STATE OF MICHIGAN

COURT OF APPEALS

PHYLLIS A. FORTNER and ARNOLD C. FORTNER, Plaintiffs-Appellants, v MERCY MEMORIAL HOSPITAL, Defendant-Appellee.	UNPUBLISHED January 30, 2001 No. 217867 Monroe Circuit Court LC No. 96-005659-NO

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiffs Phyllis and Arnold Fortner[1] appeal as of right in this premises liability case after the jury returned a verdict in favor of defendant Mercy Memorial Hospital. On appeal, Fortner raises two issues concerning evidence and arguments that the jury heard, which revealed that she had sued Mercy Memorial on other occasions. She also challenges the jury's verdict as against the great weight of the evidence. We affirm.

I. Basic Facts And Procedural History

On a morning in late January 1995, Fortner went to Mercy Memorial to visit her granddaughter, who was had been admitted for a tonsillectomy. After her granddaughter's surgery, Fortner left the hospital, where she met her daughter and her grandson outside the building in an area underneath an entranceway awning. Fortner's friend, Pam Roush, was also in this area.

As the four individuals were standing beneath the awning, falling snow, or snow and ice,[2] struck Fortner in the head and back. According to Fortner's daughter, an unidentified person in the nearby parking lot shouted a warning before the snow hit her mother. The snow fell with

[1] Because Arnold Fortner's claim is derivative, we use "Fortner" to refer to Phyllis Fortner unless otherwise specified.

[2] Witnesses testified inconsistently concerning whether snow, or snow and ice, fell on Fortner. The composition of the substance is not significant to how we decide this appeal and, for the sake of simplicity, we refer to it as snow.

enough force to eject Fortner's dentures from her mouth. According to Roush and Fortner's daughter, Fortner was dazed, wobbly, and did not know where she was for a moment.

After the incident, Billy Graves, a hospital security guard, went outside to investigate. According to Graves, he asked Fortner if she wanted to visit the emergency room but that she refused at that time. Graves observed that Fortner, who did not appear injured to him, did not have snow on her clothing or hair. Nor did Graves see snow on the ground where Fortner alleged she had been standing. After a nurse brought Fortner a wheelchair and took her to see her granddaughter, Graves informed Mercy Memorial's risk management personnel of the incident. At approximately 1:00 p.m., Sharon Roggelin, a representative from the risk management department, notified Graves that Fortner had asked to go to the emergency room.

During his opening statement at trial, the attorney for Mercy Memorial stated that this case was not the first time in which Fortner was "involved in the legal system to recover money for personal injuries" Fortner's attorney asked the trial court to excuse the jury in order to argue a motion in limine regarding Fortner's litigation history. After the trial court excused the jury, the attorneys for the parties revealed that Fortner had worked for Mercy Memorial in 1993. While working there, Fortner was injured. This led her to file a worker's compensation claim against the hospital, followed by a discrimination suit when the hospital refused to put her on light duty following her injury. Both cases were resolved in Fortner's favor in late 1994 or early 1995. Additionally, Fortner brought a small claims action against the hospital in 1995 after hospital staff lost or disposed of her dentures, which she had removed before she underwent surgery at the hospital.

According to plaintiff's counsel, none of this earlier litigation was relevant to the instant lawsuit for premises liability. However, defense counsel contended that he intended to introduce evidence of these other lawsuits to show the motivation behind the present premises liability case. In the words of defense counsel, Fortner had "an ax to grind against this hospital."

The trial court denied the motion in limine, ruling that the evidence was admissible because, it reasoned,

> the issue isn't at this point whether . . . Phyllis Fortner, likes to engage in litigation. I think that really isn't the issue and that wasn't presented, but to attempt to show that [plaintiff] has some motive to dislike the hospital because she had a comp claim, had another claim against it, I think that's an area that might be explored. I think it is more productive, a jury decides what the facts are. I suppose there's always some prejudice to anything that's presented by either side but I think helping the jury understand the case and determine whether or not that is an issue here, Mrs. Fortner doesn't like the hospital, that might go toward credibility, not to show that she likes to engage in litigation but for this other purpose . . . .

When the jury returned to the courtroom, defense counsel continued with his opening statement. Again, he touched on the issue of previous litigation, saying:

> This is not the first time Phyllis Fortner has made a claim for personal injuries. It's not even the first time she had made a case or claim against the hospital. She has made not one, not two, not – well – three other claims. This is the fourth. That I submit to you is a very significant issue on credibility.

This issue also came out at trial when plaintiff's counsel asked Fortner whether there was anything she would like to tell the jury about the way the accident had affected her. Fortner responded with a long explanation about the claims she had previously made against defendant:

> I'm very sorry it happened and like . . . the hospital said, I did have a couple of claims against them before but that was due to my valve being burst open on my job. I didn't sue the hospital, I sued workman's comp because they refused to pay me. When I lost my teeth they assured me – I was in ICU when I had my carotid done. I threw my teeth up in the pan because I was very sick. The nurse threw them away by mistake and they promised me that they would return my teeth, Mrs. Roggelin and all and when I got well and I got out of the hospital I called and I had to go through work relations which was Mrs. Roggelin. She told me on the phone that the hospital was not responsible for me losing my teeth and they got throwed [sic] away. She said to get you a lawyer. Well, I didn't want to, so my dentist told me to just go to small claims court and see if I could get them replaced which I did and the judge here ruled for my teeth to be replaced. I have nothing against the hospital. I loved working there. I worked there three years and I loved that job, and they're making you think that I have something against the hospital. All my surgeries is [sic] done at that hospital, every surgery I've ever had done is there. If I had to have one tomorrow I would enter that hospital. My family worked at that hospital, my friends work there that I have lunch with occasionally. I have nothing against that hospital . . . .

II. Litigation History

A. Issue Preservation And Standard Of Review

Fortner argues that the trial court erred when it admitted evidence that she had sued Mercy Memorial on more than one occasion in the past because the evidence was irrelevant under MRE 401. We review a trial court's decision to admit or exclude evidence for an abuse of discretion.[3] This abuse of discretion standard only applies to her relevance argument because she failed to preserve her prejudice argument by raising that issue in the trial court.[4] Thus, we must

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[3] *Powell v St John Hospital*, 241 Mich App 64, 72; 614 NW2d 666 (2000).

[4] MRE 103(a)(1); see also *In re Leone Estate*, 168 Mich App 321, 326; 423 NW2d 652 (1988) ("Objections based on one ground are insufficient to preserve an appellate review based on other grounds.").

review the prejudice argument to determine whether there was a plain error that affected Fortner's substantial rights.[5]

B. Relevance

MRE 401 defines relevant evidence as "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." Even a "minimal tendency to make the existence of a fact of consequence to the determination" of the action more or less probable is sufficient for evidence to be admissible.[6] Whether evidence is relevant is significant to whether it is admissible; pursuant to MRE 402, all relevant evidence is admissible.

Fortner urges this Court to conclude that her litigation history was irrelevant to this premises liability action. Mercy Memorial, however, asserts that this history revealed Fortner's animus against the hospital as her motivation for the instant lawsuit. Because witness credibility is "an appropriate subject for the jury's consideration," "[e]vidence that shows bias or prejudice on the part of a witness is always relevant."[7] Fortner's previous litigation against Mercy Memorial was relevant in this case because evidence of this litigation history tended to prove the hospital's theory that she had some animus against it and the jury should question her testimony to the contrary. This evidence was also important because the other witnesses to the incident had a personal relationship with Fortner, which cast doubt on whether her claim was genuine. Thus, the trial court did not err in concluding that the evidence was relevant.

C. Prejudice

Fortner claims that even if this evidence was relevant, it still should have been excluded under MRE 403 because its "probative value [was] substantially outweighed by the danger of unfair prejudice . . . ." However, this notion of prejudice is not merely a question of whether the evidence tended to harm Fortner's case.[8] Rather, MRE 403 embodies two concepts concerning prejudice:

> First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of "prejudice" exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. Where a

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[5] MRE 103(d).

[6] *Bartlett v Sinai Hospital of Detroit*, 149 Mich App 412, 417; 385 NW2d 801 (1986).

[7] *Powell, supra* at 72, citing *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995) and *Popp v Crittenton Hosp*, 181 Mich App 662, 664; 449 NW2d 678 (1989).

[8] *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735; 344 NW2d 347 (1983).

> substantial danger of prejudice exists from the admission of particular evidence, unfairness will usually, but not invariably, exist. . . .[9]

In this case, neither danger was present.

First, the trial court clearly instructed the jury that the attorneys' arguments were not evidence. This statement was broad enough to inform the jury that Mercy Memorial's opening statement, including the references to Fortner's litigation history, could not be used to support the jury's verdict. This instruction put the argument in its proper and limited framework, minimizing the potential for the jury to give it greater weight than it was worth.

Second, Fortner testified at length and without interruption that she had absolutely no bias against Mercy Memorial. Part of her testimony, which *was* actual evidence, even gave the jury some of the factual circumstances surrounding the earlier lawsuits. The jury, presented with Mercy Memorial's argument and Fortner's testimony, was free to evaluate whether she was a credible witness. This was not the sort of skewed and yet highly persuasive presentation that MRE 403 attempts to prevent. While case law that comments on the relevance of a litigation history is rare in Michigan, there is precedent for our conclusion that this evidence was not so unfairly prejudicial it should have been excluded.[10]

Further, if Fortner truly believed that this evidence was prejudicial, then she would not have testified on this subject during *direct* examination. To find plain error requiring reversal in these circumstances would be to allow Fortner to benefit from a situation that, in-part, was of her own making. As the oft-cited rule of law states, Fortner may not "harbor error as an appellate parachute."[11] Here, Fortner did not merely "harbor" the possible error that may have created the prejudice, she actually helped create it. While this may have been a matter of trial strategy, it was a strategy that Fortner adopted. This strategy now requires her to accept its consequences.

III. The Great Weight Of The Evidence

A. Issue Preservation And Standard Of Review

Fortner argues, in the alternative, that the jury verdict in favor of Mercy Memorial was against the great weight of the evidence. To preserve this issue for our review, Fortner had to raise this issue in the trial court.[12] Because Fortner, through her attorney, failed to do so, our review is limited to whether the jury's verdict constituted a miscarriage of justice.[13]

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[9] *Id*. at 735-736.

[10] *Bartlett*, *supra* at 417.

[11] *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 542; 529 NW2d 318 (1995).

[12] *Hyde v University of Michigan Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997).

[13] *Id*.

B. The Evidence

The crux of Fortner's argument is that she provided evidence of every element of negligence, as was her burden.[14] We agree that she fulfilled this basic responsibility through her own direct testimony, as well as testimony by other witnesses. However, Mercy Memorial countered this evidence with Graves' recollection that there was no snow on or near Fortner at the time of the incident. Further, according to Graves, Fortner did not appear to be injured, at least initially, by the impact of the falling snow. The question is not whether members of this Court, had we been sitting as factfinders in the trial court, would have believed the evidence supporting liability. Our review is far more limited[15] and, given this conflicting evidence, we cannot conclude that the jury's verdict was so clearly against the great weight of the evidence that it constituted a miscarriage of justice.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter

[14] See *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

[15] See *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996).