

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-392

JUNE TERM, 2020

Gary Fisk* v. Dr. Robert D. Pitts, Porter	}	APPEALED FROM:
Hospital, Inc., & Porter Medical Center, Inc.	}	
	}	Superior Court, Addison Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 204-12-16 Ancv
		Trial Judge: Alison S. Arms

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the trial court’s denial of his motion to reconsider the denial of his motion for a new trial in this medical malpractice action. We affirm.

The record reveals the following facts. Plaintiff filed suit against defendants, an emergency room doctor and the hospital where he works, asserting that they were negligent in treating him. Plaintiff alleged that at an emergency room visit, defendant doctor misdiagnosed plaintiff’s leg pain as caused by a muscle spasm, when in fact plaintiff was experiencing a blood clot. This condition eventually led to an amputation of plaintiff’s leg above the knee. After a six-day trial, the jury found that defendants were not negligent in treating plaintiff.

Plaintiff moved for a new trial, arguing that the verdict was unsupported by the evidence. Defendant opposed the motion. Plaintiff filed a response and, for first time, made a specific argument regarding the admission at trial of Exhibit N, which was a document containing discharge instructions that plaintiff received after visiting the emergency room. Plaintiff sought a new trial on the basis that the exhibit appeared to be fabricated and was not disclosed during discovery. Plaintiff contended that Exhibit N differed to the instructions disclosed in discovery in that the language appeared in a larger font size and was presented more clearly. Defendants responded that Exhibit N was properly admitted, without objection by plaintiff, and was fully authenticated. Defendants explained that the exhibit had been the subject of pretrial motion practice and that at trial defendant’s witness explained the origin of the exhibit and how it was printed from the electronic patient records.

The trial court denied the motion for a new trial. The court concluded that there was sufficient evidence to support the verdict. As to Exhibit N, the court explained that plaintiff twice objected to the admission of the exhibit at trial and the court had sustained the objections. Exhibit N was admitted later during trial without objection by plaintiff. The court explained that by not objecting, plaintiff waived any objection as to the authenticity of the exhibit. The court stated that plaintiff’s assertion that the exhibit was fabricated lacked any factual support and required presuming that at least three defense witnesses lied. The court declined to make such a presumption. The court further concluded that plaintiff failed to establish that his substantial rights

had been affected because plaintiff cross-examined defendant's witnesses regarding alleged discrepancies in the exhibits.

Plaintiff then filed a motion to reconsider the denial of the motion for a new trial. Plaintiff argued that this Court's decision in Trevor v. Icon Legacy Custom Modular Homes, LLC, 2019 VT 54, supported his request for a new trial. The court denied the motion concluding that there was no evidence of bad faith by defendants.

Plaintiff filed a notice of appeal with this Court. Defendants moved to dismiss the appeal on the grounds that it was untimely filed, asserting that the motion to reconsider was filed past the appeal deadline and did not toll the appeal period. This Court denied the motion to dismiss, concluding that although the appeal was untimely as to the final judgment, plaintiff was entitled to appeal the denial of his motion to reconsider.¹

On appeal, plaintiff argues that the admission of Exhibit N at trial and defendants' failure to disclose Exhibit N during discovery warrant a new trial and entitle plaintiff to relief from judgment. As already explained in this Court's prior order, the sole decision on appeal is the trial court's October 28, 2020 order denying plaintiff's motion to reconsider. "We review the trial court's denial of the motion to reconsider under an abuse-of-discretion standard." Gregory v. Poulin Auto Sales, Inc., 2012 VT 28, ¶ 17, 191 Vt. 611 (mem.).

Plaintiff asserts that the court abused its discretion in denying the motion for relief from judgment because defendants committed misconduct by failing to disclose Exhibit N prior to trial.² See V.R.C.P. 60(b)(3) (providing that court may relieve party of final judgment based on misconduct of adverse party). Plaintiff's motion asked the trial court to reconsider its decision to deny the motion for a new trial in light of Icon. Plaintiff argued that the facts of Icon were similar to this case and that defendants' discovery violations warranted a new trial.

The court explained that although Icon contained some similar facts, there were key differences. The defendants in Icon blatantly disregarded discovery orders or deliberately withheld discovery to gain a tactical advantage. In contrast, the court found that defendants here did not act intentionally or for tactical reasons. As to Exhibit N, the trial court highlighted that plaintiff did not dispute that the content of the exhibit was exactly the same as what had been disclosed; only that the font size differed. The court noted defendants' explanation that Exhibit N was an electronic document and that it appeared differently due to printing. The court concluded that Icon did not alter its previous decision denying the motion for a new trial.

The court acted within its discretion in denying the motion to reconsider. In Icon the defendants blatantly disregarded discovery obligations and deliberately withheld responsive discovery in hopes of gaining a tactical advantage in the litigation. 2019 VT 54, ¶ 13. As a result, the trial court excluded documents and imposed other sanctions on the defendants in its discretion. This Court upheld the sanctions as within the trial court's discretion. Id. ¶¶ 58, 64. Here, the trial court found no basis to sanction defendants for its discovery actions, and specifically found that defendants did not act intentionally or to gain a tactical advantage. Given these stark differences

¹ Having already decided this issue, we do not address plaintiff's argument that the trial court erred in denying his motion for a new trial.

² Plaintiff's motion to the trial court was labeled a motion to reconsider and did not clarify whether the motion was to alter or amend under Vermont Rule of Civil Procedure 59, or a motion for relief from judgment under Vermont Rule of Civil Procedure 60.

between Icon and this case, the court acted well within its discretion in denying the motion to reconsider on this basis.

Because we affirm on this basis, we do not reach defendants' arguments that appellant's arguments were inadequately briefed, that the objections were not preserved, and that the arguments were raised in an untimely manner.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice