STATE OF MICHIGAN

COURT OF APPEALS

BRUCE HALVERSON and MARGARET HALVERSON, Plaintiffs-Appellants, v JOHN MICHAEL GARRETT, M.D., and JOHN MICHAEL GARRETT, M.D., P.C., Defendants-Appellees.	UNPUBLISHED March 13, 2001 No. 223206 Dickinson Circuit Court LC No. 95-008833-NH

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

This is a medical malpractice action arising from defendant John Michael Garrett's alleged negligent performance of radial keratotomy ("RK") surgery on plaintiff Bruce Halverson,[1] during which plaintiff's left cornea was perforated. Plaintiffs appeal as of right from a jury verdict of no cause of action in favor of defendant. We reverse.

Plaintiffs argue that they were denied a fair trial because of defense counsel's repeated emphasis and injection, through argument and cross-examination, of irrelevant information concerning details of plaintiff's psychotic behavior, information which plaintiffs contend was irrelevant and highly prejudicial because it was designed to inflame and prejudice the jurors, thereby distracting them from the merits of the malpractice claim. We agree.

Plaintiffs concede that no objection was made to these comments and evidence, and that their own attorney raised the issue of plaintiff's psychiatric condition during her opening statement and questioning, because plaintiff's psychiatric condition was relevant to the question of plaintiff's damages. Because this issue is unpreserved, plaintiffs must show plain error affecting his substantial rights. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), applying the "plain error" standard set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); see also *People v Grant*, 445 Mich 535, 548-549, 552-553; 520 NW2d

[1] Because plaintiff Margaret Halverson's claims are derivative of Bruce Halverson's claims, the term "plaintiff" will be used to refer to plaintiff Bruce Halverson, unless indicated otherwise.

123 (1994). To establish prejudice, plaintiffs must establish that the error "could have been decisive to the outcome" or that it is the kind of error, "yet to be clearly defined, where prejudice is presumed or reversal is automatic." *Grant*, *supra* at 552-553; see also *Carines*, *supra* at 763.

It is well settled that "[w]itnesses should not be subjected to personal attacks and unsubstantiated insinuations." *Wischmeyer v Schanz*, 449 Mich 469, 481; 536 NW2d 760 (1995), quoting *Wayne Co Rd Comm v GLS LeasCo*, 394 Mich 126, 134; 229 NW2d 797 (1975). Further, "[w]hile a lawyer is expected to advocate his [or her] client's cause vigorously, 'parties are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion and prejudice.'" *GLS LeasCo*, *supra* at 131. Counsel may not seek to "divert the juror's attention from the merits of the case and to inflame the passions of the jury." *Badalamenti v Beaumont Hosp*, 237 Mich App 278, 292; 602 NW2d 854 (1999); see also *GLS LeasCo*, *supra* at 134.

When reviewing claims of attorney misconduct, "the appellate court should first determine whether the claimed error was in fact error and, if so, whether it was harmless." *Rogers v Detroit*, 457 Mich 125, 147; 579 NW2d 840 (1998), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), overruled on other grounds by *Robinson v Detroit*, 462 Mich 439, 444-445; 613 NW2d 307 (2000). "If the claimed error was not harmless" but is unpreserved, the appellate court "must decide whether a new trial must 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." *Rogers*, *supra* at 147, quoting *Reetz*, *supra* at 103. "If the court cannot say that the result was not affected, then a new trial may be granted." *Rogers*, *supra* at 147, quoting *Reetz*, *supra* at 103; see also *Badalamenti*, *supra* at 292. "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." *Rogers*, *supra* at 147, quoting *Reetz*, *supra* at 103.

In a medical malpractice case, the plaintiff bears the burden of proving all of the following: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. *Wischmeyer*, *supra* at 484; *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). This standard is also applicable to an informed consent claim. See *Paul v Lee*, 455 Mich 204, 211-213; 568 NW2d 510 (1997), overruled on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999). Evidence of a bad result alone is not enough. *Paul*, *supra* at 212; see also *Wischmeyer*, *supra* at 484; *Locke*, *supra* at 231.

"To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause." *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). In other words, plaintiff must show that defendant's breach of the standard of care proximately caused plaintiff's damages. See *Weymers*, *supra* at 648 n 12; see also *Paul*, *supra* at 217. "To establish cause in fact, 'the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's [negligent] conduct, the plaintiff's injuries would not have occurred.'" *Weymers*, *supra* at 647-648, quoting *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). Lastly, "[t]o establish legal cause, the plaintiff must show that it was foreseeable that the defendant's conduct 'may create a risk of harm to the victim, and . . .

[that] the result of that conduct and intervening causes were foreseeable." *Weymers*, *supra* at 648, quoting *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977).

Plaintiff admitted receiving a long informed consent form which warned him, among other things, about the risk of uveitis. He testified however, that defendant told him that those risks were no longer a concern due to the new technology used for the operation. The medical experts disagreed concerning whether defendant had violated the standard of care for informed consent. However, they agreed that it would be a violation of the standard of care to misrepresent the risks of a particular surgery to the patient. Therefore, resolution of the informed consent claim turns on the parties' credibility concerning whether there was misrepresentation of those risks.

Similarly, whether defendant violated the standard of care for the procedure was hotly disputed. The experts agreed that, by itself, a perforation was not a breach of the standard of care. On the other hand, the experts agreed that the standard of care would be violated if the anterior chamber sufficiently shallowed or collapsed due to the perforation, and defendant failed to notice immediately, thereby piercing, nicking or compressing the iris, and perhaps the lens. It was undisputed that trauma to the iris could trigger the sequence of events which culminated in plaintiff's corneal transplant. However, there were various other theories regarding how the sequence could have started -- including plaintiff rubbing his eye or suffering a pressure spike. Therefore, plaintiffs' theory of negligence depended on convincing the jury that the anterior chamber had shallowed or collapsed during the perforation, which defendant adamantly denied.

If the jury believed that defendant negligently damaged the iris during the perforation (by violating the standard of care), then it could conclude that, but for that violation, plaintiff's injuries would not have occurred. Although defendant's experts testified that these complications were not foreseeable from an ordinary perforation, plaintiffs' experts testified that the complications were foreseeable if the anterior chamber sufficiently shallowed or collapsed. Thus, resolution of plaintiff's malpractice claim depended on credibility.

There was no evidence that plaintiff was psychotic prior to taking anti-rejection drugs following the corneal transplant. His psychiatrist testified that he may have been predisposed to the illness, however, because his history was "suggestive of a family cluster with mood disorders." Psychiatric problems were a known possible side effect of steroid anti-rejection drugs. Plaintiff was taking anti-rejection drugs at the time of each psychotic episode.[2]

However, the psychotic episodes were not relevant to plaintiff's credibility concerning the events that happened prior to the cornea transplant. In other words, they were not relevant to his informed consent claim, nor to his allegations of malpractice in the procedure, because -- except for damages -- the facts underlying those claims had been fully completed prior to plaintiff's first

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[2] We will assume that defense counsel misspoke himself when he indicated, during closing argument, that the phone call giving defendant an eleventh hour warning happened prior to the transplant. It was uncontested that it happened *after* the transplant.

psychotic episode. The damage to plaintiff's eye had been done (whether by malpractice or not) prior to his first psychiatric episode.

Nevertheless, throughout the course of trial, defense counsel explored every conceivable excruciating detail of plaintiff's behavior during his psychotic episodes. Further, the gist of defense counsel's closing argument was that this case was about credibility and, due to his mental condition, plaintiff had none.

We conclude that defense counsel's conduct of repeatedly injecting and emphasizing, in arguments and questioning, the sordid details of plaintiff's various psychiatric episodes requires reversal. The specific facts of each episode were irrelevant to the substance of plaintiff's claims, and irrelevant to his credibility regarding those claims. Those details, and counsel's arguments, were designed to inflame the jurors and divert their attention from the merits of the case, and from the issue of *defendant's* credibility which was pivotal to his defense. "That strategy paid off handsomely here in the form of" a no cause verdict. See *Badalamenti*, *supra* at 292. "[W]hen, as in this case, the theme is constantly repeated so that the error becomes indelibly impressed on the juror's consciousness, the error becomes incurable and requires reversal" even in the absence of an objection. *Reetz*, *supra* at 111-112.

In light of the untainted evidence, we cannot conclude that defense counsel's misconduct had no affect on the verdict. *Rogers*, *supra* at 147; *Reetz*, *supra* at 103. To the contrary, in the context of this case, we believe the misconduct may well have been decisive of the outcome and seriously affected the fairness of the proceeding. *Carines*, *supra* at 763. We therefore conclude that plaintiffs are entitled to a new trial.

Plaintiffs next argue that the trial court abused its discretion in admitting an audio tape of plaintiff's call to police, because the tape was not properly authenticated under MRE 901. We disagree.

MRE 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording," conforms with the requirements of the rule when proven "by opinion based upon hearing the voice at any time under circumstances connecting it to the alleged speaker." MRE 901(b)(5). "A duplicate" of the original recording "is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." MRE 1003; see also MRE 1002.

The trial court acted within its discretion in finding that defendant sufficiently proved that this recording was what he claimed, a tape recording of plaintiff's phone call to police. See MRE 901(a), (b)(5). We do not agree that a question was raised concerning the "authenticity of the original," nor that admitting the duplicate was any more unfair than admitting the original. See MRE 1003; MRE 1002.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly

Hoekstra, J. did not participate.