2006 WL 3191785 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota.

BRANDT,

v.

WESTERN WIS. MEDICAL ASSOC.

No. C5053091.
June 19, 2006.

Memorandum Facts Plaintiff's Position

On January 22, 2002, Michelle Tschida was admitted to River Falls Hospital where Defendant Dr. Clayton performed a gastrointestinal bypass, cholecystectomy, and an incidental splenectomy. From January 22, 2002, through January 24, 2002, Michelle Tschida's condition deteriorated. Plaintiff claims that she experienced a number of symptoms consistent with an anastomotic leak and intra-abdominal infection and sepsis.

On January 25, 2002, Dr. Clayton consulted with Dr. Todd Morris, a general surgeon at Regions Hospital, and arranged to have Michelle Tschida transported to Regions Hospital for co-management of her care. On January 26, 2002, a CT scan of Michelle Tschida's abdomen was performed that showed a large amount of fluid in her upper abdomen. Dr. Morris diagnosed a "post gastrointestinal bypass now with leak - likely gastrojejunostomy", and ordered her to be taken to the operating room for "exploration, drainage, and control of the leak." Upon entering her abdomen Dr. Morris discovered a large amount of green, foul-smelling material and Dr. Morris discovered a 1 centimeter hole in Michelle Tschida's stomach with fluid escaping. He closed the perforation. Michelle Tschida continued to deteriorate. On January 30, 2002, Dr. McGonigal ordered her to be taken to surgery. Michelle Tschida died while in surgery on January 30, 2002, as a result of massive internal bleeding.

The Plaintiff intends to prove that the defendant Matthew Clayton deviated from the applicable standard of care in that he failed to diagnose and treat the anastomatic leak in a timely manner. Plaintiff also intends to prove that Defendant McGonigal deviated from the applicable standard of care in that he failed to diagnosis and treat the internal bleed in a timely manner.

Plaintiff claims that Ms. Tschida died as a direct result of the negligence of the defendants.

Plaintiff alleges that the decedent's and heirs and next-of-kin have sustained non-pecuniary damages, including loss of comfort, aid, society and companionship as well as pecuniary loss, including medical expenses, wage loss and funeral expenses.

DEFENDANT'S POSITION

Defendants claim that on January 22, 2002, Michelle Tschida was admitted to River Falls Hospital to undergo a gastric bypass procedure. Dr. Matthew Clayton performed the surgery. During the gastric bypass procedure, an incidental splenectomy was required. Following the gastric bypass procedure, Michelle Tschida began experiencing respiratory distress and running a fever. At that time, Michelle Tschida was thought to be suffering from ARDS. Ultimately, Michelle Tschida was placed on a ventilator. Due to River Falls Hospital's inability to maintain ventilator support, Dr. Clayton made arrangements to have Michelle Tschida transferred to Regions Hospital.

On January 25, 2002, Michelle Tschida was transferred from River Falls Hospital to Regions Hospital. On January 26, 2002, a CT scan of Michelle Tschida's abdomen was performed, which showed a large amount of fluid in her abdomen. Dr. Todd

Morris diagnosed a "post gastro-intestinal bypass now with leak-likely gastrojejunostomy." Dr. Morris performed a surgical repair of the leak.

On January 30, 2002, Michelle Tschida's condition deteriorated. At that time, Dr. Michael McGonigal was the physician overseeing Michelle Tschida's condition. During that evening, Michelle Tschida coded. After her condition was stabilized, she was taken into surgery. Michelle Tschida died while in surgery.

Defendant Michael McGonigal, M.D., contends that he was not negligent with respect to his care and treatment of Michelle Tschida. Dr. McGonigal intends to establish that his actions in attempting to determine the cause of Michelle Tschida's deteriorating condition, rather than taking her immediately into surgery, were reasonable and appropriate and met the standard of care.

Matthew C. Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a/ River Falls Medical Clinic, deny that they were negligent in any respect. The evidence will show that, with respect to the care rendered to Michelle Tschida, Dr. Clayton exercised the degree of care, skill, and judgment usually exercised by reasonable general surgeons under the same or similar circumstances. No act or omission on the part of Dr. Clayton caused, or contributed to cause, Ms. Tschida's demise.

Matthew Clayton, M.D., is a general surgeon practicing in River Falls, Wisconsin. Michelle Tschida was his patient. She had trouble with weight all her life. Her morbid obesity was seriously impairing her health. After a thorough pre-operative work-up and informed consent, Dr. Clayton performed a gastric bypass on Ms. Tschida on Tuesday January 22, 2002.

After the operation, Ms. Tschida did well initially, but developed respiratory distress over the next couple of days. The River Falls Area Hospital did not have the required respiratory therapy staff to provide care to Ms. Tschida over the weekend. On Friday, January 25, Dr. Clayton transferred Ms. Tschida to Regions Hospital in St. Paul for further care. On the day of transfer, Dr. Clayton spoke with Regions general surgeon Dr. Todd Morris about Ms. Tschida. Dr. Clayton claims that was his last involvement in Ms. Tschida's care and he did not co-manage her care.

LAW WISCONSIN LAW

Wisc. Stat. § 655.002. Applicability

(1) Mandatory participation. Except as provided in *s. 655.003, this chapter applies to all of the following:*

(a) *A physician or a nurse anesthetist for whom this state is a principal place of practice and who practices his or her profession in this state more than 240 hours in a fiscal year.*

(b) A physician or a nurse anesthetist for whom Michigan is a principal place of practice, if all of the following apply:

1. The physician or nurse anesthetist is a resident of this state.

2. The physician or nurse anesthetist practices his or her profession in this state or in Michigan or a combination of both more than 240 hours in a fiscal year.

3. The physician or nurse anesthetist performs more procedures in a Michigan hospital than in any other hospital. In this subdivision, "Michigan hospital" means a hospital located in Michigan that is an affiliate of a corporation organized under the laws of this state that maintains its principal office and a hospital in this state.

(c) A physician or nurse anesthetist who is exempt under *s. 655.003(1)* or (3), but who practices his or her profession outside the scope of the exemption and who fulfills the requirements under par. (a) in relation to that practice outside the scope of the

exemption. For a physician or a nurse anesthetist who is subject to this chapter under this paragraph, this chapter applies only to claims arising out of practice that is outside the scope of the exemption under *s. 655.003(1)* or *(3)*.

(d) A partnership comprised of physicians or nurse anesthetists and organized and operated in this state for the primary purpose of providing the medical services of physicians or nurse anesthetists.

(e) A corporation organized and operated in this state for the primary purpose of providing the medical services of physicians or nurse anesthetists.

(l)(em) Any organization or enterprise not specified under par. (d) or (e) that is organized and operated in this state for the primary purpose of providing the medical services of physicians or nurse anesthetists.

(f) A cooperative sickness care association organized under *ss. 185.981* to *185.985* that operates a nonprofit sickness care plan in this state and that directly provides services through salaried employees in its own facility.

(g) An ambulatory surgery center that operates in this state.

(h) A hospital, as defined in *s. 50.33(2)(a)* and (c), that operates in this state.

(i) An entity operated in this state that is an affiliate of a hospital and that provides diagnosis or treatment of, or care for, patients of the hospital.

(j) A nursing home, as defined in *s. 50.01(3)*, whose operations are combined as a single entity with a hospital described in par. (h), whether or not the nursing home operations are physically separate from the hospital operations. (Emphasis added)

Wisc. Stat. § 655.007. Patients' claims

On and after July 24, 1975, any patient or the patient's representative having a claim or any spouse, parent, minor sibling or child of the patient having a derivative claim for injury or death on account of malpractice is subject to this chapter. (Emphasis added)

Wisc. Stat. § 655.009. Actions against health care providers

An action to recover damages on account of malpractice shall comply with the following:

(1) Complaint. The complaint in such action shall not specify the amount of money to which the plaintiff supposes to be entitled.

(2) Medical expense payments. The court or jury, whichever is applicable, shall determine the amounts of medical expense payments previously incurred and for future medical expense payments.

(3) Venue. Venue in a court action under this chapter is in the county where the claimant resides if the claimant is a resident of this state, or in a county specified in *s. 801.50(2)(a)* or (c) if the claimant is not a resident of this state.

Wise. Stat. § 655.23. Limitations of liability; proof of financial responsibility

(3)(a) Except as provided in par. (d), *every health care provider either shall insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state or shall qualify as a self-insurer.* Qualification as a self-insurer is subject to conditions established by the commissioner and is valid only when

approved by the commissioner. The commissioner may establish conditions that permit a self-insurer to self-insure for claims that are against employees who are health care practitioners and that are not covered by the fund.

(b) Each insurance company issuing health care liability insurance that meets the requirements of sub. (4) to any health care provider shall, at the times prescribed by the commissioner, file with the commissioner in a form prescribed by the commissioner a certificate of insurance on behalf of the health care provider upon original issuance and each renewal.

(c) Each self-insured health care provider furnishing coverage that meets the requirements of sub. (4) shall, at the times and in the form prescribed by the commissioner, file with the commissioner a certificate of self-insurance and a separate certificate of insurance for each additional health care provider covered by the self-insured plan.

(d) If a cash or surety bond furnished by a health care provider for the purpose of insuring and keeping insured the health care provider's liability was approved by the commissioner before April 25, 1990, par. (a) does not apply to the health care provider while the cash or surety bond remains in effect. A cash or surety bond remains in effect unless the commissioner, at the request of the health care provider or the surety, approves its cancellation.

(4)(a) A cash or surety bond under sub. (3)(d) shall be in amounts of at least $200,000 for each occurrence and $600,000 for all occurrences in any one policy year for occurrences before July 1, 1987, $300,000 for each occurrence and $900,000 for all occurrences in any one policy year for occurrences on or after July 1, 1987, and before July 1, 1988, and S400,000 for each occurrence and $1,000,000 for all occurrences in any one policy year for occurrences on or after July 1, 1988.

(b)l. Except as provided in par. (c), before July 1, 1997, *health care liability insurance may have provided either occurrence or claims-made coverage. The limits of liability shall have been as follows:*

a. For occurrence coverage, at least $200,000 for each occurrence and $600,000 for all occurrences in any one policy year for occurrences before July 1, 1987, $300,000 for each occurrence and $900,000 for all occurrences in any one policy year for occurrences on or after July 1, 1987, and before July 1, 1988, and $400,000 for each occurrence and $ 1,000,000 for all occurrences in any one policy year for occurrences on or after July 1, 1988, and before July 1, 1997.

b. For claims-made coverage, at least $200,000 for each claim arising from an occurrence before July 1, 1987, regardless of when the claim is made, and $600,000 for all claims in any one reporting year for claims made before July 1, 1987, $300,000 for each claim arising from an occurrence on or after July 1, 1987, and before July 1, 1988, regardless of when the claim is made, and $900,000 for all claims in any one reporting year for claims made on or after July 1, 1987, and before July 1, 1988, and $400,000 for each claim arising from an occurrence on or after July 1, 1988, and before July 1, 1997, regardless of when the claim is made, and *$1,000,000 for all claims in any one reporting year for* claims made on or after July 1, 1988, and before July 1, 1997.

2. *Except as provided in par. (c), on and after July 1, 1997, health care liability insurance may provide either occurrence or claims-made coverage. The limits of liability shall be as follows:*

a. *For occurrence coverage, at least $1,000,000 for each occurrence and $3,000,000 for* all occurrences in any one policy year for occurrences on or after July 1, 1997.

b. *For claims-made coverage, at least $1,000,000 for each claim arising from an occurrence on or after July 1, 1997, and $3,000,000 for all claims in any one reporting year for claims made on or after July 1, 1997.*

(c)1. Except as provided in subd. 2., self-insurance shall be in amounts of at least $200,000 for each occurrence and $600,000 for all occurrences in any one policy year for occurrences before July 1, 1987, $300,000 for each occurrence and $900,000 for all occurrences in any one policy year for occurrences on or after July 1, 1987, and before July 1, 1988, $400,000 for each occurrence and $1,000,000 for all occurrences in any one policy year for occurrences on or after July 1, 1988, and before July

1, 1997, and $1,000,000 for each occurrence and $3,000,000 for all occurrences in any one policy year for occurrences on or after July 1, 1997.

2. Notwithstanding subd. 1., in the discretion of a self-insured health care provider, self-insurance may be in an amount that is less than $1,000,000 but not less than $600,000 for each occurrence on or after July 1, 1997, and before July 1, 1999, and less than $1,000,000 but not less than $800,000 for each occurrence on or after July 1, 1999, and before July 1,2001.

(d) The commissioner may promulgate such rules as the commissioner considers necessary for the application of the liability limits under par. (b) to reporting years following termination of claims-made coverage, including rules that provide for the use of actuarial equivalents.

(5) While health care liability insurance, self-insurance or a cash or surety bond under sub. (3)(d) remains in force, the health care provider, the health care provider's estate and those conducting the health care provider's business, including the health care provider's health care liability insurance carrier, are liable for malpractice for no more than the limits expressed in sub. (4) or the maximum liability limit for which the health care provider is insured, whichever is higher, if the health care provider has met the requirements of this chapter.

(5m) The limits set forth in sub. (4) shall apply to any joint liability of a physician or nurse anesthetist and his or her corporation, partnership, or other organization or enterprise under *s. 655.002(1)(d),* (e), or *(em).*

(6) Any person who violates this section or *s. 655.27(3)(a)* is subject to *s. 601.64.* For purposes of *s. 601.64(3)(c),* each week of delay in compliance with this section or *s. 655.27(3)(a)* constitutes a new violation.

(7) Each health care provider shall comply with this section and with *s. 655.27(3)(a)* before exercising any rights or privileges conferred by his or her health care provider's license. The commissioner shall notify the board that issued the license of a health care provider that has not complied with this section or with *s. 655.27(3)(a).* The board that issued the license may suspend, or refuse to issue or to renew the license of any health care provider violating this section or *s. 655.27(3)(a).*

(8) No health care provider who retires or ceases operation after July 24, 1975, shall be eligible for the protection provided under this chapter unless proof of financial responsibility for all claims arising out of acts of malpractice occurring after July 24, 1975, is provided to the commissioner in the form prescribed by the commissioner. (Emphasis added)

Wise. Stat. § 655.27. Injured patients and families compensation fund

(1) Fund. *There is created an injured patients and families compensation fund for the purpose of paying that portion of a medical malpractice claim which is in excess of the limits expressed in s. 655.23(4)* or the maximum liability limit for which the health care provider is insured, whichever limit is greater, paying future medical expense payments under *s. 655.015,* and paying claims under sub. (1m). *The fund shall provide occurrence coverage for claims against health care providers that have complied with this chapter,* and against employees of those health care providers, and for reasonable and necessary expenses incurred in payment of claims and fund administrative expenses. The coverage provided by the fund shall begin July 1, 1975. The fund shall not be liable for damages for injury or death caused by an intentional crime, as defined under *s. 939.12,* committed by a health care provider or an employee of a health care provider, whether or not the criminal conduct is the basis for a medical malpractice claim.

(1m) Peer review activities. (a) The fund shall pay that portion of a claim described in par. (b) against a health care provider that exceeds the limit expressed in *s. 655.23(4)* or the maximum liability limit for which the health care provider is insured, whichever limit is greater.

(b) A health care provider who engages in the activities described in *s. 146.37 (1g)* and *(3)* shall be liable for not more than the limits expressed under *s. 655.23(4)* or the maximum liability limit for which the health care provider is insured, whichever limit is greater, if he or she is found to be liable under *s. 146.37,* and the fund shall pay the excess amount, unless the health care provider is found not to have acted in good faith during those activities and the failure to act in good faith is found by the trier of fact, by clear and convincing evidence, to be both malicious and intentional.

(2) Fund administration and operation. Management of the fund shall be vested with the board of governors. The commissioner shall either provide staff services necessary for the operation of the fund or, with the approval of the board of governors, contract for all or part of these services. Such a contract is subject to *s. 16.765,* but is otherwise exempt from subch. IV of ch. 16. The commissioner shall adopt rules governing the procedures for creating and implementing these contracts before entering into the contracts. At least annually, the contractor shall report to the commissioner and to the board of governors regarding all expenses incurred and subcontracting arrangements. If the board of governors approves, the contractor may hire legal counsel as needed to provide staff services. The cost of contracting for staff services shall be funded from the appropriation under s. 20.145(2)(u).

(3) Fees. (a) *Assessment.* Each health care provider shall pay an annual assessment, which, subject to pars. (b) to (br), shall be based on the following considerations:

1. Past and prospective loss and expense experience in different types of practice.

2. The past and prospective loss and expense experience of the fund.

2m. The loss and expense experience of the individual health care provider which resulted in the payment of money, from the fund or other sources, for damages arising out of the rendering of medical care by the health care provider or an employee of the health care provider, except that an adjustment to a health care provider's fees may not be made under this subdivision prior to the receipt of the recommendation of the injured patients and families compensation fund peer review council under *s. 655.275(5)(a)* and the expiration of the time period provided, under *s. 655.275(7),* for the health care provider to comment or prior to the expiration of the time period under *s. 655.275(5)(a).*

3. Risk factors for persons who are semiretired or part-time professionals.

4. For a health care provider described in *s. 655.002(1)(d),* (e), *(em),* or (f), risk factors and past and prospective loss and expense experience attributable to employees of that health care provider other than employees licensed as a physician or nurse anesthetist.

(am) *Assessments for peer review council.* The fund, a mandatory health care liability risk-sharing plan established under *s. 619.04,* and a private health care liability insurer shall be assessed, as appropriate, fees sufficient to cover the costs of the injured patients and families compensation fund peer review council, including costs of administration, for reviewing claims paid by the fund, plan, and insurer, respectively, under *s. 655.275(5).* The fees shall be set by the commissioner by rule, after approval by the board of governors, and shall be collected by the commissioner for deposit in the fund. The costs of the injured patients and families compensation fund peer review council shall be funded from the appropriation under s. 20.145(2)(um).

(b) *Fees established.* 1. The commissioner, after approval by the board of governors, shall by rule set the fees under par. (a). The rule shall provide that fees may be paid annually or in semiannual or quarterly installments. In addition to the prorated portion of the annual fee, semiannual and quarterly installments shall include an amount sufficient to cover interest not earned and administrative costs incurred because the fees were not paid on an annual basis. This paragraph does not impose liability on the board of governors for payment of any part of a fund deficit.

2. With respect to fees paid by physicians, the rule shall provide for not more than 4 payment classifications, based upon the amount of surgery performed and the risk of diagnostic and therapeutic services provided or procedures performed.

2m. In addition to the fees and payment classifications described under subds. 1 and 2, the commissioner, after approval by the board of governors, may by rule establish a separate payment classification for physicians satisfying *s. 655.002(1)(b)* and a separate fee for nurse anesthetists satisfying *s. 655.002(1)(b)* which take into account the loss experience of health care providers for whom Michigan is a principal place of practice.

(bg) *Fee increase. 1.* Every rule under par. (b) shall provide for an automatic increase in a health care provider's fees, except as provided in subd. 2, if the loss and expense experience of the fund and other sources with respect to the health care provider or an employee of the health care provider exceeds either a number of claims paid threshold or a dollar volume of claims paid threshold, both as established in the rule. The rule shall specify applicable amounts of increase corresponding to the number of claims paid and the dollar volume of awards in excess of the respective thresholds.

2. The rule shall provide that the automatic increase does not apply if the board of governors determines that the performance of the injured patients and families compensation fund peer review council in making recommendations under *s. 655.275(5)(a)* adequately addresses the consideration set forth in par. (a)2m.

(br) *Limit on fees.* Every rule setting fees for a particular fiscal year under par. (b) shall ensure that the fees assessed do not exceed the greatest of the following:

1. The estimated total dollar amount of claims to be paid during that particular fiscal year.

2. The fees assessed for the fiscal year preceding that particular fiscal year, adjusted by the commissioner of insurance to reflect changes in the consumer price index for all urban consumers, U.S. city average, for the medical care group, as determined by the U.S. department of labor.

3. Two hundred percent of the total dollar amount disbursed for claims during the calendar year preceding that particular fiscal year.

(c) *Collection and deposit of fees.* Fees under pars. (a) and (b) and future medical expense payments specified for the fund under *s. 655.015* shall be collected by the commissioner for deposit into the fund in a manner prescribed by the commissioner by rule.

(d) *Rule not effective; fees.* If the rule establishing fees under par. (b) does not take effect prior to June 2 of any fiscal year, the commissioner may elect to collect fees as established for the previous fiscal year. If the commissioner so elects and the rule subsequently takes effect, the balance for the fiscal year shall be collected or refunded or the remaining semiannual or quarterly installment payments shall be adjusted except the commissioner may elect not to collect, refund or adjust for minimal amounts.

(e) *Podiatrist fees.* The commissioner, after approval by the board of governors, may by rule assess fees against podiatrists for the purpose of paying the fund's portion of medical malpractice claims and expenses resulting from claims against podiatrists based on occurrences before July 1, 1986.

(4) Fund accounting and audit. (a) Moneys shall be withdrawn from the fund by the commissioner only upon vouchers approved and authorized by the board of governors.

(b) All books, records and audits of the fund shall be open to the general public for reasonable inspection, with the exception of confidential claims information.

(c) Persons authorized to receive deposits, withdraw, issue vouchers or otherwise disburse any fund moneys shall post a blanket fidelity bond in an amount reasonably sufficient to protect fund assets. The cost of such bond shall be paid from the fund.

(d) Annually after the close of a fiscal year, the board of governors shall furnish a financial report to the commissioner. The report shall be prepared in accordance with accepted accounting procedures and shall include the present value of all claims reserves, including those for incurred but not reported claims as determined by accepted actuarial principles, and such other information as may be required by the commissioner. The board of governors shall furnish an appropriate summary of this report to all fund participants.

(e) The board of governors shall submit a quarterly report to the state investment board and the department of administration projecting the future cash flow needs of the fund. The state investment board shall invest moneys held in the fund in investments with maturities and liquidity that are appropriate for the needs of the fund as reported by the board of governors in its quarterly reports under this paragraph. All income derived from such investments shall be credited to the fund.

(f) The board of governors shall submit a functional and progress report to the chief clerk of each house of the legislature, for distribution to the appropriate standing committees under *s. 13.172(3)*, on or before March 1 of each year.

in this state under ch. 611, 613, 614 or 618 or pursue other loss funding management to preserve the solvency and integrity of the fund, subject to approval by the commissioner. The commissioner may prescribe controls over or other conditions on such use of reinsurance or other loss-funding management mechanisms.

(5) Claims procedures (a). *Any person may file a claim for damages arising out of the rendering of medical care or services or participation in peer review activities under s. 146.37 within this state against a health care provider or an employee of a health care provider. A person filing a claim may recover from the fund only if the health care provider or the employee of the health care provider has coverage under the fund, the fund is named as a party in the action, and the action against the fund is commenced within the same time limitation within which the action against the health care provider or employee of the health care provider must be commenced.*

2. Any person may file an action for damages arising out of the rendering of medical care or services or participation in peer review activities under *s. 146.37* outside this state against a health care provider or an employee of a health care provider. A person filing an action may recover from the fund only if the health care provider or the employee of the health care provider has coverage under the fund, the fund is named as a party in the action, and the action against the fund is commenced within the same time limitation within which the action against the health care provider or employee of the health care provider must be commenced. If the rules of procedure of the jurisdiction in which the action is brought do not permit naming the fund as a party, the person filing the action may recover from the fund only if the health care provider or the employee of the health care provider has coverage under the fund and the fund is notified of the action within 60 days of service of process on the health care provider or the employee of the health care provider. The board of governors may extend this time limit if it finds that enforcement of the time limit would be prejudicial to the purposes of the fund and would benefit neither insureds nor claimants.

3. If, after reviewing the facts upon which the claim or action is based, it appears reasonably probable that damages paid will exceed the limits in *s. 655.23(4)*, the fund may appear and actively defend itself when named as a party in an action against a health care provider, or an employee of a health care provider, that has coverage under the fund. In such action, the fund may retain counsel and pay out of the fund attorney fees and expenses including court costs incurred in defending the fund. The attorney or law firm retained to defend the fund shall not be retained or employed by the board of governors to perform legal services for the board of governors other than those directly connected with the fund. Any judgment affecting the fund may be appealed as provided by law. The fund may not be required to file any undertaking in any judicial action, proceeding or appeal.

(b) It shall be the responsibility of the insurer or self-insurer providing insurance or self-insurance for a health care provider who is also covered by the fund to provide an adequate defense of the fund on any claim filed that may potentially affect the fund with respect to such insurance contract or self-insurance contract. The insurer or self-insurer shall act in good faith and in a fiduciary relationship with respect to any claim affecting the fund. No settlement exceeding an amount which could require payment by the fund may be agreed to unless approved by the board of governors.

(c) It shall be the responsibility of any health care provider with a cash or surety bond in effect under *s. 655.23(3)(d)* to provide an adequate defense of the fund on any malpractice claim filed or any claim filed under sub. (1m) that may potentially affect the fund. The health care provider shall act in good faith and in a fiduciary relationship with respect to any claim affecting the fund. No settlement exceeding an amount which could require payment by the fund may be agreed to unless approved by the board of governors.

(d) A person who has recovered a final judgment or a settlement approved by the board of governors against a health care provider, or an employee of a health care provider, that has coverage under the fund may file a claim with the board of governors to recover that portion of such judgment or settlement which is in excess of the limits in *s. 655.23(4)* or the maximum liability limit for which the health care provider is insured, whichever limit is greater. In the event the fund incurs liability for future payments exceeding $1,000,000 to any person under a single claim as the result of a settlement or judgment that is entered into or rendered under this chapter for an act or omission that occurred on or after May 25, 1995, the fund shall pay, after deducting the reasonable costs of collection attributable to the remaining liability, including attorney fees reduced to present value, the full medical expenses each year, plus an amount not to exceed $500,000 per year that will pay the remaining liability over the person's anticipated lifetime, or until the liability is paid in full. If the remaining liability is not paid before the person dies, the fund may pay the remaining liability in a lump sum. Payments shall be made from money collected and paid into the fund under sub. (3) and from interest earned thereon. For claims subject to a periodic payment made under this paragraph, payments shall be made until the claim has been paid in full, except as provided in *s. 655.015.* Periodic payments made under this paragraph include direct or indirect payment or commitment of moneys to or on behalf of any person under a single claim by any funding mechanism. No interest may be paid by the fund on the unpaid portion of any claim filed under this paragraph, except as provided under *s. 807.01(4), 814.04(4)* or *815.05(8).*

(e) Claims filed against the fund shall be paid in the order received within 90 days after filing unless appealed by the fund. If the amounts in the fund are not sufficient to pay all of the claims, claims received after the funds are exhausted shall be immediately payable the following year in the order in which they were received.

(6) Purpose and integrity of fund. The fund is established to curb the rising costs of health care by financing part of the liability incurred by health care providers as a result of medical malpractice claims and to ensure that proper claims are satisfied. The fund, including any net worth of the fund, is held in irrevocable trust for the sole benefit of health care providers participating in the fund and proper claimants. Moneys in the fund may not be used for any other purpose of the state.

(7) Actions against insurers, self-insurers or providers. The board of governors may bring an action against an insurer, self-insurer or health care provider for failure to act in good faith or breach of fiduciary responsibility under sub. (5)(b) or (c). (Emphasis added)

Wise. Stat. § 895.04. Plaintiff in wrongful death action

(1) *An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.*

(2) If the deceased leaves surviving a spouse, and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse, and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50% of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse of the deceased; if no spouse survives, to the deceased's lineal

heirs as determined by *s. 852.01;* if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death. A surviving nonresident alien spouse and minor children shall be entitled to the benefits of this section. In cases subject to *s. 102.29* this subsection shall apply only to the surviving spouse's interest in the amount recovered. If the amount allocated to any child under this subsection is less than $10,000, *s. 807.10* may be applied. Every settlement in wrongful death cases in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

(3) If separate actions are brought for the same wrongful death, they shall be consolidated on motion of any party. Unless such consolidation is so effected that a single judgment may be entered protecting all defendants and so that satisfaction of such judgment shall extinguish all liability for the wrongful death, no action shall be permitted to proceed except that of the personal representative.

(4) *Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $500,000 per occurrence in the case of a deceased minor, or $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the spouse, children or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death.*

(5) *If the personal representative brings the action, the personal representative may also recover the reasonable cost of medical expenses, funeral expenses, including the reasonable cost of a cemetery lot, grave marker and care of the lot. If a relative brings the action, the relative may recover such medical expenses, funeral expenses, including the cost of a cemetery lot, grave marker and care of the lot, on behalf of himself or herself or of any person who has paid or assumed liability for such expenses.*

(6) Where the wrongful death of a person creates a cause of action in favor of the decedent's estate and also a cause of action in favor of a spouse or relatives as provided in this section, such spouse or relatives may waive and satisfy the estate's cause of action in connection with or as part of a settlement and discharge of the cause of action of the spouse or relatives.

(7) *Damages found by a jury in excess of the maximum amount specified in sub. (4) shall be reduced by the court to such maximum. The aggregate of the damages covered by subs. (4) and (5) shall be diminished under s. 895.045 if the deceased or person entitled to recover is found negligent.* (Emphasis added)

Minn. Stat. § 573.02. Action for death by wrongful act; survival of actions Subdivision 1. Death action. *When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission.* An action to recover damages for a death caused by the alleged professional negligence of a physician, surgeon, dentist, hospital or sanitarium, or an employee of a physician, surgeon, dentist, hospital or sanitarium shall be commenced within three years of the date of death, but in no event shall be commenced beyond the time set forth in *section 541.076.* An action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent. Any other action under this section may be commenced within three years after the date of death provided that the action must be commenced within six years after the act or omission. The recovery in the action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court then determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly. Funeral expenses and any demand for the support of the decedent allowed by the court having jurisdiction of the action, are first deducted and paid. Punitive damages may be awarded as provided in *section 549.20.*

If an action for the injury was commenced by the decedent and not finally determined while living, it may be continued by the trustee for recovery of damages for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court on motion shall make an order allowing the continuance and directing pleadings to be made and issues framed as in actions begun under this section.

Subd. 2. Injury action. *When injury is caused to a person by the wrongful act or omission of any person or corporation and the person thereafter dies from a cause unrelated to those injuries, the trustee appointed in subdivision 3 may maintain an action for special damages arising out of such injury if the decedent might have maintained an action therefor had the decedent lived.*

Subd. 3. Trustee for action. Upon written petition by the surviving spouse or one of the next of kin, the court having jurisdiction of an action falling within the provisions of subdivisions 1 or 2, shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages therein. The trustee, before commencing duties shall file a consent and oath. Before receiving any money, the trustee shall file a bond as security therefor in such form and with such sureties as the court may require.

Subd. 4. Applicability. This section shall not apply to any death or cause of action arising prior to its enactment, nor to any action or proceeding now pending in any court of the state of Minnesota, except, notwithstanding *section 645.21*, this section shall apply to any death or cause of action arising prior to its enactment which resulted from an intentional act constituting murder, and to any such action or proceeding now pending in any court of the state of Minnesota with respect to issues on which a final judgment has not been entered. (Emphasis added)

ANALYSIS WISCONSIN LAW APPLIES

In this case, you have a Wisconsin resident who had a gastral bypass done in a Wisconsin hospital by a physician (Matthew Clayton, M.D.) who is licensed to practice in Wisconsin. The physician is bound by the standards of care of Wisconsin and the limitations of Wisconsin law apply because he is a physician practicing within the state of Wisconsin. The Court plans to submit negligence and causation issues to the jury as it relates to the defendants Clayton and McGonigal. Following the jury's determination, the Court can apply the Wisconsin law to the Wisconsin defendants and the Minnesota law as to the Minnesota defendant. Any limitations set forth in the Statutes will be addressed by the Court after the jury verdict. For example, the pain and suffering between the time of the negligent act and the death may be awarded as against the Wisconsin defendant, but are not recoverable against the Minnesota defendant. See *Kohler v. Waukesha Mel. Company,* 208 N.W. 2d 901 (Wisconsin 1926) and *Hutchins v. St. Paul M & M Railroad Company,* 46 N.W. 2nd 79 (Minnesota 1890) and Minnesota Statutes 573.02, subdivision 1. Likewise, the limitations set forth in Wisconsin Statute 655.23 and 895.04. Also see *Stupak v. Hoffman-La Roche, Inc.*, 287 F.Supp.2d 968 (2003).

APPELLATE REVIEW

The request for appellate review is denied because this matter is scheduled for trial on July 24, 2006 and the Court has made a determination that Wisconsin law is going to apply, which is what the defendant has requested. The defendant's request for review of the appellate court of which law to apply and medical board questions are moot at this time. The plaintiff did not request a review by the appellate court and was agreeable to let the Court decide the issue at this time and wanted to proceed to trial as scheduled.

EXAMINING BOARD

The Wisconsin Medical Examining Board determines issues of competence, qualifications, ethics. The Board then makes a determination as to whether or not there should be a disciplinary proceeding. The administrative review board is a disciplinary proceeding that concludes whether to dismiss, public reprimand, suspend, or even revoke the license of a medical practitioner. This is a different issue than that which is tried as a negligence or malpractice case before this Court. The issue before the Court is whether or not the defendants are negligent because they failed to meet the standard of medical care in the community. If they have breached that standard of care, then the issue becomes whether or not their negligence is the direct cause of the injury, or

in this case, that the death of the plaintiff. It's a different issue, a different tribunal. Conclusions of the other tribunals are not relevant to the issues before this Court, even if the testimony is the same.

This Court is not reviewing the administrative process to determine whether or not administrative conclusions were arbitrary and capricious. This is a totally different at which the issues are different, even though the testimony that is received by an administrative tribunal and the Court may be duplicative. The Court is not bound by the administrative conclusion, nor by the testimony received. However, if there is conflicting testimony that had been given under oath at a tribunal, the contradictory testimony may be pointed out and used for impeachment the same as a deposition. The jury must determine the credibility and weight to be given to the testimony introduced at trial.

The Court pointed out dealing with the defendants' disciplinary proceeding that the issues are different and therefore conclusions and actions taken by the disciplinary board are irrelevant and immaterial as to the plaintiff and defendants in this case.

EXPERT WITNESSES

As to the expert witnesses, however, the jury evaluates the entire credibility of experts and considers the totality of their education, experience, background, as a part of their curriculum vitae. As a part of that education, experience, and background is whether or not they may have been involved in disciplinary proceedings or claims of malpractice themselves because that may go to the credibility of the opinions that they are going to render and therefore the Court will allow inquiry into whether or not the experts have been involved in proceedings.

INTERVENTION

In Wisconsin, the Patients and Families Fund provides coverage for all verdicts in excess of $1 million and the insurance companies is only liable to the plaintiffs up to $1 million for medical malpractice. The Fund, then, has an interest in making sure that the Fund does not have to pay, therefore, wants all verdicts under $1 million. The defendants have the same interest in keeping the verdict as low as possible and hopefully getting a defendants' verdict in its entirety. Mr. Rusboldt, attorney for the Wisconsin Patients and Families Fund, agrees that if the parties stipulate that the noneconomic loss is less than $1 million they would have no interest in remaining in the lawsuit.

DIRECT CAUSE

It is elementary in law that a person can be negligent but not be the direct cause of the injuries sustained by the plaintiff. Direct cause is a separate issue which must be proved by the plaintiff in their claim for wrongful death. Put another way, plaintiff has the obligation to prove by clear and convincing evidence that any negligence or malpractice by either of the defendants was the direct cause of the death of the defendant. Direct cause, of course, is the cause which substantially contributed to the death of the plaintiff. It does not have to be the sole cause.

STANDARD OF CARE

An expert's opinion must be placated upon the standard of care within the community. It is not relevant as to whether or not the expert would have done something differently under the same or similar circumstances, but whether or not the standard of care was breached by the actions of the defendant and as a result of that breach of the standard of care such negligence was the direct cause of the death of the plaintiff. It is of no significance or relevance that a qualified person would have done something different had they been in the same situation. The issue is whether or not a reasonable person of like qualifications under the same or similar circumstances could have done or not have done what the defendants did in this situation. It is the reasonable medical certainty that determines whether or not that standard has been reached or breached.

It is for these reasons that the Court has issued the Order regarding the motions in limine as set forth above.

ORDER

The above-entitled matter came on for hearing before the Honorable John T. Finley, on the 9th day of June, 2006 pursuant to the parties' Motions in Limine.

Michael A. Zimmer, Esq., appeared on behalf of the Plaintiff; John W. Markson, Esq., John W. Degnan, Esq. and Scott G. Knudson, Esq., appeared on behalf of Defendant Matthew Clayton, M.D. and River Falls Medical Clinic; Richard J. Thomas, Esq., appeared on behalf of Defendant Michael D. McGonigal, M.D.; Joel A. Aberg, Esq. and Thomas B. Rusboldt, Esq., appeared on behalf of Wisconsin Injured Patients and Families Compensation Fund as Interveners.

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED:
1. That the motion of defendants Matthew Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic requesting that Wisconsin law applies to the claim against him and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic, is hereby GRANTED.

The application of Wisconsin law includes the limitations set forth in Wisc. Stat. § 655.23 of $1,000,000 per occurrence and Wisc. Stat. § 895.04(4) of $350,000 for noneconomic damages. These limitations apply only to the Wisconsin defendants and not to defendant Michael D. McGonigal, M.D. This issue is governed by *Stupak v. Hoffman-La Roche, Inc.*, 267 Fed. Supp. 2d 968 (2003).

2. That the motion of defendants Matthew Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic requesting the Court to certify to the appellate court the issues *of forum non conveniens,* comity, choice of law, and medical board questions for immediate appellate review is hereby DENIED.

The plaintiff opposed the motion, because it would only delay the trial and would most likely not be reviewed, based on the past practice of the appellate court. This Court has now ruled in favor of defendants on the issue of choice of law and medical board questions, making the most important issues moot at this time.

3. That the motion of defendants Matthew Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic requesting exclusion of any reference at trial to any part of the administrative proceedings before the Wisconsin Medical Examining Board relating to Dr. Clayton is hereby GRANTED.

Live testimony which may be duplicative of testimony provided at an administrative hearing may be allowed if relevant. However, the conclusions or actions taken by the administrative tribunal are prohibited from being referred to at trial.

4. The Wisconsin Injured Patients and Families' motion to intervene for the purposes of being liable for amounts in excess of $1 million is hereby GRANTED.

The Fund and defendant Matthew Clayton, M.D., Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic, shall be considered the same as far as the issues in this case. The issues are negligence, direct cause, and damages. Therefore, the Fund and Dr. Clayton and his clinic shall be entitled to two preemptory challenges during jury selection, the same as plaintiff. Each defendant shall not have separate preemptory challenges.

5. That the motion in limine of defendants Matthew Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic, requesting that there be no testimony, argument, or comment regarding other cases of alleged medical negligence or disciplinary proceeding against any defendant healthcare provider is hereby GRANTED.

Negligence is a primary issue in the case. Experts must testify as to the standard of care and each expert's background is very relevant. Therefore, an expert's credibility may be challenged if any malpractice or disciplinary proceeding may have been brought against them.

6. That the motion in limine of defendants Matthew Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic, requesting that there be no testimony, argument, or comment regarding alleged acts or omissions on the part of any of the defendants, unless there is expert testimony that such alleged negligence *caused* the death of Michelle Tschida, is hereby GRANTED.

Negligence and cause are separate issues. The negligence of the defendant must be the cause of the death and be proven by Plaintiff through expert testimony.

7. That the motion in limine of defendants Matthew Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic, requesting that there be no testimony, argument, or comment regarding the effect of a jury verdict in favor of the plaintiff would improve the quality of medical care in the community is hereby GRANTED.

Such testimony or argument is irrelevant and prejudicial.

8. That the motion in limine of defendants Matthew Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic, requesting that the plaintiff be precluded from asking his expert witnesses, and the witnesses be precluded from commenting about, what the witness presumably would have done in a particular situation is hereby GRANTED.

The issue is the standard of care and not what the witness would do in a particular situation. The issue is whether a reasonable physician of like specialty would do or not do that which was done under the same or similar circumstances knowing all the facts known to the defendants at the time.

9. That the motion in limine of defendants Matthew Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic, requesting that plaintiff's counsel be precluded from inquiring of the expert witness regarding possibilities and that direct examination and testimony elicited be limited to the legal standard of reasonable medical probability is hereby GRANTED.

The plaintiff must prove the standard and that defendants did not meet the standard of care.

10. That the motion in limine of defendants Matthew Clayton, M.D., and Western Wisconsin Medical Associates, S.C., d/b/a River Falls Medical Clinic, requesting that the death certificate of Michelle Tschida be excluded from evidence is GRANTED.

There can be no reference made to any conclusions set forth in the death certificate as to Ms. Tschida's cause of death because such conclusions are hearsay.

The cause of death requires expert testimony, not just the death certificate because it is hearsay and not subject to cross-examination.

11. The attached Memorandum is made a part of this Order pursuant Minnesota Rules of Civil Procedure 52.01.

Dated: June 15, 2006.

BY THE COURT:

John T. Finley

Judge of District Court

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2010 WL 8399800 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota.
Clay County

CITY OF MOORHEAD, Plaintiff,

v.

RED RIVER VALLEY COOPERATIVE POWER ASSOCIATION, et al., Defendant.

No. 14-CX-06-2515.
March 30, 2010.

Order and Memorandum

Michael L. Kirk, Judge of District Court.

The above-entitled matter came on for hearing before the Court, on March 15, 2010, at the Clay County Courthouse, Moorhead, Minnesota, on the parties' cross Motions for (Partial) Summary Judgment and Motions in Limine.

Kathleen Brennan, *Esq.*, telephonically, and Benjamin Thomas, *Esq.*, in person, appeared on behalf of Plaintiff and Interested Observer City of Moorhead. Bill Schwandt, City of Moorhead Public Service General Manager, was also physically present. Harold LeVander, Jr., *Esq.*, appeared telephonically on behalf of Defendant Red River Valley Cooperative Power Association.

Having considered the arguments of counsel and the entire file herein, the Court now makes the following:

ORDER

1. That Plaintiff City of Moorhead's Motion for Summary Judgment is DENIED.
2. That Plaintiff City of Moorhead's Motion in Limine is DENIED.

3. That Defendant Red River Valley Cooperative Power Association's Motion for Partial Summary Judgment is GRANTED.

4. That Defendant Red River Valley Cooperative Power Association's Motion in Limine is GRANTED.

5. That the Date of Taking in this case is hereby determined to be February 19, 2009. City of Moorhead v. RRVCPA, 14-CX-06-2515

6. That the appropriate legal damages standard in this eminent domain proceeding is that of Minnesota Statutes § 216B.47, and the jury will be instructed that the damages awarded should cumulatively include: (1) the original cost of the property less depreciation, (2) loss of revenue to the utility, (3) expenses resulting from integration of facilities, and (4) other appropriate factors.

7. That Dennis R. Eicher's expert testimony based on his Report is admissible.

8. That testimony by Robert Strachota, and portions of his Report, regarding Fair Market Value shall be excluded. Mr. Strachota may testify as to his opinion of damages based on the four statutory factors listed above (such as net revenues), consistent with the Date of Taking, February 19, 2009.

9. That all evidence as to "fair market value" is hereby excluded.

10. That the attached Memorandum is incorporated herein by reference.

Dated this 30th day of March, 2010.

BY THE COURT:

<<signature>>

Michael L. Kirk

Judge of District Court

MEMORANDUM

City of Moorhead ("the City") and Red River Valley Cooperative Power Association ("the Cooperative") have filed cross motions for summary judgment, and motions in limine in the alternative, regarding the correct legal standard for damages, the admissibility of their opponent's expert witness and expert witness reports, and the date of taking in this matter. The City argues that fair market value is the only legal standard that can be applied in an eminent domain proceeding, alth ough fair market value may take into account the factors listed in Minnesota Statutes § 216B.47. The City claims that because its expert is the only expert addressing fair market value, the Cooperative has failed to put forth any evidence to challenge the City's computation of damages and the City should be awarded summary judgment as to the amount of damages. As an alternative to summary judgment as to the amount of damage, the City requests that the Cooperative's expert witness be excluded from trial for not addressing fair market value. The City also argues for an early date of taking, in March of 2006, when the Cooperative should have been on notice that annexation was likely to occur.

The Cooperative, however, argues that section 216B.47 creates an additional remedy above and beyond the constitutional, statutory, and otherwise recoverable minimum damages that would be calculated by fair market value in other eminent domain proceedings. The Cooperative argues that fair market value analysis has no part in this proceeding and that the City should be allowed to present no evidence as to fair market value. The Cooperative describes the City's argument as one where the four statutory factors somehow all merge into fair market value in "an effort to convert the constitutional minimum payment of just compensation into a statutory maximum amount that the City is obligated to pay in this case." In addition, the Cooperative argues for a date of taking when it began to experience an actual loss of revenue, in the summer of 2009.

When a taking of private property by [a public entity] occurs, both the state and the federal constitutions require that just compensation be paid. Minn. Cons. art. 1, § 13 provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." This language is broader than the language of the federal constitution: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. In addition, Minn.Stat. § 117.025, subd. 1 (1986) defines "taking and all words and phrases of like import" to include "every interference, under the right of eminent domain, with the possession, enjoyment, or value of private property." Thus, the clear intent of Minnesota law is to fully compensate its citizens for losses related to property rights incurred because of state actions.

[1] *State by Humphrey v. Strom*, 493 N.W.2d 554, 558 (Minn. 1992) (footnotes omitted).

I. The Appropriate Legal Damages Standard

[A]ll condemning authorities, including home rule charter cities and all other political subdivisions of the state, must exercise the power of eminent domain in accordance with the provisions of [chapter 117], including all procedures, definitions, remedies, and limitations. *Additional procedures, remedies, or limitations that do not deny or* diminish the substantive and procedural rights and protections of owners under this chapter may be provided by other law, ordinance, or charter.

Minn. Stat. § 117.012, subd. 1 (emphasis added).

There are "two alternative statutory procedures by which an expanding municipality which owns and operates a utility may similarly expand or extend its provision of utility services to annexed territory." *City of Rochester v. People's Co-op. Power Ass'n, Inc.*, 483 N.W.2d 477, 479 (Minn. 1992) (citing Minn. Stat. §§ 216B.41, 216B.47). "First, the legislature has authorized the purchase by the expanding municipality of the facilities of the assigned service utility by the payment of the appropriate value, a value to be among the terms of the sale or exchange to be determined by the [Minnesota Public Utilities Commission ('MPUC')] in the event of a dispute." *Id.* (citing Minn. Stat. § 216B.44). Under the section 216B.44 acquisition process, "the existing assigned service utility is authorized to continue providing service to the area until the value is determined," retaining "the interim authority to design and construct facilities, unless, after notice and hearing, the MPUC determines that an interim extension of services 'is not in the public interest.' " *Id.*

Under the parallel, statutory procedure in section 216B.47, a municipality may acquire the property of a public utility by eminent domain proceedings, under the jurisdiction of the courts. *City of Rochester*, 483 N.W.2d at 479. Instead of the MPUC, court-appointed commissioners (alternately a jury) determine the damages to be paid the public utility, based on *"the same factors which the MPUC would have considered had the acquisition occurred by operation of sections 216B.41 and 216B.44."* *Id.*2027077868;0021;1992080267;RT;;; (emphasis added). "However, the distinction in the invocation of 'quick take' eminent domain procedures is that the municipality thereby acquires the immediate right to service the newly annexed areas before the final compensation is determined or awarded." *Id.*2027077868;0022;1992080267;RT;;; An expanding municipality has the right of election of either procedure rather than the other. *Id.* at 481.2027077868;0023;1992080267;RT;;; In either forum, the issue of "just compensation" is guided "by identical considerations." *Id.*2027077868;0024;1992080267;RT;;;

A municipality is not precluded from acquiring the property of a public utility by eminent domain proceedings; however, *the damages to be paid* in such an eminent domain proceeding *"must include* the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities, and other appropriate factors." Minn. Stat. § 216B.47 (emphasis added). However, the City of Moorhead ("the City") argues that "just compensation" under Section 216B.47, while including the four factors in its analysis, can only mean "fair market value", while the identical language in Section 216B.44 has been interpreted to create a remedy which is the sum of the listed, cumulative factors.

" 'The great fundamental rule in construing statutes is to ascertain the intent of the legislature, and to attain this object every part of a statute must considered in connection with the whole, so as, if possible, to give effect to every part.' " *Iowa Elec. Light & Power Co. v. City of Fairmont*, 67 N.W.2d 41, 45 (Minn. 1954) (quoting *Stevens v. City of Minneapolis*, 12 N.W. 533, 533 (Minn. 1882)). While, this Court is not bound by the MPUC's interpretation of the factors, as the MPUC has no primary jurisdiction, *see City of Rochester, supra,* it finds the MPUC's interpretation very persuasive regarding the identical factors to be considered in both venues. This is especially true given the Minnesota Supreme Court's acknowledgement of the identical statutory damages factors in *City of Rochester*, 483 N.W.2d at 479, and given a general aversion to the idea that an annexing city could force a utility to accept a disparate damages award merely by choosing an alternative procedure.

In a regular eminent domain case lost revenues and expenses and the other factors mandated by section 216B.47 would specifically be excluded from any calculation of damages because they have no place in a fair market analysis, as was addressed by the Minnesota Supreme Court in *State by Humphrey* and as the City's expert apparently agrees. 493 N.W.2d at 558-60

(discussing measure of just compensation for a partial taking of land by the State for a highway). However, the Legislature specifically included the four factors in section 216B.47 with no reference to fair market value analysis; instead that section specifically says that *the damages must* include the factors, not that an analysis of fair market value damages should take the factors into consideration. Although the federal and state constitutions create a minimum level of compensation, there is nothing which would prevent the Legislature from authorizing an enhanced measure of damages, especially in the case of the annexation of a service area by a neighboring city where the neighboring city could and likely would be the only willing buyer in nearly all circumstances.

In addition to the minimally required substantive and procedural rights and protections of *owners* provided under chapter 117, the Legislature has provided for enhanced damages by statute in other eminent domain proceedings. *See* Minn. Stat. § 117.031 (costs & attorney's fees), 117.186 (on-going concern value, revenues), 117.187 (sets minimum award at cost of relocation). It would be incongruent with the obvious intent of the plain language of section 216B.47 to use the "other appropriate factors" section to include fair market value in order to put a limitation on the first three factors which are worded to address damages from the point of view of what the Cooperative is losing, not what the City is gaining or to what two willing negotiating parties would agree. The Legislature through sections 216B.41 and 216B.47 has evidenced its clear intent to fully compensate the Cooperative for its losses related to the City's annexation of a portion of its service area.

Therefore, any evidence related to fair market value should be excluded and only evidence specifically addressing the factors in section 216B.47 should be permitted. Evidence of "other appropriate factors" should be limited to unusual expenses or losses to the Cooperative (such as improvements made during the course of the condemnation proceedings--which is not an issue in this case), in addition to the first three factors, but does not include any alternative analysis of damages such as fair market value.

I. Date of Taking

Ordinarily damages in eminent domain proceedings are determined as of the date of the taking rather than as of the date of the institution of the condemnation proceedings, "and the former is generally held to be that upon which the commissioners appointed by the court file their award of damages in the proceedings." *State by Lord v. Pahl*, 100 N.W.2d 724, 728 (Minn. 1960) (citing *Hous. & Redev. Auth. of City of St. Paul v. Greenman*, 96 N.W.2d 673 (Minn. 1959); *State by Peterson v. Bentley*, 45 N.W.2d 185 (Minn. 1950); *Ford Motor Co. v. City of Minneapolis*, 173 N.W. 713 (Minn. 1919)); *Iowa Elec. Light & Power Co.*, 67 N.W.2d at 46-47; *State by Spannaus v. Northwest Airlines, Inc.*, *413* N.W.2d 514, 523 (Minn. App. 1987) ("Underlying the rule of certainty is the proposition, recognized in Minnesota for over 100 years, that damages in eminent domain proceedings are assessed as of the date of taking, this being the date of the court commissioners' original award.") (citing *City of St. Louis Park v. Almor Co.*, 313 N.W.2d 606, 609-10 (Minn. 1981). However, if a physical taking, or transfer of service, occurs sooner than the date of the commissioners' award, than the date of taking may be set earlier. *See In re Application by City of Rochester for Adjustment of its Serv. Area Boundaries with People's Co-op. Power Ass'n, Inc.*, 556 N.W.2d 611, 615 (Minn. App. 1996) (finding MPUC determination under section 216B.44 that date of interim service transfer, prior to final approval of agreement between city and utility approved, not arbitrary or capricious date selection for commencing 10-year loss of revenue calculations); as characterized by *In re City of Buffalo*, 2008 WL 2020491, 3 (Minn. App. 2008); Minn. Stat. § 117.195, subd. 1 (damages "shall bear interest from the time of the filing of the commissioner's report or from the date of the petitioner's possession whichever occurs first."); David Schultz, *The Price is Right! Property Valuation for Temporary Takings*, 22 Hamline L. Rev. 281, 294-95 (1998).

Here, there was no transfer of service or other infringement upon the Cooperative's property rights prior to the commissioners' award. The idea that the date of taking could be an early date when a utility may, or should, have known that its area might be annexed, even prior to the filing of a petition to take its service area by eminent domain and long before the commissioners' award, during which time the annexing city could still abandon the project, is not supported by Minnesota law absent a physical taking. Additionally, as the right to damages accrues as of the date of the commissioners' report-and there is therefore a change in the legal right to the property, setting the date after the commissioners' award because the City did not take over actual service

until a later date would not be warranted. *See* Minn. Stat. § 117.195, subd. 1. *But see In re City of Buffalo,* 2008 WL 2020491 (unreported) (reasonable for MPUC to determine ten-year period for loss-of-revenue compensation should not commence until the cooperative's service rights to the annexed areas are transferred to city) (no discussion of date when transfer would occur in relation to commissioners' award or approval of agreement between city and utility) (citing *In re Application by City of Rochester for Adjustment of its Serv. Area Boundaries with People's Co-op. Power Ass'n, Inc.*, 556 N.W.2d at 615-16) (Utility did not provide clear and convincing evidence that that MPUC's decision that ten-year period for areas not covered by interim service order should begin when service rights were transferred was unjust or unreasonable) (no discussion of date transfer would occur in relation to date of MPUC's award/approval). Therefore, the Date of Taking in this matter should be set as the date of the commissioners' award: February 19, 2009.

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2018 WL 817286
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

Antonio Xavier DANIELS, petitioner, Appellant,

v.

STATE of Minnesota, Respondent.

A17–0623

Filed February 12, 2018

Review Denied April 25, 2018

Hennepin County District Court File No. 27–CR–13–27736

Attorneys and Law Firms

Melvin R. Welch, Welch Law Firm, LLC, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

***1** Following a jury trial, appellant Antonio Xavier Daniels was found guilty of second-degree unintentional felony murder and second-degree manslaughter. Because we conclude that the postconviction court did not err or otherwise abuse its discretion in denying appellant's petition for postconviction relief, we affirm.

FACTS

At around 3:30 a.m. on August 22, 2013, appellant and three acquaintances, D.T., Q.S., and S.J., got in a fight with a group of four people in a Days Inn parking lot in Brooklyn Center. Minutes earlier, security cameras at a nearby Denny's restaurant captured appellant and his acquaintances exiting the restaurant and approaching a silver sedan and an SUV that had parked in the restaurant parking lot. R.E., the driver of the sedan, testified that one person from appellant's group approached his vehicle, and the others approached the SUV. R.E. described their behavior as loud, drunk, and hostile. R.E. backed his car out of its parking spot because he was concerned about a confrontation and did not want to get blocked in.

Appellant and his group left Denny's and walked a short distance to the Days Inn, where S.J. had rented a room. R.E. testified that he saw someone in the group make gunshot-like gestures and noises as he walked away. In his testimony, Q.S. denied this, but the surveillance video captured appellant making a gesture in the direction of the vehicles. A power outage at the restaurant occurred after the gesture and the security cameras turned off.

R.E. testified that he next called two acquaintances, R.G. and the decedent, M.M., and told them that he "had a few words with some guys." R.G., M.M., and a third acquaintance, J.B., drove to Denny's in a gold minivan to meet R.E. At that time, appellant and his group were standing outside the Days Inn smoking cigarettes. In quick succession, the sedan and minivan sped toward the Days Inn and abruptly stopped in front of appellant and his group. R.E. and his three acquaintances exited their vehicles and approached appellant and his group.

The witness accounts vary as to what happened next. S.J. testified that he saw appellant holding the handle of a firearm in appellant's pocket, and that he heard appellant say something to the effect of either "[t]hese fools don't know who they are messing with" or "I got this," "[h]ang back," and not to worry. Appellant denied that he made such a statement, but admitted that he was carrying a .22–caliber revolver in his pocket. S.J. did not see anyone else with a firearm.

Appellant testified that R.E. exited the sedan, held his waistline as if he had a firearm, and said something like "[y]ou better be holding." Q.S. testified that R.E. acted like he had

a firearm by placing his hand in his back pocket, but that he did not see a firearm and did not hear anyone say that they had a firearm. The state's witnesses testified that no one other than appellant had a firearm. R.E. denied acting like he had a firearm. R.E. testified that he approached appellant's group and asked them what their problem was, to which someone replied, "[A]in't no problem, n----r. I just asked you for a light." The witnesses all testified that the two groups "squared up" to fight each other.

***2** S.J. testified that the groups began fighting within five seconds of the three individuals exiting the minivan. R.E. admitted that the fighting started when someone called him a name, and he swung and struck the person in front of him, knocking him down. The witnesses testified that "everybody started swinging," and that members of appellant's group were struck and fell, and that D.T. was knocked unconscious.

Appellant testified that R.E. drew his attention, and then someone attacked him from his blind side in what he described as an ambush. Appellant testified that when he was struck, he fell down and was knocked back toward a tree next to the door of the Days Inn. When appellant got to his feet, his eye was throbbing, he saw white, and his vision was impaired. Q.S. observed appellant bleeding from his eye. A police detective confirmed that a photo of appellant taken after his arrest showed a red mark in one of his eyes.

Appellant testified that after he got to his feet he saw "some guys rushing me.... Then I fired a shot." Appellant admitted that he "pointed [the revolver] at the group of people that was rushing me" but maintained that he did not intend to kill anyone. Appellant testified that he fired "because they [were] coming right here real quick and ... my eye was impaired," and that "I had to stop the attack. I had to stop these guys from ... stomping us to death." Appellant further testified that he fired the revolver because he knew he could not beat all of the attackers by himself, that his friends were already down, that the attackers were overpowering and too aggressive. He also testified that he was scared for his well-being, that R.E. had acted like he had a firearm, and that he had no other option and no safe escape route. Appellant testified that he did not give a warning prior to firing because there was no time to communicate, that he did not think before firing, and that "[i]t was more of a sudden thing to do just to stop them in their tracks."

R.E., R.G., and J.B. testified that they saw a person, later identified as appellant, fire a handgun from behind a tree or shrubbery before they ran for cover. J.B. testified that he saw appellant point a handgun at M.M. R.E. heard one gunshot and saw M.M. react like he had been hit, and then saw M.M. run toward the Super 8 hotel. Other witnesses testified to hearing multiple gunshots.

Appellant admitted to firing three shots but said that he did not see anyone get hit. Appellant testified that he fired his second shot into the air as a "scare tactic," and that when he reached D.T., who was on the ground, he saw the sedan circling back, so "I fired another warning shot."

A guest at a Super 8 hotel, who was not involved in the altercation, testified that at around 3:30 in the morning he heard the sounds of fighting and profanity. From his room window, the guest saw a flash and heard a gunshot from the area of the nearby Days Inn, then saw people scatter and run. The guest saw two people running toward the Super 8, one of them bleeding. He estimated that the second gunshot followed the first by five to six seconds, and that he heard at least four gunshots that sounded like they came from the same small-caliber pistol.

Following the shooting, appellant discarded his firearm behind a garbage can at the Days Inn. He and his group briefly entered the hotel, before fleeing the scene on foot. R.E., R.G., and J.B. remained at the scene with M.M., who was unconscious and lying in the vestibule of the Super 8 hotel covered in blood. Police arrived and M.M. was pronounced dead. R.E., R.G., and J.B. were detained and later interviewed. The Hennepin County Medical Examiner's Office determined that M.M.'s death was caused by gunshot wound. The examining physician could not determine the distance from which M.M. was shot.

***3** The responding officers discovered the .22–caliber revolver behind the garbage can outside of the Days Inn. The revolver contained three live rounds and three rounds that had been fired. The officers swabbed the revolver for DNA. Forensic testing revealed that the predominate DNA profile taken from the revolver matched appellant's DNA. A forensic scientist also determined that bullet fragments found in M.M.'s body were consistent with a .22–caliber bullet. The officers did not find any weapons on M.M., R.E., R.G., or J.B.

Appellant was charged with second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2012). Following a jury trial on the charges, the district court granted appellant's request to provide a jury instruction

on second-degree manslaughter, Minn. Stat. § 609.205(1) (2012), and the state's request for an instruction on second-degree felony murder, Minn. Stat. § 609.19, subd. 2(1) (2012). The district court also granted appellant's requested instruction on self-defense. The jury acquitted appellant of second-degree intentional murder, but found that he was guilty of second-degree felony murder and second-degree manslaughter. Appellant filed a petition for postconviction relief, which the postconviction court denied. This appeal follows.

DECISION

Appellant challenges the denial of his petition for postconviction relief, arguing that his conviction should be reversed, or in the alternative, that he receive a new trial because (1) his right to a speedy trial was violated, (2) he received ineffective assistance of counsel, (3) the prosecutor committed misconduct, (4) the jury verdict is legally inconsistent, and (5) the evidence is insufficient to support his conviction for second-degree felony murder.

"We review the denial of a petition for postconviction relief for an abuse of discretion." *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). "We will not reverse the denial of postconviction relief unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Reed v. State*, 793 N.W.2d 725, 730 (Minn. 2010). "We review legal issues de novo, but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Matakis*, 862 N.W.2d at 36 (quotation omitted).

I. The postconviction court did not abuse its discretion in holding that appellant's right to a speedy trial was not violated.

Appellant argues that because he initially demanded a speedy trial on September 26, 2013, but his trial did not begin until February 23, 2015, nearly 17 months later, his right to a speedy trial was denied, and his conviction must be reversed.

A criminal defendant is entitled to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. In Minnesota, the trial must begin within 60 days of a defendant's trial demand unless the district court finds good cause for the delay. Minn. R. Crim. P. 11.09(b); *State v. DeRosier*, 695 N.W.2d 97, 108–09 (Minn. 2005).

To determine whether a delay violated a defendant's right to a speedy trial, courts consider: "(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the delay prejudiced the defendant." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017) (quotation omitted). The four *Barker* factors are interrelated and must be considered together, along with any other relevant circumstances. *Id.* at 628.

a. *Length of the delay*

***4** In Minnesota, under the first factor, a delay of more than 60 days from the date the defendant demanded a speedy trial raises a presumption that a violation has occurred and triggers review of the remaining factors. *State v. Windish*, 590 N.W.2d 311, 315–16 (Minn. 1999). Here, appellant initially demanded a speedy trial on September 26, 2013, then waived his demand at the same hearing and agreed to a January 13, 2014 trial date. After a number of delays, appellant's trial began on February 23, 2015. This represents a 17–month delay and triggers our review of the remaining factors.

b. *Reasons for delay*

Under the second factor, "the key question is whether the government or the criminal defendant is more to blame for the delay." *Osorio*, 891 N.W.2d at 628 (quotation omitted). Different reasons are weighted differently: a deliberate delay by the government is weighted heavily against it, while a neutral reason, such as negligence, is weighted less heavily against it. *Id.* If the overall reason for the delay "is the result of the defendant's actions ... there is no speedy trial violation." *Id.* at 628–29 (quotation omitted).

Here, a number of delays contributed to the overall delay. At the September 26, 2013 hearing, the defense and the state noted outstanding discovery issues, and appellant made a speedy trial demand. The district court then conferred with appellant to determine whether he wished to assert his right to a speedy trial with the understanding that the court may find good cause to delay the trial due to the outstanding evidentiary issues, or whether he wished to waive his speedy demand and reserve a January 2014 trial date. Appellant elected to waive his demand and agreed to the January trial date, which was outside of the speedy trial timeframe. This delay was not the fault of either party, but weighs slightly against the

state because "the ultimate responsibility for such [neutral] circumstances must rest with the government rather than with the defendant." *Id.* at 628.

On January 13, 2014, rather than beginning appellant's trial, the district court heard argument on a discovery motion appellant filed in December 2013. Appellant's counsel also indicated that he planned to file additional motions, and appellant confirmed that he had requested a continuance for that reason. The parties scheduled a January 24, 2014 hearing on appellant's new motions. At the January 24 hearing, appellant confirmed that he planned to file additional motions. The district court scheduled another motion hearing for February 24, 2014. These delays are attributable to appellant.

The next hearing occurred on March 4, 2014. The state and appellant's counsel agreed to continue the trial date from April 21 to September 29, 2014, because the state needed to replace one of its trial attorneys and September 29 was the first date when all of the attorneys were available. Appellant voiced his displeasure with the delay, and stated that he had been ready to ask for a firm trial date, but that he respected the reason the state's attorney was unavailable. Appellant agreed to the September 29 trial date and did not reassert his speedy trial demand. Because this six-month delay is not attributable to appellant, and because the delay was due to the unintentional unavailability of a state's attorney, this delay weighs slightly against the state.

On September 29, the district court began appellant's trial. However, appellant requested a continuance, which the district court denied. On October 1, the state learned that three of its key witnesses were indicted on unrelated federal narcotics charges. The state and appellant's counsel mutually requested a continuance to seek discovery of the federal evidence related to the witnesses. However, appellant withdrew his continuance request and indicated that he was ready for trial. After speaking with his attorney and the district court, appellant again changed his mind and indicated that he was in favor of a continuance. The district court granted the continuance and scheduled a new trial date for February 23, 2015. This delay weighs against neither the state nor appellant because it was caused by a joint request for a continuance.

***5** Appellant's trial began on February 23, 2015. In sum, two of these pretrial delays weigh slightly against the state, two weigh against appellant, and the final delay weighs against neither the state nor appellant. Because both parties equally contributed to the 17–month delay, we conclude that this factor does not weigh against either party.

c. *Assertion of right to speedy trial*

Under the third factor, "[a] defendant's assertion of the right to a speedy trial need not be formal or technical, and it is determined by the circumstances." *State v. Hahn*, 799 N.W.2d 25, 32 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). "[The reviewing] court must assess 'the frequency and intensity of a defendant's assertion of a speedy trial demand —including the import of defense decisions to seek delays.' " *Id.* (quoting *Windish*, 590 N.W.2d at 318).

Here, appellant did assert his right to a speedy trial on September 26, 2013, before waiving it and agreeing to the January 13, 2014 trial date. At subsequent hearings, appellant ultimately agreed to each continuance. Furthermore, appellant never reasserted a speedy trial demand. We conclude that there is sufficient evidence in the record to support the postconviction court's conclusion that appellant did not reassert his right to a speedy trial after waiving his initial demand on September 26, 2013.

d. *Prejudice*

For the final factor, we look to three indicators of prejudice: (1) oppressive pretrial incarceration; (2) anxiety and concern suffered by the accused while awaiting trial; and most importantly, (3) impairment of the defense. *Windish*, 590 N.W.2d at 318. A defendant need not "affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant's case." *Id.*

Here, appellant was incarcerated for the duration of the 17–month delay, during which he voiced his anxiety over the length of his incarceration and maintained his innocence. However, the record is devoid of any evidence that appellant's defense was impaired. The record also shows that appellant contributed to the length of the trial delay. We conclude that there is sufficient evidence in the record to support the postconviction court's conclusion that appellant did not suffer prejudice as a result of the delay.

In light of all of the *Barker* factors, we conclude that the record supports the postconviction court's conclusion that the state did not violate appellant's right to a speedy trial.

II. The postconviction court did not err in denying appellant's petition based on his ineffective-assistance-of-counsel claim.

"We review the denial of postconviction relief based on a claim of ineffective assistance of counsel de novo because such a claim involves a mixed question of law and fact." *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2070 (1984)). To prevail on a claim of ineffective assistance of counsel, an appellant "must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064). "[A]n attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). "Under the prejudice prong ..., a defendant must show by a preponderance of the evidence that his counsel's error, whether or not professionally unreasonable, so prejudiced the defendant at trial that a different outcome would have resulted but for the error." *Id.* Both prongs need not be analyzed if one is determinative. *Id.*

a. *Motion for acquittal*

***6** Appellant first argues that his attorney should have moved to dismiss the charges or requested a *Florence* hearing when, on the first day of trial, the state "announced new evidence" showing that appellant acted in self-defense and that the state's witnesses were the first aggressors. Here, as the state correctly points out, the trial transcript shows that the state did not announce new evidence; rather, it made a plea offer to appellant. Statements made in connection with a plea offer are not admissible evidence. *State v. Robledo-Kinney*, 615 N.W.2d 25, 30 (Minn. 2000) (citing Minn. R. Evid. 410; Minn. R. Crim. P. 15.06). The state referenced appellant's self-defense claim and other evidence that potentially showed that appellant was not the first aggressor with the caveat that it "would not concede this at trial, [but was] conceding it for the sake of this plea." Appellant received the state's plea offer, consulted his counsel, and rejected it, stating, "My decision is I want to go to trial." We conclude that appellant has not demonstrated that his counsel's response to the state's plea offer fell below an objective standard of reasonableness. Under the first *Strickland* prong, this argument fails.

b. *Decision to not call D.T. to testify at trial*

Appellant next argues that his counsel should have subpoenaed D.T. to testify at trial because he was present throughout the altercation and could have provided exculpatory evidence. Here, the record does not reveal the reason that appellant's counsel did not call D.T. to testify at trial. The record does reveal that D.T. was willing to testify and would have testified that: (1) R.E. grabbed his waist while approaching appellant and his group and shouted, "I've got mine on me!"; (2) that D.T. saw something shiny beneath R.E.'s hand, which he believed to be a chrome pistol; (3) that D.T. was scared for his life; and (4) that D.T. was struck in the head and lost consciousness. D.T.'s anticipated testimony may have bolstered appellant's self-defense claim, specifically, as to whether R.E.'s words or actions would have reasonably led appellant to believe that R.E. threatened the use of a firearm, and whether appellant acted reasonably in the defense of others. In addition, D.T.'s anticipated testimony is not entirely cumulative with that of other trial witnesses.

Trial counsel receive a strong presumption of competency when acting at trial and wide latitude to determine the best strategy. *Doppler*, 590 N.W.2d at 633. Strategic decisions on what evidence to present and which witnesses to call lie within the proper discretion of trial counsel and are not reviewed for competency. *Id.* Generally, appellate courts do not second-guess a trial decision to not call prospective witnesses. *See State v. Nicks*, 831 N.W.2d 493, 506 (2013).

In light of the relevant information to which D.T. could have testified, we are troubled that the record contains no explanation of appellant's counsel's decision not to call him as a trial witness. However, the decision to call or not to call a witness lies well within the strategic discretion of trial counsel and we do not second-guess the competency of such decisions. We conclude that appellant has not demonstrated that his counsel's decision not to call D.T. as a witness fell below an objective standard of reasonableness. Because the first *Strickland* prong is dispositive, this argument fails.

c. *Admission of evidence of prior criminal conduct by the state's witnesses*

Appellant claims that his attorney failed to use evidence of a criminal conspiracy between the state's witnesses to impeach their credibility.

Here, in December 2014, the federal government provided evidence related to federal charges against three of the state's witnesses to the parties. Appellant alleges that R.E. and R.G. were part of a criminal enterprise, but he does not identify any specific evidence in the appellate record with which the state's witnesses should have been impeached. Moreover, appellant's attorney impeached R.E. and R.G., and two other state witnesses who were present at the altercation, J.B. and S.J., with evidence of their prior inconsistent statements to law enforcement. The district court also granted appellant's attorney's motion to impeach both R.G. and S.J. with other evidence of prior felony convictions. Because appellant did not identify specific evidence in the appellate record to demonstrate how the impeachment of witnesses who had already been impeached at trial could have reasonably led to a different outcome at trial, appellant has not met his burden to demonstrate prejudice. Because the second *Strickland* prong is dispositive, this argument fails.

d. *Late discovery*

*7 Appellant contends that his trial attorney failed to challenge late discovery disclosures by the state. Specifically, appellant alleges that the state failed to provide timely discovery of R.E. and R.G.'s involvement in a criminal conspiracy. However, the record shows that the state did not learn of the federal indictments against R.E. and R.G. until October 1, 2014. After learning of the indictments, the state immediately sought to obtain relevant evidence from the federal government and to provide it to appellant. Appellant has not demonstrated that his counsel's performance was deficient in this instance. On the basis of the first *Strickland* prong, this argument fails.

III. The postconviction court did not err or otherwise abuse its discretion in denying appellant's petition based on his prosecutorial-misconduct claim.

Appellant argues that the prosecutor committed misconduct by (1) withholding discovery and (2) injecting improper emotion into the closing argument.

We will reverse a conviction due to prosecutorial misconduct "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). When prosecutorial misconduct is alleged, our "standard of review depends on whether the defendant objected at trial." *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). We review objected-to prosecutorial misconduct using a two-tiered harmless error test, in which we analyze both the seriousness of the misconduct and the prejudice to the defendant. *Id.* "[U]nusually serious prosecutorial misconduct is reviewed to determine whether the misconduct was harmless beyond a reasonable doubt." *Id.* (quotation omitted).

We review unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 297–99 (Minn. 2006). Under that standard, the defendant bears the burden to demonstrate that the prosecution committed an error that is plain because it "contravenes case law, a rule, or a standard of conduct." *Id.* at 302. If there is "(1) error, (2) that is plain, and (3) affects substantial rights[,] ... the [appellate] court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* If the defendant succeeds, the burden shifts to the state to demonstrate that the misconduct did not affect the defendant's substantial rights. *Id.*

a. *Discovery*

Appellant claims that the state made untimely discovery disclosures that prejudiced his substantial rights.

First, appellant alleges that the state did not disclose over 500 pages of material relevant to the criminal conduct of its witnesses until December 18, 2014. Because appellant did not object at trial to this late discovery, we apply the unobjected-to prosecutorial misconduct standard of review.

Here, as noted above, the record shows that the state did not learn of the federal indictments until October 1, 2014. The state apprised the district court and appellant as soon as it learned of the indictments and immediately sought the relevant evidence from federal authorities. A mutually requested continuance of the trial date was granted to obtain and review the evidence, which was received in December. We conclude that the state did not commit an error.

Second, appellant alleges that the state failed to disclose a witness statement until September 29, 2014, the day of his

trial. Because appellant objected at trial, we review the alleged misconduct using the two-tiered harmless error test.

Here, even assuming without deciding that the state committed unusually serious misconduct, we conclude that the alleged misconduct was harmless beyond a reasonable doubt. On September 29, appellant identified a statement made by R.G. that was summarized in a police report that was not accompanied by a transcript or audio recording. The state claimed that it did not have a written or audio record of the statement. Later that day, the state discovered an audio recording that had been misfiled under an incorrect case number. The state provided the recording and a transcript of the statement to appellant. The trial date was then continued for another reason until February 23, 2015, which allowed appellant ample time to review the statement. Any potential prejudice to appellant was remedied by the five-month continuance. We conclude that the postconviction court did not abuse its discretion in determining that the late discovery did not prejudice appellant.

b. *Improper emotion*

***8** Appellant argues that the prosecutor improperly appealed to the passions of the jury during the state's closing argument by using the terms, "kill shot" and "blood bath," and by stating that M.M. was "fighting for his life ... you see the desperation in [M.M.], who is choosing to live." Appellant did not object to the statements at trial.

"A prosecutor is not permitted to appeal to the passions of the jury during closing argument." *Nunn v. State*, 753 N.W.2d 657, 661–62 (Minn. 2008) (quotation omitted). However, a prosecutor has "considerable latitude" during a closing argument and need not make a "colorless argument." *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). A prosecutor may present "all legitimate arguments on the evidence, ... analyze and explain the evidence, and ... present all proper inferences to be drawn" from the evidence. *Id.* A prosecutor may properly discuss what a victim suffered. *Nunn*, 753 N.W.2d at 663. "When reviewing alleged [prosecutorial] misconduct in closing statements, this court must look at the whole argument in context, not just selective phrases or remarks." *State v. McNeil*, 658 N.W.2d 228, 234 (Minn. App. 2003) (citing *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993)). When credibility is a central issue in a case, we pay special attention to statements that may prejudice or inflame the jury. *Id.* (citing *State v. Porter*, 526 N.W.2d 359, 363 (Minn.1995)).

Here, the postconviction court determined that the prosecutor's statements were not improper and did not constitute plain error. To be sure, "kill shot" may connote an intention to kill, which relates to the credibility of appellant's testimony. However, "kill shot" also referenced the bullet striking M.M. in the chest, "center mass," and was relevant to appellant's aim and the manner in which M.M. was shot. "Blood bath" and the prosecutor's description of M.M.'s struggle related to the manner of M.M.'s death, in which M.M. lost a substantial amount of blood. The challenged statements are descriptive of the crime scene, the events that occurred, the manner of M.M.'s death, and are consistent with the evidence. The prosecutor made only one reference to M.M. fighting for his life, and used the terms "kill shot" and "blood bath" twice, respectively, within a closing argument that spanned 33 pages of transcript. Because the prosecutor had considerable latitude to explain the evidence, present legitimate arguments, and draw out reasonable inferences, we conclude that the statements were not improper and do not constitute plain error.

IV. The postconviction court did not err in denying appellant's petition based on his inconsistent-verdict claim.

Appellant challenges the jury's verdict finding him guilty of both second-degree felony murder and second-degree manslaughter, arguing that the verdict is legally inconsistent because second-degree manslaughter requires some form of intent while second-degree felony murder is a crime committed "without the intent to effect the death of any person." Minn. Stat. § 609.19, subd. 2(1).

A verdict is legally inconsistent, and entitles the defendant to a new trial, "only when proof of the elements of one offense negates a necessary element of another offense." *State v. Christensen*, 901 N.W.2d 648, 651 (Minn. App. 2017) (quotation omitted). "An acquittal on one count and a finding of guilty on another count can be logically inconsistent, but cannot be legally inconsistent." *Id.* We review whether two jury verdicts are legally inconsistent de novo. *Id.* (citing *State v. Leake*, 699 N.W.2d 312, 325 (Minn. 2005)).

***9** The district court instructed the jury to find appellant guilty of second-degree felony murder if the state proved beyond a reasonable doubt that appellant caused M.M.'s death while committing a second-degree assault. The assault instruction covered intentional action under assault-harm or

assault-fear. The district court also instructed the jury to find appellant guilty of second-degree manslaughter if the state proved beyond a reasonable doubt that appellant caused M.M.'s death by culpable negligence.

Under Minnesota law, there are two types of assault: assault-fear and assault-harm. *See State v. Dorn*, 887 N.W.2d 826, 829 (Minn. 2016) (citing Minn. Stat. § 609.02, subd. 10 (2014)). Both types of assault require intentional action by the defendant. Assault-harm requires that a defendant had the general intent to perform a physical act that constitutes a battery. *Id.* at 830. Assault-fear requires that the defendant committed an act "with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10(1) (2016).

A second-degree assault is a proper predicate felony for felony murder. *State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996). "The 'felony murder rule' allows one whose conduct brought about an unintended death in the commission of a felony to be found guilty of murder by imputing malice when there is no specific intent to kill." *Id.* at 51. "Lack of intent is not an element of second-degree felony murder." *Id.*

Second-degree manslaughter requires a mental state of culpable negligence. Minn. Stat. § 609.205(1). Culpable negligence for manslaughter is defined as "recklessness," which is "intentional conduct which the actor may not intend to be harmful but which an ordinary and reasonably prudent man would recognize as involving a strong probability of injury to others." *State v. Moore*, 458 N.W.2d 90, 94 (Minn. 1990). "Recklessness" and "intent" are not mutually exclusive mental states. *Cole*, 542 N.W.2d at 51. A person may be found guilty of both second-degree assault and of a crime requiring recklessness. *See id.*

Here, neither felony murder nor second-degree manslaughter required that the jury find that appellant specifically intended to cause M.M.'s death. Because the mental states for second-degree felony assault and second-degree manslaughter are not mutually exclusive and the necessary elements of the crimes do not negate each other, we conclude that the postconviction court did not err in determining that the jury's verdict finding appellant guilty of both felony murder and second-degree manslaughter is not legally inconsistent.

V. The postconviction court did not abuse its discretion in denying appellant's petition based on his sufficiency-of-the-evidence claim.

Appellant argues that the state did not present sufficient evidence to prove beyond a reasonable doubt that he committed felony murder because the evidence shows that he acted in self-defense to defend himself and his friends.

***10** In reviewing a challenge to the sufficiency of the evidence, we conduct "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We review the record "assuming the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "And we will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that [appellant] was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100. We do not re-weigh the evidence. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009).

Felony murder requires that the state prove beyond a reasonable doubt that the defendant caused the death of a person "while committing or attempting to commit a felony." Minn. Stat. § 609.19, subd. 2(1). Second-degree assault is a proper predicate felony for felony murder. *Cole*, 542 N.W.2d at 53. An assault with a dangerous weapon is a second-degree assault. Minn. Stat. § 609.222 (2016).

A defendant must put forward evidence to support his claim of self-defense, but the state bears the burden of disproving self-defense. *State v. Radke*, 821 N.W.2d 316, 324 (Minn. 2012). The state meets its burden if it "disprove[s] beyond a reasonable doubt at least one of the elements of self-defense." *Id.*

> A valid claim of self-defense requires the existence of four elements: (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he was in imminent danger of

> death or great bodily harm; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

Id.; *see also* *State v. Richardson*, 670 N.W.2d 267, 278 (Minn. 2003) (noting that defense-of-others parallels self-defense).

At trial, appellant admitted that he carried a .22–caliber revolver and intentionally fired it without warning into a group of people that included M.M. Forensic results matched bullet fragments found inside M.M.'s body to a .22–caliber bullet. Multiple witnesses testified that they saw appellant shoot M.M. Appellant admitted that he discarded the revolver where the police later discovered a .22–caliber revolver containing three spent cartridges. DNA that predominately matched appellant was discovered on the revolver. This evidence is sufficient to permit the jury to conclude that appellant committed an assault with a deadly weapon that resulted in M.M.'s death, which constitutes felony murder.

Appellant contends that the evidence shows that he acted in self-defense of himself and others. There was evidence presented at trial that depicted R.E. and his group as the initial aggressors and that appellant's group was suffering a severe beating. There was also evidence presented that R.E. acted like he had a firearm. Appellant also testified that he was scared, that his friends were already knocked down, that his eye was injured and his vision was impaired, and that he fired the revolver to stop the attackers because he had no other choice.

However, the state presented contrary evidence that appellant postured with his revolver before the fight, that appellant did not use reasonable force, and that appellant made false statements to the police about his role in M.M.'s death. Further, other witnesses testified that no one other than appellant had a weapon and that no one else acted as if he had a firearm. There was also evidence that appellant fired from behind a tree or shrubbery. Appellant's credibility was also impeached on cross-examination by his admission that he lied to the police after his arrest.

***11** We conclude that the record, when viewed in the light most favorable to the verdict, contains sufficient evidence to permit the jurors to find beyond a reasonable doubt that appellant did not act in self-defense. The postconviction court did not abuse its discretion in denying appellant's petition for postconviction relief.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2018 WL 817286

Footnotes

1 Appellant also alleges that his acquittal of second-degree intentional murder demonstrates that the jury accepted his affirmative defense of self-defense, and on that basis the jury should have acquitted him of all charges. However, appellant's acquittal for second-degree intentional murder demonstrates only that the jury did not find sufficient evidence to prove beyond a reasonable doubt that appellant acted with intent to cause M.M.'s death. The district court instructed the jury that appellant committed no crime if it found that he acted reasonably to defend himself or others from a threat of death or great bodily harm. The jury's guilty verdicts evince that the jury did not accept appellant's claim of self-defense.

2017 WL 3336607
Only the Westlaw citation is currently available.
United States District Court,
N.D. Ohio, Eastern Division.

Ricky JACKSON, Plaintiff,
v.
CITY OF CLEVELAND, et al., Defendants.

CASE NO. 1:15CV989
|
Signed 08/04/2017

Attorneys and Law Firms

Arthur R. Loevy, Jonathan I. Loevy, Loevy & Loevy, Chicago, IL, Michele L. Berry, Cincinnati, OH, Elizabeth C. Wang, Loevy & Loevy, Boulder, CO, for Plaintiff.

Shawn M. Mallamad, City of Cleveland Department of Law, Amanda M. Knapp, Roetzel & Andress, Cleveland, OH, Stephen W. Funk, Roetzel & Andress, Akron, OH, for Defendants.

OPINION AND ORDER

CHRISTOPHER A. BOYKO, United States District Judge

*1 This matter comes before the Court upon the Motion of the City of Cleveland for Summary Judgment (ECF DKT, # 101) on Plaintiffs' claims pursuant to Fed. R. Civ P. 56. For the following reasons, Defendant's Motion for Summary Judgment is GRANTED.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Ricky Jackson filed his original Complaint on May 19, 2015, against Defendant City of Cleveland and several individual former detectives, alleging constitutional violations by the detectives caused by unconstitutional policies and inadequate training by the City. Plaintiff filed his Second Amended Complaint on August 3, 2016, against Defendants City of Cleveland, former Detective Jarold Englehart and Karen Lamendola, Guardian ad Litem on behalf of Frank Stoiker. On January 27, 2017, Defendant City of Cleveland filed a Motion for Summary Judgment on all claims against the City.

In 1975, Plaintiff was convicted of murdering Harold Frank. His conviction was based on the eyewitness testimony of twelve-year old Eddie Vernon. However, nearly forty years later, in 2014, Vernon recanted his testimony, claiming that he never witnessed the crime and that he had been coerced into testifying. After being released, Plaintiff brought suit against the Investigative Officers in the Frank murder investigation and the City of Cleveland. Many of the detectives involved in the investigation were deceased by the time Plaintiff filed his claims and the Court dismissed the claims against the deceased detectives' estates. Plaintiff's remaining claims are against Karen Lamendola, Detective Jerold Englehart and the City of Cleveland.

The Cleveland Police Department in the 1970's had two forms of written rules: the Manual of Rules of Conduct and Discipline for Officers, Members, and Employees of the Division of Police ("Manual"), and General Police Orders ("GPOs"). Defendant cites several rules in the Manual that Defendant alleges relate to the requirement to disclose exculpatory evidence. Rule 66 requires police officers to familiarize themselves with the facts of a case, "so that all of the evidence may be properly presented to the court." Dkt. 65-1 at 4. Rule 77 requires officers to report on all matters they investigate and Rule 78 requires that all written and verbal reports be truthful and unbiased. *Id.* at 8-9. Plaintiff cites GPO No. 19-73, which contains Rule 16 of the Ohio Rules of Criminal Procedure. Dkt. 65-7. The GPO states that the police department shall not give reports or evidence directly to defense counsel. *Id.* The Order also clarifies that the rules of criminal procedure "will be employed through the courts and through the prosecuting attorney." *Id.* The GPO does not state the obligations of the police to disclose information to the prosecuting attorney. The Cleveland Police Department's rules and policies have since been updated.

Several former detectives, along with Edward Tomba, the Deputy Chief of Homeland Security and Special Operations for the Cleveland Police Department, testified about the rules and training in place in the 1970's. All of them testified that Cleveland police officers in the 70's received both academy and on-the-job training to be police officers. Several witnesses testified that the academy trained officers to disclose exculpatory evidence, while others testified that

the academy provided no such training. Several witnesses testified that they received on-the-job training to disclose exculpatory evidence to the prosecutor and no witness testified that on-the-job training did not include the duty to disclose, or that they were trained not to disclose such evidence.

*2 Plaintiff provided several instances of alleged police misconduct in the years leading up to their incarceration. Plaintiff cite a 1972 memo from then-Mayor Ralph Perk, in which Perk said that police misconduct was rampant. Dkt 102-16 at 88. However, the misconduct involved was failure to respond to citizen complaints and the indictment of officers for manslaughter, armed robbery and rape. Plaintiff also cites two alleged incidents of Cleveland police coercing witness statements through force or threat, one in 1974, and one in 1977, two years after Plaintiffs' incarceration. Former Detectives Ronald Turner and William Tell, Sr. also testified that detectives often did not follow the policy of turning over all evidence to the prosecutors.

Plaintiff brought suit against the individual officers for violating their constitutional rights by withholding exculpatory evidence, fabricating evidence, malicious prosecution and unconstitutional lineup procedure. Plaintiff also brought suit against the City of Cleveland under a theory of municipal liability under 42 U.S.C. § 1983, alleging that Defendant's unconstitutional policies and failure to properly train officers resulted in the violation of Plaintiff's rights. Defendant moves for Summary Judgment on all claims, arguing that Plaintiff presented no facts to show an underlying constitutional violation and arguing that the undisputed record shows that the City had adequate policies and training during the 70's. Plaintiff argues that Defendant had an explicitly unconstitutional policy, that Defendant should have had rules instructing police officers to disclose exculpatory evidence and that Defendant failed to adequately train police officers to disclose such evidence.

LAW AND ANALYSIS

I. Standard of Review for Summary Judgment

Summary judgment is proper if the movant can show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir. 2006). A dispute is genuine if it is based on facts on which a reasonable jury could find for the non-moving party. *Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006). The fact is material if the resolution of the dispute might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To meet its burden, the moving party can either present evidence showing the lack of genuine dispute as to material facts, or it may show the absence of evidence to support the nonmoving party's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once the moving party has met its burden, the nonmoving party cannot rest on its pleadings; rather, the nonmoving party must point to specific facts in the record that show that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 248-49; *Celotex Corp.*, 477 U.S. at 324.

No matter how sympathetic one may be to Plaintiff's plight, the Court is still under an obligation to apply the law to the evidence Plaintiff submits. Neither time nor death abrogates Plaintiff's obligation to support his claims.

II. *Monell* Claims Require an Underlying Constitutional Violation.

In order to bring a *Monell* claim against a municipality, there must be an underlying constitutional violation by one of the municipality's employees. *Watkins v. City of Battle Creek*, 273 F.3d 682 (6th Cir. 2001). Plaintiffs allege constitutional violations by Frank Stoiker and Jarold Englehart. However, Plaintiffs also allege that, even if the claims against the individual defendants are dismissed, Plaintiffs' *Monell* claim can still proceed as long as they can show any constitutional violation by an officer, even if that officer is not liable for that violation. In *Garner v. Memphis Police Department*, 8 F.3d 358, the Sixth Circuit held that, even though the claim against the only individual defendant had been dismissed due to qualified immunity, the *Monell* claim against the city could continue. Defendant alleges that Plaintiffs have not alleged enough facts for the Court to find there was an underlying constitutional violation.

*3 The Court will not decide this question at this time. Regardless of whether any of the detectives involved in the Franks homicide investigation committed any constitutional

violations, Plaintiffs' *Monell* claims fail as a matter of law on an independent basis discussed below.

III. Plaintiff's *Monell* Claims Fail as a Matter of Law.

A city or municipality may only be held liable for the constitutional violations of its own employees under 42 U.S.C. § 1983 if those actions are the result of a practice, policy, or custom of the municipality itself. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). There are four types of municipal action that, if they cause the underlying constitutional violation, can establish liability under a *Monell* claim: 1) legislative enactments or official policy; 2) actions by officials with final decision-making authority; 3) a policy of inadequate training or supervision; or 4) a custom of tolerance of rights violations. *France v. Lucas*, No. 1:07CV3519, 2012 WL 5207555, at *12 (N.D. Ohio Oct. 22, 2012), aff'd, 836 F.3d 612 (6th Cir. 2016).

Plaintiff, in his opposition brief, did not argue that Defendant is liable under the second or fourth theory of liability. Plaintiff also did not present argument defending his claims for fabrication of evidence, malicious prosecution, or improper lineup procedure. As discussed above, once the party moving for Summary Judgment meets its burden of production, the non-moving part *must* present specific facts from the record that support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 324 (1986). Since Plaintiff failed to do so, he cannot rely on the pleadings to survive Summary Judgment. It is not the Court's role to "wade through" the record to find specific facts which may support the nonmoving party's claims. *United States v. WRW Corp.*, 986 F.2d 138, 143 (6th Cir. 1993). Thus, even though the record may contain evidence to support other claims or theories, Plaintiff has waived that argument by not raising it in their opposition brief. Furthermore, Plaintiff has not pointed to any facts that would show that the other claims were the result of an unconstitutional policy or failure to train police officers.

A. Defendant Did Not Have an Unconstitutional Policy to Withhold Exculpatory Evidence.

Plaintiff argues that Defendant is liable under the first method of *Monell* liability for two reasons. First, that Defendant had an explicit unconstitutional policy that forbade police officers from disclosing exculpatory evidence to defendants. Second, that Defendant lacked an adequate policy on police officers' obligations under *Brady v. Maryland* 373 U.S. 83 (1963) and that the need for such a policy was so significant and so obvious that the lack of policy amounts to an deliberate indifference. However, both of these arguments fail because Defendant did have official policies in place specifically requiring police officers to report on everything they investigated.

1. *The City Did Not Have an Explicit Unconstitutional Policy.*

Under the first method of *Monell* liability, a municipality is liable for the constitutional violations of its employees if they are executing a "policy statement, ordinance, regulation, or decision" of the city. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The occasional negligent administration of an otherwise sound policy is not enough; the policy itself must either be unconstitutional, or it must have "mandated, encouraged, or authorized" unconstitutional conduct. *Heyerman v. Cnty. of Calhoun*, 680 F3d 642, 648-49; *France*, 2012 WL 5207555, *10. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process ..., irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

***4** Plaintiff alleges that GPO 19-73 was an unconstitutional policy because it forbade police officers from disclosing evidence to defense attorneys, which violates the requirements of *Brady*. The GPO states that police officers shall not disclose records or evidence to defense counsel. This order is consistent with *Brady*. *Brady* requires prosecutors to disclose exculpatory evidence to defense counsel and requires that police officers disclose that evidence to prosecutors. *Id.*; *See also Kyles v. Whitley*, 514 U.S. 419, 437–438. The General Police Order applies, as the name suggests, to police officers, not prosecutors. The GPO states that the rules of criminal procedure are enacted through the courts and the prosecuting attorney. Dkt. 65-7. Since the GPO does not forbid disclosing information to the prosecutor, this policy is not unconstitutional. [1]

Plaintiff claims that Defendant admitted that GPO 19-73 was unconstitutional by changing the rule. This argument is meritless. First, this use of evidence is clearly inadmissible under Fed. R. Evid. 407, which prohibits evidence of subsequent remedial measures to prove culpable conduct. Even though Defendant did not raise the evidentiary

objection, the Court has discretion to disregard inadmissible evidence in considering a motion for summary judgment. *Wiley v. U.S.*, 20 F.3d 222 at 226 (6th Cir. 1994); *see also Capobianco v. City of N.Y.*, 422 F.3d 47, 55 (2d Cir. 2005); *United States v. Dibble*, 429 F.2d 598, 603 (9th Cir. 1970). Second, Plaintiff cites no evidence as to the reason the rules were changed. The mere fact that police policies have changed in the forty-two years since 1975 is not evidence that the old policies were unconstitutional. Third, to allow Plaintiff to make such an inference would be plainly against public policy. If parties could use a change of rules or policies to prove that the old policies were unconstitutional, municipalities would avoid updating their policies for fear of creating liability under *Monell* claims. Since there is a strong public interest in having municipalities improve out-of-date policies, Plaintiff's argument fails.

2. *The City Was Not Deliberately Indifferent in Not Adopting Better Policies.*

Even if a municipality has not adopted an explicitly unconstitutional policy, the municipality may be liable for the failure to make a policy where one is needed. *Jones v. City of Chicago*, 787 F.2d 200, 204 (7th Cir. 1986). The Supreme Court held that a city's deliberate choice not to have a policy can be characterized as municipal policy. *City of Canton v. Harris*, 489 U.S. 378 (1989). However, it is not enough that a policy be imperfect; liability for failure to adopt a policy requires "deliberate indifference" to a "plainly obvious danger." *Armstrong v. Squadrito*, 152 F.3d 564, 578 (7th Cir. 1998). The municipality may be deliberately indifferent if there is a pattern of violations that puts the municipality on notice, or if the inadequacy of the policy in preventing constitutional violations is obvious. *Miller v. Calhoun Cnty.*, 408 F.3d 803, 816-17 (6th Cir. 2005).

The Manual contains the rules regarding disclosure of evidence to prosecutors. Rule 77 states that "[o]fficers and members shall report on all matters referred to or investigated by them." Dkt 66-2 at 59. Rule 77 further requires all police officers to submit their reports to their superior officers. Plaintiff contends that these reports were incomplete, but all parties agree that the reports were required to be turned over to the prosecutors. Rule 78 requires that "[w]ritten and verbal reports ... shall be truthful and unbiased." *Id.* at 60. The plain language of these policies means that police officers must report truthfully and completely on everything they investigate. Therefore, the City did have a policy in place that addressed the *Brady* obligations of police officers, since turning over everything to prosecutors would naturally include exculpatory and impeachment evidence.

***5** Plaintiff argues that, even if Rules 77 and 78 cover disclosing evidence to prosecutors, the rules are inadequate to prevent constitutional violations because they are too vague and do not instruct police officers as to what evidence might be exculpatory. In order for Plaintiffs' argument to prevail, the policy would have to be so inadequate as to constitute deliberate indifference by the City. *Miller*, 408 F.3d at 817. This requires that either the City knew that its policy was inadequate, or that the policy was so inadequate that the danger of violation was plainly obvious. *Armstrong*, 152 F.3d at 578.

Plaintiff argues that Defendant knew that the policy was inadequate. Plaintiff points to several reports detailing concerns with the Cleveland Police Department from the early 1970's. However, these reports concern police officers engaging in criminal activity and failing to respond to calls for assistance. These reports do not show that the City was on notice that their policy regarding disclosing exculpatory evidence was inadequate. Plaintiff also argues that Defendant admits that the Rules were inadequate because the Rules have since been replaced. As discussed above, this argument is based on subsequent remedial measures and has no merit. Therefore, Plaintiff has not alleged facts showing that Defendant had notice of the need for new policies.

Plaintiff also argues that the Rules were so vague and the risk of constitutional violations so great that Defendant was deliberately indifferent to the need for better policies. Plaintiff relies heavily on his expert witness, Donald Anders, who testified that Rule 77 could be interpreted to mean that police officers were merely required to report that they investigated a matter, without reporting on the details of what the officer learned. Dkt. 105 at 74-79. However, the requirement to report on "all matters" is not ambiguous. The plain language clearly requires police officers to turn over everything to prosecutors. Furthermore, as a police expert rather than a legal expert, Anders is not qualified to testify as to how other police officers may have interpreted the rule or as to the legal adequacy of the rule. Liability for an insufficient policy requires deliberate indifference, and where there is a

written policy requiring police officers to report on all their investigations, the attempts of an expert to obfuscate the rule to show how it might be inadequate will not suffice to show deliberate indifference.

B. Plaintiff Cannot Show That the City's Training of Officers was Inadequate.

Plaintiff asserts that Defendant is liable under *Monell* for failing to properly train the police officers involved in the 1975 homicide investigation. However, Plaintiff has not alleged sufficient facts to show that the on-the-job training of officers was inadequate.

A municipality may be liable under § 1983 for failure to train its employees, but only where such failure reflects a deliberate or conscious choice. *City of Canton v. Harris*, 489 U.S. 378 (1989). To prevail on a claim for failure to train, a plaintiff must show: 1) the training was inadequate for the tasks officers must perform; 2) the inadequacy was the result of the city's deliberate indifference; and 3) the inadequacy was closely related to or caused the injury. *Ciminillo v. Streicher*, 434 F.3d 461, 469 (6th Cir. 2006). There are two ways a plaintiff can show that the inadequate training was the result of deliberate indifference. First, the plaintiff can show "prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir. 2005). Second, a plaintiff can demonstrate deliberate indifference even where there are no prior instances of constitutional violations "by showing that officer training failed to address the handling of exculpatory materials and that such a failure has the 'highly predictable consequence' of constitutional violations of the sort Plaintiff suffered." *Gregory v. City of Louisville*, 444 F.3d 725, 753 (6th Cir. 2006)(citation omitted).

***6** Plaintiff has failed to provide evidence showing that the training given to the officers was inadequate. While Plaintiff provided enough evidence to dispute whether the police academy covered handling exculpatory evidence, this dispute is not material. Defendant cites multiple witnesses who stated that police officers received on-the-job training to disclose all evidence, including exculpatory evidence to the prosecutor and Plaintiff has presented no evidence to suggest that on-the-job training did not include handling exculpatory evidence. This training is not insufficient merely because it is on-the-job training rather than formal academy training, because "failure-to-train liability is concerned with the substance of the training, not the particular instructional format." *Connick v. Thompson*, 563 U.S. 51, 68 (2011). Plaintiff again relies on Anders' testimony, who stated that he believes that on-the-job training is always ineffective and therefore, the Court should infer that the officers' training in this case was inadequate. However, Anders' opinion about on-the-job training in general cannot create a genuine issue of fact where the undisputed facts on the record shows that officers received on-the-job training to disclose exculpatory evidence. Therefore, since Plaintiff has not provided enough evidence to create a genuine issue of material fact as to whether police officers received on-the-job training to disclose exculpatory evidence, he cannot meet their burden of showing that the training was inadequate for the tasks police officers had to perform.

Plaintiff does point to evidence in the record in the form of testimony by former Detective Turner and Tell, that there was a widespread custom of police committing constitutional violations. This evidence does suggest that there were problems with the Cleveland Police Department in the 1970's. However, this concern falls short of supporting Plaintiff's claims. Evidence that officers committed violations is not evidence that those officers were not trained, especially in the face of undisputed direct evidence that officers received on-the-job training to disclose all evidence. "Indeed, a law enforcement officer's choice to lie, fabricate evidence, or conceal exculpatory evidence would appear to be one that is made despite any training." *France v. Lucas*, No. 1:07CV3519, 2012 WL 5207555, at *12 (N.D. Ohio Oct. 22, 2012), *aff'd*, 836 F.3d 612 (6th Cir. 2016).

C. Plaintiff Cannot Show a Widespread Custom of Constitutional Violations.

While Plaintiff does not explicitly argue that Defendant is liable due to a widespread custom of constitutional violations, Plaintiff does cite some evidence from the record that suggests the possibility of such a custom. However, this evidence falls short of supporting Plaintiff's *Monell* claims.

In order to establish liability for a custom of tolerating constitutional violations, Plaintiff must prove four things: 1) a persistent pattern of illegal activity; 2) notice or constructive notice on the part of Defendant; 3) Defendant's tacit approval of the unconstitutional conduct; and 4) that

Defendant's custom caused the underlying constitutional violation. *France*, 2012 WL 5207555, at *12 (citing *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005)).

Plaintiff cannot establish these elements for three reasons. First, Plaintiff relies on the testimony of former Detectives Ronald Turner and William Tell. While both worked for the City of Cleveland Police Department during the 1970's, neither were ever a homicide detective. Turner worked in the Vice Unit and Tell worked in the Auto Theft Unit. These officers cannot speak to the policies, practices and customs of the Homicide Unit.

Second, Plaintiff relies on Anders' expert testimony that there was a custom of constitutional violations. However, expert testimony must be based on sufficient facts to support the conclusion. Since Turner and Tell lack personal knowledge of the Homicide Unit's policies, Anders' speculation cannot create a genuine issue of material fact.

Third, even if Plaintiff could show a widespread custom of violations, they presented no evidence that Defendant had notice of this custom. Plaintiff points to no evidence that the Mayor or the Chief of Police were ever informed of any failures of officers to disclose exculpatory evidence to prosecutors. Defendant had no notice or reason to be on notice that homicide detectives failed to disclose exculpatory evidence to prosecutors.

Because Plaintiff cannot establish the existence of a widespread custom of constitutional violations in the Homicide Unit and that Defendant had notice of such a custom, Plaintiff cannot meet his burden to prove *Monell* liability for a custom of constitutional violations.

CONCLUSION

*7 Because Plaintiff has not shown that Defendant had an unconstitutional policy and was deliberately indifferent to the need for better policies or inadequately trained its police officers, Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 3336607

Footnotes

1 Even if GPO 19-73 did forbid the prosecution from disclosing exculpatory evidence, the alleged constitutional violation in this case is the failure of police officers to disclose evidence to the prosecution, which the GPO does not forbid.

End of Document

2018 WL 4519599 (Minn.Dist.Ct.) (Trial Order)
District Court of Minnesota.
Seventh Judicial District
Mille Lacs County

Alice PETERSON, Plaintiff,
v.
CITY OF ISLE, Defendant.

No. 48-CV-15-920.
August 2, 2018.

Order on Plaintiff's and Defendant's Motions in Limine

Gail T. Kulick, Judge.

ORDER

***1** The above proceeding came on for a Hearing via telephone conference before the Honorable Gail T. Kulick, Judge of District Court, at the Mille Lacs County Government Center, Milaca, Minnesota, on August 2, 2018, in response to Plaintiff's and Defendant's Motions in Limine. Attorney Arlo H. Vande Vegte appeared via telephone on behalf of Plaintiff. Attorney Paul A. Merwin appeared via telephone on behalf of Defendant.

NOW, having duly considered all files, records, and proceedings herein, together with the applicable law, the Court makes the following order:

ORDER

1. Plaintiff's Motion in Limine to exclude the testimony and opinions of James R. Panko, P.E. is hereby **DENIED.**

2. Plaintiff's Motion in Limine to exclude any reference to the report of John Bogart, P.E. is hereby GRANTED. However, if Mr. Bogart is available and testifies to lay the foundation of the report, then it may be referenced appropriately.

3. Plaintiffs Motion in Limine to exclude the photographs of the sidewalk taken on July 19, 2018, is hereby **DENIED.**

4. Defendant's Motion in Limine to exclude any reference to the legal standards or guidance of the Americans with Disabilities Act (ADA) is hereby **GRANTED.** Parties stipulated on the record that any lack of compliance with construction standards shall not be referred to as "illegal."

5. Defendant's Motion in Limine to exclude any reference to the design standards developed by the Minnesota Department of Transportation (MNDOT) is hereby **DENIED.**

6. Defendant's Motion in Limine to exclude the testimony and opinions of Fredrick Patch, C.B.O. is hereby **DENIED.**

7. Defendant's Motion in Limine to preclude either party, during voir dire, from asking "the insurance question" under Minn. Gen. R. Prac. 123 in regards to whether any juror has any interest in the League of Minnesota Cities Insurance Trust is hereby **GRANTED.**

8. The attached Memorandum is hereby made part of this Order.

Dated: August 2, 2018

BY THE COURT:

<<signature>>

The Honorable Gail T. Kulick

Judge of District Court

MEMORANDUM

I. Plaintiff's Motion to Exclude the Testimony and Opinions of James R. Panko, P.E.

Mr. Panko shall be allowed to testify as an expert. Expert testimony is only admissible under Minn. R. Evid. 702 if the proponent shows that the testimony passes a four-part test: (1) The witness must qualify as an expert; (2) the expert's opinion must have foundational reliability; (3) the expert testimony must be helpful to the trier of fact; and (4) if the testimony involves a novel scientific theory, it must satisfy the Frye-Mack standard. *Doe v. Archdiocese of St. Paul & Minneapolis*, 817 N.W.2d 150, 164 (Minn. 2012) (citations omitted).

Mr. Panko is a civil and structural engineer and registered as a professional engineer in multiple states. He received his Bachelor of Science in Civil Engineering from Minnesota State University, Mankato, in 2004 and has continued his education since. Mr. Panko reasonably relied on several sources of information to form his conclusions, which were not mere speculations. That information included photographs and measurements from Plaintiff's expert, the plans and construction diary from the 2008 construction, and published materials used by experts in the field. Mr. Panko's testimony will be helpful to the jury in understanding the facts. This case does not involve a novel scientific theory, so the Frye-Mack standard analysis is not necessary. The probative value of Mr. Panko's testimony outweighs any potential prejudice that may arise from his testimony.

II. Plaintiff's Motion to Exclude Any Reference to the Report of John Bogart, P.E.

***2** The report of Mr. Bogart shall not be referenced by either party unless he testifies and lays the foundation of the report himself. Mr. Bogart's report was not directly addressed by the Court of Appeals opinion; therefore, it can be referenced if the proper foundation is laid. However, neither party has listed Mr. Bogart in their list of witnesses or his report in their list of exhibits. Without the proper foundation laid, Mr. Bogart's report shall not be referenced.

III. Plaintiff's Motion to Exclude the Photographs of the Sidewalk Taken on July 19, 2018.

Defendant's photographs of the sidewalk, which were taken during a city inspection on July 19, 2018, shall be allowed as evidence. The photographs are relevant to show the same sidewalk rising and settling. Plaintiff's objection to allowing the photographs is without merit as Plaintiff had the opportunity to continue to monitor the sidewalk at their discretion. Plaintiff is not unfairly prejudiced by these photographs. Defendant disclosed the photographs to Plaintiff as his counsel received them and within a week of the sidewalk being photographed.

IV. Defendant's Motion to Exclude Any Reference to the Legal Standards or Guidance of the ADA.

Plaintiff shall not reference the ADA or the legal standards or the guidance of the ADA. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. Any probative value of discussing the legal standards or guidelines set by the ADA in constructing sidewalks is far outweighed by the prejudice that Defendant would suffer by Plaintiff referencing the ADA to a jury and would be a needless presentation of cumulative evidence. Referencing the legal standards and guidelines set by the ADA runs the high risk of making the jury believe there is an inapplicable standard. Additionally, it is cumulative to the standards set and adopted by MNDOT. With regards to the term "illegal," the parties stipulated that it will not be used.

V. Defendant's Motion to Exclude Any Reference to the Design Standards Developed by MNDOT.

Plaintiff shall be allowed to reference the standards developed by MNDOT in constructing sidewalks. Plaintiff must prove the sidewalk differential that caused her fall was the result of negligent construction when the sidewalk was installed in 2008. The standards for installing sidewalks were developed by MNDOT and are relevant to whether or not there was a construction defect at the time of construction. Defendant will not be prejudiced by Plaintiff informing the jury of the standards that were in effect at the time of the sidewalk construction.

VI. Defendant's Motion to Exclude the Testimony and Opinions of Fredrick Patch, C.B.O.

Mr. Patch shall be allowed to testify as an expert. The standard for allowing expert testimony under Minn. R. Evid. 702 is outlined above in paragraph I and applies here the same.

Mr. Patch has an architectural degree from NDSU, and while he is not an engineer, he has used engineering principles in his profession. He has experience with reviewing plans, executing plans, and inspecting sidewalks. Mr. Patch made measurements and personal observations of the section of sidewalk where the injury occurred. Mr. Patch considered his research and the applicable MNDOT standards to form a conclusion regarding the reconstruction work. Mr. Patch's testimony would be helpful to the jury in understanding the facts. This case does not involve a novel scientific theory, so the Frye-Mack standard analysis is not necessary. The probative value of Mr. Panko's testimony outweighs any potential prejudice that may arise from his testimony.

***3 VII. Defendant's Motion to Preclude Either Party From Asking "The Insurance Question."**

Neither party will be allowed to ask "the insurance question" during voir dire. Minn. Gen. R. Prac. 123 states that when an insurance company or companies are not parties to a case but are involved in the defense or outcome of a case, "the insurance question" shall be asked if requested by either party. Minn. Stat. § 60A.02 subd. 4, which defines "[c]ompany or insurance company," specifically excludes political subdivisions providing self- insurance or establishing a pool under section 471.981, subd. 3. The League of Minnesota Cities Insurance Trust is established under Minn. Stat. § 471.981 subd. 3; therefore, Minn. Gen. R. Prac. 123 is not applicable.

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Antonio Deshaun COLLINS, Appellant.

A19-1277

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Filed August 31, 2020

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Review Denied November 25, 2020

Hennepin County District Court, File No. 27-CR-18-8903

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Considered and decided by Johnson, Presiding Judge; Cochran, Judge; and Schellhas, Judge. *

UNPUBLISHED OPINION

COCHRAN, Judge

*1 In this direct appeal, appellant challenges his conviction of carrying or possessing a pistol without a permit in violation of Minn. Stat. § 624.714, subd. 1a (2016). Appellant argues that he is entitled to a new trial because the district court erred by failing to strike a juror sua sponte for bias. He also argues that the district court abused its discretion by limiting cross-examination of the arresting officers. In addition, he contends that the evidence was insufficient to support his conviction. Concluding that appellant has failed to demonstrate grounds for a new trial or reversal of his conviction, we affirm.

FACTS

On the night of February 14, 2018, two police officers stopped a vehicle driven by appellant Antonio Deshaun Collins. The police stopped the vehicle after one of the officers observed that the vehicle's headlights were "extremely dim" and that the driver was not wearing a seat belt. When that officer approached the stopped vehicle, he could smell marijuana emanating from the vehicle. The officer then searched the vehicle while his partner remained outside with Collins. During the search, the officer found a pistol in the center console. The officers took Collins to the police station to question him. During the interview at the police station, Collins told one of the officers that he had a permit for the pistol, but that the permit was no longer valid. The state charged Collins with possession of a pistol without a permit under Minn. Stat. § 624.714, subd. 1a.

The case proceeded to a jury trial. During voir dire, the district court asked the potential jurors about their feelings and opinions on drugs. A potential juror, Juror C, informed the court that he "would not be able to be fair if drugs are brought out in this." The district court asked Juror C if he would be able to consider the evidence presented and apply the law as instructed. Juror C responded that "if someone was arrested and had drugs on them, no matter what I was told, I would go guilty automatically." The court then asked if any jurors had "such strong views about drug abuse" that they would be unable to be fair and impartial in this case. Juror C raised his hand.

At the end of voir dire, defense counsel challenged two jurors for cause—neither of which was Juror C. Defense counsel challenged one juror because she stated that she could not be fair and impartial in a case involving firearms. Defense counsel challenged a second juror because she experienced a sexual assault at gunpoint and also expressed concern about whether she could be fair and impartial. The district court granted the first challenge, but denied the second. Defense counsel later used a peremptory challenge to remove the second-challenged juror. Defense counsel had remaining peremptory challenges, but did not challenge Juror C. Juror C served on the jury.

At trial, the state called the two arresting officers to testify. At the time they stopped Collins, both officers were members of the Community Response Team, a team responsible for narcotics and weapons investigations. The first officer testified about his observations that led to the stop. He also testified that he recognized the vehicle that they stopped. And, when he approached the stopped vehicle, he recognized Collins as the driver of the vehicle. The officer was familiar with Collins from an investigation of Collins's brother in 2017. During the 2017 investigation, the officer learned that Collins carried a pistol in his vehicle and that he had a permit to carry the pistol at that time. With regard to the stop at issue here, the officer explained that he searched the vehicle because he smelled marijuana when he first approached the vehicle. During the search, the officer found a pistol in the center console under the cup holders.

***2** The officer also testified about interviewing Collins at the police station. According to the officer, Collins admitted during the interview that the pistol belonged to him. The officer also testified that Collins indicated that he no longer had a valid permit to carry the pistol. And that Collins did not present him with a valid permit. The officer then testified that, according to records he had accessed, Collins was not issued a new permit for the pistol.

On cross-examination, defense counsel played an audio recording of the interview at the police station. Defense counsel asked the officer if, after the recorded interview ended, he tried to recruit Collins to be an informant. The officer testified that he did not recall, but also stated that he may have had "other conversations" with Collins. Defense counsel then asked the officer if he remembered the specifics of the "other conversations." The state objected on relevance grounds. The district court sustained the objection.

The second arresting officer also testified that he had met Collins during the 2017 investigation and that he knew that Collins had a pistol in the past. The officer acknowledged that a bodycam video of the incident at issue in this case captured him saying that Collins "keeps it in his center console." He also testified that he attempted to drive Collins's car to the precinct where Collins was interviewed. When asked on cross-examination why Collins was brought in to be interviewed—to recruit him as an informant or to investigate the permit offense—the officer replied, "I don't know." Defense counsel then asked the officer if "that" was "something that has been done before?" At that point, the state objected on relevance grounds and the district court sustained the objection.

After the officers testified, Collins testified in his own defense. He testified that he met the two arresting officers in 2017 when they were executing a warrant at his house concerning his brother. During that interaction, the officers took his pistol and wallet, and brought him to the precinct to be interviewed. Collins testified that, at that time, he had a license to carry. And that, during the 2017 interview, the officers asked him about his brother and if his brother was selling drugs. They also asked Collins if he knew anyone selling large amounts of marijuana. In response, Collins told the officers that he did not interact with anyone selling drugs.

Collins also testified about the February 2018 incident at issue here. He confirmed that the officers pulled him over and that they found a pistol in his car. He denied, however, that there was an odor of marijuana in the car. Collins admitted that the pistol found by the officers belonged to him. He testified that he did not remember when he put the pistol in the car and stated it was an "honest mistake." Collins also testified that after the recorded interview at the police station, there was a "significant conversation." The state objected to further questioning about the unrecorded conversation. The district court sustained the objection.

The jury found Collins guilty of possessing a pistol without a valid permit. Collins appeals.

DECISION

Collins raises three issues on appeal: (1) whether the district court plainly erred by failing to sua sponte strike Juror C for bias; (2) whether the district court abused its discretion by limiting cross-examination of the arresting officers; and (3) whether the evidence was sufficient to prove Collins's guilt beyond a reasonable doubt. We address each issue in turn.

I. Collins's juror-bias argument is not reviewable.

***3** Collins argues that the district court erred when it failed to strike Juror C sua sponte for bias after Collins's trial counsel failed to challenge Juror C. The state argues that under *State v. Stufflebean*, 329 N.W.2d 314 (Minn. 1983), Collins was required to challenge Juror C for bias in district court to preserve the issue on appeal. We agree with the state.

Minnesota courts have held it is "too late" to challenge a biased juror for the first time on appeal. *State v. Thieme*, 160 N.W.2d 396, 398 (1968) (declining to consider appellant's biased-juror argument because the "defendant, after consultation with his counsel, chose to make no ... challenge" to the juror); *see also* *Stufflebean*, 329 N.W.2d at 317 (stating that an appellant must challenge the juror for cause to preserve the issue for appeal); *State v. Geleneau*, 873 N.W.2d 373, 379 (Minn. App. 2015) (same), *review denied* (Minn. Mar. 29, 2016). As the supreme court recognized in *Thieme*, allowing a defendant to challenge a juror for the first time on appeal "would extend an invitation to every defendant to leave unchallenged an objectionable juror only to raise the objection upon appeal." 160 N.W.2d at 398.

In *Stufflebean*, the supreme court held that "[i]n an appeal based on juror bias, an appellant must show [1] that the challenged juror was subject to challenge for cause, [2] that actual prejudice resulted from the failure to dismiss, and [3] that appropriate objection was made by appellant." 329 N.W.2d at 317.[1] The first *Stufflebean* requirement leaves no room for an appeal based on juror bias where appellant failed to challenge the juror for cause. *See* *Geleneau*, 873 N.W.2d at 380 (noting that *Stufflebean* establishes that "an objection is *necessary* for appellate relief, which implies that the absence of an objection in the district court is a sufficient basis for rejecting a biased-juror argument on appeal" (emphasis added)). As we observed in *Geleneau*, the requirement that a defendant first challenge a juror for cause in the district court "is consistent with the principle that the district court is in the best position to determine whether a prospective juror can be an impartial juror because the district court can assess the prospective juror's demeanor and credibility during voir dire." *Id.* Accordingly, *Stufflebean* requires that a defendant must first challenge the juror for bias in the district court to raise the issue of juror bias on appeal.

Collins argues that we should circumvent the challenge requirement in *Stufflebean* and instead review the juror-bias issue pursuant to Minn. R. Crim. 31.02. That rule provides that a "[p]lain error affecting a substantial right can be considered by the court ... on appeal even if it was not brought to the trial court's attention." Minn. R. Crim. P. 31.02. Collins contends that the issue of Juror C's bias is properly raised on appeal under rule 31.02 because the district court's failure to strike the juror was plain error. The language of rule 31.02, however, is permissive—not mandatory. The rule provides that an appellate court "can" consider a question of plain error, not that it "must." *See generally The American Heritage Dictionary of the English Language* 269, 1162 (5th Ed. 2011) (defining "can" as a word "[u]sed to indicate possibility or probability" and "must" as a word "[u]sed to indicate inevitability or certainty"). And the supreme court decided *Stufflebean* after the promulgation of the rule 31.02 and still required the appellant to challenge the juror for cause to preserve the issue on appeal. *See generally In re Proposed Rules of Criminal Procedure*, No. 45517 (Minn. Feb. 26, 1975) (order adopting the Minnesota Rules of Criminal Procedure). Therefore, we decline to apply the plain-error standard of review and instead apply the standard set forth in *Stufflebean*, which requires Collins to show that he challenged the juror for cause at the district court level. *See State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) (noting that we are "bound by supreme court precedent"). Because Collins failed to bring a for-cause challenge to Juror C in district court, the question of whether the district court erred by failing to strike Juror C sua sponte is not properly before us.[2]

II. The district court did not abuse its discretion when it limited cross-examination of the arresting officers.

***4** Collins next argues that the district court abused its discretion when it limited cross-examination of the arresting officers regarding an alleged unrecorded conversation because the excluded testimony had the potential to show that the arresting officers wanted to recruit Collins as an informant and were biased against him. The state argues that Collins was afforded an adequate opportunity to question the officers about bias, and therefore the district court did not abuse its discretion in limiting the testimony. We agree with the state.

Under the Confrontation Clause, the accused has a right to confront witnesses. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6. "The essence of confrontation is the opportunity to cross-examine opposing witnesses." *State v. Greer*, 635 N.W.2d 82, 89 (Minn. 2001); *see also* *State v. Brown*, 739 N.W.2d 716, 720 (Minn. 2007) ("[T]he defendant's right to cross-examine witnesses for bias is secured by the Sixth Amendment."). District courts, however, have broad discretion to control the scope of cross-examination. *Greer*, 635 N.W.2d at 89.

In terms of witness bias, "the Confrontation Clause contemplates a cross-examination of the witness in which the

defendant has the opportunity to reveal a prototypical form of bias on the part of the witness." *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn. 1995). To establish a violation of the Confrontation Clause, a defendant must show "that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Id.* (quotation omitted). "Bias is a catchall term describing attitudes, feelings, or emotions of a witness that might affect [the witness's] testimony, leading [the witness] to be more or less favorable to the position of a party for reasons other than the merits." *Id.* (quotation omitted). Thus, not everything a witness testifies to will show bias, and evidence that is "only marginally useful" for that purpose may be excluded. *Id.* Our examination of whether the district court abused its discretion in restricting a defendant's attempted cross-examination to show bias "turns on whether the jury has sufficient other information to make a discriminating appraisal of the witness's bias or motive to fabricate." *Id.* at 641 (quotation omitted).

We conclude that the district court did not abuse its discretion by excluding the attempted cross-examination because the jury had sufficient other information by which to make an appraisal of any bias on the part of the officers. *Lanz-Terry*, 535 N.W.2d at 641. At trial, the jury watched portions of the second officer's bodycam video in which the officer revealed that he knew where Collins kept his pistol before the other officer searched the car. Similarly, each of the officers testified that they knew Collins from a prior investigation of his brother and that they knew Collins had a pistol. Moreover, Collins himself testified, over the state's objection, that the officers tried to recruit him to be an informant in 2017. He described how the officers asked about his brother's involvement with drugs and if he knew of others who sold drugs. Collins also testified that after the interaction in 2017, the officers continued to stop him. And defense counsel played the recording of the police-station interview to the jury where Collins asked the officer if they were talking about the other investigation, and the officer told Collins that they would talk about that later. Finally, while the district court sustained the state's objection to certain questions regarding the alleged conversation, both officers did answer some questions about the issue on cross-examination before an objection was made by the state on relevance grounds. Accordingly, there was sufficient information by which the jury could evaluate any officer's bias or motive to fabricate without the excluded cross-examination. *Id.*

***5** Moreover, Collins focuses his argument on the motive *for stopping and arresting* him as a basis for showing officer bias. Even though extrinsic evidence may be used to show bias, "courts may exclude evidence that is only marginally useful for this purpose." *State v. Larson*, 787 N.W.2d 592, 598 (Minn. 2010) (quotation omitted). It is unclear to us how additional evidence related to the motive for the stop and arrest would be helpful in showing officer bias on testimony regarding the elements of the crime of carrying a pistol without a license, particularly given that Collins himself admitted that the pistol belonged to him and that he did not have a valid permit. The excluded testimony in this case is only "marginally useful" to show officer bias. *Id.*

In sum, the jury had sufficient information to appraise the officers' bias or motive to fabricate given the evidence presented at trial. Therefore, the district court did not abuse its discretion by limiting the scope of the cross-examination.

III. There is sufficient corroborating evidence to support Collins's admission.

Collins next argues that the state failed to prove beyond a reasonable doubt that he did not have a permit and therefore failed to prove an element of the offense—that he did not possess a permit to carry the pistol. The state argues that Collins's admission that he did not have a valid permit is direct evidence of his guilt and that one of the arresting officers corroborated Collins's admission by confirming that he was not issued a new permit.

We analyze a claim of insufficient evidence by determining whether the evidence, when considered in the light most favorable to the conviction, could reasonably support the verdict with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). In doing so, we assume that the jury believed the state's witnesses and evidence and disbelieved contrary evidence. *State v. Robinson*, 539 N.W.2d 231, 238 (Minn. 1995).

A defendant's confession is direct evidence of guilt. *State v. McClain*, 292 N.W. 753, 755 (1940). However, despite our deference to the jury on matters of credibility, uncorroborated confessions of guilt are not sufficient to support a conviction under Minnesota law. *See* Minn. Stat. § 634.03 (2016) ("A confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed[.]"). Section 634.03 has a dual function:

"it discourages coercively acquired confessions and requires that admissions and confessions be reliable." *State v. Heiges*, 806 N.W.2d 1, 10 (Minn. 2011). But section 634.04 does not require that each element of the offense charged be individually corroborated. *Id.* at 13; *see also* *In re Welfare of M.D.S.*, 345 N.W.2d 723, 735 (Minn. 1984) (stating that "not all or any of the elements had to be individually corroborated" to sufficiently corroborate a defendant's confession). Instead, it "only requires independent evidence of attending facts or circumstances from which the jury may infer the trustworthiness of the confession." *Heiges*, 806 N.W.2d at 13 (quotation omitted). The statement at issue here relates to only one element of the offense—that Collins did not possess a permit to carry the pistol.

The evidence in this case establishes that, during the traffic stop, Collins admitted that he did not have a permit to carry the pistol. Then, during the interview at the precinct, Collins told the officer that he had a permit to carry the pistol in the past but that it was no longer valid.

To corroborate Collins's confession, the state presented an officer's testimony that Collins admitted the pistol was his and that he did not have a valid permit to carry the pistol. The same officer also testified that Collins did not present him with a valid permit. The prosecutor then asked the officer, "And according to the records, did you have access to—he was not issued a permit, a new permit; is that correct?" The officer replied, "Correct."

***6** Collins argues that because the question regarding the officer's record search was compound and confusing, the state failed to corroborate Collins's confession. We are not persuaded. It is clear that the prosecutor was asking whether the officer found a valid permit in his record search. While we agree the better practice would be to support the confession by other evidence such as the records themselves, the corroboration need only provide the jury with independent evidence to "infer the trustworthiness of the confession." *Heiges*, 806 N.W.2d at 13 (quotation omitted). We conclude that the state presented sufficient evidence to corroborate the attendant facts and circumstances of Collins's confession.

IV. Pro Se Brief

Collins also filed a supplemental pro se brief. In his brief, Collins describes a number of encounters with the arresting officers and the circumstances surrounding his arrest but does not articulate any legal arguments. Nor does he cite to legal authority. To the extent we are able to discern any legal arguments, the arguments that he raises are similar to those raised in his primary brief. Because Collins's supplemental pro se brief contains no argument or citation to legal authority, we deem the issues raised waived and do not address them except to the extent that we have already addressed similar issues in the preceding sections of this opinion. *See* *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (noting that allegations of error without "argument or citation to legal authority in support of the allegations" are deemed waived).

Affirmed.

All Citations

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Footnotes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

1 We note that the supreme court has clarified that an appellant is not required to demonstrate that a juror's bias resulted in actual prejudice. *See* *State v. Fraga*, 864 N.W.2d 615, 625-26 (Minn. 2015). Rather, the presence of a biased juror is a structural error that requires a new trial, without any inquiry into the consequences of the biased juror's participation. *Id.*

2 Moreover, even if we were to apply the plain-error test, Collins would be unsuccessful. The plain-error test requires a defendant to establish (1) an error; (2) that is plain; and (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain "when it contravenes a rule,

case law, or a standard of conduct." *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011). The error here was not plain because "[n]either the caselaw nor the rules of criminal procedure impose on the district court a duty to strike prospective jurors for cause sua sponte." *State v. Gillespie*, 710 N.W.2d 289, 296 (Minn. App. 2006), *review denied* (Minn. May 16, 2006).

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