STATE OF MICHIGAN

COURT OF APPEALS

ROSALIND RUSSELL,

Plaintiff-Appellant,

and

CLARENCE NASH,

Plaintiff,

V

EAR NOSE & THROAT CONSULTANTS, PROVIDENCE-PROVIDENCE PARK HOSPITAL, and DR. MICHAEL STONE,

Defendants-Appellees,

and

ASCENSION HEALTH and ST JOHN PROVIDENCE,

Defendants.

UNPUBLISHED
April 30, 2020

No. 347560
Oakland Circuit Court
LC No. 2017-162679-NH

Before: M. J. KELLY, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

This medical malpractice lawsuit arises from a total thyroidectomy performed on plaintiff, Rosalind Russell, at defendant Providence Park Hospital by defendant Dr. Michael Stone while he was employed by defendant Ear, Nose & Throat Consultants (ENT). Russell appeals as of right the order of the circuit court granting Dr. Stone and ENT's summary disposition under MCR

2.116(C)(10).[1] For the reasons stated in this opinion, we reverse and remand in part and vacate in part.

I. BASIC FACTS

Dr. Stone treated Russell for a multinodular goiter. According to Russell, Dr. Stone recommended removing the mass on the right side of her thyroid along with a piece of the thyroid, but did not mention a mass on the left side and did not recommend removing the entire gland. Russell stated that her understanding was that Dr. Stone would remove only a part of the thyroid, and she made it clear before surgery that she did not consent to a total thyroidectomy. Russell alleged that, after the total thyroidectomy, she suffered severe health consequences. Relevant to this appeal, Russell's lawyer filed a complaint in December 2017, alleging medical negligence against Dr. Stone and vicarious liability against ENT.

In September 2018, the trial court granted a motion to withdraw filed by Russell's lawyer and gave Russell 30 days to obtain new a lawyer. Eventually Russell filed a pro se motion seeking reconsideration of the order granting the motion to withdraw, but the court denied it as both untimely and lacking merit. Thereafter, Dr. Stone and ENT served requests for admissions and accompanying interrogatories on Russell. Russell responded pro se, and the court determined that her responses were denials, not admissions. These answers were timely served, but Russell did not sign the document. Relevant to this appeal, Dr. Stone and ENT filed a motion to deem the requests for admissions admitted because Russell's answers did not comply with the court rules. Following a hearing that Russell did not attend, the court granted the motion.

Thereafter, Dr. Stone and ENT filed a motion for summary disposition, arguing that Russell could not maintain her case against them given her now deemed admissions. Relevant to this appeal, the court granted Dr. Stone and ENT's motion and awarded them $4,010 in taxable costs.

II. MOTION TO DEEM ADMISSIONS ADMITTED

A. STANDARD OF REVIEW

Russell argues that the trial court abused its discretion by deeming Dr. Stone and ENT's requests for admission admitted. This Court reviews for an abuse of discretion a lower court's decisions concerning discovery. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000).

[1] On appeal, Russell only challenges the part of the court's opinion summarily dismissing her claims against Dr. Stone and ENT. She does not challenge the court's decision to summarily dismiss her case against Providence. Further, the parties stipulated to the dismissal of defendants Ascension Health and St. John Providence pursuant to MCL 600.2912c. Accordingly, this opinion only address Russell's claims against Dr. Stone and ENT.

B. ANALYSIS

In their motion to deem their requests for admission admitted, Dr. Stone and ENT asserted that "no person (neither the party nor an attorney) has signed the responses in violation of MCR 2.302(G) and 1.109(E)." Both MCR 2.302(G) and MCR 1.109(E) contain signature requirements. MCR 1.109 pertains generally to court documents and filings, and its Subrule (E)(2) states that "[e]very document filed shall be signed by the person filing it or by at least one attorney of record," and that "[a] party who is not represented by an attorney must sign the document." Subrule (E)(3) adds that "[i]f a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party." Similarly, MCR 2.302 pertains to discovery, and its Subrule (G)(1) states that every response to a discovery request "made by a party represented by an attorney shall be signed by at least one attorney of record," and that "[a] party who is not represented by an attorney must sign the . . . response . . . ." Subrule (G)(2) adds that "[i]f a . . . response . . . is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the . . . response . . . ." In other words, the available remedy for failure to adhere to the signature requirements of MCR 2.302(G)(2) or MCR 1.109(E)(3) is to strike the unsigned documents *unless they are signed promptly after the omission is called to the errant party's attention*.[2] It is undisputed that Russell did not sign her responses to the requests for admission.

Russell's status as a pro se litigant did not excuse her from complying with any procedural requirements set forth in the court rules. See *Bachor v City of Detroit*, 49 Mich App 507, 512; 212 NW2d 302 (1973). However, pro se litigants may be held to a less stringent standard when determining if sanctions are warranted. *People v Herrera*, 204 Mich App 333, 339; 514 NW2d 543 (1994).

Here, to the extent that the trial court found that Russell failed to promptly sign the answers after the omission was called to her attention, the court clearly erred. Russell's notification of the missing signature came by way of the motion to deem her to have admitted everything she was asked to admit. There is no indication in the record that the trial court alerted Russell to the missing signature. The hearing on the motion was held approximately one week after Russell's receipt of it. The trial court expressed an inclination to have Russell correct the oversight at the hearing and regarded Russell's nonappearance as a mistake in her pro se advocacy. However, during the week between her receipt of the motion and the hearing, Russell responded by submitting a signed "Response to Defendant's Motion to Dismiss" in which she contested the claim that she failed to provide answers on the ground that her nephew had submitted those answers to the lawyer representing Dr. Stone and ENT. Although this response did not supply the missing signature, it

[2] In this case, the trial court did not explicitly rule that the unsigned answers were stricken pursuant to either MCR 2.302 or MCR 1.109; however, it did so implicitly when it ordered that because Russell did not sign her responses the requests to admit were deemed admitted pursuant to MCR 2.312. By striking the responses, the court left Russell in the position of having not answered the requests to admit. Failure to answer requests to admit is grounds to deem the requests admitted. See *Hilgendorf v St. John Hosp and Med Ctr Corp*, 245 Mich App 670, 688-689; 630 NW2d 356 (2001) ("A failure to respond to the request is interpreted as an admission.").

was an attempt to correct the record and to indicate that she stood by her answers. In totality, these circumstances suggest that Russell was given insufficient opportunity to correct the missing signature after it was called to her attention. Her actions were not so dilatory as to constitute an abuse the discovery process, and the missing signature caused no disadvantage to Dr. Stone or ENT. Despite the trial court's awareness of its obligation to provide some leeway to a pro se litigant such as Russell, striking Russell's response pursuant to MCR 2.302 or MCR 1.109 was a drastic sanction that resulted in treating her unsigned answers as admissions, which then formed the basis for dismissing her case on summary disposition. Accordingly, we conclude that the trial court abused its discretion when it implicitly struck Russell's response under MCR 2.302(G) or MCR 1.109(E), thereby allowing it to deem admitted the requests for admission under MCR 2.312(C).[3]

Moreover, because the trial court erred by deeming Russell to have admitted that Dr. Stone complied with the standard of care and did not proximately cause her injuries, the court also erred in concluding from those deemed admissions that Dr. Stone and ENT were entitled to summary disposition.

III. ADDITIONAL ISSUES

Russell raises several additional challenges to the proceedings below. First, she contends that the trial court erred by allowing her lawyer to withdraw. Russell did not preserve this argument for appellate review because she raised it for the first time in a motion for reconsideration. See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). Next, Russell contends for the first time that her former lawyer and the lawyer for Dr. Stone and ENT colluded against her. She also contends for the first time that the court's decision to grant summary disposition to Dr. Stone and ENT deprived her of her constitutional right to a jury trial. Finally, she argues that she was denied her constitutional right to equal protection. Yet, with regard to all of the above claims, Russell failed to raise the challenges during the lower court proceedings. Accordingly, we conclude that she has waived review of each issue.

As explained by our Supreme Court in *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008):

> Michigan generally follow the "raise or waive" rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a "failure to timely raise an issue waives review of that issue on appeal."
>
> The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to just those issues raised and argued in the trial court, and holding all other issues waived, appellate

[3] Dr. Stone and ENT also cited Russell's failure to file her answers with the trial court as a violation of MCR 2.312(E). The trial court, however, did not make any findings on that basis and we decline to do so for the first time on appeal.

> courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [Citations omitted.]

Here, we conclude that Russell has waived review of the above issues because those issues were not raised in the trial court.[4]

IV. CONCLUSION

For the reasons stated in this opinion, we reverse the court's order deeming the requests for admission admitted and remand to the trial court with instructions to provide Russell an adequate opportunity to sign her answers in accord with MCR 2.302(G)(2) and MCR 1.109(E)(3). Further, we vacate the order granting Dr. Stone and ENT summary disposition because that decision relied on the admissions that were improperly deemed admitted. Finally, we vacate the order awarding Dr. Stone and ENT taxable costs under MCR 2.625 as they are no longer the prevailing parties.

Reversed and remanded in part and vacated in part. We do not retain jurisdiction. Neither party may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto

[4] Although the Michigan Supreme Court has held that this Court must review unpreserved errors in criminal cases for plain error affecting the defendant's rights, see *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), the issue is more nuanced when it comes to civil cases. In *Walters*, 481 Mich at 387-388, our Supreme Court explained that if a party fails to timely raise an issue in the trial court, that party waives review of that issue. Although this Court may, under limited circumstances, nevertheless review that issue, there is no mandate that we must do so. Accordingly, we decline to apply the plain-error standard from *Carines* and instead rely on the raise or waive rule set forth by our Supreme Court in *Walters*.