

STATE OF MICHIGAN  
COURT OF APPEALS

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TROY ANTHONY DYBAS,  
Plaintiff-Appellee,

UNPUBLISHED  
April 7, 2011

v

RITA MARIE MADZIAR,  
Defendant-Appellant.

No. 295512  
Bay Circuit Court  
LC No. 08-003575-NI

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Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment for plaintiff following a jury trial in this automobile negligence case. We affirm.

Plaintiff sued defendant for non-economic loss under the Michigan No-Fault Act, MCL 500.3101 *et seq.* Defendant moved for summary disposition under MCR 2.116(C)(10), claiming that plaintiff's injuries did not constitute a substantial impairment of body function or permanent serious disfigurement. The circuit court denied defendant's motion, finding a question of fact with regard to whether plaintiff's injuries impaired his general ability to lead his normal life and to whether plaintiff suffered a permanent serious disfigurement. Defendant argues that plaintiff's injuries do not constitute a serious impairment of an important body function that affects his general ability to lead his normal life or permanent serious disfigurement.

A plaintiff may recover for serious impairment of an important body function or permanent serious disfigurement. MCL 500.3135(1) provides: "(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." A serious impairment of a body function is statutorily defined in MCL 500.3135(7) as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the Michigan Supreme Court provided guidance for analyzing whether there has been an objectively manifested impairment of an important body function. However, the Michigan Supreme Court overruled *Kreiner* in *McCormick v Carrier*, 487 Mich 180, 222; \_\_\_ NW2d \_\_\_ (2010). Consequently, we review this case pursuant to the holding in *McCormick*. See *Hyde v Univ of Mich Bd of Regents*,

426 Mich 223, 240; 393 NW2d 847 (1986) (“the general rule is that judicial decisions are to be given complete retroactive effect”).

*McCormick* announced a new standard for evaluating whether the injuries sustained by a third-party no-fault claimant meet the statutory threshold of serious impairment. *McCormick* instructs that “the threshold question whether the person has suffered a serious impairment of body function should be determined by the court as a matter of law as long as there is no factual dispute regarding ‘the nature and extent of the person’s injuries’ that is material to determining whether the threshold standards are met.” 487 Mich at 193, quoting MCL 500.3135(2)(a)(i). A three-pronged analysis dictates whether a plaintiff has established a serious impairment of body function. *Id.* at 215. A plaintiff must show

(1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person’s general ability to lead his or her normal life (influences some of the plaintiff’s capacity to live in his or her normal manner of living). [*Id.*]

The Supreme Court elaborated in *McCormick*, 487 Mich at 202, that when evaluating whether a plaintiff’s injuries have affected the person’s general ability to lead his or her normal life, “courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person’s general ability to do so was nonetheless affected.” The plaintiff need only produce evidence

that some of the person’s *ability* to live in his or her normal manner of living has been affected, not that some of the person’s normal manner of living has itself been affected. Thus, while the extent to which a person’s general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person’s normal manner of living is, there is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected. [*Id.* (emphasis in original).]

“The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis.” *Id.* at 215.

Applying the principles elucidated in *McCormick*, as the Supreme Court has instructed us to do, leads us to conclude that plaintiff made a sufficient showing of a “serious impairment of body function” to avoid summary disposition. MCL 500.3135(1), (7). We initially observe that because the parties do not dispute the facts surrounding the nature and extent of plaintiff’s injuries, we may decide as a matter of law whether plaintiff’s injuries meet the serious impairment threshold. MCL 500.3135(2)(a)(i). The August 2005 collision caused plaintiff to suffer a “[h]ematoma, left knee prepatellar bursa.” On September 14, 2005, orthopedic surgeon Mark C. Stewart performed outpatient surgery using general anesthesia on plaintiff’s left knee, which consisted of a “debridement/closure of left knee.” Being able to move one’s knee is an important body function. *Caiger v Oakley*, 285 Mich App 389, 394; 775 NW2d 828 (2009). Plaintiff testified regarding his inability to bear weight on his leg, which was reflected in Dr.

Stewart's records; plaintiff's functional limitations, which were reflected in the physical therapy records; and plaintiff's difficulty with repetitive bending, about which plaintiff testified extensively, indicating that Dr. Stewart restricted his activities.

The question then becomes whether the facts and circumstances show that plaintiff's impairment affected his general ability to lead his normal life. *McCormick*, 487 Mich at 215. Before the accident, plaintiff's normal manner of living consisted of an active lifestyle outside of work, which included jogging, bowling, working out, and riding his bicycle, and he testified to effects of his injury that impacted his ability to conduct that normal manner of living for at least three years following the accident. Plaintiff demonstrated that his "pre-incident manner of living was affected" by his injury. *McCormick*, 487 Mich at 218. Viewed in the light most favorable to plaintiff, these facts demonstrate that plaintiff's objectively manifested impairment of an important body function affected his ability to lead his normal life. *McCormick*, 487 Mich at 215. Consequently, the trial court properly denied defendant's motion for summary disposition.

Plaintiff failed to establish, however, that the scars on his knees are permanent serious disfigurements. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Both scars appear to be less than 3-1/2 inches in length and, although there is some discoloration on both scars, they appear to be partially covered by hair. In addition, although the scars may be permanent, the scars do not rise to the level of being permanent serious disfigurements because the scars do not meet the requirement of being "serious." MCL 500.3135(2)(a)(ii); *Coblentz*, 475 Mich at 567-568. Accordingly, the issue of whether plaintiff suffered a permanent serious disfigurement should not have been left to the jury. MCL 500.3135(2)(a)(ii); *Coblentz*, 475 Mich at 567-568. Summary disposition for defendant on this claim was warranted.

Defendant next argues that the trial court erred when it failed to grant her a directed verdict because no evidence was presented to show that plaintiff suffered a serious impairment of body function or a permanent serious disfigurement.

When deciding a motion for a directed verdict . . . , the trial court must review the evidence in a light most favorable to the nonmoving party to determine whether reasonable minds could differ on an issue of fact. If reasonable jurors could differ, a motion for a directed verdict . . . should not be granted. We will not disturb the trial court's decision unless there has been a clear abuse of discretion. [*Rice*, 207 Mich App at 635-636 (citation omitted).]

When considering a motion for directed verdict, the trial court is to grant the nonmoving party "every reasonable inference" and resolve "any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Derbabian v Mariner's Pointe Assoc Ltd Partnership*, 249 Mich App 695, 702; 644 NW2d 779 (2002).

Resolving every reasonable inference in plaintiff's favor, there was sufficient evidence for the trial court to conclude that a question of fact existed whether plaintiff suffered an objectively manifested impairment. *Id.* Medical records reflect that after plaintiff's accident, plaintiff had a two by four centimeter scab on his left knee, which was the result of an abrasion that plaintiff received as a result of the accident. In fact, a "gelatin-like pus" was coming out of the knee when plaintiff went to physical therapy. Consequently, plaintiff underwent surgery.

After the surgery, plaintiff was in a full-leg cast or brace. He wore the brace for at least a few weeks, used crutches, and was off work for two or three weeks.

Moreover, plaintiff testified extensively regarding the fact that his doctor put plaintiff on restrictions. When plaintiff saw a plastic surgeon, that surgeon noted clicking and popping in plaintiff's left knee and instructed plaintiff to return to his doctor. Medical records reflect that plaintiff's scar was 2.8 centimeters in width and 7.6 centimeters in length after the surgery. Plaintiff also testified extensively about the how the pain in his knee limited his ability to engage in physical activities. Further, plaintiff's doctor testified that he essentially expected plaintiff to be impaired for "[p]robably three months" after his accident. Based on the foregoing, resolving every reasonable inference in plaintiff's favor, there was sufficient evidence for the trial court to conclude that a question of fact existed whether plaintiff suffered an objectively manifested impairment because plaintiff had actual symptoms or conditions that someone other than plaintiff would perceive as impairing a body function. *McCormick*, 487 Mich at 196; *Derbajian*, 249 Mich App at 702. Moreover, there was a physical basis for plaintiff's complaints of pain, which was supported by medical testimony. *McCormick*, 487 Mich at 198.

As previously noted, movement of one's knee is an important body function. *Caiger*, 285 Mich App at 394. Resolving every reasonable inference in plaintiff's favor, there was sufficient evidence for the trial court to conclude that a question of fact existed whether plaintiff's objectively manifested impairment was to an important body function. *McCormick*, 487 Mich at 196; *Derbajian*, 249 Mich App at 702.

Finally, with regard to whether plaintiff's general ability to lead his normal life was affected, resolving every reasonable inference in plaintiff's favor, there was sufficient evidence for the trial court to conclude that a question of fact existed whether plaintiff's general ability to lead his normal life was affected. *Id.* Plaintiff testified extensively regarding how his activities had been affected by his knee injury. Plaintiff further indicated that his knee causes him pain every day and that his physical ability is not anywhere near the level it was before the accident. Moreover, although plaintiff's doctor indicated that he expected plaintiff's knee to return to pre-injury status within three months following the surgery, there is no "express temporal requirement as to how long an impairment must last in order to have an effect on 'the person's general ability to live his or her normal life.'" *McCormick*, 487 Mich at 202-203. Thus, the length of the impairment was not important, only the fact that there was an affect or some influence on his capacity to live in his normal manner of living. *Id.* Moreover, although plaintiff's doctor indicated that a person would normally return to their pre-injury status within three months, that was a general observation which was not specific to plaintiff and plaintiff's injury. Since the evidence at trial supported a reasonable inference that plaintiff was a very physically active man before the accident and many of his pre-accident activities were affected or influenced by his injury, there was sufficient evidence for the trial court to conclude that a question of fact existed whether plaintiff's general ability to lead his normal life was affected. *Id.*; *Derbajian*, 249 Mich App at 702. The trial court did not abuse its discretion when it denied defendant's motion for a directed verdict on the issue of serious impairment of body function. *Id.*

With regard to permanent serious disfigurement, plaintiff did not claim at trial that the scar on his right knee resulted in a permanent serious disfigurement; rather, he asserted only that

the scar on his left knee resulted in a permanent serious disfigurement. The testimony regarding the scar was that it was 2.8 centimeters in width and 7.6 centimeters in length. The scar was described as being “flattened” in that area. It was also indicated that when plaintiff gets a suntan, the scar will either lighten or darken, but its color will not match the tanning on the other areas of his skin. Resolving every reasonable inference in plaintiff’s favor, we conclude that a question of fact did not exist as to whether plaintiff suffered a permanent serious disfigurement. *Derbabian*, 249 Mich App at 702. Although there was some discoloration on the scar and the scar was described as flattened, the scar is partially covered by hair. Although plaintiff’s scar also may be permanent, the scar does not rise to the level of being a permanent serious disfigurement because the scar does not meet the requirement of being “serious.” Stated another way, the injury’s physical characteristics does not “significantly mar or deform [plaintiff’s] overall appearance.” *Fisher v Blankenship*, 286 Mich App 54, 66; 777 NW2d 469 (2009). A directed verdict was warranted on that claim.

In sum, the trial court abused its discretion by failing to grant a directed verdict in favor of defendant only on the issue of permanent serious disfigurement. Although the trial court improperly denied defendant summary disposition on the serious disfigurement issue, “reversal is required only if allowing the verdict to stand would be inconsistent with substantial justice.” MCR 2.613(A); *Zdrojewski v Murphy*, 254 Mich App 50, 64; 657 NW2d 721 (2002). Here, substantial evidence was presented for a reasonable jury to conclude that the damages were sustained as a result of plaintiff’s alternate theory of recovery, which was the issue of serious impairment of body function. *Id.* “[T]his case is not one where ‘it is impossible to know if the jury rejected the other theories advanced’ rather than the theory that should have been dismissed by directed verdict.” *Id.*, citing *Tobin v Providence Hosp*, 244 Mich App 626, 645; 624 NW2d 548 (2001). Allowing the verdict to stand would not be inconsistent with substantial justice. MCR 2.613(A); *Zdrojewski*, 254 Mich App at 64.

