

STATE OF MICHIGAN
IN THE SUPREME COURT

JAMES YKIMOFF,

Plaintiff-Appellee,

v

W.A. FOOTE MEMORIAL HOSPITAL,

Defendant-Appellant,

and

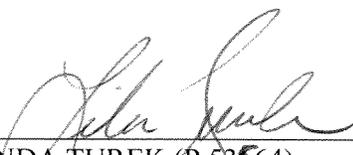
DR. DAVID EGGERT,

Defendant.

Supreme Court No.: 139561
Court of Appeals No.: 279472
Jackson County Circuit Court
Case No.: 04-2811-NH

**BRIEF *AMICUS CURIAE* ON BEHALF OF
THE MICHIGAN ASSOCIATION FOR JUSTICE**

Respectfully submitted,
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INTEREST OF AMICUS

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in trial litigation work. MAJ consists of member attorneys dedicated to advocating for the interest of the public and protecting the integrity of the justice system. MAJ recognizes an obligation to assist this Court on significant issues of law that would affect substantially the orderly administration of justice in the trial courts of this state. MAJ supports the Plaintiff-Appellee in urging this Court to affirm the decision of the Michigan Court of Appeals.

STATEMENT OF FACTS

Amicus curiae, the Michigan Association for Justice, hereby adopts the Counter-Statement of Material Facts and Orders Appealed From, as found in Plaintiff-Appellee's Response to Defendant-Appellant's Application for Leave to Appeal.

STANDARD OF REVIEW

Appellate courts review a trial court's decision on motions for directed verdict and judgment *non obstante verdicto*, or JNOV. *Wiley v Henry Ford Cottage Hosp.*, 257 Mich App 488, 491; 668 NW2d 402 (2003). A court must consider the evidence and inferences drawn therefore in the light most favorable to the party opposing the motion. *See Moll v Abbott Laboratories*, 444 Mich 1, 28; 506 NW2d 816 (1993); *DiFranco v Pickard*, 427 Mich 32, 54; 398 NW2d 896 (1986). "If reasonable jurors could honestly reach different conclusions, the motion should be denied, and the case should be decided by the jury, because no court under such circumstances has authority to substitute its judgment for that of the jury." *Mourad v Automobile Club Ins. Ass'n.*, 186 Mich App 715, 721; 465 NW2d 395 (1991)(citations omitted).

In *Moll*, this Court boldly stated that Michigan courts "do not tolerate usurping the province

of the jury” and in *Napier, infra*, it further articulated:

[t]he dominant characteristics of the approach or attitude in Michigan are that the right to trial by jury must be preserved, and that directed verdicts are drastic steps which should not be taken unless reasonable men could not differ on each and every element of the party’s claim.

Napier v Jacobs, 429 Mich 222, 232; 414 NW2d 862 (1987) quoting Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), R 2.515, § 5, p 229. In addition, a party has “a right to ask the jury to believe the case as he presented it; and, however improbable some portions of his testimony may appear to us, we can not say that the jury might not have given it full credence. It is for them, and not the court to compare and weigh the evidence.” *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975), quoting *Detroit & Milwaukee R. Co. v Van Steinburg*, 17 Mich 99, 117 (1868)(quotations omitted).

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT-APPELLANT’S MOTIONS FOR DIRECTED VERDICT AND JNOV IN ACCORDANCE WITH PLAINTIFF-APPELLANT’S RIGHT TO A TRIAL BY JURY

This Court should affirm the trial court and court of appeals’ decision upholding Plaintiff-Appellee’s constitutional right to trial by jury, where the resolution of the subject factual disputes lied firmly within the exclusive province of the jury. Defendant-Appellant’s attempt to remove the issues from the jury should be rejected because its arguments conflict with the federal and state constitutions, which protect a party’s right to a trial by jury that includes the right to cross-examine witnesses before a trier of fact that ultimately resolves the factual dispute.

The “Michigan Constitution guarantees plaintiffs in civil suits the right to trial by jury.” *Zdrojewski v Murphy*, 254 Mich App 50, 75-77; 657 NW2d 721 (2002). Article I, Section 14 of the Michigan Constitution provides that, “the right of trial by jury shall remain . . .” *Const. 1963, art*

I, § 14. “The right of trial by jury ordinarily refers to a right to present or defend an actionable claim to [one] jury to the point of jury verdict and judgment.” *Rouse v Gross*, 357 Mich 475, 481; 98 NW2d 562 (1959). Michigan courts have “long recognized that a jury is charged with resolving disputed facts.” *Moll v Abbott Laboratories*, 444 Mich 1, 27; 506 NW2d 816 (1993)(citations omitted). A trial court violates a party’s right to a jury trial by making a determination regarding a disputed issue of material fact. *Id.*, 444 Mich at 28.

Where there are questions of fact to be determined and the issues are such that at common law a right to jury trial existed, that right cannot be destroyed by statutory change in the form of action or creation of summary proceedings to dispose of such issues without jury, in the absence of conduct amounting to waiver.

State Conservation Dep’t v Brown, 335 Mich 343, 347; 55 NW2d 859 (1952), *citing Risser v Hoyt*, 53 Mich 185; 18 NW 611 (1884)(emphasis added). “In Michigan, trial by jury encompasses the right to have a jury hear a claim and determine issues of fact.” *Phillips v Mirac, Inc.*, 251 Mich App 586, 594; 651 NW2d 437 (2002) *citing Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 132; 573 NW2d 61 (1997).

Similarly, the Seventh Amendment provides that, “in Suits in common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .” *U.S. Const., Amend. VII*. It was designed “to preserve the basic institution of jury trial in only its most fundamental elements . . . at the core of these fundamental elements is the right to have a jury ultimately determine the issues of fact . . .” *Rhea v Massey-Ferguson, Inc.*, 767 F2d 266, 269 (CA 6 1985)(quotations and citations omitted). The Constitution thus mandates that in certain actions, only a jury may ultimately determine issues of fact. *Woods v Holy Cross Hospital*, 591 F2d 1164, 1178 (CA 5 1979), *citing In re Peterson*, 253 US 300 (1920). While the Seventh Amendment does not apply to state court civil cases, Michigan courts still refer to federal precedent in determining

whether a rule infringes on a party's right to trial by jury. *Great Lakes Gas Transmission Ltd. P'ship v Markel*, 226 Mich App 127, 132; 573 NW2d 61 (1997)(citations omitted).

A party's right to trial by jury is also explicitly recognized by the Federal Rules of Civil Procedure and the Michigan Court Rules. *See Fed. R. Civ. P. 38* and *MCR 2.508(A)*.

This Court and the Court of Appeals for the Sixth Circuit have acknowledged and cautioned against courts giving "mere lip service" to the principles relating to summary judgment, directed verdict, and judgment notwithstanding the verdict. "Trial by jury is our established constitutional safeguard against assumption of unwarranted judicial authority and should be honored by steadfast observance rather than discarded by dictatorial breach." *Patterson v Pennsylvania R. Co.*, 238 F2d 645, 650 (CA 6 1956); *Hopkins v Lake*, 348 Mich 382, 399; 83 NW2d 262 (1957). As such, courts are cautioned against "making findings of fact under the guise of determining that no issues of material fact exist." *Crossley v Allstate Ins. Co.*, 139 Mich App 464, 468; 362 NW2d 760 (1984)(citations omitted).

A. Plaintiff-Appellee's Right to Cross-Examine Witnesses Was Properly Upheld by the Lower Courts and Should be Affirmed by This Court Where Credibility Determinations Were Crucial in the Trial

Both federal and state law recognize a party's due process right to cross-examine adverse witnesses. *Great Lakes Div. of Nat'l Steel Corp. v City of Ecorse*, 227 Mich App 379, 426; 576 NW2d 667 (1998); *Bonelli v Volkswagen of America, Inc.*, 166 Mich App 483, 502; 421 NW2d 213 (1988); *Cooper v Chrysler Corp.*, 125 Mich App 811, 818-819; 336 NW2d 877 (1983). Basic due process provides that "before testimony should be used against any party, that party must be given an opportunity to cross-examine the witness." *Bonelli v Volkswagen of America, Inc.*, 166 Mich App at 502. Inherent in the right to trial by jury is the right to cross-examine witnesses:

The right of cross-examination is a right the law freely accords to any litigant who finds himself confronted by an adverse witness, and it may not be unduly restrained or interfered with by the court. The right of a litigant to cross-examine an adverse witness within proper bounds is an absolute right, and it is not within the discretion of the court to say whether or not the right will be accorded. . . . It is always permissible upon the cross-examination of an adverse witness to draw from him any fact or circumstance that may tend to show his relations with, feelings toward, bias or prejudice for or against, either party, or that may disclose a motive to injure the one party or to befriend or favor the other.

Hayes v Coleman, 338 Mich 371, 380-381; 61 NW2d 634 (1953). See also *Argentine v USW*, 287 F3d 486 (CA 6 2002), citing *Alford v United States*, 282 US 687, 691 (1931) (“Cross examination is a trial right.”).

This Court recognized in *Campau v Dewey*, 9 Mich 381, 417 (1861), that a witness may take the stand and testify in accordance with the oath he has taken but that the party calling the witness “may so adroitly direct the examination in chief as to disclose only that class of facts which tend to establish the issue in his favor.” The law has accordingly:

given to the opposite party the right to cross-examine the witness, for the purpose, among others, of bringing out the facts thus concealed, which tend to explain away or modify the effect of those stated on the direct examination, or to rebut the inference which would otherwise result from them.

Id. at 417-418.

“If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept [the party’s] statements, it is a necessary and just rule that the jury should pass upon it.” *Chesapeake & O. R. Co. v Martin*, 283 US 209, 218 (1931). The Court explained that only where the “evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it

conclusiveness.” *Martin*, 283 US at 216-220.

“A witness’s credibility is a primary question for the jury to evaluate. . .” *Detroit/Wayne County Stadium Auth. v Drinkwater, Taylor & Merrill, Inc.*, 267 Mich App 625, 653; 705 NW2d 549 (2005). Indeed, the United States Supreme Court has articulated that, “the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.” *Sartor v Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944), quoting *Sonnentheil v Christian Moerlein Brewing Co.*, 172 US 401, 408 (1899). Credibility issues are within the exclusive province of the jury. Juries weigh the testimony of a witness and have “the right to determine how much dependence was to be placed upon it. *Sartor*, *supra* at 628. The *Sartor* Court explained that:

[t]here are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. That part of every case . . . belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men . . .

Sartor, at 628-629 (acknowledging that cross-examination is “the best method yet devised for testing trustworthiness of testimony).

Sentilles v Inter-Caribbean Shipping Corp., 361 US 107, 110 (1959), is instructive with respect to the distinction between the function of the court and the province of the jury as it relates to medical negligence and causation. *Sentilles* involved an injured maritime worker who had suffered an illness following a work-related accident and sought medical treatment. He then suffered a subsequent illness as a result of the medical treatment. The *Sentilles* Court’s analysis revolved around the issue of medical causation. Three medical specialists, including the treating specialist, provided three differing opinions as to the causation of the worker’s injuries. The *Sentilles* Court

highlighted that:

[t]hough this case involves a medical issue, it is no exception to the admonition that, ‘[i]t is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences. . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . ***Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.***

Id. at 110. Not only did the *Sentilles* Court explicitly confine the resolution of conflicting evidence to the jury, it also clarified that the determination of causation belonged solely to the jury and not the medical experts or witnesses. “The members of the jury, not the medical witnesses were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration.” *Sentilles*, at 109-110. Thus, the Supreme Court ruled that there existed sufficient evidence to support the jury’s determination and affirmed the jury’s determination that the medical illness was caused by the work-related accident.

This Court should also affirm the jury’s determination in the case at bar where there exists sufficient evidence to support the jury’s determination and where the resolution of a factual dispute involving conflicting evidence is ultimately left for a trier of fact.

CONCLUSION

This Court should affirm the decisions of the trial court and the court of appeals and uphold Plaintiff-Appellee’s constitutional right to a trial by jury.

Respectfully submitted,
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