STATE OF MICHIGAN

COURT OF APPEALS

BRUCE HALVERSON and MARGARET HALVERSON, Plaintiffs-Appellants,	UNPUBLISHED November 21, 2006
v	No. 264463 Dickinson Circuit Court
JOHN MICHAEL GARRETT, M.D., and JOHN MICHAEL GARRETT, M.D., P.C., Defendants-Appellees.	LC No. 95-008833-NH

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiffs Bruce Halverson and Margaret Halverson[1] appeal as of right from a judgment of no cause of action in favor of defendants John Michael Garrett, M.D., and John Michael Garrett, P.C.,[2] following a jury trial. We affirm.

This medical malpractice case has a lengthy procedural history. In 1993, plaintiff suffered serious damage to his left eye that allegedly resulted from complications attendant to radial keratotomy ("RK") surgery performed by defendant, during which plaintiff's cornea was perforated. A jury trial in 1999 resulted in a judgment of no cause of action. In a prior appeal, this Court reversed that judgment because of attorney misconduct and remanded the case for a new trial. *Halverson v Garrett*, unpublished opinion per curiam, issued March 13, 2001 (Docket No. 223206). A second trial ended in a mistrial. The case was tried a third time in August 2004, and a jury again returned a verdict of no cause of action. This appeal followed.

[1] Because Margaret Halverson's claims are derivative, and her participation in this appeal is limited to challenging the trial court's award of costs, the singular term "plaintiff" is used to refer to plaintiff Bruce Halverson only.

[2] Because the claims against the professional corporation are derivative, the singular term "defendant" is used to refer to defendant Dr. John Garrett only.

I

Plaintiff first argues that he was again deprived of a fair trial by defense counsel's misconduct. Plaintiff raised this same issue in a motion for a new trial, which the trial court denied.

A trial court's decision granting or denying a motion for a new trial will not be reversed absent a palpable abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997). A new trial may be granted for, among other things, "[i]rregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial," or "[m]isconduct of the jury or of the prevailing party." MCR 2.611(A)(1)(a) and (b).

When reviewing claims of attorney misconduct, "'the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless.'" *Rogers v Detroit*, 457 Mich 125, 147; 579 NW2d 840 (1998), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), overruled on other grounds by *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). "If the claimed error was not harmless," but is unpreserved, the appellate court "must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial." *Rogers*, *supra* at 147, quoting *Reetz*, *supra* at 103. See also *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 292; 602 NW2d 854 (1999).

"While a lawyer is expected to advocate his client's cause vigorously, 'parties are entitled to a fair trial on the merits of the case, uninfluenced by appeals to passion and prejudice.'" *Wayne Co Bd of Rd Commr's v GLS LeasCo, Inc*, 394 Mich 126, 131; 229 NW2d 797 (1975) (citation omitted). Counsel may not seek to "divert the jurors' attention from the merits of the case and to inflame the passions of the jury." *Badalamenti*, *supra* at 292; see also *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 770-778; 685 NW2d 391 (2004).

A

Before trial, defense counsel announced that he intended to introduce testimony concerning the so-called 11th-hour warning, because he believed that the episode had taken place before plaintiff's first corneal transplant and, therefore, was not covered by the trial court's order prohibiting reference to plaintiff's psychotic episodes, which were caused by an anti-rejection drug that plaintiff received after the transplant.

Defendant testified that, after plaintiff's last visit on August 10, 1993, but before his August 16 transplant, he received a telephone call from plaintiff who told him that he "better repent or [he] wouldn't make it through the night." Defendant interpreted this as a threat on his

life. Plaintiff testified that he made the call on August 28 or 29, 1993, after his first corneal transplant.[3] The issue was not brought up again.

To the extent the 11th-hour warning occurred before the transplant, this episode was marginally relevant to plaintiff's credibility. But there was a question of fact concerning whether it occurred before or after the transplant. Given the trial court's order prohibiting mention of plaintiff's psychotic episodes after the transplant, the trial court should have resolved that question of fact precedent to admissibility. See MRE 104. But the question before us is whether defense counsel committed misconduct, not whether the trial court committed an evidentiary error. We conclude that defense counsel did not engage in misconduct by advocating his client's position that the threat took place before the transplant. Regardless, considering that the testimony concerning the telephone call was brief and isolated, even if it was improper for defense counsel to raise this subject, it was not so prejudicial to deprive plaintiff of a fair trial.

B

Plaintiff next argues that it was improper for defense counsel to state during closing argument that altering medical records is a felony and that, in order to find defendant liable for malpractice (for having perforated not only the cornea, but also the iris), the jury would have to find that defendant altered the medical records. We disagree.

From his opening statement through closing argument, plaintiff repeatedly accused defendant of altering the medical records or downplaying plaintiff's symptoms. Dr. Philip A. Shelton, plaintiff's expert in RK surgery, theorized that defendant breached the standard of care by perforating the iris during surgery, when the anterior chamber shallowed, resulting in blood within the chamber. He admitted, however, that the medical records did not contain any evidence that the chamber shallowed or that the iris was perforated during surgery. Dr. Shelton conceded that, in order to find that defendant was negligent in perforating the iris, the jury would have to conclude that the medical records were either altered or incomplete. Defense counsel's comments during closing argument were a fair response to plaintiff's arguments and theories, and did not constitute misconduct.

C

In his opening statement, plaintiff's counsel argued that defendant intentionally delayed referring plaintiff to Dr. Richard Lindstrom because he was waiting for the blood in the anterior chamber to disappear. In his direct examination of defendant, defense counsel elicited that the delay in the referral was due to plaintiff's schedule and plaintiff's desire to get better on his own, and that defendant not only set up the appointment with Dr. Lindstrom, but paid for plaintiff's airfare to Minneapolis when the Air Lifeline service was unable to take him. Defense counsel properly elicited this testimony in response to plaintiff's theory of the case. There was no misconduct.

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[3] During the first trial, the testimony was undisputed that the 11th-hour warning call occurred after the first transplant. *Halverson, supra*, slip op at 3 n 2.

D

Plaintiff's counsel began his closing argument by telling the jury that he had allotted two weeks for trial and, to his surprise, they had finished on schedule. In defense counsel's closing argument, counsel informed the jury that defendant was not present during closing argument because he was called away on an emergency. He also stated that closing arguments had been delayed for an hour while defendant set up "his thing." Defense counsel told the jury that defendant did not want to delay the case by asking for an adjournment, that the case had dragged on too long, and that, while plaintiff's case took a week and a half, the defense presented its case in a day and a half. Later, defense counsel mentioned that, although he had a tape (apparently referring to prior testimony from Edward Berla), he decided not to play it because he "wanted to get you guys out of here. That's why our case was so brief." Counsel added that, if he had spent as much time presenting defendant's case as plaintiff's counsel, the trial would have taken another week and a half.

The record discloses that defense counsel's comments concerning the length of plaintiff's case were factually accurate, except for the argument concerning the delay before closing arguments. Instead, the record shows that the trial court heard plaintiff's motion for a directed verdict from 9:12 until 9:17 a.m., heard defendant's objections to plaintiff's visual aids from 9:50 until 10:01 a.m., and that closing arguments immediately followed. Nonetheless, none of counsel's comments were particularly prejudicial and, in the context of the entire trial, we cannot conclude that they deprived plaintiff of a fair trial.

E

Before jury selection, plaintiff's counsel complained that defendant had issued a press release concerning his volunteer work in Africa two weeks before trial. Defense counsel responded that defendant had been doing volunteer work for 20 years, that his office manager issued the press release six weeks before trial, and that the timing of its appearance in the newspaper was coincidental. He added that plaintiff and his family had also committed various acts of misconduct against defendant and that the court should rein them in too. The court admonished both attorneys and their clients to behave appropriately or they would be held in contempt.

We find no basis for concluding that defense counsel engaged in misconduct that denied plaintiff a fair trial. Plaintiff failed to show that defense counsel was responsible for the press release. Additionally, during voir dire, the potential jurors were questioned concerning their ability to be fair and impartial. Thus, even if the press release could be imputed to defense counsel, plaintiff has failed to show that it deprived him of a fair trial.

F

During trial, while discussing that incisions are made in the cornea during cataract surgery, defendant stated that, "in the old days, and I still do this when I go to Africa, we make a—almost 180 degree incision over there because their cataracts are so thick." The court excused the jury and warned defendant to be more careful and not to mention his volunteer work again. After a break, trial resumed without further mention of the matter. Plaintiff has failed to show that defense counsel was responsible for the unsolicited comment. Furthermore,

considering that the comment was very brief and isolated, there is no reasonable basis for concluding that it deprived plaintiff of a fair trial.

G

During closing argument, defense counsel argued that a bad result did not mean that defendant committed malpractice, and that the risks had been properly explained to plaintiff, including the risk of death or losing an eye. The argument about informed consent was a fair comment on the evidence, given plaintiff's claim of lack of informed consent. Further, as discussed in part II, *infra*, the comment that a bad result does not equate to malpractice is an accurate statement of the law. Neither comment was improper.

H

Defense counsel elicited testimony that defendant did not charge plaintiff for postoperative care. This testimony was relevant to a potential determination of damages and to plaintiff's argument that defendant was motivated by greed. It does not support plaintiff's claim of attorney misconduct.

I

Dr. Shelton testified that he was charging plaintiff $7,500 a day for his services, and that he charged for one day for trial and one day for the night before, when he arrived at 8:00 p.m. and met with plaintiff's counsel, and that he would charge plaintiff for the next day, if necessary. During closing argument, defense counsel repeated these figures and added that, "[r]eally what you have is $15,000 dollars for one day's work for him coming in here, by his own admission." Counsel calculated that, if Dr. Shelton testified 261 days a year, i.e., 365 days less weekends, at $15,000 a day, he would earn $3.9 million a year. Defense counsel argued that the jury should consider Dr. Shelton's possible bias in evaluating his credibility.

Although defense counsel's closing argument was a stretch, it was supported by the facts admitted by Dr. Shelton. Further, Dr. Shelton's fee and his alleged status as a professional witness were both relevant to his credibility. See *Hunt v Freeman*, 217 Mich App 92, 97-98; 550 NW2d 817 (1996). Accordingly, defense counsel's comments were not improper.

J

On cross-examination, defendant admitted that he charged $1,500 an eye for RK surgery, and that he earned $2.9 million dollars a year performing eye surgeries. However, the trial court sustained defense counsel's relevancy objection when plaintiff asked whether RK surgery "was the big business that [defendant] wanted to tap into" with his radio and television commercials. Defense counsel argued that a doctor's earnings from the challenged surgery are "completely off limits in a malpractice case," and the trial court agreed.

Plaintiff argues that, "in stark contrast" with this ruling, defense counsel maintained, during closing argument, that defendant had no motive to get rid of the long consent form that was in plaintiff's chart, because it would have helped him prove that plaintiff was advised of all possible surgery risks, and had watched defendant's two informational videos. Defense counsel

added, "On the other hand, there is somebody in this courtroom, somebody who is looking for a million and a half dollars or so, there is somebody in this courtroom who would have a motive for that form not being there."

Regardless of whether the trial court properly decided the question of relevancy, defense counsel's objection cannot be considered misconduct. In any event, plaintiff was not prejudiced by the ruling because defendant admitted how much he charged for RK surgery, and that he earned a total of $2.9 million a year performing surgeries. Additionally, defense counsel's argument concerning plaintiff's financial incentive to make the long consent form disappear from the chart was a fair comment on the evidence and did not constitute misconduct.

K

At trial, plaintiff's counsel attempted to introduce letters from the medical chart into evidence, and defense counsel complained that the chart should be kept together, and that "[w]e're already missing parts of the original chart that were taken out after he took it—." The trial court agreed, and instructed plaintiff's counsel to keep the chart together, and to use copies instead of removing items from the chart. Considering the controversy concerning the accuracy of defendant's chart, defense counsel's complaint was justified, and did not constitute misconduct.

On direct examination, defendant was asked to find something in the chart and, when he could not find it, defense counsel commented, "[w]ell it looks like we have another part of the chart that has disappeared." Later, defense counsel was unable to find plaintiff's letter requesting information under a pseudonym and commented, "Lo and behold, it doesn't appear to be in with the exhibits. We'll return to that later." When going through the chart in chronological order, defendant was momentarily unable to find his notes for June 10, 1993, and stated that "somebody took it out of there," to which defense counsel responded that it was "[j]ust in the wrong order."

The first two comments, while sarcastic and perhaps improper, were not so prejudicial as to deprive plaintiff of a fair trial. The last comment was made by defendant and should not be imputed to defense counsel. In any event, plaintiff was not prejudiced because the missing item was immediately located. There was no misconduct.

L

John Hollingsworth, an employee for a company that made corneal topography machines, testified that he found out in approximately 1995 that he might be a witness in this case. His deposition was scheduled to be taken in 1998, "but it was cancelled by [plaintiff's] attorney, to my knowledge." The docket sheet reveals that, on May 4, 1998, plaintiff moved to adjourn Hollingsworth's de bene esse deposition. It appears that the motion was granted on June 15, 1998, when the trial was adjourned. On February 22, 1999, the deposition was rescheduled, but apparently was never taken. Hollingsworth did not testify during plaintiff's first trial.

Defendant subpoenaed Hollingsworth to testify at this trial, and paid for his airfare and hotel room. During cross-examination and at closing argument, plaintiff's counsel attacked the accuracy of Hollingsworth's recollection. He even commented, "God love 'em—I should have

asked him how old he was." In response, defense counsel argued that he "tried getting [Hollingsworth's] deposition years ago and they blocked it. Had his deposition scheduled and they blocked it." Contrary to plaintiff's argument, defense counsel's comment is supported by the record. Further, it was responsive to plaintiff's arguments and, therefore, was not improper.

M

During closing argument, defense counsel argued that, in Dr. Michael B. Shapiro's photographs,[4] the perforation, or suture hatch marks, can be seen at 3:00 o'clock, while the synechiae adhesion of the iris was located approximately at 12:00 o'clock to 1:00 o'clock; therefore, it "doesn't relate at all to this—to where this minor perforation was, which is no big deal." Plaintiff argues that this argument is misleading because plaintiff testified that the RK surgery incisions were not made exactly at the clock positions, as they would have been by a machine, and that, for example, the 12:00 o'clock incision was actually made at 12:30 o'clock, because it was done by hand. Plaintiff adds that defendant testified that the surgical chart states that it happened at the 9:00 o'clock position because the surgeon stands at the head of the patient, who is lying down, thereby inverting the clock.

Plaintiff's argument is without merit. Whether the damage to the iris was caused by the corneal perforation was an overriding issue in the case. Accordingly, both parties introduced evidence concerning whether the location of the perforation correlated to the areas of atrophy and translumination on the iris. Defense counsel did not commit misconduct by advocating his client's position during closing argument. His argument was a fair comment on the evidence.

In sum, unlike in *Gilbert*, *supra*, plaintiff has failed to show that defense counsel engaged in conduct that was designed to distract, inflame, or prejudice the jury, and that deprived plaintiff of a fair trial. The trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the basis of attorney misconduct.

II

Next, plaintiff argues that the jury's verdict is against the great weight of the evidence. We disagree.

A new trial may be granted where the verdict is against the great weight of the evidence, but "'only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.'" *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (citation omitted). "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of credibility 'for the constitutionally guaranteed jury determination thereof.'" *Id*. at 642 (citation omitted). The trial court's decision is reviewed for an abuse of discretion. *Id*. at 648 n 27.

[4] Dr. Shapiro is an ophthalmologist who sub-specializes in corneal transplants and corneal diseases. At trial, he testified as an expert on behalf of plaintiff.

"In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). This same standard is applicable to plaintiff's informed consent claim. See, e.g., *Paul v Lee*, 455 Mich 204, 211-213; 568 NW2d 510 (1997), overruled on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999). Evidence of a bad result "is not in itself evidence of negligence." *Paul*, *supra* at 212, quoting *Roberts v Young*, 369 Mich 133, 138-139; 119 NW2d 627 (1963); see also *Locke v Pachtman*, 446 Mich 216, 231; 521 NW2d 786 (1994).

Plaintiff's theory was that defendant violated the standard of care by perforating through the cornea, into the iris, causing bleeding into the anterior chamber, which set off the chain of events that eventually culminated in plaintiff needing a corneal transplant. Plaintiff also claimed that defendant had failed to obtain plaintiff's informed consent for the surgery because the consent forms failed to inform him of the risk of perforation, and because defendant's advertisement was misleading. The jury found no violation of the standard of care and, therefore, did not reach the remaining elements of plaintiff's malpractice case.

Plaintiff argues that defendant did not have sufficient training and experience to do the surgery. However, Dr. Stanley Grandon, the "father" of RK surgery in the United States, testified that defendant was well trained. He also testified that defendant was a good and careful surgeon, and had a lot of experience with other types of microsurgery. Thus, defendant's training and experience was a factual issue for the jury.

Plaintiff argues that defendant set the knife too deep, and that defendant's records fail to show that he followed Dr. Grandon's technique precisely. Defendant testified that he set the knife as he was taught, and followed Dr. Grandon's technique. He also testified that Dr. Grandon told him that his pachymetry machine was fine. Dr. Grandon testified that, as long as a surgeon can achieve 90 percent incisions consistently, it is not necessary that he use the same instruments that Dr. Grandon uses. Dr. Grandon also testified that setting the knife at the shallowest depth plus 30 microns is what he taught defendant to do. Thus, whether defendant performed the surgery as he was taught was also a disputed factual issue.

Plaintiff argues that defendant's testimony concerning the surgery is not supported by his records. He also challenges the logic and consistency of defendant's chart notations. Defendant testified that he wrote down what he deemed necessary to help him care for his patients. He maintained that he performed the surgery as he was taught, even if he did not write everything down. Defendant also testified that he never altered or misrepresented plaintiff's medical records. Once again, the accuracy of the medical records was a factual issue for the jury to resolve.

Plaintiff argues that defendant lied about the "Dear Patient" letter. Defendant testified that he was mistaken in his earlier deposition. He maintained that he obtained the letter from another doctor by the name of Dr. Lee Nordan in May 1993, and that he never used anything similar before that. Defendant also noted that Dr. Nordan's initials were at the bottom of the letter produced by plaintiff. Again, the circumstances involving the Dear Patient letter was a disputed factual issue at trial.

Plaintiff argues that witnesses saw blood in his eye. Although witnesses testified that plaintiff's eye was completely red, blood red, they did not explicitly testify that they actually saw blood in plaintiff's eye. Plaintiff claimed that there was blood in his eye, and that it would pool to the bottom when he stood or sat upright. Defendant testified that there was no blood in the anterior chamber and, if there had been, plaintiff would not have been able to see the sutures. Some blood on the limbus was normal after RK surgery. Thus, whether there was blood in the anterior chamber was also a disputed factual issue.

Plaintiff argues that a perforation through the cornea and into the iris was the only scientific way that the whole chain of events could have happened. Defendant and his experts testified that the damage to the iris did not correspond to the perforation of the cornea. Therefore, there was no perforation of the iris during surgery. Rather, the damage to the iris was the result of inflammation, which was caused by the corneal edema. The edema also caused plaintiff's glaucoma and his cataract. While Dr. Grandon candidly admitted that he did not know what triggered all of plaintiff's complications, he testified that a perforation was not a violation of the standard of care, and that defendant reacted appropriately when it happened. Whether defendant perforated plaintiff's iris was a factual issue to be resolved by the jury.

Concerning plaintiff's informed consent claim, plaintiff argues that defendant failed to disclose that plaintiff was his first RK surgery patient. But defendant and Hollingsworth both testified that plaintiff was explicitly told that he was defendant's first RK surgery patient. Plaintiff also argues that defendant misrepresented his experience. Defendant testified that he did not, because the *Patient's Guide to Refractive Surgery* that plaintiff received was meant to apply to all refractive surgeries, not just RK surgery. Again, whether plaintiff was provided with sufficient and accurate disclosure was a question of fact.

In sum, all of plaintiff's "great weight" arguments involve disputed factual questions where the jury was required to assess the credibility of witnesses testifying to diametrically opposed assertions of fact. In essence, plaintiff argues that the jury should not have believed defendant and his experts because plaintiff and his experts presented evidence to the contrary which, plaintiff argues, was far more plausible.

Plaintiff has failed to show that the evidence heavily preponderates against the verdict. Rather, plaintiff has shown only that there were many and varied factual disputes involved in this trial. Plaintiff has also failed to so thoroughly discredit the evidence presented by defendants so as to deprive it of all possible credibility, such that the jury could not reasonably believe it. Thus, an invasion of the jury's fact-finding role is unwarranted in this case. The trial court did not abuse its discretion in refusing to overturn the jury's verdict.

III

Plaintiff next argues that the trial court erred in admitting unreliable expert testimony proffered by defendant, in violation of *Gilbert*, *supra*, and *Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004). We disagree.

Contrary to plaintiff's argument on appeal, he did not object to the reliability of defendant's, Dr. Grandon's, or Dr. Jay Novetsky's testimony below. Rather, he objected only to Dr. Lindstrom's testimony, and does not renew that objection on appeal. Therefore, this issue is

unpreserved. More importantly, plaintiff never mounted a *Gilbert* challenge to defendant's extrapolation of his experience with perforations and anterior chamber collapses occurring during the course of cataract surgery, which was a recurring theme at trial. Thus, we conclude that this issue has been waived. See *Craig*, *supra* at 82. An "apparent error that has been waived is 'extinguished'" and, therefore, is not susceptible to review on appeal. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001). Accordingly, we decline to consider this issue further.

IV

Plaintiff next argues that the trial court erred in precluding testimony concerning the "Dear Patient" letter. We agree, but find that reversal is not warranted.

Whether evidence concerning the content of the original "Dear Patient" letter was admissible was an issue raised below and decided by the trial court. In order to preserve an alleged error for appeal, however, a party must object below on the same ground asserted on appeal. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). In this case, plaintiff never raised MRE 1008, which states that it is up to the jury to determine whether an original writing ever existed and whether the proffered evidence accurately reflects its contents. Therefore, this issue is unpreserved. Unpreserved issues are reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

In this case, plaintiff introduced the 1995 version of the Dear Patient letter which he admittedly obtained by seeking information from defendant, 18 months after plaintiff's surgery, using a pseudonym. Defendant admitted having previously testified that he obtained the letter from Dr. Grandon in 1991. At trial, however, he maintained that he made a mistake, and that he obtained the letter from Dr. Nordan in May 1993, *after* plaintiff's surgery. He further maintained that he had not previously used anything similar.

Plaintiff later sought to testify that he received a similar letter *before* his surgery which, like the 1995 letter, falsely stated that defendant had performed 8,000 RK surgeries. Plaintiff argues that he relied on the misinformation contained in the letter in deciding to undergo RK surgery with defendant, thus voiding his informed consent. However, plaintiff admitted that the letter that he allegedly received was not identical to the 1995 letter that was introduced. The trial court refused to allow plaintiff's testimony concerning the letter he received.

Under MRE 1002 "[t]o prove the content of a writing, . . . the original writing . . . is required, except as otherwise provided in these rules or by statute." Further, MRE 1004 states:

> The original is not required, and other evidence of the contents of a writing . . . is admissible if—
>
> (1) All originals are lost or have been destroyed . . . or
>
> (2) No original can be obtained by any available judicial process or procedure . . . .

Clearly, the 1995 Dr. Nordan letter was not a "duplicate" of the alleged earlier letter and, therefore, was not admissible under MRE 1003 and MRE 1001(4) to prove the contents of the

alleged earlier letter. However, plaintiff claims that his testimony concerning the earlier letter was admissible under MRE 1004(1) and (2), because all originals were lost or destroyed, or could not be obtained by legal process.

Under MRE 104(a), "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court." Additionally, MRE 1008 provides that, "[w]hen the admissibility of other evidence of contents of writings . . . under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104." As noted by plaintiff on appeal, however, MRE 1008 also states:

> [W]hen an issue is raised (a) *whether the asserted writing ever existed*, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) *whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine* as in the case of other issues of fact. [Emphases added.]

We conclude that the trial court plainly erred in determining, under MRE 104(a), that plaintiff had failed to sufficiently show that an earlier version of the letter ever existed. Under MRE 1008, the question whether the earlier letter existed, and whether the 1995 letter and plaintiff's testimony accurately reflected the contents of that alleged earlier letter, were all questions for the jury. The trial court committed plain error in making that determination itself.

However, the jury was instructed that it could consider defendant's prior deposition testimony (where he said he obtained the letter from Dr. Grandon in 1991) for its truth. Additionally, plaintiff introduced other evidence in support of his claim that defendant misrepresented his experience with RK surgery and the risks attendant to the same.

Plaintiff and his wife testified that they both heard defendant's television and radio ads, and believed that defendant was trustworthy. Plaintiff received a copy of a *Patient's Guide to Refractive Surgery*, which states that defendant's staff had successfully performed tens of thousands microsurgical and laser procedures. Plaintiff believed that the document implied that defendant had been involved in helping research RK surgery since 1979. On the basis of the materials plaintiff received and his conversations with defendant, plaintiff came to the conclusion that defendant was very experienced in performing RK surgery.

Defendant admitted that the literature given to plaintiff may have stated that only 15 percent of patients had to return for further corrections. Defendant stated that he could not answer a question concerning whether he had represented to plaintiff, before the surgery, that he had been performing RK surgery since 1979, and had performed over 10,000 procedures.

Plaintiff claimed that, if he had known that he was defendant's first RK surgery patient, he would have left. Plaintiff claimed that defendant offered to do the surgery for $500 an eye in exchange for his participation in a television ad campaign, not because he was defendant's first patient. Rather, he believed that he was defendant's first RK surgery patient "in private practice." In his deposition, however, plaintiff testified that defendant told him that he had decided to start doing RK surgery because of new technology, and that he had never done it in the past.

Defendant admitted asking plaintiff to appear in a television commercial, but that was not the reason why plaintiff was given a discount. Rather, plaintiff received a discount because he was defendant's first RK surgery patient. Although the forms did not specifically inform plaintiff that he was defendant's first RK surgery patient, defendant insisted that he told plaintiff that he was his first RK patient. Hollingsworth confirmed that he heard defendant inform plaintiff him that he would be his first, or one of his first, RK surgery patients, and that plaintiff was comfortable with that.

On this record, plaintiff has failed to show that this unpreserved error affected his substantial rights. Therefore, reversal is not warranted.

V

Plaintiff next argues that the trial court made other erroneous evidentiary rulings that deprived him of a fair trial. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

Plaintiff argues that the trial court erred in allowing defendant to introduce a photograph of an eye after RK surgery that showed 16 incisions (compared to plaintiff's eight), because the eye was more malformed than plaintiff's. Plaintiff argues that, because of these differences, the photograph was irrelevant and prejudicial.

Under MRE 402, irrelevant evidence is not admissible. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Defendant introduced a photograph of an eye after RK surgery that he obtained from a book or manual in his office. The photograph "shows a refractive—RK procedure with spoke incisions, and it shows some subconjunctival hemorrhage at the side [sic, site?] of the incisions." After voir dire, plaintiff's counsel objected that the photograph showed 16 incisions, whereas plaintiff's surgery only involved eight incisions. The trial court overruled plaintiff's objection, finding that plaintiff's argument went to the weight of the evidence, not its admissibility.

We believe that the photograph was relevant to support defendant's claim that the presence of some blood (and irritation) is normal during RK surgery (where the corneal incisions meet the limbus). Further, we disagree with plaintiff's claim that the photograph was unduly prejudicial. Indeed, the photograph may have been helpful to plaintiff because, according to defendant's own testimony, it does *not* show "an alarmingly red, horrible eye after RK surgery," which is what plaintiff's witnesses testified that plaintiff's eye looked like. In other words, while the photograph showed a normal outcome, plaintiff's witnesses testified that his eye looked much worse, tending to support an inference that something must have gone wrong. Thus, the trial court did not abuse its discretion in admitting the photograph.

Plaintiff next argues that the trial court erred, and deprived him of a fair trial, by not permitting him to present the testimony of defendant's former employee, Linda Ovist, who would have testified that plaintiff was in significant pain and discomfort before leaving defendant's office immediately after the surgery.[5]

"Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), quoting *People v De Lano*, 318 Mich 557, 570; 28 NW2d 909 (1947). "The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination." *Figgures*, *supra* at 399. "[T]he test of whether rebuttal evidence was properly admitted is . . . whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Id*. "As long as evidence is responsive to material presented *by the defense*, it is properly classified as rebuttal, even if it overlaps evidence admitted in the [plaintiff's] case in chief." *Id*. (emphasis added).

In this case, plaintiff clearly raised in his case in chief that he was feeling poorly immediately after the RK surgery, including that he felt nauseous, that he had to lie down before leaving, that he was unable to eat his birthday cake, and that he had to be helped to his car and laid down in the back seat on the way home. Ovist's testimony would have merely corroborated that plaintiff felt poorly after surgery. The trial court correctly ruled that Ovist's testimony could have been introduced in plaintiff's case in chief, and that she was not being offered to rebut any issues raised by defendant. The fact that defendant and Hollingsworth testified to the contrary (that plaintiff was not feeling ill immediately after surgery, and ate his birthday cake) does not make Ovist's testimony proper rebuttal. The trial court did not abuse its discretion in excluding it.

Defendant next argues that the trial court erred and deprived him of a fair trial by not allowing him to introduce certain photographs allegedly taken by Dr. Shapiro, which defendant had allegedly stipulated to allow into evidence.

Plaintiff misrepresents the record. During Dr. Shapiro's testimony, three slides were admitted into evidence, without objection, as plaintiff's exhibits 18, 19, and 20. They were later shown to the jury. The next day, Dr. Shapiro's deposition was played for the jury. After the deposition, plaintiff moved to introduce into evidence the Polaroid photographs used by Dr. Shapiro during his deposition. Although plaintiff's counsel stated that he "used them to make exposures," he added that "I'll bring them in tomorrow. I just don't have them." Defense counsel stated that he "would like to look at them to make sure the [sic] same thing we have had before."

The next day, immediately before Dr. Shelton's testimony, defendant inquired into another slide show that plaintiff was setting up. Plaintiff's counsel stated that he intended to

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[5] Defendant believed that Ovist intended to testify about the presence of blood in plaintiff's eye, but that is not what plaintiff's counsel represented.

show "the three pictures that—that were the Dr. Shapiro slides," taken on August 9, 1993. Plaintiff's counsel showed defense counsel prints of the slides that were loaded on the projector, outside the jury's presence. Defendant objected, stating that the photographs he was looking at were not the same photographs that were introduced during Dr. Shapiro's testimony. Plaintiff's counsel then admitted that "[t]hese were—these were in addition" to the slides used earlier, and that "[w]ell, they're different pictures, but this was also taken by" Dr. Shapiro. Plaintiff's counsel noted that RK surgery incisions were visible on plaintiff's cornea on the prints, so he was certain that the photographs were taken before the first corneal transplant.

The court ruled that plaintiff would not be permitted to use any photographs "that have not been authenticated by the person from whom they came." "In other words, you can't use [Dr. Shelton] . . . to says [sic] these pictures came from Shapiro and this is his picture on that day." Plaintiff then argued that defendant had stipulated to the admission of these photographs, but defendant denied doing so. Defense counsel stated that he saw the photographs on a disk that plaintiff had sent him approximately two weeks before trial, but that he could not merely accept plaintiff's counsel's representation that the photographs were what they purported to be. Plaintiff claimed that he sent defendant the disk because the trial court ordered it, and that he failed to have the photographs authenticated by Dr. Shapiro because he was relying on defendant's alleged stipulation to their admissibility. The trial court agreed that it ordered the parties to exchange exhibits, but reiterated that the photographs could not be admitted into evidence without proper authentication. The court added that other Dr. Shapiro photographs had already been introduced into evidence, and that Dr. Shelton could discuss those.

Plaintiff has failed to provide any record support for his argument that defendant stipulated to allow these photographs to be admitted into evidence at trial. Additionally, plaintiff's counsel admitted on the record that the photos were not the same photographs admitted earlier, and that he failed to have Dr. Shapiro authenticate them. Thus, under MRE 901, the photographs were inadmissible for lack of authentication. The trial court did not abuse its discretion in excluding them.

VI

Lastly, plaintiffs argue that the trial court erred in its award of costs to defendants. We disagree.

Generally, an award of taxable costs is reviewed for an abuse of discretion, but whether legal authority exists to support the award is a question of law to be reviewed de novo. *LaVene v Winnebago Industries*, 266 Mich App 470, 473; 702 NW2d 652 (2005).

Plaintiffs argue that defendants were improperly awarded costs for certain unnamed depositions. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger*, *supra* at 178. Because plaintiffs fail to specifically identify the deposition costs and expert fees that they claim were improperly awarded to defendants, we consider this issue abandoned.

Plaintiffs also argue that the trial court erred in assessing costs against plaintiff Margaret Halverson. We disagree.

MCR 2.625(A)(1) provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these court rules or unless the court directs otherwise." MCR 2.625(B)(2) adds that, "[i]n an action involving several issues or counts that state different causes of action[,] . . . the party prevailing on each issue or count may be allowed costs for that issue or count." See also MCL 600.2421b(3)(a). MCL 600.2421b(2) defines a "party" as "a named plaintiff or defendant involved in the particular civil action."

Margaret Halverson was a party because she was a named plaintiff. When a claim is involuntarily dismissed, the defendant is deemed to be a prevailing party. See *Fansler v Richardson*, 266 Mich App 123, 128-129; 698 NW2d 916 (2005). In the present case, while the dismissal was voluntary, we agree with defendants that the dismissal nonetheless improved defendants' position because it eliminated any possibility that Margaret Halverson might prevail. The trial court did not err in awarding costs against Margaret Halverson.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski