STATE OF MICHIGAN

COURT OF APPEALS

DENISE DARNELL LIPPETT,

Plaintiff-Appellant,

and

SPINE SPECIALISTS OF MICHIGAN, PC, GREATER LAKES AMBULATORY SURGICAL CENTER, LLC, TOX TESTING, INC., PARAGON DIAGNOSTICS, HEALTHCARE IMAGING PARTNERS, LLC, doing business as MRI CENTERS OF MICHIGAN, MICHIGAN AMBULATORY SURGICAL CENTER, LLC, and ANESTHESIA SERVICES AFFILIATES,

Intervening Plaintiffs,

v

CINCINNATI INSURANCE COMPANY, and AUTO-OWNERS INSURANCE COMPANY,

Defendants-Appellees,

and

PROGRESSIVE MARATHON INSURANCE COMPANY, GRANGE INSURANCE COMPANY, TREMAINE WASHINGTON, JENNIFER LANAY WASHINGTON, RELIABLE TRANSPORTATION COMPANY, LLC, TRUSTGUARD INSURANCE COMPANY, and JOHN DOE,

Defendants.

UNPUBLISHED
May 20, 2021

No. 352373
Wayne Circuit Court
LC No. 18-000776-NI

Before: RONAYNE KRAUSE, P.J., and RIORDAN and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals by leave granted[1] the trial court's orders granting defendant Auto-Owners Insurance Company's motion to dismiss, and defendant Cincinnati Insurance Company's (CIC) motion for summary disposition. On appeal, plaintiff argues the trial court erred when it granted CIC's motion for summary disposition because she presented sufficient evidence to create a genuine issue of material fact as to the extent of her injuries. Plaintiff also argues the trial court abused its discretion when it granted Auto-Owners' motion to strike and motion to dismiss for discovery violations. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Plaintiff was involved in two motor vehicle accidents. The first occurred on September 12, 2017, immediately after which plaintiff complained of pain to her wrist and was diagnosed with a fracture. At some point after the first accident but before the second accident, plaintiff also experienced pain in her neck and shoulders, and received epidural injections for the pain.

The second accident occurred on December 24, 2017. As a result of this accident, plaintiff claimed she injured her shoulder, knee, wrist, and back. She began receiving medical treatment from various healthcare providers, some of whom were intervening plaintiffs in the trial court. After two years of discovery and motion practice, CIC moved for summary disposition and Auto-Owners moved to dismiss because plaintiff failed to provide written discovery and failed to attend her independent medical examination (IME).

After a hearing, the trial court granted both motions. The trial court concluded that, as a matter of law, plaintiff's only injury resulting from the September 12, 2017 accident was to her wrist, and because plaintiff canceled her policy with CIC before the December 24, 2017 accident, CIC was not liable for any further injuries. The trial court also granted summary disposition to CIC on plaintiff's uninsured motorist claim, reasoning that plaintiff failed to present evidence that the other drivers in the September 12 accident were uninsured. As for Auto-Owners' motion to dismiss, the trial court, in granting the motion, reasoned that plaintiff engaged in numerous unreasonable and unjustified discovery violations that warranted the harsh punishment of dismissal. This appeal followed.

II. CIC'S MOTION FOR SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred when it granted CIC's motion for summary disposition because she provided evidence that she sustained injuries to her back and neck regions before the December 24, 2017 accident. We agree.

[1] *Lippett v Cincinnati Ins Co*, unpublished order of the Court of Appeals, entered August 18, 2020 (Docket No. 352373).

A. STANDARD OF REVIEW

Appellate courts review de novo a trial court's grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). CIC moved for summary disposition under MCR 2.116(C)(10). In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court explained the review of a motion under MCR 2.116(C)(10):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

B. ANALYSIS

"Liability for no-fault personal protection benefits is governed by MCL 500.3105." *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392, 394; 838 NW2d 910 (2013). Under that statute, an insurer is required to pay personal protection insurance benefits to an insured if the insured's "bodily injury aris[es] out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1).

When CIC moved for summary disposition, it argued, "There is no issue of material fact that the only injury sustained by [plaintiff] at the time of the September 12, 2017 accident (when she was insured by [CIC]), was a wrist fracture." The trial court agreed, reasoning that the only injury plaintiff suffered in the September 12 accident was, as a matter of law, the injury to her wrist because that is the only injury she listed in her application for benefits after that accident. As a result, the trial court rejected plaintiff's claim that she suffered additional injuries to her back and neck as a result of the September 12 accident, and dismissed plaintiff's claim against CIC to the extent that it sought benefits for treatment other than treatment for her wrist injury. This was error.

Plaintiff is not limited to recover only those injuries listed on an application for benefits after the September 12, 2017 accident, but instead can recover for any injury from the September 12 accident that arose out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. See MCL 500.3105(1). Plaintiff presented sufficient evidence to establish a question of fact whether she suffered more injuries than just the injury to her wrist as a result of the September 12, 2017 accident. Specifically, plaintiff claimed in her deposition that she injured her wrist, neck, and shoulder during the September 12, 2017 accident. Plaintiff's assertion was supported by various medical records and doctors' notes. For instance, one doctor noted:

> The first injury occurred on 09/12/2017 approximately one month before that MRI scan. She was driving her 2007 Malibu, when she was T-boned, with a complete

> total vehicular loss. In that automobile accident, she was transported by EMS to Sinai Grace, where she had a shattered left wrist, and she underwent open reduction with internal fixation of the left wrist injury. When she began developing severe neck shoulder blade and right arm pain, thereby indicating the MRI scan that was completed, Kim Lilly-bernau [sic], nurse practitioner ordered the scan, and followed up with the patient, the most notable findings where [sic] level of kyphotic change, high-grade neuroforaminal narrowing, and a right-sided predominant herniation of disc material at C6-C7, as well as high-grade right C4-C5 neuroforaminal narrowing. She wanted to have one epidural episode, she cannot recall the name of the physician who did the injection for her, that was early December 2017 and after that epidural and steroid injection in her neck, she had excellent relief of pain for two to three days; then however, the pain returned back to previous level.

Another doctor similarly recounted that plaintiff had neck and back injuries following the September 12 accident, and further suggested that the injuries were caused by the accident, stating:

> Patient was involved in car accident September 12, 2017 as a result of the accident she developed lower back pain, neck pain, shattered left wrist and headaches. The patient undergone [sic] 4 weeks of conservative care outpatient physical therapy after the first accident, with no relief. Patient had 1 neck injection last year, with no relief. Denies lower back injections. Patient had surgery for the left wrist September 13, 2017, she reports 7 screws on the left wrist, patient cannot remember the physician's name. MRIs were done after this accident.

Also, the lower court record contains a form from Great Lakes Ambulatory Surgical Center, LLC documenting that plaintiff received a cervical epidural for neck and shoulder pain on December 14, 2017—after the first accident but before the second accident.

In light of the foregoing, we conclude that there was sufficient evidence to create a question of fact whether plaintiff suffered injuries to her back and neck as a result of the September 12 accident. We therefore reverse the trial court to the extent it found "as a matter of law that the only injury sustained by [plaintiff] in the September 12, 2017 accident was an injury to her left wrist," and remand for further proceedings on this issue.

The trial court also granted summary disposition to CIC on plaintiff's claim for uninsured motorist benefits. Addressing the argument, we agree with the trial court that plaintiff failed to present any evidence that the other drivers involved in the accident, Jermaine Washington and Jennifer Lanay Washington, were uninsured. In the trial court, plaintiff argued that a police report stating that the drivers did not provide insurance supported that the drivers were uninsured. We agree with the trial court, however, that not providing insurance is obviously different from not being insured. Plaintiff also argued that the default she obtained against the other drivers conclusively established that the other drivers were uninsured, but this assertion is incorrect for two reasons. First, a default is different from a default *judgment*, and plaintiff is conflating the meaning of the two. Second, even if plaintiff obtained a default judgment against the other drivers, her claim against those drivers had nothing to do with whether they were insured, so a judgment on her claim against those drivers would not establish that they were, in fact, uninsured.

In conclusion, we reverse the portion of the trial court's order granting summary disposition in CIC's favor as to plaintiff's no-fault benefits claims, but affirm the trial court's order granting summary disposition as to plaintiff's uninsured motorist claims.

III. AUTO-OWNERS' MOTION TO DISMISS

Plaintiff next argues that the trial court abused its discretion when it granted Auto Owners' motions to strike and to dismiss. We disagree.

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision to impose discovery sanctions. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 659; 819 NW2d 28 (2011). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Frankenmuth Ins Co v Poll*, 311 Mich App 442, 445; 875 NW2d 250 (2015) (quotation marks and citation omitted).

B. ANALYSIS

Auto-Owners filed a motion to strike evidence of plaintiff's physical condition under MCL 500.3153 based on plaintiff's failure to attend an IME, and a motion to dismiss based on plaintiff's numerous discovery violations, including her failure to attend an IME. While the trial court's order separately grants plaintiff's motion to strike and motion to dismiss "for the reasons stated on the record," the trial court stated on the record that the motions are "essentially interweaving of the same issue" and, therefore, addressed them together. Even though the trial court addressed the motions together, it is clear that the court did not grant Auto-Owners' motion to strike and sanction plaintiff by not allowing her to present evidence of her physical condition, then in turn grant plaintiff's motion to dismiss because plaintiff had insufficient evidence to proceed. Compare *LaCourse v Gupta*, 181 Mich App 293, 296-297; 448 NW2d 827 (1989) (explaining that "the sanction imposed was to prohibit [the] plaintiff from calling any expert witnesses," and the trial court then dismissed the case "because, in the absence of expert testimony, there was no genuine issue of material fact"). In fact, the record suggests that the trial court did not even address Auto-Owners' motion to strike. While the court once mentioned "there's failures to attend"—an apparent reference to plaintiff's failure to attend an IME, which was the basis for plaintiff's motion to strike—the court made the reference while listing discovery violations. Thus, while the trial court's order states that it granted plaintiff's motion to strike "for the reasons stated on the record," the court did not give any reasons on the record for granting the motion to strike, and instead addressed only Auto-Owners' motion to dismiss. Accordingly, this Court limits its analysis to whether the trial court properly granted Auto-Owners' motion to dismiss.

The court rules permit the trial court to impose sanctions on a party that disobeys the court's discovery orders, including dismissing the plaintiff's complaint. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000). See MCR 2.313(B)(2). Dismissal, however, is a "grave sanction" that should only be imposed after careful consideration. *Kalamazoo Oil Co*, 242 Mich App at 88. In *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), this Court provided the following non-exhaustive list of factors courts should consider when determining an appropriate sanction:

> (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 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. [Citations omitted.]

When imposing a severe sanction like dismissal, the trial court must explain its reasons for the sanction on the record "in order to allow for meaningful appellate review." *Kalamazoo Oil Co*, 242 Mich App at 88.

The trial court began its ruling by acknowledging the *Dean* factors that it found relevant to this case: "the issue of willfulness, the prejudice, the history." The court did not recite the history of the case because it found that Auto-Owners' counsel had already done an adequate job of placing that lengthy history on the record. This case's history is indeed long, and this opinion walks through it to provide context for the trial court's ruling.

Auto-Owners' involvement in the case began when it was added as a defendant in January 2019—almost a year after the case was filed, and after discovery had already been closed for three months under the original scheduling order. After being brought into the case late, Auto-Owners motioned for plaintiff to specify the amount she sought from Auto-Owners, and made interrogatory and document requests to ascertain the extent of plaintiff's claims and the support that plaintiff had for those claims. Despite these requests, Auto-Owners received nothing from plaintiff. This led Auto-Owners to file a motion to compel, in response to which plaintiff stipulated that she would provide the requested information by May 2, 2019. But that did not happen—Auto-Owners did not receive responses from plaintiff until the eve of the December 6, 2019 hearing on Auto-Owners' motion to dismiss. By that time, trial was less than 50 days away. Before then, the only discovery plaintiff provided Auto-Owners was answers to Auto-Owners' requests to admit, but those answers stated only "denied" and provided no additional information.

While these events were ongoing, the parties participated in case evaluation, but that did nothing to aid Auto-Owners in ascertaining the extent of plaintiff's claims against it. Plaintiff's case evaluation summary did not request any PIP benefits, despite that she was supposedly requesting such benefits from Auto-Owners. In fact, plaintiff's summary did not even mention Auto-Owners. As a result, even after case evaluation, Auto-Owners was unable to discern the contours of plaintiff's claim. Then, when Auto-Owners attempted to schedule an IME, plaintiff failed to attend. As a result, Auto-Owners was charged for the no-show.[2]

[2] Plaintiff contends on appeal, as she did in the trial court, that she actually attended Auto-Owners' IME, but she arrived at 1:00 p.m. because she was never informed that the appointment was moved to 9:00 a.m. Plaintiff further claims that despite her late arrival, the IME was nevertheless conducted. Problematically, plaintiff did not offer any evidence—such as an affidavit—to support

All of this eventually led Auto-Owners to file its motion to dismiss, and the trial court held a settlement conference for that motion as well as other motions that were filed. At that conference, numerous individuals involved in the litigation were in attendance, including plaintiff herself, but plaintiff's counsel failed to appear, despite multiple calls from the trial court to plaintiff's counsel's office reminding her of the conference. At the hearing on the motion to dismiss, the trial court termed this failure to appear as "the grand finale" of the "discovery problem[s]" throughout the case, and stated that all the problems had "a common denominator of [plaintiff's counsel's] office."

In light of the foregoing, we conclude that the trial court did not abuse its discretion when it found that plaintiff had a long history of refusing to comply with Auto-Owners' discovery requests. Even in the instance that plaintiff accommodated Auto-Owners' discovery request by responding to Auto-Owners' request to admit, the answers plaintiff provided were wholly inadequate.[3]

We also agree with the trial court that plaintiff's failures were willful. To be willful, "the failure need not be accompanied by wrongful intent," but need only be "conscious or intentional, not accidental." *Welch v J Walter Thompson USA, Inc*, 187 Mich App 49, 52; 466 NW2d 319 (1991). After Auto-Owners was brought into this action, it repeatedly requested basic information from plaintiff, but received nothing in return. This led Auto-Owners to file several motions to compel, in response to which plaintiff stipulated that it would provide the requested information by May 2, 2019. Despite this agreement, plaintiff failed to provide the requested information for almost seven months. And even then, the information was only provided after Auto-Owners moved to dismiss. The trial court recognized that there are times when a discovery response is understandably a few days late, but believed that such noncompliance is a different "category of violation" than what occurred in this case.

This willing failure to disclose information to Auto-Owners is further supported by plaintiff's case evaluation summary. There, plaintiff did not even mention her claim against Auto-Owners, continuing to leave Auto-Owners in the dark about what exactly plaintiff was requesting.

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her assertions. In contrast, Auto-Owners provided a bill for a no-show, thereby supporting its assertion that plaintiff did not, in fact, attend the IME. In light of this, we cannot conclude that the trial court erred by rejecting plaintiff's unsupported assertions that she actually attended the IME.

[3] On appeal, plaintiff asserts that "[t]here certainly was no history of violations of any court order" and that its discovery "failures" were "immediately cured when discovered." Both assertions find no support in the record. Plaintiff's history of violating court orders is described above and finds ample support in the record. And plaintiff's assertion that she "immediately cured" any discovery defects is belied by her conduct throughout discovery. Plaintiff was first put on notice that she failed to respond to Auto-Owners' discovery requests when Auto-Owners moved to compel the discovery. Plaintiff agreed, by way of a stipulated order, to provide the discovery within 14 days. When the discovery requests were still outstanding on November 19, 2019, Auto-Owners filed its motion to dismiss. Plaintiff waited an additional 16 days after that—until one day before the hearing on Auto-Owners' motion to dismiss—to serve her responses.

In light of these facts, we cannot conclude that the trial court abused its discretion by finding that plaintiff's failure to accommodate Auto-Owners' discovery requests was willful.

As for the trial court's finding that plaintiff's discovery violations prejudiced Auto-Owners, we believe that the prejudice these failures caused Auto-Owners is clear. For almost a year, Auto-Owners sought basic discovery information from plaintiff, but received almost nothing in response. Even when plaintiff was supposed to summarize her claim for case evaluation, she failed to mention her claim against Auto-Owners. Moreover, when Auto-Owners attempted to conduct an IME of plaintiff, she failed to show up, leaving Auto-Owners without even an IME to defend against plaintiff's action. As a result of all this, almost a year after Auto-Owners was brought into the action and less than two months before trial was to begin, Auto-Owners was prevented from conducting an adequate investigation into plaintiff's claim and could not reasonably be expected to mount an informed defense against plaintiff's claim. Accordingly, the trial court did not abuse its discretion by concluding that Auto-Owners was prejudiced by plaintiff's failures and violations throughout discovery.

Lastly, the trial court considered whether a lesser sanction would be appropriate. Specifically, the trial court considered whether plaintiff's counsel should be sanctioned rather than plaintiff, but the trial court concluded that a lesser sanction was not appropriate because "this has been a terrible case in terms of how it's been conducted and the discovery." Under an abuse of discretion standard, we cannot conclude that the trial court erred. That is, on the record before the court, dismissal of plaintiff's complaint was within the range of principled outcomes on the basis of plaintiff's refusal to facilitate discovery. See *Bass v Combs*, 238 Mich App 16, 33-34; 604 NW2d 727 (1999), overruled on other grounds *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008) (holding that the trial court did not abuse its discretion when it dismissed the plaintiff's complaint for failure to obey discovery orders); *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 251-252; 477 NW2d 133 (1991).[4]

IV. CONCLUSION

We affirm the trial court's order granting Auto-Owners' motion to dismiss, as well as the trial court's order granting summary disposition to CIC on plaintiff's uninsured-motorist claims. However, we reverse the trial court's order granting CIC's motion for summary disposition to the extent that the court held, as a matter of law, that the only injury plaintiff suffered in the September 12, 2017 accident was an injury to her wrist, and remand for further proceedings.

[4] CIC spends much of its brief on appeal arguing that the trial court correctly granted Auto-Owners' motion to dismiss. While CIC concurred in Auto-Owners' motion in the trial court, almost all of the trial court's analysis was focused on discovery violations directed at Auto-Owners. Moreover, most of the discovery violations at issue uniquely prejudiced Auto-Owners' defense, not CIC's. We therefore read the trial court's order as dismissing plaintiff's claim against Auto-Owners only. If CIC wishes to file its own motion to dismiss once this action returns to the trial court, it is free do so.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Amy Ronayne Krause
/s/ Michael J. Riordan
/s/ Colleen A. O'Brien