

STATE OF MICHIGAN
COURT OF APPEALS

BRUCE HENDRICKS,

Plaintiff-Appellant,

v

ROSS LUURTSEMA,

Defendant-Appellee,

UNPUBLISHED

June 15, 1999

No. 210506

Ottawa Circuit Court

LC No. 94-021127 CZ

Before: Griffin, P.J., and Wilder and Danhof*, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's judgment of no cause of action entered in favor of defendant following a jury trial. We affirm.

This "intentional fraud" action arises from plaintiff's involvement in the City of Hudsonville's downtown redevelopment plan. At trial, plaintiff alleged that defendant, the chairman of the Downtown Development Authority (DDA), made intentional misrepresentations with respect to plaintiff's future participation in the downtown redevelopment plan. These misrepresentations allegedly induced plaintiff to forgo an option to extend a lease in a building to be affected by the plan. The jury returned a verdict in favor of defendant. On November 6, 1996, the trial court entered a judgment of no cause for action in favor of defendant. Plaintiff now appeals and we affirm.

On appeal, plaintiff first argues that the trial court erred in granting defendant's pretrial motions in limine to exclude evidence of other acts which allegedly demonstrated that defendant made similar misrepresentations to other area business owners. The trial court ruled that the evidence was inadmissible under MRE 608(b). Plaintiff now contends that the evidence should have been admissible under MRE 404(b). Plaintiff, however, failed to raise the MRE 404(b) argument below.

An issue is unpreserved where the party failed to present the same ground on appeal for which he objected below. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987).

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

Arguments that are not raised and preserved for review below are waived. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Therefore, we find that the issue is waived.¹

Plaintiff next argues that defendant violated the orders in limine by commenting, during closing argument, on the lack of evidence produced by plaintiff regarding the evidence excluded pursuant to the order. Plaintiff did not properly preserve the error by objection and a request for a curative instruction or a motion for a mistrial. *Janda v City of Detroit*, 175 Mich App 120, 130-131; 437 NW2d 326 (1989); *Harvey v Security Services, Inc.*, 148 Mich App 260, 268-269; 384 NW2d 414 (1986).

When reviewing an assertion that there was improper conduct by a lawyer at trial, an appellate court should first determine whether the error occurred, and if so, whether it was harmless. *Reetz v Kinsman Marine Transit Co.*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). If the error was not harmless, the court must then determine if the error was properly preserved by objection and a request for an instruction or a motion for a mistrial. *Id.* If the error was preserved, then there is a right to appellate review, but if the error was not preserved, the court must determine whether a new trial should nevertheless be granted because what occurred might have caused the result or denied a party a fair trial. *Id.* If the court cannot conclude that the result was not affected, a new trial may be granted. A tainted verdict will not be permitted to stand simply because a lawyer or judge failed to protect the interests of the prejudiced party by timely action. *Id.*; *Rogers v Detroit*, 457 Mich 125, 147; 579 NW2d 840 (1998).

The statement made by defense counsel implies that the only misrepresentations made by defendant were made to plaintiff. This effectively allowed defendant to use the strategy of stating to the jury that plaintiff was unable to prove that which, by court order, he was not allowed to prove. We find that this statement was improper. *Id.* at 148.

However, since plaintiff did not properly preserve the error by objection and a request for a curative instruction or a motion for a mistrial, we must determine whether a new trial should nevertheless be granted because the error might have caused the result or denied plaintiff a fair trial. *Rogers, supra* at 147. This error occurred in defendant's closing argument, constituted only a very small part of defendant's argument and likely did not cause the decision against plaintiff. In addition, we find that plaintiff received a fair trial. Therefore, plaintiff's failure to properly preserve the issue for appeal mandates that we deny plaintiff's claim where the error did not cause the result and plaintiff nonetheless received a fair trial. *Id.*

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Robert J. Danhof

¹ Plaintiff also contends on appeal that the trial court erred in failing to entertain an offer of proof regarding the motions in limine. We disagree. It is clear from the record that plaintiff satisfied the

mandates of MRE 103(a)(2) in submitting his offer of proof. The substance of the evidence plaintiff proposed to admit was made known to the trial court.