

IN THE UTAH COURT OF APPEALS

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Sallie Clatterbuck,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellant,)		
)	Case No. 20060343-CA	
v.)		
)	F I L E D	
Gregory K. Call, M.D.,)	(March 8, 2007)	
)		
Defendant and Appellee.)	<table border="1"><tr><td>2007 UT App 76</td></tr></table>	2007 UT App 76
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Third District, Salt Lake Department, 020907302
The Honorable Glenn K. Iwasaki

Attorneys: Gary B. Ferguson and Kenneth D. Lougee, Murray, for Appellant
Curtis J. Drake, Scott Dubois, and Troy L. Booher, Salt Lake City, for Appellee

Before Judges Bench, Greenwood, and Billings.

BILLINGS, Judge:

Plaintiff Sallie Clatterbuck appeals a jury verdict of no negligence toward Plaintiff's husband, Silas Clatterbuck, on the part of Defendant Gregory K. Call, M.D. We affirm.

First, Plaintiff argues the trial court erred by excluding Dr. Call's affidavit under rule 403 of the Utah Rules of Evidence. See Utah R. Evid. 403. We review a trial court's decision to exclude evidence "under rule 403 for abuse of discretion and [will] reverse only if the ruling is beyond the bounds of reasonability." Nay v. General Motors Corp., 850 P.2d 1260, 1262 (Utah 1993). Rule 403 provides that 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." Utah R. Evid. 403.

The trial court determined that although the affidavit was relevant to some extent as to Dr. Call's honesty, the prejudicial value substantially outweighed the probative value, primarily because there was "no evidence of impairment during the time of the actual care to [Plaintiff's husband]." It is the trial

court's responsibility to balance the probative and prejudicial value of evidence, and we cannot say that the trial court's decision to exclude the affidavit under rule 403 was "beyond the bounds of reasonability." Nay, 850 P.2d at 1262. Therefore, we affirm the trial court's exclusion of the affidavit.

Next, Plaintiff argues that the trial court erred in failing to dismiss juror Hammond for cause due to Hammond's connections to the medical profession and her negative opinions regarding medical malpractice lawsuits. It is well established that "litigants are . . . entitled to a fair and impartial jury." West v. Holley, 2004 UT 97, ¶12, 103 P.3d 708. However, in State v. Baker, 935 P.2d 503 (Utah 1997), the Utah Supreme Court adopted a "cure-or-waive rule" concerning challenges for cause. Id. at 510. To preserve an overruled for-cause challenge for appeal, this rule requires that a party "exercise a peremptory challenge, if one is available," against a juror who was unsuccessfully challenged for cause.¹ Id. Plaintiff concedes that she had peremptory challenges at the time the trial court denied her for-cause challenge of juror Hammond, and that she did not use a peremptory challenge against juror Hammond after the for-cause challenge failed. Consequently, Plaintiff waived the right to appeal the trial court's ruling regarding this matter.

Finally, Plaintiff argues that the trial court erred by allowing her attorney's letter to her expert witness, Dr. Brown, into evidence. Plaintiff asserts that this letter was attorney work product and therefore not discoverable or admissible. Utah Rule of Evidence 103(a)(1) states that in order to find error in an evidentiary ruling, a "timely objection or motion to strike" must appear in the record. Utah R. Evid. 103(a)(1). Moreover, to preserve an issue for appeal, a party must "'state clearly and specifically all grounds for objection.'" State v. Pritchett, 2003 UT 24, ¶18, 69 P.3d 1278 (quoting State v. Larsen, 865 P.2d 1355, 1363 n.12 (Utah 1993)). At trial, Plaintiff objected to the letter on the grounds of relevancy and hearsay but failed to

1. In State v. Baker, 935 P.2d 503 (Utah 1997), the "cure-or-waive rule" applied specifically to criminal defendants. Id. at 510. But we note that the rule also applies to civil cases. Criminal defendants are "often afforded greater protection than the civil defendant," Sims v. Utah State Tax Comm'n, 841 P.2d 6, 13 (Utah 1992), making it unlikely that civil litigants would be more protected by peremptory challenge rules. See id. Moreover, the Baker decision cites Catando v. Sheraton Poste Inn, 592 A.2d 294, 300 (N.J. Super. Ct. App. Div. 1991), noting that New Jersey applied the "cure-or-waive rule" to civil cases. See Baker, 935 P.2d at 508.

object on the basis of attorney work product. "'Inasmuch as [counsel failed] to assert a claim [for violation of attorney work product] . . . at the trial court, the issue is not properly preserved for appeal.'" Id. (quoting Larsen, 865 P.2d at 1363 n.12) (first and third alteration in original). Therefore, we do not review this claim.

Dr. Call requests attorney fees under rule 33(b) of the Utah Rules of Appellate Procedure, arguing that Plaintiff's appeal is frivolous and was brought solely to increase the costs of litigation. See Utah R. App. P. 33(a)-(b). Rule 33 provides that a court may award attorney fees when an appeal is frivolous, "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Id. A party's case is not frivolous where its "brief as a whole is supported by the record, and the [party] makes good faith arguments that are adequately supported by case law," as opposed to a case in which the "record [is] devoid of admissible supporting evidence" and "the cause of action completely lack[s] merit." Carrier v. Salt Lake County, 2004 UT 98, ¶19, 104 P.3d 1208. Plaintiff's case does not rise to the level of a frivolous appeal, as she raised issues which were reasonably supported by case law and the record. Therefore, we deny Dr. Call's request for attorney fees.

Accordingly, we affirm.

Judith M. Billings, Judge

WE CONCUR:

Russell W. Bench,
Presiding Judge

Pamela T. Greenwood,
Associate Presiding Judge