STATE OF MICHIGAN

COURT OF APPEALS

DARRYL BINDER, JOSEPH BOZICH, FRED K. EMKE, EDWARD FERGUSON, JOHN FOLEY, EDMUND N. FORYS, ROBERT GALLMORE, ROBERT C. MCCARTHY, ROBERT. R. PEPPER, JOHN. L. REIF, JR., ROBERT D. RIOPELE, JAMES SIEBERT, DON E. SIMMONS, THOMAS E. STOLL, and CLYDE E. TOME,

Plaintiffs-Appellants,

v

CITY OF DETROIT, MAYOR DENNIS ARCHER, and DETROIT FIRE COMMISSIONER,

Defendants-Appellees.

UNPUBLISHED
October 27, 2000

No. 210820
Wayne Circuit Court
LC No. 95-528008 CA

Before: Whitbeck, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order entered on a jury verdict finding no cause of action in favor of defendants in this reverse discrimination lawsuit. We affirm.

Plaintiffs first argue that the trial court erred in ordering that the issues of liability and damages be bifurcated at trial. Initially, we note that not only did plaintiffs not object during trial to the trial court's ruling bifurcating the issues of liability and damages, counsel for both parties expressly agreed on the record to the trial court's decision to bifurcate the trial. It is apparent from the record that this agreement followed in-chamber discussions between the trial court and counsel on the subject. Plaintiffs may not harbor error as an appellate parachute by objecting to something on appeal that they or their counsel deemed proper at trial. *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Therefore, because this issue is not preserved for appellate review, we will only review the claim to avoid manifest injustice.

Upon review of the record, we do not find that bifurcation of the issues of liability and damages was improper. The trial court reasonably concluded that the trial would proceed in a more orderly and

efficient manner if the issue of liability was addressed first, without any reference to the individual damages sustained by plaintiffs. In addition, given the large number of testifying witnesses, bifurcating the issues would allow the jury to focus solely on one issue at a time and diminish the potential for confusion of the issues for the litigants and jurors. Finally, in the interest of judicial economy and resources, bifurcation prevented the trial court and the parties from unnecessarily expending time and resources on the issue of damages if the jury found no liability.

However, even if bifurcation was not appropriate in this case, we fail to see how plaintiffs were prejudiced by the trial court's ruling. The showing of damages is not an element of a race discrimination claim, thus, the issue of whether plaintiffs sustained damages, and how much, was only relevant if discrimination was found. Moreover, because the same jury that decided liability would have decided damages, needless repetition of testimony and evidence would have been avoided. Finally, we are not persuaded by plaintiffs' argument that the result of the proceeding would have been different had the jury heard evidence on the issue of damages simultaneously with the evidence on liability. The jury reviewed all the evidence and testimony presented and reasonably concluded that defendants did not engage in reverse race discrimination by appointing Archie Warde Fire Chief. Accordingly, we find no manifest injustice to defendant by the trial court's order of bifurcation and we decline to further review this unpreserved issue.

Plaintiffs next contend that the trial court committed prejudicial error in its remarks to the jury regarding bifurcation and the expected length of the trial. We disagree.

Again, plaintiffs failed to object to the trial court's allegedly improper remarks. "As a general rule, issues not raised before the trial court are not properly preserved for appellate review." *Phinney v Verbrugge*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Further, this Court only reverses errors that are prejudicial. MCR 2.613(A). "[A] trial court has wide discretion and power in matters of trial conduct" and a verdict will not be reversed unless the trial court's conduct "pierces the veil of judicial impartiality." *Lansing v Hartuff*, 213 Mich App 338, 349; 539 NW2d 781 (1995), quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). A trial court pierces the veil of judicial impartiality if its conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Lansins, supra* at 350.

After a thorough review of the record and the challenged conduct, we conclude that the trial court's remarks to the jury pertaining to bifurcation and the length of the trial were not improper and did not unduly influence the jury. To the contrary, we find that the trial court went to great efforts *not* to discuss the bifurcation issue at length with the jury so as not to influence their decision. The trial court simply advised the jury of the procedural manner in which the trial would proceed in view of the large number of witnesses and anticipated length of the trial. The trial court accurately noted that the jury may be required to resolve two different issues, liability and damages, in two different phases. We find nothing in the record to support plaintiffs' contention that the trial court improperly suggested to the jury that if they wanted to complete the trial quicker, and avoid extended jury duty, they should find no liability by defendant so that a damage phase of the trial would be unnecessary. Accordingly, we find that the remarks were not prejudicial and denying plaintiff's motion is consistent with substantial justice. MCR 2.613(A).

Lastly, plaintiffs argue that the trial court erred by denying their motion for judgment notwithstanding the verdict (JNOV) or new trial with respect to the judgment in favor of defendants Watkins and the City of Detroit.[1] We disagree.

This Court reviews a trial court's grant or denial of a motion for JNOV de novo. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). In deciding this motion, a court must view the evidence, as well as any legitimate inferences arising therefrom, in the light most favorable to the nonmoving party to decide if the evidence failed to establish a claim as a matter of law. *Id.*; *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999). If the jurors could have honestly reached different conclusions from the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

We review a trial court's grant or denial of a motion for new trial for an abuse of discretion. *Id.* at 254. In deciding a motion for new trial, this Court determines whether the jury's verdict was against the great weight of the evidence. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). This Court gives substantial deference to a trial court's determination that the verdict was not against the great weight of the evidence because of the trial court's unique ability to judge the weight and credibility of the testimony. *Id.* This Court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there was competent evidence to support it. *Id.*

Although plaintiffs' complaint alleged reverse race discrimination under the Equal Protection Clauses of the United States and Michigan Constitutions, as well as under federal and Michigan statutory law, because plaintiffs only argue on appeal that the verdict was against the great weight of the evidence in the context of the Elliot Larsen Civil Rights Act (CRA), our review of this issue is limited to that claim alone.

In order to prove a claim of reverse race discrimination under the CRA, MCL 37.2202(1); MSA 3.548(202)(1), a plaintiff must prove (1) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against whites, (2) plaintiff applied and was qualified for the available promotion, (3) despite plaintiff's qualifications, he was not promoted, and (4) a non-white employee of similar qualifications was promoted. *Allen v Comprehensive Health Services,* 222 Mich App 426, 433; 564 NW2d 914 (1997), citing *Parker v Baltimore & O R Co,* 209 US App DC 215; 652 F2d 1012 (1981).[2] A plaintiff who presents evidence of the foregoing elements is entitled to a "presumption" of discriminatory intent and the employer must then rebut the presumption by offering a legitimate, non-discriminatory reason for the employment decision. *Allen, supra*.

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[1] Plaintiffs acknowledged that the evidence against defendant Mayor Dennis Archer was not overwhelming and they did not include him in their motion for JNOV or new trial.

[2] The reverse discrimination claim brought in *Allen* was actually a gender discrimination claim and the elements of the tests were modified to fit the case involving an alleged gender-based failure to promote. *Allen, supra* at 433, n 5.

After a thorough review of the record, we are not convinced that jurors could not honestly have reached different results from the evidence, or that the verdict of no cause of action was against the great weight of the evidence. First, a rational view of the evidence does not compel the conclusion that defendants were the unusual employer who discriminates against whites. While plaintiffs sought to establish this element through circumstantial evidence that race played a role in the appointment of prior fire chiefs, the undisputed evidence was that Commissioner Watkins and Mayor Archer were not the decision-makers for any fire chief appointments prior to Warde's appointment in 1994. Rather, former Fire Commissioner Melvin Jefferson and former Mayor Coleman Young were responsible for the appointments of the six previous fire chiefs. In addition, Watkins' testimony that his appointed deputy commissioner, Richard Stein, was white, and that he intended to replace the current fire chief, Curtis Edmonds, who was African-American, tends to undermine plaintiffs' argument that defendants discriminated against whites. Finally, not one plaintiff testified he ever heard Watkins make a derogatory remark about whites, and Archer testified that he was not even aware of Warde's race when he approved the appointment. Thus, reasonable jurors could have honestly concluded that plaintiffs failed to satisfy the first element of the claim.

Regarding the second element, whether plaintiffs applied and were qualified for the position, the undisputed evidence was that, despite Watkins' request for resumes from all members of the Board of Chiefs who wanted to be considered for the fire chief position, only one plaintiff, Robert McCarthy, submitted a resume. Resumes from Archie Warde and John Chakan were the only other resumes submitted to Watkins for consideration. Although plaintiffs maintained that the submission of resumes was a "sham" or "cover-up" because Watkins had already selected Warde when he requested resumes, defendants introduced evidence that Watkins' request for resumes was legitimate and reasonable. Watkins was a new fire commissioner, operating under a new administration, and he was entitled, and even encouraged, to make changes in the fire department that he believed would be beneficial to the department. Moreover, it was undisputed that there was no written policy or rule within the fire department, the union contract, or the city dharter prohibiting the solicitation of resumes or the implementation of a change in procedure when a new administration takes office. Finally, plaintiffs presented only mere speculation or suspicion and no evidence that Warde had already been selected at the time resumes were requested or that their submission of resumes would have been futile. Accordingly, the jury could reasonably have found that plaintiffs failed to establish the second element.

Regarding the third element, that plaintiffs were not promoted despite their qualifications, the only evidence plaintiffs presented on their qualifications was their own testimony that they served a substantial period as members of the Board of Chiefs and that this experience made each of them qualified for fire chief. In addition, rather than demonstrating their unique characteristics and experiences qualifying them for the position, plaintiffs instead relied on their seniority as an alternative qualification for the position and attacked Warde on the basis that he had not been a member of the Board of Chiefs nearly as long as each of them. However, the record is undisputed that seniority was not the basis on which the position of fire chief was filled. Finally, the record shows that despite the fact that the position of fire chief was primarily an administrative job, plaintiffs' testimony, individually and collectively, failed to recognize the importance of administrative work, often characterizing it as "paper

pushing. Given Watkins' testimony that administrative experience was extremely important, plaintiffs' testimony diminishing its importance arguably had some bearing on Watkins' appointment decision.

The last element is whether plaintiffs established that a non-white *of similar qualifications* was promoted. In this regard, the record is uncontroverted that Warde possessed all the qualifications necessary to be selected as fire chief. In particular, Watkins testified that Warde shared his firefighting philosophy which emphasized firefighter safety, Warde had substantial and meaningful administrative experience in the chief's office, and Warde submitted a resume setting forth his educational and training background and demonstrating his interest in the fire chief position. Although each plaintiff testified that he, too, was qualified for the position of fire chief, not one plaintiff testified that his firefighting philosophy was *more* compatible with Watkins' than Warde's, or that he was *more* qualified than Warde. In fact, those plaintiffs that were at all familiar with Warde's experience and background, testified that Warde had substantial years of experience in the fire cepartment, he was a good fire fighter, and he was qualified for the position of fire chief. As noted above, rather than presenting their own qualifications or disputing Warde's qualifications and experience, plaintiffs instead relied on their seniority as an alternative qualification for the position. However, seniority was not the basis on which the position of fire chief was filled. Finally, consistent with Watkins' testimony that the position of fire chief was primarily an administrative job, the evidence showed that Warde had substantial administrative experience during his tenure with the fire department that Watkins' viewed invaluable. The jury could reasonably have concluded from this evidence that Warde was more qualified for the position of fire chief than plaintiffs.

We find that the jury could have reasonably concluded from the evidence and all legitimate inferences arising therefrom, that defendants did not engage in reverse race discrimination under the CRA in appointing Archie Warde fire chief. Defendants presented evidence that the decision to appoint Archie Warde fire chief was based on a number of legitimate, non-discriminatory reasons, and that race played no role in the decision. The jury clearly found that the evidence and testimony weighed in favor of defendants. In situations where there is evidence in support of both parties' positions, and where reasonable minds may differ on the weight to be afforded the evidence and the credibility of the witnesses, neither the trial court nor this Court should substitute its judgment for that of the jury. *Ellsworth*, *supra* at 194. Because the jury's no cause of action verdict was supported by a rational interpretation of the evidence and the verdict was not against the great weight of the evidence, we hold that the trial court properly denied plaintiffs' motion for JNOV or new trial.

Affirmed.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Kurtis T. Wilder