

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CLOEVA PORCELLI,

Plaintiff-Appellant,

v

TIMOTHY GEORGE KIRCHNER,

Defendant-Appellee.

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UNPUBLISHED

January 24, 2003

No. 236822

Wayne Circuit Court

LC No. 00-013711

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition in favor of defendant. We affirm.

I. Facts

On July 13, 1997, defendant was driving northbound on Middlebelt Road in the City of Westland when he collided with plaintiff at the intersection of Middlebelt Road and Van Born Road. Plaintiff received a ticket following the accident for making an illegal left turn. Two days later, plaintiff went to the hospital complaining of various pains due to the accident. Throughout the next year, plaintiff underwent multiple tests and saw multiple doctors regarding the pains she felt as a result of the accident. Plaintiff filed a complaint against defendant alleging that, as a proximate result of the negligent conduct by defendant, plaintiff sustained permanent injuries that have caused pain, suffering, disability and mental anguish and have caused plaintiff to sustain a serious impairment of body functions.

II. Standard of Review

A trial court's determination of a motion for summary disposition is reviewed de novo on appeal. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The trial court did not specify the subsection of MCR 2.116(C) under which it granted summary disposition. "Because the trial court looked beyond the pleadings in deciding defendant's motion, we review the motion under MCR 2.116(C)(10)." *Trepanier v National Amusements, Inc*, 250 Mich App 578, 583; 649 NW2d 754 (2002).

In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence

filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). This Court may grant a motion for summary disposition pursuant to MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto, supra*, 451 Mich 362. Further, the decision of the trial court to decline to entertain actions beyond the time frames adhered to and set forth by the scheduling order is reviewed for an abuse of discretion. *People v Grove*, 455 Mich 439, 464-465; 566 NW2d 547 (1997), see MCR 2.401(B)(2) and (I)(2); see also *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993).

### III. Analysis

Plaintiff's first issue on appeal is that the trial court abused its discretion from striking Dr. Samet as a witness. We disagree. The trial court has the discretion to prohibit actions beyond the time frames agreed to and set forth by a scheduling order. *Grove, supra*, 455 Mich 464-465; see MCR 2.401(B)(2) and (I)(2). "Were the rules not so construed, scheduling orders would quickly become meaningless." *Grove, supra*, 455 Mich 469.

In the present case, the trial court held that due to plaintiff's failure to reveal Dr. Samet, or to file a witness list naming Dr. Samet, defendant would be greatly prejudiced if Dr. Samet's testimony or exhibits were admitted. Under MCR 2.401(B)(2)(a), a trial court has the authority to establish times for events the court deems appropriate, including the exchange of witness lists. MCR 2.401(I)(1) and (2) provides:

#### **(I) Witness Lists**

(1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:

(a) the name of each witness, and the witness's address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;

(b) whether the *witness is an expert*, and the field of expertise.

(2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown. [Emphasis added.]

On July 28, 2000, the trial court entered a scheduling order setting forth various scheduling deadlines. The trial court ordered that the witness lists shall be exchanged no later than January 7, 2001. Six months later, defendant filed a motion for dismissal because plaintiff failed to file a witness list. It was only after defendant filed his motion to dismiss, that plaintiff made an attempt to satisfy the requirement of the court's scheduling order by serving upon defendant a witness list.

The trial court's decision to strike Dr. Samet was a reasonable and measured response. The trial court allowed the evidence presented by all of the witnesses plaintiff had previously identified in her answers to defendant's interrogatories. Dr. Samet was not named in the interrogatories. Therefore, under such circumstances, the trial court did not abuse its discretion by concluding that plaintiff did not disclose the expert witness information in the time and manner required by the pretrial scheduling order. Moreover, upon reviewing the record, we find that plaintiff lacked good cause for failing to comply with the disclosure standards set forth in the order.

Defendant's second argument on appeal is that the trial court erred in finding that plaintiff did not suffer a serious impairment of an important body function. We disagree.

MCL 500.3135(1) provides:

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.

"This statutory threshold is designed to eliminate suits based on clearly minor injuries and those that do not seriously affect the ability of the body to function." *May v Sommerfield*, 239 Mich App 197, 200; 607 NW2d 422 (1999).

The determination of a threshold injury is a question of law for the trial court. *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000). MCL 500.3135(2)(a) provides:

The issues of whether an 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 as to 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.

In determining the existence of a factual dispute, trial courts must assess the nature of plaintiff's injuries and make necessary findings concerning the existence of a factual dispute as it pertains to whether plaintiff has an objectively manifested impairment, and if the important body function is impaired. *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001). Further, the trial court should also assess whether a factual dispute exists regarding whether the impairment affects plaintiff's general ability to lead a normal life. *Miller, supra*, 246 Mich App 247.

The trial court entered an order granting summary disposition in favor of defendant on the basis that no issue of fact was presented on the question of a serious impairment of body function. The evidence presented substantiated the trial court's ruling. "In determining whether the impairment of the important body function is 'serious,' the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery." *Kern, supra*, 240 Mich App 341.

Two days following the accident, x-rays were taken of plaintiff's shoulder, right forearm, and chest, which showed no abnormalities. An x-ray of plaintiff's cervical spine denoted degenerative changes in the mid-cervical region, however, no evidence existed of fracture, dislocation, or destructive process. Between August 5, 1997, and May 29, 1998, plaintiff was treated by Dr. Mendelson, regarding myofascial pains in her neck, right shoulder and right forearm. However, although Dr. Mendelson acknowledged that plaintiff did have some mild tenderness in her neck, right shoulder, and right forearm joints, Dr. Mendelson concluded that plaintiff's spine was straight and that she had no "swelling, ecchymosis, fullness, atrophy, or spasm." Further, Dr. Mendelson also concluded that plaintiff's straight leg raise was normal as well as her range of motion of the hips and knees. Moreover, plaintiff underwent nerve conduction studies and an electromyographic examination of the upper and lower extremities, which showed that no abnormalities existed. Additionally, a CT scan of plaintiff's head was conducted, which showed that there were no abnormalities. Furthermore, plaintiff admitted in her deposition that no doctor has told her that she requires surgery for her injuries.

Given the overwhelming evidence that plaintiff has not sustained a serious injury as a result of the accident, the trial court did not err in concluding that no issue of fact was presented on the question of a serious impairment of body function. Furthermore, although plaintiff stated in her deposition that she eventually left her job because she could no longer perform her housekeeping duties at work, an independent medical examiner determined that plaintiff could return to her normal housekeeping duties, with a restriction on her right knee. Moreover, plaintiff has failed to present evidence that her general ability to lead a normal life has been significantly altered by the accident. Although some activities in plaintiff's life may have changed as a result from the accident, as a matter of law plaintiff has not proved that these injuries are sufficiently severe so as to prevent her from living a normal life.

Plaintiff's last issue on appeal is that the trial court erred in finding that plaintiff's right knee injury was not caused by the automobile accident. We disagree. The determination of a threshold injury is a question of law for the trial court if no factual dispute exists concerning the nature of the person's injury. See MCL 500.3135; see also *Kern, supra*, 240 Mich App 338. In determining the existence of a factual dispute, trial courts must assess the nature of plaintiff's injuries and make necessary findings concerning the existence of a factual dispute as it pertains to whether plaintiff has an objectively manifested impairment, and if the important body function is impaired. *Miller, supra*, 246 Mich App 247.

The trial court held in its order granting summary disposition in favor of defendant that it was undisputed that plaintiff suffered an injury to her right knee in 1999, not in the 1997 accident at issue in the lawsuit. Plaintiff was involved in the automobile accident on July 13, 1997. On May 29, 1998, an orthopedic surgeon determined that plaintiff had a normal range of motion in her knees. On December 14, 1998, plaintiff was treated at Oakwood Hospital for twisting her

right knee. The medical report from Oakwood Hospital stated that plaintiff injured her right knee by falling on two steps. In January 1999, plaintiff was diagnosed with a torn meniscus in her right knee. Therefore, given the evidence and the logical sequence of events that followed, the trial court did not err in finding that plaintiff's right knee injury was not caused by the automobile accident.

#### IV. Conclusion

In sum, the trial court did not abuse its discretion when it precluded plaintiff from using Dr. Samet's testimony or offering any of Dr. Samet's records as exhibits. Further, the trial court did not err in finding that plaintiff did not suffer serious impairment of an important body function as a result of the automobile accident. Additionally, it was not reversible error for the trial court to hold that plaintiff's right knee injury was not caused by the automobile accident.

Affirmed.

/s/ Brian K. Zahra

/s/ Christopher M. Murray

/s/ Karen M. Fort Hood