STATE OF MICHIGAN

COURT OF APPEALS

FELICIA OBIE, Personal Representative of the Estate of HARDY LEE GATLIN, Deceased,

Plaintiff-Appellant,

v

GRACE HOSPITAL,

Defendant-Appellee,

and

JOHN R. HAAPANIEMI, M. D., and KHATCHADOUR HAMAMDJIAN, M. D.,

Defendants.

UNPUBLISHED
December 8, 2000

No. 214634
Wayne Circuit Court
LC No. 96-616619-NH

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment entered in favor of defendant[1], Grace Hospital, following a jury trial. We affirm.

Plaintiff first argues that numerous instances of misconduct on behalf of defense counsel denied her a fair trial. The rule governing attorney misconduct was set forth in *Reetz v Kinsman Marine Transit*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), which states:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then

[1] Dr. Haapaniemi and Dr. Hamamdjian were dismissed as parties before trial and are not parties to this appeal. Consequently, use of "defendant" in this opinion will refer solely to Grace Hospital.

> there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [Accord, *Badalamenti v Beaumont Hosp*, 237 Mich App 278, 290; 602 NW2d 854 (1999)].

An attorney's comments during trial warrant reversal where they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. *Ellsworth v Hotel Corp,* 236 Mich App 185, 191-192; 600 NW2d 129 (1999).

Plaintiff contends that defense counsel improperly commented during opening statement that plaintiff consulted a law firm about suing because of Hardy Lee Gatlin's death on either the same day or the day after he died. Plaintiff, however, inaccurately represents the record. The record shows that defense counsel stated that plaintiff consulted an attorney about a lawsuit concerning a fall off a bar stool and not about Gatlin's death. Plaintiff contends that defense counsel's remarks were calculated to portray her as insensitive, litigious, and perhaps as an alcoholic. While defense counsel's comments constituted an improper attempt to portray plaintiff as a litigious person, the error was harmless. *Reetz, supra* at 103; *Badalamenti, supra* at 290; *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996). It is highly unlikely that defense counsel's remarks about plaintiff's unrelated lawsuit had any affect on the verdict given that the jury returned a verdict finding that defendant's agents and staff did not breach the standard of care in their treatment of Gatlin. Furthermore, the trial court repeatedly instructed the jury that the attorneys' comments were not evidence. Therefore, notwithstanding defense counsel's improper comments, the error was harmless, and reversal is not required.

Plaintiff next argues that defense counsel improperly questioned her regarding the paternity of Darius, plaintiff's and Gatlin's son.[2] Defense counsel asked plaintiff during cross-examination whether Gatlin had ever declared Darius as a dependent on his income tax returns and whether Gatlin was listed as Darius' father on Darius' birth certificate. Defense counsel also insinuated during closing arguments that Gatlin may never have had a relationship with Darius before Gatlin's death. Defense counsel's comments were not error. In the context of a wrongful death action, the only means of measuring an appropriate amount of compensation for the loss of family relationships is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship. *McTaggart v Lindsey*, 202 Mich App 612, 616; 509 NW2d 881 (1993). As such, whether Gatlin declared Darius as a dependent on income tax returns and whether Gatlin was listed as Darius' father on his birth certificate were relevant to the issue of damages, along with whether Gatlin and Darius enjoyed a father-son relationship prior to

[2] Darius would have been the beneficiary of an award of damages if the jury had returned such a verdict.

Gatlin's death. In any event, considering that the jury did not reach the issue of damages in deciding its verdict, any error is harmless.

Plaintiff next contends that defense counsel improperly attempted to diminish the credibility and to question the medical knowledge of Dr. Robert Berman, one of plaintiff's experts. While defense counsel may have attempted to diminish Berman's credibility by implying that he was not a practicing physician, defense counsel's remark was so inconsequential that any error was harmless. See, *Szymanski v Brown*, 221 Mich App 423, 427; 562 NW2d 212 (1997). The trial court instructed the jury on more than one occasion that the attorneys' statements were not evidence, and Berman's testimony clearly demonstrated his vast medical knowledge. Therefore, although defense counsel may have attempted to diminish Berman's credibility during opening statement, any error in this attempt was harmless.

Plaintiff next argues that defense counsel improperly insinuated during opening statement that no matter what had happened to Gatlin, plaintiff would have found a reason to sue. Although defense counsel's remark may have implied that plaintiff was a litigious person, the error was harmless considering that the jury found that defendant's agents complied with the standard of care in treating Gatlin. Moreover, the trial court repeatedly instructed the jury that the attorneys' comments were not evidence.

Plaintiff next argues that defense counsel improperly implied that "lawsuits are lurking around every corner" during his direct examination of Haapaniemi. Although defense counsel's question was inappropriate, the trial court's curative instruction was sufficient to cure any prejudice that the question might have created. *Szymanski, supra* at 428. Furthermore, it is unlikely that defense counsel's improper question had any impact on the jury's finding that defendant's agents conformed to the standard of care in their treatment of Gatlin.

Plaintiff next contends that defense counsel deliberately failed to produce Dr. Frederick Watts, the radiologist, for deposition, and then, in the presence of the jury, blamed plaintiff's attorney for Watts' inability to testify at trial. However, the record shows that defense counsel merely objected to the line of questioning pursued by plaintiff's attorney because Watts had been available to testify earlier in the proceedings, but plaintiff's attorney objected, outside the jury's presence, to Watts testifying. As such, defense counsel did not commit misconduct. Furthermore, the trial court's curative instruction was sufficient to cure any prejudice that may have been created. *Szymanski, supra* at 428.

Plaintiff next argues that defense counsel committed misconduct by virtue of the fact that the x-ray and CT scan films were "magically located" just before trial and that the missing dictated emergency room summary was never located. Plaintiff's attorney does not argue that defense counsel intentionally hid these items, and does not explain how defense counsel's inability to locate the above items constituted misconduct. In fact, plaintiff's attorney stipulated at trial that it was not necessary that defense counsel present evidence confirming that the x-ray and CT scan films were found in a teaching file. Therefore, defense counsel's inability to locate the above evidence did not constitute error.

Plaintiff next argues that defense counsel improperly used a graph from a 1972 textbook during opening argument and the direct examination of a defense witness. MRE 707 restricts the

use of learned treatises to impeachment purposes only. *Dziurlikowski v Morley*, 143 Mich App 729, 733; 372 NW2d 648 (1985); *Fletcher v Ford Motor Co*, 128 Mich App 823, 827; 342 NW2d 285 (1983). Because defense counsel used the graph during opening statement and direct examination of Haapaniemi, his use of the graph was contrary to MRE 707. The error, however, was harmless. An error in the admission of evidence is not a basis for vacating, modifying, or otherwise disturbing a judgment unless declining to take such action would be inconsistent with substantial justice. MCR 2.613(A); *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710-711; 550 NW2d 797 (1996). Here, the evidence portrayed by the graph was merely cumulative because the graph showed that a person with a lactic acid level between six and eleven has a ninety percent mortality rate. Likewise, during trial, several witnesses testified that the mortality rate for a person with a dangerously low lactic acid level, like that of Gatlin, was between eighty-five and ninety-five percent. As such, the information depicted by the graph was merely cumulative to evidence properly admitted at trial, and any error in allowing defense counsel to utilize the graph for purposes other than that designated by MRE 707 was harmless.

Plaintiff next contends that defense counsel committed misconduct by repeatedly stating that defendant's doctors and staff did a great job of keeping Gatlin alive because he was already dead when he walked in the door. Defense counsel's remark, however, was not error because the evidence adduced at trial showed that Gatlin was at a very high risk of death at the time that he was admitted. In fact, Dr. John Fontinetta, plaintiff's own expert, admitted that Gatlin could have gone into cardiac arrest at any time after walking into the emergency room and that defendant's agents managed to keep Gatlin alive for ten hours notwithstanding his condition. Therefore, defense counsel's comments in this regard did not constitute error.

Plaintiff also argues that the cumulative effect of the above allegations of error denied her a fair trial. However, a review of the record shows that defense counsel's comments did not indicate a deliberate course of conduct aimed at preventing a fair and impartial trial, and his remarks were not such as to deflect the jury's attention from the issues involved and exert a controlling influence on the verdict. *Ellsworth, supra* at 191-192. Therefore, reversal is not required.

Plaintiff next argues that the trial court erred by allowing defense counsel to use the contested graph during opening statement and direct examination and by admitting the graph into evidence. Decisions whether to admit evidence are within the sole discretion of the trial court and will be reversed only where there is a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998).

Although the trial court did not admit the graph into evidence as plaintiff contends, the trial court did allow defense counsel to utilize the graph during opening statement and the direct examination of Haapaniemi. As previously discussed, because the information depicted by the graph was merely cumulative to evidence properly admitted at trial, the trial court's error was harmless. *Sackett, supra* at 685.

Lastly, we address plaintiff's arguments that the trial court erred by refusing to give a requested jury instruction regarding the lost emergency room summary record and Watts' failure to testify at trial. This issue implicates SJI2d 6.01, which allows the jury to infer that contested

evidence would have been adverse to the party controlling the evidence where that party failed to produce the evidence and gave no reasonable excuse for such failure. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 521; 592 NW2d 786 (1999). Pursuant to MCR 2.516(D)(2), pertinent portions of the standard jury instructions must be given if they are applicable, they accurately state the applicable law, and they are requested. A jury verdict may be vacated only when the failure to comply with MCR 2.516 amounts to an error in the trial so that the failure to set aside the verdict would be inconsistent with substantial justice. *Johnson v Corbet*, 423 Mich 304, 326; 377 NW2d 713 (1985); MCR 2.613(A).

The trial court did not err by declining to give the requested jury instruction regarding the dictated emergency room summary. Trial testimony established that, if the emergency room summary existed, it was either lost or misplaced. Therefore, it was not under defendant's control, and defendant could not have produced it at trial. *Ellsworth, supra* at 193. Even if it was under defendant's control, however, the fact that it was lost or misplaced was a reasonable excuse for the failure to produce the summary at trial. *Id.* Moreover, the emergency room summary would have been merely cumulative because a handwritten document was created to accommodate for it. *Id.*

With respect to the contention that the trial court erred by declining to instruct the jury in accordance with SJI2d 6.01 with respect to Watts' failure to testify at trial, we again disagree. Defense counsel stated on the record that Watts was an independent staff physician of defendant and was not employed by defendant or under its control. When a witness is equally available to either party, the presumption that the witness would have testified adversely to any particular theory, as provided by SJI2d 6.01, is not recognized. *Ellsworth, supra* at 193. As such, SJI2d 6.01 was inapplicable in this circumstance. Moreover, simply because Watts appeared at trial, perhaps even at the request of defense counsel, does not establish that Watts was under defendant's control. Therefore, the trial court did not err by declining to give the requested instruction at trial.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell