

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHAEL VIVIANI,

Plaintiff-Appellee,

v

DAVID R. SCHLEIF, M.D., BON SECOURS  
COTTAGE HEALTH SERVICES a/k/a  
BEAUMONT HOSPITAL GROSSE POINTE, and  
SHOREPOINTE EMERGENCY CARE  
PHYSICIANS,

Defendants-Appellants,

and

TODD G. CAMPBELL, M.D. and GROSSE  
POINTE UROLOGIC SURGEONS, P.C.,

Defendants.

UNPUBLISHED  
October 11, 2012

No. 303258  
Wayne Circuit Court  
LC No. 08-018211-NH

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Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendants appeal as of right a judgment entered in plaintiff's favor following a jury trial on plaintiff's medical malpractice claims. We affirm.

Plaintiff alleged in this action that his urological medical condition was not properly treated by Dr. David Schleif during his emergency room visit which resulted in the eventual removal of a testicle. Following a trial, the jury found in favor of plaintiff. This appeal followed.

Defendants first argue that the trial court abused its discretion when it excluded the redirect examination testimony of their expert witness which included that plaintiff's expert witness, Dr. Todd Campbell, was a former party defendant, thus, he had a motive to deny being consulted by Dr. Schleif regarding plaintiff's medical care. After review of this evidentiary decision for an abuse of discretion, we disagree. See *Taylor v Kent Radiology, PC*, 286 Mich App 490, 519; 780 NW2d 900 (2009).

During the trial, the videotaped deposition testimony of defense expert witness Dr. Michael Beer was interrupted so that an objection made during the deposition could be addressed by the court. Defense counsel argued that plaintiff's counsel's examination of Dr. Beer "opened the door" to his "motive" questioning set forth above. In particular, during plaintiff's counsel's examination, Dr. Beer was asked whether he had an opinion as to whether Dr. Schleif contacted Dr. Campbell before plaintiff was discharged from the hospital. Dr. Beer responded that he believed the consultation occurred. Plaintiff's counsel then noted that Dr. Campbell denied that he was consulted by Dr. Schleif and asked Dr. Beer "do you have any reason to believe or disbelieve Dr. Campbell?" Dr. Beer responded that the consultation would have occurred in the middle of the night, via a telephone call, and Dr. Campbell probably did not remember it. Later during questioning, plaintiff's counsel again asked Dr. Beer about this discrepancy related to the consultation and Dr. Beer responded that he believed Dr. Campbell "doesn't remember talking" to Dr. Schleif. Plaintiff's counsel asked Dr. Beer if he had spoken to Dr. Campbell about this and Dr. Beer replied that he had not but, from his own experience, he knew that such telephone consultations occurring a couple of years before might not be remembered.

During redirect examination, the following exchange between defense counsel and Dr. Beer occurred:

*Q.* Doctor, you were asked some questions as far as why Dr. Campbell may not recall the conversation that he had and may have testified that he would have wanted to see this patient immediately. Remember those questions?

*A.* Yes, sir.

*Q.* You were aware, were you not, that Dr. Campbell was sued in this case, weren't you?

*A.* Yes, sir.

*Q.* Could that be a reason that Dr. Campbell doesn't recall the conversation that occurred in the early morning hours of June 30th?

Plaintiff's counsel objected to the questioning.

At trial, defense counsel argued that his redirect questioning of Dr. Beer should be admitted because plaintiff's counsel "opened the door" to this type of "motive" testimony. Plaintiff's counsel argued that he did not "open the door" because the fact that Dr. Campbell was previously named a defendant in this action was never raised or addressed during the questioning of Dr. Beer. Defense counsel argued that the testimony would establish a motive for Dr. Campbell to deny consulting on plaintiff's condition. Plaintiff's counsel argued that the proposed "motive" testimony had no probative value.

The trial court agreed with plaintiff's counsel, holding that asking another doctor "what they believe may have been the reason for Dr. Campbell not remembering whether there was a conversation . . . is inappropriate." That is, the court held, unless medical records or personal knowledge were relied upon, the witness could only offer speculation. "What other people may have speculated about is not admissible," the court held. Other than directly questioning Dr.

Campbell about any possible “motive,” such questioning was immaterial and resulted in only a “guess and conjecture on the part of others who don’t have any personal knowledge about it.” Further, even if the testimony was relevant, the questioning would result in disclosing a settlement between plaintiff and Dr. Campbell and such evidence was more prejudicial than probative. Accordingly, defense counsel’s proposed redirect examination testimony of Dr. Beer was excluded from evidence.

On appeal, defendants argue that plaintiff’s trial strategy included the claim that Dr. Schleif did not contact Dr. Campbell, a urologist, during this urological emergency before plaintiff was discharged from the hospital. Plaintiff’s claim was premised on the fact that Dr. Campbell testified under oath that he was not contacted by Dr. Schleif. Accordingly, defendants argue, the proposed redirect examination testimony of Dr. Beer “was designed to provide the jury with a credible explanation and/or motive for Dr. Campbell’s testimony under oath that he was never contacted” by Dr. Schleif.

MRE 602 provides: “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Here, Dr. Beer testified that he did not speak to Dr. Campbell regarding the issue whether he was consulted by Dr. Schleif. Thus, Dr. Beer did not have personal knowledge of any alleged “motive” for Dr. Campbell to testify under oath that Dr. Schleif did not consult him regarding plaintiff’s medical care. And, contrary to defendants’ claim, the jury would not be provided with “credible” testimony. As the trial court concluded, Dr. Beer’s testimony in regard to any alleged “motive” would constitute pure speculation and conjecture. Only relevant evidence is admissible at trial. MRE 402. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Although whether Dr. Campbell consulted with Dr. Schleif was an issue in this case, Dr. Beer’s speculative opinion in that regard had no probative force. See *id.* Thus, the exclusion of the proposed testimony elicited during defense counsel’s redirect examination of Dr. Beer did not constitute an abuse of discretion and this claim is without merit.

Next, defendants argue that they were denied a fair trial because the trial judge questioned witnesses in a manner that unduly influenced the jury and demonstrated partiality. We disagree.

Defendants did not object to the trial court’s questioning of the witnesses. An objection is necessary to preserve a challenge concerning the trial court’s conduct. MRE 614(c); *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996); *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988). Therefore, this issue is unpreserved and our review is for plain error affecting defendants’ substantial rights. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

A trial court may question witnesses to clarify testimony or elicit additional relevant information, but such questioning may not be intimidating, argumentative, prejudicial, unfair, or partial. MRE 614(b); *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). We consider whether the “judge’s questions and comments ‘may well have unjustifiably aroused suspicion in the mind of the jury’ as to a witness’ credibility, . . . and whether partiality ‘quite

possibly could have influenced the jury to the detriment of defendant's case.'" *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986), quoting *People v Redfern*, 71 Mich App 452, 457; 248 NW2d 582 (1976). "[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v Mich Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996).

Defendants first argue that their expert witness was questioned more extensively than plaintiff's expert witness with regard to the issue whether discharge instructions establish the standard of care for a particular specialty. Defendants compare the trial court's questioning of plaintiff's expert witness, Dr. Samuel Kiehl, to the trial court's questioning of defense expert witness, Dr. Mark Thomson, to support their claim. With regard to Dr. Kiehl, the trial court asked: "Does a discharge form or a discharge summary state the standard of care for a particular specialty such as emergency medicine?" Dr. Kiehl responded: "No, not at all." Defendants argue that no additional questions were asked of Dr. Kiehl "which is strikingly different than the treatment received by ER Defense Expert, Mark Thomson, M.D."

According to the record, the trial court also asked defendants' expert witness, Dr. Thomson, if a discharge summary or discharge instructions "establish the standard of care," and he answered: "I think it is part of the standard of care, yes." The trial court then asked "why do experts come and give testimony if a discharge summary can establish a standard of care?" Dr. Thomson's response included that "medicine is very complex." Following up, the court asked whether the company that produced the discharge summaries establishes the standard of care. Dr. Thomson testified: "I don't think they establish it. Hopefully, they would be consistent with it, but it's correct, they do not establish it." The trial court then questioned: "You would expect it to be consistent with it?" And the court noted that the discharge summary "doesn't make any reference to a standard of care or practice." Dr. Thomson answered: "I think that's correct. It's an educational tool, but in terms of standard of care, would be what are – the instructions consistent with instructions that would be given in a similar case."

It is clear from the record evidence that the trial court posed the same question to both plaintiff's expert witness and defendant's expert witness. The trial court questioned Dr. Kiehl in a different manner than Dr. Thomson because they gave very different answers to the same question: whether a discharge summary established the standard of care. Dr. Kiehl testified unequivocally that it did not. Contrary to defendants' claim that Dr. Kiehl "was [only] asked one simple question" so was Dr. Thomson asked the same "simple question." However, Dr. Thomson gave a confounding answer. He appeared to testify that discharge summaries or instructions establish the standard of care. The court was then required to ask additional questions to clarify Dr. Thomson's confusing and nonresponsive answers on the issue. The manner of the trial court's questioning was not intimidating, argumentative, prejudicial or unfair, and did not demonstrate partiality. See MRE 614(b); *Conyers*, 194 Mich App at 405. There is no record support for a claim that the jury was unduly influenced by the questioning. And the questioning was designed to elicit full and clear testimony regarding an issue before the jury. See *Murchie v Standard Oil Co*, 355 Mich 550, 559; 94 NW2d 799 (1959). Accordingly, defendants' claim that they were denied a fair trial because of the trial court's questioning of their expert witness is without merit.

Second, defendants argue that the trial court demonstrated bias when it interrupted plaintiff's counsel's questioning of Dr. Schleif to ask a sarcastic question. To provide context to defendants' claim of bias, the record testimony must be reviewed as a whole. See *Collier*, 168 Mich App at 697-698. Here, during his examination, plaintiff's counsel asked Dr. Schleif if he called an urologist regarding plaintiff's medical care and Dr. Schleif testified that he did, he called Dr. Campbell. Dr. Schleif testified that he had a specific memory of speaking to Dr. Campbell and even recalled the precise details of their 2006 conversation, including that Dr. Campbell "didn't sound sleepy." Plaintiff's counsel then asked if the nature of that conversation was documented in plaintiff's medical records and Dr. Schleif said that the nature of the conversation was not documented. Plaintiff's counsel then referenced a document in plaintiff's medical record where Dr. Schleif wrote "T. Campbell," but indicated that the time of contact was not written in the record and there were no notes about what was discussed. Dr. Schleif agreed with these observations. Plaintiff's counsel asked Dr. Schleif if he could read his own handwriting with regard to a particular entry and Dr. Schleif testified that he could not and that he was "not going to guess." Dr. Schleif was later asked if his notes were written for a reason since they would pertain to plaintiff and he replied that they were written for a reason. When asked if a particular note "had some meaning," Dr. Schleif replied "Unknown. It was several years ago, so I really couldn't say."

Defense counsel later followed up with this line of questioning, asking Dr. Schleif if in 2006 when he wrote his notes about plaintiff whether he would have known what he was writing and Dr. Schleif testified that he was sure he did. On re-cross examination, plaintiff's counsel noted that Dr. Schleif testified that it was the first time in his 30 year career that he had seen a condition like plaintiff's and asked Dr. Schleif why he did not "make any notes" in plaintiff's chart. Dr. Schleif testified that it was "not our practice to do that." Again, plaintiff's counsel asked "you just didn't think maybe this is unusual" and should be documented and Dr. Schleif testified: "Well, I explained it in the chart." Plaintiff's counsel then asked: "Some of the chart you can't read?" To which Dr. Schleif replied: "Not the important parts." The trial court then asked: "How do you know if it is or is not important if you can't read what it is you wrote?" And Dr. Schleif explained: "Because of the location where it was. It was in the result and notes file, which was more for my own benefit." This sole question asked by the trial court clearly did not illustrate bias or partiality; rather, it was a singular question designed to elicit a clear and responsive answer in light of the confusing and contradictory nature of Dr. Schleif's testimony. A trial judge has the right to question a witness regarding unclear and confusing testimony. See *People v Young*, 364 Mich 554, 558; 111 NW2d 870 (1961).

In summary, defendants were not denied a fair trial on the asserted grounds. The trial judge did not question witnesses in a manner that unduly influenced the jury or that demonstrated partiality. The more extensive questioning of defendants' expert witness was necessitated by the witness' confounding and nonresponsive answers to the questions. Further, the trial judge did not demonstrate bias when during plaintiff's counsel's questioning of Dr. Schleif the judge asked a single clarifying question. The trial judge's questions to the witnesses would have been appropriate if asked by either party and did not give the appearance of partiality. See *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996). Further, to the extent that defendants have argued, without citation to any supporting authority, that the trial court illustrated bias when she requested that defense counsel lower his voice, such claim is without

merit. Accordingly, defendants have failed to establish any error, much less plain error affecting their substantial rights, and this claim is without merit.

Affirmed. As the prevailing party, plaintiff is entitled to costs. MCR 7.219(F).

/s/ Christopher M. Murray  
/s/ Mark J. Cavanagh  
/s/ Cynthia Diane Stephens