Defendant also asserts that the trial court abused its discretion when it excluded photographs and videotapes of plaintiff performing yard work, as well as questions and answers relating to those photographs and exhibits. Moreover, she argues that the trial court’s jury instruction to disregard the questions and answers relating to the photographs and videotapes was improper, and that the witness who took the photographs and made the videotapes should have been allowed to testify. We review “a trial court’s decision to admit or exclude evidence for an abuse of discretion.” *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). “[T]he decision of whether to allow a witness to testify is a matter of discretion for the circuit court. Thus, the proper standard of appellate review of such a circuit court decision is an ‘abuse of discretion’ standard.” *Pollum v Borman’s, Inc*, 149 Mich App 57, 61; 385 NW2d 724 (1986). When the decision whether to admit evidence is unpreserved, we will review for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We review claims of instruction error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

In this case, pursuant to the trial court’s scheduling order, exhibits were to be agreed upon before trial and any objections to them were required to be addressed before trial. Defense counsel did not identify the challenged photographs or videotapes before trial. Without any advance warning to plaintiff’s counsel or the trial court, defense counsel began showing photographs to plaintiff at trial and questioning him about them. Defense counsel also referred

to a videotape, which was in his briefcase, which allegedly showed plaintiff mowing the grass for two hours. As we stated in *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639; 607 NW2d 100 (1999), “[t]his Court has repeatedly recognized that a trial court has inherent authority to impose sanctions on the basis of the misconduct of a party or an attorney.” See also MCR 2.313(B)(2) and MRE 611(a). The trial court not only considered the fact that its scheduling order was violated, but also the fact that the photographs and videotape could not be used to impeach plaintiff, which was the basis under which defense counsel argued that the exhibits should be admitted. Specifically, the trial court correctly observed that plaintiff never indicated that his impairment prevented him from mowing the lawn or that he never mowed the lawn since his injury, only that since his ex-girlfriend moved out, his father mows the lawn. Moreover, plaintiff did not testify that he was incapable of kneeling or bending. Accordingly, the exhibits were not relevant for impeachment purposes. MRE 402. The trial court appears to have carefully considered defense counsel’s violation of its scheduling order, whether the exhibits were relevant for impeachment purposes, and its other options before ultimately refusing admission of the evidence and giving the jury a curative instruction. Accordingly, the trial court did not abuse its discretion by not admitting the photographs and videotapes into evidence. *Craig*, 471 Mich at 76.

MRE 103(a)(1) requires that an objection be timely. A belated objection is not timely if “at the time the objection was raised, the statement was already in evidence.” *Temple v Kelel Distributing Co*, 183 Mich App 326, 330; 454 NW2d 610 (1990). Although plaintiff’s counsel’s objection appears to be untimely because it was made after several questions regarding the photographs had already been asked, it was ultimately in the trial court’s discretion whether the questions and answers relating to the exhibits should be admitted into evidence. *Craig*, 471 Mich at 76. The trial court did not abuse its discretion in making that decision. Because the trial court did not abuse its discretion by denying the admission of the photographs and videotapes into evidence, the trial court also did not abuse its discretion by barring the questions and answers relating to the exhibits from the jury’s consideration. *Id.* And, there was no instructional error when the trial court instructed the jury to disregard the questions and answers relating to the exhibits. *Case*, 463 Mich at 6. Moreover, according to defense counsel, he was only going to call the private investigator as a witness in order to lay a foundation for the exhibits to be admitted. Because the trial court denied defendant’s request to have the exhibits admitted into evidence, the private investigator’s testimony was no longer necessary. Accordingly, there was no plain error as a result of the private investigator not testifying. *Carines*, 460 Mich at 763.

Finally, defendant asserts that impermissible hearsay relating to his injury and the restrictions imposed upon him by a doctor were admitted into evidence and manifest injustice requiring reversal resulted. “[T]he hearsay objection applies only if the [challenged] evidence is offered to prove the truth of the matter asserted.” *Stachowiak v Subczynski*, 411 Mich 459, 464; 307 NW2d 677 (1981). When a statement is not offered to prove the truth of the matter asserted, but only that as a result of the statement, a person reacted or responded in a certain way, the statement is not hearsay. *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994); *People v Garcia*, 31 Mich App 447, 455; 187 NW2d 711 (1971). In this case, plaintiff’s counsel repeatedly asserted that the statements were not made to prove the truth of the matter asserted, but to explain plaintiff’s actions or reactions in response to hearing the statements. *City of Westland*, 208 Mich App at 77. In addition, the trial court repeatedly instructed the jury that

the statements could not be considered to prove the truth of the matter asserted, but rather could only be considered to establish a basis for why plaintiff reacted to the statements in a certain way. On the record before us, we conclude that the challenged statements were admissible for the limited purpose instructed by the trial court to the jury, *id.*, and the trial court did not abuse its discretion by admitting the statements. *Craig*, 471 Mich at 76.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter