STATE OF MICHIGAN

COURT OF APPEALS

KARL FREED, as Personal Representative of the Estate of BRETTON JAMES FREED, Deceased,

Plaintiff-Appellee,

v

HEALTHLINK MEDICAL TRANSPORT SERVICES, INC. and KIMBERLY JEAN SALAS,

Defendants-Appellees,

and

WASTE MANAGEMENT OF MICHIGAN, INC., d/b/a WASTE MANAGEMENT,

Defendant-Appellant,

and

WILLIAM WHITTY,

Defendant.

FOR PUBLICATION
December 1, 2009

No. 283317
Wayne Circuit Court
LC No. 05-506666-NI

Advance Sheets Version

Before: FITZGERALD, P.J., and TALBOT and SHAPIRO, JJ.

TALBOT, J (*concurring in part and dissenting in part).*

I concur, in result only, with the majority opinion regarding the determinations that: (a) dismissal of Waste Management's driver from the litigation does not preclude a finding of Waste Management's liability under the owner's liability statute, MCL 257.401, (b) the high/low agreement does not comprise a "*Mary Carter*"[1] agreement, (c) the trial court's wording of the

[1] *Booth v Mary Carter Paint Co*, 202 So 2d 8 (Fla App, 1967), but see *Dosdourian v Carsten*, 624 So 2d 241, 246 (Fla, 1993), outlawing the use of *Mary Carter* agreements.

jury instructions pursuant to M Civ JI 12.01 was not erroneous, and (d) the trial court correctly refused to take judicial notice of the speed limit at the situs of the accident. However, I find it necessary to dissent on the remaining issues because of procedural concerns regarding the conduct of the trial.

I. FACTUAL SUMMARY

This appeal involves a motor vehicle accident that occurred on November 2, 2004, involving a garbage truck owned by defendant Waste Management of Michigan, Inc., and an ambulance owned by defendant Healthlink Medical Transportation Services, Inc. which resulted in the death of the ambulance passenger, Bretton Freed. Significantly, long before this accident occurred, Freed was rendered a spastic quadriplegic as the result of a previous motor vehicle accident that occurred in 1987. In the early stages of trial, the driver of the Waste Management truck, William Whitty, was dismissed with prejudice. The order of dismissal for Whitty acknowledged that he was an employee of Waste Management and, at the time of the accident, was operating the garbage truck within the course and scope of his employment. Plaintiff argued that Healthlink was liable because of the failure of their driver to obey a stop sign and that Waste Management was negligent because of their driver's exceeding the posted speed limit.

At the conclusion of the jury trial in this case, plaintiff received an award of $14 million. The jury apportioned fault as being 45 percent attributable to Waste Management and 55 percent attributable to Healthlink. Healthlink acknowledged negligence resulting from the driver of the ambulance, Kimberly Salas, having run a stop sign.[2] Healthlink also entered into a high/low agreement with plaintiff, limiting its financial liability to no less than $900,000 and no more than $1 million.[3]

II. ANALYSIS – NEGLIGENCE/LIABILITY

In my opinion, this case should be reversed and remanded for a new trial because of errors that occurred and affected both the determination of negligence and the damages award for conscious pain and suffering. Specifically, with regard to the issue of Waste Management's negligence and liability, the trial court improperly permitted the accident reconstruction experts to opine on the ultimate issues of Waste Management's negligence and proportion of fault and failed to permit an instruction on the sudden emergency doctrine.

A. ACCIDENT RECONSTRUCTION EXPERTS

Three accident reconstruction experts were called to testify: Richard Toner, Weldon Greiger, and Ronald Robins.[4] The majority of the testimony elicited from these individuals

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[2] Salas pleaded guilty of negligent homicide and was the only driver cited by the police at the accident scene.

[3] The high/low agreement coincided with Healthlink's insurance coverage.

[4] Plaintiff named Richard Toner and Ronald Robins as expert witnesses. Defendant Healthlink originally named Weldon Greiger as an expert witness.

focused on their method and means of determining the speed of the garbage truck at the time of impact. All three experts opined that the garbage truck was traveling in excess of the posted 35 miles an hour speed limit.[5] The problem arises with the trial court's latitude in the questioning of these witnesses, over Waste Management's repeated objections, to opine that Waste Management's driver was negligent and to suggest an apportionment of fault.

Several examples of the improper testimony demonstrate the extent and repetition of this error. When Toner was testifying, he was asked:

> *Q.* Do you have an opinion as to whether a reasonably prudent or careful truck driver under the very same circumstances of this accident would be going down that road at 51 – at minimum 51 miles an hour?
>
> * * *
>
> *A.* I don't think that was proper for him to do at all. I think that was unreasonable.

Toner was also asked:

> *Q.* Now, when a road – when a person is going northbound like the truck driver, like Mr. Whitty. And there is traffic in front of him, can you tell the Jury if you have an opinion as to whether he has a duty to, "Keep a property look out"?
>
> *A.* Absolutely, every driver does.
>
> * * *
>
> *Q.* Why didn't he stop in time?
>
> *A.* He was going too fast.
>
> *Q.* In this case, Mr. Toner, do you have an opinion as to how many causes of this accident there were?
>
> *A.* Yes.
>
> *Q.* What are they?
>
> *A.* Two.
>
> *Q.* Specifically who and what?
>
> *A.* Ms. Salas ran the stop sign and the refuge [sic] truck was going too fast. The combination of both of them caused the accident.

[5] Greiger estimated Whitty's speed to be 55 miles an hour; Toner estimated Whitty's speed at 51 miles an hour; Robins estimated Whitty's speed to be in the range of 55 miles an hour.

Relevant testimony by Greiger included the following:

Q. So in . . . in conclusion, was the speed of the garbage truck, any less or more important that then [sic] factor of the ambulance going through the stop sign?

A. Well, percentage of fault really is the purview of the Jury but if I was asked – if I'm asked the question, they really have to share equal responsibility.

* * *

Q. You mentioned, Mr. Greiger, that as part of – plain and simple, Mr. Whitty was speeding, wasn't he?

A. Yes.

Q. And you believe he was negligently [sic] when he was speeding, exceeding the speed limit?

A. Yes.

Q. Don't you?

A. Yes.

* * *

Q. Mr. Geiger [sic], in addition to the fact that Mr. Whitty in [sic] Waste Management was speeding, you told the Jury, as a result of that speeding, he lost the right of way, didn't you?

A. That's the law.

* * *

Q. [T]o what you believe, as you told this Jury about both the ambulance, Ms. Salas and Mr. Whitty and Waste Management being causes of the accident, tell the Jury if you would, please, why you think they're both at fault?

A. Well, obviously you need to yield with the stop sign. Had – had the ambulance stopped at the stop sign, there wouldn't have been an accident. Had Mr. Whitty not been speeding, there would not [sic] been an accident.

It is recognized that an expert's opinion regarding the law is of no aid to the jury and could result in confusion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 621-622; 600 NW2d 66 (1999). The function of an expert witness is to supply expert testimony, which includes opinion evidence, subject to the development of a proper foundation. Opinion evidence may embrace ultimate issues of fact, such as, in this instance, the speed of the garbage truck before impact. "However, the opinion of an expert may not extend to the creation of new legal definitions and standards and to legal conclusions." *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122; 559 NW2d 54 (1996). In addition, "an expert witness is not permitted to tell the jury how to decide the case." *Id.* at 122-123. "A 'witness is prohibited from opining on the issue of a party's negligence or nonnegligence, capacity or noncapacity to execute a will or deed, simple versus gross negligence, the criminal responsibility of an accused, or [the accused's] guilt or innocence'." *Id.* at 123, quoting *People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980). Consequently,

> it is error to permit a witness to give the witness' own opinion or interpretation of the facts because doing so would invade the province of the jury. An expert witness also may not give testimony regarding a question of law, because it is the exclusive responsibility of the trial court to find and interpret the law. [*Carson, supra* at 123 (citations omitted.).]

In other words,

> where a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury. [*Koenig v South Haven*, 221 Mich App 711, 726; 562 NW2d 509 (1997), rev'd on other grounds 460 Mich 667 (1999), quoting *Drossart, supra* at 80.]

By permitting the experts to opine definitively regarding Waste Management's negligence and the apportionment of fault, the trial court effectively removed from the jury the decision on the ultimate issue of negligence. The scope of expert testimony should have been restricted to whether Waste Management's driver was speeding. Further compounding the error regarding the admissibility of this testimony, is the omission on the verdict form of a provision for the jury to indicate whether Waste Management's driver violated a specific statute or common-law standard of care.[6] The jury's indication that Waste Management was negligent seems a mere formality given the trial court's treatment of the truck driver's negligence as a foregone conclusion rather than a question of fact to be determined by the jury. I acknowledge that the majority of testimony, which could be deemed persuasive, indicated Waste Management's driver was exceeding the applicable speed limit. However, because Waste Management's driver and his passenger estimated that he was driving between 35 miles an hour and 40 miles an hour,[7] whether the driver was speeding and violated a statutory regulation or a common-law standard of care comprised a factual issue that was solely within the purview of the jury.

Clearly, credibility and factual issues existed regarding the garbage truck's speed at the time of the accident. I do not question that sufficient evidence was presented, through expert testimony, to support a determination that Waste Management's driver was speeding at the time of the accident. However, by permitting the experts to opine that Waste Management's driver was negligent and to suggest an apportionment of fault, the trial court effectively removed the

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[6] I acknowledge that this discrepancy is rendered irrelevant given Waste Management's failure to object to this aspect or portion of the verdict form. *Chastain v Gen Motors Corp (On Remand)*, 254 Mich App 576, 591-592; 657 NW2d 804 (2002). See, also, *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 696; 630 NW2d 356 (2001); *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

[7] Whitty testified that he had slowed down and was proceeding at a speed less than 35 miles an hour when he approached the intersection.

determination of negligence from the jury and it is impossible to ascertain the impact of these opinions on the ultimate verdict.

B. SUDDEN EMERGENCY DOCTRINE

Another issue of concern pertaining to the determination of Waste Management's negligence or liability is the trial court's failure to give the requested jury instruction on the sudden emergency doctrine. The trial court reasoned that Waste Management was not entitled to the instruction because it, at least in part, created the hazard. I believe the majority misconstrues Waste Management's argument on this issue.

The majority suggests that Waste Management contends that the instruction is required to be given to the jury in conjunction with the instruction on proximate cause. However, Waste Management asserts that the trial court's refusal to give the instruction was error because it served as a predetermination that its driver was speeding. I agree with Waste Management that the failure to give the instruction effectively resulted in the trial court ruling on Waste Management's negligence rather than the jury making a determination on this issue.

The majority contends the trial court did not abuse its discretion by refusing to give the instruction because the sudden emergency doctrine only excuses a statutory violation "in regards to the events that occur after the defendant discovers the emergency," and in this instance, it was the speed of Waste Management's garbage truck before the emergent condition of the ambulance running the stop sign that precluded the ability to stop or avoid the accident. However, like the trial court, this presupposes that the garbage truck driver was speeding, which should have been a question of fact reserved solely for resolution by the jury. The jury should have first made a determination regarding whether Waste Management's driver was speeding and then, on the basis of that factual determination, should have decided whether the sudden emergency doctrine was applicable. While, in all likelihood, the jury would determine that the doctrine was not applicable, it was improper for the trial court to preclude giving the instruction on the basis of the court's assumption that Waste Management's driver was speeding, further usurping the role of the jury.

III. ANALYSIS – DAMAGES

While the errors pertaining to liability and negligence are sufficient, standing alone, to require a new trial, I also believe that error occurred involving the propriety of testimony by Dr. Werner Spitz regarding the decedent's fear of death or impending sense of doom. In addition, issues exist regarding the format or construction of a portion of the jury verdict form, which calls into question the award for conscious pain and suffering and the propriety of the trial court's ruling on remittitur, necessitating that the award be vacated.

A. WERNER SPITZ

The testimony elicited from Spitz was comprised of two interrelated components involving the decedent's actual physical capacity to sense pain and the decedent's experience of fear as a compensable aspect of suffering. "A jury may award reasonable compensation for the pain and suffering undergone by the decedent while conscious during the intervening time between the injury and death." *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 180;

475 NW2d 854 (1991). "The existence of a decedent's conscious pain and suffering may be inferred from other evidence that does not explicitly establish the fact." *Id.*

There was no actual dispute that the decedent was conscious for the approximately four hours following the time of the accident until he was transferred to University of Michigan Hospital, where he expired. Issues arise pertaining to Spitz and others indicating that the decedent was aware or cognizant, after the accident, and maintained some level of understanding of his condition and impending death. There was conflicting testimony regarding the decedent's ability to experience pain because of his preexisting medical condition and long-standing diagnosis as a spastic quadriplegic.

Waste Management raised concerns regarding the testimony anticipated to be elicited from Spitz, based on his deposition testimony, regarding the decedent's experience of a "fear of death," initially seeking the testimony to be excluded or, in the alternative, that a *Daubert*[8] hearing be conducted. The trial court denied the request for a *Daubert* hearing and, instead, defendants' concerns were addressed before Spitz testified at trial, outside the presence of the jury. At this hearing, the trial court determined that it would permit Spitz to opine on the decedent's fear of death, but that it would limit such testimony to the possibility that he "could have feared impending doom."

The initial error by the trial court involves the overall breadth and scope of the testimony it permitted from Dr. Spitz. This witness was listed as an expert in forensic pathology and, initially, it appears he was to testify that the decedent died as a result of the injuries incurred in this accident. However, at some point, Dr. Spitz's role was inexplicably expanded and he was permitted, as a forensic pathologist, to testify regarding the decedent's ability to feel or experience pain following the accident. While I would contend it was improper to permit a forensic pathologist to provide "expert" testimony so far afield from his actual area of expertise, unfathomably the trial court went even further and allowed the scope of his testimony to be further expanded, permitting Spitz to render an opinion on the decedent's fear of impending doom as, asserted by plaintiff's counsel, "part and parcel of conscious pain and suffering."

I believe that the rulings by the trial court, which allowed Spitz to testify beyond his identified area of expertise, constituted serious error on a multitude of levels. Foremost, I cannot comprehend how Spitz was permitted to testify or opine as an expert on matters pertaining to the decedent's conscious pain and suffering when Spitz was only qualified or identified as an expert in forensic pathology. Further, the basis for the testimony elicited from Spitz was purely speculative and should have been excluded in accordance with MRE 403. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). To a limited extent, the opinion expressed by Spitz regarding decedent's fear was based on testimony by a physician's assistant, Kelly Long[9], who had been involved for an ongoing time period in the decedent's care at the rehabilitation center

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[8] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[9] Also referred to as Kelly Long Barker.

where he lived. Upon hearing of the accident, Long went to the accident scene and remained with the decedent through his transfer to University of Michigan Hospital. Long asserted, on the basis of her familiarity with the decedent, that his facial expressions indicated that he was traumatized and fearful following the accident. As has been repeatedly recognized, "[t]he facts and data on which an expert relies in formulating an opinion must be reliable." *Anton v State Farm Mut Automobile Ins Co*, 238 Mich App 673, 677; 607 NW2d 123 (1999). In this instance, the opinions expressed by Spitz were not based on reliable facts and data, but were merely premised on another individual's perception and opinion. As such, for the trial court to permit Spitz to testify regarding the decedent's fear of death and impending doom was impermissibly speculative and without adequate basis.

Compounding these errors, was the failure of the trial court to require the questions directed to Spitz, and his resultant responses, to conform to the purported limitations placed on his testimony. Despite numerous and ongoing objections by Waste Management's counsel, the trial court permitted Spitz to testify that he believed the decedent experienced pain, suffering, and a fear of death or an impending sense of doom. The trial court indicated it would limit testimony by Spitz to whether decedent "could have feared impending doom." I agree with Waste Management's argument on appeal that the trial court repeatedly permitted Spitz to exceed this purported limitation. Examples of improper testimony by Spitz include, but are not necessarily limited to, the following:

> I think there's clear evidence that he was observed in a condition that was different from the usual condition that he was in. And that was based on the fact that he was in a state of great fear.
>
> ***
>
> The fear of impending doom is an instinct.
>
> ***
>
> All – any and all the injuries that he sustained were associated with pain and on top of that, the incident as a whole, even without manifestations of–direct manifestations of trauma by way of abrasion, laceration, fracture or whatever. The incident as a whole caused fear of dying in this individual.
>
> ***
>
> He could see. He could hear. And this whole event was associated, as may be expected with a lot of commotion. And a lot of physical changes in an individual who is very susceptible . . . . So that is what caused the fear of impending doom.
>
> ***
>
> We know he is losing blood and we know he is fearful.
>
> ***
>
> He's losing blood rapidly. He is not having enough oxygen to breath and he's probably fearful as well.
>
> ***

> That would cause him pain. It would cause him–he–can see. He can–he can observe the fact that there is blood shed. That makes him fearful, too. Or that could make him fearful too.
>
> ***
>
> [I]n association with the physical pain he could have had a fear of dying, the fear of impending doom.

Ultimately, the determination of the existence and extent of the decedent's pain and suffering for this four-hour period following the accident was a determination for the jury because conflicting testimony existed regarding the decedent's ability to perceive or experience pain and his level of cognizance. The decedent's physician reported that, historically, the decedent evidenced some movement and sensation in response to pin prick tests in his lower extremities. Waste Management presented testimony by a physician regarding the improbability of sensation, or the experience of pain, based on the decedent's preexisting diagnosis and evidence that the decedent was not administered any pain medication either at the accident site or when later hospitalized. While issues of fact and credibility determinations existed for the jury regarding the decedent's ability to experience pain, the trial court erred in permitting Spitz to repeatedly exceed the purported limits imposed on his testimony by indicating that the decedent's fear of dying or sense of impending doom was an established fact rather than a mere possibility. Because it is impossible to discern the impact or influence on the jury of such improper and repetitive references in its contemplation of damages, I would vacate the award for pain and suffering and remand this issue to the trial court for a new trial.

B. REMITTITUR

I believe the trial court also erred in its determination that sufficient evidence existed to support the damage award for conscious pain and suffering in its denial of Waste Management's request for remittitur. Waste Management sought remittitur or judgment notwithstanding the verdict (JNOV) on two separate occasions (October 12, 2007, and December 7, 2007) premised primarily on the insufficiency of the evidence to sustain such a verdict and comparisons to significantly lower verdicts awarded in other cases, which were factually similar to the circumstances pertaining to this decedent. At the hearing on the first motion, the trial court ruled:

> [T]he issue before me in this series of motions is whether the jury had sufficient evidence to decide the question of conscious pain and suffering. And I find that they did. They did have sufficient evidence and so the motion for JNOV, for a new trial and for remittitur based on the plaintiff's inability, Brett Freed's inability to have conscious pain and suffering is denied.

Following argument on the second motion, the trial court ruled, in relevant part:

> On the issue of remittitur, I find that the lawyers had ample time [sic] craft and approve the form of the verdict. I find further that there was sufficient evidence to support loss of society and companionship. I find lastly there was sufficient evidence to support conscious pain and suffering. Therefore, the motion for remittitur is denied.

Contrary to the trial court's implication that Waste Management waived this issue, Waste Management did object to the combination of an award of damages for pain and suffering and loss of society on the jury verdict form. Following the motion for remittitur, the trial court merely indicated that there was sufficient evidence to support the award.

This Court is required to accord due deference to a trial court's decision on remittutur and should only disturb the ruling if an abuse of discretion is shown. *Palenkas v Beaumont Hosp*, 432 Mich 527, 533-534; 443 NW2d 354 (1989). MCR 2.611(E)(1) provides:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

Our Supreme Court has identified a number of factors to be considered in evaluating a damages award, stating:

> [T]rial courts, in addition to evaluating whether a jury award is supported by the proofs, have conducted a myriad of other inquiries in determining whether remittitur would be proper in a particular case: 1) whether the verdict "shocks the judicial conscience"; 2) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; 3) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; 4) whether the amount actually awarded is comparable to awards in similar cases within the state and in other jurisdictions. [*Palenkas, supra* at 532.]

The *Palenkas* Court determined that the only "*expressly* authorized" consideration "is whether the jury award is supported by the evidence," *id*. (emphasis in original), citing MCR 2.611(E)(1), and expressly rejected the "'shock the conscience'" inquiry as an "inappropriate consideration" because of its subjectivity, *id.* Instead, the Court indicated that inquiries pertaining to remittitur should focus and "be limited to *objective* considerations relating to the actual conduct of the trial or to the evidence adduced." *Id.* (emphasis in original).

Contrary to the trial court's ruling, because it is impossible to ascertain precisely how much of the award was attributable to pain and suffering versus the loss of society and companionship as a result of the consolidation of these items on the jury verdict form, the propriety or reasonableness of the award cannot be determined. In this instance, the jury awarded $9 million in total damages for conscious pain and suffering and the loss of society and companionship from the date of the accident through to the date of trial (specifically for the period of November 2, 2004, through May 9, 2007).[10] Of this amount, $4 million of the damages awarded were designated for the date of the accident and Freed's death on November 2, 2004,

[10] An additional $5 million was awarded for future damages pertaining to loss of society and companionship (from May 10, 2007, through November 2, 2011).

through the end of the 2004 calendar year. Specifically, the relevant portion of the jury verdict form, which was objected to by Waste Management, provides the following:

> **Question No. 6:** What is the total amount of the Plaintiff's damages to the present date for conscious pain and suffering, and loss of society and companionship?
>
> Answer: $9,000,000.00
>
> | | |
> |---|---|
> | 11/2/04 – 12/31/04 | $4,000,000.00 |
> | 2005 | $2,000,000.00 |
> | 2006 | $2,000,000.00 |
> | 1/31/07 – 5/9/07 | $1,000,000.00 |

The verdict form listed as one item, without separation or distinction, damages for both conscious pain and suffering and the loss of society and companionship across four different time periods (November 2, 2004, through December 31, 2004; 2005; 2006; January 31, 2007, through May 9, 2007).[11] Clearly, as a matter of logic, conscious pain and suffering damages can only be awarded for the four-hour time period between the accident and the decedent's demise. However, because of the manner in which this question is constructed on the verdict form, it is impossible to ascertain what amounts or apportionment, if any, were made for conscious pain and suffering versus loss of society and companionship while the decedent was alive during this four-hour period. Construction of the verdict form and the failure to delineate between the actual date of the accident from subsequent time frames, as well as between conscious pain and suffering and loss of society and companionship, necessarily raises additional questions regarding whether the jury may have incorrectly awarded pain and suffering damages for time periods after the decedent's demise. As a result, I find it impossible to uphold the trial court's determination regarding the sufficiency of the evidence to support this portion of the damages award because it cannot be ascertained with any certainty or precision what amount comprised the actual award for conscious pain and suffering. In part, for this same reason, I question the award for loss of society and companionship, but as a result of the failure of counsel to adequately develop a record sufficient for appeal, I am unable to address the remainder of the damages award.

[11] I would note that the time period designated in 2007 in this category inexplicably begins at January 31, 2007, rather than January 1, 2007.

IV. CONCLUSION

Because of the obvious errors in the conduct of the trial in this matter, and with particular emphasis on the impropriety of the expert testimony elicited, I would reverse the judgment and remand for a new trial regarding Waste Management's liability and damages.

/s/ Michael J. Talbot