

STATE OF MICHIGAN
COURT OF APPEALS

MARTIN SEACORD, Personnel Representative of
the Estate of the Estate of ASA MARTIN SEACORD,
Deceased,

UNPUBLISHED
April 21, 1998

Plaintiff-Appellee,

v

CITY OF DETROIT, JAMES BORKOWSKI and
TIMOTHY SCROEDER,

No. 191109
Wayne Circuit Court
LC No. 93-318285-NI

Defendants-Appellants.

Before: Holbrook, Jr., P.J., and White and J.W. Fitzgerald*, JJ.

PER CURIAM.

Defendants appeal by leave from an order of the trial court granting plaintiff a new trial in this wrongful death action. We reverse.

I. History

On May 22, 1991, Asa Martin Seacord was at home when he began to have chest pains. This was the second time during the day that Seacord experienced such pains. An ambulance was summoned, arriving at the Seacord home at 4:07 p.m. Apparently because his chest pains had subsided, Seacord refused transportation to a hospital. Shortly after the two EMS technicians left the Seacord home, the deceased's condition worsened. The deceased's brother then approached the two technicians as they sat in their ambulance outside the Seacord home. Plaintiff and defendants tell two disparate stories about what was said in the subsequent conversation between the deceased's brother and the two technicians. After this first ambulance left, the deceased's family placed another call to 911, and a second ambulance was dispatched. When the second ambulance arrived a few minutes after 4:30 p.m., Seacord was in complete cardiac arrest. Seacord was then transported to the emergency room of Sinai Hospital. Attempts to resuscitate Seacord were ineffective; he was pronounced dead at 5:12 p.m.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Plaintiff sued the City of Detroit, and Schroeder and Borkowski, who were the two EMS technicians that came with the first ambulance dispatched to the Seacord home. The jury returned a verdict for defendants, finding that their actions did not constitute gross negligence or willful misconduct. Plaintiff filed a motion for new trial, which the trial court granted on two grounds: (1) juror misconduct, and (2) failure to allow plaintiff access to certain medical information contained in Borkowski's personnel file, which had been reviewed in camera by the trial court. On December 12, 1994, this Court vacated the trial court's order, and directed the lower court to reconsider the motion after it had conducted an evidentiary hearing on the question of juror misconduct. After convening this hearing, having found no factual basis for the juror misconduct allegations, the trial court denied plaintiff's motion for new trial. Plaintiff then filed a motion for reconsideration, arguing that: (1) because the trial court had not rejected its earlier ruling that it had erred when it failed to allow plaintiff access to the disputed portion of the personnel file, that earlier ruling was still binding; and (2) in light of the Michigan Supreme Court's holding in *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994), the jury was improperly instructed on the definition of "gross negligence." The trial court agreed, and on November 17, 1995 granted plaintiff a new trial. It is from this order that defendants now appeal.

II. Analysis

Defendants first argue that according to the precepts of the law of the case doctrine, this Court's December 12, 1994 order bars the trial court from granting plaintiff a new trial on the grounds cited. We disagree. Our December 12, 1994 order *vacated* the trial court's order *in lieu* of granting leave. Accordingly, because the trial court's order was not reversed, and because a decision was never announced on any issues of law, the law of the case doctrine is inapplicable. *Hill v Ford Motor Co*, 183 Mich App 208, 212; 454 NW2d 125 (1990). Simply put, the December 12, 1994 order established no law of the case which was binding on the lower court.

Second, defendants argue that the trial court erred in granting plaintiff's motion for new trial. We agree. This Court reviews a trial court's grant of new trial for an abuse of discretion. *Setterington v Pontiac Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997). As previously mentioned, the trial court granted plaintiff a new trial on two grounds. First, the trial court stated that it erred in not allowing plaintiff access to the disputed portions of Borkowski's personnel record. Second, in light of the Michigan Supreme Court's decision in *Jennings, supra*, the trial court concluded that its jury instruction regarding the definition of gross negligence had been in error. Because plaintiff and defendants agree that a new trial should not have been granted on the basis of the Michigan Supreme Court's holding in *Jennings*, our analysis of this issue will focus solely on the question of the personnel record.

After carefully reviewing the portions of the personnel record at issue, we conclude that the trial court abused its discretion when granting plaintiff's motion for a new trial. According to MCR 2.611(A)(1), a party may not be granted a new trial unless it is established that the party's "substantial rights were materially affected" by a specified action of the trial court. In this case, the trial court denied plaintiff access to certain medical records contained in Borkowski's personnel file. Our review of those records uncovered only one document of even marginal

relevance to issue of Borkowski's mental state at the time that he treated or failed to treat Mr. Seacord. We are satisfied that the production of this document would have had no effect on the outcome of the case.

In *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, mod on other grounds 450 Mich 1212; 539 NW2d 504 (1995), the Michigan Supreme Court observed that when reviewing the issue of relevancy, an appellate court should ask itself two questions:

First, we must determine the "materiality" of the evidence. In other words, we must determine whether the evidence was of consequence to the determination of the action. Second, we must determine the "probative" force of the evidence, or rather, whether the evidence makes a fact of consequence more or less probable than it would be without the evidence.

There is nothing in the record that establishes that Borkowski's mental capacity was at all impaired on the date in question or that it was, prior to January 1993, ever impaired to such an extent that it affected his ability to discharge his occupational responsibilities.

As for whether the material could bear on the issue of witness credibility, we observe that there is nothing in the record that indicates that Borkowski's competency as a witness was in question. There is no evidence that Borkowski's powers of perception, recollection, and communication were affected either at the time of the incident or at trial. See, e.g., *Utah v Stewart*, 925 P2d 598, 600 (Utah Ct App, 1996). Indeed, we note that Borkowski testified at great length and detail about the circumstances surrounding his and Scroeder's interaction with decedent. Therefore, we conclude that no foundation has been laid to show that the material is relevant to the issue of credibility.

We conclude, therefore, that the material contained in this single self-report was of no consequence and carries no probative force with regard to the determination of this cause of action. Consequently, we further conclude that plaintiff has failed to establish how any of his substantial rights were adversely and materially affected by the trial court's decision to deny plaintiff access to the disputed records.

Reversed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ John W. Fitzgerald