STATE OF MICHIGAN

COURT OF APPEALS

ANDREW WYSOCKI and CAROLINE WYSOCKI,

Plaintiffs-Appellants,

v

CRACKER BARREL OLD COUNTRY STORE, INC. and PATRICK CLOUSE, d/b/a STAR DIAMOND LANDSCAPING,

Defendants-Appellants.

UNPUBLISHED
February 11, 1997

No. 185806
Wayne Circuit Court
LC No. 94-402236 NO

Before: Doctoroff, P.J., and Hood and P.J. Sullivan,* JJ.

PER CURIAM.

Plaintiffs appeal as of right the judgment in favor of defendant, Cracker Barrel Old Country Store, Inc. (Cracker Barrel), entered pursuant to a jury verdict of no cause of action. Plaintiffs also appeal the trial court's order dismissing Patrick Clouse, d/b/a Star Diamond Landscaping ("Star Diamond"), from the case, without prejudice, prior to trial. We affirm.

On March 17, 1993, plaintiff, Caroline Wysocki, slipped on an icy patch and fell in the parking lot of Cracker Barrel, and sustained injuries. Plaintiffs' brought suit against Cracker Barrel, alleging that Cracker Barrel failed to take reasonable measures to remove accumulated snow and ice from its parking lot. Plaintiffs further claimed that, as a result of Caroline's injuries, she suffered a loss of income. Her husband, Andrew Wysocki, claimed loss of consortium. Following trial, the jury returned a unanimous verdict in favor of defendant. The trial court then entered judgment.

Plaintiffs first argue that the trial court abused its discretion in dismissing Patrick Clouse, d/b/a/ Star Diamond, from the litigation, without prejudice. We disagree. The decision whether to drop or add a party to an action rests within the discretion of the trial court. *Ombrello v Montgomery Ward Long Term Disability Trust*, 163 Mich App 816, 824; 415 NW2d 658 (1987); MCR 2.207.

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

In this case, the trial court did not abuse its discretion in its decision to drop Star Diamond from the lawsuit. As of July 25, 1994, the trial court had already ordered that plaintiffs could amend their complaint to add Star Diamond as a party defendant. Plaintiffs, however, did not serve Star Diamond with the amended complaint until September 23, 1994. In fact, at the time of the November 4, 1994, hearing on Star Diamond's motion to extend the discovery cut-off dates, Star Diamond had not even filed its answer. Plaintiffs contend that the court erred because the decision whether to add or drop a party under MCR 2.207 is governed by the same standards applicable to a motion to amend pleadings, *Waldorf v Zinberg*, 106 Mich App 159, 166; 307 NW2d 749 (1981), and mere delay, generally, is an insufficient ground for denying such a motion. *Terhaar v Hoekwater*, 182 Mich App 747, 753; 452 NW2d 905 (1990). However, while mere delay is an insufficient ground for denying a *motion* to amend a complaint, plaintiffs' delay in prosecuting their cause of action after receiving permission to amend their complaint is not afforded the same deference. See *Taylor v Lenawee Rd Comm'rs*, 216 Mich App 435, 443-444; 549 NW2d 80 (1996). Moreover, because plaintiffs were free to commence a separate action against Star Diamond, the trial court's decision did not result in any prejudice against them.

Plaintiffs next argue that the trial court made several improper remarks in the presence of the jury demonstrating its bias against plaintiffs and denying plaintiffs a fair trial. We disagree. In reviewing the issue, this Court must determine whether the trial judge's conduct or comments denied plaintiffs "a fair and impartial trial by unduly influencing the jury." *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 216; 457 NW2d 42 (1990). "Reversal is not required if it is evident from the record that the prejudicial references were probably rendered harmless by a proper curative instruction." *Granger v Freuhauf Corp*, 147 Mich App 190, 206; 383 NW2d 162 (1985), rev'd on other grounds 429 Mich 1; 412 NW2d 199 (1987).

Having reviewed the record, we conclude that the trial judge's allegedly improper remarks do not warrant reversal. Although the judge's comments were not always constrained in their tone, "being courteous is the ideal, not the requirement." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 154; 486 NW2d 326 (1992). Furthermore, one of the remarks made by the court was not made in the presence of the jury, thus, it could not have influenced the jury. Moreover, any potential prejudice was cured when the trial court instructed the jury to disregard any judicial conduct or remarks which might seem to indicate an opinion. *King*, *supra* at 216; *Granger*, *supra* at 206.

Plaintiffs further contend that the jury's verdict of no cause of action was against the great weight of the evidence. Plaintiffs, however, waived this claim by failing to move timely for a new trial. *Brown v Swartz Creek VFW*, 214 Mich App 15, 27; 542 NW2d 588 (1995).

Plaintiffs also raise several evidentiary issues. "The decision whether to admit evidence rests within the sound discretion of the trial court and will not be set aside on appeal absent an abuse of discretion." *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). "[E]rror requiring reversal may not be predicated upon a ruling that admits evidence unless a substantial right was affected." *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710-711; 550 NW2d 797 (1996); MRE 103(a).

Plaintiffs' first evidentiary issue is that the trial court erred in admitting evidence of plaintiffs' gambling activity as relevant with regard to the issue of damages. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Chmielewski, supra*. The fact that evidence is damaging and harms the opposing party does not indicate that it is unfairly prejudicial. *Id.*

Here, although the evidence may have been somewhat prejudicial to plaintiffs, it had more than marginal relevance. Plaintiffs' claim for damages included a claim for lost business income. In order to calculate the amount of lost income proximately caused by Cracker Barrel's alleged negligence, the jury was entitled to consider all sources of plaintiffs' income, business or otherwise. Hence, the trial court did not abuse its discretion in admitting this evidence.

Plaintiffs' second evidentiary issue is that the trial court abused its discretion in admitting evidence of Andrew Wysocki's previous lawsuits claiming permanent disability for the purpose of attacking his credibility. We disagree. MRE 611(b) provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Evidence that tends to make the existence of a fact at issue more probable or less probable is relevant and, therefore, admissible. MRE 401, 402; *Chmielewski, supra*.

In this case, Andrew Wysocki asserted a derivative claim for loss of consortium, thereby raising issues of causation as well as his credibility. Therefore, the evidence of Andrew Wysocki's preexisting, permanent disability was relevant on these issues. Moreover, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Had the jury concluded that Andrew Wysocki's purported loss of consortium was caused by his own disability, it could have denied recovery altogether. The trial court did not abuse its discretion in admitting this evidence.

As their third evidentiary issue, plaintiffs present two challenges to the trial court's decision to admit a surveillance videotape of Caroline Wysocki at plaintiffs' Florida home. First, plaintiffs argue that the evidence was not properly authenticated. However, by failing to assert this ground below, plaintiffs have not preserved for review the issue of authentication. MRE 103(a)(1); *Begola Services v Wild Bros*, 210 Mich App 636, 642; 534 NW2d 217 (1995). Second, plaintiffs allege that the videotape was inadmissible because it was not properly listed in a pretrial list of exhibits, and, therefore, they had no knowledge of its existence before trial, and had no opportunity to independently view the videotape and confer with counsel. We disagree.

Our review of the record indicates that the trial court did not order the parties to produce a pretrial list of exhibits. Furthermore, plaintiffs did have an opportunity to view the videotape before Caroline Wysocki was called to testify about its contents. In any event, plaintiffs' claim of surprise is unpersuasive where Caroline Wysocki "undoubtedly knew what her capabilities were." *Butt v Giammariner*, 173 Mich App 319, 322; 433 NW2d 360 (1988). We, therefore, conclude that the trial court did not abuse its discretion in allowing Cracker Barrel to introduce the videotape.

Plaintiffs' final evidentiary issue is that the trial court abused its discretion in excluding testimony from plaintiffs' purported expert. Again, we disagree. The qualification of an expert to render an opinion is within the trial court's discretion, and will not be reversed on appeal absent an abuse of that discretion. *Mulholland v DEC Int'l*, 432 Mich 395, 402; 443 NW2d 340 (1989). Opinion testimony by an expert witness is proper "[i]f the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence." MRE 702. A prerequisite to the admission of expert testimony is that "there must be facts in evidence that require or are subject to examination and analysis by a competent expert." *Davis v Link, Inc*, 195 Mich App 70, 74; 489 NW2d 103 (1992).

Here, the issues involved Cracker Barrel's notice of icy conditions in its parking lot, and whether it exercised reasonable care to diminish the hazards of those conditions. These matters were clearly within the grasp of the "common man" and did not require technical or specialized knowledge. "Under a theory of ordinary negligence, the jury is competent to decide what a reasonable person would do under the circumstances." *Bishop v St John Hospital*, 140 Mich App 720, 724; 364 NW2d 290 (1984). The trial court, thus, did not abuse its discretion in excluding plaintiffs' proffered expert testimony.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Paul J. Sullivan