

STATE OF MICHIGAN
COURT OF APPEALS

GWENDOLYN S. NAVARRO and JOHN
NAVARRO,

Plaintiffs-Appellees,

and

BLUE CROSS AND BLUE SHIELD OF
MICHIGAN,

Intervening Plaintiff,

v

SAIB ISTERABADI, M.D.,

Defendant-Appellant.

UNPUBLISHED
September 11, 2003

No. 231352
Sanilac Circuit Court
LC No. 98-025585-NM

GWENDOLYN S. NAVARRO and JOHN
NAVARRO,

Plaintiffs-Appellees,

and

BLUE CROSS AND BLUE SHIELD OF
MICHIGAN,

Intervening Plaintiff-Appellant,

v

SAIB ISTERABADI, M.D.,

Defendant-Appellee.

No. 231421
Sanilac Circuit Court
LC No. 98-025585-NM

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

In Docket No. 231352, defendant appeals as of right from a jury-trial-based judgment awarding plaintiffs Gwendolyn Navarro and John Navarro (“plaintiffs”) \$135,000, as well as from an order awarding plaintiffs their attorney fees as case evaluation sanctions. In Docket No. 231421, intervening plaintiff Blue Cross and Blue Shield of Michigan (“BCBSM”) appeals as of right from an order dismissing its complaint for reimbursement of medical expenses paid in connection with plaintiff Gwendolyn Navarro’s injuries. We affirm the judgment for plaintiffs but vacate the order dismissing BCBSM’s complaint and remand for further proceedings.

This medical malpractice action arose from plaintiffs’ claim that Gwendolyn Navarro suffered an injury to her accessory nerve, also known as the eleventh cranial nerve, during a lymph node biopsy surgery performed by defendant.

I

Defendant first argues that the trial court erred by denying his motion for a directed verdict and his later motion for judgment notwithstanding the verdict (JNOV). We disagree. The trial court’s decision with regard to each of these motions is reviewed de novo, with the evidence considered in the light most favorable to the nonmoving party. *Graves v Warner Bros*, 253 Mich App 486, 491-492; 656 NW2d 195 (2002); *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 284; 602 NW2d 854 (1999).

Defendant’s argument is predicated on his position that the evidence of causation offered against him at trial amounted to mere speculation. In this regard, “[t]o be adequate, a plaintiff’s circumstantial proof must facilitate reasonable inferences of causation, not mere speculation.” *Badalamenti, supra* at 285, quoting *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Thus, while a theory based on mere speculation cannot support a claim, reasonable inferences from circumstantial evidence are sufficient to do so. To establish a claim by circumstantial evidence, a plaintiff “must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.” *Skinner, supra* at 164-165.

In this case, the testimony of plaintiffs’ expert, Dr. Thomas O’Grady, indicated that defendant’s use of general anesthesia during the surgery at issue was below the applicable standard of care and that the use of general anesthesia could take away reflexes and responses that would alert a surgeon to being too close to a nerve. Dr. O’Grady further indicated that defendant breached the standard of care by not having “maximally retracted” the incision made in Gwendolyn Navarro’s neck. The apparent similarity of both of these alleged breaches of the standard of care is that they would have reduced defendant’s ability to determine whether he might have damaged the accessory nerve. Moreover, Dr. O’Grady testified that he had never experienced an injury to the accessory nerve during the surgery at issue, and he indicated on cross-examination that he knew of only two instances when such an injury occurred. We conclude that Dr. O’Grady’s testimony about the manner in which he believed that defendant breached the standard of care, considered together with his testimony about the rarity of such an injury during the type of surgery at issue, was sufficient evidence, if credited by the jury (as it evidently was), to reasonably support a finding that defendant more likely than not breached the standard of care and that this caused or contributed to the nerve injury at issue. In this regard,

the expert's testimony indicated a logical sequence of cause and effect between the alleged negligence and the injury. *Skinner, supra* at 167-168. Thus, the trial court correctly denied defendant's motions for a directed verdict and JNOV.

II

Defendant next argues that, if this Court decides that he is not entitled to judgment as a matter of law, this Court should reverse the trial court's denial of his motion for a new trial based on the great weight of the evidence. We review the denial of a motion for a new trial for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). We give substantial deference to a trial court's conclusion that a verdict is not against the great weight of the evidence. *Id.*; *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001).

Defendant's position essentially consists of the assertion that Dr. O'Grady's testimony was patently incredible and contrary to indisputable physical facts or scientific laws. Aspects of Dr. O'Grady's expert testimony contradicted expert testimony by defendant and another defense expert on certain points. However, in our view, there is nothing in the record, and nothing that is so well-known that it may be the subject of judicial notice, that would justify us in concluding that Dr. O'Grady's version of events was clearly contrary to well-established physical facts or scientific laws. Further, testimony about the rarity of the nerve injury at issue occurring as a result of a lymph node biopsy could reasonably have been viewed by the jury as a factor weighing in favor of a finding of negligence. Especially in light of the deference owed the trial court, *Bouverette, supra* at 403, we conclude that the trial court did not abuse its discretion by denying defendant's motion for a new trial based on the great weight of the evidence.

III

Defendant next argues that the trial court abused its discretion, see *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999) (setting forth the standard of review), by limiting the scope of expert testimony from Dr. Malcolm Field as a sanction for defendant's failure to update an interrogatory answer to set forth the content of Dr. Field's expert testimony. We disagree. In essence, the trial court ruled that Dr. Field would be limited at trial to testifying to the substance of the opinions that he expressed at a prior trial deposition, because those were the only opinions as to which plaintiff had notice. This Court has upheld the exclusion of evidence as a sanction for failing to provide discovery. *Settington v Pontiac General Hosp*, 223 Mich App 594, 605; 568 NW2d 93 (1997). The trial court was reasonably concerned that plaintiffs only had notice of Dr. Field's opinions to the extent that they were presented in his trial deposition. Given the nature of this complex medical malpractice case, it is reasonable to be concerned that plaintiffs would not have been fairly able to respond to additional opinion testimony from Dr. Field about which they lacked proper notice. Thus, we conclude that the trial court did not abuse its discretion by limiting Dr. Field's opinion testimony to the substance of the opinions expressed at the trial deposition.

IV

Defendant next argues that the trial court improperly excluded testimony from Dr. Field regarding medical literature or learned treatises containing information about surgery-related

accessory nerve damage. Defendant sought to use the testimony to impeach certain testimony from Dr. O’Grady. We disagree. We review a trial court’s decision to admit or exclude evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). However, in doing so, we consider the meaning of the Michigan Rules of Evidence “in the same manner as the examination of the meaning of a court rule or a statute,” which involves a question of law and is reviewed de novo. *Id.* The testimony at issue here was inadmissible under the plain language of MRE 707 because it was not called to the attention of Dr. O’Grady during his cross-examination. By referring to MRE 402, which provides that all relevant evidence is admissible except as otherwise provided by the federal or state constitution, the Michigan Rules of Evidence, or other rules adopted by the Michigan Supreme Court, defendant seems to suggest that if the testimony at issue was relevant, then it could be admitted under MRE 402, without regard to MRE 707. The flaw in this argument is that it would render MRE 707 nugatory because, if evidence from a learned treatise could be admitted for impeachment purposes under MRE 402 whenever it is relevant, the limitations expressed in MRE 707, such as the requirement of calling the statement to the attention of the pertinent expert on cross-examination, would be nullified. It is a well-established rule of statutory construction “that courts should avoid any construction that would render statutory language nugatory.” *Flint City Council v State of Michigan*, 253 Mich App 378, 394; 655 NW2d 604 (2002). In this regard, the requirements of MRE 707 pertaining to the use of learned treatises should be considered one of the limitations on the admissibility of relevant evidence contemplated by MRE 402. Thus, the trial court did not abuse its discretion by excluding the testimony at issue.

V

Finally, defendant argues that the trial court abused its discretion, see *Attard v Citizens Ins Co of America*, 237 Mich App 311, 330; 602 NW2d 633 (1999) (setting forth the standard of review), by including attorney fees for two attorneys in its award of case evaluation sanctions against defendant under MCR 2.403. We disagree. As defendant acknowledges, this Court has rejected the position that MCR 2.403(O)(6)(b) limits an award of attorney fees to fees for only one attorney. *Attard, supra* at 328-330. As in *Attard*, the present case “involved a six-day jury trial with numerous witnesses and exhibits.” *Id.* at 330. Further, we give deference to the trial court’s observation that both of plaintiffs’ attorneys were working during the trial in light of its superior ability to make such an observation. It appears reasonable for plaintiffs to have used two attorneys at trial and the related trial depositions in light of the complexity of this case, which involved quite technical medical testimony. Thus, we conclude that the trial court did not abuse its discretion in including fees for two attorneys in its award of mediation sanctions under MCR 2.403.

VI

BCBSM argues that the trial court erred in dismissing its complaint. We agree. We review for an abuse of discretion a trial court’s decision to dismiss an action for reasons other than those brought forth in a summary disposition motion. See *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995).¹ It is plain from the trial court’s written

¹ BCBSM sets forth the standard of review related to a motion for summary disposition in its brief, while defendant discusses the standard of review for a decision regarding severance of
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opinion explaining its decision to dismiss BCBSM's complaint that the decision was based on (1) a conclusion that its prior February 16, 1999, order did not provide for a separate trial regarding BCBSM's damages and (2) BCBSM's failure to cite a statute allowing for a separate trial with regard to medical expenses. Concerning the first point, it is true that the prior order did not expressly state that BCBSM could have a separate trial, but it did state that BCBSM "shall not be required to participate in the trial of the main action." That order was entered in response to a motion for intervention and joinder filed by BCBSM, which, significantly, included a paragraph expressly requesting a separate hearing with regard to damages. Further, BCBSM's counsel stated at the hearing concerning the motion to intervene that no party was adequately representing its interests, and the trial court stated that it was granting the relief that BCBSM requested. Also, we agree with BCBSM that the reference to a trial "of the main action" would make little sense unless it was contemplated that BCBSM was to have a separate trial with regard to its alleged damages. Thus, we conclude that the only rational interpretation of the prior order is that it provided for a separate trial for BCBSM with regard to its claim for damages. See *Kirby v Michigan High School Athletic Ass'n*, 459 Mich 23, 40-41; 585 NW2d 290 (1998) (interpreting a court order in accordance with its "only rational interpretation" in light of relevant circumstances).

Regarding BCBSM's alleged failure to cite a statute in support of a right to a separate trial, we note that BCBSM cited MCR 2.505(B) in its motion for intervention and joinder. That rule authorizes a trial court to conduct a separate trial on one or more claims or third-party claims. Thus, we conclude that the trial court abused its discretion by dismissing BCBSM's complaint based on a flawed rationale and, accordingly, we vacate its order dismissing that complaint and remand this case for reconsideration of defendant's motion to dismiss BCBSM's complaint.

We note that defendant provides additional considerations (such as the alleged lack of a subrogation right) that he asserts support dismissal of BCBSM's complaint. However, these considerations were not relied on by the trial court in dismissing BCBSM's complaint. In light of the discretionary nature of a trial court's decision regarding whether to dismiss a complaint, we leave these matters for the trial court's consideration on remand.

We affirm the judgment for plaintiff, vacate the order dismissing BCBSM's complaint, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Cavanagh
/s/ Jessica R. Cooper

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issues for separate trials. However, because the decision being appealed involved the dismissal of an action, it is the standard of review applicable to such a decision that we apply.