

STATE OF MICHIGAN  
COURT OF APPEALS

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JOCELYN BROWN,

Plaintiff-Appellee,

and

DONALD BROWN,

Plaintiff,

v

INGHAM REGIONAL MEDICAL CENTER,  
AMY S. HAYES, WORK IMPROVEMENT  
REHABILITATION CENTER, and LEANN G.  
WHITGEN,

Defendants-Appellants.

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UNPUBLISHED

January 27, 2009

No. 280791

Ingham Circuit Court

LC No. 01-093606-NH

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

PER CURIAM.

Defendants appeal by leave granted from a circuit court order denying their motion to amend their witness list to include an occupational therapist as an expert witness. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Jocelyn Brown filed this medical malpractice action, alleging that defendants Amy Hayes and Leann Whitgen, occupational therapists, committed malpractice and that the other named defendants were vicariously liable. Defendants filed an affidavit of meritorious defense, see MCL 600.2912e(1), from a physical therapist, Ellen Smith, and named Smith as an expert witness in their witness list. In 2004, plaintiff obtained a default against defendants because Smith was not qualified under MCL 600.2169 to testify as an expert and thus her affidavit was insufficient. In a prior appeal, this Court reluctantly agreed that Smith was not qualified to testify as an expert, but concluded that defense counsel had acted reasonably in interpreting § 2169 to preclude a registered occupational therapist from qualifying as an expert and thus was required to provide an affidavit from a licensed physical therapist. *Brown v Hayes*, 270 Mich App 491, 502-504; 716 NW2d 13 (2006), rev'd in part on other grounds 477 Mich 966 (2006). Several months after the case was returned to the trial court in 2007, defendants moved to amend their witness list to include a registered occupational therapist, Thomas Lilley, as an

expert in light of the fact that Smith was not qualified to testify as an expert. The trial court denied the motion on the ground that it was “absolutely untimely” and “far too late.”

“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). “An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.” *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The trial court issued a scheduling order stipulated to by the parties in September 2001. It required witness lists to be exchanged by November 15, 2001, and defendants’ experts to be named by January 15, 2002. See MCR 2.401(B)(2)(a)(iv) and (I)(1). It further provided that “[w]itnesses not so named shall not be permitted to testify except upon motion for good cause shown.” See MCR 2.401(I)(2). Defendants filed an original and a supplemental expert witness list in 2002; Smith was named as an expert witness but Lilley was not. The trial court abused its discretion by failing to consider whether defendants’ reason for adding Lilley as an expert, even at such a late date, constituted good cause. Further, the trial court abused its discretion to the extent that it denied defendants’ motion on the ground of timeliness alone. Before barring a witness from testifying due to untimeliness, the court must consider the particular circumstances of the case “to determine if such a drastic sanction is appropriate.” *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). The court should consider numerous factors relevant to the circumstances of the case, *id.* at 32-33; *Tisbury, supra* at 20-21, and “[t]he record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.” *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled in part on other grounds by *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008). Accordingly, we remand this case to the trial court for such a determination.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Brian K. Zahra