

STATE OF MICHIGAN
COURT OF APPEALS

JANIS CLIFF,

Plaintiff-Appellee,

v

MICHAEL E. HEATH, D.D.S. and THE
HUNTINGTON GROUP, P.C.,

Defendants-Appellants,

and

GREGORY NEILSEN, D.D.S. a/k/a GREGORY
NIELSEN, D.D.S. and JOHN V. GAUL, D.D.S.,

Defendants.

UNPUBLISHED
January 4, 2011

No. 294101
Oakland Circuit Court
LC No. 2006-078456-NH

JANIS CLIFF,

Plaintiff-Appellee,

v

GREGORY NEILSEN, D.D.S. a/k/a GREGORY
NIELSEN, D.D.S.,

Defendant-Appellant,

and

MICHAEL E. HEATH, D.D.S., JOHN V. GAUL,
D.D.S., and THE HUNTINGTON GROUP, P.C.,

Defendants.

No. 294710
Oakland Circuit Court
LC No. 2006-078456-NH

JANIS CLIFF,

Plaintiff-Appellee,

v

MICHAEL E. HEATH, D.D.S. and THE
HUNTINGTON GROUP, P.C.,

Defendants-Appellants,

and

GREGORY NEILSEN, D.D.S. a/k/a GREGORY
NIELSEN, D.D.S. and JOHN V. GAUL, D.D.S.,

Defendants.

No. 294896

Oakland Circuit Court

LC No. 2006-078456-NH

Before: CAVANAGH, P.J., and FITZGERALD and FORT HOOD, JJ.

PER CURIAM.

Defendants appeal as of right a judgment in plaintiff's favor after the trial court entered (1) an order granting plaintiff's motion for rehearing and reconsideration of a decision granting a new trial in favor of defendants Michael Heath, D.D.S. and Huntington Group, P.C., (2) an order denying a motion for prevailing party costs and case evaluation sanctions filed by defendant Gregory Nielsen, D.D.S., and (3) an order granting plaintiff's motion for prevailing party costs and case evaluation sanctions. We affirm.

Docket No. 294101

This is a dental malpractice case. A five-day jury trial was held before a visiting judge, the Honorable Charles Simon, and resulted in a verdict in favor of plaintiff and against Dr. Heath and Huntington, only. Dr. Heath and Huntington moved for a new trial on the grounds that plaintiff's counsel committed misconduct in her closing argument and that an improper jury instruction was given to the jury. In particular, these defendants argued that during closing argument plaintiff's counsel alleged that there was a conspiracy between defendants, defense counsel, and defendants' expert witnesses to render collusive and untrue testimony which was highly improper, inflammatory, and denied defendants a fair trial. Defendants also argued that during closing argument plaintiff's counsel requested that the jury "send a message" to defendants which was prejudicial and materially affected defendants' right to a fair trial. Further, these defendants argued that the jury was improperly instructed because M Civ JI 50.10 was given and there was "absolutely no testimony that Plaintiff had a latent susceptibility or was unusually susceptible to injury."

Oral arguments were held on the motion before Judge Simon, but a complete trial transcript was not provided to the court. Following arguments, Judge Simon concluded, in total, as follows:

In light of the Defense's comment, the word conspiracy bothered me, and also the sending a message is really a message for punishment. And the current case, that's at 404 Michigan 339, where setting purpose to prejudice the Jury in regards to the Juror's attention from the merits of the case, here it didn't happen that many times, but also, it's my – the Court concedes that it was error to give the 50.10 instruction. For that reason a motion for a new trial is granted.

Thereafter, an order was entered granting Dr. Heath and Huntington's motion for a new trial.

Plaintiff moved for rehearing and reconsideration, arguing that the court committed palpable errors. Plaintiff's arguments included that the referenced remarks made during closing argument, considered in context, were relevant and properly supported by the evidence. There was no deliberate course of misconduct or studied purpose to inflame or prejudice the jury. Further, the jury was properly instructed that arguments of counsel were not evidence, that their verdict was not to be based on sympathy, and that they should not render a verdict to punish defendants. Moreover, defendants never requested a curative instruction or moved for a mistrial. In any event, the jury returned a verdict in favor of one defendant and rendered a conservative verdict, without future damages, against the other two defendants, illustrating that the jury verdict was not the result of prejudice or an improper purpose. Finally, ample evidence justified the jury instruction, including repeated references throughout the trial to plaintiff's pre-existing medical conditions and predisposition to infection.

The Honorable Steven Andrews, who was assigned the case, requested a copy of the complete trial transcript, as well as briefing from defendants. On August 28, 2009, Judge Andrews entered an opinion and order granting plaintiff's motion for rehearing and reconsideration, reversing the order granting defendants a new trial. First, the court noted that plaintiff's counsel argued that there was a "conspiracy of silence" among oral surgeons in Michigan which required her to go outside the state to find an expert witness; she was not arguing that there was a conspiracy amongst defendants and their experts to collude and lie. The court held that the "conspiracy of silence" argument was improper because it was not based on facts in evidence but, upon objection, the court promptly reminded the jury that they were to decide the case based on the facts. Later the court also instructed the jury that attorneys' statements and arguments were not evidence and jurors are presumed to follow their instructions. Accordingly, the court held that the error was cured by the court's instructions. The court noted that such conclusion was supported by the facts that Dr. Nielsen was found not liable and the jury's award was fairly conservative.

Second, the court considered the context of plaintiff's counsel's "send a message" argument. In part, counsel had argued that the jury, as members of the community, were to decide whether it was just what happened to plaintiff or "should they pay for what they did to her and should they be sent a message that this [is] not how you treat patients" After defense counsel objected, the trial court indicated that "it's not the purpose of this trial to send a message, that's not what the purpose of it is." Because the court clearly indicated that "sending a

message” was not the purpose of trial and also gave the jury instruction that attorney statements and arguments were not evidence, the error was cured. Further, the court concluded that the verdict showed that the jury’s attention was not diverted from the merits of the case by these statements because Dr. Nielson was not found liable and the damages awarded were conservative.

Third, the motion for new trial also alleged that plaintiff’s counsel’s remarks about the defense experts “re-paying a favor” constituted misconduct warranting a new trial. The court rejected that argument on the grounds that counsel may characterize the testimony of a witness and any prejudice was cured by the court’s instructions to the jury that lawyers’ statements and arguments were not evidence.

Fourth, the court considered whether M Civ JI 50.10 was properly given. Although defendant had argued that there was no evidence to support the instruction, the court concluded that this argument “is inaccurate.” Dr. Heath testified at length about plaintiff’s history of allergies and back problems that required the placement of metal rods from which the jury could have inferred made plaintiff more susceptible to infection. Thus, this instruction was proper.

The court concluded that plaintiff demonstrated palpable errors as follows:

In considering whether Judge Simon erred in granting Defendants’ motion for new trial, this Court has considered that Judge Simon did not address his statements and instructions to the jury and whether they cured any errors in the closing argument. He also did not address the verdict and what it communicated regarding any prejudice from the closing argument. He also did not address the testimony regarding Plaintiff’s latent susceptibility to injury.

On appeal, defendants argue that the successor judge committed reversible error in granting plaintiff’s motion for rehearing and reconsideration because plaintiff did not establish palpable error. We disagree.

A trial court’s decision on a motion for reconsideration is reviewed for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009). MCR 2.119(F)(3) provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

First, we address Dr. Heath and Huntington’s claims that the successor judge acted improperly by granting plaintiff’s motion for reconsideration (1) “by failing to adhere to the palpable error standard,” and (2) because the judge made “several presumptions that Judge

Simon did not take into account several things when ruling on Defendants' motion." Neither of these claims have merit.

The case law is clear that "[t]he purpose of MCR 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties." *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). As the *Bers* Court explained, quoting *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986):

If a trial court wants to give a "second chance" to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide the trial court with some guidance on when it may wish to deny motions for rehearing. [*Id.*]

As illustrated by its plain language, i.e., "[g]enerally, and without restricting the discretion of the court," MCR 2.119(F)(3) does not limit a trial court's discretion when ruling on motions for rehearing to palpable errors, contrary to Dr. Heath and Huntington's claim. See, also, *Brown v Northville Regional Psychiatric Hosp*, 153 Mich App 300, 308-309; 395 NW2d 18 (1986).

In any event, contrary to defendants' second claim—and as the successor judge obviously determined—the trial court's initial decision granting defendants' motion for new trial was not only unclear, but seriously lacking. First, it appears that the initial decision was based entirely on the purported "error to give the 50.10 instruction." The initial decision held: "For that reason a new trial is granted." Second, there was ample evidence to support the disputed jury instruction, as will be discussed below. Third, there was no reasoning of any kind in support of the court's initial holding, including consideration whether any of the alleged errors were harmless. Fourth, because of the confusing nature of the initial holding, it was unclear to the parties, and the successor judge, as to the precise reason that the new trial was granted. Thus, upon plaintiff's motion for reconsideration, the trial court proceeded as if a new trial was granted because of attorney misconduct, as well as the purported erroneous instruction. Under these circumstances, the successor judge was entirely right to reconsider the decision to grant a new trial in this case that had already been litigated through a five-day jury trial. We also note that the initial decision was made without benefit of the complete trial transcripts. Therefore, we reject defendants' claims on appeal that the successor judge improperly reviewed this matter on reconsideration. Nevertheless, because the initial decision was a product of palpable errors, it was properly reversed.

A new trial may be granted when the substantial rights of a party were materially affected and there was misconduct of the prevailing party's counsel or an error of law such as an improper jury instruction. MCR 2.611(A)(1)(b) and (g). The claimed attorney misconduct occurred during plaintiff's counsel's closing and rebuttal arguments. The purported improper jury instruction was M Civ JI 50.10. We first address the claims of attorney misconduct.

An attorney's comments during a trial warrant reversal where "they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 501-502; 668 NW2d 402

(2003), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). However, misconduct of counsel will not justify a new trial if the error was harmless. *Id.*

Plaintiff's counsel's closing argument included the following:

Plaintiff's Counsel:

Mr. Manion [*defense counsel*] told you in opening statements and as far as here numerous times that you will have sympathy for Mrs. Cliff [*plaintiff*] and that you should set that aside and decide this case only on the facts and the law. I agree with that. We are not here begging for money based on sympathy. We are here demanding justice. She is entitled to justice. She did not get proper treatment from them. She had to undergo this horrific injury. And now this is her only day in court where she can get the members of the community, you, to decide is this just what happened to her or should they pay for what they did to her and should they be sent a message that this is not how you treat patients and the next time a patient comes to your office and has this kind of problem, maybe you will be more alert and think infection and -- and -- and if you don't know --

Defense Counsel:

I just --

Plaintiff's Counsel:

--refer out to somebody else.

Defense Counsel:

--I'm sorry, excuse me just for a minute. I just object to this over-the-top send-a-message kind of argument. It really is totally inappropriate and argument -- way overly argumentative and inappropriate by the way.

The Court:

Yeah, well, it's not the purpose of this trial to send a message, that's not what the purpose of it is.

Plaintiff's Counsel:

I'll move on.

After additional argument by plaintiff's counsel, defense counsel proceeded with his closing argument. Defense counsel reminded the jury that they were to decide the case based upon "what you hear from the witness chair" and not from what they hear in argument. Further, he reminded the jury that they could not base their decision on sympathy for plaintiff because "she had a bad complication." With regard to determining whether there was a breach in the

standard of care, defense counsel referred the jury to the expert witness testimony. Regarding plaintiff's expert witness, Dr. Krell, defense counsel argued:

I asked you to listen to [his deposition testimony] carefully, because you have to figure out who's being straight with you here, and who's testifying in connection with what the standard of care is, and who is being straight with you or truthful with you concerning Drs. Heath and Nielsen's compliance with the standard of care. Things for you to remember in balancing this out with respect to Dr. Krell is he does this, in my view, as a business, he makes a big part of his income doing this, he advertises his willingness to consult in these types of litigation cases to attorneys, has done so for many years, has been involved in many cases, has been exposed a lot to court, has testified in trials many times, and has been to numerous states claiming other oral surgeons were negligent for various reasons. And I'd like you to balance that when you assess credibility, balance that with respect to Drs. Heath and Nielsen, but also Drs. Betts and Bonk. And balance that out with respect to how you assess their interest in this case. And I'm asking you to, when you balance it out, Drs. Bonk and Betts are the two that are being straight to you with respect to these particular issues.

During closing argument, defense counsel also referenced the fact that plaintiff was given antibiotics before the extraction procedure stating, "he also prescribes an antibiotic, he pre[-]medicates her for the surgery to protect her and her hardware from her serious back issues that she -- that are preexisting."

Then plaintiff's counsel began her rebuttal argument. During rebuttal, plaintiff's counsel discussed the issue of complications associated with medical procedures, stating: "I -- we are not saying that these doctors are evil. We are not saying that these doctors set out to intentionally hurt [plaintiff]. We are saying they made a mistake." She then discussed Dr. Krell and the following exchange occurred:

Plaintiff's Counsel:

I wanted to talk to you a little bit about Dr. Krell, too. The next so-called defense or excuse I hear for why you should render a verdict in favor of the defendants is, well, look at Dr. Krell, he's someone they hired to, you know, and he likes to make money doing this, whatever. Look at what has happened in this case. Dr. Nielsen tells you he knows Dr. Betts and Dr. Bonk [*defense experts*]. Dr. Nielsen tells us that the oral surgery community in this state is about 50 to 75 oral surgeons, that they all know each other, that it's like a school classroom, and that as the community is small they all know each other. Look who they bring as a so-called independent objective expert witness, the first one you heard this morning, [defense counsel's] former client. When he is sued for malpractice who does he get to testify for -- to come and tell a jury that he didn't do anything wrong? Dr. Gaul, their partner. Now it's -- it's -- it's his turn to repay the favor. When they are getting sued because they did something wrong, he comes to court and voluntarily testifies on their behalf and does not charge them any money and happily does so and says yes, I didn't charge any money. Do you think that I am

going to be able to get any one of these oral surgeons in the state of Michigan, including Dr. Bonk and Dr. Betts, to act as an expert witness for the plaintiff?

Defense Counsel:

There's no evidence -- wait, wait, wait. There's no evidence to support such a thing, Judge. I mean that's just totally inappropriate.

The Court:

You're assuming facts not in evidence.

Plaintiff's Counsel:

Okay. Well, [defense counsel] talked to you about the fact that Dr. Krell advertises and that somehow this should make him less credible. How else am I going to find out about him?

The law is we have to have an expert oral surgeon to talk to you about what was done wrong here. Am I supposed to go look at the phone book for the entire country and figure out eeny meeny miny moe and call a million of them? No. Obviously there has to be some way for lawyers to know the availability of other doctors who are willing to come forward and not be part of this conspiracy of silence --

Defense Counsel:

Hold it, Judge. You know, this is just way over-the-top argument. What can -- there's been no testimony to support anything like that.

Plaintiff's Counsel:

Your Honor --

Defense Counsel:

It's just hopeless argument on this attorney's part.

Plaintiff's Counsel:

Your Honor, he brought up about Dr. Krell advertising for his services --

The Court:

Okay, you can --

Plaintiff's Counsel:

There's been testimony that the expert witness was [defense counsel's] client.

The Court:

All right. The jury remembers what was testified to and what was not in evidence.

Plaintiff's Counsel:

Okay. Um, so you were asked by [defense counsel] to consider the credibility of each of these witnesses, and I ask you to consider the credibility of Dr. Bonk. He's getting his clients to testify for each other.

Following plaintiff's counsel's rebuttal argument, the trial court instructed the jury. Those instructions included that "[t]he lawyers' statements and argument are not evidence. They're only meant to help you understand the evidence and each side's legal theories." Further, the court instructed that "[y]our verdict must be solely to compensate Plaintiff for her damages, and not to punish the Defendants."

It is clear from the trial court's analysis of plaintiff's motion for rehearing and reconsideration that it first considered whether plaintiff's counsel's comments, taken in context, were improper, whether a proper objection was made, and if the comments were improper, whether they were nevertheless harmless. Again, a new trial may be granted when the substantial rights of a party were materially affected and there was misconduct of the prevailing party's counsel. MCR 2.611(A)(1)(b). Clearly, these considerations should have been made initially before defendants' motion for new trial was granted and it is readily apparent that the initial decision—if it was even based on attorney misconduct—did not consider these matters.

Dr. Heath and Huntington claim that plaintiff's counsel's reference to "sending a message" during closing argument was inappropriate, prejudicial, and materially affected their right to a fair trial. Defendants argue that the use of the precise words "send a message," automatically requires reversal because "there was only one reason counsel requested that the jury 'send a message,' and that was to punish defendants." We cannot agree. First, although plaintiff's counsel did ask the jury to "send a message" to defendants, the "message" to be sent was that "the next time a patient comes to your office and has this kind of problem, maybe you will be more alert and think infection and . . . if you don't know . . . refer out to somebody else." In other words, evaluated in context, the words "send a message" were not an obvious plea to punish defendants, but to cause them to be more alert to the signs of infection after an oral surgery procedure, i.e., to educate defendants. In fact, in her rebuttal argument, plaintiff's counsel advised the jury that it was not plaintiff's position that "these doctors are evil" or that "these doctors set out to intentionally hurt" plaintiff. In other words, counsel was clear that plaintiff's intent was not to punish defendants.

In any case, upon objection, the jury was properly advised that it was not the purpose of the trial to send a message. Thus, even if this single and brief comment was improper, any error was rendered harmless by the court's instruction, as well as by the fact that the jury was instructed on more than one occasion that the comments and arguments of the attorneys were not evidence. Further, the jury was also instructed that their verdict "must be solely to compensate Plaintiff for her damages, and not to punish the Defendants." Juries are presumed to understand

and follow the court's instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Consequently, plaintiff's counsel's "send a message" comment did not warrant a new trial. See *Szymanski v Brown*, 221 Mich App 423, 429; 562 NW2d 212 (1997).

Dr. Heath and Huntington also argue that during closing argument plaintiff's counsel "made several improper comments without a basis in evidence of a conspiracy between Defendants, defense counsel and Defendants' expert witnesses to render collusive and untrue testimony." We disagree.

During defense counsel's closing argument, as set forth above, he argued that plaintiff's expert witness, Dr. Krell, was not to be believed because, essentially, he offered bought and paid for testimony. See *Kern v St. Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 346; 273 NW2d 75 (1978). Particularly, defense counsel stated: "Things for you to remember in balancing this out with respect to Dr. Krell is he does this court thing, in my view, as a business, he makes a big part of his income doing this, he advertises his willingness to consult in these types of litigation cases to attorneys, has done so for many years, has been involved in many cases, has been exposed a lot to court, has testified in trials many times, and has been to numerous states claiming other oral surgeons were negligent for various reasons." Defense counsel asked the jury to consider these things to determine "who's being straight with you." Clearly, defense counsel was attempting to totally discredit the opinions of Dr. Krell on the ground that he would testify to negligent conduct, whether true or not, because that was how he made his living. As was the case in *Kern*, 404 Mich at 352, 354, here, defense counsel was attempting to convey the message that plaintiff would not have relied on an out-of-state physician, i.e., a "professional expert," to testify for her had her case been meritorious.

In her rebuttal argument, plaintiff's counsel was then required to attempt to discredit defendants' expert witness testimony. There was evidence that defendants personally knew their defense experts and that was brought to light in plaintiff's counsel's rebuttal argument. Counsel reminded the jury that Dr. Kenneth Bonk had testified that he was a former client of defense counsel and that Dr. Gaul—who also worked at Huntington with both Dr. Heath and Dr. Nielsen—had been his defense expert when Dr. Bonk was sued for malpractice. Plaintiff's counsel asked the jury to infer that Dr. Bonk was repaying the favor by offering his "expert" opinion in this case as evidenced by the fact that he was not charging any fee for his work as an expert on this case. Further, Dr. Nielsen admitted during his trial testimony that he knew the defense's expert witnesses stating that, with regard to oral surgeons, "It's a small community, you know everybody." Thus, contrary to the case of *Kern*, 404 Mich at 346-347, evidence supported plaintiff's counsel's closing argument statements.

And this argument was responsive to defense counsel's argument. Defense counsel asked the jury to conclude that Dr. Krell was not giving true testimony on the ground that he was in the "business" of providing expert testimony. Plaintiff's counsel asked the jury to conclude that defendants' experts were not giving true testimony because, as the evidence showed, they all knew each other and, in one case, an expert was not even getting paid. Counsel is permitted to draw reasonable inference from the testimony and may comment on a witness' bias during closing argument. *Hayes v Coleman*, 338 Mich 371, 382; 61 NW2d 634 (1953); *Wiley*, 257 Mich App at 505. And plaintiff's counsel's rebuttal comments were responsive to defense counsel's closing argument comments. "Statements made by counsel in closing argument may

not be error if given in response to arguments made by opposing counsel.” *Wheeler v Grand Trunk Western R Co*, 161 Mich App 759, 765; 411 NW2d 853 (1987).

Moreover, because of defense counsel’s emphasis on the fact that Dr. Krell advertises his expert services and goes to “numerous states” to give his testimony, plaintiff’s counsel was forced to attempt to explain why plaintiff’s expert was retained by advertisement and why he was not from the State of Michigan. Thus, she had to discredit defense counsel’s claim that Dr. Krell was a “professional expert witness.” She did so by reminding the jury of Dr. Nielsen’s testimony that oral surgeons are a “small community, you know everybody” and that “it’s like a school class where you know everybody by name.” From this testimony plaintiff’s counsel asked the jury to infer that she could not have retained one of these oral surgeons—who all knew each other and were all like a school class—to testify on behalf of her client. Plaintiff’s counsel vaguely referred to this, and in only one instance, as a “conspiracy of silence.” Although this characterization was not precisely supported by the evidence in that there was no evidence that plaintiff had attempted to retain one of the other oral surgeons in the state, upon objection, the court promptly addressed the issue by stating that the “jury remembers what was testified and what was not in evidence.” Defense counsel never requested a curative instruction. Thus, even if the use of the phrase “conspiracy of silence,” on only one occasion, was improper, any error was rendered harmless by the court’s repeated instructions that the comments and arguments of the attorneys were not evidence. Accordingly, a new trial was not warranted by this comment.

In summary, plaintiff’s counsel’s disputed comments clearly did not warrant reversal. They did not illustrate a deliberate course of conduct aimed at preventing a fair and impartial trial and were not an attempt to deflect the jury’s attention from the issues involved. See *Wiley*, 257 Mich App at 501-502. To the extent that plaintiff’s comments were improper, any such error was harmless and did not have a controlling influence on the verdict. See *Reetz*, 416 Mich at 103. Accordingly, the trial court did not abuse its discretion when it granted plaintiff’s motion for rehearing and reconsideration with regard to defendants’ claims of attorney misconduct.

Next, Dr. Heath and Huntington argue that the trial court’s instruction of M Civ JI 50.10 constituted an error of law requiring a new trial; thus, the order granting them a new trial should not have been reversed. We disagree. When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2). The trial court’s determination that a standard instruction was applicable and accurate is reviewed for an abuse of discretion. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008) (citation omitted).

Here, Dr. Heath and Huntington argue that “there was absolutely no testimony that Plaintiff had a latent susceptibility to injury or was unusually susceptible to infection.” We do not agree. First, during the course of the trial it was made clear to the jury that plaintiff was seeking damages for her alleged continued anxiety and panic attacks related to this matter. On direct examination plaintiff testified to that effect. On cross-examination, defense counsel queried plaintiff at length about her alleged anxiety, eliciting from plaintiff testimony about her “many other medical issues,” “serious medical issues with respect to [her] back,” an “infected dog bite,” her “failed back syndrome,” and her “acute asthmatic bronchitis.” Second, on direct examination by defense counsel, Dr. Nielsen testified that plaintiff had a history of “many, many, many allergies.” On cross-examination, when questioned by plaintiff’s counsel as to whether he

was telling the jury that any of those allergies were the cause of her problems requiring hospitalization in this case, Dr. Nielsen responded, “I did not suggest that, but neither can I totally eliminate them.” Third, during direct examination by defense counsel, Dr. Heath testified that plaintiff had allergies and that she also had metal rods in her back which required that she be given antibiotics before dental procedures—indicating a predisposition to infection. Fourth, during closing argument, defense counsel referenced the fact that plaintiff was given antibiotics before the extraction procedure stating, “he prescribes an antibiotic, he pre-medicates her for the surgery to protect her and her hardware from her serious back issue that she – that are pre-existing.”

As the trial court stated in granting plaintiff’s motion for rehearing and reconsideration, defendants’ argument that there was no evidence to support the instruction “is inaccurate.” In light of the foregoing information provided to the jury, the jury could have inferred that plaintiff’s injuries were caused by her other medical conditions, including her predisposition to infection, rather than defendants’ actions. Further, plaintiff testified that she had continued emotional problems and anxiety from this experience and her counsel requested damages for those injuries. During defense counsel’s cross-examination of plaintiff, her various health issues were set forth before the jury for consideration, apparently in an attempt to establish that plaintiff’s continued emotional problems and anxiety were caused by those other medical conditions and not defendants’ actions. Therefore, it is clear that, in light of the evidence of record, the disputed standard jury instruction was applicable and properly given. Thus, the trial court did not abuse its discretion when it granted plaintiff’s motion for rehearing and reconsideration on this ground. But, even if the instruction was inapplicable, defendants never established the instruction unfairly prejudiced them so as to render the jury’s verdict inconsistent with substantial justice; thus, it was palpable error to grant their motion for new trial on this ground. See MCR 2.613(A). Accordingly, none of Dr. Heath and Huntington’s claims set forth in this appeal are meritorious. The trial court’s reversal of the order granting them a new trial is affirmed.

Docket No. 294710

Following the trial, the jury returned a verdict in favor of Dr. Nielsen, indicating that he was not professionally negligent in this matter. Thereafter, Dr. Nielsen filed a motion arguing that he was entitled to prevailing party costs under MCR 2.625, as well as case evaluation sanctions under MCR 2.403(O)(6). The trial court denied the motion. First, the court held that Dr. Nielsen was not entitled to case evaluation sanctions in this case involving multiple parties because plaintiff obtained an aggregate verdict more favorable than the case evaluation award. Second, the court held that, although Dr. Nielsen was a prevailing party, an award of costs under MCR 2.625(B)(3) is discretionary. The court noted that all defendants were represented by the same attorney and insurance company and defended against the same theory of liability. Because plaintiff was entitled to prevailing party costs against Dr. Heath and Huntington, an award of costs to Dr. Nielsen would have the effect of negating plaintiff’s award of prevailing party costs. Thus, the request for taxable costs was denied.

On appeal, Dr. Nielsen argues that the trial court abused its discretion by denying his request for prevailing party costs under MCR 2.625. We disagree. A trial court’s decision on a

motion for prevailing party costs under MCR 2.625 is reviewed for an abuse of discretion. *Mason v City of Menominee*, 282 Mich App 525, 530; 766 NW2d 888 (2009).

MCR 2.625(A)(1) provides that, in general, costs will be allowed to the prevailing party in an action unless the court directs otherwise for reasons stated in writing and filed in the case. MCR 2.625(B)(3) pertains to actions with several defendants and provides:

If there are several defendants in one action, and judgment for or dismissal of one or more of them is entered, those defendants are deemed prevailing parties, even though the plaintiff ultimately prevails over the remaining defendants.

In this case, the trial court denied the motion for prevailing party costs, although it found that Dr. Nielsen was a prevailing party. Plaintiff was also a prevailing party against Dr. Heath and Huntington. The trial court properly set forth its reasons in writing for denying Dr. Nielsen's request for prevailing party costs. MCR 2.625(A)(1). Those reasons were that all defendants were represented by the same attorney and insurance company with regard to the same theory of liability; thus, the effect of awarding Dr. Nielsen prevailing party costs would be to negate the award of prevailing party costs to plaintiff.

Dr. Nielsen argues that the trial court's decision constituted an abuse of discretion because it is "inappropriate" and the trial court could have apportioned taxable cost. Dr. Nielsen cites to the case of *Blue Cross & Blue Shield of Mich v Eaton Rapids Community Hosp*, 221 Mich App 301; 561 NW2d 488 (1997) in support of his apportionment argument. In that case, this Court held that: "Where the Michigan Court Rules are to be construed to secure the just, speedy, and economical determination of every action, MCR 1.105, we have no trouble concluding that a court may take the intermediate step of apportioning the costs allowed to a prevailing party among the parties against whom the costs are assessed." *Id.* at 314. In this case, however, the prevailing parties were both plaintiff and only one of three defendants. Thus, unlike the case of *Blue Cross & Blue Shield of Mich*, this is not a case in which there was one prevailing party and several "parties against whom the costs are assessed." In light of the circumstances presented in this case and the discretionary nature of the decision, we cannot conclude that the trial court's decision to deny Dr. Nielsen prevailing party costs was outside the range of principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Accordingly, we affirm the decision.

Docket No. 294896

After the trial court granted plaintiff's motion for rehearing and reconsideration, plaintiff filed a motion for prevailing party costs under MCR 2.625 and for case evaluation sanctions under MCR 2.403(O)(4)(a). On October 13, 2009, the trial court entered an opinion and order granting in part and denying in part plaintiff's motion. The trial court held that plaintiff was entitled to case evaluation sanctions, including taxable costs and reasonable attorney fees at a rate of \$250 an hour for both of plaintiff's attorneys and for a total of 183.56 hours. The taxable costs included sundry costs, some of the requested court costs, and deposition costs. Although plaintiff had requested costs for certified court records and expert witness fees for Dr. Krell, plaintiff did not adequately support the requests thus they were denied without prejudice. Plaintiff was permitted to submit a supplemental brief addressing those two requests for costs.

On October 30, 2009, Dr. Heath and Huntington filed their claim of appeal with regard to this order. On November 6, 2009, the court entered an order denying plaintiff's request for costs related to certified court records, but granted plaintiff's request for Dr. Krell's expert witness fees as follows: \$1,000 for work performed on February 21, 2008, \$1,000 for work performed on August 11, 2008, and \$1,125 for the expert's deposition on August 11, 2008, totaling \$3,125.

On appeal, Dr. Heath and Huntington argue that the trial court abused its discretion by awarding plaintiff attorney fees at all because she rejected the case evaluation award and, further, by awarding an unreasonable attorney fee. Dr. Heath and Huntington also argue that the trial court abused its discretion by awarding plaintiff expert witness fees. We disagree. We review for an abuse of discretion the trial court's decision on a motion to tax costs under MCR 2.625. *Mason*, 282 Mich App at 530.

First, Dr. Krell's expert witness fees were awarded by order entered November 6, 2009, and Dr. Heath and Huntington, who filed their claim of appeal on October 30, 2009, did not appeal that order. Thus, this Court lacks jurisdiction to consider the issue whether plaintiff was entitled to recover Dr. Krell's expert witness fees. See MCR 7.203(A)(1). Accordingly, this issue is not properly before this Court.

Second, Dr. Heath and Huntington argue that plaintiff is not entitled to case evaluation sanctions because she rejected the case evaluation award. In support of their argument, they cite to MCR 2.403(O)(6)(b) which provides:

[A] reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

Dr. Heath and Huntington claim that plaintiff cannot show that the attorney fees requested were "necessitated" by defendants' rejection of the award because she also rejected the award. However, this argument has been considered and rejected by the Court on several occasions. "Actual costs, including attorney fees, are awardable when both parties reject the award as well as when only one does." *Haliw v City of Sterling Heights (On Remand)*, 266 Mich App 444, 450; 702 NW2d 637 (2005), citing *Zalut v Andersen & Assoc, Inc*, 186 Mich App 229, 232-234; 463 NW2d 236 (1990). Further, the language of MCR 2.403(O)(1) allows for costs, including attorney fees, to be awarded even where there has been a mutual rejection. Therefore, this issue is without merit.

Finally, Dr. Heath and Huntington argue that the award of attorney fees to plaintiff was unreasonable because "[t]his case was a relatively straightforward action for medical malpractice having been tried to a conclusion in four days. Plaintiff called only one independently retained expert witness, and in short, the fees requested are not representative of the scope and magnitude of the subject claim." We disagree and note that, despite Dr. Heath and Huntington's contention that this was a "relatively straightforward action," they utilized the services of two expert witnesses and the jury did not reach its verdict until the fifth day of trial.

In *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), our Supreme Court held:

In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982)] and MRPC 1.5(a). In order to aid appellate review, the court should briefly indicate its view of each of the factors. [*Id.* at 537.]

In this case, the trial court determined the fee customarily charged in Oakland County to be \$200 to \$205 an hour by using a reliable survey, and then made an upward departure to \$250 an hour after considering the factors set forth in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982) and Rule 1.5(a) of the Michigan Rules of Professional Conduct. The trial court noted that the case was “difficult because it involved two doctors who saw Plaintiff on numerous occasions, and each visit required a separate evaluation as whether professional negligence occurred.” After review of plaintiff’s counsel’s billing records, the trial court determined that plaintiff’s primary attorney was entitled to compensation for 163.71 hours and plaintiff’s other attorney was entitled to compensation for 19.85 hours. We conclude that the trial court’s decision was within the range of reasonable and principled outcomes and, thus, was not an abuse of discretion. See *Smith*, 481 Mich at 526. Accordingly, the decision is affirmed.

Affirmed. Plaintiff is entitled to costs as the prevailing party. MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Karen M. Fort Hood