

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS LANIER, on behalf of LORRAINE
LANIER, a legally incapacitated person,

UNPUBLISHED
March 31, 2009

Plaintiff-Appellant,

v

BORTZ HEALTH CARE OF YPSILANTI, INC.,

No. 280343
Washtenaw Circuit Court
LC No. 06-001239-CZ

Defendant-Appellee.

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant nursing home pursuant to MCR 2.116(C)(7), (C)(8), and/or (C)(10) in plaintiff's negligence action, which was brought on behalf of plaintiff's incapacitated mother, Lorraine Lanier ("Lorraine").¹ We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In October 2006, plaintiff filed a complaint alleging that while Lorraine was a resident of defendant's nursing home in 2003, a combination of excessive chemical restraints and a lack of supervision resulted in injury to Lorraine when she fell while attempting to get out of bed. Defendant sought summary disposition, arguing that plaintiff's negligence action sounded in medical malpractice and that plaintiff had failed to serve a notice of intent to file a medical-malpractice action in compliance with MCL 600.2912b(2) or an affidavit of merit in compliance with MCL 600.2912d(1). Defendant also argued the claim was time-barred under MCL 600.5805(6) because it was not filed within two years of the alleged injury.

Rather than filing a response to defendant's motion, plaintiff filed a motion to extend discovery beyond the deadline provided in the trial court's scheduling order. On August 8, 2007, the day before the scheduled hearing on defendant's motion for summary disposition, plaintiff contacted the trial court and requested a fax number so that he could fax his response.² Shortly

¹ Plaintiff was apparently appointed as guardian of Lorraine in 2005 because of her advanced age and Alzheimer's disease.

² There is no indication in the record that plaintiff ever submitted a response below, and it has
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thereafter, the trial court issued an order denying plaintiff's motion to extend discovery³ and granting defendant's motion for summary disposition on the ground that no response had been filed at least seven days before the hearing, as required by MCR 2.116(G)(1)(a)(ii) and the court's scheduling order. Because no timely response or admissible evidence to refute defendant's motion had been provided, the trial court held that summary disposition was appropriate for the reasons articulated by defendant in its motion.

In his brief on appeal, plaintiff fails to properly address the actual basis for the trial court's decision or to cite any authority in support of his bare assertion that the trial court's action should be reversed because it was "harsh" and "unfair." An appellant may not simply announce a position and leave it to this Court to discover and rationalize the basis for his claims. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Moreover, we hold that the trial court did not abuse its discretion in granting summary disposition on the ground that plaintiff had failed to timely respond to defendant's motion, which was brought, in part, pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). "When a motion under [MCR 2.116(C)(10)] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

This Court reviews for an abuse of discretion a trial court's decision to decline to entertain motions and briefs filed after the deadlines set forth in a scheduling order or applicable court rules. See *EDI Holdings LLC v Lear Corp (EDI Holdings II)*, 469 Mich 1021; 678 NW2d 440 (2004); *People v Grove*, 455 Mich 439, 470; 566 NW2d 547 (1997); *Prussing v Gen Motors Corp*, 403 Mich 366, 369-370; 269 NW2d 181 (1978); *Kemerko Clawson, LLC v RxIV*, 269 Mich App 347, 349; 711 NW2d 801 (2005). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MCR 2.116(G)(1)(a)(ii) specifically provides that "[u]nless a different period is set by the court, . . . any response to [a summary disposition motion] (including brief and any affidavits) *must* be filed and served at least 7 days before the hearing." (Emphasis supplied.) Where a party fails to respond to a motion for summary disposition by seven days before the hearing as required by MCR 2.116(G)(1)(a)(ii), any response and supporting evidence are properly excluded from consideration. See *Prussing v General Motors Corp*, 403 Mich 366, 369-370;

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not been provided on appeal.

³ Plaintiff does not challenge the trial court's denial of his motion to extend discovery.

269 NW2d 181 (1978). When the motion is a properly supported summary disposition motion under MCR 2.116(C)(10), plaintiff *must* submit a responsive brief and factual support creating a genuine issue for trial. MCR 2.116(G)(4) (emphasis supplied); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). When an adverse party does not respond to a properly supported motion for summary disposition under subrule (C)(10) as required by MCR 2.116(G)(4), “judgment, if appropriate, shall be entered against him or her.” Therefore, a trial court does not abuse its discretion when it refuses to consider an untimely response to a motion under (C)(10). *Prussing, supra* at 369-370.

Furthermore, although plaintiff has submitted an affidavit to this Court in an attempt to refute defendant’s contention that the complaint sounded in medical malpractice, and although he now argues that defendant failed to provide evidence that it was licensed on the relevant dates,⁴ a party may not expand the record on appeal. Rather, this Court is limited to the record established by the trial court. *Detroit Leasing Co, supra* at 237; *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002); see MCR 7.210. Because plaintiff failed to satisfy his burden under MCR 2.116(G)(4) of responding to defendant’s properly supported motion and establishing that a genuine issue of material fact existed, summary disposition was required. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 725; 691 NW2d 1 (2005).

Plaintiff additionally complains, without citation to authority, that the trial court erred in granting defendant’s motion without hearing oral argument. However, MCR 2.119(E)(3) explicitly provides that “[a] court may, in its discretion, dispense with or limit oral arguments on motions. . . .” The trial court’s decision to do so is reviewed for an abuse of discretion. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000); *Fast Air, Inc v Knight*, 235 Mich App 541, 550; 599 NW2d 489 (1999). Summary disposition was required due to plaintiff’s failure to respond to defendant’s motion as required by the applicable court rules. Under these circumstances, oral argument would have been fruitless. Accordingly, the trial court’s decision to dispense with oral argument fell within the range of reasoned and principled outcomes.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto

⁴ Defendant states on appeal that had plaintiff properly responded to the motion for summary disposition and raised the argument that defendant was not licensed during the relevant period, it would have provided the affidavit of its administrator, Joseph Jarackas. In his affidavit, which is attached to defendant’s appellate brief, Jarackas states that the facility was licensed at all relevant times, including the year 2003.