STATE OF MICHIGAN

COURT OF APPEALS

SHEILA TOLBERT,

Plaintiff-Appellee,

v

SCOTT ISHAM,

Defendant-Appellant.

UNPUBLISHED
May 29, 2003

No. 231424
Genesee Circuit Court
LC No. 98-063265-NI

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right a default judgment in favor of plaintiff. We reverse and remand for entry of judgment for defendant.

On August 23, 1996, plaintiff was involved in a car accident with Timothy Lee Gelander. At the time of the accident, Gelander was driving a car owned by defendant. As a result of the accident, plaintiff suffered a shoulder injury and alleges that she aggravated a pre-existing back injury. Plaintiff filed a complaint against defendant and Gelander alleging that Gelander's negligence caused the accident and her injuries. The case was assigned to Genesee Circuit Court Judge Robert M. Ransom.

On August 4, 1999, defendant and Gelander filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's injuries stemmed from a 1993 accident, and there was no question of material fact that plaintiff's injuries from the 1996 accident involving Gelander did not constitute a serious impairment of body function under MCL 500.3135 because the evidence demonstrated that plaintiff did not experience any additional restrictions to her general ability to lead her normal life. The trial court denied defendant and Gelander's motion, finding that there was a factual dispute regarding whether the nature and extent of plaintiff's injuries constituted a serious impairment of body function.

After adjourning the trial date several times and removing the case to the Removal Trial Docket,[1] the trial court sent the parties a notice to appear for a mandatory settlement conference

[1] The Removal Trial Docket was designed to expedite the disposition of cases that were mediated for less than $25,000 and that fit the profile of cases to be removed to the district court.

on June 26, 2000, and for trial on June 27, 2000. Along with the notice to appear, the trial court sent the parties a "Removal Trial Docket Notice," informing the parties that the settlement conference and trial would take place in Flint. The parties then stipulated to again adjourn the June 27, 2000, trial date because defendant's attorney, who was an attorney for Allstate, had a trial in *Broemer v Moriarity*, Genesee Circuit Court Case No. 98-63151-NI, which was scheduled on the same day. This stipulation was sent to the Removal Docket Coordinator, who later called defense counsel and told him that no order to adjourn the case would be signed until it was known whether the trial in *Broemer* was going to proceed.

At the settlement conference on June 26, 2000, defense counsel informed the trial court that he had a trial in *Broemer* the next day, but that the case might settle. After the settlement conference, the Removal Docket Coordinator called defense counsel and told him that he must appear for trial in both the instant case and *Haynes v Hannah*, Genesee Circuit Court Case No. 98-062970-NO, notwithstanding the fact that defense counsel had a trial in *Broemer* the same day. An order adjourning the trial was never signed in the instant case.

On June 27, 2000, defense counsel had trials scheduled in *Broemer*, *Haynes*, and the instant case. Defense counsel asked the *Broemer* judge, Judge Judith A. Fullerton, for a short recess so he could check-in for the instant case, but Judge Fullerton denied defense counsel's request. During an opportunity provided by brief settlement discussions, defense counsel excused himself from the *Broemer* courtroom and reported to the Removal Docket Clerk regarding his schedule conflict. Defense counsel asked the Removal Docket Clerk to request that Judge Larry J. Stecco, the district court Removal Trial Docket judge assigned to *Haynes* and the instant case, contact Judge Fullerton regarding the conflict pursuant to MCR 2.501(D)(2).[2] During the *Broemer* proceedings, defense counsel informed Judge Fullerton that the other Allstate staff attorney for Genesee County and Mid-Michigan, Mitch Karas, was not available to take his place in the trial in the instant case and that the conflict between the scheduled trials needed to be resolved under MCR 2.501(D).

When defense counsel did not appear for trial in the instant case, Judge Stecco entered a default against defendant,[3] explaining that defense counsel or another Allstate attorney should have been available for trial. Judge Stecco then held a short hearing where plaintiff testified

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[2] MCR 2.501(D)(2) provides:

> When conflicts in scheduled trial dates do occur, it is the responsibility of counsel to notify the court as soon as the potential conflict becomes evident. In such cases, the courts and counsel involved shall make every attempt to resolve the conflict in an equitable manner, with due regard for the priorities and time constraints provided by statute and court rule. When counsel cannot resolve conflicts through consultation with the individual courts, the judges shall consult directly to resolve the conflict.

