STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS ELLMAN, Bankruptcy Trustee for Linda Robertson,

Plaintiff-Appellant,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

HOGBACK OFFICENTER and FLYING DUTCHMAN MANAGEMENT, INC.,

Defendants/Cross-Plaintiffs,

and

EDGAR SIMONS,

Defendant,

and

W.D. CONSTRUCTION, INC.,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
March 15, 2002

No. 223490
Washtenaw Circuit Court
LC No. 98-004495-NO

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Plaintiff, as Chapter 7 bankruptcy trustee for Linda Robertson, appeals as of right the October 6, 1999, judgment on jury verdict, in which judgment for plaintiff was entered against defendants Hogback Officenter and Flying Dutchman Management, Inc., but in which a no cause

of action verdict, the sole subject of this appeal, was entered against defendant W.D. Construction, Inc.[1] We affirm.

This case arises from Linda Robertson's slip and fall that occurred at Hogback Officenter's office complex near Ann Arbor on March 6, 1995. Robertson sustained injuries after falling on some ice and slush, and she subsequently filed the underlying negligence lawsuit against Hogback Officenter, Flying Dutchman Management, Inc., W.D. Construction, Inc., and Edgar Simons.[2] Hogback owns the office complex; Flying Dutchman manages the complex for Hogback; Flying Dutchman contracted with W.D. Construction, Inc., for the removal of snow and for discretionary salting during the 1994-1995 snow season.

First, plaintiff argues that the court erred in denying plaintiff's motion to amend its caption and to exclude evidence referencing Robertson's bankruptcy. We disagree.[3]

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or 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, *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Plaintiff's brief, relying upon MRE 401 and MRE 402, emphasizes the irrelevance of Robertson's bankruptcy status to defendant's contractual duties, defendant's breach of those duties, the proximate cause relationships between defendant's breach of duty and Robertson's accident, and the damages flowing from the accident.

MRE 401 provides that evidence is relevant if it has "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." By contrast, irrelevant evidence is inadmissible. MRE 402. The credibility of witnesses is a material issue and evidence that shows bias or prejudice of a witness is always relevant. *Powell v St John Hospital*, 241 Mich App 64, 72; 614 NW2d 666 (2000).

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[1] Reference to "defendant" in this opinion is to W.D. Construction, Inc., unless otherwise indicated.

[2] Plaintiff dismissed the claim against Simons before trial.

[3] Although plaintiff refers in his framing of the issue to the trial court's refusal to allow amendment of the caption, he concedes in his appellate brief that because he is in fact the bankruptcy trustee, "the caption of the case at bar **had** to read the way it did because there was no other way for Plaintiff to lawfully bring suit." Plaintiff is correct on that point. See *Kuriakuz v Community National Bank of Pontiac*, 107 Mich App 72, 74-75; 308 NW2d 658 (1981). Plaintiff's argument is thus, couched largely in terms of whether evidence of the bankruptcy should have been admitted because, according to plaintiff, it was irrelevant. Therefore, we will treat this issue as one of evidence admissibility.

Thus, despite plaintiff's emphasis on the fact that Robertson's bankruptcy status was irrelevant to the elements of negligence, it does not necessarily follow that such fact was altogether irrelevant or immaterial; to the contrary, it addressed the defenses asserted and the issue of her credibility and her motive for bringing the lawsuit, along with the veracity of her damage claims. Moreover, the defenses asserted included the argument that Robertson was fiscally irresponsible and sought to collect in order to pay back her personal credit card debt, not in order to recoup compensation for injuries.

Plaintiff also relies on MRE 403, which permits the exclusion of even relevant evidence when the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Plaintiff contends that Robertson's status as a bankrupt "was an issue that needlessly distracted the jury from what should have been [its] exclusive focus—Ms. Robertson's slip and fall at the Hogback office complex and her subsequent injury."

The facts surrounding the accident, however, should not have been the jury's "exclusive focus" because while evaluating those facts, the jury had to make credibility determinations, especially regarding the extent of damages. Moreover, we are not convinced that Robertson's status as a bankrupt was necessarily "damaging" because a jury might have actually had sympathy for someone experiencing financial hardship, which could work in plaintiff's favor. Furthermore, even assuming that Robertson's status as a bankrupt was "damaging," "unfair prejudice" does not mean "damaging." *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710; 550 NW2d 797 (1996), aff 457 Mich 593 (1998).

Given the "abuse of discretion" standard that applies to evidentiary issues, we cannot say that relief is warranted. Even if this could be considered a close question, 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). Moreover, any error was harmless considering the fact that the jury awarded a substantial judgment in favor of plaintiff as against defendants Hogback and Flying Dutchman. MCR 2.613(A). The verdict indicates that plaintiff was not prejudiced by the jury's exposure to Robertson's bankruptcy.

Second, plaintiff argues that the court erred by refusing to permit plaintiff to amend the second amended complaint before trial in order to exclude allegations arising from an automobile accident referenced therein. We disagree.

In the second amended complaint, plaintiff included a count for negligence in the operation of a motor vehicle against Rontaria Titicia-Lacola Grays and Robin A. Grays. The action settled before trial, and at trial, plaintiff sought to delete reference to the lawsuit and allegations regarding the car accident, but conceded that evidence regarding the accident (as opposed to the lawsuit) should be admissible. Accordingly, plaintiff sought to amend the complaint by deleting the references and allegations related to the car accident. Plaintiff contends that the objective of the amendment was to "avoid confusing the jury about Plaintiff's need to plead and prove serious impairment of body function in order to recover damages from the party at fault in the automobile accident, but the complete absence of a serious impairment of body function requirement in the case against the Defendant." That portion of the complaint relating to the car accident included the allegation that "[t]he injuries and aggravation of pre-

existing injuries to LINDA ROBERTSON caused by the negligence of RONTORIA TITICIA-LACOLA GRAYS constitute a serious impairment of body function." The trial court denied plaintiff's request in part and allowed defendant to introduce plaintiff's pleadings in the automobile accident case into evidence; however, the court did not allow the jury to see the pleadings. In making its ruling, the court explained that this would prevent the jury from becoming confused regarding the "serious impairment" language, but would allow the jury to learn of the related lawsuit, which it ruled was admissible. Plaintiff also moved to exclude any reference to a second automobile accident lawsuit that occurred in 1997; the court denied plaintiff's motion.

As a preliminary matter, we note that to the extent that plaintiff's concern was that the jury would experience confusion regarding the "serious impairment" language within the pleadings, such concern was addressed because the jury was not allowed to see the language, and no reference to that language was made. Also, plaintiff concedes that defendant "could introduce evidence about the automobile accidents and what effect it had on Plaintiff at trial." Thus, the remaining issues are whether the court abused its discretion by allowing the pleadings to be introduced into evidence (but not shown to the jury), and by allowing reference to the other "lawsuits."

Significantly, while the jury was made aware of the related lawsuits involving the car accident in December 1995, and in May 1997, it was not made aware of the outcome of either lawsuit; instead, defense counsel questioned Robertson only about the injuries which she alleged occurred as a result of the accidents, and the treatments she received from her various treating physicians. The scope of the cross-examination relating to the other lawsuits was targeted toward inconsistent injury claims Robertson had made in the complaints. Robertson had alleged in her first complaint that the first car accident (December 1995) caused aggravation of an existing back injury; yet, she alleged in another complaint filed after a May 1997 car accident, that she was "in full possession and enjoyment of all her faculties" before that accident. Thus, pleadings relating to the other lawsuits were used only to call into question Robertson's alleged injuries and damages; there was no mention of settlement or dismissal. For this reason, no "half-truths" were told in this case, and this situation is distinguishable from the situation in *Clery v Sherwood*, 151 Mich App 55; 390 NW2d 682 (1986), upon which plaintiff relies. The court did not abuse its discretion by allowing defense counsel to admit evidence regarding the two car accident lawsuits. Moreover, any error was harmless for the reasons previously stated above regarding the bankruptcy issue. MCR 2.613(A).

Third, plaintiff contends that the court abused its discretion by denying his request that the missing written instruction, SJI2d 6.01, be given. We disagree.

The determination whether an instruction is accurate and applicable based on the characteristics of a case is in the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

Brian Darwin, the missing witness, and Daniel Wolf were business partners in W.D. Construction, Inc. from 1994 to 1997. Darwin was responsible for checking the Hogback Officenter property, which was "on his route," in the mornings to see if it needed plowing or salting. Darwin did not appear for trial and there is no indication that he was subpoenaed by either party.

SJI2d 6.01(a) is the relevant portion of the civil instruction entitled "Failure to Produce Evidence or a Witness" which plaintiff requested and which the court declined to give.

SJI2d 6.01(a) provides:

> The [plaintiff/defendant] in this case has not offered [the testimony of _____/_____]. As this evidence was under the control of the [plaintiff/defendant] and could have been produced by [him/her], and no reasonable excuse for the [plaintiff's/defendant's] failure to produce the evidence was given, you may infer that the evidence would have been adverse to the [plaintiff/defendant].

As plaintiff contends, the requested instruction is permissive. That fact alone, however, is not dispositive of the issue of whether it should have been given. A court can refuse to give a generally applicable instruction based on the facts of a particular case. *Sells v Monroe Co*, 158 Mich App 637, 649; 405 NW2d 387 (1987). A requested instruction need not be given if it would neither add to an otherwise balanced and fair jury charge nor enhance the jury's ability to decide the case intelligently, fairly, and impartially. *Id*.

The pertinent inquiry is whether defendant had Darwin "under its control" at the time of trial. As plaintiff suggests, "control" has been found to exist where the witness is an officer or agent of the party. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 15; 527 NW2d 13 (1994). Wolf testified that W.D. Construction had dissolved. Thus, while Darwin was "an officer" at the time of Robertson's fall, the only evidence produced indicated that he was not an officer of any "party" at the time of trial. The cases plaintiff relies upon do not involve dissolved corporations. There was no evidence that W.D. Construction had any control of Darwin at the time of trial. Furthermore, "[w]here a witness is equally available to either party, the presumption that the missing witness would testify adversely to any particular theory is not recognized." *Id.* at 15-16. Plaintiff gives no explanation for why he could not have subpoenaed Darwin. Therefore, we believe that no presumption applies and the request for the adverse inference instruction was properly denied. SJI2d 6.01 was not warranted in this case and the court did not abuse its discretion in so determining.

Finally, plaintiff argues that the court abused its discretion by refusing to give a special jury instruction concerning payment of medical bills by an insurance company. We disagree. The determination whether the supplemental instructions are applicable and accurate is within the trial court's discretion. *Stoddard v Manufacturers National Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999).

Plaintiff contends that because insurance issues were "repeatedly interjected" at trial, SJI2d 3.06 was not appropriate or specific enough. Plaintiff further contends that the special instruction was necessary in order to ensure that plaintiff received a fair trial and a fair verdict.

SJI2d 3.06, the instruction the court gave, is concise, and straightforward:

> Whether a party is insured has no bearing whatever on any issue that you must decide. You must refrain from any inference, speculation, or discussion about insurance.

Furthermore, the Use Note for the instruction explains:

> This instruction is to be used only where the subject of insurance has been brought out during the trial and has no bearing on any of the issues.

In this case, the issue of insurance was offered in order to prove the bias and prejudice of witnesses. Dr. Sayer, Robertson's chiropractor and a witness for plaintiff, testified regarding the various insurance forms that she filled out for Robertson and what she indicated were Robertson's injuries at various times and the causes of those injuries; Robertson also testified regarding the arguably conflicting information she gave various doctors at different times. In opening and closing arguments, defense counsel did argue that Robertson had made inconsistent claims of injuries and damages. Plaintiff's counsel had argued that they were not making any claims for damages from the automobile accidents, thereby minimizing the jury's impression of the impact of the car accidents on her injuries, which were attributed to the slip and fall during trial; however, Dr. Sayer's bills were being sent to Robertson's auto insurance carrier for payment after the accidents.

Inherent in plaintiff's argument that the special instruction was required is the argument that the topic of insurance should not have arisen at all. We believe that evidence regarding insurance was properly admitted.

MRE 411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.

The insurance issue was raised for the proper purpose of establishing Robertson's lack of credibility, i.e., her bias or prejudice. Testimony at trial established that Robertson attributed her injuries to the slip and fall on some occasions, to the December 1995 car accident on other occasions, and to the May 1997 accident on other occasions; furthermore, arguably, Robertson made inconsistent claims of injuries and their causes on different insurance forms and to the various doctors. Thus, the testimony was properly adduced for this limited purpose of calling into question her credibility.

Moreover, we believe that, to the extent that the jury may have been tempted to make other insurance considerations, the instruction as given encompassed any concerns plaintiff sought to remedy via his proposed instruction. Because the jury was instructed that it was not to consider insurance *at all*, any speculation it may have had about assessment would have been cured. Additionally, taking into consideration the favorable verdict rendered in plaintiff's favor, any error was harmless.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra