

STATE OF MICHIGAN
COURT OF APPEALS

MOUSA AWADA,

Plaintiff-Appellant,

v

FARM BUREAU GENERAL INSURANCE
COMPANY and ALLIED PROPERTY &
CASUALTY INSURANCE COMPANY,

Defendants-Appellees,

and

JOSE VALENCIA,

Defendant.

UNPUBLISHED

November 13, 2008

No. 280003

Wayne Circuit Court

LC No. 05-534721-NF

Before: O’Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants’ motion for summary disposition and denying plaintiff’s cross-motion for summary disposition in this automobile negligence action.¹ We affirm in part, reverse in part, and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

A person seeking uninsured motorist coverage for noneconomic injuries under an insurance policy must prove that his injuries meet the threshold established by MCL 500.3135. *Auto Club Ins Ass’n v Hill*, 431 Mich 449, 451; 430 NW2d 636 (1988). Pursuant to MCL 500.3135(1), a person may recover noneconomic damages if he “suffered death, serious impairment of body function, or permanent serious disfigurement.” A serious impairment of body function is defined as “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).

¹ We review de novo a trial court’s ruling on a motion for summary disposition. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007).

Whether a person has suffered a serious impairment of body function or permanent serious disfigurement is a question of law for the court if the court finds that there is no factual dispute concerning the nature and extent of the plaintiff's injuries or if any factual dispute is not material to the determination whether the plaintiff suffered a serious impairment of body function or permanent serious disfigurement. MCL 500.3135(2)(a).

The parties do not dispute that plaintiff's knee injury was an objectively manifested injury that affected an important body function. If an important body function has been impaired and the impairment is objectively manifested, the question remains whether the impairment has affected the plaintiff's general ability to lead his normal life. *Kreiner v Fischer*, 471 Mich 109, 132; 683 NW2d 611 (2004). In answering this question, a court must compare the plaintiff's life before and after the accident and consider "the significance of any affected aspects on the course of the plaintiff's overall life." *Id.* at 132–133. Factors to consider include "(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." *Id.* at 133. The extent of a residual impairment cannot be established by self-imposed restrictions based on real or perceived pain. *Id.* at 133 n 17. However, self-imposed restrictions based on actual physical inability, as opposed to pain, may be considered a residual impairment. *McDaniel v Hemker*, 268 Mich App 269, 283; 707 NW2d 211 (2005).

An injury need not be permanent in order to be serious, *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000), and even "an impairment of short duration may constitute a serious impairment of body function if its effect on the plaintiff's life is extensive." *Williams v Medukas*, 266 Mich App 505, 508; 702 NW2d 667 (2005). Thus, "the more extensive the nature and degree of the impairment, the lesser the need for a lengthy or permanent duration of impairment in order to qualify an impairment as a serious impairment of body function." *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412, 424; 745 NW2d 174 (2007), lv gtd 481 Mich 885 (2008).

Plaintiff is now 67 years old. As a result of the accident, he sustained a comminuted fracture of his left patella (kneecap).² The orthopedic surgeon's operative report describes a portion of the fractured patellar bone as "morselized," and that "[t]here was very little structural integrity between the bony pieces..." The surgical repair involved wiring bone fragments in place incorporating several metallic pins. The hardware remains permanently implanted in plaintiff's kneecap. Following surgery, plaintiff participated in physical therapy for several months. When evaluated by a consultant retained by defendant in 2006, plaintiff continued to wear a brace on his knee and to walk with a cane.

Before the accident, plaintiff spent his time visiting with friends and family and performing brief ritual prayers twice a day at home and at a mosque. Plaintiff testified that during the first eight weeks after the surgery, he was unable to care for himself and relied on his daughter to meet all his daily personal and household needs. The evidence supports that

² Comminuted is defined as "broken or crushed into small pieces." Dorland's Illustrated Medical Dictionary (25th ed), p 344.

plaintiff's knee injury rendered him unable to care for himself for at least eight weeks and possibly longer. Therefore, plaintiff created a factual question regarding whether he sustained a temporary serious impairment, and the circuit court erred by granting summary disposition regarding this aspect of plaintiff's claim.

Three months post-accident, plaintiff reported to his orthopedic surgeon that he was "doing quite well." The orthopedic surgeon cleared plaintiff to engage in activities "as tolerated" and without restrictions. After completing physical therapy, plaintiff continued to see a doctor, but the doctor, but received no treatment other than pain medication. At his deposition, plaintiff complained of unrelenting pain that prohibited him from standing, sitting, or walking for prolonged periods of time and prevented him from performing his brief ritual prayers, but he has provided this Court with no medical documentation regarding the source of his pain, and according to the record evidence, his limitations qualify as entirely self-imposed.³

Plaintiff also claims that the scar on his leg constitutes permanent serious disfigurement. Whether a scar constitutes a permanent serious disfigurement depends on the scar's physical characteristics rather than its effect on the plaintiff's ability to lead a normal life. *Kosack v Moore*, 144 Mich App 485, 491; 375 NW2d 742 (1985). A determination regarding whether a scar is serious should be answered by resorting to common knowledge and experience, while giving objective consideration to the plaintiff's subjective embarrassment and sensitivity about his appearance. *Nelson v Myers*, 146 Mich App 444, 446 & n 2; 381 NW2d 407 (1985). A small scar that is "hardly discernible" does not meet the statutory threshold. *Petaja v Guck*, 178 Mich App 577, 580; 444 NW2d 209 (1989). Likewise, a three-centimeter scar that is slightly depressed and lighter than the surrounding skin on plaintiff's face has been held not to meet the statutory threshold. *Nelson, supra* at 446 n 1.

There appears to be no dispute that plaintiff's scar is permanent. The scar is on the front of one leg. Although thin, it is several inches long, lighter than the surrounding skin, and clearly discernible when not covered by clothing. Indeed, the trial court found the scar to be "prominent," but it determined that it was not serious because plaintiff is a man in his sixties. Because there is no evidence in the record beyond the photograph of the scar to establish or refute plaintiff's claim and there is no objective basis for concluding that a scar is not serious simply because the plaintiff is an older male, we conclude that the seriousness of the scar was a question of fact, and the trial court erred in ruling on this issue as a matter of law.

³ Plaintiff's counsel failed to provide this Court with a medical record reflecting a physician's conclusion that he currently suffers from any disability, or that his activities should be limited in any fashion. Plaintiff unquestionably sustained a serious injury to his kneecap. However, plaintiff bears the burden of demonstrating his injury's permanence, seriousness, and its impact on the trajectory of his life. MCR 2.116(G)(4) provides that plaintiff "may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavit or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." Plaintiff attached no medical records to his appellate brief. Other than a report authored by defendant's medical consultant, the most recent medical information in the record dates from 2005.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher