

STATE OF MICHIGAN
COURT OF APPEALS

DENISE WILLINGHAM,

Plaintiff-Appellant,

v

LARRY C. JOHN,

Defendant-Appellee.

UNPUBLISHED

December 21, 2001

No. 224597

Wayne Circuit Court

LC No. 98-825415-NO

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action in favor of defendant following the jury's verdict. We affirm.

Plaintiff rented her flat in the city of Detroit from defendant. On August 11, 1996, plaintiff tripped on some missing stair treads and fell down several stairs. As a result of the fall, plaintiff suffered a sprained ankle and ligament tear, and a back injury. Plaintiff filed suit to recover for her personal injuries under a negligence theory. The jury found that defendant was not negligent and a judgment in favor of defendant was subsequently entered. On appeal, plaintiff argues that the trial court abused its discretion in allowing defendant to file a late witness list without any good cause shown. Plaintiff also argues that the trial court abused its discretion in allowing defendant to call an unlisted witness to testify at trial with no prior notification to plaintiff. We find no error requiring reversal and affirm.

Plaintiff first argues that the trial court abused its discretion in allowing defendant to file a late witness list.

The trial court entered a scheduling order on November 13, 1998, requiring that witness lists be due by February 1, 1999. Plaintiff filed her witness list on December 21, 1998, and defendant filed his witness list on March 22, 1999. On March 24, 1999, plaintiff filed her objection to defendant's witness list on the basis that it was untimely. On May 7, 1999, defendant moved to file a late witness list and stated that the witness list was untimely because defense counsel had been hospitalized from late November 1998 until January 1999, was released, and then rehospitized. Defendant's witness list contained two names that were not on plaintiff's witness list: Dr. Matthew Griffin and Dr. Carla Morton. At the hearing, plaintiff's main objection was with Dr. Morton because Dr. Griffin was plaintiff's treating physician while Dr. Morton conducted an independent medical examination. The trial court allowed defendant to

file the late witness list, subject to plaintiff's right to add an additional witness. On May 10, 1999, plaintiff filed a supplemental witness list adding Dr. Thomas Pinson.

A trial court's decision to allow an untimely filed witness list is reviewed for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 31; 451 NW2d 571 (1990). Various factors are considered in determining appropriate sanctions for the untimely filing of a witness list. *Id.* at 32. These non-exhaustive factors are: (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the parties, (4) actual notice of the witness and the length of time prior to trial that such notice was received, (5) whether there exists a history of engaging in deliberate delay, (6) the degree of compliance with other provisions of the court's order, (7) the attempt to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. *Id.* at 32-33.

The trial court did not abuse its discretion by allowing defendant's witness list. Defendant's failure to timely file the witness list was not wilful; rather, it was because of the hospitalization of defendant's original attorney. Thus, there was good cause shown for the untimely filing of defendant's witness list. There is no indication in the record that defendant failed to comply with any other discovery orders or engaged in deliberate delay. Further, plaintiff admitted to the trial court that she had time to prepare for Dr. Morton, the only witness that plaintiff objected to on defendant's witness list. Indeed, the witness list was available to plaintiff nine months before trial. Moreover, plaintiff has demonstrated no prejudice and the trial court, in the interest of fairness, permitted plaintiff to add an additional witness (Dr. Pinson).

Under these circumstances, the trial court did not abuse its discretion in granting defendant's motion to file a late witness list.

Plaintiff also argues that the trial court abused its discretion when it allowed defendant to call an unlisted witness to testify at trial.

The unlisted witness, Rick Emerson, was a handyman who did occasional work for defendant. At her deposition, plaintiff testified that she had never complained to anyone about the worn stairs. At trial, plaintiff testified that she had told Emerson of the stairs, but never directly told defendant. Defendant impeached plaintiff with her deposition testimony and then called Emerson as a witness. Plaintiff objected because Emerson was not listed on the witness list. Defendant contended that Emerson's testimony was necessary because plaintiff had changed her testimony and the trial court allowed defendant to call Emerson.

An unlisted witness may not be called at trial, except as the court orders for good cause shown. MCR 2.401(I)(2). "Trial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires particularly with regard to rebuttal witnesses." *Pastrick v General Telephone Co of Michigan*, 162 Mich App 243, 245; 412 NW2d 279 (1987). When one party has introduced evidence to disprove a certain fact, the trial court may allow rebuttal evidence to prove that fact. *Nolte v Port Huron Area School Dist Bd Of Ed*, 152 Mich App 637, 645; 394 NW2d 54 (1986). The decision whether to allow an unlisted witness to testify is within the trial court's discretion and the decision should not be reversed unless there is an abuse of discretion. *Jernigan v General Motors Corp*, 180 Mich App 575, 584; 447 NW2d 822 (1989).

Plaintiff's argument that she was unaware of Emerson and that defendant virtually built his case upon an undisclosed witness is entirely unpersuasive. It was plaintiff who testified at her deposition that she did not complain to anyone about the stair treads, yet testified at trial that she had told Emerson about the condition of the stair treads. This was surely a surprise to defendant. Emerson's testimony was only necessary after plaintiff changed her testimony during trial. Consequently, good cause was shown in light of the fact that plaintiff changed her testimony at trial regarding the important issues of liability and notice. Therefore, the trial court did not abuse its discretion in allowing Emerson to testify as a rebuttal witness.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen