STATE OF MICHIGAN

COURT OF APPEALS

ELLIS L. ROSS and ROGER HOLLAND,

Plaintiffs-Appellees,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

UNPUBLISHED
December 29, 2005

No. 250636
Oakland Circuit Court
LC No. 02-039304-NZ

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant General Motors appeals from the jury verdicts awarding plaintiff Ellis L. Ross $112,558 for lost wages and benefits and $2,600,000 for emotional distress and awarding plaintiff Roger Holland $398,234 for lost wages and benefits and $3,100,000 for emotional distress. Plaintiffs alleged that they failed to obtain promotions based on their age, and the jury found defendant liable for age discrimination based on the Civil Rights Act, MCL 37.2101. We reverse and remand.

Defendant first argues that the trial court abused its discretion in denying defendant's motion to sever the claims of Ross from the claims of Holland. We agree. We review a trial court's decision to deny severance for an abuse of discretion. *Commonwealth Capital v McElmurry*, 102 Mich App 536, 542; 302 NW2d 222 (1980).

MCR 2.505(B) provides that consolidated actions may be severed (1) for convenience, (2) to avoid prejudice, or (3) when separate trials will be conducive to expedition and economy. The power to sever, however, "should be exercised only upon the most persuasive showing that the convenience of all parties and of the court requires such drastic action or that prejudice to a party cannot otherwise be avoided than by such order of separation." *Danyo v Great Lakes Steel Corp*, 93 Mich App 91; 286 NW2d 50 (1979), citing *Osgerby v Tuscola Circuit Judge*, 373 Mich 237, 241; 128 NW2d 351 (1964).

Though only the most extraordinary circumstances justify severing consolidated claims, this Court affirmed a trial court's finding that severance was appropriate in a case with similar facts. *Legendre v Monroe County*, 234 Mich App 708; 600 NW2d 78 (1999). In *Legendre*, this Court concluded that the trial court did not abuse its discretion when it ordered the plaintiff's claim to be severed from that of her coworker. The elected Prosecuting Attorney of Monroe County, chose not to reappoint Legendre, the plaintiff, and her coworker Nancy Fleick to their

positions as assistant prosecutors. Legendre and Fleick attributed the prosecutor's decision to sex discrimination. Fleick additionally alleged age discrimination. The trial court severed the women's claims, and the decision was appealed. *Id*. at 711-713.

This Court affirmed the trial court's decision to sever because different proofs would be required to establish each woman's case. The claims by Legendre arose from a different set of occurrences than Feick's. Legendre and Feick had different backgrounds, experience levels, and longevity with the prosecutor's office. Moreover, Feick alleged age discrimination, while Legendre did not. The court concluded that the differences outweighed the similarities. Though the plaintiffs worked in the same department and claimed discrimination by the same person on the same date, the Court found that their different positions, lengths of service, and experience levels raised the potential for jury confusion and prejudice against the defendants. *Id*. at 719-721.

The differences between Ross's and Holland's cases are at least as striking as those between Legendre and Fleick. While Ross and Holland both worked in the paint department of the Orion plant, they had different qualifications, different levels of seniority, held different positions in the department, and sought different positions. They had different responsibilities and worked under different managers. Ross retired from General Motors claiming discrimination had made it impossible to continue working, whereas Holland continued to work for General Motors and stated that he was happy in his position as launch manager. The only common question of fact was plaintiffs' allegation that one of defendant's managers, because of animus for older workers, played a role in their being denied positions for which they were qualified.

In *Legendre*, this Court concluded that the differences between Legendre's and Fleick's claims were so great as to harbor the potential for jury confusion and prejudice against the defendants and warrant severance. Defendant in the present case argues that the consolidated trial resulted in jury confusion and prejudice because the jury heard testimony from each plaintiff that would not have been admissible in a trial concerning the other plaintiff. Large portions of Ross' testimony had nothing to do with proving Holland's claims, and vice versa; thus, this testimony was irrelevant and prejudicial to defendant. In its second issue on appeal defendant also argues that it was prejudiced by some of the testimony of plaintiff's coworkers. For the reasons discussed below, defendant is correct that it was prejudiced by the consolidated trials and by some of the testimony of plaintiff's coworkers. While severance is an extraordinary provision to be granted only upon the most persuasive showing that prejudice to a party cannot otherwise be avoided, defendant has made that showing. The trial court abused its discretion in denying defendant's motion to sever plaintiffs' claims and therefore, a new trial is warranted. *Legendre, supra*.

Defendant next argues that the trial court improperly admitted the testimony of non-party General Motors employees. We agree. We review a trial court's decision to admit evidence for an abuse of discretion. *Chmielewski v Zermac*, 457 Mich 593, 614; 580 NW2d 817 (1998).

The trial court properly admitted the testimony of these witnesses addressing their opinions regarding discrimination suffered by plaintiffs. A lay witness may express an opinion regarding discrimination in an employment setting if the opinion is (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. *Wilson v General Motors Corp*, 183 Mich App 21, 35; 454 NW2d 405 (1990). The trial court also properly permitted these witnesses to testify regarding their observations of discrimination suffered by plaintiffs. Such testimony is relevant, and thus, admissible. However, opinion testimony about whether the witnesses feel *they* have been discriminated against is irrelevant, and thus, inadmissible. This case did not present a hostile work environment claim where such testimony might, in some circumstances, be relevant to establish the nature of the work environment. For the same reason, coworker testimony about discrimination they believed they had suffered is likewise not relevant, and thus, not admissible. MRE 401; MRE 402; MRE 403. Moreover, such testimony is so prejudicial that it should not be admitted. Defendant cites a number of cases from the federal courts supporting this proposition. While nonbinding, these cases are instructive.

In *Bailey v The Northern Trust Co*, 196 FRD 513, 514 (ND Ill, 2000), five plaintiffs sought relief for race discrimination under the federal Civil Rights Act of 1991. Defendant moved to sever their claims. *Id*. at 515. The court granted this motion on the ground that "it would be highly prejudicial to defendant for all the plaintiff's cases to be presented to one jury." *Id.* at 517. The court explained:

> In this case, there are five different factual situations regarding work performance and employment decisions. A single trial would require the jury to keep separate each plaintiff's individualized claim and work history, presenting the jury with the "hopeless task of trying to discern who did and said what to whom and for what reason." *Moorhouse v Boeing Co*, 501 F Supp 390, 392 (E.D. Pa 1980). The jury may simply resolve the confusion by considering all the evidence to pertain to all the plaintiffs' claims, even when it is relevant to only one plaintiff's case. There is tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus prejudicing defendant with respect to the other plaintiffs' claims. The need to focus the jury's attention on the merits of each individual plaintiff's case counsels against proceeding with these cases in one consolidated trial. Thus, the court concludes that it would be extremely prejudicial to the defendant if the claims of the plaintiffs' are tried jointly. [*Id.* at 518.]

Similarly, the consolidated trial of plaintiffs' claims and the testimony of coworker witnesses as to discrimination allegedly suffered by them left the *Ross* jury with the "hopeless task" of discerning who suffered what injury. Plaintiffs and their witnesses painted a picture of department-wide discrimination with which the jury might have inappropriately found defendant liable for discrimination toward plaintiffs. Plaintiffs did not allege a pattern or practice of discrimination; rather, they alleged that they had been individually discriminated against. Thus, any testimony not relating to discrimination suffered by each plaintiff individually is irrelevant and prejudiced defendant. The trial court abused its discretion in permitting the consolidated trial and coworker testimony on matters not relating to discrimination suffered by plaintiffs individually. (See also, *Moorhouse v Boeing Co*, 501 F Supp 390 (ED Pa, 1980); *Haskell v*

Kaman Corp, 734 F2d 113 (CA 2, 1984); *Chappell v GTE Prods Corp*, 803 F2d 261 (CA 6, 1986).[1]

Defendant's third argument is that the trial court erred in granting plaintiffs leave to amend their complaint to add a new claim after the discovery period had closed. We agree. We will address this issue because it might arise on retrial. We review a trial court decision to grant a motion to amend for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 645; 563 NW2d 647 (1997).

MCR 2.118(A)(2) requires that leave to amend a pleading is freely given whenever justice so requires. However, a motion to amend may be denied if the amended pleading will unduly prejudice the opposing party. *Id.* at 658, citing *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). Prejudice exists (1) "when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and [(2)] the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." *Weymers, supra* at 659-660.

Plaintiffs sought to amend their complaint to add two counts of retaliation less than three weeks before trial, after the period for discovery had closed. Plaintiffs argued that retaliation was not a new claim or theory because it was a prohibited act under the Civil Rights Act, MCL 37.2101. However, claims for age discrimination and retaliation under the act require different proofs. Thus, they are different claims. Age discrimination may be proven by direct evidence or by establishing a prima facie case of disparate treatment. To establish a prima facie case of disparate treatment, a plaintiff must prove that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Lytle v Malady*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). To establish a prima facie case of retaliation, a plaintiff must show that (1) he engaged in protected activity, (2) he was subjected to an adverse employment action, and (3) there is a causal link between the protected activity and the adverse employment action. *Jacklynn v Schering-Plough Healthcare Products*, 176 F3d 921, 929 (CA 6, 1999).

[1] We also note that plaintiff's counsel attempted to admit evidence of race discrimination by reviewing affidavits signed by certain witnesses. However, it was revealed that the witnesses did not attribute any "Sanford" comment to racial discrimination; but rather, it referenced the condition of Ross' desk. Moreover, the witnesses did not prepare the affidavits. Personnel from the office of plaintiff's legal counsel prepared the affidavits. This elicitation of "evidence" caused defendant to move for a mistrial because the complaint did not allege any claim of racial discrimination. Further, the trial court also indicated its shock at the evidence and noted that the file was perused after the admission to determine if racial discrimination was at issue. The trial court denied the motion for a mistrial, but provided a cautionary instruction. We presume on retrial, that plaintiff's counsel will not attempt any such introduction of improper, unsupported evidence.

Plaintiff also argues that defendant had notice of the new claims because plaintiffs, during their depositions, testified to retaliatory acts directed towards them by defendant. The *Weymers* Court rejected this same argument. Consequently, the trial court abused its discretion in granting leave to amend.

Defendant's fourth argument is that the trial court read a prejudicial jury instruction. We agree. Again, we will address this issue because it might arise on retrial. We review a trial court's decision to give an instruction de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

At trial, the court read the following:

> The defendant, General Motors, in this case has not offered the plaintiffs' performance review for the year 2000. As this evidence was under the control of the defendant, General Motors, and could have been produced by them, you may infer that the evidence would have been adverse to the defendant, General Motors, if you believe that no reasonable excuse for defendant's failure to produce the evidence has been shown.

It is error to instruct a jury on a matter not sustained by the evidence or the pleadings. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). This jury instruction told the jury that plaintiffs' performance reviews for the year 2000 were "under the control" of and not produced by defendant; however, plaintiffs presented no evidence contradicting that of defendant's manager that he failed to give Ross[2] a performance review in 2000 because he was in the process of transferring to a different plant. Additionally, Holland's performance review for the year 2000 was introduced as part of an exhibit at trial, and so, was not missing. Thus, this jury instruction was neither applicable, nor sustained by the evidence or the pleadings. This accumulation of error constitutes an additional basis for reversal of the jury verdicts. See *Haynes v Seiler*, 16 Mich App 98, 103; 167 NW2d 819 (1969).

Defendant also alleges that the trial court erred in denying defendant's motion for a new trial or remittitur. We agree. A new trial or amendment to the judgment may be granted where excessive or inadequate damages appear to have been influenced by passion or prejudice. MCR 2.611(A)(1)(c). Moreover, if the trial court finds that the only error in the trial was the inadequacy or excessiveness of the verdict, a motion for new trial may be denied, conditioned upon the nonmoving party's consent to the additur or remittitur. MCR 2.611(E)(1). Whether the evidence supports the jury award is based on objective considerations relating to the actual conduct of the trial or to the evidence adduced. *Palenkas v Beaumont Hospital*, 432 Mich 527, 532; 443 NW2d 354 (1989). We consider the evidence in the light most favorable to the nonmoving party when reviewing the trial court's exercise of discretion regarding remittitur. *Wiley v Henry Ford Cottage Hospital*, 257 Mich App 488, 499; 668 NW2d 402 (2003). The Supreme Court in *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 763,-764; 685 NW2d 391

[2] Indeed, even Ross attributed the absence of a review to having three supervisors during that one-year period.

(2004), provided additional guidance regarding review of a jury award when the verdict is confounded by improper factors:

> In the context of compensatory damages, the determination whether damages exceed the "necessary or proper limit" is no simple task. "[T]he authority to measure damages," as we stated in *Kelly v Builder's Square* [465 Mich 29, 34; 632 NW2d 912 (2001)], "inheres in the jury's role as trier of fact." Because the amount required to compensate a party for pain and suffering is imprecise, that calculation typically belongs to the jury.
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> The difficulty of reviewing damage awards, however, does not undermine the judicial obligation to do so under MCR 2.611. A reviewing court is therefore faced with the task of ensuring that a verdict is not "excessive" without concomitantly usurping the jury's authority to determine the amount necessary to compensate an injured party. Given the impossibility of using a simple algorithm for this task, judicial review of compensatory awards must rely on the fundamental principle behind compensatory damages-that of recompensing the injured party for losses proven in the record.
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> When a verdict is procured through improper methods of advocacy, misleading argument, or other facts that confound the jury's quantification of a party's injuries, that amount is inherently unreliable and unlikely to be a fair estimate of the injured party's losses. Likewise, when a verdict is unsupported by the record or entirely inconsistent with verdicts rendered in similar cases, a reviewing court may fairly conclude that the verdict exceeds the amount required to compensate the injured party. [Footnotes omitted.]

Although this appeal may be resolved in light of our disposition of the other issues on appeal, we nonetheless address it because the verdicts in the instant cause appeared to have been influenced by passion or prejudice. The testimony regarding the emotional distress suffered by plaintiffs was minimal and subjective, without medical corroboration or detail in foundation. For example, plaintiff Ross testified that he suffered from "lack of sleep" and "fear" from working conditions, something he had not experienced even as a war veteran.[3] He also acknowledged a medical condition, but there was no evidentiary correlation between the medical condition and the psychological impact of the conditions at work. While plaintiff Ross testified that he voiced his complaints regarding age discrimination to his immediate superiors, he admitted that he did not take the issue to human resources or other individuals in a position to remedy the situation. Plaintiff Ross attributed this limited action to "fear" of "vindictiveness." Moreover, there was no indication that plaintiff Ross sought counseling or other treatment for the sleep loss and fear.

[3] Plaintiff Ross testified that he had seen "bodies" during his military service and was not impacted by those events. However, his treatment at work caused him sleep loss and to mistreat his family, although the specifics regarding mistreatment were conclusory and not delineated in detail.

Similarly, plaintiff Holland testified that he suffered from loss of sleep as a result of the working conditions, but he also did not seek medical treatment. The evidence adduced at trial, even viewed in the light most favorable to the nonmoving party, *Wiley, supra*, did not support the extremely large emotional distress verdicts rendered by the jury. The awards were not supported by objective considerations or the evidence adduced at trial, even considering the sleep loss testimony, and thus may have been the product of the improper injection of race into the trial and the subjective testimony of other witnesses regarding their own beliefs about personal discrimination. *Palenkas, supra*. In light of the analysis set forth in *Gilbert, supra*, it was also error for the trial court to deny the motion for remittitur.

Reversed and remanded for separate trials. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood