STATE OF MICHIGAN

COURT OF APPEALS

CHARLES MORGAN and RICHARD MORGAN, d/b/a MORGAN BROTHERS CONSTRUCTION, DAVID R. VANSCHAIK, and PAMELA VANSCHAIK,

Plaintiffs,

and

STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff-Appellant/Cross-Appellee,

v

ROBERT VELTING, d/b/a VELCO PLUMBING, and VELCO PLUMBING, INC.,

Defendants-Appellees/ Cross-Appellants.

UNPUBLISHED
May 30, 1997

No. 175014
Kent Circuit Court
LC No. 89-063910-NZ

Before: Reilly, P.J., and MacKenzie and B. K. Zahra*, JJ.

PER CURIAM.

In this subrogation case, State Farm (plaintiff) sought reimbursement from defendants for monies paid to Morgan Brothers following a fire at their construction site. Plaintiff alleged that the cause of the fire was the failure of defendants and their employees to follow proper safety procedures during the "sweating" of copper pipes. A jury rejected plaintiff's theory of causation and returned verdicts of no cause of action on plaintiff's breach of contract, negligence, and breach of warranty claims. The trial court subsequently denied plaintiff's motion for new trial or relief from judgment. Plaintiff appeals as of

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* Circuit judge, sitting on the Court of Appeals by assignment.

right and defendants have filed a cross-appeal. We affirm the judgment of no cause of action entered against plaintiff.

Plaintiff first argues that it was denied a fair trial because defense counsel repeatedly and intentionally injected prejudicial statements into the trial proceedings which portrayed the case as a battle between a "Goliath" insurance company with vast financial resources and a poor, small "David" businessman. Remarks made by one party which reference the corporate nature and wealth of an opposing party are always improper, although not always incurable or warranting reversal. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 110-111; 330 NW2d 638 (1982); *Duke v American Olean Tile Co*, 155 Mich App 555, 562; 400 NW2d 677 (1986). Such remarks constitute error warranting reversal when they are constantly repeated so as to indelibly impress the theme on the jurors' consciousness and demonstrate a deliberate course of conduct aimed at preventing the opposing party from having a fair and impartial trial. *Reetz, supra*, 111-112; *Duke, supra*, 562-563.

In this case, defense counsel's statements during voir dire were made in contexts that did not portray plaintiff as an unfeeling, powerful corporation. Nor, taken in context, did the statements expressly or implicitly ask the jury to find for defendants because of plaintiff's size. Further, the record does not support plaintiff's claim that defense counsel made a deliberate attempt to inflame the passions of the jury against plaintiff. Because any prejudice arising from the statements was insignificant, the trial court did not abuse its discretion in declining to declare a mistrial on this basis. *McCarthy v Belcher*, 128 Mich App 344, 347; 340 NW2d 848 (1983).

Plaintiff failed to object below to the remaining statements it now argues constituted improper argument. In any event, the record does not support plaintiff's claim that defense counsel engaged in a deliberate course of conduct aimed at preventing it from having a fair and impartial trial. Reversal is therefore unwarranted.

Plaintiff next argues that the trial court abused its discretion in admitting into evidence wiring that was found at the fire scene by a defense expert. The record indicates that the wiring was admitted on plaintiff's motion. Accordingly, plaintiff has waived appellate review of this alleged error. *People v King*, 158 Mich App 672, 677; 405 NW2d 116 (1987); *City of Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986). Similarly, plaintiff has waived appellate review of its claim that the trial court abused its discretion when it admitted the model of Building 4360 by stipulating to the admission of the model. *King, supra; City of Troy, supra*.

Plaintiff argues that the trial court abused its discretion when it admitted into evidence a circuit breaker box found at the fire scene by a defense expert. The record does not indicate that the box was admitted into evidence. Even if the box was erroneously admitted, the error would have been harmless because plaintiff first disclosed the existence of circuit breaker boxes during the direct examination of Charles Morgan and because the box found by the defense expert played no role in the formation of his opinion regarding the cause of the fire.

To the extent that plaintiff argues that other items taken from the fire scene by a defense expert should not have been admitted or used by defense counsel, the record indicates that the trial court

excluded these items and precluded defense counsel from using them. Moreover, to the extent that plaintiff now challenges the admission of any testimony concerning these items, the record indicates that it failed to object to the testimony. This failure to object precludes appellate review of any challenge to that testimony. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992).

Likewise, plaintiff failed to preserve for appellate review its claim that the trial court abused its discretion by allowing defense counsel to use photographs not previously disclosed to plaintiff and allowing defense counsel to use the photographs to elicit new opinion testimony from defendants' fire origin and causation expert. *Considine, supra*. A review of the record reveals that plaintiff did not advance a timely objection on the same grounds as advanced on appeal when defense counsel used the photographs in question in a manner inconsistent with the trial court's prior ruling concerning the photographs. Nor did plaintiff object when defense counsel used one of the photographs in question to elicit new opinion testimony from a defense expert. Furthermore, we are satisfied that no manifest injustice would befall plaintiff in the absence of appellate review. *Richards v Pierce*, 162 Mich App 308, 316; 412 NW2d 725 (1987). Any prejudice flowing from the changed opinion testimony was mitigated by the expert's failure to rule out other possible sites of the fire's origin, by the expert's continued adherence to his opinion that he could not rule out the sweating of the pipes as a cause of the fire, and by plaintiff's impeachment of the expert's new origin testimony by use of other photographs.

Plaintiff also failed to preserve for appellate review the claim that the trial court abused its discretion when it allowed defense counsel to cross-examine witness Ernest Evans with a statement contained in an adjuster's letter. *Considine, supra*. No manifest injustice will befall plaintiff absent review; plaintiff has not established if and how it suffered irreparable prejudice from the information disclosed during this cross-examination. *Richards, supra.*

Plaintiff next argues that the trial court abused its discretion when it allowed defense counsel to impeach its witness, Wyoming Fire Marshall Michael Larabel, by using a newspaper article containing hearsay. Even assuming error, plaintiff fails to explain how the impeachment irreparably harmed its case. The record discloses no obvious irreparable harm. Absent a demonstration of prejudice, any error was harmless. *Teledyne v Muskegon Twp*, 163 Mich App 188, 195; 413 NW2d 700 (1987).

Plaintiff also argues that the trial court abused its discretion when it allowed defense counsel to publish certain photographs to the jury before it ruled on the admissibility of the photographs, especially in light of the court's eventual exclusion of the photographs. Again, assuming error, the error was harmless given that plaintiff fails to explain how it was prejudiced by the jury's viewing of the photographs. *Teledyne, supra*.

Finally, plaintiff argues that the trial court abused its discretion when it denied plaintiff's new trial motion. Plaintiff argues that it was entitled to a new trial pursuant to MCR 2.611(A)(1)(b) (misconduct of the prevailing party) because a defense fire origin and causation expert misrepresented his qualifications. Plaintiff, however, does not assert that defense counsel or defendants had any knowledge of the alleged misrepresentations or were in any way involved in a knowing presentation of the alleged misrepresentations to the court. On its plain language, MCR 2.611(A)(1)(b) applies only to jury or prevailing party misconduct. Since plaintiff does not allege any knowing participation in the alleged

misrepresentations by defense counsel or

defendants, it has failed to allege any misconduct by "the prevailing party." See e.g., *Cooper v Garden City Osteopathic Hosp*, 98 Mich App 362, 365-368; 296 NW2d 259 (1980). The trial court therefore did not abuse its discretion when it denied plaintiff's motion for a new trial under MCR 2.611(A)(1)(b). *Wigginton v Lansing*, 129 Mich App 53, 60; 341 NW2d 228 (1983). Even if plaintiff's motion were treated as one based upon newly discovered evidence under MCR 2.611(A)(1)(f), plaintiff would still not be entitled to a new trial. The record reveals that defendants disclosed the identity of the expert in question more than three years before trial. The record also discloses that plaintiff knew of the expert's alleged credentials well in advance of trial. With reasonable diligence, plaintiff could have produced the "new" evidence at trial. It thus was not entitled to a new trial on the basis of newly discovered evidence. *Stallworth v Hazel*, 167 Mich App 345; 421 NW2d 685 (1988).

Our resolution of plaintiff's appellate claims renders a discussion of defendants' claimed error moot. See *Crawford Co v Secretary of State*, 160 Mich App 88, 93; 408 NW2d 112 (1987).

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Barbara B. MacKenzie
/s/ Brian K. Zahra