STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH K. SANDERS, Individually and as Personal Representative of the Estate of ALISON C. SANDERS, deceased, and as Next Friend of MATTHEW SANDERS and DAVID L. SANDERS, Minors, and ROBERT C. SANDERS, Individually and as Next Friend of LINDSAY L. SANDERS, a Minor,

Plaintiffs-Appellants,

v

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
June 28, 2002

Nos. 228305, 229907, 229989
Wayne Circuit Court
LC No. 96-616038-NP

ELIZABETH K. SANDERS, Individually and as Personal Representative of the Estate of ALISON C. SANDERS, deceased, and as Next Friend of MATTHEW SANDERS and DAVID L. SANDERS, Minors, and ROBERT C. SANDERS, Individually and as Next Friend of LINDSAY L. SANDERS, a Minor,

Plaintiffs-Appellees,

v

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

No. 231345
Wayne Circuit Court
LC No. 96-616038-NP

Before: Whitbeck, C.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In Docket No. 228305, plaintiffs appeal as of right a judgment of no cause of action in this product liability action arising from the death of seven-year-old Alison Sanders from injuries

sustained in an automobile accident. In Docket No. 229907, plaintiffs appeal as of right the order awarding defendant attorney fees and costs in the amount of $19,295.00 with regard to an interlocutory appeal. In Docket No. 229989, plaintiffs appeal as of right the order awarding defendant sanctions in the amount of $12,342.60 for plaintiff Robert C. Sanders' violation of a protective order regarding discovery. In Docket No. 231345, defendant appeals as of right the order granting in part defendant's motion for costs and fees.

On October 15, 1995, Alison Sanders was a right front-seat passenger in her father's 1995 Dodge Caravan. Her father, Robert Sanders, ran a red light and broadsided another van. Alison was wearing a seat belt, but had placed the shoulder harness of the seat belt behind her back. Both the driver and passenger air bags deployed as a result of the crash. Alison suffered fatal air bag related injuries.

Plaintiffs brought this product liability against defendant DaimlerChrysler Corporation, alleging that the passenger airbag system in the 1994-95 Dodge Caravan[1] was defective in design and that defendant failed to adequately warn plaintiffs of the potential risks posed by the airbag. In their complaint, plaintiffs alleged that defendant was negligent in the design, testing, and engineering of the 1994-95 Dodge Caravan and its air bag components and that defendant owed a duty of due care to plaintiffs in the design, testing, manufacture, assembly, marketing and sale of the vehicle and all components and sub-assemblies of the vehicle, including the airbag components. At trial, plaintiffs also argued that alternative designs should have been used in the 1994-95 Dodge Caravan, including no air bag, higher deployment thresholds, dual deployment thresholds, dual stage inflation, different placement of sensors, different deployment paths, and depowering the airbag.

Following a lengthy jury trial during which voluminous exhibits were introduced and admitted and several expert witnesses testified, the jury returned a judgment of no cause of action.

Docket No. 228305

Plaintiffs argue that the trial court abused its discretion by refusing to admit proposed exhibits 164 and 347 into evidence. Proposed exhibit 164 was entitled, "Air Bag Technology in Light Passenger Vehicles." Proposed exhibit 347 was entitled, "Preliminary Evaluation on Actions to Reduce the Adverse Effects of Airbags, December 1996." Plaintiffs contend that

> these tests were central to Plaintiffs' defect claim because they quantified in a meaningful way how the system that killed Alison Sanders posed an unreasonable risk of harm when compared with two alternative designs: the Chrysler system with 30 percent less deployment force and a dual level system. The only way that Plaintiffs could scientifically quantify the benefits of the two alternative designs was to compare the injury measurements on the six-year-old dummy in the alternative safer systems.

[1] The 1995 Dodge Caravan is identical in all respects to the 1994 Dodge Caravan, which was the first Chrysler minivan to have a passenger-side airbag. Airbags were not mandated in light trucks, which a minivan is classified as, until 1999.

Plaintiffs have not cited any case law, statutes, court rules, rules of evidence, or other authority in support of their argument. The appellant may not give issues cursory treatment with little or no citation of supporting authority, *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), after remand 211 Mich App 214; 535 NW2d 568 (1995); *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000). Because plaintiffs have failed to properly present or perfect their appeal, we need not address this issue.[2]

Docket No. 229907

Plaintiffs argue that the trial court abused its discretion by taxing costs and fees incurred by defendant with regard to an interlocutory appeal against plaintiffs rather than against their former attorney whose discovery request resulted in the interlocutory appeal. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 621; 550 NW2d 580 (1996). We disagree. Plaintiffs filed a motion to dismiss the interlocutory appeal on the ground that the discovery order should not have been granted. This Court originally denied the motion to dismiss, but on rehearing entered an order stating that:

> The Court orders that plaintiffs' motion to remand to the trial court is GRANTED. On remand, the trial court shall set aside the discovery order giving rise to this appeal and enter an order precluding plaintiffs from discovering the referenced materials in this litigation.
>
> On remand the trial court shall impose costs arising from this appeal against plaintiffs and in favor of defendant. Such costs may include reasonable attorney fees expended in pursuing these appellate proceedings.
>
> This appeal is DISMISSED.

Apparently this Court relied on MCR 2.302 in ordering the trial court to impose costs arising from this appeal against plaintiff. On remand to the trial court, defendant filed a motion pursuant to MCR 2.302 for costs and attorney fees arising from its interlocutory appeal. Defendant sought costs of $545.00 and attorney fees of approximately $64,000. Plaintiffs argued that fees and costs should be assessed on their former attorney because he was the party responsible for securing the discovery order giving rise to the appeal. On September 8, 2000, the trial court entered an order awarding defendant $545 in taxable costs and $18,750 in attorney

[2] Nonetheless, we find no abuse of discretion in the trial court's refusal to admit the results of tests that were performed using technology that was not available to defendant at the time the airbag was designed and integrated into the 1994-95 Dodge Caravan. Further, even assuming that the trial court erred by refusing to admit the evidence, any error was harmless because abundant evidence and expert testimony was presented with regard to the effects of depowering an airbag. This is the same purpose for which plaintiffs sought admission of the proposed exhibits.

fees from plaintiffs.

Plaintiffs argue that the trial court abused its discretion by taxing costs and attorney fees on the plaintiffs rather than on Mueller. However, this Court's order provides that the trial court "*shall* impose costs arising from this appeal *against plaintiffs* and in favor of defendant." Plaintiffs did not seek rehearing of that order nor did they seek Supreme Court review of the decision. Thus, plaintiffs waived review of that order and the trial court was mandated by this Court's order to impose costs against plaintiffs.

Docket No. 229989

Plaintiffs contend that the trial court abused its discretion by imposing sanctions under MCR 2.313(B) for Robert C. Sanders' violation of a protective discovery order because Sanders did not violate the order. We disagree. Sanders conceded that the Staffeld memorandum referenced in Sanders' report to the National Highway Traffic Safety Administration was marked "confidential." The fact that Sanders included a copy of the same memorandum that was not marked as confidential does not change the confidential nature of the document nor does it change the fact that Sanders knew the document was intended to be confidential.

Plaintiffs also contend that, even if Sanders violated the protective discovery order, an award of sanctions was not warranted because any violation was inadvertent. However, MCR 2.313(B) authorized a trial court to "order such sanctions as are just" if a party fails to obey a discovery order. There is no requirement in the rule that the court find that the violation of the discovery order was intentional or deliberate before awarding sanctions.

Docket No. 231345

Defendant argues that the trial court erred by awarding defendant as an element of costs expert witness fees in the amount of $12,150. We review for abuse of discretion the trial court's determination to award expert witness fees. *Detroit v Lufran Co*, 159 Mich App 62, 66; 406 NW2d 235 (1987).

Defendant originally sought reimbursement of $573,849 for expert witness fees, but reduced its request to $277,366.16 and attached a verified bill of costs, including the invoices of three expert witnesses – Drs. Dorris, Benedict, and Guenther. Drs. Benedict and Dorris testified at trial, while Dr. Guenther, an accident reconstructionist, did not.

Plaintiffs opposed the motion for fees, arguing that the hourly rates charged by Drs. Dorris and Benedict were not reasonable and that the amount of time for which fees were requested was excessive and included items that were not compensable. Plaintiffs also opposed the award of any fees for Dr. Guenther's work because Dr. Guenther did not testify at trial and was never qualified by the trial court as an expert. Plaintiffs suggested that defendant was entitled to costs of $12,400 for Dr. Dorris and $17,750 for Dr. Benedict.

On November 13, 2000, the trial court issued an order granting in part defendant's motion for costs and awarding defendant taxable costs of $192.60 and $12,150 in expert witness fees. The trial court found the witnesses' hourly rates of $275 and $500, respectively, to be unreasonable and calculated recoverable expert witness fees using lower hourly rates. The court

awarded fees of $900 for Dr. Dorris and $11,250 for Dr. Benedict. The court also limited recoverable fees to those fees labeled on the invoices as "court time," "trial testimony," "preparation for trial," or "trial preparation." The court also refused to award any fees requested for Dr. Guenther's work because he did not testify at trial.

Defendant first argues that the trial court abused its discretion by restricting recovery to only those items expressly labeled on the Drs. Dorris' and Benedict's invoices as "trial preparation," "trial testimony," or "trial appearance." Defendants contend that the trial court's definition of "recoverable fees" was unduly restrictive and narrower than provided by Michigan law.

The power to tax costs is wholly statutory; costs are not recoverable where there is no statutory authority for awarding them. *Brown v Dep't of State Highways*, 126 Mich App 392, 396; 337 NW2d 76 (1983). With regard to expert witness fees, MCL 600.2164(1) provides in pertinent part:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as part of the taxable costs in the case.

Recoverable expert witness fees include those for time spent both in trial and preparation for trial, *Gunderson v Village of Bingham Farms*, 1 Mich App 647; 137 NW2d 763 (1965), because absent such preparation the witness' testimony would "provide but little light for the trier or triers of fact."

Here, the trial court stated that it would "award costs for each expert for time billed as trial preparation time and actual trial time." In making a determination with regard to what constituted trial preparation time, the court simply looked to the language on each expert's invoice to determine whether the expert specifically labeled a fee as trial preparation or testimony. If an invoice was not labeled specifically as trial preparation or testimony, the court declined to award fees. The trial court also determined that the fees charged by defendant's experts were unreasonable without providing a basis for this determination or for the rate selected by the trial court as a reasonable rate. In addition, the trial court determined that defendant was not entitled to expert witness fees for Dr. Guenther because Dr. Guenther did not testify at trial.

Because the record does not indicate that the trial court thoroughly considered and weighed the reasonableness of defendant's expert witness fees, we conclude that its ultimate, reduced award of $12,150 for expert witness fees constituted an abuse of discretion. In addition, the trial court made a mistake of law in refusing to award expert witness fees for a witness who did not testify at trial. MCL 600.2164(1); *Miller Bros v Dep't of Nat'l Resources*, 203 Mich App 674; 513 NW2d 217 (1994); *Hererra v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989). Therefore, we vacate the order granting in part defendant's motion for costs and fees and remand for the trial court to make detailed findings with regard to expert witness fees.

Docket numbers 228305, 229907, and 229989 are affirmed. In docket number 231345,

we vacate the order granting in part defendant's motion for costs and fees and remand for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey