

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DORIS OLESKI and KATHY WALTERS, as Co-  
Personal Representatives of the Estate of DORIS  
WALTERS,

Plaintiffs-Appellants,

v

DANIEL T. ANBE, M.D., DANIEL T. ANBE, M.D.,  
P.C. and MCLAREN REGIONAL MEDICAL  
CENTER,

Defendants-Appellees.

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UNPUBLISHED  
November 21, 1997

No. 192134  
Genesee Circuit Court  
LC No. 92-013123-NH

Before: Saad, P.J., and Holbrook and Doctoroff, JJ.

PER CURIAM.

Plaintiffs raise numerous evidentiary issues in their appeal as of right from the judgment for defendants entered following a jury verdict in favor of defendants in this medical malpractice case. We affirm.

Plaintiffs' decedent, Doris Walters, was treated by defendant Dr. Daniel Anbe for circulatory problems in her legs. Dr. Anbe attempted to perform a balloon angioplasty procedure on Walters in March, 1990, to improve her circulation and reduce her risk of another heart attack. However, Dr. Anbe was not able to complete the procedure on Walters because he could not access the grafts in her legs. He stopped the procedure and rescheduled it for another time. However, Walters did not return to Dr. Anbe. She subsequently developed circulatory problems which led to the amputation of her legs, and she died on September 18, 1990. Plaintiffs filed suit alleging wrongful death and negligence on the part of Dr. Anbe in performing the attempted angioplasty on Walters.

I

Plaintiffs argue that the trial court abused its discretion in refusing to impose discovery sanctions on defendants by excluding certain testimony of Dr. Eric Bates as a remedy for defendants' failure to supplement discovery.

Dr. Eric Bates was a cardiologist. Although he was defendants' expert witness, plaintiffs read his deposition testimony into evidence during their case in chief. Dr. Bates had testified during deposition, that he reviewed Doris Walters' medical records and that by making the decision to perform an angioplasty procedure, Dr. Anbe was acting within reasonable medical practice and there was no fault in his recommending the balloon angioplasty to Doris Walters. Dr. Bates also stated that it would have been reasonable for Dr. Anbe to treat Walters with beta blockers. Walters was not treated with beta blockers and Dr. Bates was asked whether there was "a reasonable excuse in this case for her not having a trial of beta blockers?" He replied:

- A. . . . [O]ne excuse might have been the concern that she had lung disease. I'm not exactly sure how severe her lung disease was because I don't remember seeing how it was characterized. But significant lung disease is one reason not to give patients a beta blocker.

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- Q. On the lung disease issue, you really don't have an opinion here that her lung disease would have precluded her from having beta blockers, do you?

- A. No. I think putting her on a beta blocker would have been a very reasonable treatment. I don't know why she was not on them is my answer.

Defendants subsequently called Dr. Bates as an expert witness at trial. Dr. Bates opined that Dr. Anbe's recommendation to Doris Walters that she undergo a balloon angioplasty was "within the standard of care for a reasonably prudent cardiologist." He further opined that beta blocker therapy would not have been appropriate for Walters because it might have worsened her significant lung disease.

Plaintiffs assert that, prior to trial, defendants were required to supplement Dr. Bates' deposition testimony pursuant to MCR 2.302(E), which provides in relevant part:

(1) Duty to Supplement. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, except as follows:

(a) A party is under a duty seasonably to supplement the response with respect to a question directly addressed to

\* \* \*

(ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.

\* \* \*

(2) Failure to Supplement. If the court finds, by way of motion or otherwise, that a party has not seasonably supplemented responses as required by this subrule the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b).

One sanction for failure to comply with discovery is “prohibiting the party from introducing designated matters into evidence.” MCR 2.313B(2)(b). In order for a duty to amend a discovery response to arise, the circumstances of the failure to so amend must be in substance a knowing concealment. *Richardson v Ryder Truck Rental, Inc.*, 213 Mich App 447, 452; 540 NW2d 696 (1995). To constitute a knowing concealment, there must be a conscious decision by a party to prevent disclosure of the information requested. *Id.*

We find that Dr. Bates’ trial testimony was not inconsistent with his deposition testimony and defendants were not under a duty to supplement his responses. Dr. Bates’ trial testimony was simply more focused and detailed than his deposition testimony. Plaintiffs presumably had access to all of Doris Walters’ medical records and knew or should have known the severity of her lung disease. Because Dr. Bates explained at his deposition that one reason not to prescribe beta blockers was if a patient has severe lung disease, plaintiffs were on notice that defendants could, and likely would, try to establish that Walters’ lung disease prevented her from being treated with beta blockers. There is no indication that defendants consciously decided not to disclose that fact to plaintiffs. Although plaintiffs were disadvantaged by Dr. Bates testimony, that disadvantage was avoidable by them. Because plaintiffs had access to all of Walters’ medical information, plaintiffs were simply not as prepared as defendants for trial.

Plaintiffs also contend that the trial court abused its discretion in allowing Dr. Canfield to testify that beta blockers could not have been used on Doris Walters because defendants did not supplement the relevant answers to interrogatories.

Dr. Canfield had been Walters’ primary care physician, and he moved to Utah in 1990. Apparently, neither party deposed Dr. Canfield. When he “was contacted about the case, [Dr. Canfield] requested from [defense counsel] that he send [him] the records that were involved.” He also requested medical records of Walters from his former office. He did not receive some of the records until the week of trial. Dr. Canfield arrived from Utah the night before he was scheduled to testify at trial. At that time, he provided defense counsel with a copy of Walters’ medical records and met with him to discuss the case, apparently for the first time. Defense counsel gave a copy of the medical records to plaintiffs’ counsel the following morning. Dr. Canfield testified at trial that he elected not to use beta blockers on Walters because it would have worsened her lung condition.

There is no indication that defendants knowingly concealed the substance of Dr. Canfield’s testimony. Defendants apparently did not meet with Dr. Canfield or obtain his medical records until the night before he testified at trial. If plaintiffs were concerned about the substance of his testimony, they could have deposed him or requested new interrogatories after he was identified as an expert witness.

Moreover, since Dr. Canfield was treating Walters at one point, and she was not taking beta blocker medication, it was reasonable to assume that Dr. Canfield did not treat her with beta blockers and it is illogical for plaintiffs to claim surprise regarding his testimony that she should not have been taking beta blockers. Accordingly, the trial court did not abuse its discretion in refusing to grant discovery sanctions pursuant to MCR 2.302(E)(1)(a)(ii).

## II

Plaintiffs also allege that the trial court abused its discretion in redacting certain portions of medical records created by Dr. David Reyes because, according to plaintiffs, the records were admissible under MRE 803(6).

MRE 803(6) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Dr. Reyes treated Doris Walters after Dr. Anbe attempted to perform the balloon angioplasty on her. He did not testify at trial, but his deposition was read into evidence by defendants. The trial court redacted the portions of Dr. Reyes’ medical records that contained statements made to him by the Walters family essentially indicating that Dr. Anbe’s attempts to perform the angioplasty thrombosed both limbs of the previous grafts placed in Walters’ leg. Defendants objected to the admission of those portions of the medical records because Dr. Reyes apparently testified at deposition that he did not attribute Walters’ subsequent circulatory problems in her legs to anything Dr. Anbe did, but he used those comments in his records “because that’s what the family told him, and he put that down in the records.” Dr. Reyes indicated that he never spoke with Dr. Anbe about the attempted angioplasty.

The redacted portions of the medical records containing comments from Walters’ family (i.e. that the attempted balloon angioplasty caused the circulatory problems in her legs) did not fall within the hearsay exception of MRE 803(6). Dr. Reyes’ deposition testimony indicates that he did not record those comments as acts, transactions, occurrences, events, conditions, opinions or diagnoses. Rather,

he was relating the statements made by Walters' family. Dr. Reyes testified at deposition that he did not form an opinion that Dr. Anbe's attempted angioplasty caused Walters' circulatory problems. Although plaintiffs argue that MRE 803(6) allows the admission of opinions found in medical records, the statements by Walters' family were not Dr. Reyes' opinion or diagnosis. Therefore, the statements do not fall within the hearsay exception and were properly redacted.

Plaintiffs also argue that the trial court abused its discretion in precluding them from cross examining Dr. Wayne Kinning about the redacted portions of the medical records because he relied on those portions in forming his opinions during direct examination and he gave misleading information regarding the redacted portions of the medical records. Plaintiffs rely on MRE 705, which states:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Dr. Kinning was a vascular surgeon who reviewed medical records of Doris Walters, including the Bay Medical Center records, as well as depositions of various doctors involved, office records and the autopsy report. We do not believe that the trial court abused its discretion in prohibiting plaintiffs from questioning Dr. Kinning about the redacted portions of the medical records. Dr. Kinning relied, *inter alia*, on the "operative findings of Dr. Reyes" in concluding that Dr. Anbe's attempted angioplasty did not cause Walters' subsequent circulatory problems. Dr. Kinning also relied on the results of the angiogram or x-ray dye studies that were done when Dr. Anbe attempted the angioplasty, the subsequent operative reports that were done on the left leg and the pathology autopsy report. Dr. Kinning did not rely on the statements given to Dr. Reyes by Walters' family. Had he relied on those statements, he would not have concluded that Dr. Anbe did not cause Walters' circulatory problems. Thus, there was no basis for the court to require disclosure of evidence properly redacted and not relied upon by Dr. Kinning in forming his opinion.

Moreover, Dr. Kinning's statement during redirect examination that there was nothing in Walters' medical records to indicate an acute event caused by Dr. Anbe's work did not require disclosure of the redacted portions of the medical records. Dr. Kinning examined the physicians' depositions, the film of the attempted angioplasty, x-rays, the autopsy report and various other medical records before determining that Dr. Anbe did not cause Walters' circulatory problems. Despite the fact that Dr. Reyes' records included statements that her family relayed to him, those were apparently not a medical fact or observation which Dr. Kinning considered in forming his opinion. Therefore, we do not believe the trial court abused its discretion in refusing to allow plaintiffs to cross examine Dr. Kinning about the redacted portions of the medical records.

### III

Finally, plaintiffs say that the trial court abused its discretion in admitting the medical records submitted by Dr. Canfield because defendants did not lay a proper foundation for their admission pursuant to MRE 803(6). We disagree.

Dr. Canfield testified regarding his care, treatment and diagnosis of Doris Walters. Defendants questioned Dr. Canfield about Walters' medical records, including the results of tests contained in the records. Plaintiffs do not explain why they believe that there was a lack of foundation for admission of the medical records provided by Dr. Canfield. Plaintiffs merely contend that many of the medical records brought to court by Dr. Canfield were not authored by him. Defendants claim that "there is nothing [in the medical records] which Dr. Canfield did not either personally author, either by himself or in conjunction with Dr. Franco, or order to be performed, such as laboratory tests or pulmonary function tests." Plaintiffs do not contest that the medical records were prepared at the time Dr. Canfield was Walters' treating physician or that they were retained in Dr. Canfield's records. Plaintiffs also do not claim that the records were inadmissible under MRE 803(6) for any reason other than lack of foundation. Because Dr. Canfield apparently testified regarding the overall substance of the medical records before their admission, defendants laid a proper foundation. Moreover, there is no evidence that the admission of Dr. Canfield's medical records was prejudicial to plaintiffs. Accordingly, the trial court did not abuse its discretion in admitting the medical records submitted by Dr. Canfield because defendants laid a proper foundation.

Affirmed.

/s/ Henry William Saad  
/s/ Donald E. Holbrook, Jr.  
/s/ Martin M. Doctoroff