

STATE OF MICHIGAN
COURT OF APPEALS

DEBRA A. MAYES and WILLIAM D. MAYES,

Plaintiffs-Appellants/Cross-Appellees,

v

MOUNT CLEMENS GENERAL HOSPITAL, INC.,

Defendant-Appellee/Cross-Appellant,

and

NORTHEAST SURGICAL GROUP and JAMES H.
MCQUISTON, D.O.,

Defendants.

UNPUBLISHED

June 27, 1997

No. 195082

Macomb Circuit Court

LC No. 93-004668-NH

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition for defendant hospital pursuant to MCR 2.116(C)(10).¹ We affirm. Defendant hospital cross-appeals as of right from an order denying its motion to enforce a settlement agreement. Because we affirm the order granting summary disposition for defendant hospital, we need not address this issue.

In this medical malpractice action, plaintiffs claim that they raised a genuine issue of material fact regarding the independent negligence of hospital employees. However, the only evidence presented to the trial court in support of this allegation came in the form of an affidavit from an expert witness who was not on plaintiffs' witness list. The trial court declined to consider this evidence and granted summary disposition for defendant hospital. The question before this Court is whether the trial court properly declined to consider this evidence.

The decision whether to allow a party to add an expert witness is within the discretion of the trial court. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992); *Levinson v Sklar*,

181 Mich App 693, 699; 449 NW2d 682 (1989), after remand *sub nom Levinson v Trotsky*, 199 Mich App 110; 500 NW2d 762 (1993). In determining whether the trial court abused its discretion, this Court considers whether the party seeking to add an expert has adequately explained its reason for delay, and whether the opposing party would be prejudiced. *Tisbury, supra* at 21; *Levinson, supra* at 699. In determining prejudice, this Court considers a number of factors, including: (1) whether the original expert witness has already been deposed, (2) whether the addition of an expert would affect any mediation evaluation, (3) whether the party seeking to add the expert has caused repeated delays because of a lack of diligence, and (4) whether the failure to allow the addition of an expert will deny a party a determination on the merits of their claim. *Tisbury, supra* at 21; *Levinson, supra* at 699.

We conclude that the trial court did not abuse its discretion in denying plaintiffs' belated attempt to add an expert witness. First, the original trial date had already passed, and plaintiffs have provided no adequate explanation for their failure to add this expert earlier. Apparently, after plaintiffs retained new counsel, they decided to expand their theory of liability. This does not justify plaintiffs' late attempt to add an expert witness. Second, in this case, unlike the situations in *Tisbury, supra* at 21, and *Levinson, supra* at 699, it is clear that this late addition would have prejudiced defendant hospital because (1) defendant hospital had already deposed plaintiffs' expert, and (2) mediation had already been completed, apparently based only on plaintiffs' theory that the hospital was vicariously liable, rather than independently negligent. In addition, it also appears that plaintiffs caused a substantial delay in the proceedings either personally or through their own counsel by a settlement agreement repudiating a settlement agreement. While the trial court's refusal to allow the addition of this expert witness did deny plaintiffs a determination on the merits of their claim, this was solely due to plaintiffs' own inaction, rather than some event beyond their control. Contrast *Tisbury, supra* at 20-21. Thus, the trial court properly declined to consider the affidavit of plaintiffs' proposed expert. Because, in the absence of the affidavit, there was no genuine issue regarding the independent negligence of hospital employees, the trial court properly granted summary disposition for defendant hospital.

In light of our resolution of this issue, we need not address defendant's cross-appeal.

Affirmed.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

¹ The other defendants reached a settlement with plaintiff and were dismissed from this action.