STATE OF MICHIGAN

COURT OF APPEALS

SCOTT E. COMBS,

Plaintiff-Appellant,

v

SARA M. WILLIAMS,

Defendant-Appellee.

UNPUBLISHED
November 4, 2004

No. 247797
Oakland Circuit Court
LC No. 01-034327-NI

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for a directed verdict. We affirm.

In June 2000, plaintiff was walking through a parking lot in Southfield when defendant reversed her car out of a parking space and struck plaintiff. On August 29, 2001, plaintiff initiated this case. On March 11, 2003, after a jury was impaneled in this case, plaintiff gave notice to defendant of his intent to take the de bene esse deposition of his treating physician on the following afternoon. Defendant immediately filed an emergency motion to quash this deposition, arguing that it was being taken in violation of MCR 2.302(B)(4)(d). The court heard arguments on this motion the following morning and subsequently granted defendant's motion.

Plaintiff then moved to admit his medical records into evidence through the testimony of his expert witness. Defendant objected, arguing that plaintiff had failed to meet the foundational requirements necessary to permit the medical records to be introduced into evidence. After hearing arguments and taking testimony from plaintiff's expert witness, the court ruled that plaintiff's medical records were not admissible under any exception to the hearsay rule. Moreover, as a result of the arguments made in connection with plaintiff's motion to admit the medical records, the court found that plaintiff had violated MCR 2.302(E) by failing to seasonably supplement his answers to defendant's interrogatories. Accordingly, the court barred plaintiff's expert witness from testifying. MCR 2.313(B)(2)(b).

Subsequently, plaintiff sought leave from the court to conduct the de bene esse depositions of two of his treating physicians. Defendant again objected on the ground that such depositions violated MCR 2.302(B)(4)(d). The trial court agreed and barred plaintiff from taking either of these depositions. Without his medical records or the testimony of his treating

physicians, plaintiff was unable to offer evidence of his injury, and the trial court granted defendant's motion for directed verdict.

Plaintiff first argues on appeal that the trial court erred when it barred plaintiff from taking the de bene esse depositions of three of his treating physicians. We review a trial court's general conduct of a trial for an abuse of discretion. *In re King,* 186 Mich App 458, 466; 465 NW2d 1 (1990). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph,* 461 Mich 757, 768; 610 NW2d 893 (2000).

Three court rules govern a party's taking of a deposition of its own witness or potential witness. MCR 2.301(C) provides that "[a]fter the time for completion of discovery, a deposition of a witness taken solely for the purpose of preservation of testimony may be taken at any time before commencement of trial without leave of court." MCR 2.302(B)(4)(d) provides, in pertinent part, that "[a] party may depose a witness that he or she expects to call as an expert at trial. The deposition may be taken at any time *before trial on reasonable notice* to the opposite party[.]" (Emphasis added.) MCR 2.302(F)(1) provides that, unless the court orders otherwise, by written stipulation the parties may "provide that depositions may be taken before any person, at any time or place, on any notice, and in any manner, and when so taken may be used like other depositions[.]" The parties did not enter into a written stipulation regarding discovery or, more specifically, the taking of depositions. Accordingly, the parties were required to comply with the requirements of MCR 2.301(C) and 2.302(B)(4)(d) in taking the deposition of any of their own witnesses.

Plaintiff did not give notice of his intent to take the deposition of the witnesses at issue until after trial had begun. Additionally, plaintiff provided opposing counsel with only twenty-four hours' notice of one of the depositions and failed to seek leave of court to take this deposition. With respect to the other two depositions, plaintiff provided only a couple of hours' notice. Thus, plaintiff did not comply with the requirements of either MCR 2.301(C) or MCR 2.302(B)(4)(d) in connection with any of these depositions. Accordingly, the trial court did not abuse its discretion when it barred plaintiff from taking these depositions.

Plaintiff next argues that the trial court erred when it barred plaintiff from introducing his medical records into evidence. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Craig ex rel Craig v Oakwood Hosp,* 471 Mich 67, 76; 684 NW2d 296 (2004). MRE 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 802 provides that hearsay is not admissible except as provided by the Michigan Rules of Evidence. MRE 803(6) provides an exception to the general prohibition against hearsay. This rule provides, in pertinent part, that the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if

> kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. [MRE 803(6).]

Under the plain language of MRE 803(6), a qualified witness must testify that the record sought to be entered: (1) was made at or near the time in question; (2) by or from information transmitted by a person with knowledge; and (3) in the course of a regularly conducted business activity. Alternatively, the parties may stipulate to the admission of such records. *Werthman v General Motors Corp,* 187 Mich App 238, 242; 466 NW2d 305 (1990).

In the instant case, plaintiff did not produce any qualified person to testify with regard to the foundational requirements necessary for the admission of his medical records under MRE 803(6). For purposes of setting the foundation for the admission of medical records pursuant to MRE 803(6), a qualified person is an agent or "any person connected with a hospital and who is familiar with its procedures of hospital record-keeping[.]" *People v Kirtdoll,* 391 Mich 370, 390 n 11; 217 NW2d 37 (1974); *Sponenburgh v Wayne County,* 106 Mich App 628, 652; 308 NW2d 589 (1981). Plaintiff presented neither the doctors who actually created the records, nor a custodian of such doctors' records as a witness at trial. The witness through whose testimony plaintiff attempted to introduce the medical records was merely an expert witness, and plaintiff did not attempt to show any connection between this witness and the sources of the medical records. Indeed, the expert himself testified that his sole connection with the records was that he had reviewed them in expectation of testifying as an expert on plaintiff's behalf. Moreover, contrary to plaintiff's assertions, defendant did not stipulate that the records were admissible. Accordingly, the trial court did not abuse its discretion when it found that plaintiff's medical records were not admissible.

We also reject plaintiff's argument that the trial court erred when it barred, as a sanction for discovery violations, his expert witness from testifying at trial. A trial court's decision whether to impose discovery sanctions rests in the trial court's discretion. *Local Area Watch v Grand Rapids,* 262 Mich 136, 147; 683 NW2d 745 (2004). Where the sanction imposed is the barring of an expert witness that results in the dismissal of the plaintiff's action, the sanction should be exercised cautiously. *Dean v Tucker,* 182 Mich App 27, 32; 451 NW2d 571 (1990). Accordingly, the trial court's record should indicate that the court "gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it." *Id.*

MCR 2.302(E)(1)(a)(ii) provides:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, except . . . [a] party is under a duty seasonably to supplement the response with respect to a question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, the

> subject matter on which the expert is expected to testify, and the substance of the expert's testimony.

MCR 2.302(E)(2) provides:

> If the court finds, by way of motion or otherwise, that a party has not seasonably supplemented responses as required by this subrule the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b).

MCR 2.313(B)(2)(b) provides that, as a sanction for discovery violations, a court may enter "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[.]"

The factors we consider in determining an appropriate discovery sanction include: "(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, (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." *Dean*, *supra* at 32-33 (footnotes omitted).

In the present case, plaintiff included the expert witness at issue as a potential expert witness on his witness list dated February 13, 2002. However, this witness was only one of three experts, and one of ten doctors or other members of the medical field, that plaintiff included in this list. At his February 18, 2002, deposition, while indicating that this witness was listed as an expert on his witness list for the purpose of testifying at trial, plaintiff also indicated that as of that time he had not yet sent this witness any materials in connection with this case, nor had he paid him a retainer fee. In his answers to defendant's interrogatories, served on March 11, 2002, plaintiff responded to a question regarding the names of the doctors who had provided medical treatment to him or had examined him in connection with the accident by merely referring defendant back to plaintiff's medical records, as previously provided to defendant and defendant's insurance carrier. In his April 9, 2002, supplemental answers to defendant's interrogatories, plaintiff explicitly stated that not all of the experts there listed, including the witness at issue, had been "contracted for final opinions" as of that time. Some three months after these supplemental answers were served on defendant, this witness finally examined plaintiff for purposes of testifying on his behalf. However, plaintiff never supplemented his April 9, 2002, answers to indicate that this witness had actually been retained in connection with this case.

Under MCR 2.302(E)(1)(a)(ii), plaintiff had a duty to seasonably supplement his responses to defendant's requests for discovery to divulge the identity of any expert witnesses retained after his response to defendant's requests was submitted, and to provide the subject matter of which any such expert witnesses were expected to testify. Accordingly, plaintiff had a duty to supplement his answers once he retained this witness as an expert in July 2002. Because plaintiff did not properly supplement his answers, the court had the discretion to sanction plaintiff for his violation of MCR 2.302(E)(1)(a)(ii). MCR 2.302(E)(2).

We conclude that the sanction imposed by the court was appropriate. In the past both this Court and the Michigan Supreme Court have found that a trial court abused its discretion when it barred a party from introducing testimony or calling witnesses as a sanction for discovery violations. See, e.g., *Dean*, *supra* at 33-35. Moreover, this Court has also concluded that it was an abuse of discretion to dismiss an action where the party aggrieved by a discovery violation has delayed in taking any action to try to remedy the violation, or when the aggrieved party has himself contributed in some way to the discovery violation. *Thorne v Bell,* 206 Mich App 625, 634-635; 522 NW2d 711 (1994); *Middleton v Margulis,* 162 Mich App 218, 223-224; 412 NW2d 268 (1987).

In the present case, however, plaintiff's violation was extremely egregious. Plaintiff was aware of his duty to supplement his answers to defendant's interrogatories. Moreover, plaintiff had nearly eight months within which to supplement those answers between the time he actually retained his expert and the time of trial. Nonetheless, plaintiff failed to supplement his answers. Further, there is no indication that defendant in any way contributed to the discovery violation, and defendant did not delay in seeking to remedy the violation.

Moreover, we do not believe the less severe sanction of postponing trial to permit proper discovery to occur was a reasonable option under the circumstances. The expert himself admitted that he had no records of his evaluations of plaintiff and that he had not prepared any documents indicating his opinions. Further, a jury had already been impaneled in this case when the discovery violation became apparent. Under these circumstances, the trial court's sanction barring plaintiff's expert from testifying was appropriate. *Kalamazoo Oil Co v Boerman,* 242 Mich App 75, 88-89; 618 NW2d 66 (2000). Therefore, the trial court did not abuse its discretion when it barred this witness from testifying.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra