STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY EARL,

Plaintiff-Appellant,

JUN 9 1986

-v- No. 83521

ROBERT DON WHITE and
JOHN H. EARL,

Defendants-Appellants.

BEFORE: Cynar, P.J., and M.H. Wahls and E.E. Borradaile*, JJ.

PER CURIAM

Plaintiff was injured on August 6, 1982 while a passenger in an automobile driven by her husband, defendant John H. Earl, which was struck at the intersection of Secor Road and County Road 151 in Monroe County by a vehicle driven by defendant Robert Don White. Plaintiff's complaint said that the accident was caused by defendant White negligently driving into the path of the Earl's automobile, and by defendant Earl negligently failing to yield the right-of-way to White's vehicle.

Plaintiff was taken to the emergency room of Riverside Hospital in Toledo, Ohio where she was diagnosed as suffering from a scalp hematoma, a soft tissue contusion of the right ankle, and a contusion of the left knee. On August 9, 1982, after plaintiff had been in the hospital for three days, an orthopedic surgeon, Dr. John Chow, was called in to examine her right ankle. Dr. Chow noted that there was severe swelling and marked ecchymosis of her right foot and ankle, and also observed that there was no fracture or dislocation of the ankle. He recommended a short leg plaster splint for plaintiff's right foot and ankle area for two weeks, to be followed up with the application of a short leg cast. Plaintiff remained in the hospital a total of two weeks.

*Circuit judge, sitting on the Court of Appeals by assignment.

Subsequent to her discharge from the hospital, plaintiff went to Dr. Chow's office and had the plaster splint removed and a short leg cast applied to her lower right leg and ankle. She wore the cast for approximately four weeks, during which time she was forced to walk on crutches. After the cast was removed plaintiff continued physical therapy for several months with her difficulties in walking ending approximately November 4, 1982, some three months after the accident occurred. The last time plaintiff saw a doctor for any injury arising out of the accident at issue was in early 1983 and, while plaintiff claims her right ankle still hurts, she admits that she takes no pain medication for it and that she has not had to significantly change her life style.

Suit was commenced in this matter on March 26, 1984 and, on November 30, 1984, defendant Earl filed a motion for summary judgment pursuant to GCR 1963, 117.2(1) and (3) [now MCR 2.116(C)(8) and (10)], alleging that plaintiff had failed to demonstrate that her injuries met the requisite "impairment of body function" threshold of the Michigan No-Fault Act and asking that the Court determine under Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1983), that the plaintiff did not meet the threshold as a matter of law. On January 31, 1984, defendant White filed a concurrence in defendant Earl's motion and, after a hearing on the motion, the trial judge granted the motion by an order dated February 15, 1985. We affirm the determination by the trial judge.

Plaintiff has claimed two procedural flaws with defendants' motion which, under the Michigan Court Rules that became effective March 1, 1985, would not be serious defects. Plaintiff alleges that no supporting affidavits were filed as required by GCR 1963, 117.3, and that the deposition testimony of the plaintiff on which the defendants principally relied in their motion was not proper evidence, as plaintiff's deposition was

never filed with the lower court. Under MCR 2.116(G)(3), affidavits, depositions, admissions, or other documentary evidence are required when judgment is sought based on MCR 2.116(C)(10).

A key exception has developed to the affidavit requirement in dealing with the serious impairment threshold under the No-Fault Act. This exception has been applied to situations where a supporting affidavit was filed, but the affidavit was defective:

> "The function of an affidavit by the defendant is to establish affirmatively that there is no basis in fact to support plaintiff's claim. To that end, the defendant must come forward with some evidentiary proof - some statement of specific fact." Durant v Stahlin, [375 Mich 628; 135 NW2d 392 (1965)], Doornbos v Nordman, 26 Mich App 278, 281; 182 NW2d 362 (1970). In the present case, the specific evidential facts (see Simerka v Pridemore, 380 Mich 250, 275; 156 NW2d 509 [1968]) concerning the nature of plaintiff's injuries and treatment were within the personal knowledge of only the plaintiff and Dr. Eisman. It is unlikely that either of them would have provided the defendants with a voluntary statement and affidavit.
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> "Under such circumstances, the trial court has the authority to excuse the defendant from presenting the material facts in the affidavit. GCR 1963, 116.6. The affidavit is then supplemented by depositions or answers to interrogatories." Brooks v Reed, 93 Mich App 166, 174; 286 NW2d 81 (1979), lv den 411 Mich 862 (1981).

In Pullen v Warrick, 144 Mich App 356, 359; 375 NW2d 448 (1985), the rule was extended to the situation where no affidavits were filed in support of a summary judgment motion under the No-Fault Act:

> "Plaintiff first argues that defendant's motion for summary judgment pursuant to GCR 1963, 117.2(3) was jurisdictionally defective because it was not accompanied by affidavits, as required by subrule 117.3. * * * The better view is expressed in Jakubiek v Kumbier, 134 Mich App 773, 775-776; 351 NW2d 865 (1984), where this Court concluded that affidavits based on personal knowledge were unnecessary where defendant conceded for purposes of the motion that there was no genuine issue of material fact as to the nature and extent of plaintiff's injuries and defendant relied on plaintiff's answers to interrogatories and deposition testimony as well as exhibits."

In this case, defendants have conceded that there is no genuine issue of material fact as to the nature and extent of plaintiff's injuries, and their only disagreement is with the effect of these injuries on plaintiff's life. Defendants rely for

the most part on plaintiff's own deposition testimony in their motion for summary judgment, an approach explicitly approved of in Brooks and Pullen. There is no requirement in this case that supporting affidavits be submitted.

The issue of filing the deposition would appear to be a moot issue if the Court were to reverse the trial court and send the matter back for further hearing in view of the provisions of MCR 2.302(H). This provision is a new provision governing the filing of discovery materials and differs from both prior Michigan practice and the federal rules. See 2 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), Staff Comments, p 160.

If the issue does exist, it would appear plaintiff has waived it, inasmuch as at no time at the trial level either in her brief in opposition or at the argument on the motion did she ever object to the use of her deposition testimony. Absent a showing of manifest injustice, plaintiff has waived this objection. Brooks v January, 116 Mich App 15, 30; 321 NW2d 823 (1982); Taubitz v Grand Trunk Western R Co, 133 Mich App 122, 129-130; 348 NW2d 712 (1984). Also, in her brief on appeal she has not cited any case, statute, court rule, or policy consideration in support of her position. Therefore her arguments are not preserved for review. See Mitcham v Detroit, 355 Mich 182, 203; 94 NW2d 388 (1959).

Even if plaintiff's argument is not waived, the Court is satisfied that the language of GCR 1963, 117.3 indicates that the trial court could consider other documents submitted by the parties: "Such affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties shall be considered by the court at the hearing." (Emphasis added.) In Guerrero v Schoolmeester, 135 Mich App 742, 746; 356 NW2d 251 (1984), lv den 422 Mich 880 (1985), an almost identical situation in the no-

fault context existed, and the Court ruled consistent with the ruling in this case.

In Williams v Payne, 131 Mich App 403, 409; 346 NW2d 564 (1984), this Court noted that the following standards have been developed to assist the courts in determining whether a threshold injury was sustained:

> "First, 'impairment of body function' actually means 'impairment of important body functions.' Second, by its own terms, the statute requires that any impairment be 'serious.' Third, the section applies only to 'objectively manifested injuries'." (Citations omitted.)

Despite plaintiff's attempt to take the trial court's statement out of context by stating that the trial court required permanency for a determination of serious impairment, we note that the court said: "Also, although an injury need not be permanent to be serious, permanency is relevant. * * *"

The trial judge indicated that he found that there was an impairment of a body function, ambulation, and indicated that ambulation is an important body function. He found, however, that it was not a serious impairment and could not be equated, or begin to be equated, with either death or permanent serious disfigurement. He noted correctly that recovery for pain and suffering is not predicated on serious pain and suffering, but on the injuries that fall within the considerations mentioned by the Supreme Court. He also correctly noted that there was no objective manifestation at this time as to pain, except the scar tissue. And his comment that plaintiff indicated that there was really nothing she cannot do now because of the accident that she could not do before the accident is borne out by her own deposition where she said as follows:

> "Q. Okay. Is there anything you can't do with that ankle now -- other than, I know when you do a lot of stuff, a lot of walking, or a lot of steps, but is there anything that you can't do now that you did before the accident, because of the ankle?
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> "A. Well, the stairs, when I do my wash, or anything like that, it's really hard.

"Q. So, it gets painful? You can do it, but it just gets painful?

"A. I have to do it yes.

"Q. Has this accident affected your marriage at all?

"A. No."

Consistent with the findings in Williams v Payne, supra; Pullen v Warrick, supra; Franz v Woods, 145 Mich App 169; 377 NW2d 373 (1985); and Denson v Garrison, 145 Mich App 516; 378 NW2d 532 (1985), we believe that the trial judge properly found as a matter of law that there was not a serious impairment of a body function as required in the No-Fault Act.

AFFIRMED.

/s/ Walter P. Cynar
/s/ Myron H. Wahls
/s/ Earl E. Borradaile