

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KEITHIE MOTLEY,

Plaintiff-Appellee,

v

GENESYS REGIONAL MEDICAL CENTER,  
GENESYS HEALTH SYSTEMS, and TARIK J.  
WASFIE, M.D.,

Defendants-Appellants.

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UNPUBLISHED

October 19, 2006

No. 261928

Genesee Circuit Court

LC No. 03-077896-NH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendants appeal by leave granted from the trial court's order denying their motion to permit them to file a motion for summary disposition outside the date set by the trial court's scheduling order. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On December 8, 2003, plaintiff filed a medical malpractice complaint alleging that defendant physician, while performing an appendectomy on plaintiff in July 1996 at defendant Genesys Regional Medical Center, failed to remove the entire appendix. Plaintiff claimed that he discovered the error when he was diagnosed with calcifications to the tip of his appendix in December 2002. Defendants filed an answer raising, among other affirmative defenses, the expiration of the applicable statute of limitations.

On March 18, 2004, the trial court issued a pretrial scheduling order directing that the discovery cutoff date was September 20, 2004, and that the cutoff date for dispositive motions was October 19, 2004. The scheduling order also provided for mediation and case evaluation and provided time limits for witness and exhibit lists and arbitration. Trial was scheduled to begin on February 1, 2005.

On July 20, 2004, the trial court signed a stipulated order providing that case evaluation, which was scheduled for August 11, 2004, would be adjourned for a period of at least 120 days, and that discovery would continue until the date of case evaluation. The trial court subsequently granted defendants' motion to adjourn trial and issued an order adjourning trial until April 26, 2005, and adjourning case evaluation, which was scheduled for December 1, 2004, for 45 days.

Case evaluation occurred on March 2, 2005. Defendants then filed a motion to permit them to file a motion for summary disposition on statute of limitations grounds after the cutoff date of October 19, 2004, set by the scheduling order. Defendants noted that the trial court had entered an order extending discovery up to the date of case evaluation, and that it had subsequently entered an order adjourning case evaluation. Accordingly, discovery was open until the date of case evaluation, March 2, 2005. Since defendants wished to file a motion for summary disposition under both MCR 2.116(C)(7) and (C)(10), they contend it could not be filed until after the completion of discovery. Moreover, MCR 2.116(B)(2) provided that a motion for summary disposition could be filed at any time, and *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 254 Mich App 241, 248; 657 NW2d 143 (2002), rev'd 472 Mich 44; 693 NW2d 149 (2005), provided that scheduling orders could not be used to create a cause of action that did not exist.

The trial court declined to permit the late filing of defendants' summary disposition motion, holding that the scheduling order dates had been agreed upon by the parties, rather than imposed upon them by the court, and that *Gerling* was therefore distinguishable. The trial court also denied defendants' request for permission to raise the statute of limitations defense in a motion in limine and their oral motion for a stay of proceedings pending appeal. This Court subsequently granted defendants' application for leave to appeal and their motion for a stay of proceedings. For the reasons set forth in this opinion, we affirm the trial court.

"This Court reviews for an abuse of discretion a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order." *Kemerko Clawson, LLC v RxIV*, 269 Mich App 347, 349; 711 NW2d 801 (2005); see also *EDI Holdings LLC v Lear Corp*, 469 Mich 1021; 678 NW2d 440 (2004) (summarily reversing this Court's determination that the trial court abused its discretion by refusing to accept a brief filed after the deadline established by a summary disposition scheduling order); *People v Grove*, 455 Mich 439, 470; 566 NW2d 547 (1997).

MCR 2.401(B)(1)(c) provides that a trial court may direct that an early scheduling conference be held and may enter a scheduling order "setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case." MCR 2.401(B)(2)(a)(ii) further provides that the court "shall establish times for events the court deems appropriate, including . . . the amendment of pleadings, adding of parties, or filing of motions." It is within a trial court's discretion under MCR 2.401(B) to decline to entertain actions beyond the time frames established in a scheduling order. *Grove, supra* at 469; *Kemerko Clawson, supra* at 350. "Were the rules not so construed, scheduling orders would quickly become meaningless." *Grove, supra* at 469.

Defendants contend that the trial court abused its discretion in denying their motion to file an untimely motion for summary disposition because MCR 2.116(B)(2) provides that a motion for summary disposition may be filed by a party "at any time," and because *Gerling, supra*, prohibits, by enforcement of the scheduling order, requiring defendants to defend against a claim that was absolutely prohibited by law. However, each of these arguments was squarely rejected by this Court in *Kemerko Clawson, supra* at 350-352 (holding that "the specific provision of MCR 2.401(B)(2)(a)(ii) controls over the more general rule that motions under MCR 2.116 may be filed at any time," *id.* at 351, and that *Gerling*—which was of questionable validity in light of the ultimate disposition in that case and the Supreme Court's holdings in

*Grove, supra*, and *EDI Holdings, supra*—applied only to motions brought under MCR 2.116(C)(8) and did not apply to defendants’ (C)(7) motion).

However, defendants’ argument that after permitting the adjournment of the trial date and extending discovery in contravention of the scheduling order, the trial court’s rigid enforcement of its scheduling order in this case comes at the expense of judicial economy is not without merit. MCR 2.401(B)(2)(a)(ii) allows the trial court to enforce time constraints for the filing of motions when it “concludes that such an order would facilitate the progress of the case.” The trial court’s order forces this case to proceed to trial, at which point defendants will presumably seek a directed verdict on the basis of the statute of limitations.<sup>1</sup> Thus, defendants argue that the order merely forestalls the inevitable, all the while wasting precious judicial resources. MCR 1.105 requires the courts to construe the court rules “to secure the just, speedy, and economical determination of every action.” Defendants argue that construing MCR 2.401(B)(2) to allow the blind enforcement of the scheduling order under the particular circumstances of this case would contravene this overriding directive, and would certainly not “facilitate the progress of the case.”<sup>2</sup> MCR 2.401(B)(2)(a)(ii). However demonstration that a trial court has abused its discretion presents defendants with a monumental burden. We would be inclined to accept defendants’ argument premised on MCR 2.401(B)(2)(a)(ii) if not for the fact that defendants were seeking a motion for summary disposition pursuant to the statute of limitations, MCR 2.116(C)(7). Such a motion requires little, if any discovery. Defendants likely had all the information necessary for such a motion when plaintiff filed their notice of intent. Thus, we have difficulty accepting as true the argument of defendants that they could not bring their (C)(7) motion until the end of discovery. Additionally, the parties were free at any time to request from the trial court an extension of time for the bringing of dispositive motions to correspond with their extension of discovery and case evaluation. They failed to do so.

The last issue presented to us is whether the time frame for bringing dispositive motions was extended by implication when the parties agreed to extend discovery and delay case evaluation. The trial court specifically held that the time frame for bringing dispositive motions was not extended by implication and we agree.

From the outset we note this Court does not typically interfere with the scheduling orders of a trial court or their decisions on their enforcement. In this case, the initial discovery cutoff date was September 20, 2004 and the cutoff date for dispositive motions was October 19, 2004. Such deadlines are a traditional exercise by the trial court to hear dispositive motions following the conclusion of discovery. Following their initial agreement, the parties agreed, and the trial court ordered an extension of discovery until the date of case evaluation. Case evaluation was also extended in the parties’ agreement which the trial court also made into an order. The parties failed to request from the trial court a corresponding date when dispositive motions must be

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<sup>1</sup> See *Horvath v Delida*, 213 Mich App 620, 630-631; 540 NW2d 760 (1995).

<sup>2</sup> It is difficult for defendants to sustain an argument that the trial court was adhering to “blind enforcement” of a scheduling order when the evidence clearly demonstrates that the trial court granted every request by the parties to increase the time frame for discovery and also to delay case evaluation.

brought. Therefore the parties set the dates for ending discovery, case evaluations and dispositive motions. The trial court granted every request by the parties to enlarge discovery dates. Had defendants sought to extend the date for dispositive motions, every indication is that such a request would have been granted by the trial court. Thus, defendants have not presented this Court with a case where a trial court is engaging in an arbitrary exercise to enforce blind adherence to a scheduling order. Rather, defendants created the initial agreement which set the date for dispositive motions and then failed to request from the trial court an extension. Now they seek from this Court an opinion freeing them from the terms of their own agreement, or as was more aptly stated by the trial court, “they’re hoisted on their own petard.”

Affirmed.

/s/ Stephen L. Borrello

/s/ Jessica R. Cooper