

STATE OF MICHIGAN
COURT OF APPEALS

VIRGENE COPPESS,

Plaintiff-Appellant,

v

THOMAS KUPIEC,

Defendant-Appellee.

UNPUBLISHED

August 5, 1997

No. 197154

Wayne Circuit Court

LC No. 95-507697-NI

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing her automobile negligence action pursuant to MCR 2.401(G). On appeal, plaintiff argues that the trial court abused its discretion in three ways: (1) when it dismissed her action for her counsel's failure to appear at two final pretrial conferences; (2) when it conditioned reinstating her cause of action upon the payment of \$1,200 in costs to defendant; and (3) when it barred her from presenting proof of permanent disfigurement for her failure to comply with a discovery order. We affirm.

MCR 2.401(G) permits trial courts to dismiss a cause of action if a party or the party's counsel does not appear at a scheduled pretrial conference. However, failure to appear shall be excused if the court finds that a dismissal would result in manifest injustice or if the failure to appear was not due to the culpable negligence of the party or attorney. MCR 2.401(G)(2). The showing of a meritorious claim may constitute evidence that manifest injustice would result if the dismissal were allowed to stand. Compare *Park v American Casualty Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996).

Here, plaintiff's counsel not only failed to appear once, but he also failed to appear at the second final pretrial conference after the trial court gave him another opportunity to appear. The first failure to appear seems to have been accidental, however, the second time was clearly deliberate. Moreover, plaintiff failed to demonstrate that she has a meritorious claim. Specifically, she failed to offer any evidence that would establish that she has a serious impairment of body function or is permanently disfigured as a result of her car accident, the threshold required to succeed in an

automobile negligence action. MCL 500.3135; MSA 24.13135. Consequently, the trial court did not abuse its discretion in dismissing plaintiff's cause of action, and there is no manifest injustice in allowing the dismissal to stand.

Next, plaintiff argues that the trial court abused its discretion when it ordered the payment of \$1,200 to reinstate her action. MCR 2.401(G) permits a trial court to condition reinstatement of a cause of action upon the payment of "reasonable expenses as provided in MCR 2.313(B)(2)." That court rule provides that the expenses may include attorney fees. While, as noted by plaintiff, the trial court in this case did not articulate how it reached the \$1,200 figure, the error if any was harmless. The record indicates that the money was never paid, and the trial court had another proper ground to dismiss plaintiff's claim -- her attorney's deliberate failure to attend the second pretrial conference that had been scheduled for plaintiff's benefit. Under these circumstances, reversal would serve no meaningful purpose.

Lastly, plaintiff argues that the trial court abused its discretion when it barred her from presenting proof of permanent discoloration in her legs. We disagree. Factors that a court should consider when determining what sanction is appropriate for a discovery violation include:

(1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

The above list of factors should not be considered exhaustive. *Id.* at 33.

Here, plaintiff made her claim for permanent disfigurement for the first time at mediation. Discovery had already been completed. At the settlement conference, the trial court ordered that plaintiff produce herself so that defense counsel could have pictures taken of her legs. This was to be completed by April 1, 1996. By the April 1 pretrial conference, defense counsel still had not viewed plaintiff's legs. In fact, neither plaintiff nor her counsel were present at the conference. At the hearing on the motion to set aside the dismissal, it was revealed that defense counsel had made numerous attempts to arrange a time to view plaintiff's legs, but plaintiff's counsel was uncooperative.

Considering the *Dean* factors, the trial court did not abuse its discretion. First, although it is difficult to declare that plaintiff's failure to comply with the discovery order was deliberate, a clear pattern of disobeying the trial court's orders has emerged. Second, defendant was prejudiced by this delay, because he was unable to depose experts on the discoloration issue. Third, plaintiff made no attempt to cure her behavior. Fourth, plaintiff's counsel has shown nothing but disrespect for the trial court's orders, especially the orders to appear in court. On this record, the trial court did not abuse its

discretion in barring plaintiff's proofs of permanent disfigurement for plaintiff's violation of a discovery order.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin