STATE OF MICHIGAN

COURT OF APPEALS

RUTHVYN J. FREDERICK and ALLAN REMY,

Plaintiffs-Appellees,

v

U.S. ICE CORP.,

Defendant-Appellant,

and

HASANI HAMADI-ZOMA DEBROSSARD,

Defendant.

UNPUBLISHED
August 9, 2005

No. 254336
Wayne Circuit Court
LC No. 02-238844-NI

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the judgment entered in plaintiffs' favor in this automobile negligence action. We affirm.

On appeal, defendant argues that it is entitled to a new trial because the trial court erred in precluding Dr. Maynard Buszek from testifying on behalf of defendant as an expert medical witness at trial. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). A trial court abuses its discretion 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. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

The trial court denied defendant's request to allow Dr. Buszek to testify because: (1) had defendant exercised due diligence, it could have discovered Dr. Buszek well before trial; (2) defendant's own doctors would provide testimony regarding plaintiffs' medical conditions; and (3) Dr. Buszek was presumptively biased against plaintiffs since he was hired by the insurance company. The trial court's ruling is not an abuse of discretion.

MCR 2.401 permits the judge to enter a scheduling order "at such other time as the court concludes that such an order would facilitate the progress of the case," which "shall establish times for events the court deems appropriate, including . . . the exchange of witness lists . . . ." MCR 2.401(B)(2)(a)(iv). MCR 2.401(B)(2) further provides that "[m]ore than one such order may be entered in a case." With respect to witness lists, MCR 2.401(I)(1)(b) requires the parties to list their expert witnesses as ordered by the court, and MCR 2.401(I)(2) provides that "[t]he court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown."

In the instant case, the trial court entered a Final Pretrial Order requiring the parties to list its expert witnesses before trial, and specifically provided that unnamed witnesses would not be permitted to testify absent justification. It is undisputed that defendant never listed Dr. Buszek on any of its witness lists and did not request that Dr. Buszek be permitted to testify until after jury selection and on the morning of the first day of trial. Defendant's counsel argued that he did not know about Dr. Buszek's examinations of plaintiffs because he did not receive plaintiffs' no-fault carrier's file containing Dr. Buszek's reports until just six days before trial, even though he had subpoenaed the file almost one year earlier, before Dr. Buszek examined plaintiffs. Defendant further argued that it should be permitted to call Dr. Buszek since plaintiffs failed to supplement their Answers to Interrogatories to include Dr. Buszek as an "examining physician." The trial court, however, noted that the instant matter had been pending for more than two years, and held that defendant could have known plaintiffs' no-fault insurance carrier might have ordered an independent medical exam of plaintiffs.

Further, the trial court noted that defendant would have the opportunity to present testimony from its own medical experts in this case. Indeed, based on Dr. Buszek's reports regarding plaintiffs' medical conditions, Dr. Buszek's anticipated testimony would have been cumulative since it would have overlapped significantly with another of defendant's expert medical witnesses, Dr. Lucius Tripp. Presumably, Dr. Buszek's trial testimony would have been substantially similar to what is set forth in his reports. Dr. Buszek's reports concluded that Frederick and Remy were no longer injured as of June 2003, and they could return to work without restrictions.

Dr. Tripp opined that Frederick did not suffer a brain injury, there was no objective evidence of injury, and Frederick could return to work as a painter or plasterer. Dr. Tripp further testified there was no objective evidence to substantiate Remy's complaints of pain, his neurological examination of Remy was "normal," and concluded that Remy could participate in normal activities, including working as a painter and plasterer. Therefore, Dr. Buszek's trial testimony would have overlapped significantly with Dr. Tripp's testimony and was thus cumulative.

In this regard, an analogous case, *Bugar v Staiger*, 66 Mich App 32; 238 NW2d 404 (1975), is instructive here. In *Bugar*, the plaintiff argued, *inter alia*, "that the trial judge should have ordered a new trial based on newly discovered evidence." *Id.* at 37. Specifically, the plaintiff had subpoenaed hospital records, but the hospital neglected to supply the complete records. *Id.* After the trial, the plaintiff's counsel argued the omitted records would have been helpful in proving the timing of the plaintiff's injury, which was an issue at trial. *Id.* at 34, 37. This Court held that the records were "cumulative evidence" because "our impression is that the records would have overlapped testimony given by a witness." *Id.* at 37. This Court further

held, "we are not convinced that the plaintiffs could not, with reasonable diligence, have discovered and produced the records for trial." *Id.* For these reasons, the Court affirmed the trial court's decision to deny the plaintiff's motion for a new trial. *Id.*

Based on the foregoing, we conclude that the trial court's decision to preclude Dr. Buszek from testifying was not "so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias" so as to constitute an abuse of discretion. *Barrett, supra* at 325. To the contrary, the trial court's requirement that the parties timely list their trial witnesses is permitted by MCR 2.401, and Dr. Buszek's anticipated testimony was cumulative since it would have overlapped with defendant's other doctor's testimony as noted by the trial court here. *Bugar, supra* at 37. The facts that Dr. Buszek was not named as a witness and Dr. Buszek's testimony would have been cumulative provide a sufficient basis for the trial court's ruling. Defendant's other arguments, that Dr. Buszek's apparent bias against plaintiffs was an insufficient reason to bar him from testifying, and Dr. Buszek should have been able to testify where plaintiffs failed to supplement their Answers to Interrogatories, are moot in light of our resolution of the issue on appeal, and thus, we decline to reach these issues. The trial court, therefore, did not err by denying defendant's request to allow Dr. Buszek to testify as an expert medical witness.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray