

STATE OF MICHIGAN
COURT OF APPEALS

RAY KOUZA and DURAI DAUD,

Plaintiffs-Appellants/Cross-
Appellees,

v

AKRAM NAMOU, AKRAM NAMOU, CPA, PC,
and ROMULUS NIGHTS, INC.,

Defendants-Appellants/Cross-
Appellees.

UNPUBLISHED

April 22, 2003

No. 231470

Oakland Circuit Court

LC No. 94-481757-CK

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from entry of a judgment in favor of defendants following a jury verdict of no cause of action with respect to plaintiffs' claims against defendants for an alleged lost opportunity to purchase the former Clarion Hotel in Romulus. We affirm.

I

This case stems from plaintiffs' alleged lost opportunity in late 1993 and early 1994 to purchase a Clarion Hotel in Romulus, which plaintiffs claim defendant¹ Akram Namou, a CPA and hotel owner, usurped for his own benefit after plaintiffs sought his professional financial advice concerning the hotel's profitability. Plaintiffs filed this action for damages, alleging three claims: professional malpractice and breach of fiduciary duty against Akram and Akram Namou C.P.A., P.C., and tortious interference with a business relationship or expectancy against all three defendants.

¹ Although there are three named defendants, both defendant corporations are wholly owned by defendant Akram Namou. One corporate defendant is Namou's accounting firm and the other is the corporate owner of the Clarion Hotel (now a Best Western). For clarity, this opinion refers to defendant in the singular.

Plaintiffs' theory of the case was that defendant betrayed plaintiffs' trust for his own personal gain, falsely advising them that the Clarion was a losing proposition with no long term prospects for improvement, thereby causing their partnership to dissolve. Defendant's theory was that plaintiffs aborted their purchase and attempted to blame their own lack of funds, experience and courage on defendant, and brought this contingency case without any evidence because they had nothing to lose. Further, plaintiffs earlier bailed out of a signed letter of intent on another hotel; they had significant money problems, could not complete the Clarion purchase, and asked defendant to be a partner because they needed his money. They passed up offers to purchase the Clarion and now want the hotel risk-free. The jury found in favor of defendant on all counts.

II

Plaintiffs first argue that they were denied their right to a fair trial on the basis of misconduct by defense counsel on four alleged grounds: 1) improper accusations of misconduct and criminality, 2) violation of the trial court's ruling on mitigation argument, 3) advising the jury of the court's rulings outside the presence of the jury, and 4) improper testimony by defendant concerning the lack of any previous malpractice lawsuits against him. We find no error requiring reversal.

A

This Court reviews alleged misconduct of counsel to first determine whether the attorney's action was error and then whether the error requires reversal. *Craig v Oakwood Hospital*, 249 Mich App 534, 539, 555; 643 NW2d 580 (2002) (Cooper, J, concurring). An attorney's remarks will not generally be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* Reversal is required if prejudicial statements by counsel reflect a studied attempt to inflame the jury or deflect its attention from the issues involved. *Id.*

Where an issue of alleged misconduct by counsel is unpreserved, this Court must determine if a new trial is required because the error denied the party a fair trial, i.e., what occurred may have caused the result or played too large a part such that the verdict is tainted. *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 290; 602 NW2d 854 (1999). Unpreserved claims of error are forfeited absent a showing of plain error that affected the claimant's substantial rights, i.e., plaintiffs must show a clear or obvious error that affected the outcome of the case. *Shinholster Estate v Annapolis Hosp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 225710, issued 2/14/03) slip op p 7; *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

B

Plaintiffs argue that defense counsel used unfounded accusations of misconduct and criminality toward plaintiffs to obtain a verdict. The alleged misconduct does not indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Craig, supra* at 555. Generally, defense counsel's remarks were based on the evidence or the circumstances presented, and were not "unfounded." Further, counsel's comments were limited to the context that warranted them. Plaintiffs have shown no error requiring reversal.

Plaintiffs failed to object to remarks made during counsel's opening statement. Defendant's remarks did not plainly violate the court's ruling precluding use of the word fraud in reference to plaintiffs' activities. Moreover, counsel's remarks properly characterized, and responded to, plaintiffs' counsel's remarks in his opening statement concerning defendant stealing plaintiffs' business deal. Counsel's remarks concerning plaintiff Kouza's misrepresentations, even if objectionable, unlikely influenced the trial outcome, given Kouza's own admissions of untruthfulness and plaintiffs' evidence to the contrary. The remaining instances of misconduct are baseless.

Plaintiffs complain that defendant violated the court's pretrial ruling prohibiting defendant from arguing that plaintiffs were required to mitigate their damages by accepting defendant's offer to assign his rights to purchase the Clarion. Even if this comment was improper, plaintiffs did not object, and it is unlikely to have influenced the result. The court instructed the jury, and defense counsel reiterated, that the court would instruct the jury on the law and that the statements of the attorneys were merely their opinions. There was no instruction on mitigation. The jury is presumed to follow the instructions. *Id.* at 561.

Moreover, counsel's remark, by its own limitation, applied only if the jury found liability. The jury found no liability, thus never reached the issue of damages, and therefore the error would not have played a part in the result.

Plaintiffs complain that defense counsel advised the jury of rulings made outside its presence. Again, plaintiffs did not object to the alleged misconduct, and there is no indication that these isolated incidents over a nine-day trial tainted the result.

Plaintiffs themselves placed the matter of former plaintiff Salem's withdrawal at issue, referring to Salem in their opening statement. A party waives review of the admission of evidence that he introduced or made relevant by his own placement of a matter in issue. *City of Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986).

Counsel's lost profits reference, by his express limitation, only related to damages. As noted above, the jury did not reach the issue of damages; thus, it is unlikely that the verdict was tainted by counsel's remark. Likewise, we find no error in counsel's remark in closing argument referencing relevant expert testimony concerning malpractice. The expert's testimony on financing was relevant with respect to the facts underlying the alleged malpractice, i.e., whether defendant's financial analysis was accurate and his advice to plaintiffs proper.

Regarding counsel's reference to the malpractice ruling, the trial court had stated during discussion on defendant's motion for a directed verdict that plaintiffs could not claim malpractice beyond mid-January and could not make a claim to the contrary in the jury instructions or in argument to the jury. Further, the court ultimately instructed the jury that nothing that took place after the middle of January 1994 could be considered as malpractice.

Defendant's reference to the ruling could not have affected the outcome beyond any effect from the actual instruction.

4

Finally, plaintiffs did not object to defendant's testimony that he had no previous malpractice lawsuits, and may not now complain of error. As defendant points out, the alleged misconduct involves defendant's testimony during cross-examination in response to the question whether he testified earlier that he was a "good accountant." Defendant's response pertained to a matter raised by plaintiffs. A party waives review of the admission of evidence that he introduced, or that was made relevant by his own placement of a matter in issue. *Id.* at 570-571.

III

Plaintiffs argue that the trial court committed error requiring reversal in instructing the jury on the elements of professional malpractice and breach of fiduciary duty. We disagree.

A

Claims of instructional error are generally reviewed de novo, *Cox v Flint Bd of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), although a trial court's determination whether supplemental instructions are applicable and accurate is reviewed for abuse of discretion. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 151; 640 NW2d 892 (2002).

Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Bachman v Swan Harbour Ass'n*, 252 Mich App 400, 424; 653 NW2d 415 (2002). Reversal is not required unless the failure to reverse would be inconsistent with substantial justice. MCR 2.613(A), *Case, supra*. There is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997); *In re Flury Estate*, 249 Mich App 222, 226; 641 NW2d 863 (2002).

B

We find no error requiring reversal based on instructional error; the failure to vacate the verdict would not be inconsistent with substantial justice. The theories of the parties and the applicable law were adequately and fairly presented to the jury. *Id.* at 226.

1

Plaintiffs claim error requiring reversal on the basis that the court failed to inform them of the malpractice claim cut-off instruction before closing argument in violation of MCR 2.516(A)(4). Plaintiffs did not raise their objection before the trial court. A trial court's failure to inform counsel of its proposed action on requested instructions does not constitute reversible

error in the absence of timely objection. *Hanna v Ivory*, 61 Mich App 225, 228; 232 NW2d 366 (1975).

Further, from the record, it appears that defense counsel's closing argument reference to the court's malpractice ruling has its genesis in the court's ruling on defendant's motion for a directed verdict. The instruction arose essentially as a curative instruction, requested by defendant following plaintiffs' rebuttal closing argument. Pursuant to MCR 2.516(B)(2), at any point during trial, the court may "instruct the jury on a point of law if the instruction will materially aid the jury to understand the proceedings and arrive at a just verdict."

Plaintiffs also claim that the substantive instruction on malpractice took from the jury the ability to credit testimony of plaintiffs' expert. We disagree. Contrary to plaintiffs' assertion, questions regarding duty are generally for the court to decide as a matter of law, *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999), and are subject to de novo review, *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001). The trial court's ruling and subsequent instruction was based on the facts, the testimony, and plaintiffs' particular claims. The ruling did not improperly preclude the jury from crediting the testimony of plaintiffs' expert concerning a continuing duty or effectively instruct the jury that it was obliged to believe defendant's expert.

Plaintiffs also argue that the court's instruction that no events after mid-January could be considered with respect to malpractice was wrong and it eviscerated plaintiffs' malpractice case, making it impossible for the jury to return a verdict in favor of plaintiffs. The determination whether the supplemental instructions are applicable and accurate is within the trial court's discretion. *Stoddard, supra* at 162. This discretion is to be exercised in the context of the particular case, with due regard for the adversaries' theories of the case and counsels' legitimate desires to structure argument to the jury around anticipated instructions. *Jones v Porretta*, 428 Mich 132, 146; 405 NW2d 863 (1987); *Wengel v Herfert*, 189 Mich App 427, 431; 473 NW2d 741 (1991). Although the trial court's instruction may have been broader than necessary, we find no abuse of discretion in light of plaintiffs' theory and the evidence.

The essence of plaintiffs' malpractice claim was that defendant committed malpractice in advising plaintiffs that the hotel was a bad project. In the final instructions, the court quoted plaintiffs' theory, which stated that defendant betrayed the trust of his clients, plaintiffs, for his own personal gain, that he failed to reveal his conflicts of interest, and that he falsely convinced plaintiffs that the hotel was a losing proposition with no long term prospects for improvement. The jury was not precluded from so finding. There is no error requiring reversal with regard to jury instruction, if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock, supra* at 60; *In re Flury Estate, supra* at 225-226.

2

Similarly, plaintiffs' claims of error in the fiduciary duty instructions are without merit. Plaintiffs' challenges rest primarily on law, including case law from other states, that is specific to other types of relationships, such as joint venturers, partners, agents, and attorneys, and other factual circumstances. Even if the instructions were somewhat imperfect, we find no error requiring reversal because the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Id.*

Plaintiffs claim error in the court's instruction regarding termination of fiduciary duty, which stated: "Once the fiduciary relationship is over, however, a fiduciary is free to pursue his or her own interest." Arguably, plaintiffs waived objection to this instruction given their opportunity to further develop the instruction on the definition of "fiduciary relationship." Likewise, plaintiffs failed to object to the trial court's decision to exclude the duty of disclosure. Failure to timely and specifically object to a jury instruction precludes appellate review absent manifest injustice. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001). Manifest injustice results if the defect is of such a magnitude as to constitute plain error requiring a new trial or if it pertains to a basic and controlling issue. *Shinholster Estate, supra* at slip op p 7; *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 680-681; 555 NW2d 1 (1996), rev'd in part on other grds 455 Mich 866 (1997). We find no manifest injustice.

The court instructed the jury that a fiduciary owes a client "the duty of honesty and continuing good faith and loyalty and restraint from self-interest." Plaintiffs' theory was that defendant knowingly gave plaintiffs false advice to scare them away from the Clarion deal. The instructions did not preclude a finding of liability for breach of fiduciary duty had the jury accepted plaintiffs' theory. Even if the affirmative statement that a fiduciary is free to pursue his or her own interest is subject to challenge, we find no error when the instructions are considered in their entirety. Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions *Case, supra* at 6; *Bachman, supra* at 424.

Plaintiffs also allege error in the court's failure to instruct the jury that a fiduciary owes the "utmost" fidelity, asserting that the court initially agreed to use the word "utmost" and then inexplicably later changed its mind and refused to do so. Contrary to plaintiffs' assertion, plaintiffs themselves essentially reraised the issue of use of the word utmost and should not now be heard to complain that the court omitted the word. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998).

In any event, the trial court did not "water down" the standard of fiduciary duty by omitting the word utmost. Although certain decided cases, particularly those involving agency or corporate director relationships, have used the word utmost, many cases addressing fiduciary duty in general do not. A requested nonstandard jury instruction must be modeled as nearly as practicable after the style of the standard jury instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative. *Beadle v Allis*, 165 Mich App 516, 527; 418 NW2d 906 (1987). Thus, a trial court is not required to give an instruction merely because it is an accurate statement of the law, even where the instruction is taken verbatim from a decided case. *Id.* at 526-529; see also 2 Lang, Neilson, Young & Holsinger, Michigan Civil Procedure, Jury Instructions & Special Verdicts, § 19.8, pp 19-8-19-11.

Cases that have addressed the nature of the fiduciary relationship state generally, that a fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another, and that relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed. *Vincencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995); *Smith v Saginaw S & L Ass'n*, 94 Mich App 263, 274-275; 288 NW2d 613 (1979). Further, "[a] person in a fiduciary relation to another is under a duty to act for the benefit of the other with regard to matters within the scope of the relation." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999). A fiduciary is one in whom another has reposed trust and

confidence and the fiduciary must exercise a corresponding degree of fairness and good faith. *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981). The trial court's instructions properly informed the jury of the applicable law.

IV

In light of the above disposition, this Court need not address the issues presented in defendant's cross-appeal.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Hilda R. Gage