

STATE OF MICHIGAN
COURT OF APPEALS

ANNA E. FIELDS,

Plaintiff-Appellant/Cross-Appellee,

v

NEW CENTER FOODS, d/b/a POPEYE'S
CHICKEN, and SEVEN MILE CATERING CO.,

Defendants-Appellees,

and

ROGER R. BURNEY, ROGERS CLARK, JR., and
SEVEN MILE CATERING, INC.,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED
October 20, 2000

No. 211021
Wayne Circuit Court
LC No. 96-625600-NI

Before: Owens, P.J., and Jansen and R.B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right a jury verdict of no cause of action on her intentional tort and negligence claims. Defendants Roger R. Burney, Rogers Clark, Jr., and Seven Mile Catering, Inc. cross-appeal the trial court's denial of their motions for summary disposition and directed verdict and the grant of plaintiff's motion to amend her complaint to add a negligence claim against defendants Burney and Clark. We affirm.

Plaintiff worked at a Popeye's Chicken restaurant owned by defendant Seven Mile Catering, Inc. She alleged in her complaint that she was required to hose down a walk-in freezer using a standard garden hose attached to a hot water faucet, and that she and other employees had complained numerous times to supervisors about being burned while using the hose. According to plaintiff, the hose leaked, rags had been tied around the hose's handle, and employees were not able to regulate the

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

temperature of the water because hot water was necessary to cut the grease on the freezer floor. While plaintiff was hosing down the freezer, hot water dripped from the hose onto her foot causing third-degree burns.

Plaintiff alleged that defendants Burney and Clark, who apparently managed the restaurant under a contract with Seven Mile Catering, Inc., breached a duty owed to her to perform their contract in a non-negligent manner. She also alleged that defendant Seven Mile Catering, Inc. was liable under the intentional tort exception to the Worker's Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1). The jury found that defendants Burney and Clark were not negligent and that defendant Seven Mile Catering, Inc. was not liable for an intentional tort.

On appeal, plaintiff first argues that the trial court erred in granting defendants' motion to limit testimony regarding the purchase of the restaurant by Seven Mile Catering, Inc. Central to plaintiff's negligence theory, according to plaintiff, was evidence that Burney and Clark had previously owned and managed the restaurant under the name Seven Mile Catering Company, that the sale of their interest to Seven Mile Catering, Inc. was a sham transaction, and they continued to have total control over the restaurant despite their official status as consultants working under a management contract. The trial court did not allow the jury to hear testimony from the president and sole shareholder of Seven Mile Catering, Inc., Clark's sister Deidre Scott, that she had entrusted the responsibility of work place safety to Burney and Clark. The court also sustained defendants' objections to some of plaintiff's cross-examination of Burney and Clark.

Generally, all relevant evidence is admissible at trial, while evidence which is not relevant is not admissible. MRE 402; *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188-189; 600 NW2d 129 (1999). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *Ellsworth, supra* at 188. To establish a prima facie case of negligence against defendants Burney and Clark, plaintiff had to prove four elements: (1) defendants owed her a duty; (2) defendants breached that duty; (3) proximate cause; and (4) damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993); *Swan v Wedgwood Christian Youth & Family Services, Inc*, 230 Mich App 190, 195; 583 NW2d 719 (1998). "Duty" refers to any obligation the defendants had to avoid negligent conduct. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Questions regarding duty are for the court to decide as a matter of law. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). However, if there are factual circumstances that give rise to a duty, the existence of those facts must be determined by a jury. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996), *aff'd* 457 Mich 871 (1998).

We first address defendants' assertion that maintaining a safe workplace for employees is a nondelegable duty of the employer. Defendants refer this Court to several older cases that support this proposition. See, e.g., *Scoop v W H White Co*, 182 Mich 539, 547; 148 NW 762 (1914) and *Baucino v Fitzpatrick*, 186 Mich 1, 4-5; 152 NW 927 (1915) (the duty of the master to provide and maintain a reasonably safe place for the servant to perform his work in is nondelegable). However, these cases do not hold that a consultant or independent contractor who undertakes management

responsibilities for maintaining a safe workplace under a contract with the employer cannot also be held liable for the negligent performance of his duties. The WCDA provides that an injured worker can enforce liability against an individual who is not the employer or another employee even though the worker has accepted benefits from the employer. MCL 418.827(1); MSA 17.237(827)(1). Further, while performing a contract, a party holds a separate general duty to perform the contract with due care so as not to injure another. *Courtright v Design Irrigation*, 210 Mich App 528, 530; 534 NW2d 181 (1995). “Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care.” *Osman v Summer Green Lawn Care Inc*, 209 Mich App 703, 708; 532 NW2d 186 (1995), overruled in part on other grounds, *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999). Breach of this duty may give rise to tort liability. *Courtright*, *supra* at 530.

Because evidence about Burney’s and Clark’s contractual responsibilities would have been relevant to the duty that they owed to plaintiff, and whether they performed their contractual duties with due care, the trial court abused its discretion to the extent that it limited such evidence from jury consideration. However, an error in the admission or exclusion of evidence is grounds for reversal only if refusal to grant a new trial on this basis is inconsistent with substantial justice. MCR 2.613(A); *Morrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998).

Here, no substantial injustice resulted from the trial court’s erroneous evidentiary rulings because, despite the rulings, ample testimony about Clark’s and Burney’s contractual role in operating the restaurant was presented to the jury, and the excluded testimony preserved by plaintiff for this Court’s review is not particularly relevant to her negligence claim. For example, Scott testified before the jury that when she drew up the management agreement under which Burney and Clark worked, she intended that Burney and Clark would continue to have control of the day-to-day operations. She further testified that defendants’ roles in connection with the stores did not change after the sale, and that she left the entire management of the stores and employees to Burney and Clark, who were paid as consultants for their services. The only testimony from Scott that the jury did not receive, and of which plaintiff made an offer of proof, was that she relied on Burney and Clark to provide a safe workplace for the employees. However, in light of her testimony that Burney and Clark continued to have day-to-day control of the store operations and management of employees, the excluded testimony would not have significantly added to the jury’s understanding of any duty owed by Burney and Clark to plaintiff. Although plaintiff argues that she should have been allowed to question Scott about her lack of knowledge of the sale transaction or the operations of the restaurant, plaintiff made no offer of proof regarding this testimony and, therefore, has not preserved this portion of her argument for appeal. MRE 103(a)(2).

Furthermore, although the examination of Burney and Clark was also limited by the trial court, Clark acknowledged in testimony before the jury that he and Burney had a contract with Seven Mile Catering, Inc. to handle all day-to-day operations of the five stores sold to the corporation, including the purchasing of equipment and the hiring of supervisors and managers. Burney testified before the jury that he and Clark were the majority shareholders in a corporation called Franchise Management, which acquired a number of Popeye’s restaurants and sold five of the restaurants to Seven Mile Catering, Inc. They continued as consultants to the corporation and had the responsibility for operating the stores,

including hiring and supervising of managers and establishing a petty cash fund for the purchase of supplies.

We find that Clark's testimony, preserved by plaintiff in a special record,¹ would not have made the existence of any fact of consequence to plaintiff's negligence claim more probable to the jury. MRE 401. If anything, the preserved evidence tends to show that Burney and Clark remained as plaintiff's employers after the sale to the corporation, and as plaintiff's employers they would not be liable under the exclusive remedy provision of the WCDA, unless plaintiff could prove an intentional tort. Therefore, while evidence of the contractual relationship between Burney and Clark and Seven Mile Catering, Inc. was relevant to the negligence claim, and the trial court's exclusion of evidence surrounding the formation of the corporation and the continued existence of the partnership was therefore error, the error was harmless in light of the evidence that was presented to the jury and, accordingly, does not warrant a new trial. *Morrow*, *supra* at 634.

Plaintiff next argues that the trial court abused its discretion by denying her motion to amend her complaint during trial to conform with the proofs that her right foot, not her left, had been injured. The grant or denial of leave to amend a complaint is within the trial court's discretion. *Milnikel v Mercy-Memorial Medical Center, Inc.*, 183 Mich App 221, 222; 454 NW2d 132 (1989). In her pre-trial pleadings and affidavit, plaintiff consistently stated that her left foot had been injured. Other documentation and the evidence presented at trial were inconsistent with regard to which foot was injured in the accident at Popeye's. At trial, plaintiff's counsel asked for leave to amend the complaint to conform to the evidence that plaintiff had actually injured her right foot, which the trial court denied.

The requirements for amending a pleading at trial under MCR 2.118(C)(2) are strict. "Unless the party requesting amendment 'satisfies the court that . . . amendment . . . would not prejudice the objecting party,' amendment 'shall not be allowed.' This rule contrasts sharply with the free amendment allowed before trial." *Dacon v Transue*, 441 Mich 315, 333; 490 NW2d 369 (1992). Although plaintiff's counsel argued that he had made a clerical error in the pleadings and should be allowed to correct it, the evidence presented up to that point was contradictory. Amending the complaint to indicate an injury to the right foot would not conform plaintiff's pleadings to the evidence because it was controverted; therefore, the trial court did not abuse its discretion in denying the request to amend.

¹ Outside the presence of the jury, Clark testified in a special record that he and Burney continued as partners in Seven Mile Catering Company after the sale of five stores to the corporation and were consultants to the new corporation. One district manager provided daily supervision to the stores owned by the corporation and the one store that was still owned by the partnership. The district manager and the five corporate stores were directly under the supervision and control of Burney and Clark. The partnership and the corporation both operated out of a single office and had the same office manager. The franchise rights to the five stores transferred to the corporation still belonged to Clark and Burney. Plaintiff made no separate record of testimony from Burney.

Plaintiff next argues that the trial court erred in instructing the jury on defendants' theory of the case, which advanced defendants' argument that only plaintiff's employer owed her a duty to provide a safe work environment. This Court reviews a claim of instructional error for an abuse of discretion. *Ellsworth, supra* at 193. MCR 2.516(A)(2) provides that, after the close of evidence, the parties are required to submit a statement of the issues to the trial court and may submit the party's theory of the case on each issue. "The statements must be concise, be narrative in form, and set forth as issues only those disputed propositions of fact which are supported by the evidence." Under MCR 2.516(B)(3), "the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in subrule (A)(2), that party's theory of the case." The trial court has the discretion, under MCR 2.516(D)(4), to give additional instructions regarding the applicable law that are not covered by the Standard Jury Instructions. The additional instructions "must be concise, understandable, conversational, unslanted, and nonargumentative." *Id.*

Here, the trial court did not abuse its discretion in instructing the jury on defendants' theory of the case. Contrary to what plaintiff argues, the court's instruction did not amount to a statement of law. Rather, the court merely instructed the jury that "Burney and Clark *deny* that they owed a duty to the Plaintiff" and "Burney and Clark *maintain* that . . . her employer owed the duty and no one else." The court also instructed the jury on plaintiff's theory of her negligence claim against Burney and Clark and gave the applicable standard negligence instructions. We find no abuse of discretion.

Next, plaintiff argues that the trial court erred in instructing the jury on her intentional tort claim. The determination of whether a supplemental jury instruction is applicable and accurately states the law is within the discretion of the trial court. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999).

Generally, the right to recover benefits for personal injury under the WDCA is the exclusive remedy of an employee against an employer who has complied with the act. MCL 418.131(1); MSA 17.237(131)(1); *Gray v Morley*, 460 Mich 738, 741; 596 NW2d 922 (1999). However, the exclusive remedy provision does not apply to claims arising from intentional torts. *Id.* To avoid the exclusive remedy provision through the intentional tort exception, the plaintiff must establish that the employer deliberately acted or failed to act either with the purpose of inflicting injury on the plaintiff or with a deliberate disregard of actual knowledge that an injury was certain to occur. MCL 418.131(1); MSA 17.237(131)(1); *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 169, 171-172, 180; 551 NW2d 132 (1996). Whether the facts alleged by the plaintiff are sufficient to constitute an intentional tort is a question of law for the court, and whether the facts are as the plaintiff alleges is a question for the jury. *Gray, supra* at 742-743; *Travis, supra* at 188.

Over plaintiff's objection, the court read defendants' proposed supplemental instruction indicating that an injury is not certain to occur if supervisory personnel performed the same job duties that allegedly caused the plaintiff's injury. The supplemental instructions were based on our Supreme Court's holding in *Travis, supra*. We agree that the challenged portion of the supplemental instructions misstate that holding. In *Travis*, the Court stated that the fact that the plaintiff's supervisor was willing to operate a press machine, on which the plaintiff was injured, was evidence that the supervisor did not have actual knowledge that an injury was certain to occur. *Travis, supra* at 182. However, the Court

did not state that an injury is not certain to occur whenever supervisory personnel are performing the same job duties as the plaintiff. With the exception of the challenged statement, the trial court's jury instructions defining an intentional tort are accurate statements of the law and accord with the Supreme Court's decision in *Travis*.

Jury instructions should be reviewed by this Court in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990). "[T]here is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury." *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). Even if a jury instruction is erroneous, reversal is required only where failure to reverse would be inconsistent with substantial justice. *Head v Phillips Camper Sales & Rental, Inc.*, 234 Mich App 94, 101; 593 NW2d 595 (1999). This Court will decline to reverse a verdict where an erroneous jury charge could not have affected the verdict. *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 400-401; 493 NW2d 441 (1992).

Here, plaintiff argues that the verdict should be reversed because "[i]t is within the realm of possibility that the jury believed that Eddie McGinnis had actual knowledge that Plaintiff's injury was certain to occur, and willfully disregarded that knowledge, but could not find for Plaintiff because of the faulty instruction." However, to find that McGinnis had actual knowledge that plaintiff's injury was certain to occur, the jury by necessity would have found that McGinnis was not credible and, thus, would have disbelieved his testimony that he used the hose approximately thirty minutes before plaintiff was injured, as well as his testimony that neither plaintiff nor other employees had complained about the hose. Therefore, extending plaintiff's argument, if the jury found McGinnis' testimony to be incredible, their verdict would have been for plaintiff even with the faulty instruction. However, if the jury found McGinnis to be credible, they could have considered his testimony that he used the hose shortly before plaintiff was injured as evidence that he lacked actual knowledge that an injury was certain to occur. See *Travis*, *supra* at 182. Further, if the jury found McGinnis credible, they were allowed to consider his testimony that plaintiff never expressed any safety concerns to him regarding her job duties, and that no employees had ever complained to him about being burned before the injury to plaintiff. Under the circumstances, therefore, we find that the challenged jury instruction did not affect the jury's verdict. Thus, reversal is not warranted.

Finally, plaintiff argues that she is entitled to a new trial because of the cumulative effect of several errors committed by the trial court. In determining whether a party has been denied a fair trial by the cumulative effect of trial errors, "only actual errors are aggregated to determine their cumulative effect." *People v Bahoda*, 448 Mich 261, 292, n 64; 531 NW2d 659 (1995). We conclude that, while plaintiff has identified some errors that occurred at trial, none require reversal, nor did the cumulative effect of any errors deprive plaintiff of a fair trial.

Under this issue, plaintiff complains that the trial court made "numerous erroneous evidentiary rulings" and "exhibited numerous instances of rather abusive behavior toward Plaintiff's counsel," which combined to cast her case in a negative light in front of the jury. While we agree that some evidentiary errors occurred, our refusal to grant a new trial based on these errors is not inconsistent with substantial

justice. MCR 2.613(A). For example, the trial court's rulings prohibiting plaintiff's testimony about statements made by Eddie McGinnis were erroneous because the statements were admissible under MRE 801(d)(2)(D). However, because McGinnis testified at trial about the statements and was subject to plaintiff's cross-examination, substantial justice does not require reversal of the jury's verdict on this basis. Furthermore, while it was improper for defense counsel to question plaintiff about her understanding of the term "negligence," because plaintiff was not qualified to give legal opinions about her case, MRE 701, the trial court did sustain several objections by plaintiff's counsel during this portion of her testimony and we are not persuaded that refusing to grant a new trial on this basis is inconsistent with substantial justice.

Regarding plaintiff's argument that the trial court was biased against her and her counsel, we note that plaintiff did not object to the trial court's conduct at trial. In the absence of an objection, this Court may review the question of whether a party was denied a fair trial because of judicial bias only if manifest injustice would result from failure to review the issue. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Moreover, a party challenging a judge on the basis of bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). Here, none of the challenged rulings and remarks extracted from the lengthy record of this case indicate that the trial court was biased against plaintiff or that she was deprived of a fair trial. Therefore, appellate relief is not warranted.

On cross-appeal, defendants Burney, Clark, and Seven Mile Catering, Inc. argue that the trial court erred in denying their motions for summary disposition because, as a matter of law, where supervisors use the same equipment that allegedly caused the plaintiff's injury, an injury is not certain to occur and, therefore, plaintiff could not prove an intentional tort. However, as previously discussed, defendant's argument incorrectly states the holding in *Travis*, *supra*. Thus the trial court did not err in denying their motion for summary disposition on this basis.

Next, defendants contend that the trial court abused its discretion in allowing plaintiff to amend her complaint to add a negligence claim against Burney and Clark because the claim is barred by the exclusive remedy provision of the WDCA. The trial court granted the motion to amend, determining that plaintiff's theory that Burney and Clark might be liable because of negligence in performing their consulting contract was not legally implausible. We agree and therefore conclude that the trial court did not abuse its discretion. Leave to amend pleadings shall be freely given when justice so requires. MCR 2.118(A)(2); *Weymars v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Defendants next contend that the trial court erred in failing to grant their motion for directed verdict on plaintiff's intentional tort claim based on the simple tool doctrine. The simple tool doctrine only addresses whether liability can be imposed against the employer based on the employer's duty to provide safe working conditions when the alleged injury was caused by a simple tool. *Sheltrown v Michigan Central R Co*, 245 Mich 58, 62; 222 NW 163 (1928); *Cressman v Wright*, 105 Mich App 194, 199; 306 NW2d 447 (1981). Because defendants conceded in arguing for a directed verdict that plaintiff's employer owed her a duty to provide safe working conditions, and because plaintiff's injury was not caused simply by a defect in the hose but by the conditions under which she

was required to use the hose, the trial court did not err in denying defendants' motions for a directed verdict.

Finally, defendants argue that the trial court erred in denying their motion for a directed verdict of plaintiff's negligence claim pursuant to the exclusive remedy provision of the WDCA. However, if Burney and Clark were not plaintiff's employers they may have had a common law duty to plaintiff to operate the restaurant, pursuant to their management contract, in a non-negligent matter. Therefore, plaintiff's negligence claim was not barred as a matter of law, and the trial court did not err in submitting this claim to the jury.

Affirmed.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Robert B. Burns