

STATE OF MICHIGAN
COURT OF APPEALS

SHERRI EDWARDS,

Plaintiff-Appellant/Cross-Appellee,

v

CHURCH OF GOD IN CHRIST and DORINDA
CLARK-COLE,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

March 8, 2002

No. 220348

Wayne Circuit Court

LC No. 96-610411-CZ

Before: Owens, P.J., and Holbrook, Jr., and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the trial court granting defendants' motion for remittitur, arguing, in part, that the court erred in granting defendants' remittitur motion. Defendants cross-appeal, challenging the trial court's order denying their motion for judgment notwithstanding the verdict (JNOV) or new trial. We affirm in part and remand for further proceedings.

This negligence action arose after plaintiff, a parishioner of defendant Church of God in Christ (COGIC), was audio taped while singing a featured solo in a song performed along with the COGIC international mass choir at a July 1994 music celebration held in Detroit. The name of the song was "Right Now God," and defendant Clark-Cole wrote it. The tape of the COGIC choir's performance that day was made into a compact disc (CD) that was distributed and sold commercially under the title, "He'll Bring You Out!" Plaintiff alleged that the recording was made without her knowledge or consent. Further, the CD erroneously identified defendant Clark-Cole as the soloist on the aforementioned song. The jury awarded plaintiff damages of \$1,615,000, \$1,600,000 of which was for past (\$600,000) and future (\$1,000,000) noneconomic damages. The trial court subsequently denied defendants' motion for JNOV or new trial, but granted defendants' motion for remittitur and reduced the jury award to \$725,000.

On cross appeal, defendants argue that the trial court erred by denying their motion for JNOV or a new trial because plaintiff's cause of action is not recognized in Michigan. Specifically, defendants' argue that an action for "negligent misappropriation of voice" is not cognizable in Michigan.

The decision whether to grant a new trial is one addressed to the trial court's discretion, and the trial court's decision will not be reversed absent an abuse of that discretion. [JNOV] should be granted only when there is insufficient evidence presented to create an issue for the jury. If the evidence is such that reasonable minds could differ, the question is for the jury, and [JNOV] is improper. [*Constantineau v DCI Food Equipment, Inc.*, 195 Mich App 511, 514; 491 NW2d 262 (1992) (citations omitted).]

Plaintiff's complaint alleged negligence, invasion of privacy through misappropriation of her voice, intentional and negligent infliction of emotional distress, tortious intrusion, and conversion. Prior to trial, the court dismissed the intentional and negligent infliction of emotional distress claims. When the case was presented to the jury, the court's instructions framed the matter as if it were a simple case of negligence.

Although the court did not instruct the jury on the concept of duty, the verdict form asked the jury to answer this initial question before proceeding to the issues of causation and damages: "Do you find the Church of God in Christ and Dorinda Clark-Cole were negligent in the performance of their duties taping Sherri Edwards' voice without permission for the purpose of commercial trade on July 29th, 1994?" The jury answered this question in the affirmative for each defendant. It is this question on the jury form that lies at the heart of defendants' argument on this issue.

We believe that this question is confusing. The inquiry is predicated as if the listed behavior that follows is something that could be done negligently. However, the behavior identified is an amalgamation of both potentially negligent conduct and purposeful actions. There is no indication in the record that plaintiff argued that the actual taping of plaintiff's voice was an inadvertent act. Rather, plaintiff argued that defendants intentionally taped the concert for the purpose of creating a CD that would be sold at a profit. Plaintiff alleged that this act was wrongful not because it was done in a negligent manner, but because it was an intentional misuse of something over which she held a proprietary right, i.e., her voice. In this way, it sounds more like an action for intentional violation of plaintiff's right of publicity.¹

Some federal circuit courts have recognized a cognizable tort for misappropriation of voice rising out of the right of publicity. See, e.g., *Midler v Ford Motor Co.*, 849 F2d 460 (CA 9, 1988), *cert denied* 503 US 951; 112 S Ct 1513; 117 L Ed 2d 650 (1992). In the Ninth Circuit of the United States Court of Appeals, such a claim has so far been limited to misappropriation of a distinctive and widely known voice through impersonation. See *Watts v Frito-Lay, Inc.*, 978 F2d 1093, 1100 (CA 9, 1992). In the United States Court of Appeals, Fifth Circuit, such a claim was sustained in a case involving musicians of some renown in their genre and location. See *Brown v Ames*, 201 F 3d 658 (CA 5, 2000). There is no evidence that plaintiff's voice meets either of

¹ Plaintiff did not argue below that her right of privacy was invaded and that she was due compensation for a loss of anonymity. Indeed, part of her argument was that confusion over the misidentification of the soloist on the song in question deprived her of the chance, perhaps her only chance, to make a name for herself as a singer. Further, plaintiff asked for damages to compensate her for the mental anguish she experienced as a result of knowing that people hearing the song would not know it was she singing the solo.

these standards. Indeed, the evidence indicates that this was the first time that plaintiff's voice was recorded and distributed to the public.

Accordingly, we agree with defendants that no cognizable tort for negligent misappropriation of an unknown singer's voice exists in Michigan. However, the verdict form does include a potentially negligent act, i.e., not obtaining plaintiff's permission to be taped. It is this act that forms the basis of this negligence action. While telling the jury in the verdict form of the use to be made of the tape might be extraneous, the inclusion of such information does not undermine the legitimacy of the trial. Thus, we reject defendants' claim that plaintiff's cause of action was not cognizable.

Defendants also argue that a claim for negligence could not succeed because they owed no duty to plaintiff. In order to establish a prima facie case of negligence, the plaintiff must prove, among other things, that the defendant owed a duty to the plaintiff. *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997).

Duty is an obligation that the defendant has to the plaintiff to avoid negligent conduct. Whether a duty exists is a question of law for the court. . . .

In determining whether a duty exists, courts look to different variables, including the (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. [*Id.* (citations omitted).]

Here, an examination of the relevant factors leads to the conclusion that a duty should be imposed on defendants. There was a long-standing relationship between the defendant COGIC and plaintiff, who had been a life-long member of the church. It was defendant Clark-Cole who approached plaintiff and asked her to sing the solo line in "Right Now God" at the July 1994 event. Further, it was foreseeable that plaintiff would be harmed from the unauthorized recording of her voice. We also believe that imposing a duty under circumstances such as these would also deter future conduct of this type, and the burden of imposing such a duty would be slight. Therefore, we reject defendants' argument that they did not owe a duty to plaintiff.

Defendants also contend that the jury erroneously concluded that there was a duty because of the court's deficient jury instructions. Defendants' point out that the court did not define or mention the term "duty." However, defendants failed to object to the court's instructions at trial. Indeed, plaintiff indicated she was satisfied with the instructions given when asked by the court. We review unpreserved claims of error for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), citing MRE 103(d). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ""seriously affect[ed] the fairness,

integrity or public reputation of judicial proceedings' independent of the defendant's innocence.'"" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

Because duty is a question of law for the court, no plain error resulted when the court failed to instruct the jury on this element. Moreover, because it is clear that a duty should be imposed in this case, defendants' substantial rights were not affected. Accordingly, this issue does not warrant appellate relief.

Finally, defendants argue that the trial court abused its discretion by refusing to grant a new trial because of the improper comments by plaintiff's attorney. Asserted claims of counsel misconduct are reviewed by first

determin[ing] whether the attorney's action was error and, if it was, whether reversal is required. An attorney's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. [*Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996) (citation omitted).]

Although defendants did not object to the disputed remarks at trial, we may review this issue to determine whether the comments "'may have caused the result or played too large a part and may have denied the party a fair trial.'" *King v Taylor Chrysler-Plymouth, Inc.*, 184 Mich App 204, 217; 457 NW2d 42 (1990), quoting *Reetz v Kinsman Marine Transit Co.*, 416 Mich 97, 103; 330 NW2d 638 (1982).

After examining the remarks in question, we agree that plaintiff's counsel's remarks suggesting a conspiracy and suggesting that plaintiff was entitled to be compensated for royalties were improper and may have influenced the amount of the verdict. We are satisfied, however, that the trial court acted within its discretion in determining that the remarks contributed only to the excessiveness of the verdict, which could be remedied through remittitur. Under the circumstances, we conclude that the court did not abuse its discretion.

Plaintiff and defendants both contend that the trial court abused its discretion in remitting the jury award to \$725,000. Although the trial court did not break down the reduced award into past and future economic and noneconomic damages, we will assume that the award of \$15,000 in past economic damages was reduced to \$6,000, the highest award supported by the evidence.² *May v William Beaumont Hosp.*, 180 Mich App 728, 732; 448 NW2d 497 (1989). Accordingly, we find no abuse of discretion in reducing the past economic damages from \$15,000 to \$6,000. The remaining \$719,000 is for past and future noneconomic damages for plaintiff's mental anguish.

² The only evidence of past economic damages presented was for plaintiff's psychiatric bills, which totaled \$6,000.

Plaintiff contends that the court should not have reduced the award, and defendants claim that the award should have been reduced even further. While we believe that the award should have been reduced, we believed the court erred in reaching its decision.

We disagree with plaintiff's contention that the court should have dismissed the motion for remittitur because it was untimely. Under MCR 2.611(B), such a motion must be filed and served within 21 days after entry of the judgment. However, that rule merely prescribes the time in which a party may file such a motion as of right; it does not limit the authority of the trial court to extend the time for filing such a motion. *Arrington v Detroit Osteopathic Hospital Corp (On remand)*, 196 Mich App 544, 550; 493 NW2d 492 (1992). The court had the discretion to extend the time for defendants to file the motion for remittitur, which it effectively did by hearing and disposing of the motion on its merits. *Id.* at 549. Here, defendants had initially challenged the amount of the verdict in a timely filed motion for JNOV or new trial, so plaintiff had timely notice that defendants were contesting the amount of the verdict. Because the parties needed to review the transcript, however, in order to properly argue the remittitur issue, the court allowed the parties to separate that issue from the remaining issues advanced by defendants in support of their request for JNOV or a new trial. Defendants later filed a separate motion for remittitur, which was addressed and decided by the trial court. Under these circumstances, the trial court did not abuse its discretion in entertaining the late filing.

We do agree, however, with plaintiff that the trial court's grant of remittitur was procedurally faulty. The court's order directs that the jury's verdict is "reduced to \$725,000." Under MCR 2.611(A)(1)(c) and (d), a new trial may be granted because of excessive damages. According to subrule (E)(1), however, which governs remittitur,

[i]f the court finds that the only error in the trial is the . . . 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 . . . highest (if the verdict was excessive) amount the evidence will support.

In this case, the court determined that the only error in the trial was that the verdict was excessive. However, the court reduced the judgment to \$725,000, without doing so conditionally, subject to plaintiff's consent. By simply reducing the judgment, without conditioning the reduction on plaintiff's consent, the court erred. See 2 Lang, Neilson, Young, Jr. and Holsinger, *Michigan Civil Procedure*, p 21-29 ("Without the consent of the nonmoving party, any attempt by the court to invoke remittitur or additur will fail."); 3 Dean & Longhofer, *Michigan Court Rules Practice* (4th ed), p 415 ("In the absence of a party's consent to remittitur, the court itself cannot reduce the verdict by the amount deemed to be excessive.")

Turning to the actual amount of the remitted award, we are unable to determine from the record whether the trial court considered plaintiff's claim of damages for an incident in 1996 at the annual church convention. We have often recognized the imprecision inherent in reaching a damage award for mental anguish. See, e.g., *Phillip v Deihm*, 213 Mich App 389, 405; 541 NW2d 566 (1995). Such an award is not amenable to precise mathematical calculations. *Precopio v Detroit*, 415 Mich 457, 471; 330 NW2d 802 (1982). Nonetheless, the evidence must show that the mental anguish claimed flows naturally from the negligence claimed. *Gore v Rains & Block*, 189 Mich App 729, 819; 473 NW2d 813 (1991). In this case, plaintiff claimed

that she suffered humiliation and mortification when she attempted to take the stage at a church convention held two years after the 1994 taping. As the GOGIC choir was preparing to sing “Right Now God,” plaintiff rose and headed toward the stage, allegedly getting ready to sing the song’s solo line. Defendant Clark-Cole then motioned for plaintiff to stop and resume her seat, which plaintiff did.

We believe that any connection between this incident and the only negligence at issue—the failure to receive permission to tape plaintiff’s voice two years prior—is too attenuated to support a damage award for the claimed mental anguish arising from this incident. Not only is the negligent act far distant in time, but plaintiff had also previously received a public apology at this convention for the misidentification of her voice on the CD. Plaintiff was also presented with a corrected copy of the CD. More importantly, however, there is no evidence that plaintiff was ever told she would be singing the solo when the COGIC choir performed the song. Accordingly, any mental anguish she may have suffered as a result of being motioned to sit down appears to be the result of her own mistake, and not defendants’ negligence.

We are also unable to determine from the record whether the trial court considered comparable damage awards when remitting the award. Trial and appellate courts can consider analogous cases to help establish a reasonable range of an award for noneconomic damages. *Precopio, supra* at 474; *May, supra* at 733. There is no indication in the record that the trial court engaged in such an analysis. We believe that such an objective evaluation is essential in this case. On remand, we instruct the court to consider analogous awards for mental anguish when ruling on the motion for remittitur.

Affirmed in part and remanded for further proceedings consistent with this opinion. If plaintiff fails to consent in writing within 14 days to the amount set by the trial court, a new trial shall be held, limited to the issue of damages. *Kellom v Ecorse*, 329 Mich 303; 45 NW2d 293 (1951). We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot