STATE OF MICHIGAN

COURT OF APPEALS

ANGELA E. DYKES,

Plaintiff-Appellant/Cross-Appellee,

and

BRIAN DYKES,

Plaintiff,

v

TARLOCHAN SINGH,

Defendant-Appellee/Cross-Appellant,

and

WEST MICHIGAN CARDIOLOGY, P.C.,

Defendant-Appellee.

UNPUBLISHED
August 21, 2012

No. 299346
Kent Circuit Court
LC No. 08-002596-NI

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

On January 22, 2008, defendant Tarlochan Singh, an employee of defendant West Michigan Cardiology, P.C. (WMC), was on his way home from WMC's office when he lost control of his vehicle and it slid into the path of the vehicle driven by plaintiff Angela Dykes, causing her severe and continuing injuries. Following a jury trial, judgment was entered in favor of Dykes. Dykes appeals by right the trial court's order granting summary disposition to WMC on her respondeat superior claim. Singh cross-appeals the trial court's order denying his motion for judgment notwithstanding the verdict (JNOV), new trial, or remittitur. We affirm.

I. DYKES'S APPEAL

Dykes argues that the trial court erred in granting summary disposition under MCR 2.116(C)(10) to WMC on her claim for respondeat superior. We review de novo a trial court's

decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is properly granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." We must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009).

Under the doctrine of respondeat superior, "[a]n employer is generally liable for the torts its employees commit within the scope of their employment." *Hamed v Wayne Co*, 490 Mich 1, 10-11; 803 NW2d 237 (2011). An employee is acting within the scope of his employment when the employee is "'engaged in the service of his master, or while about his master's business.'" *Id.* at 11 (citations omitted). The relevant inquiry is whether the employer had retained the right to exercise control over the employee. *Norris v State Farm Fire & Cas Co*, 229 Mich App 231, 239; 581 NW2d 746 (1998); *Hoffman v JDM Assoc, Inc*, 213 Mich App 466, 468-469; 540 NW2d 689 (1995). Generally, whether an employee is acting within the course or scope of his employment is a question of fact, but the issue may be decided as a matter of law where the facts are not in dispute and no conflicting inferences can reasonably be drawn from the evidence. *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989); *Rowe v Colwell*, 67 Mich App 543, 549-550; 241 NW2d 284 (1976).

Dykes does not dispute that an employee is generally not acting within the course of his employment when the employee is traveling to and from work. See *Camburn v Northwest Sch Dist (After Remand)*, 459 Mich 471, 478; 592 NW2d 46 (1999); *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444, 451; 320 NW2d 858 (1982). However, Dykes argues that the coming and going rule is not applicable to the present case. According to Dykes, the rule only applies to employees who are driving to work and have not yet commenced their work responsibilities and to employees who are driving from work and whose work responsibilities have ended. She asserts that because Singh was an hourly employee and because he was being paid at the time of the accident—he had not yet completed his scheduled eight-hour workday—the accident occurred during the course of Singh's employment.

There is no genuine issue of material fact regarding the status of Singh's employment. A conclusion that Singh was an hourly employee who was paid for working eight hours each day is contrary to the undisputed evidence. Linda Roush, WMC's manager, and Singh testified that Singh was a salaried employee and that his salary was not dependent on the actual number of hours that he worked. Roush testified that Singh was a salaried employee and that his weekly salary was $816 per week. She explained that, while Singh's salary was based on WMC paying Singh $25.50 an hour for 32 hours of work, Singh's pay was not actually affected by the number of hours that he worked. WMC paid Singh $816 per week regardless of the number of hours that Singh actually worked in a week. Singh testified that he left the WMC office whenever his work was finished, i.e., when no further patients were scheduled for testing. Roush testified that Singh might work nine hours one day and three hours the following day. She explained that it was common practice for Singh to go home after he finished his testing and that he did not need to get permission to leave. This undisputed evidence established that on January 22, 2008, Singh was a salaried employee; his work responsibilities ended when he completed testing for the one scheduled patient and left the Greenville office. Accordingly, we reject Dykes's argument that the coming and going rule does not apply.

Nonetheless, Dykes argues that three exceptions to the coming and going rule apply to the present case. See *Bush*, 413 Mich at 452 n 6. First, she argues that WMC derived a special benefit from Singh's early departure from the Greenville office. According to Dykes, the weather caused the cancellation of scheduled appointments; therefore, Singh had nothing further to do at the Greenville office. WMC, she asserts, made the decision to send Singh home and that Singh's early return to Grand Rapids was a benefit to WMC because there was no point in having Singh sit in the office for the six remaining hours of his shift. The factual basis of Dykes's argument is simply not support by the record. On January 22, 2008, one patient had a 9:00 a.m. appointment for testing to be done by Singh. There was no evidence that other appointments, which had been scheduled, were cancelled because of the weather. In addition, there was no evidence that WMC made a decision to send Singh home. The evidence established that, because there were no other appointments for the day, Singh was not required to stay at the Greenville office after the 9:00 a.m. patient testing was completed and that Singh did not need permission from WMC to leave. Accordingly, we reject Dykes's argument that WMC derived a special benefit from Singh's morning return to Grand Rapids.

Second, Dykes argues that WMC paid for Singh's transportation. Dykes's argument is premised on the fact that Singh was an hourly employee and that, at the time of the accident, he was actually being paid $25.50 an hour. As already discussed, the evidence established that Singh was not an hourly employee. Rather, he was a salaried employee and his work responsibilities were generally complete after he finished the scheduled testing of patients. No evidence supports Dykes's argument that WMC paid for Singh's transportation.

Third, Dykes argues that Singh's morning return to Grand Rapids comprised a dual purpose that combined WMC's business needs and the personal activity of Singh. Dykes's argument is based on the "fact" that WMC made the decision to send Singh home. However, as already discussed, there was no evidence that WMC decided to let Singh leave the Greenville office early. Singh left the Greenville office, without the need for approval from WMC, because his appointments for the day were finished. At the time of the accident, Singh was driving to his home in Grand Rapids. There was no evidence that Singh intended to perform any service of benefit to WMC. Accordingly, we reject Dykes's argument that Singh's early return to Grand Rapids was comprised of a dual purpose.

Dykes also claims that WMC retained the right to control Singh after he left the Greenville office because, given the fact that Singh's eight-hour shift was not over, it could have required Singh to return to work. Again, Dykes's argument is premised on the notion that Singh was an hourly employee and that, at the time of the accident, Singh was being paid an hourly rate. As explained, the notion that Singh was an hourly employee is contrary to the evidence. The evidence established that Singh was a salaried employee and that Singh was on his way home because he had completed his work responsibilities for the day.

Dykes also argues that WMC retained control over Singh because WMC created the necessity of Singh traveling to and from Greenville by maintaining an office in Greenville. In *Ten Brink v Mokma*, 13 Mich App 85, 87; 163 NW2d 687 (1968), this Court stated:

> "If the work of the employer creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of

> his own. If, however, the work is merely incidental to the travel, and the trip would not have been made but for the private purpose of the servant, he is out of the scope of his employment in making it." [Citation omitted.]

Here, unlike the employee in *Ten Brink*, Singh was not traveling to (or from) a place that was not his regular work site at the direction of his employer, nor was he driving anywhere at WMC's direction. Singh was simply traveling home after his work responsibilities for the day had ended.

Because there is no evidence to dispute that Singh was a salaried employee, that he was involved in an automobile accident while driving to his home from WMC's office in Greenville after having completed his work responsibilities, and that he was not under the control of WMC or performing a benefit for WMC, we affirm the trial court's order granting summary disposition to WMC.

In doing so, we reject Dykes's argument that Singh's deposition testimony should be given minimal weight. Dykes asserts that Singh attempted to deceive and did not fully cooperate at his deposition. Singh was unwilling and procrastinated in providing the names of his ex-wife, children, relatives, and WMC employees. Dykes does not claim that Singh's deposition testimony was used by WMC for any purpose other than to establish that Singh was a salaried employee and that he had a flexible schedule. She offers no argument regarding how Singh's refusal to answer questions about the names of family members and coworkers creates a genuine issue as to any material fact. The material facts concern Singh's pay, his schedule, the time of the accident, and the reason why Singh left the Greenville office. Dykes presented no documentary evidence to suggest that the testimony of Singh regarding any of the material facts was false. Singh's testimony on these facts contains no inconsistencies and is supported by the testimony of Roush. Accordingly, the alleged "serious credibility problem" of Singh does not create a genuine issue of material fact that precludes the grant of summary disposition to WMC.

II. SINGH'S CROSS-APPEAL

Singh claims that the trial court erred in denying his motion for JNOV. He claims that there was no evidence that he was negligent because he was confronted with a sudden emergency, i.e., losing control of his vehicle when it slid on black ice that was not of his own making. We review de novo a trial court's decision on a motion for JNOV. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 599; 792 NW2d 344 (2010). A motion for JNOV "'should be granted only if the evidence viewed in the light most favorable to the nonmoving party fails to establish a claim as a matter of law.'" *Id.* (citation and alterations omitted).

A violation of the assured clear distance statute, MCL 257.627(1), constitutes negligence per se. *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964). However, a violation of the statute is not negligence if the driver of the vehicle was faced with a sudden emergency not of his own making. *Id.*; *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971). A patch of ice can be an unsuspected condition constituting a sudden emergency. *Vsetula v Whitmyer*, 187 Mich App 675, 681; 468 NW2d 53 (1991); *Young v Flood*, 182 Mich App 538, 543-544; 452 NW2d 869 (1990). Moreover, because the assured clear distance statute requires drivers to take into account weather conditions, a patch of ice does not excuse a

violation of the statute if the driver had reason to suspect icy spots and failed to adjust his speed to be able to stop. *Young*, 182 Mich App at 543.

At the time of the accident, there was snow and slush on M-57, and the road was slippery. The evidence established that Singh was driving his vehicle at a speed much slower than the speed limit of 55 miles per hour; however, Gregory Gillmer testified that Singh appeared to be in a hurry. During the 4-1/2 miles that he drove behind Singh, Gillmer saw Singh on multiple occasions move his vehicle partially into the opposite lane or onto the shoulder. In addition, Singh's vehicle was "kind of close" to the vehicle in front of it. This evidence, when viewed in the light most favorable to Dykes, the nonmoving party, did not preclude judgment for Dykes as a matter of law. *Alpha Capital Mgt, Inc*, 287 Mich App at 599. Given Gillmer's testimony and the road conditions, a trier of fact could have determined that Singh did not use ordinary care in driving his vehicle and that any emergency was the result of his own making. Accordingly, the trial court did not err in denying Singh's motion for JNOV.

Singh next claims that the trial court erred in denying his motion for a new trial under MCR 2.611(A)(1)(e) . He asserts that because there was no evidence of negligence by him the verdict was against the great weight of the evidence and contrary to law. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Under MCR 2.611(A)(1)(e), a new trial may be granted where a verdict or decision is against the great weight of the evidence or contrary to law. A trial court may determine a verdict is against the great weight of the evidence when the overwhelming weight of the evidence favors the losing party. *Bordeaux v Celotex Corp*, 203 Mich App 158, 170; 511 NW2d 899 (1993). But a court must accord substantial deference to the judgment of the trier of fact, especially regarding its determination of witness credibility. *Allard*, 271 Mich App at 406-407. Thus, a jury verdict should not be set aside when there is competent evidence to support it. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). A verdict may be contrary to law where there has been a failure of proof as to a necessary element of the claim. 3 Longhofer, Michigan Court Rules Practice (5th ed), § 2611.7, p 437.

For the same reason that the trial court did not err in denying Singh's motion for JNOV, the trial court did not abuse its discretion in denying Singh a new trial under MCR 2.611(A)(1)(e). Based on Gillmer's testimony, which permitted a finding that Singh did not drive his vehicle with ordinary care on the snowy and icy road, the evidence does not preponderate so heavily against the verdict that Singh was negligent to justify setting it aside, *Allard*, 271 Mich App at 406-407; *Wiley*, 257 Mich App at 498, and there was no failure of proof as to breach of duty, a necessary element of negligence, Longhofer, § 2611.7.

Singh next argues that the trial court erred in denying his request to recall and question the jurors to determine whether any of them made remarks during deliberations to suggest religious or ethnic prejudice against him, a Sikh. According to Singh, because the verdict was excessive, it must have been motivated by something other than dispassionate reason. We

review a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002).

Generally, jurors may not impeach their verdict by showing mistakes or misconduct inherent in the deliberative process. *Consumers Power Co v Allegan State Bank*, 388 Mich 568, 573; 202 NW2d 295 (1972); *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004). But a verdict may be impeached with evidence that it was affected by extraneous influences. *Id*. at 539-540. The nature of the allegation determines whether it is intrinsic to the jury's deliberations or whether it is an outside or extraneous influence. *Id*. at 541 (citation omitted).

Singh relies on *Fleshner v Pepose Vision Institute, PC*, 304 SW3d 81, 89 (Mo, 2010), where the Missouri Supreme Court held that when a party files a motion for a new trial alleging that statements reflecting ethnic or religious prejudice were made by a juror during deliberations, the trial court should hold an evidentiary hearing to determine whether such statements were made, because such statements would deprive a party of its right to trial by fair and impartial jurors. Even assuming that we agree with the holding and reasoning of *Fleshner*, there is one critical distinction between *Fleshner* and the present case. In *Fleshner*, there was actual evidence that a juror made statements during deliberations that evinced an ethnic or religious prejudice. A juror spoke with the defendant's attorneys and averred in an affidavit that a fellow juror made anti-Semitic comments. Here, there is no evidence that any juror during deliberations made comments that reflected ethnic or religious bias against Singh. Even Singh admitted that it was only his belief that the verdict was the result of prejudice. Under these circumstances, the trial court did not abuse its discretion in denying Singh's request to recall and examine the jurors about statements made during deliberations. An evidentiary hearing would be nothing more than a fishing expedition contrary to the goals of preventing tampering with the jurors after the jury is discharged and promoting finality and certainty of judgments. *Fletcher*, 260 Mich App at 539-540; *Brillhart v Mullins*, 128 Mich App 140, 149; 339 NW2d 722 (1983).

Singh next argues that he is entitled to a new trial because the trial court erred in admitting exhibit 50, a photograph that depicts a piece of Dykes's leg bone embedded in the dashboard of Dykes's vehicle. We review a trial court's evidentiary decisions for an abuse of discretion. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 519; 780 NW2d 900 (2009).

Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Evidence is unfairly prejudicial when a danger exists that the jury will give undue or preemptive weight to marginally probative evidence. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 730; 761 NW2d 454 (2008). A photograph may be used to corroborate other evidence, and it is not excludable simply because it is cumulative of a witness's testimony. *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). In addition, gruesomeness alone does not require exclusion. *Id*. at 228.

The trial court did not abuse its discretion in admitting exhibit 50. Dr. James Ringler testified that Dykes's right leg was shorter than her left leg, in part, because of significant bone loss in the right femur. Ringler explained that the bone loss occurred when parts of the bone

"just fell out of the leg." He also stated that Dykes "brought in a picture where a piece of it was impaled in the dashboard." Exhibit 50 corroborated Ringler's testimony about Dykes's bone loss, and the photograph was not excludable simply because it was cumulative of Ringler's testimony. *Id.* The photograph was relevant because it had a tendency to make the existence of Dykes's leg injury more probable than it would be without the photograph. MRE 401.

In addition, the trial court did not abuse its discretion in concluding that the probative value of exhibit 50 was not substantially outweighed by the danger of unfair prejudice. We agree with the trial court that, unless told, a person would not know what exhibit 50 depicted. Admittedly, upon being told what the photograph depicted, a person may find it unpleasant to look at the photograph. But, the photograph is not breathtaking or particularly gruesome. While the piece of bone appears to be bloody, there are no other body parts or even splattered blood in the photograph. Because the photograph was not particularly gruesome, there was no danger that the jury would give it undue or preemptive weight. *Morales*, 279 Mich App at 730. Accordingly, the trial court's decision to admit exhibit 50 fell within the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.

Singh also argues that he is entitled to a new trial because the jury was allowed to consider nonrecord evidence. According to Singh, the jury was allowed to consider exhibits that were identified during Ringler's trial deposition even though Dykes never formally moved for the exhibits' admission before the close of proofs.

The only cases that Singh cites in support of his argument are cases that state that this Court will not consider evidence that was not submitted to the trial court. See *Manley v Detroit Auto Inter-Ins Exch*, 127 Mich App 444, 460-461; 339 NW2d 205 (1983), rev'd in part on other grounds 425 Mich 140 (1986), citing *Dora v Lesinski*, 351 Mich 579, 581; 88 NW2d 592 (1958). Here, however, the trial court admitted the deposition exhibits into evidence, albeit during closing arguments. Essentially, the trial court reopened proofs so that the exhibits could be formally admitted into evidence. A decision whether to reopen proofs is within the discretion of the trial court. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959). Here, the trial court's decision to admit the exhibits into evidence during closing arguments did not give Dykes an "undue advantage." *Id.* Singh saw the exhibits at Ringler's deposition. And, when given the opportunity to challenge their admissibility, Singh stated that he had no objections to the exhibits, except for one, which was not admitted into evidence. Under the circumstances, the trial court did not abuse its discretion admitting the exhibits into evidence.

Finally, Singh argues that the trial court erred in denying his request for remittitur. We review a trial court's decision on a motion for remittitur for an abuse of discretion. *Taylor*, 286 Mich App at 522. We must accord due deference to a trial court's decision because the trial court, having had the unique opportunity to evaluate the jury's reaction to the evidence and witnesses, is in the best position to make an informed decision regarding the excessiveness of a verdict. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989). We view the evidence in the light most favorable to the nonmoving party. *Wiley*, 257 Mich App at 499.

A trial court may grant a new trial if a verdict is clearly or grossly inadequate or excessive. MCR 2.611(A)(1)(d). As an alternative remedy for an excessive verdict, a trial court may offer the prevailing party an opportunity to consent to judgment in the highest amount the

court determines is supported by the evidence. MCR 2.611(E)(1); *Heaton v Benton Constr Co*, 286 Mich App 528, 538; 780 NW2d 618 (2009). For purposes of MCR 2.611, the term "excessive" means "going beyond the usual, necessary, or proper limit, or degree; characterized by excess." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 763; 685 NW2d 391 (2004). Furthermore, "appellate review of jury verdicts must be based on *objective* factors and firmly grounded in the record." *Id*. at 764 (emphasis in original), citing *Palenkas*, 432 Mich at 531-532. The objective factors courts should focus on are:

> (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions. [*Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009), citing *Gilbert*, 470 Mich at 764, in turn citing *Palenkas*, 432 Mich at 532-533.]

When the record and objective factors establish that a jury's verdict is excessive, remittitur is justified. MCR 2.611(E)(1); *Gilbert*, 470 Mich at 764-765.

The first *Palenkas* factor provides no support for Singh's claim that the verdict was excessive. Although Singh believes that the verdict was the result of religious or ethnic prejudice against him, there is no objective evidence in the record indicating that the verdict was the result of juror prejudice.

The second *Palenkas* factor, whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained, is essentially an inquiry into whether the verdict is supported by the record. *Gilbert*, 470 Mich at 766. Singh claims that the record does not support the jury's award for economic and noneconomic damages.

The jury awarded Dykes economic damages of $75,000 per year for work loss beginning on January 23, 2011, three years after the date of the accident, and continuing through 2025. Dykes's husband testified that the average annual income before expenses from Dykes's counseling practice from 2003 through 2007 was $83,202.20. The annual average income after expenses was $67,988.80. In addition, in 2007, Dykes earned $7,880 for teaching at Spring Arbor University. Based on the evidence of Dykes's income before the accident and evidence of her far reaching residual difficulties with attention processing, depression, accessing language, organization of thought and managing day-to-day affairs, the amount of the jury's award for Dykes's annual work loss was supported by the record.

The jury awarded Dykes $2.5 million for pain and suffering that Dykes had already suffered and $2.5 million for pain and suffering that Dykes would suffer in the future. It is impossible to place a true dollar amount on a person's pain and suffering. *Phillips v Deihm*, 213 Mich App 389, 405; 541 NW2d 566 (1995). To determine whether an award of noneconomic damages is supported by the record, "comparison with damage awards in comparable cases in this jurisdiction and beyond—the final *Palenkas* factor—becomes most relevant." *Gilbert*, 470 Mich at 767. While the analysis is not perfect, "other damage awards may provide a range of what constitutes reasonable compensation for the type of injury suffered by a plaintiff." *Id*. This

range may then be utilized to "determine whether the verdict appears to be 'within the limits of what reasonable minds would deem just compensation for the injury sustained . . . .'" *Id.*, quoting *Palenkas*, 432 Mich at 532.

Singh has not provided this Court, nor did he provide the trial court, with any verdicts from comparable cases.[1] By failing to do so, Singh has failed to establish a range of what constitutes reasonable compensation for the type of injuries suffered by Dykes. *Id.* Accordingly, there is nothing before us on which we can say that the jury's award of noneconomic damages exceeded the limits of what reasonable minds would deem just compensation for Dykes's injuries. Absent any comparable cases, and because Dykes suffers from depression, chronic pain, permanent physical disabilities and disfigurements, the trial court did not abuse its discretion in denying Singh's motion for remittitur. *Taylor*, 286 Mich App at 522. As the prevailing party plaintiff may tax costs pursuant to MCR 7.219.

We affirm.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronanye Krause

[1] We reject Singh's claim that the trial court's description of the verdict as being on "the high side" was the equivalent to a determination that the award was greater than the highest amount the evidence would support. The trial court went on to state that the verdict was not contrary to the evidence when the evidence was viewed in the light most favorable to Dykes.