

STATE OF MICHIGAN
COURT OF APPEALS

AMBER J. CUTTLE,

Plaintiff-Appellant,

v

ERIC A. BARE,

Defendant-Appellee.

UNPUBLISHED

November 15, 2002

No. 234184

Ionia Circuit Court

LC No. 99-020144-NI

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition and denying her motion to amend the scheduling order. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On April 27, 1999 a car driven by plaintiff was struck from the rear by a car driven by defendant as traffic slowed for road construction. Plaintiff was taken to the emergency room where she was diagnosed with neck strain; however, x-rays revealed no objective neck injuries. Both an EKG and an MRI performed after the accident were normal.

In September 1999 plaintiff filed suit alleging that the accident resulted in injuries to her neck, upper back, and shoulders and aggravated preexisting conditions, and that her injuries constituted a serious impairment of body function. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). He noted that plaintiff had a number of conditions that preexisted the accident, but that her principal complaint, temporomandibular joint (TMJ) syndrome, did not manifest itself for nearly one year after the accident. Defendant emphasized that plaintiff's expert, Charles Van Dyken, DDS, could not state with any degree of certainty that plaintiff's TMJ syndrome was caused by the accident, and that office notes kept by plaintiff's treating dentist revealed that plaintiff exhibited signs of TMJ syndrome, including malocclusion and grinding, several years before the accident.

In response to defendant's motion plaintiff argued that a question of fact existed as to whether her TMJ syndrome constituted a serious impairment of body function. Plaintiff relied on an affidavit from Don Blough, a registered physical therapist, who opined that her condition was caused by the accident and constituted a serious impairment of body function. Plaintiff also submitted her own affidavit in which she stated that as a result of her TMJ syndrome she was unable to eat properly and suffered migraine headaches.

In addition, plaintiff moved to amend the scheduling order to adjourn mediation, permit amendment of the expert witness lists, and reopen discovery. She asserted that her TMJ syndrome had worsened and required surgical intervention. She sought to add Blough and two oral surgeons to her expert witness list, and sought to extend discovery to allow for the compilation of evidence related to the surgery.

The trial court granted defendant's motion for summary disposition and denied plaintiff's motion to amend the scheduling order. The trial court stated that plaintiff's affidavit contradicted her deposition testimony and that Blough's affidavit was merely conclusory, and concluded that plaintiff did not put forth evidence to create a genuine issue of fact as to whether she suffered a serious impairment of body function.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

A serious impairment of body function is "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(7). Whether a person has suffered a serious impairment of body function is a question of law for the court if there is no factual dispute concerning the nature and extent of the injuries, or if there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a). In determining whether the impairment of the important body function is serious, the court should consider factors such as the extent of the injury, the treatment required, the duration of the disability, and the extent of residual impairment and prognosis for eventual recovery. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). In assessing the extent of the injury, the court may compare the plaintiff's lifestyle before and after the injury. *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000).

We review a trial court's decision to allow a party to amend a witness list to add an expert witness for an abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991).

Plaintiff argues the trial court erred by granting defendant's motion for summary disposition and abused its discretion by denying her motion to amend the scheduling order. We disagree and affirm the trial court's decision. The evidence showed that nearly one year after the accident, plaintiff manifested symptoms of TMJ syndrome. The condition was demonstrated by objective tests and x-rays. Plaintiff's expert witness could not state whether her TMJ syndrome was caused by the accident, and the records kept by plaintiff's treating dentist showed that plaintiff exhibited symptoms of TMJ syndrome several years before the accident.

In response to defendant's motion for summary disposition plaintiff submitted an affidavit from therapist Blough, who opined that her condition was caused by the accident. In his affidavit Blough set out plaintiff's physical condition, and then stated in a conclusory manner that he believed that plaintiff's TMJ syndrome was caused by the accident and that it constituted a serious impairment of body function. An affidavit submitted in opposition to or in support of a motion for summary disposition brought pursuant to MCR 2.116(C)(10) is to be considered only to the extent that the contents would be admissible as evidence to support or deny the grounds

stated in the motion. MCR 2.116(G)(6). Blough was not included on plaintiff's original witness list, notwithstanding the fact that he began treating her in May 2000, three months before the trial court entered the scheduling order setting the deadline for disclosure of witnesses. His testimony would not be admissible at trial absent an order of the court. MCR 2.401(I)(2).

The trial court correctly found that the admissible evidence did not create an issue of fact as to whether plaintiff suffered a serious impairment of body function as a result of injuries sustained in the accident. MCL 500.3135(2)(a); *Kern, supra*, and properly granted defendant's motion for summary disposition. Given this decision, the trial court's denial of plaintiff's motion to amend the scheduling order to allow her to add witnesses and reopen discovery did not constitute an abuse of discretion.

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter