

STATE OF MICHIGAN
COURT OF APPEALS

JANICE WINNICK,

Plaintiff-Appellant,

v

MARK KEITH STEELE and ROBERTSON-
MORRISON, INC.,

Defendants-Appellees.

and

FARMERS INSURANCE EXCHANGE,

Defendant.

UNPUBLISHED

October 30, 2003

No. 237247

Washtenaw Circuit Court

LC No. 00-000218-NI

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

PER CURIAM.

In this automobile negligence action, plaintiff appeals as of right a judgment of no cause of action following a jury trial. We affirm.

Plaintiff argues that a new trial is warranted because of misconduct by defense counsel. We disagree. In *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), our Supreme Court stated:

When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. [Footnotes omitted.]

Additionally, an attorney's comments during trial may 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 *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999).

Plaintiff first contends that defense counsel improperly emphasized that she was seeking money damages. While the challenged remarks referred to plaintiff's desire for money, plaintiff cites no authority in support of her position that such remarks are improper. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Therefore, we decline to consider this matter further.

Plaintiff also argues that defense counsel deliberately misled the jurors by suggesting that the threshold determination of a serious impairment of an important body function was applicable to an award of excess economic damages. We agree that this threshold determination need not be proven to recover *economic* loss damages in excess of no-fault benefits. MCL 500.3135(3)(c); *Cochran v Myers*, 146 Mich App 729, 731; 381 NW2d 800 (1985). Rather, this threshold is relevant only to an award of *noneconomic* damages. *Id.* at 731.

We disagree with plaintiff that she objected to the challenged remarks at trial. At most, plaintiff merely expressed confusion at defense counsel's argument. While defense counsel's remarks in opening statement may have suggested that the jury would have to find a serious impairment of an important body function in order to award excess economic damages, counsel later correctly stated the law. More importantly, the trial court subsequently properly instructed the jury regarding this matter. Therefore, this issue does not warrant reversal. *Seppala v Neal*, 323 Mich 697, 705; 36 NW2d 186 (1949).

Plaintiff also argues that defense counsel improperly referred to the no-fault scheme for economic loss claims. Whether a plaintiff seeking recovery for personal injury has other remedies available is generally considered irrelevant and, therefore, should not be raised before a jury. *Reetz, supra* at 104. In this case, however, the trial court expressly allowed counsel to refer to the statutory scheme in order to avoid confusion by the jury regarding why plaintiff was not seeking economic damages for the first three years following the accident, and for other legitimate purposes. Moreover, plaintiff had already referred to the no-fault scheme in her opening statement. Therefore, defense counsel's remarks were not improper.

Plaintiff's final argument of this issue is that defense counsel improperly disparaged her expert witness, an economist who testified regarding "hedonic damages." We disagree. It is proper for counsel to "discuss the character of witnesses, the probability of the truth of testimony given on the stand, and . . . when there is any reasonable basis for it, [to] characterize testimony." *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 353-354; 273 NW2d 75 (1978), quoting *Firchau v Foster*, 371 Mich 75, 78; 123 NW2d 151 (1963) (emphasis deleted). Reversal may be required, however, where the language used reveals "a studied purpose to inflame or prejudice the jury, based upon facts not in the case[.]" *Kern, supra* at 354 (emphasis deleted).

Here, the challenged remarks by defense counsel were proper comments regarding the credibility of plaintiff's expert, which was a contested issue in the case. Defense counsel was attempting to persuade the jury that the witness' testimony was not reliable. We are not persuaded that defense counsel's comments were improper.

Plaintiff additionally complains about matters unrelated to defense counsel's conduct.¹ Plaintiff raises these matters only as support for her position that defense counsel's alleged improper conduct cannot be considered harmless. However, we have rejected most of plaintiff's claims of improper conduct by defense counsel, and the one matter that we did credit, counsel's misstatement of the law during opening statement, was cured by counsel's subsequent correct statement of the law and by the trial court's instructions. Plaintiff has not demonstrated how the remaining matters of which she complains denied her a fair trial. Therefore, reversal is not warranted.

Next, plaintiff argues that the trial court abused its discretion by denying her pretrial motion to compel discovery from a nonparty. Specifically, plaintiff sought information showing the gross total of charges paid by all sources to Medical Evaluation Specialists for services provided by Dr. Jeffrey Middledorf, who evaluated plaintiff pursuant to a request by plaintiff's insurer, Farmers Insurance Exchange. Plaintiff's theory was that Dr. Middledorf's financial ties to the defense insurance industry were relevant and subject to inquiry because one defendant was an insurance company and the other defendants were both insured. This Court reviews a trial court's decision to grant or deny a discovery request for an abuse of discretion. *In re Pott*, 234 Mich App 369, 373; 593 NW2d 685 (1999).

Although evidence that Dr. Middledorf has a pattern of testifying as an expert witness for insurance defendants may have been relevant to suggest possible bias, *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995); *Wilson v Stilwill*, 411 Mich 587, 600-601; 309 NW2d 898 (1981), we conclude that the trial court did not abuse its discretion by denying plaintiff's broad discovery request on the basis that it could be embarrassing or harassing to the witness. MRE 611(a)(3); see also MCR 2.302(C) (authorizing the court to issue a protective order where information sought could cause annoyance or embarrassment).

In *Allen v Superior Court of Contra Costa Co*, 151 Cal App 3d 447; 198 Cal Rptr 737 (1984), the court held that the trial court had erred in granting a subpoena duces tecum that required a defense witness to produce documents including: (1) records pertaining to his examination of the real party in interest and billing for the examination; (2) records indicating the sources of his income where examinations were made at the request of insurance companies or defense lawyers over the last five years; (3) records of any kind that would reveal what portion of his total income was from the treatment of patients, as opposed to the evaluation of persons for the defense during the last five years; and (4) records related to prior depositions in

¹ For example, plaintiff complaints included: that the trial was held shortly after the September 11, 2001, terrorist attack; poor acoustics in the courtroom; redaction of deposition transcripts; a juror's alleged exposure to extraneous information, which the juror denied; and the timing of a cautionary instruction.

cases over the past five years when he was asked by the defense to examine someone. The court concluded that the party seeking production of the documents

made no showing that the information sought or substantially equivalent information could not be obtained through other means, such as by conducting a deposition without production of the records. Nonetheless, the court permitted disclosure. The court abused its discretion when it failed to require a less intrusive method of discovery. At deposition, the medical expert may be asked questions directed toward disclosing what percentage of his practice involves examining patients for the defense and how much compensation he derives from defense work. To show bias or prejudice, [the party seeking to obtain discovery by subpoena] need not learn the details of his billing and accounting or the specifics of his prior testimony and depositions. As petitioner points out, publications which index the testimony of medical units are available to real party. Exact information as to number of cases and amounts of compensation paid to medical experts is unnecessary for the purpose of showing a bias. [*Id.* at 453 (footnote omitted).]

Similarly, in *Elkins v Syken*, 672 So 2d 517, 522 (Fla, 1996), the Florida Supreme Court expressed concern about the invasiveness of requests for personal financial information and the negative effect on the trial process:

In addressing this issue, it is essential that we keep in mind the purpose of discovery. Pretrial discovery was implemented to simplify the issues in a case, to eliminate the element of surprise, to encourage the settlement of cases, to avoid costly litigation, and to achieve a balanced search for the truth to ensure a fair trial. Discovery was never intended to be used as a tactical tool to harass an adversary in a manner that actually chills the availability of information by non-party witnesses; nor was it intended to make the discovery process so expensive that it could effectively deny access to information and witnesses or force parties to resolve their disputes unjustly. To allow discovery that is overly burdensome and that harasses, embarrasses, and annoys one's adversary would lead to a lack of public confidence in the credibility of the civil court process. The right to a jury trial in the constitution means nothing if the public has no faith in the process and if the cost and expense are so great that access is basically denied to all but the few who can afford it. In essence, an overly burdensome, expensive discovery process will cause many qualified experts, including those who testify only on an occasional basis, to refrain from participating in the process, particularly if they have the perception that the process could invade their personal privacy. To adopt petitioners' arguments could have a chilling effect on the ability to obtain doctors willing to testify and could cause future trials to consist of many days of questioning on the collateral issue of expert bias rather than on the true issues of liability and damages. [Citations omitted.]

In light of this rationale, we are persuaded that the trial court did not abuse its discretion by denying plaintiff's discovery request and suggesting that plaintiff instead obtain the information sought by deposing Dr. Middledorf.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Christopher M. Murray