

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY S. COPELAND,

Plaintiff-Appellant,

v

FAMILY DENTAL CENTER and MICHAEL
PASSERA, D.D.S.,

Defendants-Appellees.

UNPUBLISHED

August 18, 2000

No. 212862

Wayne Circuit Court

LC No. 94-423677-NH

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

In this action alleging dental malpractice, the trial court directed a verdict in favor of defendant Michael Passera, D.D.S. (“Passera”). Plaintiff filed an appeal as of right from that decision, which was ultimately dismissed by this Court for lack of jurisdiction. While the appeal was pending, plaintiff filed a motion in the trial court for entry of a default judgment against defendant Family Dental Center, which the trial court denied with prejudice. Plaintiff then filed another appeal as of right with this Court, which also was dismissed for lack of jurisdiction. However, in lieu of granting leave to appeal, our Supreme Court remanded the case to this Court for consideration as on leave granted. See 458 Mich 852 (1998). We affirm.

Plaintiff first argues that he presented sufficient evidence to avoid a directed verdict of his dental malpractice claim against Passera.¹ We review de novo the trial court’s decision to grant a directed verdict. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 634; 601 NW2d 160 (1999).

¹ The malpractice statute, MCL 600.2912a(1);MSA 27A.2912(1)(1) provides, in relevant part:

[I]n an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

(a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in

Because defendant Passera was a general practitioner at the time of the alleged malpractice in August 1992, plaintiff was required to prove that he failed to act in accordance with the recognized standard of acceptable professional practice in the community in which he practiced or in a similar community. MCL 600.2912a(1)(a); MSA 27A.2912(1)(1)(a). Expert testimony is ordinarily required to establish the standard of care and to show that it was breached. *Sullivan v Russell*, 417 Mich 398, 407; 338 NW2d 181 (1983). In particular, if the standard of conduct issue raises a question involving medical judgment, expert testimony is needed to establish the standard. *Wilson v Stilwill*, 411 Mich 587, 611; 309 NW2d 898 (1981). Expert testimony is not necessary, however, if “the lack of professional care is so manifest that it would be within the knowledge and experience of the ordinary layman that the conduct was careless and not conformable to the standards of professional practice and care employed in the community.” *Sullivan, supra* at 407, quoting *Lince v Monson*, 363 Mich 135, 141; 108 NW2d 845 (1961).

We reject plaintiff’s argument that he could prove his claim in this case without expert testimony. Plaintiff’s liability theories regarding Passera’s decision to extract the tooth on August 8, 1992, the decision to perform the extraction himself rather than have it done by an oral surgeon, and the decision not to prescribe antibiotics, all involved issues of medical judgment outside of the common knowledge and experience of the ordinary layperson and, therefore, required expert testimony. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 46; 594 NW2d 455 (1999).

We also disagree with plaintiff that his attacks on Passera’s credibility provided a basis for avoiding a directed verdict. It is improper to rely upon untruthful testimony to establish the truthfulness of an inverse factual proposition. *MERC v Cafana Cleaners, Inc*, 73 Mich App 752, 761; 252 NW2d 536 (1977), overruled on other grounds in *Kalamazoo City Education Ass’n v Kalamazoo Public Schools*, 406 Mich 579, 606; 281 NW2d 454 (1979). Thus, assuming that a jury would disbelieve Passera, plaintiff’s burden of proof would still remain unsatisfied. *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 805; 286 NW2d 34 (1979).

We also reject plaintiff’s claim that a directed verdict was improper in light of evidence showing that Passera refused to answer certain questions during his deposition. Such a refusal cannot be used to establish a prima facie case of negligence and, in particular, that Passera breached any specific standard of care. Cf. *Curtis v M & S Petroleum, Inc*, 174 F3d 661, 674 (CA 5, 1999); *Stanojev v Ebasco Services, Inc*, 643 F2d 914, 924, n 7 (CA 2, 1981). We note that this is not a case where plaintiff sought an adverse inference as a discovery sanction against Passera for not answering questions. See MCR 2.313; cf. *Brenner v Kolk*, 226 Mich App 149, 161; 573 NW2d 65 (1997) (failure of party to preserve evidence may be sanctioned under inherent powers of trial court by an adverse inference jury instruction). Hence, to the extent plaintiff’s claim may be viewed as one seeking an adverse inference as a discovery sanction, we decline to address it because this claim was not preserved for appeal. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

which the defendant practices or in a similar community, and that as a proximate cause of the defendant failing to provide that standard, the plaintiff suffered an injury.

In sum, having viewed the evidence in a light most favorable to plaintiff and drawing all reasonable inferences in his favor, we conclude that the trial court properly granted a directed verdict because neither Passera's testimony nor plaintiff's testimony, if believed, established a breach of the applicable standard of care. *Locke v Pachtman*, 446 Mich 216, 228-229; 521 NW2d 786 (1994).

Plaintiff next claims, as he did before the trial court, that he was entitled to a default judgment against the Family Dental Center under MCR 2.603 for defendant's failure to answer the complaint. Defendant Family Dental Center responded to plaintiff's argument in the trial court by asserting that: (1) Family Dental Center is the assumed name of Dr. Norman Weiss, (2) plaintiff never properly served Family Dental Center, and (3) Family Dental Center was not vicariously liable for the alleged acts of negligence by Passera. Although the court's order indicates that it was denying plaintiff's request for a default judgment with prejudice, the court's reasons for its decision reveal that, in substance, it dismissed the action against the Family Center based on a determination that plaintiff had abandoned his claim by not taking any steps to prosecute it until after the judgment of no cause of action was entered in favor of Passera.² On appeal plaintiff does not directly contest the trial court's ruling; instead, he again argues that he was entitled to entry of a default judgment against defendant Family Dental Center because the Center failed to answer the complaint. Defendant Family Dental Center responds that plaintiff failed to timely move for a default judgment and therefore his request for a default is now barred by the equitable doctrines of estoppel and laches.

Plaintiff raised this claim in the trial court. He should not be penalized because the trial court chose to rule against him without resolving his claim. Therefore, we will briefly consider this issue on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

In order to resolve this question, a brief review of the procedural history of this case is necessary. Plaintiff filed his complaint against defendants Passera and Family Dental Center on August 8, 1994. After obtaining a second summons, the complaint and summons were served on defendant Family Dental Center by registered mail on November 2, 1994, with receipt of service occurring the following day. No answer to the complaint was ever filed by defendant Family Dental Center and no attorney appeared on its behalf. The attorney who appeared on behalf of Passera was very careful to consistently indicate that he was appearing only on behalf of Passera. The trial court granted a motion for a directed verdict as to Passera on May 21, 1996, at the conclusion of plaintiff's proofs. Plaintiff then waited until November 1, 1996, to request that a default judgment be entered as to defendant Family Dental Center. In his brief in support of his application for default judgment, plaintiff admitted that the "Family Dental Center was a separate business entity owned by Norman Weiss." Plaintiff claimed that service of process was proper under MCR 2.105(B)(4) and MCR 2.105(D) "whether Family Dental Center is viewed as a corporation or an assumed name for an individual."

² Although termed an "abandonment" by the trial court, it appears that the trial court was actually ruling that the case would be dismissed for lack of progress, MCR 2.502, but if that is the case, the trial court failed to provide the required notice. MCR 2.502(A).

MCR 2.105(D) details the requirements for properly serving a corporation; however, because defendant asserts, and plaintiff acknowledges, that Family Dental Center is not a corporation, MCR 2.105(D) is inapplicable.

MCR 2.105(B)(4) details the requirements for properly serving an individual doing business under an assumed name. The court rule provides that service may be accomplished by:

(a) serving a summons and copy of the complaint on the person in charge of an office or business establishment of the individual, *and*

(b) sending a summons and a copy of the complaint by registered mail addressed to the individual at his or her usual residence or last known address.
[Emphasis supplied.]

Plaintiff did not comply with either of these provisions and therefore did not properly serve Family Dental Center (or its alter ego, Dr. Norman Weiss). Thus, it appears that the trial court never had jurisdiction over Family Dental Center. Likewise, plaintiff could not take the default of a defendant that he failed to properly serve. MCR 2.504(E) provides that an action may be dismissed under MCR 2.102(E) for failure to serve a defendant. We therefore conclude that the trial court properly dismissed the case against defendant Family Dental Center, albeit for the wrong reason. *Lane v KinderCare Learning Center, Inc.*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

We further note that the trial court's grant of the directed verdict as to defendant Passera was based on plaintiff's failure to establish the applicable standard of care. Plaintiff's claim of liability as to defendant Family Dental Center was based on a theory of vicarious liability. However, where a defendant cannot establish liability against the agent, he likewise cannot establish vicarious liability against the principal. *Harts v Farmers Ins Exchange*, 461 Mich 1, 12; 597 NW2d 47 (1999). Therefore, even if this case were reinstated, it would be subject to dismissal on a motion for summary disposition under MCR 2.116(C)(8).

We therefore hold that the trial court properly granted a directed verdict as to defendant Passera, and that the trial court likewise properly denied plaintiff's motion for entry of a default judgment as to defendant Family Dental Center, albeit for reasons different than those stated by the trial court.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald