STATE OF MICHIGAN

COURT OF APPEALS

ANDREA SMITH, Personal Representative of the Estate of KELLY SNIDER SMITH, Deceased,

Plaintiff-Appellee/Cross-Appellant/Cross-Appellee,

v

COMMUNITY EMERGENCY MEDICAL SERVICE,

Defendant-Appellant/Cross-Appellee/Cross-Appellant.

UNPUBLISHED
January 24, 2008

No. 269003
Wayne Circuit Court
LC No. 01-121764-NI

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

PER CURIAM.

Defendant, Community Emergency Medical Service (CEMS), appeals by leave granted the trial court's February 22, 2006, order granting plaintiff's motion for a new trial on the basis of the trial court's finding that the jury's no cause of action verdict was against the great weight of the evidence. Both parties have additionally filed timely cross-appeals. Because the jury was free to choose which witnesses it believed, and because the testimony accepted by the jury was not void of all probative value, we reverse the trial court's February 22, 2006, order granting plaintiff's motion for a new trial, and reinstate its October 14, 2005, judgment of no cause of action.

I. Background

On October 10, 1988, Kelly Snider Smith (KSS) was involved in a high impact automobile accident at approximately 2:30 a.m. He suffered two significant injuries (broken femur and fractured pelvis) as a result of the accident. KSS was initially transported to Botsford Hospital in Farmington Hills, Michigan. After diagnosing and treating KSS for approximately 2 ½ hours, Botsford staff concluded that they were not equipped to treat KSS, and therefore ordered that he be transferred to the University of Michigan Hospital in Ann Arbor, Michigan.

At approximately 5:30 a.m., CEMS dispatched an ambulance (unit 770) to Botsford with EMTs Amy Ellison and Jennifer Pichan on-board, to pick-up and transport KSS to the U of M. Upon arrival at Botsford, Ellison and Pichan learned that KSS was having trouble breathing and was bleeding profusely as a result of a left femur fracture. Ellison and Pichan immediately

requested additional staff to help them with a lift assist and/or accompany them to the U of M. CEMS supervisor, Paul Sorrel, was able to arrange for a lift assist, but was not immediately able to arrange to have additional help accompany Ellison and Pichan to the U of M. Due to KSS' unstable condition, the transfer was changed to high priority (priority I) right before the ambulance left Botsford.

Shortly after departing Botsford, Ellison, who was attending to KSS in the back of the ambulance, was already having trouble with KSS because he was "thrashing around" and pulling away his oxygen mask. As a result, Ellison ordered Pichan, who was driving, to radio dispatch and ask for an intercept[1] to come meet them and provide assistance. Pichan complied with Ellison's request, but claims that although she believed dispatch stated they would send an intercept, she never heard back from dispatch regarding where they were supposed to meet the intercept.

Sorrell heard Pichan's request for an intercept, and replied by instructing Pichan to drive to St. Mary's Hospital to meet another unit. As previously discussed, Pichan stated that she never heard Sorrell's order to meet the intercepting unit at St. Mary's. Ellison heard the order to go to St. Mary's, and although she did not "know whether or not [Pichan] heard [her]," she shouted from the back of the ambulance to Pichan on more than one occasion that she should "divert" to St. Mary's. Robert Condee and his partner, who were resting at the Livonia CEMS station, heard the request for an intercept, and immediately took unit 730 to St. Mary's to meet unit 770. Sorrell also headed to St. Mary's to help with the intercept. When unit 730 arrived at St. Mary's, unit 770 was not there. Unit 730 called dispatch and informed them about the situation.

Almost instantaneously after Sorrell heard that unit 770 was not at St. Mary's, Sorrell heard Pichan's second request for an intercept, which Pichan stated she made immediately after she heard Ellison's request to pull over and help her. Immediately after making her second request for an intercept and giving her location, Pichan pulled over and attempted to help Ellison. Condee heard the "broken up" message from unit 770 asking for help on M-14. Condee immediately turned onto M-14 and started driving toward Ann Arbor. Sorrell relayed unit 770's location (M-14 and Gottfredson) to unit 730, instructed them to continue with their intercept, and told them he would meet them at the U of M.

A couple of minutes after Pichan pulled over, unit 730 arrived at their location. Condee instructed his partner to follow unit 770 to the U of M, hopped in the back of unit 770 to help Ellison, and instructed Pichan to drive to the U of M. Approximately three minutes before unit 770 arrived at the U of M, KSS stopped breathing and passed away. The official cause of KSS' death was blood loss stemming from a leg fracture.

On June 28, 2001, plaintiff filed a complaint against CEMS alleging, in relevant part, that CEMS was grossly negligent for failing "to transport [KSS] to the nearest medical facility,

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[1] An intercept consists of meeting up with anther vehicle on or near your direct route, as opposed to an order to divert, which consists of diverting to another hospital.

despite direct orders from" Sorrell and Ellison. Trial eventually began on September 26, 2005. After hearing several witnesses testify over a course of seven days, the jury was posed with the following question, which was dispositive if answered in the negative:

> Did [CEMS] employee [Pichan] hear an order and/or orders to divert and/or intercept to [St. Mary's] from [Ellison] and/or [Sorrell]?

The jury found that Pichan did not hear the alleged orders,[2] and the trial court therefore entered a judgment of no cause of action in favor of CEMS. Plaintiff subsequently filed a motion for a new trial arguing that a new trial should be granted on the basis that the jury's verdict was against the great weight of the evidence. Plaintiff alternatively argued that a new trial should be granted on the basis that the trial court prejudiced plaintiff when it issued a special interrogatory and because defense counsel prejudiced plaintiff when he impermissibly (1) argued that Botsford committed malpractice and (2) elicited testimony that St. Mary's was closed at the time of the incident.

The trial court granted plaintiff's motion for a new trial, holding that the jury's verdict was against the great weight of the evidence. The trial court ruled:

> for the first time in 24 years, this Court does find that the jurors finding that [Pichan] did not receive a direct command from the dispatcher, [Sorrell] to intercept at St. Mary's and additionally, did not receive a direct – a directive to drive to St. Mary [sic] from the shouting EMT within three feet of her is against the great weight of the evidence. And the Court will order a new trial.

II. Analysis

CEMS argues that the trial court erred when it granted plaintiff's motion for a new trial. We review a trial court's decision on a motion for a new trial for an abuse of discretion, *Detroit/Wayne County Stadium Authority v Drinkwater, Taylor and Merrill, Inc*, 267 Mich App 625, 644; 705 NW2d 549 (2005),[3] giving substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence, *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003), but giving less deference to a "trial court's determination that a verdict is against the great weight of the evidence" to insure that the trial court has not invaded the province of the jury, *Arrington v Detroit Osteopathic Hosp Corp*, 196 Mich App 544, 560; 493 NW2d 492 (1992).

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[2] The jury's verdict was not unanimous, as only five of six jurors believed that Pichan did not hear the alleged orders.

[3] An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A trial court can grant a motion for a new trial if the jury's verdict is against the great weight of the evidence presented, or if there was an error of law occurring in the proceedings. MCR 2.611(A)(1). In general, "[o]ur courts are 'reluctant to overturn a jury's verdict' where there is 'ample evidence' to support the jury's decision, . . . and will do so only where we are satisfied that allowing the verdict to stand would be inconsistent with substantial justice." *Clark v Kmart Corp*, 249 Mich App 141, 150; 640 NW2d 892 (2002), quoting in part *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001). "This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Sullins*, *supra* at 193. A jury's verdict should be upheld, even if it is arguably inconsistent, if there is an interpretation of the evidence that provides a logical explanation for the jury's findings. *Hill v Sacka*, 256 Mich App 443, 461; 666 NW2d 282 (2003). If testimony supporting the verdict has been impeached, and it cannot be said as a matter of law that the impeached testimony was deprived of all probative value or that the jury could not believe it, then the credibility of the witnesses is for the jury. *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 519; 679 NW2d 106 (2004).

Direct evidence was presented that could lead a jury to conclude that Ellison ordered Pichan to divert to St. Mary's, and that Sorrell ordered Pichan to meet unit 730 at St. Mary's for an intercept. However, the trial court determined that for it to be found that CEMS was grossly negligent, the jury needed to find that Pichan actually heard and subsequently ignored the orders, and accordingly, the trial court framed a special interrogatory asking the jury to determine whether Pichan heard the orders.

The only direct evidence presented regarding whether Pichan heard the orders is her own testimony consistently denying that she ever heard an order from either Ellison or Sorrell to go to St. Mary's, and Ellison's and Sorrell's testimony that they could not confirm that Pichan heard their respective orders, all of which supports the jury's verdict that Pichan did not hear the questioned orders. Also supporting Pichan's testimony is that Pichan called Sorrell a second time to obtain an intercept. The jury could infer from this evidence that Pichan did not hear the first command to divert to St. Mary's, otherwise she would not have called a second time.

Although plaintiff contends that Ellison and Sorrell unequivocally testified that Pichan heard their respective orders, we note that that is clearly not the case. Ellison testified that she did not know whether Pichan actually heard the orders:

> I told [Pichan] to go to St. Mary's. I remember specifically. I don't know whether or not she heard me. I'm very sure I told her more than once but at the same time, I could hear some radio communications. I couldn't exactly decipher exactly what was being said. So that's about what happened. . . . . I was communicating with her. As far as whether she heard me at that time I could not say.

Sorrell similarly testified:

> I don't know what she heard. I do know from being in that kind of a situation, you have the siren, you have the space between where the patient and that

> attendant is. I can't attest to what she heard over the radio or didn't hear over the radio.

Therefore, it was for the jury to decipher all of this testimony, as well as the other circumstantial evidence presented, as described below.

It is certainly true, as noted by the trial court, that circumstantial evidence was presented that would have allowed the jury to conclude that Pichan heard the orders,[4] but there was also circumstantial evidence presented supporting Pichan's testimony and the jury's verdict that Pichan did not hear the questioned orders. In particular, Ellison, Sorrell and Pichan all stated that the ambulance was a loud vehicle in general, particularly when it is speeding down the highway with sirens engaged, while Ellison testified that during the run KSS was also "thrashing around." Pichan additionally testified that she had her back turned to Ellison and could only communicate to her by shouting through the opening between the back and front of the ambulance, while Ellison testified that she could not even see Pichan from where she was sitting. Additionally, Condee testified that although messages from dispatch are generally pretty clear, radio to radio communication was not as good and could be "extremely broken," as well as "stepped on top of,"[5] which was exemplified by the fact that Condee never heard Sorrell tell them that he was going to meet them at St. Mary's. Finally, Greg Bouerman testified that it is very hard to hear orders in the ambulance business.

In simple terms, and as argued by both counsel during closing arguments, the jury was presented with two different stories of the same event: Pichan testifying that she never heard orders from Ellison or dispatch to divert to St. Mary's, while Ellison testifying that Pichan knew that she was to divert to St. Mary's, and that she ordered her to divert three times. But great weight of the evidence issues are not decided by a witness numbers game, nor are they resolved by a judicial officer determining that one side was simply more believable. As the Michigan Supreme Court opined more than sixty years ago:

> Was the verdict contrary to the great weight of the evidence? The testimony as to how the accident occurred was squarely in opposition. One viewpoint or the other must prevail. The mere fact that several witnesses testified for plaintiffs and that the defendant was the only witness in his own behalf would not justify our

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[4] Ellison's testimony that she ordered Pichan to divert three times, shouted the orders, was close in proximity to Pichan, and that Pichan did not have a problem hearing and complying with other orders that she gave, suggests that Pichan heard her order. Likewise, Sorrell's testimony that he successfully communicated over the radio with Pichan regarding their location, and that Pichan did not comply with his request to complete an incident report, could also suggest that Pichan heard his orders. However, the fact that Pichan was upset after they arrived at the U of M did not necessarily suggest that she heard the orders. The jury could have just as easily inferred that Pichan was upset after a trying experience where a passenger died in the ambulance. Additionally, everyone that was involved in the trying incident was upset.

[5] An order is "stepped on" and cannot be heard if it is given while the intended recipient is in the process of sending out his or her own message over his or her radio.

> holding that the verdict for defendant was contrary to the great weight of the evidence. Great weight does not depend on the number of witnesses testifying for each party. Credibility of witnesses is for the jury. We do not find that the verdict was contrary to the great weight. [*Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943).]

And, with all due respect to the very learned trial judge, that is what occurred here, for although there certainly was evidence that placed Pichan's testimony into doubt, there was no impeachment evidence that "as a matter of law" deprived her testimony of all probative value. *Shuler, supra* at 519. Hence, even giving some deference to the trial court's decision, we cannot conclude that the jury's verdict was against the great weight of the evidence presented, *Arrington, supra* at 560, and therefore hold that the trial court abused its discretion when it granted a new trial. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).[6]

In her cross-appeal plaintiff has presented two alternative arguments that support the trial court's February 22, 2006, order. Plaintiff first argues that she is entitled to a new trial because she was unfairly prejudiced by defense counsel's improper conduct. The trial court rejected this argument, and so do we. When reviewing a claim that counsel made improper comments, we first determine whether the comments were erroneous and then whether the error requires reversal. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). A lawyer's comments during trial warrant reversal if they (1) indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or if counsel's remarks were such as to deflect the jury's attention from the issues involved and (2) had a controlling influence on the verdict. *Wiley v Henry Ford Cottage Hospital*, 257 Mich App 488, 501-502; 668 NW2d 402 (2003).

Plaintiff cites several preserved instances of alleged attorney misconduct on the part of defense counsel. Plaintiff first argues that, despite the trial court's orders that defense counsel was precluded from referencing plaintiff's state and federal claims against Botsford for medical malpractice, as well as the trial court's preliminary instructions that "no witness will be allowed to testify in this case as to whether or not [Botsford] met the standard of care," defense counsel "constantly interjected" the issue of Botsford's alleged negligence in his opening statement, while questioning several witnesses, and during his closing argument. Plaintiff specifically takes issue with defense counsel's following remarks during his opening statement:

> [CEMS] is not grossly negligent and we didn't cause [KSS'] death. We're being sued here not because we caused the death but because we can't save him.
>
> I agree that it's unfortunate that [KSS] died. And I agree with him that there was treatment and neglect. That wasn't our treatment and neglect that caused [KSS'] accident.

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[6] Given our resolution of CEMS' appeal, we need not address the arguments raised by CEMS in its cross-appeal.

Plaintiff also takes issue with the following questions defense counsel posed to Dr. Kling, "So we can agree that in fact after [Ellison] brought to the attention of the emergency room physician that there was bleeding?" given the difficulty of maintaining blood pressure, decedent "should not have been transferred?" as well as defense counsel's cross examination questions to Dr. Spitz regarding Botsford's failure to issue epinephrine to reduce blood loss, and Botsford's decision to transfer decedent in an ambulance given his unstable condition. Finally, plaintiff takes issue with the following portion of defense counsel's closing argument:

> Now, I can't tell you why it took them a couple more hours to do that. I don't know. [Botsford] is not a party to this suit. [Botsford] did not come in to defend this suit, but look at the Record and you can see that they decided at 3:20 a.m. to transfer [KSS.]
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> ***
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> And in that two and a half plus hours he was there and despite the fact that he had this obvious blood loss from this femur and this other blood loss that they didn't know because how is it or why is it that there was no effort to transfuse him at [Botsford]?

We conclude that the challenged remarks by defense counsel during opening statements, which do not even mention Botsford, related to defendant's position that CEMS actions were not the proximate cause of KSS' death. The challenged remarks therefore did not violate the trial court's ruling.

Assuming that defense counsel's challenged questions to Dr. Kling and Dr. Spitz, as well as defense counsel's challenged closing argument remarks were an improper attempt to divert the jury's attention to whether Botsford breached its standard of care, we nevertheless conclude that the error does not require reversal. *Wiley*, *supra*. As previously discussed, the jury's verdict was based on its finding that Pichan did not hear orders to go to St. Mary's, which has absolutely nothing to do with whether Botsford breached its standard of care. Furthermore, a jury is presumed to follow a judge's instructions, *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993), and the trial court instructed the jury on multiple occasions that:

> The questions to be decided by you in this case is whether [Pichan] heard an order to go to [St. Mary's] from either [Sorrell] and [Ellison]. And whether this indicated – whether these actions were a proximate cause of injury or damage to [KSS] . . .
>
> Evidence has been presented to you concerning the nature of treatment afforded [KSS] at [Botsford] before his transport by CEMS. There is no claim regarding the quality of care given by [Botsford]. You have also heard and will hear evidence regarding the physical condition of [KSS] while he was in the ambulance. There is no claim regarding the quality of health care services rendered to [KSS] by CEMS. Now – neither the quality of health care rendered by [Botsford] or CEMS is relevant to your deliberations.

> The jury is asked to determine whether or not – whether CEMS through its employee, [Pichan], was grossly negligent, and if so, whether the gross negligence caused [KSS] damage or harm. . . .

We therefore conclude that, assuming defense counsel's questions and remarks during closing argument were improper, they did not have a controlling influence on the jury's verdict. Accordingly, defense counsel's questioned actions do not amount to error requiring reversal, and do not merit grounds for a new trial. *Wiley, supra* at 501-502.

Plaintiff next takes issue with the fact that defense counsel elicited testimony from Bouerman that St. Mary's was closed on the night in question, and that Pichan was only obligated to divert "if that hospital can receive that patient." Even assuming that defense counsel's actions in this regard were improper,[7] given that the jury's no cause of action verdict was based on its finding that Pichan did not hear orders to go to St. Mary's, and not on a finding that it was proper for Pichan not to go to St. Mary's because it was closed, coupled with the trial court's subsequent instruction that the jury was "to completely disregard any testimony regarding the assertion that on the day of KSS' death that St. Mary's emergency room was closed," it follows that defense counsel's questioned actions likewise did not have a controlling influence on the jury's verdict. Accordingly, defense counsel's questioned actions do not amount to error requiring reversal, and do not merit grounds for a new trial. *Wiley, supra* at 501-502.

Plaintiff's final argument on cross-appeal is that the trial court erred when it issued a special verdict form that did not include language that CEMS could alternatively be found liable for Ellison's and Sorrell's failure to get confirmation from Pichan that she heard their respective orders. We review a trial court's decision to use a special verdict form for an abuse of discretion. *Wengel v Herfert*, 189 Mich App 427, 435; 473 NW2d 741 (1991).

Pursuant to MCR 2.514(A), a trial court "may require the jury to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict." The trial court for several reasons did not abuse its discretion when it denied plaintiff's request to include language that CEMS could alternatively be found liable for Ellison's and Sorrell's failure to get confirmation from Pichan that she heard their respective orders. First, in submitting this case on a special verdict, the court ensured that the jury focused on the factual issues in dispute and decided those issues on the evidence. By using a special verdict, the trial court also avoided the possible confusion that could have arisen in this case given all the expert medical testimony that was presented, when the jury really only needed to determine whether Pichan was grossly negligent for failing to follow orders that she was required to follow.

Second, the failure to confirm was not a viable theory of recovery. In relevant part, under MCL 333.20965, CEMS is immune from liability unless it is found that it was grossly negligent. Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of

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[7] Nonresponsive answers to an attorney's questions are not attributable as misconduct to the attorney unless he or she knew, encouraged, or conspired with the witness to provide the unresponsive testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990).

concern for whether an injury results." MCL 691.1407; *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 411; 716 NW2d 236 (2006). Thus, even though it was CEMS policy to have a party giving an order confirm that the order was received by having the receiving party repeat the order back to them, a party's failure to confirm that their order was heard when there is no reason to think that it would not be heard, could not amount to "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Third, plaintiff's complaint did not specify this theory against CEMS or it's supervisory personnel.

We reverse the trial court's order granting a new trial and reinstate the trial court's October 14, 2005, judgment of no cause of action rendered after the jury trial.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder