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**CHARLES ZIMMERMAN, Personal Representative of the Estate of EMMITT WEATHERSPOON, JR., Deceased, Plaintiff-Appellee, v ROBIN COLEMAN, L.P.N., CORRECTIONAL MEDICAL SERVICES, INC., NASIM A. YACOB, M.D., and CINDY SEMEYN, R.N., Defendants-Appellants.**

Nos. 239976; 241494

## COURT OF APPEALS OF MICHIGAN

*2004 Mich. App. LEXIS 373*

February 5, 2004, Decided

**NOTICE:** [\*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

**PRIOR HISTORY:** Kent Circuit Court. LC No. 99-010895-NH.

**JUDGES:** Before: Markey, P.J., and Murphy and Talbot, JJ. William B. Murphy, J., concurs in result only.

**OPINION: PER CURIAM.**

Plaintiff commenced this medical malpractice action after Emmitt Weatherspoon, Jr., an inmate at the Kent County Correctional Facility, died from complications from a perforated ulcer. Following a jury trial, a judgment of no cause of action was entered in favor of defendants. Plaintiff moved for judgment notwithstanding the verdict (JNOV) or a new trial. The trial court subsequently granted plaintiff a new trial and limited at retrial defendants' expert witness with respect to her testimony establishing the standard of care at correctional facilities. In Docket No. 239976, this Court granted defendants' application for leave to appeal the trial court's order granting plaintiff a new trial. In Docket No. 241494, this Court granted defendants' application for leave to appeal the trial court's order limiting the testimony of its expert witness at retrial and [\*2] consolidated the two appeals. We reverse the order granting plaintiff a new trial.

Emmitt Weatherspoon, Jr., was sentenced to forty-five days in the county jail on an outstanding warrant related to child support arrearages. On the morning of June 16, 1997, several days after being jailed, he complained to a correction's officer that he had stomach pains and cramps. After 10:00 a.m., defendant Cindy Semeyn, R.N., assessed Weatherspoon's condition. She did not take a full history from him because she was

seeing him for a particular complaint. After evaluating him and speaking with him, she treated him with Maalox. Because Weatherspoon's complaints were subjective and there were no objective signs of a serious problem, or "severe pain," Semeyn decided not to call the physician in charge, Nasim Yacob, M.D., about Weatherspoon's condition. Before leaving Weatherspoon, Semeyn advised him that if the Maalox did not work or if his condition changed, he should contact the deputy, and she would return to see him. Semeyn did not hear from Weatherspoon for the remainder of her shift, which ended at 3:00 p.m.

After the shift change, Weatherspoon complained to a correction's officer that he was [\*3] sick and may need a doctor. The deputy contacted the nurse's station. The nurse indicated that Weatherspoon had already been seen, did not appear to have a serious problem, and had received medication. Later, defendant Robin Coleman, L.P.N., briefly saw Weatherspoon during an afternoon "med pass," which is the nursing round where medications are dispensed to inmates. Coleman provided more Maalox to Weatherspoon after checking his pulse and respirations and noting that his skin felt normal. Coleman had no indication that Weatherspoon's condition constituted an emergency. After Coleman saw Weatherspoon, the inmates received their evening food trays. Weatherspoon ate his meal and did not vomit. Later, during the evening "med pass," Coleman again checked Weatherspoon's pulse and respirations, which were still normal. She also again noted that his skin was warm, i.e., normal. Weatherspoon informed Coleman that he was feeling better and that the Maalox was helping. Weatherspoon did not appear to be in acute distress. In fact, when Coleman left Weatherspoon's cell, he followed her, walked to the telephones, and stood making calls for approximately half an hour. He returned to his cell at [\*4] 10:00 p.m. and a correction's official observed him apparently sleeping at 10:30 p.m.

At approximately 3:45 a.m., Weatherspoon was

found unconscious on the floor of his cell. He was pronounced dead at 4:19 a.m. He died from a perforated pyloric ulcer, which caused peritonitis. Dr. David Start, the forensic pathologist who performed the autopsy, testified that the ulcer could have ruptured any time between three and twenty-four hours before death. Consequently, it could have ruptured as late as 1:00 a.m. on June 17, 1997. Dr. Start agreed that the information Semeyn recorded at 10:50 a.m. when Weatherspoon was first assessed, was not consistent with a perforated ulcer. He also agreed that the symptoms Coleman described were inconsistent with a perforated ulcer. Moreover, Weatherspoon's ability to walk to the telephones, make calls over a period of half an hour, walk back to his cell, and fall asleep by 10:30 p.m. were inconsistent with a perforated ulcer. Start testified that when an ulcer perforates, the pain is so tremendous that the patient would be doubled over, would be unable to eat a meal without vomiting, and would be unable to stand and make telephone calls. n1

n1 Dr. Yacob believed that Weatherspoon's ulcer perforated sometime after 10:30 p.m.

[\*5]

At trial, plaintiff offered the expert testimony of Sharon Van Riper, R.N., a clinical nurse manager from the University of Michigan. Van Riper had never worked in a correctional facility and was unfamiliar with correctional facilities or their procedures. Over a defense objection, she was permitted to testify as to the applicable standard of care and breach of that standard. She testified that the standard of care required the nurses to take a full history of Weatherspoon's complaint, obtain information about his diet and medication, document the recurrence of his problem and how he obtained relief for his symptoms, question the onset of his pain, note the cause of the pain, and inquire about the quality and severity of the pain. Van Riper testified that Semeyn should have recorded all vital signs, including weight, and should have assessed Weatherspoon's abdomen by palpitation and by listening to bowel sounds. Semeyn was required to contact Dr. Yacob in five circumstances, including if severe pain existed, if there were a loss of bowel sounds, or if Weatherspoon's symptoms were unrelieved. Van Riper criticized Semeyn for not taking a full history or recording all of Weatherspoon's [\*6] vital signs. She testified that Semeyn breached the standard of care by not listening to Weatherspoon's bowel sounds and by not calling Dr. Yacob after seeing Weatherspoon. Van Riper additionally criticized Coleman's performance because Coleman's failure to conduct a full physical assessment of Weatherspoon during both med passes fell below the standard of care.

Defendants' expert, Lisa Wise, R.N., disagreed. She

testified that there are differences between healthcare in a traditional setting and healthcare in a correctional facility because there are extra concerns in a correctional facility. During any given shift at a correctional facility, there may be between thirty and fifty complaints of gastric pain. Inmates often fabricate complaints, so a nurse must use her professional judgment to determine how complete an assessment to perform. A full assessment is not feasible or warranted on each occasion. Semeyn recorded Weatherspoon's subjective complaints and his vital signs, except his weight, which was insignificant. She then performed an assessment of Weatherspoon's abdomen by palpating it and by listening to its bowel sounds. Wise testified that Semeyn's actions complied with [\*7] protocol and that the assessment provided no reason to contact Dr. Yacob. Wise also testified that a med pass at a correctional facility is unlike that in a hospital setting. A nurse on med pass in a correctional facility provides medicine to hundreds of inmates. When she encounters a medical situation during this time, she does what she can for the patient. During a med pass, she does not possess medical equipment for safety reasons, and she is not allowed to conduct a full assessment of a patient. Licensed Practical Nurses (L.P.N.) who are conducting a med pass are allowed only to distribute medications and conduct certain triage assessments. They then communicate their findings to a supervising registered nurse (R.N.). Wise opined that Coleman complied with the applicable standard of care by checking Weatherspoon to the best of her ability and reporting his condition to her supervising R.N. Nothing she reported to the R.N. warranted additional care. The standard of care was met.

The jury returned a verdict in favor of defendants Semeyn and Coleman, finding that they did not breach the standard of care. n2

n2 The parties stipulated to dismiss Dr. Yacob as a defendant before trial.

[\*8]

We review a trial court's decision to grant a new trial for an abuse of discretion. *Wiley v Henry Ford Cottage Hosp*, 257 Mich. App. 488-498; 668 N.W.2d 402 (2003). "An abuse of discretion occurs when the decision was so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Id.* Here, the trial court granted a new trial based on two grounds that were neither preserved at trial, nor raised by plaintiff in his motion for a new trial. We conclude that the reasons cited by the trial court to grant a new trial were so violative of fact and logic that they evidenced bias; therefore, the trial court abused its discretion.

First, the trial court stated that Wise's standard of

care testimony was improper because it established an illegal standard of care. We completely disagree.

The common-law standard of care applies to malpractice actions against nurses. Therefore, the applicable standard of care is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities. Expert testimony is necessary to establish the standard of care [\*9] because the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service and determine whether it meets the standard of practice in the community. [*Id.* at 492 (citations omitted).]

In this case, Wise pointed out the differences between healthcare standards of care in a traditional setting and in a correctional setting, noting that there are extra concerns in the correctional setting. She also explained that med passes in correctional facilities are different from med passes in a hospital. She indicated that the standard of care in a correctional facility requires a nurse to use her professional judgment to determine how much assessment an inmate may need. A full assessment is not feasible or warranted on each occasion. When treating a patient, however, the nurses are required to treat according to protocol. Wise's testimony articulated a specific standard of care for an R.N. assessing and treating a patient with a gastric complaint in a correctional facility, particularly noting subjective and objective information, assessing the abdomen, recommending treatment or contacting the physician, and, if treating, [\*10] following with protocol. Wise's testimony further articulated a specific standard of care for an L.P.N. on med pass who encounters an inmate complaint. The standard of care requires the L.P.N. to do what she can for the inmate and report information to her supervising R.N. Contrary to the trial court's written opinion, Wise never testified that the standard of care required medical personnel to only assess inmates visually and to refrain from performing examinations that require touching unless an inmate is in acute distress. Additionally, Wise never testified that the standard of care provided that medical personnel in a jail "are to avoid sending inmates to outside hospitals, etc., for diagnosis and/or treatment."

The trial court cited *Estelle v Gamble*, 429 U.S. 97, 98-101; 97 S. Ct. 285; 50 L. Ed. 2d 251 (1976), as a rationale for its decision. In *Estelle*, a prisoner filed a complaint against corrections officials and the medical director of the corrections department and prison hospital. In determining whether a cause of action existed under 42 USC 1983, the Court analyzed Eighth Amendment prohibitions against [\*11] "cruel and unusual punishments." *Id.* at 102-103. It determined that the government has an obligation to provide medical care for those whom it is punishing by incarceration. *Id.* at

103. The Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Id.* at 104 (citation omitted). The Court recognized, however, that an Eighth Amendment violation does not occur every time a prisoner claims that he received inadequate medical treatment. *Id.* It held that "an inadvertent failure to provide adequate medical care" is not actionable and that a "complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Id.* at 105-106. (Emphasis added.) Rather, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106. The courts of this state have agreed that mere negligence does not establish deliberate indifference under the Eighth Amendment. *Jackson v Detroit*, 449 Mich. 420, 431-432; [\*12] 537 N.W.2d 151 (1995); *Davis v Wayne Co Sheriff*, 201 Mich. App. 572, 577; 507 N.W.2d 751 (1993). In *York v Detroit*, 438 Mich. 744, 757; 475 N.W.2d 346 (1991), the Court stated that "deliberate indifference contemplates knowledge, actual or constructive, and a conscious disregard of a known danger." *Id.* Simple negligence will not constitute a municipal policy of indifference. *Id.* In *Tobias v Phelps*, 144 Mich. App. 272, 277-278; 375 N.W.2d 365 (1985), this Court stated:

A medical need is serious if it is one that has been diagnosed by a physician as requiring treatment or it is so obvious that even a lay person would recognize the necessity of medical attention. To have acted with "deliberate indifference", defendants must have either intentionally denied or unreasonably delayed treatment of a discomfort-causing ailment or wilfully failed to provide prescribed treatment without medical justification. [Citations omitted.]

The trial court's analysis focused on whether the medical care Weatherspoon received was premised on an illegal standard of care and as such constituted [\*13] cruel and unusual punishment. But the case before this Court is *not* based on an allegation of an Eighth Amendment violation. It is based on a claim of medical negligence. While deliberate indifference as a matter of policy is constitutionally intolerable in correctional facilities, Wise did not testify to any standard of care or policy that permitted deliberate indifference to inmates' medical conditions. She did not outline a standard of care that would enable nurses to intentionally deny, unreasonably delay, or wilfully fail to provide treatment without medical justification.

In fact, Wise offered testimony that the standard of care in the prison setting is different from that in the outside world. The prison setting can be construed as the "community" within which defendants practiced. If the

standard of care in the prison setting is as Wise testified, then defendants' conduct was properly measured against that standard of care. Whether that standard of care is illegal, as the trial court concluded, does not affect whether defendants were negligent in their treatment of Weatherspoon, i.e., violated that standard, and thus should not affect this medical malpractice action. The [\*14] trial court's analysis of this issue would be arguably apropos had plaintiff made a claim against the KCCF and other entities challenging the medical standard of care applied in prison settings as unconstitutional. But plaintiff did not raise such a claim. n3 The trial court erroneously characterized Wise's testimony as espousing an illegal standard of care and, as a result, abused its discretion in granting plaintiff a new trial on this basis.

n3 Moreover, the testimony regarding the facts of Weatherspoon's complaints, condition and care even when viewed in a light most favorable to plaintiff fails to meet the definition of "serious medical need," nor demonstrate defendants were "deliberately indifferent," as defined in *Tobias, supra*.

The trial court additionally ruled that a new trial was warranted because defense counsel made improper and prejudicial remarks in his closing argument. Plaintiff did not object to the arguments the trial court cited as improper and prejudicial.

When reviewing [\*15] asserted improper comments by an attorney, we first determine whether the attorney's action was error, and, if it was, whether the error requires reversal. An attorney's comments usually will 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 N.W.2d 817 (1996)* (citations omitted).]

See also *Craig v Oakwood Hosp, 249 Mich. App. 534, 555; 643 N.W.2d 580 (2002)* (Cooper, P.J., concurring in part and dissenting in part), lv gtd on other gds *469 Mich. 880 (2003)*, and *Kubisz v Cadillac Gage Textron, Inc, 236 Mich. App. 629, 638; 601 N.W.2d 160 (1999)*. Additionally, a trial court's instruction to the jury before opening statements and after closing arguments that the statements of counsel are not evidence is generally sufficient to cure any prejudice arising from improper remarks of [\*16] counsel. *Tobin v Providence Hosp, 244 Mich. App. 626, 641; 624 N.W.2d 548 (2001)*. Moreover, where prejudice arising from improper argument could have been cured by a proper instruction if such an instruction had been requested, error requiring

reversal does not exist. *Hunt v CHAD Enterprises, Inc, 183 Mich. App. 59, 65; 454 N.W.2d 188 (1990)*.

The jury in this case was instructed that the attorneys' arguments and analogies could not be given evidentiary weight. The jury was also instructed that it should not consider sympathy in reaching a verdict. Upon review of the challenged comments in context and in light of the instructions the trial court gave, we conclude that a new trial was not warranted on these grounds either. Counsel's remarks did not reflect a studied purpose to inflame or prejudice the jury or to deflect the jury's attention from the issues involved. Specifically, viewed in context, defense counsel's analogy to his daughter's death were brief and not designed to elicit sympathy. Rather, when viewed in context, the comment was intended to challenge the jury to think about the real issues and complaints in the [\*17] case and to refrain from connecting the emotional pain of loss with a finding of fault. Moreover, any prejudice arising from the analogy could have been cured by instructing the jury that sympathy or prejudice must not influence the juror's decision. *Reetz v Kinsman Marine Transit Co, 416 Mich. 97, 105; 330 N.W.2d 638 (1982)*. Similarly, defense counsel's analogy to the type of medical care provided to the military in Desert Storm did not warrant reversal. The analogy was designed to illustrate counsel's point that there are differences in the standard of care depending on the locale. This was a point that plaintiff's expert refused to recognize during in her testimony. Moreover, we note that it is not improper for an attorney to call upon jurors to rely upon their common sense or knowledge. The analogy was based on common sense and information within the realm of any ordinary juror. Further, it was not a recurring theme in counsel's argument, and defense counsel even cautioned the jury that the "community" for purposes of the standard of care at issue was a correctional facility and not the military field in Desert Storm. Any prejudice from the comments [\*18] about Desert Storm was effectively dispelled. Additionally, we have reviewed the remainder of the comments cited by the trial court and find that they were either supported by the evidence at trial, were insignificant, or were based on matters within the realm of the jurors' common knowledge (e.g., that jails are not nice places).

The arguments the trial court cited in support of its order granting plaintiff a new trial did not demonstrate a deliberate course of conduct aimed at preventing a fair and impartial trial.

Further, the trial court's instructions were sufficient to cure any prejudice from the challenged remarks. In sum, the trial court also abused its discretion to the extent it based its decision to grant plaintiff a new trial, on defense counsel's remarks in closing argument; therefore, the order granting a new trial is reversed.

In light of our decision, we need not consider the remaining issues raised in Docket Nos. 239976 and 241494.

We reverse and remand for reinstatement of the entry of judgment consistent with the jury's verdict and the trial court's subsequent rulings on case evaluation. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Michael [\*19] J. Talbot

**CONCUR BY:** William B. Murphy

**CONCUR:**

I concur in result only.

/s/ William B. Murphy