STATE OF MICHIGAN

COURT OF APPEALS

REBECCA BLESSING, Individually, and as Personal Representative of the Estate of DALE G. BLESSING, Deceased,

Plaintiff-Appellee/
Cross-Appellant,

v

JAMES CHRISTENSEN,

Defendant-Appellant/
Cross-Appellee,

and

MUFFLER MAN SUPPLY CO.,

Defendant-Appellant.

UNPUBLISHED
May 21, 2002

No. 227234
Genesee Circuit Court
LC No. 96-053178-NO

REBECCA BLESSING, Individually, and as Personal Representative of the Estate of DALE G. BLESSING, Deceased,

Plaintiff-Appellee,

v

JAMES CHRISTENSEN and MUFFLER MAN SUPPLY CO.,

Defendants-Appellants.

No. 228451
Genesee Circuit Court
LC No. 96-053178-NO

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

In Docket No. 227234, defendants appeal as of right the portion of the jury's verdict in plaintiff's favor, and plaintiff cross-appeals the denial of her post-trial motion for attorney fees

and costs. In Docket No. 228451, defendants appeal the denial of their post-trial motion for offer of judgment sanctions pursuant to MCR 2.405(D). We affirm in both docket numbers.

Plaintiff Rebecca Blessing brought suit against defendants alleging slander, stalking and intentional infliction of emotional distress. Plaintiff's husband, Dale Blessing, alleged loss of consortium. During the pendency of the proceedings below, Dale Blessing died. The jury found in plaintiff's favor on the slander claim only[1] and awarded $22,350 in damages. The jury awarded Dale Blessing's estate $6,350 for loss of consortium.

I - Docket No. 227234

A

Defendants first argue that the trial court abused its discretion by denying defendants' motion to reopen proofs, and that this Court should remand for a new trial on plaintiff's slander claim. We disagree.

The decision to permit a party to reopen its proofs after submission of the case to the jury is one entrusted to the sound discretion of the trial court. *Clapham v Yanga*, 102 Mich App 47, 56; 300 NW2d 727 (1980). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). On issues of reopening proofs, this Court's attitude has generally been one of noninterference. *Knoper v Burton*, 12 Mich App 644, 648; 163 NW2d 453 (1968), rev'd on other grounds 383 Mich 62; 173 NW2d 202 (1970). Generally, this Court has found an abuse of discretion when the barred testimony was vital to the moving party's case in that it would establish a necessary element to the cause of action. *Potts v Shepard Marine Construction Co*, 151 Mich App 19, 26; 391 NW2d 357 (1986).

Defendants sought to reopen proofs to allow one of plaintiff's witnesses, Jared Reed, to be recalled to testify regarding a document he produced to counsel after testifying at trial. The trial court denied defendants' motion on the grounds that allowing the proofs to be reopened after both parties had rested would give undue influence to the witness' testimony, and the testimony would have been largely cumulative.

The 6 ½ page document at issue is a typed chronological list of events, worded in the first person as though written by the witness. For the most part, the events include recounting of statements the witness allegedly heard from defendant Christensen and others involving Dale Blessing's businesses and their decline, and general work events regarding the performance of other Muffler Man stores and employees, which had no bearing on plaintiff's slander claim. The document contained only one sentence pertaining to plaintiff's slander claim. Presumably, had

[1] The jury concluded that plaintiff had no cause of action on the stalking and intentional infliction of emotional distress claims.

the witness been recalled, he would have testified that Dale Blessing, deceased by the time of trial, had himself *typed* the document at issue, and had given it to the witness to coach him regarding what to say in this suit.

Reed had already testified that he and Dale Blessing were friends, that they had had numerous conversations regarding the lawsuit, that Dale had proposed different legal and factual theories to him and discussed other witnesses' testimony, that Dale rehearsed with him testimony that he was supposed to give, that Dale was obsessed with the lawsuit and wanted to win it, and that Dale admitted to him that the stalking allegations were not true. Reed also testified that although he had testified at deposition that Bob Bell called plaintiff derogatory names during a particular conversation, it was not true, and that he had lied at the deposition because Dale had wanted him to. Regarding the defamatory statement mentioned in the document, Reed had testified that Dale made it clear how he wanted him to testify, that after all the coaching, his memory got a little blurred regarding what he actually remembered, and that although he had testified at deposition that Christensen made the defamatory statement at a particular meeting, he was not sure whether Christensen had actually made the statement or whether it came from other sources. Reed could not say one way or the other; it was possible Christensen made the statement, and possible he did not.

There had already been testimony at trial from several other witnesses supporting that the slanderous statement referred to in the one sentence of the document pertinent to the slander claim had been made, and that it was a general topic of conversation. Reed did not think that Dale Blessing started the rumors as a way of fabricating a claim against Christensen. Reed did not disavow his testimony that he told Dale about the statement about six months later, and other testimony supported that he did so. The inclusion of the statement in a document prepared by Dale Blessing does not establish that he made up the allegation, only that he coached Reed regarding the testimony he wanted Reed to give, something Reed had already testified to.

The court's ruling did not deprive defendants of the opportunity to prove an element of their defense. The trial court did not abuse its discretion in concluding that that the document and proposed testimony would have been largely cumulative.

B

Defendants next argue that the trial court abused its discretion by admitting into evidence excerpts of Dale Blessing's diary pursuant to MRE 803(1) and 803(3). We agree, but conclude that reversal is not required.

We review the trial court's determinations to admit evidence for abuse of discretion. *Chmielewski v Xermac, Inc,* 457 Mich 593, 613-614; 580 NW2d 817 (1998). Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence. MRE 802; *Tobin v Providence Hospital*, 244 Mich App 626, 640; 624 NW2d 548 (2001).

MRE 803(1) provides that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is not excluded by the hearsay rule. *Tobin, supra* at 640. We conclude that none of the diary excerpts were admissible under MRE 803(1).

The only testimony addressed to Dale Blessing's diary entries is that of plaintiff Rebecca Blessing:

> *Q*. We've heard testimony that Dale kept diaries, were you aware of that?
>
> *A*. Yes, I was.
>
> *Q*. How did he keep them, were they in pieces of paper, in a computer, do you know how he kept them?
>
> *A*. He had book forms and a book. I believe he even had many diaries from when he was a teacher.
>
> *Q*. Going back a number of years?
>
> *A*. A number of years ago.
>
> *Q*. Were they in handwritten form?
>
> *A*. Yes.
>
> *Q*. Were you aware that he – what type of entries would he put in there? Would they be business records or personal records or shopping lists, what – what sort of things did he put in?
>
> *A*. Everyday activity, whether it be business related, family related. Maybe telephone calls in it. He just – it was – it was a daily journal like he would keep.
>
> *Q*. Did he – when he would make entries would he make it for the particular day in question?
>
> *A*. Yes.
>
> *Q*. . . . . Was Dale in the habit of going back and adding anything to an earlier entry that you're aware of?
>
> *A*. No. No.
>
> *Q*. Would he make his entries contemporaneously?
>
> *A*. Yes.

Q. And in the – in the journals are they – are they broken apart by day, for example say April 1st, April 2nd, April 3rd, that sort of thing?

A. Yes, I believe so, yes.

Q. When Dale would make entries in the journals would he make it on the day --

A. The day of that, yes. Daily.

Plaintiff's testimony that her husband kept a daily diary and made entries contemporaneously did not establish that her husband wrote any of the excerpts at issue while he experienced the events or substantially contemporaneously with the events they addressed. *Tobin*, *supra* at 640. Admission of the diary excerpts under MRE 803(1) was improper.

2

MRE 803(3) provides:

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Three of the diary excerpts concerned Dale Blessing's thoughts of suicide. Dale Blessing did not, in fact, commit suicide, but died of a heart attack before trial in the instant case. Both parties note on appeal that the diary excerpts pertaining to suicide were cumulative to Pastor Cocke's testimony. Improper admission of evidence is harmless if it is merely cumulative to other properly admitted evidence. *Sackett v Atyeo*, 217 Mich App 676, 685; 552 NW2d 536 (1996). Any error in admitting these excerpts was thus harmless.

We conclude that many of the ten remaining excerpts were improperly admitted. Many of these excerpts did not describe, or minimally described, Dale Blessing's existing state of mind, emotion, sensation, or physical condition. The excerpts were largely statements of fact or descriptions of events.[2] However, we conclude that reversal is not required, because the jury

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[2] The admitted excerpts had been redacted, and stated:

> "Becky and I have our first fight since we met. She was in Canada playing Bingo for the weekend. I don't know, I just lost it. I jumped down her throat before she could even say hello to me. I know that going to Canada is her only form of entertainment and escape from the pressure of Christensen; but I couldn't help myself. She has no idea of what has been said to me that Christensen has said she goes to Canada on weekends for."
>
> Maybe I am losing it. Christensen's bull shit must be getting to me. But Becky, Dwayne [Rebecca Blessing's son], and I were a happy family until Nov of 1995.

(continued…)

heard considerable properly-admitted testimony regarding the subject of those excerpts, i.e., marital problems between plaintiff and Dale Blessing, Dale Blessing's being highly upset by the alleged defamatory statements regarding plaintiff, Dale Blessing's hatred of defendant Christensen, and Dale Blessing's attributing many of his problems to Christensen. *Sackett, supra.*

(…continued)

> Now we no longer even smile at one another. I just can not confront her with Christensen's statements about her and Canada.
>
> I don't know what to do: keep it inside of me or confront her with it and get matters in the open. I keep praying for guidance since I heard it . . .
>
> Note . . 12 mths of nothing but bull shit and pressure from Christensen.
>
> If I had Christensen in sight I would kill him for this.
>
> We can't even look at each other without one of us jumping down the throat of the other it seems.
>
> I don't know what to do to help her. She just seems to withdraw from me.
>
> Thank God for Becky. I sincerely believe that God put the two of us together for a reason. She is something special. She has spent a lot of tears trying to make me reconsider suicide and I promised her with God as my witness that I would not do anything to myself at this point in time.
>
> I don't know what to do to help her except to be there for her and pray.
>
> I only hope & pray that I survive long enough to make certain that both her and Dwayne are taken care of & matters pertaining to Christensen are brought to a <u>just</u> conclusion.
>
> The only solution appears to be for her to spend as much time as possible in Canada. This puts a great strain on our marriage and Dwayne oas well. But we, Dwayne and myself, see no choice in matters since her full recovery is vital to us all.
>
> Today, it is now 2 years to the date that Christensen started all of this bull shit. I don't know how much longer we, as a family, can endure. Our mariatial [sic] state has been tested to the point where it can not last much longer.
>
> Becky breaks down in front of Dwayne. Her crying while telling Dwayne was heart breaking.

C

On cross-appeal, plaintiff argues that she was entitled to attorney fees for negligent slander under MCL 600.2911(7), for malicious slander under MCL 600.2911(2)(a), or the common-law exception for malicious conduct of defendants. Plaintiff claims that MCL 600.2911 provides that attorney fees are recoverable as taxable costs to be determined by the trial court. Under the circumstances that plaintiff consented to the jury being instructed only on actual malice, and not negligent slander, and that plaintiff presented no proofs regarding attorney fees, we disagree.

MCL 600.2911 provides, in pertinent part:

> (2)(a) Except as provided in subdivision (b), in actions based on libel or slander the plaintiff is entitled to recover only the actual damages he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings.
>
> * * *
>
> (7) An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

Although plaintiff's complaint and the proposed jury instructions she submitted before trial maintained that she was entitled to actual attorney fees under MCL 600.2911(7), the jury was instructed, with plaintiff's acquiescence, only on actual malice, which would entitle plaintiff to actual damages, including damages to feelings. In seeking actual damages, plaintiff did not present evidence that she had incurred attorney fees or the extent of fees incurred. Plaintiff sought attorney fees post-trial, pursuant to MCL 600.2911(7), which pertains only to claims alleging negligent defamation, where only economic damages are recoverable. Under these circumstances, where the claim was presented to the jury, with plaintiff's consent, as an actual malice case only, where plaintiff produced no evidence regarding attorney fees, and where plaintiff requested fees under the statutory provision that applies to negligent defamation claims, we cannot conclude that the trial court erred by denying plaintiff's motion for attorney fees.

II - Docket No. 228451

Defendants argue that the trial court abused its discretion in denying their motion for offer of judgment costs under MCR 2.405. We disagree.

This Court reviews a trial court's decision to award sanctions under MCR 2.405 for an abuse of discretion. *JC Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). Defendants made an offer to stipulate to the entry of a judgment pursuant to MCR 2.405 in the amount of $15,000 in exchange for a settlement of all plaintiff's claims. Plaintiff made a counteroffer of $100,000 to settle all claims, except for the quiet title claim that had been settled earlier at summary disposition. Both offers were rejected. MCR 2.405(D) provides that if an offer is rejected, the following costs are payable:

(1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.

(2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs.

(3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.

Here, the offer of judgment was offered "in full, final, and complete settlement of all claims" that plaintiff asserted. At the time the offer was made, the trial court had granted plaintiff's motion for summary disposition regarding the quiet title claim, but the judgment was made expressly subject to defendants' right to file a notice of lis pendens, and defendants had in fact filed a notice of lis pendens. Defendants argue that the quiet title claim was one in equity, not subject to the offer of judgment that covered the money damages claims in the lawsuit. However, there is no distinction between equity and damages in MCR 2.405(D) or MCR 2.406(A). If the value of the quiet title claim is considered, defendants are not entitled to offer of judgment costs under the rule.[3]

Further, MCR 2.405(D)(3) provides: "The court shall determine the actual costs incurred. *The court may, in the interest of justice, refuse to award an attorney fee under this rule.*" [Emphasis added.] A reading of defendants' offer of judgment indicates that the offer addressed the entire lawsuit, including the quiet title claim. It certainly does not convey that defendants were offering to pay $15,000 and relinquish any claims to the property. As the trial court observed, plaintiffs filed a counter-offer making clear their concern that the quiet title action not be included in any monetary settlement through the offer of judgment rule. Defendants could have then responded with another offer that expressly excluded count IV. The trial court did not abuse its discretion in concluding that under the language of the rule, plaintiff should not have had to guess or assume that the court would not have followed the rule and entered a judgment "according to the terms of the stipulation," which provided for the "full, final, and complete settlement of all claims."

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[3] At the hearing on defendants' motion for offer of judgment sanctions, plaintiff uncontestedly asserted that the property was appraised at over $100,000. By factoring in this amount, the adjusted verdict is $130,118.38. This amount was less favorable to the offeror (defendants) than the average offer of $57,500 or $107,500. (Defendants offered $15,000 to settle all claims; plaintiffs countered with an offer to settle counts I – III for $100,000. If the $100,000 is added to the $100,000 demand, it raises the average offer to $107,500).

Affirmed.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald