STATE OF MICHIGAN

COURT OF APPEALS

LETITIA OWENS, Personal Representative of the Estate of CATHERINE GRIMES, Deceased,

Plaintiff-Appellant,

v

DETROIT RECEIVING HOSPITAL, DR. RAYS, MERCY HOSPITAL, MICHIGAN OSTEOPATHIC MEDICAL CENTER, ROYAL NURSING HOME,

Defendants,

and

G & K MANAGEMENT SERVICES, INC., d/b/a OMNI CONVALESCENT CENTER,

Defendant-Appellee.

UNPUBLISHED
October 27, 1998

No. 203003
Wayne Circuit Court
LC No. 94-411347 NH

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from a jury verdict of no cause of action in favor of defendant and from an order denying her motion for a new trial. We affirm.

First, plaintiff argues that reversal is required because the trial court erred in instructing the jury. A court must give pertinent portions of a standard jury instruction if the instruction is applicable and accurately states the law. *Duke v American Olean Tile Co*, 155 Mich App 555, 565; 400 NW2d 677 (1986). The determination whether an instruction is accurate and applicable is a matter within the sound discretion of the trial court, *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997), and thus we review the trial court's decision on jury instructions for an abuse of discretion, *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 103; 574 NW2d 36 (1997). The failure to give accurate, applicable "instructions does not require reversal unless the failure to vacate the jury

verdict would be inconsistent with substantial justice." *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 415; 516 NW2d 502 (1994).

Here, the trial court instructed the jury in accordance with plaintiff's theory of malpractice, stating that the plaintiff had the burden of proving "that the Defendant was professionally negligent in one or more of the ways claimed by the plaintiff as stated in these instructions." See SJI 2d 30.03. However, the court declined to give the premises liability instruction requested by plaintiff, which stated that "[a] possessor has a duty to exercise ordinary care to protect an invitee from unreasonable risks of injury that were known to the possessor or that should have been known in the exercise of ordinary care." See SJI 2d 19.03. Plaintiff argues that because her complaint in this case sounded partially in premises liability, the court abused its discretion in failing to instruct the jury on this theory of liability. Plaintiff relies on *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1; 535 NW2d 215 (1995), as an example of a case treating the failure to supervise residents as sounding in premises liability. In contrast, defendants argue that plaintiff did not properly present the premises liability theory in her complaint or at trial and that, in any event, the error was harmless.

Although plaintiff is arguably correct in asserting that the premises liability theory was applicable in this case, we find that the trial court's decision not to read the instruction does not rise to the level of an abuse of discretion. Even assuming that the trial court abused its discretion in failing to instruct on premises liability, we agree with defendant that the error does not require reversal because the burdens of proof plaintiff would bear regarding either theory of liability were essentially the same, albeit couched in different terms. To prove professional negligence or malpractice, plaintiff had to prove that defendant had a duty to supervise the decedent while bathing and breached that duty by failing to supervise her or to install various devices to prevent her from taking a bath without the nursing staff's knowledge. Likewise, to prove premises liability, plaintiff had to prove that defendant should have known that the decedent required supervision while bathing and failed to exercise ordinary care by failing to supervise her or to install various devices to prevent her from taking a bath without the knowledge of a member of the nursing staff. Having rejected the substance of plaintiff's claim, the jury would have also reached the same result had the same evidence been considered in terms of premises liability; therefore, reversal is not required. See *Phillips, supra*.

Next, plaintiff argues that the trial court erred in admitting a page from a visitors' register to impeach a witness' testimony that she had not signed in when she went to defendant's facility to conduct an investigation. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias and not the exercise of discretion. *Id.* The trial court admitted the document as a business record pursuant to MRE 803(6); however, this was error because the declarants, the persons who signed in and out, were not acting in the regular course of their business when filling out the register. See *Hewitt v Grand Trunk W R Co*, 123 Mich App 309, 325; 333 NW2d 264 (1983). Rather, the only significance of the document was to impeach the inspector's credibility and to cast doubt on her findings of neglect by showing that she spent little time investigating the incident. Therefore, the trial court abused its discretion in admitting the evidence on this basis.

Nonetheless, an error in the admission of evidence is not a ground for vacating, modifying, or otherwise disturbing a judgment unless refusal to do so would be inconsistent with substantial justice. *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997). Here, the witness' testimony was cumulative because it was essentially the same as that of plaintiff's nursing home expert. Additionally, plaintiff failed to preserve the argument for appeal by objecting to the document at trial on the same grounds raised on appeal. *Meagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997). Last, plaintiff waived this issue by failing to cite authority in support of her claim that the document was inadmissible because defendant did not produce the document during discovery or include it in its exhibit list. *Price v Long Realty, Inc*, 199 Mich App 461, 467; 502 NW2d 337 (1993). For these reasons, substantial justice does not require us to set aside the jury's verdict based on the erroneous admission of the register.

Next, plaintiff argues that the trial court erroneously excluded evidence that at least some of the bathtubs were removed and replaced with shower stalls after the decedent's death. See MRE 407. However, plaintiff waived this issue by failing to cite applicable case authority in support of her position. See *Price*, *supra* at 467. We nonetheless note that the evidence was irrelevant for the purpose of proving feasibility of precautionary measures because defendant did not dispute the feasibility of installing showers. See, e.g., *Fellows v Superior Products Co*, 201 Mich App 155, 164-165; 506 NW2d 534 (1993).

Next, plaintiff argues that the trial court erroneously allowed defendant's expert to testify. We review for an abuse of discretion a trial court's decision whether to allow a witness to testify after the party calling him failed to comply with a witness list deadline. *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993). The purpose of requiring parties to exchange witness lists in advance of trial is to eliminate the element of surprise at trial. *Coles v Galloway*, 7 Mich App 93, 101; 151 NW2d 229 (1967). Here, defendant disclosed the identity of the added expert four months before trial and agreed to produce him for a deposition even though discovery had closed; however, plaintiff took no action until the week before trial, when she filed the motion to strike defendant's expert from the witness list. Given that plaintiff was aware of the witness well in advance of trial and that any surprise resulted from plaintiff's failure to take advantage of the opportunity to depose the witness, the trial court did not abuse its discretion in allowing the witness to testify.

Plaintiff's related argument that defendant failed to establish a proper foundation for the expert's testimony has not been preserved for appeal because plaintiff neither objected to the testimony on this basis at trial, see *Meagher*, *supra* at 724, nor cited any authority in support of her claim on appeal, see *Price*, *supra* at 467. In any event, it was proper for defendant's expert to offer an opinion as to the cause of decedent's death based upon a review of the records even though he did not personally witness her death or the autopsy. See MRE 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.").

Last, plaintiff argues that the trial court erred in denying her motion for a new trial based on the alleged misconduct of defense counsel. We review the denial of a new trial for an abuse of discretion.

Phillips, supra at 411. A new trial may be granted whenever the substantial rights of all or some of the parties are materially affected by an irregularity that denied the moving party a fair trial. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 547; 481 NW2d 762 (1992). When reviewing asserted improper conduct by a party's lawyer, the court must first determine whether the lawyer's action was error and, if so, whether the error requires reversal. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). A lawyer's comments will not be cause for relief unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or they were such as to deflect the jury's attention from the issues involved and had a controlling influence upon the verdict. *Id.* The giving of a curative instruction is generally sufficient to render any error harmless. See, e.g., *In re Ellis Estate*, 143 Mich App 456, 464; 372 NW2d 592 (1985).

Again, plaintiff has failed to preserve this issue for appeal by citing authority in support of her argument that the cited portions of defense counsel's argument were improper, *Price, supra*, but we have nevertheless reviewed defense counsel's argument at trial in its entirety. We find that any error that occurred was harmless because the trial court twice instructed the jury that the attorney's statements were not evidence, see *Ellis Estate, supra* at 464, and plaintiff has failed to show that an additional curative instruction, if timely requested, would have been futile.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell