

STATE OF MICHIGAN
COURT OF APPEALS

JAMES PLAGGEMEYER and RUTH
PLAGGEMEYER,

UNPUBLISHED
May 12, 2009

Plaintiffs-Appellants,

v

THOMAS LEE, SUSAN LEE, and RYAN E.
LEE,

No. 284016
Muskegon Circuit Court
LC No. 07-045215-NI

Defendants-Appellees.

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Plaintiff¹ appeals as of right from the trial court's order granting defendants' motion for summary disposition on the issues of serious impairment of body function and permanent serious disfigurement. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On August 25, 2004, plaintiff suffered a fractured left femur when his bicycle collided with defendants' motor vehicle. Plaintiff underwent surgery to repair his leg, and spent three nights in the hospital. Upon discharge, plaintiff walked with the aid of a walker for the first four weeks, then used crutches for the following eight weeks, and then used a cane on occasion for four to six weeks. Plaintiff returned to work approximately six weeks after the accident, with a sit-down-only restriction. Approximately 14 weeks after the accident, plaintiff's doctor lifted all work restrictions.

Prior to the accident, plaintiff did his own yard work and home maintenance, and enjoyed camping in his recreational vehicle, hiking, and riding his bicycle. He jogged once a week and played tennis on occasion. After the accident, plaintiff's son-in-law did plaintiff's yard work for the first year. Thereafter, plaintiff was able to mow his lawn using a riding mower, and to perform home maintenance that did not require the use of a ladder. Plaintiff continued to camp

¹ The claims of Ruth Plaggemeyer are derivative to those of James Plaggemeyer and are not presented in this appeal. "Plaintiff" refers solely to James Plaggemeyer.

eight to ten times each summer and to ride his bicycle on a very limited basis. He no longer hiked, jogged, or played tennis because of pain. As a result of the surgery, plaintiff now has roughly an eight-inch scar on his upper left thigh. Additionally, plaintiff's left leg has decreased in diameter due to atrophy.

Plaintiff sued defendants, seeking non-economic damages. Defendant moved for summary disposition, arguing that, as a matter of law, plaintiff did not suffer a serious impairment of body function or a permanent serious disfigurement. The trial court agreed and granted defendant's motion.

We review de novo a trial court's decision on a motion for summary disposition. *Joyce v Rubin*, 249 Mich App 231, 234; 642 NW2d 360 (2002). When reviewing a motion under MCR 2.116(C)(10), we consider all the evidence submitted and grant the benefit of any reasonable doubt to the opposing party. *Morales v Auto Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

"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." MCL 500.3135(1). Whether a person has suffered a serious impairment of body function is a question of law if either there is no factual dispute concerning the nature and extent of the person's injuries or there is a factual dispute, but that dispute is not material to the determination as to whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a).

A serious impairment of body function exists when there is "an objectively manifested impairment of an important body function that affects the person's general ability to live his or her normal life. MCL 500.3135(7). To be objectively manifested, an impairment must be a medically identifiable injury or condition, which has a physical basis and is supported by objective verification by a qualified medical person as visually apparent or detectable through medical testing. *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006). Walking is an important body function. *Kern v Blethen-Coluni*, 240 Mich App 333, 343; 612 NW2d 838 (2000).

"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 v Fischer*, 471 Mich 109, 130; 683 NW2d 611 (2004). The "objectively manifested impairment of an important body function must affect the *course* of a person's life." *Id.* at 130-131. "Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite these 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." *Id.* at 131.

"In determining whether the course of a plaintiff's normal life has been affected, a court should engage in 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 the plaintiff's overall life. . . . Merely 'any effect' on the plaintiff's life is insufficient . . ." *Id.* at 132-133. The court

must objectively analyze whether differences in lifestyle before and after the injury actually affected the person's general ability to conduct his life. *Id.* at 133. The *Kreiner* Court listed the following objective factors that may be helpful in determining whether the course of a plaintiff's life has been affected: (1) the nature and extent of the impairment; (2) the type and length of treatment required; (3) the duration of the impairment; (4) the extent of any residual impairment; and (5) the prognosis for eventual recovery. *Kreiner, supra* at 133. The totality of the circumstances must be considered when determining whether the impairment has affected the person's general ability to conduct the course of his or her normal life. *Id.* at 134.

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition because he suffered a serious impairment of body function as a matter of law. We disagree.

Plaintiff sustained an objectively manifested impairment, i.e., a broken left femur that required surgery. Plaintiff spent several days in the hospital following surgery, and thereafter required the use of a walker for four weeks, crutches for the following eight weeks, and, depending on the circumstances, a cane for an additional four to six weeks. For approximately one year following the accident, plaintiff had difficulty walking properly, and at times required his wife's support when walking. Walking is an important body function. *Kern, supra* at 343. Plaintiff returned to work approximately six weeks after the accident, but was restricted to sit-down duty for approximately eight weeks. He returned to unrestricted work approximately 14 weeks after the accident. Plaintiff ceased performing heavy yard work and using a ladder following the accident. Plaintiff no longer jogs, rides his bicycle, or plays tennis; however, his activities were not restricted by a physician. Self-imposed restrictions, based on real or perceived pain, do not establish the extent of a residual impairment. *Kreiner, supra* at 133 n 17.

Plaintiff argues that *Kern* stands for the proposition that an impairment of walking affects a person's ability to lead his or her normal life as a matter of law. We disagree. In *Kern*, the minor plaintiff was unable to walk for 11 weeks. In this case, although plaintiff first used a walker, then crutches, and finally a cane when needed, he was able to walk. Walking with assistance is not the same as being unable to walk at all. We did not hold in *Kern* that an impairment of walking affects a person's ability to lead his or her normal life, and we did not hold that a broken femur is a serious impairment of body function as a matter of law; rather, we held only that the boy's broken femur constituted a serious impairment of body function in his particular case.

Plaintiff's broken femur has not affected his general ability to live his normal life. Plaintiff can walk without assistance, perform unrestricted duties at his job, do some yard work and home maintenance, and engage in recreational activities. Accordingly, the trial court was correct in ruling that plaintiff did not suffer a serious impairment of body function.

Whether a person has suffered a permanent serious disfigurement is a question of law if either there is no factual dispute concerning the nature and extent of the person's injuries or there is a factual dispute, but that dispute is not material to the determination as to whether the person has suffered a permanent serious disfigurement. MCL 500.3135(2)(a).

Whether a scar is a permanent serious disfigurement depends on the scar's physical characteristics rather than its effect on the person's ability to lead a normal life. *Kosack v*

Moore, 144 Mich App 485, 491; 375 NW2d 742 (1985). Whether a scar is serious must be answered by resorting to common knowledge and experience. *Nelson v Myers*, 146 Mich App 444, 446 n 2; 381 NW2d 407 (1985). The scar must be readily noticeable; a “hardly discernable” scar is not a permanent serious disfigurement. *Petaja v Guck*, 178 Mich App 577, 579-580; 444 NW 2d 209 (1989) (superceded by 1995 PA 222 on other grounds).

Plaintiff argues that the determination of a permanent serious disfigurement is a question of fact, and that he was entitled to have the issue determined by a jury. Plaintiff submitted photographs of his leg, so there is no factual dispute as to the extent of his injury. This makes the determination a question of law. MCL 500.3135(2)(a)(i).

Plaintiff argues that he has suffered a permanent serious disfigurement as a matter of law in that he has a surgical scar on his thigh and his leg is now smaller in diameter due to atrophy. We disagree. The scar in question is approximately eight inches long, fairly narrow, is situated on plaintiff's upper left thigh and is slightly different in color than the surrounding skin. By all indications, the scar is permanent. However, in applying common knowledge and experience, we determine that it is not a serious disfigurement. In *Minter v City of Grand Rapids*, 480 Mich 1182; 747 NW2d 229 (2008) (adopting dissenting opinion in *Minter v City of Grand Rapids*, 275 Mich App 220; 739 NW2d 108 (2007)), our Supreme Court held that the plaintiff's facial scar did not meet the no-fault standard for serious disfigurement. The scar in *Minter* was above the plaintiff's eyebrow and prevented her from moving her eyebrow in normal fashion. *Minter, supra*, 275 Mich App 223-224. Based on the Court's determination that a facial scar that impacted the movement of the face was not a serious disfigurement, we decline to hold that the scar on plaintiff's thigh is a serious disfigurement where that scar will generally be concealed and will not be readily apparent. However, in reaching our conclusion we acknowledge that there is little published authority to provide guidance on this portion of the no-fault statute. While our Supreme Court has made it clear that the question of whether a condition is a permanent serious disfigurement is a legal question, the Court has failed to provide clear direction regarding the factors that should be applied in analyzing the seriousness of an alleged disfigurement. Additionally, plaintiff has not established that he is disfigured where his injured leg is allegedly smaller in circumference than his other leg. To begin, it is not clear that the difference in size is permanent. Furthermore, even if the condition were permanent, it is certainly not a serious disfigurement. Unlike the scar, the alleged size difference is not readily apparent upon visual examination. In resorting to common knowledge and experience, this Court is not persuaded that the alleged size difference rises to the no-fault threshold.

Neither plaintiff's surgical scar nor his reduced-diameter leg constitutes a permanent serious disfigurement. The trial court properly granted summary disposition for defendant on this issue.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens