STATE OF MICHIGAN

COURT OF APPEALS

RANDY BRUBAKER and LORI KAY BRUBAKER,

Plaintiffs-Appellants,

v

ANDREW GEORGE HERRING and LANDSCAPE SPECIALTIES, INC.,

Defendants-Appellees.

UNPUBLISHED
June 6, 1997

No. 166316, 175043
Kent Circuit Court
LC No. 91-071440-NI

Before: Bandstra, P.J., and Hoekstra and S.F. Cox*, JJ.

PER CURIAM.

In docket no. 166316, plaintiffs appeal by right a judgment of no cause of action, entered upon a jury verdict, in this third-party action brought under the No-Fault Act, MCL 500.3101 *et seq*.; MSA 24.13101 *et seq*. In docket no. 175043, plaintiffs appeal from the trial court order awarding costs, including attorney fees, to defendants pursuant to MCR 2.405, the offer of judgment rule. This Court consolidated both appeals on its own motion.

Plaintiff Lori Brubaker asserted that she suffered a serious impairment of a body function due to a motor vehicle accident with defendant Andrew George Herring, who was driving a vehicle owned by defendant Landscape Specialties, Inc. She maintained that, as a result, she was entitled to work loss damages and non-economic damages. She claimed to have suffered extensive pain and other symptoms since the accident. Defendants acknowledged that Herring was negligent in the accident, but disputed that Brubaker suffered from the alleged injuries and that Herring's negligence was the proximate cause of the asserted damages. We reverse and remand for a new trial. Accordingly, we also vacate the order awarding offer of judgment costs to defendants.

Plaintiffs first argue that the trial court committed error requiring reversal by instructing the jury that it could consider plaintiff Randy Brubaker's past problems with alcoholism and plaintiff Lori Brubaker's past problems with abuse of cocaine in judging their respective credibility. We agree. After

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* Circuit judge, sitting on the Court of Appeals by assignment.

initially allowing the evidence to be admitted for the limited purpose of comparing plaintiffs' home life before and after the accident,[1] at the end of the trial, the trial court instructed the jurors that they could use the evidence for "whatever it might tell you about credibility . . . [t]hat's for you to decide." In so ruling, the trial court impermissibly allowed the jury to make determinations about plaintiffs' characters based on their former abuse of substances.

We agree with this Court's previous conclusion that evidence of a person's history of substance abuse is not relevant for purposes of assessing credibility. See *People v Carter*, 128 Mich App 541, 548; 341 NW2d 128 (1983), rev'd on other grds, sub nom, *People v Woodward*, 422 Mich 941; 369 NW2d 852 (1985). Under the trial court's instructions, the jury was allowed to infer that a former substance abuser would be more prone to lie simply because he or she was a former substance abuser, and that the jury could therefore conclude that plaintiffs were lying when they testified. Thus, contrary to MRE 404, the jury may have improperly considered the substance abuse evidence as showing that plaintiffs had an inclination toward wrongdoing, including untruthfulness, from which it could be inferred that they were more likely to have lied in this case. See, e.g. *People v VanderVliet*, 444 Mich 52, 63; 508 NW2d 114 (1993), amended 445 Mich 1205, 520 NW2d 338 (1994). Defendants' counsel attacked plaintiffs' credibility, particularly in closing argument. In light of the importance of credibility to plaintiffs' claims, we conclude that the trial court's instruction was not harmless. Thus, the judgment on appeal is reversed and this case remanded for a new trial.

We have reviewed plaintiffs' remaining claims of error and find them all, with one exception, to be without merit. We agree with plaintiffs that the trial court abused its discretion in excluding the deposition testimony of Dr. Paul Smucker, which was taken in May 1992, nearly a year before the trial commenced, but after the original trial date had been adjourned. At a hearing held shortly after Dr. Smucker's deposition was taken, the judge previously assigned to this case ordered that Dr. Smucker's testimony be excluded because he had not been timely disclosed as a witness. However, the trial was postponed a number of times and did not commence until March 29, 1993. On that date, the trial court continued to preclude Dr. Smucker from testifying. Although a trial court has discretionary authority to bar an expert witness as a sanction for the failure to timely file a witness list, there must be a consideration of the circumstances of a case to determine if this drastic sanction is appropriate. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

Here, Dr. Smucker's deposition was taken over ten months before trial began, giving defendants actual notice of his testimony well in advance of trial. Defendants have not shown how they would have been unfairly prejudiced if this deposition testimony had been admitted. Thus, we conclude that the trial court abused its discretion by excluding Dr. Smucker's deposition. *Id.* at 32-33. Aspects of Dr. Smucker's testimony, particularly his statement that he found no signs that plaintiff Lori Brubaker was consciously or unconsciously magnifying her symptoms, provided substantial support for her credibility. Because her credibility was a critical issue at trial, we believe that Dr. Smucker's deposition should have been admitted at trial, and presume that it will be admitted at plaintiffs' new trial.

We disagree with plaintiffs' further assertion that the trial court abused its discretion by excluding four other depositions of medical experts. Three of these depositions were taken a mere four

days before the trial started, and one only ten days previously. One could reasonably conclude that defendants were not afforded a reasonable time to meet this evidence and would have been unfairly prejudiced by its admission at trial. *Id*. The trial court also acted reasonably in not adjourning the trial given that plaintiffs were obviously aware of Lori's asserted condition and could have sought further expert opinions at an earlier date.[2]

In light of our reversal of the judgment for plaintiffs, we need not address plaintiffs' arguments regarding the order awarding offer of judgment costs under MCR 2.405 because that order is vacated.

Reversed and remanded for a new trial. The order awarding offer of judgment costs to defendants is vacated. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Sean F. Cox

[1] Although it is impossible to know whether the issues will present themselves in the same manner upon retrial, we note that had the evidence of plaintiffs' drug and alcohol abuse been limited to comparing their home life before and after the accident by an appropriate instruction to that effect, we would find no error in the admission of the evidence under the facts of this case.

[2] Because we find no abuse of discretion in the trial court's failure to admit them at the previous trial, we express no opinion on whether these depositions should be admitted at the new trial.