute an impairment of an important body function that was objectively manifested.” *Kreiner*, slip op, p 33.

I view the Supreme Court’s requirement of a “medically documented” injury to indicate that the Court has concluded that the Legislature has overruled *DiFranco v Pickard* and reinstated the medical measurement standard of *Williams v Payne*. As previously indicated, this line of authority holds that temporary muscle spasms, tenderness, and limited range of motion are manifestations of possible symptoms, not an objective manifestation of an injury. In my view, the following argument rejected by the Supreme Court in *DiFranco* has now been accepted by the Legislature:

If the objective manifestation requirement of the statutory threshold is to have any meaning at all, the courts must require that injured claimants present the sort of hard scientific data which physicians seek to support their clinical impressions and enable them to make a definitive diagnosis. Objective manifestation of an injury cannot be demonstrated by either the subjective complaints of the claimant, the clinical impressions of the physician or unaccepted, subjective medical testing. The injury itself – and not merely its symptoms or effects – must be either directly perceivable by the senses of the observer, without resort to inference or diagnosis, or the nature and extent of the injury must be demonstrable by the use of a scientifically-established, medically-accepted test or procedure. [Defendant-Appellee Brief and Appendix on Appeal, *Kucera v Norton*, Michigan Supreme Court Docket No. 75299, decided December 23, 1986.]

Based on 1995 PA 222 and its construction in *Kreiner*, I would hold that plaintiff’s temporary muscle spasm, tenderness, and temporary limited range of motion, while indicative of possible symptoms, do not constitute an objectively manifested impairment of an important body function. MCL 500.3135(7).

I would affirm.

/s/ Richard Allen Griffin