STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF KORD KOSTICH, by TERESA HERRON, Personal Representative, Plaintiff-Appellant/Cross-Appellee, v MONROE MOTORSPORTS, INC., Defendant-Appellee/Cross-Appellant.	UNPUBLISHED October 14, 2021 No. 353446 Wayne Circuit Court LC No. 17-015068-NO
ESTATE OF KORD KOSTICH, by TERESA HERRON, Personal Representative, Plaintiff-Appellee, v MONROE MOTORSPORTS, INC., Defendant-Appellant.	No. 354158 Wayne Circuit Court LC No. 17-015068-NO

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

PER CURIAM.

These consolidated appeals arise from the death of Kord Kostich, who was killed in a traffic accident while driving a three-wheeled Polaris Slingshot motorcycle. Plaintiff, Teresa Herron, Kostich's wife and personal representative of Kostich's estate, brought suit against defendant for negligence. A jury trial was conducted, which resulted in a judgment of no cause of action.

In Docket No. 353446, plaintiff appeals as of right and argues that the trial court erred by discharging the deadlocked jury and abused its discretion by allowing defendant's expert witness to offer testimony concerning the Slingshot's traction control. Defendant cross-appeals and argues that the trial court erred by declining to admit a statute into evidence and by striking defendant's

notice of nonparty fault. In Docket No. 354158, defendant appeals by leave granted[1] the trial court's order denying defendant's postjudgment motion for case-evaluation sanctions. We affirm in Docket No. 353446, and reverse and remand in Docket No. 354158.

I. PROCEDURAL HISTORY

Kostich purchased a new Polaris Slingshot in February 2015. The Slingshot is a hybrid vehicle that is technically classified as an "auto-cycle," which is a subclass of a motorcycle.[2] Despite this classification, a driver need not have a motorcycle endorsement to operate it. The vehicle uses an automobile engine but has three wheels, with two wheels in the front and one wheel in the rear. The Slingshot also has two side-by-side seats, seatbelts, and a steering wheel.

Kostich and Herron lived in Livonia and took the Slingshot to defendant's business in Monroe for maintenance in July 2016. In addition to requesting an oil change, Herron testified that they informed defendant that they were planning a trip with the Slingshot to Chicago and wanted to make sure it was prepared for the long trip. On August 13, 2016, Kostich and Herron picked up the Slingshot. When Herron asked about the condition of the Slingshot for their Chicago trip, the employee told her that it was "like perfect condition, like it was in new condition," and that she did not need to worry about their trip. For their return drive back home, Kostich drove the Slingshot and Herron drove the truck they had driven to Monroe. As Kostich drove north on Farmington Road in Livonia and approached Five Mile Road, it started to rain heavily. Once past Five Mile Road, Kostich lost control of the Slingshot, which skidded or slid to the left into oncoming traffic and was struck by a vehicle. Kostich was killed in the accident.

Plaintiff filed suit against defendant, alleging negligence. Specifically, plaintiff alleged that defendant should have recognized that the tire tread depth on the rear tire was less than four millimeters, which was deemed unsafe by Polaris, the Slingshot's manufacturer. Plaintiff's theory was that the unsafe tire caused the vehicle to hydroplane on the wet road, resulting in the fatal collision.

In support of plaintiff's theory, plaintiff noted that the Polaris service manual, which defendant had and should have followed, provided that the rear tire needed to be replaced once its tread depth reached four millimeters. Plaintiff's expert, Don Phillips, testified that he measured the tread depths on the rear tire to be anywhere between 4/32 inches and 5/32 inches. Phillips converted his measurements and the four-millimeter standard to decimal form. To the nearest

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[1] *Estate of Kostich v Monroe Motorsports, Inc*, unpublished order of the Court of Appeals, entered September 3, 2020 (Docket No. 354158). This order also consolidated the two appeals.

[2] MCL 257.25a defines "autocycle" as "a motorcycle that is equipped with safety belts, rollbar or roll hoops, handlebars or a steering wheel, and equipment otherwise required on a motorcycle, has not more than 3 wheels in contact with the roadway at any 1 time, and is not equipped with a straddle seat."

thousandths of an inch, 5/32 of an inch equates to 0.156 inches, and four millimeters equates to 0.157 inches.

Defendant's primary theory was that it was not liable because it was not the proximate cause of the accident. Instead, defendant asserted that Kostich caused the accident by driving too fast in the rain with the traction control disabled. Defendant's expert, Steven Fenton, testified that police photographs taken after the accident showed that the traction-control light was illuminated on the Slingshot. Fenton opined that the only way for that light to be illuminated was for the driver to press a button, thereby disabling the traction control system.[3] Fenton also testified that there was not enough water on the road to cause hydroplaning and that the tread depth was not a causal factor in the accident.

After deliberating, the jury returned a verdict that defendant was negligent, but that the negligence was not the proximate cause of Kostich's death.[4] In open court, the jury foreman read the verdict: "Question No. 1, was the Defendant negligent? The Jury thinks, yes, the Defendant was negligent." The foreman continued: "Question No. 2, was the negligence of the Defendant a proximate cause of Plaintiff's death? The Jury voted no."

After the foreman announced the jury's verdict, plaintiff requested that the trial court poll the jury and some confusion ensued:

The Court: Juror No. 1, was that and is that your verdict?

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[3] Fenton testified that he tested another Slingshot to see if any of the vehicle's systems, if damaged in a crash, would cause the traction control light to illuminate. Fenton was not able to illuminate the light apart from pushing the traction control button.

[4] The verdict form, later signed and dated by the jury foreman, read:

> **QUESTION NO. 1: Was the defendant negligent?**
>
> Answer: Yes [handwritten] (yes or no)
>
> If your answer is "no," do not answer any further questions.
>
> If your answer is "yes," go on to Question No. 2.
>
> **QUESTION NO. 2: Was the negligence of Defendant a proximate cause of plaintiff's death?**
>
> Answer: No [handwritten] (yes or no)
>
> If your answer is "no," do not answer any further questions.
>
> If your answer is "yes," go on to Question No. 3.

The jury answered no further questions on the verdict form.

Juror No. 1: That is our verdict.

The Court: Okay. Your personal verdict?

Juror No. 1: Oh, that was not mine.

The Court: Okay. Jury No. 2, was that and is that your verdict? Yes?

Juror No. 2: What do you mean?

The Court: Was that verdict—

Juror No. 2: Yes.

The Court: That is your verdict?

Juror No. 1: You voted no or yes?

Juror No. 2: No.

The Court: Okay. So you disagree with that verdict, that was your vote? 'Cause I know I sent you back, I said 5 of the 8 of you agree.

Juror No. 2: Correct.

The Court: So this is where we poll to make sure that actually 5 out of the 8 of you agree.

Juror No. 2: Okay, well yes.

The Court: Okay. So the verdict that was—

Juror No. 2: I voted yes.

[Plaintiff's Counsel]: He voted yes.

The Court: All right, we're going to start over, okay.

Juror No. 2: No was not my vote, my vote was yes.

Because of the confusion, the trial court began the polling anew:

The Court: The verdict that was just read Juror No. 1, was that and is that your verdict?

Juror No. 1: That is not my verdict.

The Court: Okay. Juror No. 2, was that and is that your verdict?

Juror No. 2: Yes.

The Court: Okay. Juror No. 3, was that and is that your verdict?

Juror No. 3: Yes.

The Court: Juror No. 4, was that and is that your verdict?

Juror No. 4: No.

The Court: Okay. Juror No. 5, was that and is that your verdict?

Juror No. 5: No.

The Court: Juror No. 6, was that and is that your verdict?

Juror No. 6: No.

The Court: Juror No. 7, was that and is that your verdict?

Juror No. 7: Yes.

The Court: And Juror No. 8, was that and is that your verdict?

Juror No. 8: Yes.

The Court: Okay. All right, thank you very much. I polled the Jury[;] I've confirmed the verdict.

Neither party objected. And the trial court subsequently entered a "judgment [of] no cause for [sic] action in favor of defendant," approved as to form by both counsel.

Defendant thereafter moved for case-evaluation sanctions because plaintiff earlier rejected a $1.5 million case-evaluation award and did not improve upon her position at trial. The trial court denied the motion without holding a hearing. These appeals followed.

II. DOCKET NO. 353446

Plaintiff first argues that a new trial is required because the transcript shows that an insufficient number of jurors agreed with the verdict. We disagree.

Plaintiff did not object at trial when the jury was polled or otherwise raise this issue in the trial court. Michigan follows the "raise or waive rule." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Although appellate courts have the authority to nonetheless review an unpreserved issue, generally the "failure to timely raise an issue waives review of that issue on appeal." *Id*. (quotation marks and citation omitted). Indeed, to the extent that there was any uncertainty about the jury's verdict or the effect of the polling on the validity of the jury's verdict, plaintiff should have raised the issue at that time, where it could have been promptly addressed and any needed clarification obtained, and appropriate remedial action could have been taken if

necessary. See *Loutts v Loutts*, 298 Mich App 21, 36; 826 NW2d 152 (2012) ("It is unfair to harbor error and use it as an appellate parachute."). Because plaintiff failed to object or otherwise raise this issue in the trial court, appellate review is waived and we decline to address the issue further.[5]

Plaintiff next argues that the trial court erred by denying her motion in limine to preclude defendant's expert, Fenton, from testifying regarding the effect of the presence or absence of traction control on the accident. We disagree.

This Court reviews a trial court's decision on a motion in limine for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 431; 697 NW2d 851 (2005). Similarly, a trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. See *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A trial court abuses its discretion when it selects an outcome falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Before trial, plaintiff moved to preclude Fenton from testifying that the Slingshot's lack of traction control caused the accident. Plaintiff asserted that Fenton was not qualified to offer opinions on vehicle handling with and without traction control, and that the basis for his opinion was a hearsay conversation he had with a coworker. The trial court denied the motion in part because it determined that Fenton had relied on "a lot more" than just the conversation he had with a coworker in forming his opinion. But the court precluded Fenton from referring to the coworker's statement at trial.[6]

MRE 702, which governs the admissibly of expert testimony, provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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[5] Even if plaintiff had preserved this issue, the surrounding circumstances indicate that there is an error in the transcript regarding the vote of Juror No. 6. The trial court informed the jury that it needed to have five of the eight jurors agree for there to be a verdict, instructing them that "[w]hen at least five of you agree upon a verdict that is your verdict[;] it will be received as your verdict." The jury's foreperson told the trial court that a verdict was reached. "Jurors are presumed to follow their instructions . . . ." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013) (quotation marks and citation omitted). Further, after the jury was polled, the verdict form reflects that the jury determined that defendant's negligence was not a proximate cause of plaintiff's death and the trial court "confirmed the verdict" after polling the jurors.

[6] Plaintiff does not suggest that Fenton violated that limitation at trial.

"The admission of expert testimony requires that (1) the witness be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man." *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007). Additionally, the testimony must be reliable, "including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004).

Plaintiff first contends that Fenton was not qualified to testify regarding traction control and its effects on vehicle handling. "Generally, the expert may be qualified by virtue of 'knowledge, skill, experience, training, or education.' " *Craig*, 471 Mich at 78, quoting MRE 702. Fenton is a distinguished, accredited accident reconstructionist with years of experience. He also is a board-certified forensic engineer. As an accident reconstructionist, Fenton was amply qualified to testify regarding the effect of no traction control on a vehicle. Plaintiff suggests that Fenton needed specific experience or knowledge pertaining to how Kostich's *particular Slingshot* would have acted without traction control being engaged, but we are not persuaded.

Traction control, or the lack thereof, is not a concept that is unique to the Polaris Slingshot. Indeed, traction control in vehicles is so commonplace in recent years, it is questionable that any expert testimony is needed to explain how that feature generally works. Regardless, the concept or principle of traction control works the same regardless of the type of vehicle: traction control attempts to prevent tires from losing traction, i.e., freely spinning. Indeed, there were no shortage of lay witnesses at trial who testified regarding how the absence of traction control on a vehicle allows tires to spin or slip. Phillips, plaintiff's own expert, indirectly recognized this when he stated that if there is no traction control and there is a slippery surface, the rear tire may just "sit there" and "spin" without the vehicle moving forward.[7] Although plaintiff did not expressly testify about her understanding of traction control, she implicitly acknowledged what it was and thought Kostich would not have disengaged it for safety reasons. In short, there is nothing distinct about how traction control operated on the Slingshot, requiring more specialized knowledge or experience.

Plaintiff also contends that Fenton's opinion was inadmissible because it was solely based on hearsay. We disagree. During Fenton's deposition, the follow exchange occurred:

> *Q.* So your opinion is he accelerated, lost control of the back end because of no traction control, and then ended up going across the lanes; is that right?
>
> *A.* Yes, because he was going too fast. So too fast with traction control off and likely accelerating because he had just passed several people.

[7] Phillips also gave an example of how important it is to have traction on rear tires. He used a four-wheel automobile as an example and said that if you are only going to place two new tires on a car, they should be placed on the rear, leaving the "most worn tires on the front." This comment was not directly tied to "traction control," but it demonstrates that traction concepts apply to both typical automobiles and auto-cycles.

Q. What is the rate of acceleration?

A. We don't know the exact rate. I mean, all it takes is—

Q. Are you saying he punched it?

A. I don't think it's going to take a punch to break traction. But I—one of the engineers in my office did do some testing of a Slingshot, and it's easy to get that rear wheel to spin out.

Q. Where is that in here in your binder?

A. I don't have any of that testing.

* * *

Q. Did he do the testing at your instruction?

A. No. This was way before we had this case.

Q. Okay.

A. I think. I mean, we didn't do it under this case. He did a bunch of testing of different motor—different types of vehicles. So I said, "Hey, do you have any testing of this Slingshot that I could use?" And he said he didn't have anything from the testing but that he said, "If you want to get that rear wheel to spin out, it's so easy."

The trial court rejected plaintiff's argument that Fenton's opinion was solely based on hearsay because it was apparent that Fenton relied on more than just the coworker's statement in formulating his opinion. The court did not err. In his deposition, Fenton testified that the rear tire was the "drive tire," meaning the tire that the engine "powers" or directly "drives." This was important to Fenton's analysis because, consistent with Phillips's opinion, if traction control were disabled and the conditions were just right, pressing the gas pedal to accelerate could cause the rear tire to "slip." No specific testing was required to arrive at this opinion. Just common sense and basic, accepted scientific principles support this theory, which is sufficient. See MRE 702 (stating that expert testimony is permissible if "the testimony is the product of reliable principles and methods"). Because the gas pedal only directly powers the rear tire, if traction control were disabled, then that rear tire could conceivably "slip" on wet or slick surfaces when attempting to accelerate by pressing the gas pedal. Indeed, evidence was presented that the Slingshot owner's manual specifically warns against turning the traction control off, due to the increased risk of harm. In fact, even irrespective of traction control, the owner's manual warns:

> Accelerating abruptly could cause loss of control on low traction surfaces. Loss of control could result in serious injury or death. Always accelerate gradually, especially on wet, slippery or other low traction surfaces.

Moreover, the overall premise of plaintiff's position is wanting. Plaintiff suggests that Fenton relied solely on the observations of his coworker in arriving at his conclusion. But the record demonstrates that Fenton relied on much more, including photographs that he took, scans of Kostich's Slingshot, scans of the exemplar Slingshot that Fenton had, scans from the accident scene, and various literature. Consequently, the trial court did not abuse its discretion when it denied plaintiff's motion in limine.

Because we find no error requiring reversal in plaintiff's appeal, defendant's issues on cross-appeal, which would only be relevant in the event of a new trial, are moot. Accordingly, we decline to address them. See *Ryan v Ryan*, 260 Mich App 315, 330; 677 NW2d 899 (2004) ("Generally, this Court need not reach moot issues or declare legal principles that have no practical effect on the case . . . .").

III. DOCKET NO. 354158

Defendant argues that the trial court erred when it declined to award case-evaluation sanctions. We agree.

" 'A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo.' " *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009), quoting *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

MCR 2.403(O) provides, in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party *must* pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
>
> (2) For purpose of this rule "verdict" includes,
>
> (a) a jury verdict[.]
>
> * * *
>
> (3) [T]he verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. [Emphasis added.]

It is undisputed that plaintiff rejected the unanimous case-evaluation award of $1.5 million in her favor. It also is undisputed that the jury returned a verdict of no cause of action by finding that defendant's negligence was not the proximate cause of Kostich's injuries or death. Thus, because plaintiff did not improve upon her position after rejecting the case-evaluation award, the imposition of case-evaluation sanctions is mandatory. *Tevis v Amex Assurance Co*, 283 Mich App 76, 86; 770 NW2d 16 (2009). There are three exceptions to this mandatory rule.

> First, the trial court may decline to award costs in a case involving equitable relief when the verdict is more favorable to the rejecting party than the evaluation award. The second exception applies only to dramshop actions. Third, the trial court may, in the interest of justice, refuse to award costs when the judgment is entered as a result of a ruling on a motion after the party rejected the [case] evaluation under MCR 2.403(O)(2)(c). [*Id*. at 88 (quotation marks and citations omitted; alteration in original).]

None of the exceptions apply here because this case did not involve equitable relief, was not a dramshop action, and the judgment was the result of a jury verdict, not a motion. Therefore, the trial court was without authority or discretion to decline to award case-evaluation sanctions. Plaintiff's argument on appeal tacitly acknowledges this by only suggesting that case-evaluation sanctions are not warranted because a new trial is required as a result of the issues she raises in Docket No. 353446. However, as we have explained, reversal is not warranted on the basis of those issues. Accordingly, the trial court erred as a matter of law by declining to award case-evaluation sanctions. Therefore, we reverse the order denying defendant's motion for case-evaluation sanctions and remand for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michelle M. Rick
/s/ Amy Ronayne Krause
/s/ Anica Letica