STATE OF MICHIGAN

COURT OF APPEALS

AUDREY TROWELL,

Plaintiff-Appellant,

v

PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,

Defendant-Appellee.

UNPUBLISHED
November 18, 2021

No. 353448
Oakland Circuit Court
LC No. 2014-141798-NO

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the judgment of no cause of action entered by the trial court after a jury trial. She also appeals the trial court's denial of plaintiff's posttrial motion for relief from judgment under MCR 2.612 and for the imposition of discovery sanctions against defendant. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant is a nonprofit corporation that operates Providence Hospital (Providence) in Southfield, Michigan. Plaintiff suffered a stroke in February 2011, and was treated at Providence, where she underwent surgery to remove a portion of her brain. After the surgery, she was transferred to Providence's inpatient rehabilitation unit to receive physical and occupational therapy. According to plaintiff, hospital staff had been advised that two persons were needed to help transfer her from her bed to a wheelchair and from the wheelchair to a bathroom commode chair. Plaintiff alleged in her complaint that in March 2011, a patient care technician, Nina McCorkle, helped plaintiff to the bathroom, but did not obtain the assistance of a second person. Plaintiff claimed that McCorkle dropped her while transferring her from the wheelchair to the commode chair, causing plaintiff to fall on the floor and hit her head on the wheelchair. Plaintiff further claimed that McCorkle dropped her a second time while attempting to transfer her from the commode chair back into her wheelchair. Plaintiff alleged that she told her treating physicians, as well as a nurse, about the incident the next day. Plaintiff also alleged that she later reported the incident to her primary care physician.

Plaintiff filed suit against defendant, alleging one count of negligence. Prior to trial, plaintiff filed several motions to compel discovery, claiming that defendant had failed to produce documents, or had provided electronic records in formats that she could not read. The trial court granted the majority of plaintiff's motions, and the matter proceeded to trial.

Defendant's theory at trial was that the incident had never occurred. Defendant contended that plaintiff had not reported an incident, as she claimed, that a reported incident would have been documented in plaintiff's hospital chart, and that no such report was documented. Defendant theorized that plaintiff had actually fallen in her bathroom at home when she had the stroke, and misremembered the incident as having taken place in the hospital. After a five-day trial, the jury returned a verdict of no cause of action. Afterward, both parties' attorneys interviewed the jurors. The jurors indicated that they did not believe that the incident had occurred as plaintiff described, because it was not recorded in her chart. One of the jurors stated that she did not find plaintiff credible because plaintiff testified that she had urinated and had a bowel movement in the bathroom, but the evidence had established that she had a "Foley catheter" in place at the time. After trial, plaintiff's counsel further reviewed the hospital records plaintiff had received during discovery, and found that while the certain medical records defendant had provided had recorded plaintiff's bowel movements, they were not reflected in other records. Counsel contended that defendant had deleted the bowel-movement entries from certain electronic records because they would have corroborated plaintiff's allegations. Plaintiff moved for relief from judgment, and for entry of a default against defendant and judgment in favor of plaintiff, as a sanction for producing fraudulent records in discovery. The trial court denied the motion.

This appeal followed.

II. DISCOVERY SANCTIONS

Plaintiff argues that the trial court abused its discretion by denying her motion to impose a sanction against defendant for its alleged alteration of the medical records. We disagree. We review for an abuse of discretion a trial court's decision whether to impose a discovery sanction. *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

MCR 2.313(B)(2) authorizes a court to impose a sanction for a party's failure to comply with discovery, and states:

> (2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
>
> (a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;

(c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party;

(d) in lieu of or in addition to the foregoing orders, an order treating as a contempt of court the failure to obey an order, except an order to submit to a physical or mental examination;

(e) where a party has failed to comply with an order under MCR 2.311(A) requiring the party to produce another for examination, such orders as are listed in subrules (B)(2)(a), (b), and (c), unless the party failing to comply shows that he or she is unable to produce such person for examination.

In lieu of or in addition to the foregoing orders, the court may require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. [Emphasis added.]

A drastic sanction, such as barring a witness or dismissing an action, is discretionary, and therefore "necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate." *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). This Court in *Dean* set forth eight factors a trial court should consider in determining an appropriate sanction:

(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 [or opposing party], (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.]

"This list should not be considered exhaustive." *Id*. at 33.

"[A] default may be granted . . . as a sanction for improper conduct such as discovery abuses." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 87; 618 NW2d 66 (2000). "[A] default entered as a sanction is a means to penalize a party for failure to comply with the trial court's directives and, as noted above, should be entered only in the most egregious circumstances." *Id*. "The sanctioning court is in a position to determine what sanction would be appropriate for curbing the sanctioned behavior, restoring order to the proceeding, and chastising the abuser for the improper conduct." *Id*. "[B]ecause discovery sanctions are to be proportionate and just, it would be imprudent to attempt to delineate a bright-line rule." *Id*.

Plaintiff argues that the trial court erroneously concluded that an adverse-inference instruction was an appropriate penalty for defendant's discovery abuse, which plaintiff did not detect until after the trial. This argument misconstrues the trial court's explanation for its denial of plaintiff's posttrial motion. At the hearing on that motion, the trial court agreed that defendant had failed to provide full records, but noted that it had addressed the issue at trial by giving an adverse-inference instruction, permitting the jury to infer that missing records would have been favorable to plaintiff.[1] The trial court then went on to find that there was no evidence that anyone had tampered with or altered plaintiff's records, and that the extreme sanction of setting aside the no-cause judgment and entering a judgment in plaintiff's favor was not warranted.

Plaintiff also argues that, in determining that a more extreme sanction was not warranted, the trial court erred by failing to consider the factors set forth in *Dean*, 182 Mich App 27. We disagree. The trial court indeed did not explicitly address all of the *Dean* factors, but it did properly consider the specific circumstances of the case and plaintiff's allegations of tampering. *Dean*, 182 Mich App at 32, The court noted that defendant had never disputed that plaintiff was taken to the bathroom for bowel movements. Further, to the extent that a juror found plaintiff's testimony that she had urinated to be inconsistent with her testimony that she had worn a catheter, a record of plaintiff's bowel movements would not have helped resolve the discrepancy or disprove defendant's theory that plaintiff mistakenly believed that an incident in her home bathroom had taken place in the hospital. Moreover, prior to trial, plaintiff's counsel had received records that contained bowel-movement entries, and could have entered those records into evidence if counsel had noted the discrepancy earlier. Plaintiff did not provide evidence that defendant had in fact altered certain records before giving them to plaintiff; plaintiff's expert only opined that plaintiff's bowel movements *should have* been recorded both in the electronic health record and in the audit trail. Defendant provided an affidavit from the manager of the rehabilitation unit stating that patient's bowel movements were not tracked in the audit trail.

Under these circumstances, the trial court's denial of plaintiff's motion for imposition of a sanction of default (and judgment in favor of plaintiff) was not an abuse of discretion. *Jilek*, 297 Mich App and 665. Plaintiff has not demonstrated that the outcome was outside the realm of principled outcomes. *Barnett*, 478 Mich at 158.

III. MOTION FOR RELIEF FROM JUDGMENT

Plaintiff also argues that the trial court abused its discretion by denying her motion for relief from judgment. We disagree. We review for an abuse of discretion a trial court's decision on a motion for relief from judgment. *Peterson v Auto Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). We review for clear error a trial court's findings of fact. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Smith v Straughn*, 331 Mich App 209, 215; 952 NW2d 521 (2020) (citation and quotation marks omitted).

[1] At trial, plaintiff principally complained that defendant had failed to provide plaintiff's billing records.

A trial court may grant relief from a judgment under MCR 2.612(C)(1), which provides:

> On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.

In this case, plaintiff sought relief on grounds of fraud. MCR 2.612(C)(1)(c). The trial court denied the motion because it was not persuaded that plaintiff had demonstrated any fraud. For the reasons discussed earlier, the trial court's finding was not clearly erroneous. *Woodington*, 288 Mich App at 355.

Plaintiff's evidence of fraud involved the claimed discrepancies between certain records, and the opinion of her expert, who had experience as "an informatics nurse." Plaintiff also argued that recorded bowel movements would have had significant weight and relevance because they would have corroborated plaintiff's testimony about the bathroom incident. However, as discussed, plaintiff did not provide evidence that defendant had altered the records, but only that the audit trail also *should have*, according to her expert, contained the bowel movement records. And in any event, for the reasons noted, the subject matter of the alleged fraud would not have affected the outcome of the trial. The trial court did not abuse its discretion by denying plaintiff's motion for relief from judgment, because plaintiff did not demonstrate that defendant committed fraud or that the alleged defects in the records were outcome determinative. *Peterson*, 274 Mich App at 412.

IV. EVIDENTIARY HEARING

Plaintiff also argues that the trial court erred by deciding her motion without conducting an evidentiary hearing. We disagree. We review for an abuse of discretion a trial court's decision whether to conduct an evidentiary hearing. See *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995).

"Where a party has alleged that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary

hearing regarding the allegations." *Id.* "An evidentiary hearing is necessary where fraud has been alleged because the proof required to sustain a motion to set aside a judgment because of fraud is of the highest order." *Id*. (citation and quotation marks omitted). "Longstanding Michigan case law" requires an evidentiary hearing "when a party makes a motion alleging that fraud has been committed on the court . . . ." *Williams v Williams*, 214 Mich App 391, 394; 542 NW2d 892 (1995). However, the Court in *Williams* recognized an exception to this rule under MCR 2.119(E)(2), which provides:

> When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition.

The Court in *Williams* further stated:

> While recognizing that the level of proof relating to allegations of fraud is "of the highest order," we believe that the trial court itself is best equipped to decide whether the positions of the parties (as defined by the motion and response, as well as by the background of the litigation) mandate a judicial assessment of the demeanor of particular witnesses in order to assess credibility as part of the fact-finding process. Some motions undoubtedly will require such an assessment, e.g., situations in which "swearing contests" between two or more witnesses are involved, with no externally analyzable indicia of truth. Other motions will not, e.g., situations in which ascertainable material facts are alleged, such as the contents of a bank account on a particular day. Where the truth of fraud allegations can be determined without reference to demeanor, we do not believe that the law requires a trial court to devote its limited resources to an in-person hearing. [*Id*. at 398.]

In the instant case, it was not necessary to conduct a hearing to determine the material facts relating to plaintiff's claim of tampered discovery. Each party provided affidavits supporting their positions regarding the records. The parties and the trial court also had access to the records themselves. Plaintiff does not explain what additional information may have been elicited at an evidentiary hearing. Under these circumstances, the trial court did not abuse its discretion by declining to hold an evidentiary hearing before deciding plaintiff's motion. *Kiefer*, 212 Mich App at 179.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Mark T. Boonstra