

STATE OF MICHIGAN  
COURT OF APPEALS

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PATRICIA DIVELY, Personal Representative of  
the Estate of MICHAEL DIVELY, Deceased,

Plaintiff-Appellant,

V

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee.

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UNPUBLISHED  
June 22, 2004

No. 242288  
Oakland Circuit Court  
LC No. 1997-547836-NO

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from a judgment of no cause of action entered in favor of defendant following a jury trial. We affirm.

On June 21, 1995, plaintiff's decedent, Michael Dively, was receiving physical therapy at defendant hospital for rehabilitation after knee surgery. Dively was injured while using the Total Gym apparatus, which defendant had purchased from Engineering Fitness International, Inc. ("EFI"). The Total Gym machine was designed so that the user could lay on a glide board and use a pulley to move the board up and down a rail. The user of the equipment could increase or decrease the amount of effort required to move the slide board by setting the rail at one of ten different settings. In particular, the Total Gym apparatus was equipped with a Slide Distance Regulator (SDR), which consisted of a strap, hook, and buckle, and which attached the glide board to the base of the equipment with snap hooks. The SDR was a Y-shaped fabric belt with three J-shaped steel hooks containing spring clips at each end of the Y. As Dively was performing an exercise on the Total Gym apparatus, the SDR disconnected from the glide board, causing the board, with Dively on it, to fall to the bottom of the rail. As a result of injuries sustained in the fall, Dively became totally disabled.

Michael Dively and his wife Patricia subsequently brought a product liability action against EFI and a premises liability action against defendant. The Divelys' settled their action against EFI before the original trial date. Although trial against defendant began in December 2000, a mistrial was declared. Michael Dively thereafter died before a new trial was held. The matter proceeded to trial against defendant in May 2002, following which, using a special verdict form, the jury found that defendant was not negligent. Because the jury answered the first question negatively, it did not consider additional issues concerning alleged fault by a non-party (EFI) or damages.

On appeal, plaintiff first argues that the trial court abused its discretion by allowing defendant to call James Lighthall as its expert liability witness. Plaintiff contends that Lighthall should not have been allowed to testify because defendant failed to name an expert witness in a timely fashion, failed to supplement expert witness interrogatories, failed to supplement discovery requests, failed to disclose its expert's qualifications or opinions, and withheld its expert's work papers. We review the trial court's decision to allow Lighthall to testify for an abuse of discretion. *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993).

The trial court did not abuse its discretion by allowing Lighthall to testify. In *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999), this Court, quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), set forth the factors to be considered in determining the appropriate sanction for failing to comply with discovery:

(1) [W]hether 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 [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice.

Here, the record indicates that when this case first proceeded to trial in November 2000, Lighthall was identified during voir dire as a witness for the defendant. After that case concluded in a mistrial, approximately eighteen months passed before the case was retried. Although plaintiff had notice of Lighthall's identity as a witness more than a year before trial, plaintiff raised no objection to Lighthall being called as an expert witness until well after the second trial had commenced. In denying plaintiff's motion to strike Lighthall as an expert witness, the trial court concluded that plaintiff had notice that Lighthall would be proffered as an expert witness to rebut the testimony of Professor Stein.

There appears to be merit to plaintiff's contention that defendant ignored its obligation to supplement expert witness interrogatories, failed to supplement discovery requests, failed to disclose its expert's qualifications or opinions, and withheld its expert's work papers. Nevertheless, plaintiff took no steps to actively inquire about Lighthall's qualifications, papers or opinions, and made no effort to object to defendant's apparent violation of MCR 2.302(E) before trial. Under the circumstances, we cannot characterize as an abuse of discretion the trial court's decision to allow Lighthall to testify. This conclusion is supported by the decision in *State Hwy Comm v Redmon*, 42 Mich App 642; 202 NW2d 527 (1972), wherein this Court held that the trial court did not err in denying the defendant's motion to strike the plaintiff's known expert witness where the defendant was dilatory in bringing the motion. As in *Redmon*, plaintiff here was dilatory by failing to raise her objections to Lighthall before trial.

Plaintiff further argues that the trial court erroneously permitted Lighthall to testify beyond the scope of his expertise. The qualification of a witness as an expert and the admissibility of the expert's testimony are within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Mulholland v DEC Int'l Corp*, 432 Mich

395, 402; 443 NW2d 340 (1989). Here, Lighthall testified that the field of biomechanics involves the direct application of the laws of physics to living structures, such as the Total Gym apparatus, and analyzes the interaction between machines and people. The trial court did not abuse its discretion in determining that Lighthall was sufficiently qualified to give the testimony in question. Moreover, it was not necessary for Lighthall to have the same qualifications as Dr. Stein in order to give expert testimony in this case.

Plaintiff next argues that the trial court erred in denying her motion for a directed verdict regarding the existence of fault by the non-party manufacturer, EFI. Even if the trial court erred in denying plaintiff's motion, however, any such error was harmless because the jury verdict in favor of defendant was based on the jury's determination that defendant was not negligent, thus rendering moot the issue of non-party fault. *Jackson v Thompson-McCully Co*, 239 Mich App 482, 493; 608 NW2d 531 (2000).

Similarly, even if the trial court abused its discretion when it allowed defendant to use the de bene esse depositions of EFI's medical expert witnesses as to the issue of damages, any error in this regard was harmless because the jury concluded that defendant was not negligent and did not reach the issue of damages. *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 103-104; 574 NW2d 36 (1997).

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Richard Allen Griffin

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COOPER, J. (*dissenting*).

I must respectfully dissent from the opinion of my colleagues, as I would find that the trial court abused its discretion in failing to strike James Lighthall as an expert witness or to impose other sanctions on defendant for its continuous abuse of discovery.

Defendant willfully failed to supplement interrogatory answers regarding expert witnesses and to supplement discovery requests. Defendant also willfully withheld Dr. Lighthall's identity, qualifications and his report and opinions for eighteen months between the declaration of a mistrial and the retrial in this case. Defendant knew Dr. Lighthall was to serve as an expert witness at the time of the original trial, but withheld his work papers and opinions from plaintiff and falsely identified him as a rebuttal witness on the final pretrial witness list. Defendant did not disclose Dr. Lighthall as an expert witness until the filing of an amended witness list, without the court's permission, one month prior to retrial. Defense counsel did not inform plaintiff of his intent to call Dr. Lighthall until the fourth day of trial and withheld Dr. Lighthall's report, which did not include his opinions, until this late date.

Not only did the trial court admit Dr. Lighthall's testimony over plaintiff's objections, but it also erroneously found that plaintiff had been notified of his status as an expert witness prior to the original trial date. Defendant's continuous dereliction of its duty to supplement discovery was egregious and certainly should have been sanctioned. I cannot find the trial court's failure to strike Dr. Lighthall's testimony proper in light of the serious and continued nature of defendant's discovery violations and the trial court's own erroneous finding of fact. I would, therefore, remand for a new trial.

/s/ Jessica R. Cooper