STATE OF MICHIGAN

COURT OF APPEALS

RUBY WILLIAMS,

Plaintiff-Appellant/Cross-Appellee,

v

POINTE PLAZA, L.L.C.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
February 9, 2001

No. 215802
Oakland Circuit Court
LC No. 97-537285-NO

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from a jury verdict finding defendant not negligent, and defendant cross-appeals from an order denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff's first issue on appeal is that the trial court erred when it refused to permit cross-examination of a witness, and excluded plaintiff's exhibits from evidence. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias, *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997).

It appears most of the problems plaintiff's counsel encountered was during his cross-examination of Michael Yono. After being presented with the photographs of the premises where plaintiff fell, Yono responded the photographs did not accurately represent the shopping center on the date of plaintiff's fall. To authenticate photographs, a party must produce a witness to testify that the photographs present a reasonable or faithful reproduction of the scene as it existed at the time of the accident. *Werthman v General Motors Corp*, 187 Mich App 238, 242; 466 NW2d 305 (1990).

During Yono's initial cross-examination, plaintiff's counsel attempted to impeach Yono's testimony of the condition of the sidewalk with his deposition testimony. However, because that deposition testimony referred to a photograph that also was not properly identified, we find that the trial court properly excluded admission of Yono's deposition testimony regarding the photograph.

The trial court also excluded from evidence any questions regarding Yono's plans to repair the premises after the date of plaintiff's fall. Pursuant to MRE 407:

> When, after an event, measures are taken which, if taken previously would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

"MRE 407 provides that evidence of subsequent measures may be admitted for impeachment or for other purposes, if controverted." *Palmiter v Monroe Co Rd Comm'rs*, 149 Mich App 678, 686; 387 NW2d 388 (1986). In this case, Yono did not testify that repairs to the sidewalk were not possible or feasible, rather, Yono testified that, at the time of plaintiff's fall, repairs were not necessary. Since subsequent remedial measures are not admissible to prove negligence, and plaintiff failed to demonstrate any other proper purpose for the evidence, the trial court did not abuse its discretion by refusing to allow questions regarding plans for repairs of the sidewalk.

Plaintiff also claims on appeal that the trial court erred by not allowing impeachment of Yono regarding whether a repair budget existed and whether he lied about knowing the precise location of plaintiff's fall. The existence of a repair budget and whether Yono knew the location of plaintiff's fall are collateral matters. Because collateral matters cannot be used to impeach the testimony of a witness, *Cook v Rontal*, 109 Mich App 220, 229; 311 NW2d 333 (1981), we find that the trial court did not abuse its discretion in precluding such testimony.

Plaintiff further claims that the trial court's decision to limit cross-examination of Yono when he was recalled, was an abuse of discretion. At the close of Yono's initial cross-examination testimony, plaintiff's counsel asked the trial court to be able to recall Yono after the photographs were admitted. Pursuant to MRE 611:

> **(a) Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
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> **(b) Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

In this case, plaintiff's counsel sought to question Yono about matters other than the now admitted photographs. As such, we find that the trial court acted within the authority of MRE 611, and did not abuse its discretion in limiting the scope of Yono's questioning on recall to that of the prior admitted photographs.

Plaintiff's last issue on appeal is that the trial court's comments and rulings during the trial prejudiced and denied her a fair trial. We disagree. The trial court's conduct during trial is reviewed for an abuse of discretion and whether, upon review of the record as a whole, appellant received a fair trial. *Moldovan v Allis Chlmers Manufacturing Co*, 83 Mich App 373, 380; 268 NW2d 656 (1978).

This issue arises out of the evidentiary rulings made by the trial court against plaintiff. During the cross-examination of Yono, plaintiff's counsel repeatedly asked improper questions regarding photographs not properly admitted. The trial court had to sustain multiple objections to plaintiff's counsel's improper questions. Furthermore, the trial court had to admonish plaintiff's counsel not to hold the photographs so the jury could see them. Although our review of the record clearly indicates the trial court became impatient with plaintiff's counsel's repeated objectionable questions, we do not find the court's conduct prejudiced or denied plaintiff a fair trial. The Michigan Supreme Court, in *Patrick v Carrier-Stevens Co*, 358 Mich 94; 99 NW2d 518 (1959), dealt with the circumstances where the trial court became impatient and irritable with counsel. In holding that reversible error does not exist unless it can be said that a party was deprived of a fair trial, the Court stated:

> The remarks complained of had generally to do with the court's sharpness of language in overruling a defense objection. The test to determine error in this respect is not whether there occurred certain unfortunate incidents during the trial. Few trials are without such instances. Our job is to determine whether or not the parties had a fair trial. We cannot screen every word dropped by the harried trial judge; for in spite of his robe and respectability, he is still a human being, subject to the usual human frailties, including sometimes an unintended expression of emotion. Thus so long as we continue to have men on our benches, and not computing machines, we must overlook occasional remarks such as the ones expressed here, else the wheels of justice would grind to a permanent halt. [*Id*. at 97-98.]

Defendant cross-appeals claiming the trial court erred when it denied it's motion for summary disposition. We disagree. Furthermore, since we affirmed plaintiff's appeal rendering this issue moot, suffice it to say, our review of the evidence in a light most favorable to plaintiff shows sufficient evidence of causation to preclude summary disposition in defendant's favor. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Kirsten Frank Kelly