

STATE OF MICHIGAN
COURT OF APPEALS

JOHN FODERA and SABRINA FODERA,

Plaintiffs-Appellees,

v

KEENAN VAN LOBBS and KYLEE LYNN
LOBBS,

Defendants-Appellants.

UNPUBLISHED

January 31, 2006

No. 256555

Genesee Circuit Court

LC No. 03-076302-NI

JOHN FODERA and SABRINA FODERA,

Plaintiffs-Appellants,

v

KEENAN VAN LOBBS and KYLEE LYNN
LOBBS,

Defendants-Appellees.

No. 259097

Genesee Circuit Court

LC No. 03-076302-NI

Before: Talbot, P.J., and White and Wilder, JJ

PER CURIAM.

This action arises out of an automobile accident in which defendants' car struck plaintiffs' car, causing it to roll over. In Docket No. 256555, defendants, Keenan Van Lobbs and Kylee Lynn Lobbs, bring an interlocutory appeal from the trial court's order denying defendants' motion to compel an independent neurological examination of plaintiff Sabrina Fodera. In Docket No. 259097, plaintiffs, John Fodera (John) and Sabrina Fodera (Sabrina), appeal as of right a jury verdict of no cause of action and the trial court's denial of plaintiffs' motion for a new trial and/or motion for judgment notwithstanding the verdict. We affirm the trial verdict of no cause of action.

Because we affirm the trial verdict of no cause of action, as discussed *infra*, defendants' motion to compel an independent neurological examination of Sabrina is moot. "An issue is moot if an event has occurred that renders it impossible for a court to grant relief." *City of*

Warren v Detroit, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004) (citations omitted). We, therefore, decline to address the merits of defendants' claim on appeal in Docket No. 256555.

In Docket No. 259097, plaintiffs first contend that the trial court erred in reading defendants' requested supplement to M Civ JI 36.11, which was based on *Kreiner v Fischer*, 471 Mich 109; 638 NW2d 611 (2004), because the supplemental instruction did not properly inform the jury of the applicable law. We disagree.

This Court reviews claims of instructional error de novo, examining the jury instructions as a whole to determine whether there is error requiring reversal, and reversing only if failure to do so would be inconsistent with substantial justice. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Jury instructions are reviewed in their entirety to determine whether the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Cacevic v Simplimatic Engineering Co*, 241 Mich App 717, 721; 617 NW2d 386 (2000), vacated in part on other grounds 463 Mich 997 (2001). When the standard jury instructions do not adequately cover an area, 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. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). Supplemental instructions, when given, must be modeled as nearly as practicable after the style of the Standard Jury Instructions and must be concise, understandable, conversational, unslanted, and nonargumentative. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 402; 628 NW2d 86 (2001).

In this case, the Supreme Court had issued *Kreiner* just five days before trial commenced. Based on *Kreiner*, defendants requested the trial court to supplement the standard jury instruction on "serious impairment of a body function," M Civ JI 36.11, with the following definition of "general ability" to lead a normal life:

In order for you to find that the impairment affects the plaintiff's general ability to lead his/her normal life, you must find that the impairment constitutes more than a minor interruption in life. Although some aspects of the plaintiff's entire normal life may be interrupted by the impairment, if, despite those impairments, the course or, or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his and/or her normal life has not been affected and he does not meet the "serious impairment of a body function" threshold.

As this language was taken directly from *Kreiner*, *supra* at 130-131, it accurately explained the state of the law as it existed at the time of trial. A trial court is permitted to further define terms for a jury based on case law. See *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994) (finding no error where, although a term was defined neither by statute nor the model jury instructions, the trial court's supplemental instruction properly explained the term as it has been defined by case law). Moreover, as *Kreiner* clarified the no-fault statute, there is no indication that its applicability was limited to motions for summary disposition, as plaintiffs argue.

Plaintiffs at no point argue that that the trial court's supplemental definition from *Kreiner* provided the jury with an inaccurate statement of the law as it existed at the time, but rather, that the trial court erred in reading it to the jury at all. Plaintiffs base this argument on an affidavit of

a reporter for the Committee on Model Civil Jury Instructions, which states that the Committee determined not to amend the Model Civil Jury Instructions in light of *Kreiner*. The Committee's determination, which was made long after the trial in the present case, has no effect on whether the trial court erroneously instructed the jury on the law as it existed at the time of trial. The trial court had to move forward, and its instructions properly and accurately instructed the jury.

Plaintiffs also cite currently pending legislation, which they argue shows that *Kreiner* did not accurately reflect the Legislature's intent. This argument is of no relevance to this case, however, since pending legislation has no legal effect. *Dean v Dean*, 175 Mich App 714, 717; 438 NW2d 355 (1989). In any event, neither the reporter's affidavit nor any evidence of the pending legislation were ever presented to the trial court. Appeals are heard on the original record, MCR 7.210(A)(1), and it is impermissible to expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Plaintiffs' argument, therefore, lacks merit. The trial court did not err in reading the supplemental instruction to the jury.

Next, plaintiffs argue that they are entitled to a new trial because the jury verdict form erroneously required a finding of serious body impairment as a prerequisite to considering Sabrina's claim for excess wage loss. We disagree.

Here, plaintiffs not only failed to object to the jury verdict form before it was given to the jury, they actually prepared it. "A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf v St. John Hosp*, 245 Mich App 670, 683; 630 NW2d 356 (2001), quoting *Dresselhouse v Chrysler*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Because plaintiffs not only acquiesced in the trial court's instructions to the jury, but also affirmatively drafted the jury verdict form, plaintiffs are not entitled to any relief with regard to this issue. *Chastain v General Motors Corp*, 254 Mich App 576, 591; 657 NW2d 804 (2002).

Plaintiffs next argue that the trial court committed error requiring reversal when it permitted the jury to view a video surveillance tape of John raking leaves in his front yard, despite defendants' failure to produce the videotape pursuant to discovery requests prior to trial. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 509; 679 NW2d 106 (2004), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

Generally, all relevant evidence is admissible. MRE 402; *Wayne Co v State Tax Comm*, 261 Mich App 174, 196; 682 NW2d 100 (2004). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Under this broad definition, evidence is admissible if

explains an issue at trial, and witness credibility is always at issue in a trial. See *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003); see also MRE 607.

Still, the trial court may exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” MRE 403. However, “[e]vidence is not inadmissible simply because it is prejudicial. Clearly, in every case, each party attempts to introduce evidence that causes prejudice to the other party.” *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). “In this context, prejudice means more than simply damage to an opponent’s cause. A party’s case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion.” *Michigan Dep’t of Transportation v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 156; 700 NW2d 380 (2005) (citation omitted). “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *Id.* at 157 (citation omitted).

Here, plaintiffs argue that defendants’ delay in providing the surveillance tape for plaintiffs’ viewing until after cross-examining John on the fifth day of trial unfairly prejudiced their case because they did not have an opportunity to voir dire the person who made the surveillance tape. Plaintiffs, however, knew of the existence of the surveillance video at least a week before trial and were on notice that it might be admitted. Although the trial court ruled in limine that the video would not be admissible as part of defendants’ case in chief, the trial court left open the possibility that the video could be used for impeachment. Further, the videographer was on defendants’ amended witness list and could have been subpoenaed before trial. It was not until John testified that he was unable to rake leaves that the trial court ruled to allow the videotape.

Plaintiffs argue that defendants violated MCR 2.302(E)(1)(b) and (c) by failing to produce the video during discovery. Even assuming defendants violated the discovery rule, however, sanctions for failure to supplement discovery requests are within the discretion of the trial court. MCR 2.302(E)(2). Additionally, there is no rule of pleading that would require a party to give notice that it would introduce evidence in rebuttal. *Linderman Machine Co v Shaw-Walker Co*, 187 Mich 28, 37-38; 153 NW 34 (1915). Here, the trial court, after hearing both parties’ arguments, ruled that the videotape was admissible for impeachment purposes.

This court has previously held that a trial court did not abuse its discretion when it allowed a videographer to testify during rebuttal for the purpose of impeaching a plaintiff’s testimony and for laying a foundation for the introduction of videotape, despite the fact that the defendant had not included the videographer on his witness list. *Butt v Giammariner*, 173 Mich App 319, 321-322; 433 NW2d 360 (1988). There, this Court held that although the plaintiff’s counsel may have been surprised by the videotape evidence, the plaintiff undoubtedly knew what her capabilities were. *Id.* at 322. Plaintiff argues that *Butt* is distinguishable from the present case because the plaintiff had the opportunity to voir dire and cross-examine the videographer. Yet, the videographer in the present case was not available because plaintiffs failed to subpoena him, even though he was on defendants’ witness list, unlike the videographer in *Butt*. Also, plaintiffs in the present case had advance warning that the videotape might be allowed for impeachment, whereas it is not clear that the plaintiff in *Butt* had any advance knowledge of the existence of a videotape at all.

To the extent that the facts of this case are distinguishable from *Butt, supra*, the facts of the present case lend greater support to the admissibility of the videotape than those in *Butt*. John opened the door to the impeachment evidence by testifying on direct examination about his lessened ability to rake leaves. John also had the opportunity to explain the videotape to the jury on re-direct. The trial court's decision to allow the jury to view the videotape to impeach John's testimony was justified and, therefore, not an abuse of discretion. *Shuler, supra* at 509.

Plaintiffs also argue that the videotape was tampered with or altered. Although plaintiffs raised this issue below during oral argument at a post-trial motion hearing, plaintiffs never filed a motion with the trial court regarding any irregularities in the videotape, and the trial court refused to consider the issue on that basis. This issue was not addressed or decided by the trial court and, therefore, is not preserved for appellate review. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). Although this Court possesses the discretion to review a legal issue not raised by the parties or decided by the trial court, *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004), we find no grounds to do so here because plaintiffs have not submitted any affidavits or other evidence to support their allegation that the tape was tampered with.

Plaintiffs next argue that the trial court committed error requiring reversal when it admitted testimony by Dr. William Leuchter, Sabrina's treating neurologist, regarding the cause of Sabrina's alleged shoulder injury. We disagree.

This Court reviews a trial court's decision whether to admit or exclude evidence for an abuse of discretion. *Chmielewski, supra* at 614. This Court also reviews the trial court's decision regarding the qualification of an expert witness for an abuse of discretion. *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), citing *Bahr v Harper-Grace Hosps*, 448 Mich 135, 141; 528 NW2d 170 (1995). The trial court has an obligation under MRE 702 "to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). "Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Id.* at 782.

In the present case, Dr. Leuchter testified by video deposition that he is a board certified neurologist who regularly diagnoses and treats injuries to the neck, back, and shoulders. Furthermore, Dr. Leuchter was Sabrina's treating neurologist, and he examined Sabrina with regard to her neck, back, and right shoulder. Based on his personal examination and treatment of Sabrina, Dr. Leuchter testified that she made no complaints to him with regard to her neck, back, or shoulder for almost one year after the car accident. Although Dr. Leuchter stated that the cause of Sabrina's shoulder injury was "certainly beyond [his] area of knowledge," Dr. Leuchter's opinion that, given a lack of complaints over the course of a year of treatment, Sabrina's shoulder injury did not likely relate back to the accident is relevant and admissible. The trial court admitted Dr. Leuchter's testimony based on "his knowledge of this patient [Sabrina], more so than his expertise." Additionally, the trial court said that plaintiffs would have been entitled to a limiting instruction with regard to Dr. Leuchter's testimony, but plaintiffs never requested one. In any event, Dr. Leuchter's testimony was based on his personal knowledge of whether Sabrina ever complained to him of shoulder pain following the car accident, and it had some tendency to make it less likely that the car accident caused Sabrina's

shoulder injury. MRE 401; *VanElslander, supra*. The trial court, therefore, did not abuse its discretion in admitting Dr. Leuchter's testimony.

Plaintiffs also argue, for the first time on appeal, that defense counsel improperly instructed a witness how to testify. In support of their argument, plaintiffs submitted the affidavit of Joseph Davidson, which states that, in the hallway outside the courtroom, Davidson overheard defendants' attorney telling Dr. Olejniczak, the independent medical examination (IME) doctor, how to testify. Plaintiffs, however, never raised this issue at the trial court; therefore, is not preserved for appellate review. *ISB Sales Co, supra* at 532-533. Additionally, the Davidson affidavit was not part of the record below, and plaintiffs are not permitted to expand the record on appeal. *Powell, supra* at 561 n 4. We, therefore, decline to address this issue.

Plaintiffs next argue that the jury verdict was against the great weight of the evidence. We disagree.

This Court will not set aside a jury's verdict if there is competent evidence to support the jury's findings. *Hodgins v The Times Herald Co*, 169 Mich App 245, 257-258; 425 NW2d 522 (1988). If reasonable jurors could reach conclusions different than this Court, then this Court's judgment should not be substituted for the judgment of the jury. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 680; 645 NW2d 287 (2001). In this case, there was evidence presented that, following the accident, John was able to walk and move freely, and all his x-rays were normal. Three days after the accident, John's examination by his family doctor was normal. Although John received a one-week disability note for work, he returned to work the following Monday and had not missed any work since. One month after the accident, John had normal EMG and MRI results. The jury also saw video of John raking leaves in his front yard. Given that "different minds [c]ould naturally and fairly come to different conclusions" as to facts established by such evidence, *People v Lemmon*, 456 Mich 625, 644; 576 NW2d 129 (1998), we conclude that the trial court correctly declined to disturb the jury's verdict.

Plaintiffs next argue that the trial court committed error requiring reversal when it allowed defendants to ask Sabrina and her treating neuropsychologist, Dr. Jay Inwald, about Sabrina's prior psychological treatment. Plaintiffs, however, did not make a timely and specific objection or motion for a mistrial on the record and, thus, failed to preserve this issue for appellate review. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 363; 533 NW2d 373 (1995). We, therefore, decline to review this issue.

Plaintiffs next claim that defendants' attorney improperly appealed the to jurors sympathy during closing argument, entitling them to a new trial. We disagree.

At the beginning of closing argument, defense counsel stated to the jury, "I want to thank you on behalf of my clients, uh, who, quite frankly, felt horrible about this accident." Plaintiffs' counsel made no objection at the time, but argued at the post trial motion hearing that he knowingly did not make an objection because he did not want to highlight the remark. Plaintiff's knowing decision not to object at the time of the argument extinguished any error arising from the allegedly improper argument. *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 92 n 11; 697 NW2d 558 (2005). Accordingly, we decline to address this matter further.

Lastly, plaintiffs argue that, given the evidence presented at trial, MCL 500.3135(2)(a)(ii) required the jury to find that Sabrina suffered a serious impairment of a body function, and the trial court, therefore, abused its discretion in denying their motion for a new trial. We disagree.

This Court reviews a trial court's denial of a motion for new trial for an abuse of discretion. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor, and Merrill, Inc*, 267 Mich App 625, 644; 705 NW2d 549 (2005). Plaintiffs' argument that MCL 500.3135(2)(a)(ii) requires a finding that Sabrina suffered a serious impairment of a body function is misplaced. The statute states, "for a closed-head injury, *a question of fact for the jury is created* if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury." (Emphasis added.) The doctors' testimony in this case merely allowed Sabrina's claim to survive summary disposition but did not conclusively establish an injury. The jury was free to accept or reject any or all of the evidence presented pertaining to Sabrina's alleged injuries. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

Moreover, the jury actually did determine that Sabrina was injured in the car accident; however, they also determined that these injuries simply did not rise to the level of a serious impairment of a body function. Although Sabrina claimed that her ability to do math and deal with customers had been impaired, Sabrina's former employer testified that Sabrina's work abilities excelled after the accident. There existed sufficient evidence from which the jury could determine that Sabrina did not suffer a serious impairment of a body function. The trial court, therefore, did not abuse its discretion in denying plaintiffs' motion for a new trial.

Affirmed.

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder