

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

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MAHENDRA DALMIA,

Plaintiff-Appellant,

v

CARL PALFFY, M.D., EMERGENCY  
PHYSICIANS ASSOCIATES, P.C., and ST.  
JOSEPH MERCY HOSPITAL, PONTIAC, a/k/a  
TRINITY HEALTH-MICHIGAN,

Defendants-Appellees.

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UNPUBLISHED

February 6, 2007

No. 264088

Oakland Circuit Court

LC No. 03-052350-NH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders striking the testimony of his expert witness, dismissing his suit, and denying his motion for reconsideration. We reverse and remand for proceedings consistent with this opinion. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff suffered a stroke at his home, and was conveyed to St. Joseph Mercy Hospital in Pontiac. At the hospital, plaintiff complained of nausea, lightheadedness, dizziness, numbness on his left side, and vomiting. He had equal strength in both his arms and legs, but could not do a finger-to-nose test. Plaintiff had elevated blood pressure and blood sugar.

Plaintiff was initially seen in the emergency room by a resident physician, and approximately one hour later, by defendant Dr. Palffy. Plaintiff underwent a CT scan to rule out bleeding in his brain. He was admitted to the hospital and treated for a stroke. At a second examination, plaintiff's condition had not changed. He was well oriented, but was still unable to do the finger-to nose test. The initial CT scan showed no hemorrhage.

Plaintiff's caregivers noted a heart arrhythmia and began administration of heparin, a blood thinner. Almost immediately, plaintiff experienced a very severe headache. The heparin was stopped and a second CT scan was done. That test showed an acute infarct in plaintiff's

right posterior cerebral artery, with an associated hemorrhage. This injury disabled plaintiff, and he has been unable to return to work.<sup>1</sup>

Plaintiff filed suit alleging malpractice, particularly defendants' failure to promptly administer a clot dissolving drug, Tissue Plasminogen Activator (TPA). Plaintiff offered the testimony of Dr. Ira Mehlman, a physician with significant experience<sup>2</sup> in the emergency room treatment of stroke patients. Dr. Mehlman testified that the prompt administration of TPA was required as the standard of care for all stroke patients who scored between 3 and 22 on a National Institute of Health (NIH) stroke scale, if no contraindications were present. Dr. Mehlman opined that plaintiff was a "perfect" candidate, and that had TPA been given within three hours of plaintiff's first symptoms, the outcome would have been different and plaintiff would not have had bleeding in his brain. Dr. Mehlman based his conclusion that plaintiff had a score of greater than three on the NIH stroke scale, requiring the prompt administration of TPA, on his finding that plaintiff suffered from ataxia when he was admitted to the hospital. He blamed the lack of any evidence of ataxia on a poor evaluation by Dr. Palffy.

During his deposition, Dr. Mehlman was asked several times to support his conclusions and opinions with data or studies.<sup>3</sup> He stated that he had not reviewed any literature prior to his deposition, but relied on his years of emergency care experience (see footnote 2) and recollection of studies he had read about TPA. He further stated that if the matter proceeded to trial, he could at that time produce literature to support his conclusions.

Dr. Palffy brought a pre-trial motion to strike Dr. Mehlman's testimony on the ground that it lacked the indicia of reliability required by MRE 702 and MCL 600.2955(1). The trial court granted the motion for the following reasons: (1) plaintiff's lawyers failed to provide data, methods, or documentation to support Dr. Mehlman's opinion on the standard of care; (2) the offer to provide this documentation at trial was untimely, and was an inappropriate way to respond to the request for discovery; (3) because trial was imminent, striking Dr. Mehlman's testimony was an appropriate sanction; (4) plaintiff failed to include any evidence in support of Dr. Mehlman's opinion in his exhibit list, and this failure prejudiced defendants; and (5) relying on both MRE 702 and MCL 600.2955(1) as well as *Craig v Oakwood Hosp*, 471 Mich 67, 77-85; 684 NW2d 896 (2004), and *Gilbert v Daimler-Chrysler Corp*, 470 Mich 749, 779-791; 685

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<sup>1</sup> Plaintiff formerly worked as an engineer in the automotive industry.

<sup>2</sup> Dr. Mehlman testified in his deposition that he had been "primarily an emergency room physician since '81, but more exclusively since '97." He also stated he had practiced emergency medicine "90 plus percent of the time since '92," and "exclusively" since 1997.

<sup>3</sup> The subpoena for the deposition required, among other things, that Dr. Mehlman bring with him to the deposition:

"4. A copy of all medical literature reviewed by deponent in connection with the present matter;

...

7. Any and all medical records or other documents reviewed in connection with this matter."

NW2d 391 (2004), the trial court found that Dr. Mehlman's testimony, without supporting data or studies, was unreliable and inadmissible.

We review a trial court's decision to admit expert testimony for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCR 2.313(B)(3)(c) expressly authorizes a trial court to enter an order of dismissal or default judgment against a party who fails to provide discovery. *Thorne v Bell*, 206 Mich App 625, 632; 522 NW2d 711 (1994). However, the drastic penalty of dismissal or default should be used only where there is a finding that failure to comply with discovery rules or orders is "willful." *Citizen's Ins Co v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001).

Although in the context of a failure to timely file a witness list, this Court has before addressed the factors a trial court ought to consider before deciding to bar a witness as a sanction for a discovery violation: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (refusal to disclose witnesses); (3) the prejudice to the other party; (4) actual notice to the other party of the witness and length of time prior to trial that the other party received actual notice; (5) whether there exists a history of the party's engaging in delay; (6) the degree of compliance by the party with other provisions of the court's order; (7) an attempt by the party to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). We find this list of factors an appropriate guide here, and focus particularly on the last item, whether the interests of justice are served by the harsh sanction of excluding a witness. As the *Dean* Court noted: "Where the sanction is the barring of an expert witness resulting in the dismissal of the plaintiff's action, the sanction should be exercised cautiously." *Id.* at 32.

The trial court stated that Dr. Mehlman's offer to provide the requested documentation at trial was "an inappropriate way to respond to the request for discovery and the subpoena," and concluded that because plaintiff had waited too long to provide documentation to support its expert's opinion, striking plaintiff's expert was an "appropriate sanction." We disagree and find the trial court's decision unduly harsh, given the circumstances of the case.

Of course, the court must consider "the facts, technique, methodology, and reasoning relied on by the expert," collectively forming the basis for the expert's opinion. MCL 600.2955(1). But here we have an expert who is an emergency care physician with at least 25 years of concentrated experience in emergency care. The trial court could have assumed, for the sake of argument, that this doctor would have been able to follow through on his promise to provide documentation to support his opinion. Although Dr. Mehlman suggested he could bring such materials to trial, the court could instead have continued the hearing to another date to allow the witness sufficient leeway to produce the documents, and then made a determination, based on the evidence, as to whether the expert's opinion was appropriately reliable.

The sanction the trial court chose serves only the interest of certainty, and that only for defendants. Fairness is assuredly not served, and neither therefore are the interests of justice. Clearly, Dr. Mehlman should have read the deposition subpoena carefully and recognized that he was required to bring documentation to that proceeding. And, of course, plaintiff's counsel should have kept a closer eye on the ball and ensured that discovery requirements were complied

with more completely. But excluding an expert where such exclusion decimates plaintiff's claim irretrievably is nonetheless unnecessarily harsh where lesser sanctions could be employed to highlight the errors committed while still allowing the claim to be litigated.

We therefore find, limited to the specific facts of this case, that the trial court abused its discretion in summarily striking Dr. Mehlman's testimony.

Plaintiff also urges that the trial court abused its discretion by denying plaintiff's motion for reconsideration. In light of our dispositive ruling, we need not address this claim.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Jessica R. Cooper