# STATE OF MICHIGAN

# COURT OF APPEALS

PATRICIA MAYS,

Plaintiff-Appellee,

v

GERALD SCHELL, M.D. and VALLEY NEUROSURGERY, P.C.,

Defendants-Appellants,

and

ST. MARY'S MEDICAL CENTER OF SAGINAW,

Defendant.

FOR PUBLICATION
October 13, 2005
9:20 a.m.

No. 253816
Saginaw Circuit Court
LC No. 00-034067-NH

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

KELLY, J.

In this medical malpractice case, defendants appeal by leave granted the trial court's order granting plaintiff's motion for a new trial on the basis of evidence not admitted at trial being submitted to the jury. We reverse.

## I. Facts

Defendant Gerald Shell, M.D. performed two back surgeries on plaintiff. Plaintiff alleged that Dr. Shell's failure to render timely and effective treatment resulted in her paralysis. In an approximately three-week trial, nine witnesses testified, seven of which were experts, and forty exhibits were admitted, including numerous medical records.

During deliberations, the jury requested plaintiff's complete medical records including MRI's, CT's, myleograms and a light box. Pursuant to the court's policy, instead of providing the exhibits specifically requested by the jury, all of the trial exhibits were presented to the jury. Unfortunately, the jury was also erroneously given defense counsel's banker's box, which contained numerous items never admitted at trial, including: medical records; deposition transcripts, including one questioning plaintiff's expert about his censure by the American

Association of Neurosurgeons; testimonial history of expert witnesses; deposition summaries; memos to the file; memoranda of law, including one on the ability of defense counsel to cross-examine on an expert's censure; some marked exhibits; correspondence between Dr. Schell and defense counsel; correspondence between Dr. Schell and Pronational Insurance Company; and defense counsel's notes. After the jury rendered its no-cause verdict and was discharged, the trial court's clerk retrieved the exhibits from the jury room and found that some[1] of the exhibits were intermixed with the contents of defense counsel's banker's box. The trial court contacted both parties and scheduled a hearing to determine what should be done about the error.

At the hearing, plaintiff moved for a new trial, arguing that it was the only appropriate remedy given the jury's exposure to the prejudicial documents in the banker's box. However, plaintiff objected to recalling the jury for questioning to ascertain whether they looked at the items in the banker's box. Defendants countered that the trial court was obligated to first review the materials in the box to determine if they were substantially prejudicial to plaintiff's case and poll the jurors to determine whether they even relied on any of the items in the box. The trial court took the matter under advisement and, four months after the motion was first heard, ultimately granted plaintiff's motion. The trial court concluded that the unadmitted materials in the banker's box were prejudicial and reasoned that because of the quantity and complexity of the exhibits in the case, it would be impossible to determine with any certainty if the jury relied on the prejudicial materials in reaching their verdict.

## II. Analysis

Defendants argue that the trial court erred when it granted plaintiff's motion for a new trial because plaintiff failed to establish substantial prejudice by the submission to the jury of the unadmitted evidence. We agree. We review a trial court's decision to grant a motion for a new trial for an abuse of discretion. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). "An abuse of discretion occurs when the decision is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Id*.

"The consideration of documents that are not admitted into evidence but are submitted to the jury does not constitute error requiring reversal unless the error operated to substantially prejudice the party's case." *Phillips v Deihm*, 213 Mich App 389, 402-403; 541 NW2d 566 (1995); see also *Beasley v Washington*, 169 Mich App 650, 660; 427 NW2d 177 (1988); *Eley v Turner*, 155 Mich App 195, 200; 399 NW2d 28 (1985). In describing what constitutes actual prejudice under these circumstances, our Supreme Court in *People v McCrea*, 303 Mich 213, 266; 6 NW2d 489 (1942), quoting 16 RCL, pp 302-303), held:

> "When by mistake or inadvertence on the part of a juryman or the court, or even through error of judgment on the part of the court, an article has been taken to their room by the jury which ought not to have been, then before a verdict will be set aside for that cause, it must appear, either from examination of the

[1] It is unclear form the record what items, exactly, were intermixed.

> objectionable article itself, or from the facts properly presented by the bill of exceptions, that such article must have been, in the nature of the case, or in point of fact was, considered by the jury in arriving at the conclusion reached by their verdict."

In this case, while the record is clear that the banker's box was presented to the jury, plaintiff, the moving party, did not prove—indeed objected to eliciting proof—that the jury even looked at the items in the box, let alone considered any item. Under the circumstances, it is possible that the jury simply found the evidence they requested and only reviewed that evidence leaving the contents of the banker's box unviewed. In other words, because the record does not reflect that the jury in fact looked at, let alone relied on, the materials not admitted into evidence, there was no basis for the trial court to conclude that plaintiff was substantially prejudiced by the mistake. Because the trial court's ruling was based on mere speculation rather than established fact and because the trial court granted a new trial before it determined whether plaintiff actually suffered any prejudice, we conclude that it abused its discretion in granting plaintiff's motion for a new trial.

Reversed.

/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

# S T A T E  O F  M I C H I G A N

# C O U R T  O F  A P P E A L S

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COOPER, P.J. (*dissenting*).

I must respectfully dissent from the majority opinion of my colleagues. The jury room is sacrosanct[1] and the trial court properly determined that this invasion entitled plaintiff to a new trial. I would, therefore, affirm.

"'[I]t is perfectly plain that the jury room must be kept free of evidence not received during trial and that its presence, if prejudicial, will vitiate the verdict.'"[2] If a jury considers extraneous information not introduced into evidence, the parties are denied their constitutionally protected rights of confrontation, cross-examination, and the effective assistance of counsel.[3]

[1] *People v Freeman*, 57 Mich App 90, 92; 225 NW2d 171 (1974).

[2] *People v Keith*, 63 Mich App 589, 593; 234 NW2 717 (1975), quoting *Dallago v United States*, 138 US App DC 276; 427 F2d 546, 553 (1969).

[3] *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997), writ gtd *Nevers v Killinger*, 990 F Supp 844 (ED Mich, 1997).

The moving party must establish "that the jury was exposed to extraneous influences" and that there was "a real and substantial *possibility* that [those influences] *could have affected* the jury's verdict."[4] In making this determination, a court may consider:

> "(1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the [jury] discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict."[5]

It is undisputed in this case that, based completely on trial court error, the jury was given an entire bankers box of information never admitted at trial, including inadmissible evidence and defense counsel's personal notes on the case. Several of the documents directly attacked the credibility of plaintiff's expert witness. The information was available to the jury for several hours while they deliberated.[6] Moreover, this error was not discovered until two days after the jury had rendered its verdict and the jurors had been formally dismissed from service. It is undisputed that, when the information was retrieved from the jury room, several exhibits were discovered intermingled with these inadmissible and privileged documents. It was obvious "from an examination of the objectionable article itself . . . that such article must have been, in the nature of the case, or in point of fact was, considered by the jury in arriving at the conclusion reached by their verdict."[7] Based on the large volume of information that was improperly and erroneously sent into the jury room, and the fact that this information was intermingled with exhibits that had been placed before the jury, further inquiry into the prejudicial effect on the jury's verdict was unnecessary. Contrary to the majority opinion, it does not matter which exhibits were intermingled. What matters is that these trial exhibits were found intermingled with the defense attorney's personal notes. This was highly improper and blatant error. There was more than a real and substantial possibility that the inappropriate material in the bankers box affected the outcome of this case.

Under the circumstances, the trial court's decision to order a new trial was "a valid exercise of discretion" and this Court is duty-bound to affirm.[8] "An abuse of discretion involves far more than a difference in judicial opinion."[9]

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[4] *Id.* at 88-89 (emphasis added).

[5] *Id.* at 89 n 11, quoting *Marino v Vasquez*, 812 F2d 499, 506 (CA 9, 1987).

[6] See *Eley v Turner*, 155 Mich App 195, 199; 399 NW2d 28 (1986) (noting the strong likelihood that the jury would be tainted by the receipt of evidence not admitted at trial as they are "able to view it and review it as often they like[] during the course of their deliberations").

[7] *People v McCrea*, 303 Mich 213, 266; 6 NW2d 489 (1942).

[8] *Alken-Zeigler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

[9] *Id.*

> "To warrant this Court in interfering in matters so entirely in the sound discretion of the circuit court as the granting or refusing of a new trial, the abuse of discretion ought to be so plain that, upon consideration of the facts upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling."[10]

The trial court's decision to order a new trial was based on the submission to the jury of highly prejudicial information not presented at trial. This determination was in no way "palpably and grossly violative of fact and logic."[11] My colleagues in the majority have inappropriately substituted their judgments for that of the trial court.[12] I would defer to the trial court's sound judgment and affirm.

/s/ Jessica R. Cooper

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[10] *Id.* at 228, quoting *Detroit Tug & Wrecking Co v Gartner*, 75 Mich 360, 361; 42 NW 968 (1889).

[11] *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959).

[12] *Alken-Zeigler*, *supra* at 228.