STATE OF MICHIGAN

COURT OF APPEALS

KEENA PANNELL,

Plaintiff-Appellant,

v

DR. ABDELKADER HAWASLI, DR. FREIDREICH DALMAN, and ST. JOHN HOSPITAL AND MEDICAL CENTER,

Defendant-Appellant,

and

DR. SHAWN VANDERMARK,

Defendant.

UNPUBLISHED
December 23, 2008

No. 279582
Wayne Circuit Court
LC No. 06-610036-NH

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order dismissing her action for failure to timely file a witness list. We affirm.

Plaintiff filed her complaint in this action on April 5, 2006, alleging that defendants committed medical malpractice by inflicting a burn to the middle of her forehead during gallbladder surgery, resulting in a disfiguring injury. On July 17, 2006, the trial court entered a scheduling order requiring the filing of witness lists by December 30, 2006, setting case evaluation for February 2007, and discovery cutoff for January 30, 2007.[1] Defendants filed their witness list timely on January 2, 2007.[2] Case evaluation pursuant to MCR 2.403 took place on

[1] Defendants state on appeal that discovery was extended to May 1, 2007, by stipulation and order. However, we find no order to that effect in the record provided on appeal.

[2] December 30, 2006, was a Saturday, and the court was closed for a legal holiday on January 1, 2007, MCR 8.110(D). Thus, contrary to plaintiff's assertion on appeal, the filing on January 2, 2007, was timely. MCR 1.108(1).

February 12, 2007. On March 8, 2007, defendants filed a motion to dismiss the action due to plaintiff's failure to file a witness list as required by MCR 2.401(I). Plaintiff did not appear at the motion hearing on March 23, 2007, where the court granted the motion for dismissal. An order dismissing the action was entered April 4, 2007. On April 5, 2007, counsel for plaintiff filed objections and sought to set aside the dismissal, stating that he had not received notice of the motion for dismissal prior to the hearing date. At a hearing on May 18, 2007, the trial court sustained plaintiff's objections and an order setting aside the dismissal was entered May 23, 2007. The parties were ordered to attend a settlement conference on June 11, 2007, at which time, the court indicated, re-argument could be heard concerning defendant's motion to dismiss. Rather than filing the witness list immediately after May 23, plaintiff filed her witness list on the day of the settlement conference, June 11, 2007. No hearing was held on that date. However, defendants renewed their motion to dismiss, and at a hearing on June 22, 2007, the trial court granted dismissal of the action.[3]

Pursuant to MCR 2.401(B)(1)(c), the trial court has authority to "enter a scheduling order setting time limitations for the processing of the case and the establishing of dates when future actions should begin or be completed in the case." Where a scheduling order is entered, it must establish a time for the exchange of witness lists. MCR 2.401(B)(2)(a)(iv). The court rule provides that "any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2). The trial court may also, upon motion of a defendant, dismiss an action as a sanction for failure of the plaintiff to comply with the court rules or an order of the court. MCR 2.504(B)(1), (3). Such a dismissal operates as an adjudication on the merits. MCR 2.504(B)(3).

In *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990), this Court noted that the discretionary nature of such sanctions as the barring of witnesses or the dismissal of a case indicates that the circumstances of each case should be examined to determine if such a drastic sanction is appropriate. The Court articulated several factors that should be considered:

> (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 defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Id*. at 32-33 (footnotes omitted).]

In *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994), the Court stated that

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[3] Plaintiff did not file a response to defendant's re-noticed motion to dismiss. The only written response filed by plaintiff that addressed the merits of this issue was in a motion for reconsideration filed after the June 22 dismissal.

> [b]efore imposing the sanction of a default judgment, a trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for default judgment, the prejudice to defendant, and whether wilfulness has been shown. . . . The sanction of a default judgment should be used only when there has been a flagrant and wanton refusal to facilitate discovery.

Application of these factors does not indicate an abuse of discretion by the trial court. First, plaintiff never offered any good cause for not timely filing the witness list. Thus, the trial court properly precluded plaintiff from calling any witnesses. MCR 2.401(I)(2). Second, the *Dean* factors also support the trial court's decision. There is no indication that the failure to file a witness list was accidental. Counsel for plaintiff was not unaware of the December 30, 2006, deadline, and counsel was alerted to the necessity for prompt action when the action was dismissed by an order entered April 4, 2007. When the case was reinstated on May 18, 2007, the court advised that defendants could re-praecipe their dismissal motion and "[i]f he hasn't filed a witness list it may be fatal . . . ." Yet, plaintiff's counsel did not file a witness list until three weeks later, on June 11, 2007, the same date as the settlement conference. Under the circumstances, this was not a timely attempt to cure the problem, but a continued delay and a repeated and wilful disregard of the court's scheduling order and oral instructions. Apart from plaintiff's representations in its brief on appeal, there is no indication that defendants had actual notice of plaintiff's witnesses. Thus, although trial was not yet scheduled, defendants were nevertheless prejudiced in their ability to obtain discovery concerning any witnesses appearing on plaintiff's list. While the trial court did not expressly consider lesser sanctions on the record, it did make reference to the plaintiff's disregarding the court's order twice. The court clearly felt that an extreme sanction was appropriate, and given plaintiff's failure to file a witness list for three weeks after the case was reinstated (and for more than two months after learning of the initial dismissal), the trial court's action was not an abuse of discretion.

Plaintiff appears to argue that the sanction of barring testimony from any of plaintiff's witnesses except plaintiff herself would be an appropriate lesser sanction. She argues that she will be able to establish her case through her own testimony by virtue of the doctrine of *res ipsa loquitur*. In a medical malpractice case, plaintiff must establish "(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005) (quotation and citation omitted). Generally, expert testimony is necessary in medical malpractice cases. *Id.* " However, if a medical malpractice case satisfies the requirements of the doctrine of *res ipsa loquitur*, then such case may proceed to the jury without expert testimony." *Id.* The doctrine of *res ipsa loquitur* allows a jury to infer negligence "from a result which they conclude would not have been reached unless someone was negligent." *Id.* at 7 (quotation and citation omitted). In order for the doctrine to apply, the following conditions must be met:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and (4) evidence of the true explanation of the event must be more readily accessible to the defendant

than to the plaintiff. [*Id*., quoting *Jones v Poretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987) (internal quotation marks omitted).]

While it is arguable that the instant case may indeed be one of the rare cases in which the doctrine of *res ipsa loquitur* would apply, we are not convinced that the trial court abused its discretion by failing to apply the lesser sanction of barring plaintiff from presenting expert testimony. The instant case may be contrasted with *Dean*, *supra* at 29, where this Court overturned the barring of expert witnesses where an inadvertent error led to a three week late filing. In *Gruber Enterprises, Inc v Kortidis*, 201 Mich App 625, 626-627, 630; 506 NW2d 614 (1993), the Court upheld dismissal as a sanction for the late filing of a witness list where the witness list was sought to be allowed more than one year after the suit commenced and only three days prior to the scheduled beginning of trial. Plaintiff's dereliction in this case is comparable to that in *Gruber*. Plaintiff filed her witness list more than six months late, more than two months after the first dismissal of the case for failure to file a witness list, after case evaluation, and on the same date (June 11, 2007) as the settlement conference. The trial court's action in this case did not constitute an abuse of discretion.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder