

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL RAY HEFLIN, Personal Representative
of the ESTATE OF KATHLEEN HEFLIN,
Deceased.

UNPUBLISHED

Plaintiff-Appellant,

v

No. 177570
LC No. 89-003367-NO

BOARD OF COUNTY ROAD COMMISSONERS
OF THE COUNTY OF VAN BUREN,

Defendant-Appellee,

and

DENISE LOUISE GENEREAUX and
JERRELL W. GOODSON,

Defendants.

Before: White, P.J. and Sawyer and R.M. Pajtas,* JJ.

White, J. (concurring in part and dissenting in part).

I concur in the majority opinion except regarding McCulfor's testimony concerning Genereaux's statements. I conclude Genereaux's statements were not admissible under MRE 804(b)(3) as statements against interest by an unavailable witness,¹ and were hearsay.

MRE 804(b)(3) allows the admission of :

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

* Circuit judge, sitting on the Court of Appeals by assignment.

When viewed in the context of her explanation to McCulfor that she swerved to the left and then to the right to avoid a deer, Genereaux's statements that she lost control of her vehicle while it was on the gravel surface of the road and before her tires hit the grassy area were not statements against interest. Genereaux's statements to McCulfor were as exculpatory as inculpatory; they attributed the loss of control of the vehicle to the sudden appearance of the deer. The statement regarding the loss of control commencing while on the roadway is consistent with attributing responsibility to the appearance of the deer, rather than Genereaux's driving, and can be seen as a denial of any implied allegation by McCulfor that Genereaux regained control of the vehicle after encountering the deer and then lost it again due to some inadequacy in her driving.

In context, at the time of their making, the statements, as distinguished from their inverse, to which Genereaux testified at her deposition,² were not so far contrary to Genereaux's interest, and did not so far tend to subject her to civil or criminal liability, that a reasonable person in her position would only have made them if believed to be true.³

Given the jury's verdict and the record regarding its deliberations, I cannot conclude that the admission of McCulfor's testimony was harmless. I would reverse and grant a new trial.

/s/ Helene N. White

¹ At trial, plaintiff's counsel conceded Genereaux's unavailability, stating:

I mean, I think she is unavailable. She's not in the State of Michigan. She's in Texas, right? I mean, our information is that she's in the State of Texas, so she's really unavailable as the term is used in 804.

Counsel went on to argue:

Basically, Judge, if I could say what's going on here, her deposition was taken and someone from the Van Buren County Road Commission, an attorney on their behalf, was there to cross-examine her and do a thorough, legal questioning at which time a Court Reporter took down the exact question asked and the answer given. Now, what Mr. Weibel's trying to do, with all due respect, is totally garble the transmission through a police officer and that's what -- that's exactly what hearsay is designed to avoid, garbling the facts through an intermediary. He has the deposition that she gave. They had a chance to cross-examine her and find out what her true statements were and what they're trying to do is garble that through the police officer and I submit that for each question he's offering, there he's got to show that answer was against her interest in order to satisfy 804(b)(3).

I question whether Genereaux was, indeed, unavailable under MRE 803(a)(5), which defines unavailability as including when the declarant [Generaux]

is absent from the hearing and the proponent of the statement [defendant] has been unable to procure the declarant's attendance . . . or testimony [] by process or other reasonable means. . . . [emphasis added]

Nevertheless, plaintiff waived this argument in the trial court and on appeal and relies exclusively on the argument that Generaux's statements were not statements against interest within the meaning of the rule.

² Q. Up until the time you struck the first tree, was it your impression that the vehicle was out of control?

A. No.

³ Defendant did not argue that the statements were admissible as prior inconsistent statements, and Generaux was not afforded an opportunity to explain or deny the statements at her deposition. MRE 613.