STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK LESNIAK,

Plaintiff-Appellant,

v

MILLAR ELEVATOR SERVICE CO.,

Defendant-Appellee.

UNPUBLISHED
November 8, 2002

No. 226843
Wayne Circuit Court
LC No. 97-737185-NO

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Plaintiff Frederick Lesniak appeals as of right from the trial court's judgment in favor of defendant Millar Elevator Service Co., entered following the jury's verdict in favor of Millar in this age discrimination law suit under the Civil Rights Act (CRA), MCL 37.2101 *et seq*. We affirm.

I. Basic Facts And Procedural History

Lesniak was born on March 6, 1941. In 1962, at age twenty-one, Lesniak acquired his license to repair elevators in Michigan. Over the next twenty-five years, Lesniak worked in the elevator repair industry as an elevator mechanic. When he was laid off occasionally because of shifting demand in the industry, Lesniak consistently sought new employment through his union.

In 1987, shortly before his forty-sixth birthday, Lesniak began working for Millar. Whether this was because Millar acquired the company for which Lesniak was working through a variety of mergers and acquisitions happening in the elevator service industry around that time is not clear. In any event, Millar organized its mechanics by placing them in one of three departments: repair (sometimes called service), modernization, and maintenance. Generally speaking, maintenance mechanics performed ongoing work on elevators and were the first people called to respond to a breakdown. Repair mechanics performed mainly safety testing and related work. And modernization mechanics worked to upgrade older elevators with new machinery and components. Under the union contract, all the mechanics, regardless of department, were considered to be the same type of worker, and Millar's personnel classification scheme reflected this unity. Millar placed Lesniak in the maintenance department.

As a maintenance mechanic, Lesniak had about a dozen accounts that were considered part of his "route." He personally took care of the accounts regularly, though other mechanics

assisted him when certain projects were too large for a single person to handle. Hutzel Hospital was one of Lesniak's most important accounts because of its multiple elevators and critical need for smooth operation. Hutzel Hospital was quite pleased with Lesniak's work, his familiarity with the unusual elevator equipment in the hospital, and his availability after hours. Hutzel Hospital even signed a contract with Millar to cover seven additional elevators because of Lesniak's work. Lesniak's other accounts included the Detroit Chamber of Commerce and the City of Detroit Public Lighting Department. Though Lesniak earned approximately $25 per hour as a maintenance mechanic under the union scale, he was making between $70,000 and $90,000 dollars a year. This additional income came from overtime.

In 1995, Charles Charpie joined Millar as a vice-president and regional manager. Though Millar had never before had a system for ranking its mechanics, Charpie had his three department supervisors each develop a list placing the mechanics in one of three tiers. Though the tiers reflected the most to least skilled mechanics, being placed in the third tier did not necessarily mean that a mechanic was at all unskilled or deficient in any area. Rather, the tiers attempted to sort between the mechanics, all of whom were skilled, without individually ranking them. Robert Cheyne, the maintenance department supervisor, used four criteria when categorizing the maintenance mechanics: the number of "callbacks" for a job, which would indicate that the job had not been performed or had not been done correctly in the first place; whether the mechanic was able to cooperate with people in the office; whether the mechanic was able to cooperate with people in the field; and whether the mechanic was able to follow direct orders from supervisors. After applying these four criteria, Cheyne generated a list with three tiers, and separately identified the "helpers," who were apprentices.

The first tier consisted of fourteen mechanics. The youngest mechanic in this tier was Eric Austin, who was thirty-one years old. The oldest mechanic in this tier was fifty-seven years old. Including these two mechanics, three people were in their thirties, four people were in their forties, and seven people were in their fifties. The average age of the people placed in the first tier was approximately 46.4 years.

The second tier consisted of eleven mechanics. The youngest mechanic was Larry T. Parker, who was thirty-four years old. The oldest mechanic was Lesniak's older brother, Ron Lesniak, who was fifty-nine years old. Including Parker and Ron Lesniak, three of these eleven mechanics were in their thirties, two were in their forties, and six mechanics were in their fifties. The average age of the people placed in the second tier was forty-seven years.

The third tier, in which Cheyne placed Lesniak, consisted of only five mechanics. Rob Michalik was only twenty-eight years old, Lou Moro and Mike Treanor were both fifty-three years old, Lesniak was fifty-four years old, and Al Desmadryl was fifty-nine years old. The average age of the people placed in this tier was 49.4 years.

In 1996, Millar's revenue in its maintenance department was falling because it had lost several accounts. Lesniak's route was still profitable, and, unlike younger mechanic Michalik, Lesniak did not personally lose any accounts. Though Millar acquired several new accounts, they did not offset the lost revenue. In May 1996, Charpie decided that the company would have to lay off an employee to save money. As a labor-intensive industry, employees were a significant cost to the company and the reduced number of accounts reportedly left Millar with more employees than necessary to complete the work. Charpie asked Cheyne to begin thinking

about who Millar would have to lay off and how to reorganize the routes so that the remaining maintenance mechanics would be able to cover the route that the laid off worker had handled. The union contract did not impose a seniority system to protect long-time workers from layoff, though it did discuss laying off apprentices before mechanics. In late May 1996, Charpie and Cheyne decide to lay off Lesniak. Lesniak had no poor performance evaluations in his record and several of his clients had written letters praising him. Charpie and Cheyne did not review these commendations before making the decision to lay him off. Additionally, they would later claim, they never discussed anyone's age when discussing the required layoff.

Charpie and Cheyne never actually laid off Lesniak during summer 1996. They did not warn him of any impending layoff, nor did they ask Lesniak to improve in any way. Charpie and Cheyne kept Lesniak on the payroll because many employees took vacations during the summer, which then required additional temporary staffing, and because they wanted to see if any additional business would materialize. In August 1996, Millar hired Mike Bujan and Todd Parker in the modernization department to work on a temporary project at Henry Ford Hospital. Parker and Bujan were in their thirties and their respective fathers had each worked for Millar. Evidently, the money from the Henry Ford Hospital contract paid for their salaries.

In early October 1996, Cheyne asked the supervisors in the repair and modernization departments if they needed an additional mechanic, and each said that their respective departments did not need anyone else. On October 4, 1996, Cheyne and Don Strauch, a Millar account representative, met Lesniak at Hutzel Hospital. They informed Lesniak that he was being laid off. At the time, Cheyne expressed regret to Lesniak, saying that he had been fighting this action for some months. Lesniak was officially laid off on October 7, 1996. He immediately went to his union to seek additional work. Millar distributed the accounts on Lesniak's former route to several mechanics. His Hutzel Hospital account went to Austin, who was in his early thirties.

Lesniak's layoff did not please some of his accounts, especially Hutzel Hospital[1] and the City of Detroit Public Lighting Department. In the three weeks following Lesniak's layoff, Lesniak's contacts at Hutzel Hospital and the City of Detroit Public Lighting Department each wrote letters of recommendation for him. Charpie also wrote a letter of recommendation on his behalf. Lesniak, however, did not find any work.

Lesniak began suspecting that Millar laid him off because of his age some time after his discharge. According to Lesniak, Charles Elter, the repair department supervisor, had often made comments about his age, referring to him as "old man," and asking him when he was planning to retire. Once when Elter asked about retirement, Lesniak had gone to the office to get a new battery for his radio and Elter said that Lesniak was as old or older than the radio. About a month later, Elter asked Lesniak, "[A]re you still here with this company?" When Lesniak asked Elter if there was a problem, Elter replied that he thought Lesniak "had retired." Elter's son, Mark Elter, the modernization department supervisor, also referred to Lesniak as old man.

[1] Millar lost the Hutzel Hospital account in 1998.

Lesniak, a divorced father of nine, became seriously depressed after he lost his job. He had a hard time interacting with people, leaving the house, and sometimes had suicidal thoughts. He suffered from insomnia and lost weight. He was particularly affected by the timing of the layoff. As Christmas approached, his bills mounted, he could not pay as much support for his two children who were still dependents, and he had to borrow money from his uncle even though he was receiving unemployment benefits. He also questioned whether anyone would hire him at age fifty-five.

Lesniak contacted a psychiatrist in late December 1996, and scheduled an appointment for the third week in January 1997. When Lesniak met with the psychiatrist, Dr. Marietta Jamsek-Tehlirian, on January 22, 1997, she diagnosed him as having a major depressive episode with some post-traumatic elements. Even though Lesniak reported that he no longer had suicidal thoughts, Dr. Jamsek-Tehlirian determined that Lesniak's job loss had triggered his condition, and that condition had rendered him disabled. She prescribed, and subsequently adjusted, medication for Lesniak's depression.

In February 1997 another car traveling approximately seventy to eighty miles per hour rear-ended the car Lesniak was driving. Lesniak, who was not at fault for the accident, suffered serious injuries, including a closed head injury, broken ribs, a sprained neck, and internal bleeding. He was hospitalized for about a week, and subsequently received insurance benefits for the accident.

In September 1997, following a complaint process, the federal Equal Employment Opportunity Commission issued Lesniak a right to sue notice, and he initiated this lawsuit. In his verified complaint, filed November 18, 1997, Lesniak alleged that Millar had violated the CRA by discriminating against him on the basis of his age and hiring younger, less experienced workers to replace him. Lesniak also claimed that Millar had discharged him wrongfully.[2]

At trial, Lesniak's chief evidence of age discrimination came in the form of the comments Charles and Mike Elter made regarding his age and retirement, and the fact that Millar had chosen not to lay off Michalik, who was also in the third tier and had lost some accounts. Millar maintained that it had a legitimate, documented business reason to lay off Lesniak, namely falling revenues. Millar pointed out that Charpie and Cheyne testified that they had never discussed employees' ages and that the Elters were not Lesniak's supervisors, much less participants in the decision regarding who to lay off. Charles Elter also testified that he had referred to Lesniak as old man in jest, and that he commonly referred to people in this way. In fact, he was slightly older than Lesniak, and he wanted to discuss retirement because he was thinking about retiring. Additionally, Millar claimed, because there was no seniority system and the union had a pay schedule, it had no financial incentive to lay off older workers.

Though Millar had always insisted that it had chosen Lesniak to lay off because it had a lack of work, and he was the most dispensable of the mechanics, Cheyne also referred to complaints he had received from office staff and workers in the field as some of the reasons that he and Charpie chose Lesniak. Lesniak countered that the complaints regarding Millar service

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[2] The trial court summarily disposed of the wrongful discharge claim.

that Cheyne referred to actually related to work slated for another department, and emphasized the praise he had received for his work. Even Cheyne admitted that Lesniak was an "adequate" or competent mechanic. Lesniak was also able to suggest that age bias was at work in the layoff decision when Cheyne claimed that Lesniak could not perform the same work that Bujan and Parker were performing because the work was too heavy. As Lesniak put it, the work he did most days was heavy, his toolbox even weighed more than fifty pounds, and he was never under a medical restriction while at work. The implication was that Millar's improper opinion of older workers led it to assume, incorrectly, that Lesniak could no longer perform this sort of work. Lesniak also challenged Millar's claim that economic factors forced his layoff, contending that Millar was spending as much or more on salaries following his discharge. For instance, Bujan and Parker were still working at Millar even though they were supposed to be temporary employees.

The biggest disputes at trial revolved around two matters: whether the three types of mechanics Millar employed were interchangeable and whether Millar had an obligation to transfer or rearrange the routes for Lesniak rather than firing him. According to Lesniak, fellow maintenance mechanic Lou Moro, and Strauch, the three types of mechanics could each perform each other's work. As Lesniak explained it, in more than thirty-five years in the elevator repair business, he had done all the work necessary of the three types of mechanics. Indeed, he had learned the set of skills fundamental to any elevator work, such as being able to read schematics. Charpie and Cheyne conceded that the union contract made these positions interchangeable on paper, but claimed that, in practice, the different types of mechanics did different work. Thus, Charpie and Cheyne suggested, Lesniak was not suited for the modernization work people like Bujan and Parker were doing. Millar also argued that the union contract did not state a policy that required it to transfer Lesniak to a different department, rearrange the routes to allow him to continue working, or to rehire him when business improved.

Having heard this conflicting evidence, the jury rendered a verdict in favor of Millar. Lesniak now appeals, raising issues that concern a particular juror and the evidence at trial. We explain the factual background for each of these issues in more detail in the following sections of this opinion.

II. The Juror

A. Background

At the very beginning of the jury selection process, even before the court clerk called the first group of venire members to the jury box for voir dire, the trial court gave an overview of the case and the attorneys introduced themselves. Millar's attorney, David Barbour, informed those assembled that he was "from the law firm of Pettersmarck[3] Callahan Bauer & Barbour." The trial court then asked if there was "anyone here who believes that you know Mr. Barbour, have any connection with his law firm, Pettersmarck, etcetera, etcetera, please raise your hand?" One member of the venire, a veterinarian, inquired, "Is that George Pettersmarck?" When Barbour responded, "Yes, it is," the veterinarian said, "Yeah, they're clients of mine." The trial court

[3] The correct spelling appears to be Petersmarck.

noted the veterinarian's comment, indicating that if he were picked, the attorneys would ask additional questions.

As chance would have it, the veterinarian was selected for the panel. Sitting for voir dire, the veterinarian answered the routine questions posed to all prospective jurors concerning his background, employment, experience with the courts, and other matters. For instance, the trial court asked the veterinarian whether, because he owned his own practice, he had ever had to discharge someone. The veterinarian explained a situation in which he had to fire an employee because the employee was using drugs, indicating that the employee was not happy and he found the whole situation unpleasant. The trial court later turned to the veterinarian's relationship to the defense firm.

> THE COURT: . . . Now, this issue with Mr. Pettersmarck, how long has he been a client of yours?
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> [VETERINARIAN]: Fifteen years. I had – I hadn't personally seen Jordan [sic: George Pettersmarck] since he got out of the [business of raising] labradors. He used to hunt and it was basically his deceased wife, Sue, that I knew as the client.
>
> THE COURT: Okay. She would bring in the dogs?
>
> [VETERINARIAN]: Typically it's the housewife that will run the dog to the vet.
>
> THE COURT: And then after she passed away, then Mr. Pettersmarck for a while, had the labs and he'd bring them in if they needed to?
>
> [VETERINARIAN]: Yeah.
>
> THE COURT: But that – about how long has it been since you've seen Mr. Pettersmarck?
>
> [VETERINARIAN]: Oh, God, big man, right?
>
> MR. BARBOUR: Very big, yes.
>
> [VETERINARIAN]: Yeah, maybe 12 years.
>
> THE COURT: Okay. But I think that the question was, even just remembering that Mr. Pettersmarck's family were dog lovers, you know, that might – do you feel that knowing that Mr. Barbour is in partnership with a former client, I mean, you haven't seen him for 12 years, he's not even a current client, is that right?
>
> [VETERINARIAN]: Right.
>
> THE COURT: *Would that cause you to either favor or disfavor Mr. Barbour or do you feel it would have no effect?*

[VETERINARIAN]: *It would have no effect at all.*

THE COURT: I really don't know if Mr. Pettersmarck paid his bills or not, you know –

[VETERINARIAN]: Right.

THE COURT: –I'm just saying we don't know, –

MR. BARBOUR: (Interposing) That was going to be my question.

[VETERINARIAN]: He did – he could be in the deadbeat file.

THE COURT: I have no idea whether he was a [sic] easy client or a difficult client. I know as a lawyer there's easy clients and there's –

[VETERINARIAN]: (Interposing) They were very much.

THE COURT: Mr. Combs [Lesniak's attorney]?

MR. COMBS: The gentleman you're talking about, Mr. Pettersmarck, since you do know him personally, do you think that you're a party to this case that would be something that you would be *concerned about that, in effect, that there's a connection between you and someone that's connected with the defense of this case?*

[VETERINARIAN]: *It actually had no effect at all. It was more of a name recognition and kind of a known – there's no current relationship.*

MR. COMBS: You said he had dogs, he had labradors?

[VETERINARIAN]: Yes.

MR. COMBS: That, apparently, a number of them?

[VETERINARIAN]: Over the years, yes.

MR. COMBS: Over how many years?

[VETERINARIAN]: Fifteen.

MR. COMBS: So how many years were you involved with – at least a portion of (Indistinguishable word: lowered voice) Mr. Pettersmarck?

[VETERINARIAN]: Eight.

THE COURT: And the last time that would have been starting 20 years ago and ending about 12 years ago?

[VETERINARIAN]: About – yeah. Sue died, what, six years ago, five years ago?

MR. BARBOUR: It's approximately nine.

MR. COMBS: How – how do you know – you know him well enough to know his wife's first name and apparently, you – ex-wife's first name – former wife's first name?

[VETERINARIAN]: *Well, actually I don't know George at all*. I know his wife – deceased wife, who brought the labs to the clinic. *I'm not sure I even talked to George beyond possibly recognized him as a big guy that may have got the (Inaudible word) phone call at the end of the day to come and pick up the dog.*[4]

Comb then challenged the veterinarian for cause, arguing that the veterinarian

knows a partner of Mr. Barbour. I think it creates not only his potential bias, but it also creates a situation where he's going to be talking to the other jurors with some added knowledge of the defense side. I think he knew him pretty well if he knows the individual and he's probably got hundreds of clients and he know this lady by [her] first name.

THE COURT: Well, is it your position that he's not telling the truth with regard to what he said about George Pettersmarck?

MR. COMBS: Oh, no. No. No. Not at all.

THE COURT: Because he says he – he knew the wife.

MR. COMBS: Right. And what he said was is that for about eight years he earned income as a result of George Pettersmarck, who's a partner of Mr. Barbour. I just think in – in that situation, it is a prejudice which is not needed as part of the jury.

THE COURT: Counsel, that's such a minimal acquaintance. Not even an acquaintance. He knows Mr. Pettersmarck as a good [sic: big] guy. . . .

MR. BARBOUR: He's a large man, your Honor.

THE COURT: I mean, I think it would be a completely different situation if Mr. Pettersmarck was a current client, first of all.

MR. COMBS: I – I hear – I hear what you're saying.

THE COURT: This was so long ago.

[4] Emphasis added.

MR. COMBS: It doesn't matter if it's long ago or not. It's a – it's a business relationship between someone –

THE COURT: (Interposing) He didn't even know who – he didn't even know who paid the bill.

MR. COMBS: Okay, I understand that.

THE COURT: For all he knows, Sue Pettersmarck worked and she paid them.

MR. COMBS: I'll just – I'll just make the record, thank you.

Lesniak subsequently exercised a peremptory challenge to remove the veterinarian from the jury.

Lesniak now argues that the trial court erred in denying his challenge for cause concerning the veterinarian, contending that the veterinarian should have been excused from the panel pursuant to MCR 2.511(D)(3) or (4).

B. Standard Of Review

This Court reviews a trial court's decision to deny a challenge to a prospective juror for cause to determine whether the trial court abused its discretion.[5]

C. Bias

MCR 2.511(D) permits a party to challenge a juror for cause on the basis of the factors outlined. In particular, MCR 2.511(D)(3) permits a challenge for cause if the juror "is biased for or against a party or attorney." Similarly, MCR 2.511(D)(4) provides a challenge for cause if the juror "shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be." Lesniak argues that the previous business relationship between the veterinarian and Petersmarck, who did not appear at trial, demonstrates that bias or improper state of mind.

Courts presume that jurors are "competent and impartial," which then places the burden to rebut that presumption on the party bringing the challenge for cause.[6] Whether the trial court acts within its discretion in granting or denying a challenge for cause typically depends on whether there is reason to believe the prospective juror is able to sit as a fair and impartial factfinder.[7] In other words, if the prospective juror's statements during voir dire, whether

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[5] See *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 102; 574 NW2d 36 (1997).

[6] *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987).

[7] See, generally, *People v Williams*, 241 Mich App 519, 521-522; 616 NW2d 710 (2000); *Jalaba v Borovy*, 206 Mich App 17, 24; 520 NW2d 349 (1994).

offered or prompted, reveal that the prospective juror meets one of the disqualifying criteria in MCR 2.511(D), then the trial court must dismiss the juror for cause.[8]

In this case, the veterinarian was quite candid about his relationship with Petersmarck. Nevertheless, it is difficult to characterize this relationship as naturally engendering some bias in the veterinarian, considering that whatever pecuniary gain the veterinarian had from treating the attorney's dogs ceased twelve years before trial.[9] Equally important is the veterinarian's testimony that he was barely acquainted with Petersmarck, having dealt primarily with the attorney's wife. Further, the veterinarian had no relationship with Barbour, who was acting as defense counsel. Most important of all, the veterinarian mentioned not once, but twice that this distant relationship with Petersmarck would have no effect at all on his ability to be impartial, and Combs did not dispute that the veterinarian was speaking truthfully. The attorneys and trial court also spent quite some time questioning the veterinarian regarding this relationship and did not elicit any testimony that the relationship was deeper, more personal, or more financially advantageous than the veterinarian freely admitted.[10] Lesniak correctly points out that forcing a party to use a peremptory challenge when a prospective juror should have been removed for cause can be error requiring reversal.[11] However, on the basis of this record, we have no reason to conclude that the veterinarian should have been excused under either provision Lesniak now cites. Therefore, the trial court did not abuse its discretion in denying the challenge for cause.

III. Coworker Testimony

A. Background

On December 9, 1998, Lesniak filed his witness list. On that list he indicated that he intended to call a variety of Millar employees to testify at trial. The following year, on August 24, 1999, Millar brought a motion in limine seeking "to exclude evidence unrelated" to its "conduct toward" Lesniak. Substantively, Millar argued in this motion that any evidence of discrimination against other employees was irrelevant to whether Millar intentionally discriminated against Lesniak on the basis of his age.

Lesniak provided a very brief written response to the motion, arguing that the testimony "is certainly relevant and probative, and therefore, admissible to Plaintiff's claims." Lesniak also contended that the evidence regarding other age discrimination would not prejudice Millar because Millar had a chance to depose these still as yet unidentified individuals. He eventually

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[8] See *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 236-239; 445 NW2d 115 (1989).

[9] Notably, the relationship between the veterinarian and Pettersmarck ended so long ago that MCR 2.511(D)(10) did not apply. That court rule permits a challenge for cause when the prospective juror "*is* the guardian, conservator, ward, landlord, tenant, employer, employee, partner, *or client* of a party or *attorney*." Emphasis added. "Is," the present tense form of the verb "to be," indicates that the relationship between prospective juror and attorney must be current to be challenged for cause on this basis. See, generally, *Random House Webster's College Dictionary* (2d ed, 1997), p 693.

[10] Compare *Poet*, *supra* at 233-234 (the defendant was the juror's current client).

[11] See *id*. at 240-241.

submitted affidavits from Moro, Lawrence Pridemore, and Dale Sawyer, all former Millar employees, as support for his argument that the trial court should deny the motion. In Moro's affidavit, he stated:

1. I was employed with Millar Elevator Company in the maintenance department for almost thirty (30) years.

2. It is my opinion that Fred Lesniak was discriminated against on the basis of age.

3. Fred Lesniak was capable, knowledgeable and had the skills to perform the work that was required of his position.

4. Fred Lesniak was well liked by all his customers and co-workers.

5. At the time Fred Lesniak was terminated, there was not a lack of work.

6. The customers of Fred Lesniak were very disappointed and irate when they heard of Fred Lesniak's termination as they were very satisfied with his work.

7. Based on my observations and perception, the company had a history of hiring new young employees and then terminating and/or laying off older employees.

8. Based on my observations and perception, the company often sent younger employees to job training and did not include the older employees[.]

9. The individual that replaced Fred Lesniak was younger and less experienced than Fred.

10. It is my opinion that management displayed favoritism to the younger employees.

Pridemore's affidavit averred:

1. I was employed with Millar Elevator Company as an elevator mechanic and retired in approximately August 1998.

2. Based on my observations and perception, I believe that Fred Lesniak was discriminated against on the basis of age.

3. To my knowledge, Fred Lesniak had the knowledge, ability and skills to perform his job requirements.

4. To my knowledge, Fred Lesniak was well liked by all his customers who were satisfied with his work.

5. Just prior to the termination of Fred Lesniak the company hired several younger employees.

6. The individual that replaced Fred Lesniak was younger and less experienced than Fred.

Sawyer's affidavit was even shorter:

1. I was employed with Millar Elevator Company and laid off in approximately ~~October~~ 1995 [written by hand] Feb 2 1995 [sic]

2. Based on my observations and perception, I believe the company had a tendency to discriminate against its employees on the basis of age.

3. It is my belief that Fred Lesniak was a very capable, knowledgeable and hard working individual who had the skills to perform his job duties.

4. It is my understanding that Fred Lesniak was well liked by all his customers and co-workers.

For reasons not made clear in the record, the trial court and the parties delayed deciding this motion several times. Finally, the trial court addressed it when considering Millar's motion for summary disposition. In a lengthy opinion and order, the trial court first examined Sawyer's affidavit, finding that,

> [a]t best, Sawyer's statements constitute an expression of his own opinion that defendant "had a tendency to discriminate" not against plaintiff, but against various unknown persons. Generally, "it is not erroneous for a lay witness to express an opinion regarding discrimination in an employment setting so long as the opinion complies with the requirements of MRE 701," *Wilson v General Motors Corp*, 183 Mich App 21, 35[; 454 NW2d 405] (1990) . . . . Given that the court has no indication of what the alleged foundation is for Sawyer's statements – that is, what he in fact observed and perceived which caused him to reach the opinion that "the company" (and it should be noted that Sawyer did not specify any of the persons whose decisions are allegedly at issue in this case) had a tendency to discriminate. The court has therefore not considered the affidavit in support of the response to the motion, since there is no basis on which the court could find that his opinion is "<u>rationally</u>" based on his perception [as MRE 701 requires]. Prior to permitting Sawyer to testify to such opinion at trial, the court would require a specific offer of proof outside of the presence of the jury concerning the nature of his testimony (and given the length of time Sawyer has been absent from the company at the time of plaintiff's termination, it appears unlikely that the court would admit his testimony).

The trial court then noted the similarities between Sawyer's affidavit and Moro's affidavit, and ruled:

> Again, since the court has no indication of what the alleged foundation is for Moro's statements, or precisely when he worked at the company (the affidavit states that he was employed with Millar for thirty years but does not indicate when he left), the court can make no finding as to whether his opinion is rationally based on his perception (or, of course, whether his testimony would assist the trier of fact in determining whether plaintiff was the victim of discrimination). A specific offer of proof (outside the presence of the jury) concerning the nature of his testimony would be necessary before the court could consider admitting such testimony.

The trial court, however, saw Pridemore's affidavit differently, because

> it expresses the opinion that plaintiff has been discriminated against because of his age, based (among other things) on the facts which have been put forth in response to defendant's motion: that just prior to the termination the company hired younger employees (presumably referring to Parker and Bujan). It appears, therefore, that Pridemore's opinion may have a rational basis (although of course, defendants and the jurors may disagree with the conclusions drawn from his perceptions), and defendant's motion is therefore denied without prejudice as to Pridemore's testimony. Certainly, it may be that Pridemore's opinion may not be helpful to the trier of fact – for example, it may be redundant to other testimony presented in the case. The court will reconsider this issue at the time of trial.

Of these three former Millar employees, only Moro testified at trial. Moro attempted to testify that he had sensed discrimination at Millar. In his offer of proof, made outside the jury's presence, Moro claimed that he had witnessed Pridemore, who had been with Millar for eighteen years, be transferred to a new position and replaced by a younger worker. He also knew that Millar had laid off Sawyer following an injury though "there was, like, all kinds of work where younger guys all worked in." Moro also claimed that "only younger mechanics were sent to schools. They were sent to Toledo or they were sent to other technical schools and the rest of us, we were never asked, you know, to go to school or told to go to school, actually." Moro explained that ongoing advances in elevator technology made this sort of training critical. Moro, however, conceded that he did not know whether Pridemore had been transferred because the client was dissatisfied with his work, and that it was his assumption that he had been transferred because of age discrimination. Moro admitted that he had no real knowledge that Millar had terminated Sawyer because of his age. He also acknowledged that he formed his opinion about the discrimination in training opportunities when he saw a list of approximately seventy employees who "went to school and who didn't go to school," and he did not believe that anyone over age fifty had been to school, though he had no idea how individuals were selected to go to school.

The trial court declined to allow Moro to give his opinion testimony regarding discrimination because it was "far too vague." The trial court also found Pridemore's transfer and Sawyer's discharge following an injury to be a "totally different" from the instant case. Further, the trial court noted that Moro had little factual information regarding Sawyer's discharge and the list concerning schooling.

Lesniak now argues that the trial court erred in barring testimony from all three former Millar employees about their observations and opinions that Millar discriminated against older workers. He claims that these witnesses could testify regarding the discrimination they saw at Millar even though they were lay people and their testimony would have embraced an ultimate issue at trial.

B. Standard Of Review

We review evidentiary issues to determine whether the trial court abused its discretion.[12]

C. Analysis

Lesniak is correct that the court rules permit lay opinion testimony and opinion testimony concerning core issues, such as discrimination. MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 704 adds that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The trial court did not, however, bar any testimony from Moro, Pridemore, and Sawyer because they would have testified concerning discrimination and that was an "ultimate issue" at trial. Rather, the trial court, in ruling on the motion in limine and Moro's offer of proof, directly questioned the factual basis for each man's proposed lay opinion.

With respect to Sawyer, the trial court only had his affidavit to reveal the substance of his proposed testimony. Sawyer's affidavit essentially consisted of four sentences, only one of which asserted anything relevant to this action. In that single sentence, Sawyer merely asserted that he thought Millar had a "tendency to discriminate against its employees on the basis of age." As the trial court noted, in addition to giving absolutely no factual basis from which a person reading the affidavit could conclude that Sawyer had actually observed any discrimination, the affidavit did not suggest that Lesniak had suffered any discrimination because of that alleged tendency. Even if Sawyer would have helped the jury understand Millar's discrimination generally, the trial court had good reason to conclude that Sawyer could not provide this testimony "rationally based on" his "perception."[13] Thus, the trial court did not abuse its discretion when it barred Sawyer from testifying.

The trial court also had to rely on Pridemore's affidavit when ruling on whether he could testify at trial. This affidavit offered little more than Sawyer's affidavit did. Though Pridemore, as affiant, tied the discrimination he allegedly saw at Millar directly to Lesniak, he still failed to articulate what he observed that made him draw this conclusion. In the trial court's ruling on the

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[12] See *Miller v Hensley*, 244 Mich App 528, 529; 624 NW2d 582 (2001).

[13] See MRE 701(a).

motion in limine, it left open the possibility that Pridemore would be able to testify at trial. Apparently, the trial court wished to have Pridemore give an additional offer of proof to determine whether he had a factual basis for his opinion. However, Pridemore did not appear at trial to create an additional record concerning his alleged observations at Millar leading to his opinion that the company discriminated against Lesniak. Therefore, the trial court did not abuse its discretion in barring his testimony because it had no factual basis from which it could conclude that Pridemore's testimony would satisfy MRE 701(a).

As for Moro, Lesniak provided the trial court with more information regarding his proposed opinion testimony. Like Pridemore's and Sawyer's affidavits, Moro's affidavit was largely conclusory. In the affidavit, he gave no factual basis for his alleged knowledge that Millar "had a history of" pushing out older workers by hiring new, younger workers or gave training opportunities only to younger workers. Further, at trial during his offer of proof, he conceded that he had no real information concerning Millar's actions regarding older workers, whether the actions related to training opportunities or transfers. Therefore, the trial court did not abuse its discretion in barring Moro's opinion testimony on this issue.

IV. Evidence Of Benefits And Grievance

A. Background

On January 4, 2000, just two weeks before trial, Lesniak filed a motion in limine asking the trial court to bar Millar from introducing any evidence at trial that he received unemployment benefits following his termination and he received insurance benefits following his car accident. Lesniak argued that the collateral source rule barred this evidence, and that the evidence would prejudice the jury. In this same motion Lesniak also asked the trial court to exclude evidence that his union had not resolved his grievance against Millar favorably, contending that the grievance had become irrelevant since the trial court summarily disposed of his contract claim. Finally, Lesniak asked the trial court to bar Millar from presenting any charts and reports purporting to demonstrate Millar's failing finances as the reason for its decision to discharge him. According to Lesniak, MRE 1006 made these reports and charts inadmissible without all the underlying documents used to compile them.

Millar responded that the unemployment benefits were relevant and admissible at trial because they demonstrated that Lesniak was able to work between his layoff and his disabling accident in February 1997. Millar argued that this evidence properly challenged Lesniak's claim that the discrimination he allegedly suffered caused him such severe distress that, even before his car accident, his depression made him disabled. Similarly, Millar argued that the insurance benefits were relevant to whether the termination or his car accident caused him to be disabled, as well as the "nature" and "scope" of that disability. With respect to the union grievance, Millar said that it intended to use its response to the grievance as support for its financial necessity argument, and that it was entitled to explore at trial why Lesniak and the union "chose not to pursue the grievance to the next level . . . ." As for Lesniak's argument that the reports and charts were inadmissible under MRE 1006, Millar countered that it would lay a proper foundation to admit the reports and charts as business records under MRE 803(6).

Having not yet secured a ruling on the motion in limine, the parties brought the unemployment and insurance benefit issues to the trial court's attention on the first day of trial. The trial court ruled:

> I am going to admit the testimony that, in fact, he applied for unemployment benefits. I do think that his statements made in connection with that application are relevant. As, indeed, are his applications for the PIP benefits. I don't see that the jury needs to hear the amounts he received or the nature of them and I would consider giving a special instruction on both of them. Particularly to the extent that you are going to argue, Mr. Barbour, that the fact that he received PIP benefits is evidence that he was disabled as a result of the auto accident and not his mental stress, I think a special instruction has to be given.

Because the parties did not again mention the issues related to the grievance or the charts and reports, the trial court did not address those matters in its ruling from the bench.

Lesniak now argues that the trial court erred in ruling before trial that the evidence of the benefits were admissible because they did not violate the collateral source rule and that evidence surrounding the grievance was admissible. Lesniak does not challenge the trial court's ruling with respect to the reports and charts nor does he specifically challenge any specific trial testimony.

B. Standard Of Review

This evidentiary issue also requires us to review the record to determine whether the trial court abused its discretion in admitting this evidence.[14]

C. Collateral Sources

Because Lesniak does not refer to a statutory collateral source rule, we assume that he means to argue that the common-law collateral source rule barred admitting the evidence that he received unemployment and insurance benefits. "The common-law collateral-source rule provides that the recovery of damages from a tortfeasor is not reduced by the plaintiff's receipt of money in compensation for his injuries from other sources."[15] Though not usually referred to as a tort, "discrimination claims have always been characterized as a species of statutory tort."[16] Plainly, therefore, the evidence surrounding Lesniak's age discrimination claim is subject to this common-law collateral source rule.

Nevertheless, in *Gallaway v Chrysler Corp*,[17] another case concerning an age discrimination claim, this Court explained that when "the introduction of evidence concerning

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[14] See *Miller*, *supra* at 529.

[15] *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984) (Brickley, J.).

[16] *Mack v Detroit*, __ Mich __; 649 NW2d 47, 51, n 6 (2002), citing *Donjakowski v Alpena Power Co*, 460 Mich 243; 247; 596 NW2d 574 (1999).

[17] *Gallaway v Chrysler Corp*, 105 Mich App 1, 7; 306 NW2d 368 (1981).

collateral benefits has bearing on some purpose other than the question of mitigating damages, it is admissible." As a result, the *Gallaway* Court held that the trial court in that case did not err when it admitted evidence that the plaintiff had received social security and worker's compensation benefits because they were relevant to his reason for retiring.[18] Millar has always maintained that the fact that Lesniak received unemployment benefits and insurance benefits were materially related to whether the alleged discrimination caused him to become disabled. In other words, Millar relied on this evidence to prove that, contrary to Lesniak's explicit arguments at trial, its decision to lay off Lesniak did not cause the damages for which Lesniak claimed he was entitled to be compensated. Under Millar's theory, Lesniak's depression developed after he was involved in the car accident because, by receiving unemployment benefits, he was representing to the state that he was fit to work, something he could not do if disabled by depression. Similarly, the insurance benefits established a point somewhat distant from the layoff when Lesniak became disabled, calling into question any causal relationship between the layoff and Lesniak's depression and inability to work. This evidence fit the definition of relevance under MRE 401. Accordingly, under these circumstances, we agree with Millar that the trial court did not err in allowing the company to present this evidence.

Further, the trial court took special steps to prevent the jury from using this evidence concerning the collateral source benefits inappropriately; it barred the evidence of the amount of money Lesniak received from these benefits. At the close of the trial, the trial court also properly instructed the jury:

> You also heard testimony that the plaintiff, after being terminated, received, for a short time, employment compensation benefits. You are not to consider any such benefits received in any evaluation of damages. Therefore, if you award damages, you are not to deduct any such benefits from the damages.

We generally presume that juries follow their instructions.[19] As a result, even if the trial court erred in admitting the evidence, the error was likely so inconsequential that it was not contrary to substantial justice, which means that Lesniak is not entitled to relief on this basis.[20]

D. Grievance

Lesniak argues that the "initial grievance request and the Defendant's initial response may have been relevant to the jury; however, the fact that the grievance is dismissed is irrelevant." Stated another way, Lesniak contends that the trial court should have prevented Millar from introducing evidence that his grievance was dismissed because the union grievance process is not designed to adjudicate discrimination claims, which is why he was referred to the EEOC. Apparently, Lesniak feared that the jury would improperly infer that, because his grievance was dismissed, the jury should automatically reject his discrimination claim.

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[18] *Id*.

[19] See *People v Manning*, 434 Mich 1, 8; 450 NW2d 534 (1990).

[20] See MCR 2.613(A).

Lesniak, however, fails to articulate the legal grounds on which the trial court should have excluded this evidence. If he intended to argue that this evidence was irrelevant, and therefore should have been excluded under MRE 402, he does not say so. Nor does he suggest that the evidence was too unfairly prejudicial, and therefore should have been excluded under MRE 403. He has effectively abandoned this argument.[21]

In any event, there was very little evidence of the grievance presented at trial. Defense counsel mentioned it a single time on the second day of trial when questioning Charpie about whether the collective bargaining agreement prohibited its decision to hire Bujan and Parker or layoff Lesniak. Charpie replied that there was nothing in the materials surrounding the grievance indicating that the collective bargaining agreement prohibited Millar's employment decisions related to this case. Lesniak's attorney also questioned Lesniak about the steps he took following his discharge, which is when he indicated that he filed the grievance and was instructed to contact the EEOC, which issued a letter giving him the right to sue. This evidence was so minimal we cannot say that it prejudiced Lesniak. Further, before submitting the case to the jury, the trial court issued a limiting instruction on this issue, stating:

> You have heard evidence that plaintiff filed a grievance concerning his termination. There is no requirement that an employee, such as Mr. Lesniak, pursue agreements under any collective bargaining agreement. *The fact that Mr. Lesniak filed a grievance is irrelevant to your analysis of the alleged age discrimination by Defendant.*[22]

This is just the proposition of law that Lesniak wanted the jury to understand. Accordingly, as we suggested above, this instruction obviated any improper effect this evidence could have had on the jury, which means that Lesniak is not entitled to relief on this basis.

V. New Trial And Judgment Notwithstanding The Verdict

A. Background

Following Lesniak's loss at trial, he moved for a new trial or judgment not withstanding the verdict (JNOV). He argued that he was entitled to a new trial because of the jury selection and evidentiary issues that we have already discussed. He contended that he was entitled to JNOV because the jury's verdict was against the great weight of the evidence. In making this argument, he suggested that he was wrongfully selected for the layoff, and noted that Millar had hired Bujan and Parker, both of whom were substantially younger than him. Lesniak also contended that the evidence demonstrated that the Elters, who chose not to take him in their respective departments, both made blatantly discriminatory statements to him, and he was qualified to do any type of work as a mechanic. With respect to the JNOV issue, Millar simply responded that it was "interesting" that Lesniak would argue that the evidence did not support the jury's verdict because he never moved for a directed verdict. In Millar's view, there was "simply no basis to set aside the jury verdict in this case."

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[21] See *In re Costs And Attorney Fees*, 250 Mich App 89, 106-107; 645 NW2d 697 (2002).

[22] Emphasis added.

The trial court held a hearing on these motions on March 17, 2000, and announced its ruling from the bench:

> Plaintiff also seeks judgment notwithstanding the verdict, arguing that the verdict was against the great weight of the evidence. Plaintiff argues that defendant could offer no substantial reason why plaintiff was not hired for one of these two service mechanic positions and the person making the decision showed strong signs of discriminatory intent. Here reasonable minds certainly could differ as to these material issues of fact. Specifically, Charlie Elter testified, and he admitted making certain statements referring to plaintiff as an old geezer and asking him when he was going to retire. Mr. Elter, who by my recollection of appearance and testimony was at least as old or older than plaintiff explained that he's an old geezer himself, calls everyone around his age old geezer and that he asked plaintiff about retirement because he's getting ready to retire himself and wanted to chat about various plans. He testified that plaintiff's age had nothing to do with the job selection but that the person selected had more experience directly relevant to the job. The jury believed him and there is simply no basis to set aside their verdict in this case, so I will deny that motion as well.

Following the hearing, the trial court entered an order denying the motions for new trial and JNOV.

Lesniak now argues that the trial court erred in denying his motion for JNOV because, in fact, the verdict was against the great weight of the evidence.

B. Standard Of Review

We review a trial court's decision to deny a motion for JNOV to determine whether the trial court abused its discretion.[23] There is case law that applies a de novo standard of review to JNOV issues.[24] Yet, this abuse of discretion standard of review is actually appropriate because it is consonant with the discretionary language used in MCR 2.610(B)(1), and because Lesniak actually raises grounds typically considered in the context of a motion for new trial, which is subject to the abuse of discretion standard of review.[25]

C. Great Weight Of The Evidence

MCR 2.610(A)(1) states in part that, if a jury returns a verdict, "a party may move to have the verdict and judgment set aside, and to have judgment entered in the moving party's favor." When presented with this motion for JNOV "the [trial] court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as requested in the motion."[26] While a motion for JNOV and new trial often overlap given the trial

[23] See *Anton v State Farm Mut Ins Co*, 238 Mich App 673, 683; 607 NW2d 123 (1999).

[24] See, e.g., *Burnett v Bruner*, 247 Mich App 365, 377; 636 NW2d 733 (2001).

[25] See *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

[26] MCR 2.610(B)(1).

court's authority to grant either type of relief under MCR 2.610, Lesniak's argument that the great weight of the evidence contradicted the jury's verdict is usually evaluated in the new trial context. For instance, in *Phinney v Perlmutter*,[27] this Court explained that,

> with respect to a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. This Court's function is to determine whether the trial court abused its discretion in making such a finding. This Court gives substantial deference to the trial court's conclusion that a verdict was not against the great weight of the evidence.[28]

Thus, to address the substance of Lesniak's argument, we view this issue from the new trial perspective despite his references to JNOV.

The structure of Lesniak's argument is simple. First, he outlines the burden-shifting scheme that applies in age discrimination cases under the CRA that rely on circumstantial evidence of discrimination.[29] He then identifies the evidence supporting his prima facie case[30] and emphasizes the evidence supporting his argument that the nondiscriminatory reason Millar named for his layoff, financial necessity, was merely a pretext to hide the true discriminatory animus that motivated his layoff.[31] For example, he argues that the fact that Millar continued to hire new mechanics, like Bujan and Parker, despite the supposed economic downturn for the company belies its claim that it could not longer afford to employ him. That these new employees were younger than him, he contends, suggests that this financial excuse for the layoff was intended to disguise Millar's discriminatory animus toward older workers.

The problem with Lesniak's argument is that the evidence does not heavily preponderate in his favor. Rather, it is conflicting. We can assume for the sake of argument that the evidence of Lesniak's prima facie case was not largely in dispute at trial.[32] He was in a protected class defined by his age; he was discharged; after more than thirty-five years in the industry with satisfied customers, he was qualified to be an elevator mechanic; and at least one of the people who replaced him, Austin, was younger. However, once Millar claimed that it laid off Lesniak because of financial constraints, Lesniak was forced to demonstrate by a preponderance of the evidence that this legitimate reason for his discharge was merely a pretext to hide the company's

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[27] *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997).

[28] Citations omitted.

[29] See *Debrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539-540; 620 NW2d 836 (2001); *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001).

[30] See *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999) ("Under an intentional discrimination theory of age discrimination, the plaintiff must show (1) membership in a protected class, (2) discharge from employment, (3) that the plaintiff was qualified for the position, and (4) that he was replaced by a younger person.").

[31] *Id*.

[32] See *id*.

age discrimination.[33] This is where the evidence, even if not perfectly balanced or strongly favoring Millar, did not overwhelmingly favor Lesniak.

For each point Lesniak makes, Millar presented a countervailing piece of evidence. For instance, though Lesniak draws our attention to the evidence that Bujan and Parker stayed far longer than the three or four month contract on which they were originally hired to work lasted, Millar presented evidence that the company received additional contracts suitable for them after that original contract ended. Lesniak notes that, even though Millar claimed to have lost business, it actually gained new accounts, but Charpie testified that these new accounts did not offset the lost business. Lesniak suggests that Michalik should have been the person laid off because he had lost accounts and was in the third tier, and that the only reason was not laid off was because he was younger. Yet, Charpie and Cheyne both testified that they never considered age when choosing a person to lay off, and Cheyne added that he had received complaints from the office and field regarding Lesniak. This argument and rebuttal in the evidence continues in many other respects. Thus, though Lesniak's evidence would have allowed a jury to conclude that the reasons Millar put forth for Lesniak's discharge were a pretext for age discrimination, the conflict in the evidence indicates that the jury's verdict was not against the great weight of the evidence.

Further, though Lesniak argues that this case is like *Featherly v Teledyne Industries, Inc*,[34] *Featherly* involved a motion for summary disposition under MCR 2.116(C)(10).[35] To survive a motion for summary disposition on this ground, the nonmovant must only demonstrate that a dispute of material fact exists to be decided at trial by the jury.[36] This is a far lower evidentiary threshold than the preponderance standard that applies at trial[37] when the jury is allowed to weigh the evidence, consider which witnesses were more credible than others, and decide the facts.[38]

In this case, the evidence on the record at the time Millar moved for summary disposition did reflect a dispute, especially regarding whether the business reasons it cited for Lesniak's discharge was a pretext. This is why the trial court did not summarily dispose of his age discrimination claim. However, when the parties submitted that conflicting evidence to the jury, the jury simply decided that Millar's evidence was more persuasive, and therefore did not meet the preponderance standard. The trial court noted this very factor when it denied the motion for JNOV. Even if we were not required to give great deference to the trial court's ruling on this motion because it heard the evidence as it was presented to the jury,[39] we still could find no reason to disagree with the trial court's decision that the jury's verdict in favor of Millar was not

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[33] See *id*.

[34] *Featherly v Teledyne Industries, Inc*, 194 Mich App 352; 486 NW2d 361 (1992).

[35] *Id*. at 354.

[36] See MCR 2.116(G)(4).

[37] See *Debrow, supra* at 538.

[38] See *People v Hardiman*, 466 Mich 417, 431; 646 NW2d 158 (2002).

[39] See *Phinney, supra* at 525; see also MCR 2.613(C).

against the great weight of the evidence. Because the evidence was conflicting,[40] and did not greatly favor Lesniak, the trial court did not abuse its discretion in denying Lesniak's motion.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

[40] See *Ewing v Detroit*, __ Mich App __; __ NW2d __ (2002), slip op at 11.