STATE OF MICHIGAN

COURT OF APPEALS

KRISTEN WRIGHT, as Personal Representative of the ESTATE OF JUSTIN LINIHAN, Deceased,

Plaintiff-Appellant, Cross-Appellee,

v

EDDIE ALLEN MOORE and ASSURANCE TRANSPORTATION,

Defendants-Appellees, Cross-Appellants.

UNPUBLISHED
April 28, 2000

No. 213837
Kalamazoo Circuit Court
LC No. 96-003259-NI

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Plaintiff, acting as personal representative for the estate of the decedent, Justin Linihan, appeals as of right from the trial court's order of judgment of no cause of action entered pursuant to a jury verdict. Defendants Eddie Allen Moore and Assurance Transportation cross-appeal from the trial court's denial of their motion for a directed verdict with regard to issue of damages for the loss of companionship and society allegedly suffered by Jordan Linihan, the decedent's son. We affirm.

This case arises out of a fatal automobile accident that occurred in the township of Oshtemo on December 18, 1994. Plaintiff argues on appeal that the trial court erred in denying her motion for a mistrial because defendant made severely prejudicial statements during opening arguments. We disagree. The trial court's grant or denial of a mistrial will not be reversed on appeal in the absence of an abuse of discretion. *RCO Engineering v ACR Industries,* 235 Mich App 48, 64; 597 NW2d 534 (1999).

During opening arguments, defense counsel made the following statement to the jury:

> Deputy Richards, who was at the scene, who recalls this accident clearly, who as – will be in here next week in my case to testify, who will tell you that he interviewed each and every person at the scene, he looked at the physical evidence, he's familiar with the problems of this roadway, he knows why that sign is there, and that [defendant Moore]

> did not do a thing that within his police powers, and his experience, he could even think to give him a ticket for.

Plaintiff did not immediately object to defense counsel's comment. During the first break in the trial proceedings, however, plaintiff moved for a mistrial, claiming that the prejudice caused by defendants' statement regarding the giving of a ticket was so severe that it could not be cured by an instruction from the court. The trial court denied plaintiff's motion but offered to read a curative instruction if plaintiff wished to prepare one. Plaintiff did not avail himself of the court's proffered remedy.

We find no abuse of discretion. "[R]eversible error is not established where matters asserted in the opening statement cannot be proven under the rules of evidence so long as counsel's references were made in good faith." *In re Ellis Estate*, 143 Mich App 456, 461; 372 NW2d 592 (1985). "Counsel cannot be expected to anticipate at all times the ruling of the court on evidence he thinks is admissible." *Id.* Defense counsel in this case explained his reasons for believing the evidence could be admitted. After hearing from both counsel, the trial court in the present case stated,

> this is not a situation where counsel has deliberately refused to follow a court order or a direction. It came up as soon as the objection was made. Counsel was told, you know, Don't – don't broach the subject again. It hasn't been broached.

Appellate courts "accord considerable weight to the opinion of the trial judge in assessing the effect" of improper subject matter. *Illins v Burns*, 388 Mich 504, 511; 201 NW2d 624 (1972). Counsel's comment here was not evidence, there was no indication of bad faith, and any prejudice could have been cured. *Id.*. The trial court did not abuse its discretion in denying plaintiff's motion for a mistrial.

Plaintiff next argues that the trial court erred by allowing Robin Lovett to testify as to her opinion regarding the cause of the accident. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

A lay witness may give testimony in the form of an opinion where it is rationally based on the witness' perception and helpful to a clear understanding of the witness' testimony or the determination of a fact at issue. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455; 540 NW2d 696 (1995). MRE 701. Opinion testimony is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. *Sells v Monroe County*, 158 Mich App 637, 645; 405 NW2d 387 (1987). MRE 704. Lovett's opinion regarding the cause of the accident was rationally based on her perceptions as an eye witness. We find no abuse of discretion.

Plaintiff next argues that the trial court erred by failing to read SJI2d 10.08 after it had agreed to do so, and after plaintiff relied on the instruction in closing arguments. We review claims of instructional error for an abuse of discretion. *RCO Engineering v ACR Industries*, 235 Mich App 48, 66; 597 NW2d 534 (1999). There is no merit to this issue.

It was not an error for the trial court to omit SJI2d 10.08, "Presumption of Ordinary Care—Death Case." The "Notes on Use" section SJI2d 10.08, provides that the instruction should not be given where the decedent was negligent. It is undisputed in this case that the decedent was speeding.

Plaintiff argues that because the court previously agreed to read SJI2d 10.08 and plaintiff relied on it in closing arguments, the court's failure to read the instruction is error pursuant to MCR 2.516(A), and requires reversal. We do not agree. Even assuming arguendo that failure to read the instruction under these circumstances was error under MCR 2.516(A)(4), the error would have been harmless in this case because it did not prejudice plaintiff. The jury in this case never reached the issue of comparative negligence.

Plaintiff's reliance on SJI2d 10.08 related only to plaintiff's arguments about the issue of comparative negligence. The jury, however, entirely rejected plaintiff's claim that defendant Moore was negligent in any way, so the amount of care exercised by decedent never became an issue for the jury. See *Johnson v White,* 430 Mich 47, 49, 61; 420 NW2d 87 (1988). As a result, plaintiff suffered no prejudice sufficient to warrant a new trial.

Because of our disposition of plaintiff's issues, we need not address those issues raised by defendant on cross-appeal.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald