

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

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MARILYN GLANCY,

Plaintiff-Appellant,

v

USF&G, a Maryland Corporation, also known as  
UNITED STATES FIDELITY AND  
GUARANTEE COMPANY,

Defendant-Appellee.

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UNPUBLISHED

May 20, 2003

No. 233094

Jackson Circuit Court

LC No. 98-091131-CH

Before: Murphy, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a jury verdict of no cause of action in defendant USF&G's favor. We affirm.

I

Plaintiff contends that the jury's verdict was against the great weight of the evidence, and that, therefore, the trial court erred in denying her motions for a new trial and JNOV. In *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999), we opined as follows:

This Court will give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. [Citations omitted.]

Here, plaintiff's case was essentially a credibility contest between several medical experts. As such, we defer to the trial court's ability to judge the jury's weighing of the credibility of those witnesses. Thus, although we agree that there was evidence supporting plaintiff's case, plaintiff's contention that the jury's verdict was against the great weight of the evidence is without merit.

We further reject plaintiff's assertion that the jury's verdict was against the great weight of the evidence because of various "concessions." Plaintiff contends that defendant conceded that plaintiff's condition or treatment arose out of the 1989 automobile accident. Although defendant's agent agreed that plaintiff received reasonably necessary care immediately following the 1989 accident, she further opined that plaintiff's ongoing medical expenses were no longer reasonably related to that accident. Accordingly, her testimony fell well short of a concession of liability. Moreover, we are not persuaded that either party's medical experts could concede an issue of liability. At most, these witnesses could offer testimony to be accepted or rejected by the jury. It was the jury's province to determine which testimony to find credible and which testimony deserved more weight.

Further, to whatever extent defendant offered to accept partial liability on some issues as part of a settlement offer, the settlement offer was not—from a practical or legal standpoint—a concession. Nor were the terms of the settlement offer even admissible at trial pursuant to MRE 408. *Arnold v Darczy*, 208 Mich App 638, 640; 528 NW2d 199 (2002). In fact, because the terms of the settlement offer were not presented to the jury, there is absolutely no basis to conclude that the jury's verdict should have reflected that "evidence." Consequently, the trial court did not err in denying plaintiff's motions for a new trial and JNOV. *Ellsworth, supra* at 194.

## II

Next, plaintiff contends that the trial court erred in admitting defendant's file because it appeared to contain more documents than defendant disclosed to plaintiff. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Here, we note that the trial court indicated that plaintiff could receive a copy of Exhibit G after the trial was over. Although we are troubled by plaintiff's inability to immediately get a copy of the exhibit, plaintiff did not object to the trial court's statement. Moreover, plaintiff's counsel could have, and should have, at least requested to *review* the exhibit before making his closing argument. Plaintiff's brief suggests that, despite the trial court's statement, plaintiff's counsel *still* has not received a copy of the exhibit. We question why plaintiff's counsel did not review or obtain a copy of the exhibit before drafting the JNOV motion and presenting this appeal.

Regardless of the circumstances, however, we have been presented with absolutely no indication what documents were in the exhibit. Although plaintiff suggests that there may have been relevant and damaging documents, it is also possible that the exhibit contained irrelevant and harmless documents. It is also possible that the size discrepancy between the admitted exhibit and the disclosed exhibit was caused by defendant not disclosing multiple copies of the same document. In other words, we cannot conclude that plaintiff has satisfied her burden of demonstrating that the trial court abused its discretion in allowing any particular documents to be admitted. *Cain, supra* at 122.

### III

Plaintiff also challenges the trial court's instructions to the jury. In a civil trial, we review jury instructions "in their entirety to determine whether the theories of the parties and the applicable law were adequately and fairly presented to the jury." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001). If the standard jury instructions are inadequate to instruct the jury on an area of law, "the trial court is obligated to give additional instructions when requested, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence." *Id.* at 401-402. If a supplemental instruction is provided, it "must be modeled as nearly as practicable after the style of the Standard Jury Instructions and must be concise, understandable, conversational, unslanted, and nonargumentative." *Id.* at 402. We will only reverse a trial court's decision regarding a supplemental instruction when a "failure to vacate the verdict would be inconsistent with substantial justice." *Id.*

First, plaintiff contends that the trial court erred in refusing to instruct the jury with her three-paragraph version of a proximate cause instruction. However, we believe that the trial court instructed the jury consistent with Michigan law. Moreover, because the trial court instructed the jury that plaintiff's susceptibility to injury was not a defense to defendant's liability, it is unlikely that the jury found that plaintiff's preexisting conditions were merely a contributing cause to plaintiff's injuries. Instead, it is more likely that it found plaintiff's preexisting conditions to be the sole cause of her ongoing medical expenses. Accordingly, we are not persuaded that the trial court's failure to provide plaintiff's proposed instruction rendered the resulting verdict inconsistent with substantial justice. *Bouverette, supra* at 401-403.

Second, plaintiff contends that there was insufficient evidentiary support for a mitigating damages instruction. However, defendant introduced evidence suggesting that plaintiff withdrew from a traumatic brain injury program. Thus, we are not persuaded that the trial court erred in providing the instruction. *Bouverette, supra* at 401-403.

Third, plaintiff contends that the trial court erred in failing to instruct the jury that plaintiff's counsel was ethically barred from contacting defendant—even to submit bills on her behalf. Although the trial court instructed the jury that plaintiff's counsel was ethically barred from contacting defendant's agents and was required to contact defense counsel, the trial court opined that plaintiff's counsel could submit information or reports on her behalf. We do not believe that the trial court's instruction was legally erroneous.<sup>1</sup> Regardless, where, as here, the outcome of the proceedings relied so heavily on the credibility contest between the medical experts, we are not persuaded that this instruction rendered the resulting verdict inconsistent with substantial justice. *Bouverette, supra* at 401-403. Consequently, we find no error.

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<sup>1</sup> We note that the opinion letter plaintiff submitted is obviously not binding authority. Regardless, the opinion letter did not comment on the questions before us and is, therefore, irrelevant.

#### IV

Finally, plaintiff contends that the trial court erred in denying her request to strike the testimony of Dr. Adams because he refused to disclose his annual earnings doing independent medical examinations for insurance companies. However, we note that Dr. Adams did testify that ten percent of his evaluations were done for insurance companies. If anything, the percentage of work is more relevant to a credibility determination than the raw figures. Consequently, we do not believe that the trial court abused its discretion in allowing percentage-based testimony to be sufficient, and denying plaintiff's motion to strike the testimony. *Cain, supra* at 122.

Affirmed.

/s/ William B. Murphy  
/s/ Donald S. Owens  
/s/ Bill Schuette