

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY WILSON,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee,

and

AVIS RENT A CAR SYSTEM, dba AVIS RENT
A CAR

Defendant.

UNPUBLISHED

October 26, 2001

No. 216230

Wayne Circuit Court

LC No. 96-615952-NI

Before: Talbot, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff Dorothy Wilson appeals as of right from a judgment entered by the trial court for defendant General Motors Corporation¹ following a jury trial. We affirm.

I

In April 1995, plaintiff rented a minivan manufactured by defendant from Avis Rent-A-Car (Avis) to drive it from her home in Michigan to Texas to visit family. The minivan had a rear hatch-style door that opened vertically and was supported by two struts, one on each side, containing pressurized gas to assist in opening the door and to support the weight of the door while open. Plaintiff drove the minivan straight through without incident to the home of an aunt in Texas. At the time of the trip, plaintiff was on medical leave from her employment with defendant due to a work-related injury that occurred in October 1994.

¹ Plaintiff settled her claims against defendant Avis Rent-A-Car and dismissed Avis from the case prior to trial. For purposes of this opinion, the term “defendant” will be used to refer to General Motors Corporation.

While plaintiff was unloading the back of the minivan at the home of a relative in Texas, one of the struts supporting the rear door became disconnected from body of the vehicle and the door fell on plaintiff. According to plaintiff, when the door struck her, she fell to the ground and hit her head and chin. Plaintiff did not seek medical attention immediately following this incident. Plaintiff contacted Avis to request a new minivan and was instructed to bring it to Avis' rental facility in Austin, Texas for replacement. At the time that she turned in the minivan, plaintiff informed Avis personnel of the accident, however she did not complete an accident report.

During the trip back to Michigan, plaintiff claimed she suffered from headaches and one incident in which her jaw temporarily locked in an open position, however, plaintiff did not seek medical attention during the return trip. In May 1995, plaintiff sought medical attention from a dentist who eventually diagnosed her with a displacement of the tempomandibular joints in her jaw. Plaintiff was also treated by a physiatrist for head and neck pain allegedly caused by the accident. In addition, plaintiff claimed that the accident with the minivan resulted in an aggravation of a pre-existing lower back injury.

On March 25, 1996, plaintiff filed a complaint against Avis alleging that it negligently maintained the minivan, that Avis' negligence caused the strut to become detached from the van, and that plaintiff's injuries resulted from being hit by the door of the minivan. Avis filed a third-party complaint against defendant on August 30, 1996, alleging that plaintiff's injuries were the result of defendant's negligence.

Plaintiff reached a settlement of her claim against Avis in February 1998. Before finalizing that settlement, plaintiff sought leave to amend her complaint to state claims of negligence and product liability against defendant. The court granted leave to amend, and plaintiff filed her amended complaint against defendant on February 24, 1998, alleging that defendant's negligent design or manufacture of the minivan caused the strut to malfunction and resulted in her injuries. Avis was dismissed as a defendant on February 27, 1998.

The case proceeded to trial against defendant in November 1998. Prior to trial, plaintiff argued that defendant should not be allowed to introduce evidence regarding (1) the fact that plaintiff initially sued Avis, (2) plaintiff's allegations against Avis in her original complaint, (3) plaintiff's worker's compensation settlement against defendant, and (4) the lack of similar incidents involving a malfunction of the struts on the rear door of defendant's minivans. Plaintiff also filed a pretrial motion seeking to preclude application of the 1996 tort reform legislation, 1995 PA 161, to this case, arguing that the original complaint was filed prior to the effective date of the tort reform legislation, and the amended complaint against defendant related back to the original filing date. Plaintiff further asserted that the statutes in question were unconstitutional.

The trial court decided that defendant could introduce evidence of plaintiff's lawsuit against Avis, but could not mention the settlement. In addition, the court found that plaintiff was "stuck with [her] pleadings" and ruled that defendant could use the statements in plaintiff's complaint, including her allegations against Avis, as admissions at trial. The trial court also stated that it would allow defendant to introduce evidence establishing that there were no similar accidents involving defendant's minivans. Regarding evidence of plaintiff's worker's compensation claims, the trial court found that defendant could not introduce evidence of the

amount of plaintiff's worker's compensation settlement in terms of wage or medical loss, however defendant could introduce evidence of plaintiff's worker's compensation claims to establish that she had pre-existing injuries. Finally, the court found that because plaintiff's amended complaint added defendant as a party, it did not relate back to the original filing date, and the tort reform statutes applied to plaintiff's claim against defendant.

At trial, plaintiff's counsel indicated in his opening remarks that plaintiff first sued Avis and after an investigation, concluded that Avis had done nothing wrong and decided to go after defendant. During defendant's opening statement, defense counsel argued that at the time of the accident, plaintiff had been on medical leave since October 1994, and that at the time of trial, she had been on medical leave for most of the past ten years. Plaintiff's counsel objected to these statements, however the court overruled the objection. Plaintiff also moved for a mistrial at the conclusion of defendant's opening statement, arguing that the implication of defense counsel's statement was that plaintiff had no legitimate reason for being on medical leave and now plaintiff was forced to introduce evidence of her pre-existing medical conditions to prove that she had a legitimate reason for being on leave. The court found there was no basis for a mistrial and denied plaintiff's request for a remedial instruction.

Plaintiff admitted during her testimony that she originally sued Avis and settled her claims against Avis. Plaintiff also claimed that she missed a substantial amount of work from her employment with defendant due to the April 1995 accident. On cross-examination, defendant sought to introduce evidence of plaintiff's worker's compensation claims to prove that she actually missed work due to work-place injuries unrelated to the April 1995 accident. Plaintiff objected to introduction of the worker's compensation documents because plaintiff was not claiming wage loss. The trial court found that defendant could use the documents to impeach plaintiff's testimony that she lost time from work due to the April 1995 accident.

Prior to resting, defendant moved to admit all exhibits identified and marked during the case in chief and defendant's cross examination of plaintiff's witnesses. The exhibits in question included plaintiff's complaint against Avis, documentation of plaintiff's worker's compensation claims, and her medical records. The court asked if plaintiff had any objections to admission of the exhibits, and plaintiff's counsel stated that there were no objections.

Defendant rested its case, and the trial court instructed the jury. After deliberating for a few hours, the jury returned a verdict for defendant. Specifically, the jury found that defendant was not negligent and that plaintiff was not injured or damaged in one or more of the ways claimed.

II

We first address plaintiff's various claims that the trial court erred in allowing defendant to admit certain evidence at trial. A trial court's decision to admit evidence is within its discretion and should not be reversed on appeal absent an abuse of that discretion. *Chmielewski v Xermac, Inc.*, 457 Mich 593, 614; 580 NW2d 817 (1998). An abuse of discretion occurs where an unprejudiced person, considering the facts on which the trial court acted, would find no justification or excuse for the ruling, or when the result is so palpably and grossly violative of fact and logic that it shows perversity of will or the exercise of passion or bias. *Ellsworth v Hotel*

Corp of America, 236 Mich App 185, 188; 600 NW2d 129 (1999); *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997).

Relevant evidence is generally admissible at trial. *Ellsworth, supra* at 188-189. Evidence is relevant if it has the 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. *Id.* at 188. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Allen, supra* at 404. Unfair prejudice exists when marginally relevant evidence might be given undue weight by the jury or if it is inequitable to allow use of the evidence. *Id.*

Plaintiff first argues that the trial court erred by allowing defendant to introduce evidence that plaintiff initially sued Avis and reached a settlement with Avis. Plaintiff claims that defendant sought to introduce this evidence so that it could blame a settling nonparty. According to plaintiff, under *Brewer v Payless Stations, Inc*, 412 Mich 673; 316 NW2d 705 (1982), when there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount of the settlement, the jury should not be informed of the existence of a settlement or the amount paid, unless the parties stipulate otherwise. *Id.* at 679. However, we need not determine whether the trial court erred in ruling that evidence of plaintiff's suit and settlement with Avis was admissible because plaintiff waived her allegation of error by introducing this evidence in her own testimony and opening statement. Plaintiff cannot complain of error to which she contributed by plan or negligence. *Farm Credit Services v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998); *Bercel Garages, Inc v Macomb Co Rd Comm'n*, 190 Mich App 73, 84; 475 NW2d 840 (1991). In addition, we have held that where a party opened the door to admission of otherwise inadmissible evidence by inquiring into its existence, it was not error for the opposing party to seek admission of the evidence. *Bishop v St John Hosp*, 140 Mich App 720, 726; 364 NW2d 290 (1984).

Plaintiff next argues that defendant should not have been able to use plaintiff's allegations in her first complaint against Avis as admissions. We find that this allegation of error was also waived. Plaintiff's testimony admitting that she sued Avis and settled her suit against them opened the door to admissibility of the allegations in her complaint. *Farm Credit Services, supra* at 683-684. Even if this error was not waived, we would not agree that the court abused its discretion in admitting the evidence. In her opening statement and her case in chief, plaintiff claimed that she decided to settle her suit against Avis because she determined that Avis had done nothing wrong. By not only informing the jury that she settled her suit against Avis, but also raising the issue of why she settled her suit, plaintiff's voluntary statements removed the threat of unfair prejudice and increased the probative value of the allegations in plaintiff's complaint. MRE 403; *Allen, supra* at 404. Therefore, we find that the danger of unfair prejudice created by introduction of the allegations in plaintiff's complaint against Avis did not substantially outweigh the probative value of the evidence, and the trial court did not err in allowing defendant to impeach plaintiff's testimony with the allegations in her complaint.

Plaintiff also argues that the trial court erred by allowing defendant to admit evidence of plaintiff's worker's compensation settlement with defendant. Specifically, plaintiff objects to the admission of a "Voluntary Payment Form" that defendant used to impeach plaintiff during cross-

examination. Plaintiff argues that this evidence was more prejudicial than probative because it gave the appearance that plaintiff was trying to be compensated twice for her injuries. Although plaintiff initially objected to admission of this form during her cross-examination, it is apparent that when defendant later moved for admission of the document, plaintiff acquiesced to its admission. Again, it appears that plaintiff waived this allegation of error by failing to maintain her objection to admission of the evidence. *Farm Credit Services, supra* at 683-684.

However, even if the trial court had erred by allowing admission of this document, we would find the error to be harmless because the jury specifically found that plaintiff was not injured as a result of the April 1995 accident. If the jury reached the conclusion that plaintiff was not injured as a result of the accident, then the introduction of evidence that plaintiff was injured prior to the accident could not have possibly resulted in prejudice to plaintiff. A trial error that clearly did not affect the outcome of the case would not warrant reversal. See *Werthman v General Motors Corp*, 187 Mich App 238, 244; 466 NW2d 305 (1991).

Plaintiff's final allegation of error regarding admission of evidence concerns the trial court's ruling that defendant could present evidence that it did not receive notice of similar incidents prior to the April 1995 accident. However, plaintiff failed to cite a single piece of such evidence introduced at trial. Instead, plaintiff focuses on arguments made by defense counsel in its opening statement. The statements of a party's counsel in opening arguments are not evidence, and the jury was properly instructed that attorney's statements are not evidence. SJI2d 3.04. Jurors are presumed to understand and follow the court's instructions. *Bordeaux v The Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Because defendant did not introduce this evidence at trial, no error occurred.

III

Plaintiff also claims error in certain arguments by defendant in its opening statement regarding plaintiff's medical leave and pre-existing injuries. According to plaintiff, these arguments were prejudicial and the trial court erred in allowing defendant to make these arguments. A trial court has the discretion to determine what is fair and proper opening statement. *Hunt v Freeman*, 217 Mich App 92, 97; 550 NW2d 817 (1996). When reviewing alleged improper arguments by a party's counsel, we must first determine whether the attorney's action was error and, if it was, whether the error requires reversal. *Id.* at 95. A party's improper arguments are not cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial, or were designed to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. *Id.* at 95; *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990).

Here, plaintiff argues that statements in defendant's opening arguments were prejudicial to her because they implied that she was a malingerer and challenged her honesty and veracity. Although the statements did appear to be intended to question plaintiff's credibility,² the test is

² The statements at issue were as follows:

(continued...)

whether defendant's statements indicated (1) a deliberate course of conduct aimed at preventing a fair and impartial trial, (2) a studied purpose to inflame or prejudice a jury, or (3) an intent to deflect the jury's attention from the issues involved. *Hunt, supra* at 95. In this case, there is no evidence that defendant's intention was to prevent a fair trial, prejudice the jury, or deflect the jury's attention from the issues of the trial.

Plaintiff also asserts that defendant's argument should have been excluded under MRE 403 because the unfair prejudice of the argument outweighed the probative value. However, as we stated above, counsel's statements in opening arguments are not evidence, the jury was properly instructed on this issue, and we presume that the jurors understood and followed the court's instructions. SJI2d 3.04; *Bordeaux, supra* at 164.

IV

In her final assertion of error, plaintiff challenges the constitutionality and applicability of the "1996 tort reform legislation," 1995 PA 161. Plaintiff first argues that the trial court erred in applying 1995 PA 161 to this case because plaintiff's complaint was filed before the March 28, 1996, the effective date of the legislation, and her amended complaint adding defendant as a party related back to the original complaint.

Generally, an amendment relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the same conduct, transaction, or occurrence set forth in the original pleading. MCR 2.118(D); *Hurt v Michael's Food Center*,

(...continued)

Mr. Wernette [Defense Counsel]: Let me elaborate on the assertion of the Plaintiff's opening that she was at the time of this incident off work recuperating from a back injury — in fact she was off work starting in October of 1994 on medical leave from GM for back injury and six months later was able to drive a without [sic] stopping except for some rest stops to Texas. I'm not suggesting somebody can't go on a vacation. She didn't go back to work right after this incident or any time in the near future after that after [sic] she got done recuperating from her back injury; in fact, the evidence is going to show that for most of the past 10 years including before and after this accident because of back injuries —

Mr. Andress [Plaintiff's Counsel]: I'm going to object again, Your Honor. May we approach the bench?

The Court: Counsel there's no reason to approach. This goes strictly to her credibility.

Mr. Wernette: For most of the past 10 years because of complaints about her back being hurt, headaches, and shoulder and neck problems she's been on medical leave. So I think that helps you establish did this accident cause her problems?

Inc., 220 Mich App 169, 179; 559 NW2d 660 (1996). However, the relation-back doctrine of MCR 2.118(D) does not extend to the addition of new parties. *Id.*

Here, it is undisputed that plaintiff filed her original complaint on March 25, 1996, and that complaint named only Avis as a defendant. On August 30, 1996, after the effective date of the tort reform legislation, Avis filed a third-party complaint against defendant. Plaintiff did not amend her complaint to state a claim against defendant until February 24, 1998. Clearly, defendant did not become a party to this matter until after the effective date of the tort reform legislation, and plaintiff did not amend her complaint to state a claim against defendant until nearly two years after the effective date. Because the relation-back doctrine does not apply to the addition of parties, the claims against defendant in plaintiff's amended complaint would not relate back to the original filing date of plaintiff's first complaint, and the tort reform statutes would apply to this case.

Plaintiff also claims that the statutes in question are unconstitutional and asserts various theories supporting her argument. Specifically, plaintiff challenges MCL 600.2956, which abolished joint liability, and MCL 600.2957(1), which requires liability to be apportioned among all possible tortfeasors, including alleged tortfeasors that are not parties to the action. However, in order for the several liability statutes to apply in this case, the jury had to conclude that defendant was negligent and that it was liable to plaintiff for that negligence. Upon finding that defendant was liable to plaintiff, the jury would then have to assess defendant's percentage of the fault, and the percentage of fault attributable to other potential tortfeasors. MCLA 600.2957(1). In this case, however, the jury found that defendant was not negligent and plaintiff was not injured as a proximate cause of defendant's negligence. Because the jury concluded that defendant was not liable, there was no need to apportion fault between defendant and any other tortfeasors, and the several liability provisions of these statutes were inapplicable to this case.

Because it is apparent that the several liability provisions of MCL 600.2956 and MCL 600.2957(1) were inapplicable here, we need not address the constitutionality of these statutes. The constitutionality of a statute should not be considered unless it is imperatively required, essential to the disposition of the case, and unavoidable. *People v Higuera*, 244 Mich App 429, 441; 625 NW2d 444 (2001). In this case, whether defendant and other potential tortfeasors were jointly and severally liable for plaintiff's injuries was not dispositive to this case, and, therefore, we refrain from reviewing the constitutionality of MCL 600.2956 and MCL 600.2957(1).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael J. Talbot