STATE OF MICHIGAN

COURT OF APPEALS

FAYE ANN DUROCHER and HOWARD DUROCHER,

Plaintiffs-Appellees,

v

CENTRAL MICHIGAN RAILWAY COMPANY,

Defendant-Appellant.

And

STRAITS CORPORATION, D. M. CENTRAL TRANSPORTATION, WILLIAM EWALD, MARY EWALD, JEFFREY KUSCH, and CAROL KUSCH,

Defendants.

UNPUBLISHED
September 17, 1999

No. 204356
Bay Circuit Court
LC No. 92-003419 NO

Before: Markman, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant[1] Central Michigan Railway Company appeals as of right a judgment in favor of plaintiffs entered following a jury trial. We reverse and remand for a new trial.

This case arises out of an accident that occurred on the Saginaw River in Bay City on July 3, 1989. Plaintiffs were passengers on a boat (the "Rebecca J") owned and operated by Michael Ratajczak. At about 11:45 p.m., the boat was traveling north (downriver) on the river after the completion of a fireworks display. The river was congested with many other boats also watching the fireworks. As the boat moved forward, two boats[2] suddenly cut in front of the Rebecca J, causing Ratajczak to downthrottle quickly. The boat then stalled as it passed directly under the Liberty Bridge. The boat drifted toward the Central Michigan Bridge (a railroad bridge) and struck the bridge. Faye Durocher, who had been walking along the side of the boat, was struck on her hands by an I-beam of

the bridge as she attempted to cover her head with her hands. Her right hand was rather severely injured; she lost the use of three fingers on her right hand and her middle finger on her left hand was also amputated as a result of the collision.

The case was tried before a jury in February 1997. The jury rendered its verdict and found defendant to be negligent, that its negligence was a proximate cause of plaintiffs' damages, that the total amount of damages for Faye Durocher was $1,000,000, and the total amount of damages for Howard Durocher was $10,000. Faye Durocher was found to be sixty percent comparatively negligent so that the damages were reduced to $400,000 and $4,000 respectively. The judgment was also subject to a setoff of $175,750. Defendant now appeals from the final judgment.

I

Defendant first argues that plaintiffs' claim of failure to install, maintain, and use the navigational lighting on the bridge was preempted by federal law and regulation and that the trial court erred in ruling that the claim was not preempted. We disagree.

At a pretrial motion in limine, defendant argued that plaintiffs' claim that defendant failed to provide or to light any navigational beacons on the bridge at the time of the accident was preempted by federal law, specifically citing Title 33 (navigation and navigable waters). The trial court denied the motion, finding that plaintiffs' claim was not preempted. The issue of preemption was again raised at trial before testimony was heard from plaintiffs' expert. Defense counsel reiterated his argument that the question of navigational lights should not be decided by a jury because such a matter is for the federal regulatory authorities. Defense counsel did not want plaintiffs' expert to testify to any opinion regarding lights on the bridge. The trial court again ruled that the claim was not preempted.

Our Supreme Court's most recent pronouncement on the matter of federal preemption is *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997). There, the Court stated that Congressional intent is the cornerstone of preemption analysis. *Id.* at 27. Congressional intent is gleaned from the text, structure, and purpose of the statute as a whole, including the manner in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law. *Id.* at 28. Federal preemption is either express or implied. If express, the intent of Congress to preempt state law must be clearly stated in the statute's language or impliedly contained in the statute's structure and purpose. *Id.* Implied preemption may exist in the form of conflict or field preemption. Conflict preemption preempts state law that is in direct conflict with federal law or with the purposes and objectives of Congress. *Id.* Field preemption preempts state law where federal law so thoroughly occupies a legislative field that it is reasonable to infer that Congress did not intend for states to supplement it. *Id.* A common-law tort claim is a state law such that it can be preempted by federal law. *Id.* at 33-34.

The Court in *Ryan* also stated that federal provisions invalidating state law must be narrowly tailored to support a presumption against preemption of state law. *Id.* at 27. State police powers are not to be superseded unless that is the clear and unequivocal intent of Congress. *Id.* This is especially so where state regulation of matters relating to safety and health are involved. *Id.*

The federal statutory scheme relied on by the parties below was Title 33 and a review of the chapter relating to bridges, 33 USC 491-534, reveals that the only provisions regarding lights is 33 USC 494, which provides in relevant part: "The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe." In its appellate brief, defendant cites 14 USC 85, which relates to the Coast Guard, and provides:

> The Secretary shall prescribe and enforce necessary and reasonable rules and regulations, for the protection of maritime navigation, relative to the establishment, maintenance, and operation of lights and other signals on fixed and floating structures in or over waters subject to the jurisdiction of the United States and in the high seas for structures owned or operated by persons subject to the jurisdiction of the United States. Any owner or operator of such a structure, excluding an agency of the United States, who violates any of the rules or regulations prescribed hereunder, commits a misdemeanor and shall be punished, upon conviction thereof, by a fine of not exceeding $100 for each day during which such violation continues.

We conclude that the above-cited statutory provisions do not preempt plaintiffs' state tort law claim, especially since there is a presumption against preemption. Defendant has failed to cite any statutory provision in its brief indicating a Congressional intent, either explicit or implicit, to preempt a state tort law claim relating to lights on a bridge.

Further, we note that it was plaintiffs' claim that defendant failed to provide or light navigational beacons on the bridge. It appears that it was undisputed at trial that there were lights on the bridge that conformed with federal law and regulation; however, there was evidence that some or most of the lights were not lit the night of the accident. Therefore, whether the lights were actually lit would not appear to be a matter that would be preempted by federal law even if it was determined that the placement of the lights on the bridge is a matter exclusively within the province of the federal government. Accordingly, we conclude that the trial court did not err in ruling that plaintiffs' claim was not preempted by federal law.

II

Defendant next argues that the trial court erred by dismissing defendant's defense that the negligence of the boat owner (Michael Ratajczak) was the sole proximate cause of the injuries sustained by Faye Durocher.

As its affirmative defense to the first amended complaint, defendant asserted that Faye Durocher's injuries were due to the negligence of the boat's owner and operator. Before trial, plaintiffs moved to strike the defense pursuant to MCR 2.116(C)(9). At the hearing, there was some question whether defendant could properly raise this defense because defendant had not asserted it in the answer to the original complaint. Because of this posture, defendant stipulated that the trial court could grant plaintiffs' motion for summary disposition regarding the affirmative defense, but still wished to present evidence that Ratajczak was negligent so that the jury could consider whether his conduct was the sole

proximate cause of Faye Durocher's injury. The trial court's order provided that an opinion, conclusion, or argument of any alleged negligence of Ratajczak was not material to the issue involving allegations of defendant's negligence, that Ratajczak's actions were not an intervening cause of Faye Durocher's injuries, that any opinion, conclusion, or argument of any alleged negligence of Ratajczak could not be introduced at trial, and that evidence of Ratajczak's actions leading to the accident was permitted to explain events leading to the boat's collision with the bridge.

It is well established that there may be more than one proximate cause for the same injury. *Rogers v Detroit*, 457 Mich 125, 143; 579 NW2d 840 (1998); *Dedes v Asch*, 446 Mich 99, 116; 521 NW2d 488 (1994); *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988). The fact that some other cause cooperates with the negligence of the defendant to produce the injury for which suit is brought does not relieve the defendant from liability. *Dedes*, *supra* at 116.

We find no error in the trial court's ruling that how the boat ended up hitting the bridge was not material to the jury's decision whether defendant was negligent in maintaining the bridge. See, generally, *Derbeck v Ward*, 178 Mich App 38, 44-47; 443 NW2d 812 (1989); *Deaton v Baker*, 122 Mich App 252; 332 NW2d 457 (1982). Ratajczak knew that the boat had engine problems and apparently had attempted to correct the fuel line defect that caused the engine to stall. While on the river, two other boats cut in front of Ratajczak's boat, causing him to downthrottle quickly, in turn causing the boat to stall and drift into the bridge. Even if Ratajczak's conduct is considered to be negligent and a proximate cause of Faye Durocher's injury, the question for the jury was whether defendant was negligent in failing to maintain the bridge so that there would be no injury to persons on boats that might hit the bridge. Here, there was clearly a chain of events leading to Faye Durocher's injury and Ratajczak's conduct cannot be considered, as a matter of law, to be the *sole* proximate cause of Faye Durocher's injuries.

Defendant also contends that Ratajczak's conduct was a superseding cause such that his conduct cut off defendant from all liability. "A superseding cause is one that intervenes to prevent a defendant from being liable for harm to a plaintiff that the defendant's antecedent negligence is a substantial factor in bringing about." *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 436; 487 NW2d 106 (1992); see also *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985) (an intervening cause is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed). Contrary to defendant's argument, foreseeability is still the touchstone where superseding cause is involved. *Hickey*, *supra* at 437 (in order to be a superseding cause, thereby relieving a negligent defendant from liability, an intervening force must not have been reasonably foreseeable); see also *McMillian*, *supra* at 576 (the modern trend is to eliminate foreseeable consequences as a test of proximate cause, except where an independent, responsible, intervening cause is involved). Further, where the defendant's negligence consists of failing to protect the plaintiff against the very risk that occurs, it cannot be said that the intervening cause was not reasonably foreseeable. *Hickey*, *supra* at 148.

In the present case, the trial court's ruling that no juror could find that the bridge owner would not be able to foresee that a boat, under some circumstances, would get close enough to the bridge so that if the bridge was not properly maintained someone would be injured, is in accord with Supreme

Court precedent. Moreover, the trial court permitted evidence of the events leading to the boat's collision with the bridge.

The trial court's rulings with regard to the defenses of superseding and intervening causes were not erroneous.

III

As its last issue, defendant argues that plaintiffs' counsel's closing argument was so improper, inflammatory, and unfairly prejudicial as to deny it a fair trial. We agree.

First, we note that although defense counsel did not interrupt plaintiffs' counsel's argument after every improper comment, the issue is nevertheless preserved by defendant's timely motion for a mistrial made outside of the presence of the jury after the conclusion of plaintiffs' counsel's closing argument. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 100-103; 330 NW2d 638 (1982). Although unnecessary to preserve the issues, defense counsel did make several contemporaneous objections to plaintiffs' closing argument. Specifically, defendant objected to plaintiffs' counsel's argument that (1) the jury should put themselves in the place of plaintiffs, (2) that the jury should consider statements made during voir dire by an excused juror, (3) that a jury "out in L.A. recently gave 8.5 million dollars," (4) that a substantial damage verdict is necessary to "wake up" non-party "Charles Pinkerton the III [principal stockholder of defendant] and let him know that the community values are – are followed in this town," (5) that "[w]e're asking them to send home a message" that defendant and/or Pinkerton the III cannot put "profits over people," (6) "that you can't do business in this town and le -- live elsewhere and have such callous disregard for the boating public's safety," and (7) that plaintiff deserves a substantial sum to "convince the fairly new Central Michigan Railway Company to start using ordinary and reasonable care."

All the objections were argued in front of the jury. While the first three and sixth objections were sustained by the trial court,[3] defendant's fourth, fifth, and seventh objections were overruled. Thus, the jury was tacitly advised that a large part of plaintiffs' argument, including the repeated theme of "profits over people," was proper and should be considered by them in rendering their verdict and potential damage award.

The seminal case regarding the deprivation of a fair trial by improper and inflammatory argument of counsel is *Reetz, supra*. In *Reetz*, although no motion for a mistrial was made, the asserted error was reviewed on appeal on the basis that the error was plain and incurable. Plaintiff's counsel in *Reetz* deliberately referred to million dollar verdicts in other cases which the Supreme Court characterized as always improper. Further, plaintiff's counsel deliberately inflamed the passions of the jury by stressing defendant's corporate wealth, power, and insensitivity:

D. Comments on Kinsman's Corporate Nature and Wealth

Kinsman further claims that Reetz's lawyer inflamed the passions of the jury against Kinsman by constantly stressing the corporate nature, wealth, power, and insensitivity of Kinsman.

Comments made during closing argument which fall into this category include a claim that Reetz's attorney is dedicated to representing only individuals and not corporations, that Kinsman cared nothing about Reetz's welfare, that Kinsman can afford the best of everything, and repeated references to George Steinbrenner, III, owner of the New York Yankees and chairman of the board of Kinsman's parent corporation, although he was not personally a party in this case.

The effect of these comments was to create in the minds of the jurors an image of Kinsman as an unfeeling, powerful corporation controlled by a ruthless millionaire. Even a juror who harbored no prejudice against corporations or millionaires might have been swayed by these inflammatory remarks to alter his view of the evidence.

Our prior cases should have made clear that even isolated comments like these are always improper, even if not always incurable or error requiring reversal. However, when, as in this case, the theme is constantly repeated so that the error becomes indelibly impressed on the juror's consciousness, the error becomes incurable and requires reversal. We find the following statement from *Steudle v Yellow & Checker Cab & Transfer Co,* 287 Mich 1, 11-12; 282 NW 879 (1938), to be applicable in this case:

"We believe the record in the instant case shows a deliberate course of conduct on the part of counsel for plaintiff aimed at preventing defendant from having a fair and impartial trial. We think the course of misconduct was so persistently followed that a charge of the court in an effort to obviate the prejudice would have been useless."

Thus, although no objection was made to these comments, a new trial should be ordered. [Emphasis in original.]

Similarly, in *Fellows v Superior Products Co,* 201 Mich App 155; 506 NW2d 534 (1993), this Court reversed a substantial jury damage award and remanded for a new trial on grounds that included plaintiffs' counsel deliberate and repeated emphasis in his closing argument of irrelevant and unfairly prejudicial considerations such as the contrast between plaintiffs' poverty and defendant's corporate wealth and alleged insensitivity. See also *Badalamenti v William Beaumont Hosp,* __ Mich App ___; ___ NW2d ___ (1999) (Docket Nos. 207038;207149, issued 8/20/99).

In the present case, plaintiffs' improper and inflammatory argument to the jury was as egregious as the arguments held to constitute error requiring reversal in both *Reetz* and *Fellows.* Specifically, plaintiff began by characterizing defendant as "arrogant, selfish, and anti-community:"

> Again, that – that *glaring arrogance* of – of *disregard for the public is what this trial's all about*. You can't find better examples of it. It's a *very selfish perspective* and it certainly has *a anti-community ring*. It's like saying Faye Durocher doesn't count. *Her life doesn't matter*. [Emphasis added.]

Next, plaintiff argued that defendant did not "care about the Faye Durochers:"

> It's gonna happen again. Because *they don't care about the Faye Durochers*. It's obvious. [Emphasis added.]

Plaintiffs' counsel asked the jury to express its anger against defendant:

> It's – it defies logic to accept their claim that it's only to protect the bridge. How arrogant. It should insult your intelligence. It's enough to make any thinking person angry. *Especially if you're the victim*, you can't even look at that bridge. *You can't even think about that bridge without that anger inside*. [Emphasis added.]

The improper argument continued with plaintiffs' counsel asking the jury to put themselves in the place of plaintiff:

> Mental anguish includes her inability to – to wear that suit or – or – or her inability to – to leave that house for a year. It – it is spending her nights in the easy chair, sleeping, crying. I mean, there's just – it's a – it's a her – horror story. The fright and shock. *How would you like to turn around* and see a girder comin' right *at your head*? [Emphasis added.]

Next, plaintiffs' counsel improperly asked the jury to consider comments made during voir dire by an excused juror:

> It's not just the loss of those fingers.
>
> It's much more than that. What did – what did the one juror say, Mr. Lippert wisely knocked her off, but she's the young gal who –
>
> *Mr. Lippert (defense counsel):* Judge, that's highly inappropriate, to comment about why I would've excused a juror; and he has no idea why I might've excused the juror.
>
> *The Court:* I'll sustain the objection; the jury –
>
> *Mr. Czuprynski:* Thank you.
>
> *The Court:* -- should disregard that comment.
>
> *Mr. Czuprynski (plaintiffs' counsel): Prior to her being discharged from the jury pool, she said three times, "I can't imagine --"*

Mr. Lippert: Judge, that's not testimony in this case. That was voir dire examination; that's highly inappropriate.

The Court: Yeah, I'll sustain the objection.

Mr. Czuprynski: Some young people in life, maybe in their twenties, young, would find it very hard to imagine life without a right hand.

As was found always improper in *Reetz*, plaintiffs' counsel also attempted to testify regarding multi-million dollar verdicts in other cases:

Mr. Czuprynski: . . . During this trial, there's a jury out in L.A. that gave 8.5 million dollars –

Mr. Lippert: Judge, that's highly inappropriate.

Mr. Czuprynski: Your Honor, it is –

Mr. Lippert: I think he's probably making reference to the Simpson case. And what the facts of that case are, what the jury did, can be of no assistance to this jury. And it only invites prejudice, judge, along with the rest of his argument.

The Court: Mr. Czuprynski?

Mr. Czuprynski: Your Honor, there – *there is case law that suggests that it – it – a passing – a – a char – a – a casual reference to a case other than the case at hand and what happened there is permissible so long as it is not dwelled upon.*

The Court: Well, I'm gonna sustain the objection and instruct the jury to disregard it. [Emphasis added.]

As indicated by the above colloquy, plaintiffs' counsel was aware that his reference to other multi-million verdicts was improper but asserted that his improper argument was not reversible error requiring reversal "so long as it is not dwelled upon." The above statement clearly indicates a deliberate and calculated effort by plaintiffs' counsel to influence the jury with improper argument. Further, although defendant's objection to this particular improper comment was sustained, the information was presented to the jury before an objection could be made.

The most improper and inflammatory argument deliberately and repeatedly made by plaintiffs' counsel was that a substantial damage award in favor plaintiffs should be rendered for the purposes of "waking up" Charles Pinkerton, III (defendant's principal stockholder), to "let him know that the community values are – are followed in this town" and to have the jury "send a message" that "you can't do business in this town" putting "profits over people." In front of the jury, defendant's objection to his line of improper argument was overruled on three separate occasions by the trial judge:

In trying to assess a figure, let your conscience be your guide. . . .

We would like to suggest that if you did come up with a sizable verdict, if you chose in your wisdom to give her the compensation we feel she's entitled to, then *it would accomplish some things. . . .*

It also might wake up Charles Pinkerton the III and let him know that the community values are – are followed in this town. [Emphasis added.]

Finally, although defense objections were partially sustained, plaintiffs' counsel repeatedly emphasized his theme that defendant cared only about profits and not for the people or the values of the community:

Mr. Czuprynski: We're asking to send home a message in this trial, --

Mr. Lippert: Same argument, Judge.

Mr. Czuprynski: -- that people are first, over profits. That you can't do business in this town and le – live elsewhere and have such callous disregard for the boating public's safety.

Mr. Lippert: There again, your Honor, is he – he – he now is playing to the prejudice to the out of towner against the home town folks. That's absolutely impermissible. Absolutely impermissible. And I object.

The Court: Mr. Czuprynski?

Mr. Czuprynski: Your Honor, it – it's just part and party to the theme throughout this whole thing; and that is callous disregard.

The Court: Well, I'll sustain the objection. It re – doesn't have any relevance, whe – whether anyone's from this community or not from this community is irrelevant.

Mr. Czuprynski: Okay. Thank you, your Honor, and I'll – I'll restrict myself accordingly.

And maybe a – a – maybe adequate compensation to Faye Durocher through *a substantial sum that she richly deserves could convince the fairly new Central Michigan Railway Company to start using ordinary and reasonable care* in the way they maintain that bridge, set in the middle of our river.

Mr. Lippert: Same argument, judge, and same objection.

The Court: All right. Overruled. [Emphasis added.]

Following the conclusion of plaintiffs' argument, defense counsel timely moved for a mistrial outside the presence of the jury. In support of its motion, defendant cited *Reetz, supra*, and argued that plaintiffs' counsel's deliberate attempt to inflame the jury with a highly improper and unfairly prejudicial closing argument was as egregious as the argument found to constitute reversible error in *Reetz*. We agree and hold that the trial court abused its discretion in denying defendant's motion for a mistrial when under the circumstances of the present case, plaintiffs' counsel's argument deprived defendant of its right to a fair trial.

Reversed and remanded for a new trial. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Richard Allen Griffin

[1] "Defendant" in this opinion will refer solely to Central Michigan Railway Company as it is the only defendant involved in this appeal and was the only defendant involved in the jury trial. Plaintiffs had also filed suit against D. M. Central Transportation and Straits Corporation. D. M. Central is a subsidiary of Straits Corporation, doing business as Central Michigan Railway Company. Straits Corporation and D. M. Central were deleted from the case caption pursuant to a court order.

[2] Plaintiffs alleged that defendants Ewalds and Kuschs were the owners and operators of the boats that cut in front of the Rebecca J. The Ewalds and Kuschs were dismissed from the case before trial.

[3] The rulings by the trial judge on defendant's objections were largely ignored by plaintiffs' counsel. Plaintiffs' counsel ensured that the jury heard all of the improper and unfairly prejudicial information.