STATE OF MICHIGAN

COURT OF APPEALS

ARNETTA GRABLE, Personal Representative of the Estate of LAMAR GRABLE, Deceased, Plaintiff-Appellee, v EUGENE BROWN, Defendant-Appellant.	UNPUBLISHED December 20, 2005 No. 256215 Wayne Circuit Court LC No. 99-906156-NO

Before: Gage, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment following a jury verdict in favor of plaintiff in this wrongful death action. Defendant also raises claims related to an order denying his motions for judgment notwithstanding the verdict (JNOV) and remittitur and granting in part and denying in part plaintiff's motion for costs, attorney fees and interest. We affirm.

I. Background

This action arose out of the shooting and death of plaintiff's decedent, Lamar Grable, by defendant, a Detroit police officer. Grable's mother, Arnetta Grable, as personal representative of Grable's estate, instituted a wrongful death action against defendant. After voluntarily dismissing her original complaint, plaintiff filed another complaint for wrongful death on March 2, 1999. Plaintiff alleged counts of gross negligence and assault and battery. A jury trial followed. Defendant claimed that Grable shot at him and that he returned fire in self-defense. Plaintiff asserted that Grable did not pose a threat to defendant's life and was misidentified as the man officers saw holding a gun. After hearing witness and expert testimony, the jury returned a verdict on August 6, 2003. The jury found in favor of plaintiff on both the gross negligence and assault and battery claims. The jury awarded compensation to Grable in the amount of $4 million. Accordingly, on October 10, 2003, the trial court entered judgment in favor of plaintiff for that amount. On May 21, 2004, the trial court denied defendant's post-trial motions for JNOV and remittitur and granted in part and denied in part plaintiff's post-trial motion for costs, attorney fees and interest.

II. Analysis

A. JNOV

On appeal, defendant contends that he was entitled to JNOV on the claims of gross negligence and assault and battery because no reasonable jury could have found against defendant based on the facts presented at trial. We disagree.

We review de novo a trial court's decision to grant or deny a motion for JNOV. *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004). The evidence and all legitimate inferences from the evidence must be examined in the light most favorable to the nonmoving party. *Id*. The jury verdict must stand where reasonable jurors could honestly have reached different conclusions on the matter. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). The moving party is entitled to JNOV only if there was insufficient evidence presented to create a claim as a matter of law. *Craig, supra* at 77.

Pursuant to MCL 600.2922, a personal representative of an estate of a deceased person is entitled to bring a cause of action where the death was caused by the "wrongful act, neglect, or fault of another." Here, plaintiff alleged a count of gross negligence and a count of assault and battery against defendant for the shooting and death of Grable. The jury found that defendant was grossly negligent and his gross negligence caused Grable's death and that defendant committed an assault and battery.

i. Gross Negligence

Regarding the gross negligence claim, the governmental tort liability act, MCL 691.1401 *et seq*., provides a governmental employee with immunity from tort liability if the employee's conduct "does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). "As used in this subdivision, 'gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Beaudrie v Henderson*, 465 Mich 124, 138; 631 NW2d 308 (2001), quoting MCL 691.1407(2)(c). However, this Court has rejected prior attempts to convert claims involving elements of intentional torts, including excessive force, into claims of gross negligence. *VanVorous v Burmeister*, 262 Mich App 467, 483-484; 687 NW2d 132 (2004); *Sudul v Hamtramck*, 221 Mich App 455, 458, 477; 562 NW2d 478 (1997).

In *VanVorous*, for example, the plaintiff brought a count of gross negligence, alleging that defendants "undertook the obligation to properly perform their duties to ensure the safety of all parties during the chase and subsequent attempted apprehension of Mr. VanVorous," and that they "breached the duty of care they owed to Mr. VanVorous by utilizing excessive force to subdue or control Mr. VanVorous and failing to follow proper police procedure in apprehending him." *Id*. at 483. This Court concluded that the plaintiff's claim of gross negligence was completely premised on her claim of excessive police force, and therefore, the plaintiff did not state a claim for gross negligence upon which relief could be granted. *Id*. at 483-484.

Here, plaintiff's complaint contained a count of gross negligence, alleging that defendant shot Grable and that Grable fell to the ground after the initial shooting, but defendant continued to shoot Grable at least seven more times, including at least four gunshots from close range. Plaintiff contended that "all of the Defendant's actions were entirely unjustified and constituted an excessive use of force and abuse of power and murder." At trial, plaintiff argued that defendant was grossly negligent for failing to contact dispatch for assistance, chasing after a suspect down a dark alley and shooting at the wrong person. However, plaintiff also argued that

defendant used excessive force because he should not have shot Grable after his arm was disabled from the shot to the back of his arm and after he fell to the ground.

As in *VanVorous*, plaintiff's claim of gross negligence is premised on the intentional tort claim. Although plaintiff stated that the case involved two separate claims, plaintiff's arguments blurred the lines pertaining to gross negligence with those pertaining to assault and battery. Because this Court has rejected attempts to couch claims of intentional torts as claims of gross negligence, we hold that the trial court erroneously failed to vacate that portion of the jury's verdict finding that defendant acted with gross negligence.

ii. Assault and Battery

Regarding the assault and battery claim, "[a]n assault is defined as any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). A battery is defined as "the wilful and harmful or offensive touching of another person which results from an act intended to cause such a contact." *Id*. A government employee is not immune from liability for intentional torts, including the tort of assault and battery. *Sudul*, *supra* at 458. However, as explained above, a governmental officer's actions that would normally constitute intentional torts are shielded from liability if those actions are justified because they were objectively reasonable under the circumstances. *VanVorous*, *supra* at 483, citing *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984).

In Michigan, a police officer may use reasonable force to effectuate a lawful arrest where the suspect resists arrest. *Tope v Howe*, 179 Mich App 91, 106; 445 NW2d 452 (1989). An officer who uses excessive force may be held liable for assault and battery. *White v City of Vassar*, 157 Mich App 282, 293; 403 NW2d 124 (1987). Moreover, if a police officer reasonably believes that he is in great danger, the officer may use force that is reasonable in self-defense and is not required to retreat when faced with a "display of force" by the suspect. *Alexander v Riccinto*, 192 Mich App 65, 69; 481 NW2d 6 (1991). Thus, when faced with a life threatening circumstance, "[a] peace officer may use deadly force in defense of his own life, in defense of another, or in pursuit of a fleeing felon." *Ealey v Detroit*, 144 Mich App 324, 332; 375 NW2d 435 (1985) (citation omitted).

"If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). As the trial court determined, a reasonable juror could have found that defendant did not act in self-defense. At trial the parties presented conflicting evidence regarding whether defendant's actions were justified. Although defendant and Yost testified that Grable shot at defendant and that defendant returned fire, there was circumstantial evidence to support plaintiff's theory that Grable did not shoot at defendant because Grable never possessed a gun. Circumstantial evidence to support or oppose a proposition is equal with direct evidence. *Reed v Breton*, 264 Mich App 363, 375; 691 NW2d 779 (2004). Specifically, there was evidence that, shortly before the chase and shooting, Grable attended a Police Athletic League (PAL) party where he was searched for weapons and found to possess none. There was no evidence that Grable obtained a weapon between the time that he left the PAL party and the

shooting occurred. There was also no evidence of Grable's fingerprints on the gun found next to his body.

Although defendant contended that he was merely responding to Grable's actions, there was evidence to support plaintiff's theory that defendant used an unreasonable amount of force. There was evidence that, after the first and second rounds of shooting, defendant again shot Grable as he lay on the ground. Defendant testified that, after Grable fell to the ground, it appeared that Grable was raising his gun as if to shoot at defendant. Defendant contended that he responded by shooting at Grable two more times. However, on cross-examination, defendant made the following admission in response to a question that plaintiff's counsel posed:

> *Q.* Mr. Grable was on the ground over here and you fire those four shots, you know now, into his chest, point blank range, contact range, as he fell to the ground. Let me ask you this. Is it possible, sir, that rather than Mr. Grable being erect, that he was instead already down on the ground and you punitively, kneeling down on one knee, sir, pumping him with those four rounds? Is that possible?
>
> *A.* That's possible.

Furthermore, there were several inconsistencies between the officers' trial testimony and their prior statements and between their trial testimony and the physical evidence that could have caused a reasonable juror to disbelieve the officers' version of events. Regarding the inconsistencies with the officers' prior statements, Yost's version of the events in her preliminary report, where she recalled only one round of shooting, was contrary to her version at discovery and trial, where she recalled two rounds of shooting between Grable and defendant. Yost's original wording regarding the incident changed from defendant "tackled" Grable to "collided" with Grable and from Grable held what she "believed to be a weapon" to Grable was "armed" when he ran from the police. Defendant also had minor inconsistencies between his preliminary report and trial testimony regarding his distance from Grable when Grable shot at him and whether Grable "waited" for him behind the mound where the scuffle ensued.

There was also testimony from expert witnesses of inconsistencies between the officers' version of the events and the physical evidence. Most notably, plaintiff's expert, Dr. John G. Peters, testified that, evidence of stippling around one of the holes in defendant's shirt, and not around the other hole, indicated that the barrel of the gun that shot defendant "moved some distance away" for the shot that showed no stippling. This was contrary to defendant's testimony that he was shot when he and Grable were so close to each other that the barrel of Grable's gun was probably touching his clothing. In addition, Dr. Peters noted that, in defendant's preliminary report of the shooting and deposition, he failed to account for the near-contact wound to the back of Grable's left arm. Dr. Peters testified that, if Grable had fired at defendant using his right hand as defendant contended, there should not have been gunpowder on both of Grable's hands. Dr. Peters opined that the presence of gunpowder on both of Grable's hands indicated that he held his hands in a defensive position when he was shot. Dr. Peters testified to inconsistencies between Yost's testimony regarding the manner in which the gun found near Grable's body was fired. Dr. Peters opined that these inconsistencies raised "a serious doubt" regarding the number of shots fired or what happened to the weapon as it was being examined. Dr. Peters found it odd that Yost's version of the events seemed to become clearer as time passed since one's memory is

generally fresher closer to the event. Dr. Peters opined that defendant's and Yost's behavior could be consistent with peer secrecy and deviant police behavior.

Another of plaintiff's experts, Dr. Werner Spitz, testified that, contrary to defendant's testimony that Grable fell to the ground after defendant shot him at close range three or four times, Grable would likely have fallen backward after the first infliction of one of the near-contact wounds to Grable's chest. Dr. Spitz also testified that, contrary to defendant's testimony that Grable was lying on his right side after he fell to the ground and when defendant shot him, the three wounds to Grable's chest were inflicted while Grable was on his back because the wounds had abrasions that can only occur where there is pressure against the skin when the bullet passes through. Dr. Spitz opined that the three wounds to Grable's chest were "inflicted deliberately in a short period of time or in a rapid or fairly rapid succession" to either disable or kill the victim.

Disputed factual issues and the assessment of the credibility of witnesses are within the province of the jury's determination. *Wiley*, *supra* at 491; *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000). Given the conflicting evidence and the above-mentioned inconsistencies, there were material factual issues for the jury. When viewing the evidence in a light most favorable to plaintiff and allowing plaintiff all reasonable inferences, reasonable minds could differ on whether defendant's actions in shooting Grable were justified. Therefore, we conclude that the trial court properly denied defendant's motion for JNOV with regard to the claim of assault and battery.

Despite reversal of one of the two theories of recovery, we hold that defendant's contention of error regarding the finding of gross negligence is rendered moot by the jury's finding that defendant's actions constituted the intentional tort of assault and battery. The court rules allow both for a general verdict and for special verdicts. MCR 2.512 and 2.514. "'[T]he special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial.'" *Sudul*, *supra* at 459, quoting *Sahr v Bierd*, 354 Mich 353, 365; 92 NW2d 467 (1958), quoting Sunderland, *Verdicts, General and Special*, 29 Yal LJ 253, 259 (1920).

In the instant case, the jury answered the following questions on the special verdict form:

> Question number one: Did Eugene Brown commit an assault and battery upon Lamar Grable causing his death? Our answer is yes.
>
> Question number two: Was Eugene Brown grossly negligent and, if so, did that gross negligence cause Lamar Grable's death? Our answer is yes.
>
> Question number three: What is the total amount of damages to compensate the Estate of Lamar Grable? The jury decided upon an amount of four million dollars.

Furthermore, the trial court instructed the jury regarding the separate elements for gross negligence and proximate cause and for assault and battery. Therefore, the special verdict concerning assault and battery was unaffected by the error relating to the gross negligence claim

where there was sufficient evidence for a jury question regarding assault and battery and the jury specifically found that defendant committed assault and battery against Grable.

B. Instructional Error

Next, defendant argues that he is entitled to a new trial because the trial court erred in instructing the jury that it only needed to find that defendant's grossly negligent conduct was "a" proximate cause, not "the" proximate cause, of Grable's injuries and death and instructing the jury on false arrest when that theory was neither pleaded nor supported by the evidence. We disagree.

We review de novo claims of instructional error. *Case v Consumers Powers Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Id*. Reversal is required where instructional error "resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice." *Cox v Bd of Hosp Mgrs*, 467 Mich 1, 8; 651 NW2d 356 (2002) (citations omitted).

Regarding the proximate cause instruction, defense counsel stated that he had no objection to the proximate cause instruction as revised by the trial court and that he waived all additional arguments concerning the agreed upon instructions. A party waives its right to appeal an issue when the party specifically assents to the action or decision by the trial court. *People v Carter*, 462 Mich 206, 220; 612 NW2d 144 (2000); *Kohn v Ford Motor Co*, 151 Mich App 300, 310; 390 NW2d 709 (1986). Because defense counsel agreed to waive further argument of the agreed upon instructions, we hold that defendant waived this issue for appeal. See *Carter*, *supra* at 220; *Kohn*, *supra* at 310. Nonetheless, any error regarding the proximate cause instruction does not require reversal because a finding of proximate cause relates only to the gross negligence claim, and we previously concluded that the special verdict finding assault and battery remains unaffected by error concerning the gross negligence claim.

Regarding the false arrest instruction, defendant argues that the trial court erred in instructing the jury on CJI 115.08. When a party so requests, a standard jury instruction must be given if it is applicable and accurately states the applicable law. MCR 2.516(D)(2); *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997). "The determination whether an instruction is accurate and applicable to a case rests within the sound discretion of the trial court." *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). The trial court need not give a requested instruction if the instruction would "simply add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jurors to decide the case intelligently, fairly, and impartially." *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985). Where jury instructions are erroneous or inadequate, reversal is required if failure to reverse would be inconsistent with substantial justice. MCR 2.613(A); *Willoughby v Lehrbass*, 150 Mich App 319, 336; 388 NW2d 688 (1986).

As given by the trial court in the instant case, CJI 115.08 provides:

> A citizen has the right to resist an false arrest. However, the amount of force a citizen may use to resist an false arrest must be reasonable under the circumstances.

As given by the trial court, CJI 115.09 provides:

> If a person has knowledge or by the exercise of reasonable care should have knowledge that he or she is being lawfully arrested by a law enforcement officer, it is the duty of that person to refrain from resisting the arrest.
>
> An arresting officer may use such force as is reasonably necessary to effect a lawful arrest. Here, an officer who uses more force than is necessary - - I'm sorry. An officer who uses more force than is reasonably necessary to effect a lawful arrest commits a battery upon the person arrested to the extent that the force used was excessive.

Before jury instructions were given, defense counsel requested CJI 115.09, and plaintiff's counsel responded by requesting CJI 115.08. The trial court decided to read both instructions.

Contrary to defendant's contention, the instruction did not place false arrest at issue. Neither CJI 115.08 nor CJI 115.09 contains the definition or defenses for a false arrest claim. See CJI 116.01-116.21. During trial, plaintiff's counsel admitted that false arrest was not at issue. At issue was the claim of assault and battery and whether defendant's conduct of shooting at Grable was justified. CJI 115.08 is related to CJI 115.09 and both instructions are defenses to an assault and battery claim regarding an officer's use of force to arrest a suspect. See *People v Krum*, 374 Mich 356, 361; 132 NW2d 69 (1965) (holding that an individual may use reasonable force as is necessary to resist an illegal arrest); *Delude v Raasakka*, 391 Mich 296, 302; 215 NW2d 685 (1974) (holding that an officer has the right to protect himself and others during an arrest and may use reasonable force to effect an arrest). The instructions are applicable to the question regarding the proper amount of force to be used to effect an arrest. In addition, the trial court comprehensively instructed the jury on the elements of assault and battery and on the defenses to that claim. Because defendant's rights were sufficiently protected, we conclude that the trial court did not abuse its discretion in giving CJI 115.08.

C. Conduct of Counsel

Finally, defendant claims he is entitled to a new trial because plaintiff's counsel engaged in improper conduct at trial. We disagree.

"When reviewing claims of improper conduct by a party's lawyer, this Court must first determine whether the lawyer's action was error and, if so, whether the error requires reversal." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191; 600 NW2d 129 (1999). "A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Id*. at 191-192. Even if not preserved, we will review the matter to determine whether counsel's remarks "'may have caused the result or played too large a part and may have denied a

party a fair trial.'" *Wiley*, *supra* at 501, quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982).

Defendant argues that he was denied a fair trial based on misconduct by plaintiff's counsel on five alleged grounds: 1) injecting race into the proceedings, 2) portraying police officers as a group as untruthful and protective of each other, 3) urging the jury to discount the truthfulness of Yost's testimony because she invoked her fifth amendment privilege against self-incrimination, 4) ignoring a pretrial stipulation of the parties by introducing evidence that Grable was a law-abiding individual who had great respect for police, and 5) using inflammatory language to influence the jury. First, defendant argues that plaintiff's counsel improperly injected race into the proceedings during voir dire. Because defense counsel objected to plaintiff's questions to the jury regarding racial prejudice but did not request further relief in the form of a curative instruction or a mistrial, this issue has not been preserved for appeal. See *Wiley*, *supra* at 501. Nevertheless, review is proper to determine whether counsel's remarks may have caused the result or played too large a role so as to deny defendant a fair trial. *Id*., citing *Reetz*, *supra* at 103.

During voir dire, plaintiff's counsel questioned potential jurors regarding whether they believed that, "if a [p]olice [o]fficer decides to stop and detain a young African-American man, that he obviously must be doing something wrong just because he stopped and detained and investigate[d]?" Plaintiff's counsel also inquired of the potential jurors whether they associated with individuals who are from ethnic groups other than their own. Plaintiff's counsel inquired how the jurors would value Grable's life compared to "a young man who might live in Livonia or Dearborn Heights or even Wyandotte" or a "Caucasian young man."

A fair trial "demands that the jury should be free from bias and prejudice in all cases, and that they enter upon the trial of the cases with the single desire and purpose of doing equal and exact justice between the parties . . . ." *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 235; 445 NW2d 115 (1989), quoting *Theisen v Johns*, 72 Mich 285, 292; 40 NW 727 (1888), overruled in part on other grounds, *Hink v Sherman*, 164 Mich 352; 129 NW 732 (1911). Therefore, "[i]t is a general principle that remarks calculated to prejudice a jury are improper." *In re Widening of Woodward Avenue*, 297 Mich 235, 246; 297 NW 468 (1941). "'Appellate courts should not interfere, unless the errors complained of are such as may fairly be said to have had a controlling influence in securing the result.'" *Id*., quoting *In Fort-Street Union Depot Co v Jones*, 83 Mich 415; 47 NW 349 (1890).

In the instant case, the record does not show that the comments and questions at issue were intended to prejudice the jury or that they had a substantial influence on the results. Instead, the prospective jurors were asked to respond to questions about whether they held certain racial biases. Such questions relating to juror biases are typically asked in voir dire. Therefore, we conclude that the comments and questions of plaintiff's counsel regarding racial prejudice did not result or play too large a role so as to deny defendant a fair trial.

Second, defendant argues that plaintiff's counsel improperly portrayed police officers as a group as untruthful and protective of each other. Defendant contends that this was error because "no special weight should be given against the credibility of a police officer merely because he is a police officer." Defendant neither cites to any portion of the record nor to any authority to support this particular assertion. "An appellant may not merely announce its

position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position." *Wiley*, *supra* at 499, citing *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Nevertheless, we note that, because witness credibility was at issue, plaintiff's counsel was permitted to imply that adverse witnesses, including police officers, were fabricating their testimony. See *Reetz*, *supra* at 109.

Third, defendant argues that plaintiff's counsel erroneously encouraged the jury to discount the truthfulness of Yost's testimony because she invoked her Fifth Amendment privilege against self-incrimination. Because defense counsel objected to these comments and moved for a mistrial, this issue has been preserved for appeal. See *Wiley*, *supra* at 501. However, defendant fails to cite authority to support its contention that the comments at issue are improper and require reversal. Again, this Court has refused to search for authority to support an appellant's position. *Id*. at 499, citing *Wilson*, *supra* at 243. Nevertheless, we note that it was not error for counsel to question Yost regarding her assertion of the privilege and to comment regarding the negative inference of such an assertion. When an adverse inference is permitted against a party to a civil action, it necessarily follows that such an inference is also permitted against a witness where, as here, it is relevant to the credibility of the witness. See *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995); *Powell*, *supra* at 72.

Fourth, defendant argues that plaintiff's counsel erred in ignoring a pretrial stipulation of the parties by introducing evidence that Grable was a law-abiding individual who had great respect for the police. Defendant failed to object to the actions of plaintiff's counsel in this regard; however, review is proper to determine whether counsel's remarks may have caused the result or played too large a role so as to deny defendant a fair trial. *Wiley*, *supra* at 501, citing *Reetz*, *supra* at 103.

Before the trial commenced, the parties agreed to the following:

> [I]f the Plaintiff and Plaintiff's witnesses do not call, do not present evidence of Lamar Grable's character for peacefulness or law abidedness as articulated in the Michigan Rules of Evidence, then evidence of any arrest or existence of an arrest warrant will not be offered by the Defense.

However, the parties also agreed that plaintiff's counsel was allowed some exceptions, including "to present evidence that Mr. Grable grew up with a great respect for the Police . . . ." On appeal, defense counsel cites to the testimony of Grable's mother, Arnetta Grable, in which she told the jury that she had family members who were police officers, that Grable knew and was close to these officers, and that Grable "had a good understanding of law enforcement and what their job was. He was a respectful young man and he respected the Police Department. He respected those in Law Enforcement." Given the exception to which the parties agreed before trial, we conclude that these comments were not contrary to the terms of the agreement. Therefore, there was no error requiring reversal.

Fifth, defendant argues that plaintiff's counsel used inflammatory language to influence the jury. Defendant contends that plaintiff's counsel erroneously referred to defendant as a murderer and to his conduct as an execution, asserted that defendant was a deviant cop and should be indicted, and compared the instant case to two movies about rogue police officers.

Defense counsel preserved part of this issue by objecting to the references to defendant as a murderer and to defendant's conduct as an execution and moving for a mistrial. See *Wiley*, *supra* at 501. Therefore, we must determine whether counsel's actions constitute error and, if so, whether this error requires reversal. *Ellsworth*, *supra* at 191.

Before the trial commenced, the parties agreed that plaintiff's counsel was not to reference or suggest "criminality" by defendant and not to "call [defendant] a murderer or an assassin or suggest that he is a felon, committed a felonious act." In exchange for this promise, defense counsel agreed to make "no reference to any Governmental decision not to prosecute [defendant]." Despite this agreement, plaintiff's counsel referred to the shooting of Grable as an execution and suggested that defendant had "the motivation to not got to jail for a murder."

An attorney's remarks are cause for reversal where "they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Ellsworth*, *supra* at 191-192. "[T]he trial court has a duty to assure that all parties who come before it receive a fair trial. Consequently, if counsel exceeds the proper bounds of argument, a judge should interrupt to correct counsel and take any curative measures which are necessary." *Reetz*, *supra* at 103 n 9. Plaintiff's counsel briefly mentioned these terms during closing argument. The record does not indicate that the alleged misconduct of plaintiff's counsel was egregious and repetitive. See *Id*. at 107 n 20. Moreover, defense counsel also breached the pretrial agreement by informing the jury of the outcome of the internal investigation. The trial court correctly gave an instruction to disregard the statements of plaintiff's counsel referencing "murder and/or execution" and the statements of defense counsel regarding the "finding by any investigative body." Accordingly, we conclude that any error caused by these comments was alleviated by the curative instruction to the jury.

Defense counsel failed to object to the comments of plaintiff's counsel urging the jury to "indict" defendant and comparing this case to two movies about rogue police officers; however, review is proper to determine whether counsel's remarks may have caused the result or played too large a role so as to deny defendant a fair trial. *Wiley*, *supra* at 501, citing *Reetz*, *supra* at 103. During closing argument, plaintiff's counsel encouraged the jury to "indict" defendant for his conduct. Also during closing, plaintiff's counsel compared the instant case to the movies *Training Day* and *Internal Affairs*, which both have plots about corrupt police officers. Specifically, plaintiff's counsel stated, "Is this life imitating art or is art imitating life? You've seen the movie Training Day, you've sent he movie Internal Affairs. The stuff is possible. And don't believe for a minute that it's not." Each of these comments was mentioned only once during closing argument. Therefore, the record does not indicate that the alleged misconduct of plaintiff's counsel was repetitive. See *Reetz*, *supra* at 107 n 20. Moreover, the trial court instructed the jury that "[a]rguments, statements, and remarks of the attorneys are not evidence and you should disregard anything said by an attorney which is not supported by evidence or by your own general knowledge and experience." Generally, instruction to the jury that the statements of counsel are not evidence is sufficient to cure any prejudice resulting from any improper remarks of counsel. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). Therefore, we conclude that counsel's conduct was either not improper, or it was harmless error and did not amount to a controlling influence on the verdict.

Affirmed.

/s/ Hilda R. Gage
/s/ Christopher M. Murray