

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA SMITH, Personal Representative of the
Estate of CARLTON SMITH, Deceased,

UNPUBLISHED
October 30, 1998

Plaintiff-Appellee,

v

Nos. 188995;189001;
189037;189904

NORTHWEST GENERAL HOSPITAL, ADNAN
ABBASI, M.D., ADNAN ABBASI, M.D., P.C.,
and DAVID R. WEAVER, D.O.,

Wayne Circuit Court
LC Nos. 92-203805 NH
92-220503 NH

Defendants-Appellants,

and

ANDREW HARDY, M.D. and ANDREW HARDY,
M.D., P.C.,

Defendants.

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

In these consolidated appeals, defendants-appellants appeal by leave granted from a trial court order granting plaintiff's motion for a new trial after the jury returned a verdict of no cause of action in favor of defendants in this medical malpractice action. We reverse.

In reviewing a motion for a new trial on the ground that the verdict is against the great weight of the evidence, the trial judge must review the whole body of proofs to determine whether the overwhelming weight of the evidence favors the losing party. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *Bordeaux v Celotex Corp*, 203 Mich App 158, 170; 511 NW2d 899 (1993). Where there is competent evidence to support the finding of the jury, its verdict should not be set aside and a new trial granted solely because the trial court would weigh and evaluate the evidence

differently. The trial court cannot substitute its judgment for that of the factfinder. *Kalamazoo Co Rd Commrs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964); *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990). Credibility of witnesses is a question for the jury and the trial court cannot disturb the jury's evaluations of credibility absent exceptional circumstances not present here. *Lemmon, supra* at 643-644, 647.

The trial court's ruling on a motion for a new trial on the ground that the verdict is against the great weight of the evidence is reviewed for an abuse of discretion. *Bordeaux, supra*. The trial court's determination that the verdict is against the great weight of the evidence is given less than substantial deference to insure that the trial court has not invaded the province of the jury. In reviewing the trial court's ruling, this Court must engage in an in-depth analysis of the record. *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992).

The trial court determined that the overwhelming weight of the evidence supported plaintiff's claim that defendant Weaver was negligent. Having reviewed the record, we find that arguably credible evidence was presented by both plaintiff and defendants regarding the proper diagnosis and treatment of plaintiff's decedent's condition, as well as the cause of death, but the overwhelming weight of the evidence did not favor plaintiff. The case came down to a jury determination of credibility of the experts, which the trial court could not properly second-guess. Accordingly, we find that the trial court improperly invaded the province of the jury and thus abused its discretion in granting plaintiff's motion for a new trial against defendant Weaver.

When reviewing asserted improper conduct by a party's lawyer, the court must first determine whether the lawyer's action was error and, if so, whether the error requires reversal. A lawyer's comments usually will not be cause for relief unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or they were such as to deflect the jury's attention from the issues involved and had a controlling influence upon the verdict. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 Mich 405 (1990). A specific curative instruction, as well as SJ12d 3.04, is generally sufficient to render any error harmless. *Kirk v Ford Motor Co*, 147 Mich App 337, 348-349; 383 NW2d 193 (1985); *In re Ellis Estate*, 143 Mich App 456, 464; 372 NW2d 592 (1985).

Following opening statements, plaintiff objected to defendant Abbasi's counsel's remark that the hospital had closed for financial reasons, but did not object to remarks that the hospital had simply closed. The hospital's insolvency was not mentioned again. During closing argument, in prefatory remarks to the issue of vicarious liability, the hospital's counsel noted, again without objection, that the hospital had closed. We find that neither the isolated remark about the hospital closing for financial reasons nor the few remarks that the hospital had closed were made as direct appeals to the prejudices or self-interest of the jury. The hospital's attorney's statement did not imply that the hospital could not be held liable because it had closed; to the contrary, the statement explained why, despite its closure, the hospital was a party in the case. The jurors were not asked to consider what effect a judgment against the hospital might have on the availability of medical care in their community and there was no implication that the hospital's financial problems or resulting closure had anything to do with malpractice insurance or damage awards. Moreover, in addition to giving a special instruction requested and drafted by plaintiff's counsel that the jurors were to disregard the financial status of any party in deciding

the issues, the court reminded the jury that the lawyers' comments were not evidence and were to be disregarded to the extent they were not corroborated by evidence or testimony both before closing argument and in the final instructions. Given that plaintiff did not object to remarks that the hospital had closed, that there was a single reference to the hospital's financial condition made fifteen days before the jury went out to deliberate, and that the court gave appropriate curative instructions, one of which was specially drafted by plaintiff's counsel, any error was rendered harmless and did not deprive plaintiff of a fair trial. Accordingly, we conclude that the trial court abused its discretion in awarding a new trial on the basis of improper remarks by defense counsel.

Reversed and remanded for reinstatement of the judgment of no cause of action in favor of defendants. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ William C. Whitbeck