STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE HLIFKA, personal representative of the estate of MAUREEN HLIFKA, Plaintiff-Appellant, v MARGARET HIGGINS, Defendant-Appellee.	UNPUBLISHED July 1, 2004 No. 244355 Oakland Circuit Court LC No. 01-029920-NI

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

PER CURIAM.

Plaintiff appeals by right the trial court's judgment of no cause of action entered in accordance with the jury verdict that plaintiff was 90% at fault in this automobile negligence case. MCL 500.3135(4)(a).[1] Plaintiff also claimed an appeal from the trial court's order denying her motion for new trial but has not identified that issue in her statement of questions presented, nor presented a specific argument on that claim. MCR 7.212(C)(5), (7). Plaintiff has therefore abandoned the claim. *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). We find none of plaintiff's underlying claims of trial error in the admission of evidence or the conduct of defense counsel merit reversal. We affirm but remand for further hearing on case evaluation sanctions.

I. Factual Background

Plaintiff[2] was walking across a five-lane highway around noon on December 1, 2000, when defendant's vehicle struck her. Before the accident, plaintiff had suffered from back and

[1] If a tort action survives Michigan's no fault provisions, MCL 500.3135(4)(a) provides: "Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault."

[2] Plaintiff passed away after this appeal was filed and her personal representative has substituted as a party on motion granted March 16, 2004. When using "plaintiff" in this opinion, we refer to Maureen Hlifka and not her personal representative.

stomach problems resulting in numerous surgeries, had broken her hip in a fall in 1997, and also suffered from smoking related respiratory illnesses, including emphysema. At the time of the accident, plaintiff was sixty-three years old and ambulated with the aid of a cane. Defendant does not dispute that plaintiff suffered substantial injuries as a result of the accident.

Plaintiff testified she left her apartment in Clawson Manor at noon to get a pop at a gas station on the other side of 14 Mile Road. Plaintiff testified that she remembered walking up to the curb of the five-lane highway and the next thing she remembered was being in the hospital. Plaintiff further testified that it was her habit when crossing the street to first look left and wait for the traffic light at the corner to turn red and then walk to the middle of the street. She would then look right and wait for the traffic light a couple of blocks down to turn red before continuing to cross the street. A Burger King restaurant (from which defendant exited before the accident) was located between the traffic light to her right and where she would cross the street.

As evidence that defendant was exceeding the thirty-five miles per hour (mph) speed limit, plaintiff presented the deposition testimony of one of her treating physicians. Dr. James Robbins, a critical care specialist, opined that "higher speed lead[s] to more injuries." Robbins further opined that plaintiff's injuries were consistent with being struck by a motor vehicle traveling at a speed of twenty-five mph or higher, but that "it makes more sense that the car was going a higher speed." According to Robbins, the car which struck plaintiff was more likely going forty-five than twenty-five.[3]

Debra Vitale, a paramedic, testified that she attended to plaintiff after the accident. Vitale testified that when she arrived she immediately observed that plaintiff was in critical condition. She looked one second at the accident vehicle because the patient was "priority one." While attending to plaintiff, Vitale overheard a conversation coming from a nearby group of people, "that the woman had stepped out in front of her, that she was doing the speed limit at forty-five and that she was barely able to stop." Vitale believed the female driver of the accident vehicle, which Vitale described as a van, made the statement. Vitale recorded the statement in her "run sheet," which was admitted as an exhibit. Vitale acknowledged the speed limit on 14 Mile Road was 35 mph.

Defendant testified on the day of the accident she drove to Burger King on 14 Mile Road in Clawson to pick up lunch at the drive-thru. Defendant denied eating or checking her food while driving. From Burger King, defendant turned right driving west in the far right lane of 14 Mile Road where the speed limit was 35 mph. Defendant testified she was not distracted, nor was her view obstructed; she was attentive to driving. Defendant testified that plaintiff "was just there" in her lane close to and facing the curb but not moving. Defendant braked (leaving 32 feet of skid marks) but struck plaintiff about one hundred yards from the Burger King. Defendant denied talking to the responding ambulance personnel. Forty-five minutes after the

[3] Plaintiff did not establish Dr. Robbins possessed specific expertise to extrapolate the speed of a motor vehicle from injuries sustained by an accident victim.

accident she gave the police a written statement consistent with her testimony. She did not tell the police how fast she was going before the accident because she was not asked.

Mark McCaley testified that he was in Clawson on the day of the accident driving his van east on 14 Mile Road intending to pick up parts for his work repairing refrigeration equipment. McCaley saw a pedestrian begin to cross 14 Mile Road heading from the south side curb, by a senior citizen residential unit, toward a strip mall on the north side of 14 Mile Road. McCaley did not observe the pedestrian look in the direction of the on-coming eastbound traffic before beginning a fast shuffle into the street, forcing vehicles in both eastbound lanes to brake and swerve to avoid hitting the pedestrian who continued looking and walking straight north. McCaley testified that the pedestrian made it to the middle lane of 14 Mile Road. As he drove by, he continued watching her in the van's side mirror. According to McCaley, the pedestrian did not stop or look eastward but continued walking into the inside westbound lane forcing a westbound vehicle to swerve to avoid striking her. McCaley lost sight of the pedestrian after she moved into the westbound curb lane because a red Blazer blocked his view. McCaley was adjacent to a Burger King restaurant and thought the pedestrian made it to the north curb of 14 Mile Road but couldn't say for sure because the Blazer blocked his view. Then McCaley saw brake lights and the pedestrian fly into the air. He made a u-turn, parked behind the Blazer, told his assistant to call the police, and began directing traffic around the accident scene.

McCaley described the driver of the Blazer after the accident as, "hysterical in shock, couldn't believe what happened." Further, McCaley observed that before the accident the red Blazer was not speeding and testified that defendant "was going slow, she wasn't going fast."

Orla Munion testified that he was a resident manager and president of the resident's council at Clawson Manor where plaintiff lived at the time of the accident. Munion was eating lunch at the community room on December 1, 2000, seated on the north side of the room by a window with a view of 14 Mile Road. Munion first saw plaintiff when she was about one foot from the curb of the far westbound lane of 14 Mile Road. According to Munion, plaintiff appeared to attempt to step up on to the curb but then stumbled backward. Munion testified that, "apparently, I must have looked away because the next thing I know I look back and she was laying on the ground." Munion wrote out a statement for the police on the day of the accident and later talked to Officer Prosser when he came to Clawson Manor on an unrelated 911 call.

Other evidence presented at trial will be discussed where pertinent to the issues plaintiff raises on appeal.

II. Standards of Review

We review a trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). An abuse of discretion exists only in the extreme case where the result is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id*. Alternatively, an abuse of discretion is demonstrated when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). But, the trial court's decision on a

close evidentiary question ordinarily cannot be an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Finally, even if the trial court does err in admitting or excluding evidence, we will not reverse unless a substantial right of a party is affected, and it affirmatively appears that failing to grant relief is inconsistent with substantial justice. *Id.*, citing MCR 2.613(A), *Chastain v General Motors Corp*, 467 Mich 888, 654 NW2d 326 (2002), and *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

We review claims of misconduct by counsel to determine whether a party was denied a fair trial. *Reetz v Kinsman Marine Transit Co,* 416 Mich 97, 100-103; 330 NW2d 638 (1982); *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 290-293; 602 NW2d 854 (1999). Our review is de novo because whether a party has received a fair trial is a question of law. *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998). We employ a two steep analysis: (1) did error occur and (2) does it require reversal. *Ellsworth, supra* at 191. "A lawyer's comments will usually not be cause for reversal unless 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." *Id*. at 191-192. A trial court's instruction will cure most but not all misconduct by counsel. *Reetz, supra* at 106; *Badalamenti, supra* at 292 n 6.

We review de novo the trial court's decision to award mediation sanctions because it is a question of law. *Elia v Hazen*, 242 Mich App 374, 376-377, 378; 619 NW2d 1 (2000). We review the amount of an award by the trial court for an abuse of discretion. *Id*. at 377. "An abuse of discretion is found only in extreme cases in which 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 defiance thereof, not the exercise of reason but rather of passion or bias." *Id.* (citations and internal punctuation omitted).

III. Analysis

A. Officer Prosser's Testimony

Plaintiff first argues that it was error to admit testimony by investigating police officer James Prosser that he believed that speed was not a factor in the accident, that he could find nothing that defendant did wrong, that plaintiff should have used a crosswalk and that failing to do so violated the Uniform Traffic Code. Plaintiff categorizes this evidence as inadmissible opinion testimony, and that defense counsel's reference to the evidence was misconduct that denied her a fair trial. We disagree. We find no abuse of discretion by the trial court. And, viewed in context, we conclude defense counsel did not engage in misconduct that denied plaintiff a fair trial.

The trial court entered an order in limine before trial that "police officer opinion testimony regarding fault and causation and the non-issuance of a citation to Defendant shall be excluded, [and] further, no evidence of what any witnesses, excluding Defendant, told the police shall be admitted." The parties stipulation to this order clearly indicates that it did not preclude evidence of the officer's investigation and observations that otherwise complied with the Rules of Evidence.

Plaintiff theorized in her opening statement that defendant negligently drove in excess of the speed limit and was preoccupied with her Burger King order when she struck defendant. Plaintiff's counsel stressed the importance of measurements taken at the scene of the accident, and damage to and the position of defendant's vehicle. Referring to Officer Prosser as plaintiff's first witness, counsel noted that, "police when they have a serious injury like this, they leave everything in place so they can take some measurements."

During direct examination of Prosser, plaintiff's counsel's elicited a foundation that Prosser was a trained accident investigator, but not trained in accident reconstruction. Prosser testified that he did not initially respond to the accident but was summoned when other officers decided to call for the fatal accident team. Prosser further testified that a serious accident site is treated as a "crime scene" to preserve it and identify witnesses. Prosser also noted that permanent reference points are identified, in this case, a light pole, so that measurements could be taken at the scene years after the accident. Plaintiff's counsel then elicited extensive testimony from Prosser about measurements he took at the accident scene, and the time to travel distances at 25 mph, 35 mph, and 45 mph, converted to feet per second. This testimony was based on Prosser's training, education, and experience.

Plaintiff also elicited testimony from Prosser concerning plaintiff's failure to use a crosswalk. Specifically, Prosser testified that motorists have an obligation to watch for pedestrians and must yield to them even if they are not in a crosswalk. Prosser further testified that it was not unusual for pedestrians to cross 14 Mile Road at the point where the accident occurred and also identified the location of the nearest crosswalk.

On cross-examination, Prosser testified that he gathered some measurements during his initial investigation, including the location of a blood spot on the road, the distance to defendant's vehicle from a reference point, and skid marks in the road. But not until a week before trial at the request of plaintiff's counsel did Prosser measure other distances, including to the distance from the point of the accident to the Burger King and to cross-streets. Defense counsel asked why the latter measurements were not obtained in the initial investigation. Prosser answered:

> At the time we saw no reason to. We didn't think speed was a factor in the crash. And we didn't need to.

Plaintiff did not object; therefore, she failed to preserve her claim of error regarding the admission of this testimony. MRE 103(a)(1). The testimony was relevant to Prosser's credibility and to rebut innuendo that the time to travel the measured distances at various speeds was an important part of Prosser's investigation. MRE 401. It was therefore admissible. MRE 402. Moreover, defense counsel's question did not call for an opinion regarding fault or causation in violation of the pretrial order but rather only asked for an explanation why certain measurements were not taken until plaintiff's counsel asked that it be done. Indeed, Prosser did not opine on fault or causation except to the extent of stating a belief existed at the time of his initial investigation that speed was not a factor in the accident to explain why certain measurements were not initially taken. Accordingly, plain error affecting plaintiff's substantial rights did not occur. MRE 103(d).

On further cross-examination, Prosser testified he considered "witness statements and the evidence at the scene being for example skid marks" in making his ultimate decision regarding an accident investigation. Plaintiff objected on the basis of relevancy below and on appeal suggests this testimony was an improper lay opinion. MRE 701. We disagree. The testimony was not an opinion but rather evidence relevant to the thoroughness of Prosser's investigation, a permitted topic under the limine order, and also related to Prosser's credibility. The credibility of a witness is always relevant. See *People v Mills,* 450 Mich 61, 72; 537 NW2d 909, remanded 450 Mich 1212; 539 NW2d 504 (1995).

Prosser also testified that crosswalks exist for pedestrian safety, that plaintiff should not have crossed the street where she did, and that doing so violated the Uniform Traffic Code. We find this testimony a proper response to testimony plaintiff elicited from Prosser regarding pedestrians crossing the street at the accident location all the time, and the duty of motorists with respect to pedestrians. "It was not error to cross-examine . . . upon subjects that were brought out on direct examination and which had some relation to the issue involved." *Stewart v Eghigian*, 312 Mich 699, 702; 20 NW2d 777 (1945). The testimony was relevant because the violation of a state statute or local ordinance is evidence of negligence. *Zeni v Anderson*, 397 Mich 117, 129; 243 NW2d 270, 276 (1976) (statute); *Hodgdon v Barr*, 334 Mich 60, 71; 53 NW2d 844 (1952) (ordinance). Plaintiff waived any claim of error regarding the admission of this evidence by eliciting comparable testimony from Prosser concerning a motorist's obligation. *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 704 n 47; 630 NW2d 356 (2001). For the same reason, plaintiff waived any claim Prosser was not qualified to render a legal opinion concerning traffic law.

Finally, plaintiff contends a lay witness is precluded from giving testimony in the form of legal opinions, a matter reserved exclusively to the trial court. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 704; 513 NW2d 230 (1994). But even if error occurred, it was harmless because plaintiff points to no inaccuracy in Prosser's testimony. *Id*. Indeed, the trial court instructed the jury that,

> [t]he city of Clawson has an ordinance providing that every pedestrian that crosses a roadway at any point other that within a marked crosswalk at the intersection shall yield the right-of-way to all vehicles on the roadway.
>
> * * *
>
> If you find that plaintiff violated this ordinance before or at the time of the occurrence, that violation is evidence of negligence which you should consider together with all other evidence in deciding if plaintiff was negligent.

Plaintiff also argues error occurred when defendant was permitted to elicit testimony from Prosser that he could find nothing that defendant did wrong. We again disagree.

Plaintiff theorized that defendant was speeding and inattentive because she was preoccupied with the lunch she had just purchased from Burger King. As noted already, plaintiff elicited testimony from Officer Prosser that he treated the accident site as a "crime scene," and Prosser testified extensively regarding the time to travel the distance from the Burger King to the

point of the accident at various speeds in feet per second. During cross-examination, defense counsel elicited the following testimony from Prosser:

> *Q*. Had a chance to do some preliminary investigation and I believe part of your investigation you were trying to figure out potentially the fact that the driver may have been utilizing the cell phone, correct?
>
> *A*. Correct.
>
> *Q*. Did you find any evidence that she was utilizing her cell phone?
>
> *A*. No, I did not.
>
> *Q*. Okay. And she told you that she just departed the Burger King drive-thru, correct?
>
> *A*. Yes, she did.
>
> *Q*. And was there any evidence to show that she was eating at the time of the accident?
>
> *A*. No.
>
> *Q*. Were you able to find anything else with respect to Mrs. Higgins, the driver of the vehicle with respect to something that may have distracted her?
>
> *A*. No.
>
> *Q*. And you were actually looking for that. Isn't that correct?
>
> *A*. Yes, I was.
>
> *Q*. You were looking for something?
>
> *A*. Yes.
>
> *Q*. And you couldn't find anything, correct?
>
> *A*. Could not.
>
> * * *
>
> *Q*. With respect to all the measurements, your entire investigation, you're not telling the jury or making any inference to the jury that my client did anything wrong, correct?

Plaintiff's counsel objected, claiming that defendant had not laid a foundation for Prosser to render an opinion. The trial court overruled the objection after first asking defense counsel to repeat the question. The rephrased question and Prosser's answer follow.

Q. With respect to all the foundation stuff, the measurements that we saw, the points that he used, his entire investigation, whether he found that my client did anything wrong.

A. We did not.

The trial court did not abuse its discretion in admitting this testimony. First, it is not opinion testimony; it is factual testimony of the results of the officer's investigation. Although it is negative evidence, it is, nonetheless, relevant and material that Officer Prosser actively looked for wrongdoing on defendant's part but found none. But to the extent the testimony may be considered a lay opinion regarding fault, we find the trial court did not abuse its discretion.

"This Court has admitted lay opinion testimony from investigating police officers regarding fault in traffic accidents when the testimony was the result of direct observations and analysis of the accident scene." *Miller, supra* at 531. MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

In *Miller* this Court found error in the admission of two lay police officers' opinions regarding fault in a traffic accident when the officers' opinions were based solely on witnesses statements, and therefore, "was not rationally based on their own perceptions." *Miller, supra* at 531. In contrast, here, defense counsel's question was premised on Prosser's measurements at the scene of the accident and his entire investigation. Although Prosser's "entire investigation" would have included witness statements, it must also have included Prosser's observations at the accident site of blood in the road, the position of and damage to defendant's vehicle, skid marks in the road, lack of a crosswalk, and no evidence that defendant was distracted.[4] We find the present case closer factually to *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 590; 657 NW2d 804 (2002). In *Chastain* this Court found no abuse of discretion in admitting the investigating police officer's lay opinion that the plaintiff was not wearing his seatbelt based on his observation that the seat belt appeared to be intact, and the plaintiff was ejected from his vehicle during the accident. *Id*. at 588-589. Prosser's testimony was admissible because it was "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701.

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[4] But we also believe that even were we to conclude the Prosser's testimony was admitted erroneously, the error was harmless. Numerous witnesses to the accident testified, as did several experts, so to the extent that Prosser testified as to witness' statements, his testimony was merely cumulative. Moreover, there is no disputing the fact that his testimony stemmed primarily from his own observations and perceptions.

We also find no misconduct by defense counsel in referring to Officer Prosser's anticipated testimony in his opening statement. Counsel noted plaintiff's theory of the case that defendant was speeding and distracted with her lunch, and then stated:

> In fact, the speed you will hear testimony from the police officers, okay. The testimony the police officers will indicate that she was not speeding. But, they were trying to dig for something and the police they simply couldn't. They couldn't find anything that Mrs. Higgins was doing.

The opening statement of a trial is intended to permit counsel to make "a full and fair statement of that party's case and the facts the party intends to prove." MCR 2.507(A); *Ambrose v Detroit Edison Co*, 380 Mich 445, 454; 157 NW2d 232 (1968); *Wiley v Henry Ford Cottage Hosp,* 257 Mich App 488, 503; 668 NW2d 402 (2003). There is a difference between "facts" counsel intends to prove, and the evidence from which those "facts" may be found or inferred. *Ambrose, supra* at 456, quoting *Scripps v Reilly*, 35 Mich 371, 387-389 (1877). Of necessity, during opening statement counsel must paint with a broad brush to outline the ultimate facts counsel expects to prove. *Ambrose, supra* at 454-455. In essence, defense counsel stated to the jury they could infer from the police officers' testimony the ultimate facts that defendant was not speeding and did nothing wrong. Counsel's opening statement was a proper. Moreover, even assuming counsel's comments were improper, plaintiff's right to a fair trial was adequately protected by the trial court's instruction that an attorney's "arguments, statements and remarks" are not evidence. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001), citing *People v Bahoda,* 448 Mich 261, 281; 531 NW2d 659 (1995).

Similarly, no misconduct occurred when counsel asserted during closing argument that the evidence proved defendant's theory of the case: defendant did nothing wrong. Counsel's comment was consistent with the purpose of closing argument, which is to permit the attorneys to comment on the evidence and to argue their theories to the jury. *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987), aff'd 431 Mich 506; 431 NW2d 19 (1988). Moreover, even if counsel engaged in hyperbole by stating "all of the witnesses" testimony supported that conclusion, the trial court's instructions protected plaintiff's right to a fair trial.

B. Reference to Mental Illness, Suicide Attempts and Prior Alcohol Abuse.

Before trial plaintiff moved to exclude evidence of her mental condition and alleged prior alcohol abuse. Defendant opposed the motion contending that plaintiff's use of alcohol arose from her depressed mental state, which had resulted in suicide attempts in the past, and was relevant to plaintiff's mental state at the time of the accident. Plaintiff acknowledged two suicide attempts in 1979 and that her medical records were inconsistent regarding past alcohol use. But plaintiff had no alcohol in her system at the time of the accident. Accordingly, plaintiff argued the evidence was irrelevant. Defendant acknowledged plaintiff did not have alcohol in her system on the day of the accident but argued evidence of plaintiff's suicidal tendencies was relevant because the evidence would show plaintiff acted with reckless disregard for her own safety. Defense counsel asserted evidence of plaintiff's mental condition and recent suicide attempt existed in plaintiff's medical records, but counsel could not provide the trial court with a specific offer proof at the motion hearing. The trial court granted plaintiff's motion in limine. The order precluded evidence of plaintiff's, "alleged prior mental condition . . . including prior

suicide attempts or history of depression . . . [and] alleged prior alcohol abuse" and also precluded any offers of proof or questions on the excluded topics without a prior hearing outside the presence of the jury.

The trial court addressed this issue again before jury selection because plaintiff intended to offer at trial the depositions of two of her treating physicians which contained cross-examination regarding the doctor's familiarity with plaintiff's past depression, suicide attempts, and alcohol abuse. Both doctors denied any knowledge. In addition to her relevancy objection, plaintiff added unfair prejudice and lack of evidentiary support for the questions. Defense counsel argued the questions bore on the doctor's credibility and was relevant to damages - - whether the injuries sustained in the accident affected plaintiff's ability to lead a normal life. To support her contention that plaintiff's depression and suicidal tendencies were more recent than the two acknowledged 1979 suicide attempts, defendant offered medical records of an August 1999 hospital admission, which may have been related to an overdose of pain medication. The 1999 medical records contained a psychological consultation in which plaintiff reported treating with a psychiatrist, having problems with pain medications, having psychotic delusions over the past four to five years, but denying any history of suicidal behavior. Defense counsel also informed the trial court of medical records from March 2001, three months after the accident, which indicated that plaintiff was diagnosed with depression and schizo-affective disorder. Plaintiff argued that the evidence should not be admitted unless defendant called the diagnosing doctor to explain the record.

The trial court ruled that questions regarding plaintiff's past history of depression would be permitted as being relevant to the doctor's credibility (presumably their knowledge of their patient) and relevant to damages. The court ruled that questions concerning suicidal behaviors and mental diagnosis would also be permitted because they were probative of the doctor's credibility and also relevant to plaintiff's mental state at the time of the accident. The trial court further determined that danger of unfair prejudice did not substantially outweigh the probative value of the inquiry.

In plaintiff's opening statement, counsel acknowledged that plaintiff was divorced in 1979 and suffered from depression for a year but sought treatment. Counsel also alerted the jury to plaintiff's 1979 suicide attempts but contended she made no attempts thereafter. In essence, plaintiff claimed she had worked hard in the intervening years and "got herself in order."

On the second day of trial, plaintiff presented the video deposition of Dr. James Robbins, a critical care specialist who was summoned to the hospital to treat plaintiff after the accident. Robbins was not asked about plaintiff's alleged past alcohol abuse. So before presenting the deposition of Dr. Gregory Nowinski, plaintiff again moved to exclude reference to alcohol abuse. Dr Nowinski testified that he was not aware that plaintiff may have abused alcohol. Defense counsel argued that evidence of plaintiff's alcohol abuse was in her medical records, which would be admitted. The trial court, without stating a specific reason, overruled plaintiff's objection but warned defense counsel, "if you're wrong you will be assessed sanctions . . . ."

Plaintiff also presented the testimony of her daughter, Michelle Hlifka, who confirmed that her mother attempted suicide twice after her 1979 divorce. Hlifka also testified that in 1999 she found her mother "passed out" on the floor of her apartment after no family members had

visited over a weekend. Hlifka acknowledged that she initially suspected that her mother had overdosed on pain medication but then found a missing bottle of pills. She denied that her mother was an alcoholic or abused alcohol, but admitted that her mother had "bouts of depression."

During cross-examination, plaintiff denied that she ever drank alcohol. Defense counsel moved to admit plaintiff's hospital records. The records were in a sealed box and plaintiff's counsel objected that he had not had time to peruse the contents for specific objections. The trial court noted that plaintiff's objection was not on authenticity but the potential for objectionable hearsay within hearsay and admitted the documents subject to review by plaintiff's counsel for specific objection to content. On further cross-examination plaintiff denied any memory of a 1980 hospitalization for a prescription drug overdose. Plaintiff also denied memory of the incident in August 1999, only knowing something happened from talking to her daughter. Plaintiff admitted that she had suffered from depression but never sought treatment for it or any other mental illness.

Orla Munion, the Clawson Manor resident manager, testified that on one occasion in 1998 or 1999 the staff brought plaintiff to the dining room because they believed she had not been eating well by herself in her room. Munion testified that plaintiff fell face forward into the dinner tray. Munion believed plaintiff to be intoxicated because she appeared half-asleep and he could smell intoxicants on her breath. Munion also observed plaintiff drinking alcohol with her daughter at outside park benches on other occasions.

After Munion's testimony was concluded, the trial court asked defense counsel if he had other witnesses to present. Counsel answered, "No, defense rests."

During colloquy between the trial court and counsel over jury instructions the court asked defense counsel what evidence there was to support an instruction on mental illness. Counsel replied, "the [hospital] records that have been submitted." Plaintiff's counsel noted he had not reviewed the records and would have to do so if the court permitted defendant to reopen proofs. But the trial court would not reopen the proofs without the consent of plaintiff. Accordingly, the trial court refused to give M Civ JI 13.03.[5]

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[5] M Civ JI 13.03 provides: "An adult who is disabled by reason of mental illness must still observe the same standard of care which a normal and reasonably careful person would exercise under the circumstances which existed in this case." The commentary reports that although no Michigan case addresses this instruction, it expresses the general rule outside Michigan, citing Restatement Torts, 2d, §283 B, at 16–17. But see, *Thornton v Flint*, 39 Mich App 260; 197 NW2d 485 (1972) (finding no prejudice to the defendant when the trial court suggested the alcoholic plaintiff may be held to a standard less than the reasonable man), and *Hastings Mutual Ins Co v Rundell*, unpublished opinion per curiam of the Court of Appeals decided July 1, 2003 (Docket No. 238549) (declining to address constitutional challenges to SJI 13.03).

Plaintiff also moved to strike any reference to plaintiff's alcoholism because it lacked supporting evidence. The trial court found Munion's testimony unsatisfactory in that regard. The trial court also the granted plaintiff's objections to one of two trial "boards" of defendant, a blowup of page one of an August 1999 hospital discharge summary,[6] because defendant failed to produce a sponsoring witness to verify it met the criteria of MRE 803(4) & MRE 803(6). A blowup of page three of the same discharge summary, Dr. Patel's August 1999 psychological consultation, and a number of other medical records defendant proposed were also not admitted for the same reason. The trial court granted plaintiff's motion to preclude argument that plaintiff was an alcoholic, abused alcohol, or suffered from schizo-affective disorder.

In final instructions, the trial court told the jury it must not consider evidence where an objection to it had been sustained or evidence had been stricken. The court also specifically told the jury it had "struck testimony regarding alcoholism, alcohol abuse and schizo affective disorder. In other words, you may not consider those conclusions during your deliberations nor should you consider the reasons for those rulings."

The record demonstrates that the trial court did not abuse its discretion permitting defense counsel to question witnesses regarding plaintiff's mental health, history of depression and suicide attempts. We cannot conclude the trial court was without justification or excuse in permitting this line of inquiry because it was relevant to the credibility of plaintiff's medical experts and had a tendency to support defendant's liability theory: that plaintiff acted with reckless disregard for her own safety. MRE 402; *Ellsworth, supra at* 188. Even if admission of this evidence were a close question under MRE 403, no abuse of discretion is demonstrated. *LeGrow, supra* at 200. Moreover, even if error occurred, it is not reasonably likely that the error was outcome determinative given the strength of the properly admitted evidence on the issue of the negligence of the respective parties. *Oppenheim v Rattner,* 6 Mich App 554, 559; 149 NW2d 881 (1967). Accordingly, the alleged error did not affect plaintiff's substantial rights and it does not affirmatively appear that failing to grant relief is inconsistent with substantial justice. MCR 2.613(A); *Chastain, supra.*

We are convinced, however, that inquiry and evidence of plaintiff's purported alcohol abuse should have been excluded. Defendant never articulated a theory of logical relevance for this inquiry. Although defendant acknowledged plaintiff did not use alcohol on the day of the accident, defendant contended plaintiff "has used alcohol in the past as part of her depression." But assuming that to be true, there is still no logical connection between alcoholism as a symptom of depression and liability or damages in this case. Defendant also contended the evidence was relevant to impeach plaintiff's testimony because she denied alcohol use. But a party may not impeach a witness on a collateral matter with extrinsic evidence. MRE 608(b): *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003); *Oppenheim, supra.* Thus, we conclude that there was no justification or excuse for allowing defense counsel to inquire or present evidence of alleged prior alcohol abuse by plaintiff. *Ellsworth, supra at* 188.

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[6] This record referred to an alcohol history, possible analgesic dependency, delusions, and schizo-affective disorder.

Nevertheless, reversal is not warranted. The trial court specifically instructed the jury it had "struck testimony regarding alcoholism, alcohol abuse and schizo affective disorder . . . [and] you may not consider those conclusions during your deliberations nor should you consider the reasons for those rulings." We must presume that the jury followed the trial court's instructions, and that the instruction cured the error here. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), and *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Moreover, in light of properly admitted evidence, substantial justice does not require reversal. MCR 2.613(A); *Miller, supra* at 531; *Oppenheim, supra* at 559.

C. Evidence of Defendant's Residence

Plaintiff argues she was denied a fair trial when defendant testified that she did not own her Bloomfield Hills' townhouse. Plaintiff contends this was improper evidence concerning defendant's financial situation designed to elicit sympathy. We disagree.

Admission of evidence of the financial status of a party attempting to evoke sympathy for or bias against the party is improper. Thus, the "'admission of testimony as to a litigant's wealth tends to create prejudice the same as testimony of poverty tends to create sympathy; and in either case constitutes reversible error.'" *Stewart, supra* at 702, quoting *Forman v Prudential Ins Co*, 310 Mich 145, 156-157; 16 NW2d 696 (1944). We conclude that any error in this regard does not warrant reversal. Plaintiff's counsel first raised the issue of defendant's residence and where she worked in opening statement and while cross-examining defendant. Defense counsel could reasonably conclude that plaintiff's counsel was attempting to portray defendant as a well-to-do resident of a community associated with affluence. Accordingly, the trial court did not abuse its discretion by permitting defense counsel to respond. *Stewart, supra* at 702; *Young v E W Bliss Co*, 130 Mich App 363, 370; 343 NW2d 553 (1983) (where a party "opens the door" to a topic it cannot complain about the admission of evidence by the other party on the same topic). Moreover, in light of the brevity of testimony when compared to the other evidence in the case, and the trial court's instruction to the jury that sympathy and prejudice must not influence its verdict, it cannot be said that refusal to grant relief on this basis is inconsistent with substantial justice. MRE 613(A); *Bordeaux, supra* at 164-165.

D. Alleged Misconduct by Defense Counsel

Plaintiff argues she was denied a fair trial because defense counsel elicited opinion testimony from a non-expert police witness, injected irrelevant, prejudicial issues (alcohol abuse and mental illness), presented improper evidence that defendant did not own the townhouse she lived in, and argued without evidentiary support that plaintiff was faking memory loss. Plaintiff moved for a new trial based on these same grounds, which the trial court denied. The trial court ruled that plaintiff, "is entitled to a fair trial, not a perfect trial" and here, "it was not a perfect trial but it was a fair one." We agree.

We have already rejected plaintiff's argument that error occurred with regard to Officer Prosser's testimony and evidence that defendant merely rented a Bloomfield Hills townhouse. Further, defense counsel did not violate the trial court's pretrial order in limine regarding prior alcohol abuse, depression, and mental illness. Rather, defense counsel supported inquiry into those matters by presenting plaintiff's medical records as an offer of proof. In denying plaintiff's

motion for new trial, the trial court recognized that it had ordered "defendant's counsel to present certain issues to the Court outside the presence of the jury before the testimony was introduced [and that order] was satisfied . . . ." The record supports the trial court's finding.

Furthermore, neither defendant's failure to admit the supporting medical records nor this Court's conclusion that the evidence of alcohol abuse should not have been admitted, establishes intentional misconduct by counsel. In the context of a criminal case, the government's attorney good-faith effort to admit evidence cannot form the basis of a claim of prosecutorial misconduct. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003), citing *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). We believe this rule applies equally to civil cases because the standard of review is the same: did an attorney's misconduct deny a party a fair trial. The record here does not establish bad faith on the part of defense counsel. Further, in the context of the entire trial, error in the admission of evidence of alcohol abuse was cured by the trial court's instructions. *Tobin, supra* at 641; *Bordeaux, supra* at 164-165. Thus, refusing to grant relief based on this argument is consistent with substantial justice. MCR 2.613(A).

Plaintiff also asserts that defense counsel committed misconduct by arguing that the jury should not believe plaintiff's testimony regarding her lack of memory about crossing 14 Mile Road before the accident. Defense counsel argued that plaintiff's detailed narrative of events leading up to her attempting to cross the street, but ending at the curb, was a convenient method for plaintiff to avoid responsibility for her actions. In general, an attorney may argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Bahoda, supra* at 282. Further, the trier of fact, not the appellate court, determines what inferences may fairly be drawn from the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Similarly, it was for the jury to believe or disbelieve plaintiff's testimony regarding memory loss. *Clery v Sherwood*, 151 Mich App 55, 64; 390 NW2d 682 (1986), citing *Sacred Heart Aid Society v Aetna Casualty & Surety Co*, 355 Mich 480, 486; 94 NW3d 850 (1959). Here, defense counsel did not engage in misconduct by suggesting that the jury find that plaintiff's testimony was not credible. Furthermore, the jury was properly instructed that arguments, statements and remarks of attorneys are not evidence, and that the jury should disregard anything said by an attorney that was not supported by evidence or by the jury's own general knowledge and experience. Thus, even if defense counsel's argument was improper, plaintiff received a fair trial. *Tobin, supra* at 641.

After reviewing all of plaintiff's arguments of misconduct by defense counsel in the context of the entire trial and instructions by the trial court, we conclude that plaintiff received a fair trial. *Id.*; *Ellsworth, supra* at 191-192. In other words, based on the evidence and instructions of the trial court, we simply cannot say that the alleged misconduct of defense counsel affected the outcome of the trial so as to warrant reversal. *Reetz, supra* at 100-103.

E. Case Evaluation Sanctions

This case was submitted to case evaluation before trial. MCR 2.403(A). It was evaluated at $90,000 in favor of plaintiff, but both parties rejected the evaluation. MCR 2.403(L)(1). After the jury rendered its verdict in defendant's favor, defendant filed a motion for case evaluation sanctions that included a request for reasonable attorney's fees in the amount of $32,165 based on 183.8 hours at $175 an hour from the date of case evaluation rejection through

trial. MCR 2.403(O)(1), (6). Defendant relied upon *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co*, 194 Mich App 230, 236; 486 NW2d 68 (1992), and *Transportation Dept v Dyl*, 177 Mich App 33, 37; 441 NW2d 18 (1989), which upheld trial court determinations of comparable hourly rates as reasonable.

In her written response to defendant's motion, plaintiff argued an hourly attorney fee rate of $175 an hour was unreasonable based on an economics survey, "Law Firm Billing Rates and Billing Practices," published in the November 2000 Michigan Bar Journal, pp 1559-1562. Plaintiff further argued that because defense trial counsel had less than two years' experience, hourly rates of form $97 to $125 was generous. In addition, plaintiff argued that defense counsel had not provided an itemized billing statement or differentiated time senior defense counsel worked on the case. Plaintiff questioned the number of post case evaluation hours defense counsel claimed "when all that occurred after mediation was defense counsel preparing for and attending two de bene esse depositions scheduled by Plaintiff, and preparing for and attending one four day trial."

At the hearing on the motion for case evaluation sanctions, defense counsel offered an "itemized list" to support its request for attorney fees. Apparently, defense counsel did not provide the itemized statement to either plaintiff's counsel or the trial court before the hearing. The trial court noted the nonexclusive factors it considered in determining a reasonable attorney fee were "the skilled time and labor involved, the fee customarily charged in this locality for similar services, professional standing and experience of the attorney, whether the fee is fixed or contingent, and the amount in question and the results achieved." Reasoning that defense counsel bore the burden of proof and had not itemized its request for attorney's fees, the trial court reduced the hours claimed by defense counsel from 183 to 150. Based on its observation of the trial, the court determined that $75 per hour was a reasonable hourly rate for an attorney of similar qualifications and experience. Thus, the trial court awarded $11,250 as a reasonable attorney's fee for case evaluation sanctions. MCR 2.403(O)(6)(b).

On appeal, plaintiff does not contest that $75 per hour is a reasonable hourly rate for an attorney's fee. Rather, plaintiff argues that the trial court abused its discretion by determining that defense counsel should be compensated 150 hours without requiring him to submit an itemized statement, conducting a hearing, or making factual findings. We agree.

A party who rejects an evaluation and fails to improve his position at trial must pay the opposing party's "actual costs," which included reasonable attorney fees. MCR 2.403(O)(1); *Dessart v Burak,* ___ Mich ___; ___ NW2d ___ (#122238, dec'd 5/5/04) slip op pp 3, 6. A reasonable attorney fee must be based on a reasonable hourly or daily rate, as determined by the trial judge, for services necessitated by the rejection of the evaluation. MCR 2.403(O)(6)(b); *Rafferty v Markovitz*, 461 Mich 265, 267; 602 NW2d 367 (1999). Attorney fees are "necessitated by the rejection of the case evaluation" if incurred after rejection of the evaluation. *Haliw v Sterling Heights*, 257 Mich App 689, 698; 669 NW2d 563 (2003); *Michigan Basic Property Ins, supra* at 235. If the reasonableness of attorney fees is challenged, the court should conduct an evidentiary hearing unless the parties have created a sufficient record. *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 488; 652 NW2d 503 (2002). This Court will uphold the trial court's determination of the amount of the award absent an abuse of discretion. *Elia, supra* at 377. An abuse of discretion occurs only if the trial court's decision is grossly

contrary to fact and logic, or it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Haliw, supra* at 694.

In this case the record adequately supports, and the parties do not contest, the trial court's determination that $75 an hour is a reasonable hourly attorney fee rate. But under MCR 2.403(O)(6)(b), once a reasonable hourly rate is determined, the number of attorney hours reasonably incurred in defense or prosecution of the party's claim or defense must also be determined. The burden of proving that element of a reasonable attorney fee also rests with the proponent. *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983). "When plaintiff challenged the reasonableness of the fee requested, the trial court should have inquired into *the services actually rendered* by the attorney before approving the bill of costs." *Id*. (emphasis added). In *Jager, supra* at 489, this Court held that the trial court did not abuse its discretion determining a reasonable attorney fee where the "defendants provided affidavits of defense counsel [and] itemized billing statements." But in this case, defense counsel provided no evidentiary support for his claim that 180 attorney hours were reasonably necessary to defend against plaintiff's claim. Moreover, the trial court offered no reasonable explanation for reducing defendant's claim of 180 actual hours to 150. Accordingly, we conclude the trial court abused its discretion in determining the number of attorney hours that were reasonably necessary to defend against plaintiff's claim because there is an insufficient record to permit meaningful review. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999).

IV. Conclusion

The properly admitted evidence in this case overwhelmingly supported the jury's verdict and the judgment of no cause of action. Further, although we conclude that some evidence should not have been admitted, we cannot conclude that it is reasonably probable in the context of the properly admitted evidence that the error affected the outcome of the trial. Accordingly, this record fails to establish evidentiary error meriting relief, i.e., failing to grant relief is not inconsistent with substantial justice. MCR 2.613(A).

The record also does not support plaintiff's claim of misconduct by defense counsel. Moreover, plaintiff's right to a fair trial was adequately protected by the trial court's instructions. Even so, if counsel's conduct created error, the error likewise does not merit reversal under MCR 2.613(A).

We affirm the judgment of no cause of action, but remand this case to the trial court for a hearing to determine the number of reasonably necessary attorney hours defendant actually incurred to defend against plaintiff's claim. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter