STATE OF MICHIGAN

COURT OF APPEALS

LAURA E. PUTNAM-WESENER,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE CORPORATION OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
September 3, 2009

No. 285413
Saginaw Circuit Court
LC No. 05-057259-NF

Before: Saad, C.J. and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order granting plaintiff's motion to strike two of defendant's expert witnesses in this first-party no fault insurance case. We affirm.

Plaintiff was in an automobile accident on September 10, 2004, and suffered injuries to her head, neck, and spine. In addition to this suit for wage-loss and medical expenses, filed in Saginaw Circuit Court, plaintiff filed a third-party tort suit against the other driver in Genesee Circuit Court. In that case, independent medical examinations (IMEs) were performed by John Baker, Ph.D., and by William Kohen, M.D. The third-party action was settled.

The Saginaw trial court entered a scheduling order on November 16, 2005, providing that the parties exchange all known witnesses within 21 days of the order, and that any newly discovered witnesses were to be divulged to opposing counsel within 14 days of their discovery. The order further provided that defendant reserved the right to an IME, and limited each party to three expert witnesses. Discovery was to be completed within 150 days. Trial was scheduled for January 9, 2007, but it was repeatedly adjourned.

On May 17, 2007, defendant moved to allow modification of the scheduling order, asking for a medical evaluation of plaintiff by Drs. Wilbur Boike (a neurologist) and Sharon Nassau (a neuropsychologist). Plaintiff objected, arguing that defendant had not shown good cause for the delay, citing MCR 2.311(A).[1] The court allowed the examination, "if and only if this trial will

[1] In relevant part, MCR 2.311(A) provides:

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not be adjourned in August and defendant cooperates with plaintiff." The court added, "I guess if you come back and plaintiff wants something and it can't be accomplished before August, then I'm going to strike the IME." An amended scheduling order was entered June 11, 2007, allowing defendant until July 1, 2007, to conduct an IME of plaintiff. Plaintiff's answer included a proposed order that included the details required under MCR 2.311(A), but the court signed an order prepared by defendant that included no details except the July 1 deadline requirement.

Although the examinations took place before trial, the trial date was once again adjourned to January 8, 2008. At about the same time, July 31, 2007, defendant filed a second notice of additional witnesses listing, among others, Drs. W. John Baker, and William M. Kohen, the IME doctors from the third-party suit. Plaintiff moved to strike Drs. Baker and Kohen from defendant's witness list, arguing that defendant failed to list these experts by the designated dates in the pretrial order. Plaintiff asserted that allowing defendant to use these two doctors would be duplicative, cumulative, and without authorization from the court. At the hearing on plaintiff's motion to strike, defendant admitted that it had not listed the two doctors, and had identified two different doctors as its experts. But, defense counsel asserted, plaintiff had "sandbagged" him by knowing about these relevant examinations and not telling defendant. Plaintiff would have treating physicians testify from four different specialties and defendant would only have two; thus, the added experts would not be cumulative. However, defense counsel admitted he had known for some time that plaintiff had been seen by a neuropsychologist and a neurosurgeon, but had not timely named more than two of the three experts allowed by the scheduling order.

The court was not sympathetic: "[I]f you had been diligent from the first time, you would have perhaps asked the Court for a neuropsychologist and a neurosurgeon, correct?" Defendant argued that the delay was due in part to plaintiff, who failed to meet her obligation to supplement her answers to interrogatories after the examinations were done in the third-party case, sometime in late 2006 or early 2007. The court granted plaintiff's motion, noting that defendant declined the opportunity to add these medical examiners in 2006 when the court granted three weeks to conduct an IME.

We review for abuse of discretion a trial court's decision whether to permit a witness to testify when a party has failed to comply with a deadline for submitting a witness list. *Carmack v Macomb Co Comm College*, 199 Mich App 544, 546; 502 NW2d 746 (1993). MCR 2.401(I)(2) provides, "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."

Defendant argues that the two experts should be allowed to testify because they were newly discovered witnesses who were not identified by plaintiff even though she knew they had examined her in another case. In an interrogatory, plaintiff was asked to state the name and

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> . . . The order [for an examination] may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.

address of every physician, psychologist, psychiatrist, physical therapist, or medical or psychological personnel who treated or examined her between January 1, 1995, and the present. Defendant asserts that plaintiff had a duty to supplement that answer. However, MCR 2.302(1) provides in part:

> (1) A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, except as follows:
>
> (a) A party is under a duty seasonably to supplement the response with respect to a question directly addressed to
>
> (i) the identity and location of persons having knowledge of discoverable matters; and
>
> (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.

Here, plaintiff clearly did not intend to call another defendant's expert witnesses at trial, and she was under no duty to supplement the answers to her interrogatories.

Defendant gives no other explanation for its failure to discover these witnesses and timely include them on its witness list. Defendant was aware of the need for expert witnesses, and included the witnesses that it believed necessary on its initial list. It does not state what new information made it aware at such a late date that additional expert witnesses were necessary. The trial court here concluded that defendant had plenty of opportunity to call for an IME by either a neuropsychologist or a neurosurgeon but chose not to. It was only by luck that defendant found out such evidence was already available. Moreover, the doctors would not have testified just as expert doctors but as *examining* doctors: defendant was essentially trying to extend discovery. Under the circumstances, the trial court did not abuse its discretion by granting plaintiff's motion to strike the two additional expert witnesses.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra