IN THE UTAH COURT OF APPEALS

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Robert Kearl, Plaintiff and Appellant, v. Edwin Ray Okelberry, Defendant and Appellee.	AMENDED MEMORANDUM DECISION[1] (Not For Official Publication) Case No. 20080301-CA F I L E D (July 15, 2010) 2010 UT App 197

Fourth District, Provo Department, 050401593
The Honorable Gary D. Stott

Attorneys: Denton M. Hatch, Spanish Fork, for Appellant
Karra J. Porter and Ruth A. Shapiro, Salt Lake City, for Appellee

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Before Judges Orme, Thorne, and Voros.

VOROS, Judge:

Plaintiff Robert Kearl filed a negligence suit against Defendant Edwin Ray Okelberry for injuries sustained when a jack released and dropped a trailer on his leg. The jury returned a verdict of no liability. Plaintiff appeals the trial court's ruling denying his motion for a new trial based on juror and counsel misconduct and alleges various other trial errors. We affirm.

I. Jury Selection

Plaintiff first contends that the trial court conducted inadequate voir dire when it refused to ask questions submitted by Plaintiff designed to elicit juror bias against alcohol users. As a corollary, Plaintiff contends that the trial court should have conducted a post-trial evidentiary hearing to investigate

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1. This Amended Memorandum Decision corrects several inaccuracies in the Memorandum Decision in Case No. 20080301-CA issued on May 13, 2010.

allegations of juror bias. However, these issues were not preserved. "[I]n order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." Pratt v. Nelson, 2007 UT 41, ¶ 15, 164 P.3d 366 (internal quotation marks omitted). To provide this opportunity, "(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce evidence or relevant legal authority." Id.

Our review of the record on appeal indicates that Plaintiff never stated why his proposed questions regarding alcohol were relevant. Alcohol was not an inherent aspect of this case, and Plaintiff never explained to the trial court why a question about alcohol was needed. Because a party does not preserve an issue by "'merely mentioning . . . an issue without introducing supporting evidence or relevant legal authority,'" id. (omission in original) (quoting State v. Cruz, 2005 UT 45, ¶ 33, 122 P.3d 543), we conclude that this issue was not preserved and do not address it further.

Similarly, Plaintiff did not request the trial court to conduct a post-trial evidentiary hearing on juror bias. Instead, he merely asked the court to award him a new trial. This issue was accordingly not "raised to a level of consciousness such that the trial judge [could] consider it," State v. Brown, 856 P.2d 358, 361 (Utah Ct. App. 1993) (internal quotation marks omitted). We therefore decline to address it.[2]

II. Juror Misconduct in Voir Dire

Next, Plaintiff contends that a new trial is warranted because of alleged juror misconduct in voir dire. Claims of this type are governed by the two-pronged test set forth in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). Under that test, a party is entitled to a new trial if he or she can show that "a juror failed to answer honestly a material question on voir dire" and that "a correct response would have provided a valid basis for a challenge for cause." Id. at 556. Because the trial court did not conduct a McDonough analysis here, we review

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2. Plaintiff does not argue that the plain error or exceptional circumstances exceptions to the preservation rule apply to either of these issues. See generally State v. Holgate, 2000 UT 74, ¶ 12-13, 10 P.3d 346 (discussing the applicability of the plain error and exceptional circumstances exceptions).

both prongs as a matter of law. See State v. Redding, 2007 UT App 350, ¶ 17 n.4, 172 P.3d 319; see also State v. Thomas, 830 P.2d 243, 245 (Utah 1992) (stating that because the trial court did not address the second prong of McDonough, it is reviewed on appeal as a matter of law).

Plaintiff alleges that a jury panel member (Juror) failed to answer honestly multiple questions during voir dire. Juror completed a jury questionnaire and responded to brief individual voir dire. In doing so, he responded to the following questions: "Do you believe you have a valid reason that would make it difficult for you to serve as a juror?"; "If you were in the position of either party, would you feel comfortable with yourself as a juror?"; and "Do you believe that you could be, if you're chosen as a juror, fair and impartial to both sides and listen to all the evidence and the law that I would give you?" Plaintiff argues that Juror dishonestly answered all of these questions because he did not affirmatively disclose his alleged bias against alcohol drinkers.

"A juror clearly cannot fail to answer honestly a material question if the juror was not asked a question regarding the subject matter alleged to have gone undisclosed." Thomas, 830 P.2d at 246. For example, a "juror who was asked only [a] general question regarding his ability to be impartial [was] not required to reveal that he was under investigation for [a] situation similar to that of the defendant." Id. (citing United States v. Aguon, 851 F.2d 1158, 1170 (9th Cir. 1988)). Here, Juror was asked only general questions. Hence, he was not required to volunteer his alleged bias against alcohol drinkers.

Because we conclude that Plaintiff does not establish the first prong of McDonough, we do not address the second. See State v. Shipp, 2005 UT 35, ¶ 19, 116 P.3d 317 ("Both [McDonough] elements are necessary to successfully challenge the participation of the juror in question.").

III. Attorney Misconduct

Plaintiff contends that the trial court erred in connection with alleged misconduct by Defendant's counsel. The alleged misconduct occurred during Defendant's counsel's use of an exhibit to cross-examine Plaintiff's damages expert. After Plaintiff's timely objection, the trial court withdrew the exhibit and instructed the jury to disregard it. The trial court denied Plaintiff's motion to instruct the jury that the exhibit was withdrawn because of Defendant's counsel's misconduct. It also denied Plaintiff's post-verdict motion for a new trial.

"A trial court has no discretion to grant a new trial absent a showing of at least one of the circumstances specified in [rule 59(a) of the Utah Rules of Civil Procedure 59]." Moon Lake Elec. Ass'n v. Ultrasystems W. Constructors, 767 P.2d 125, 128 (Utah Ct. App. 1988). "If such a showing is made, the trial court's ruling on a motion for new trial will be disturbed on appeal only for an abuse of discretion." Id.

Plaintiff argues that Defendant's counsel's alleged misconduct constitutes an "[i]rregularity in the proceedings . . . [by an] adverse party" under rule 59(a)(1), see Utah R. Civ. P. 59(a)(1). The irregularity must be such that "either party was prevented from having a fair trial." Id. Attorney misconduct warranting a new trial must be "'real and substantial and such as may reasonably be supposed would affect the result.'" Nelson v. Trujillo, 657 P.2d 730, 734 (Utah 1982) (quoting Ivie v. Richardson, 9 Utah 2d 5, 336 P.2d 781, 787 (1959)). For example, a finding that the misconduct had "'slight, if any' effect is not responsive to this standard." Id. Likewise, the issue of liability is not prejudicially affected when the attorney misconduct relates only to the issue of damages. See id. at 734-35.

Here, Plaintiff argues that the exhibit was prejudicial because it surprised his expert witness, causing the witness to appear unprepared and incompetent, thereby damaging Plaintiff's entire case. Plaintiff acknowledges his difficulty in demonstrating the harm he claims resulted from this episode, noting that "the effect of the surprise cannot be understood from reviewing the written word of the trial record alone." In any event, the prejudicial effect of the surprise, if any, was cured by the trial court's cautionary instruction.

> "We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to [the party opposing the evidence]."

State v. Harmon, 956 P.2d 262, 273 (Utah 1998) (alteration omitted) (quoting Greer v. Miller, 483 U.S. 756, 767 n.8 (1987)). We see nothing in this record to suggest that the jury failed to abide by the court's instruction. Nor are we persuaded that, to be effective, such an instruction should have informed the jury that the exhibit was being stricken because of Defendant's counsel's conduct.

Moreover, the exhibit in question pertained only to damages. Because the jury found there was no liability, it never reached the issue of damages. The trial court noted, "There is no evidence that the few minutes when that exhibit was presented affected the determination of liability." Plaintiff offers no persuasive reason to reject this assessment. Accordingly, we have no reason to overturn the trial court's rulings with respect to the alleged attorney misconduct.

IV. Defendant's Expert

Plaintiff raises two issues in regard to Defendant's expert, Dr. Smith. First, he contends that the trial court erred by allowing Dr. Smith to testify. According to Plaintiff, Dr. Smith was not qualified to render an opinion on Plaintiff's injury. Also, Plaintiff argues, Dr. Smith's testimony was not reliable because it was based on tests performed on the jack five years after the incident. Second, Plaintiff contends that the trial court erred by excluding evidence that Dr. Smith had been hired by Defendant's insurance company.

We grant trial courts considerable discretion in determining whether to admit expert testimony. See In re G.Y., 962 P.2d 78, 83 (Utah Ct. App. 1998). And "[w]hen a [party] predicates error to [an appellate court], he has the duty and responsibility of supporting such allegation by an adequate record." State v. Penman, 964 P.2d 1157, 1162 (Utah Ct. App. 1998) (third alteration in original) (internal quotation marks omitted). In addition, a party may not assign error "upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Utah R. Evid. 103(a). "In the absence of a transcript, it is impossible for us to ascertain whether, assuming an error was committed, a 'substantial right' has been affected." Kelson v. Salt Lake County, 784 P.2d 1152, 1157 (Utah 1989). As stated previously, "where we are without an adequate record, we must assume the regularity of the proceedings below." Gorostieta, 2000 UT 99, ¶ 16. Further, as the appellant, Plaintiff has the duty to provide an adequate record, and "[n]either the court nor [Defendant] is obligated to correct [Plaintiff's] deficiencies in providing the relevant portions of the transcript." Utah R. App. P. 11(e)(2).

Although Plaintiff challenges the admissibility of Dr. Smith's testimony, he has included in the record on appeal neither a transcript of the hearing on his motion to exclude Dr. Smith's testimony nor a transcript of Dr. Smith’s testimony at

trial.[3] Without these transcripts we are not in a position to determine whether the trial court properly exercised its discretion in qualifying Dr. Smith as an expert and allowing him to testify as he did. We therefore affirm the trial court's qualification of Dr. Smith as an expert and its admission of his testimony.

Plaintiff's second contention is that the trial court erred by excluding evidence that Dr. Smith was "hired by" an insurance company. Rule 411 of the Utah Rules of Evidence states,

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Utah R. Evid. 411 (emphases added). Plaintiff argues that he offered the evidence to demonstrate Dr. Smith's bias. Again, the record on appeal is inadequate to permit review. The record does contain Plaintiff's motion in limine seeking to introduce this evidence. However, the record does not contain the trial court's ruling or the transcript from the hearing on the motion. We therefore assume the regularity of the proceedings below. Gorostieta, 2000 UT 99, ¶ 16.[4]

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3. Pursuant to rule 11 of the Utah Rules of Appellate Procedure, Plaintiff did move to supplement the record with a statement of what transpired at the unrecorded hearing and with the trial testimony of Dr. Smith. The motion was filed after Defendant had already filed his brief, and Defendant strenuously opposed it. The motion was denied by a law and motion panel of this court before the appeal was submitted to this panel for resolution.

4. We note that the merits of this claim are questionable at best. Evidence of a witness's connection to an insurance company is admissible only if there is a "substantial connection" between the witness and the insurance company. See Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶ 37, 221 P.3d 256 (citing Yoho v. Thompson, 548 S.E.2d 584, 586 (S.C. 2001)). A substantial connection exists, for example, when the witness maintains an employment relationship with the insurance carrier independent of the person's position as an expert witness. See Yoho, 548 S.E.2d at 586 (holding that a substantial connection existed where the

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V. Jury Instruction

Plaintiff contends that the trial court erred by rejecting his proposed jury instruction on alcohol use as a pre-existing condition. Plaintiff's jury instruction explained that Plaintiff is entitled to recover damages for the aggravation of a pre-existing condition as a result of Defendant's negligence. The instruction also suggested that alcohol use is a pre-existing condition.

We may disregard briefs that do not comply with rule 24 of the Utah Rules of Appellate Procedure. See State v. Sloan, 2003 UT App 170, ¶ 13, 72 P.3d 138; see also Utah R. App. P. 24 (setting forth briefing requirements). "Briefs must contain reasoned analysis based upon relevant legal authority. An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." Sloan, 2003 UT App 170, ¶ 13 (internal quotation marks omitted).

Plaintiff's briefing of this issue is inadequate. It consists of a one-paragraph factual summary of the fate of his proposed instruction: he requested it, Defendant objected, and the court declined to give it. Plaintiff provides no legal analysis and no legal authority, nor does he identify the applicable standard of appellate review as required by rule 24 of the Utah Rules of Appellate Procedure, see Utah R. App. P. 24(a)(5). While his reply brief provides the standard of review, it contains no other legal authority or analysis. We therefore decline to reach the merits of this issue.

VI. Trial Judge's Recusal

Finally, Plaintiff argues that the trial judge should have recused himself sua sponte as a result of an ex parte discussion with Defendant's counsel. "Determining whether a trial judge committed error by failing to recuse himself . . . is a question of law, and we review such questions for correctness." Lunt v. Lance, 2008 UT App 192, ¶ 7, 186 P.3d 978 (omission in original) (internal quotation marks omitted).

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4. (...continued)
witness's relationship with the insurance carrier went beyond "merely being paid an expert's fee in th[e] matter"). Here, Dr. Smith's only connection to the insurance company was that the company hired him as an expert witness.

While the jury was deliberating, the trial judge occasionally visited the courtroom and provided updates to both counsel on the progress and activities of the jury. During one of his visits, Plaintiff's counsel was not in the courtroom and a brief conversation ensued between the trial judge and Defendant's counsel. At Defendant's counsel's request, the trial judge offered constructive criticism regarding Defendant's counsel's performance during trial, stating that she had a "strong finish." He also wished her "good luck."

"A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," including where "the judge has a personal bias or prejudice concerning a party or a party's lawyer." Utah Code Jud. Conduct R. 2.11(A)(1). "'Bias and prejudice are only improper when they are personal. A feeling of ill will or, conversely, favoritism toward one of the parties to a suit are what constitute disqualifying bias or prejudice.'" In re Young, 1999 UT 81, ¶ 35, 984 P.2d 997 (quoting Jeffrey M. Shaman, et al., Judicial Conduct and Ethics § 4.04 (2d ed. 1995)). "The purpose of disqualification based on appearance of bias is to promote public confidence in the judicial system by avoiding even the appearance of partiality." Madsen v. Prudential Fed. Sav. & Loan Ass'n, 767 P.2d 538, 544 n.5 (Utah 1988) (internal quotation marks omitted). For this purpose, "a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter." Utah Code Jud. Conduct R. 2.9(A). However, there is no "categorical rule that whenever a judge engages in an ex parte conversation, he or she is deemed to be partial, biased or prejudiced such that disqualification is mandated." In re Young, 1999 UT 81, ¶ 36. Plaintiff "must instead establish that the ex parte communication stemmed from or otherwise involved the type of personal bias or prejudice contemplated by [rule 2.11(A)(1) of the Utah Code of Judicial Conduct]." Id. That rule "contemplates disqualification where, for instance, a judge . . . is related to a party or an attorney, [or] has a close social or professional relationship with a party or an attorney." Id. ¶ 35; see also Utah Code Jud. Conduct R. 2.11(A)(1).

Here, the judge's brief comments regarding counsel's trial performance, out of earshot of the jury charged with deciding the case, do not indicate a personal bias or favoritism such that his impartiality could reasonably be questioned. In fact, when both counsel were present, the judge commended both counsel on their performance at trial. While the better course here would have been to avoid all ex parte conversations during jury deliberations, we find nothing in the statements to indicate bias

or favoritism such that the trial judge's impartiality could reasonably be questioned.

Affirmed.

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J. Frederic Voros Jr., Judge

WE CONCUR:

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Gregory K. Orme, Judge

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William A. Thorne Jr., Judge