

Court of Appeals, State of Michigan

ORDER

People of MI v Thomas David Richardson

Bill Schuette
Presiding Judge

Docket No. 281359

William C. Whitbeck, C.J.

LC No. 07-001782 FC

Peter D. O'Connell
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The motion to strike is DENIED.

The Court orders pursuant to MCR 7.205(D)(2), in lieu of granting leave to appeal, the circuit court's October 4, 2007 order is VACATED.

With respect to Dr. Dorothy Kahler's and Dr. Julianne Kirkham's testimony, the matter is REMANDED to the circuit court to hold a hearing and make specific findings regarding the reliability of the proffered testimony. MRE 104(c); *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782-783; 685 NW2d 391 (2004).

With respect to Dr. Werner Spitz's testimony, the matter is REMANDED to the circuit court to determine if plaintiff is prejudiced by the violation of the discovery order. *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997). The court is also required to determine if a lesser sanction than exclusion of the evidence will promote the interest of justice. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 455 n 10; 722 NW2d 254 (2006). If there are other grounds for the exclusion of the expert testimony, the court may hold a hearing and make specific findings in that regard. MRE 104(c); *Daubert, supra*; *Gilbert, supra*. We do not retain jurisdiction.

O'Connell, J. would reverse that part of the trial court's October 4, 2007, order that deemed Dr. Warner Spitz unqualified to testify. His impeccable credentials speak for themselves, and the trial court may limit Dr. Spitz's testimony to his area of expertise. In this case, the court erred by barring his testimony on the basis of a discovery violation. Regarding Dr. Dorothy Kahler's and Dr. Julianne Kirkham's testimony, Judge O'Connell would remand this case to the trial court to conduct an evidentiary hearing and make a preliminary determination in accordance with MRE 702. If the court determines that these experts meet the threshold requirements to testify in a Michigan court, then the court should conduct a hearing pursuant to MCL 600.2955(1). See *Chapin v A&L Parts, Inc*, 274 Mich App 122; 732 NW2d

578 (2007), lv den 478 Mich 916 (2007). The court must make findings of fact and conclusions of law sufficient for appellate review. In all other respects, Judge O'Connell concurs with the majority's order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

NOV 15 2007

Date

Sandra Schultz Mengel
Chief Clerk