

STATE OF MICHIGAN
COURT OF APPEALS

SABRINA E. PORTER, Personal Representative
of the Estate of RICHARD SMITH, III,

Plaintiff-Appellee,

v

NORTHEAST GUIDANCE CENTER, INC., and
MARY ELLEN GUIDO,

Defendants-Appellants.

UNPUBLISHED
October 5, 2001

No. 213190
Wayne Circuit Court
LC No. 96-602956-NI

SABRINA E. PORTER, Personal Representative
of the Estate of RICHARD I.SMITH,

Plaintiff-Appellee,

v

NORTHEAST GUIDANCE CENTER, INC., and
MARY ELLEN GUIDO,

Defendants-Appellants.

No. 217974
Wayne Circuit Court
LC No. 96-602956-NI

SABRINA E. PORTER, Personal Representative
of the Estate of RICHARD IRVINSMITH, III,

Plaintiff-Appellee,

v

NORTHEAST GUIDANCE CENTER, INC., and
MARY ELLEN GUIDO,

Defendants-Appellants.

No. 223647
Wayne Circuit Court
LC No. 96-602956-NI

SABRINA E. PORTER, Personal Representative
of the Estate of RICHARD IRVINSMITH, III,

Plaintiff-Appellee,

v

NORTHEAST GUIDANCE CENTER, INC., and
MARY ELLEN GUIDO,

Defendants-Appellants.

No. 223648
Wayne Circuit Court
LC No. 96-602956-NI

Before: Sawyer, P.J., and Murphy and Saad, JJ.

PER CURIAM.

In this consolidated appeal, defendants appeal from a judgment of the circuit court entered on a jury verdict in favor of plaintiff in the amount of \$5,505,000 on plaintiff's wrongful death claim and from orders of the circuit court regarding sanctions under the offer-of-judgment rule, MCR 2.405. We affirm in part, reverse in part and remand.

This case arises out of a traffic accident which occurred in the City of Detroit on December 27, 1995. Defendant Guido (defendant) was driving a vehicle owned by her employer, defendant Northeast Guidance Center. She struck plaintiff's decedent, nine-year-old Richard Smith III, while he was crossing the street in the crosswalk. Plaintiff maintains that defendant failed to yield the right-of-way to the victim, who was properly in the crosswalk. Defendants maintain that defendant's view of the victim was obscured by an oncoming vehicle, that she applied the brakes as soon as possible after initially seeing the victim, and that the victim was responsible for the accident because he entered the intersection in front oncoming traffic when it was unsafe to do so, in violation of city ordinance. The jury found defendants to be 100 percent responsible for the accident.

We turn first to defendants' appeal from the judgment itself. They first argue that they are entitled to a new trial because plaintiff's counsel deliberately misrepresented the record on a number of occasions. We disagree. This Court reviewed the standards relating to attorney misconduct in *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996):

When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* Reversal is required only whether the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the

jury's attention from the issues involved. *Hammack v Lutheran Social Services*, 211 Mich App 1, 9; 535 NW2d 215 (1995).

See also *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982).

This presents a close call. Of the instances cited by defendants, at least two represent examples of clear misrepresentations of the record for which it is difficult to conclude were anything other than intentional. First, there was a rather strenuous objection by plaintiff's counsel to a question by defense counsel about whether the victim was running. In the objection, plaintiff's counsel stated that there was no evidence whatsoever that the victim had been running. In fact, a number of witnesses had so testified. Plaintiff even concedes on appeal that the objection was "flawed." Second, in framing a question to defendants' expert during cross-examination, plaintiff's counsel stated "So no witness puts [defendant] on her own side [of the road]." In fact, many witnesses, including those called by plaintiff, had already testified that defendant was on her own side of the road at the time of the accident.¹

The question becomes, then, whether counsel's conduct requires reversal. While we are deeply troubled by counsel's conduct, we are not persuaded that the incidents rise to the level of establishing "a deliberate course of conduct aimed at preventing a fair and impartial trial" and that "the prejudicial statements of [the] attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunt, supra*. With some reservation, we accept the proposition that these incidences represent counsel endeavoring to be zealous advocates and pressing their theory of the case at each opportunity rather than a deliberate course of conduct designed to deprive defendants of a fair trial.

Next, defendants argue that the trial court erred in admitting into evidence a pamphlet published by the Secretary of State entitled "What Every Driver Should Know." We agree that the trial court erred in admitting the pamphlet. The pamphlet was not relevant and should not have been admitted. However, we are persuaded that the error was harmless. The material from the pamphlet was consistent with the instructions given to the jury regarding the duties of defendant and the decedent. Accordingly, any error was harmless. See, e.g., *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 704; 513 NW2d 230 (1994) (testimony by expert as to legal standard harmless where the expert's opinion is consistent with the applicable law).²

¹ The other incidents defendants complain of are less concerning to us. The use of the phrase "world class sprinter" to describe the speed defendants alleged the victim was running at, while inaccurate, is little more than bombastic hyperbole. Plaintiff's counsel's objection during defense counsel's examination of the defense expert regarding whether plaintiff's expert placed the victim's speed at nine miles per hour was not inherently inaccurate. Finally, plaintiff's objection during the direct examination of defendant's expert regarding whether the passenger testified defendant's vehicle was fifty feet or one hundred feet away when the victim was ten feet from the centerline did make a misstatement as to the witness' ultimate testimony, but the witness had changed his testimony on that point.

² Defendants also complain that plaintiff made use of the pamphlet to erroneously suggest that defendant had an absolute duty to yield the right-of-way to the victim. While there were comments by attorney Fieger during closing argument to that effect, those statements did not

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Next, defendants argue that the trial court erred in admitting testimony from the decedent's mother, sister and grandmother regarding the fact that the decedent's organs were donated to give different people. We agree. The fact that the decedent's organs were donated was in no way relevant to any issue before the jury.

The Wrongful Death Act, MCL 600.2922(6); MSA 27A.2922(6), provides in pertinent part as follows:

In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

Thus, the statute establishes the following elements of damages:

- (1) Reasonable medical, hospital, funeral and burial expenses of the deceased;
- (2) Pain and suffering of the deceased prior to death;
- (3) The surviving family members' loss of financial support and loss of society and companionship of the deceased.

No where in the statute is mentioned the family members' pain and suffering as a result of the decedent's death. In fact, under a previous version of the statute, the Supreme Court, in *Wycko v Gnodtke*, 361 Mich 331, 340; 105 NW2d 118 (1960), noted that such damages are not allowed:

We are, it will be noted, restricting the losses to pecuniary losses, the actual money value of the life of the child, not the sorrow and anguish caused by its death. This is not because these are not suffered and not because they are unreal. The genius of the common law is capable, were it left alone, of ascertaining such damages, but the legislative act creating the remedy forbids.

Plaintiff contends that changes to the Wrongful Death Act since the *Wycko* decision suggests a broader range of damages. Specifically, plaintiff points to the fact that the 1971 and 1985 amendments deleted the term "pecuniary" and specifically authorized the elements of damages for loss of financial support and for loss of society and companionship. However, plaintiff's arguments prove too much. That is, because the Legislature added elements of damages, had they also intended to add the surviving family members' own pain and suffering, it would have said so and added that to the statute as well.

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invoke the pamphlet as supporting that proposition.

Further, the verdict form utilized by the jury did not provide for an award for the pain and suffering of the family members. The following questions were submitted to the jury on damages:

QUESTION NO. 3: What is the total amount of Plaintiff's damages to the present date for funeral and burial expenses?

* * *

QUESTION NO. 4: What is the total amount of Plaintiff's damages to the present date for conscious pain and suffering of Richard Irvin Smith, III?

* * *

QUESTION NO. 5: What is the total amount of Plaintiff's damages to the present date for loss of services and the loss of the love, society and companionship of Richard Irvin Smith, III as a result of his death?

* * *

QUESTION NO. 6: What is the total amount of Plaintiff's future damages for loss of services and the loss of love, society and companionship of Richard Irvin Smith, III, as a result of his death?

Thus, the issue of the amount of damages for the family members' own pain and suffering was not before the jury.

Therefore, it must be inquired whether the testimony of organ donation is relevant to any issue of damages before the jury. The answer to that question is clearly "no." There is no indication that the organ donation affected the cost of the funeral and burial expenses (and, even if it did, those costs could be proven without reference to the organ donation). Further, organ donation obviously did not affect the decedent's conscious pain and suffering, the donation occurring after his death. Finally, it does not affect the family members' loss of services, society or companionship of the decedent. Those were lost because of the death, not because of the organ donations. Therefore, the organ donations were not relevant to any issue before the jury.

Plaintiff does argue that the evidence was relevant to the measure of the loss of the decedent's society and companionship because it impacted the grief suffered by the family. That, however, is a non sequitur. That would be true only if the definition of society and companionship is the absence of grief. In our view, "society and companionship" is a positive attribute, not merely the absence of a negative. That is, "society and companionship" is what the family would enjoy if the victim were still with them.

Plaintiff also argues that, at worst, the admission of the evidence was harmless. We disagree. How can such a discussion not be prejudicial? What purpose does it serve but to inflame the passions of the jury? In any event, any argument that a discussion of organ donations

was not for the purpose of inflaming the passions of the jury is laid to rest by the following portion of plaintiff's closing argument:

Today when my body will lay upon a white sheet, neatly tucked under four corners of a mattress, located in a hospital, busily occupied with living and the dying. In a certain moment a doctor will determine that my brain had deceased [sic] to function. And for all practical purposes, my life has stopped. When that happens, do not attempt any artificial life into my body by the use of a machine. And don't call this my death bed, let it be called the bed of life.

Whatever was usable let it be taken from it to help others to lead a full life. Give my sight to a man who has never seen a sunrise. A baby's face and the love in a woman's eyes.

Give my heart to a person whose own heart has caused nothing but endless days of pain.

Give my blood to a teenager who is pulled from the wreckage of a car so he might live to see his grandchildren play.

Give my kidneys who depend on to one depend upon machines to exist [sic].

And take my bones and every nerve and muscle in my body and find a way to make a crippled child walk.

Explore every corner of my brain, take my cells if necessary, let them grow so that someday a speechless boy will shout at the crack of a bat. And a deaf girl will hear the sound of rain against a window. Burn what's left and scatter my ashes in the wind to help the flowers grow.

And if you must bury something, let it be my faults, my weaknesses, and all my prejudices against my fellow man. Give my sins to the devil and give my soul to God. And if by chance you wish to remember me, do so with a kind deed or word to somebody that needs you. And if you do all that I have asked, I will live forever.

The issue of organ donation was an emotional one. It was not relevant to any measure of damages. It was utilized to invoke the sympathies of the jury. Therefore, the error in its admission was not harmless.

Accordingly, defendants are entitled to a new trial. However, because the organ donation issue is related to the issue of damages, not liability, we limit the new trial to the issue of damages only.

Our resolution of the above issue renders it unnecessary to consider defendants' remittitur issue, but we do need to consider defendants' argument that the jury's conclusion that the

decedent was not comparatively negligent was not against the great weight of the evidence. While there certainly was evidence of the decedent's negligence, the jury was not compelled to accept it. Accordingly, we are not persuaded that the trial court erred in denying the motion for new trial on this issue.

As for the numerous issues relating to sanctions under MCR 2.405, all are also rendered moot. Because we set aside the damage award, all of the orders granting sanctions must also be aside because it remains to be seen whether defendants will improve their position following retrial. Following that retrial, the trial court may revisit the sanctions issue if the result of the new trial deems it appropriate.

For the above reasons, we affirm the judgment of the trial court finding defendant liable and the decedent not comparatively negligent. However, we reverse the damage award and the orders regarding sanctions and remand the matter for a retrial on the issue of damages. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ David H. Sawyer

/s/ Henry William Saad