STATE OF MICHIGAN

COURT OF APPEALS

Estate of RODERICK SYDNEY SMITH, Deceased, by HARISSA KIRKSEY as Personal Representative and individually, and RODERICK SYDNEY SMITH, JR., and ALEXIS NUBIA SMITH,[1] by their Best Friend,

Plaintiffs-Appellees,

v

DETROIT POLICE OFFICER LORI PIERCE, DETROIT POLICE OFFICER CHARLES KELLY, DETROIT POLICE OFFICER RICARDO JENKINS, DETROIT POLICE SERGEANT WILLIAM MACDONALD, DETROIT POLICE COMMANDER BRODERICK WILLIAMS, DETROIT CHIEF OF POLICE ISAIAH MCKINNON, and CITY OF DETROIT,

Defendants,

and

DETROIT POLICE OFFICER PATRICK MOORE,

Defendant-Appellant.

UNPUBLISHED
December 21, 2004

No. 247154
Wayne Circuit Court
LC No. 96-642284-NO

Before: Zahra, P.J., White and Talbot, JJ.

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[1] The final judgment and this Court's docket listings name both "Alexis Nubia Smith, Jr.," and "Alexis Nubia Smith" as plaintiffs. This appears to be an error, because "Alexis Nubia Smith" is decedent Roderick Smith's only surviving minor daughter. None of the parties' briefs identify an additional plaintiff with the name "Alexis Nubia Smith, Jr." Therefore, that name has been omitted from the case caption in this opinion.

PER CURIAM.

Defendant Patrick Moore appeals as of right from a judgment awarding plaintiffs $533,087.62 in this wrongful death action.[2] We affirm.

I. Overview

This action arises from the death of Roderick Smith, who died while in police custody in October 1994. Smith, while under the influence of cocaine, engaged in bizarre conduct that prompted his family and a neighbor to call the police for assistance. Moore, a Detroit Police officer, and his partner, defendant Lori Pierce, responded to the call. Moore and Pierce attempted to restrain Smith, who vigorously resisted and even threatened to kill both officers. The officers eventually managed Smith to the ground in a prone position. According to one witness, Moore continued to restrain Smith by placing his knee in Smith's back for ten to fifteen minutes until other officers arrived to assist. After other officers arrived, Smith was placed in a police car and transported to a hospital for treatment. Before Smith could be admitted, he was found dead in the back of the police car.

Plaintiffs' expert witness, Dr. Werner Spitz, opined that Moore asphyxiated Smith by applying his weight on Smith's back with his knee while in a prone position. Relying on witness accounts that Smith was not moving before he was placed in the police vehicle, Dr. Spitz concluded that Smith had significant brain damage when placed in the police car. Dr. Spitz also opined that officers placement of Smith in the police car face down was not conducive to Smith's condition, and may have prevented him from being able to properly breath. On the other hand, the defense experts, relying on testimony of other witnesses who allegedly observed Smith move and talk while in the police car, concluded that Moore did not asphyxiate Smith while holding him down on the ground. Instead, the defense experts believed that Smith died suddenly because of his cocaine use, or excited delirium.

The jury determined that Moore was grossly negligent, but found that Smith was fifty percent at fault. The trial court therefore reduced the amount of damages determined by the jury by fifty percent. Moore filed a posttrial motion for judgment notwithstanding the verdict (JNOV), which the trial court denied. This appeal followed.

II. Motion for Judgment Notwithstanding the Verdict

Moore first argues that the trial court erred in denying his motion for JNOV.

A. Standard of Review

[2] The remaining defendants were either dismissed before trial, received a directed verdict at trial, or were found not liable by the jury.

A trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM,* 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, this Court must view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party. *Id*; *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995). If reasonable jurors honestly could have reached different conclusions based upon the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

B. Analysis

1. "Absolute Defense" of MCL 600.2955a

Moore argues that MCL 600.2955a[3] precludes his liability because the jury specifically found Smith fifty percent at fault. MCL 600.2955a would bar plaintiffs' recovery if the jury found that Smith had an impaired ability to function due to the influence of a controlled substance and that, "as a result of that impaired ability, [he] was 50% or more the cause of the accident or event that resulted in [his] death or injury." Although the jury found Smith fifty percent at fault for his own injuries or damages, the jury was not asked and did not decide whether Smith's fifty percent contributory conduct was the *result of his impaired ability*. Thus, Moore requests this Court assume that the jury decided that Smith's fifty percent contributory conduct was exclusively the result of cocaine consumption. We decline to do so.

Rather, we conclude that Moore waived this defense by first failing to plead it as an affirmative defense as required by MCR 211(F)(3). Moore attempts to avoid this result by arguing that MCL 600.2955a need not be pleaded as an affirmative defense because it is an "absolute defense." In regard to affirmative defenses, MCR 2.111(F)(3) provides that "a party must state facts constituting . . . (b) a defense that by reason of affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or part." Because MCL 600.2955a is clearly a defense employed to "avoid the legal effect of or defeat the claim of the opposing party," we conclude Moore's failure to plead this defense waives this issue.

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[3] MCL 600.2955a(1) provides:

> It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

Moreover, Moore also waived this defense by failing to raise it at trial. In *Napier v Jacobs,* 429 Mich 222; 414 NW2d 862 (1987), the Michigan Supreme Court explained the rationale for the raise-or-waive rule:

> "There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal." [*Napier*, *supra* at 227-229 quoting *State v Applegate*, 591 P 2d 371, 373 (Or App, 1979).]

Moore failed at trial to request the trial court consider the statutory bar to recovery contained in MCL 600.2955a, and also failed to request that the jury be given an instruction tailored to the language of MCL 600.2955a. See *Wysocki v Kivi*, 248 Mich App 346, 349-350; 639 NW2d 572 (2001). The rationales for waiver rule expressed in *Napier* support the conclusion that Moore waived this issue.

While this Court may review an unpreserved issue to prevent manifest injustice, such review in a civil case is to be exercised "quite sparingly." *Napier*, *supra* at 233-234. Here, there is no manifest injustice. Moore's contention requires this Court to assume that Smith's fifty percent contributory conduct was *exclusively* the result of cocaine consumption.[4] "We are not at liberty to impeach the verdict by mere speculative reasoning." *Mazzolini v Kalamazoo County*, 228 Mich 59, 63; 199 NW 648 (1924).

Further, even if this Court were free to assume that the jury would have concluded that Smith's fifty percent contributory conduct was exclusively the result of cocaine consumption, Moore contends only that Smith's intoxication may have barred plaintiffs' recovery pursuant to MCL 600.2955a, rather than operating as a function of comparative fault. Moore's argument

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[4] The statute does not require that all the negligence attributable to the plaintiff be exclusively the result of liquor or controlled substance consumption. However, in the instant case, where the jury found that plaintiff was exactly fifty percent at fault, and the statutory bar only applies when the plaintiff is fifty percent or more at fault, all the fault found by the jury must be attributed to the cocaine consumption in order for the statutory bar to apply.

relates only to the loss of a favorable jury verdict. "More than the fact of the loss of the money judgment . . . is needed to show a miscarriage of justice or manifest injustice." *Id*. at 234. Relief is further inappropriate when considering that had the jury been instructed pursuant to MCL 600.2955a, plaintiffs' recovery would not have been barred had the jury found a mere iota of Smith's contributory conduct was not the result of his cocaine consumption. Manifest injustice has not been shown, and reversal is not required.

2. Immunity under MCL 691.1407(2)

Moore also argues that he is entitled to immunity under MCL 691.1407(2), because, as a matter of law, he was not the proximate cause of Smith's death. During deliberations, the jury specifically asked if "Smith and defendants [can] both be responsible for the proximate cause of death? For example, 50 percent Smith, 50 percent defendants." Moore's attorney agreed that the trial court could respond to the jury's question by answering "yes," which the court did. A party is prohibited from assigning error on appeal to something that he or his attorney deemed proper at trial. To do so would permit that party to harbor error as an appellate parachute. *Hilgendorf v St John Hosp & Medical Center Corp,* 245 Mich App 670, 683; 630 NW2d 356 (2001). Because Moore's counsel approved of instructing the jury that it could find Moore responsible for the proximate cause of Smith's death by finding both Moore and Smith fifty percent at fault for the resulting death, which the jury did, he may not now assign error on this basis. Moreover, the jury was properly instructed that to find Moore liable it had to find that his conduct was *the* proximate cause of Smith's death, and was further instructed on the meaning of "the proximate cause."

3. Expert Testimony

Moore argues that the trial court improperly allowed testimony from plaintiffs' forensic pathology expert, Dr. Spitz, concerning the cause of Smith's death. Dr. Spitz theorized that Smith died as a result of positional asphyxia, which Dr. Spitz defined as an "interference with the oxygen exchange as a result of position."

MRE 702 at the time of trial provided[5] that:

> If the trial court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"The plain language of MRE 702 establishes three broad preconditions to the admission of expert testimony. First, the proposed expert witness must be 'qualified' to render the proposed testimony." *Craig v Oakwood Hosp*, 471 Mich 67, 78, 83; 684 NW2d 296 (2004). Second, the

[5] MRE 702 was amended, effective January 1, 2004, after this case was tried.

proposed testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." *Id*. at 79. "Finally, under MRE 702 as it read when this matter was tried, expert testimony must have been based on a 'recognized' form of 'scientific, technical, or other specialized knowledge.'" *Id*. The proponent of the expert testimony bears the burden of proving that the expert has specialized knowledge which will aid the factfinder in understanding the evidence or determining a fact in issue, and that the opinion is based on a recognized field and methodology. *Id*. at 80, 83.

Dr. Spitz, who has conducted between 55,000 to 60,000 autopsies over his near fifty year medical career, is unquestionably qualified to offer his opinion regarding cause of death in this case. There is also no question that his testimony assists the jury in determining the cause of Smith's death. At trial, Dr. Spitz summarized his opinion regarding the cause of Smith's death, stating:

> Roderick Smith was, as I said, agitated, combative as a result of it, excited, under the influence of cocaine, probably had an elevated blood pressure at the time, because of the agitation. He was in prone restraint, with legs held, feet held, or legs, and weight on his back of a knee, by a heavy officer, which I understand most of the officer's weight on the back of Smith, pinning him to the ground, immobilizing his bellows, his chest expansion causing him to react by moving head, which is a way a person would react when he's in need to breath, but unable to. Then he's loaded in that condition in the vehicle, 10 minutes later arriving at the – actually 15 minutes later. . .
>
> All that lead to his demise. . . .

In short, Dr. Spitz opined that the officers' restraint of Smith rendered him unable to breath and ultimately caused him to asphyxiate. This expert testimony is proper.

Moore's contends that Dr. Spitz's opinion is unreliable because it contradicts studies suggesting that hogtying a person in prone position cannot result in positional asphyxia. Here, however, there was no evidence of hogtying, and the gravaman of Dr. Spitz' testimony is that Moore asphyxiated Smith by kneeling on Smith's back for an extended period of time. Moreover, Moore's contention is belied by defense experts' testimony that persons can die as a result of asphyxiation when their bellows are compressed and they are unable to breath. The defense experts simply disagreed that it occurred in this case. Thus, Moore's argument that Dr. Spitz' testimony is unreliable is without merit, and accordingly, the trial court did not err in denying Moore's motion for JNOV.

III. New Trial

Moore next argues that the trial court erred in denying his motion for a new trial.

A. Standard of Review

This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *Kelly, supra* at 34. A trial court abuses its discretion when an unprejudiced person,

considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Gilbert, supra* at 761-762.

B. Analysis

1. Dr. Spitz' Testimony

Moore argues that a new trial is warranted because Dr. Spitz raised a new theory at trial concerning the cause of Smith's death without plaintiffs supplementing their discovery responses to identify this new theory. See MCR 2.302(E)(2), 2.311(B)(2)(b). This issue was not raised before and addressed by the trial court, either at trial or in Moore's motion for a new trial. Therefore, it is not properly before this Court, and we decline to address it. *Alan Custom Homes, Inc v Krol,* 256 Mich App 505, 513; 667 NW2d 379 (2003). Regardless, we are not convinced that Spitz actually changed his theory on the cause of death, but rather only provided more detail about how Smith was asphyxiated by the officers. There was no significant change in Dr. Spitz' theory of how Smith died, and Moore's argument is without merit.

Moore also claims that Dr. Spitz' opinion regarding cause of death should not have been admitted under MRE 702 and MCL 600.2955(1), and that it was contrary to the evidence. However, as also previously addressed, Moore's argument is not persuasive and we cannot conclude the trial court abused its discretion in allowing the evidence.

2. Evidence of Police Department Policies, Procedures, and Training

Next, Moore argues that the trial court erroneously allowed evidence of police department policies, procedures, and training. The trial court allowed the evidence for the limited purpose of proving defendants' state of mind, not as evidence that their conduct amounted to gross negligence. The jury was instructed on the limited purpose of the evidence and we are not persuaded that the trial court abused its discretion in this regard.

3. Jury Instructions

We reject Moore's claim that a new trial is required because the trial court failed to sua sponte give a jury instruction based on MCL 600.2955a. There was no "objection at trial to the failure to give such an instruction, and the issue is waived absent manifest injustice." *City of Westland v Okopski*, 208 Mich App 66, 78; 527 NW2d 780 (1994) citing *People v Vaughn,* 200 Mich App 32, 39-40, 504 NW2d 2 (1993). Moreover, the jury was fairly apprised of the defense's contention that Smith's own negligence, including his cocaine use, resulted in his death. Therefore, we do not find manifest injustice.

For similar reasons, we conclude the trial court's decision not to instruct the jury on Smith's cocaine use consistent with M Civ JI 12.01, violation of statute-negligence, and M Civ JI 13.02, intoxication as affecting negligence, does not require reversal. "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002), quoting *Case v Consumers Power Co,* 463 Mich 1, 6, 615 NW2d 17 (2000). Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A). Moore requested these instructions to

bolster his argument that Smith was negligent. The jury found Smith fifty percent at fault. Thus, the trial court's instructions on comparative negligence fairly presented the issue of Smith's negligence to the jury. Further, that the jury found Smith fifty percent at fault shows that reversal is not required to maintain substantial justice in this regard. MCR 2.613(A).

4. Great Weight of the Evidence

Finally, we reject Moore's claim that the jury's verdict was against the great weight of the evidence. In reviewing this issue we must determine whether the overwhelming weight of the evidence favors the losing party. *Cambell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). This Court must give substantial deference to the trial court's determination that the verdict was not against the great weight of the evidence since the trial court observed first-hand the demeanor of the witnesses and therefore is in a better position to assess the quality of the evidence presented at trial. *Id*.

In arguing this issue, Moore relies only on the defense version of the facts. He ignores the testimony of other witnesses who claimed that they did not see Smith move on his own after he was placed in the police vehicle. Moreover, Dr. Spitz opined that Smith was alive when placed into the police car, though suffering from the onset of brain damage because of oxygen deprivation. Further, Dr. Spitz opined that it was possible to resuscitate Smith before and shortly after he was placed in the police car. Because the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand, the trial court did not abuse its discretion in denying Moore's motion for a new trial on this ground. *Id*.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot