STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH HAMPTON,

Plaintiff-Appellant,

v

JOYIA WEST,

Defendant-Appellee.

UNPUBLISHED
June 21, 2016

No. 327145
Oakland Circuit Court
LC No. 2014-142108-NI

Before: M. J. KELLY, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition of her third-party no-fault insurance action. We affirm.

On March 5, 2013, the parties were in a motor vehicle accident. On January 16, 2014, plaintiff filed this lawsuit against defendant pursuant to MCL 500.3135, claiming to have sustained a serious impairment of a body function as a result of the accident.

On March 4, 2015, defendant filed a motion for summary disposition, arguing that plaintiff did not sustain an objectively manifested impairment of an important body function that affected her general ability to lead her normal life as required under MCL 500.3135. Defendant argued that, although plaintiff claimed to have suffered a neck injury, she underwent several diagnostic tests following this accident and all of the results were negative for neck injury. The test results were submitted as exhibits and included: x-rays of the left shoulder, cervical spine, and thoracic spine on March 7, 2013, which showed no evidence of accident-related injury; an EMG on April 30, 2013, which showed no evidence of cervical radiculopathy; an EMG on May 7, 2013, which showed no evidence of radiculopathy or neuropathy; an MRI of the cervical spine on December 12, 2013, which showed only mild cervical spondylosis—a degenerative condition; and an MRI of the brain and cervical spine on August 30, 2014, which showed only degenerative changes in the spine. Further, two insurance medical examinations confirmed that, at most, plaintiff sustained a cervical strain which was resolved. Therefore, defendant argued, although plaintiff was claiming to have suffered a neck injury, she could only show that she sought treatment for subjective complaints of pain and not an objectively manifested injury arising from the accident. Accordingly, defendant was entitled to summary disposition of plaintiff's lawsuit.

On March 9, 2015, the trial court issued an order entitled: "Motion for Summary Disposition Brief Scheduling Order." The hearing on defendant's motion was to be held on

April 8, 2015 at 9:30 a.m. The order also provided that the "non-moving party's responsive motion and supporting brief shall be filed and received by the Court and opposing counsel on or before March 25, 2015 by 4:30 p.m." The order further stated: "If motions and supporting briefs are not timely filed, the Court will assume there is no law to support that party's position."

On April 1, 2015, at 2:50 p.m., plaintiff filed her brief in response to defendant's motion for summary disposition. Plaintiff argued that a factual dispute existed concerning the nature and extent of her injuries because defendant claimed that she only suffered a cervical strain. In fact, plaintiff argued, she suffered "persistent problems with severe migraines, neck pain and shoulder pain" and her impairment was objectively manifested because her doctors noted tightness in the trapezius muscle, pain in the left shoulder, and tightness in the cervical paraspinal muscles. She also had been disabled from returning to work for a period of time, and had been prescribed medical treatments. Thus, plaintiff argued, defendant's motion should be denied.

On April 8, 2015, the trial court heard oral arguments on defendant's motion for summary disposition, but noted that plaintiff did not file a timely responsive brief. Plaintiff's counsel advised the trial court that he assumed his brief was due one week before the date set for the hearing. The trial court then proceeded with oral arguments, and plaintiff's counsel argued that there was a dispute as to the nature and extent of plaintiff's injuries. While defendant had characterized plaintiff's injury as a "muscle strain," plaintiff's medical records indicated that she had cervical radiculopathy and a nerve injury in her neck. Plaintiff argued that there were objective findings, including a positive Spurling's test, as well as tightness and muscle spasm, and that plaintiff was issued disability slips for work. Defendant replied that these claims were insufficient to demonstrate that plaintiff sustained an injury in the accident that satisfied the statutory threshold. The court indicated that it would issue a written opinion on the motion.

Thereafter, the trial court issued its written opinion and order granting defendant's motion for summary disposition. The court held that plaintiff's responsive brief to defendant's motion was filed in violation of its March 9, 2015 Brief Scheduling Order and, thus, the untimely brief would not be considered. The court noted that the dispositive issue raised was whether plaintiff had sustained a threshold injury and then the court detailed the medical record evidence provided by defendant in support of its motion. The court concluded that, even viewing the evidence in the light most favorable to plaintiff, no genuine issue of material fact existed—plaintiff did not sustain an objectively manifested injury as required under MCL 500.3135. The court noted that all of the diagnostic tests performed demonstrated no acute findings as a result of the accident. The court further noted that plaintiff had argued that there was a factual dispute as to the nature and extent of her injury, but disregarded that argument as untimely and held that there was no factual dispute that she sustained "a soft tissue strain of the cervical spine that resolved itself." Accordingly, defendant's motion for summary disposition was granted. This appeal followed.

Plaintiff argues that the trial court erroneously granted defendant's motion for summary disposition without considering either plaintiff's written response to the motion or oral argument at the hearing on the motion. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). But a trial court's decision not to consider a motion or responsive brief filed in violation of a scheduling order deadline date is reviewed for an abuse of discretion. See *Prussing v Gen Motors Corp*, 403 Mich 366, 369-370; 269 NW2d 181 (1978); *Kemerko Clawson, LLC v RXIV Incorp*, 269 Mich App 347, 349; 711 NW2d 801 (2005). Because such a decision is within the inherent power of the trial court, it is generally entrusted to its discretion. See MCL 600.611; *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999); *Persichini v William Beaumont Hosp*, 238 Mich App 626, 639-640; 607 NW2d 100 (1999). Accordingly, "[a]n abuse of discretion involves far more than a difference in judicial opinion." *Alken-Ziegler, Inc*, 461 Mich at 227. In *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), our Supreme Court explained that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." Further, "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.*

In this case, on March 9, 2015, the trial court entered a "Motion for Summary Disposition Brief Scheduling Order." The order stated that a hearing on defendant's motion for summary disposition would be held on April 8, 2015 at 9:30 a.m. The order also stated that the "non-moving party's responsive motion and supporting brief shall be filed and received by the Court and opposing counsel on or before March 25, 2015 by 4:30 p.m." The order provided the following warning: "If motions and supporting briefs are not timely filed, the Court will assume there is no law to support that party's position." And, the order noted: "The scheduling of this matter for oral argument does not preclude this Court from waiving oral argument at a later date pursuant to applicable Michigan Court Rules."

On appeal, plaintiff admits that she filed her responsive brief on April 1, 2015, after the deadline set forth in trial court's order, but argues that it was filed within the time limits imposed by MCR 2.119(C)(2). However, the trial court's order set forth a definite date by which a responsive brief had to be filed and plaintiff does not argue that the court was without authority to issue such a mandate. In fact, MCR 2.119(C)(3) specifically provides that a court—by separate order—may set a different time for filing motions or responses, which occurred in this case. Further, it is well-established that a court may enter scheduling orders and impose time periods that differ from time periods set forth in particular court rules. See *People v Grove*, 455 Mich 439, 469-470; 566 NW2d 547 (1997); *Kemerko Clawson, LLC*, 269 Mich App at 350-351. While it is true that refusing to accept a responsive brief to a motion brought under MCR 2.116(C)(10) is a harsh sanction, we may not substitute our judgment in matters falling within the discretion of the trial court. *Alken-Ziegler, Inc*, 461 Mich at 228; see also *EDI Holdings LLC v Lear Corp*, 469 Mich 1021 (2004) (holding that this Court "clearly erred in finding that the Oakland Circuit Court abused its discretion when it enforced the summary disposition scheduling order.") Further, even when the opposing party fails to submit a timely responsive brief to a motion for summary disposition brought under MCR 2.116(C)(10), the trial court must still determine whether the moving party established entitlement to judgment as a matter of law. See MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). And, in this case, the trial court determined that defendant's proofs demonstrated that she was entitled to judgment as a matter of law.

Plaintiff also argues that the trial court should have at least considered her counsel's oral arguments made at the motion hearing in deciding the motion for summary disposition. However, the party opposing a motion for summary disposition brought under MCR 2.116(C)(10) "has the burden of showing by evidentiary materials that a genuine issue of disputed material fact exists." See *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 440-441; 814 NW2d 670 (2012). That is, when an "opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Quinto*, 451 Mich at 363. Thus, plaintiff's counsel's oral argument at the hearing on the motion was insufficient to establish that a genuine issue of material fact existed and plaintiff's argument premised on this ground is without merit.

In summary, the trial court did not abuse its discretion in granting defendant's motion for summary disposition without considering either plaintiff's written response to the motion or oral argument at the hearing on the motion. See *Babcock*, 469 Mich at 269.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly