

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

676

CA 24-01692

PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND KEANE, JJ.

ROBERT MALONEY AND MARILYN MALONEY,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

DEAN DEROBERTS, M.D., JENA MURPHY, FNP-C,
AND DEROBERTS PLASTIC SURGERY, PLLC, NOW KNOWN AS
SYRACUSE PLASTIC SURGERY PLLC, DEFENDANTS-RESPONDENTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

ADDELMAN CROSS & BALDWIN, PC, BUFFALO (JESSE B. BALDWIN OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County
(Rory A. McMahon, J.), entered April 30, 2024, in a medical
malpractice action. The judgment awarded defendants costs and
disbursements.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for
defendants' alleged medical malpractice in failing to timely diagnose
Robert Maloney (plaintiff) with melanoma. In 2018, plaintiff
underwent a biopsy of a lesion located on his left shin, which was
determined to be benign. Defendants' practice left a voicemail
informing plaintiff of the biopsy results, which plaintiffs indicated
was reassuring and relayed that there was nothing to worry about. The
exact language of the message is unknown, however, because plaintiff
did not retain the cell phone containing the voicemail. After
receiving the biopsy results, plaintiff did not appear for a follow-up
appointment with defendants, and he never returned to their practice.
In 2019, while a patient at a different practice, plaintiff underwent
another biopsy on a lesion located on his left shin. That lesion was
promptly identified as a malignant melanoma. The action proceeded to
a jury trial in which the jury returned a verdict determining that
defendants were not liable to plaintiffs. Plaintiffs appeal from a
judgment entered in favor of defendants. We affirm.

On appeal, plaintiffs contend that the judgment should be
reversed and that they should be granted a new trial based on several
erroneous trial rulings. We reject plaintiffs' contentions. "Since

'[t]rial courts are accorded wide discretion in making evidentiary rulings . . . , absent an abuse of discretion, those rulings should not be disturbed on appeal' " (*Mazella v Beals*, 27 NY3d 694, 709 [2016]; see *People v Carroll*, 95 NY2d 375, 385 [2000]). "To be admissible [at trial], evidence must be relevant and its probative value outweigh the risk of any undue prejudice" (*Mazella*, 27 NY3d at 709; see generally *Jerome Prince, Richardson on Evidence* § 4-101 at 136 [Farrell 11th ed 1995]). Nevertheless, "[a]n error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced"; in other words, there are no grounds for reversal if the ruling is harmless error (CPLR 2002; see *Mazella*, 27 NY3d at 711; *Senyia v Vosseler*, 217 AD3d 1520, 1522 [4th Dept 2023]).

Initially, plaintiffs contend that Supreme Court erred in refusing to preclude testimony from defendants' expert that the cancerous lesion from 2019 was pathologically different from the lesion biopsied in 2018 on the basis that such a theory was not included in defendants' expert disclosure. We reject that contention. Defendants' expert disclosure explained that "[t]he expert will offer opinions regarding the *pathological analysis* of the pathology slides in this case" (emphasis added) and that "the biopsy of plaintiff's shin lesion [in 2018] . . . appears to be a blue nevus," which "differs pathologically from a . . . melanoma." Further, the expert disclosure noted that the expert would "respond to the testimony of plaintiff[s'] experts." In short, defendants' disclosure made clear that their expert would provide precisely the type of pathological testimony that plaintiffs challenged and that he disagreed with plaintiff's expert on the nature of the lesions in 2018 and 2019. We therefore conclude that the court did not err in allowing defendants' expert to testify that the cancerous lesion from 2019 was pathologically different from the lesion biopsied in 2018 inasmuch as that testimony was encompassed by their expert disclosure (see *Neumire v Kraft Foods*, 291 AD2d 784, 786 [4th Dept 2002], *lv denied* 98 NY2d 613 [2002]; cf. *Saraiva v New York State Thruway Auth.*, 234 AD3d 1325, 1327 [4th Dept 2025], *lv denied* 44 NY3d 904 [2025]; see generally *Mazella*, 27 NY3d at 709).

To the extent that plaintiffs contend that the court also erred in refusing to preclude testimony of defendants' expert concerning the location of the lesions on plaintiff's leg because that testimony exceeded the scope of the expert disclosure, we conclude that no expert disclosure was required on that point inasmuch as it was a question of fact that did not require an expert opinion to establish (see *Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386 [1980]; *O'Neill v Pelusio*, 65 AD2d 914, 914-915 [4th Dept 1978]). Furthermore, we reject plaintiffs' contention that the court erred in precluding them from introducing evidence rebutting the aforementioned testimony of defendants' expert. Rebuttal is "not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove" (*Marshall v Davies*, 78 NY 414, 420 [1879]; see generally *People v Harris*, 98 NY2d 452, 489 [2002]; *Yeomans v Warren*, 87 AD2d 713, 713 [3d Dept 1982]).

Here, there was no basis for plaintiffs to rebut the assertion of defendants' expert that, based on their respective locations, the 2018 lesion and the 2019 lesion were different lesions. Plaintiffs had affirmatively presented evidence about the lesions' locations in their direct case; defendants introduced no evidence on that question that plaintiffs had not already addressed (*see Hutchinson v Shaheen*, 55 AD2d 833, 834 [4th Dept 1976]; *see also Syracuse Airport Metroplex v City of Syracuse*, 249 AD2d 926, 927 [4th Dept 1998]).

Plaintiffs also contend that the court erred in precluding them from presenting testimony from one of defendants' former employees as part of their direct case. We reject that contention. Although "nothing in CPLR article 31 requires a party to generate a witness list per se," "it is within a court's discretion to require a party to disclose the names and addresses of witnesses" (*Hunter v Tryzbinski*, 278 AD2d 844, 844 [4th Dept 2000]; *see* 22 NYCRR 202.37). Compliance with disclosure obligations "must be gauged with reference to the purposes of disclosure," which include a desire to "prevent gamesmanship and unfair surprise at trial" (*Hunter*, 278 AD2d at 845). It is undisputed that plaintiffs never disclosed defendants' former employee on a witness list prior to trial. Ultimately, we cannot say that the court abused its discretion in concluding that the former employee's testimony should be precluded, particularly in light of its determination that defendants would be prejudiced by plaintiffs' failure to disclose the employee as a witness (*see Gerasimowicz v Delis*, 231 AD3d 536, 537 [1st Dept 2024]; *Eros Intl. PLC v Mangrove Partners*, 191 AD3d 464, 465 [1st Dept 2021]; *Slomczewski v Ross*, 148 AD3d 1648, 1649 [4th Dept 2017]). We further conclude that the court did not abuse its discretion in precluding plaintiffs from calling the former employee to testify as a rebuttal witness. Although plaintiffs offered the former employee's testimony to establish certain facts about defendants' office practices, defendants offered no testimony on that specific issue that required rebuttal (*see generally Marshall*, 78 NY at 420). Moreover, we note that the relevancy of the former employee's testimony about defendants' office practices was questionable inasmuch as she could provide testimony only about those office practices in effect years before the alleged negligence occurred.

Plaintiffs next contend that the court erred in requiring them to disclose the identity of an expert witness before that witness took the stand. We reject that contention. CPLR 3101 (d) (1) (i) provides that a party in a medical malpractice action is permitted to omit the name of an expert medical witness from its expert disclosure form, which stems from a " 'concern that medical experts might be discouraged from testifying by their colleagues' " (*Thomas v Alleyne*, 302 AD2d 36, 45 [2d Dept 2002]; *see Mercado v Schwartz*, 209 AD3d 30, 38 [2d Dept 2022]). Nevertheless, the omission of an expert's identity "postpone[s] revelation of [that fact]" only "until the time of trial" (*Thomas*, 302 AD2d at 45; *see Mercado*, 209 AD3d at 38; *Rivera v Albany Med. Ctr. Hosp.*, 119 AD3d 1135, 1137 n 1 [3d Dept 2014]). Under the circumstances of this case, we conclude that the court did not abuse its discretion in requiring plaintiffs to disclose the

identity of their expert shortly before he took the stand.

Plaintiffs also contend that they were deprived of a fair trial by allegedly improper comments made by defense counsel during the course of trial. Plaintiffs failed to object to several of the comments challenged on appeal, and we therefore conclude that their contention with respect to those comments is unpreserved for our review (see *Masmalaj v New York City Economic Dev. Corp.*, 197 AD3d 1294, 1296 [2d Dept 2021]; *Baynes v Maple 3, LLC*, 169 AD3d 749, 750 [2d Dept 2019]; *Lagos v Fucale*, 139 AD3d 908, 908 [2d Dept 2016], *lv dismissed* 28 NY3d 1178 [2017]). Although plaintiffs objected to one of the challenged statements, they successfully requested that the court admonish defense counsel and then failed to object any further. Plaintiffs' failure to request additional relief renders that portion of their contention unpreserved for our review as well (see *Country Park Child Care, Inc. v Smartdesign Architecture PLLC*, 129 AD3d 1636, 1637 [4th Dept 2015]; *Lucian v Schwartz*, 55 AD3d 687, 688-689 [2d Dept 2008], *lv denied* 12 NY3d 703 [2009]).

Plaintiffs contend that the court erred in granting defendants' request for an adverse inference instruction for spoliation of evidence that instructed the jury that plaintiffs had a "culpable state of mind" when they failed to preserve the cell phone containing the voicemail from defendants' practice regarding the 2018 biopsy results. We reject that contention. Here, plaintiff testified that he failed to retain the cell phone containing the voicemail from defendants' practice providing the results of the 2018 biopsy, and he did so at a time when he should have reasonably anticipated that there would be litigation related to his treatment by defendants. There is no dispute that the court defined "culpable state of mind" as being based on plaintiffs' negligence—indeed, it did so specifically to ameliorate plaintiffs' concern that the proposed spoliation charge implied that they intentionally disposed of the cell phone. Contrary to plaintiffs' assertion on appeal, the "culpable state of mind" needed to support a sanction for spoliation includes negligence in cases where, as here, the party seeking a spoliation sanction establishes that the party with control over the missing evidence had an obligation to preserve the evidence at the time it was lost and that the missing evidence is relevant to a party's claims or defense (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-548 [2015]; see *Storm v Kaleida Health*, 229 AD3d 1239, 1240 [4th Dept 2024]). Given the relevancy of the voicemail to plaintiffs' claims, as well as plaintiffs' admission that they did not retain the cell phone containing the voicemail at a time when they were on notice that it may be needed for litigation (see *Mahiques v County of Niagara*, 137 AD3d 1649, 1652 [4th Dept 2016]), we conclude that the court did not abuse its "broad discretion" in giving the jury the adverse inference instruction here (*Storm*, 229 AD3d at 1241 [internal quotation marks omitted]; see generally *Page v Niagara Falls Mem. Med. Ctr.*, 167 AD3d 1428, 1430 [4th Dept 2018]).

We have considered plaintiffs' remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court