

STATE OF MICHIGAN
COURT OF APPEALS

JERRY DANIELS,

Plaintiff-Appellant,

v

JOHN CESAR and COMMUNITY PROGRAMS
AND SERVICES,

Defendants,

and

WAYNE COMMUNITY LIVING SERVICES, INC.,

Defendant-Appellee.

UNPUBLISHED

December 4, 1998

No. 200273

Wayne Circuit Court

LC No. 95-525759 CZ

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff's Elliott-Larsen Civil Rights Act action. We affirm.

Plaintiff first contends that the trial court erred in permitting defendant more than twenty-eight days to respond to plaintiff's requests to admit, rather than deeming the requests admitted. Plaintiff argues that the requests, if deemed admitted, create a genuine issue of material fact regarding whether CPS acted as defendant's agent, and that defendant is consequently liable to plaintiff for the actions of Cesar, an employee of CPS. Plaintiff thus claims that because a genuine issue of material fact exists regarding this relationship, summary disposition was improper.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

MCR 2.312 governs requests for admissions, and provides:

Each matter as to which a request is made is deemed admitted *unless*, within 28 days after service of the request, or *within a shorter or longer time as the court may allow*, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter. . . . [MCR 2.312(B)(1) (emphasis added).]

The trial court has discretion to allow a party to file late answers, or to amend or withdraw answers. *Janczyk v Davis*, 125 Mich App 683, 691; 337 NW2d 272 (1983). An abuse of discretion will only be found if an unprejudiced person, after considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Medbury v Walsh*, 190 Mich App 554, 556-557; 476 NW2d 470 (1991). The trial court indicated that to deem plaintiff's requests admitted in a case so hotly contested would not serve the interests of justice, but awarded plaintiff the costs he incurred because of defendant's failure to timely respond. We perceive no abuse of discretion in the trial court's ruling.

Furthermore, even had we concluded that the trial court did abuse its discretion in refusing to deem plaintiff's requests admitted, this error would have been harmless because the admissions do not establish an agency relationship between defendant and CPS. The test of whether an agency has been created is whether the principal has a right to control the agent's actions. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). This control must be such as to give the purported principal the authority and capability to direct the agent's day-to-day operations. *Little v Howard Johnson Co*, 183 Mich App 675, 682; 455 NW2d 390 (1990) (examining agency in franchisor-franchisee context).

If deemed admitted, plaintiff's requests establish only that it was obligated by contract, statute, or regulation "to supervise the care and treatment of recipients of services provided by CPS," that it provided one hundred percent of the funding for CPS' operations, and that plaintiff had informed it of Cesar's alleged sexual harassment. These admissions do not establish that defendant determined what type or amount of care each recipient was to receive, dictated the manner in which or methods by which CPS' employees cared for or treated recipients on a daily basis, directed the manner in which any of the funding it provided was to be disbursed, placed any limitations or prohibitions on the disbursement of this funding, or provided that these funds were to be used to pay for any specific services, activities, salaries or improvements, or that it was obligated to remedy plaintiff's allegations of sexual harassment. The admissions establish only that defendant had some general oversight over the care CPS provided its residents. *Id.* at 681. Thus, because admission of plaintiff's requests does not establish defendant's control over CPS' day-to-day operations, plaintiff suffered no harm by the trial court's refusal to deem his requests admitted.

Plaintiff next argues that a genuine issue of material fact exists regarding whether CPS was defendant's agent, and that therefore summary disposition pursuant to MCR 2.116(C)(10) was improper. We review de novo a trial court order granting summary disposition. *Weisman v US Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). A motion for summary

disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* MCR 2.116(C)(10) permits summary disposition when no genuine issue exists regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 566-567.

No record evidence demonstrates that defendant exercised control over CPS sufficient to create an agency relationship. Rather, defendant engaged in the following general oversight of CPS' operations: providing health care training to CPS employees; planning yearly patient goals, in conjunction with CPS, without participating in the specific care processes by which the CPS staff achieved the recipients' goals; reviewing monthly or yearly patient medical records; investigating alleged incidents of wrongdoing by CPS workers, as required by the state, while leaving the ultimate disciplinary determination and enforcement to CPS, according to CPS' established code of procedure; ensuring that the physical structures were maintained; and reserving the right to hold CPS in breach of the service contract for any violations of its terms.

CPS managed the day-to-day operation of the homes, and directly supervised its staff of health care workers. CPS developed and adopted its own procedure manual, which included procedures that CPS had developed and also incorporated some procedures developed by defendant. Furthermore, CPS determined its employees' salaries, wages, and benefits, assigned its employees to its various locations and to specific patients for whom the employees would provide care, decided which employees to hire fire, determined to what disciplinary action it would subject its employees for their wrongdoing or misbehavior, and requested from defendant background checks of potential employees. While CPS received the entirety of its budget from defendant, CPS decided on what it would expend the budget, and CPS remained free to contract with other service provider entities. CPS was free to expand its operation pursuant to an offer from defendant or any other service provider, or could decline to acquire additional homes or recipients. While defendant would accept repair bids itself and contract with needed repairmen when CPS had exhausted its original repair budget, CPS decided which repairs to perform and selected repairmen for maintenance projects falling within its repair budget. Thus, because the evidence revealed no direct involvement by defendant in CPS' day-to-day patient care activities and no control over CPS' operations beyond a mere oversight and recommendation role, no genuine issue of material fact existed tending to show an agency relationship between defendant and CPS. *Little, supra* at 680-682. We conclude that the trial court properly granted defendant summary disposition pursuant to MCR 2.116(C)(10).

Finally, in light of our conclusion that the trial court properly granted defendant summary disposition, we find it unnecessary to address defendant's argument that a release plaintiff entered with CPS and Cesar also released defendant from the suit.

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Robert J. Danhof