[3] Apparently, plaintiff did not pursue her claims against Gelander because Gelander moved out of Michigan and could not be found to be served.

regarding the circumstances of the accident and her resulting injuries. After hearing plaintiff's testimony, Judge Stecco granted plaintiff a default judgment in the amount of $20,000.

Defendant moved to set aside the default, which Judge Stecco denied. The trial court found that either defense counsel or another attorney should have been there for the trial and entered a default judgment for plaintiff against defendant for $20,000.

Defendant argues on appeal that Judge Stecco abused his discretion in entering the default and default judgment for several reasons: (1) Judge Stecco did not have the authority to enter the default or default judgment because only Judge Ransom, the circuit court judge assigned to the case, had the authority to do so; (2) even if Judge Stecco had the authority to enter the default and default judgment, he abused his discretion in doing so in order to sanction defense counsel for his failure to appear at trial; (3) defendant was not given proper notice of the entry of default judgment; and (4) defendant did not waive his right to a jury trial, and the default judgment should not have been entered without allowing defendant a jury trial on the issue of damages. A trial court's decision to enter a default judgment when a party or counsel fails to appear at a duly scheduled trial is reviewed for an abuse of discretion. *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

Regardless of whether Judge Stecco had the authority to enter the default and default judgment, we find it was an abuse of discretion to do so under the circumstances. "Our legal system favors disposition of litigation on the merits." *Id.* at 507. However, as previously stated, a court has the discretion to enter a default judgment when a party and counsel fail to appear at a duly scheduled trial. MCR 2.603(B)(1)(d); MCR 2.506(F)(6); *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991). Dismissal is a drastic step that should be taken cautiously. Before imposing such sanction, the trial court must carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. *Vicencio, supra* at 506. This Court has compiled a non-exhaustive list factors to be considered before imposing the sanction of dismissal:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id.* at 507.]

Considering the circumstances in this case, we find that the trial court abused its discretion in entering the default and default judgment for defense counsel's failure to appear at trial. Before entering the default and default judgment for defense counsel's failure to appear, the trial court did not evaluate other available options on the record. As discussed, the trial court must evaluate all available options before imposing the sanction of dismissal. *Vicencio, supra* at 506. It also appears that defense counsel attempted to comply with the trial court's order to appear for trial on June 27, 2000, but was unable to do so because of the trial in *Broemer*. Defense counsel was not deliberately attempting to delay the trial by seeking an adjournment and did not deliberately fail to appear for trial in Judge Stecco's courtroom. It does not appear that defense counsel failed to comply with any of the trial court's previous orders. Although unsuccessful, defense counsel attempted to either adjourn the case, secure another attorney to try

the case, resolve the scheduling conflict with the Removal Docket Coordinator and Judge Fullerton, and to check-in with Judge Stecco. Although plaintiff hired a videographer who appeared for trial on June 27, 2000, plaintiff was not unduly prejudiced by defense counsel's absence. We find that the default and default judgment were excessively harsh sanctions in this case and that a lesser sanction would have better served the interests of justice. Therefore, we find that the trial court abused its discretion in entering the default and default judgment for plaintiff for defense counsel's failure to appear at trial.

Defendant also argues that because there was no factual dispute regarding whether plaintiff suffered a serious impairment to body function in this case, the trial court erred in denying his motion for summary disposition. Defendant did not include this issue in the "Statement of Questions Presented" in his brief on appeal. MCR 7.212(C)(5). Ordinarily, failure to include an issue in the statement of questions presented would waive appellate review. *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Nevertheless, this Court may consider an issue raised in a nonconforming brief if it is one of law and the record is factually sufficient, *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 337; 512 NW2d 74 (1994), or where it is in the interest of justice to resolve the issue, *Frericks v Highland Twp*, 228 Mich App 575, 586; 579 NW2d 441 (1998). In the instant case, although the issue was not presented in the statement of questions presented, the parties briefed and orally argued it, and the record is sufficient for our review. Moreover, whether a person injured in an automobile has a sufficient injury to maintain a tort action for noneconomic loss is a question of law for the court. MCL 500.3135(2); *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

This Court reviews a trial court's grant or denial of summary disposition de novo. *May v Sommerfield*, 239 Mich App 197, 199; 607 NW2d 422 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must specifically identify the undisputed factual issues, MCR 2.116(G)(4), and has the initial burden of supporting its position with documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden, supra*. If the moving party sustains its initial burden, the party opposing the motion then must demonstrate with substantively admissible evidentiary materials that a genuine and material issue of disputed fact exists, MCR 2.116(G)(4); *Maiden, supra* at 121. Summary disposition is properly granted, upon failure to do so, *Smith, supra* at 455 n 2.

We briefly address the parties' arguments on this issue. First, in light of our holding, *supra*, plaintiff's argument that this issue is moot because the trial court's entry of default judgment is without merit. Further, a party aggrieved by a trial court's decision on a motion for summary disposition may proceed to final judgment and raise the trial court's errors in deciding the motion in an appeal taken from final judgment. MCR 2.116(J)(2)(c). We also reject plaintiff's claim that evidence presented at the default hearing resolved any question that plaintiff met no-fault threshold. MCR 2.116(C)(10) "plainly requires the adverse party to set forth specific facts *at the time of the motion* showing a genuine issue for trial." *Maiden, supra* at 121 (emphasis added). Therefore, in reviewing the trial court's denial of defendant's motion for

summary disposition, we only consider the evidence submitted in support or opposition to defendant's motion.

Defendant argues that in denying his motion for summary disposition, the trial court erred in considering plaintiff's deposition testimony and affidavit. Only substantively admissible evidence may be considered in opposition to a motion for summary disposition under MCR 2.116(C)(10). *Maiden, supra* at 121. Evidence, including affidavits, depositions, admissions and other documenting evidence, presented in support or opposition to a motion for summary disposition "shall only be considered to the extent that the content or substance would be admissible as evidence . . .." MCR 2.116(G)(6); *Maiden, supra* at 123-124. Under the rules, plaintiff's deposition testimony and affidavit are admissible in form, and thus are admissible if their content were admissible. Here, the trial court did not err in considering them because the deposition and affidavit contained admissible evidence to establish or deny the grounds stated in the motion.

Defendant also argues that the trial court should not have considered plaintiff's affidavit in denying defendant's motion for summary disposition because it contradicted her deposition testimony. "It is well settled that a party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior clear and unequivocal testimony." *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997). In plaintiff's deposition, she testified that she was unable to do regular chores around the house before the 1996 accident. In her affidavit, she swore that, as a result of the injury to her shoulder caused by the 1996 accident, she could not perform overhead activities, such as hanging clothes, putting away dishes and cans. In her deposition, plaintiff testified that her lifestyle did not change after the 1996 accident. However, in her affidavit, she swore that her shoulder injuries caused by the 1996 accident caused changes in her lifestyle. Thus, plaintiff's affidavit contradicts her deposition testimony to the extent that she asserts that the shoulder injury precluded her from performing household chores and caused changes in her lifestyle. Because plaintiff had already testified that she could not perform any household chores before the 1996 accident, injuries sustained in the 1996 accident could not have rendered her unable to perform the overhead chores. Additionally, because plaintiff had already testified that her lifestyle did not change after the 1996 accident, she could not assert that her injuries from the 1996 accident affected her lifestyle. Accordingly, the trial court should not have considered those portions of plaintiff's affidavit contradicting her prior deposition testimony when deciding defendant's motion for summary disposition. *Palazzola, supra.*

Finally, defendant argues that plaintiff presented no evidence that she suffered a serious impairment of body function. Because plaintiff filed her lawsuit in 1998, after the effective date of 1995 PA 222, which amended Michigan's no-fault law, MCL 500.3135 applies to the case at bar. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001); *May, supra* at 201. Plaintiff may maintain a tort action for noneconomic loss caused by her ownership, maintenance, or use of a motor vehicle "only if . . . [she] has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1); *Jackson v Nelson*, 252 Mich App 643, 644; 654 NW2d 604 (2002). The Legislature defined "[s]erious impairment of body function" as "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); *Kern, supra* at

341. The Legislature adopted the following standard to determine whether plaintiff has met this "threshold" requirement:

> (a) 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:
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> (i) There is no factual dispute concerning the nature and extent of the person's injuries.
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> (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 . . . .[MCL 500.3135(2)(a).]

Thus, the Legislature has returned the determination of whether a threshold injury exists to the trial court, *Miller, supra* at 247, and whether plaintiff suffered a serious impairment of body function should be submitted to the jury only when the trial court determines that an "outcome-determinative genuine factual dispute" exists, *id.* citing *Kern, supra* at 341.

This Court has discussed the framework to address the initial question of law as to whether the "nature and extent" of a plaintiff's injuries satisfy the statutory threshold.

> In determining the "nature" of plaintiff's injuries, the trial court should make appropriate findings concerning whether there is a factual dispute with respect to whether plaintiff has an "objectively manifested" impairment and, if so, whether "an important body function" is impaired. In determining the "extent" of plaintiff's injuries, the trial court should make appropriate findings concerning whether there is a factual dispute with respect to whether the impairment affects plaintiff's "general ability to lead his . . . normal life." [*May, supra* at 202-203.]

This Court has also set forth a non-exhaustive list of factors to consider when determining whether the impairment of an important body function is "serious" within the meaning of MCL 500.3135(7). *Miller, supra* at 248. These factors include "extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery." *Kern, supra* at 341. We also note our Supreme Court's observation in *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982):

> Another significant aspect of the phrase "serious impairment of body function" is that it demonstrates the legislative intent to predicate recovery for noneconomic loss on objectively manifested injuries. Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body. [*Miller, supra* at 249, quoting *Cassidy, supra*.]

In determining whether "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), it is proper for a court to compare the person's lifestyle before and after the accident. *May v Sommerfield (After Remand),* 240 Mich App 504, 506; 617 NW2d 920 (2000).

Further, as our Supreme Court recently explained: "Although a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life." *Kreiner v Fischer*, ___ Mich ___; ___ NW2d ___ (No. 122115, April 9, 2003)(emphasis in original).

We conclude after de novo review of the record that no "outcome-determinative genuine factual dispute" exists as to whether plaintiff "suffered a serious impairment of body function." MCL 500.3135(2); *Miller, supra* at 247; *Kern, supra* at 341. The record reveals that the only objectively manifested proof of injury from the 1996 accident is the doctor's report that plaintiff suffered "a small partial tear of the supraspinatus muscle tendon just proximal to its insertion on the greater tuberosity." Plaintiff's other evidence merely chronicles her complaints of pain and other subjective manifestations of her injuries. However, noneconomic tort recovery cannot be predicated on pain but rather must be based on a "serious impairment of body function." *Miller, supra* at 249. Although plaintiff sustained an objectively manifested injury and plaintiff's shoulder injury affected "an important body function," plaintiff did not suffer a serious impairment of body function in the 1996 accident because her general ability to lead her normal life was not affected.

In her deposition, plaintiff admitted that her daily routine did not change after the 1996 accident because she had already been disabled from working and performing household chores as a result of her 1993 accident. Before the 1996 accident, plaintiff was still disabled from work and was restricted from doing every day household chores. She was unable to do any normal household chores like cooking, cleaning, laundry, vacuuming, and housecleaning. After the accident, plaintiff was still disabled from work and still unable to accomplish every day household chores. As already noted, in determining whether a factual dispute exists with respect to the extent of plaintiff's injuries, it is appropriate to compare plaintiff's lifestyle before and after the accident. *May, supra* at 506. Plaintiff has not demonstrated that any aspect of her day-to-day activities was affected as a result of the injuries she sustained in the 1996 accident. Rather, the evidence shows that she was unable to perform household chores before the 1996 accident and that her general ability to lead her "normal life" was not significantly altered by her injury. This Court's conclusion in *Miller, supra* at 249-250, applies equally to the instant case.

> However, assuming that plaintiff's injury is objectively manifested, we are satisfied that plaintiff has not suffered a serious impairment of body function because her general ability to lead her normal life has not been altered by her injury. During her deposition, plaintiff admitted that she was able to perform all the same activities that she did before the accident.
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> [T]he record is clear that her general ability to lead her normal life has not been significantly altered by her injury.
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> Because plaintiff failed to meet the threshold of § 3135, we hold that the trial court erred in not granting summary disposition in favor of defendant. [*Id.*]

We conclude that plaintiff failed to meet the no-fault threshold of MCL 500.3135(1). Accordingly, the trial court erred in denying defendant's motion for summary disposition. We vacate the default judgment entered in favor of plaintiff and remand for entry of judgment for defendant.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey