

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF RONALD C. RUSSEAU,

Plaintiff-Appellant,

and

PAT BESEDICH,

Plaintiff,

v

KIMBERLY ESTATES MOBILE HOME PARK,
JOSEPH S. DRESNER, JACK FRIEDMAN, SOL
S. DRESNER, MILTON H. DRESNER, and
MILTON H. DRESNER REVOCABLE LIVING
TRUST,

Defendants-Appellants.

UNPUBLISHED

May 29, 2003

No. 233675

Monroe Circuit Court

LC No. 99-009010-NO

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff¹ appeals as of right from a judgment of no cause of action in favor of defendants. We affirm.

Before the commencement of trial, the parties filed various motions before the trial court regarding compliance with discovery and production of documents, exclusion of photographs regarding the scene of the injury, and exclusion of evidence regarding plaintiff's prior use of alcohol. Plaintiff requested documentation regarding other accidents or incidents that had occurred at the mobile home park. Defendants objected to the request, claiming that it was overbroad and ambiguous. The trial court entered an order requiring a response to the request for production of documents. Plaintiff filed a re-notice of hearing regarding the motion to

¹ The loss of consortium claim raised by plaintiff Pat Besedich was dismissed in the trial court and is not an issue on appeal. Ronald C. Russeau died while this appeal was pending. For ease of reference, the term "plaintiff" will refer to Russeau.

compel. However, the trial court signed a handwritten order indicating that the motion was dismissed after plaintiff's counsel failed to appear for the hearing of the motion. The order further provided that the trial court would consider imposing costs if defendants were required to re-appear for the motion hearing.

Defendants moved to exclude photographs of the scene of the injury because the photographs depicted snow on the ground, and there was no evidence to establish the presence of snow at the time of the fall. Plaintiff submitted new photographs that depicted the area without snow. However, plaintiff submitted a photograph of an unrelated driveway across the street from the scene of the injury with a substantial amount of water accumulated at the base of the driveway. The trial court ruled that a foundation for admission had not been established, but agreed to address the issue at trial if the photograph was relevant for purposes of rebuttal.

The parties acknowledged that plaintiff had a medical history of alcohol use. Plaintiff asserted that alcohol use did not play a role in his slip and fall, and there was no evidence of alcohol use prior to the fall. Defendants did not dispute that there was no actual proof of alcohol use on the day of the fall. However, defendants alleged that prior alcohol use was relevant to contest causation and damages. Defendants alleged that their medical experts testified regarding the impact of alcohol abuse on blood clotting. The trial court held that prior alcohol use could not be utilized to demonstrate that plaintiff had been drinking on the day of the fall. However, the trial court directed the parties to submit the medical experts' depositions for review prior to trial to determine if the evidence was relevant for another purpose. The parties did not submit the medical documentation prior to trial, and a written order regarding the trial court's ruling was not entered.

During voir dire, plaintiff's counsel advised the jurors that plaintiff had a problem with alcohol use in the past. Additionally, plaintiff's counsel referenced prior alcohol use during opening argument. Plaintiff's counsel also submitted the deposition of Dr. Michael Healy, which contained a medical history that plaintiff was an alcoholic. Dr. Healy testified regarding the impact alcohol may have on a hematoma, plaintiff's injury. Besedich and friend, Frankie Briel, also testified regarding alcohol usage by plaintiff. Both individuals denied recent alcohol abuse by plaintiff, and Brief testified that plaintiff attended Alcoholics Anonymous.

Plaintiff testified that, in late November 1997, he was watching Monday Night Football and ate a late dinner with Besedich. He then proceeded to the mailbox at approximately midnight to collect the mail from down the street. Plaintiff avoided the area of the base of the driveway because of the accumulation of water in the area. On the return from the mailbox, plaintiff slipped and fell on an accumulation of ice at the base of the driveway. Plaintiff acknowledged that he could have avoided this location of the driveway on his return from the mailbox. Plaintiff experienced a severe headache, but he did not seek medical treatment because he did not have insurance. Two weeks later, after suffering a seizure, plaintiff was taken to the hospital and underwent surgery for a subdural hematoma. A toxicology screen at the hospital, albeit two weeks after the slip and fall, did not reveal the presence of alcohol. The jury returned a verdict of no cause of action in favor of defendants.

Plaintiff first alleges that the trial court erred in permitting evidence of alcohol use and/or intoxication at trial in violation of MRE 404(b)(1). We disagree. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Davidson v Bugbee*, 227 Mich

App 264, 266; 575 NW2d 574 (1997). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 647; 591 NW2d 393 (1998). This Court will not reverse on the basis of evidentiary error unless the trial court's ruling affected a party's substantial rights. *In re Caldwell*, 228 Mich App 116, 123; 576 NW2d 724 (1998). See also MRE 103(a); MCR 2.613(A). A party may not harbor error as an appellate parachute by allowing counsel to deem something proper at trial and assign error to it on appeal. *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989).

In *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 102-103; 574 NW2d 36 (1997), the plaintiff alleged that it was erroneous to allow in spousal abuse evidence. This Court disagreed, holding that the plaintiff had "opened the door" to such testimony:

Next, plaintiff argues that the trial court erred in allowing defendants to introduce evidence of spousal abuse by the decedent and the plaintiff's receipt of public assistance. With respect to the evidence of spousal abuse, this was certainly relevant. Specifically, it was relevant to plaintiff's claims for loss of society and relationship. Furthermore, it was relevant to the issue of the decedent's alcoholism and plaintiff's claim that the decedent did not have a drinking problem. Furthermore, plaintiff *opened the door* to these issues when she raised her entire thirty-year relationship with the decedent in support of her claim for loss of society and relationship and when she offered a reason for filing for divorce from the decedent in the 1970s. [*Id.* (emphasis added).]

In the present case, plaintiff cannot take issue with the introduction of testimony regarding plaintiff's alcoholism where plaintiff's counsel essentially "opened the door" by introducing evidence of alcoholism to the jury when empanelling the jurors and in referencing the alcohol use in opening statements. Then, plaintiff's counsel allowed the jury to hear further alcohol related evidence with the admission of Dr. Healy's entire deposition. A party may not harbor error as an appellate parachute. *Dresselhouse, supra*. Irrespective of any ruling² regarding the admission of plaintiff's alcoholism, plaintiff nonetheless introduced evidence without qualification. Thus, plaintiff cannot disregard a court's ruling by introducing the evidence in his case in chief and then allege on appeal that the admission was contrary to a court order.³

² We note that courts speak through their judgments and decrees, not oral statements or written opinions. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). A written order regarding the admission of evidence of alcohol use or alcoholism was not entered. Additionally, the trial court indicated that it would review the medical experts' testimony in advance of trial in order to determine the extent of admissibility with respect to causation and damages. The depositions were not submitted to the trial court until the time of trial, and the trial court indicated throughout the trial that review was continuing. Consequently, we cannot conclude that the admission of this evidence was in violation of an oral ruling or order where the parties did not ensure that this issue was resolved prior to trial.

³ Because of our conclusion that plaintiff opened the door to this testimony, we need not address the trial court's failure to provide a limiting instruction.

Plaintiff also alleges that defense counsel took advantage of the trial court's refusal to enforce MRE 404(b) and introduced improper statements in closing argument. We disagree. An attorney's comments are not cause for reversal unless they indicate a deliberate course of conduct designed to prevent a fair and impartial trial. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999). Reversal is required only where the prejudicial statements by the attorney reflect a studied purpose to inflame or prejudice the jury or deflect the jury's attention from the issues involved. *Id.* An attorney's statements must be examined in context to determine whether a timely objection and request for a curative instruction would have alleviated any prejudice. *Snell v UACC Midwest, Inc*, 194 Mich App 511, 517; 487 NW2d 772 (1992). Following a review of the statements in context, we conclude that the comments were not a deliberate course of conduct designed to prevent a fair and impartial trial, but rather were responsive to testimony and argument presented by plaintiff. *Kubisz, supra; Snell, supra.*

We note that plaintiff introduced, through the testimony of Briel, that plaintiff quit drinking after hospitalization for "heavy drinking" in 1996, and he attended Alcoholics Anonymous meetings. Besedich also supported this testimony that alcohol did not contribute to the fall. Furthermore, plaintiff's counsel repeatedly argued that plaintiff had not been drinking at the time of the slip and fall and cited to the toxicology screen at the hospital. However, the slip and fall and visit to the hospital occurred two weeks apart. Thus, the toxicology screen did not address intoxication, if any, at the time of the fall. Defense counsel's argument, in context, noted that evidence regarding whether plaintiff continued to consume alcohol was in dispute, and it was for the trier of fact to resolve the credibility issues. Consequently, the claim of attorney misconduct is without merit.

Plaintiff next alleges that the trial court erred in denying admission of evidence of the water condition at the mobile home park. We disagree. A trial court's decision regarding admission of photographic evidence is reviewed for an abuse of discretion. *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 401; 586 NW2d 549 (1998). In *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 133; 492 NW2d 761 (1992), this Court set forth the following criteria for admission of photographs:

To lay a proper foundation for the admission of photographs, a person familiar with the scene depicted in the photograph must testify, on the basis of personal observation, that the photograph is an accurate representation. Photographs may still be admissible despite changes in the scene, as long as someone testifies with regard to the extent of the changes. [Citations omitted.]

In *Knight, supra*, this Court held that an adequate foundation for admission of the photographs was established by the testimony of the witness who was familiar with the area because of his past employment for the defendant. The witness was also familiar with the lighting conditions on the day of the plaintiff's accident because he found the plaintiff.

In the present case, the trial court did not abuse its discretion by excluding the photograph at issue. *Metalux, supra*. The photograph at issue did not demonstrate the condition of plaintiff's driveway as it abutted the street and accumulated water, but rather was a photograph of the driveway across the street. Besedich testified that the brain injury occurred on November 24, 1997, but she did not take the photographs until late November 2000. The park manager testified that alterations to the roadways had occurred in approximately 1999. Therefore, it is

unclear whether any subsequent repaving of the road had an impact on the degree of standing water. In the testimony presented by Besedich regarding the admission of the photograph, she did not testify regarding the weather conditions prior to taking the photograph. Thus, it is unclear whether a severe heavy rain caused the accumulation or whether a resident had washed a vehicle prior to the taking of the photograph. Furthermore, there was testimony regarding a drain that was in proximity to plaintiff's driveway. There was no testimony to indicate whether a drain was near the location of this photographed driveway or whether any repaving of this area had an impact on any drain in the area. In light of deficiencies in the foundation for admission of this photograph, taken three years later of an unrelated area, the trial court did not abuse its discretion by excluding the photograph. *Metalux, supra; Knight, supra*.

Plaintiff next alleges that the trial court erred in failing to take action against defendants for failing to produce all requested documents in discovery. We disagree. The decision to grant or deny discovery sanctions is reviewed for an abuse of discretion. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 87; 592 NW2d 112 (1999).

MCR 2.313 governs failure to provide or permit discovery and sanctions. MCR 2.313(A) permits a party to file a motion for an order compelling discovery. While plaintiff did file such a motion, the trial court did not enter a written order compelling discovery. As previously noted, the court speaks through its written orders, not oral declarations. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). If a party fails to comply with a discovery order, the trial court may order "such sanctions as are just" including, but not limited to, ordering established facts, refusing to allow the disobedient party to support or oppose claims or defenses, striking pleadings, entering a dismissal or default, etc. See MCR 2.313(B)(2).

The trial court declined the opportunity to conclude that a discovery violation had occurred, and we cannot conclude that the decision was an abuse of discretion. The park manager testified that certain record keeping procedures were discontinued for a time. Therefore, it is unclear whether a discovery violation occurred or whether the documentation was unavailable. Additionally, plaintiff's counsel cited to monthly record logs of individuals who came to the premises to perform some sort of work. However, it is questionable whether the trial court would have compelled defendants to produce this information. For example, if the monthly log addressed visits by electricians, that information had no bearing on plaintiff's slip and fall. In light of the inadequacy of the record addressing the existence of the records, without any indication of what the documentation would have revealed, and without a formal written discovery order to evidence that this documentation would have been governed by the order, we cannot conclude that the trial court's decision to deny discovery sanctions was an abuse of discretion. *Jackson Co Hog Producers, supra*.

Plaintiff next alleges that the trial court erred in granting mutually exclusive jury instructions on the element of duty. As an initial matter, we note that plaintiff did not preserve this issue on this basis in the record below. In *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 10; 535 NW2d 215 (1995), this Court held that to preserve an instruction issue for appellate review, the objection must specifically state the objectionable matter and the ground for objection. Thus, where defendants merely gave a general objection to the entire verdict form used by the trial court, this general objection did not preserve the issue for appellate review because it did not identify a specific ground for the objection. *Id.*

At trial, plaintiff objected to the submission of SJI2d 19.03⁴ (Duty of Possessor of Land, Premises or Place of Business to Invitee) and SJI2d 19.05 (Duty of Possessor of Land, Premises, or Place of Business to a Business Invitee Regarding the Natural Accumulation of Ice and Snow). However, plaintiff objected on the basis that SJI2d needed to be modified to reflect the fact that any violation of SJI2d 19.05 required immediate attention, rather than reasonable measures within a reasonable period of time, citing *Freed v Simon*, 370 Mich 473; 122 NW2d 813 (1963). However, review of this decision reveals that it does not address any distinction in duty between natural and unnatural accumulations. Consequently, plaintiff's challenge at trial did not involve the objection raised on appeal, and therefore, is not preserved for appellate review. *Hammack, supra*. However, because the propriety of instructing on both SJI2d 19.03 and SJI2d 19.05 was challenged by the defense, we nonetheless will address the merits of this issue.

In *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000), the following rules regarding review of jury instructions were stated:

We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Johnson v Corbet*, 423 Mich 304; 377 NW2d 713 (1985).

The trial court instructed the jury as follows:

A possessor of land, premises, a place of business, has a duty to maintain that land, premises, place of business in a reasonably safe condition. A possessor has a duty to exercise ordinary care to protect an invitee from unreasonable risks of injury that were known to the possessor or that should have been known in the exercise of ordinary care.

It was the duty of Kimberly Estates [defendants] to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to determine – I'm sorry, to diminish the hazard of injury to Ron Russeau [plaintiff].

⁴ The instructions were renamed effective May 1, 2002, to the Model Civil Jury Instructions (M Civ II). The amended text was not in effect at the time of trial. Therefore, references will be to the instructions given at the time of trial, although no substantive changes in these instructions occurred.

Review of the record reveals that the trial court did, in fact, give the first two paragraphs of SJI2d 19.03 and SJI2d 19.05. The note on use accompanying SJI2d 19.05 states:

This instruction should be used where applicable instead of the more general SJI2d 19.03 Duty of Possessor of Land, Premises, or Place of Business to Invitee. It does not apply to public sidewalks.

Courts must give the ordinary and accepted meaning to the mandatory word “shall” and the permissive word “may.” See *Browder v Int’l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). There is no language in the use note to indicate that it is mandatory that alternative instructions be given. Furthermore, irrespective of the use note accompanying SJI2d 19.05, the instructions comported to the theory underlying plaintiff’s case. Specifically, plaintiff pleaded, in his complaint, two theories of negligence based on the breach of a duty to protect or warn and a breach of duty to prevent damages caused by snow and ice.⁵ Plaintiff’s proofs at trial attacked the maintenance and grading of the street abutting the driveway that purportedly caused water accumulations in that area. Furthermore, plaintiff alleged that defendants breached a duty where ice was allowed to accumulate in this area, despite prior notice of the accumulation and prior notice of falls on the ice in winter. Plaintiff’s theory of the case involved a challenge to the maintenance of the grade of the street *and* the accumulation of ice in the area as a result of the grading. Thus, error requiring reversal did not occur, irrespective of the use note, because plaintiff’s theories and applicable law were fairly presented to the jury. *Case, supra*. Furthermore, reversal for instructional error only occurs where the failure to do so would be inconsistent with substantial justice. *Id.* Plaintiff has failed to meet this heavy burden. Accordingly, the challenge based on instructional error is without merit.

Lastly, plaintiff alleges that the trial court’s conduct toward plaintiff’s counsel unfairly prejudiced the jury by demonstrating the trial court’s opinion of the case. We disagree. In *In re Susser Estate*, 254 Mich App 232, 236; 657 NW2d 147 (2002), the respondents alleged a denial of due process and fair trial when the trial court refused to allow them to question a witness about a hand gesture. This Court stated:

A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise. *SC Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810-811; 286 NW2d 34 (1979); see also *Cain, supra* [*Cain v Dep’t of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996)]. Here, the sole allegation of bias asserted by respondents is that petitioner’s main witness was once affiliated with the trial judge’s bid for election to the bench. However, other than the fact that the trial judge ruled against them on a contested issue, respondents point to no conduct by the trial judge demonstrating prejudice or bias. Because rulings against a litigant, even if erroneous, do not themselves constitute bias or prejudice sufficient to establish a denial of due process, see *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573,

⁵ The issue of the propriety of two claims of negligence is not at issue on appeal. But see *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495-497; 595 NW2d 152 (1999).

597-598; 640 NW2d 321 (2001), we cannot, in the absence of a more specific demonstration of bias or prejudice, conclude that respondents have overcome the presumption of judicial impartiality. *Gray, supra; Cain, supra*. [Footnote omitted.]

Review of the entire record reveals that plaintiff has failed to overcome the presumption of judicial impartiality. *Susser, supra*. The incident cited by plaintiff's counsel was isolated, not present throughout the trial. Furthermore, plaintiff's counsel waived this issue by agreeing to the trial court's curative instruction to the jury and failing to request a mistrial as offered by the trial court. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood