STATE OF MICHIGAN

COURT OF APPEALS

SARAH L. BROOKS and ARKLES BROOKS,

Plaintiffs-Appellees,

v

JESSICA SCIBERRAS,

Defendant-Appellant.

UNPUBLISHED
July 28, 2000

Nos. 207743;212273
Wayne Circuit Court
LC No. 96-621541-NI

SARAH L. BROOKS and ARKLES BROOKS,

Plaintiffs-Appellants,

v

JESSICA SCIBERRAS,

Defendant-Appellee,

and

KATHERINE GARBARINO,

Defendant.

No. 211227
Wayne Circuit Court
LC No. 96-621541-NI

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals by leave granted in Docket Nos. 207743 and 212273, challenging an order denying defendant's second motion for summary disposition and an order partially denying defendant's motion for costs and sanctions. Plaintiffs appeal by right in Docket No.

211227, from the order granting defendant's third motion for summary disposition and dismissing the action in its entirety. We affirm in part, reverse in part, and remand.

In November 1995, a vehicle operated by plaintiff Sarah Brooks ("Sarah") was struck by a vehicle operated by defendant. In March 1996, Sarah and her husband, Arkles Brooks (hereafter jointly referred to as "plaintiffs"), filed this negligence action, seeking to recover damages from defendant on the ground Sarah sustained injuries that met the threshold for a serious impairment of body function under the no-fault act, MCL 500.3135; MSA 24.13135. The complaint alleged Sarah's injuries consisted of an "aggravation and exacerbation of her prior condition of multiple sclerosis, and other injuries." Defendant subsequently admitted negligence, but not liability, causation, or damages in excess of the no-fault threshold. After three motions for summary disposition under MCR 2.116(C)(10), each of which alleged that plaintiffs could prove that the accident caused an exacerbation of Sarah's multiple sclerosis, defendant was granted summary disposition and the action was dismissed in its entirety.

DOCKET NO. 211227

In their appeal as of right, plaintiffs first challenge the June 19, 1997, order granting defendant's motion for sanctions pursuant to MCR 2.114 and MCR 2.302(G), which thereby precluded plaintiffs from presenting the testimony of Dr. Owen Perlman at trial. We review the trial court's determination with regard to whether plaintiffs' attorney violated the signature requirements of these court rules when signing interrogatories for clear error. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72; 592 NW2d 112 (1999). Having reviewed the evidence presented to the trial court, we conclude plaintiffs have not demonstrated clear error. We could decline to address plaintiffs' claim that the trial court rendered its findings without affording them due process because this issue was not presented to the trial court. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Although there are circumstances where this Court reviews unpreserved constitutional issues, *Schellenberg v Rochester Lodge No 2225*, 228 Mich App 20, 28; 577 NW2d 163 (1998), plaintiffs here have not established plain error. Cf. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). To the contrary, the record reveals plaintiffs were afforded a hearing which allowed them an opportunity to respond to evidence. *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). Considering the absence of any indication in the record that plaintiffs made an offer of proof, or the trial court refused to allow any offer of proof, we reject their claim that they were deprived of an opportunity to present evidence.

We also find plaintiffs have failed to establish any basis for disturbing the sanction ordered by the trial court. The determination of an appropriate sanction was within the trial court's discretion. *Jackson Co Hog Producers*, *supra* at 87; *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 727; 591 NW2d 676 (1998). Although we agree that the factors set forth in *Dean v Tucker*, 182 Mich App 27, 33; 451 NW2d 571 (1990), are appropriate considerations in determining a sanction, there is no per se rule governing the trial court's exercise of discretion. We must determine whether the record made below reflects an abuse of discretion. Cf. *North v Dep't of Mental Health*, 427 Mich 659, 661 397 NW2d 793 (1986). Given the circumstances presented to the trial court at the time it determined an appropriate sanction, and the fact that the sanction ordered was tailored to the particular rule violation on which the request was based, we do not find an abuse of discretion.

Plaintiffs next challenge the trial court's ruling concerning whether another proposed witness, Denyce Kerner, Ph.D., could be added to their witness list, but concede no court order was entered on this issue. "A court speaks through it orders, and the jurisdiction of this Court is confined to judgments and orders." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989). Hence, we decline to address this claim.

Plaintiffs next contend the trial court erred in granting defendant's third motion for summary disposition because they had competent evidence raising a material issue of fact regarding whether Sarah's multiple sclerosis was aggravated by the accident. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 337. The initial burden of factually supporting the motion rests with the moving party. The burden then shifts to the opposing party to establish a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is properly granted if the opposing party does not present evidentiary proofs creating a genuine issue of material fact for trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 456; 597 NW2d 28 (1999). A genuine issue of material fact must be established by admissible evidence. *SSC Associates Ltd Partnership v General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Upon de novo review, we uphold the trial court's grant of summary disposition because plaintiffs failed to meet their burden, as the opposing party, to present evidentiary proofs creating a genuine issue of material fact for trial on the issue of causation in fact. For circumstantial evidence to permit a reasonable inference of causation in fact, a "plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 162-165; 516 NW2d 475 (1994) See also *Badalamenti v William Beaumont Hosp*, 237 Mich App 278 ; 602 NW2d 854. Causation in fact is not proven if the matter is one of pure speculation or conjunction, or probabilities are, at best, evenly balanced. *Skinner, supra* at 165. The "before and after" theory of causation presented by plaintiffs did not establish a genuine issue of fact on whether Sarah's multiple sclerosis, which Dr. Eilender's deposition reflected was already in at least a "relapsing progressive" stage before the accident, was exacerbated by the accident. We are unpersuaded that the rationale in *Schust v Wright Aeronautical Corp*, 7 NJ Super 54; 71 A2d 894 (1950), is applicable to this case. Because the common knowledge and experience of ordinary laypersons would not equip a trier of fact in deciding if the trauma suffered by Sarah exacerbated her multiple sclerosis, admissible expert testimony was necessary for plaintiffs to show a genuine issue of material fact for trial on whether it was more likely than not that trauma was a cause in fact of the exacerbated multiple sclerosis. See, generally, *Law Offices of Lawrence J Stockler, PC, supra* at 48-49. See also *Locke v Pachtman*, 446 Mich 216, 228-229; 521 NW2d 786 (1994). Because lay testimony alone did not establish a genuine issue for trial and Dr. Eilender's deposition did not provide the necessary factual support for causation in fact, we uphold the trial court's grant of defendant's third motion for summary disposition.

DOCKET NO. 207743

Because the trial court did not err in granting defendant's third motion for summary disposition, we dismiss defendant's appeal in Docket No. 207443 concerning the second motion for summary disposition as moot. See, generally, *Contesti v Attorney General*, 164 Mich App 271, 278; 416 NW2d 410 (1987), see also *Tauriainen v Secretary of State*, 69 Mich App 318, 321; 244 NW2d 462 (1976).

DOCKET NO. 212273

In Docket No. 212273, defendant first contends the trial court erred in denying her request for sanctions under MCR 2.114, based on an alleged violation of the signature requirement by plaintiffs' attorney when signing answers to interrogatories and responses to defendant's second and third motion for summary disposition. Defendant argues plaintiffs' attorney failed to comply with the "reasonable inquiry" requirement with regard to whether Dr. Eilender would support their causation theory. We agree.

"The determination whether an attorney or party has violated the 'reasonable inquiry' requirement of MCR 2.114(D)(2) depends largely on the facts and circumstances of the claim." *In re Stafford*, 200 Mich App 41, 42; 503 NW2d 678 (1993). Here, the trial court focused on whether the action itself was frivolous, not on the particular matter raised by defendant concerning Dr. Eilender, in finding that the criteria in MCR 2.114 were not met. The record is devoid of any evidence of a reasonable inquiry made by plaintiffs' attorney to determine whether Dr. Eilender could provide expert testimony supportive of their position. The only inquiries evident from the record were made by defendant, who demonstrated that Dr. Eilender was not able to provide expert testimony in support of plaintiffs' causation theory. The response to the second motion for summary disposition is most telling of the lack of reasonable inquiry, inasmuch as the argument made was based on speculation that Dr. Eilender might not "stick" by his affidavit if subjected to questioning and "obviously crossed over to the dark side." No evidence was produced with regard to any inquiries made of Dr. Eilender regarding his expertise on causation to support the arguments. Giving due regard to the fact defendant was not disputing that plaintiff's multiple sclerosis worsened after the accident, but rather the cause of the change, we conclude it was clear error for the trial court not to find a violation of the reasonable inquiry requirement of MCR 2.114(D), relative to the narrow issue whether Dr. Eilender could provide expert testimony supportive of plaintiffs' causation theory. *Jackson Co Hog Producers, Inc, supra* at 91. Had a reasonable inquiry been made, it could have prevented the time, effort, and expense spent by defendant and the trial court concerning the motions for summary disposition with regard to causation, leaving plaintiffs to pursue their appellate argument concerning Dr. Perlman. Without supportive expert testimony, plaintiffs' claim based on the exacerbation of multiple sclerosis was not well-founded in fact. Accordingly, we vacate the trial court's order denying a sanction and remand for the determination of an appropriate sanction. We decline to order the attorney fees sought by defendant because the determination of an appropriate sanction rests within the trial court's discretion. *FMB-First Michigan Bank*, *supra* at 727.

Finally, we have considered defendant's claim that the trial court erred in refusing to award a meeting fee of $250 for Dr. Eilender as costs pursuant to MCR 2.625(A) and MCL 600.2412b; MSA 27A.2421(2). Having considered the specific argument regarding the meeting presented by defendant

to the trial court in her motion for costs, we do not find the trial court abused its discretion in denying this item. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996). Defendant did not demonstrate the necessity of the meeting. Hence, we uphold the trial court's refusal to award the cost of this meeting.

We affirm in Docket No. 211227, dismiss the appeal in Docket No. 207743 as moot, and partially reverse in Docket No. 212273 and remand for a determination of an appropriate sanction. Defendant may tax costs under MCR 7.219(A) in Docket No. 211227. No costs in Docket Nos. 207743 and 212273. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard Allen Griffin