

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PATRICIA I. ROSS,

Plaintiff-Appellant,

and

MARVIN ROSS,

Plaintiff,

v

DAYTON HUDSON CORPORATION,  
a Minnesota corporation, d/b/a DAYTON  
HUDSON and d/b/a NORTHLAND CENTER,

Defendant-Appellee.

UNPUBLISHED

September 20, 1996

No. 175165

LC No. 92440785 NO

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Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,\* JJ.

PER CURIAM.

In this slip and fall case, plaintiff Patricia Ross appeals as of right from a jury finding of no cause of action. She argues that she is entitled to a new trial, because defendant failed to provide photographs in its possession which plaintiff requested during discovery. She asserts that the judge abused his discretion when he failed to instruct the jury on defendant's failure to produce the photographs. Finally, she claims that the judge erred in failing to dismiss a juror for cause. We affirm.

At trial, plaintiff testified that she slipped and fell on a foreign substance near an escalator on defendant's premises. She reported the incident to a store employee who called store security. Photographs were taken of her injuries.

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

## I

Plaintiff argues that the trial judge abused his discretion in denying her motion for new trial where defendant failed to produce the photographs of her injuries which were in its possession. We disagree.

Where fraud has occurred, a party may be granted relief from judgment. MCR 2.612(C)(1)(c). A judge's decision on a motion to set aside a judgment under MCR 2.612 will not be disturbed absent a clear abuse of discretion. *Henritzy v General Electric Co*, 182 Mich App 1, 7; 451 NW2d 558 (1990).

In the instant case, we find that no abuse of discretion occurred. During discovery, plaintiff requested copies from defendant of the photographs that had been taken of her. When it failed to comply, she brought a motion to compel their production. The court entered an order instructing defendant to turn over any photographs in its possession regarding plaintiff's injuries. At trial, defendant contended that it did not have the requested photographs. During the first day of trial, the judge requested that defendant check for the photographs during the evening between the first and second days of trial. The next day, defense counsel informed the trial judge that he checked his files and contacted the individual who allegedly took the photographs. His efforts proved fruitless.

The judge determined that no fraud had been committed. We find that the judge's determination was substantiated by the facts placed before him with regard to the existence of the alleged photographs. The ruling did not constitute an abuse of discretion. *Henritzy, supra*.

## II

Moreover, the judge did not abuse his discretion by refusing to instruct the jury on defendant's failure to produce the photographs. *Rice v ISI Manufacturing, Inc*, 207 Mich App 634, 637; 525 NW2d 533 (1994). SJI2d 6.01(a) would permit the jury to infer that evidence that was under a party's control and for which the party gave no reasonable excuse for nonproduction would have been adverse to that party. *Botsford Hospital v Citizens Insurance*, 195 Mich App 127, 144; 489 NW2d 137 (1992).

As we already discussed, the trial judge made specific findings with regard to whether defendant had possession of the alleged photographs and whether it failed to produce them. In light of defense counsel's representations, the trial judge had the discretion to determine whether SJI2d 6.01 should be read to the jury. We cannot find an abuse of discretion under the facts of this case.

## III

Finally, the judge did not abuse his discretion in denying plaintiff's request to excuse one of the jurors for cause. *Jalaba v Borovoy*, 206 Mich App 17, 23; 520 NW2d 349 (1994). Error requiring reversal occurs when the record indicates: (1) the judge improperly denied a challenge for cause; (2) the aggrieved party had exhausted all peremptory challenges; (3) the party demonstrated a desire to excuse another summoned juror; and (4) the juror whom the party later wished to excuse was objectionable. *Id.*, pp 23-24.

Here, the juror in question initially gave an indication that he might not be able to be impartial, because he was a physician and had been involved in litigation. The judge asked further questions to determine whether the juror could be impartial. The juror then stated that he was not biased against plaintiffs or defendant and that he could be impartial.

Under these circumstances, we agree with the trial judge that the juror's statements did not establish that he was biased for or against either party. At most, plaintiff has shown that the juror previously participated in litigation. Therefore, no abuse of discretion occurred.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Marilyn Kelly

/s/ J. Richardson Johnson