STATE OF MICHIGAN

COURT OF APPEALS

DAVID WOOSTER,

Plaintiff-Appellant,

and

MICHIGAN BRAIN & SPINE PHYSICIANS, ORTHOPEDIC SURGEONS, P.C., and MCLAREN LAPEER REGION,

Intervening Plaintiffs,

v

FARM BUREAU MUTUAL INSURANCE COMPANY and FARM BUREAU GENERAL INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
September 15, 2015

No. 322296
Wayne Circuit Court
LC No. 12-003048-NF

Before: TALBOT, C.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right a no cause of action judgment following a jury trial in this no-fault action against defendants Farm Bureau Mutual Insurance Company of Michigan and Farm Bureau General Insurance Company. We affirm.

Plaintiff first argues that he is entitled to a new trial because the trial court abused its discretion by precluding Dr. Aria Sabit from testifying as an expert witness unless Dr. Sabit produced materials pertaining to his employment and credentials to obtain staff privileges at McLaren Lapeer Hospital. We disagree.

We review for an abuse of discretion a trial court's decision to admit or bar expert testimony. *Gay v Select Specialty Hosp*, 295 Mich App 284, 290; 813 NW2d 354 (2012). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

We agree with defendants that plaintiff has waived appellate review of this issue. Waiver is the intentional and voluntary relinquishment of a known right. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co v City of Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009). Whether the facts of a case establish a waiver presents a question of fact. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). Clear and convincing evidence of a waiver is required. *Quality Prod & Concepts Co*, 469 Mich at 364–365.

We initially note that plaintiff's representations regarding the trial court's rulings and the discussions on the record are imprecise. Despite plaintiff's assertions, the trial court never ruled that Dr. Sabit could not testify. Rather, the trial court ruled that Dr. Sabit needed to provide the requested documentation before he could testify. Thus, the relevant issue appears to be whether the trial court abused its discretion in requiring Dr. Sabit to provide his credentials. This issue is further muddied by the record. After the trial court's initial ruling, the parties never again discuss the issue of Dr. Sabit testifying, except for the trial court asking if Dr. Sabit would be testifying, to which plaintiff responded, "Don't need it." Plaintiff's attorney's statement indicated that plaintiff determined the testimony of Dr. Sabit was not necessary. Thus, we hold that plaintiff waived review of this issue by opting not to call Dr. Sabit. *Quality Prod & Concepts Co*, 469 Mich at 374; *Roberts*, 466 Mich at 69.

We briefly address the merits of plaintiff's arguments on appeal for completeness. Plaintiff addresses two primary concerns regarding the trial court's ruling. First, plaintiff complains that defendants' subpoena was defective. Second, plaintiff asserts that the requested information was privileged and inadmissible.

First, we reject plaintiff's reliance on the defective subpoena. The trial court did not rely on defendants' subpoena as a basis for requiring the documentation. While it was first raised by defendants, the record indicates that the trial court wanted the documentation produced for review in relation to Dr. Sabit's credibility as an expert witness. MRE 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise[.]

"MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). As defendants assert, the trial court sits in a gatekeeper role in regard to expert witness testimony, and we do not agree that it was an abuse of discretion to require the requested information before Dr. Sabit's testimony. See *Gay*, 295 Mich App at 290. Further, Dr. Sabit did not indicate he could not produce the information in a timely manner, but that he did not wish to produce the document for review in front of the jury.

Further, plaintiff asserts that there was an offer and request for a hearing outside the presence of the jury, which was denied. We again disagree with plaintiff's representation. The

trial court did not deny the request—the trial court ordered that the documentation needed to be produced before the trial court made any further rulings or Dr. Sabit testified. In fact, the court clearly stated:

> So counsel was asking to be allowed to at least review those and then make a determination as to whether or not, I support, any questions would be asked with regard to that.
>
> So I do want the credentials produced and so that needs to be done, counsel, before he can testify. [Tr II, pp 67-68.]

At this point, it seemed clear that the trial court had not even determined whether the documentation was admissible or relevant, only that it needed to be produced for review.

Plaintiff also asserts that the documentation was privileged. The issue of whether the documentation was privileged was not preserved. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). From a legal standpoint, plaintiff's argument is not without merit. This Court has held that MCL 333.20175 and MCL 333.21515 protect against disclosure of information relating to a physician's application for staff privileges at a hospital. *Dye v St John Hosp & Med Ctr*, 230 Mich App 661, 669; 584 NW2d 747 (1998). However, we are unable to come to an ultimate conclusion regarding whether documentation in question would be privileged, as the documentation was described only in vague terms (apparently taking the form of correspondence) and was never produced for the trial court. Had plaintiff believed that the documents were privileged, a hearing outside the presence of the jury was not the correct remedy, as asserted by plaintiff. Rather, plaintiff should have asked the court to conduct an in camera review of the document. *In re Costs and Attorney Fees*, 250 Mich App 89, 100-101; 645 NW2d 697 (2002). Further, if the documentation related solely to Dr. Sabit's malpractice claims as plaintiff claimed, it seems likely the information in the credentialing material would have been deemed inadmissible by the trial court, as it had already ruled that evidence of malpractice claims against Dr. Sabit were inadmissible.

However, the documentation was never actually produced for a determination of whether it was privileged or inadmissible. In fact, it was never again discussed on the record at all. The court ordered the documentation produced so it could be reviewed before Dr. Sabit testified as an expert witness. Rather than produce the documentation for the court, plaintiff *chose* not to call Dr. Sabit as a witness. We do not agree with plaintiff that the court's holding precluded Dr. Sabit's testimony, or that the trial court abused its discretion in ordering that the documentation be produced for review.

Finally, an error in the admission of evidence is not grounds to set aside a verdict unless it was inconsistent with substantial justice. MCR 2.613(A) provides:

> Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Here, plaintiff does not explain what Dr. Sabit's testimony would have revealed that would impact the result of the trial. Moreover, plaintiff unsuccessfully attempts to blame his unfavorable verdict on the lack of Dr. Sabit's testimony alone, overlooking the disparaging Facebook video, photographs, and medical testimony that were presented to the jury. Accordingly, we are not convinced that, even assuming the trial court erred, plaintiff is entitled to a new trial.

Plaintiff next argues that the trial court erred by not permitting evidence or testimony regarding claims that were paid by defendants on plaintiff's behalf in regard to his no-fault claim. We disagree. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Edry*, 486 Mich at 639.

The trial court did not abuse its discretion. Plaintiff's representation of the record is, again, flawed. First, we note that the trial court did permit evidence regarding claims that were paid by defendants without dispute. Defendants' claims adjustor clearly testified regarding claims that were paid and unpaid by defendants.

Plaintiff fails to distinguish between claims that were paid without dispute, and claims that were paid pursuant to a settlement. MRE 408 plainly provides, in relevant part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

MRE 409 prohibits evidence of "offering or promising to pay" medical expenses in order to "prove [a party's] liability for the injury." MRE 408 has been found to apply to evidence of a settlement made by a party to a lawsuit with a third person when the evidence is admitted to prove the party's liability. *Windemuller Electric Co v Blodgett Memorial Med Ctr*, 130 Mich App 17, 20-23; 343 NW2d 223 (1983).

Here, the trial court allowed the admission of all evidence regarding defendants' payments made or not made relating to plaintiff's claim, except with regard to its settlements with other parties. In the trial court and on appeal, plaintiff has been unable to provide a reason, other than liability, why the evidence of the *settlements* should be admitted. Thus, the trial court did not abuse its discretion.

Affirmed. Defendants, the prevailing parties, may tax costs. MCR 7.219.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood