STATE OF MICHIGAN

COURT OF APPEALS

JANET SHUMAKER and STEVE SHUMAKER, a/k/a STEVE MARTEN,

Plaintiffs-Appellants,

v

EMHART INDUSTRIES, INC., BLACK & DECKER CORPORATION, ROYCE TOFFOLO, DAVE SMITH, NICK BENIDETTI, a/k/a NICHOLAS BENNEDDTTI, and BOB OLSTERMAN, a/k/a ROBERT OSTERLAND,

Defendants-Appellees.

UNPUBLISHED
July 31, 1998

Nos. 183375; 184644
Macomb Circuit Court
LC No. 92-000595-CZ

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Plaintiff Janet Shumaker and her husband filed this action against Janet's former employer, defendant Emhart Industries, Inc.,[1] alleging gender discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. The jury returned a verdict of no cause of action in favor of defendant. In Docket No. 183375, plaintiffs appeal as of right from the final judgment entered on this verdict. In Docket No. 184644, plaintiffs appeal as of right from the trial court's order assessing mediation sanctions in the amount of $71,862.50. We affirm.

Plaintiffs first argue that the trial court abused its discretion in allowing defendant to introduce into evidence certain documents that had not been produced during discovery. Plaintiffs also argue that the trial court should have excluded the testimony of three defense witnesses on the ground that defendant's answers to plaintiffs' interrogatories did not include information about the witnesses' testimony. We do not believe that the trial court abused its discretion in any of these rulings. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 618; 550 NW2d 580 (1996). In some instances, it was undisputed that defendant failed to produce requested documents. For example, a witness for defendant admitted that an internal report regarding plaintiff's claim of discriminatory treatment was not produced during discovery. The witness allegedly forgot about the report. However, we note that the

report itself was not admitted into evidence. In addition, plaintiffs' counsel was given time to review the report before proceeding with his cross-examination of the witness. On appeal, plaintiffs have failed to point to any erroneous ruling on the part of the trial court. In addition, they have not shown that they were prejudiced by the witness' reference to the report. Under these circumstances, there is simply no basis for reversal.

In other instances, there was a dispute regarding whether documents had been produced during discovery. Defendant maintained that, while compilations or summaries of some documents had not been produced, plaintiffs had been provided with all of the underlying data in documents produced before trial. Defendant also provided proof that 1,500 pages of documents were produced for plaintiffs during discovery. However, plaintiffs continued to argue that the documents in question had never been produced. Under these circumstances, the trial court implemented a reasonable solution when it allowed plaintiffs' counsel time to review all of defendant's exhibits before continuing with the trial. We find no abuse of discretion in this compromise.

Plaintiffs also argue that they were not provided with relevant discovery regarding three defense witnesses. Plaintiffs contend that these witnesses should have been stricken. However, given the fact that the witnesses were not major figures in this case and that plaintiffs' counsel was given time to interview them, the trial court did not abuse its discretion in allowing the witnesses to testify.

Plaintiffs next argue that error occurred when proposed exhibits, which had not been formally admitted into evidence, were provided to the jury during their deliberations. Plaintiffs raised this issue in their motion for a new trial. We review a trial court's decision whether to grant a new trial for an abuse of discretion. *Mahrle v Danke*, 216 Mich App 343, 351; 549 NW2d 56 (1996). Here, the trial court asked the attorneys to review the exhibits before they were submitted to the jury. Plaintiffs failed to bring this matter to the trial court's attention before the jury was provided with the exhibits. Under these circumstances, any error regarding the exhibits was attributable to plaintiffs, not the trial court. Furthermore, plaintiffs have not shown that the error substantially prejudiced their case. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). The substance of plaintiffs' argument is that defendant did not formally move for the admission of the exhibits before the jury received the case. However, the trial court had conditionally admitted the exhibits, and it appears that the failure to formally admit them was a technicality. Under these circumstances, plaintiffs cannot show substantial prejudice. *Id.* at 402-403. See also *Hirdes v Selvig*, 369 Mich 173, 179-180; 119 NW2d 537 (1963). Thus, the trial court did not abuse its discretion in declining to grant a new trial on this ground.

Next, plaintiffs argue that certain notes made by defendant's employees should not have been admitted or mentioned during trial pursuant to the Bullard-Plawecki Employee Right to Know Act, MCL 423.502; MSA 17.62(2), because the notes were not included in plaintiff's personnel record. We believe that plaintiffs have waived any claim of error on this issue. When plaintiffs raised this issue in the trial court, the court agreed to conduct a hearing to decide if the notes should be excluded later in the trial. However, plaintiffs never requested the hearing, nor did they identify what notes should have been included in plaintiff's personnel file. The record is insufficient to even review the merits of plaintiffs' argument. Accordingly, this issue is deemed waived. *Phinney v Perlmutter*, 222 Mich App 513, 529, 537-538; 564 NW2d 532 (1997).[2]

Plaintiffs next argue that the trial court abused its discretion in granting defendant's motion in limine, which restricted the testimony of a former employee who was suing defendant for sexual discrimination at the time plaintiff was hired. The trial court found that introduction of the evidence would have been unfairly prejudicial. Although we do not necessarily agree with the trial court, we find no abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361-362; 533 NW2d 373 (1995). Even if there was error here, it was harmless given that the same evidence was eventually introduced through another witness.

In relation to the above issue, plaintiffs also argue that the trial court erred in limiting redirect examination of a witness who, in response to defense questioning, volunteered information regarding the prior lawsuit. Plaintiffs contend that, despite the trial court's earlier ruling, defense counsel "opened the door" on this issue. We review the trial court's determination regarding the proper scope of redirect examination for an abuse of discretion. *Richardson v Ryder Truck Rental*, 213 Mich App 447, 454; 540 NW2d 696 (1995); *Gallaway v Chrysler Corp*, 105 Mich App 1, 8; 306 NW2d 368 (1981). Here, it does not appear from the record that defendant intended to open the door on this issue, or that defense counsel should have anticipated that his question would elicit the witness' discussion of the prior lawsuit, and we cannot conclude that the trial court abused its discretion in limiting redirect examination of this witness. As above, even if the trial court's initial ruling regarding the admissibility of this evidence was erroneous, the error was harmless because the information plaintiffs sought had already come out on cross-examination.

Plaintiffs next argue that the trial court erred in denying their motions for judgment notwithstanding the verdict and for a new trial. Both motions were deficient under the court rules, MCR 2.119(A)(1)(b), because plaintiffs did not state with particularity the grounds and authority on which the motions were based. For this reason, the trial court properly denied both motions. In addition, the trial court properly denied the motion for judgment notwithstanding the verdict because the case involved a credibility contest between the parties. Where reasonable jurors could have honestly reached different conclusions based upon the evidence, neither this Court nor the trial court may substitute its judgment for that of the jury. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995). Finally, as discussed above, we find that the errors at trial, if there were any, were harmless. Under these circumstances, the trial court did not abuse its discretion in denying the motion for a new trial.

Lastly, plaintiffs argue that they were denied the right to an evidentiary hearing regarding the reasonableness of the mediation sanctions requested by defendant. We agree with the trial court that this issue was waived by plaintiffs below. Plaintiffs' counsel stated on the record that he would work out any objections with defense counsel. Because plaintiffs failed to follow through with this procedure within the time limits agreed upon, their claim of error is waived on appeal. *Phinney, supra* at 537-538.

Affirmed.

/s/ Henry William Saad
/s/ Myron H. Wahls
/s/ Hilda R. Gage

[1] Because Steve Shumaker's claims are derivative, we will use the term "plaintiff" to refer to Janet Shumaker only. In addition, because the other defendants named in this matter were dismissed before trial, "defendant" will refer to Emhart Industries, Inc. only.

[2] Even were this issue preserved, plaintiffs have failed to show that MCL 423.502; MSA 17.62(2) would have required exclusion of this evidence. That statute provides:

> Personnel record information which was not included in the personnel record but should have been as required by this act shall not be used by an employer in a judicial or quasi-judicial proceeding. However, personnel record information which, in the opinion of the judge in a judicial proceeding or in the opinion of the hearing officer in a quasi-judicial proceeding, was not intentionally excluded in the personnel record, may be used by the employer in the judicial or quasi-judicial proceeding, if the employee agrees or if the employee has been given a reasonable time to review the information. Material which should have been included in the personnel record shall be used at the request of the employee.

Here, it is not clear that the notes at issue were "personnel records" within the meaning of the statute. See MCL 423.501(2)(c); MSA 17.62(1)(2)(c). In addition, there was no evidence that defendant intentionally excluded this evidence from plaintiff's personnel file.