STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND CHRISTIAN AND ERIC SMITH, Next Friend of ROSHAUN CHRISTIAN,

Plaintiffs–Appellants/Cross-Appellees,

and

ANITA CHRISTIAN,

Plaintiff,

v

THE DETROIT COKE CORPORATION,

Defendant–Appellee/Cross-Appellant,

v

GENERAL ACCIDENT INSURANCE COMPANY, and MODERN REFRACTORIES SERVICE CORPORATION,

Third-Party Defendants.

UNPUBLISHED
June 11, 1996

No. 162934
LC No. 89-918222 NO

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo,* JJ.

PER CURIAM.

Plaintiffs Raymond and Roshaun Christian[1] appeal as of right the circuit court's order denying their motion for new trial following a judgment of no cause for action. We affirm.

This case arose from a fall suffered by plaintiff Raymond Christian while he was working as a laborer on a renovation project at defendant's coke plant. Plaintiffs sued defendant on the grounds that

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* Circuit judge, sitting on the Court of Appeals by assignment.

Christian's fall was due to negligent maintenance and installation of a handrail surrounding the elevated walkway from which he fell. At the conclusion of trial, the jury found that defendant was not negligent and a judgment of no cause for action was entered. Thereafter, the trial court denied plaintiffs' motion for new trial.

Plaintiffs initially assert that the lower court abused its discretion in denying their motion for new trial. They contend that because defendant presented surprise testimony at trial, a new trial was warranted. We disagree. MCR 2.611 provides that a trial court may grant a new trial whenever the moving party's substantial rights have been materially affected, for any of a variety of reasons, including an "irregularity in the proceedings of the court, jury, or prevailing party, or . . . misconduct . . . of the prevailing party." MCR 2.611(A)(1)(a) and (b). However, our courts have repeatedly upheld the denial of a new trial for alleged surprise when the movant failed promptly to object and to request a continuance or a postponement in order to alleviate the surprise. *In re Turner's Estate*, 217 Mich 359, 363; 186 NW 402 (1922); *Byrne* v *Schneider's Iron, Inc*, 190 Mich App 176, 184; 475 NW2d 854 (1991).

Regarding the three claims of surprise, plaintiffs failed to object to the testimony or request a continuance or a postponement in order to alleviate the alleged surprise. Therefore, plaintiffs have forfeited their claim. *Turner*, *supra*, 217 Mich 363; *Byrne*, *supra*, 190 Mich App 184. Further, plaintiffs' failure to provide this Court with the record of the interrogatories and depositions containing the alleged statements by defendant precludes review of this issue. Plaintiffs have effectively abandoned this issue. *Taylor* v *Blue Cross and Blue Shield of Michigan*, 205 Mich App 644, 654; 517 NW2d 864 (1994).

Next, plaintiffs argue that defense counsel's numerous instances of misconduct warrant a new trial. They contend that the trial court abused its discretion in denying their motion for new trial. We disagree. In reviewing a claim of attorney misconduct, we decide whether error occurred and, if so, whether the error was harmless. *Reetz* v *Kinsman Marine Transit*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). Counsel's comments typically do not provide grounds for reversal unless they reflect a deliberate attempt to prevent a fair and impartial trial. *Wilson* v *General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). If the claimed error was not harmless, then the court must ask whether the error was preserved through objection, request for instruction, or motion for mistrial. *Reetz, supra*, 416 Mich 103. If the error is preserved, then the party has a right to appeal; however, if it is not preserved, the court must make one further inquiry. *Id*. The court must determine whether the error caused the result or played so large a role in the outcome that it denied the party a fair trial. *Id*. Where the court cannot say that the error did not affect the outcome of the trial, a new trial should be granted. *Id*.

Regarding the assertion that defense counsel misrepresented his client's willingness to settle the case, plaintiffs have failed to allege any facts which would support their allegation. Moreover, plaintiffs have failed to cite any record support for such a finding. Because plaintiffs have presented no record for this Court to review, they have abandoned this issue. *Taylor, supra*, 205 Mich App 654.

Similarly, plaintiffs' assertion of defense counsel's misconduct in referring to Raymond Christian as a "safety man" has been effectively abandoned because they failed to provide this Court with the necessary transcript of the January 9, 1992 trial proceedings. Further, they fail to cite the record where defense counsel made such a reference. *Taylor*, *supra*, 205 Mich App 654.

Regarding defense counsel's comments during closing argument about the presence of a chain on the gate, the record contains evidence that a chain was present. Thus, defense counsel's reliance on that evidence was not error. Similarly, defense counsel's reliance on testimony establishing that the beam was twenty feet long was not error. The record also contains expert evidence about the relative force on the gate, again supporting defense counsel's argument.

With respect to the allegation that defense counsel improperly appealed to juror sympathy by stating that defendant's industry had experienced financial hard times, we conclude that the statement did not amount to an appeal to sympathy. See *Fellows* v *Superior Products Co*, 201 Mich App 155, 159-165; 506 NW2d 534 (1993); *Duke* v *American Olean Tile Co*, 155 Mich App 555, 561-564; 400 NW2d 677 (1986).

Plaintiffs have failed to provide the transcript supporting their claim that defense counsel improperly inquired of plaintiffs' expert about two deaths at a plant he supervised. Plaintiffs have abandoned this issue. *Taylor*, *supra*, 205 Mich App 654. Similarly, plaintiffs assert that defense counsel misrepresented the fact that his expert would not conduct any further testing. Plaintiffs failed to provide the transcript of the deposition in which defense counsel allegedly made this promise and thus have abandoned this issue. *Taylor*, *supra*, 205 Mich App 654.

Finally, regarding the assertions that defense counsel violated the court's sequestration order, plaintiff has failed to provide the sequestration order. Without the benefit of the specific language of that order, we cannot review this issue. *Taylor*, *supra*, 205 Mich App 654. Accordingly, plaintiffs'numerous allegations of misconduct either lack merit or are unsupported by the record.

Plaintiffs next argue that the court abused its discretion in denying their motion for new trial on the basis that the jury's verdict was against the great weight of the evidence. We disagree. The test for a motion for new trial on grounds that the verdict was against the great weight of the evidence is whether the verdict was contrary to the overwhelming weight of the evidence at trial. *Heshelman* v *Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). This Court defers to the trial court's opportunity to assess witness credibility. *Kochoian* v *Allstate Ins Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988).

Plaintiffs' failure to provide a complete transcript of the trial proceedings containing the testimony of their witnesses significantly impairs their position on this issue. On the basis of the record provided, only minimal evidence supported the theory that the gate presented a dangerous condition. On the other hand, abundant evidence established that plaintiff Raymond Christian's usage of the gate and handrail was unreasonable under the circumstances. Further, substantial evidence indicated that the

gate was equipped with a safety latch and that the gate and handrail were routinely maintained. The trial court did not abuse its discretion in denying plaintiffs' motion for new trial.

Finally, plaintiffs argue that they were entitled to a new trial because of the cumulative effect of the errors. Because each of the alleged errors is without merit or is unsupported by the record, no cumulative harm exists.

In light of our disposition, we need not reach defendant's assertion on cross-appeal that the trial court erred in ruling that defendant could not question plaintiffs' expert on two deaths which occurred at a site where the expert was employed as a safety consultant.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Paul J. Clulo

[1] Plaintiff Anita Christian was dismissed as a party by order of this Court dated November 22, 1995.