

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

EDWARD M. HORANT and :
AGNES J. HORANT, :
Husband and wife, :
 :
Plaintiffs :
 :
vs. : No. 11-2870
 :
JAMES YARNELL, JR., :
THE PEPSI BOTTLING GROUP, INC., :
NEW BERN TRANSPORT CORPORATION, :
 :
Defendants :

Brian B. Gazo, Esquire Counsel for Plaintiffs
Randy C. Greene, Esquire Counsel for Defendants

MEMORANDUM OPINION

Matika, J. - April 1, 2013

Before this Honorable Court is a motion for summary judgment filed by Defendants James Yarnell Jr., and New Bern Transport Corporation (hereinafter "Defendants") on the basis that Edward M. Horant and Agnes J. Horant, husband and wife, (hereinafter "Plaintiffs") have failed to pierce the limited tort threshold and establish a serious injury as defined in, and in accordance with, 75 Pa.C.S.A. § 1705. After an argument on the matter and a review of the briefs and supplemental brief, for the reasons stated within this opinion, Defendants' motion for summary judgment is **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND

The facts in this matter are neither in dispute nor complex. On April 23, 2010, at around 9 A.M., Plaintiff, Edward Horant, (hereinafter "Horant") was operating his vehicle in the westerly direction on Pennsylvania State Route 209 near the intersection of First Street and Bankway in Lehigh County. At the same time and traveling in the same direction Defendant James Yarnell, an employee of Defendant New Bern Transport Corporation, was operating a truck owned by Defendant New Bern Transport Corporation. Defendant Yarnell collided into the rear of Horant's vehicle. As a result of said accident, Horant suffered tears to his medial and lateral meniscus in his left knee that resulted in arthroscopic surgery.

Horant, through his own admission, stated he did not seek medical treatment until a week after the accident. Additionally, Horant affirmed that by January 1, 2011 he was fully recovered and returned back to the same activities he enjoyed before the accident. (Horant Dep. 29:23 - 36:11, May 2, 2012).

At the time of the accident, Plaintiffs had an automobile insurance policy with Hartford AARP. Under the policy, Plaintiffs elected limited tort coverage.

Defendants have filed this motion for summary judgment

arguing to the Court that Plaintiffs have failed to establish that the injuries suffered by Horant were of the nature to be considered "serious injury" in order to pierce the threshold necessary to recover noneconomic losses under a limited tort policy pursuant to 75 Pa.C.S.A. § 1705.

DISCUSSION

A trial court may grant a motion for summary judgment whenever there are no genuine issues of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report. Pa.R.C.P. 1035.2. In response, the non-moving party must demonstrate that there is a genuine issue for trial and cannot rest upon the mere allegations and denials of his pleadings. *Phaff v. Gerner*, 303 A.2d 826, 829 (Pa. 1973); *Davis v. Resources for Human Development, Inc.*, 770 A.2d 353, 357 (Pa. Super. Ct. 2001). The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Pa.R.C.P. 1035.2.

In granting a motion for summary judgment the trial court must decide "whether the admissible evidence in the record, in whatever form, from whatever source, considered in the light most favorable to the [non-moving party] to the motion, fails to

establish a prima facie case or defense" to allow the case to continue to trial. *Liles v. Balmer*, 567 A.2d 691, 692 (Pa. Super. Ct. 1989). Thus a court may grant summary judgment based upon an evidentiary record that either shows the material facts are undisputed, or contains insufficient evidence of facts to make out a prima facie cause of action or defense. *Basile v. H & R Block, Inc.*, 777 A.2d 95, 100 (Pa. Super. Ct. 2001).

Pursuant to Pennsylvania Rules of Civil Procedure Rule 1035.2, if a defendant is the moving party, the defendant "may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action." *Rauch v. Mike-Mayer*, 783 A.2d 815, 224 (Pa. Super. Ct. 2001) (citing Pa.R.C.P. 1035.2(2)).

In Pennsylvania, a plaintiff who has elected the limited tort alternative coverage under his or her respective insurance policy is precluded from maintain an action for any noneconomic loss unless the plaintiff has sustained a serious injury. 75 Pa.C.S.A. § 1705(d).¹

Serious injury is defined as "death, serious impairment of body function, or permanent serious disfigurement." 75

¹ There are some exceptions to this general rule but none are applicable to the situation before the Court.

Pa.C.S.A. § 1702.² In the summary judgment context, the Court must determine whether Defendants, as the moving party, have establish the fact that Plaintiff, Edward Horant, has not suffered a serious injury as defined by the Pennsylvania statutes.

The court, in its determination of whether a plaintiff has sustained a serious impairment of body function, must focus not on the injury itself, but rather on how the injury has affected the particular body function. *Long v. Mejia*, 896 A.2d 596, 600 (Pa. Super. Ct. 2006). As the appellate courts have stated numerous times, "serious impairment of body function" threshold determinations involve a two-step inquiry:

1) What body function, if any, was impaired because of the injuries sustained in the motor vehicle accident?

2) Was the impairment of body function serious?

Washington v. Baxter, 719 A.2d 733, 740 (Pa. 1998) (citing *DiFranco v. Pickard*, 398 N.W.2d 896, 901 (Mich. 1986)).

In examining the first prong of this two-step analysis, Horant claims that he suffered, as a result of the accident, a tear to both his medial and lateral meniscus of the left knee. Horant further claims that the direct consequence of such

² Since death is not an issue in this matter, the Court will only exam serious impairment of body function and permanent serious disfigurement.

ligament tears of the left knee was that his movement and ambulation of the knee were impaired.

The second prong of the Court's analysis, that being, was the impairment of body function serious, requires a greater scrutiny of the facts. In determining if the impairment of a particular body function is of the serious nature required under the statute, there are certain factors a court must examine. These factors are: 1) extent of impairment; 2) particular body function impaired; 3) length of time impairment lasted; 4) treatment required to correct impairment; and 5) any other relevant factors. *Washington*, 719 A.2d at 740.

In making its ultimate conclusion, the Court notes that the impairment itself need not be permanent to be serious; however, the consequences of the injury must involve serious impact to Horant's life for an extended period of time. *Oswin v. Shaw*, 609 A.2d 415, 429 (N.J. 1992). The impairment needs to interfere substantially with Horant's normal activities and not impose only mild to slight limitations. *Dodson v. Elvey*, 665 A.2d 1223, 1234 (Pa. Super. Ct. 1995) *rev'd on other grounds*, 720 A.2d 1050 (Pa. 1998). "Generally, medical testimony will be needed to establish the existence, extent, and permanency of the impairment." *Washington*, 719 A.2d at 740. Thus the question that needs to be answered is not whether Plaintiffs have adduced sufficient evidence to show that Horant has suffered any injury,

but rather whether Horant has suffered a serious injury such that a body function has been seriously impaired. *Id.* at 741.

In applying these factors to the case at bar, the Court concludes that reasonable minds could not differ on the conclusion that Horant's injury was not serious. As stated previously, the extent of Horant's impairment were tears to the medial and lateral meniscus of the left knee. Horant, by his own admission stated that by Christmas of 2010 his left knee regained full function and he was able to participate in the same daily activities as he was before the accident. (Horant Dep. 35:22 - 37:1, May 2, 2012). As such, the length of total impairment as a result of the accident was eight months.

The treatment Horant had to undergo as a result of such impairment was physical therapy, cortisone injections, and arthroscopic surgery. Following arthroscopic surgery, Horant underwent more physical therapy.

In examining the relevant case law, the impairment of Horant's injuries to his body function is analogous to that of the plaintiff in *Washington* as oppose to the plaintiffs in *Kelly v. Ziolk*, 734 A.2d 893 (Pa. Super Ct. 1999), *Hellings v. Bowman*, 744 A.2d 274 (Pa. Super Ct. 1999), and *Furman v. Shapiro*, 721 A.2d 1125 (Pa. Super Ct. 1998).

The plaintiff in *Washington* suffered a right foot injury

and was immediately treated at a hospital emergency room.³ Similar to Horant, the plaintiff in *Washington* was able to perform his work duties and engage in his normal daily activities a year after the accident. The *Washington* Court, in granting defendant's summary judgment motion concluded there was little to no impact on plaintiff's performance of his job and his engagement in personal activities, despite him still complained of pain in his foot. *Washington*, 719 A.2d at 741. As stated previously, eight months after the accident Horant was able to re-engage in those daily activities he enjoyed before the accident.

When comparing Horant's situation to those plaintiffs in *Kelly*, *Hellings*, and *Furman*, where the Superior Court reversed and remanded the trial court's granting of summary judgment, such plaintiffs' daily activities and way of life were substantially impacted due to their respective injuries, unlike Horant.

The plaintiff in *Kelly*, as a result of the injury he sustained, could not do much physical activity or sit for long periods of time. Furthermore, besides being unable to play with his child, plaintiff could not engage in the recreational activities he once enjoyed, such as riding mountain bikes and

³ It should be noted that Horant did not seek medical treatment until a week after the accident. (Horant Dep. 29:20, May 2, 2012).

motorcycles and hunting. *Kelly*, 734 A.2d at 899-90. Similarly, the plaintiff in *Furman* could not enjoy the normal activities she once enjoyed due to her accident. In fact, because of her accident, plaintiff had to reduce her employment status from full-time to part-time. *Furman*, 721 A.2d at 1127.

Although Horant stated in his deposition that some of his daily activities were impacted by the accident, like walking, climbing steps, and going to the bathroom, unlike the situations in *Kelly* and *Furman*, there has been no medical testimony or evidence presented to the Court that Horant's injuries are of a permanent nature or will substantially impair Horant's daily activities in the future. See, *Kelly*, 734 A.2d at 900; *Furman*, 721 A.2d at 1127; *Calderon v. Kauffman*, 3 Pa. D. & C. 5th 225, 227 (Pa. Com. Pl. Aug. 7, 2007) (Due to plaintiff's inability to produce any such medical documentation that her injuries from the accident substantially interfered with her normal activities, the Court granted defendant's summary judgment motion.). On the contrary, an independent medical examination conducted by Dr. Prodromos A. Ververeli, of Horant on June 4, 2012, affirmed that there is no further treatment necessary for Horant's knee. The Doctor further concluded that as of December 9, 2010, Horant made satisfactory postoperative recovery and was able to resume normal duties without restriction.

For these forgone reasons, this Court concludes that no reasonable mind could differ on the conclusion that Horant's injury was not of such a serious nature to substantially impair his body functions.

Plaintiffs also argue that as a result of the accident, Horant has suffered serious injury in the form of permanent serious disfigurement. In support of this argument, Plaintiffs have submitted various pictures of Horant's left knee which depict various scars. In these photographs, there are four small portal scars. On the top of the patella region however is a much larger scar. From that large scar, Plaintiffs submits to the Court that Horant has suffered a serious injury in the form of a permanent disfigurement. Even if the Court itself is unwilling to make that ultimate conclusion, such pictures frustrate Defendants in carrying their burden that no genuine issue of material fact exists, and as such this matter must be sent to a jury.

Notwithstanding this argument, Plaintiffs have not provided the Court with any evidence to support the conclusion that the large scar on Horant's left knee was caused by the accident or subsequent surgery. Plaintiffs have merely stated that the scar could only have come from the accident.

Defendants, in carrying their burden and disproving

Plaintiffs' argument, submitted to the Court an October 4, 2012, addendum to Dr. Ververeli's June 4, 2012 independent medical examination. The Doctor opines that based upon an examination of the operative report from Horant's arthroscopic surgery, that he has four "well-healed" portal incisions about one-half centimeter in size. In addition, and more importantly to Plaintiffs' argument, the Doctor determined, within a reasonable degree of medical certainty, that the large scar above the patella region is not related to the arthroscopic procedure Horant had undergone as a result of the accident. In reaching this conclusion, the Doctor noticed a difference in coloration between the four minute portal incisions and the large scar, in addition to this large scar not matching up with the arthroscopic surgical report.

To survive a motion for summary judgment, the non-moving party cannot rest upon the pleadings and bald assertions, but rather must provide support in the form of affidavits to overcome the moving party having met its burden Pa.R.C.P. 1035.3(a). Here, Plaintiffs have not provided the Court with any evidence to contradict that presented by the Defendants nor have they raised a genuine issue of material fact that the scar above Horant's patella region is a result of the accident.

For the reasons stated above, Defendants have met their

burden in proving Horant has not suffered serious injury in order to recover noneconomic loss from the accident of April 23, 2010. Accordingly, the Court enters the following order:

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Brian B. Gazo, Esquire	Counsel for Plaintiffs
Randy C. Greene, Esquire	Counsel for Defendant

ORDER OF COURT

AND NOW, this 1st day of April, 2013, upon consideration of the Motion for Summary Judgment filed by Defendants, James Yarnell, Jr. and New Bern Transport Corporation, the briefs lodged in support thereof, Plaintiffs' response and supplemental brief thereto, and after oral argument thereon, it is hereby

ORDERED and DECREED that the Motion for Summary Judgment is **GRANTED** and Defendants, James Yarnell, Jr. and New Bern Transport Corporation are **DISMISSED** from the case with prejudice.

BY THE COURT:

Joseph J. Matika, Judge