STATE OF MICHIGAN

COURT OF APPEALS

LESLIE WAKNIN,

Plaintiff-Counterdefendant-Appellant,

v

RICHARD CHAMBERLAIN,

Defendant-Counterplaintiff-Appellee.

UNPUBLISHED
October 12, 2001

No. 224042
Cass Circuit Court
LC No. 96-000433-NO

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of no cause of action that the trial court entered following a jury trial on plaintiff's assault and battery claims against defendant for alleged incidents occurring in July 1995, and on May 6, 1996. We affirm.

Before trial, defendant made two motions in limine. One motion asked the trial court to exclude defendant's criminal conviction of assault and battery arising out of the May 6, 1996 incident. Relying upon *Wheelock v Eyl*, 393 Mich 74; 223 NW2d 276 (1974), the trial court held that defendant's criminal conviction was inadmissible for purposes of establishing liability. The second motion requested that plaintiff be precluded from presenting any witnesses or exhibits because plaintiff had failed to file with the court, as directed in the pretrial order, his list of witnesses and exhibits. In response to this motion, the trial court only allowed as witnesses and as an exhibit respectively the people and the photograph listed in plaintiff's answers to interrogatories. Because plaintiff failed to list a sheriff deputy in the answers, the trial court refused to allow the deputy to testify. Following trial and the jury's verdict of no cause of action, plaintiff filed a motion for new trial. In that motion, plaintiff argued that the trial court erred in excluding defendant's prior criminal conviction for assault and battery. The trial court denied the motion on the same grounds as stated before trial, and on the alternative basis that the evidence was more prejudicial than probative pursuant to MRE 403. On appeal, plaintiff again challenges the trial court's rulings on the motions in limine.

Regarding the exclusion of defendant's criminal conviction, we are not persuaded that plaintiff is entitled to relief. Plaintiff argues that the rule announced in *Wheelock, supra*, did not survive the subsequent adoption of the Michigan Rules of Evidence in 1978 and that defendant's

conviction was admissible under MRE 403. Whether to admit evidence is within the sound discretion of the trial court and we will not disturb that decision on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991).

Even assuming, as plaintiff suggests, that *Wheelock* is no longer good law, we conclude that the trial court did not abuse its discretion in excluding defendant's previous conviction for assault and battery. Although the trial court originally did not base its decision on MRE 403, the trial court explained on the record when denying plaintiff's motion for a new trial that regardless of the *Wheelock* decision, it determined that under MRE 403, the probative value of defendant's conviction would clearly be outweighed by the prejudicial effect, stating that "clearly the prejudicial effect would be tremendous. Essentially, school would be out," and characterizing such an admission as "a bombshell against a defendant in a civil case." Here, the trial court conducted the appropriate analysis under MRE 403 and we are not convinced that there is no justification or excuse for the ruling made. We find no abuse of discretion.

Nor did the trial court err in disallowing use of defendant's conviction for impeachment purposes. MRE 609 provides for the impeachment of a witness by evidence of a conviction of a crime only when the crime contained an element of dishonesty, false statement, or theft, none of which are involved in an assault and battery conviction. We find no error.

Next, we find without merit plaintiff's claim that the trial court abused its discretion when it excluded the testimony of a sheriff deputy as a sanction for plaintiff's failure to comply with the pretrial order in the case that required the parties to submit a list of witnesses and exhibits before trial. The failure of a party to file a witness list is sanctionable. MCR 2.401(I)(2). *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628-629; 506 NW2d 614 (1993). We review the trial court's decision regarding whether a witness may testify after a party has failed to file its witness list for an abuse of discretion. *Carmack v Macomb County Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993). Here, we conclude that the sanction that the trial court imposed was a reasonable and measured response. The trial court allowed plaintiff to call all the witnesses that he had identified in his answer to defendant's interrogatories, as well as himself. The sheriff deputy was not named in the interrogatories. We find no abuse of discretion in this method of sanctioning plaintiff for the failure to properly disclose his witnesses before trial.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage