STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF JESSE M. HUNT, by GLORIA N. HUNT, Personal Representative,

Plaintiff-Appellant,

v

SINAI HOSPITAL OF DETROIT and DR. GERALD LEVINSON,

Defendants-Appellees.

UNPUBLISHED
May 9, 1997

No. 184150;187654
Wayne Circuit Court
LC No. 92-222348 NH

ESTATE OF JESSE M. HUNT, by GLORIA N. HUNT, Personal Representative,

Plaintiff-Appellant,

v

SINAI HOSPITAL OF DETROIT, and DR. GERALD LEVINSON,

Defendants-Appellees,

and HENRY FORD HEALTH SYSTEM d/b/a HENRY FORD HOSPITAL,

Defendant.

No. 188237
Wayne Circuit Court
LC No. 92-222348 NH

Before: Holbrook, Jr., P.J., and White and A. T. Davis*, JJ.

PER CURIAM.

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* Circuit judge, sitting on the Court of Appeals by assignment.

A jury returned a verdict of no cause of action in this medical malpractice and wrongful death case involving defendants' alleged failure to diagnose and properly treat coronary artery disease in plaintiff's decedent, who died shortly after undergoing surgery for an unrelated condition. In these consolidated cases, plaintiff appeals the trial court's striking an expert witness and precluding his testimony about an autopsy, jury instructions regarding the standard of care, the court's barring of one of plaintiff's experts from testifying regarding the standard of care, and the court's award of mediation sanctions to defendants. We affirm the underlying judgment in defendants' favor, but reverse and remand regarding sanctions.

I

Plaintiff's theory of the case as stated in the final pre-trial order was that given the results of certain thallium studies Dr. Levinson performed on plaintiff's decedent, Dr. Levinson should have treated plaintiff's decedent with anti-ischemic therapy, e.g., aspirin, nitrates and/or beta blockers, and that had Dr. Levinson notified plaintiff's decedent of the significance of the abnormal thallium studies, plaintiff's decedent would have informed Henry Ford Hospital of this heart disease history, which would have prompted a pre-operative cardiology evaluation, and most likely would have resulted in alternative non-surgical management and therapy for decedent's prostate condition, which would have averted his sudden death at age sixty nine.

Defendants' defenses as stated in the final pre-trial order were that Dr. Levinson at all times complied with the applicable standard of care, correctly interpreted the thallium tests in combination with the EKG's and had no role in plaintiff's decedent's demise. Sinai Hospital denied vicarious liability for Dr. Levinson's alleged negligence.

II

In docket no. 184150, plaintiff first argues that the trial court abused its discretion by striking Dr. Werner Spitz as an expert and precluding him from testifying regarding the autopsy he performed on plaintiff's decedent. We disagree.

A

Pursuant to the court's scheduling order, the parties timely filed witness lists by May 21, 1993. Both parties deposed experts after the July 23, 1993 discovery cut-off date specified in the scheduling order, and after mediation was held on September 20, 1993. Defendant deposed plaintiff's experts on November 30, 1993, and December 7, 1993.

Plaintiff first listed Dr. Spitz as a possible expert witness in the final pre-trial order, dated February 17, 1994. At that point, trial was set for June 27, 1994. The final pre-trial order stated that "no autopsy was performed." Dr. Sptiz performed the autopsy at 7:00 p.m. on February 17, 1994. Plaintiff informed defense counsel by letter dated March 4, 1994 that decedent's body had been exhumed and that the autopsy revealed extensive coronary artery disease and no evidence of pulmonary

embolism. The letter further stated that Dr. Spitz would be made available for deposition, should defendants so request. Plaintiff's counsel sent defense counsel Dr. Spitz' report on the same date he received it, March 8, 1994.

On March 9, 1994, defendants filed an emergency motion to strike Dr. Spitz as plaintiff's expert and to preclude any reference at trial to the autopsy. Defendants argued that they received no notice that decedent's body would be exhumed, and were not invited to attend or participate in the autopsy. Defendants argued that plaintiff's exhumation of the body and performance of the autopsy violated the discovery cut-off date and final pre-trial order, and that they would be prejudiced should Dr. Spitz be permitted to testify.

Plaintiff's response to defendants' emergency motion argued that there was no requirement that defendants be given notice of the exhumation, that no order precluded exhumation or the performance of an autopsy, and that defendants were immediately provided with the autopsy report and the opportunity to conduct a discovery deposition of Dr. Spitz.

At the April 1, 1994 hearing, plaintiff's counsel argued that it became obvious from defendant's mediation summary and during plaintiff's expert's deposition, conducted in December 1993, after discovery closed, that defendants were going to challenge the conclusion that plaintiff's decedent died a cardiac death as stated in the death certificate, and would argue that a pulmonary embolism caused decedent's death. Therefore, plaintiff argued, the body was exhumed to determine the cause of death. Plaintiff's counsel also argued that Dr. Levinson's mediation summary stated that "it is important to note that there was no autopsy . . . therefore, there is no way to prove that the patient died from any cardiac problems," and that defendants would call an internist to testify that the most likely cause of death was a pulmonary embolism. Plaintiff's counsel further argued that defendants were provided with Dr. Spitz' report the same day plaintiff's counsel received it, and that defendants would not be prejudiced because they were given notice of the autopsy nearly four months before trial.

The trial court stated that

> nothing here [] indicates to me that the autopsy could not have been performed when discovery was open. It could have been done by leave of the Court.
>
> There was ample notice to you, even before mediation was conducted that the cause of death was part of the proofs in this case, part of the contested facts. And, [sic] do this after the final pretrial is done and the trial date is set – I think it's late for discovery.

B

Discovery sanctions are reviewed for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). It is within the trial court's authority to bar an expert witness from testifying as a sanction for failure to timely file a witness list. *Id.*

In determining whether such a sanction is appropriate, the court should consider: 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's engaging in deliberate delay; 6) the degree of compliance by the plaintiff with other provisions of the court's order; 7) an attempt to timely cure the defect, and 8) whether a lesser sanction would better serve the interests of justice. *Id.* at 32-33.

We are unable to conclude that the trial court abused its discretion in refusing to allow Dr. Spitz' testimony regarding the autopsy. Plaintiff was on notice that the cause of death was contested no later than September. However, the autopsy was not performed until February. Further, while plaintiff had contemplated an autopsy, and had arranged for one to be performed, plaintiff nevertheless failed to reveal this in the final pretrial order. While the statement "[n]o autopsy was performed" found in plaintiff's section of the final pretrial order was not inaccurate (the autopsy was not performed until that evening), the failure to disclose that an autopsy was about to be performed could fairly be considered by the court in determining whether plaintiffs' delay was reasonable, whether the delay was willful, whether the attempt to cure was timely, and whether plaintiff had been diligent. Additionally, because of the way plaintiff proceeded, any effort to provide defendant with an opportunity to meet Spitz' evidence would have been time consuming, involving another exhumation and autopsy, possibly resulting in delay, and, at a late date, would have introduced new issues concerning the manner in which the autopsy was performed, the condition of the body, and whether defendants' autopsy, if performed, would be entitled to the same weight as plaintiff's. Under the circumstances, we are unable to conclude that the trial court abused its discretion.

III

Plaintiff next argues that the trial court erred by instructing the jury that Dr. Levinson should be held to the standard of care of a cardiologist rather than an internist/cardiologist, and by striking all references in the video deposition of Dr. Wohlgelernter regarding the standard of care applicable to an internist. We disagree.

The determination whether an instruction is accurate and applicable is within the sound discretion of the trial court. *Williams v Coleman*, 194 Mich App 606, 623; 488 NW2d 464 (1992). It is error to give a jury instruction on an issue which is not sustained by the evidence. *Murdock v Higgins*, 208 Mich App 210, 218; 527 NW2d 1 (1994) *aff'd* 454 Mich 46 (1997). Although Dr. Levinson was not a board-certified cardiologist, he testified that he completed two fellowships in cardiology, had the education and training required of a cardiologist, and is considered a board-eligible cardiologist. Dr. Levinson testified that approximately fifty percent of his office practice and eighty percent of his hospital practice was in cardiology. The fact that he was plaintiff's decedent's general physician does not mean that he did not function as a cardiologist with respect to his cardiac problems.

Moreover, plaintiff has not defined the standard of care applicable to an internist/cardiologist, nor has she shown that the standard of care applicable to an internist/cardiologist is different from the standard of care applicable to a cardiologist. Lastly, she has failed to explain what Dr. Wohlgelernter's stricken testimony would have added to her case. Plaintiff's claim of error is unsupported.

IV

Plaintiff's third argument is that the trial court abused its discretion in barring the testimony of Dr. Kaufman concerning the standard of care. Assuming that the court erred under the statute, MCL 600.2169(1); MSA 27A.2169(1), or MRE 702, *McDougall v Eluik*, 218 Mich App 501; 554 NW2d 56 (1996), we conclude the error was harmless. Plaintiff has not established that Dr. Kaufman would have given testimony different from that provided by Dr. Wohlgelernter. Further, we reject as overly speculative the argument that Dr. Wohlgelernter's testimony was tainted by defense counsel's statements in opening. We also note that counsel made a similar remark regarding Dr. Kaufman.

V

In docket nos. 187654 and 188237, plaintiff argues that the court's award of costs and attorney fees to defendants pursuant to MCR 2.403(O) was erroneous.

A

Plaintiff first argues that certain costs were improperly awarded by the trial court. We agree.

The power to tax costs is wholly statutory and costs are not recoverable where there is no statutory authority. *Herrera v Levine*, 176 Mich App 350, 357; 439 NW2d 378 (1989). An award of costs does not include all expenses. *Beach v State Farm Mutual Automobile Insurance Co*, 216 Mich App 612, 621-622; 550 NW2d 580 (1996). Taxation of costs and allowable fees is governed by MCL 600.2401 *et seq.*; MSA 27A.2401 *et seq.* and MCL 600.2501 *et seq.*; MSA 27A.2501 *et seq*.

The fees paid for the deposition of Dr. Wohlgelernter were properly taxed as costs because the deposition was filed with the clerk's office and read into evidence at trial. MCL 600.2549; MSA 27A.2549. However, the fees paid for the depositions of Dr. Petz, Dr. Shea, Dr. Kaufman, and Dr. Sirils were not recoverable as costs.

Plaintiff also argues that certain motion fees were improperly taxed as costs. However, MCL 600.2529(1)(e) and (2); MSA 27A.2529(1)(e) and (2) allow motion fees to be taxed as costs.

Plaintiff further asserts that the trial court improperly awarded several items of costs, including costs for postage, facsimile, and Lexis/Westlaw charges, airfare and hotel charges, expenses incurred to attend unspecified meetings, and expenses for an anatomical chart and medical book. Defendants have not offered support for the award of these costs, and argue only that plaintiff has failed to provide this Court with a calculation showing which costs are taxable and which are not. We conclude that plaintiff has sufficiently established that defendants were wrongfully awarded costs for a number of items.

B

Plaintiff also argues that the trial court abused its discretion by awarding excessive attorney fees.

Although there is no precise formula to be taken into account for computing the reasonableness of attorney fees, the factors to be taken into consideration include the following: 1) the professional standard and experience of the attorney, 2) the skill, time, and labor involved, 3) the amount in question and the results achieved, 4) the difficulty of the case, 5) the expenses incurred, 6) the nature and length of the professional relationship with the client. *JC Building Corporation v Parkhurst Homes, Inc*, 217 Mich App 421; 552 NW2d 466 (1996); *Wood V DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). In the instant case, the court awarded the fees summarily, without adequate explanation. We are therefore unable to determine whether the court abused its discretion. We remand for a hearing on the proper fees to be awarded. *JC Building Corp, supra*.

C

Finally, plaintiff argues that awards of costs and attorney fees under MCR 2.403 is inequitable and unconstitutional. We disagree.

Plaintiff first argues that an award of costs and attorney fees under MCR 2403 is inequitable because plaintiff offered to settle before trial. However, plaintiff could have avoided the situation by accepting mediation or making an offer of judgment.

Plaintiff next argues that an award under MCR 2.403 is unconstitutional because it chills plaintiff's fundamental right to trial by jury. There is no Michigan caselaw directly addressing the constitutionality of mediation sanctions in relation to the right to trial by jury. However, in upholding the court rule as within the Supreme Court's rulemaking power, this Court noted that, "[i]f any party rejects the award, the party receives a trial on the merits. The right to trial is not foreclosed by potentially heavy mediation costs." *Gainnetti Brothers Construction Company, Inc, v City of Pontiac*, 152 Mich App 648, 657-658; 394 NW2d 59 (1986). Federal courts have also held that mediation rules do not violate the right to trial by jury, even when they provide for sanctions in the form of costs and attorney fees. *Rhea v Massey-Ferguson, Inc*, 767 F2d 266, 268 (CA 6, 1985); *Lenaghan v Pepsico, Inc*, 961 F2d 1250, 1253-1254 (CA 6, 1992).

We similarly find no merit in plaintiff's argument that MCR 2.403(O) violates equal protection. MCR 2.403(O) is rationally related to the legitimate governmental purpose of expediting litigation and places both plaintiffs and defendants at risk when rejecting a mediation evaluation. *Haberkorn v Chrysler Corporation*, 210 Mich App 354, 381; 533 NW2d 373 (1995).

Affirmed in part and remanded for a hearing on the reasonableness and appropriateness of the costs and fees awarded pursuant to MCR 2.403(O). We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Alton T. Davis