STATE OF MICHIGAN

COURT OF APPEALS

RICHARD RUNLES,

Plaintiff-Appellant,

v

EDWARDS BROTHERS, INC.,

Defendant,

and

MAREN ENGINEERING CORPORATION,

Defendant-Appellee.

UNPUBLISHED
September 3, 1999

No. 210074
Washtenaw Circuit Court
LC No. 96-002604 NP

Before: Hood, P.J., and Fitzgerald and Collins, JJ.

PER CURIAM.

In this product liability action, plaintiff appeals as of right from a judgment of no cause of action, entered after a jury trial, in favor of defendant Maren Engineering Corporation. We affirm.

Plaintiff, an employee of defendant Edwards Brothers, Inc. ("Edwards Brothers"), a book binding factory, seriously injured his hand in a paper baler manufactured by defendant Maren Engineering Corporation ("Maren"). Plaintiff originally filed suit against Edwards Brothers only, alleging that Edwards Brothers intentionally exposed him to a known hazard by altering the controls of the baler in which he injured his hand. He subsequently amended his complaint to add claims of negligent design against Maren, alleging that Maren failed to utilize available technology to position the clean-out area of the baler away from the ram and to install a key interlock in the clean-out door that would disable all power upon opening of the door. Following discovery, Edwards Brothers was granted summary disposition based on the exclusive remedy provisions of the Workers Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1), leaving Maren as the sole defendant. The case proceeded to trial and, following four days of testimony, the jury unanimously found that Maren was not negligent. The court denied plaintiff's motion for a new trial.

Plaintiff first argues on appeal that the trial court erred in denying his motion for a new trial based upon, among other things, juror misconduct. He argues in the alternative that he is entitled to a discovery/evidentiary hearing to determine whether juror misconduct occurred. This Court reviews the trial court's denial of plaintiff's motion for a new trial for an abuse of discretion. *Joerger v Gordon Food, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997). A trial court may deny a motion for a new trial based on juror misconduct where the moving party does not make an affirmative showing of prejudice and the facts do not establish an inference that juror prejudice occurred. *Phinney v Perlmutter*, 222 Mich App 513, 539; 564 NW2d 532 (1997).

Plaintiff asserts juror misconduct based on a post-verdict discussion with the jury wherein a juror apparently indicated that the jury had "eavesdropped" on plaintiff's argument that Maren should not be allowed to call witnesses because it had not notified plaintiff of any witnesses, and that the jury believed that a ruling by the court was the reason that defendant did not call any witnesses. Plaintiff contends that this "eavesdropping" compromised his attorney's credibility because he had argued strenuously during closing arguments that Maren's failure to present witnesses meant they could not find any to testify in support of their theory of the case.

To establish extrinsic influence on a jury requiring reversal, the appellant must (1) prove that the jury was exposed to extraneous influences, and (2) "establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997). In proving the second point, generally, the appellant "will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89.

Here, plaintiff offers only his own affidavit in support of his argument that juror misconduct occurred.[1] In *Budzyn, supra* at 92 n 14, our Supreme Court refused to consider an affidavit unsigned by a juror, despite an affidavit from the defendant's counsel swearing that the juror had adopted all of the statements contained therein, finding that "the attorney cannot testify with respect to these juror's [sic] statements because that testimony would be hearsay." Although plaintiff argues that Maren's failure to contest plaintiff's assertions that the jury had "eavesdropped" establishes the existence of misconduct and the necessity of a new trial, plaintiff bore the burden of establishing that the jury was exposed to extraneous influences and that plaintiff was prejudiced by that exposure. See *Budzyn, supra* at 88-89. Maren's failure to address whether "eavesdropping" on plaintiff's argument took place does not establish either prong. Thus, plaintiff has presented no admissible evidence that the jury in this case was exposed to or influenced by extraneous information or evidence.

Moreover, plaintiff has failed to show that he was prejudiced in any regard by any alleged "eavesdropping" by the jury. As the trial court explained, it is not unusual for juries to hear arguments regarding evidentiary matters or the court's rulings on those matters. While the court in this case excused the jury when it realized that plaintiff's counsel was launching into an argument regarding Maren's witnesses, the record clearly shows that plaintiff's counsel began that argument while the jury was filing into the courtroom after the court's ruling on Maren's motion for a directed verdict, and that he continued his argument after the jury was seated. Plaintiff did not ask that the jury be excused; the court interrupted his argument and excused them. Moreover, the court gave standard jury instructions,

SJI2d 2.08, 3.03, and 3.04. Jurors are presumed to understand and follow a court's instructions. *Bordeaux v Celotex Corp,* 203 Mich App 158, 164; 511 NW2d 899 (1993). Although plaintiff contends that he was prejudiced because the alleged "eavesdropping" caused the jury to believe his counsel was a liar, not even plaintiff's summary of the post-verdict conversation with the jury indicates that any juror questioned his credibility.

Because plaintiff has not demonstrated that the jury's verdict in this case was influenced by any alleged extraneous influences in reaching its verdict, we find that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial and that plaintiff is not entitled to a discovery/evidentiary hearing to confirm whether or not juror misconduct took place.

Plaintiff's second argument on appeal is that the trial court erred in allowing him to introduce evidence regarding the concept of reduction of future damage to present value during trial, but then precluding him from discussing that concept during closing arguments. Plaintiff argues that this error further compromised his attorney's credibility with the jury. Generally, we review the trial court's rulings with regard to opening and closing arguments for an abuse of discretion. *Wilson v General Motors Corp,* 183 Mich App 21, 27; 454 NW2d 405 (1990).

MCL 600.6306; MSA 27A.6306, enacted under 1986 PA 178, and made applicable to cases filed on or after October 1, 1986, entrusts the trial court with the task of calculating the present value of future damages. *Nation v WDE Electric Co,* 454 Mich 489, 492; 563 NW2d 233 (1997). Prior to 1986, the jury was obligated, under common law, to perform the required calculations. *Id.* SJI2d 53.03 instructed the jury in how to perform those calculations. The note on use for SJI2d 53.03 states, however, that "[t]his instruction is not for use in personal injury actions filed on or after October 1, 1986."

At trial, plaintiff's witness, economist Michael Thompson, testified regarding, among other things, reduction of future damages to present value. Although Maren objected to the testimony, arguing that tort reform has removed those calculations from the province of the jury; the court allowed the testimony. Later, during discussion with the court regarding jury instructions, plaintiff acknowledged that SJI2d 53.03 was not applicable in this case, but argued that the court should explain as part of its jury instruction the process it would go through in making the statutorily mandated adjustments to any award the jury may make. The court denied plaintiff's request, noting that such an instruction is not included in the standard instructions and finding that such instruction would likely lead to juror confusion. The court further ruled that plaintiff was precluded from discussing the concept of reduction of future damages to present value during closing.

Plaintiff argues on appeal that because the MCL 600.6306; MSA 27A.6306 does not instruct that the concept of present value reduction should be kept secret from the jury, the court erred in interpreting the statute to preclude the jury from knowing about the concept. However, it does not appear that the trial court read the statute as precluding the court from allowing a party to discuss the concept of present value reduction in its closing. Rather, the court ruled as it did based on potential for juror confusion. "This Court has recognized a trial court's broad discretion in matters of trial conduct, including limiting arguments of counsel." *Warden v Fenton Lanes, Inc,* 197 Mich App 618, 625; 495 NW2d 849 (1992).

Moreover, plaintiff has not shown how he was prejudiced in any way by the court's failure to allow his discussion of reduction of future damages to present value during closing. As plaintiff himself acknowledges, the jury found no negligence on the part of Maren; thus, it never reached the issue of damages. Furthermore, after plaintiff explained the verdict form asking for the year-by-year award of future damages contemplated by MCL 600.6305; MSA 27A.6305 during his closing argument, he decided instead to use an abbreviated verdict form which asked the jury to give a fixed, single lump-sum damage award, about which the court instructed. Thus, the only basis for plaintiff's claim of prejudice is that he was made to look dishonest, because he was allowed to present testimony with regard to the concept of present value reduction, but was precluded from discussing it during closing argument. We conclude that plaintiff has not demonstrated prejudice and that the trial court did not abuse its discretion in refusing to allow plaintiff's counsel to discuss reduction of future damages to present value during his closing argument.

Plaintiff's third argument on appeal is that the trial court erred in instructing the jury under SJI2d 12.06 that the jury could find that plaintiff was negligent if he violated Michigan Occupational Safety and Health Administration ("MIOSHA") Rule 32.[2] Plaintiff also argues that the trial court erred in finding that whether Rule 32 applied to the facts of this case was for the jury to determine. This Court reviews claims of instructional error for an abuse of discretion, considering the jury instructions in their entirety. *Joerger, supra* at 173. There is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

We conclude that the trial court erred in giving the challenged instruction. First, although Maren did plead as defenses "negligence, contributory and/or comparative negligence" on the part of plaintiff, Maren did not plead a defense based on an alleged violation by plaintiff of rules or regulations promulgated pursuant to statutory authority. As this Court explained in *Zalut v Andersen & Associates, Inc*, 186 Mich App 229, 234-235; 463 NW2d 236 (1990), "[i]n Michigan, the violation of administrative rules and regulations is evidence of negligence, *and therefore when a violation is properly pled it may be submitted to the jury*." [Emphasis added.] Because Maren did not plead a violation of an administrative rule or regulation, the trial court should not have instructed on the alleged violation.

Second, we do not believe that Rule 32 applies to the facts of this case. Rule 32 requires, among other things, that employees "lock out" the power source to any machinery "to be repaired, serviced, or set up." Daily maintenance, such as that performed by plaintiff in this case, does not fall within the plain language of the rule. Furthermore, the determination whether the rule applies to the facts of this case was for the trial court to determine, see Note on Use accompanying SJI2d 12.06 and SJI2d 12.04, and it was error for the court give the instruction and leave it to the jury to decide if the rule applied.

Plaintiff also argues on appeal that the challenged instruction was erroneously given because Rule 32, as it was presented by the trial court, no longer existed at the time of plaintiff's accident. However, because plaintiff did not raise this argument in the trial court, the trial court had no opportunity

to consider it. Arguments not addressed by a trial court are not preserved for appeal. *Michigan Millers Mutual Ins Co v Bronson Plating Co,* 197 Mich App 482, 495; 581 NW2d 295 (1992).

In any event, because any error by the trial court in its instruction under SJI2d 12.06 was harmless, reversal is not warranted. MCR 2.613(A). Instructional error may be deemed harmless where the jury never reaches the question to which such instructions relate. *Ferguson v Delaware International Speedway,* 164 Mich App 283, 293; 416 NW2d 415 (1987). Here, the jury concluded that Maren was not negligent. The jury never reached the question of plaintiff's negligence or the issue of comparative negligence. Although plaintiff contends that the very fact that the jury was instructed on the issue of plaintiff's alleged violation of MIOSHA Rule 32 was prejudicial in that it likely contributed to the jury's conclusion that Maren was not negligent, when read in their entirety, the jury instructions do fairly and adequately represent the theories of the parties and the relevant law. Given that the trial court properly instructed the jury on the issue of defendant's alleged negligence, even assuming that the trial court erred in instructing the jury under SJI2d 12.06, reversal is not required. *Ferguson, supra*.

Plaintiff's fourth argument on appeal is that he was denied a fair trial because of improper comments by defendant's attorney. When reviewing asserted improper comments by an attorney, this Court first determines whether the attorney's action was error and, if it was, whether the error requires reversal. *Hunt v Freeman,* 217 Mich App 92, 95; 550 NW2d 817 (1996). An attorney's comments normally will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair trial. *Id.* This Court must reverse only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. *Id.*

During his opening statement, counsel for Maren stated as follows:

> Now as you've heard, there's no dispute that this switch was replaced, that the new switch has these two "on" positions, that it bears a misleading, inaccurate label. They admit all that. Even so, they've brought this case not against the people that changed the switch, not against anyone else, against Maren for having -

Plaintiff immediately objected, arguing as follows:

> that's an improper statement to say I didn't bring a claim against the people who designed the switch. I couldn't bring one if I wanted to.

The court responded with the following instruction:

> Well, let me just cure it by saying that, again, remind you the remarks of counsel are not evidence, and you are to concern yourselves with this case and not speculate on any other cases that may or may not have been brought.

Later, after the jury returned from its lunch break, plaintiff revisited the issue of Maren's opening statement, asking the court to immediately instruct the jury under SJI2d 15.05. The court refused

plaintiff's request, stating that if relevant, the court would so instruct the jury at the close of trial. At the close of trial, the court included SJI2d 15.05 in its instructions to the jury.[3]

In *Reetz v Kinsman Marine Transit*, 416 Mich 97, 104; 330 NW2d 638 (1982), our Supreme Court explained that "whether or not a plaintiff seeking recovery for personal injury has other remedies available" is not relevant and, therefore, such alternative remedies "should not be raised before the jury." Thus, Maren's remarks to the effect that plaintiff could have or should have sued someone else were improper. Moreover, they were inaccurate inasmuch as plaintiff's suit against his employer was dismissed based on the exclusive remedy provisions of the WDCA.

Plaintiff argues that the prejudicial effect of this statement was compounded by defendant's references during trial to his workers compensation suit. Where improper comments by an attorney indicate a deliberate course of conduct aimed at preventing a fair and impartial trial, he is not required to establish affirmative prejudice to require reversal on the basis of those comments. See *Hunt, supra* at 95-96.

We are troubled by Maren's counsel's references to plaintiff's workers compensation suit, especially when coupled with his suggestion that plaintiff could or should have sued his employer, and we caution counsel to refrain from injecting such inflammatory statements into proceedings in the future. Such statements have the potential to distract jurors from the issues at hand and taint the proceedings. However, the record in this case does not indicate that these comments comprised a deliberate course of conduct aimed at preventing a fair and impartial trial. Therefore, because the trial court did immediately instruct the jury not to treat any statements by counsel as evidence and to disregard any reference to cases not before them when plaintiff objected to Maren's suggestion that he should have sued his employer, and the court gave SJI2d 15.05 at the close of trial, we find that reversal is not required.

Plaintiff's fifth argument on appeal is that the trial court erred in excluding as exhibits learned treatises that established the state of knowledge that Maren, a manufacturer, is presumed to have as an expert concerning the safety of its own products. We disagree. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1998); *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 rather than the exercise of discretion. *Id.* An error in the exclusion 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. MCR 2.613(A); *Davidson, supra*.

MRE 707 provides as follows:

> To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial

> notice, are admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits.

The plain language of MRE 707 makes clear that treatises and similar literature are admissible only for purposes of impeachment and then, excerpts may only be read into evidence. The documents are not admissible as exhibits. To the extent that the plain language of MRE 707 may be interpreted as inconsistent with our Supreme Court's decision in *Fletcher v Ford Motor Co,* 128 Mich App 823; 342 NW2d 285 (1983), we believe that the language of MRE 707, which was amended in 1991, controls.

In any event, any error in the court's decision not to admit the documents as exhibits was not inconsistent with substantial justice. Plaintiff's expert witness, Robert Rennel, testified that, at the time the baler in question was manufactured, the technology that plaintiff argued would have prevented his injuries was in existence. Furthermore, Maren's employee, Donald Tamosaitis, also testified when called as a adverse witness that such technology existed at the time the machine in question was manufactured. Thus, the documentary evidence concerning the technology available when the baler in question was manufactured was cumulative and any error by the trial court in excluding it harmless. See *Fletcher, supra* at 830.

Plaintiff's sixth argument on appeal is that the trial court abused its discretion in excluding evidence that Maren manufactured a baler subsequent to its manufacture of the 1971 baler at issue in this case, but prior to plaintiff's injury, with a clean-out door located in a safer location. We disagree. A trial court has broad discretion in determining whether to exclude relevant evidence on the basis that it would cause undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Wayne Co Sheriff v Wayne Co Bd of Comm'rs,* 148 Mich App 702, 710; 385 NW2d 267 (1986). Here, when ruling to exclude the proffered evidence, the trial court indicated that plaintiff could argue the testimony of Mr. Tamosaitis acknowledging the availability of the safety technology in question at the time of manufacture. Because showing of the videotape would have been cumulative, the trial court did not abuse its discretion in excluding it.

Plaintiff's last argument on appeal is that the trial court abused its discretion in admitting as an exhibit a photograph of a 1967 baler, when defendant had photographs of machines the same vintage as the 1971 baler at issue in this case. We disagree. Maren sought to admit as an exhibit a photograph of a 1967 Maren baler to illustrate that, as originally manufactured, Maren's balers bore a sign on the clean-out doors which read "Clean Out Daily/Turn Power Off." At the time of plaintiff's accident, however, such sign did not exist on the baler in which plaintiff was injured. Rather, there existed a decal reading only "Clean Out Daily." Defendant's employee, Donald Tamosaitis, established proper foundation for admission of the photograph by testifying that the balers manufactured in 1971 contained the same labeling as that depicted in the photograph of the 1967 baler.

On appeal, plaintiff does not explain in what regard the court erred in admitting the photograph, but argues only that Maren's use of the photograph of the 1967 baler demonstrates suspicious motives, given that Maren admitted that it had pictures of a 1971 baler, but had not brought them to court. Where a party fails to argue the merits of an issue in its brief, the issue is not properly presented for

appellate review and this Court need not consider it. *Meagher v Wayne State University,* 222 Mich App 700, 718; 565 NW2d 401 (1997). In any event, because the photograph was relevant and its probative value was not substantially outweighed by it potential for unfair prejudice, MRE 401 and MRE 403, the trial court did not abuse its discretion in admitting the photograph of the 1967 baler as an exhibit.

Affirmed.

/s/ Harold Hood
/s/ E. Thomas Fitzgerald
/s/ Jeffrey G. Collins

[1] Plaintiff's counsel submitted an affidavit wherein he summarized the content of his discussion with the jurors. In response to a question from the court, plaintiff's counsel acknowledged that he did not know how the jurors allegedly "eavesdropped."

[2] 1979 AC, R 408.10032, rescinded 1983 AACS.

[3] The court instructed the jury as follows:

> If you decide that the defendant was negligent and that such nelgigence was a proximate cause of the occurrence, it is not a defense that the conduct of the plaintiff's employer, who is not a party to this suit, also may have been a cause of this occurrence.
>
> However, if you decide that the only proximate cause of the occurrence was the conduct of plaintiff's employer, then your verdict should be for the defendant.