

STATE OF MICHIGAN
COURT OF APPEALS

MAHENDRA DALMIA,

Plaintiff-Appellant,

v

CARL PALFFY, M.D., EMERGENCY
PHYSICIANS ASSOCIATES, P.C., and ST.
JOSEPH MERCY HOSPITAL, PONTIAC, a/k/a
TRINITY HEALTH-MICHIGAN,

Defendants-Appellees.

UNPUBLISHED

February 6, 2007

No. 264088

Oakland Circuit Court

LC No. 03-052350-NH

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

JANSEN, J. (*concurring*).

I concur with the majority's conclusion that the trial court abused its discretion in summarily striking Dr. Mehlman's testimony. I write separately to emphasize my conclusion that Dr. Mehlman did nothing wrong.

The deposition subpoena required that Dr. Mehlman bring with him to the deposition "[a] copy of all medical literature reviewed by deponent *in connection with the present matter*," and "[a]ny and all medical records or other documents reviewed *in connection with this matter*." (Emphasis added). However, Dr. Mehlman specifically testified during his deposition that he had not reviewed any medical literature or done any independent research in connection with this case. Instead, Dr. Mehlman simply based his deposition testimony on his years of experience in emergency medicine and the treatment of strokes. In short, because Dr. Mehlman reviewed no medical literature and did no independent research "in connection with this matter," he was not required by the plain and unambiguous language of the subpoena to bring any materials with him to the deposition. No discovery violation in fact occurred in this case.

Finally, I recognize that the trial court must serve as a "gatekeeper" to ensure the relevance and reliability of expert testimony. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 684 NW2d 896 (2004). However, "[w]hile the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Id.* at 780, quoting *Kumho Tire Co Ltd v Carmichael*, 526 US 137, 158-159; 119 S Ct 1167; 143 L Ed 2d 238 (1999) (Scalia, J., concurring). If the trial court had serious doubts regarding the reliability and admissibility of Dr. Mehlman's testimony, an evidentiary hearing should have been convened pursuant to MRE 702 and *Daubert v Merrill*

Dow Pharmaceuticals, Inc, 590 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). Rather than wholesale striking Dr. Mehlman's testimony because of a purported, nonexistent discovery violation, the trial court should have followed established and proper procedures for assessing the reliability of Dr. Mehlman's testimony.

/s/ Kathleen Jansen