

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE KAPP, as Next Friend of
ELIZABETH JOHNSON,

Plaintiff-Appellant,

v

MARK A. EVENHOUSE, M.D. and LAURELS
OF KENT/LOWELL MEDICAL CENTER,

Defendant-Appellees.

UNPUBLISHED
March 6, 2001

No. 216020
Kent Circuit Court
LC No. 97-012668-NH

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing her medical malpractice case with prejudice. We affirm.

FACTS

Plaintiff's complaint alleges that negligent care was given to Elizabeth Johnson by defendants during Johnson's convalescence at defendant Laurels of Kent/Lowell Medical Center (Laurels of Kent). Laurels of Kent is a nursing home located in Lowell. Defendant Evenhouse is a doctor employed by Laurels of Kent.

Central to this case is a pretrial scheduling order entered by the trial court on April 30, 1998. That order required plaintiff and defendants to disclose all expert witnesses by June 19, 1998, and July 17, 1998, respectively. The parties stipulated to extend the deadline for plaintiff's disclosure to July 15, 1998. The scheduling order also required the disclosures regarding the experts contain all information specified in MCR 2.302(B)(4)(a)(i)¹ and stated: "*Absent good*

¹ That subsection provides:

(B) Scope of Discovery

* * *

(4) Trial Preparations; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and

(continued...)

cause expert witnesses not identified as required hereby will not be allowed to testify as trial.”
(Emphasis in original.)

On September 25, 1998, defendants moved to dismiss plaintiff’s complaint,² arguing plaintiff’s failure to disclose her expert witnesses and failure to respond to interrogatories caused them prejudice. Plaintiff’s counsel submitted a one-page response to the motion and cited no legal argument or authority to support plaintiff’s failure to comply with the court’s scheduling order. On October 8, 1998, one day prior to the hearing on defendants’ motion to dismiss, plaintiff provided defendant Evenhouse with her witness list and answers to interrogatories concerning her experts. During the hearing on defendants’ motion to dismiss, plaintiff explained that her delay in disclosing information regarding her experts was caused by the delay in taking defendant Evenhouse’s deposition. Plaintiff claimed she was waiting to hear defendant Evenhouse’s testimony before selecting experts to challenge the issues identified during the deposition.

The trial court determined that plaintiff’s October 8, 1998 witness list and expert interrogatory answers failed to comply with MCR 2.302(B)(4)(a)(i). The trial court also determined that plaintiff’s explanation for missing the deadline did not constitute good cause and ruled that, because plaintiff failed to disclose her experts in the time and manner provided in the scheduling order, plaintiff’s experts were prohibited from testifying at trial. The trial court then dismissed plaintiff’s case, reasoning that without expert testimony plaintiff could not prove her medical malpractice claims.

ANAYLSIS

A trial court has discretion to decline to entertain actions beyond the time frames agreed to and set forth in a scheduling order. *People v Grove*, 455 Mich 439, 464-465; 566 NW2d 547 (1997); see MCR 2.401(B)(2) and (I)(2); see also *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993) and *Dean v Tucker*, 182 Mich App 27, 31; 451 NW2d 571 (1990) (both cases reviewing the trial courts’ decisions to impose discovery sanctions

(...continued)

acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a)(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

² The motion was originally filed by defendant Evenhouse, but was joined and concurred with by Laurels of Kent.

barring a party's expert witnesses after the party failed to comply with deadlines for disclosure of witnesses for an abuse of discretion). "Were the rules not so construed, scheduling orders would be meaningless." *Grove, supra* at 469. We will find an abuse of discretion only in extreme cases in which the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999), quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985) and *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

In the present case, the trial court prohibited plaintiff's experts from testifying pursuant to MCR 2.401(I)(2) because plaintiff did not come close to complying with its pretrial scheduling order.³ The trial court did not bar plaintiff's experts' testimony as a discovery sanction. See MCR 2.313(B)(2). Thus, we focus our review on the specific issue whether the trial court abused its discretion in barring plaintiff's experts based on plaintiff's failure to comply with its pretrial scheduling order.

Under MCR 2.401(B)(1)(b), a trial court has authority to "enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in this case." A scheduling order may establish times for the completion of discovery and the exchange of witness lists. MCR 2.401(B)(2)(a). In regard to witness lists, MCR 2.401(I)(1) and (2) requires the following:

(I) Witness Lists.

(1) No later than the time directed by the court under subrule (B)(2)(a), the parties shall file and serve witness lists. The witness list must include:

(a) the name of each witness, and the witness's address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;

(b) whether the witness is an expert, and the field of expertise.

(2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.

The use of scheduling orders is encouraged to promote the efficient processing of cases. *Grove, supra* at 465.

Here, plaintiff's original deadline for disclosure of her experts set forth in the pretrial scheduling order was extended to July 15, 1998. However, the record reveals that plaintiff failed to disclose the required information regarding experts by way of a witness list or any other means

³ In a written opinion, the trial court stated "[h]ad there been only a short deviation from the deadline, or if plaintiff could demonstrate good cause for it, this court would forgive missing the deadline. Plaintiff offers no such case, however."

of discovery prior to the imposed deadline. See MCR 2.401(I)(3). Nearly three months had passed and plaintiff had not filed her witness list. Once defendants filed a motion to dismiss, plaintiff made an attempt to satisfy the requirements of the court's scheduling order by serving upon defendants a witness list and answers to defendant Evenhouse's expert interrogatories. However, neither the witness list nor the interrogatory answers were substantively sufficient in that they failed to disclose "the substance of the facts and opinions to which [each] expert is expected to testify and a summary of the grounds for each opinion." MCR 2.302(B)(4)(a)(i).

Defendant Evenhouse concedes that, in May and June 1998, plaintiff disclosed the names of two experts in her answers to defendant Evenhouse's interrogatories. However, like the untimely interrogatory answers of October 13, 1998, plaintiff did not indicate within her earlier answers the substance of the facts and opinions to which the experts were expected to testify, and a summary of the grounds for each opinion. See MCR 2.302(B)(4)(a)(i). Under such circumstances, we cannot find that the trial court abused its discretion by concluding that plaintiff did not disclose the expert witness information in the time and manner required by the pretrial scheduling order.

The trial court was also justified in determining plaintiff lacked good cause for failing to comply with the disclosure standards set forth in the order. Plaintiff acknowledged below that she did not disclose the expert information as required by the order because she was waiting to hear defendant Evenhouse's testimony before selecting her experts. As expressed by the trial court, such delay was not warranted given plaintiff's obligation to prove her case.⁴ Given plaintiff's explanation for her failure to comply with the scheduling order, we are not convinced that the trial court erred in determining plaintiff lacked good cause for the delay. Under these circumstances, we conclude that the trial court did not abuse its discretion in prohibiting plaintiff's experts from testifying at trial.

We further conclude that the trial court did not err in dismissing plaintiff's medical malpractice case. A trial court's decision to dismiss an action for violation of a court order is reviewed for an abuse of discretion. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 359; 503 NW2d 915 (1993).⁵ Proof of a medical malpractice claim requires showing, "(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and injury." *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). Expert testimony is generally required "to establish the applicable standard of care and to demonstrate that the professional breached that standard."

⁴ We make no determination with respect to plaintiff's claim that defendant Evenhouse was dilatory in failing to attend several scheduled depositions. Plaintiff simply was not justified in making her disclosure of her expert witnesses dependent on defendant Evenhouse's deposition testimony.

⁵ We note that the trial court dismissed plaintiff's claims after barring plaintiff's experts from testifying because plaintiff could not prove her case without expert testimony. Therefore, we view the dismissal as having been entered as a direct result of plaintiff's violation of the court's pretrial scheduling order requiring timely disclosure of expert witnesses and review the trial court's ultimate decision to dismiss the case under the abuse of discretion standard expressed in *Zantop Int'l Airlines, Inc, supra*.

Sullivan v Russell, 417 Mich 398, 407; 338 NW2d 181 (1983). However, expert testimony is not required when “the lack of professional care is so manifest that it would be within the common knowledge and experience of the ordinary layman that the conduct was careless and not conformable standards of professional practice and care employed in the community.” *Id.*, quoting *Lince v Monson*, 363 Mich 135, 141; 108 NW2d 845 (1961).

Here, plaintiff’s claims are based on injuries Johnson allegedly suffered while a resident at Laurels of Kent. According to plaintiff, Johnson, who suffered from dementia, entered a bathroom unsupervised and fell off a toilet, seriously fracturing her hip. Plaintiff’s complaint specifically alleges that defendants were negligent: (1) for failing to provide adequate staff support and supervision while Johnson was in the bathroom; (2) for failing to implement guidelines concerning patient care; (3) for failing to examine, assess, diagnose and treat Johnson’s injuries following her fall; and (4) for failing to discontinue Johnson’s physical therapy after she was injured, which caused her additional suffering.

Expert testimony would have been necessary to establish the standard of care and to demonstrate that defendants breached the standard of care in regard to each of plaintiff’s allegations. Expert testimony regarding dementia and the level of supervision necessary for people afflicted with dementia as compared to the level of supervision and care provided by defendants would be necessary to sustain plaintiff’s claims that defendants failed to supervise Johnson at the time of her fall and failed to implement patient care guidelines that could have prevented the accident. Likewise, plaintiff’s claim that defendants were negligent in failing to examine, assess, diagnose, and treat Johnson following the fall could not be properly evaluated without expert testimony regarding the symptoms, ease of diagnosis, and methods of treating a fractured hip. Furthermore, the jury could not have determined whether defendants’ continuation of Johnson’s physical therapy fell below an applicable standard of care without expert testimony describing the proper course of treatment under such circumstances. See *Moy v Detroit Receiving Hosp*, 169 Mich App 600, 609; 426 NW2d 722 (1988).

For the above reasons, we affirm the trial court’s decision to bar plaintiff’s expert witness from testifying at trial and its decision to dismiss plaintiff’s case based on her inability to prove her medical malpractice claims.

Affirmed.

/s/ Brian K. Zahra

/s/ Joel P. Hoekstra