

STATE OF MICHIGAN
COURT OF APPEALS

RUDY LOZANO, as Personal Representative of
the Estate of JON ALEXANDER
JARZEMBOWSKI,

Plaintiff-Appellee,

v

DETROIT MEDICAL CENTER, HARPER-
HUTZEL HOSPITAL, d/b/a HARPER
HOSPITAL,

Defendants,

and

DR. ALFREDO LAZO and DR. L. REYNOLDS
ASSOCIATES, P.C.,

Defendants-Appellants.

UNPUBLISHED
April 16, 2013

Nos. 300463; 300751; 306703
Wayne Circuit Court
LC No. 05-504343-NH

RUDY LOZANO, as Personal Representative of
the Estate of JON ALEXANDER
JARZEMBOWSKI,

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v

DETROIT MEDICAL CENTER, HARPER-
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HOSPITAL,

Defendants-Appellants,

and

DR. ALFREDO LAZO and DR. L. REYNOLDS
ASSOCIATES, P.C.,

Defendants.

No. 300466
Wayne Circuit Court
LC No. 05-504343-NH

Before: MARKEY, P.J., and TALBOT and DONOFRIO, JJ.

PER CURIAM.

This consolidated appeal involves allegations of medical malpractice by Rudy Lozano,¹ personal representative of the Estate of decedent Jon Alexander Jarzembowski (Estate) against neuroradiologist Dr. Alfredo Lazo and his employer Dr. L. Reynolds Associates, P.C. (Lazo), as well as Detroit Medical Center and Harper-Hutzel Hospital, d/b/a Harper Hospital (Hospital).

In Docket No. 300463, Lazo appeals as of right the trial court's June 17, 2010, judgment and September 9, 2010, order denying Lazo and the Hospital's post-trial substantive motions. The appeal raises issues regarding the trial court's alleged failure to grant a mistrial or a new trial after the revelation of newly discovered material evidence that the Estate allegedly purposefully concealed until the last day of trial. Additional issues raised include the trial court's evidentiary rulings regarding attorney work product at the post-verdict evidentiary hearing, the trial court's inconsistent application of the standard of proof for whether misconduct by the Estate's attorney was committed, alleged instructional error by the trial court regarding the standard of care, evidentiary rulings at trial regarding learned treatises and their use for the impeachment of experts, and the trial court's failure to grant remittitur.

In Docket No. 300466, the Hospital appeals as of right the June 17, 2010, amended order of judgment, and the September 9, 2010, order denying Lazo and the Hospital's post-trial substantive motions. The issues raised on appeal are the same as those raised by Lazo in Docket No. 300463. Additionally, the Hospital challenges the trial court's denial of its motion for summary disposition and motion for directed verdict regarding agency, the trial court's grant of directed verdict in favor of the Estate regarding agency, the court's consideration of depositions of doctors taken in an unrelated matter to deny summary disposition and grant directed verdict in favor of the Estate regarding agency, the jury's consideration of the depositions of the doctors from the unrelated matter, and the court's inconsistent instruction of the jury regarding the burden of proof for agency.

In Docket No. 300751, Lazo appeals by leave granted the trial court's September 30, 2010, order awarding sanctions to the Estate and requiring Lazo to post an appeal bond in the amount of \$1,849,000. The issues on appeal involve the trial court's determination that monetary sanctions were appropriate, and the allegedly prejudicial language used in the trial court's order.

Last, in Docket No. 306703, Lazo appeals as of right the trial court's October 6, 2011, order awarding the Estate \$7,100 in sanctions. Lazo challenges the trial court's finding that \$400 an hour was a reasonable attorney rate to determine the amount of the sanctions award. We

¹ Lozano is the father of the decedent's wife, Sherri Christie.

affirm in part, reverse in part, and remand to the trial court for entry of summary disposition in favor of the Hospital in Docket No. 300466.

I. THE HOSPITAL'S MOTION FOR SUMMARY DISPOSITION RE: AGENCY²

The Hospital argues that the trial court erred when it denied its motion for summary disposition regarding agency. We agree.

The Hospital's motion for summary disposition was brought pursuant to MCR 2.116(C)(10). Appellate review of a trial court's decision on a motion for summary disposition is *de novo*.³ "A motion brought under MCR 2.116(C)(10) tests the factual support for a claim."⁴ "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties . . . in the light most favorable to the party opposing the motion."⁵ A party "may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition."⁶ Summary disposition is proper under this subsection "where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment . . . as a matter of law."⁷

The evidence presented fails to establish that Lazo was the actual agent of the Hospital. Common law agency "includes every relation in which one person acts for or represents another by his authority."⁸ "[F]undamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him."⁹ It is undisputed that Lazo is an employee of the PC and was an independent contractor of the Hospital. The Estate claims that because the alleged "malpractice arose in the course of his duties to provide interventional radiology services to Harper Hospital," Lazo was an actual agent of the Hospital. Because the Estate has failed to demonstrate the Hospital's right to control Lazo's conduct, the Estate cannot overcome summary disposition.¹⁰

² Docket No. 300466.

³ *Steinmann v Dillon*, 258 Mich App 149, 152; 670 NW2d 249 (2003).

⁴ *Id.*

⁵ *Karbel v Comerica Bank*, 247 Mich App 90, 96-97; 635 NW2d 69 (2001) (citations and quotation marks omitted).

⁶ *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001) (citation and quotation marks omitted).

⁷ *White v Taylor Distrib Co, Inc*, 275 Mich App 615, 620 n 2; 739 NW2d 132 (2007).

⁸ *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 557; 581 NW2d 707 (1998) (citation and quotation marks omitted).

⁹ *Id.* at 558 (citation omitted).

¹⁰ *White*, 275 Mich App at 620 n 2.

Second, the Estate has failed to demonstrate the presence of the elements of ostensible agency. Generally, “a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely uses the hospital’s facilities to render treatment to his patients.”¹¹ If a patient “look[s] to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found.”¹² Thus, “the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems.”¹³ In making this determination, it is relevant to consider whether the patient and the physician “had a patient-physician relationship independent of the hospital setting.”¹⁴ The doctor’s use of the hospital’s facilities alone is insufficient to result in the patient’s reasonable belief that the doctor was the hospital’s agent.¹⁵

Although a physician may be an independent contractor that is not subject to “the direct control of the hospital,” a hospital may not avoid liability for the alleged negligence of the physician if the physician is found to be the hospital’s ostensible agent.¹⁶ Ostensible agency exists when:

the principal intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. . . . [B]efore a recovery can be had against a principal for the alleged acts of an ostensible agent, three things must be proved, to wit: [1] The person dealing with the agent must do so with belief in the agent’s authority and this belief must be a reasonable one; [2] such belief must be generated by some act or neglect of the principal sought to be charged; [3] and the third person relying on the agent’s apparent authority must not be guilty of negligence.¹⁷

This Court examined the seminal case of *Grewe v Mt Clemens Gen Hosp*,¹⁸ which is relied on by both the Hospital and the Estate, most recently in *VanStelle v Macaskill*.¹⁹ In *VanStelle*, this Court held that the Hospital “as the putative principal must have done something

¹¹ *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 250; 273 NW2d 429 (1978).

¹² *Id.* at 250-251.

¹³ *Id.* at 251.

¹⁴ *Id.*

¹⁵ *VanStelle v Macaskill*, 255 Mich App 1, 11; 662 NW2d 41 (2003).

¹⁶ *Grewe*, 404 Mich at 252-253.

¹⁷ *Id.* (citations and internal quotation marks omitted).

¹⁸ *Id.* at 240.

¹⁹ *VanStelle*, 255 Mich App at 1.

that would create in the patient's mind the reasonable belief that the doctors were acting on behalf of the defendant hospital."²⁰

The evidence provided regarding the Hospital's motion for summary disposition supports that the Hospital cannot be held liable on a theory of ostensible agency. It is undisputed that the decedent and Lazo failed to have a pre-existing physician-patient relationship. The existence of a prior physician-patient relationship, however, is not dispositive.²¹ Based on Sherri Christie's deposition testimony, at the time of the decedent's admission to the Hospital, the decedent was not looking to the Hospital to provide medical treatment. Christie testified that the decedent was diagnosed with a basilar artery aneurysm that had ruptured resulting in a subarachnoid hemorrhage. She requested that neurosurgeon Dr. Mazhari be called because she was familiar with him. Mazhari recommended that the decedent seek treatment with "Dr. [Richard] Fessler out of Harper [Hospital]." Mazhari explained to Christie that Fessler was doing a "newer type of procedure" for the repair of aneurysms that was an alternative to open brain surgery, and that Fessler was "the best." The following testimony was elicited regarding the decision that the decedent be transferred to Harper Hospital:

Q. And basically the reason for the transfer was you wanted to talk to Dr. Mazhari and you did and Dr. Mazhari suggested that he be seen by Dr. Fessler?

A. Yes.

* * *

Q. And the reason that you and your husband had to transfer John [sic] to Harper was that's where Dr. Fessler was, had staff privileges that Dr. Mazhari recommended, correct?

A. Yes.

Christie did not provide an alternative explanation during her deposition for the reason behind the decedent's transfer. While Fessler ultimately did not perform the procedure, it does not change the fact that the decedent came to Harper Hospital so that Fessler could treat him. Additionally, there was no evidence presented that at some time before the procedure, on the basis of Fessler's unavailability, Christie or her husband looked to the Hospital to assign a physician to perform her husband's procedure. Rather, Christie testified that when her husband arrived at Harper Hospital it was her understanding that Fessler would be performing the procedure, and she did not learn until after the procedure that Lazo performed the procedure instead. Thus, because the evidence supports that Christie and her husband did not look to the Hospital to provide treatment, the Estate is unable to demonstrate ostensible agency.²²

²⁰ *Id.* at 10.

²¹ *Grewe*, 404 Mich at 251.

²² *Grewe*, 404 Mich at 250-251.

Accordingly, the trial court erred when it denied the Hospital's motion for summary disposition.²³

Christie submitted an affidavit which indicated that the decision to transfer the decedent to Harper Hospital was based in part on the Hospital's reputation. The affidavit also stated that if Fessler was not available to perform the procedure, it was her expectation that the Hospital would assign a physician to do so. No such testimony, however, was provided during Christie's deposition. Because a party "may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition,"²⁴ Christie's affidavit is not appropriately considered on appeal.

Additionally, the Hospital challenges the trial court's consideration of the depositions of Drs. George Harvill and Monte Kling, taken in an unrelated matter, to deny summary disposition. Harvill is the chief of radiology at Harper Hospital and is a member of the PC, and Kling is a retired radiologist who resides in Florida and is the former president of the PC. Pursuant to the rules of evidence, only relevant evidence is admissible.²⁵ Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."²⁶ In pertinent part, Harvill and Kling testified regarding the practices of the PC's employees to verbally identify themselves to patients as members of the Hospital's radiology department as opposed to employees of the PC. The testimony also explained that lab coats that the PC's employees wore also identified them as members of the Hospital's radiology department. The testimony of Harvill and Kling is not related to whether Christie or the decedent looked to the Hospital to provide treatment for the decedent's aneurysm before the decedent was treated by Lazo, or whether they believed that Lazo was an agent of the Hospital at the time treatment was rendered.²⁷ Thus, the evidence is irrelevant to the establishment of ostensible agency, and does not create a triable issue of fact.²⁸

Moreover, the deposition testimony of Harvill and Kling is hearsay as it is an out of court statement offered by the Estate to prove that Lazo acted in conformity with their testimony at the

²³ *White*, 275 Mich App at 620 n 2.

²⁴ *Dykes*, 246 Mich App at 480 (citation and quotation marks omitted).

²⁵ MRE 402.

²⁶ MRE 401.

²⁷ *Grewe*, 404 Mich at 250-253.

²⁸ Because we find that the trial court erred in denying the Hospital's motion for summary disposition regarding agency and the above analysis is dispositive of the Hospital's issues on appeal, we need not address the Hospital's arguments that directed verdict in its favor regarding the agency issue should have been granted, whether the depositions of Harvill and Kling were inappropriately considered by the trial court or the jury, or whether the jury was inconsistently instructed regarding the burden of proof for agency.

time that the decedent was treated at Harper Hospital.²⁹ “[A] disputed fact (or lack of it) must be established by admissible evidence” and “inadmissible hearsay do[es] not satisfy the court rule.”³⁰ Although the Estate argued below that the Hospital had the opportunity to cross-examine the witnesses in the unrelated matter so the testimony falls within an exception to hearsay, the record does not support that the witnesses were unavailable to be deposed in the instant action.³¹ Thus, the hearsay exception³² does not apply and the testimony was improperly considered. Accordingly, reversal of the trial court’s order denying the Hospital’s motion for summary disposition regarding agency is necessary.

II. TRIAL³³

Lazo asserts on appeal that the trial court erred when it improperly instructed the jury regarding the standard of care. Lazo’s framing of the issue, however, is inaccurate. The record demonstrates that Lazo takes issue with three comments made by the trial court. The comments were made in the presence of the jury in response to objections made by defense counsel regarding the Estate’s definition of the standard of care. Lazo alleges that during those comments, the court inaccurately defined the standard of care. Because the comments were not made to the jury, they were not jury instructions. Thus, the applicable standard of review is that for evidentiary rulings, which we review for an abuse of discretion.³⁴ “An abuse of discretion occurs when a result falls outside the range of principled outcomes.”³⁵ “Evidentiary errors are not a basis for vacating, modifying, or otherwise disturbing a judgment unless declining to take such action would be inconsistent with substantial justice.”³⁶ We find no error.

“[P]rofessional negligence” or “malpractice” means “the failure to do something which a [interventional neuroradiologist] of ordinary learning, judgment or skill in [interventional neuroradiology] would do, or the doing of something which a [interventional neuroradiologist]

²⁹ MRE 801, 802.

³⁰ *SSC Assoc Ltd Partnership v Gen Retirement Sys of City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

³¹ MRE 804.

³² *Id.*

³³ Docket Nos. 300463 and 300466. These issues were raised by both the Hospital and Lazo, however, because we found that the Hospital should have been dismissed on summary disposition, the issues will be phrased as those of Lazo only.

³⁴ *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

³⁵ *Arkin Distrib Co v Jones*, 288 Mich App 185, 187-188; 792 NW2d 772 (2010).

³⁶ *Veltman v Detroit Edison Co*, 261 Mich App 685, 696; 683 NW2d 707 (2004) (citation and quotation marks omitted).

of ordinary learning, judgment or skill would not do, under the same or similar circumstances[.]”³⁷

During the testimony of Dr. William Sanders, who was Lazo and the Hospital’s interventional neuroradiology expert, the court acknowledged that while all aneurysms may not be the same, the “standard of care shouldn’t change from person to person.” Later during Sanders’ testimony the Estate asserted that it was its understanding “that standard of care is all reasonable interventional neuroradiologists.” The Hospital challenged the Estate’s use of the word “all.” The court responded:

We’re not going to quibble over this, I’m sure. If there’s a standard by definition, it would apply to all who practice in a particular specialty or sub-specialty. And it’s what reasonably prudent or average interventional neuroradiologist would or would not do under like or similar circumstances in this – in this particular case. That is the standard of care. Now, the jury instruction might use slightly different wording, but that’s close enough, I think. So, it doesn’t matter if the instruction uses the word all. If it’s a standard, it applies to all. And if it doesn’t, I want you to show me something that says it doesn’t apply to all within that medical community.

Additionally, during Lazo’s testimony, the Hospital sought clarification of the meaning of the standard of care and again raised its objection to the use of the word “all” when defining it. The court indicated:

Well, of course, we’re only talking about interventional neuroradiologists, that’s the specialty we’re talking about. So, no, you’re not talking about all doctors, because not all doctors are interventional neuroradiologists. But we are talking about doctors who practice in that specialty, neuroradiologists. So in that sense it does mean all within that field, even though the word “all” is not in the jury instruction. There can be no standard unless it applies to everyone within that particular field of practice.

A reading of the jury instruction reveals that the court’s recitation of its understanding of the standard of care was incorrect. The jury instruction does not state that the standard is what “all” interventional neuroradiologists would or would not do, but rather what “a” interventional neuroradiologist would or would not do.³⁸

Although the statements made by the trial court were incorrect, they were only made on three occasions over nine days of trial. Additionally, at the end of trial, the jury was properly instructed regarding the standard of care. Because declining to vacate the verdict based on three

³⁷ M Civ JI 30.01.

³⁸ *Id.*

inaccurate comments made by the court is not inconsistent with substantial justice, reversal is not warranted.³⁹

Lazo next argues that the trial court erred when it admitted unauthenticated learned treatises at trial, permitted their use to cross-examine defense experts, and did not allow the treatises to be used to impeach the Estate's economics expert, Malcolm Cohen, Ph.D. We disagree. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion."⁴⁰

MRE 707 provides:

To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, are admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits.

Thus, in order to impeach an expert witness on cross-examination with a learned treatise, the treatise must be established as reliable authority either by that expert or by other expert testimony.⁴¹

The four treatises in this case, which consist of two textbooks and two articles, were properly established as reliable authority by the Estate's interventional neuroradiology expert, Dr. Gregg Zoarski. An authority is defined as "[a]n accepted source of expert information or advice, as a book or person[.]"⁴² During Zoarski's direct examination, he was questioned regarding whether he believed the treatises at issue were generally reliable authorities. Zoarski specifically stated that he considered the articles to be generally reliable sources. Additionally, Zoarski indicated that although he could not attest to every statement contained in the textbooks, he considered the textbooks "good references." Because Zoarski's testimony supports that he considers the textbooks to be "good" "accepted sources of advice" his testimony establishes his belief that they are reliable authorities. Accordingly, Lazo's argument must fail.

Lazo also contends that the treatises in question were impermissibly used as substantive evidence by the Estate when the Estate read excerpts to the defense experts and then questioned the experts regarding whether they agreed or disagreed with the statements. Lazo is correct that

³⁹ *Veltman*, 261 Mich App at 696.

⁴⁰ *Barrett*, 245 Mich App at 325.

⁴¹ MRE 707; See also *Wolak v Walczak*, 125 Mich App 271, 275; 335 NW2d 908 (1983).

⁴² *McCarty v Sisters of Mercy Health Corp*, 176 Mich App 593, 600; 440 NW2d 417 (1989) (citation and quotation marks omitted).

treatises are prohibited from being used as substantive evidence in a case.⁴³ In the instant case, however, the record demonstrates that the Estate's attempted impeachment of the witnesses was proper. In regards to the challenged question to Sanders, the Estate's attorney advised the court, over Lazo's objection, that his question to Sanders referencing the treatise addressed Sanders' prior statement that an individual that suffered an aneurysm and was determined to be a Hunt Hess classification of three had a 50 percent chance of death.

Additionally, the Estate's question to Dr. John Wald referencing one of the treatises was in response to Wald's testimony that "a spontaneous bleed is worse than a bleed caused by an intraprocedural coiling process." Because the rules of evidence specifically permit reading statements from authoritative treatises into the record, and impeaching witnesses on cross-examination based on authoritative learned treatises, relief is not warranted.⁴⁴

Moreover, assuming arguendo that counsel's questions were inappropriate, Lazo takes issue with only one question posed to each Sanders and Wald. Thus, declining to vacate the jury verdict on that basis would not be "inconsistent with substantial justice," so relief is not warranted.⁴⁵

Finally, Lazo challenges the trial court prohibiting him from impeaching the Estate's economic expert with the learned treatises at issue. The learned treatises were from medical textbooks and journals. MRE 707 permits impeachment of an expert on cross-examination through the use of learned treatises, and the rule does not require that the author of the treatise and the expert being impeached be of the same discipline. An expert, however, cannot provide opinion testimony that is outside of his area of expertise.⁴⁶ Cohen is an economist. Thus, had the trial court permitted the attempted impeachment of Cohen using the treatises, he would have been required to render an opinion regarding medical texts, which is outside of his expertise. Thus, there was no abuse of discretion by the trial court.⁴⁷

III. POST-VERDICT EVIDENTIARY HEARING⁴⁸

Lazo asserts that the trial court erred when it found that certain questions presented by counsel for the Hospital and Lazo invaded the attorney work product privilege. We disagree.

⁴³ *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 702; 630 NW2d 356 (2001).

⁴⁴ MRE 707; *Arkin Distrib Co*, 288 Mich App at 187-188.

⁴⁵ *Veltman*, 261 Mich App at 696.

⁴⁶ See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 789; 685 NW2d 391 (2004).

⁴⁷ *Arkin Distrib Co*, 288 Mich App at 187-188.

⁴⁸ Docket Nos. 300463 and 300466. These issues were raised by both the Hospital and Lazo, however, because we found that the Hospital should have been dismissed on summary disposition, the issues will be phrased as those of Lazo only.

The trial court's decision to admit or exclude evidence is reviewed by this Court for an abuse of discretion.⁴⁹

Under MCR 2.302(B)(3)(a), “the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” At the post-verdict evidentiary hearing, counsel for the Hospital and Lazo questioned the Estate’s attorney, Thomas DeAgostino, regarding why Exhibit 5C was not provided to Zoarski by the Estate when the expert initially reviewed the case; and why the measurement of the aneurysm of 6.7 mm indicated on Exhibit 5C was not mentioned at the *Daubert*⁵⁰ hearing, in the notice of intent, in the complaint, the first amended complaint, or Zoarski’s affidavit of merit. Although the trial court specifically indicated that such areas of inquiry were relevant to the post-verdict evidentiary hearing, objections by the parties were specifically permitted by the trial court’s order, and review of the transcript of the post-verdict evidentiary hearing reveals that defense counsel’s questions were appropriately determined to be violative of the attorney work product privilege as they requested counsel’s “mental impressions, conclusions, [and] opinions.”⁵¹ Thus, there was no abuse of discretion by the trial court in sustaining the objections.⁵²

Additionally, while Lazo asserts that the trial court negated the purpose of the post-verdict evidentiary hearing by sustaining the attorney work product objections, as will be explained below, the trial court had sufficient evidence to determine whether counsel for the Estate knew or had reason to know that he was in possession of the only version of Exhibit 5C and armed with that knowledge concealed it from the defense, thus committing misconduct. Moreover, DeAgostino’s responses to the objected to areas of inquiry were not necessary to determine whether DeAgostino knew or had reason to know that he was in possession of the only version of Exhibit 5C. Thus, any error was harmless.⁵³

Lazo next asserts that the trial court violated his constitutional due process rights when it applied a different standard of proof to him at the post-verdict evidentiary hearing than to the Estate. We disagree. Appellate review of whether a party’s constitutional due process rights were violated is de novo.⁵⁴

Lazo argues that at the post-verdict evidentiary hearing the court only considered whether DeAgostino knew that he had the one and only Exhibit 5C. Lazo asserts that had the court also considered whether DeAgostino had reason to know that Exhibit 5C was the one and only of that

⁴⁹ *Barrett*, 245 Mich App at 325.

⁵⁰ *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469 (1993).

⁵¹ MCR 2.302(B)(3)(a).

⁵² *Arkin Distrib Co*, 288 Mich App at 187-188.

⁵³ MCR 2.613(A).

⁵⁴ *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999).

film, as was the standard applied to Lazo and the Hospital, the post-verdict evidentiary hearing would have had a different result. Lazo's argument, however, must fail. The court's opinion specifically states that the question presented was whether DeAgostino knew or had reason to know that Exhibit 5C "was the original film and that no copies of the original were made, and armed with that knowledge, deliberately concealed [its] existence from the Defendants and/or Defense counsel?" The court responded "No."

Additionally, in its opinion, the court made specific findings regarding whether DeAgostino had reason to know that the Exhibit 5C in his possession was the one and only. The court found that "it is unlikely that DeAgostino would have requested medical records after January, 2003 if 'all' of the records had been forwarded to him and he knew or had reason to know that he, in fact, had all of the records." The court also found that "[n]o reason has been advanced as to why Plaintiff's counsel would honestly believe the Defendant hospital had not maintained 'a full and complete record' regarding Plaintiff's decedent." The court further noted that "Plaintiff's counsel also had reason to believe that the hospital retained all of the records because Dr. Lazo testified that all films printed ('the cuts') would be saved on the computer hard drive and transferred to a digital tape following the procedure." Because the record demonstrates that the court appropriately considered whether DeAgostino had reason to know that he was in possession of the one and only Exhibit 5C, Lazo's argument that his due process rights were violated lacks merit.⁵⁵

IV. MOTION FOR A NEW TRIAL⁵⁶

Lazo claims that its motion for a new trial should have been granted. We disagree. "Whether to grant or deny a motion for a new trial is entrusted to a trial court's discretion, which requires appellate review to be for an abuse of that discretion."⁵⁷

Lazo first claims that the trial court erred when it failed to grant Lazo's motion for a new trial based on the DeAgostino's alleged deliberate concealment of material evidence. "MCR 2.611(A)(1)(b) permits a trial court to grant a motion for a new trial if the prevailing party committed 'misconduct,' affecting the moving party's substantial rights."⁵⁸

When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and

⁵⁵ *Id.*

⁵⁶ Docket Nos. 300463 and 300466. These issues were raised by both the Hospital and Lazo, however, because we found that the Hospital should have been dismissed on summary disposition, the issues will be phrased as those of Lazo only.

⁵⁷ *Hilgendorf*, 245 Mich App at 682.

⁵⁸ *Id.*

request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action.⁵⁹

The post-verdict evidentiary hearing failed to demonstrate misconduct by DeAgostino. There was no evidence presented that DeAgostino knew or had reason to know that he was in possession of the one and only Exhibit 5C. Review of the record reveals that DeAgostino received Exhibit 5C sometime after November 5, 2003. DeAgostino assumed that Exhibit 5C was received from the Hospital before the notice of intent was filed. DeAgostino testified that he does not have the expertise to distinguish between an original and a copy of an x-ray. He also disputed that the exhibit was an original, and there was no evidence presented that the Estate requested originals of any record that should have contained Exhibit 5C.

DeAgostino testified that he believed that as custodian of the decedent's records, the Hospital had a copy of Exhibit 5C. He also believed that Lazo had a copy of Exhibit 5C because Lazo indicated that any image he made during the procedure was saved on the computer's hard drive and that he always makes a computer-generated measurement of aneurysms. At no time did counsel for the Hospital or Lazo advise DeAgostino that they believed films were missing from the Hospital's records and they did not request to inspect the films in the Estate's possession.

DeAgostino did not provide Exhibit 5C to Zoarski before the affidavit of merit was filed. The exhibit was not provided to his expert until just before the expert's deposition and was not brought by counsel or the expert to Zoarski's deposition. The notice of intent did not reference a 6.7 mm aneurysm, nor did the complaint, first amended complaint or the affidavit of merit. The 6.7 mm measurement was not discussed by DeAgostino during the *Daubert* hearing that was held. Exhibit 5C also was not utilized at Lazo's deposition, at the depositions of any of the decedent's treating physicians, or at the depositions of any party's expert. That notwithstanding, the Estate maintained throughout the litigation that the aneurysm measured 4 mm to 6 mm. At no point did it represent that the aneurysm measured 6.7 mm as indicated in Exhibit 5C. Lazo has failed to establish that failure to provide certain evidence to experts or reference the evidence during depositions, court proceedings, or in pleadings constitutes misconduct if such evidence is not the basis for the party's position. Thus, there was no abuse of discretion by the trial court in determining that a new trial was not warranted.⁶⁰

⁵⁹ *Id.* at 682-683 (citation and quotation marks omitted).

⁶⁰ *Id.* at 682.

DeAgostino admitted that former counsel for the Hospital requested copies of the records that were in the Estate's possession. Additionally, DeAgostino testified that it is his policy to provide opposing counsel with access to the records in his possession and he does not provide them with copies of the records. MCL 600.2912b(5) provides in pertinent part that the "claimant shall allow the health professional or health facility receiving the [notice of intent] access to all of the medical records related to the claim that are in the claimant's control[.]" Because the statute does not necessitate that the Estate provide copies of the records in its possession, the trial court did not abuse its discretion when it found that DeAgostino's behavior was not misconduct.⁶¹

The Estate was served with interrogatories pertaining to their experts on May 3, 2005, and June 8, 2006. The interrogatories requested copies of all information given to the experts by or on behalf of the Estate. The Estate failed to respond to the interrogatories by providing Exhibit 5C. MCR 2.302(B)(4)(a)(i) states that in preparation for trial:

[a] party may through interrogatories require another party to identify each person whom the other party excepts to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Because the court rules do not require that the substance of the interrogatories at issue be produced by the Estate, the trial court did not abuse its discretion when it found that the Estate's failure to produce Exhibit 5C in response to the interrogatories was not misconduct.⁶²

Lazo next asserts that the trial court erred when it found that a new trial was not warranted because Exhibit 5C did not constitute newly discovered non-cumulative evidence. Pursuant to MCR 2.611(A)(1)(f), a "new trial may be granted . . . whenever [a party's] substantial rights are materially affected," by "[m]aterial evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." To succeed on a motion for a new trial, the moving party must establish:

(1) that the evidence itself and not merely its materiality is newly discovered; (2) that it is not merely cumulative; (3) that it is such as renders a different result probable on retrial; and (4) that the party could not with reasonable diligence have discovered and produced it at trial.⁶³

Here, the evidence elicited at the post-verdict evidentiary hearing establishes that Exhibit 5C was produced by the Hospital to the Estate before the notice of intent was filed. The Hospital

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Hoven v Hoven*, 9 Mich App 168, 173; 156 NW2d 65 (1967).

is under a statutory duty⁶⁴ to maintain the records of its patients, however, it failed to retain a copy of Exhibit 5C at the time that it produced the decedent's films to the Estate. Lazo should have been aware of the exhibit's existence as he testified that he prepares a computer-generated measurement of all aneurysms. Zoarski also mentioned at least twice during his deposition that there was a measurement taken during the pretreatment angiogram at Harper Hospital measuring the aneurysm at 6 mm. Lazo, however, never advised the Estate that he believed that he was not in possession of all of the decedent's films, and failed to request to inspect the records of the decedent in the Estate's possession as he is entitled.⁶⁵ Thus, the evidence was not newly discovered, and Lazo is unable to demonstrate that with reasonable diligence the evidence could not have been discovered and produced at trial.⁶⁶

Moreover, Lazo is unable to demonstrate that it was probable that the evidence would render a different result on retrial. Lazo and his expert, Sanders, testified at trial that computer-generated measurements were unreliable and resulted in error. In fact, Lazo indicated that because there was no computer-generated lateral measurement of the aneurysm contained on Exhibit 5C, the length of the aneurysm could not be determined. Moreover, Lazo testified that his method of measuring the aneurysm was more accurate than a computer-generated measurement. Accordingly, the trial court did not abuse its discretion when failed to grant a new trial on this basis.⁶⁷

V. REMITTITUR⁶⁸

Lazo contends that the trial court erred when it failed to grant his motion for remittitur. We disagree. "A trial court's decision regarding remittitur is reviewed for an abuse of discretion."⁶⁹ The evidence must be viewed in the light most favorable to the nonmoving party.⁷⁰

"The power of remittitur should be exercised with restraint."⁷¹ To determine if remittitur is appropriate, "a trial court must decide whether the jury award was supported by the evidence."⁷²

⁶⁴ MCL 333.20175(1).

⁶⁵ MCL 600.2912b(5).

⁶⁶ *Hoven*, 9 Mich App at 173.

⁶⁷ *Hilgendorf*, 245 Mich App at 682; *Hoven*, 9 Mich App at 173.

⁶⁸ Docket Nos. 300463 and 300466. These issues were raised by both the Hospital and Lazo, however, because we found that the Hospital should have been dismissed on summary disposition, the issues will be phrased as those of Lazo only.

⁶⁹ *Shaw v Ecorse*, 283 Mich App 1, 17; 770 NW2d 31 (2009).

⁷⁰ *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 231; 755 NW2d 686 (2008).

⁷¹ *Taylor v Kent Radiology*, 286 Mich App 490, 522; 780 NW2d 900 (2009).

The trial court's inquiry is limited to objective considerations regarding the evidence presented and the conduct of the trial. Remittitur is justified when a jury verdict exceeds the highest amount the evidence will support. When determining whether an award is excessive, a court may consider whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact, whether it was within the limits of what reasonable minds would deem to be just compensation for the injury inflicted, and whether the amount actually awarded is comparable to other awards in similar cases. A verdict should not be set aside simply because the method of computation used by the jury in assessing damages cannot be determined, unless it is not within the range of evidence presented at trial.⁷³

“If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, it should not be disturbed.”⁷⁴

Lazo concedes that loss of household services and loss of financial support are available as damages in a wrongful death action. He also agrees that the jury's damages award relates at least in part to the testimony of Cohen. Lazo argues, however, that Cohen's testimony was insufficient to support an award of past or future loss of household services. Cohen testified that to determine the amount of past or future loss of household services, an economist can ask a decedent's family what type of home responsibilities the decedent had, or studies can be reviewed regarding what a typical person does around the house. Here, Cohen's estimates for loss of household services were not based on conversations that he had with Christie or a review of her deposition testimony. Rather, they were based on studies addressing economic loss associated with household services, and took into consideration the decedent's estimated life expectancy of 77.5 years. Lazo asserts that Cohen's reliance on studies was improper, but he fails to present any evidence that Cohen's method of determining loss of household services in this case was not an accepted method. Thus, because the jury's award falls within the range of the evidence presented by Cohen and “is within the limits of what reasonable minds would deem just compensation,” the trial court did not abuse its discretion when it failed to grant remittitur.⁷⁵

Additionally, Lazo argues that the jury's consideration of the decedent's earning capacity, as opposed to his actual earnings in determining the Estate's loss of financial support, causes the jury's award for loss of financial support to be based on speculation. Lazo's contention lacks merit. “[S]peculative damages cannot be recovered in Michigan in a tort action.”⁷⁶ “Damages, however, are not speculative simply because they cannot be ascertained

⁷² *Shaw*, 283 Mich App at 17.

⁷³ *Diamond v Witherspoon*, 265 Mich App 673, 693-694; 696 NW2d 770 (2005) (citations omitted).

⁷⁴ *Taylor*, 286 Mich App at 522 (citation and quotation marks omitted).

⁷⁵ *Id.*; *Arkin Distrib Co*, 288 Mich App at 187-188.

⁷⁶ *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005).

with mathematical precision.”⁷⁷ Earning capacity is properly considered by the jury to determine the Estate’s loss of financial support.⁷⁸

Moreover, the jury’s award of loss of financial support was not based on speculation, but as aptly noted by the trial court, was based on statistical data and Cohen’s experience as an economist. According to the record, Cohen’s expert testimony was based on his background, education, training and experience as an economist. Cohen testified that his calculation for economic loss and the decedent’s estimated earning capacity were based on studies from the Bureau of Labor Statistics. Cohen estimated that the decedent’s work life expectancy would have been another 22 years, which would have been until he was 59.9 years old. Cohen explained that his estimate of the decedent’s work life expectancy took into consideration that the decedent may not work 100 percent each year, and may earn less than what an average carpenter would earn annually, which Cohen estimated to be \$39,000.

Cohen discussed the discrepancy between the average income of a carpenter and the income that the decedent actually earned based on his tax returns, which was less. Cohen explained that because the decedent did not have children before his death, it was unclear whether his work history was an accurate reflection of what he would have earned after experiencing the “major life change” of having a child. Thus, in Cohen’s opinion, using the wage of an average carpenter was appropriate. Cohen testified that overall, his calculations do not take into consideration the decedent’s medical history, capabilities as a carpenter, or whether or not he was going to start his own business. Because the jury’s award of loss of financial support fell within the evidence presented by Cohen and is “within the limits of what reasonable minds would deem just compensation,” the trial court did not abuse its discretion when it failed to grant remittitur.⁷⁹

VI. MOTION FOR SANCTIONS⁸⁰

Lazo next argues that the trial court erred when it determined that sanctions were appropriate. We disagree. “We review a trial court’s decision regarding the imposition of a sanction to determine if it is clearly erroneous.”⁸¹ “A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.”⁸² The trial court granted sanctions pursuant to MCR 2.114(E).

⁷⁷ *Id.*

⁷⁸ See *Hanna v McClave*, 273 Mich 571, 576; 263 NW 742 (1935).

⁷⁹ *Taylor*, 286 Mich App at 522; *Arkin Distrib Co*, 288 Mich App at 187-188.

⁸⁰ Docket Nos. 300751 and 306703.

⁸¹ *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

⁸² *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

To impose a sanction under MCR 2.114(E), the trial court must first find that an attorney or party has signed a pleading in violation of MCR 2.114(A)-(D). The determination whether an attorney or party has violated the “reasonable inquiry” standard of MCR 2.114(D)(2) depends largely on the facts and circumstances of the claim.⁸³

Under MCR 2.114(E) sanctions are mandated for signing a document without confirming through reasonable inquiry that the document was “well grounded in fact” in violation of MCR 2.114(D).

Pursuant to MCL 500.3036, in order for the trial court to accept Lazo’s affidavit of recognizance in lieu of an appeal bond, Lazo’s insurance carrier must be “authorized to do business in this state.” An “[a]uthorized’ insurer means an insurer duly authorized, by a subsisting certificate of authority issued by the commissioner, to transact insurance in this state.”⁸⁴

Dr. Joseph J. Mittner represented on behalf of Physicians Reliable Insurance Company, Ltd. in the affidavit of recognizance that Physicians Reliable was an insurance carrier authorized to do business in Michigan. The hearing on the Estate’s ex parte motion revealed that Physician’s Reliable did not have a certificate of authority issued by the insurance commissioner. Thus, based on MCL 500.108, Physicians Reliable was not authorized to do business in Michigan. Accordingly, the affidavit of recognizance filed on behalf of Lazo was inaccurate.

According to counsel for Lazo, the affidavit of recognizance was prepared by counsel with a good faith belief that the information contained therein was accurate. Counsel for Lazo represented that his research did not reveal that in order for Physicians Reliable to be authorized to do business in Michigan that it was necessary that the insurer have a certificate of authority issued by the insurance commissioner. Additionally, according to counsel, Lazo’s insurance policy did not contain language indicating that the insurer was not authorized to do business in Michigan, and the insurer informed him that they file U.S. taxes. Because counsel for the Estate was able to discover that the insurer was not authorized to do business in Michigan, we find that despite counsel for Lazo’s efforts, the trial court did not clearly err when it found that sanctions were appropriate based on MCR 2.114(E) for Lazo’s filing the affidavit of recognizance without reasonable inquiry that the representations contained therein were well grounded in fact.

Lazo also argues that the inclusion of the language in the trial court’s order that the affidavit was “inaccurate and untrue” is unnecessarily prejudicial and should be stricken. Because Lazo filing a document that was “inaccurate and untrue” describes in part the court’s findings regarding why the Estate was entitled to sanctions for Lazo’s violation of MCR 2.114(E), we are not persuaded by Lazo’s argument.

⁸³ *Whalen v Doyle*, 200 Mich App 41, 42; 503 NW2d 678 (1993).

⁸⁴ MCL 500.108.

Finally, Lazo asserts that the trial court's determination that \$400 an hour was a reasonable attorney fee warrants reversal. We disagree. The trial court's determination regarding the appropriate amount of sanctions is reviewed by this Court for an abuse of discretion.⁸⁵

“[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them.”⁸⁶ It is required that the totality of the circumstances of the case be considered by the trial court in determining a reasonable fee.⁸⁷ The factors to be considered include:

(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.⁸⁸

Additional factors for consideration, which overlap the above factors and are detailed in the model rules of professional conduct, are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

⁸⁵ *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002).

⁸⁶ *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 228; 823 NW2d 843 (2012), citing *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008) (quotation marks omitted).

⁸⁷ *Van Elslander*, 297 Mich App at 228.

⁸⁸ *Id.*, quoting *Smith*, 481 Mich at 529 (quotation marks omitted).

(8) whether the fee is fixed or contingent.⁸⁹

The analysis of the above factors should begin:

by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee.⁹⁰

In the instant case, the trial court acknowledged the appropriate factors relevant to its analysis to determine a reasonable attorney fee, but indicated that it also applied the case of *Welch v Khoury*⁹¹ to determine that \$400 an hour was a reasonable attorney fee. Because *Welch* is unpublished, it has no precedential value.⁹² The trial court, however, was not prohibited from using *Welch* for its persuasive value, as *Welch* was tried in a similar locality by an attorney with similar experience to that of the Estate's attorney in the instant case.⁹³

The trial court's opinion in the instant case indicates that in determining a reasonable fee, it considered counsel's years of experience, area of practice, and the locality in which the underlying facts and the trial occurred, as well as the customary charge for such an attorney as contained in the 2003 Economics of Law Practice Survey referenced in *Welch*, which is a "reliable survey . . . of the legal market."⁹⁴ The trial court acknowledged that the 2003 survey was completed approximately two years before the instant case was filed, but further noted that in making its determination of a reasonable fee, it also considered counsel's membership in professional associations, and his resume, which included verdicts and settlements obtained.

⁸⁹ *Van Elslander*, 297 Mich App at 229, quoting *Smith*, 481 Mich at 529-530 (quotation marks omitted).

⁹⁰ *Van Elslander*, 297 Mich App at 229-230 (citation and quotation marks omitted).

⁹¹ *Welch v Khoury*, unpublished opinion per curiam of the Court of Appeals, issued January 28, 2010 (Docket No. 285106).

⁹² MCR 7.215(C)(1).

⁹³ See *Reed v Reed*, 265 Mich App 131, 143-144; 693 NW2d 825 (2005); *Welch*, unpub op at 12.

⁹⁴ *Van Elslander*, 297 Mich App at 229-230.

Thus, we find that the trial court did not abuse its discretion when it determined that \$400 an hour was a reasonable fee.⁹⁵

Affirmed in part, reversed in part, and remanded to the trial court for entry of summary disposition in favor of the Hospital in Docket No. 300466. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Pat M. Donofrio

⁹⁵ *In re Costs & Attorney Fees*, 250 Mich App at 104.