STATE OF MICHIGAN

COURT OF APPEALS

MARLENE KONWAY and ROBERT KONWAY,

Plaintiffs-Appellants,

v

MARY C. JORDAN, D.O., and SISTERS OF BON SECOURS HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
March 1, 2002

No. 224151
Wayne Circuit Court
LC No. 97-721327-NH

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right the judgment of no cause of action entered following an eight-day jury trial in this medical malpractice action. We affirm.

Marlene Konway (plaintiff)[1] had an emergency Cesarean section (C-section) at defendant hospital, performed by defendant Dr. Mary Jordan, D.O. (defendant). Plaintiff's theory of the case, presented through three expert witnesses, was that Dr. Jordan negligently performed the post-delivery closure of plaintiff's uterus by a) stitching the posterior portion of the uterus to the two anterior edges of the delivery incision, or b) sewing one anterior portion of the incision to the posterior uterine wall, and that as a result (of either), plaintiff's uterine walls adhered together. There is no dispute that plaintiff developed Asherman's Syndrome, defined basically as traumatic amenorrhea, meaning no menstruation due to injury and closure of the neck of the womb. There is no dispute that plaintiff's case of Asherman's was severe, and that as a result she ceased menstruating and is unable to bear more children.

Both parties' experts testified that Asherman's Syndrome is very uncommon, and involves intrauterine scarring/adhesions of traumatic origin. The experts agreed that Asherman's syndrome can be from mild to severe, and that in some moderate cases, women continue menstruating. The experts agreed on little else, and trial was, indeed, a battle of the experts.

Plaintiff's experts testified that they had never seen or heard of a patient developing Asherman's syndrome simply from having a C-section alone, and maintained that Asherman's

[1] Plaintiff Robert Konway claims loss of consortium.

usually arises from vigorous post-partum or post-abortal curettage, meaning the scraping of the lining of the uterus. Plaintiff maintained that no such vigorous curettage occurred in this case. Plaintiff maintained that in the absence of trauma to the uterus, Asherman's is only known in cases involving tuberculosis of the uterus, which plaintiff did not have.

Defendant's theory of the case was that Dr. Jordan was not negligent, and that plaintiff's development of Asherman's Syndrome resulted from the trauma of the C-section itself, in combination with chorioamnionitis, a sub-clinical infection[2] of the chorion and amnion (parts of the placenta), that was first noted in the placenta pathology report.

Plaintiff's experts, all of whom were board-certified in obstetrics and gynecology, testified that the type of sub-clinical infection plaintiff had was extremely common and minor, that development of Asherman's Syndrome under such circumstances was not a complication that would occur in the course of an ordinary C-section, and that the incision made is not the kind of trauma capable of causing Asherman's, even in the presence of subclinical infection.

Plaintiff's experts, Drs. Michael Berke, Ronald Zack and Bernard Nathanson, testified that two objective factors demonstrated, in the absence of other trauma or instrumentation, that defendant Jordan had improperly sewn the anterior and posterior walls of plaintiff's uterus together: first, during the days following plaintiff's delivery she had scant bleeding or lochia, which is uncommon and consistent with one segment of the uterine incision being left open. Bleeding normally persists for two to four weeks after such a delivery, initially being heavy and decreasing with passing weeks. Second, three weeks after delivery (on May 31, 1995) plaintiff passed a large piece of necrotic tissue vaginally, measuring 5 ¼" x 1 ¼" x ½", which was sent for pathological examination. The pathology report revealed that it contained suture material and inflammatory cells. Plaintiff maintained that that was highly abnormal, that the size of the tissue passed was consistent with the incision size, and that the fact that it contained suture material was highly significant and consistent with improper uterine suturing.

Defendants' experts, also board-certified, maintained that there was no evidence that defendant Jordan had improperly closed the uterus as plaintiff argued, and that sewing uterine walls together would be difficult to achieve even if a surgeon attempted to do so. Defendants maintained that plaintiff's lochia was within normal limits, and that the tissue plaintiff passed on May 31, 1995 was shedding of the uterine lining and not consistent with the incision size.

The jury concluded that defendant was not negligent and did not reach the proximate cause issue.

I

Plaintiff argues that the trial court clearly erred in denying plaintiff's counsel the opportunity to cross-examine defendant Jordan regarding material facts and issues. Plaintiff called Dr. Jordan under the adverse witness statute. The trial court cut off plaintiff's counsel's cross-examination of defendant Dr. Jordan after approximately 1 ½ hours, with little notice. The

[2] With sub-clinical infections, symptoms, if any, tend to be slight. Clinical infections tend to have overt signs and symptoms.

court noted that plaintiff's counsel had earlier represented to the court that the cross-examination would take approximately thirty minutes, greatly underestimating the amount of time, and that the court could properly limit cross-examination, relying on MRE 611. Plaintiff was permitted to make an offer of proof. Plaintiff's motion for a mistrial was denied.

"A party's right to cross-examine adverse witnesses is a basic due process right." *Great Lakes Div of Nat'l Steel Corp v Ecorse,* 227 Mich App 379, 426; 576 NW2d 667 (1998). "So far as the cross-examination of a witness relates either to facts at issue or relevant facts, it is a matter of right; but when its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge and, unless abused, its exercise is not the subject of review." *People v Fleish,* 321 Mich 443, 464; 32 NW2d 700 (1948); see also *People v Dellabonda,* 265 Mich 486, 502-503; 251 NW 594 (1933), citing 5 Jones, Commentaries on Evidence (1st ed) § 842.

The adverse witness statute, MCL 600.2161, provides in pertinent part:

> In any suit or proceeding in any court in this state, either party, if he shall call as a witness in his behalf, the opposite party . . . shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true.

This Court does not disturb a trial court's determination to deny a motion for mistrial absent a finding that the court abused its discretion and that a miscarriage of justice resulted. *Wolak v Walczak,* 125 Mich App 271, 274; 335 NW2d 908 (1983).

In limiting plaintiff's cross-examination of defendant Jordan, the trial court relied in part on MRE 611, which provides in pertinent part:

> (a) *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
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> (b) *Scope of cross-examination.* A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

Plaintiff notes that no case permits the arbitrary and abrupt termination of the cross-examination of a party as to relevant, material matters at issue as occurred here. We agree.[3]

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[3] The cases defendants rely on, *Carlton v St John Hospital,* 182 Mich App 166; 451 NW2d 543 (1989), and *Martin v Jabe,* 747 F Supp 1227 (ED MI, 1989), aff'd without opinion 909 F2d 1483 (continued…)

Given the significance of the right of cross-examination, that cross-examination of the principal defendant is at issue, and that defense counsel had not objected to the length of the cross-examination, we conclude that the trial court abused its discretion in limiting plaintiff's cross-examination of defendant Dr. Jordan, even under the circumstance that plaintiff's counsel had significantly underestimated how long the cross-examination would take. We have found no case, nor does defendant cite any, supporting that if an attorney (whether negligently or

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(1990), are factually distinguishable. In *Carlton, supra* at 173-174, this Court concluded that the trial court did not abuse its discretion by limiting the plaintiff's cross-examination of the defendant doctor regarding the operation of the defendant hospital's intensive care unit, under the circumstance that plaintiff's counsel had had opportunity to depose the defendant doctor, but had not done so. That was clearly not the case in the instant case.

In *Martin, supra,* Martin had been arrested and charged with having participated with two other persons in a series of criminal offenses that resulted in the deaths of two persons, and was convicted of two counts of first degree murder, one count of assault with intent to murder, and felony-firearm in Recorder's Court. Martin petitioned for writ of habeas corpus, asserting a number of claims, including that the trial court abused its discretion by improperly limiting his *pro se* cross examination of a Detroit police officer, Everett. The court disagreed, noting:

> [Petitioner] Martin submits that the judge, after excusing the jury, admonished him for submitting "confusing, speculative" questions, and **gave him a period of two minutes in which to complete his cross examination.** Martin asserts that "[g]iven the seriousness and complexity of the facts of the case, and given that [he] had taken over his own representation to overcome perceived mistakes or inadequacies of his counsel, the [trial court judge] should have continued to give [him] leeway."
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> Defendant takes issue with Martin, stating that Everett had testified that he, as one of the first officers to arrive at the scene of the homicide, saw bloodstains on the stairwells and found the victims in the basement. It is argued by the Defendant that the admonition was issued by the trial court when Martin's *pro se* cross examination began "to drift aimlessly from unrecalled irrelevancy to irrelevancy . . . . "
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> In Michigan, the trial judges are given the authority to place a limitation upon cross examinations in order to promote an effective administration of justice. [footnote here cites MRE 611 and *People v Lewis*, 25 Mich App 132; 181 NW2d 79 (1970).] Although a trial judge must be prudent not to trammel upon an individual's right to test the accuracy of a witness' testimony through the process of cross examination, the reviewing court must be equally careful to avoid an unwarranted interference into the management of a trial in the absence of an abuse of discretion. There was no abuse of discretion here. Therefore, Martin's claim on this issue must be rejected. [747 F Supp at 1231. Emphasis added.]

In the instant case, unlike *Martin*, there was no claim that plaintiff's counsel's cross-examination was drifting aimlessly or was repetitive.

otherwise) underestimates the amount of time his or her cross-examination of the principal defendant will take, the trial court may cut off the cross-examination with only five or ten minutes' notice to counsel.[4]

We conclude, however, that reversal is not required under the circumstances that plaintiff's counsel had explored the material areas he listed in his offer of proof during his 1 ½ hour cross-examination of defendant,[5] and plaintiff's counsel could have pursued further questioning on re-cross examination of Dr. Jordan but did not do so.[6]

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[4] Notwithstanding this error, we are not convinced by plaintiff's related judicial bias argument. Plaintiff has not overcome the heavy presumption of judicial impartiality as required where a party challenges a judge for bias or prejudice. *Cain v Dep't of Corrections,* 451 Mich 470, 497; 548 NW2d 210 (1996).

[5] Plaintiff's counsel stated in his offer of proof that he had not been able to address a number of areas, including: 1) plaintiff's infection, the bases for Dr. Jordan's opinions regarding that infection, the placenta pathology report, 2) the actual surgery itself, the suturing of the uterus, and what caused plaintiff's Asherman's syndrome, 3) her definition of Asherman's Syndrome and of amenorrhea, 4) whether plaintiff's subsequent treatment should have included another hysteroscopy, additional ultrasounds, and 5) her medical knowledge, judgment and expertise based on her representation that she had done 1,000 C-sections.

Before being cut off by the trial court, plaintiff's counsel questioned Dr. Jordan under the adverse witness statute regarding her education, number of deliveries and C-sections performed, training in performing C-sections, her technique in suturing after C-sections, the operative report regarding plaintiff's C-section (dictated six weeks after plaintiff's C-section), antibiotics administered to plaintiff post-delivery, whether any of the six other persons present in the operating room for plaintiff's C-section were qualified to perform a C-section (responding to defense counsel's contention in opening statement that no person in the operating room saw defendant make any mistake), whether defendant advised plaintiff that she could get Asherman's Syndrome as a result of a C-section, defendant's training and knowledge regarding Asherman's Syndrome, whether Asherman's syndrome is most frequently seen where there is curettage after a C-section, whether there was curettage in plaintiff's case, whether there were any complications that could have resulted in plaintiff's Asherman's syndrome, defendant's opinion that plaintiff had had trauma to the uterus, i.e., the C-section itself, which could lead to Asherman's in conjunction with the sub-clinical infection plaintiff had, whether the sub-clinical infection was severe and could in fact result in Asherman's syndrome, whether defendant had changed her mind regarding what caused plaintiff's Asherman's since the time of her deposition (at which she testified that she would have to examine plaintiff to determine the cause, and did not mention infection as a possible contributing factor), regarding the causes of Asherman's Syndrome, plaintiff's gynecological history, whether anything in plaintiff's history would have caused Asherman's before the C-section, whether defendant called plaintiff and told her she had Asherman's syndrome after she learned of the pathology report regarding the necrotic tissue plaintiff passed on May 31, 1995, defendant's employment as doctor of the day at defendant hospital, how defendant was advised of the instant lawsuit, regarding the video shown during voir dire of defendant performing a C-section, and whether defendant participates in continuing medical education and attends seminars.

[6] Defense counsel's direct examination of Dr. Jordan covered areas including defendant's education and training; the specifics of plaintiff's C-section; defendant's customary method of suturing the uterus; what lochia is, the amount of lochia plaintiff had post-delivery, and whether

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II

Plaintiff contends that the trial court improperly allowed defense counsel to claim at trial that two of plaintiff's expert witnesses, Drs. Berke and Zack, one of whom was a subsequent treater (Zack), were to blame for plaintiff's condition, rather than defendants.

> When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required 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. [*Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). Citations omitted.]

Michigan adheres to the rule that the original tortfeasor is liable for all of the injuries, even those resulting from subsequent malpractice of a physician attending the injured person, with the qualification that such total recovery from the original tortfeasor is permissible if the injured person exercised reasonable care in securing the services of a competent physician or surgeon. See *Reed v Detroit*, 108 Mich 224; 65 NW 967 (1896); *Pohl v Gilbert*, 89 Mich App 176, 184-186; 280 NW2d 831 (1979) (chiropractic manipulations subsequent to injury that may have adversely affected plaintiff's condition are irrelevant). "A patient may follow a licensed medical care provider's advice without risking a reduced award for following such advice." *Hunt, supra*, 217 Mich App at 96 (holding that defense counsel's argument that plaintiff's pain post-injury was attributable to plaintiff's having followed the advice of her podiatrist, advice that was contrary to the advice of two orthopedic surgeons, was improper argument that may have

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the amount of plaintiff's lochia was unusual; post-delivery procedure on the uterus, whether bleeding would have occurred if plaintiff's uterus had been sewn shut; whether plaintiff's uterus had been partially closed (one of plaintiff's theories) and, if so, whether she would have bled to death; whether plaintiff's second theory (sewing the uterine walls together) would be virtually impossible; that had the uterus been sewn shut plaintiff would not have expelled the piece of tissue; the process of shrinkage (involution) of the uterus post-delivery; how much experience defendant had had with Asherman's at the time plaintiff's counsel deposed her, that she had studied a lot about Ahserman's during the course of this litigation, and that she had learned a great deal from reading Dr. Valle's deposition; whether other medical staff in the operating room during plaintiff's C-section had witnessed prior C-sections; and the timing of her dictating the operative report of plaintiff's C-section and the receipt of the pathology report. Defense counsel presented a ten-minute video of defendant and another doctor performing a C-section, during which defendant explained aspects of the procedure, as well.

Plaintiff's counsel's recross-examination of Dr. Jordan was brief, occupying ten pages of transcript. Plaintiff's counsel questioned Dr. Jordan regarding whether she worked at the same clinic as plaintiff's family physician, the tardiness of her dictating plaintiff's operative report, at what point post-delivery she saw plaintiff's medical chart, who performed what tasks on the C-section videotape played for the jury, whether she could identify the origin of the tissue plaintiff passed on May 31, 1995, and questioned her about models or drawings of the uterus that had been used by defense counsel.

denied plaintiff a fair trial, and influenced jury's determination that plaintiff had been 50% comparatively negligent).[7]

Evidence at trial established that plaintiff saw a number of licensed physicians and specialists after she failed to resume menstruating post-delivery, including her family doctor, Dr. Parcells, and several specialists Dr. Parcells recommended. Plaintiff treated with Dr. Parcells for about a year, during which time he prescribed three different hormone treatments. Plaintiff consulted with specialists thereafter, including Dr. Nehra, who attempted but could not successfully complete a hysteroscopy due to blockage, and who perforated plaintiff's uterus in the process. Plaintiff also consulted Dr. Goldrath, who testified as an expert for the defense, and she made an appointment with another defense expert, Dr. Valle, in Chicago, which Dr. Valle's office cancelled. Plaintiff did not reschedule the appointment.[8]

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[7] In *Hunt*, *supra* at 95-96, this Court stated:

> Plaintiff argues that defense counsel engaged in several improper arguments. We reverse on the basis of two improper arguments made by defense counsel.
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> * * * [stating standard of review of improper attorney comments, quoted *supra*]
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> Plaintiff testified that her foot was stiff as a result of the accident. During closing argument, defense counsel argued that this may have been a result of plaintiff's using a wrap for her foot in accordance with the podiatrist's advice, which had been contrary to the advice of two orthopedic surgeons. Although plaintiff's counsel did not object to this argument, we find that it was error requiring reversal. Defense counsel's argument invited the jury to reduce plaintiff's damages because her injury may have been exacerbated by following the advice of her podiatrist as opposed to the advice of the two orthopedic surgeons. This was improper argument that may have denied plaintiff a fair trial. A patient may follow a licensed medical provider's advice without risking a reduced award of damages for following such advice. *McAuliff v Gabriel*, 34 Mich App 344, 348-349; 191 NW2d 128 (1971). This improper argument may well have influenced the jury's determination that plaintiff had been fifty percent comparatively negligent and may have caused the jury to award only $1,000 a year for future pain and suffering. Plaintiff is not required to establish affirmative prejudice as a consequence of this improper argument. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103, n 8, 107, n 20; 330 NW2d 638 (1982).

[8] Plaintiff testified at trial that when she did not resume menstruating after delivery, she saw her family physician, Dr. Parcells, who over the course of about a year [until about May 1996] prescribed three different kinds of hormones. When none of them worked, plaintiff asked Dr. Parcells for a referral to a specialist. Dr. Parcells referred plaintiff to Dr. Nehra, who treated plaintiff for about 1 ½ years, and performed various tests, including a hysteroscopy, and diagnosed Asherman's Syndrome. Dr. Nehra was unsuccessful, i.e., could not penetrate the uterus, and in the process perforated plaintiff's uterus. Dr. Nehra told plaintiff that she had very serious stenosis and that plaintiff "either had been sewn incorrectly or . . . had a low grade fever
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Given the evidence, defense counsel's remarks and closing argument to the effect that plaintiff's experts and subsequent treaters were in some way responsible for not "curing" plaintiff's Asherman's because they did not refer her to other specialists were clearly improper.[9] The trial court allowed the remarks as going toward the issue of mitigation of damages, but defense counsel did not pursue the mitigation of damages issue in closing argument, see n 9, nor did the evidence support a failure on plaintiff's part to mitigate damages. Thus, we agree with plaintiff that there was error.

Nevertheless, we find no basis for reversal. In the instant case, the jury found no negligence and did not reach the questions of proximate cause and damages. The objectionable questioning and arguments related to issues of proximate cause and damages, and not the issue whether defendant doctor was negligent. In other words, the questioning related to the treatment of plaintiff's Asherman's syndrome and her damages, not the cause of the Asherman's syndrome. Under these circumstances, we conclude that reversal on this basis is not warranted.

III

Plaintiff also argues that the trial court erred in permitting defendants' expert Dr. Davidson to testify, for the first time at trial and in contrast to his deposition testimony, that plaintiff's white blood cell count was significantly elevated five days before the delivery, without imposing sanctions on defendant for its failure to provide discovery in this regard.

We review the trial court's determination regarding discovery sanctions for abuse of discretion. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 618; 550 NW2d 580 (1996).

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in the hospital." Dr. Nehra wanted plaintiff to see Dr. Valle in Chicago, and plaintiff scheduled an April 18, 1997 appointment with Dr. Valle. She also asked whether there were specialists in Michigan she could see. Dr. Valle's office canceled plaintiff's appointment in March 1997 and, after receiving the letter canceling her appointment, plaintiff decided not to reschedule with Dr. Valle, because her insurance would not have covered Dr. Valle's services and because of the travel required. Plaintiff returned to see Dr. Parcells and discussed with him what Dr. Nehra had done, and she asked Dr. Parcells for a specialist in Michigan she could see. Dr. Parcells recommended Dr. Goldrath, whom plaintiff saw on July 18, 1997. Plaintiff testified that Dr. Goldrath performed a pelvic ultrasound, showed her the ultrasound and told plaintiff that he wanted to "do this procedure of sticking a needle here and seeing if it drains out there and I wasn't going to let him," because it scared her, and her "body had been through so much as it is, and here he's talking about a procedure I had never heard of. I just – I was scared." Plaintiff testified that Dr. Goldrath "mumbled and talked under his breath. We couldn't get him to answer an outright question and I just didn't trust him." Plaintiff then returned to Dr. Parcells to get another referral, and sometime thereafter saw Dr. Zack, who was one of plaintiffs' experts at trial.

[9] In closing argument, defense counsel argued that the real reason this case was being litigated was the failure of Drs. Zack, Berke and Nathanson to "open up a textbook" and research Asherman's Syndrome, **their failure to refer** plaintiff to the appropriate physicians for treatment, and that Dr. Zack knew about Drs. Valle and Goldrath and did nothing.

Dr. Davidson testified at trial that plaintiff's white blood cell count was significantly elevated on May 5, 1995, indicating that the infection was present then, and that she had been put on a broad spectrum antibiotic (Teflax) from May 7 through 10, when it was thought she may have had a urinary tract infection, that masked the symptoms of the ongoing infection in her placenta. Dr. Davidson testified at trial that the elevated white count demonstrated an infection that was part of the same infectious process manifested in the placenta pathology examination and report, and that this ongoing infectious process would have caused a bridging of the inflamed tissue, causing the uterus to close up and seal across the row of stitches without any negligence on Dr. Jordan's part, resulting in the formation of scar tissue.

Defendants do not dispute that Dr. Davidson first testified to that effect at trial. It is thus clear that defendants did not provide full discovery to plaintiff. Plaintiff had requested all information of this sort in discovery, specifically in various interrogatories dated August 15, 1997, but defendants did not provide this information, notwithstanding MCR 2.302(E), which imposes a duty to seasonably supplement responses to requests for discovery of this kind.[10]

The new testimony by Dr. Davidson was potentially prejudicial to plaintiff's case, in that the minor nature of the subclinical infection was an important part of plaintiff's case and plaintiff's experts testified that Asherman's could not result from a properly performed C-section with a subclinical infection. On the other hand, Dr. Davidson did not change his theory that there was a subclinical infection that contributed to causing the Asherman's; rather, he augmented his opinion by referring to matters in the medical records that he did not previously identify as significant - -the elevated white blood count and the administration of the antibiotic, Teflax.

The underlying facts were in plaintiff's medical records, and plaintiff should not have been surprised by them. The significance of the facts to Dr. Davidson's conclusions was the material that had been omitted in discovery.

Under these circumstances, we conclude that the trial court did not abuse its discretion in permitting Dr. Davidson to expand upon the reasons for his conclusions. The trial court, in effect, ruled that plaintiff could challenge his opinion by cross-examination based on his deposition. Plaintiff's experts presumably were aware of the earlier blood count and the administration of antibiotics based on the medical records. Plaintiff could have called an expert in rebuttal to challenge Dr. Davidson's testimony that these facts were significant in the assessment of the significance of the infection. On balance, there was no reversible error.

IV

Plaintiff also argues that in cross-examining Drs. Berke and Zack, defense counsel failed to establish the necessary foundation to use the alleged contents of textbooks for impeachment purposes, yet the trial court nonetheless overruled plaintiffs' counsel's objections.

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[10] It is unclear when Dr. Davidson formed the opinion that the earlier infection and antibiotic treatment provided further support for his position that the C-section together with the chorioamnionitis caused plaintiff's Asherman's.

MRE 707 provides:

> To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises . . . on a subject of . . . medicine . . . , 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.

Assuming that error occurred, we conclude that it was harmless. Both parties' experts' testified that Asherman's syndrome is an uncommon condition, is most commonly caused by trauma to the uterus such as a D & C, and that a properly performed C-section does not constitute such trauma. Nearly all the experts testified that they had never seen or heard of a case like plaintiff's where a patient developed severe Asherman's from a C-section. However, the jury also heard defense expert Dr. Valle's deposition testimony that he had treated approximately 400 cases of Asherman's (more than any other expert witness), and that Asherman's occurs in about 2 % of women who have undergone only C-sections, without a D &C or other invasion.

Thus, regardless of whether the jury surmised that the textbooks did indeed state that a C-section alone could constitute trauma sufficient to result in Asherman's, the substance of that testimony was before the jury through Dr. Valle. Since almost all the experts testified that they had never seen a severe case like plaintiff's result from a C-section alone, the contest was clearly between the weight of that testimony and the weight to be accorded Dr. Valle's testimony in light of his extensive experience with Asherman's. It is doubtful that the references to the supposed learned treatises had any impact on the jury's decision in this regard.

V

Plaintiff also argues that defendants' cross-examination of plaintiff's experts Drs. Berke and Zack was intended from the outset to harass, insult and belittle them because their testimony was diametrically opposed to defendants' experts' testimony, and the jury's determination as to credibility would therefore decide the trial's outcome. Plaintiff notes that defense counsel persistently referred to Drs. Berke and Zack as "hired witnesses" earning in excess of one million dollars over the years in "the hired witness business," in a consistently disrespectful, belligerent, harassing and insulting manner, over plaintiff's counsel's vehement objections. Plaintiff also takes issue with certain of defense counsel's remarks in closing argument.[11]

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[11] The challenged remarks were:

> [t]here are such things as hired witnesses. There is also such a thing as an expert witness. And there is a distinction between the two. And the distinction is this.
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> A hired witness is somebody who you give money and he will take the stand and he will say something without really knowing what he is talking about or with a disregard for whether or not it is true.

> When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required 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. [*Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999), quoting *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996).].

The Supreme Court stated in the medical malpractice case of *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995):

> A broad range of evidence may be elicited on cross-examination for the purpose of discrediting a witness. The scope and duration of cross-examination is in the trial court's sound discretion; we will not reverse absent a clear showing of abuse. The trial judge is charged with overseeing attacks on an expert's credibility and insuring that
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> > questions seeking to elicit evidence indicating bias, prejudice or interest and inconsistent testimony or statements are not unduly limited or improvidently extended. The trial judge must also be alert to questions which harass, intimidate or belittle a witness. [quoting *Wilson v Stilwill*, 411 Mich 587, 599; 309 NW2d 898 (1981).]
>
> However, when a case turns on the testimony of one expert compared with that of another, the credibility of each expert is relevant to the disposition of the case. The credibility of a medical expert, therefore, is relevant to the disposition of a medical malpractice case and evidence of an expert's credibility generally is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. [*Wischmeyer, supra* at 474-475.]

Despite the lack of civility and the innuendo defense counsel included in his cross-examination of plaintiff's experts, reversal on this basis is not merited, given that this trial was a battle of the experts, and wide latitude in cross-examination on matters of credibility and bias is permitted. *Wischmeyer, supra.* Defense counsel's remarks in closing argument were inappropriate. However, because plaintiff did not object, and the remarks were not expressly addressed to any expert in particular, we conclude reversal is not warranted.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper