STATE OF MICHIGAN

COURT OF APPEALS

FOUR S & J, INC., d/b/a KAREM'S PARTY STORE, and SS & J, INC.,	UNPUBLISHED May 22, 2001
Plaintiffs-Appellants/Cross-Appellees,	
v	No. 215687 Wayne Circuit Court
M. JOHN PEARSON,	LC No. 96-636965-CK
Defendant-Appellee/Cross-Appellant.	

Before: Hoekstra, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

After a jury trial, plaintiffs appeal as of right from a judgment of no cause of action. Plaintiffs' complaint alleged that defendant, an insurance agent, negligently failed to procure insurance coverage for the business known as Karem's Party Store. In a special verdict, the jury found that (1) defendant had acted negligently, and (2) plaintiffs sustained damages, but (3) defendant's negligence did not proximately cause plaintiffs' damages. We affirm.

I

Brothers Sami and Jamal Tobia incorporated the named plaintiff entities to purchase Karem's Party Store, located in Detroit, and enter into business. The Tobias financed part of the purchase price through an $80,000 loan from Madison National Bank (MNB), granting MNB their personal guarantees, a mortgage on the business building, equipment and inventory, and a mortgage on Sami Tobia's home. On September 12, 1995, a fire, the third fire since August 1995, gutted the party store, destroying everything inside.

After several contacts with defendant, who had prepared a liquor liability insurance policy for the party store, defendant advised the Tobias that no business insurance policy existed. Trial testimony indicated that the Tobias believed they had full business coverage at least in part because of representations by MNB. When the Tobias arrived at their loan closing with MNB, they did not bring a certificate of insurance regarding the business, but merely advised their loan officer that defendant had informed them they possessed full coverage of the business. The loan officer testified that she promptly telephoned defendant's agency and spoke with someone who

informed her that MNB would be added as a mortgagee and loss payable payee to plaintiffs' insurance policies covering the building and business property. After this call, the MNB loan officer advised plaintiffs that they correctly understood they had insurance covering the business. The loan officer averred that MNB relied on defendant's agency's misrepresentation in closing the loan and foregoing its contractual right to obtain business insurance at plaintiffs' expense.

After defendant advised the Tobias that no business insurance policy existed, the Tobias sought from MNB a loan to repair the store, but MNB declined. Instead, MNB sued the Tobias and SS & J, obtained a judgment against them amounting to approximately $86,000, and began repossessing Sami Tobia's personal property, including his vehicle and furniture. Eventually, the Tobias and MNB entered a settlement agreement pursuant to which MNB agreed to discharge the brothers' obligations to it, and the brothers agreed to pay MNB $10,000 immediately and additionally provide MNB a certain amount of money from any successful lawsuit the brothers filed against defendant.

II

Plaintiffs first contend that the trial court erred in denying their requests for a mistrial or new trial because defense counsel during his closing argument personally attacked plaintiffs' counsel. This Court reviews for an abuse of discretion the trial court's rulings regarding plaintiffs' motions for mistrial and new trial. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999); *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

When reviewing asserted improper comments by an attorney, this Court first determines whether the attorney's action was error and, if it was, whether the error requires reversal. An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). What constitutes a fair and proper closing statement is left to the discretion of the trial court. *Id*. at 97.

Plaintiffs allege that defense counsel falsely and improperly attacked plaintiffs' counsel by asserting that MNB retained her and conspired with her to victimize plaintiffs, characterizing her as Howdy Doody and suggesting that she acted unscrupulously, and that defense counsel impermissibly speculated regarding the extent of plaintiffs' counsel's fee. Defense counsel argued that plaintiffs had suffered no damages necessitating reimbursement by defendant. Defense counsel argued that according to the settlement agreement between the Tobias and MNB, plaintiffs owed no obligations, and that therefore the instant suit "is a totally manufactured lawsuit, not for the benefit of [plaintiffs] and not for the benefit of the [Tobias]. . . . It's for the [unscrupulous] lawyer and it's for the [unscrupulous] bank." Defense counsel suggested that plaintiffs' counsel "came from the bank," and consequently was a puppet of MNB, comparing her with the more famous puppet Howdy Doody. Defense counsel concluded that in light of plaintiffs' requested damages, any proceeds from this case would go to MNB and plaintiffs' counsel, with nothing left for plaintiffs.

Viewed in context, most of defense counsel's remarks address plaintiffs' damages and were supported by the record, including evidence of the settlement agreement between the Tobias and MNB. In light of evidence reflecting (1) MNB's rather ungenerous conduct toward the Tobias, i.e., MNB's failure to ensure the proper placement of insurance covering Karem's Party Store and its subsequent foreclosures and lawsuit against the Tobias, (2) plaintiffs' status under the settlement agreement as the last to benefit from the instant litigation, and MNB's position as the primary beneficiary of the first $62,000 of the instant lawsuit,[1] and (3) MNB's authority under the agreement to validate or reject a proposed settlement in this case, we find that defense counsel's remarks regarding MNB's, and its attorneys', "unscrupulous" conduct toward the Tobias and MNB's influence over the litigation, while somewhat abrasive, constituted logical and proper inferences from the record, not baseless or unwarranted attacks. *Hunt*, *supra* at 98.

We found no specific evidence of record demonstrating that plaintiffs' counsel herself "came from the bank." Nonetheless, even assuming the impropriety of this isolated comment, we conclude that any error caused by this remark is harmless in light of the trial court's instructions to the jury, both at the beginning and end of trial, as well as several times during the trial, that "[a]rguments and statements and remarks of attorneys are not evidence and you should disregard anything said by an attorney not supported by evidence or by your own general knowledge and experience." Cf., *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 292, n 6; 602 NW2d 854 (1999) ("The objectionable remarks of plaintiff's lead counsel were so pervasive that the trial court's instruction to the jury that statements of counsel are not evidence could not have cured the resulting prejudice in this case.").

We conclude that the trial court did not abuse its discretion in denying plaintiffs a mistrial or new trial because of defense counsel's allegedly improper closing argument.

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[1] The settlement agreement apportioned any proceeds from the Tobias' action against defendant as follows:

> Upon resolution of the "fire claim" litigation in Wayne County Circuit Court Case No. 96-636965-CK, the proceeds of said suit, if any, will be applied first towards agreed upon attorney fees and litigation costs, second to TOBIAS in the amount of Ten Thousand . . . DOLLARS, third to the BANK toward the payment, exclusively out of said proceeds, in an amount not to exceed Fifty-Two Thousand . . . DOLLARS, and finally, again to TOBIAS for any proceeds generated in excess of the amount directed to the BANK.

Thus, MNB was entitled to $62,000 beyond the amount of plaintiffs' attorney fees and litigation costs; while the settlement agreement provides for $10,000 to the Tobias, defense counsel argued that this $10,000 would go to MNB because no evidence showed that the Tobias ever paid MNB $10,000 immediately after entering the settlement agreement We note that defense counsel's comment regarding plaintiffs' counsel's potential fees constituted a proper inference from the settlement agreement and the recovery plaintiffs' sought at trial.

III

Plaintiffs next argue that the trial court erred in permitting defendant, without notice, to introduce the defense that plaintiffs lacked an insurable interest in Karem's Party Store, and in failing to instruct the jury regarding the definition of "insurable interest." We note that plaintiffs did not object during defense counsel's opening statement when he suggested that plaintiffs might not have possessed title to the store, and that plaintiffs' counsel herself first introduced testimony regarding the state of plaintiffs' title to the store. Accordingly, to the extent that plaintiffs now challenge the trial court's admission of evidence concerning their title to the store, we conclude that plaintiffs have waived our consideration of this issue. *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 388; 554 NW2d 49 (1996) ("An appellant cannot contribute to error by plan or design and then argue error on appeal.").[2]

IV

Plaintiffs also claim that the trial court improperly permitted defendant to set forth an unnoticed uninsurability defense that was based on the speculative testimony of an expert witness. Our review of the record indicates that defendant advised plaintiffs in early March 1998, six months before trial began, of its proposed expert witness who would testify regarding the "probable lack of insurance of $40,000 on a building in the City of Detroit with a SEV . . . of $6500." In May 1998, plaintiffs filed a motion to strike the expert's testimony because his inclusion would increase litigation costs by requiring another deposition, but the trial court denied plaintiffs' motion. In light of the fact that at the time of the May 22, 1998 hearing regarding plaintiffs' motion plaintiffs had notice of defendant's uninsurability argument and had approximately 2 ½ months to conduct further depositions, we find no abuse of discretion in the trial court's denial of plaintiffs' motion to strike. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 296; 616 NW2d 175 (2000) ("It remains within a trial court's sound discretion to admit testimony from a witness even where the witness was not identified in the discovery process."); *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992) ("The decision whether to allow a party to add an expert witness is within the discretion of the trial court.").[3]

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[2] With respect to plaintiffs' suggestion that "[t]he trial court refused to rule as a matter of law that Plaintiffs had an insurable interest and compounded the error by refusing to give an instruction to the jury defining insurable interest as defined . . . in *Crossman* [*v American Ins Co of Newark, NJ*, 198 Mich 304; 164 NW 428 (1917)]," this author notes that plaintiffs fail to cite any authority whatsoever concerning a trial court's duty to instruct the jury. In any event, plaintiffs' counsel successfully informed the jury regarding an insurable interest by eliciting from an expert witness that "[a]n insurable interest exists in the property insurance business when a party suffers a financial loss or would suffer a financial loss if the property was damaged. And that's really what we're taught in Agents 101."

[3] Even assuming some error regarding the trial court's decision to permit the expert's testimony, plaintiffs on appeal raise no specific allegations concerning how such error prejudiced them. Plaintiffs' presentation of several witnesses who testified regarding the insurability of party stores located within Detroit indicates that plaintiffs suffered no prejudice arising from an

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Furthermore, we disagree with plaintiffs' characterization of the expert's testimony concerning insurability as pure speculation. The expert, Donald McCluskey, testified at length regarding his background, including his continuing education and licensing as a certified insurance counselor, experience teaching insurance classes, and twenty-four years of experience working as a Michigan licensed insurance agent. McCluskey indicated that his experience included selling commercial establishment clients property and casualty insurance, and that before trial he reviewed deposition testimony and other evidence, including some MNB records. McCluskey also twice responded affirmatively to defense counsel's inquiries whether McCluskey "had any experience . . . in trying to obtain . . . insurance for party stores." McCluskey testified generally that insuring party stores was increasingly difficult because, due to their vulnerability to holdups, slip and fall claims, and vandalism, "companies typically just refuse party stores period." When presented with the question whether he could have secured insurance for a Detroit party store (at the address of Karem's Party Store) operated by inexperienced owners, McCluskey responded negatively. Because McCluskey's opinions drew from his own experience and facts contained within the trial court record, this author concludes that the trial court did not abuse its discretion in permitting McCluskey's opinion testimony regarding insurability, which constituted proper expert testimony according to MRE 702, 703; *Anton v State Farm Mut Automobile Ins Co*, 238 Mich App 673, 677; 607 NW2d 123 (1999).

V

Plaintiffs additionally suggest that the trial court erred in failing to instruct the jury not to consider defendant's arson defense, which defendant withdrew after the proofs concluded. We need not consider this contention because plaintiff did not object at trial to the court's decision that defendant would instruct the jury that the arson defense was withdrawn, *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997), and because plaintiffs on appeal cited no authority supporting their arson-related arguments. *Staff v Johnson*, 242 Mich App 521, 529; 619 NW2d 57 (2000). Regardless, however, we find no error because defense counsel explicitly advised the jury not to consider arson because the defense was unsupported by the record. To the extent that plaintiffs assert prejudice arising from the trial court's refusal to itself instruct the jury not to consider arson, we fail to comprehend, and plaintiffs cite no authority explaining, how any prejudice occurred from the mere fact that defense counsel, not the trial court, advised the jury not to consider arson.

VI

Plaintiffs further contend that the trial court incorrectly admitted into evidence the irrelevant settlement agreement between the Tobias and MNB. The agreement was relevant, however, to (1) show the extent of plaintiffs' indebtedness to their lender, an amount essential to a proper calculation of the total damages plaintiffs sustained,[4] and (2) rebut plaintiffs' counsel's

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asserted lack of notice of defendant's uninsurability defense.

[4] Even accepting plaintiffs' argument that the settlement agreement should not have factored into the calculation of their damages, any error in this respect is harmless given the jury's verdict

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attempts during her opening statement to emphasize the extent of the Tobias' indebtedness to MNB and that the Tobias "desperately" sought insurance regarding the business building to prevent them from "losing everything." MRE 401. Consequently, we find no abuse of discretion in the trial court's admission of the settlement agreement.[5] *Miller v Hensley*, 244 Mich App 528, 529; ___ NW2d ___ (2001).

VII

Plaintiffs lastly suggest that in light of their combined allegations of error, the trial court erred in denying their motion for a new trial. Because, as discussed above, (1) plaintiffs either failed to properly present these arguments, or (2) the allegations of error were groundless, or (3) to the extent that any error occurred it was harmless in light of the evidence presented at trial and the jury's special verdict finding that defendant did not proximately cause plaintiffs' damages, we conclude that the trial court did not abuse its discretion in denying plaintiffs' motion for new trial. *Setterington*, *supra*.

In light of our determinations that plaintiffs failed to assert the existence of error entitling them to reversal of the no cause of action judgment, we need not consider the issues defendant raises in his cross appeal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage

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denying plaintiffs any damages because of its finding regarding proximate cause.

[5] While plaintiffs also indicate that the trial court "erred once having ruled the settlement agreement inadmissible, in refusing to admit Plaintiffs' fee agreement with counsel into evidence, in that the fee agreement was relevant to the settlement agreement," we decline to address this unpreserved issue because plaintiffs neither presented this issue within the appellate brief's statement of questions presented nor cited relevant portions of the transcript addressing this issue or any authority supporting their argument. *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000); *Great Lakes Division of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 422; 576 NW2d 667 (1998).