

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE KAPP, as Next Friend of ELIZABETH
JOHNSON,

UNPUBLISHED
March 6, 2001

Plaintiff-Appellant,

v

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

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

Defendants-Appellees.

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

WHITE, J. (*dissenting*).

I respectfully dissent.

As the majority notes, plaintiff informed defendants of the names of two of her experts before her expert witness list was due on July 15, 1998.¹ Plaintiff's answers to Dr. Evenhouse's interrogatories, dated May 14, 1998, identified Dr. David Peters and Dr. Robert Dunn as experts, and referred to plaintiff's affidavit of merit, prepared by Dr. Peters and filed by plaintiff on December 18, 1997, ten days after filing her complaint alleging nursing home and medical negligence.²

¹ The parties' agreement to extend the deadline for expert witness lists included extending defendants' deadline to August 15, 1998. Defendant Evenhouse filed his expert witness list on August 13, 1998, and defendant Laurels of Kent filed its expert witness list on August 17, 1998.

² Plaintiff's complaint alleged that after undergoing surgery for a pertrochanteric fracture of the right hip, Johnson was transferred to defendant Laurels of Kent and started on physical therapy. The complaint alleged that Johnson was taken to the bathroom and left unattended, that she fell and was found laying on the bathroom floor, developed bruising to the right leg but was not examined for injury, and was continued on physical therapy. The complaint alleged that several weeks later, Johnson was examined at Carson City Hospital and x-rays revealed that she had sustained a new fracture around the previously placed lag screw inside plate, that she was placed in traction and then underwent surgery for removal of the lag screw and side plate from the previous fracture site, and a proximal femoral replacement. Following the second surgery, Johnson was placed in traction and later transferred to Chelsea Hospital Rehabilitation. Plaintiff's complaint alleged that defendants breached duties owed to plaintiff, including to

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Plaintiff's answers to defendant Laurels of Kent's interrogatories, dated June 11, 1998, also identified Dr. Peters, provided his address and stated that Dr. Peters would testify to the standard of care, breach of standard of care, proximate cause and damages. Plaintiff attached Dr. Peters' curriculum vitae to her answers, and again referred to the affidavit of merit.

The witness list plaintiff filed on October 13, 1998 listed five medical experts, including Drs. Peters and Dunn, about which it stated:

37. Dr. David Peters - expert Internal Medicine/Geriatrics

Dr. Peters will testify consistent with the affidavit of merit, as to the suggested inappropriate care outside the standard of care and proximate cause of damages.

* * *

39. Dr. Robert Dunn - expert Orthopedics [sic], 325, [sic] Princeton Ave, Princeton, NJ 08540, Dr. Dunn will testify as to the orthopedic [sic] causation and damages. He has not yet completed his review.

Striking the experts plaintiff listed for the first time in October 1998, and perhaps even Dr. Dunn,³ may have been appropriate under the circumstances, but the circuit court abused its discretion in also striking Dr. Peters and then, in dismissing plaintiff's case. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). The record does not show that defendants were prejudiced by plaintiff's failure to provide before the hearing date a more complete account of Dr. Peters' opinion than found in his affidavit of merit. The circuit court did not consider sanctions less drastic than precluding plaintiff from calling any experts and dismissing the case, although defendant's motion to dismiss sought in the alternative to compel discovery, discovery remained open until November 15, 1998, mediation was scheduled to occur in late January 1999, trial was scheduled for February 1999, and the record showed that both parties, not plaintiff alone, had been less than prompt in meeting deadlines on more than one occasion. Defendants could have fleshed out through a deposition the opinions of Dr. Peters, whose identity as an expert witness and whose anticipated testimony in accordance with the affidavit of merit they had been aware of for months. There was no unfair surprise. There was still ample time before the discovery cut-off to take his deposition.

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provide an adequately staffed facility, ensure appropriate guidelines and policies concerning patient care and treatment were in place and followed by staff, to not leave Johnson unattended and unassisted in the bathroom, to promptly and adequately examine Johnson after her fall and discontinue physical therapy, and that the examining treating physician and nursing staff properly access, observe, follow-up, and care for Johnson, especially in light of her admitting conditions, which included dementia.

³ No information regarding Dr. Dunn's opinion, had been provided.

I would reverse the circuit court's grant of summary disposition, and remand with the instruction that Dr. Peters be allowed to provide expert testimony, and that defendants be allowed to seek costs and reasonable fees expended in bringing and joining in the motion to dismiss.

/s/ Helene N. White