STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY EDLER and DARRIN EDLER, Plaintiffs-Appellees,	UNPUBLISHED March 18, 2003
v	No. 235771 Lapeer Circuit Court
CHANGHEE KIM and JOONPYO HONG, Defendants-Appellants.	LC No. 98-025101-NI

Before: Cooper, P. J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendants appeal as of right a judgment on a jury verdict awarding plaintiffs $520,000 after plaintiff Kimberly Edler[1] suffered serious brain injuries when a vehicle driven by defendant Dr. Changhee Kim[2] collided with plaintiff's vehicle. We affirm.

I. Basic Facts and Procedural History

Plaintiff was driving southbound on M-24 in Metamora Township. Defendant was driving northbound when she crossed the center line and hit plaintiff's car head-on. There were two eyewitnesses to the accident in addition to the parties. John Sund testified that the events happened quickly, but it appeared that defendant was gripping the steering wheel at the ten o'clock and two o'clock positions and staring blankly. He testified that, in retrospect, the look on defendant's face was "odd." Dale Pincumbe testified that he saw defendant's car cross the center line, go back into the correct lane, and then cross the center line again. He stated that defendant hands were on the steering wheel at the twelve o'clock and two o'clock positions and that her head was straight forward. He stated that her eyes were open, but it appeared she was either asleep or on a "suicide mission."

Defendant testified that she did not remember the impact or what happened before the

[1] Plaintiff Darrin Edler's claims are derivative of Kimberly Edler's. For ease of reference, the singular "plaintiff" refers only to Kimberly Edler unless otherwise noted.

[2] The vehicle Changhee Kim drove was leased by her husband, defendant Joonpyo Hong, whom plaintiffs claimed was vicariously liable. For ease of reference, the singular "defendant" refers only to Changhee Kim.

impact. According to responding officer Sergeant David Eady, defendant told him at the scene that she must have fallen asleep and that she had not gotten much sleep the night before. Defendant testified that she was not sure what she said to the officer, but she was not sure she told him she fell asleep.

Defendant testified that she had trouble sleeping the night before the accident. She stated that she had experienced sleeping difficulties for some time before the accident, and it was typical for her to wake up frequently during the night. Defendant stated it was normal for her to be tired and that she was always tired. She stated that on the morning of the accident, she was tired while driving to work. She stated that she was driving carefully because she was concerned about arriving at her office safely. As she neared her office, she felt a sense of relief because she was having such a difficult time driving. The accident occurred shortly before she would have reached her office.

Defendant claimed that she had an unforeseeable partial complex seizure and was not liable for plaintiff's injuries under the sudden medical emergency doctrine. Defendant's experts testified this partial complex seizure caused defendant to lose functions seconds before the accident.[3] Both parties' experts also indicated that defendant probably had sleep apnea at the time of the accident. The apnea was detected in April 1998, a year after the accident. Defendants' experts claimed that the sleep apnea caused a partial complex seizure, while plaintiffs' experts claimed that because of defendant's sleep deprivation, she simply fell asleep.

Defendant was diagnosed with kidney cancer in October 1998, and thyroid cancer in June 1999. Defendants sought to admit expert testimony that if defendant had cancer at the time of the accident, the cancer may have contributed to the partial complex seizure. Plaintiff brought a motion on the first day of the trial objecting to any mention of cancer. In its initial ruling, the trial court precluded the evidence because defendants failed to produce an oncologist who could testify that the cancer probably existed at the time of the accident. However, the court stated that if defendants could produce the required evidence, it would reconsider.

On the third day of trial, defendants' counsel indicated that it could produce two doctors to testify that defendant's cancer existed at the time of the accident. However, the doctors would not be available until the next week. Plaintiffs' counsel argued that there was no excuse for the delay in procuring witnesses because defendants had known about their defense for two years and because defendants had failed to comply with the trial court's ruling that they produce the names and theories of their cancer experts. Plaintiffs' counsel also argued that neither of defendants' experts were qualified to testify regarding how long defendant's cancer existed because one was an internist and gastroenterologist and the other was a urologist. When the court asked defendants' counsel whether either expert had the "experience or knowledge to give that type of testimony," counsel answered, "I've never talked to them." The court again held that unless and until defendants could produce the proper expert, references regarding cancer would be inadmissible.

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[3] Defendant first went for neurological testing in October 1999. Defendant never had seizures before the accident, and she had not had any up to the trial. All tests conducted on defendant in the years following the accident were negative for indications of seizure.

Later that day, defendants' counsel stated that he needed "a couple of days" to produce a cancer expert. Plaintiffs' counsel responded that defendants' proposal was unfair delay and that there was no time to prepare for cross-examination. The court ruled:

> At this point in time . . . we don't even know what the doctor may or may not be. We are in the middle of trial. This case has been pending for a long time. This is not a new situation.
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> * * *
>
> The Court, at this point in time, based upon the lateness of the request and the posture of the case at this point in time, to have this trial adjourned for an unknown period of time for an unknown doctor who may possibly come here sometime next week to testify to these particular issues and then for the Court to adjourn this matter, is not proper as far as this Court is concerned; that it would be an unfair burden to place upon the Plaintiffs in this matter.
>
> Your request for an extension of time is considered and denied . . . .

The jury returned a verdict for plaintiffs awarding damages for plaintiff's pain and suffering ($340,000), plaintiff's future economic losses ($160,000), and for her husband's loss of consortium ($20,000). The trial court calculated the present value of the award, offsets, and interest and entered judgment on the verdict.

II. Adjournment

Defendants first argue the trial court abused its discretion by denying their request for an adjournment to procure an expert who could testify about defendant's cancer diagnosis in relation to the accident. We disagree. This Court reviews a trial court's grant or denial of a motion for adjournment for an abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). An abuse of discretion occurs when the result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.'" *Kurtz v Faygo Beverages, Inc*, 466 Mich 186, 193; 644 NW2d 710 (2000), citing *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting, *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959).

This Court has outlined at least three factors a trial court should consider when asked to grant an adjournment for a party to procure a witness (1) whether there has been an extended trial or numerous past continuances, (2) whether the movant has diligently pursued the desired witness, and (3) whether the movant would suffer injustice if the adjournment were not granted. *Tisbury*, *supra* at 20, citing *Rosselott v County of Muskegon*, 123 Mich App 361, 370-371; 333 NW2d 282 (1983). Regarding the second factor, this Court has also held that "A denial [of a motion for adjournment] because of the absence of a witness is proper where the movant fails to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness." *Id.*

Defendants began theorizing about a connection between cancer and a partial complex seizure in July 1999, nearly two years before trial. Defendants informed plaintiffs of a potential expert oncologist in November 2000, five months before trial. Defendants then filed a witness list naming two oncologists three months before trial. However, defendants continually failed to respond to plaintiffs' discovery requests regarding the experts' testimony, theories, and factual bases. Instead of appearing at trial with their oncologists ready to testify, defendants asked for an adjournment on the third day of trial to procure an oncologist. However, they still could not identify an oncologist or a time the expert would be available. Thus, because defendants failed to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness, the trial court did not abuse its discretion in denying defendants' motion for adjournment.

III. Evidentiary Issues

A. Standard of Review

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Powell v St John Hospital*, 241 Mich App 64, 72; 614 NW2d 666 (2000).

B. Expert Testimony

Defendants next argue that the trial court erred by precluding the testimony of defendants' other treating physicians that defendant's cancer could have been related to the alleged partial complex seizure. We disagree.

Relevant evidence is "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; *Szymanski v Brown*, 221 Mich App 423, 435; 562 NW2d 212 (1997). Here, there was no testimony that defendant had cancer at the time of the accident. Thus, testimony that cancer may have contributed to a partial complex seizure that caused defendant to lose control of her car was mere speculation. This type of speculation is not probative because it does not tend to make a fact more or less true. See *McClaine v Alger*, 150 Mich App 306, 313-314; 388 NW2d 349 (1986); *People v Dyer*, 425 Mich 572, 581; 390 NW2d 645 (1986), citing *People v Diaz*, 98 Mich App 675, 684; 296 NW2d 337 (1980). Because MRE 402 bars the admission of irrelevant evidence, the trial court did not abuse its discretion by barring references to cancer under these circumstances.

C. Striking Testimony

Defendants' next argument is stated as "The "stonewalling" refusal of plaintiffs to grant discovery as to Dr. Frank Judge injected reversible, prejudicial error into the proceedings." However, defendants actually argue that the trial court erred by not striking Judge's testimony at trial. Because this claim of error is not reflected in defendants' question presented, this issue is waived. See MCR 7.212(C)(5); *Flury v Flury*, 249 Mich App 222, 225 n 2; 641 NW2d 863 (2002).

In any event, the trial court did not abuse its discretion by allowing the testimony. Defendants argued below that because plaintiffs scheduled their trial deposition of Judge to immediately follow defendants' discovery deposition of Judge, defendants did not have time to adequately prepare for cross-examination. However, defendants were aware of plaintiffs' intentions to call Judge as a witness approximately six months before trial, and defendants were granted a discovery extension to take his deposition. Thus, the trial court correctly noted that defendants were aware of Judge's intended testimony and had sufficient time to depose him. The court did not abuse its discretion by denying defendants' motion to strike.

D. Evidence of Disability Payments

Defendants also argue that the trial court erred by refusing to admit a letter from plaintiff's insurance company regarding her long-term disability payments. We disagree.

Generally, the collateral source rule bars evidence of insurance coverage when the evidence is presented to show mitigation of damages. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 58; 457 NW2d 637 (1990). However, an exception exists where a defendant seeks to prove that an injured plaintiff is malingering or that insurance payments are the plaintiff's motivation to not work. *Id.*, citing 47 ALR 3d 234, 239-240. For the exception to apply, "'Sufficient facts must be adduced which raise serious doubts in the minds of the jurors as to the extent of the injury actually suffered.'" *Id.* at 59, quoting *Blacha v Gagnon*, 47 Mich App 168, 171; 209 NW2d 292 (1973). "Thus, the evidence should be admitted 'only if it appears to the trial judge from other evidence that there is a real possibility that plaintiff was motivated by receipt of collateral source benefits to remain inactive as long as he did.'" *Id.*, quoting 22 Am Jur 2d, Damages, § 967, p 1004.

Here, defendants cross-examined plaintiff's vocational specialist regarding plaintiff's disability payments. Thus, the evidence was already admitted, and nothing prevented defendants from advancing their malingering theory. Therefore, defendants' claim that they were unable to present their theory lacks merit.

Even though the evidence was presented to the jury in a different fashion, the trial court did not abuse its discretion by excluding the letter. There was overwhelming evidence that plaintiff's brain injury was severe and permanent and that there was no possibility she could return to gainful employment. Not only did plaintiff's family, co-worker, and treating physician testify that plaintiff's capabilities were significantly altered after the accident, but defendants' independent medical examiner and a representative of plaintiff's insurance company agreed. Given the extensive medical evidence presented regarding plaintiff's condition and prognosis, the trial court's decision that defendants did not produce "sufficient facts" that raised "serious doubts" about plaintiff's injuries was substantially supported by the record. Therefore, its refusal to admit the letter regarding plaintiff's disability payments was not an abuse of discretion.

IV. Juror Bias

Defendants next argue that a prospective juror's answers to questions of whether the juror was biased against people of Korean descent, tainted the jury and precluded a fair trial. However, defendants failed to preserve this issue. In order to preserve an issue for appellate review, the specific issue must be raised before and addressed by the trial court. *Auto Club Ins*

Ass'n v Lozanis, 215 Mich App 415, 421; 546 NW2d 648 (1996). This Court reviews unpreserved nonconstitutional claims for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"It is a general principle that remarks calculated to prejudice a jury are improper." *In re Widening of Woodward Avenue*, 297 Mich 236, 246; 297 NW 468 (1941). "'Appellate courts should not interfere, unless the errors complained of are such as may fairly be said to have had a controlling influence in securing the result.'" *Id.*, quoting *In Fort-Street Union Depot Co v Jones*, 83 Mich 415; 47 NW 349 (1890). Here, the record does not demonstrate that the comments in question were calculated to prejudice the jury or that they had a controlling influence in securing the results. Rather, the prospective juror responded to questions about whether he harbored biases, questions commonly asked in voir dire. Several of these questions were posed by defense counsel. After responding to the questions, the prospective juror was excused by the defense. Therefore, we find no plain error affecting defendant's substantial rights.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly