

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER ASHCRAFT,

Plaintiff-Appellant,

v

LARRY MCLAUGHLIN and JONATHAN
MCLAUGHLIN,

Defendants-Appellees.

UNPUBLISHED

April 25, 2006

No. 266116

Oakland Circuit Court

LC No. 04-059021-NP

Before: Murphy, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

In this no-fault case, plaintiff appeals as of right from the trial court’s order granting defendants’ motion for summary disposition under MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured when she was run over by a vehicle being operated by defendant, Jonathan McLaughlin. The trial court granted defendants’ motion for summary disposition, concluding that there was no genuine issue of material fact that plaintiff did not sustain a permanent serious disfigurement or serious impairment of body function under MCL 500.3135(1).

We review a trial court’s decision on a motion for summary disposition de novo. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005). This Court reviews the evidence submitted by the parties in a light most favorable to the nonmoving party to determine if there is a genuine issue regarding any material fact. *Id.*

The no-fault act, MCL 500.3135(1), precludes a tort action for noneconomic damages unless “the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” The current version of the statute largely returned to the standards set forth in *Cassidy v McGovern*, 415 Mich 483, 503; 330 NW2d 22 (1982), which had been overruled in *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986). See *Kreiner, supra* at 121; *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000). The statute defines a “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.”

MCL 500.3135(7), but leaves “permanent serious disfiguration” undefined. MCL 500.3135(2)(a) provides:

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. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

Here, the evidence discloses that plaintiff’s injury caused a scar in the hip area of plaintiff’s left abdomen. We decline to consider the medical assessment of the scar that plaintiff has submitted on appeal because this evidence was not presented below. Our review is limited to the record developed in the trial court. *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643, 648; 482 NW2d 474 (1992); *Amorello v Monsanto Corp*, 186 Mich App 324; 330; 463 NW2d 487 (1990). In any event, the medical assessment indicates only that plaintiff’s scar could possibly be treated in a manner to make it appear “pencil thin.” We express no opinion whether the medical assessment affects the permanency element of a “permanent serious disfigurement,” but rather will assume for purposes of our review that plaintiff’s scar, as depicted in the color photographs presented to the trial court, is permanent. We instead address only the seriousness of the disfigurement.

Although the Legislature has not defined “permanent serious disfigurement,” the word “serious” has been construed from early dates in various contexts. See *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 478; 208 NW2d 469 (1973), citing *Brown v Metro Life Ins Co*, 65 Mich 306; 32 NW 610 (1887) (in action involving insurance policy, “serious” was found to generally mean a grave, important, or weighty trouble, rather than a dangerous condition). In the context of the “serious neurological injury” provision in the amended version of the no-fault act, MCL 500.3135(2)(a)(ii), this Court has defined “serious” as requiring some indication that the injury was severe. *Churchman v Rickerson*, 240 Mich App 223, 230; 611 NW2d 333 (2000).

We must likewise consider the context in which “serious” is used in the “permanent serious disfigurement” threshold in MCL 500.3135(1). *Cassidy, supra* at 503. Like death and a serious impairment of body function, a “permanent serious disfigurement” is a significant obstacle to noneconomic damages. *Id.*

Unlike the “serious neurological injury” provision in MCL 500.3135(2)(a)(ii), medical testimony is not required to establish the seriousness of a disfigurement. The impact of a scar largely lies in the emotional effects it has on an individual. *Earls v Herrick*, 107 Mich App 657,

668; 309 NW2d 694 (1981). The seriousness of a scar is nonetheless decided by a resort to common knowledge and experience, using an objective, rather than a subjective, standard. *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985). Whether a scar is a serious disfigurement depends on its physical characteristics. *Kanaziz v Rounds*, 153 Mich App 180, 185-186; 395 NW2d 278 (1986).

This Court has stated that “[a]lmost any facial scar which is immediately noticeable might result in serious emotional effects for the individual who must bear the scar.” *Earls, supra* at 668. The evidence in this case reveals that plaintiff has a scar that is approximately 2-3/4 inches long in her hip area. Although the scar is noticeable, common sense dictates that such a scar will have less of an emotional effect on an individual than a 2-3/4-inch facial scar. Considering all of the scar’s physical characteristics, including its size, location, pigmentation, and irregular shape, we agree with the trial court that it constitutes a disfigurement, but does not have the requisite seriousness to satisfy MCL 500.3135(1). Therefore, we affirm the trial court’s determination that plaintiff failed to show that her permanent disfigurement was serious.

Plaintiff also claims that the trial court erred in finding that she did not suffer a serious impairment of body function. In this regard, plaintiff does not seriously challenge the trial court’s determination that she cannot establish a serious impairment of body function under the standards set forth in *Kreiner, supra*. Rather, plaintiff seeks relief “[s]hould such a precedent change the holding of the *Kreiner* decision and return such factual determination to the jury[.]” Because *Kreiner* is still good law, plaintiff has not established any basis for reversal.

In light of our disposition, it is not necessary to address defendants’ alternative grounds for affirmance.

Affirmed.

/s/ William B. Murphy
/s/ Christopher M. Murray

I concur in result only.

/s/ Peter D. O’Connell