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UNPUBLISHED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.

WHITE, J. (*concurring in part and dissenting in part*).

I concur with the portion of the majority's opinion in Docket No. 212273 upholding the circuit court's refusal to award defendant a meeting fee of $250.00. In all other aspects, I respectfully dissent.

On the afternoon of Friday, November 3, 1995, Sarah Brooks[1] (hereafter "plaintiff") was stopped at an intersection at a red light when her vehicle was struck in the front and on the left side by a vehicle driven by defendant Jessica Sciberras, age sixteen, who had run the red light and crossed the median, hitting plaintiff's vehicle several times, and totaling it.

Plaintiff's complaint[2] alleged that as a result of the collision she suffered "aggravation and exacerbation of her prior condition of multiple sclerosis . . . and other injuries and damages which have caused a serious impairment of body function and are of a permanent nature." The complaint alleged that as a result of said injuries, plaintiff's ability "to earn a living and carry on her ordinary functions of life have been impaired and will be impaired in the future and her capacity to earn has also been impaired." Plaintiff's husband, Arkles Brooks, alleged loss of consortium.

I - Docket No. 211227

Plaintiff's argument is that the circuit court erred in striking Dr. Perlman as a witness under the circumstances that defendant was informed on December 10, 1996, before discovery closed, that Dr. Perlman was a treating physician; was provided with Dr. Perlman's full address and specialization, as well as an affidavit detailing his opinions, in January 1997; was provided with releases in February 1997 allowing access to all of Dr. Perlman's records, which defendant in fact obtained; was allowed to depose Dr. Perlman after discovery closed; and where there was no evidence before the court that plaintiff's counsel had intentionally failed to disclose information and there was no pending trial date. Plaintiff argues that the circuit court struck Dr. Perlman apparently due to its conclusion, based solely on inference, that plaintiff's counsel had received a copy of Dr. Perlman's report regarding his initial examination of plaintiff on October 24, 1996, but had not fully disclosed Dr. Perlman's identity before discovery closed on December 12, 1996.

Defendant argues that Dr. Perlman was properly stricken because plaintiff's counsel "concealed the identity of plaintiff's only causation expert until discovery was closed, despite the fact that defendant had served expert interrogatories and obtained an order compelling the information." Regarding prejudice, defendant argues:

> [P]laintiff expects this Court to agree that plaintiff's failure to disclose the identity of her only causation expert until discovery had been closed for six weeks and defendant had filed a motion for summary disposition was not prejudicial to defendant. Similarly, plaintiff expects this Court to agree that withholding the identity of this crucial expert until one month prior to mediation, and withholding the report of his October 24, 1996 examination of plaintiff (which defendant would have subpoenaed if she had known the

[1] Plaintiff was first diagnosed with multiple sclerosis in 1987, at age forty-three. She has been employed as a speech and language disorders specialist since 1969, holds a bachelor of science degree in speech therapy, and did post-graduate work in speech pathology.

[2] Plaintiff's first amended complaint contained the exact allegation.

doctor's name) until plaintiff filed her mediation summary was not prejudicial to defendant.

These arguments are not credible and constitute an attempt to sidestep the issue presented in considering the propriety of sanctions granted under MCR 2.114 and MCR 2.303(G) [sic 2.302].

This Court has held that the word "shall" contained in these court rules makes the award of sanctions *mandatory* upon a finding that the paper was signed in violation of the rule. *Mich ex rel Saginaw Cty Pros Atty v Cergnul*, [203 Mich App 69; 512 NW2d 49 (1993). Thus a showing of prejudice is not a prerequisite to the imposition of sanctions under MCR 2.114 and MCR 2.303(G)(4) [sic 2.302].

Moreover, it should go without saying that legal prejudice may be presumed where the conduct of an attorney or party constitutes a violation of these rules, since their mandatory penalties could not otherwise be justified.

A

This Court reviews a circuit court's factual finding that a pleading or other paper was signed in violation of MCR 2.114 for clear error. *Brown v Townsend*, 229 Mich App 496, 500; 582 NW2d 530 (1998). Defendant relied below on MCR 2.302(G) and 2.114. MCR 2.302(G) provides in pertinent part:

> (1) In addition to any other signature required by these rules, every request for discovery and every response or objection to such a request made by a party represented by an attorney shall be signed by at least one attorney of record. . . .
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> * * *
>
> (3) The signature of the attorney or party constitutes a certification that he or she has read the request, response, or objection, *and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is:*
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> * * *
>
> (b) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . .
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> * * *
>
> (4) If a certification is made in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable

expenses incurred because of the violation, including reasonable attorney fees. [Emphasis added.]

Dean & Longhofer, Michigan Court Rules Practice, § 2302.31, p 234, states:

> . . . . Motions relating to discovery are governed by MCR 2.114. However, since discovery requests, responses, and objections generally are of a more limited nature and are directed to a more specific subject matter than are motions generally, the elements that must be certified in these papers are spelled out more completely in MCR 2.302(G)(3). Neither the Advisory Committee Notes, nor the federal or Michigan rules, directly indicate whether the provisions of MCR 2.303(3) and (4) supersede their counterparts in MCR 2.114. A study of the Notes, and the history of the rule, indicates, however, that clarification was the intent.
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> The principal area of divergence between the provisions of MCR 2.302(G) and those of MCR 2.114 is that MCR 2.114(D) indicates that a signature constitutes a certification that the "pleading is well grounded in fact;" MCR 2.302(G)(3), on the other hand, indicates that a signature under that rule constitutes a certification that a request, response, or objection is "consistent with these rules." No suggestion is made that the attorney signing discovery materials certifies that, after reasonable inquiry, the response is "well grounded in fact."
>
> It is clear that MCR 2.302(G)(3) serves to further define, rather than supersede, the provisions of MCR 2.114(D). *The rule recognizes that it would impose an impossible burden on an attorney if the attorney were required to certify the truthfulness of answers to interrogatories and other responses to discovery requests furnished by the attorney's client. Rather, only a reasonable inquiry into this area is required. If the inquiry reveals no reason to believe the material in question is false or incomplete, the attorney may affix his or her signature to it. If, however, reasonable cause exists to believe that a factual basis for the response does not exist, or that it is intentionally deceptive and misleading, the attorney may not certify such a response without violating the provisions of this rule.* [Emphasis added.]

MCR 2.114 provides in pertinent part:

> **(D) Effect of Signature.** The signature of an attorney or party . . . constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Dean & Longhofer, Michigan Court Rules Practice, (1999 Supp) pp 7-8, states:

> MCR 2.114 expressly applies to "all pleadings, motions, affidavits, and other papers" provided for by the MCR, referred to generically as "documents" in the rule. The sole exception is the form of verifying affidavits. MCR 2.302(G) governs the signing of discovery requests and responses. Although, unlike the situation under MCR 2.114, a signature under MCR 2.302(G) does not certify that a discovery response is "well grounded in fact," both rules have been applied to discovery responses signed by attorneys. Thus, in *Jackson County Hog Producers v. Consumers Power Company*, [234 Mich App 72; 592 NW2d 112 (1999)], the Court of Appeals approved sanctions under both MCR 2.114(E) and 2.302(G) against attorneys who signed answers to interrogatories that identified expert witnesses supposedly retained by the plaintiffs, where the experts had not in fact been retained.
>
> In general, however, the rules clearly distinguish between factual responses to discovery requests, and factual statements in other papers. Nevertheless, in *Kirschner v. Process Design Associates, Inc.*, [459 Mich 587; 592 NW2d 707 (1999)], the Michigan Supreme Court stated, without qualification, that MCR 2.114(E) is a basis for sanctions against attorneys for false or misleading answers to interrogatories. The Court did not mention the parallel and more limited provisions of MCR 2.302(G). The Court may have inadvertently created confusion with this statement. As noted in the Advisory Committee Note to Federal Rule of Civil Procedure 26(g), from which MCR 2.302(G) was drawn:
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> > Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand.

> It would constitute a major, and unwarranted, change in the discovery rules if attorneys could be sanctioned for untruthful answers to interrogatories given by their clients. Presumably, the Court in *Kirschner* did not intend such a change.[3]

B

The circuit court in the instant case stated no factual findings on the record at the June 6, 1997 hearing. I glean from the hearing transcript and the sanction imposed that the court believed that plaintiff's counsel knew Dr. Perlman's full name and address and had his report of plaintiff's initial examination before discovery closed, and intentionally withheld that information from defendant.

I conclude that the record does not support the drastic sanction of striking Dr. Perlman. The record indicates that plaintiff saw Dr. Perlman, on her own initiative and not at plaintiff's counsel's behest, for the first time on October 24, 1996, i.e., after she was deposed in August 1996, and after she responded to defendant's first interrogatories. The record supports that plaintiff's counsel could not have listed Dr. Perlman on plaintiff's witness list because he was unaware that plaintiff was treating with Dr. Perlman on the date witness lists were due, October 24, 1996. Plaintiff's counsel maintained throughout the proceedings below that he did not learn that plaintiff had seen Dr. Perlman until December 1996, upon receiving defendant's second interrogatories for the first time,[4] in conjunction with defendant's motion to compel answers, at which time he contacted plaintiffs and was given "scanty" information.

Dr. Perlman's report summarizing his examination of plaintiff on October 24, 1996 indicates that it was "carbon copied" to plaintiff's counsel, and bears a handwritten notation stating "sent 10/29/96," about which there is no evidence before this Court. The report bears a typewritten notation that it was "dictated but not read." Plaintiff's counsel's discovery responses of December 10, 1996 stated that plaintiff was undergoing treatment with "Dr. Pearlman," and that plaintiff would provide defendant with

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[3] Dean & Longhofer, *id.*, 1999 Supplement, §2302.31, pp 6-7, similarly states pertinent to MCR 2.302:

> The Court [in *Kirschner, supra*] did not mention the parallel and more limited provisions of MCR 2.302(G), thus creating a potential for confusion in the application of discovery sanctions. *Since the rules provide more limited certification standards for discovery responses than for pleadings and other papers, and clearly did not intend to permit sanctions against attorneys for their clients' untruthful answers to interrogatories, the Court's failure to reference MCR 2.302(G) must have been inadvertent. It would represent a major change in the rules if attorneys were required to vouch generally for the truth of their clients' answers to discovery requests.* [Emphasis added.]

[4] The record contains a fax of the second interrogatories, sent from defense counsel to plaintiff's counsel, dated December 5, 1996.

supplemental information as soon as it was received. Given that Dr. Perlman signed the affidavit plaintiff submitted below on January 14, 1997, it is safe to conclude that plaintiff's counsel contacted Dr. Perlman some time before that date regarding providing an affidavit, and thus had obtained Dr. Perlman's full name and address by that time. On January 27, 1997, plaintiff filed a supplemental witness list and supplemental responses to defendant's discovery requests, providing Dr. Perlman's full name and address, and the name and address Denyce Kerner, Ph.D., a licensed psychologist, to whom Dr. Perlman had referred plaintiff for a neuropsychological evaluation, which Dr. Kerner conducted over two dates, November 22 and December 12, 1996.

On February 14, 1997, several weeks before the case was mediated on March 3, 1997, defendant received, as part of plaintiff's mediation summary, Dr. Perlman's report summarizing his initial examination of plaintiff on October 24, 1996 .

At oral argument before this Court, defense counsel stated that she knew who Dr. Perlman was when she received his affidavit (the proof of service of which is dated January 28, 1997). She further stated at oral argument that she then subpoenaed Dr. Perlman's records through Records Deposition Service and that upon receiving the records in March, 1997, she learned that Dr. Perlman was a treating physician. The latter argument is contradicted by the record. Plaintiff's response to defendant's motion for summary disposition, served on defendant on January 28, 1997, the same day as Dr. Perlman's affidavit, stated that plaintiff's "treatment is continuing and that recent medical treatment by her physician(s) has resulted in a finding that the aforesaid collision . . . aggravated her underlying condition of multiple sclerosis." Plaintiff's brief stated that Dr. Perlman "is a medical doctor who undertook to treat" plaintiff's condition. Thus, the record establishes that defense counsel had been advised in late January, 1997 that Dr. Perlman was a treating physician.

At the time the case was mediated on March 3, 1997, defendant had had Dr. Perlman's report of his October 24, 1996 examination of plaintiff for several weeks, and had had Dr. Perlman's full name and address, his affidavit, and Dr. Kerner's report since the end of January, 1997. Defense counsel did not depose Dr. Perlman before mediation, and stated at oral argument before this Court that she had not wanted to take Dr. Perlman's deposition because it would be "expensive and time-consuming." Defense counsel argued before this Court that plaintiff argued at mediation that plaintiff's condition had deteriorated and that defendant had no way to controvert this argument. I am unpersuaded by this argument. As of late January 1997, defense counsel could have contacted Dr. Perlman before mediation and attempted to discuss plaintiff's condition with him. See *Domako v Rowe*, 438 Mich 347, 358-362; 475 NW2d 30 (1991); *Davis v Dow Corning*, 209 Mich App 287, 292-293; 530 NW2d 178 (1995).

The circuit court struck Dr. Perlman at a June 6, 1997 hearing, i.e., the day after defense counsel deposed Dr. Perlman, and at a time when defendant had had all of Dr. Perlman's records for several months. Although I agree with the circuit court that some sanction against plaintiff was warranted by this course of events, I conclude that striking Dr. Perlman, plaintiff's treating physician and, in the end, only causation expert, without a hearing or considering alternative sanctions, was inappropriate. Although the circuit court asked a few questions of counsel, it did not hold a hearing, as plaintiff had requested, or consider alternative sanctions and, on this record, I cannot conclude that

plaintiff's counsel was motivated by an improper purpose; the record at the most supports a lack of diligence on the part of plaintiff's counsel. See *Beach v State Farm*, 216 Mich App 612, 618-620; 550 NW2d 580 (1996).

C

The circuit court did not address, and the record, in my estimation, is insufficiently developed to enable this Court to address, defendant's argument that summary disposition was appropriate because Dr. Perlman's opinions were not based on "recognized scientific knowledge," and were thus inadmissible under MRE 702 and MCLA 600.2955; MSA 27A.2955. See *Nelson v American Sterilizer (On Remand)*, 223 Mich App 485, 490-492; 566 NW2d 671 (1997).[5]

Under MRE 702, an expert may be qualified by virtue of his knowledge, skill, experience, training, or education. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403, 406-411; 443 NW2d 340

[5] As plaintiff notes, there are two reported Michigan cases upholding verdicts in favor of plaintiffs who claimed that auto accidents aggravated their pre-existing multiple sclerosis, or caused dormant multiple sclerosis to surface. See *McMillan v Auto Club Ins Assn*, 195 Mich App 463; 491 NW2d 593 (1992), and *Gorelick v Dep't of State Hwys*, 127 Mich App 324, 337-338; 339 NW2d 635 (1983). My research has yielded a number of out of state cases involving claims of exacerbation of pre-existing multiple sclerosis, although not in the auto-negligence area. These cases were decided both ways on the question whether multiple sclerosis symptoms can be aggravated by trauma. See e.g., *Abbott v State Accident Ins Fund*, 45 Or App 657; 609 P2d 396 (1980) (affirming Workers' Compensation Board finding that claimant's heavy workload and stressful employment as a legal secretary exacerbated her MS, rejecting the view that exertion or stress can never be a causative factor, while noting that medical experts disagree as to the relationship between stress and exacerbation of MS); and *Robinson v Chicago Transit Authority*, 69 Ill App3d 1003; 388 NE2d 163, 165-166 (1979) (affirming judgment in plaintiff's favor in this negligence action, concluding that evidence was sufficient to support jury's conclusion that auto accident aggravated plaintiff's dormant MS, despite conflicting medical testimony on issue whether trauma affected her condition). Compare *Wiggins v New York & New Jersey Port Authority*, 276 NJ Super 636; 648 A2d 743 (1994) (reversing workers' compensation award for permanent aggravation of preexisting MS and associated depression on basis that claimant failed to establish causal link between exacerbation of MS and occupational exposure to chemicals and temperature variations, where claimant's expert did not identify any medical literature to support causal link and employer's expert testified that he thoroughly checked medical literature and found no scientific basis for contention that general stress, chemical exposure or temperature variations can exacerbate MS); and *Jerokovitch v Workmen's Compensation Appeal Board (Gateway Coal Co)*, 171 Pa Cmwlth 172; 454 A2d 227 (1983) (affirming referee's decision that claimant, who alleged that high-voltage electrical shock injury accelerated progression of his MS, failed to establish compensable injury, finding no error of law or capricious disregard of competent evidence where referee believed employer's medical expert's testimony that although claimant was totally disabled from MS, there was no relationship between incident and worsening of his condition).

(1989). Limitations regarding an expert witness' qualifications go to the weight, and not admissibility, of the testimony. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 493; 593 NW2d 180 (1999). An expert may base an opinion on hearsay information or on the findings and opinions of other experts. *Forest City Enterprises v Leemon Oil Co*, 228 Mich App 57; 577 NW2d 150 (1998).

MCLA 600.2955; MSA 27A.2955 provides in pertinent part:

> Sec. 2955. (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
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> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.
>
> (2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

I would remand for further proceedings on this issue, to include a hearing pursuant to MCLA 600.2955; MSA 27A.2955.[6]

II - Docket No. 207743

Defendant argues that the circuit court erred in denying her second motion for summary disposition. Because the motion assumed that Dr. Perlman would not be a witness and I conclude that it was error to strike Dr. Perlman, I would not set aside the denial of the motion.

III - Docket No. 212273

I do not agree that the circuit court erred in denying defendant's request for sanctions under MCR 2.114 with regard to whether Dr. Eilender would support plaintiff's causation theory. Plaintiff testified at deposition that Dr. Eilender agreed with her that her symptoms had worsened after the accident. Dr. Eilender testified at deposition, and his records support, that plaintiff's condition worsened after the accident.

I would affirm the circuit court's denial of defendant's second motion for summary disposition,[7] and its partial denial of defendant's motion for costs and sanctions.[8] I would vacate the circuit court's orders precluding Dr. Perlman's testimony and dismissing plaintiffs' case,[9] and remand for a hearing pursuant to MCLA 600.2955; MSA 27A.2955.

/s/ Helene N. White

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[6] Some of the statutory factors may be more relevant than others in the context of evaluating medical opinion regarding causation. It is necessary to explore how such opinions are developed by the medical profession, and how differences in opinion based on clinical observation are regarded within the profession.

[7] Docket No. 207743.

[8] Docket No. 212273.

[9] Docket No. 211227.