

STATE OF MICHIGAN
COURT OF APPEALS

MICHELE KASETA,

Plaintiff-Appellant,

v

LARRY VAN AMEYDE,

Defendant-Appellee,

and

WILLIAM BEAUMONT HOSPITAL,

Defendant.

UNPUBLISHED

April 19, 2002

No. 223531

Macomb Circuit Court

LC No. 95-001004-NH

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right from a judgment of no cause of action, following a jury trial. On appeal, plaintiff challenges the trial court's denial of her motion for a new trial, motion to reinstate a default against defendant, and motion for rehearing or reconsideration. We affirm.

I

To support her claim that she is entitled to a new trial, plaintiff advances several arguments that relate to the trial court's order setting aside a prior default against defendant. Whether to grant new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Settingington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). Further, a trial court's ruling on a motion to set aside a default will not be disturbed absent a clear abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). "Where there has been a valid exercise of discretion, appellate review is sharply limited." *Id.* An abuse of discretion is found only in extreme cases in which 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).

Although plaintiff argues that our resolution of this issue should be guided by the principles set forth in MCR 2.603(D), we conclude that this argument is not properly preserved for our review because it was neither raised before, nor addressed by, the trial court. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Further, we find dispositive plaintiff's acquiescence to the trial court's decision to set aside the default, in exchange for plaintiff being allowed to amend her complaint to add a new claim of negligent surgeries.

Plaintiff's first amended complaint alleged that defendant had breached his duty to maintain accurate records regarding her treatment, breached his duty to adequately inform plaintiff regarding the risks inherent in several surgeries, and prescribed excessive and harmful amounts of medication. The first amended complaint did not plead a claim for negligent and/or improper performance of plaintiff's surgeries. Only five days before trial, plaintiff filed a motion seeking leave to amend her complaint, in order to add a claim that defendant had negligently and/or improperly performed several surgeries. The trial court allowed plaintiff to file the second amended complaint and reopened discovery. However, the trial court balanced its decision to allow the amendment by allowing defendant to contest liability on all of plaintiff's claims. Apparently, the trial court believed that this arrangement was fair because the issues involved in the negligent surgery claim were closely intertwined with liability issues on plaintiff's other claims.

Accordingly, plaintiff's counsel deposed defendant on the day before trial, eliciting information on all of the issues to be tried, including plaintiff's negligent surgery claim. Then, on the first day of trial, the court set aside the default and proceeded to try the case on all of plaintiff's claims. We find the following exchange between the trial court and plaintiff's two attorneys of particular relevance:

[Plaintiff's attorney]: Your honor, you're setting aside the default? There was an admission of liability on over prescription, failure to give informed consent, and failure to keep adequate records. And the problem with that, setting aside the default is we didn't have access to his office.

[Trial court]: All right, then I'll bar any mention of the surgery here, the wrongful surgery. That was a tradeoff at the time. You had your complaint [sic] set forth wrongful surgery. I said okay, looks like we've got a mix up here because of discovery problems if you will and so let's get it all, *let's lay it all on the table and we'll allow you to claim your wrongful surgery and we'll allow them to put in their defense to all the claims.*

[Plaintiff's Attorney]: *Okay.*

[Plaintiff's second attorney]: *Okay.* [Emphasis added.]

This excerpt clearly demonstrates that the trial court's decision to allow plaintiff's eleventh-hour amendment of her complaint was tied to a corresponding "trade-off" for defendant, i.e., he would be permitted to contest liability on all of plaintiff's claims. If plaintiff had objected to this arrangement, her counsel could have decided to forego addition of the negligent surgery claim and proceeded with the damages phase of trial on the pre-existing

claims. However, plaintiff's counsel accepted the trial court's offer of a compromise, in order to pursue the negligent surgery claim.

Once the trial court officially set aside the default, plaintiff's attorneys did not object, request an adjournment, or make any other challenge to the trial court's decision. Rather, plaintiff proceeded through a full trial and objected only *after* the jury returned a verdict of no cause of action. It is well established that "[a] party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001) (citation omitted). Moreover, acquiescence to an issue at trial waives that issue for appeal. *Id.* at 696.

Plaintiff next argues that the trial court's denial of a new trial and its order setting aside the default denied her due process because defendant had previously stipulated to try the issue of negligent surgeries. Plaintiff first relies on a stipulation, memorialized by court order after entry of the default, stating that liability would no longer be contested and that defendant would not raise any affirmative defenses to liability. However, that order clearly pertained only to those allegations that were at issue at that time, which did not include negligent and/or improper surgeries. Moreover, once the trial court set aside the default, the earlier stipulation became moot.

Plaintiff also relies on defendant's answers to requests for admissions. However, we also conclude that this argument is without merit. Although defendant's answers mentioned surgery, those answers were not equivalent to a stipulation to try the issue of negligent surgeries before a jury. Indeed, in her first amended complaint, plaintiff alleged that defendant had failed to adequately inform her of the risks inherent in several surgeries. Accordingly, defendant's answers could have easily addressed the claim for failure to adequately inform plaintiff of those risks. We further note that plaintiff's motion for leave to amend her complaint to add a claim for negligent surgeries belies her argument that such a claim was at issue before that amendment was granted.

We also note that plaintiff devotes many pages of her brief arguing that the lower court proceedings and outcome violated public policy and were unduly prejudicial, that defendant was involved in "shenanigans," and that the trial court showed a "complete lack of judgment" and "neglect[ed]" to understand the record. However, plaintiff's arguments must fail in light of her two attorneys' acquiescence to set aside the default, plaintiff's failure to request an adjournment or other relief, and the fact that plaintiff had a full jury trial on all issues. We also note that, while plaintiff cites several court rules regarding unfair trials, lack of due process, and prejudice, she fails to cite any authority applicable to the circumstances of this case. A party may not leave it to this Court to search for authority to sustain or reject its position. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 95; 572 NW2d 246 (1997).

In sum, we hold that plaintiff acquiesced to the trial court's setting aside the default against defendant and proceeded through trial, litigating all issues. After receiving a no cause of action jury verdict, plaintiff objected to the trial court's previous act of setting aside the default, claiming prejudice and a lack of due process. Although plaintiff attempts to phrase her issues under different captions, each relate back to her attorneys' acquiescence to the court's decision to

set aside the default, in exchange for her ability to litigate the negligent surgery claims. Under such circumstances, we conclude that plaintiff is not entitled to a new trial.

II

Plaintiff also claims that the trial court abused its discretion by denying her an opportunity to conduct discovery regarding defendant's office staff. We disagree. The grant or denial of a motion to compel or to limit discovery is within the trial court's discretion. *Dafer Twp v Reid*, 159 Mich App 149, 159; 406 NW2d 255 (1987). In deciding a discovery motion, the trial court should consider whether the requested discovery will facilitate or impede litigation, as well as the timeliness of the request, the duration of the litigation, and possible prejudice to the parties. *McDonald Ford Sales, Inc v Ford Motor Co*, 165 Mich App 321, 330; 418 NW2d 716 (1987). The trial court's decision will not be reversed unless it constituted an abuse of discretion. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998).

We conclude that the trial court did not abuse its discretion in this regard. Plaintiff has failed to show specific facts indicating that defendant's staff personnel were relevant to the case. Further, plaintiff's claim that she would have handled discovery differently had the default not been set aside is without merit. If plaintiff wanted to question defendant's office staff after the trial court set aside the default, it was her responsibility to take the necessary action. However, plaintiff did not seek further discovery or request an adjournment after the default was set aside. Under these circumstances, we cannot conclude that the trial court's denial of the motion to compel was an abuse of discretion.

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder