

STATE OF MICHIGAN
COURT OF APPEALS

ARDIAN IVEZAJ,

Plaintiff-Appellant,

v

CHRISTOPHER R. SIMON and MAURO
ESQUIVEL,

Defendants-Appellees.

UNPUBLISHED

October 6, 2009

No. 287152

Oakland Circuit Court

LC No. 07-081960-NI

Before: Murray, P.J. and Markey and Borrello, JJ.

PER CURIAM.

In this automobile no-fault, threshold injury case, plaintiff appeals by right from the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On December 20, 2005, plaintiff, then 17 years old, was the back-seat passenger in a vehicle driven by defendant Christopher Simon. Defendant Esquivel turned in front of Simon, who was speeding and driving recklessly. The resulting collision caused plaintiff's injuries. Plaintiff alleged three basic injuries: damage to his neck, back, and shoulder, a closed head injury, and permanent serious disfigurement from a scar on his head.

Esquivel moved for summary disposition, and Simon concurred in the motion. Defendants argued that plaintiff had no objectively manifested injuries and that plaintiff's general ability to lead his normal life had not been affected. Specifically, defendants noted that plaintiff did not experience any pain in his neck or back at the time of the injury and complained of back and neck pain only after he saw an attorney in 2007. He was not taking any medication for his alleged pain, was under no doctor-imposed restrictions, and merely alleged that his back caused him trouble sleeping and that his neck was sensitive. Defendants noted that plaintiff had trouble with his shoulder long before the accident, and reinjured it in February or March after the accident when tumbling in gym class. He was able to return to work without restrictions. Plaintiff's only evidence of a closed head injury came from Dr. Van Horn, a psychologist, whose conclusions were based in part on misinformation about plaintiff's pre-accident intellectual level. Plaintiff's GPA and IQ went *up*, not down, after the accident, and he had documented learning disabilities back in middle school. No other experts found evidence of a closed head injury, and plaintiff was no longer receiving treatment for his accident-related injuries other than from Dr. Van Horn at the time defendants' motion was filed. Finally, defendants asserted that plaintiff

was fully able to resume his normal life: he worked, could do flips, play basketball, and drive. Surveillance video showed that plaintiff was much more capable than he claimed.

Plaintiff responded that the medical record provided objective evidence of his injuries. He pointed to testimony of Dr. Ellenberg, with whom he treated beginning in January 2006, and of Dr. Ahmad, with whom he began treatment in January 2007. Finally, he identified portions of Dr. Van Horn's medical records where she noted he was suffering from post-concussion syndrome, exhibiting "difficulty with tasks requiring processing speed, cognitive flexibility, set maintaining and the ability to respond to changing task demands."

The trial court agreed with defendants, finding there was no objective evidence that plaintiff's neck, back, or shoulder were injured in the accident. Instead, the x-ray taken on the day of the injury showed no abnormalities, and an MRI taken in February 2006 was analyzed as showing plaintiff had returned to his pre-accident condition. Plaintiff had had trouble with his shoulder for three years before the accident according to Dr. Ellenberg's records, and he also injured it while tumbling shortly after the accident. The court stated that plaintiff's psychological expert did not take into account his history, and so the only evidence of plaintiff's post-accident condition was that of defendants' experts, who testified that there was no evidence of a closed head injury. Finally, the court noted that the only evidence plaintiff provided regarding his alleged scarring was the photograph taken shortly after the accident. There was no evidence that the scar resulted in serious, *permanent* disfigurement.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The determination whether someone has suffered a serious impairment of body function or a permanent serious disfigurement, as required by the no-fault insurance act, MCL 500.3101 *et seq.*, is a question of law for the court if there is no factual dispute concerning the nature and extent of the injuries, or there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function or permanent serious disfigurement. MCL 500.3135(2)(a); *Kreiner v Fischer*, 471 Mich 109, 120; 683 NW2d 611 (2004).

Under the no-fault act, to be awarded damages for noneconomic loss, plaintiff must show he has suffered a serious impairment of body function or permanent serious disfigurement. MCL 500.3135(1); *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005). A serious impairment of body function is an objectively manifested impairment of an important body function that affects the person's general ability to lead his normal life. MCL 500.3135(7); *Kreiner, supra* at 129. An objectively manifested impairment is one that is "capable of objective verification by a qualified medical person either because the injury is visually apparent or because it is capable of detection through the use of medical testing." *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006). In determining whether an injury constitutes a serious impairment of an important body function, a court should consider the totality of the circumstances, including the extent of the injury, the treatment required, the duration of the

disability, the extent of residual impairment and the prognosis for eventual recovery. *Kreiner, supra* at 133-134.

Turning first to plaintiff's allegations concerning his scar, we find that plaintiff has not shown it to be a serious permanent disfigurement. The seriousness of a scar is a matter of objectively perceived, common knowledge and experience. *Nelson v Myers*, 146 Mich App 444, 446; 381 NW2d 407 (1985). The sole photograph plaintiff provided was taken only a week after the accident; it shows a cut high on plaintiff's head, consistent with the drawings in the emergency treatment record. Plaintiff's deposition testimony indicates no more than that the scar goes back a few inches into his hairline. There is no evidence that it is visible on his face, or that it cannot be made more invisible with cosmetic surgery. Thus, the evidence does not support plaintiff's allegations that the scar is either permanent or seriously disfiguring.

Plaintiff's complaints about his neck, back, and shoulder are also not supported by objective evidence. There is almost nothing in the medical record showing medically detectable problems with his neck and back, and the only objectively manifested problems with his shoulder, once the initial emergency treatment was complete, are those documented after he reinjured it in early 2006. Moreover, the record shows that he had had problems with his shoulder for at least three years before the accident, so there is no proof that the accident made him more prone to reinjury.

Finally, regarding plaintiff's alleged closed head injury, Dr. Van Horn opined that the medical conclusions drawn immediately after the accident were simply wrong, and were a misdiagnosis of plaintiff's problem and missed the fact that he had suffered internal injury. Usually, this might be sufficient to create at least a fact question on whether he had suffered such an injury as a result of the accident. But, as the trial court noted, Dr. Van Horn's conclusions were based on the cognitive testing plaintiff underwent which showed him performing at below-average levels on some tests. But defendants provided test results from 2004, *before* the accident, which show plaintiff was at that time performing below his expected level and suffering from emotional impairment. There is no indication Dr. Van Horn had the advantage of seeing these pre-accident test results; in contrast, defendants' experts' analyses make note of the earlier tests. Consequently, we agree plaintiff failed to meet his burden of establishing that defendants' conduct caused the impairment, consistent with the general elements of proof for negligence claims. See, e.g., *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660; 391 NW2d 320 (1986); *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

We affirm. As the prevailing party, Defendants-Appellees may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello