

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER FRANCIS,

Plaintiff-Appellant,

V

RAMIE ALEXANDER YELLE, KENNETH
ALEXANDER YELLE, and FARM BUREAU
INSURANCE COMPANY OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED

May 29, 2003

No. 237406

Lapeer Circuit Court

LC No. 01-030209-NI

JENNIFER FRANCIS,

Plaintiff-Appellant,

V

FARM BUREAU GENERAL INSURANCE
COMPANY, KENNETH ALEXANDER YELLE,

Defendants-Appellees.

No. 244788

Lapeer Circuit Court

LC No. 01-030209-NI

Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

In Docket No. 237406, plaintiff appeals by leave granted the order granting defendant Farm Bureau's motion to set aside default and default judgment. In Docket No. 244788, plaintiff appeals as of right the order granting defendants' motions for summary disposition. We affirm in No. 237406 and reverse in No. 244788. These appeals were consolidated and are being decided without oral argument pursuant to MCR 7.214(E).

In this residual bodily injury motor vehicle tort action, plaintiff sought damages for non-economic loss from the individual defendants, and she sought underinsured motorist benefits from Farm Bureau, her own insurer. Plaintiff obtained a default and default judgment against Farm Bureau when the insurer failed to timely answer the complaint. The trial court granted Farm Bureau's motion to set aside default and default judgment, and subsequently granted

summary disposition on the issue of serious impairment of body function as to all defendants under MCR 2.116(C)(10).

A trial court's ruling on a motion to set aside a default or a default judgment is reviewed for a clear abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). Except for lack of jurisdiction, the motion should be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1). Good cause sufficient to warrant setting aside a default may be shown by a substantial irregularity or defect in the proceeding or by reasonable excuse for the failure to comply with the requirements that created the default. *Alken-Ziegler, supra*, 233; *Barclay v Crown Bldg and Dev, Inc*, 241 Mich App 639, 653; 617 NW2d 373 (2000).

Plaintiff served her complaint on defendant Farm Bureau on August 7, 2001 and the answer was due September 4. Farm Bureau sent the summons and complaint to defense counsel, and counsel prepared responsive pleadings. However, because of other pressing litigation, the pleadings were not placed in final form and signed until September 5th, and were not mailed until the 7th. They were received by the trial court on September 10, 2001. On September 7, 2001, plaintiff obtained entry of default and default judgment by the Clerk of the Court, asserting a sum certain. In obtaining the default judgment, plaintiff asserted that damages amounted to the \$100,000 underinsurance policy limits, minus a \$20,000 policy limit of the individual defendants. Farm Bureau moved to set aside the default and default judgment and the court granted the motion finding that there was an excusable reason for the late answer. Plaintiff asserts that the circuit court abused its discretion in setting the default and default judgment aside where Farm Bureau failed to comply with the requirements of MCR 2.603. We disagree.

While Farm Bureau failed to file an affidavit of meritorious defense, its motion to set aside default and default judgment set forth a meritorious defense as a matter of law. Plaintiff may only collect under the underinsured motorist coverage if she exhausts the applicable policies by judgment or settlement. Plaintiff has not settled with codefendants, has not established their liability, and has not recovered a judgment in excess of policy limits. The absence of an affidavit of meritorious defense was not fatal where a defense under the policy was presented and the complaint failed to establish that the preconditions for recovery were met.

Nor did the court abuse its discretion with respect to good cause. While the "good cause" requirement must be satisfied independently of the meritorious defense requirement, the *Alken-Ziegler* Court held that "the strength of the defense obviously will affect the 'good cause' showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice." *Alken-Ziegler, supra* at 233-234. Applying the great deference due the circuit court in this matter, *Alken-Ziegler*, at 227-228, we cannot say that the court committed a clear abuse of discretion in setting the default aside where defense counsel's delay was minimal and the defense was absolute.

Further, Farm Bureau established the requisite procedural irregularity or defect to constitute good cause with respect to the default judgment. Plaintiff's request for relief in the complaint in an amount in excess of \$25,000 is neither a specific amount nor a sum certain. Therefore, plaintiff's request for judgment in the sum of \$80,000 is outside the parameters upon

which the clerk may enter judgment. Plaintiff is required to provide seven day's notice to Farm Bureau before entry of the requested judgment. MCR 2.603(B) (1)(ii)(iii); MCR 2.603(B)(1)(b). Because the court needed to determine the amount of damages the court may conduct hearings or trial. MCR 2.603(B)(3)(ii). In addition, Farm Bureau appeared in the action during the mandatory notice period and would, therefore, have a right to participate in the damage determination. *Mink v Masters*, 204 Mich App 242, 246; 514 NW2d 235 (1994). Plaintiff's failure to give seven day's notice before the entry of the default judgment and failure to hold a hearing to determine damages constitutes a substantial irregularity in the entry of the default judgment. Therefore, we cannot conclude that the circuit court abused its discretion when it set aside the default judgment.

Under MCL 500.3135 a person remains subject to tort liability for non-economic loss caused by her use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. The issue whether an injured person has suffered serious impairment of body function is a question of law if there is no factual dispute concerning the nature and extent of the person's injuries, or if there is a dispute that is not material to the determination. MCL 500.3135(2)(a). Serious impairment of body function is defined to mean 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).

In determining whether a plaintiff has suffered a serious impairment of body function, the trial court must consider the nature and extent of the injuries. *May v Sommerfield*, 239 Mich App 197, 202-203; 607 NW2d 422 (1999). The court is required to make appropriate findings whether the plaintiff has an objectively manifested injury, whether an important body function is impaired, and whether that impairment affects the plaintiff's general ability to lead her normal life. *Id.*

A court should compare plaintiff's lifestyle before and after the accident in determining whether a factual dispute exists with respect to the extent of plaintiff's injuries. *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000). A plaintiff must show that her general ability to lead her normal life has been significantly altered by her injury. *Miller v Purcell*, 246 Mich App 244, 250; 631 NW2d 760 (2001).

Here, plaintiff was in high school at the time she was rear-ended by a drunk driver. The collision caused plaintiff's car to flip over and resulted in a fracture of her left hip (of the pubic ramus). Before the accident, plaintiff was a cheerleader and active physically, and held a job in a retail clothing store where most of her responsibilities were on the floor. Immediately after the accident, plaintiff could not walk or sit up, she was bed-bound for several days, she walked on crutches for weeks, was unable to weight bear on her left leg, and was in extreme pain five or six weeks after the accident per Dr. Yap's medical records. The pain continued thereafter as well.

Plaintiff was deposed eight months after the accident, and testified that she could not walk for any distance at all without pain and is limited to short distances, she cannot stand for long periods, she cannot carry her backpack unless it contains only a book at a time, she continues to limp, her job responsibilities after the accident must be primarily sit-down, and she cannot exercise like she did before the accident, cannot lift weights, run, or do stretching exercises. Plaintiff's prognosis is unclear from the record. Dr. Yap testified that she may develop osteoarthritis, but was unable to so state with certainty.

However, on the other hand, we do recognize that plaintiff only missed six days of work, her physician only imposed minor restrictions on her activities, and plaintiff herself placed restrictions on her exercise. Nevertheless, an injury need not be permanent to be serious. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). We conclude that there was a factual dispute concerning the extent of plaintiff's injuries that was material to the question whether plaintiff suffered a serious impairment of body function. Because there is a factual dispute concerning the nature and extent of plaintiff's injuries, and it is material to the determination, the circuit court erred when it determined this question as a matter of law. MCL 500.3135(2)(a).

We affirm the circuit court's setting aside of the default and default judgment, and reverse the grant of summary disposition on the issue of serious impairment.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Pat M. Donofrio