# STATE OF MICHIGAN

# COURT OF APPEALS

PATRICIA A. BANWELL,

Plaintiff-Appellant,

v

JACOB A. BURSTEIN,

Defendant-Appellee.

UNPUBLISHED
April 14, 2005

No. 251128
Oakland Circuit Court
LC No. 2002-046122-NI

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for partial summary disposition. We affirm.

## I. Motion to Set Aside Default

Plaintiff first argues that the circuit court abused its discretion in granting defendant's motion to aside default. Specifically, plaintiff claims that defendant did not meet the "good cause" and "meritorious defense" requirements under MCR 2.603(D). We disagree.

### A. Standard of Review

This Court reviews for an abuse of discretion the trial court's decision to set aside a default. *AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003).

### B. Analysis

MCR 2.603(D)(1) provides that:

> A motion to set aside a default or default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

Good cause that warrants setting aside a default or default judgment can be shown by either of the following: (1) a procedural defect or irregularity or (2) a reasonable excuse for the failure to comply with the requirements that created the default. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). In addition, the trial court must also

consider whether its failure to set aside the default will result in manifest injustice. *Id.* Manifest injustice is "the result that would occur if a default were allowed to stand after a party has demonstrated good cause and a meritorious defense." *Id.* "When a party puts forth a meritorious defense and attempts to satisfy 'good cause' by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, 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." *Id.* at 233-234.

Plaintiff filed suit against defendant on December 17, 2002. Defendant was personally served on March 11, 2003, and after not receiving a response from defendant within twenty-one days, plaintiff entered a default on April 1, 2003. On April 2, 2003, defendant filed an answer. Defendant then filed a motion to set aside the default. The trial court, after conducting a hearing, concluded that the affidavit of meritorious defense was proper and that the delay between the default and the filing of defendant's answer did not affect plaintiff's substantial rights. The trial court granted defendant's motion to set aside the default.

The trial court did not abuse its discretion in setting aside the default. See *Daugherty v State*, 133 Mich App 593, 599-601; 350 NW2d 291 (1984). Here, the two-day period in which defendant was inactive in pursuing the defense was brief. Plaintiff showed no harm resulting from defendant's failure to timely file the answer. Further, as demonstrated, *infra*, the trial court properly granted defendant's motions for partial summary disposition, thus indicating that defendant would have suffered manifest injustice if the default had not been set aside. And although plaintiff challenges the absence of specific factual allegations in the affidavit of meritorious defense, those allegations constituted the basis for defendant's motions for partial summary disposition. The trial court did not abuse its discretion in setting aside the default.

## II. Assertion of Defenses

Plaintiff next argues that the trial court erred in allowing defendant to assert the defenses of "failure to state a claim upon which relief may be granted," under MCR 2.116(C)(8), and "no genuine issue of material fact," under MCR 2.116(C)(10), in its summary disposition motions because defendant did not plead them as affirmative defenses in his answer and affirmative defenses. Plaintiff's claim is without merit. Defendant's motion brought under MCR 2.116(C)(8) and (10), did not assert any affirmative defenses because they did not admit "the establishment of plaintiff's prima facie case." *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993), citing 2 Martin, Dean & Webster, Michigan Court Rules Practice, p 192. Moreover, MCR 2.116(D)(3), which governs the time to raise defenses and objections, expressly states that grounds for summary disposition under (C)(8) and (10) may be raised at any time. Therefore, plaintiff's argument is without merit.

## III. Summary Disposition

### A. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary

disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition, this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. Serious Impairment of a Body Function

Plaintiff argues that her injuries meet the threshold requirement of a serious impairment of body function. We disagree.

"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." MCL 500.3135(1). A serious impairment of body function is defined as "an objectively manifested impairment of an important body function that affects a person's general ability to lead his or her normal life." MCL 500.3135(7).

There is no genuine issue of material fact whether plaintiff injuries affect her general ability to lead her normal life. In support of her claim, plaintiff testified that Dr. Weingarden advised her not to do any "pushing or lifting." Also, plaintiff claims that she can no longer bowl, golf, take long walks, cut grass, tend to the garden, or do home improvements. But Dr. Weingarden's records do not reflect any such restrictions. The only documented restriction imposed on plaintiff was with regard to snow shoveling on October 24, 2000. In addition, plaintiff testified that she must carry less at one time. However, Dr. Weingarden did not impose any lifting restriction on plaintiff and, in fact, encouraged her to start doing so as early as March 14, 2000. Here, any restriction to plaintiff's activities, except for shoveling snow, was self-imposed. And self-imposed restrictions do not establish that an injury has affected a person's ability to lead her normal life. *Kreiner v Fischer*, 471 Mich 109, 134 n 17; 683 NW2d 611 (2004).

Plaintiff also claims that she suffers from sleep deprivation because of back pain. This sleep deprivation is documented in Dr. Weingarden's reports and appears to negatively affect the plaintiff's daily life. However, plaintiff is still able to function day to day even with the sleep deprivation. And our Supreme Court has stated that "[a] negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Kreiner*, *supra* at 137.

Further, plaintiff is still able to work, holding the same position (account manager) that she had prior to the accident. Plaintiff only missed a total of three weeks of work over the course of three years, as she would take a day or two off, here and there, due to back pain. And since October 24, 2000, plaintiff has been self-treated with hot and cold compresses and over the counter medications for her back pain, and she has not returned to Dr. Weingarden for any treatment. Finally, as early as June 12, 2000, Dr. Weingarden noted that, at that time, plaintiff did not seem to have any restrictions on her daily life because of her back injury. For these

reasons, plaintiff cannot establish that her back injury affected her general ability to lead her normal life.

In addition, plaintiff failed to submit evidence showing an objectively manifested nose injury that prevents her from breathing. Initially, we note that plaintiff's deposition testimony regarding the nose injury focuses on the nerve damage to the nose, not breathing problems. Indeed, her testimony and affidavit state that she attributes the breathing problems after the accident to the tightness in her back, and not the injury to her nose. In any event, there is likewise no evidence that plaintiff's nose injury has affected her ability to lead her normal life. Therefore, the trial court did not err in granting defendant's motion for partial summary disposition because plaintiff has not established that she suffered a serious impairment of body function.

C. Permanent Serious Disfigurement

Plaintiff argues that the scars on her lips, as a result of the lacerations sustained in the auto accident from the air bag, are a permanent serious disfigurement. We disagree.

Whether a scar is a permanent serious disfigurement depends on its physical characteristics rather than its effect on the plaintiff's ability to lead a normal life. *Kosack v Moore*, 144 Mich App 485, 491; 375 NW2d 742 (1985). Whether a scar is serious is a question to be answered by resorting to common knowledge and experience. *Nelson v Meyers*, 146 Mich App 444, 446 n 2; 381 NW2d 407 (1985). And the trial court must objectively judge a plaintiff's subjective reactions to the scarring, such as embarrassment and sensitivity. *Id*. at 446. In addition, this Court has held that a "hardly discernable scar" is not the type of injury for which the Legislature intended to allow recovery when it established the threshold of permanent serious disfigurement. *Petaja v Guck*, 178 Mich App 577, 580; 444 NW2d 209 (1989).

The trial court, in granting defendant's motion for partial summary disposition in regard to permanent serious disfigurement, stated that:

> The evidence consists of the photographs submitted by the parties. Plaintiff's taken the day after the accident, and defendant's, which are current, as well as plaintiff's deposition testimony that she can still see scarring today, and that's out of page 58 through 60 of her deposition.
>
> On review of all the evidence that's been presented to this Court, this Court is satisfied that plaintiff's hardly discernable scar on her lips is not the type of injury for which the legislature intended to allow recovery when it established the threshold of permanent serious disfigurement. Plaintiff even testified that although she can see the scarring, makeup helps cover it, and because she is vain, she probably pays more attention to it. And that's out of her deposition at pages 60 and 61.
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> Although the scars may be permanent, this Court finds that they are not serious, and summary disposition is granted.

We agree with the trial court that plaintiff's scar is not serious. From the photos provided, we conclude that plaintiff's scar is not readily apparent to the casual observer, and thus similar to a "hardly discernable" injury. *Petaja, supra*. Therefore, the trial court did not err when it granted defendant's motion.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Donald S. Owens