

STATE OF MICHIGAN
COURT OF APPEALS

JULI JULIANO SHIRE,

Plaintiff-Appellant/Cross-Appellee,

v

J. MEYER, D.P.M. and PODIATRY PLUS, P.C.,

Defendants-Appellees,

and

L. NISHON, D.P.M.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

May 4, 1999

No. 201909

Ingham Circuit Court

LC No. 93-074528 NH

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

In this action alleging podiatry malpractice, plaintiff appeals as of right from a directed verdict in favor of defendant, L. Nishon, D.P.M., and from a judgment of no cause of action based on a jury verdict in favor of defendants, J. Meyer, D.P.M., and Podiatry Plus, P.C. Defendant Nishon cross-appeals the denial of his motion for sanctions under MCL 600.2591; MSA 27A.2591. We affirm.

Plaintiff was referred to Podiatry Plus, P.C., to be considered for shoe inserts to alleviate pain associated with athletic activity. Plaintiff was treated by Dr. Meyer, who advised plaintiff to undergo surgery. Plaintiff acquiesced to Dr. Meyer's recommendation and had surgery performed on both of her feet. Dr. Meyer and his partner, Dr. Nishon, performed the surgery. Dr. Nishon did not meet plaintiff until the morning of her surgery. Thereafter, plaintiff brought the instant lawsuit alleging that both doctors committed malpractice which resulted in permanent injury to plaintiff. In short, plaintiff alleged that surgery was not indicated for her condition, that a non-surgical course of treatment should have been employed and that defendants failed to obtain informed consent before performing the surgical procedures.

Plaintiff first claims that the trial court erred in directing a verdict in favor of Dr. Nishon. We disagree. When reviewing a trial court's grant of a directed verdict, this Court examines the evidence in a light most favorable to the nonmoving party to determine if there exists a genuine and material factual issue that must be resolved by a jury. *Oakland Hills Development Corporation v Lueders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1995). A motion for a directed verdict should be denied if reasonable minds could differ with regard to whether the plaintiff has met the burden of proof. *Id.*

The trial court reasoned that Dr. Nishon could not be responsible for any injury sustained by plaintiff because he did not develop plaintiff's course of treatment nor was he responsible for obtaining from plaintiff her consent to undergo the surgery. We need not decide whether the trial court was correct in its legal assessment of plaintiff's claims against Dr. Nishon, since we find that any error was harmless in light of the jury's rejection of the claims against Dr. Meyer. *Eberbach v Woods*, 232 Mich 392, 398; 205 NW 174 (1925). Viewing the testimony in a light most favorable to plaintiff, we note that plaintiff's experts conceded that the theories against the two doctors were essentially the same and that Dr. Meyer was more culpable than Dr. Nishon. Because the jury rejected the claims asserted against Dr. Meyer, logic dictates that the jury would have also rejected the claims asserted against Dr. Nishon.

Plaintiff next argues that she was prejudiced because the court informed the jury that the case against Dr. Nishon had been dismissed. We disagree. The trial court stated:

Members of the jury, as you can see, Dr. Nishon is not in court today. I have directed a verdict in his favor. You should not speculate the reasons for my decision. You should continue to hear the merits of this case in accordance with the instructions you have been provided and those you will be provided on the law. The law of the case is contained in those instructions.

Comments from the trial court constitute a basis for reversal only if the comments denied plaintiff a fair and impartial trial by unduly influencing the jury. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 216; 457 NW2d 42 (1990). We do not see how this truthful comment regarding the status of Dr. Nishon deprived plaintiff of a fair trial or unduly influenced the jury. Because the directed verdict was granted at the close of plaintiff's proofs, some explanation was warranted in order to minimize jury speculation regarding Dr. Nishon's absence. While it was possible that the jury may have speculated that the dismissal of Dr. Nishon was an indication that the court found plaintiff's entire case lacking merit, it is equally possible that the jury may have speculated that the decision to continue the trial exclusively against Dr. Meyer was an indication that the court found the claim against Dr. Meyer to be meritorious. To avoid speculation, the court instructed the jury that they must follow the law and impartially resolve the merits of the claim against Dr. Meyer. Moreover, the jury was later instructed to disregard any judicial comment or conduct that may have been construed as an indication of the court's opinion on how the case should be decided. We presume that the jurors understood and followed the court's instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993).

Plaintiff also argues that the trial court erred by barring the testimony of Dr. Dodds, one of plaintiff's expert witnesses. Our review of the record does not support plaintiff's argument. According to the record, the trial court ruled that plaintiff could present Dr. Dodds' testimony in rebuttal. However, plaintiff never did so. We conclude that plaintiff's failure to call Dr. Dodds as a witness on rebuttal waives any error in the trial court's ruling. "An appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 388; 554 NW2d 49 (1996).

Next, plaintiff contends the trial court committed error requiring reversal by responding ex-parte to a note sent by the jury during deliberations. Specifically, the jury sought the flip-charts used by defense counsel during closing argument. The flip-charts were not admitted in evidence. The court provided the flip-charts to the jury without informing counsel of the request.

Trial courts are prohibited from engaging in ex-parte communication with a deliberating jury. *People v France*, 436 Mich 138, 161; 461 NW2d 621 (1990).¹ Not all *ex-parte* communication, however, requires reversal. Reversal is warranted only if the improper communication resulted in undue prejudice to the appellant. *Id.* At 143.

In *Phillips v Diehm*, 213 Mich App 389, 402-403; 541 NW2d 566 (1995), this Court considered the prejudicial effect of providing to a deliberating jury charts that were used in closing argument, but never admitted in evidence:

[The defendant] did not object to the charts when they were first shown to the jury during closing arguments. The charts in the jury room contained nothing that the jury had not already seen without objection in open court. . . . It was not shown that anything unfairly prejudicial to defendant was on the charts. . . . In addition, defendant had a full opportunity to comment about the charts during closing argument. The submission of this evidence to the jury did not substantially prejudice [the defendant's] case. [*Id.* at 403.]

In the present case, nothing in the record suggests that the flip-charts contained material unfairly prejudicial to plaintiff. These charts were displayed to the jury without objection during closing arguments. Applying the rationale of *Phillips* to this case, we hold that plaintiff has not established that the jury's consideration of the flip charts was unduly prejudicial. We therefore reject plaintiff's claim of error.

Plaintiff next claims that the trial court erred when it instructed the jury that it could assume that two photographs offered in evidence by plaintiff, but later lost during the course of trial, demonstrated evidence adverse to plaintiff. See SJ12d 6.01. The court instructed the jury as follows:

The Court instructed counsel to keep their separate exhibits intact. [Plaintiff's counsel] has brought to the attention of this Court that he's unable to locate admitted Exhibited [sic] 12A and B, photographs taken on September nine [sic], 1994 by [plaintiff's expert] at the time he did an evaluation of [plaintiff] at [plaintiff's counsel's] request.

Because [plaintiff's counsel] is unable to account for these photographs and unable to offer an explanation of their disappearance, you may assume those [sic] photographs demonstrated evidence adverse to the situation of the Plaintiff.

We find no error associated with the giving of this instruction.

When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2); *Pontiac School District v Miller Canfield Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997). The determination whether an instruction is accurate and applicable based on the characteristics of the case is in the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). Thus, we review the trial court's conclusion that the instruction was applicable under an abuse of discretion standard.

Pursuant to SJI2d 6.01 (see "Note on Use," SJI2d 6.01), an instruction addressing the failure to produce evidence should be given when the court finds that:

1. The missing evidence was under the control of the party against whom the instruction is to be offered and could have been produced by him or her;
2. No reasonable excuse for the failure to produce the evidence is offered; and
3. The evidence would have been material, not merely cumulative, and not equally available to the opposing party.

Plaintiff argues that the trial court lacked authority to delegate responsibility to the litigants for exhibits admitted in evidence. Plaintiff then argues that, once admitted, the exhibits were no longer within her control. Plaintiff cites no authority in support of her position and we find no merit in plaintiff's argument.

A trial court possesses authority and discretion to fashion orders it may deem necessary to effectuate the efficient administration of court proceedings. We find no error in the court requiring counsel who introduced an exhibit in evidence to be responsible for that exhibit through out the course of trial. Nor do we find merit in plaintiff's claim that the photos were not unique and could have been replaced by photos taken during trial. The missing photos depicted plaintiff's feet in September, 1994, after plaintiff subjected herself to surgery by another podiatrist. Defendants claimed that any injury sustained by plaintiff was proximately caused by that other podiatrist. Replacement photos taken on the day of trial, in February of 1996, would not have served as an adequate substitute. In sum, we do not find that the trial court abused its discretion by giving an adverse inference instruction pursuant to SJI2d 6.01.

Plaintiff's final issue, that the case should be assigned to a different judge if it is reversed or remanded, is moot in light of our resolution of the preceding issues. *People v Leonard*, 224 Mich App 569, 596; 569 NW2d 663 (1997).

On cross-appeal, Dr. Nishon claims that the trial court erred in denying his request for sanctions based on a finding that plaintiff's action was frivolous. MCL 600.2591; MSA 27A.2591. We are not persuaded that the trial court clearly erred in its determination that the action was not frivolous. *Avery v Demetropoulos*, 209 Mich App 500, 503; 531 NW2d 720 (1995). "The ultimate outcome of a case does not necessarily determine the issue of frivolousness." *Louya v William Beaumont Hosp*, 190 Mich App 151, 164; 475 NW2d 434 (1991).

Affirmed.

/s/ Kurtis T. Wilder

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra

¹ In *France*, the Supreme Court specifically held that the rule it was adopting in that criminal case with respect to a court's ex parte communication with a jury would be equally applicable in civil cases. *France, supra* at 142, n 3.