

STATE OF MICHIGAN
COURT OF APPEALS

RANDALL MILLER,

Plaintiff-Appellant,

v

LEWIS JOSEPH DEISLER II,

Defendant-Appellee.

UNPUBLISHED

March 3, 2020

No. 347997

Shiawassee Circuit Court

LC No. 2018-002650-NI

Before: BORRELLO, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

In this automobile negligence action, plaintiff appeals as of right the trial court’s order granting defendant’s motion for summary disposition under MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm in part and reverse in part.

I. BACKGROUND

This case arises out of a motor vehicle accident involving a motorcycle that occurred on September 25, 2016. At approximately 10:27 a.m. that day, plaintiff was riding his motorcycle and traveling east. He was preparing to turn when the pickup truck that defendant was driving pulled out of a driveway, or the intersecting road, and struck the side or rear of plaintiff’s motorcycle. Plaintiff was not wearing a helmet, but he was “fully leathered” and wearing “riding chaps, leather coat, leather vest, [and] leather boots.” Plaintiff maintained that he had the right of way and that defendant had a yield sign. Plaintiff described the impact as follows:

Yeah, I hit his front right corner panel of the truck. The bike went in front of the truck. He ran over the bike. I hit the corner panel of the truck with my face and my body and I fell down onto my knees and then rolled over onto my back.

Plaintiff testified that after lying on the ground for approximately 10 to 15 minutes and talking with the state trooper who arrived on the scene, he got up. Following the accident, plaintiff was taken by ambulance to the emergency room at Memorial Healthcare. Regarding his injuries at that time, plaintiff testified that he “was bleeding real bad” and “had blood all over.” Plaintiff stated that he was bleeding from his forehead, leg, and right hand, which was “smashed, totally

swollen up.” He testified, “My left knee was hurting real bad and my right shoulder was hurting, this—I really took a hard impact, let’s put it like that.”

Plaintiff testified that he was at the emergency room for approximately two hours. He described his treatment during the following exchange with defense counsel at his deposition:

A. When I went in there, the doctor asked me what was wrong with me and I told him what I just told you, my cut on my forehead, my leg, my left knee and my right shoulder. And he said, “No, no, no. I just want to know exactly what is hurting you the worst right now.” And I said, “Well, obviously it’s my forehead and my knee,” and that was the two things they probably documented on there; that he didn’t even take a full report on everything.

Q. Okay. So he didn’t dress your cuts or lacerations?

A. Gave me 16 stitches in the forehead. The leg, I can’t remember what they did to the leg. It was just road rashed real bad.

Q. Okay.

A. The kneecap was hurt but it wasn’t a cut. But it was, you know, damaged. And so they—I think—they took me back and I think they did a test on my head. Like an MRI, something like that and on my knee and stuff. But I—to be honest with you, I don’t recall exactly the procedures they did on me.

Plaintiff’s medical records from the day of the accident indicate that plaintiff was able to walk at the scene and had a laceration on the right side of his forehead above his eye. The laceration was documented in various portions of these records as a “3 cm laceration,” a “2 in laceration,” a “2in deep laceration,” and a “2CM LAC TO RT FORHEAD [sic].” Other documented injuries included lower back pain, bleeding, headache, hip pain, “Large hematoma on left lower extremity,” “mid anterior leg with superficial abrasions,” abrasions to left leg, bruising on shin, and bruising on knuckles. The records also indicate that plaintiff had no head, neck, chest, or abdominal pain and did not lose consciousness.

Plaintiff’s roommate picked him up from the hospital and took him home, where plaintiff “pretty much cried” because he “was in really severe, bad pain, laid up in bed.” He did not recall anything about the following day “other than hurting.” According to plaintiff, he starting moving around again in “about a week.”

Plaintiff testified that at some point, he visited a surgeon regarding his knee and also went to the emergency room at Sparrow Hospital “because of the pain and everything [he] was in.” Defense counsel questioned plaintiff as follows:

Q. Okay. And when you went to Sparrow, you were in pain, you said, but what areas of your body were in the most pain, if you recall?

A. I can’t recall. I mean, my knee and my shoulder and my head and just—same things, you know, I was just telling you about.

The record contains medical records indicating that plaintiff visited Sparrow Hospital on October 27, 2016, for complaints of hip pain, lower back pain radiating down his left leg to his knee, and neck pain radiating to his head and shoulders. According to these records, plaintiff complained that he suffered these injuries in the motorcycle accident from the previous month and that he was still having pain. These records also indicate that plaintiff was not experiencing headaches, that he had a medical history of back pain, and that he had chronic back pain. Plaintiff was diagnosed with a left leg abrasion, acute pain of the left knee, acute pain of the left shoulder, bilateral neck pain, and acute midline low back pain without sciatica.

When asked about his daily activities during the time after the accident until he received treatment at Sparrow, plaintiff responded that he did “[n]othing” and was “laid up.” He testified that he did not do any cooking or grocery shopping. He further stated, “I couldn’t even hardly walk.” Plaintiff was asked how much time elapsed after his treatment at Sparrow before he started doing things like cooking and laundry again, and plaintiff responded, “Probably a couple months. I didn’t have to because my roommate took good care of me.” Accordingly, plaintiff was doing these things again by approximately December 2016 or January 2017. However, plaintiff testified, “I wasn’t full blown back into getting things done again.”

According to additional medical records, plaintiff was treated by Dr. Edward C. Sladek at Orthopaedic Specialist of Lansing, PLLC, beginning on October 31, 2016, for complaints of “pain in his left shoulder, neck, left hip, back and knee.” This included both knees. Sladek indicated, “We have x-rays of his knee, taken in our office, which are normal.” On January 16, 2017, an MRI of plaintiff’s left knee was conducted at Sparrow Hospital.

On January 20, 2017, Sladek indicated that an MRI of plaintiff’s left knee revealed a small tear in the posterior portion of the medial meniscus that could heal on its own. Plaintiff elected to have the tear surgically repaired. Sladek operated on plaintiff’s left knee on February 7, 2017. In the operative report, it was noted the plaintiff’s pre-operation and post-operation diagnosis was “Degenerative tear of posterior horn of medial meniscus of left knee.” On February 20, 2017, Sladek wrote in plaintiff’s records that the knee was “better.” On March 1, 2017, plaintiff was continuing to have pain in his left knee and was developing more pain in his right knee. Plaintiff received injections in both knees. On March 15, 2017, his knees were “somewhat better.”

Plaintiff testified that following his knee surgery, Sladek restricted him from going up and down stairs and from taking long walks. According to plaintiff, his recovery from the knee surgery took “[q]uite awhile” and he had “a lot of difficulty with it.”

Plaintiff indicated that he also visited a neurologist within approximately a month of the accident for head trauma, which consisted of “[s]evere headaches.” According to plaintiff, he was not given any diagnosis or treatment; “They just said that there was nothing that they could see.” Plaintiff testified that as of the time of his deposition in November 2018, he was no longer receiving treatment from a neurologist for his head trauma. Additionally, plaintiff testified that at some point, he told his primary care doctor about the injuries he suffered in the accident, including injuries to his hand, lower back, right shoulder, and left knee. Plaintiff also testified that he still currently experienced pain associated with the knee injury and “[p]utting any pressure on the knee itself,” stating further as follows:

My knee problem is, I get real sharp pains in it, burning pains in it. The knee feels like it's tearing on me, the kneecap. Some days it's just real difficult to walk and then I have problems of getting down on my knees.

Plaintiff also testified that he had surgery on his right shoulder in June or July 2018. Regarding his shoulder, plaintiff testified that it was "[i]n pain" immediately after the accident, that he had problems moving it, and that he had not had similar shoulder problems before the accident.

Plaintiff's counsel asked him more specifically about his shoulder injury:

Q. And then how did that progress?

A. How did the shoulder progress?

Q. Yeah.

A. Well, it was hurting real bad. I haven't had nothing done with it because I was dealing with my forehead and my knee.

Q. Okay.

A. Mainly my knee surgery. And then approximately later in the year—think it was last year [2017]—my neighbor lady was backing out of her driveway and got stuck in the snow. I went out to push her car. And when she got traction, the car went out and I slipped down and that is when my shoulder totally went out on me.

Q. Okay. Before that incident, had you been experiencing pain and having problems with your shoulder?

A. Yes, after the accident—the bike accident?

Q. Yes.

A. Yes.

Q. Okay. So after the bike accident and before the pushing your—

A. Oh, yes.

Q. —neighbor's car—

A. Yes.

Q. —you were having problems with it?

A. Correct.

Q. Okay. But you were focusing on your knee first?

A. That is correct.

Q. Okay. Describe this incident with your neighbor's car and this fall. Did you fall on your shoulder?

A. No.

Q. Okay. Did you—

A. I just slipped and went down. I mean—

Q. Okay. What did you—

A. —it wasn't—

Q. What did you fall on?

A. A snowbank.

Q. Okay.

A. Soft snow which she was stuck in.

Q. Okay. So how did your shoulder get—you know, become painful after that? Or did it?

A. Well, it was already painful.

Q. Okay.

A. Before that incident ever happened. It was painful after the bike accident and, you know, I hadn't mentioned it. If I'm not mistaken, I can't recall, but it's documented. And I had told the—my primary care about it if I'm not mistaken. And the knee surgery was the most important thing to me at the time because I couldn't get around on my legs. You know, it was easier for me to deal with the shoulder than it was my knee itself.

Q. Okay. So when you were pushing the car, did your shoulder bother you? Did it—was it hurting when you were pushing the car or you—or was it normal?

A. It had been hurting, the same as usual.

Q. Okay. So it didn't get worse because of the pushing?

A. No; no.

Q. Now, did it get worse because of the fall?

A. I don't believe so. I think it was—I can't recall to be honest with you.

Q. Okay. All right.

A. You know, I mean it just—I can't recall.

Q. How about the next day after the—your neighbor's car was stuck? How was your shoulder feeling at that time?

A. Hurting about the same as what it was before I pushed the car.

Q. Okay. So did anything about the neighbor's car incident cause you to do more treatment for your shoulder?

A. No, I just haven't gotten to that point yet.

Q. Okay.

A. Because of my knee and because of—more than anything, my knee and my depression.

Plaintiff could not recall how long it was after the incident with his neighbor's car that he sought treatment for his shoulder, but he clarified that his shoulder issue was present “immediately after the motorcycle accident.” He also clarified that the incident with his neighbor's car occurred in “the winter of 2017 or early 2018.” Plaintiff believed that testing had been performed on his right shoulder before this time but that he had not had any other prior treatment for his shoulder.

Plaintiff's medical records indicate that he visited Mid-Michigan Orthopaedic Institute, PLLC, on May 23, 2018, for complaints of “deep anterior pain in the right shoulder that occurs constantly and during activities.” Plaintiff's arm felt “weak,” he experienced “occasional popping,” and he had intermittent numbness in his upper arm in certain positions. According to these records, “[t]he onset was sudden with injury that occurred about four months ago. He was pushing a car out of the snow, slipped and fell, hitting his right shoulder against the car.” His symptoms were “aggravated by daily activities lifting overhead and throwing.” It was determined that plaintiff had “right shoulder impingement, labral tear, biceps tendon tear”; it was also determined that plaintiff would undergo surgical treatment. The surgical procedure was performed on June 22, 2018.

When asked about his current daily activities as of the time of his deposition in November 2018, plaintiff replied, “I don't do a lot. You know, I'm on Social Security Disability.” Plaintiff was still able to drive, and he had been doing his own grocery shopping and cooking for approximately the previous 11 months. He currently lived by himself. He was able to take short walks, was able to engage in activities such as raking leaves, and did not have any doctor-imposed restrictions, but he was scared to ride his motorcycle again. Plaintiff admitted that he was not very active and did “A lot of sitting.” Before the accident, he took short walks and frequently rode his motorcycle. The record also reflects that plaintiff had not worked since approximately 2008, when he began collecting Social Security Disability due to issues involving Barrett's esophagus with

high dysplasia and his lower back. His preexisting lower back condition involved a herniated disc.

Additionally, Plaintiff testified at his deposition that he had a scar on his forehead, above his right eye, that was “very noticeable.” He continued, “Every time I look in the mirror, it causes flashbacks to me of the accident . . . I—it’s noticeable to me because it’s right there on my face and I see it. I don’t know if you see it or if he sees it but I see it and it’s very noticeable to me.”

Plaintiff sued defendant, alleging that defendant negligently caused the accident. Defendant subsequently moved for summary disposition under MCR 2.116(C)(10), arguing that he was entitled to summary disposition in his favor because plaintiff could not establish a threshold injury as required under the no-fault act. Defendant argued that plaintiff’s medical records showed that all of his conditions were degenerative and not related to the motor vehicle accident at issue. Defendant further argued that the medical records showed that plaintiff’s right shoulder injury was caused by the incident where he was pushing his neighbor’s vehicle out of the snow rather than by the September 25, 2016 motor vehicle accident. Defendant maintained that plaintiff could not show that his ability to lead his normal life had been affected. Finally, defendant argued that the scar on plaintiff’s forehead did not constitute a permanent serious disfigurement because it had healed since the accident and was now nearly unrecognizable, blending in with plaintiff’s existing wrinkles. Plaintiff opposed the motion.

After hearing the parties’ oral arguments at the hearing on the motion, the trial court issued its ruling from the bench. The trial court first decided “to address the issue of causation” before analyzing the threshold injury question. The trial court continued as follows:

And there are important links in the chain of causation that I just haven’t been able to get from Plaintiff’s pleadings.

And although there are a variety of injuries claimed, the arguments of the parties focus on three major areas of injury; those are: Plaintiff’s right shoulder, his left knee, and a scar on his forehead.

Starting with the shoulder, Plaintiff, from what the Court can see, did not complain of any pain to his right shoulder at the time of the collision.

A month after the accident he reported to Sparrow Hospital and he listed, among his complaints, pain in his left shoulder.

As presented to the Court, *the real injury to Plaintiff’s right shoulder came in 2018 when he injured himself pushing a car out of the snow.*

As to the left knee, the records relied on by Defendant established that there was some tenderness the month following the collision.

However, *the scans and operative notes indicate that the knee was steadily degenerating over time.*

Again, there's nothing that the Court can find that would link that injury to the collision.

There's no dispute that the scar on the Plaintiff's forehead resulted from this incident.

But, as to the knee and shoulder claims, the Court is not persuaded that it even needs to do a *McCormick*¹ analysis.

The Court will note, however, that there's no evidence to support an impact on Plaintiff's ability to lead his normal life.

And by Plaintiff's own testimony, he was largely sedentary prior to the accident.

He was on disability. [Plaintiff's counsel] points out that it's different, his disability is different than what his injuries are that he's claiming today, and I get that.

And, he identified his hobbies as playing cards and riding his motorcycle.

With one small exception, there's no evidence or testimony that he's restricted from doing these things now; that exception is his own subjective fear of getting back on a motorcycle, which is really, at best, a self-imposed restriction.

Even if the Court assumes that that impacts his ability to lead his daily life, it certainly isn't an objectively manifested impairment.

Plaintiff states that he has headaches, but there's nothing connecting that to any change in his daily life as a result.

And that takes us up to the scar. There are a number of pictures of a scar, and at least one of them appears like the picture made, was made closely after the collision, because he still had stitches. In other pictures, the scar has faded.

From a conversational distance, the scar has the same appearance, really, as other lines on Plaintiff's forehead.

I can take [plaintiff's counsel's] position that: Hey, he just took off his ballcap, but - I mean, all I have is the picture.

He testified he's very conscious of the scar, but there's no showing of how it impacts his daily life. He doesn't say that he socializes less or receives different

¹ *McCormick v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010).

treatment from people, and there's simply no showing under the third prong of the test.

And, then, we've already talked of the *Minter* case, but that doesn't control the outcome of the case.^[2]

With all that said, the Court finds that summary disposition would be properly granted under MCR 2.116(C)(10). [Emphasis added.]

Plaintiff now appeals.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(10), the evidence submitted by the parties is to be considered in a light most favorable to the party opposing the motion. *Id.* at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). "[I]t is well settled that the circuit court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition." *Id.* at 480. Furthermore, "a court may not weigh the evidence before it or make findings of fact; *if the evidence before it is conflicting*, summary disposition is improper." *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003) (quotation marks and citation omitted).

III. ANALYSIS

On appeal, plaintiff specifically challenges the trial court's determinations regarding the existence of a serious impairment of body function and whether plaintiff's scar constituted a permanent serious disfigurement.

Under MCL 500.3135(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

² It appears that the trial court was referring to *Minter v Grand Rapids*, 275 Mich App 220, 223, 228-230; 739 NW2d 108 (2007), which had held that there was a "factual dispute" sufficient to create a jury question regarding whether the plaintiff's facial scar was a permanent serious disfigurement; this portion of the opinion was reversed by our Supreme Court in *Minter v Grand Rapids*, 480 Mich 1182; 747 NW2d 229 (2008).

has suffered death, serious impairment of body function, or permanent serious disfigurement.”³ For a cause of action under § 3135(1), “[t]he issues of whether the 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 . . . [t]here is no factual dispute concerning the nature and extent of the person’s injuries [or] . . . [t]here is a factual dispute concerning the nature and extent of the person’s injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function or permanent serious disfigurement” MCL 500.3135(2)(a).⁴

At the time of the summary disposition proceedings below, a “serious impairment of body function” was defined by statute to mean “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(5), as amended by 2012 PA 158.⁵ In *McCormick v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010), our Supreme Court held that “the statutory language provides three prongs that are necessary to establish a ‘serious impairment of body function’: (1) an objectively manifested impairment (2) of an important body function that (3) affects the person’s general ability to lead his or her normal life.”

Under the first prong, an “objectively manifested” impairment is one that is “observable or perceivable from actual symptoms or conditions,” meaning that it is “evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function.” *Id.* at 196. As the Court explained, the statutory provision

does not contain the word “injury,” and, under the plain language of the statute, the proper inquiry is whether the *impairment* is objectively manifested, not the *injury* or its symptoms.” This distinction is important because “injury” and “impairment” have different meanings. An “injury” is “1. Damage of or to a person . . . 2. A wound or other specific damage.” “Impairment” is the “state of being impaired,” and to be “impaired” means being “weakened, diminished, or damaged” or “functioning poorly or inadequately.” These definitions show that while an injury is the actual damage or wound, an impairment generally relates to the effect of that damage. Accordingly, when considering an “impairment,” the focus “is not on the injuries themselves, but how the injuries affected a particular body function.” [*Id.* at 197 (citations omitted).]

³ This subsection has not been affected by the recent amendments to Michigan’s no-fault act. See 2019 PA 21; 2019 PA 22.

⁴ This language also was not changed by the recent amendments to Michigan’s no-fault act. See 2019 PA 21; 2019 PA 22.

⁵ MCL 500.3135(5) has since been amended and essentially codifies the test set forth in *McCormick*, 487 Mich at 195-203, for determining whether a serious impairment of body function has been incurred. See MCL 500.3135(5), as amended by 2019 PA 22.

There must be evidence, generally through medical testimony, of a physical basis for subjective complaints of pain and suffering in order to show an objectively manifested impairment. *Id.* at 197-198.

The second prong is “an inherently subjective inquiry that must be decided on a case-by-case basis.” *Id.* at 199. The focus is on whether the impaired body function is “important,” meaning that it has “great value, significance, or consequence.” *Id.* at 198-199 (quotation marks and citation omitted).

Regarding the third prong, the *McCormick* Court held as follows:

[T]he common understanding of to “affect the person’s ability to lead his or her normal life” is to have an influence on some of the person’s capacity to live in his or her normal manner of living. By modifying “normal life” with “his or her,” the Legislature indicated that this requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis. Determining the effect or influence that the impairment has had on a plaintiff’s ability to lead a normal life necessarily requires a comparison of the plaintiff’s life before and after the incident.

There are several important points to note, however, with regard to this comparison. First, the statute merely requires that a person’s general ability to lead his or her normal life has been affected, not destroyed. Thus, 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.

Second, and relatedly, “general” modifies “ability,” not “affect” or “normal life.” Thus, the plain language of the statute only requires 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.

Third, and finally, the statute does not create an 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.” [*Id.* at 202-203.]

In summarizing this test, the *McCormick* Court stated:

The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis. . . . “[T]he Legislature recognized that what is important to one is not important to all[;] a brief impairment may be devastating whereas a near permanent impairment may have little effect.” As such, the analysis does not “lend itself to any bright-line rule or imposition of [a] nonexhaustive list of factors,” particularly where there is no basis in the statute for

such factors. Accordingly, because “[t]he Legislature avoided drawing lines in the sand . . . so must we.” [*Id.* at 215-216 (citations omitted, second, third, and fourth alterations in original; second ellipsis in original).]

In this case, turning to the trial court’s first basis for its decision, the trial court focused on whether the motor vehicle accident was the factual cause of two of plaintiff’s claimed injuries—the right shoulder injury and the left knee injury—before considering whether these injuries constituted threshold injuries under *McCormick*. “Proximate cause is an essential element of a negligence claim.” *Ray v Swager*, 501 Mich 52, 63; 903 NW2d 366 (2017). The term “proximate cause,” has historically been used “both as a broader term referring to factual causation and legal causation together and as a narrower term referring only to legal causation.” *Id.* As explained in *Ray*,

All this broader characterization recognizes, however, is that “a court must find that the defendant’s negligence was a cause in fact of the plaintiff’s injuries before it can hold that the defendant’s negligence was the proximate or legal cause of those injuries.” In a negligence action, a plaintiff must establish both factual causation, i.e., “the defendant’s conduct in fact caused harm to the plaintiff,” and legal causation, i.e., the harm caused to the plaintiff “was the general kind of harm the defendant negligently risked.” If factual causation cannot be established, then proximate cause, that is, legal causation, is no longer a relevant issue. [*Id.* at 63-64 (citations omitted).]

Demonstrating factual causation, which is the only type of causation at issue for purposes of reviewing the trial court’s ruling in this case, requires a plaintiff to “present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.” *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997).

In this case, with respect to the right shoulder injury, the trial court specifically concluded that “the real injury to Plaintiff’s right shoulder came in 2018 when he injured himself pushing a car out of the snow.” The trial court reasoned that plaintiff did not complain of right shoulder pain at the time of his injury and that he only complained of pain in his left shoulder rather than his right shoulder when he sought treatment at Sparrow Hospital approximately one month after the motor vehicle accident.

We concur with the trial court’s conclusion that plaintiff is not entitled to relief on the alleged injury to his shoulder because plaintiff failed to present any proof of a physical injury to his shoulder until after the 2018 incident. Until the incident that caused plaintiff to fall on the ice while pushing a car, and thereafter seeking medical attention, plaintiff had not been treated for his shoulder, and there is no medical evidence supporting his claims of pain. There were no records, medical or otherwise, that demonstrated an objectively manifested injury to plaintiff’s shoulder. Hence, plaintiff’s claims, relative to his shoulder, were legally insufficient under *McCormick*: “There must be evidence, generally through medical testimony, of a physical basis for subjective complaints of pain and suffering in order to show an objectively manifested impairment.” *McCormick*, 487 Mich at 197-198. Here, in the absence of medical evidence presented to the trial

court of an injury to defendant's shoulder prior to 2018, we conclude that plaintiff is not entitled to relief as to any alleged injury to his shoulder.

Regarding the left knee injury, the trial court concluded that plaintiff's left knee injury was not caused by the motor vehicle accident because the medical records showed that this injury was the result of degeneration over time. However, to reach this conclusion, trial court ignored conflicting evidence present in the record. This conflicting evidence was contained in plaintiff's deposition testimony and plaintiff's medical records. Plaintiff testified that when his motorcycle collided with defendant's truck, he "fell down onto [his] knees and then rolled over onto [his] back." He also testified that his "left knee was hurting real bad" immediately after the motor vehicle accident and that he reported this condition while he was being treated at the emergency room. Plaintiff's medical records further indicate that when he was treated at Sparrow Hospital approximately one month after the accident, he was diagnosed with acute pain in the left knee. Additionally, there was evidence that plaintiff had not had any other surgeries before the accident related to his knees, and plaintiff did not indicate that he had preexisting medical issues with knee pain in response to defense counsel's questioning about plaintiff's preaccident medical history, even though plaintiff listed various other health issues that he had before the motor vehicle accident. Plaintiff also testified that he had not been in any previous motor vehicle or motorcycle accidents.

Although there was also evidence that plaintiff had a degenerative knee condition, a plaintiff may still permissibly recover for an injury that exacerbates a preexisting condition "if the trauma caused by the accident triggered symptoms from that condition." *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000). If there is evidence that the trauma caused by the accident precipitated the symptoms from an underlying preexisting condition, a jury may reasonably conclude that the accident was the cause in fact of the plaintiff's injury. *Id.* at 394-396. A "peculiar susceptibility of the victim does not relieve the tortfeasor of full responsibility for the damages" *Id.* at 394.

In *Wilkinson*, the plaintiff was diagnosed with neck strain following a motor vehicle collision in which the plaintiff's vehicle was hit from behind by the defendant's vehicle, throwing the plaintiff "forward and then backward with sufficient force to break the seat of the vehicle." *Id.* at 389. The plaintiff only missed two days of work. *Id.* at 389-390. Subsequently, the plaintiff's mental and physical condition deteriorated severely over the course of a year and a half, leading to the discovery and removal of a brain tumor. *Id.* at 390. There was trial testimony that the tumor "quite likely" had been present at the time of the accident and that the accident did not cause the tumor or its further growth or acceleration. *Id.* However, there was also testimony that "the trauma to plaintiff's head from the accident could have precipitated or accelerated the symptoms of the tumor that the plaintiff experienced." *Id.* There was further testimony that the trauma from the accident likely contributed to, or caused, the plaintiff's symptoms. *Id.* at 396. Our Supreme Court held, as pertinent to the issue in the instant case, that "the jury could have found from the evidence that the accident caused by the driver's negligence was the cause in fact of the plaintiff's injury." *Id.*

In this case, viewing the evidence in a light most favorable to plaintiff as the nonmoving party, a reasonable jury could conclude that it was more likely than not that but for the accident in which plaintiff was thrown off his motorcycle and the trauma resulting from the impact to his knee,

any preexisting degenerative knee condition that plaintiff had would not have become symptomatic; thus, a jury could find that the accident was the cause in fact of plaintiff's knee injury in this case. *Id.* at 394-396; *Weymers*, 454 Mich at 647-648.

Additionally, there was evidence that plaintiff had not had any previous medical issues involving knee pain before the accident but began experiencing left knee pain immediately after the accident and eventually underwent a surgical procedure on his left knee. There is record evidence further reflecting that plaintiff attributed his left leg and knee pain to the motor vehicle accident. Although a plaintiff may not rely on "mere speculation" to establish a theory of factual causation, see *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994), a plaintiff's "evidence is sufficient if it establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support," *id.* at 159-160 (quotation marks and citation omitted).

Here, even though there was evidence that plaintiff had a degenerative knee condition, there also was evidence that plaintiff only began experiencing painful symptoms in his left knee immediately following the motor vehicle accident, thus establishing a logical sequence of cause and effect rather than a mere coincidental temporal relationship. *Id.* In light of the conflicting evidence regarding causation of plaintiff's knee injury, the trial court erred by making improper findings of fact to resolve this issue in support of its decision to grant summary disposition. *Id.*; *Wilkinson*, 463 Mich at 394-396; *Innovative Adult Foster Care*, 285 Mich App at 480; *Lysogorski*, 256 Mich App at 299; *Holton*, 255 Mich App at 326. We reverse this portion of the trial court's ruling.

Next, the trial court ruled that there was no evidence that plaintiff's ability to lead his normal life was impaired. The trial court reached this conclusion by simply comparing what plaintiff was able to do by the time of the summary disposition motion with what he could do before the accident.

However, the trial court failed to properly analyze this prong as required under *McCormick*. In *McCormick*, our Supreme Court explicitly stated with respect to the third prong that "the statute does not create an 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 203. In this case, plaintiff testified that he was unable to walk, cook, grocery shop, or do laundry for a period of time (approximately two to three months) following the accident. Plaintiff did not need to show that his general ability to lead his normal life had been "destroyed," and there "is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected." *Id.* at 202-203. Plaintiff can meet the third prong by showing impairment for a relatively short period, such as two to three months. See *id.*; see also *Piccione v Gillette*, 327 Mich App 16, 17-18, 20-24; 932 NW2d 197 (2019) (opinion by M. J. KELLY, J.)⁶ (holding that there was a genuine issue of material fact precluding summary disposition regarding whether the injured plaintiff's general ability to lead his normal life was impaired by his clavicle fracture where, in addition to evidence that the plaintiff could not go to school for two weeks and that his ability to

⁶ Judges MARKEY and SWARTZLE concurred, but also filed a separate, joint concurring opinion. *Piccione*, 327 Mich App at 23 (MARKEY and SWARTZLE, JJ., concurring).

complete various other activities was compromised after the accident for a period of time, there was also evidence that the plaintiff had physically recovered from his injury and resumed his normal life within three or four months).

Because the trial court in this case misapplied the relevant legal standard required under *McCormick* with respect to the third prong of the test, and because there was evidence creating a genuine issue of material fact regarding the extent to which plaintiff's general ability to lead his normal life was impaired by his knee injury for at least some period of time, the trial court erred by granting summary disposition on this ground. *McCormick*, 487 Mich at 202-203; *Piccione*, 327 Mich App at 23 (opinion by M. J. KELLY, J.). We therefore reverse this portion of the trial court's ruling.

Finally, plaintiff challenges the trial court's ruling regarding his scar, specifically contending that the scar constitutes a permanent serious disfigurement and that the trial court erred by reaching the opposite conclusion. It appears that the trial court made such a ruling, concluding from the pictures in the record that the scar had healed, had faded, and was no longer noticeable.

As previously noted, a plaintiff may also establish a threshold injury under MCL 500.3135(1) by demonstrating that the plaintiff suffered "permanent serious disfigurement." Whether a plaintiff suffered permanent serious disfigurement is a question of law for the court if the court finds either that no factual dispute exists concerning the nature and extent of the plaintiff's injuries or that any such factual dispute is not material to determining whether the plaintiff suffered permanent serious disfigurement. MCL 500.3135(2)(a).

This Court has explained the relevant legal framework for a court to apply in determining whether a plaintiff suffered permanent serious disfigurement as follows:

Under the plain language of MCL 500.3135(1), in order to meet the disfigurement threshold, a plaintiff must have a disfigurement that is both permanent and serious. To disfigure something is to "mar the appearance or beauty of," to "deform," or to "deface." Hence, with regard to a person, a disfigurement is something that mars, deforms, or defaces the person's appearance. Further, the disfigurement is permanent if it will exist perpetually or is otherwise "long-lasting," and will be considered serious if it is "significant" or "not trifling." *Thus, a threshold disfigurement is a long-lasting and significant change that mars or deforms the injured person's appearance.*

In assessing whether a particular change in appearance meets the disfigurement threshold, this Court has held that the determination depends on the physical characteristics of the injury rather than the effect of the injury on the plaintiff's ability to lead a normal life. Thus, the focus must be on the outward appearance of the injury, which necessarily entails a case-by-case assessment. Likewise, whether the change in appearance is significant enough to be considered serious is an objective determination that must be made as a matter of common knowledge and experience. Finally, whether an injury constitutes a serious disfigurement must be determined with regard to the injured person's appearance while engaged in a "full spectrum" of life activities rather than in an isolated

“perusal” of the injured person’s immediate appearance. *Consequently, when determining whether a plaintiff has established a threshold disfigurement, courts must objectively examine the physical characteristics of the injury on a case-by-case basis and determine whether, in light of common knowledge and experience and considering the full spectrum of the injured person’s life activities, the injury’s physical characteristics significantly mar or deform the injured person’s overall appearance.* [*Fisher v Blankenship*, 286 Mich App 54, 66-67; 777 NW2d 469 (2009) (citations omitted; emphasis added).]

The *Fisher* Court further held that “courts must consider the effect of the disfigurement on the injured person’s appearance without the use of devices designed to conceal the disfigurement,” but that “the fact that an injured person requires, or does not require, the use of a prosthesis to mitigate the disfiguring effects of an injury will often be evidence of the seriousness of the disfigurement.” *Id.* at 69.

Fisher, like the instant case, was also an automobile negligence action. *Id.* at 56. In *Fisher*, this Court considered whether the plaintiff’s loss of 14 front teeth that necessitated his use of dentures constituted a permanent serious disfigurement. *Id.* at 57, 61, 65. Noting that there was no material factual dispute regarding the nature and extent of the plaintiff’s injuries, this Court considered the matter as a question of law. *Id.* at 65. First, this Court concluded that the plaintiff had “suffered a permanent disfigurement” because it was “clear that [the plaintiff’s] loss of teeth mars or deforms his overall appearance” and it was “also abundantly clear that the disfigurement will last for the remainder of his life.” *Id.* at 67. The Court then turned to the question “whether the disfigurement [was] significant enough to be considered ‘serious’ within the meaning of MCL 500.3135(1).” *Id.* This Court determined that the injury was objectively serious for purposes of the statute, reasoning as follows:

we conclude that [the plaintiff]’s ability to partially conceal his disfigurement through the use of dentures does not render his disfigurement less serious. Rather, we conclude that the need for such a prosthesis is evidence that the disfigurement itself is so serious that one cannot reasonably expect [the plaintiff] to appear in public without it. Further, even when he uses the dentures, his appearance is significantly altered: his upper lip protrudes, he drools, and his speech is altered. Therefore, taking into consideration the effect of [the plaintiff]’s injury on his appearance with regard to the full spectrum of his life activities, we conclude that [the plaintiff]’s injury amounts to a permanent serious disfigurement. [*Id.* at 69.]

In this case, the record contains photographs of plaintiff’s scar demonstrating its effect on his appearance,⁷ and there accordingly appears to be no material factual dispute over the nature and extent of the injury. Hence, whether the scar is a permanent serious disfigurement is a “question[] of law for the court.” MCL 500.3135(2)(a); see also *Fisher*, 286 Mich App at 65. The pictures reflect that the laceration has healed and appears less noticeable since the time of the accident, as would be expected. However, the pictures also reflect that a thin, pink line remains just above plaintiff’s right eyebrow. The length of the scar is approximately equivalent to the

⁷ We have reviewed these photographs.

width of plaintiff's eye, and the coloring of the scar is not much different than plaintiff's skin tone. The scar seems to mar plaintiff's appearance somewhat such that it could constitute a disfigurement, and the parties do not seem to dispute that the scar will be long-lasting or permanent. *Fisher*, 286 Mich App at 66-67.

Nonetheless, assuming without deciding that plaintiff has established a permanent disfigurement, plaintiff has failed to demonstrate that the scar is objectively significant enough to be considered "serious" for purposes of MCL 500.3135(1). The seriousness of any change in appearance resulting from the disfigurement is to be assessed under an objective standard "as a matter of common knowledge and experience," and the focus is on "the physical characteristics of the injury rather than the effect of the injury on the plaintiff's ability to lead a normal life." *Fisher*, 286 Mich App at 66-67. Thus, plaintiff's subjective feelings about the scar, and his testimony that seeing it in the mirror causes him to experience flashbacks of the accident, do not enter into the analysis in this context. Here, objectively considering the physical characteristics of the scar in the context of plaintiff's general appearance, under the "totality of the circumstances" as required by this Court's decision in *Fisher*, 286 Mich App at 67, 68, the scar is not immediately distinguishable from the overall appearance of plaintiff's wrinkles and skin tone unless one is specifically looking for and considering the scar. Determining whether an injury is a permanent serious disfigurement, however, requires considering "the injured person's appearance while engaged in a 'full spectrum' of life activities rather than in an isolated 'perusal' of the injured person's immediate appearance." *Id.* at 67. Plaintiff's appearance is not "significantly altered" by the scar; the record evidence does not reflect facts analogous to those that were present in *Fisher*, where the plaintiff's loss of teeth and resulting denture use caused him to drool, affected his speech, and caused his upper lip to protrude. *Id.* at 69.

Accordingly, the scar does not *significantly* mar plaintiff's overall appearance and, therefore, is not "serious" for purposes of MCL 500.3135(1). Because there is no genuine issue of material fact that the scar is not "serious," the scar does not constitute a permanent serious disfigurement and the trial court did not err by granting defendant's motion for summary disposition in this respect. We affirm this portion of the trial court's ruling.

IV. CONCLUSION

For the reasons stated above, we reverse the trial court's summary disposition ruling with respect to plaintiff's injuries to his knee, but affirm in all other aspects.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction. No costs are awarded. MCR 7.219.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Michael J. Riordan