

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA MAYS,

Plaintiff-Appellee,

v

GERALD SCHELL, M.D., and SAGINAW
VALLEY NEUROSURGERY, P.C.,

Defendants-Appellants,

and

ST. MARY'S MEDICAL CENTER OF
SAGINAW,

Defendant.

FOR PUBLICATION
October 13, 2005
9:20 a.m.

No. 253816
Saginaw Circuit Court
LC No. 00-034067-NH

Official Reported Version

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

KELLY, J.

In this medical malpractice case, defendants appeal by leave granted the trial court's order granting plaintiff's motion for a new trial on the basis of evidence not admitted at trial being submitted to the jury. We vacate the order granting a new trial.

I. Facts

Defendant Gerald Schell, M.D., performed two back surgeries on plaintiff. Plaintiff alleged that Dr. Schell's failure to render timely and effective treatment resulted in her paralysis. In an approximately three-week trial, nine witnesses testified, seven of whom were experts, and 40 exhibits were admitted, including numerous medical records.

During deliberations, the jury requested plaintiff's complete medical records, including MRIs (magnetic resonance imaging), CTs (computerized tomography), myelograms, and a light box. Pursuant to the court's policy, instead of providing the exhibits specifically requested by the jury, all the trial exhibits were presented to the jury. Unfortunately, the jury was also erroneously given defense counsel's banker's box, which contained numerous items never

admitted at trial, including: medical records; deposition transcripts, including one questioning plaintiff's expert about his censure by the American Association of Neurosurgeons; testimonial history of expert witnesses; deposition summaries; memos to the file; memoranda of law, including one on the ability of defense counsel to cross-examine on an expert's censure; some marked exhibits; correspondence between Dr. Schell and defense counsel; correspondence between Dr. Schell and Pronational Insurance Company; and defense counsel's notes. After the jury rendered its verdict of no cause of action and was discharged, the trial court's clerk retrieved the exhibits from the jury room and found that some¹ of the exhibits were intermixed with the contents of defense counsel's banker's box. The trial court contacted both parties and scheduled a hearing to determine what should be done about the error.

At the hearing, plaintiff moved for a new trial, arguing that it was the only appropriate remedy given the jury's exposure to the prejudicial documents in the banker's box. However, plaintiff objected to re-calling the jury for questioning to ascertain whether the jurors looked at the items in the banker's box. Defendants countered that the trial court was obligated to first review the materials in the box to determine if they were substantially prejudicial to plaintiff's case and to poll the jurors to determine whether they even relied on any of the items in the box. The trial court took the matter under advisement and, four months after the motion was first heard, ultimately granted plaintiff's motion. The trial court concluded that the unadmitted materials in the banker's box were prejudicial and reasoned that because of the quantity and complexity of the exhibits in the case, it would be impossible to determine with any certainty if the jury relied on the prejudicial materials in reaching its verdict.

II. Analysis

Defendants argue that the trial court erred when it granted plaintiff's motion for a new trial because plaintiff failed to establish substantial prejudice by the submission to the jury of the unadmitted evidence. We agree. We review a trial court's decision to grant a motion for a new trial for an abuse of discretion. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). "An abuse of discretion occurs when the decision is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Id.*

"The consideration of documents that are not admitted into evidence but are submitted to the jury does not constitute error requiring reversal unless the error operated to substantially prejudice the party's case." *Phillips v Deihm*, 213 Mich App 389, 402-403; 541 NW2d 566 (1995); see also *Beasley v Washington*, 169 Mich App 650, 660; 427 NW2d 177 (1988); *Eley v Turner*, 155 Mich App 195, 200; 399 NW2d 28 (1986). In describing what constitutes actual prejudice under these circumstances, our Supreme Court in *People v McCrea*, 303 Mich 213, 266; 6 NW2d 489 (1942), quoting 16 RCL, pp 302-303), held:

¹ It is unclear from the record what items, exactly, were intermixed.

"When by mistake or inadvertence on the part of a jurymen or the court, or even through error of judgment on the part of the court, an article has been taken to their [sic] room by the jury which ought not to have been, then before a verdict will be set aside for that cause, it must appear, either from examination of the objectionable article itself, or from the facts properly presented by the bill of exceptions, that such article must have been, in the nature of the case, or in point of fact was, considered by the jury in arriving at the conclusion reached by their [sic] verdict."

In this case, while the record is clear that the banker's box was presented to the jury, plaintiff, the moving party, did not prove—indeed objected to eliciting proof—that the jury even looked at the items in the box, let alone considered any item. Under the circumstances, it is possible that the jury simply found the evidence it requested and only reviewed that evidence leaving the contents of the banker's box unviewed. In other words, because the record does not reflect that the jury actually looked at, let alone relied on, the materials not admitted into evidence, there was no basis for the trial court to conclude that plaintiff was substantially prejudiced by the mistake. Because the trial court's ruling was based on mere speculation rather than established fact, and because the trial court granted a new trial before it determined whether plaintiff actually suffered any prejudice, we conclude that it abused its discretion in granting plaintiff's motion for a new trial.

Order for a new trial vacated.

Bandstra, J., concurred.

/s/ Kirsten Frank Kelly

/s/ Richard A. Bandstra