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STATE OF MICHIGAN

COURT OF APPEALS

JAMIE ELMHIRST,

Plaintiff-Appellant,

v

MCLAREN NORTHERN MICHIGAN, MCLAREN HEALTH CARE CORP., NORTHERN MICHIGAN EMERGENCY PHYSICIANS, PC, and CRAIG A. REYNOLDS, D.O.,

Defendants-Appellees,

and

WILLIAM J. STEINBACH, D.C., PC, doing business as PRECISION CHIROPRACTIC AND WELLNESS CENTER, and WILLIAM JOEL STEINBACH,

Defendants.

UNPUBLISHED
December 17, 2020

No. 351574
Emmet Circuit Court
LC No. 17-105942-NH

Before: O’BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right the trial court’s order denying her motion for reconsideration of an order striking plaintiff’s damage claims and granting summary disposition to defendants.[1] Plaintiff also challenges the trial court’s order striking some of her

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[1] The trial court originally entered the appealed order on August 23, 2019, but plaintiff did not receive notice of the order until September 26, 2019. Due to this lack of notice, plaintiff moved to strike the August 23 order under MCR 2.612(A)(1), which the trial court granted and then entered the appealed order on November 4, 2019. Defendant argues that plaintiff’s appeal is

witnesses. We affirm the trial court's order striking plaintiff's witnesses, but reverse the trial court's order striking plaintiff's damage claims and granting defendants' motion for summary disposition, and remand for further proceedings.

I. BACKGROUND

Plaintiff brought this action alleging, in part, medical malpractice and medical negligence after she suffered a stroke following what she described as an abrupt, excessive, and forceful chiropractic adjustment. As part of discovery, plaintiff filed an extensive amended witness list, and plaintiff's counsel sent an e-mail to defendants stating that if they wanted to set a deposition for plaintiff's friends or family members, defendants should contact him. Despite multiple attempts by defendants to set up depositions, however, plaintiff's counsel did not respond, and those witnesses were not deposed. After the December 1, 2018 discovery deadline passed without the requested depositions, the trial court entered an order on January 4, 2019, requiring plaintiff to produce all expert and lay witnesses for deposition before May 31, 2019. Even with this order, however, plaintiff produced only two of the named expert witnesses for deposition. Thereafter, defendants moved to strike the additional witnesses that plaintiff failed to produce, and the trial court granted the motion.

Also as part of discovery, plaintiff signed multiple authorizations to disclose her protected health information from more than a dozen medical providers. One such authorization was for North Country Community Mental Health, which plaintiff signed on March 30, 2018. Almost a year later, on March 15, 2019, defendants received notice that plaintiff had sent a handwritten note to North Country Community Mental Health seeking to revoke her signed authorization.

After receiving this notice, defendants filed a motion in the trial court asking the court to prevent plaintiff from introducing evidence related to her medical history or mental or physical condition. According to defendants, plaintiff's note was an assertion of privilege under MCR 2.314(B)(1), so plaintiff should be precluded from introducing evidence relating to her medical history or mental or physical condition pursuant to MCR 2.314(B)(2). The trial court agreed and granted the motion. Because the trial court's ruling prevented plaintiff from introducing evidence to establish damages, the trial court granted summary disposition to defendants. Plaintiff filed a motion for reconsideration, which the trial court denied.

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untimely because plaintiff did not follow the procedure in MCR 7.204(A)(3) to cure plaintiff's lack of service. While defendant is correct that plaintiff could have followed the procedure in MCR 7.204(A)(3) to cure her lack of notice, that rule does not *require* an appellant to utilize its procedure. Plaintiff permissibly resolved the notice issue in the trial court and appealed the resulting order in accordance with MCR 7.204(A)(1)(b). Regardless, even if plaintiff did not timely appeal the trial court's order, we would exercise our discretion to treat this appeal as on leave granted. See *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61; 807 NW2d 354 (2011).

II. ANALYSIS

A. ADDITIONAL WITNESSES

We first address plaintiff's challenge to the trial court's decision to strike her additional witnesses, and conclude that the trial court did not abuse its discretion by striking plaintiff's witnesses because plaintiff did not comply with the court's order compelling her to produce the witnesses for deposition.

We review for an abuse of discretion sanctions imposed by a trial court for a discovery violation. *Jilek v Stockson (On Remand)*, 297 Mich App 663, 665; 825 NW2d 358 (2012). An abuse of discretion occurs when a decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A trial court may strike witnesses as part of a discovery sanction in a pending action pursuant to MCR 2.313(B)(2)(c), which states:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may order such sanctions as are just, including, but not limited to . . . 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.

In *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990), this Court set out eight nonexhaustive factors to consider when determining whether a sanction is "just and proper in the context of the case before it":

> (1) whether the violation was willful 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 the 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.*]

Here, each of the *Dean* factors weighs in favor of the trial court's sanction striking plaintiff's additional witnesses. First, plaintiff willfully disregarded the court's order. The trial court ordered plaintiff to produce all witnesses for deposition, and plaintiff chose not to do so. Plaintiff argues that she did not willfully violate the court's order because "defendants simply waited for plaintiff to 'produce' the witnesses without taking any steps of its own." But the order clearly placed the onus of producing the witnesses on plaintiff; it required no action from defendants. Next, defendants requested plaintiff to produce her witnesses for deposition several times without success, and despite the stipulated court order, plaintiff failed to produce all but two witnesses. Therefore, plaintiff demonstrated an extended history of failing to comply with court orders and a lack of effort to cure the defect. This prejudiced defendants because it pushed discovery well past the initial closing date of December 1, 2018, and prevented defendants from

fully developing a defense strategy until the court granted defendants' motion to strike the additional witnesses four weeks before trial. Finally, the trial court had already attempted to provide a lesser sanction by ordering plaintiff to produce witnesses for deposition, which plaintiff refused to do. Therefore, each of the *Dean* factors weighed in favor of a more substantial sanction, and as such, the trial court did not abuse its discretion by granting defendants' motion to strike plaintiff's additional witnesses, which she failed to produce.[2]

B. ASSERTION OF PRIVILEGE

Plaintiff also argues that the trial court abused its discretion when it ruled that plaintiff could not introduce evidence related to her medical history or mental or physical condition pursuant to MCR 2.314(B). According to plaintiff, MCR 2.314(B) was inapplicable. We agree.

The interpretation and application of a court rule is reviewed de novo. *Colista v Thomas*, 241 Mich App 529, 535; 616 NW2d 249 (2000).

MCR 2.314(A)(1)(b) provides that "[w]hen a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under these rules to the extent that . . . the party does not assert that the information is subject to a valid privilege." MCR 2.314(B) establishes when privilege may be asserted and the effect of asserting a privilege to prevent the discovery of medical information:

> (1) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's disclosure under 2.302(A), in written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.
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> (2) Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information that must be disclosed or is otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

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[2] For clarity, we note that the experts that plaintiff produced for deposition—Eugene Saltzberg, M.D., and Robert Lee, M.D.—are not stricken. As the trial court's order stated, only "Plaintiff's expert witnesses who have not been produced for deposition, as well as Plaintiff's family members and neighbors/friends who have not been produced for deposition, are prohibited from testifying in this case at trial."

MCR 2.314(B)(1) states four ways that the privilege at issue here "must" be asserted. The use of "must" denotes a mandatory requirement. *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 777 NW2d 722 (2009). Plaintiff did not invoke privilege in one of the four ways required by MCR 2.314(B)(1), so MCR 2.314(B)(2) was not applicable.

Defendants disagree[3] and contend that plaintiff's revocation of her authorization was a "written response to a request for production of documents under MCR 2.310." Yet defendants do not explain how plaintiff's revocation amounted to a "response to a request for production of documents under MCR 2.310." Indeed, in response to defendants' request for production of documents, plaintiff initially signed the medical authorization. Her revocation of that authorization nearly a year later cannot reasonably be considered a "response to a request for production of documents under MCR 2.310."

Defendants nevertheless contend that we should avoid a "hypertechnical" interpretation of MCR2.314(B) and liberally construe "written response to a request for production of documents under MCR 2.310" to include plaintiff's revocation of authorization. We disagree that our interpretation of MCR 2.314(B) is "hypertechnical," but even if it were, we are merely applying the plain language of the court rule. It is well established that when the language of a court rule is unambiguous, the rule must be applied as written without further judicial construction or interpretation. *CAM Const v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554; 640 NW2d 256 (2002).

Moreover, even if plaintiff's revocation of her authorization could be construed as an assertion of privilege (which it was not), the privilege was not timely asserted. Again, plaintiff did not assert her privilege in a written response to defendants' request to produce documents, but initially authorized the release of the medical records and attempted to assert the privilege a year later. Because plaintiff's attempt to assert privilege came one year after initially allowing discovery of her medical information, the privilege was not timely asserted and was consequently waived under MCR 2.314(B)(1). See *Domako v Rowe*, 438 Mich 347, 357; 473 NW2d 30 (1991) (holding that "[a]fter the patient voluntarily allows discovery of the medical information, the plaintiff is not thereafter free to assert the privilege because the plain language of MCR 2.314(B)(1) declares that the privilege is waived for that action").

Regardless of whether plaintiff failed to properly assert a privilege under MCR 2.314(B)(1) or otherwise waived privilege under that rule by failing to timely assert it, the trial court erred by granting defendants' motion to strike plaintiff's damage claims. It follows that the trial court also erred by granting defendants' motion for summary disposition, because plaintiff should have been

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[3] This case is somewhat of a legal oddity in that plaintiff is willing to give defendants access to her medical information, but defendants contend that such access should not be allowed because the information they seek is protected by privilege.

able to present evidence to establish her medical history and physical and mental health to prove damages.[4]

We affirm the trial court's order striking plaintiff's additional witnesses. We reverse the trial court's order striking plaintiff's damage claims and granting defendants' motion for summary disposition. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford

[4] Plaintiff argues in the alternative that the circuit court's order striking her claims was an unjustly harsh sanction for a discovery violation. Given our disposition of this case, we need not address this alternative argument.