[Cite as *Haworth v. Roman*, 2023-Ohio-3816.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JAMES HAWORTH et al.	:	
Appellants	:	C.A. No. 29687
v.	:	Trial Court Case No. 2022 CV 01124
ROBERT J. ROMAN MD et al.	:	(Civil Appeal from Common Pleas Court)
Appellees	:	

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OPINION

Rendered on October 20, 2023

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EPLEY, J.

{¶ 1} Plaintiff-Appellant James W. Haworth and others appeal from a judgment of the Montgomery Count Court of Common Pleas, which granted the summary judgment motions of Dr. Robert Roman, Dr. Megan Leonard, Dr. Monique Cunin, Orthopedic Associates of Dayton, Inc., and Medical Center at Elizabeth Place, LLC in this medical malpractice case. For the reasons that follow, the judgment of the trial court will be affirmed.

I. Facts and Procedural History

{¶ 2} On the morning of November 16, 2018, Dr. Roman performed a VMO advancement and lateral release surgery on James Haworth's left knee. It is Haworth's contention that Dr. Roman failed to fully close his incision. Dr. Roman denies the accusation. After surgery, Haworth's knee was placed in bandages and an immobilizer, and he was soon released from the hospital.

{¶ 3} After several hours, it became clear that there was something wrong as Haworth's wound continued to bleed. In fact, according to his complaint, Haworth bled through his bandages three times. As a result, he contacted Dr. Roman's office and was instructed to go to the emergency room.

{¶ 4} On the afternoon of November 16, Haworth was driven to the Springfield Regional Medical Center (SRMC) by his wife and was seen by Dr. Megan Leonard. After consulting with Dr. Roman, Dr. Leonard removed the post-operative tape and applied Surgicel (a cellulose polymer used to control bleeding) and pressure dressing. Haworth's knee was bandaged back up and placed in a new immobilizer, and he was discharged.

{¶ 5} After returning home, Haworth's knee continued to bleed through the

bandages, and later that evening he was transported by ambulance back to SRMC. This time he was treated by Dr. Monique Cunin, who packed the incision with micro-fibrillar collagen powder and a hemostat pad. Haworth was instructed to follow up with Dr. Roman.

{¶ 6} Over the next few days, the bleeding continued. On November 19, Haworth was seen by Dr. Roman. According to the complaint, a nurse applied glue and Steri-Strips to the incision. However, despite the continued treatment, Haworth developed a fever on November 24 and was transported to Soin Medical Center, where he was admitted and treated for an infection. Two days later he was taken to The Medical Center at Elizabeth Place for a “joint wash out” surgery. The procedure, which was done by a different surgeon, completely removed his knee and “washed out” the space to prevent further infection. This meant that for several months – until March 5, 2019, when he had a new knee installed – Haworth was without a knee and was forced to get around by using a walker.

{¶ 7} On March 30, 2019, Haworth returned to Soin after infection complications with his new knee. He alleges that he was unable to work between November 16, 2018, and June 1, 2019 and that he will need daily antibiotics for the rest of his life.

{¶ 8} Haworth filed his original complaint in 2019 (Montgomery C.P. No. 19CV05467), but it was voluntarily dismissed without prejudice pursuant to Civ.R. 41(A)(1) in March 2021. The complaint at the center of this case, filed on March 14, 2022, asserted claims of (1) lack of informed consent; (2) spoilation of evidence; (3) loss of consortium and economic loss; (4) declaratory judgment; (5) negligence; and (6) vicarious

liability. It listed Dr. Roman, Dr. Leonard, Dr. Cunin, Orthopedic Associates of Dayton, Inc., The Medical Center at Elizabeth Place, LLC, Community Mercy Health Partners, United Healthcare Services, Inc., and Nationwide Mutual Insurance Company as defendants. Attached to the complaint was an affidavit of merit signed by Dr. James Kemmler. United Healthcare filed cross-claims against Dr. Roman, Dr. Leonard, Dr. Cunin, Orthopedic Associates of Dayton, The Medical Center at Elizabeth Place, and Mercy Health in the event that Haworth obtained monetary judgments in this case.

{¶ 9} As the case moved forward, the trial court set a series of discovery deadlines. Pertinent to this appeal, August 22, 2022, was set as the deadline for Haworth to file his expert disclosures and reports. The deadline came and went but Howarth did not file expert disclosures or reports. As a result, on September 20, 2022, Medical Center at Elizabeth Place filed a motion for summary judgment in which it argued that, because Haworth had not filed his expert disclosure and reports by the deadline, he was precluded from using experts at trial, therefore making it impossible to prove his case. A few hours after the summary judgment filing, Haworth filed his "disclosure of expert witnesses." Three days later, Medical Center at Elizabeth Place filed a motion to strike Haworth's expert disclosure.

{¶ 10} On October 17, 2022, the trial court granted Medical Center at Elizabeth Place's motion for summary judgment and motion to strike, finding that Haworth's disclosures were untimely and hence, he could not be successful with his claim. Over the next week, Doctors Leonard and Cunnin, Mercy Health, Dr. Roman, and Orthopedic Associates of Dayton filed motions for summary judgment. On November 15, Haworth

filed a motion for leave to supplement affidavits of merit and a motion to belatedly supplement expert reports. Multiple motions to strike were filed as a result. The trial court granted the remaining defendants' motions to strike and summary judgment on December 7, 2022.

{¶ 11} Haworth has filed this appeal which features five assignments of error. We will address them in a way that facilitates our analysis.

II. Motion to Strike

{¶ 12} Our analysis begins with Haworth's third assignment of error in which he argues that the trial court abused its discretion by granting Medical Center at Elizabeth Place's motion to strike his "disclosure of expert witnesses," filed September 20, 2022.

{¶ 13} In May 2022, the trial court published its final pretrial order setting out discovery deadlines for the suit. It set August 22, 2022, as the deadline for Haworth to file expert disclosures and expert reports. Despite knowing about the date three months in advance, Haworth filed nothing prior to or on August 22. In fact, four weeks went by without expert disclosures or reports being filed by Haworth. That changed, however, on September 20, after Medical Center at Elizabeth Place filed its motion for summary judgment, which asserted that Haworth's claim must fail because he had no experts to testify in support of his medical malpractice claim. His filing, titled "Plaintiff's Disclosure of Expert Witnesses," listed 13 different doctors and one physical therapist and stated that each medical provider's "medical records will be provided and may be used in lieu of an expert report per Civ.R. 26(B)(7)(d)." On September 23, Medical Center at Elizabeth Place responded by filing its motion to strike, contending that Haworth's disclosure was

four weeks tardy, was filed without leave of the court, and should therefore be stricken. The trial court agreed, and so do we.

{¶ 14} "Trial courts have broad discretion in managing their dockets, setting case schedules and imposing discovery sanctions for violations of court rules and scheduling orders, including the exclusion of expert witnesses who are not timely disclosed." *Sonis v. Rasner*, 2015-Ohio-3028, 39 N.E.3d 871, ¶ 40 (8th Dist.). *See also Smith v. Farmer*, 2022-Ohio-4180, 201 N.E.3d 988, ¶ 16 (2d Dist.) (trial courts have inherent power to manage their dockets and the progress of cases before them). Because of that, an appellate court uses an abuse of discretion standard when reviewing the trial court's decisions in this area. *In re T.H.*, 2011-Ohio-248, 948 N.E.2d 524, ¶ 38 (2d Dist.). To constitute an abuse of discretion, a trial court's action must be arbitrary, unreasonable, or unconscionable. *Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 232, 466 N.E.2d 875 (1984).

{¶ 15} Haworth missed the deadline to file expert disclosures and reports by four weeks; the date set by the trial court was August 22, 2022, and he filed what purported to be expert disclosures on September 20. Even then, it was filed only after Medical Center at Elizabeth Place filed a motion for summary judgment. Further, it was done without leave of court and without excuse. In accordance with the trial court's fundamental power to manage its docket, we cannot say that it abused its discretion by granting the motion to strike.

{¶ 16} Nevertheless, Haworth makes several arguments in support of its submission. First, he claims that he provided the "Haworth MPs' Reports on January 14,

2020." Appellant's Brief at 20. We understand this to mean that he believes he complied with the court's expert disclosure deadline by providing Medical Center at Elizabeth Place (and the other defendants/appellees) his medical records through discovery in his 2019 case. He also states that he provided an "affidavit of merit" by Dr. James Kemmler opining that Dr. Roman had breached the standard of care and damaged his knee by allegedly not fully closing his incision. There are several problems with this argument.

{¶ 17} First, anything filed in the 2019 case could not be considered in the subsequent case. According to Civ.R. 41(A), a plaintiff may dismiss all claims asserted against the defendant by either filing a notice of dismissal at any time before the start of trial or filing a stipulation of dismissal signed by all parties who have appeared in the action. A suit dismissed pursuant to this Rule is "deemed to never have existed." *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, 173 N.E.3d 448, ¶ 20. It leaves the parties as if no action had been brought at all. *Id.* Accordingly, whatever steps were (or were not) taken in Montgomery C.P. No. 19CV05467 could not be carried over to this case. For the court's purposes, it is as if that case had never happened.

{¶ 18} Haworth also argues that the medical records he turned over satisfied the expert requirement from Civ.R. 26(B)(7). We disagree. According to that Rule, parties must submit expert reports and curricula vitae in accordance with the time schedule established by the trial court. Civ.R. 26(B)(7)(b). A party may not call an expert to testify unless a written report has been provided to opposing counsel. Civ.R. 26(B)(7)(c). The report "must disclose a complete statement of all opinions and the basis and reasons for them as to each matter on which the expert will testify. It must also state the compensation

for the expert's study or testimony." *Id.* Haworth's September 20, 2022 "Disclosure of Expert Witnesses" failed to comply with Civ.R. 26(B)(7)(b) because it was not filed "in accordance with the time schedule established by the trial court."

{¶ 19} In addition to the untimeliness, the medical records themselves did not satisfy the rule in this matter. Civ.R. 26(B)(7)(d) states that "[a] witness who has provided medical * * * care may testify as an expert and offer opinions as to matters addressed in the healthcare provider's records. Healthcare providers' records relevant to the case shall be provided to opposing counsel in lieu of an expert report in accordance with the time schedule established by the Court." It appears from the plain language of the Rule that the provided medical records *could* satisfy the expert report requirements, but there must also be a witness disclosure. Without disclosure of the witnesses, a party would have to comb through (in this case) thousands of pages of medical records and bills to try to determine who *might* be called as an expert witness. It is for that reason the Rule requires both an expert disclosure and an expert report.

{¶ 20} Finally, Haworth avers that Dr. Kemmler's affidavit of merit and an "Independent Medical Review" letter (which were filed in the 2019 case) should have counted as an expert report. Even putting aside the previously discussed problems with the disclosures, these documents did not meet the requirements of Civ.R. 26(B)(7)(c), which states that "[t]he report of an expert must disclose a complete statement of all opinions and the basis and reasons for them as to each matter on which the expert will testify. It must also state the compensation for the expert's study or testimony." The affidavit of merit filed with the complaint in this case (which appeared to be identical to

the one filed in the 2019 case as it listed the previous case number and previous judge) did not disclose compensation and was not accompanied by a C.V. Without those items, it was not an expert report.

{¶ 21} Haworth filed a "Motion to Supplement Affidavits of Merit" on November 15, 2022, and attached Dr. Kemmler's C.V. and compensation report. The motion was denied, though, because it was filed nearly three months past the trial court's deadline and a month after summary judgment had been granted to Medical Center at Elizabeth Place.

{¶ 22} Based on the belated disclosures filed weeks beyond the court-imposed deadline and other substantive issues, we cannot say that the trial court abused its discretion when it granted Medical Center at Elizabeth Place's motion to strike Haworth's "Disclosure of Expert Witnesses." The third assignment of error is overruled.

III. Summary Judgment

{¶ 23} In his first and second assignments of error, Haworth claims that the trial court erred in granting summary judgment to Medical Center at Elizabeth Place, Dr. Roman, Orthopedic Associates of Dayton, Mercy Health, Dr. Leonard, and Dr. Cunin. Haworth makes two main arguments: (1) medical records and bills may be used in lieu of expert reports, and (2) if he cannot use an expert, it would not be fatal to his claim because a lay person could understand the issue in this case. Because we concluded in the previous section that the trial court rightfully struck Haworth's expert disclosures and reports (which included his medical records), we must reject his first argument; neither expert reports or medical records were available for his suit. Thus, we will focus on his

second contention, that expert testimony was not necessary in this case.

{¶ 24} Pursuant to Civ.R. 56(C), a movant is entitled to summary judgment when that party demonstrates that there is (1) no issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the non-moving party. *Rhododendron Holdings, LLC v. Harris*, 2021-Ohio-147, 166 N.E.3d 725, ¶ 22 (2d Dist.).

{¶ 25} "The burden of demonstrating that no genuine issues exist as to any material fact falls upon the moving party requesting a summary judgment." *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Once the moving party has satisfied its burden of showing that there is no genuine issue of material fact, the burden shifts to the nonmoving party to set forth specific facts showing a genuine issue for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). The nonmoving party cannot rely upon the mere allegations or denials in the pleadings, but must give specific facts showing that there is a genuine issue for trial. Civ.R. 56(E). *Accord Geloff v. R.C. Hemm's Glass Shops, Inc.*, 2021-Ohio-394, 167 N.E.3d 1095, ¶ 14 (2d Dist.). If no genuine issue of material fact exists, summary judgment must be awarded as a matter of law. We review the trial court's ruling on a summary judgment motion de novo. *Martcheva v. Dayton Bd. of Edn.,* 2021-Ohio-3524, 179 N.E.3d 687, ¶ 35 (2d Dist.).

{¶ 26} To establish a medical malpractice claim, a plaintiff must demonstrate by a preponderance of the evidence that the injury was caused by the "doing of some particular thing or things that a physician or surgeon of ordinary skill, care, and diligence would not have done under like or similar circumstances and that the injury complained of was the

direct and proximate result of doing those particular things." *Wolder v. DiPasquale*, 2d Dist. Montgomery No. 20797, 2005-Ohio-2010, ¶ 8, citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), syllabus. Failure to establish the recognized standard of the medical community is generally fatal to the presentation of a prima facie case of malpractice. *Id.*

{¶ 27} "Proof of the recognized standard must necessarily be provided through expert testimony." *Id.*; *see also Crosswhite v. Sesai*, 64 Ohio App.3d 170, 174, 580 N.E.2d 1119 (2d Dist.1989) ("[I]n cases of medical malpractice, expert testimony is not merely permitted but required of the plaintiff to meet his burden of proof."). This is because the elements of the tort require the knowledge, training, and experience of a medical expert to assist the jury in reaching its verdict. *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, 959 N.E.2d 1033, ¶ 2. An exception to the rule only exists when the lack of skill or care of the physician is so evident that it is within the comprehension of laymen and only requires common knowledge and experience to grasp. *Bruni* at 130.

{¶ 28} Haworth argues that a layman could understand that leaving a wound open (and untreated by antibiotics) after a surgery would create a risk of infection and cites a series of cases to support the claim. While the cited cases all fall under this "common knowledge" exception, they do not bolster his case as they are all distinguishable.

{¶ 29} For instance, in *Jones v. Hawkes Hosp. of Mt. Carmel*, 175 Ohio St. 503, 196 N.E.2d 592 (1964), a sedated and restless patient fell out of her hospital bed while she was unsupervised. In *Burks v. Christ Hosp.*, 19 Ohio St.2d 128, 249 N.E.2d 829 (1969), an obese, sedated, and disoriented patient fell from a hospital bed without guard

rails. In *Dimora v. Cleveland Clinic Found.*, 114 Ohio App.3d 711, 638 N.E.2d 1175 (8th Dist.1996), a patient who had known balance issues fell while her nurse stepped away to secure the bathroom door. *See also LaCourse v. Flower Hosp.*, 6th Dist. Lucas No. L-02-1004, 2002-Ohio-3816 (obese stroke patient fell after being left unattended); *Taliaferro v. S. Pointe Hosp.*, 8th Dist. Cuyahoga No. 86999, 2006-Ohio-1611 (patient with multiple sclerosis, impaired balance, lower limb weakness, and increased spasticity fell multiple times after being admitted to the hospital).

{¶ 30} The theme of all the cases submitted by Haworth is best described as negligent supervision; indeed, nearly all the Ohio caselaw in the "common knowledge" exception can be placed in the same category. As the Tenth District put it, "[i]n general, Ohio courts have found the common knowledge exception applicable in cases dealing with gross inattention during patient care or miscommunication with a patient. Many such cases deal with supervisory negligence and involve fact patterns in which a patient suffered injury after a medical provider has left the patient unattended." (Citations omitted.) *Cunningham v. Children's Hosp.*, 10th Dist. Franklin No. 05AP-69, 2005-Ohio-4284, ¶ 21. It would be inappropriate to extend this very narrow exception to the case at bar, as post-operative medical care and ER wound evaluations are inapposite to making sure bed rails are engaged for a sedated patient or leaving a fall-risk patient unattended.

{¶ 31} Finally, we note that Haworth appears to be raising this argument for the first time on appeal. "It is well settled that arguments raised for the first time on appeal will not be considered by an appellate court. This rule applies when reviewing decisions on motions for summary judgment. Although we review summary judgment decisions de

novo, the parties are not given a second chance to raise arguments that they should have raised below." (Citations omitted.) *Budz v. Somerfield*, 2d Dist. Montgomery No. 29550, 2023-Ohio-155, ¶ 30. Haworth's "common knowledge" argument fails on procedural grounds as well.

{¶ 32} In summary, we decline to extend the "common knowledge" exception to this case, and because Haworth was left without an expert witness to prove his medical malpractice claim, we conclude that the trial court did not err by granting summary judgment to any of the appellees. The first and second assignments of error are overruled.

IV. Motion for Leave to Supplement

{¶ 33} In his fourth and fifth assignments of error, Haworth avers that the trial court abused its discretion when it denied his motion for leave to supplement Dr. Kemmler's affidavit of merit, what he considers Kemmler's expert report, and the "Haworth MPs' Reports." His argument that Civ.R. 6(B)(2) permitted the court to grant his motion to supplement upon a finding of "excusable error" is unpersuasive.

{¶ 34} Civ.R. 6(B)(2) confirms that a trial court may *in its discretion* permit an act that was not done on time to be completed if the failure to act was the result of excusable neglect. Neglect under Civ.R. 6(B)(2) has been defined as conduct that falls substantially below what is reasonable under the circumstances. *Davis v. Immediate Med. Servs., Inc.*, 80 Ohio St. 3d 10, 14, 684 N.E.2d 292 (1997). "The determination of whether neglect is excusable or inexcusable must take into consideration all the surrounding facts and circumstances[.]" *Provident Funding Assocs., LP v. Ettayem*, 5th Dist. Delaware No. 13 CAE 04 0037, 2013-Ohio-5275, ¶ 23.

{¶ 35} In its ruling on the matter, the trial court noted that Haworth's motions for leave to supplement, which were filed on November 15, 2022, relied on discovery responses filed after the court's disclosure deadline. The documents Haworth was requesting to add had already been removed from the record and summary judgment had been granted to Medical Center at Elizabeth Place by the time he filed his motion to supplement. In essence, there was nothing to supplement because those filings did not exist.

{¶ 36} But even assuming for argument's sake that the documents had not been struck, Civ.R. 6(B)(2) leaves the decision to permit supplementation of a late filing to the discretion of the trial court. A trial court has great leeway in the manner it controls its docket and rules on evidentiary matters. *See Sonis,* 2015-Ohio-3028, 39 N.E.3d 871*,* at ¶ 40, and *Smith,* 2022-Ohio-4180, 201 N.E.3d 988, at ¶ 16. As such, we cannot conclude that the court abused its discretion by not allowing Haworth to supplement documents that were late and ultimately did not exist.

{¶ 37} The fourth and fifth assignments of error are overruled.

V. Conclusion

{¶ 38} The judgment of the trial court will be affirmed.

HUFFMAN, J., concurs:

{¶ 39} Though I concur in the lead opinion's conclusions, I write separately to suggest that, while no abuse of discretion occurred under the circumstances here where Haworth failed to seek leave to file an untimely disclosure of expert witnesses, I believe

that if Haworth had sought leave to file a disclosure of expert witnesses, it would have been an abuse of discretion to deny the request. *See Bentley v. Grey Fox Homes, Ltd.,* 184 Ohio App.3d 276, 2009-Ohio-5038, 920 N.E.2d 438 (2d Dist.). The complaint was filed on March 14, 2022. The final pretrial order, issued May 23, 2022, set August 22, 2022, as the deadline for Haworth's expert report and disclosures; Haworth's disclosure without leave was made on September 20, 2022, the same day the trial court filed three agreed entries permitting certain defendants an extension of time to designate their expert witnesses and disclose reports. The discovery deadline was set at September 25, 2023, over a year after Haworth's expert disclosure deadline, and the trial was scheduled to begin October 24, 2023. No defendant would have been prejudiced if leave to file an expert disclosure and report had been granted. Pursuant to Civ. 6(B)(1), extensions of time should be granted in the court's discretion for cause shown. *Kaur v. Bharmota,* 10th Dist. Franklin No. 05AP-1333, 2006-Ohio-5782, ¶ 10. Cause would have been shown here if Haworth had sought leave to file his expert disclosure. In the absence of a request for leave, though, the court here did not abuse its discretion in striking Haworth's untimely disclosure.

TUCKER, J., concurs:

{¶ 40} I also agree with the lead opinion's conclusions, and, more specifically, with the conclusions that, under the facts of this case, the trial court did not abuse its discretion when it granted Medical Center at Elizabeth Place's motion to strike Haworth's tardy expert disclosure and, thereafter, when the trial court overruled Haworth's motion to

supplement Dr. Kemmler's affidavit of merit.

{¶ 41} I write separately to note that, although I am sympathetic to the concerns set forth in Judge Huffman's thoughtful concurring opinion, I cannot, under the facts of this case, endorse her conclusion that the trial court would have abused its discretion in denying a motion for leave to file an untimely disclosure of expert witnesses if one had been filed. But, that being said, I do suggest that in a complex civil action with a trial date months away, a trial court should, generally speaking, look favorably upon requests, even if somewhat untimely, to continue expert disclosure and other deadlines when granting such a request would not prejudice other parties.