

In The Court of Appeals for the State of Michigan

On Appeal from the Third Circuit Court for the County of Wayne

Judge Lita M. Popke

LUZVIMINDA LANURIAS, BROOKS
NEUROLOGICAL PRACTICES, LEVEL
ONE HOME CARE, INC. and TIMELY
TRANSPORTATION, LLC,
Appellants,

) Court of Appeals Case No: 327435
)
) Wayne County Case No.: 12-011562-CZ
)
)
)
)

vs.

PROGRESSIVE INSURANCE COMPANY,
Appellees.

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**WITHDRAWAL OF APPELLANTS' MOTION FOR EXTENSION OF TIME AND
REPLY TO APPELLEE'S RESPONSE TO MOTION FOR EXTENSION OF TIME TO
SECURE FILING OF STENOGRAPHER'S CERTIFICATES**

First, Appellants withdraw their motion for the reason that the same is now moot. The docket in this matter indicates that all three court reporters filed their stenographer's certificates before the February 4, 2016 date in which Appellants' had to secure ordering of the same, per this Court's January 14, 2016 Order. Appellants had not been able to confirm that the

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certificates had been filed prior to the close of business on February 4, 2016 and filed this motion to prevent their appeal from being dismissed.

However, Appellee's response to said motion make it abundantly clear that Appellees are anxious to prevent this Honorable Court from ever hearing this appeal on its merits.

Because Appellee made several accusations in the response that appear to be a thinly veiled motion for reconsideration of its previous motion to dismiss, Appellants will briefly address the more pertinent points raised by Appellees.

A. Appellants Immediately Ordered All Outstanding Transcripts

Using Appellee's motion to dismiss which listed the dates it claims were outstanding, Appellants immediately attempted to order the transcripts as soon as the January 14, 2016 Order was received. The transcripts could not be ordered in writing until:

- 1) the proper person in Court Reporting Services ("CRS") was actually in the office;
- 2) CRS confirmed the names of the court reporters and the dates in which they each presided over the dozens of proceedings going back almost three years;
- 3) each of the four court reporters returned Appellants' counsel's office's calls to confirm that they had in fact transcribed proceedings on said dates¹, and then confirmed the amount owed; and
- 4) the proper person in CRS was again in the office to process the paperwork and accept the written order and payments.

The Court is no doubt aware that such a process takes time, but Appellants' counsel undertook extensive efforts as soon as possible, devoting time and resources to ordering transcripts, including numerous calls and emails to the court reporters for the better part of two weeks. As

¹ As Appellants later discovered, only three different court reporters had transcribed the proceedings in the lower court, but Appellants had to speak with all four individuals to confirm the dates they recorded or were responsible for recording.

soon as Appellants were able to confirm all of the above, the transcripts were ordered in writing and submitted along with checks for the individual court reporters.

B. Appellants Submitted All Exhibits in its Possession Offered into Evidence

Further, it is patently false that Appellants did not file all exhibits offered into evidence. Of all of the charts it devised, Appellee never bothered to identify what exhibits it claims are missing. Appellants submitted all exhibits that its counsel had in its possession to this Honorable Court. The only exhibit that Appellants cited in their brief was the one Appellee filed with this Court. Appellants filed all exhibits that they introduced and repeatedly asked Appellees' counsel to respond regarding their own exhibits. (**Exhibit A**). Rather than having the courtesy to respond, Appellee's counsel filed their exhibits with this Court, which was already their responsibility under MCR 7.210(C).² It is not clear how or why Appellee would expect Appellants to file exhibits that were in possession of Appellee and were retained by it following the trial.

C. Appellants Filed All *De Bene Esse* Transcripts, Including for Appellees' Witnesses

Appellants produced the required *de bene esse* transcripts in accordance with this Court's January 14, 2016 order. The Court ordered Appellants to file "any *de bene esse* depositions" and that is what they produced. There was no separate transcript of these proceedings produced at trial. While the *de bene esse* transcripts are not redacted to exclude objections, the court reporter at trial did not "re-transcribe" the transcripts, per MCR 2.315(F)(4) (emphasis added):

When a video deposition is used in a court proceeding, **the court must indicate on the record what portions of the recording have been played**. The court reporter or recorder need not make a record of the statements in the recording.

² The court rule is likely the actual reason why Appellee finally submitted the exhibits.

However, a review of the trial transcript in this matter reveals that the lower court never indicated on the record what portions of the recording were played because **Appellees' counsel told the court that the record already included the video depositions:**

MS. MAGDICH: And I would move for the admission of Exhibit I, the *de bene esse* deposition of Dr. Narula as presented to the Jury.

THE COURT: You know, with those video *de bene esse* depositions I don't think you have to move for the admission of them since we've incorporated them into the video record. But just, I don't know that there's anything to admit, but you're just talking about the disc itself?

MS. MAGDICH: **That is true, since you have a video courtroom they are already in the record, so it's really not an issue.**

(Trial Tr. May 12, 2014 at 11:15-25) (emphasis added).

The irony of Appellee's position that Appellants did not file the redacted *de bene esse* transcripts is that Appellee's counsel **ignored** Appellants' request in December 2015 to agree to submit the *de bene esse* transcripts because the court reporter had not "re-transcribed" the depositions. (**Exhibit B**). Thus, it is disingenuous for it to argue that Appellants caused Appellee to incur costs when Appellee took no steps to be either courteous or cooperative in resolving any issues whatsoever. Because no response had been received, Appellants' counsel had drafted and was in the process of filing a motion to permit them to file the *de bene esse* transcripts on the same day that counsel received the January 14, 2016 Order. Thus, Appellants did not feel it was necessary to file the motion when this Court had already ruled on the issue.

Moreover, addressing the argument that Dr. Nisar's³ transcript was not certified, the version of Dr. Nisar's transcript that was filed with this Court is what was emailed by the court reporter to Appellants' counsel. It is now apparent that this version was not actually signed by

³ The court reporter misspelled her name "Nasir" in the trial transcripts Appellants has received.

the stenographer. However, Appellee never objected to this same document being read into evidence at the time of trial and never raised any issue regarding the certification of the same until now. Further, Appellee never argues that it actually objects to the contents of what Appellants filed.

D. Stenographers Certificates Were Secured and Filed from the December 2015

Transcript Orders

Further, it is unclear what point Appellee is trying to make regarding the December 2015 transcript orders, but the Court's docketing system clearly shows that Appellants ordered the transcripts, that the two court reporters filed transcript orders with this Court on December 18, 2015, and that one stenographer submitted a stenographer's certificate. If one is missing or has not been received by this Court, Appellants will notify her of the same but she has assured Appellants that she is working on the transcripts for the indicated dates.

E. Conclusion

Appellants withdraw their motion as moot. All stenographers' certificates were apparently filed prior to the expiration of the 21-day time period set forth in this Honorable Court's January 14, 2016 order.

Further, Appellants have 1) ordered all transcripts for all hearings that Appellees mentioned in its motion to dismiss, which is all hearings that Appellants have confirmed took place in the lower court; 2) filed all exhibits in its possession; 3) filed all *de bene esse* deposition transcripts. Any alleged costs incurred by Appellee are self-imposed and could have been avoided by simply contacting Appellants' counsel or responding to emails.

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Respectfully Submitted,

/s/ Carla D. Aikens
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Date: February 8, 2016

Certificate of Service

The undersigned certifies that a copy of the forgoing Motion, Brief in Support and this Certificate of Service, was served upon all parties to the above cause to each of the attorneys of record herein by eservice on February 8, 2016, by:

/s/ Alexis Leader
Alexis Leader
Legal Assistant to Carla D. Aikens, P.C.

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