S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

IONEL TUCUNEL and CHERYL TUCUNEL,

Plaintiffs-Appellants,

v

K-MART CORPORATION, a Michigan Corporation,

Defendant-Appellee.

UNPUBLISHED
November 12, 1996

No. 183115
LC No. 92-001209-NO

IONEL TUCUNEL and CHERYL TUCUNEL,

Plaintiffs-Appellees,

v

K-MART CORPORATION, a Michigan Corporation,

Defendant-Appellant.

No. 185153
LC No. 92-001209-NO

Before: Smolenski, P.J., and Wahls and G.S. Buth,* JJ.

PER CURIAM.

Following a jury trial, a verdict was rendered in favor of defendant on plaintiffs' premises liability action. In Docket No. 183115, plaintiffs appeal as of right the judgment in favor of defendant, the order denying their motion for a new trial and the orders denying their motion for sanctions and rehearing of the same. In Docket No. 185153, defendant appeals as of right the trial court's order denying in part and granting in part its motion for costs and attorney fees. We affirm.

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

Docket No. 183115

Plaintiffs first argue that the trial court abused its discretion in failing to grant them a new trial. We disagree. This Court reviews the trial court's refusal to grant defendant's motion for a new trial for an abuse of discretion. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995). Specifically, plaintiffs argue that they are entitled to a new trial because defense counsel improperly referred to medical records that were not admitted at trial. When reviewing asserted improper conduct by a party's lawyer, this Court must first determine whether the lawyer's action was error and, if so, whether the error requires reversal. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). A lawyer's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* Reversal may also be required where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence upon the verdict. *Id.*

Defense counsel's reference to the medical records was not error requiring reversal. A review of the record reveals that the medical records were admitted into evidence. The physician who drafted the records treated Ionel Tucunel after he slipped and fell in an aisleway on defendant's premises. Defense counsel's comments during closing argument were supported by the evidence. Moreover, the jury was instructed that the arguments of counsel were not evidence, but were only intended to assist the jury in understanding the evidence and each party's theory of the case. Because defense counsel's reference to the medical records was supported by the evidence, the reference did not indicate a deliberate course of conduct aimed at preventing a fair and impartial trial and the reference did not have a controlling influence on the verdict. Thus, we find defense counsel's argument proper.

Next, plaintiffs argue that it was error for the jury to have possession of an enlarged jury instruction, which had been prepared by the defense, and that the trial court should have granted plaintiffs' motion for a new trial on this basis. We disagree. This Court reviews the trial court's refusal to grant defendant's motion for a new trial for an abuse of discretion. *Hamann, supra* at 254. The rules of evidence provide that to the extent practicable, jury proceedings shall be conducted so as to prevent inadmissible evidence from being suggested to the jury. *Detroit v Larned Associates*, 199 Mich App 36, 40; 501 NW2d 189 (1993). However, submitting to the jury documents that have not been admitted into evidence does not constitute error requiring reversal unless the error operated to substantially prejudice the party's case. *Beasley v Washington*, 169 Mich App 650, 659-660; 427 NW2d 177 (1988) (citing *Eley v Turner*, 155 Mich App 195; 399 NW2d 28 [1986]).

Here, an enlarged jury instruction, submitted by defendant, which stated the duty that a possessor of land owes to an invitee, was taken by the jury into deliberations. It appears that the parties inadvertently stipulated to the admission of the jury instruction Upon realizing the error, the trial court retrieved the instruction and instructed the jury on the applicable law. A review of the record reveals that although the jury had an enlarged instruction, the substance of the instruction did not deviate from the law given by the trial court. As noted above, documents submitted to the jury that have not been admitted into evidence do not constitute error requiring reversal unless the error operated to substantially prejudice the party's case. *Beasley, supra* at 659-660. Plaintiffs have failed to

demonstrate that they were prejudiced. Accordingly, the trial court did not abuse its discretion in denying plaintiffs a new trial on this basis.

Plaintiffs next contend that the trial court abused its discretion in refusing to impose discovery sanctions on defendant and that, therefore, they are entitled to a new trial. We disagree. This Court reviews a trial court's decision to impose sanctions for an abuse of discretion. *Richardson v Ryder Truck Rental, Incorp*, 213 Mich App 447, 450; 540 NW2d 696 (1995). The trial court's findings of fact will not be disturbed absent clear error. MCR 2.613(C). As noted above, we review the trial court's refusal to grant defendant's motion for a new trial for an abuse of discretion. *Hamann, supra* at 254.

Specifically, plaintiffs argue that discovery sanctions against defendant were proper because defendant failed to supplement its answer to interrogatory number thirty-four, which requested the names of persons who would have information related to any of defendant's affirmative defenses. A party who has responded to a discovery request with a response that was complete when made has a duty to seasonably supplement the response when it learns that the original response "is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." MCR 2.302(E)(1)(b)(ii); *Richardson*, *supra* at 451. If the party fails to seasonably supplement the response, the trial court may enter an order as is just, including an order for sanctions. MCR 2.302(E)(2); MCR 2.313(B)(2)(b); *Richardson, supra*. Because the imposition of sanctions is discretionary, the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate. *Richardson, supra*. When fashioning an appropriate sanction, a court should consider the following nonexhaustive list of factors:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests . . . ; (3) the prejudice to the [plaintiffs]; (4) . . . ; (5) whether there exists a history of [defendant's] engaging in deliberate delay; (6) the degree of compliance by the [defendant] with other provisions of the court's order; (7) an attempt by the [defendant] to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. [*Id.,* quoting *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

Plaintiffs sent interrogatories to defendant, and, apparently, defendant did not answer them. An order compelling defendant to answer the interrogatories was entered and defendant complied. Plaintiffs then filed another motion to compel additional answers, arguing that defendant's answers did not provide enough information to allow plaintiffs to adequately prepare their case for trial. It appears that a hearing on plaintiffs' motion to compel was scheduled and defendant again stated an intent to supplement its answer to interrogatory thirty-four. Defendant never supplemented its answer to interrogatory thirty-four.

At trial, Sue Vance, a defense witness, testified that when Tucunel tried on a watch he used only his right hand while keeping his left hand in his pocket. Based upon defendant's failure to supplement its answers to interrogatories (by failing to provide information regarding Vance's testimony), plaintiffs moved for discovery sanctions seeking a default judgment. To support their argument, plaintiffs

contended below, as they do on appeal, that because defendant alleged in affirmative defense number six that Tucunel had a pre-existing injury, defendant was in essence alleging the affirmative defense of fraud. Plaintiffs further indicate that interrogatory number thirty-four requested the names of persons who would have information related to any of defendant's affirmative defenses. According to plaintiffs, defendant never listed Vance as a person having information relating to its affirmative defense of fraud, but merely indicated that it had minimal information related to its affirmative defenses. Defendant did, however, indicate a willingness to supplement its answers to interrogatories, but then never supplemented interrogatory number thirty-four. As noted, plaintiffs sought discovery sanctions for defendant's failure to supplement its answers to interrogatories.

Plaintiffs' argument is without merit. In denying plaintiffs' motion for rehearing the motion for sanctions, the trial court found the following:

> Contrary to plaintiffs' assertion, the court is not satisfied that defendant's Affirmative Defense No. 6 alleges fraud. Instead, it merely raises the defense that plaintiff suffered from pre-existing conditions that were not aggravated by his accident on defendant's premises. The Court cannot conclude that pre-existing conditions, without more, automatically rise to the level of fraud. Furthermore, the Court is not convinced that the testimony of Ms. Vance suggested fraud on the part of plaintiffs. Instead, such testimony was used for impeachment purposes. After considering the totality of the underlying circumstances, the Court also opines that it would not be in the interest of justice to impose sanctions against defendant for defendant's failure to supplement its answers to interrogatories. The Court finds no merit to plaintiffs' argument that defendant willfully and wantonly concealed evidence.

Defendant's affirmative defense number six stated the following:

> Upon information and belief Plaintiffs suffered from pre-existing conditions that were not aggravated by this incident.

As noted above, plaintiffs contend that defendant's affirmative defense number six is essentially one for fraud. However, we find that defendant's affirmative defense does not embody any of the elements of fraud. See *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994). On its face, defendant's affirmative defense merely alleges that Tucunel had a pre-existing injury.

Moreover, the sanction of dismissal is appropriate only where the court has considered several different factors, one of which is whether defendant wilfully or intentionally failed to answer plaintiff's interrogatories. *Richardson, supra* at 451. A review of the record reveals that defendant was unaware that Vance had any information relevant to the case at hand until Ionel Tucunel's photograph was taken at a deposition and circulated among defendant's employees. It appears from Vance's testimony that she identified Tucunel a few months after the incident in question, which was still approximately two years prior to trial. However, Vance was listed as a witness on defendant's first amended witness list, which was filed on April 13, 1993, approximately 1½ years prior to the commencement of trial. Plaintiffs thus had notice several months prior to trial that Vance would be called as a witness and this refutes the

conclusion that defendant attempted to intentionally conceal evidence. Therefore, the trial court did not abuse its discretion in failing to sanction defendant for failure to amend or supplement its interrogatories. Thus, plaintiffs' motion for a new trial on this basis was properly denied.

Plaintiffs next argue that the trial court abused its discretion in failing to grant them a new trial because the verdict was against the great weight of the evidence. We disagree. The grant or denial of a motion for a new trial on the ground that the verdict is against the great weight of the evidence is a matter within the sound discretion of the trial judge, whose exercise of that discretion will not be disturbed on appeal unless a clear abuse of discretion is shown. *King v Taylor Chrysler-Plymouth, Inc,* 184 Mich App 204, 210; 457 NW2d 42 (1990). After reviewing the record in this case, we conclude that the trial court did not abuse its discretion in determining that the jury's verdict of no negligence was not against the great weight of the evidence.

Docket No. 185153

Defendant argues that the trial court abused its discretion in failing to award it attorney fees. A trial court's decision to award or deny attorney fees will be upheld on appeal absent an abuse of discretion. *Cleary v The Turning Point*, 203 Mich App 208, 211; 512 NW2d 9 (1994).

The instant dispute between plaintiffs and defendant was mediated for $72,500. Plaintiffs accepted the mediation evaluation; however, defendant declined to accept it. Defendant made an offer of judgment to plaintiffs for $5,000. Plaintiffs rejected defendant's offer of judgment and countered with an offer of judgment in the amount of $72,500. Defendant made a second offer of judgment in the amount of $5,500, and plaintiffs failed to respond.

After the jury returned a verdict of no cause of action, defendant sought actual costs incurred in proceeding to trial, based upon plaintiffs' failure to respond to defendant's offer of judgment for $5,500. The trial court awarded defendant taxable costs, but denied attorney fees. Defendant argues the denial of attorney fees was an abuse of discretion.

The attorney fees issue is controlled by the offer of judgment rule, MCR 2.405, which states in relevant part:

> If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action. [MCR 2.405(D)(1).]

In cases such as the instant matter, where there had been a rejection of a mediation evaluation and a subsequent offer of judgment, MCR 2.405(E) governs and states in pertinent part: "In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control . . . ."

The court may, in the interest of justice, refuse to award an attorney fee. MCR 2.405(D)(3); *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275, 278; 505 NW2d 862 (1993). In this case, the trial court articulated its reason for denying defendant attorney fees:

> I'll tell you what, I think a fair result here based on my – you know, I lived with this case for almost – for over two years trying to get the parties to move. And I know one thing, K-Mart never got off the dime in this case. And I'm not so sure their refusal to negotiate was in good faith at the time they were refusing to negotiate. In hindsight, the jury agreed with them.

In *Luidens v State of Michigan 63rd Dist Court*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 165935 & 167662, issued 9/17/96), this Court discussed the factors that do not fit into the "interest of justice" exception under MCR 2.405(D)(3), such as a reasonable rejection of an offer of judgment, as well as the factors that do fit into this exception, including the following factor:

> The "interest of justice" exception appears to be directed at remedying the possibility that parties might make offers of judgment for gamesmanship purposes, rather than as a sincere effort at negotiation. This Court has noted that counsel might make a token offer of judgment after an unfavorable mediation evaluation to avoid mediation sanctions under MCR 2.403 or make a *de minimus* offer of judgment early in a case in the hopes of tacking attorney fees to costs if successful at trial *Sanders* [*v Monical Machinery Co*, 163 Mich App 689, 692; 415 NW2d 276 (1987).] The *Sanders* Court held that there should be "some flexibility in order that a trial judge can prevent injustice both ways, but favoring the granting of such fees. *Id.* MCR 2.405's purpose of encouraging settlement is not furthered by awarding attorney fees when gamesmanship of this sort occurs. Therefore, evidence of such gamesmanship, e.g., as demonstrated by comparisons of offers to the mediations evaluation and jury verdict, constitute a relevant factor in determining whether the exception applies. See *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 340; 525 NW2d 470 (1994).

Accordingly, in light of *Luidens, supra*, we cannot conclude that the trial court's stated reason for denying defendant attorney fees under MCR 2.405(D)(3) constituted an abuse of discretion. Finally, we also note that although the trial court discussed the fact that defendant was represented by in-house counsel, our review of the record indicates that, contrary to defendant's assertion, this fact was not critical to the court's decision to not award defendant attorney fees.

Affirmed.

/s/ Michael R. Smolenski
/s/ Myron H. Wahls
/s/ George S. Buth