# STATE OF MICHIGAN

# COURT OF APPEALS

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STEVEN J. WALKER, personal representative of the estate of NICHOLAS JAMES WALKER, deceased,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY,

Defendant-Appellee.

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UNPUBLISHED
December 29, 1998

No. 200362
Wayne Circuit Court
LC No. 94-420988 NP

Before: Smolenski, P.J., and White and Markman, JJ.

PER CURIAM.

In this product liability case, plaintiff Steven Walker, the father and personal representative of the estate of Nicholas Walker, appeals as of right the trial court judgment of no cause of action in favor of defendant Ford Motor Company. After a jury trial regarding defendant's alleged negligent design of the passive restraint system in its 1993 Ford Escorts, the jury returned a verdict finding that defendant was not negligent. We affirm.

On May 7, 1993, thirteen-year old Nicholas Walker was killed in an automobile accident when the passive shoulder belt restraint in the 1993 Ford Escort station wagon in which he was riding severed his trachea. Plaintiff filed this product liability action against defendant, the designer and maker of the automobile, alleging that defendant was negligent in its design of the seatbelt. Although the driver of the Escort acknowledged that the accident was his fault, plaintiff claims that it was the improper design of the seatbelt that caused Nicholas' death. Plaintiff argued that although Nicholas was wearing his seatbelt properly at the time of the accident, since the height, length and position of the seatbelt were not adjustable, it improperly restrained smaller people like Nicholas around the neck instead of the chest and shoulder. Defendant argued that the seatbelt restrained Nicholas across his neck because he was not wearing his seatbelt properly with the shoulder belt passing over his right shoulder, across his torso and under his left arm.

Trial began on July 8, 1996, with two-days of jury voir dire. On July 8, 1996, after the court had already excused three potential jurors for cause, Donald Jeffries was selected as a potential juror.

Jeffries stated that he worked two jobs and would continue to work his midnight job during the trial if he was selected as a juror. He said that he was "dead tired," but assured the court that it would not affect his ability to listen to the evidence presented. Neither the defense nor the prosecution objected to Jeffries. However, through much of the voir dire, he apparently sat with his head in his hand and sometimes had his eyes closed.

On the second day of voir dire, defendant requested at a sidebar conference that Jeffries be dismissed for cause because he was unable to pay sufficient attention to the evidence due to his fatigue. The court denied defendant's motion at that point, but stated that it would deal with the matter. Also on the second day of jury selection, the court questioned Jeffries regarding his tired appearance and warned him that he could not take "cat naps" while sitting on the jury. Both parties thereafter exercised their remaining peremptory challenges. They continued to question two more jurors, one of whom was dismissed for cause, until they finally passed on the remaining jury members for cause. At this point, the defense attorney again raised the issue of Jeffries, stating that it "needs to be dealt with." The trial judge was surprised to hear that both parties had exhausted all of their peremptories, but then excused Jeffries on its own motion. Plaintiff objected because the court dismissed Jeffries after both parties had used all of their peremptory challenges and suggested that each party be given one additional peremptory challenge. Defendant objected to the request for additional peremptory challenges and stated that the "only remedy that is available at this point in time is a mistrial." The trial court indicated that it had intentionally waited to dismiss Jeffries, but believed that dismissing him even after the parties had exhausted their peremptories was in the best interests of both parties since his conduct, if it continued, would necessitate dismissing him during the trial, raising the likelihood of prejudice.

Nine potential jurors were called to replace Jeffries on the jury. The trial court liberally excused all of these jurors for cause. Finally, William Reina, who worked for a supplier of defendant Ford Motor Company, General Motors and Chrysler, was selected to the remaining seat on the jury. In response to voir dire questioning, he stated that he worked with various Ford departments regularly, that it was his opinion that Ford product quality was good and that he had a close friend who worked for defendant. Neither party attempted to challenge Reina and he was impaneled as part of the jury.

At trial, both parties presented testimony regarding the design of the restraint system at issue and the position of the shoulder belt at the time of the car accident. During defendant's case-in-chief, defendant's engineering expert, Michael Klima, testified that he inferred from the physical evidence that Nicholas was not wearing the shoulder belt under his left arm at the time of the accident. He relied upon the angle of abrasion marks made by the shoulder harness webbing that he observed during his inspections of the vehicle to state that the webbing was in a "vertical orientation" from the upper portion of the belt being located across Nicholas' neck and vertically down behind his left shoulder toward the retractor. However, Klima had never examined the belt outside of the vehicle. Plaintiff had the belt removed from the vehicle for trial and attempted to show that the angle of the abrasions did not demonstrate that the belt had been in a vertical position during the accident. After direct examination and the first day of cross-examination of Klima, the defense requested that Klima examine the belt, which the trial court allowed. Subsequently, plaintiff continued to cross-examine Klima, then defendant questioned him on redirect about his examination of the belt. Klima again stated that the marks that he

observed supported his prior opinion that the shoulder harness was vertical at the time of the injury and that Nicholas was improperly wearing his shoulder belt. Consistent with the trial court's general disallowance of recross-examination, plaintiff was not allowed to further question Klima.

Subsequently, the jury returned a verdict finding that defendant was not negligent. Following this verdict, the attorneys for the parties met with four members of the jury. Jurors Lauren Hallerman and Stephanie Donovan, who indicated that they did not agree with the majority's verdict, related that they believed that certain jurors had not acted in proper manner during the trial and jury deliberations. Upon the request of plaintiff's attorneys, jurors Hallerman and Donovan subsequently provided them with affidavits. The affidavits stated in part that (1) juror Kristi Porter told other jurors that the case was "frivolous" and said "why would we give him any money when he caused the accident?"; (2) several jury members discussed the appearance of the vehicle before deliberations; (3) jury members stated that Ford would not intentionally do something wrong and remarked on the litigiousness of society; (4) jury members discussed testimony and credibility prior to deliberations; and (5) jury members engaged in impermissible 'experiments' relating to evidence introduced at trial. Plaintiff relied upon the affidavits in part in filing his motion for new trial, asserting jury and evidentiary errors. The trial court denied the motion.

This Court reviews decisions on motions for a new trial for an abuse of discretion. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). MCR 2.611(A)(1) authorizes motions for a new trial "whenever [the parties'] substantial rights are materially affected" by irregularity in the court proceedings[1] or misconduct of the jury.[2]

First, plaintiff argues that the trial court abused its discretion by denying his motion for a new trial on the basis of two categories of juror misconduct. The general rule is that jurors may not impeach their verdicts by oral testimony or affidavits. *Consumers Power Co v Allegan State Bank*, 388 Mich 568, 573; 202 NW2d 295 (1972). Impeachment by affidavit is generally disallowed (1) to prevent jurors from impeaching their findings by asserting their own misconduct; (2) to prevent tampering with the jury after they are discharged; (3) to avoid undermining the finality and certainty attached to judgments; and (4) to discourage the invasion of the mental processes used to arrive at verdicts. *Brillhart v Mullins*, 128 Mich App 140, 149; 339 NW2d 722 (1983). However, to avoid inequity, courts have developed an exception to the general rule where *external* factors are alleged to have influenced the jury in a manner prejudicial to a party. *Hoffman v Monroe Public Schools*, 96 Mich App 256, 258; 292 NW2d 542 (1980). Thus, once a jury has been discharged, juror affidavits and comments are inadmissible to challenge mistakes or misconduct inherent in the verdict, but are admissible if they pertain to extraneous influence or clerical errors. *Id.* at 261.

In this case, plaintiff's first category of juror misconduct consists of allegations that one juror, Kristi Porter, stated during voir dire that she was not biased against either party, but then told other jurors that she thought plaintiff's case was "frivolous" and questioned why the plaintiff's side should receive any money when they caused the accident; and that the majority of the jurors discussed and criticized the case before jury deliberations began. While plaintiff attached two juror affidavits regarding these alleged incidents to his motion for a new trial, the trial court announced that it would not consider the affidavits because they dealt with misconduct

inherent in the verdict.[3] We agree with the trial court. In *Sharp v Merriman,* 108 Mich 454, 464; 66 NW2d 372 (1896), the Supreme Court directly addressed this issue and held that extraneous influences did not include "improper communications between jurors themselves, whether in the court room or out of it." In *People v Budzyn,* 456 Mich 77, 91; 566 NW2d 229 (1997), although the jurors discussed among themselves allegations that a police defendant had been in a highly controversial police unit, this information was determined to be an extraneous influence upon the jury because it was an alleged fact about the defendants that the jurors were necessarily exposed to outside of the trial and their own experiences and opinions. In contrast, here the "misconduct" was a product of the jurors' own opinions about the case, expressed only to other jurors. Thus, in our opinion, there was no outside influence comparable to *Budzyn*. In addition, plaintiff has failed to present any evidence that Porter answered untruthfully during voir dire since her alleged statements later only show that she was still somewhat confused about the difference between liability for the accident and liability for the injury. See *Brillhart, supra* at 151. We assume that her difficulty with these concepts was alleviated once the trial court instructed the jury regarding the applicable law, since she told the court that she would follow the law as the court gave it at the end of the trial. However, even if her misunderstanding continued, faulty reasoning is not reviewable by this Court. *Hoffman v Spartan Stores, Inc,* 197 Mich App 289, 294-5; 494 NW2d 811 (1992). Since plaintiff did not make any allegations of influence from outside the panel, any errors are now inherent in the verdict and affidavits are inadmissible to prove juror misconduct. Thus, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Plaintiff's second category of misconduct consists of allegations that jurors performed impermissible experiments with chairs and seatbelts during the trial and deliberations. Jurors are entitled to consider their general knowledge and common experience during their deliberations. CJI2d 3.5. Indeed, one of functions of a jury is to consider the legal theories offered by the parties in light of their own practical sense. However, an investigation into the facts of the trial becomes improper where it "amount[s] to additional evidence supplementary to that introduced during the trial." *In re Beverly Hills Fire Litigation,* 695 F2d 207, 214 (CA 6, 1982).[4] Thus, the question we must again answer is whether these experiments, if proved, injected extraneous information into the trial. *Id.* at 213.

Here, plaintiff alleges that several jurors took note of the seatbelts in their personal vehicles to determine the placement of the belts and that they used the seatbelt that was removed from the decedent's car and admitted as an exhibit to determine, as had been shown during trial, how the belt could have restrained Nicholas across the neck. The trial court stated:

> we had a lot of people sit in different chairs, in the BUCs, do different types of testing, vertical testing, horizontal, necks, you [plaintiff's attorney] used your own tie at times to show different things, migration and the like. . . . And the chair's (sic) here. How many people sat in them? Mr. Paige, Mr. Wilhelm, both experts. How many people other than our surrogate sat in those chairs? I can't even recall them all. It was a long summer.

On the basis of the above facts, we agree with the trial court that even if plaintiff's allegations were proven to be true, any input would result only from common experience and would not be extraneous to that offered by the parties at trial. It would be extremely difficult for jurors hearing testimony about the

fit of a seatbelt to avoid noticing how their own seatbelts were similar or dissimilar. These observations amount to no more than everyday common knowledge and experiences. Indeed, we find any observations to be even less likely to cause prejudice where, as here, they involved entirely different vehicles (and seatbelts) than that at issue in this suit. With all of the references at trial to the technical specifications of the car, the seatbelt and the decedent, we believe that the jurors were certainly aware that their own vehicles, belts and bodies were not exactly comparable to those in the suit. With regard to the use of the actual seatbelt at issue during deliberations, the jurors merely performed the same movements as did numerous attorneys and witnesses during trial. Most of the attorneys and witnesses were also not exactly the same height, weight or build as Nicholas and they did not recreate the accident exactly to determine the placement of the seatbelt. The use of the belt by the jury was effectively no different from the demonstrations at trial and thus did not put the jurors in possession of evidence not offered at trial. Consequently, since there was no extraneous influence, the affidavits of the jury are inadmissible on this issue and the trial court did not abuse its discretion in denying the motion for a new trial. While we believe that jurors should attempt to precisely follow the instructions they are given during a trial, we are cognizant of the fact that few trials-- or juries-- are perfect and that all we can reasonably require is a fair trial. *People v Fournier,* 86 Mich App 768, 787; 273 NW2d 555 (1978). Probing into every thought, word or act of the jurors within the confines of the jury panel, and thereby encouraging the parties to do so, would not contribute to a fair trial-- much less a perfect trial-- in our judgment.

Next, plaintiff argues that the trial court improperly denied his motion for a new trial on the basis of its dismissal of juror Donald Jeffries after both parties had exhausted their peremptory challenges. In *People v Grabowski,* 12 Mich App 672, 675; 163 NW2d 449 (1969), this Court held that where it became necessary for the court to excuse a juror even after the jury was sworn but before any witnesses were sworn, the decision to impanel another juror rather than declare a mistrial was discretionary with the court. See also *People v Flansburgh,* 71 Mich App 1, 8; 246 NW2d 360 (1976). "A litigant has not a vested right in a particular juror, but only a right to be tried by a fair and impartial jury qualified under the law." *Id.*, quoting *Sullivan v State,* 125 So 115, 117 (Miss, 1929). Even where a juror is dismissed improperly for cause, this court will not reverse the trial court unless the moving party can demonstrate prejudice. *Lee v Misfeldt,* 1 Mich App 675, 679; 137 NW2d 753 (1965).

> [I]t is no ground of error for the court to be more cautious and strict in securing an impartial jury than the law actually required; and that for this purpose the court may very properly reject a juror on a ground which would not be strictly sufficient to sustain the challenge for cause, or, in other words, when the refusal to sustain the challenge would not constitute error. *So long as an impartial jury is obtained, neither party has a right to complain of this course by the court, and especially when, as in this case, no objection was taken by either party to the competency or impartiality of the jury which was obtained.* (Emphasis added.) [*Luebe v Thorpe*, 94 Mich 268, 271-2; 54 NW 41 (1892), quoting *Atlas Mining Co v Johnston,* 23 Mich 36 (1871); see also *Reynolds v Knowles,* 223 Mich 70, 73; 193 NW 900 (1923).]

Here, the trial court dismissed Donald Jeffries only after observing him appear to sleep several times in court and even warning him that he must stay awake and pay attention to the facts of the case. It appears that, although the trial court attempted to allow Jeffries to remain on the jury panel, his continuing actions of disinterest and sleeping forced the court to dismiss him in order to secure a fair and competent trial for both parties. At this point, although both parties had exhausted their peremptories, the jury had not yet been sworn into service. Thus, in our opinion, it appears that the trial court properly dismissed juror Jeffries and impaneled a new juror in his place when it became clear that Jeffries was not competent to serve, but before trial began and prejudice became more likely. In addition, plaintiff never objected to Jeffries' replacement, or claimed that the jury was not competent, fair and impartial. See *Reynolds, supra* at 73. There was no mandate that the trial court declare a mistrial or offer additional peremptory challenges where the juror could be replaced without prejudice to either party; we will not find prejudice based merely on the lack of additional peremptory challenges.

Parties often use their limited number of peremptory challenges before the jury panel is complete, leaving them without recourse if a subsequently-selected jury member is not objectionable for cause. Indeed, here the parties exhausted their peremptory challenges before the jury panel was complete and questioned two potential jurors without the option of challenging peremptorily even before Jeffries was dismissed. In our opinion, attorneys have an obligation to not only apportion their peremptory challenges in the best interest of their client, but at the same time to recognize that the judge has the authority to strike a juror on his own motion and act accordingly. This is especially relevant in the present case, since (1) the court clearly had the authority to strike a juror who was unable to stay awake or pay attention to the evidence; and (2) the court and the parties had already noted juror Jeffries' difficulties in staying awake, had discussed them and even discussed dismissing him, although the court chose to warn him in lieu of dismissing him initially. Thus, the attorneys were under a duty to anticipate that Jeffries might be dismissed. Consequently, we defer to the reasonable judgment of the trial court on this matter and find no abuse of discretion.

Lastly, plaintiff argues that the trial court improperly denied his motion for a new trial because it denied him the opportunity to recross-examine one of defendant's expert witnesses. The permissible scope of cross-examination during a trial is vested in the sound discretion of the trial court. Such discretion will not be reversed by this Court absent a clear abuse of discretion. *People v Taylor*, 386 Mich 204, 208; 191 NW2d 310 (1971). Although the parties have the right to cross-examine witnesses on relevant evidence, the court must weigh the probative value of the evidence against the counterbalancing factors such as the waste of time in presenting the evidence and the needless presentation of cumulative evidence. *People v Jackson*, 108 Mich App 346, 349; 310 NW2d 238 (1981); MRE 403.

Here, Michael Klima, defendant's engineering expert, examined the seatbelt at issue inside the vehicle before trial. On direct examination, he stated that he had observed abrasions on the webbing of the shoulder belt and on the plastic slot of the console over the retractor, from which the webbing emerges, formed by the webbing being pulled across the plastic and heating the plastic. He testified that the marks on the belt were made by the belt coming out of the console slot in a vertical orientation. He also believed that a second, three-quarter inch wide abrasion located nine inches from the buckle

matched the abrasion on Nicholas' neck. These factors led him to conclude that Nicholas was not wearing the shoulder belt properly under his left arm at the time of the accident. On the first day of cross-examination, plaintiff admitted the seatbelt and the retractor into evidence, both of which had been removed from the vehicle just prior to trial. Although plaintiff attempted to show, based on the angle of the abrasions on the console slot, that the shoulder belt had not been in the more vertical orientation that Klima had previously testified to, Klima refused to alter his conclusions.

Between the first and second days of cross-examination, the defense asked for and received permission for Klima to examine the seatbelt and retractor since it had been removed from the car. Thus, on the second day of cross-examination, plaintiff had the opportunity to question Klima regarding his examination of the seatbelt both in and out of the vehicle. However, plaintiff chose not to question him regarding the marks on the retractor. On redirect examination, defendant was given the chance to question Klima regarding his examination of the seatbelt after it was removed from the car. However, there was no new information presented during the re-direct of Klima to which plaintiff needed to respond on recross-examination.. He had previously examined the seatbelt and come to a conclusion, to which he testified on direct and cross-examination, and his analysis and conclusion did not change on re-direct. He testified that the marks on the retractor, which had been hidden by the plastic cover with the slot when he examined the seatbelt inside of the car, supported the opinions that he had previously expressed. He stated that the abrasions on the passenger side belt webbing showed that the belt webbing had to be in a more vertical orientation at the time of the accident, in contrast to the belt webbing on the driver's side which was not in this vertical position. Photographs of the seatbelt taken during Klima's overnight examination and admitted during redirect examination did not contain any new evidence to that already admitted by plaintiff himself when he admitted the seatbelt. They were merely a tool to help the jury better see the details of the belt webbing and retractor, which were actually present in the courtroom, and plaintiff specifically did not object to the admission of these photographs.

Thus, overall, plaintiff's argument lacks merit. Plaintiff had the opportunity to fully question Klima about his examination of the seatbelt both inside and out of the car. Plaintiff chose not to question Klima on the second day of cross-examination about how his new examination of the retractor impacted the theory that he stated on direct examination. In addition, plaintiff did not make an offer of proof regarding his need for additional questioning. Nor did plaintiff make use of his rebuttal argument to challenge Klima's statements and conclusions. In our judgment, had this "new information" testified to by Klima been particularly prejudicial to plaintiff's case, his response to the introduction of this testimony would have been far different. In the absence of any such action, we defer to the broad discretion of the trial court regarding the permissible scope of recross-examination, especially where, as here, it appears that further questioning would be merely cumulative and result in a waste of the court's time.

Affirmed.

/s/ Michael R. Smolenski
/s/ Stephen J. Markman

[1] MCR 2.611(A)(1)(a).

[2] MCR 2.611(A)(1)(b).

[3] The trial court apparently considered the affidavits nevertheless in denying the motion for new trial in order to learn the substance of the complaints.

[4] The Michigan Supreme Court relied upon *In re Beverly Hills Fire Litigation,* 695 F2d 207 (CA 6, 1982) in reversing and remanding the case of *People v Wilson*, 445 Mich 927; 521 NW2d 13 (1994) for an evidentiary hearing regarding juror misconduct.