STATE OF MICHIGAN

COURT OF APPEALS

BRUCE BEAGLE,

Plaintiff-Appellant/Cross-Appellee,

v

GENERAL MOTORS CORPORATION, BILLY BURNS, and KEN HORTON,

Defendants-Appellees,

and

CINDY KAYANEK,

Defendant-Appellee/Cross-Appellant.

.

UNPUBLISHED
December 27, 2002

No. 232958
Ingham Circuit Court
LC No. 98-087845-CZ

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Plaintiff Bruce Beagle appeals by right the trial court's order of judgment entered in accordance with the jury's verdict of no cause of action. Defendant Cindy Kayanek cross appeals the trial court's denial of her motion for directed verdict. We affirm.

I. DISMISSAL OF GM

Plaintiff argues that the trial court erred in dismissing GM and granting summary disposition in favor of GM pursuant to MCR 2.116(C)(10). On appeal, plaintiff is essentially arguing that GM could be held vicariously liable for sexual harassment; thus, the trial court erred in granting summary disposition in favor of GM.[1] The trial court's grant of summary disposition

[1] With respect to the assault and battery and intentional infliction claims, plaintiff briefly mentions these claims in three sentences in a footnote. Thus, as GM contends, it would appear that plaintiff is not raising theses issues on appeal. Further, in his appellate reply brief to defendants' brief, plaintiff again only raises the sexual harassment claim and does not respond to GM's claim that plaintiff is not raising the assault and battery and intentional infliction issues. In any event, we conclude that the trial court properly dismissed the issues of assault and battery
(continued…)

is reviewed de novo on appeal. *Munson Medical Center v Auto Club Ins Assoc*, 218 Mich App 375, 382; 554 NW2d 49 (1996). '"When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.'" *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 471; 652 NW2d 503 (2002), quoting *Meyer v Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). "Summary disposition is appropriate where the proffered evidence fails to establish a genuine issue of material fact." *Jager, supra*.

At the October 13, 1999 motion hearing, the trial court dismissed the sexual harassment, assault and battery, and intentional infliction of emotional distress counts against GM. With respect to the sexual harassment (ELCRA) claim, the trial court stated that plaintiff never reported the alleged numerous sexual harassment incidents to anyone at GM until after the August 15th incident. Although plaintiff argues that the trial court engaged in factfinding in making this finding, we disagree. There was no dispute regarding this fact. Plaintiff admitted that he did not report any of the alleged incidents until after the last incident that occurred on August 15. When plaintiff made this report, GM conducted a prompt investigation. The trial court concluded that GM had a good defense to vicarious liability because (1) GM had a program in place to investigate and take appropriate action where sexual harassment is alleged, (2) plaintiff knew about the GM policy and failed to take advantage of it, and (3) GM did take action once a report was made. Thereafter, the court granted summary disposition in favor of GM on the sexual harassment claim.

ELCRA prohibits an employer from discriminating because of sex, which includes sexual harassment. MCR 37.2202(1); MCL 37.2103(i); *Jager, supra*. In this case, plaintiff's sexual harassment claim against GM is based on a hostile work environment. MCL 37.2103(i)(iii) provides:

(…continued)

and intentional infliction. *Travis v Dreis & Krump Manuf Co*, 453 Mich 149, 161, 169-170, 172-173 (Boyle, J.), 191-192 (Riley, J.), 551 NW2d 132 (1996) (employee's exclusive remedy for a personal injury is the recovery permitted under the Worker's Disability Compensation Act (WDCA), except where an employer commits an intentional tort which exists only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury; "deliberate act" includes a situation in which an employer consciously fails to act; an employer is deemed to have intended to injure if it had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge); *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 235; 477 NW2d 146 (1991) (the WDCA bars claims brought by employees against their employer for injuries received in the course of employment unless the claim is one for an intentional tort; an employer is "deemed to have intended an injury if it had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge"); *Green v Shell Oil Co*, 181 Mich App 439, 446-447; 450 NW2d 50 (1989) (an employer is vicariously liable for the intentional tort of an employee if the tort is committed in the course and within the scope of employment; an employer "is not liable if the employee's tortious act is committed while the employee is working for the employer but the act is outside his authority;" summary disposition is appropriate where it is apparent that the employee is acting to accomplish his own purpose).

> (i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
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> * * *
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> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.

In order to demonstrate a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence:

> (1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of sex;
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> (3) the employee was subjected to unwelcome sexual conduct or communication;
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> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
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> (5) respondeat superior. [*Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993); *Jager, supra* at 472-473.]

With regard to the respondeat superior element, our Supreme Court in *Chambers* stated:

> Under the Michigan Civil Rights Act, an employer may avoid liability [in a hostile environment case] "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." . . . Such prompt and appropriate remedial action will permit an employer to avoid liability if the plaintiff accuses either a co-worker . . . or a supervisor of sexual harassment. . . . An employer, of course, must have notice of alleged harassment before being held liable for not implementing action. . . . [*Chambers, supra* at 312, quoting *Radtke, supra* at 396-397.]

The Court in *Chambers, supra* at 312-313, stated further that a plaintiff must establish some fault on the employer's part and that a violation relating to a hostile work environment can only be attributed to the employer if the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment. See, also, *Jager, supra* at 473; *Downer v Detroit Receiving Hospital*, 191 Mich App 232, 234; 477 NW2d 146 (1991). "[N]otice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring." *Chambers, supra* at 319.

Plaintiff claims that GM had both actual and constructive notice that sexual harassment was occurring. Regarding actual notice, the evidence in this matter reveals that GM did not receive actual notice until after the August 15th incident. Immediately thereafter, GM proceeded to investigate the incident to determine what happened and concluded that the incident involved horseplay, which was prohibited by GM policies and resulted in discipline to employees for the horseplay.

With respect to constructive notice, plaintiff asserts that GM knew or should have known of the sexual harassment and hostile work environment because "of the numerous incidents and years of duration." However, plaintiff has failed to demonstrate that sexual harassment was so pervasive that GM knew or should have known about it. *Jager, supra* at 475, 477. From the totality of the circumstances in this case, including the described conduct and the social context in which the conduct occurred, an employer such as GM could have reasonably thought that any conduct in this matter was horseplay rather than conduct that would make it "aware of a substantial probability that sexual harassment was occurring." See *Chambers, supra* at 319. From the evidence, it appears that employees never complained about the conduct in question, and in this case, plaintiff actually admitted to participating in some of it.

In *Oncale v Sundowner Offshore Services, Inc.*, 523 US 75; 118 S Ct 998; 140 L Ed 2d 201 (1998), the United States Supreme Court considered the issue of whether sex discrimination consisting of same-sex sexual harassment was actionable under Title VII of the Federal Civil Rights Act of 1964, 42 USC § 2000e-2(a)(1). In addressing the issue and concluding that same-sex sexual harassment was actionable, the Court made several statements that pertain to the instant matter. The Court in *Oncale, supra* at 81-82, stated:

> [T]he plaintiff . . . must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "*discrimina[tion]* . . . because of . . . sex." . . . The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. . . . [C]ourts and juries [should] not mistake ordinary socializing in the workplace – such as male-on-male horseplay or intersexual flirtation – for discriminatory "conditions of employment." . . . In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationship which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive. [Emphasis in original.]

Although the *Oncale* Court's statements related to federal civil rights law, the statements are relevant in the present situation.[2] Viewing the evidence in a light most favorable to plaintiff, he provided insufficient evidence to meet the respondeat superior element.

Further, it appears, as GM contends, that viewing the evidence in a light most favorable to plaintiff, he failed to provide sufficient evidence (a preponderance of the evidence) to establish the third element, i.e., that he was subjected to "unwelcome" sexual conduct or communication. *Chambers, supra* at 311. "The threshold for determining that conduct is unwelcome is 'that the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive."' *Radtke, supra* at 384. There is no dispute that plaintiff voluntarily told dirty and offensive jokes such as acting out violence against his wife and a woman performing oral sex on a man, engaged in slow dancing with one of his male co-workers, and repeatedly stripped down to his underwear in order to change clothes in the break room where anyone could come in. Moreover, on August 15th just before plaintiff was allegedly "attacked" by his co-workers, plaintiff told his co-workers to get off their "lazy asses" and get back to work. Thus, plaintiff's conduct could easily be viewed as soliciting or inciting the conduct exhibited by his co-workers.

To the extent that plaintiff is asserting that reversal is required because the trial court erred in applying principles announced by the United States Supreme Court relating to the Federal Civil Rights Act, 42 USC § 2200e *et seq.*, we disagree. Even if the trial court improperly applied such precedent, the court ultimately reached the right result in granting summary disposition in favor of GM. *Hawkins v Dep't of Corrections*, 219 Mich App 523, 528; 557 NW2d 138 (1996).

II. PLAINTIFF'S GROSS NEGLIGENCE CLAIM

Plaintiff next argues that the trial court erred in granting summary disposition to "all defendants" on his gross negligence (count V) claim. We disagree. The trial court's grant of summary disposition is reviewed de novo on appeal. *Munson Medical Center, supra*. A trial court's decision regarding the meaning and scope of pleadings falls within the sound discretion of the court, and this Court will reverse only when the trial court has abused that discretion. *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992). "Establishing such an abuse is difficult." *Id*.

With respect to the gross negligence claim against GM, plaintiff's statement of the issue does not include GM, but rather only refers to the individual defendants Horton, Burns, and Kayanek. Generally, no point will be considered that is not set forth in the statement of the questions presented. *Caldwell v Chapman*, 240 Mich App 125, 132; 610 NW2d 264 (2000). Moreover, plaintiff has waived this argument against GM. At the hearing below, plaintiff's attorney stated that her research indicated that GM "would not be responsible on the gross negligence claim." Thereafter, on the record, the court stated twice that plaintiff was withdrawing the gross negligence claim against GM. Plaintiff did not object to the trial court's

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[2] "With respect to coverage, Michigan's [Civil Rights Act] is similar to title VII, although the [Michigan Civil Rights Act] broadens the scope of employers covered." *Jager, supra* at 483.

statements that he was withdrawing the claim against GM. Thus, according to the lower court record, plaintiff withdrew his claim below. Because this claim has been abandoned, this Court will not review plaintiff's argument on appeal as it relates to GM. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001) (a party cannot stipulate a matter below and then argue on appeal that the action was error); see, also, *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997).

Regarding Kayanek, the court ultimately opined that plaintiff had failed to plead gross negligence against Kayanek and stated that plaintiff had not "apprise[d] . . . defendant Kayanek [that she] was to be held liable on a theory of gross negligence." We agree with the trial court. Although plaintiff asserts that the complaint should be read more broadly, the plain language of the complaint indicates that the claim is against GM only. Count V of plaintiff's complaint specifically states that the gross negligence claim is against GM. Further, the allegations contained in the claim are alleged against GM and not the individual defendants. Count V of the complaint failed to provide reasonable notice to Kayanek. *Dacon, supra* at 328, 329. The trial court did not abuse its discretion in determining the scope of plaintiff's complaint. *Id*. at 328.

With respect to the claim against Horton and Burns, it appears from the transcript that plaintiff's attorney recognized that the claim was not viable against Burns and Horton. Specifically, when plaintiff's attorney responded "yes" that she was pursuing a gross negligence claim against the individual defendants, the trial court stated that the gross negligence claim was "not viable against [Burns and Horton] because their actions are alleged to have been intentional, not negligent." In response to the trial court's statement, plaintiff's attorney stated: "Oh, oh. Your Honor, you're correct," and then proceeded to explain why the gross negligence claim applied to defendant Kayanek. Thus, according to the record, plaintiff withdrew and has waived his gross negligence claim against Burns and Horton. *Chapdelaine*, *supra*; *Weiss*, *supra*. In any event, the gross negligence claim and the allegations contained therein specifically pertained to GM and not Burns and Horton. Thus, the complaint failed to provide reasonable notice to Burns and Horton. *Dacon, supra;* see, also, *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (a party may not leave it to this Court to search for the factual basis to sustain his position).

III. EXCLUSION OF EVIDENCE

Plaintiff raises numerous instances in which the trial court improperly excluded the admission of evidence. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Barrett v Kirtland Comm College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). "An abuse of discretion involves far more than a difference in judicial opinion." *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *id*., or only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse of the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). Any error in the exclusion of evidence does not require reversal unless a substantial right of the party is affected. MCR 2.613(A); MRE 103(a); *Ellsworth, supra*.

A. The testimony of Bidwell, Hill, and Molzon

Regarding this issue, plaintiff states: "Core to proving Plaintiff's case, particularly the "Totality" of the environment and credibility, were the prior and similar sexual acts of [Burns and Horton] toward [Bidwell and Hill]." Plaintiff argues that the testimony was admissible under MRE 404(b)(1) and the exclusion of the testimony eviscerated his ability to prove the existence of a hostile environment, pervasiveness, intent, notice, fear, pattern of discrimination, pattern of supervision nonresponsiveness, credibility, and noneconomic damages. Plaintiff also argues that the trial court erred in excluding the similar acts testimony of co-worker Molzon with whom Burns and Horton had worked subsequent to plaintiff.

In this case, the depositions of GM employees Bidwell and Hill indicated that defendants Horton and Burns had engaged in similar acts toward them as plaintiff described. Both Bidwell and Hill described the conduct as "horseplay" and testified that the some of the conduct involved overtly sexual conduct. Hill and Bidwell never reported the "horseplay" to GM supervisors. With regard to this testimony, the court concluded that plaintiff could not present the testimony of Bidwell and Hill in his case-in-chief because it was not relevant and was merely an attempt to bolster plaintiff's credibility with prejudicial evidence of alleged similar bad acts before plaintiff's credibility had even been attacked. In response to plaintiff's argument that the testimony was relevant to the totality of the circumstances of pervasive discrimination and his reliance upon a case that involved racial discrimination in the workplace, the court also stated that the instant case involved a plaintiff who was alleging a very specific set of actions that were aimed at him, not a situation where the entire GM plant was permeated with a particular type of hostility toward a particular minority, such as homosexuals. Nonetheless, the court also told plaintiff that the testimony may turn out to be relevant and could become admissible if the circumstances of the case warranted the testimony (e.g., under rebuttal). At a later hearing to settle the order regarding the matter, plaintiff's attorney stated that she did not envision any circumstances in which Bidwell's and Hill's testimony should come in during plaintiff's case-in-chief, but rather she expected that it would come in under cross-examination when the individuals defendants were on the stand. The trial court subsequently reiterated to plaintiff that defendants could open the door to Bidwell's and Hill's testimony, but plaintiff could not "bootstrap" the admissibility of that testimony. Regarding witness Molzon, the court limited the testimony to the timeframe of February through August 1996 during which the sexual harassment allegedly occurred against plaintiff.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity , or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), our Supreme Court clarified the standard to be applied with respect to MRE 404(b): (1) the evidence must be offered for a proper purpose under MRE 404(b); (2) the evidence must be

relevant under MRE 402 as enforced through MRE 104(b); the probative value of the evidence must not be substantially outweighed by unfair prejudice; and (4) the trial court may, upon request, provide a limiting jury instruction.

We agree with the trial court that the testimony of Bidwell and Hill was prejudicial, irrelevant to plaintiff's case-in-chief, and was an attempt to bolster plaintiff's credibility before it had been attacked. Moreover, after many discussions with the trial judge regarding the admission of the testimony, plaintiff's attorney finally admitted at the July 5, 2000 hearing that she did not have any reason why the testimony of Bidwell and Hill should be admitted during plaintiff's case-in-chief. It appears that plaintiff wanted the testimony of Molzon, Hill, and Bidwell to be admitted in order to show that Burns and Horton acted consistent with their alleged prior and subsequent conduct. This purpose is clearly not allowed by MRE 404(b)(1). Even if the trial court arguably should have allowed the testimony of Molzon, Bidwell, and Hill on the basis of some proper purpose under MRE 404(b)(1), a decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). We do not believe that the trial court abused its discretion in denying the admission of the testimony because the decision was so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation, supra* at 768.

B. The Nemanis Report

Plaintiff argues that the trial court improperly excluded another sexual harassment complaint (the Nemanis report) that another male employee filed against defendant Kayanek that was contemporaneous with plaintiff's employment at GM. Specifically, plaintiff argues that the court erred in finding that the Nemanis report was not impeachment because it was not sexual harassment or discipline.

We agree with the trial court that Kayanek's voice mail message was irrelevant because it was not sexual harassment and could be prejudicial. Further, although Kayanek had discussions with her supervisors regarding her message and was informally counseled by her immediate supervisor, it appears that Kayanek was also told that the message would have no impact on her level, merit, or future consideration for positions. Thus, the trial court was correct in stating that Kayanek did not lie in her deposition about being disciplined. The trial court did not abuse its discretion in excluding the Nemanis report. *Barrett, supra* at 325.

C. GM testimony regarding sexual harassment versus "horseplay" determination

Plaintiff argues that the "trial court erred in excluding testimony from GM witnesses about their determination of sexual harassment in this case whereas their determination that this was "horseplay" was allowed." Plaintiff's vague and cursory argument, which consists of three sentences, is merely a statement of position, provides no references to the record, and does not state which GM witnesses determined that sexual harassment had occurred. *Meagher v Wayne State Univ*, 222 Mich App 700, 718-719; 565 NW2d 401 (1997). In any event, to the extent that plaintiff is arguing that the trial court should not have allowed GM witnesses to testify that the alleged conduct constituted "horseplay," we fail to see, and plaintiff fails to explain, how the trial court's admission of the testimony constituted an abuse of discretion. In fact, during his case-in-chief, plaintiff called witnesses Ronald LaVigne and Michael Breen, who testified about the

investigation and their determination that the conduct was "horseplay." Plaintiff cannot now complain about the witnesses' testimony. "To hold otherwise would allow [plaintiff] to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998); see, also, *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

D. Plaintiff's psychological record

Plaintiff argues that the trial court improperly excluded plaintiff's psychological treatment summary and admitting the voluminous medical records and substantial testimony involving irrelevant and highly prejudicial information. We conclude that the trial court did not abuse its discretion.

First, plaintiff, in his cursory argument, has again failed to support his argument with references to the lower court record. *Meagher, supra* at 719. Plaintiff states, with no explanation, that the Dr. VanDyke's two-page document should have been admitted under MRE 1006, which provides that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." However, plaintiff fails to address the issue of hearsay. In this case, plaintiff made several claims in his complaint that he had suffered psychological injury, including mental anguish and emotional distress, because of the conduct that occurred at GM. The short summary was being offered to prove the truth of the matter asserted, which constitutes "hearsay." MRE 801(c). Plaintiff had to show that the medical summary fell within one of the exceptions under MRE 803, which he failed to do. *People v Huyser*, 221 Mich App 293, 297; 561 NW2d 481 (1997) (a physician's report is hearsay unless it falls within an exception to the hearsay rules). Generally, a document prepared for use in litigation is inadmissible; however, a report, such as a medical record, generated exclusively for business purposes is admissible under MRE 803(6). *Id*. at 297-298. Thus, the trial court did not abuse its discretion in admitting the medical records and denying the admission of the medical summary.

E. Plaintiff's evidence regarding economic damages

Plaintiff argues that the trial court erred in excluding the testimony of his expert economist, Dr. William King, and foreclosing him from proving his economic damages.[3] We

[3] At the end of plaintiff's issue regarding economic damages, plaintiff states that "the record is replete with unmerited hostility, degradation and disparate treatment toward Plaintiff's counsel, her client and the rulings, repeatedly throughout this case and particularly in front of the jury." Plaintiff claims that the trial court was "glaringly disparate to the defense and the records and rulings reflect this." Plaintiff requests that this Court review and address this issue. We conclude that this issue is without merit. First, plaintiff does not raise this issue in his statement of questions presented; therefore, this issue has been waived. *Caldwell, supra* at 132. In addition, plaintiff has waived this issue because his appellate brief gives only cursory treatment of this issue and lacks references to supporting proofs in the lower court record. *Meagher, supra* at 719. Moreover, our review of the record in this matter does not reveal that plaintiff and his counsel were "degraded, humiliated, harshly and publicly reprimanded repeatedly and without reason."

disagree. First, plaintiff gives only cursory treatment to this issue, fails to cite supporting authority, and fails to give references to supporting proofs in the record. *Weiss, supra* at 637; *Meagher, supra* at 716, 719.

In denying plaintiff's request to call Dr. King as a witness, the trial court stated:

> [T]he name of expert witness King was filed late. It was properly objected to. That objection was never responded to, and, therefore, the Defendants had every right to believe that King was not going to be presented as an expert witness. It wasn't unreasonable for them to not take any further steps to find out about his testimony, and it would be prejudicial to Defendants for me to allow Plaintiff to present that testimony when her inaction is what allowed them to believe that King wasn't going to be called.

This Court reviews a trial court's decision to exclude an undisclosed witness for an abuse of discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90; 618 NW2d 66 (2000). In this case, the record reveals that plaintiff did not amend her witness list to include Dr. King until long after the deadline for submitting such list. As stated in Horton's and Burns' appellate brief, it appears, according to the lower court record and docket entry, that plaintiff amended his witness list to include King in September 1999, which was one month before the trial was scheduled to commence and about ten months after discovery closed in November 1998. Because the trial court gave a proper reason for its discretionary ruling, we conclude that no abuse of discretion occurred.

IV. JURY INSTRUCTIONS

Plaintiff argues that the trial court erred in failing to give his requested jury instructions on sexual harassment.[4] We disagree. A trial court's decision regarding jury instructions is reviewed de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

Jury instructions are reviewed in their entirety, and there is no error requiring reversal if, on balance, the parties' theories and the applicable law were fairly and adequately presented to the jury. *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998).

[4] Although we conclude that the trial court did not err in failing to give plaintiff's requested jury instructions on sexual harassment, we also note that in the recent case of *Jager, supra* at 485, this Court concluded that the ELCRA envisioned *employer* liability for civil rights violations that resulted from the acts of its employees who have authority to act on the employer's behalf rather than *individual* liability for those civil rights violations. *Jager* involved an action for sexual harassment brought under ELCRA. Assuming without deciding that *Jager* should be given full retroactive effect, then it would appear that this issue would be moot because it deals with jury instructions on a sexual harassment claim against individuals rather than an employer and such a claim against individuals is not viable. *Pohutski v City of Allen* Park, 465 Mich 675, 695-697; 641 NW2d 219 (2002); *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986); *Adams v Dep't of Transportation*, ___ Mich App ___; ___ NW2d ___ (Docket No. 230268, issued October 11, 2002), slip op p 2 (judicial decisions are generally given full retroactive effect unless the decision clearly established a new principle of law that resulted from overruling case law that was clear and uncontradicted). In *Jager*, the plaintiff's delayed application for leave before the Supreme Court is presently pending.

"Supplemental instructions need not be given if they would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly, and impartially." *Id.* It is error to instruct a jury regarding a matter that is not sustained by the evidence or the pleadings. *Id.* This Court "will only reverse for instructional error where failure to do so would be inconsistent with substantial justice." *Case, supra*.

First, plaintiff's appellate brief presents only cursory treatment of this issue. Plaintiff's argument is brief, vague, and provides no references to supporting proofs in the record. *Meagher, supra* at 716, 719 (this Court can decline to address an issue when the party's appellate brief gives only cursory treatment of the issue). In any event, this Court will address this issue. In addition, contrary to plaintiff's assertion in his statement of the issue, the trial court did not deny "all" of plaintiff requested instructions.

The lower court record reveals that the trial court carefully examined plaintiff's requested instructions after the evidence had been presented in the case. After reviewing the jury instructions that were given in their entirety, we conclude that the trial court's instructions presented the theories of the parties and the applicable law fairly and adequately. Further, as previously stated, this Court "will only reverse for instructional error where failure to do so would be inconsistent with substantial justice." *Case, supra*. With respect to plaintiff's sexual harassment claim, the court instructed the jury as follows:

> First, I will explain to you the elements of Plaintiff Beagle's first claim against each of the Defendants for sexual harassment. Sexual harassment and assisting in sexual harassment is discrimination prohibited by law. Sexual harassment means verbal or physical conduct or communication of a sexual nature unwelcomed to the Plaintiff if under all the circumstances a reasonable person would have perceived the conduct or communication as being, number one, substantially interfering with the Plaintiff's employment, or, number two, having the purpose or effect of creating an intimidating, hostile, or offensive employment environment.
>
> The Plaintiff has the burden of proving that he was sexually harassed by the Defendants. Individual persons may be held liable under Michigan law. Individual co-workers may be held liable for their acts in violation of Michigan law. An individual's supervisor may be held liable under Michigan law if she condoned, encouraged, or participated.

As the trial court correctly stated, plaintiff's additional requested instructions appear to have been inapplicable or were covered by the jury instructions that were given. For example, plaintiff's special instruction no. 3 regarding "employment as civil right" is basically covered by the court's statement that sexual harassment is discrimination prohibited by law and its definition of sexual harassment pertaining to employment. The same is true of plaintiff's requested instruction no. 7 regarding hostile work environment, which was covered in the court's definition of sexual harassment. Further, plaintiff's proposed instruction no. 10 regarding conspiracy was inapplicable because conspiracy was never alleged or presented at trial. Giving this instruction would have been both confusing to the jury and erroneous because it would have been error to instruct the jury regarding conspiracy when a conspiracy claim was not sustained by the evidence or the pleadings. *Central Cartage, supra* at 528. Plaintiff's other requested instructions were

unnecessary because they added "nothing to an otherwise balanced and fair jury charge nor enhance[d] the ability of the jury to decide the case intelligently, fairly, and impartially." *Id.* Reversal is not warranted on this issue.

V. CUMULATIVE ERROR

Plaintiff argues that the trial court committed cumulative error in this matter that resulted in the jury's no cause verdict. "[A]t times, the cumulative effect of a number of minor errors may require reversal." *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 471; 624 NW2d 427 (2000). Because no error occurred in this case, reversal is not required. See *id*.

VI. CROSS APPEAL

On cross-appeal, defendant Kayanek argues that the trial court erred when it denied her motion for directed verdict at the close of plaintiff's proofs with respect to plaintiff's claims of assault and battery and intentional infliction of emotional distress.[5] Because reversal is not required on any of plaintiff's issues, this Court need not address Kayanek's cross appeal.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Michael R. Smolenski

[5] In response to plaintiff's jurisdictional challenge to Kayanek's cross appeal, we conclude that plaintiff's challenge is without merit. See *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993) (failure to file cross appeal precludes review of the issue).