STATE OF MICHIGAN

COURT OF APPEALS

RONALD P. HORTON,

Plaintiff-Appellant,

v

MARY SWITZER, BRENDA BELL, and WILLIAM SLEIGHT,

Defendants,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION, DONNA STOERTZ, a/k/a JEANNE STOERTZ, AND DALE LINDLEY,

Defendants-Appellees.

UNPUBLISHED
October 10, 2000

No. 216291
Ingham Circuit Court
LC No. 96-084651-CZ

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Plaintiff Ronald Horton appeals as of right from a judgment entered after a jury awarded him nominal damages in his employment discrimination case. We affirm.

I. Basic Facts And Procedural History

On March 27, 1996, Horton filed a complaint alleging that defendant Mary Switzer sexually harassed him and that defendants Michigan Employment Securities Commission (MESC), Jeanne Stoertz, and Dale Lindley retaliated against him for making a complaint regarding Switzer's harassment. The trial court dismissed Horton's claims against defendants Switzer, Brenda Bell, and William Sleight, but permitted the remaining claims against MESC, Stoertz, and Lindley to proceed to trial in late October 1998. At trial, the court directed a verdict for the remaining defendants on the issue of economic damages because Horton failed to present sufficient evidence of his past and present income and fringe benefits. The jury returned a verdict for Horton, but awarded him only $1 in damages.

II. Refreshed Recollection As Evidence

A. Standard Of Review

Horton first argues that the trial court erred by refusing to allow him to refresh his recollection regarding his benefits at MESC with a document he received from the state civil service commission. We review a trial court's decision to preclude a witness from refreshing his recollection with a particular document for an abuse of discretion.[1]

B. Laying The Proper Foundation

A witness may refresh his or her recollection with a writing if there is a proper foundation.[2] To lay a proper foundation, the proponent must show that (1) the witness's present memory is inadequate, (2) the writing could refresh the witness's present memory, and (3) reference to the writing actually does refresh the witness's present memory.[3] MRE 612 provides a number of guidelines for allowing an opposing party access to materials used to refresh a witness's recollection.

C. Preparing The Document

Here, Horton testified that he believed the benefits he received from his employment with MESC were worth more than $18,000. Horton also testified that he was aware of the value of his benefits because he had received a statement of his benefits in 1996. Defendants objected to Horton using the document to refresh his memory or offering the document into evidence. Horton argued that the document, although hearsay, should be admitted as a business record. The trial court ruled that the document was inadmissible because Horton was not the custodian for the issuing agency and could not testify whether the document was an appropriate business record. Horton's counsel then questioned the trial court regarding the document's use for refreshing memory:

> *Q*. And is it also inadmissible, your Honor, as a refreshment tool?
>
> *A*. Well, my recollection would be it would have to be something that he had prepared that would refresh his recollection. Otherwise, he could refresh his recollection from the Lansing State Journal or the [sic] comic books or any other source. So, yeah, I don't think it qualifies for that. If it's used to refresh it wouldn't be admissible anyway, I don't believe ordinarily.

This interchange suggests that counsel and the trial court confused the standards for admitting a document *as evidence* with the standard for using a document to *refresh* a person's memory. A document that is used solely to refresh the memory of the witness need not be admitted into evidence

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[1] *Durbin v K-K-M Corp*, 54 Mich App 38, 45; 220 NW2d 110 (1974).

[2] *Moncrief v Detroit*, 398 Mich 181, 190; 247 NW2d 783 (1976).

[3] *Id*.

because the witness's refreshed memory constitutes evidence, not the document that helped the witness remember.[4]

The issue in this case, therefore, is whether Horton could properly refresh his memory from a document he did not prepare. We are not aware of any case that prohibits a witness from refreshing his memory by consulting a document he did not prepare and there are a number of cases in which witnesses have been allowed to refresh their recollection with writings they did not create. For instance, in *Cameron v Blackman*,[5] the Supreme Court found no error when a witness used a memorandum someone else prepared to refresh his memory. The Court merely commented that the witness "swore, however, that he had a complete recollection of the facts, and it is not, therefore, of any consequence whether this was or was not, a memorandum which could have been evidence in itself. He evidently used it for convenience merely."[6] In a more recent case, *Simons v Besse*,[7] this Court upheld a trial court's decision to allow a doctor to refresh his memory by reading hospital records, including entries he did not make.

Although these cases are rather old, they generally reflect the modern conclusion that, "[w]here memory or recollection is being refreshed, the material used for that purpose is not substantive evidence. Rather, the material is employed to simply trigger the witness's recollection of the events. That recollection is substantive evidence and the material used to refresh is not."[8] Accordingly, we infer, the standards for materials *not* entered into evidence but merely used to refresh recollection are quite loose so long as they are calculated to be effective at reminding the witness of some forgotten information.

It is apparent, therefore, that even though Horton did not prepare the benefit statement, it could still be used to refresh his memory as long as it did, in fact, refresh his memory.[9] Horton's testimony that he was, at one time, aware of the value of his benefits because he had reviewed the benefit statement meets the first two elements of *Moncrief*. However, the trial court never inquired whether, after reviewing the statement, Horton would likely remember the amount of those benefits. This was an abuse of discretion, which apparently resulted from the trial court's erroneous assumption that the statement would be submitted as evidence. Rather, to use the statement to refresh Horton's memory, only he would see the document, not the jury.[10] Then, if he was able to recall the value of his benefits,

[4] *Durbin, supra* at 44.

[5] *Cameron v Blackman*, 39 Mich 108, 109-110 (1878).

[6] *Id.*; see also *Robinson v Mulder*, 81 Mich 75, 81-82; 45 NW 505 (1890) (refreshing memory from list someone else prepared was not error because, after reviewing the list, the witness was able to testify from his memory); *People v McNutt*, 220 Mich 620, 622-623; 190 NW 750 (1922) (prosecution witness relied on police document to remember identifying features of the car the defendant allegedly drove unlawfully).

[7] *Simons v Besse*, 14 Mich App 257, 258; 165 NW2d 334 (1968).

[8] *People v Favors*, 121 Mich App 98, 109; 328 NW2d 585 (1982).

[9] *Moncrief, supra* at 190.

[10] See *Favors, supra*.

he could testify to that amount without referring to the document at all. Thus, contrary to the trial court's implicit conclusion, allowing Horton to refresh his memory would not expose the jury to extraneous information.

D. The Error's Effect

Even though the trial court abused its discretion, the error does not require reversal of the jury's verdict unless refusal to do so is inconsistent with substantial justice or the error affected Horton's substantial rights.[11] Here, the jury found for Horton but awarded nominal damages. Clearly, the damage award was affected, in large part, by the directed verdict for defendants on the economic damages issue. The question then becomes whether Horton would have had sufficient evidence of economic damages to avoid the directed verdict if the trial court had allowed Horton to use the document to refresh his memory.

After reviewing the trial court's ruling on the directed verdict, we conclude that, even if Horton had been able to testify in detail regarding the value of his benefits, the trial court would have still directed the verdict on economic damages for defendants. Horton intended to use the statement to testify in detail regarding the value of his *benefits*, not his *wages*. In its ruling on the directed verdict, the trial court acknowledged Horton's testimony on benefits; however, the trial court still found the evidence insufficient to raise a jury issue regarding damages. Because Horton's refreshed recollection of *benefits* would have no effect on the outcome, the error was harmless.[12]

III. Admitting The Benefits Statement As Evidence

A. Standard Of Review

Horton argues that the trial court erred by refusing to admit the benefits statement as substantive evidence. The decision to admit or exclude evidence is within the discretion of the trial court.[13] An abuse of that discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made.[14] The ruling will not be reversed unless a substantial right of the party is affected.[15]

B. Preservation

Although the record does not clearly reveal why the trial court ruled the benefits statement inadmissible, it appears that the trial court found that Horton was not competent to establish the proper

[11] *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), citing MCR 2.613(A) and MRE 103(a).

[12] MCR 2.613(A).

[13] *Chmielewski v Xermac*, 457 Mich 593, 613-614; 580 NW2d 817 (1998).

[14] *Ellsworth, supra* at 188.

[15] *Id.*

foundation for admitting the document under the business record exception to the hearsay rule, MRE 803(6). Horton now argues that the court erred in refusing to admit the benefits statement because it qualifies as an admission of a party opponent, which is not hearsay under MRE 801(d)(2). However, because Horton never argued that the benefits statement was an admission of a party opponent at the trial, the only issue preserved for appeal is whether the benefits statement qualifies under the business record exception to the rule against hearsay.[16]

C. The Business Record Exception

MRE 803(6) provides:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

This exception to the rule against admitting hearsay is commonly known as the business record exception. In order for a document to qualify as a business record under MRE 803(6), a plaintiff must establish that the proposed evidence is one of the documents or other records identified in the rule prepared in accordance with the conditions that ordinarily make such a document or material trustworthy.[17]

We have no reason to doubt Horton's assertion that the statement was potentially admissible because a state agency created it in the course of a regularly conducted business activity. However, Horton did not offer the custodian of the state agency to establish this fact as MRE 803(6) requires. Further, Horton admitted that he was not prepared to testify regarding this foundational requirement. Without the essential foundation to establish the document's trustworthiness, it did not qualify as a hearsay exception under MRE 803(6) and the trial court properly refused to admit the document.

IV. Horton's Economic Expert

A. Standard Of Review

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[16] *Kubisz v Cadillac Gage Textron*, 236 Mich App 629, 637; 601 NW2d 160 (1999).

[17] See *Lopez v General Motors Corp*, 224 Mich App 618, 626; 569 NW2d 861 (1997), citing *People v Safiedine*, 163 Mich App 25, 33; 414 NW2d 143 (1987).

Horton argues that the trial court erred by refusing to allow his economic expert to testify. We review a trial court's decision on the admissibility of evidence for an abuse of discretion.[18]

B. Legal Standards

According to MRE 702, if a trial court "determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact," in this case the jury, "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." Though the expert may base his opinion on facts learned at or before trial, the trial court may require the "underlying facts or data essential to an opinion or inference be in evidence."[19]

C. The Trial Court's Decision To Exclude The Expert's Testimony

Horton offered very little evidence of his economic losses at trial, failing even to state what his wages were at the time he ended his employment with MESC. Horton's expert admitted that his opinions were substantially based on facts that were not in evidence in the case, including Horton's past and present wages, tax returns, and the benefits statement, which the trial court had ruled was inadmissible. Because these facts were not in evidence, the trial court properly exercised its discretion to prevent the expert from offering opinions based on assumptions that did not accord with the facts established at trial.[20]

V. Directed Verdict

A. Standard Of Review

Horton argues that the trial court erred by directing a verdict for defendants on the issue of his economic damages. We review the trial court's decision to grant a directed verdict de novo.[21]

B. Legal Standards

When deciding whether to grant a directed verdict, the trial court must consider all the evidence presented in the light most favorable to the nonmovant.[22] The trial court must also make all reasonable inferences and resolve all conflicts in the favor of the nonmoving party.[23] A directed verdict is appropriate only when no factual question exists on which reasonable minds may differ.[24] A directed

[18] *Chmielewski, supra* at 613-614.

[19] MRE 703; *Thornhill v Detroit*, 142 Mich App 656, 658; 369 NW2d 871 (1985).

[20] See *Green v Jerome-Duncan Ford*, 195 Mich App 493, 499-500; 491 NW2d 243 (1992).

[21] *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

[22] *Meagher*, *supra* at 708.

[23] *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000).

[24] *Meagher*, *supra* at 708.

verdict is inappropriate if there is a factual dispute in the record allowing reasonable jurors to reach different conclusions.[25] A directed verdict is generally "viewed with disfavor."[26]

C. Horton's Evidence

During his initial direct examination, Horton failed to produce evidence of his wages or fringe benefits while employed by MESC, or his current income and benefits. Over defendants' objection, the trial court allowed Horton to reopen his testimony to offer proof of his economic losses. During his reopened testimony, Horton gave general testimony about his current income and his benefits while at MESC. He did not, however, offer evidence of his *wages* at MESC or his *current* benefits. The trial court concluded that Horton failed to present sufficient evidence of economic damages that would raise a question of fact for the jury. In particular, the trial court focused on the lack of evidence of Horton's income while employed at MESC, the lack of evidence of his current economic circumstances, and the inability to value the damages given the missing evidence.

Viewing the evidence in the light most favorable to Horton, the trial court did not err in deciding that there was insufficient evidence from which reasonable jurors could determine economic loss. Although a plaintiff need not present voluminous or detailed evidence of his economic damages, he must present enough evidence to raise a question of fact in order to survive a directed verdict.[27] Without any evidence of whether Horton was currently receiving benefits or what those benefits were worth, it would have been impossible for the trier of fact to determine the value of benefits he allegedly lost as a result of losing his job at MESC. Similarly, without evidence of what Horton's income was at MESC, it would have been impossible for the trier of fact to determine if he actually lost income and what the sum of that loss was after he left MESC. Because Horton's proofs raised no question of fact, the trial court did not err in directing the verdict on economic damages for defendants.

Affirmed.

/s/ William C. Whitbeck
/s/ Jeffrey G. Collins

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[25] *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

[26] *Zeeland Farm Services v JBL Enterprises*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

[27] *Meagher*, *supra* at 708.