STATE OF MICHIGAN

COURT OF APPEALS

TRAVELERS PROPERTY CASUALTY,
subrogee of SINBAD'S INC,

Plaintiff-Appellee,

v

SANI VAC SERVICE, INC,

Defendant-Appellant,
and

FIRE EQUIPMENT COMPANY,

Defendant,

UNPUBLISHED
June 24, 2004

No. 242966
Wayne Circuit Court
LC No. 99-938479-NP

TRAVELERS PROPERTY CASUALTY,
subrogee of SINBAD'S, INC,

Plaintiff-Appellee,

v

SANI VAC SERVICE, INC,

Defendant-Appellant.

No. 243860
Wayne Circuit Court
LC No. 99-938479-NP

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant Sani Vac Service, Inc,[1] appeals by leave granted[2] the May 10, 2003, judgment for plaintiff after a jury found defendant eighty-five percent responsible for a fire that damaged plaintiff's insured restaurant, Sinbad's. Plaintiff contended defendant's careless cleaning of the kitchen's exhaust system permitted the fire to spread and cause the loss. This Court ordered the appeal consolidated with Docket 242966, defendant's claim of appeal of the trial court's July 26, 2002, order awarding plaintiff costs, interest and case evaluation sanctions. Defendant raises fourteen issues on appeal. We conclude that none of the alleged errors, individually or in combination, resulted in a denial of substantial justice. MCR 2.613(A). Accordingly, we affirm.

I. Spoliation of Evidence

Defendant first argues that the trial court erred by not dismissing plaintiff's complaint based on spoliation of evidence. Specifically, defendant argues that plaintiff did not timely notify defendant of plaintiff's subrogation claim, depriving defendant of an opportunity to inspect the fire scene before it was disturbed. Defendant also argues other evidence was lost or destroyed. A broiler in which the fire originated was discarded, and the exhaust hood and the ductwork at issue were cut and removed from Sinbad's kitchen to a storage warehouse without maintaining a chain of custody. Thus, defendant argues, spoliation of evidence deprived it of a fair trial. Defendant's claim is without merit.

When a party destroys or loses material evidence, whether intentionally or unintentionally, and "the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence," a trial court has the inherent authority to sanction the culpable party to preserve the fairness and integrity of the judicial system. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). We review for a clear abuse of discretion the trial court's decision whether to impose sanctions for spoliation of evidence. *Citizens Ins Co v Juno Lighting, Inc*, 247 Mich App 236, 242; 635 NW2d 379 (2001), citing *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 400; 586 NW2d 549 (1998). The trial court abuses its discretion when the result is so contrary to fact and logic that it demonstrates not the exercise of will but perversity of will, not the exercise of judgment but defiance of judgment, not the exercise of reason but instead passion or bias. *Citizens, supra* at 244-245.

To dismiss a case because evidence has been lost is a drastic measure that should be imposed only rarely and only after the trial court determines other lesser sanctions cannot remedy the unfair advantage arising from the failure to preserve evidence. *Citizens, supra* at 243-244; *MASB-SEG, supra*, at 401. Whether sanctions are necessary to ensure a "fair playing field" is a function of how important the lost evidence is to the parties' claims or defenses. For example, because lack of unimportant evidence can hardly render the playing field uneven, the

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[1] Sani Vac, Inc. is hereafter referred to as "defendant." Defendant Fire Equipment Company (FEC) settled with plaintiff before trial and is not a party to these appeals.

[2] In Docket 242966, this Court dismissed defendant's untimely claim of appeal from the judgment but the appeal of the trial court's July 26, 2002, order awarding plaintiff costs, interest and case evaluation sanctions continued. We granted leave to appeal in Docket 243860.

lost evidence is not material, so sanctioning the culpable party is not merited. *Ellsworth v Hotel Corp*, 236 Mich App 185, 193; 600 NW2d 129 (1999). But even where lost evidence is critical or crucial to the parties' claims or defenses, dismissal is usually not warranted because lesser sanctions are a sufficient remedy. In *Brenner*, no dismissal was warranted even though the failure to preserve tires and the entire seatbelt latching mechanism of an automobile involved in an accident were crucial to defending against claims that the tires were bald and the seatbelt latch was defective. *Id*. at 154, 162-163. Instead, excluding testimony regarding the unavailable evidence may remedy the unfair advantage. *Id*. at 164; *MASB-SEG, supra* at 400-401. See, also, *Hamann v Ridge Tool Co*, 213 Mich App 252, 258; 539 NW2d 753 (1995) (the trial court abused its discretion by not precluding expert testimony where only the plaintiff's expert was able to examine the alleged defective part before it was lost). The trial court may also remedy unfair advantage by instructing the jury it may draw an adverse inference from a party's failure to produce evidence. M Civ JI 6.01, formerly SJI2d 6.01; *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 146; 640 NW2d 892 (2002). In sum, only where unavailability of evidence unfairly disadvantages a party is a sanction warranted, and then, only where a party would be denied a fair trial because available lesser sanctions cannot level the playing field, may the drastic remedy of dismissal be imposed. *Citizens, supra* at 243-244; *MASB-SEG, supra* at 401.

Here, a review of the theories of the parties and the record convinces us that the trial court did not abuse its discretion by denying defendant's motion to dismiss premised on spoliation of evidence. The trial court determined there were several compelling reasons not to grant the extraordinary relief of dismissal. The trial court noted a serious question existed whether or not spoliation of material evidence occurred, and if it did occur, the degree of spoliation. Further, the trial court reasoned that defendant's agents were at the fire scene within a couple of days of the fire and plaintiff's experts had taken photographs. In addition, the critical evidence, the hood and its ductwork, were preserved, albeit dismantled. The trial court concluded "it's up to the jury to determine what weight, if any, should be given to the assertion that there was spoliation," and whether defendant was treated unfairly.

The evidence at trial showed that Sinbad's contracted with defendant to thoroughly clean and degrease to "bare metal" its main kitchen's exhaust system, including the hood, stacks, fans and filters. Defendant's crew cleaned between 10:30 p.m. on December 30, 1996, and 7:00 a.m. on December 31, 1996. Sinbad's was open for a short business day on New Year's Eve, serving only one-half the number of meals it usually did. Sinbad's closed for business at 9:00 p.m. It is undisputed that a fire started at approximately 2:30 a.m. on January 1, 1997, in a broiler after Sinbad's cleaning manager, Carol Love, turned it on in prepation to clean it. Plaintiff theorized that defendant's careless cleaning of the exhaust system less than 24 hours earlier permitted the fire to spread to the exhaust hood and ductwork. Plaintiff contended that defendant failed to clean accumulated grease in the hood and the exhaust ductwork.

Defendant argued that the fire was the result of Sinbad's own negligence in the manner it cleaned the broiler. Also, defendant contended that Sinbad's employees lacked training, failed to timely call the fire department, and that Sinbad's failed to maintain adequate fire suppression equipment. Most important, defendant contended it did nothing wrong because it had removed all the grease from the hood and ductwork as it agreed to do. Defendant also argued it had been unfairly treated by not being notified of plaintiff's subrogation claim as soon as plaintiff

suspected defendant's culpability, and by spoliation of the evidence. Defendant advanced this theory in opening statement, questioning of witnesses, expert testimony, and closing argument.

Plaintiff's adjuster, Bernard John Burke, visited the fire scene on January 2, 1997. Burke hired a company with fire cause and origin expertise to examine the fire scene. Plaintiff's experts, John Fatchett and John Moore, visited the fire scene on January 3, 1997. Moore took forty-five photographs of the scene, but he and Fatchett seized no physical evidence. At about the same time, Charles Samples, the supervisor of defendant's cleaning crew that had been at Sinbad's on December 30-31, 1996, contacted Sinbad's offering defendant's services to get the restaurant back in business as soon as possible. Sinbad's accepted. Samples and a cleaning crew went to the fire scene on January 4, 1997. Both Samples and the cleaning crew's foreman testified that defendant had removed the grease from the hood and ductwork during the December 31 cleaning and that on January 4, 1997, defendant's crew only cleaned up fire-fighting debris. Love testified, however, that defendant's crew cleaned a hood and ductwork on January 4 that should have been cleaned four days earlier. Love also testified that defendant's crew scraped out big, charcoal-colored chunks of grease, and she believed that an employee of defendant took a fist-sized piece with them. Defendant never billed Sinbad's for the January 4, 1997 cleaning. Defendant's field report for that date reads:

> Cleaned scraped (2) back deep fry hood system and (1) main hood Also cleaned 1 duct from fan. Power washed floor in kitchen.

On January 6, 1997, Fatchett advised Burke by telephone of his opinion: that the fire originated in the broiler and spread to the hood and exhaust system because of accumulated grease. Burke testified that after speaking to Fatchett he contacted the repair contractor working at Sinbad's and instructed that the hood and ductwork be removed and placed in safekeeping with as little disruption as possible. Defendant's experts inspected and photographed the hood and ductwork at the storage facility on March 27, 2001; they found just bare, rusted metal and some "grayish-ash-type material." Plaintiff's experts visited the storage facility five days before trial. And according to Fatchett, other than the hood and ductwork being dismantled and at a different location, it was in the same condition as when he and Moore observed it in Sinbad's kitchen on January 3, 1997.

This record does not establish spoliation created an uneven playing field. Representatives of both plaintiff and defendant were on the fire scene within a day or two of the fire and were able to testify whether there was grease in the exhaust system at issue. Both plaintiff and defendant had access to forty-five photographs of the fire scene taken two days after the fire. Though cut up, the critical hood and ductwork were preserved, and removed to a storage facility. Both parties had access to inspect and photograph the stored evidence. Both parties had the opportunity to seize samples from the fire scene within two days of the fire and from the stored hood and ductwork up to the time of trial. Defendant's experts chose only to inspect and photograph the stored hood and ductwork. Plaintiff's experts took a sample from the stored hood and ductwork but did not have it analyzed. The only truly lost evidence was the broiler. But unlike *Citizens* and *MASB-SEG* where the cause and origin of the fire were disputed, here no one questioned that the fire started in the broiler during Love's cleaning activities. Thus, the broiler itself was not material evidence. And, although defendant's expert's testified it would have been helpful to have visited the undisturbed fire scene, the remaining

evidence allowed them to render opinions consistent with defendant's theory of the case. In sum, the record fails to establish that plaintiff lost or ruined critical, material evidence, so defendant's ability to defend was not prejudiced. Accordingly, the trial court did not abuse its discretion by denying defendant's motion to dismiss.

II. Sufficiency of the Evidence

(A) Defendant next argues that the jury verdict was against the great weight of the evidence. We disagree. We review the trial court's denial of a motion for new trial for an abuse of discretion. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). But we review de novo the trial court's denial of a motion for judgment notwithstanding the verdict (JNOV) because it may be granted only when the moving party is entitled to judgment as a matter of law. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

The trial court denied defendant's motion for JNOV or new trial, reasoning, in part, as follows:

> . . . The case notwithstanding the aggressiveness of counsel and all the various issues that were raised with or without merit, to me nevertheless does not obscure the fact that the case is relatively simple. What was the cause or causes of this fire loss? And is there competent, reliable, credible evidence to support the jury's finding as to cause.
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> * * *
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> [A]t the time of the fire as well as shortly prior thereto the customers for all practical purposes had left and there was simply one or two of the owners on the premises and some cleaning people. Carol Love had the responsibility or at least she was performing the act of cleaning areas of the kitchen. One of the areas was the broiler. I think the testimony indicates that that's where the fire started, at the broiler. Carol Love was engaged in some other cleaning activity apparently at the onset of the fire. And there was an interval between when the fire actually started and when it was observed by her.
>
> But the critical factor is this from my observation, and I think fairly supported by the evidence, that Sani Vac, the day before the fire, was called upon to clean the hood and the venting or exhaust system for this particular grill where the fire was transferred to. The fire which caused without question the substantial damage originated in the hood and then went on through the exhaust system and conduits. That fire could only have been fueled by combustible materials. If they were there, and they shouldn't have been there if Sani Vac had done its job and used reasonable care to clean the system. I think there is abundance [sic] evidence from the testimony pretty much independent of expert testimony that it was the presence of the grease or combustible substances in the hood and in the venting or exhaust system that caused the fire to spread and caused the damage. The negligence of Sani Vac is determined, as I recall, eighty[-]five percent, was

> simply the failure to exercise due care or reasonable care in cleaning the hood and the exhaust system. But for their failure, I think it's speculative or problematic as to whether or not it could have been contained with far less damage. But the jury found otherwise. I think that's a substantial issue of fact that the jury resolved in favor of plaintiff.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e), *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). The jury's verdict should not be set aside if competent evidence supports it. *Wiley, supra* at 498; *Ellsworth, supra* at 194. Thus, to set aside a jury verdict the evidence must be manifestly against the clear weight of the evidence. *Id*. Neither the trial court nor this Court may substitute its judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.; Campbell v Sullins,* 257 Mich App 179, 193; 667 NW2d 887 (2003).

When reviewing the trial court's decision on a motion for JNOV, this Court must view the evidence and all legitimate inferences from the evidence in the light most favorable to the nonmoving party. *Sniecinski, supra* at 131; *Wiley, supra* at 492. A jury verdict cannot be set aside where "reasonable jurors honestly could have reached different conclusions." *Barrett v Kirtland Community College*, 245 Mich App 306, 312; 628 NW2d 63 (2001), citing *Central Cartage Co v Fewless,* 232 Mich App 517, 524; 591 NW2d 422 (1998). This conclusion flows from the premise that the credibility of witnesses and the weight to be accorded evidence is for the jury to determine. *Grinstead v Anscer*, 353 Mich 542, 552; 92 NW2d 42 (1958); *Krohn v Sedgwick James, Inc,* 244 Mich App 289, 304 n 9; 624 NW2d 212 (2001). See also *Sacred Heart Aid Society v Aetna Casualty & Surety Co*, 355 Mich 480, 486; 94 NW3d 850 (1959), and *Clery v Sherwood*, 151 Mich App 55, 64; 390 NW2d 682 (1986).

Applying these standards to the case at bar, we are in accord with the trial court that abundant evidence supported the jury's verdict. *Wiley, supra* at 498. Thus, the trial court did not abuse its discretion denying defendant's motion for new trial. Defendant's motion for JNOV was properly denied because the evidence when viewed in the light most favorable to plaintiff did not fail to establish plaintiff's claim as a matter of law. *Id.* The evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Campbell, supra* at 193.

As discussed already, it was undisputed at trial that the fire started in a broiler Love was preparing to clean. Plaintiff asserted no claim that defendant's negligence started the fire, only that its careless cleaning less than 24 hours before the fire permitted it to spread throughout the hood and ductwork of the kitchen exhaust system. In addition to Love's testimony already noted, she testified that she never saw defendant's cleaning crew scrape grease out of the exhaust system until after the fire. Plaintiff's experts, Fatchett and Moore, testified they observed accumulated grease in the hood and ductwork after the fire and opined that this was reason for the fire spreading from the broiler. Photographs and physical evidence supported both Plaintiff's expert's testimony and Love's testimony. Further, Samples, defendant's production manager in charge of ensuring defendant's cleaning work was done properly, left Sinbad's on January 1, 1997, three or four hours before the job was completed. Samples also acknowledged that hardened grease could look like the sample plaintiff's experts produced. And, although

defendant presented testimony that it had properly cleaned the grease out of Sinbad's exhaust system, the evidence was such that "reasonable jurors honestly could have reached different conclusions." *Barrett, supra* at 312. It was for the jury to resolve the credibility of witnesses and determine what weight to give the evidence. *Grinstead, supra* at 552; *Krohn, supra* at 304 n 9.

Contrary to defendant's argument, plaintiff presented testimony to counter defendant's theories. Plaintiff presented testimony from Seth Doyle, General Manager for the Detroit Fire Department, that Sinbad's fire extinguishers and automatic fire suppression (Ansul) system were compliant with the Fire Safety Code. Further, plaintiff presented the testimony of Donald John Hoffman, a safety engineer with a Ph.D. in chemical engineering. Dr. Hoffman also opined that grease in Sinbad's exhaust system permitted the fire, which otherwise would have been contained in the broiler, to spread. Hoffman further testified that Sinbad's fire extinguishers were approved for use in restaurants, the Ansul system installed at Sinbad's was the standard at the time of the fire, and that Love acted properly by attempting to extinguish the fire before calling the fire department. In that regard, defendant repeatedly asserts that Love waited twenty minutes to call 911 based on an admission in one of plaintiff's pleadings that the fire occurred at approximately 2:30 a.m. and the fire department logged the "alarm time" at "0250." Yet, Love testified at trial that she called 911 "maybe two minutes" after noticing the fire, and that when she spoke to the emergency dispatcher, she was informed that the fire department had already been notified. Defendant also presented evidence that any grease in Sinbad's exhaust system was the result of cooking on New Year's Eve on a broiler with the hood missing filters. But Love testified the hood was not missing any filters, and her testimony was supported by John Fleming and Dr. Hoffman who found no evidence that filters were missing. In sum, the evidence presented questions of credibility and weight for the jury to resolve, which it did in plaintiff's favor. The jury's verdict was not against the great weight of the evidence.

(B) Defendant also argues the verdict must be set aside because it was based on sympathy. Defendant contends Love cried at some point during her testimony and returned to the courtroom during closing arguments. Defendant also argues that plaintiff attempted to engender sympathy by announcing during jury selection that one of plaintiff's attorneys may not attend the entire trial because his wife was expecting a child. This argument has no merit.

The trial court instructed the jury that its verdict must be "based solely on the evidence and the law." Further, the court instructed the jury that "sympathy must not influence your decision nor should your decision be influenced by prejudice of any nature or any other factor that is totally irrelevant to the rights of the parties to this lawsuit." This Court has noted that "in order for the jury system to function, jurors are and must be presumed to understand and follow the court's instructions." *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). See, also, *Craig v Oakwood Hospital*, 249 Mich App 534, 561; 643 NW2d 580 (2002) (Cooper, J, concurring), lv gtd on other grounds 469 Mich 880; 668 NW2d 910 (2003) ("Jurors are presumed to follow their instructions absent a showing to the contrary."). Here, defendant offers nothing to support its speculative argument, and so, it must fail.

III. Evidentiary Issues

Defendant raises several claims regarding the admission or exclusion of evidence at trial. Defendant argues that the trial court erred by (A) delaying admission of evidence of fault on the part of Fire Equipment Company (FEC), (B) admitting Exhibit 17B, (C) excluding health department records, and (D) permitting Dr. Hoffman to testify as an expert witness. Based on our review of the record, we conclude the trial court did not abuse its discretion. If error occurred, reversal is not warranted.

This Court reviews a trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Barrett, supra* at 325. We will find an abuse of discretion exists only in the extreme case where the result is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id*. Alternatively stated, an abuse of discretion is demonstrated when 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, supra* at 188. By definition, a trial court cannot abuse its discretion when deciding a close evidentiary question. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). When the trial court does abuse its discretion, we may not reverse unless a substantial right of a party is affected, and it affirmatively appears that failing to grant relief is inconsistent with substantial justice. MRE 103; MCR 2.613(A); *Chastain v General Motors Corp*, 467 Mich 888, 654 NW2d 326 (2002).

(A) Defendant argues that error warranting reversal occurred because the trial court did not permit questions regarding FEC's alleged fault for the fire loss. Defendant relies on 1995 tort reform legislation that changed Michigan's rule of joint and several liability for multiple tortfeasors to a rule that each tortfeasor is only liable for damages based on its own fault, that is, liability is "several only and is not joint." MCL 600.2956; MCL 600.2957[3]; *Smiley v Corrigan*, 248 Mich App 51; 638 NW2d 151 (2001). Plaintiff argues that defendant, not the trial court, was solely responsible for any delay in presenting a case for assigning fault to FEC. Plaintiff further argues defendant suffered no prejudice, at least none warranting reversal. The record convinces us that plaintiff is correct on both points.

During opening statement, defense counsel stated that he hoped to be able to explain to the jury why FEC was no longer a party to the case. Plaintiff's counsel objected, and the trial court reminded defense counsel that opening statement was for the purpose of outlining what a party intended to prove. Defense counsel then outlined that plaintiff was negligent because it did not act on FEC's advice to update Sinbad's fire suppression system.

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[3] MCL 600.2957(1) provides: "In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

On the second day of trial, before cross-examination of plaintiff's second witness, plaintiff's counsel moved for a mistrial based on defense counsel's comments during opening statement regarding FEC which counsel believed referred to plaintiff's settlement with FEC. In the alternative, plaintiff's counsel requested that defense counsel be admonished "to refrain from any further discussion or presentation of evidence concerning this inadmissible topic."[4] The trial court denied the motion, but added: "[b]efore we have any further reference to [FEC] we'll have a discussion to see what the relevance is and we'll go from there." Defense counsel expressed agreement with the trial court's resolution of the issue by stating "sure."

At the start of the fourth day of trial, defense counsel moved for permission to present evidence of FEC's fault. Plaintiff's counsel conceded that under tort reform defendant could apportion fault to other parties and noted that the trial court had not prevented defendant from presenting such evidence. On appeal, defendant fails to cite any part of the record where the trial court precluded questions of witnesses regarding FEC's alleged fault. As noted above, the prior discussion involved plaintiff's *settlement* with FEC. "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis, supra* at 210. See, also, *Phinney v Perlmutter,* 222 Mich App 513, 537; 564 NW2d 532 (1997).

Moreover, defendant's only argument that it suffered prejudice on this issue is that some witnesses had already testified. But defendant again fails to support its position by citation to anything in the record indicating that the witnesses were unavailable or that the defense was precluded from recalling them. Defendant has not established prejudice necessary to warrant reversal on this issue. MRE 103(a); MCR 2.613(A).

(B) Five days before trial, plaintiff's attorneys and expert witnesses, John Fatchett and John Moore, visited the storage facility where the hood and ductwork involved in the fire at Sinbad's were located. Fatchett testified that other than not being at Sinbad's and being rusted, the hood and ductwork still contained the grease he had observed in the exhaust system at Sinbad's on January 3, 1997. Moore testified that he seized a sample of the charred grease from the hood during the pretrial inspection, which the trial court admitted in evidence as Exhibit 17B. Defense counsel objected below that Exhibit 17B had not been disclosed during discovery, that plaintiff had not established a chain of custody for the hood and ductwork from Sinbad's to the storage facility, that the hood and ductwork had been stored unsecured together with "8 zillion

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[4] MRE 408 provides: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

other items" salvaged from other fires, that the evidence had not been subjected to laboratory analysis, and that the proposed exhibit was "highly prejudicial." The trial court overruled defendant's objections and admitted Exhibit 17B.[5] On appeal, defendant relies on MRE 403, MRE 901, and *Haberkorn v Chrysler Corp*, 210 Mich App 354; 533 NW2d 373 (1995), to support the same arguments raised below that the trial court abused its discretion by admitting Exhibit 17B, and abused its discretion by not granting a mistrial. We disagree.

We note that defendant does not argue that the evidence was irrelevant. "Under Michigan's rules of evidence, all logically relevant evidence is admissible at trial, except as otherwise prohibited by the state or federal constitutions or other court rules." *Lewis, supra* at 199, citing MRE 402 and *Waknin v Chamberlien*, 467 Mich 329, 333; 653 NW2d 176 (2002). The trial court has the discretion under MRE 403 to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. *Waknin, supra* at 334; *Lewis, supra.* But defendant's assessment that the evidence was "highly prejudicial" is insufficient to establish the type of substantially unfair prejudice necessary to preclude admission of relevant evidence under MRE 403. "'Unfair prejudice' does not mean 'damaging'; any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow use of such evidence." *Haberkorn, supra* at 362.

Here, defendant does not claim unfairness stems inherently from the nature of the evidence but only from the manner in which the evidence was obtained. Defendant claims it was the victim of "trial by ambush." Defense counsel suggests that he should have been invited to accompany opposing counsel with its experts on the pretrial inspection of the hood and exhaust system when Exhibit 17 was obtained. Defendant cites no authority for this argument. Defendant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims. *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). As for failing to supplement discovery, the exhibit was obtained only five days before trial from a place that the record reflects both parties had access. Further, the record supports plaintiff's position that it gave defense counsel notice of intent to offer a physical sample of charred grease from the hood and ductwork as an exhibit in a proposed final pretrial statement. The parties were exchanging their respective portions of the final pretrial statement by email on the eve of trial, and defense counsel was handed a copy of plaintiff's proposed statement on the first day of trial.

Defendant also asserted that the unfairness of admitting Exhibit 17B warranted granting a mistrial. The trial court denied the motion. Noting counsels' antagonism in this "highly contested case," the court reasoned:

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[5] The trial court denied admission of exhibit 17A, a rag found on the same visit to inspect the hood and ductwork at the storage facility.

> Our system of justice cannot guarantee the perfect trial. As due process is due process, not perfect process. And I think that applies to both trial and pre-trial activity.
>
> * * *
>
> I don't think there's any unfairness that has transpired in this action that would prejudice the rights of either the Plaintiff or the Defendant.

Although this ruling came after the admission of Exhibit 17B, we believe it reflects the trial court's thought process in doing so. That is, as a preliminary fact to the admissibility of evidence, MRE 104(a), it is apparent that the trial court found no unfairness or inequity that substantially outweighed the probative value of the evidence. MRE 403; *Haberkorn, supra* at 362. The record here convinces us that that the trial court did not abuse its discretion by admitting Exhibit 17B. *Waknin, supra* at 332. Defendant simply fails to articulate how admission of Exhibit 17B created the "danger of unfair prejudice" by threatening the "fundamental goals of MRE 403: accuracy and fairness." *Waknin, supra* at 334, citing Gold, *Federal Rule of Evidence 403: Observations on the nature of unfairly prejudicial evidence*, 58 Wash L R 497 (1983). Exhibit 17B did not lead to confusion of the issues on extraneous matters, nor mislead the jury, nor cause undue delay, nor waste time, nor was it cumulative evidence. Rather, it focused the attention of jury on the critical issue of the case: whether defendant failed to remove accumulated grease in Sinbad's kitchen exhaust system.

Defendant's argument that insufficient foundation existed for the admission of Exhibit 17B also lacks merit. Whether evidence has been sufficiently authenticated to be admitted in evidence is determined by MRE 901. *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991). A litigant sufficiently authenticates evidence as a condition precedent to its admission when testimony by a witness with knowledge is sufficient to support a finding that the matter in question is what its proponent claims. MRE 901(a)(1); See, also, *People v Hack*, 219 Mich App299, 308; 556 NW2d 187 (1997), and *Haberkorn, supra* at 366. Whether an item of evidence has been properly authenticated is a matter within the trial court's discretion. *Id*. Our review of the record convinces us that the trial court did not abuse its discretion.

Plaintiff presented the following testimony from its expert John Fatchett regarding inspecting the hood and its ductwork at the storage facility before trial:

> *Q*. Did you look up into the hood and the duct system to see if there was still any of that grease that you had seen when you were at the restaurant on January 3rd?
>
> *A*. Yes.
>
> *Q*. And was it still there?
>
> *A*. Yes.
>
> *Q*. And had some of it - - Did you see some of that substance somewhere other than still being stuck on the inside of the system?

A. Yes. There was some; yes.

Q. Where was that?

A. A lot of it in the corners, on the edges.

Q. Had some of it fallen down, fallen off of the vent system and laid at the bottom of the vent system?

A. Yes.

Q. Did you at any time pick up any of those pieces?

A. A number of them; yes.

* * *

Q. What color were they?

A. Brownish black.

Q. And how did they feel?

A. They were somewhat carbonized, but it was greasy.

Q. When you say, somewhat carbonized, what do you mean by that?

A. It's been subjected to fire or flame.

Q. Did you ever smell any of those pieces?

A. Yes.

Q. What did they smell like?

A. Smells what I would think would be grease. . . .

Q. Did they have any smokey odor also as if they had been through the fire?

A. Yes. Like it'd been through a fire.

* * *

Q. And based on the appearance of it, the feel, the smell, did you have an opinion as to what the substance was?

A. It was my opinion it was grease.

John Moore, another of plaintiff's experts, also testified to accompanying Fatchett and plaintiff's attorneys to the storage facility before trial. Moore testified:

Q. And when you were there last week looking at the hood, showing me the hood, showing me the hood and the duct system, did you take anything else into your possession?

A. Yes, sir, I did.

Q. Could you, please, produce? I'm going to mark that as Proposed Exhibit 17B. Would you, please, tell us what 17B is?

[Colloquy between counsel and the trial court.]

Q. Sir, what is that thing you have there?

A. This is material that was inside the vent hood above the broilers and the deep-fat fryers in the kitchen of Sinbad's at the time of the fire. A large amount of it was still affixed or adhered to the inside of the ductwork. These were some sections that had broken loose, and they were loose inside the hood. So I collected them. They are a material that is carbonized, in other words, it's been exposed to combustion or open flame. And it has an odor and a feeling of food grease.

Plaintiff then moved the admission of Exhibit 17B, defendant objected, and the trial court overruled the objections without stating its reasoning. But, contrary to defendant's argument, the trial court's rationale for admitting Exhibit 17B is not a mystery. In addition to addressing this issue on defendant's motion for mistrial, the trial court further elaborated on its reasons for admitting the exhibit at defendant's motion for new trial. The trial court stated,

> As I recall, [Exhibit 17B] was found in immediate proximity of the hood at the warehouse . . . . The opinion of the expert was that it was grease. I think grease is a common substance that you don't need expertise on. It was represented to be grease or greasy substance in close proximity to the hood that was involved in the fire. It [sic] think it is reasonable to infer that this clump of stuff whatever it may be had some relationship to the object that it was the closest to.
>
> I think the jury was in a position to make the determination . . . what weight to give it or what weight not to give it. I think the jury, if they so choose, could open that bag, feel that stuff and use their ordinary, common experiences in life and determine whether or not it was a greasy substance. It was relevant. . . .

The trial court did not abuse its discretion by finding that Exhibit 17B was sufficiently authenticated to permit its admission. Two witnesses with knowledge testified that it looked, felt, and smelled like grease. Further, Exhibit 17B looked the same to the witnesses as the substance they had observed in the hood and ductwork at Sinbad's after the fire. In addition, Moore testified that Exhibit 17B was grease recovered from inside the hood that had been in Sinbad's kitchen. This testimony was sufficient "to support a finding that the matter in question is what its proponent claims." MRE 901(a); *Haberkorn, supra* at 366.

Defendant also argues that Exhibit 17B had not been subjected to laboratory analysis, that there was no established chain of custody, and that the evidence was stored at an unsecured location. But these arguments all go to the weight to be accorded the evidence, not its admissibility. "Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994). The trial court properly concluded the weight to be accorded the evidence was for the jury to determine. *Grinstead, supra* at 552; *Krohn, supra* at 304 n 9.

Finally, because the evidence was properly admitted, the trial court did not abuse its discretion denying defendant's motion for mistrial. *In re Flury Estate*, 249 Mich App 222, 229; 641 NW2d 863 (2002). "A mistrial should be granted only when the error prejudices one of the parties to the extent that the fundamental goals of accuracy and fairness are threatened." *Id.* That did not occur here.

(C) Next, defendant argues that trial court abused its discretion by excluding evidence of Detroit Health Department records reflecting Sinbad's was cited for Health Code violations before and after the fire on January 1, 1997. Defendant argues the records were admissible as hearsay exceptions, MRE 803(5); MRE 803(8), as evidence of Sinbad's habit or routine. MRE 406. Plaintiff argues that the evidence was not relevant, and if relevant, subject to exclusion under MRE 403 as being unfairly prejudicial, misleading and adding confusion to the issues in the trial. The trial court excluded the evidence finding it irrelevant and too remote. We cannot say that the trial court's ruling was so grossly contrary to fact and logic that it evidenced a defiance of judgment or the exercise of passion. *Barrett, supra* at 325. Nor can we say that there was no justification or excuse for the ruling made. *Ellsworth, supra* at 188. Accordingly, we find no abuse of discretion by the trial court.

Sinbad's restaurant has three kitchens. The main kitchen on the first floor is where the fire at issue occurred on January 1, 1997. Sinbad's also has smaller kitchens located on the second floor, where there is a smaller dining room, and in the basement. The health department records at issue are: (1) a May 14, 1993 report that filters were missing in the basement kitchen ventilation system; (2) a May 24, 1994 report regarding the need to clean the ventilation system in the second-floor kitchen and the need to clean the basement kitchen; (3) a May 7, 1996 report regarding the buildup of grease on the oven and stoves in the second-floor kitchen; (4) a May 8, 1997 report that the ventilation hood filters needed to be cleaned; (5) a March 20, 1998 report that the ventilation system was not meeting demand placed on it; and (6) a May 27, 1998 report that the ventilation system had buildup grease.

On appeal, defendant does not advance an argument on how these records were relevant, nor argue how the defense was prejudiced by their exclusion. An appellant's cursory treatment of an issue in its brief may constitute a waiver of the issue. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252 n 8; 673 NW2d 805 (2003), citing *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Nevertheless, this issue has no merit. Here, plaintiff conceded that the fire started as a result activities by Sinbad's in cleaning a broiler in the main kitchen but spread to the hood and ventilation system defendant was to have thoroughly cleaned to the bare metal less than 24 hours before the fire. Thus, grease buildup in the ventilation system on other occasions was simply not relevant to the issues in this case. The only

report having slight relevance to defendant's theory of the case was that of missing filters. But because that report was more then over 43 months old and involved a different kitchen, the trial court did not clearly abuse its discretion excluding it because it was too remote.

(D) Defendant argues that the trial court abused its discretion permitting Dr. Donald Hoffman to testify as an expert witness for plaintiff. Defendant contends plaintiff did not establish a sufficient foundation under MRE 702 & 703, and that Dr. Hoffman's testimony should have been excluded because it was cumulative. We disagree.

Like other evidentiary issues, the qualification of a witness as an expert and the admissibility of the expert's testimony, are within the trial court's sound discretion and will not be reversed on appeal absent an abuse of that discretion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999). We will find an abuse of discretion 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. *Id*. There are three prerequisites to the admission of expert testimony: (1) the witness must be an expert; (2) there must be facts in evidence which require or are subject to examination and analysis by a competent expert; and (3) there must be knowledge in a particular area which belongs more to an expert than to the common man. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990). The critical inquiry is whether the expert testimony will aid the factfinder in making the ultimate decision in the case. *Id*., citing *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986).

Defendant does not contest the first criterion, i.e., that Dr. Hoffman is an expert. Defendant's argument on the second criterion, that Dr. Hoffman did not conduct his own investigation of the fire scene, is clearly without merit. The facts on which an expert bases his testimony may be those he perceives or learns of at or before trial. MRE 703; *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401; 628 NW2d 86 (2001). Regarding the final criterion, plaintiff offered Dr. Hoffman's testimony to address defendant's theory that Sinbad's fire extinguishers and automatic fire suppression system were inadequate and, when used together were counterproductive. The trial court correctly recognized that Dr. Hoffman possessed expertise beyond that of laymen and that his testimony would be helpful in addressing those questions of fact. Further, the trial court recognized that Dr. Hoffman's testimony regarding cause and origin might be cumulative, but not *unfairly cumulative.* In sum, the trial court recognized its discretion to limit Dr. Hoffman's testimony where the probative value of the evidence would be substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. MRE 403. We conclude no abuse of discretion occurred when the trial court allowed Dr. Hoffman to testify as an expert because it was not unfair to do so. See *Waknin, supra* at 334.

IV. Alleged Misconduct by Counsel

Defendant argues it was denied a fair trial because plaintiff's counsel (A) inferred in closing argument that defendant possessed liability insurance to cover the expense of the instant litigation and (B) questioned defendant's employees whether they possessed a certificate of fitness from the City of Detroit for the work that defendant performed at Sinbad's. We disagree.

We review claims of misconduct by counsel to determine whether a party was denied a fair trial. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 100-103; 330 NW2d 638 (1982); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 290-293; 602 NW2d 854 (1999). We employ a two step analysis: (1) did error occur and (2) does it require reversal. *Ellsworth, supra* at 191. "A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Id*. at 191-192.

(A) In support of its theory that plaintiff failed to timely assert its claim resulting in the spoliation of evidence, defendant introduced into evidence Exhibit 2J, an April 17, 1999, letter from plaintiff to defendant requesting reimbursement for the amount it had paid Sinbad's as a result of the fire. The letter recommended that defendant refer the matter to defendant's insurance company but if no insurance was available plaintiff expected "payment from you directly." Defense counsel continued arguing the spoliation theory in closing argument, telling the jury it had the opportunity to right an injustice, that it was unjust that defendant had to defend this costly lawsuit, and that plaintiff was a "big insurance company who was looking for essentially found money." Plaintiff's counsel responded in rebuttal that the defense argument was a "red herring." Counsel suggested that the jury look at the April 17 letter "and see if that helps you figure out whether this lawsuit really is costly to Sani Vac." The trial court subsequently denied defendant's motion for mistrial when defense counsel conceded that Exhibit 2J was in evidence, that defendant's insurance company had retained him and that the instant litigation would probably not "cost Sani Vac a dime."

We conclude that plaintiff's argument, even if error, did not deny defendant a fair trial. The record shows plaintiff's counsel was responding to defense counsel's improper and inaccurate arguments.[6] If not otherwise relevant, it is equally improper to attempt to create bias against a party by showing the party's wealth as it is to attempt to garner sympathy for a party through claims of poverty. *Stewart v Eghigian*, 312 Mich 699, 702; 20 NW2d 777 (1945). It is also improper to attempt to create bias against a party by portraying it as a greedy, big

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[6] In criminal cases, our Supreme Court has adopted the doctrine of invited response. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). The doctrine does not excuse improper comments, but applies to determine whether their effect on the trial as a whole requires reversal. *Id.* "Under the doctrine of invited response, the proportionality of the response, as well as the invitation, must be considered to determine whether the error, which might otherwise require reversal, is shielded from appellate relief." *Id*., citing *United States v Young*, 470 US 1; 105 S Ct 1038; 84 L Ed 2d 1 (1985).

corporation. *Reetz*, *supra* at 111. In closing argument, defense counsel made both of these improper arguments and falsely suggested this lawsuit was very costly to defendant. Although it is improper for an attorney to intentionally inject the subject of insurance for the sole purpose of creating bias for or against a party, "'it is not reversible error if the subject is only incidentally brought into the trial, is only casually mentioned, or is used in good faith for purposes other than to inflame the passions of the jury.'" *Cogo v Moore*, 119 Mich App 747; 327 NW2d 345 (1982), quoting *Cacavas v Bennett*, 37 Mich App 599, 604; 194 NW2d 924 (1972). Here, plaintiff's counsel was apparently trying to rebut the suggestion that defendant was suffering financially from the heavy expense of this litigation.

Moreover, defendant can hardly claim prejudice when the jury is asked to examine an exhibit defendant introduced into evidence. A party may not claim error to which it has contributed by plan or negligence. *Lewis*, *supra* at 210; *Phinney*, *supra* at 537. Also, actual prejudice is not established because the exhibit itself does not indicate whether defendant had liability insurance. Accordingly, the trial court did not abuse its discretion denying defendant's motion for mistrial. *Van Oordt v Metzler*, 375 Mich 526, 530-531; 134 NW2d 609 (1965) (a showing of prejudice is necessary to support a motion for mistrial).

(B) Plaintiff's counsel cross-examined defendant's employees who testified at trial whether they possessed a certificate of fitness from the City of Detroit for the work they performed at Sinbad's. These questions were apparently based on such a requirement in the Detroit Fire Safety Code. All defense witnesses denied having such a certificate. The trial court ultimately denied plaintiff's request that the jury be instructed it may consider an ordinance violation as evidence of negligence. See M Civ JI 12.03. Contrary to defendant's argument on appeal, the record to which defendant cites does not reflect an objection to plaintiff's questions. The only objection raised was to whether Charles Samples had read the Detroit Fire Prevention Code, which was overruled because Samples had testified on direct examination that he was certified by the International Kitchen Exhaust Cleaning Association. Accordingly, our review is for plain error affecting substantial rights. MRE 103(d). Because plaintiff did not argue the alleged ordinance violation and the trial court did not instruct the jury that violating the ordinance was evidence of negligence, we conclude defendant's substantial rights were not affected. Likewise, the good faith effort to admit evidence does not establish misconduct by counsel warranting reversal. See *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

V. Instructional Issues

Defendant argues that the trial court committed three errors when instructing the jury: (A) it failed to give SJI2d 6.01 in regard to its spoliation theory [Part I]; (B) failed to properly instruct regarding the alleged fault of FEC [Part III(A)]; and (C) failed to properly instruct the jury regarding damages. We conclude the trial court did not abuse its discretion by declining to give SJI2d 6.01 and that defendant has waived the other alleged instructional errors.

(A) Defendant argues that the trial court committed error warranting reversal by refusing to instruct the jury in accord with SJI2d 6.01. We disagree. We review de novo claims of instructional error. *Clark*, *supra* at 144. We will not find error warranting reversal if on balance, the theories of the parties and the applicable law are adequately and fairly presented to

the jury. *Id.* at 144-145. Moreover, this Court will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. *Id*., citing MCR 2.613(A) and *Johnson v Corbet*, 423 Mich 304; 377 NW2d 713 (1985).

SJI2d 6.01, now M Civ JI 6.01, instructs the jury that where a party fails to produce evidence under its control, and no reasonable excuse for the failure to produce the evidence exists, the jury may infer that the evidence would have been adverse to that party. *Brenner, supra* 155-156, n 2; *Ellsworth, supra* at 193. This instruction "should be given only where (1) the evidence was under the control of the party who failed to produce it and could have been produced by that party, (2) no reasonable excuse for the failure to produce the evidence has been given, and (3) the evidence would have been material, not merely cumulative, and not equally available to the opposite party." *Id*. Here, the missing evidence was either not material (broiler), or each party had access to the evidence. Consequently, we cannot conclude that the trial court abused its discretion by declining to give SJI2d 6.01. Moreover, even if the instruction was technically applicable because the trial court permitted defendant to argue and present evidence regarding its spoliation theory, declining to read SJI2d 6.01 was not an abuse of discretion.[7] Nor is our declining to grant relief inconsistent with substantial justice, MCR 2.613(A).

(B) Defendant waived its claim that the trial court erred in instructing the jury on how to calculate FEC's alleged fault. First, defendant did not object below to the trial court's instructions. MCR 2.516(C).[8] Second, defendant's appeal is by leave granted and alleged instructional error regarding this issue was not included in defendant's application or brief in support. MCR 7.205(D)(4).[9] The order granting leave here did not otherwise include instructional error on this issue. Defendant also waived alleged error because it did not include them in the questions presented in its brief on appeal. MCR 7.212(C)(5); *Persinger v Holst*, 248 Mich App 499, 507 n 2; 639 NW2d 694 (2001).

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[7] In *Johnson, supra* at 327, our Supreme Court opined: "It is conceivable, for example, that a given SJI would accurately state the law and be applicable, in the theoretical sense that the evidence in a case included reference to the subject matter of that SJI, but that a wise and experienced trial judge, in the exercise of informed discretion, would determine that reading the SJI would confuse the jurors or unnecessarily distract them from the material issues in the case, or extend the jury instruction process out of all proportion to the educational benefit to the jurors and fairness to the litigants, or unduly emphasize a potentially prejudicial aspect of the evidence, or simply add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jurors to decide the case intelligently, fairly, and impartially."

[8] MCR 2.516(C) provides: "A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury."

[9] MCR 7.205(D)(4) provides, "Unless otherwise ordered, the appeal is limited to the issues raised in the application and supporting brief."

(C) Contrary to defendant's argument on appeal, the record does not reflect that counsel objected below to the trial court's instructions regarding damages. Accordingly, defendant has waived alleged instructional error on this issue. MCR 2.516(C). Moreover, it does not appear that defendant contested the issue of damages at trial; defendant only contended it did not breach its contract with Sinbad's and did not perform its work negligently. Any error was harmless. MCR 2.613(A).

VI. Cumulative Trial Error

Defendant argues that trial errors combined to deprive it of a fair trial. We disagree. We recognize that several minor errors which do not individually warrant reversal may combine to deprive a party of a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001); *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 471; 624 NW2d 427 (2000). But to warrant reversal the errors must be consequential and combine to deprive a party of a fair trial and substantial justice. *Lewis, supra* at 201; *Knapp supra* at 388. Clearly, where no errors exist, they cannot accumulate to deprive a party of a fair trial. *Gore v Rains & Block*, 189 Mich App 729, 744; 473 NW2d 813 (1991). We have found no trial errors that combined to deny defendant substantial justice. MCR 2.613(A).

VII. Post-Verdict Issues

(A) Defendant argues that the trial court erred by not dismissing this case based on plaintiff's failure to timely obtain entry of a judgment, contrary to both a local administrative notice of intent to dismiss and to then existing MCR 2.602(B)(3)(c). We disagree.

The jury verdict in this case was entered on November 26, 2001. Apparently, the parties could not agree on the terms of a judgment. On December 10, 2001, the circuit court mailed a "Notice of Intention to Dismiss" if the parties failed to enter an order by January 14, 2002. Plaintiff filed a proposed judgment pursuant to MCR 2.602(B)(3) on December 21, 2001. Defendant filed objections to the judgment on December 27, 2001, and again on January 2, 2002. The trial court entered an administrative dismissal on January 17, 2002. Plaintiff's motion for entry of judgment was filed on January 25, 2002 and heard on February 7, 2002, three weeks beyond the local noticed "cutoff date" and beyond the then seven-day time period for noticing settlement before the court under MCR 2.602(B)(3)(c).[10] The trial court summarily denied

[10] Before January 1, 2002, MCR 2.602(B)(3)(c) provided: "If objections are filed, the party who filed the proposed judgment or order must notice the judgment or order for settlement before the court within 7 days after receiving notice of the objections." MCR 2.602(B)(3)(c) was amended effective January 1, 2002 to provide: "The party filing the objections must serve them on all parties as required by MCR 2.107, together with a notice of hearing and an alternate proposed judgment or order." The staff comment reads: "The September 12, 2001 amendment of MCR 2.602(B)(3), effective January 1, 2002, was based on a recommendation from the Michigan Judges Association to eliminate delay and unnecessary work caused by nonspecific and meaningless objections. The amendment shifted some of the burden of going forward from the proponent of the order to the objector and clarified the objection procedure." We assume, without deciding, that the rule existing before January 1, 2002 applies to this case.

defendant's motion to dismiss, set aside the administrative dismissal, and observed, "I don't believe that any case that has gone all the way through to a jury can be dismissed nunc pro tunc because of the Seven Day Rule." On appeal, defendant argues that dismissal was mandatory under MCR 2.602(B)(3)(c), and that the circuit court should have followed its own local rule requiring dismissal.

The interpretation and application of a court rule is a question of law subject to de novo review. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001); *In re Gosnell*, 234 Mich App 326, 333; 594 NW2d 90 (1999). But where a court rule vests the trial court with discretion, appellate review is for an abuse of discretion. *Marposs Corp v Autocam Corp*, 183 Mich App 166, 170; 454 NW2d 194 (1990). In general, technical violations of court rules will not merit reversal unless they result in actual prejudice or impair substantial rights of the parties. *Id.*; MCR 1.105; *Longworth v Highway Dep't*, 110 Mich App 771, 778; 315 NW2d 135 (1981). Here, the December 2001 version of MCR 2.602(B)(3)(3) did not require mandatory dismissal for noncompliance and defendant's argument fails as matter of law. Because defendant asserts no actual prejudice from the delay in settling the terms of the judgment, the trial court did not abuse its discretion setting aside the administrative dismissal. *Longworth, supra* at 778-779.

(B) Finally, defendant argues that the trial court erred when adjusting the jury verdict to determine whether it was more favorable to defendant under MCR 2.403(O)(3) because "it is more than 10 percent below the evaluation." The parties agree on the basic facts necessary to this determination. Before trial, when FEC was still a defendant, the case was evaluated in plaintiff's favor with a proposed award of $20,000 from FEC and $100,000 from defendant. Plaintiff and FEC accepted the evaluation and settled; defendant rejected the evaluation. The jury returned its verdict[11] awarding plaintiff $119,920.94 in total damages, finding plaintiff 15% at fault, defendant 85% at fault; and no fault on the part of FEC. The parties also agree that interest of $5,103.07 and costs of $160.00 for a total of $5,263.07 must be added to the verdict under MCR 2.403(O)(3). But, the parties and the trial court could not agree on the affect of plaintiff's settlement with FEC.

The trial court reasoned that failure to deduct the FEC settlement from the verdict would give plaintiff a windfall. The trial court relied on the common-law rule of setoff, which is "predicated on the principle that a plaintiff is entitled to only one recovery for his injury." *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 250; 660 NW2d 344 (2003), citing *Great Northern Packaging, Inc v General Tire & Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986). The trial court also reasoned that the setoff should be deducted from the total jury award to avoid giving defendant a windfall when reducing the award on the basis of fault. Thus, the trial court deducted $20,000 from the total award, then deducted from that result 15% fault attributed to plaintiff, and to that result

[11] The jury also returned a verdict of $102,000 in favor of plaintiff on its contract theory, which the trial court treated as having been merged into the $119,920.94 tort verdict. No issue is raised on appeal regarding the verdict on plaintiff's contract claim.

added costs and interest. The trial court's mathematical calculations are: $119,920.94 - $20.000.00 = $99,920.94 – $14, 988.14 = $84,932.80 + $5,263.07 = $90,195.87. Because this adjusted verdict is not more than ten percent below the evaluation, i.e., not less than $90,000, the trial court determined that plaintiff was entitled to case evaluation sanctions.

Defendant argued below, and argues on appeal, that the trial court should have first subtracted the percentage of fault attributed to plaintiff from the total damages awarded by the jury, then deducted plaintiff's FEC settlement, and then added interest and costs. Defendant's proposed adjustments to the jury verdict are: $119,920.94 - $17,988.14 = $101,932.80 – $20,000.00 = $81,932.80 + $5,263.07 = $87,195.87. Because this adjusted verdict according to defendant's calculations is more than ten percent below the evaluation, i.e., less than $90,000, defendant argues that the trial court erred by ruling plaintiff was entitled to case evaluation sanctions. Defendant relies on *Marketos, supra,* which held that that the trial court properly applied a setoff of the defendant fire insurer's payment to a secured creditor to a jury verdict in favor of the insured in determining whether the plaintiff was entitled to mediation sanctions. The *Marketos* Court opined:

> For purposes of awarding sanctions under MCR 2.403(O), a "verdict" must represent a finding of the amount that the prevailing party should be awarded. The dollar amount that the jury includes on the verdict form may or may not be the "verdict" for that purpose. [*Marketos, supra* at 414.]

Plaintiff argues that the trial court erred by deducting its settlement with FEC in adjusting the jury verdict for purposes of determining whether case evaluation sanctions applied, but reached the correct result. This Court will not reverse when the trial court reaches the correct result, albeit for a wrong reason. *Ellsworth, supra* at 190; *Phinney, supra* at 532. Plaintiff argues that under principles of comparative fault, and the abolition, in general, of joint and several liability under tort reform legislation, no setoff of its settlement with FEC should have applied. See, e.g., *Gerling Konzern Allgemeine Versicherungs AG v Lawson,* 254 Mich App 241, 247-248, 657 NW2d 143 (2002), lv gtd 469 Mich 947; 671 NW2d 54 (2003) (holding a settling tortfeasor no longer has a viable claim for contribution from a joint tortfeasor), and *Smiley, supra*. Specifically, plaintiff argues that setoff of its FEC settlement should not apply under MCR 2.403(O)(4)(a), which provides, in part, that "in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties."

We agree that the trial court erred by deducting the FEC settlement for the purpose of adjusting the jury verdict under MCR 2.403(O), but not for the same reasons plaintiff asserts. Instead, we apply the plain language of MCR 2.403(O)(10). "When [the] language [of a court rule] is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *Marketos, supra* at 414. MCR 2.403(O)(10) provides:

> In an action filed on or after March 28, 1996, for the purpose of subrule (O)(1), a verdict awarding damages for personal injury, property damage, or wrongful death shall be adjusted for relative fault as provided by MCL 600.6304; MSA 27A.6304.

MCL 600.6304(1) provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

In the case at bar, the jury determined the relative fault of the parties and nonparty FEC as follows: plaintiff 15%, defendant 85%, and FEC 0%. By applying a setoff, the trial court in essence, adjusted the jury's verdict on the basis of FEC's fault, though the jury found none. The jury determined the relative fault of FEC to be zero. Accordingly, applying the plain language of MCR 2.403(O)(10) precludes any adjustment of the jury's verdict when determining the effect of case evaluation between plaintiff and defendant. This result is consistent with determining whether case evaluation sanctions apply by considering "only the amount of the evaluation and verdict as to the particular pair of parties," MCR 2.403(O)(4)(a), and is also consistent with the overall purpose of MCR 2.403 "to encourage settlement, deter protracted litigation, and expedite and simplify the final settlement of cases." *Dessart v Burak*, 252 Mich App 490, 498; 652 NW2d 669 (2002), aff'd ___ Mich ___; 678 NW2d 615 (2004).

Because plaintiff has not cross-appealed the setoff of its settlement with FEC from its judgment against defendant and because the trial court correctly awarded case evaluation sanctions, error requiring reversal did not occur.

VIII. Conclusion

We have found no individual or collective trial error that merits setting aside the jury verdict or reversing the judgment entered in this matter. MCR 2.613(A). We conclude the jury verdict was not manifestly against the great weight of the evidence, and the trial court did not abuse its discretion denying defendant's motion for new trial. The trial court correctly awarded plaintiff case evaluation sanctions. Accordingly, we affirm.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter