STATE OF MICHIGAN

COURT OF APPEALS

SUSANNAH GREENE, Plaintiff-Appellee,	UNPUBLISHED April 21, 2009
v	No. 281850 Berrien Circuit Court
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellant.	LC No. 04-003142-NF-M

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Defendant appeals by right from the judgment for plaintiff, following a jury trial. We affirm.

I.

This action, seeking first-party no-fault insurance coverage, involves a claim of a traumatic brain injury. On appeal, defendant argues that: (1) the trial judge abused his discretion in denying a motion to compel production of the quantitative electroencephalogram (QEEG) tracings of Dr. Robert Shuman, a neurologist, or in the alternative, to exclude plaintiff's experts from providing testimony concerning the QEEG results; (2) the trial court abused its discretion and denied defendant a fair trial when it allowed Dr. Shuman to testify at trial; (3) the statements made by plaintiff's counsel in closing argument were misconduct, and the trial court abused its discretion in denying defendant's motion for a new trial; (4) the successor circuit court judge erred in agreeing to hold a hearing to determine whether the admission of Dr. Shuman's QEEG testimony was harmless error, after the trial judge had previously ruled that if that testimony was erroneously admitted, then defendant was entitled to a new trial.

II.

Plaintiff was involved in five motor vehicle accidents prior to the one at issue. The prior accidents occurred annually from 1997 through 2001.

State Farm provided automobile-related insurance to plaintiff, and this policy was in effect at the time of the accident at issue. Following this accident, in October 2002, State Farm paid no-fault benefits (first-party coverage) for some of plaintiff's injuries, but not for the alleged

traumatic brain injury. In 2003 and thereafter, Dr. Shuman performed the first of several EEGs on plaintiff, one of which was a QEEG.

In March 2004, plaintiff commenced this action, alleging breach of the insurance contract. In June 2004, plaintiff answered interrogatories. But she did not identify Dr. Shuman in her answers. In July 2004, plaintiff responded to defendant's request for production of documents. Plaintiff attached medical records, but not Dr. Shuman's. In October 2004, plaintiff filed a witness list. It identified treating physicians as experts, but did not disclose Dr. Shuman. In August 2005, Dr. Shuman performed the EEG with quantitative analysis. Defendant argues that, sometime between November 2005 and March 2006, it learned of the EEGs.

In May 2006, defendant filed an amended notice of experts, which named Drs. Shuman and Burdette as experts. Defendant unsuccessfully sought discovery from Dr. Shuman, of Indiana. Dr. Shuman refused to produce his records. In July 2006, defendant filed a motion to compel production of Dr. Shuman's EEG tracings. In the alternative, defendant moved in limine to prevent plaintiff's experts from providing testimony or opinion based on the EEGs. The trial court denied the motion, ruling that defendant had to apply to an Indiana court for a domesticated subpoena.

Defendant secured an Indiana order, which it served on Dr. Shuman. Dr. Shuman responded with an affidavit, stating that a biologic acquisition platform, on which the QEEG data had been gathered, had been disassembled, and could not be reassembled. Dr. Shuman represented that the optical disk with the quantitative EEG data, was readable only on the disassembled equipment.[1]

Trial was scheduled for Tuesday, August 22, 2006. On Thursday, August 17, 2006, just before 5:00 p.m., plaintiff faxed to defense counsel an amended list of experts. This list named Dr. Shuman as a rebuttal expert. In his trial deposition on August 18, 2006, defense expert Dr. Burdette testified that there is no evidence that quantitative EEGs are clinically useful for diagnosing traumatic brain injuries. He also testified that no meaningful interpretation can be made from quantitative EEG data.

Trial began on August 22, 2006. Dr. Hensley, a psychiatrist, testified, in plaintiff's case-in-chief, that his differential diagnoses were post-concussion syndrome, and complex partial epilepsy. Dr. Hensley opined that these conditions were related to the accident. Dr. Hensley testified that the EEG reports by Dr. Shuman corroborated his, Dr. Hensley's, differential diagnoses. After plaintiff's case-in-chief, Dr. Burdette testified, via his trial deposition, that QEEGs are unreliable, and that a conclusion cannot be drawn therefrom, regarding whether a person has a head injury.

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[1] Later, in August 2006, it became apparent that that the QEEG data *was* available, without the disassembled equipment. The QEEG diagrammatic information was marked as an exhibit at a trial deposition in August 2006.

At the close of defendant's proofs, plaintiff called Dr. Shuman as a rebuttal witness. Defendant objected on the basis that plaintiff had not identified Dr. Shuman as an expert witness until seven days before trial, and because he authored the four EEG reports which were a subject of the litigation, and which were extensively discussed by several witnesses, Dr. Shuman could not fairly be considered a rebuttal witness. Defendant argued that instead, Dr. Shuman could have been presented in plaintiff's case-in-chief, so that defendant would not be deprived of the opportunity to rebut his testimony. Defendant pointed out that it did not learn of the EEGs until late in the litigation, and named its expert in April 2006, and contends that plaintiff should have named Dr. Shuman as an expert much earlier than on the eve of trial.

The trial judge overruled the objections. Thereafter, Dr. Shuman testified that he used the quantitative EEG to diagnose plaintiff as having a traumatic brain injury. Dr. Shuman opined that plaintiff must have suffered a blow to the head to produce the slow brain activity.

The jury returned a verdict mostly favorable to plaintiff. Defendant filed a motion for a new trial, on two grounds: (1) that the trial judge denied defendant a fair trial when it allowed plaintiff to call Dr. Shuman, where defendant had no opportunity for discovery from him, no opportunity to examine his file, and no opportunity to file a *Daubert*[2] motion to exclude him; and (2) that statements by plaintiff's counsel in closing argument constituted misconduct. In January 2007, the trial judge entered an order granting in part, and denying in part, defendant's motion for a new trial. The trial judge ruled that defendant was entitled to a *Daubert* evidentiary hearing, for the purpose of determining whether Dr. Shuman was a qualified expert under MRE 702, and whether his analysis met the *Gilbert*[3] test. The trial judge further ruled that if Dr. Shuman's testimony should have been excluded on either ground, defendant would be granted a new trial.

In March 2007, defendant again filed a motion to compel production of the QEEG tracings, in order to allow its experts to analyze them for the *Daubert* hearing. In April 2007, the trial judge granted the motion. At the oral argument on the motion to compel, plaintiff argued that if the trial judge found the admission of Dr. Shuman's QEEG testimony to be error, the trial judge should also consider whether the error was harmless. The trial judge agreed to this approach.

In May 2007, plaintiff served on defendant the QEEG data/tracings. Thereafter, the trial judge left the state-court bench, and the case was assigned to a successor circuit court judge.

In August 2007, the successor judge held the *Daubert* evidentiary hearing on the admissibility of Dr. Shuman's quantitative EEG testimony. She then ruled Dr. Shuman's testimony was not reliable and should have been excluded.

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[2] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993). In Michigan, a *Daubert* motion is also known as a *Gilbert* motion, for *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 780; 685 NW2d 391 (2004), to "ensure that any expert testimony admitted at trial is reliable." MRE 702.

[3] *Gilbert, supra* at 780.

Plaintiff then filed a motion for a supplemental order regarding defendant's motion for a new trial, requesting a harmless error hearing. In September 2007, the successor judge granted plaintiff's motion, and proceeded with a harmless error hearing. Following the hearing, the successor judge concluded that because the jury had sufficient other evidence on which to conclude that plaintiff had suffered a traumatic brain injury as a result of the accident at issue, the admission of Dr. Shuman's testimony was harmless error. Accordingly, the successor judge denied defendant's motion for a new trial.

III.

Defendant first argues that the trial judge abused his discretion in denying the motion to compel, or to exclude, Dr. Shuman's EEG results, and by requiring defendant to file an action in Indiana to obtain a domesticated order compelling Dr. Shuman to produce the information. We disagree.

This Court reviews for an abuse of discretion circuit court rulings concerning discovery. *Van Vorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004). This Court also reviews a trial court's decision to admit evidence for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005).

A decision on a close evidentiary question ordinarily is not an abuse of discretion. *Morales v State Farm Mut Automobile Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008). But an abuse of discretion can arise when the court admits evidence that is inadmissible as a matter of law. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

Plaintiff argues that she had produced authorizations allowing defendant to obtain Dr. Shuman's information, as well as the information in the possession of Dr. Hensley, who had directed that the EEGs be taken, and who had received the resulting reports. Under these circumstances, we find no authority for the proposition that a trial court cannot require a party seeking to compel production by an out-of-state person, to seek an order of the jurisdiction where such person is located. Nor does defendant cite authority with similar circumstances.[4]

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[4] In the decision cited by defendant, *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612; 550 NW2d 580 (1996), the plaintiff named an expert, but failed to provide a copy of the expert's evaluation report. The defendant filed a motion in limine, and later plaintiff faxed a copy of the expert's report to defense counsel, on the eve of trial. The defendant then filed a motion for sanctions, which the trial court denied. This Court reversed, holding that the trial court abused its discretion in denying sanctions, because plaintiff had a duty to supplement its interrogatory answers, rather than to hold the report until the eve of trial. *Id*. at 619-620.

Beach is distinguishable, because it does not involve a factual scenario where the expert from whom discovery was sought, was located out of state, and was uncooperative. In addition, *Beach* did not involve data that the expert thought could not be produced, believing it was only viewable on disassembled equipment that could not be reassembled. Finally, *Beach* involved a question of sanctions, not a motion to compel production.

Accordingly, the trial judge did not abuse its discretion in requiring defendant to apply in Indiana for an order.

Defendant next contends that the trial judge erred when he concluded that even if Dr. Shuman's testimony was erroneously admitted, a harmless error analysis could be applied to such an error. Principally, defendant argues that the trial judge erred by not applying his previous ruling that, if Dr. Shuman's testimony was inadmissible, then defendant was denied a fair trial. We disagree.

Because defendant challenges the trial judge's ruling on defendant's motion for a new trial, our review is for an abuse of discretion. *Allard v State Farm Ins Co,* 271 Mich App 394, 406; 722 NW2d 268 (2006). Appellate review of the application of MRE 702 is also for an abuse of discretion. *Clerc v Chippewa War Mem Hosp,* 267 Mich App 597, 601; 705 NW2d 703 (2005). Finally, this Court also reviews a trial court's decision to reconsider an earlier ruling for an abuse of discretion. See *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

A trial court judge, or his or her successor, can sua sponte reconsider prior rulings, except a final judgment. MCR 2.604(A). Thus, the trial judge's decision to permit plaintiff to argue that a harmless error analysis should apply to defendant's motion for new trial, and the trial judge's ruling that a harmless error analysis would be utilized in this case, were both appropriate exercises of the trial judge's discretion.

At the time of the January 2007 order, the trial judge had not yet made his complete ruling on defendant's motion for a new trial. Therefore, the January 2007 order was mere obiter dictum; it was a preliminary statement, not the trial judge's complete and final ruling. The trial judge had not yet considered all the ramifications and aspects of the motion. Accordingly, the trial judge was free, at his discretion, to modify the January 2007 order.

Moreover, MCR 2.613(A) provides: "*An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial . . . unless refusal to take this action appears to the court inconsistent with substantial justice*." (Emphasis added.) Thus, the failure of a trial judge to grant a new trial is not inconsistent with substantial justice, if the error in the admission of evidence was harmless, because of the presence of substantial other evidence supporting the verdict. See generally, e.g., *Ward v Consolidated Rail Corp*, 472 Mich 77, 87; 693 NW2d 366, 372 (2005) ("Instructional error is harmless unless a failure by the reviewing court to correct the error would be inconsistent with substantial justice," (internal quotation marks omitted) (citing MCR 2.613(A)). For these reasons, the trial court did not abuse its discretion in holding that a harmless error hearing would be appropriate before a final ruling on the motion for a new trial was made.

Defendant also asserts that the trial judge abused his discretion in allowing Dr. Shuman to testify at trial. We disagree.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp,* 471 Mich 67, 76; 684 NW2d 296 (2004). In addition, we review decisions regarding the qualification of an expert witness for an abuse of discretion. *Clerc, supra* at 601. An error in the admission of evidence will not warrant appellate relief unless

refusal to take this action appears inconsistent with substantial justice or affects a substantial right of the opposing party. *Craig, supra* at 76 (quotation marks and citation omitted).

At trial, when plaintiff called Dr. Shuman as a rebuttal witness, defendant objected on the basis that Dr. Shuman was not timely identified as an expert witness and that he could and should have been presented in plaintiff's case in chief so that defendant had an opportunity to rebut the testimony. Defendant did not object on the basis now asserted on appeal, that Dr. Shuman was not qualified as an expert under MRE 702, and that Dr. Shuman's testimony was unreliable. Therefore, these arguments asserted on appeal are unpreserved. This Court is not obliged to consider unpreserved issues, *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Coates v Bastian Bros*, 276 Mich App 498, 509-510; 741 NW2d 539 (2007), therefore, we decline to review this challenge.

In any event, however, we conclude that defendant was not denied a fair trial by the trial judge's decision to permit Dr. Shuman to testify. Defendant knew at least several days before trial that Dr. Shuman was a proposed witness, yet failed to file a written motion, or to make an oral motion, to exclude him. Again, during trial, when Dr. Shuman was called as a rebuttal witness, defendant failed to raise the issue of Dr. Shuman's qualifications, or the reliability of his testimony. In affect, defendant failed to preserve this issue by failing to timely bring it to the trial judge's attention. *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997).

In addition, defendant was not denied a fair trial, because there was substantial other admissible evidence supporting the conclusion that plaintiff suffered a brain injury in this 2002 accident. Dr. Hensley, a qualified psychiatrist, testified that the accident aggravated plaintiff's pre-existing chronic pain, and her narcotic dependence, and also caused a closed-head injury with complex partial seizures. Dr. Paul Macellari, a neuropsychologist, who was a treater both before and after the accident, testified that he observed a big difference in plaintiff, pre-accident versus post-accident, which made him think that she "really went through something." Dr. Macellari observed plaintiff to be severely confused; delirious; disoriented in time, space and place; impaired in gait; and with memory loss. Dr. Gary Elliott, a neuropsychologist, testified that his testing suggested that plaintiff was suffering from a brain injury, superimposed on pre-existing psychological and pain issues. Dr. Elliott also testified that the pre-existing psychological and pain issues were aggravated by the 2002 accident. Given this other evidence in support of plaintiff's claim, the trial court did not abuse its discretion in concluding that any error in the admission of Dr. Shuman's testimony and QEEG test results, was harmless.

Lastly, defendant contends that plaintiff's counsel's statements during closing argument constituted misconduct, such that the trial court abused its discretion in denying defendant's motion for new trial. We review the denial of a motion for a new trial for an abuse of discretion. *Allard, supra* at 406. While we agree that the statements were misconduct, the trial court did not abuse its discretion in denying the motion.

Counsel may not appeal to jurors' self-interest. *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 290-291; 602 NW2d 854 (1999). Here, plaintiff's counsel argued, in closing argument, that buying insurance is like betting, and that everyone, including the jurors, do it. He argued that "[y]ou're buying protection for yourselves and for your families." Plaintiff's counsel argued that when an accident doesn't happen, the insurance company is happy, because it has

won the bet. Plaintiff's counsel told jurors that if they didn't believe him, they should "drive down to Indianapolis or Bloomington, Indiana and look at the . . . structures . . . built . . . by the insurance companies."

The trial court found these comments to be inappropriate, and we agree. Under *Badalamenti*, counsel may not ask jurors to step into the shoes of the injured party, and may not appeal to their self-interest (here, their self-interest as insureds and as purchasers of insurance). *See Badalamenti, supra* at 290.

Further, the trial judge found that plaintiff's counsel intentionally inserted his comments regarding the alleged size and wealth of defendant, and for an improper purpose. This is a finding of fact, which we review for clear error. *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 269 Mich App 25, 53; 709 NW2d 174, 193 (2005). The trial court had the opportunity to view the demeanor of plaintiff's counsel, and the circumstances surrounding his argument, and because we find no evidence suggesting that the trial judge's conclusions were clearly erroneous we defer to the trial judge's finding. As such, we must determine whether the misconduct affected the verdict. Where misconduct of counsel is alleged, in a civil case, a reviewing court must apply a harmless error analysis:

> 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. [*Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 290; 602 NW2d 854, 860 (1999) (emphasis added by *Badalamenti* deleted).]

Here, although the misconduct was clearly an appeal to jurors to consider their own interests as buyers of insurance, and to have an antipathy toward insurance companies because of their alleged size and wealth, defense counsel promptly objected, and the trial court gave an immediate curative instruction. Also, later the trial judge instructed the jurors that sympathy must not influence its decision, nor should the jury be influenced by prejudice regarding any factor not relevant to the rights of a party. The trial judge instructed the jury that the defendant, a corporate person, was entitled to the same fair and unprejudiced treatment as a natural person would receive, under like circumstances.

We presume that jurors follow instructions. *Dep't of Transportation v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 178-179; 700 NW2d 380 (2005). And immediate instructions may cure error or possible unfair prejudice created by remarks constituting misconduct. See *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 106; 330 NW2d 638 (1982). We conclude that, given the foregoing evidence and presumption, defendant has failed to show that the trial judge abused his discretion in denying the motion for new trial.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto