

**JULY 2016 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES**

EXAMINERS' ANALYSIS OF QUESTION NO. 1

The question requires the applicant to discuss two main issues: (1) whether Paula can establish liability against Dave Defendant for noneconomic damages resulting from her temporary injuries and her scar, and (2) whether a judge or jury should decide these issues.

MCL 500.3135(1) & (2) provide in part as follows:

(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.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

(a) The 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 of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is

created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

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I. Who Decides?

As the above statute makes clear, if there is no factual dispute concerning the nature and extent of Paula's injuries, or there is a factual dispute about them but the dispute is not material to the threshold injury issues, then a court must decide these issues. *McCormick v Carrier*, 487 Mich 180, 215-216 (2010). Consequently, the applicant must discuss whether there are any factual disputes about the nature and extent of Paula's injuries, and the reasonable conclusion is that there is no material factual dispute. The question contains no suggestion of differing evidence or facts about the nature and extent of the injuries, leaving just the application of those facts to the statutory criteria, i.e., a question of law for the court. As to the scar, the undisputed facts show that Paula had an eight inch scar that is still visible, even through makeup. Therefore, whether Paula's scar constituted a "permanent serious disfigurement," is also a question of law to be decided by the court.

II. The

Injuries A. Serious Impairment:

In *McCormick*, 487 Mich at 215-216, the Michigan Supreme Court summarized the applicable steps and standards for deciding whether an individual has suffered a serious impairment of body function:

If the court may decide the issue as a matter of law, it should next determine whether the serious impairment threshold has been crossed. The unambiguous language of MCL 500.3135(7) provides three prongs that are necessary to establish a "serious impairment of body function": (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).

The serious impairment analysis is inherently fact--and circumstance--specific and must be conducted on a case-by-case basis. As stated in the *Kreiner* dissent, "[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." *Kreiner*, 471 Mich at 145 (CAVANAGH, J., *dissenting*). 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. *Id.* Accordingly, because "[t]he Legislature avoided drawing lines in the sand ... so must we." *Id.*

A good answer will examine the three factors outlined in *McCormick*, and conclude that the broken leg and fractured hip constituted serious impairments of body function. Specifically, a broken leg and fractured hip are **objectively manifested impairments**, as they are both readily observable by the naked eye or through x-ray and other medical exams. A leg and hip are also **important body functions**, as they allow one to walk and be mobile for everyday activities. *Kern v Blethen-Coluni*, 240 Mich App 333, 343 (2000).

Finally, most of the analysis will be on whether these objectively manifested impairments of important body functions affects Paula's **general ability to lead a normal life**. The facts tell us that before her injuries, Paula lived an active life, both in and out of work. She was a RN, walking many miles during each shift. She frequently worked overtime, which necessitated more walking (and more income). She also was active in both summer and winter sports that required healthy legs and hips, and she also took care of her elderly parents and would occasionally babysit her grandchildren. This all came to an end after the accident. Paula was off work for over nine months, and when she returned, she could no longer perform her regular RN duties. She only returned to her normal RN duties just shy of two years after the accident. Additionally, although she resumed caring for her parents and grandchildren when she first returned to work, she was prohibited from playing golf or tennis until she was fully recovered, which was in the

summer of 2016. Under these facts, it is reasonable to conclude that Paula suffered a serious impairment of important body function.

Some may question that conclusion on the ground that the impairments lasted less than two years, and Paula returned to work (though not to her prior work) and caring for her parents and grandchildren after only nine months. But as the *McCormick* Court noted, the issue is how the impairments affected the person's life, and even temporary impairments could have a serious impact on one's general ability to lead a normal life. See also *Williams v Medukas*, 266 Mich App 505, 508 (2005). For this reason, it is important that the issue of temporary impairment be raised, but it is most reasonable to reject that factor as precluding relief.

B. Permanent serious disfigurement:

Paula's scar raises different standards. As for her scar, Michigan law provides that determining the "seriousness" of a scar is a matter of common knowledge and experience for the courts unless there is a question regarding the nature and extent of the scar. MCL 500.3135(2)(a); *Kern v Blethen-Coluni*, 240 Mich App 333, 338 (2000); *Nelson v Myers*, 146 Mich App 444, 446 (1985). As previously noted, there is no question regarding the nature and extent of the scar.

The seriousness of a scar "depends on its physical characteristics rather than its effect on [a] plaintiff's ability to live a normal life." *Myers*, 146 Mich App at 446. The undisputed evidence reveals that Paula was embarrassed by the unusually long scar, that it was clearly visible on her forehead, and that it could not be covered up by makeup. People would even stare at the scar. There was also no suggestion that plastic surgery would be considered, or would even work. Given the scar's location and discoloration, it is reasonable to conclude that the scar was a permanent serious disfigurement.