STATE OF MICHIGAN

COURT OF APPEALS

JUDITH D. DADD,

Plaintiff-Appellee,

v

MOUNT HOPE CHURCH AND INTERNATIONAL OUTREACH MINISTRIES and DAVID R. WILLIAMS,

Defendants-Appellants.

UNPUBLISHED
April 9, 2009

No. 278861
Eaton Circuit Court
LC No. 05-000878-NO

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendants Mount Hope Church and International Outreach Ministries (Mount Hope) and David R. Williams (Williams) appeal as of right a judgment for plaintiff Judith D. Dadd in the amount of $317,255.68. This action arises out of an injury suffered by plaintiff during a religious gathering at Mount Hope and communications subsequently published by Williams. The judgment reflected a jury verdict awarding plaintiff $40,000 for her negligence claim, $23,750 for her claim of false light, $200,000 for her claim of libel and $50,000 for her claim of slander. The judgment also reflects an award of $3,505.68 in various taxes, costs and fees. We affirm in part, reverse in part and remand.

I. Basic Facts and Proceedings

In July 2002, plaintiff was a member of Mount Hope and Williams was Mount Hope's pastor. During religious gatherings at Mount Hope, Williams sometimes asks congregants "if they would like to give their lives to Jesus and they come down [to the altar]. You've seen it in the Billy Graham crusades . . . . That's an altar call." During altar calls, Williams and other assigned ministers of Mount Hope pray over the congregants who approach the altar. Sometimes, congregants who answer the altar call fall to the ground, a phenomenon referred to as "slain in the spirit." One witness explained the phenomenon as,

> "[b]asically as if you were being prayed over and, over time, or maybe even suddenly you feel weak. You feel you are no longer able to stand on your own power. It's as if the, the strength is draining out of you. And for different people it could happen rather quickly. For other people it may come gradually.

Williams testified that congregants do not regularly fall during an altar call, but plaintiff testified that she may have been "slain in the spirit" over 100 times. Sometimes plaintiff would fall to the ground and other times she would not fall.

Plaintiff introduced into evidence a recording of one of Williams' sermons in which, while discussing whether congregants should respond to an altar call, he stated that, "[o]thers are against it because they're afraid of getting hurt. That's why we train our ushers to catch people if this happens . . . ." Plaintiff also cites her testimony in which she was asked, "had you ever heard that the defendant, David Williams, told people not to be afraid to come up and be prayed over because there were ushers there to catch people," and she replied, "I heard it from the pulpit." Several witnesses corroborated plaintiff's testimony that ushers were regularly provided during altar calls to catch congregants that fell while being prayed over.

On July 18, 2002, plaintiff attended a leadership rally at Mount Hope. There were approximately 275 people at the rally. Ushers attending the rally did not wear identifying coats that they typically wear during Sunday services. At the rally, Williams began an altar call. He eventually called on members of the Women's Ministry, of which plaintiff was a member, to participate in the altar call. Plaintiff proceeded toward the altar, and while waiting, saw other congregants being prayed over falling and being caught by ushers. Williams admitted that, "more than one [person] went down." One witness testified that she was caught by an usher during the altar call. Another witness testified that "people were falling all over." Plaintiff testified that an usher summoned her to the altar and that she went to the altar to be prayed over. While being prayed over by an assistant minister, she was "slain in the spirit," fell backward and struck her head on the floor. Plaintiff sustained a head injury, the seriousness of which was in dispute.

Plaintiff went to see John Elieff, a Mount Hope minister, and Patrick Fox, Mount Hope's property manager, to discuss whether Mount Hope would pay plaintiff's medical bills relating to her fall. Plaintiff told them that she had mounting medical bills related to her fall. Plaintiff was informed that $5,000 may be payable through Mount Hope's insurance carrier, Cincinnati Insurance Company (Cincinnati). Plaintiff believed her medical bills would eventually exceed $5,000.

Plaintiff retained counsel and filed a complaint for negligence and gross negligence against defendants. The complaint alleged that plaintiff "had been called to the altar by Williams and prayed over on many occasions prior to July 18, 2002, and each time Plaintiff was overcome with the Spirit of the Lord, she was caught by Williams's designees and gently laid down upon the floor." Further, that on July 18, 2002, "[d]efendants did not employ the use of a catcher while praying over Plaintiff." She further alleged that she "was overcome with the Spirit of the Lord and collapsed backwards into a prone position," thereby suffering injuries. Plaintiff essentially alleged defendants were negligent in failing to provide an usher to catch plaintiff when being prayed over.

After plaintiff filed her complaint, "[o]ne of [her] friend[s] called . . . and told [her] that her sister-in-law had been at the leadership rally and that [Williams] was talking about [plaintiff] and saying some things that weren't very nice and she thought [plaintiff] should know." Plaintiff acquired an audiotape in which Williams spoke at a leadership rally in regard to plaintiff's claim. After summarizing the events surrounding plaintiff's fall and noting that plaintiff refused to fill

out insurance forms, Williams indicated that "it almost makes you want to think that this was a design. That this, this was a premeditated design – but I can't say for sure, and I don't know. . . ." Plaintiff testified that she felt hurt by Williams' comments.

On October 4, 2005, Williams wrote a letter and sent it to the members of the "120-prayer group." The 120-prayer group is a group of 50 Mount Hope members that pray daily for Williams. In the 120-prayer group letter Williams explained, "what I believe," and without mentioning plaintiff's name, (though he admitted at trial the 120-prayer group letter was about plaintiff) he indicated that the church had received warnings about plaintiff being "trouble," implied plaintiff was malingering, and that she was attempting to commit insurance fraud. Cynthia Woodard, a friend of plaintiff, received the 120-prayer group letter, although she claimed she was no longer a member of the 120-prayer group or even attending Mount Hope at the time. Woodard mailed the 120-prayer group letter to plaintiff.

On March 29, 2006, plaintiff filed an amended complaint that included claims for intentional infliction of emotional distress, false light, slander and libel. Essentially, plaintiff alleged that Williams' communications defamed her and caused her harm. Discovery commenced and defendants moved to separate for trial plaintiff's negligence count from the counts added in the amended complaint. The trial court took the matter under advisement pending discovery, but eventually denied the motion.

Before trial, plaintiff moved for summary disposition on plaintiff's claim of libel. Plaintiff argued that there was no dispute that Williams published the 120-prayer group letter. Further, plaintiff claimed that the 120-prayer group letter stated that she had committed insurance fraud, which tended to harm her reputation. Defendants responded alleging there remained questions of fact in regard to whether Williams disseminated the 120-prayer group letter, whether the letter was truthful, whether the 120-prayer group letter was subject to a qualified privilege, and that plaintiff had not shown malice. At a December 20, 2006, hearing, the trial court entertained plaintiff's motion for summary disposition and denied the motion. The trial court specifically indicated that "we arguably had a qualified privilege that exists here regarding the communication." Notably, although the trial court had indicated that Williams' communications were "arguably" subject to a qualified privilege, the trial court, over objection, refused to instruct the jury that Williams' communications were subject to any privilege.

The trial court presided over an eight-day jury trial. At trial plaintiff presented evidence from several witnesses to establish the circumstances surrounding plaintiff's fall and the ensuing treatment of plaintiff's injury. Plaintiff also presented testimony from Kelly Rowe, an adjuster for the Cincinnati Insurance Company. Plaintiff counsel elicited testimony, over objection by defense counsel, that Rowe is obligated in her position with Cincinnati to investigate claims to discover insurance fraud. She agreed with plaintiff counsel that, "there was no determination of any kind made by the company at the time it sent the file to [defense counsel] to defend the claim [on the basis] . . . of fraud of any kind." She further testified that she "was not aware of any [fraud,]" "or even an attempt at insurance fraud."

Plaintiff also presented a videotaped deposition of expert witness Dr. Charles Seigerman in which he concluded that plaintiff had been injured in the fall. Dr. Seigerman diagnosed plaintiff with a mild traumatic brain injury. He specifically testified that plaintiff suffers cognitive deficits in that she has difficulty concentrating. Dr. Seigerman also testified that he

found no indication that plaintiff was malingering. He admitted that he only saw plaintiff once, on October 12, 2006.

Plaintiff testified on her own behalf. Plaintiff essentially testified to her version of the events surrounding her fall. In regard to whether she looked to see if an usher was behind her before she fell, she testified that: "As I go before whoever is praying for me they, there're facing the congregation in the sanctuary. I'm facing the altar, the front. They are the ones that determine when to start praying for you. It's up to them." She also testified in regard to her treatment and how her injury had a negative affect on her life. She testified Williams' communications suggested that she had renounced her faith and that she was committing an evil act. She testified that she felt hurt by Williams' communications. She also testified that people at Mount Hope treated her differently after Williams' communications.

Williams testified on behalf on defendants. In response to questioning by plaintiff counsel, Williams essentially admitted that he made every alleged communication in regard to this case. However, he maintained his belief that the communications were true.

The jury returned a verdict in favor of plaintiff. This appeal ensued.

II. Motion for Directed Verdict

A. Standard of Review

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003); *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). This Court reviews all the evidence presented up to the time of the motion to determine whether a question of fact existed. *Silberstein, supra*. In doing so, this Court views the evidence in the light most favorable to the nonmoving party and resolves any conflict in the evidence in his favor. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005), after rem 274 Mich App 1; 731 NW2d 452 (2007); *Ververis v Hartfield Lanes*, 271 Mich App 61, 63-64; 718 NW2d 382 (2007). Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and we give deference to the factfinder's responsibility to determine the credibility and weight of the testimony. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008). If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Silberstein, supra*.

B. Analysis

Defendants argue there was no legal duty requiring ushers to protect congregants at Mount Hope should they fall during an altar call. The very unique facts and procedural history presented in this case lead us to reject defendants' argument.

"[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). There is generally no duty that obligates one person to aid or protect another unless there

is a special relationship between them or some special circumstance. *Beaudrie v Henderson*, 465 Mich 124, 141; 631 NW2d 308 (2001).

The requisite special relationship must exist between the defendants and the victims or the defendants and third parties. *Id*. The determination whether a duty-imposing special relationship exists in a particular case involves ascertaining whether the plaintiff reasonably entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself. *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 9; 492 NW2d 472 (1992). In order to determine whether a "special relationship" giving rise to a legal duty to act exists in a particular case, this Court has held that it is necessary to,

> "balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties . . . . Other factors which may give rise to a duty include the foreseeability of the [harm], the defendant's ability to comply with the proposed duty, the victim's inability to protect himself from the [harm], the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant." [*Id*. quoting *Roberts v Pinkins*, 171 Mich App 648, 652-653; 430 NW2d 808 (1988).]

Ordinarily, whether a duty exists is a question of law for the court. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). If there is no duty, summary disposition is proper. *Beaudrie, supra* at 130. However, if factual questions exist regarding what characteristics giving rise to a duty are present, the issue must be submitted to the factfinder. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996).

During the hearing on defendants' motion for directed verdict,[1] defense counsel argued that no special relationship existed between the parties because plaintiff fell at a leadership rally and not at a church service. However, the record does not reflect a meaningful difference between an altar call at a leadership rally and an altar call at a service. Although ushers were not wearing identifying clothing at the leadership rally, as they would in a church service, the evidence establishes that at both events persons known to be ushers signaled specific congregants to approach the altar to be prayed over by a minister. Thus, the trial court did not err in concluding that plaintiff was justified in relying on representations that ushers would protect against falling those persons who responded to an usher's specific request to answer an altar call at this leadership rally.

Defendants also argue on appeal that "[r]equiring the presence of an usher for every person who attends a church service places a huge burden on churches and removes all responsibility from a person attending a church service to be careful." This argument was not presented to the trial court and is therefore not properly preserved. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). In any event, we generally agree with defendants that they had no legal duty to insure that they would protect

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[1] The lower court record does not contain a written motion for directed verdict.

from injury all congregants who participated in the church service. However, rejection of this broad legal duty does not necessitate rejection of plaintiff's claim. Williams made it clear to the congregants that ushers were trained to catch persons who fall during an altar call. Significantly, plaintiff alleges that an usher specifically solicited her participation in the altar call. This usher then directed her to a specific place before the altar where a specific minister would pray over her. A person in plaintiff's position could reasonably conclude that the usher who positioned her for this altar call would also guard her through the process. Accepting all of plaintiff's proofs as true we conclude the very narrow and unique circumstances that exist in the present case support the imposition of a legal duty imposed on defendants to assist plaintiff while she participated in this altar call.

Defendants also argue on appeal that "[p]laintiff's injuries arose out of a condition a condition [sic] that was open and obvious and had no special aspects." This argument is also unpreserved as it was not raised below or decided by the trial court. We elect not to address this unpreserved issue on appeal. *Booth Newspapers, Inc, supra*. Moreover, defendants may not merely announce their position and leave it to this Court to discover and rationalize the basis for their claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Defendants failed to cite authority to support a premises liability law analogy to the instant case. MCR 7.212(C)(7).

III. Jury Instruction on Qualified Privilege

A. Standard of Review

Here, defendants requested a jury instruction reflecting that Williams' communications were subject to qualified privilege, and defendants objected the trial court's decision denying the instruction. The instructional issue is thus preserved for appeal. MCR 2.516(C).

On appeal, claims of instructional error are generally reviewed de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). A trial court's determination whether a standard instruction was applicable and accurate is reviewed for an abuse of discretion. *Moore, supra* at 223, and its determination whether an instruction is supported by the evidence is entitled to deference. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). However, a determination based upon a legal issue is a question of law subject to de novo review. *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002).

B. Analysis

We conclude that the trial court erred in refusing to instruct the jury that the communications were subject to a qualified privilege.

MCR 2.516(D)(2) provides that the trial court must give a jury instruction if a party requests an instruction and it is applicable to the case. "The trial court's jury instructions must include all the elements of the plaintiff['s] claims and should not omit any material issues, defenses, or theories of the parties that the evidence supports." *Lewis v LeGrow*, 258 Mich App 175, 211-212, 670 NW2d 675 (2003). Further, "[i]f, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury, no error requiring reversal occurs." *Id*. "Reversal based on instructional error is only required where the failure to reverse would be inconsistent with substantial justice." *Id*. citing MCR 2.613(A).

> The elements of a defamation action are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication (defamation per quod). *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). "A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual." *Id*. [*Frohriep v Flanagan*, 278 Mich App 665, 680-681; 754 NW2d 912 (2008).]

Defendants essentially challenge the trial court's instruction in regard to the second element, and claim that the communication was subject to the following qualified privileged:

> A "qualified privilege extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty and embraces cases where the duty is not a legal one but is of a moral or social character of imperfect obligation." *Hall v Pizza Hut of America, Inc*, 153 Mich App 609, 619; 396 NW2d 809 (1986).

Defendants maintain that the trial court erred in finding that the 120-prayer group letter was not subject to a qualified privilege. The trial court held:

> In regard to the qualified privilege, we wrestled that back and forth and back and forth, and I did frankly. And I made a tentative ruling, perhaps it was on a motion for partial summary disposition last December, and I used the word arguably. Then I looked at the transcript of what I said at the request of [plaintiff counsel] and realized that I was vacillating back and forth, to tell you the truth, and I could see why. Now I had the benefit, when I was going over instructions yesterday I had heard all the testimony including the role of the prayer group versus the governing board, if there is such a thing there, and I think there is, and the number of people this went out to, what it encompassed, and the fact that even if a qualified privilege arguably existed possibly to the 120 letter. We've got another situation with the exhibit that we just played because in that type of a setting, a prayer group or a leadership group, you have people that aren't necessarily within this tightknit group by the pastor's own testimony. And he indicated here during the trial that Judith Dadd was there at this meeting that night on July 18 and she didn't fit the category. This is the type of group - and that is, and that's one of the reasons why I asked the questions that I did to see just how regulated and just how stringent these requirements were for attendance at meetings or functions, whatever it is, and it's, they don't exactly check IDs when they're coming in. And so we were in to a whole different situation on qualified privilege in regard to certainly that session and maybe the 120. I mean what is this group, 120 group? I'm not sure to this day, other than that's a prayer group that the pastor communicates back and forth to. And granted this 120 letter was stamped confidential and all that other stuff. But I, I, I made the best call I could frankly and I think it was the right one on that.

We conclude that the trial court erred in not instructing the jury that the 120-prayer group letter was entitled to a qualified privilege. The trial court apparently based its decision not to instruct the jury on qualified privilege based on a lack of shared interest in the communication among the 120-prayer group members.

"[T]he 'shared interest' privilege . . . extends to all bona fide communications concerning any subject matter in which a party has an interest or a duty owed to a person sharing a corresponding interest or duty. The privilege embraces not only legal duties but also moral and social obligations." *Rosenboom v Vanek*, 182 Mich App 113, 117; 451 NW2d 520 (1989), *Harrison v Arrow Metal Products, Corp*, 20 Mich App 590, 611-612; 174 NW2d 875 (1969). It has long been held understood that common membership in church alone is a basis to apply qualified privilege. See *Howard v Dickie*, 120 Mich 238, 79 NW 191 (1899).

The point has been iterated in treatises such as the Restatement of Laws, Second, Torts 2d, § 596 (1977), comment (e), which provides in relevant part that:

> "The common interest of members of religious, fraternal, charitable or other non-profit associations, whether incorporated or unincorporated, is recognized as sufficient to support a privilege for communications among themselves concerning the qualifications of the officers and members and their participation in the activities of the society. This is true whether the defamatory matter relates to alleged misconduct of some other member that makes him undesirable for continued membership, or the conduct of a prospective member. So too, the rule is applicable to communications between members and officers of the organization concerning the legitimate conduct of the activities for which it was organized. The rule, however, does not afford protection to communications made by a non-member to members of the organization, nor does it afford protection to communications made by a member to one who is neither a present nor a prospective member. . . ."

Here, the trial court erred in finding that the members of the 120-prayer group, or the members of the church itself, did not share a common interest. There is no dispute that the 120-prayer group letter, and Williams' statements in regard to plaintiff, stemmed from an event that occurred within the church, i.e. plaintiff's fall. Further, although Woodard claimed she was no longer a member of the 120-prayer group, or even Mount Hope, there was evidence presented that Woodard had not effectively indicated to anyone that she had terminated her membership. Further, Williams' communications concern conduct of a church member. Williams and members of Mount Hope in general have a clear interest in such matters. There is persuasive evidence that Williams' communications are subject to a qualified privilege.

Assuming that the communications were subject to a qualified privilege, defendants were entitled to the following standard instruction:

> Because (under Michigan law) in this case, the defendant had a qualified privilege to communicate information, the plaintiff has the burden of proving that the defendant had knowledge that the statement was false, or that the defendant acted with reckless disregard as to whether the statement was false. [M Civ JI 118.07.]

The trial court however instructed the jury that:

> The plaintiff has the burden of proving that the defendant was negligent in making the statement.
>
> When I use the word negligent I mean the failure to do something which a reasonably careful person would do or the doing of something which a reasonably careful person would not do under the circumstances that you find existed in this case. It is for you to decide what a reasonably careful person would do or would not do under such circumstances. [See M Civ JI 118.08.]

The trial court's decision to instruct the jury as stated above requires reversal. There is a clear difference between proving "something which a reasonably careful person would do" and proving "defendant had knowledge that the statement was false, or that the defendant acted with reckless disregard as to whether the statement was false." The difference is significant, particularly, as here, where Williams' state of mind is a basic and controlling issue of the case. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 350; 660 NW2d 361, aff'd in part, rev'd in part on other grounds 471 Mich 540; 685 NW2d 275 (2004). At no point during the jury instructions is the word, "malice" mentioned, though the trial court twice re-read the previously given jury instructions on slander and libel on the second and final day of deliberations. Simply put, the jury was not properly instructed in regard to a controlling issue, intent.

Plaintiff maintains on appeal that any instructional error was harmless given that the jury answered yes to questions appearing on the jury verdict form, stating: "Did the defendant have knowledge that the statement was false or did the defendant act with reckless disregard as to whether the statement was false."

We do not find that the jury verdict form provides a sufficient basis to find that the jury concluded that defendants defamed plaintiff based on what a "reasonably careful person would do," or based on whether, "defendant had knowledge that the statement was false, or that the defendant acted with reckless disregard as to whether the statement was false." While the jury verdict form indicates that the jury agreed that "defendant had knowledge that the statement was false, or that the defendant acted with reckless disregard as to whether the statement was false," the fact remains the jury simply was not instructed to determine liability for defamation on this standard. This Court presumes that the jurors followed the instructions. *Dep't of Transportation v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 178-179; 700 NW2d 380 (2005). Here, the jury was instructed to apply a negligence standard in determining liability for defamation claims. Thus, regardless of an additional question on the jury verdict form, this Court must presume that the jury followed the trial court's instructions. Further, the jury should have been instructed that "defendant had a qualified privilege to communicate information." Thus, we conclude the trial court committed error requiring reversal in failing to properly instruct the jury that Williams' statements were subject to a qualified privilege. Given the disposition of this issue, we need not address issues III, V, and VI of defendants' brief on appeal, as they relate only to plaintiff's amended complaint and are therefore moot.

IV. References to Insurance

A. Standard of Review

The decision whether to admit evidence is within a trial court's discretion. *Elezovic*, *supra* at 419. An abuse of discretion exists if the results are outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). However, error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

B. Analysis

Defendants argue that the trial court abused its discretion in denying their motion for mistrial, which was based on plaintiff counsel's repeated references to insurance.

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [*Guerrero v Smith*, 280 Mich App 647, 651-652; __ NW2d __ (2008), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).]

We conclude that defendants are not entitled to reversal because defense counsel, at several points at trial, introduced evidence in regard to insurance. Defense counsel questioned plaintiff at length concerning her employment as an Aflac insurance agent. Defense counsel repeatedly suggested that plaintiff's familiarity with the insurance business bolstered the claim that plaintiff was attempting to commit insurance fraud. Defense counsel also elicited evidence that although plaintiff had several Aflac insurance policies, she did not submit to Aflac a claim based on her fall at Mount Hope.

Indeed, in one instance, defense counsel specifically attempted to inject the issue of "other" insurance into the proceedings, i.e. insurance other than the policy issued by Cincinnati Insurance Company. Defense counsel raised the issue of "other" insurance in a question to plaintiff, to which plaintiff counsel objected.

> *Defense counsel*. Did you turn any of your medical expenses into your sickness policy as part of, for you claim under your sickness policy?
>
> *Plaintiff counsel*. Excuse me. I'm going to object Your Honor. It's already been established that the Cincinnati Insurance Company was the insurer for these, these claims that are involved now. So anything else besides that is irrelevant. It's been establish that Cincinnati, through Kelly Rowe's testimony, said that they were the carrier that was involved in the handling of the processing of those medical bills.

The trial court admitted the testimony over plaintiff counsel's objection. Here, defense counsel, not plaintiff counsel, injected the notion of "other" insurance into the proceedings. A party is estopped from claiming improper references to insurance tainted the proceedings when they introduce the subject of insurance. *Dembinski v Miller*, 130 Mich App 822, 825; 345 NW2d 626 (1983), citing *Broitman v Kohn*, 16 Mich App 400, 404; 168 NW2d 311 (1969). Accord *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 168; ___ NW2d ___ (2008) (A party may not take a position before the trial court, request a certain action of the trial court, and then argue on appeal that the resultant action was error.)

Last, the trial court instructed the jury that: "Whether a party is insured has no bearing whatever on any issue that you must decide. You must refrain from any inference, speculation, or discussion about insurance." This Court presumes that the jurors followed the instructions. *Dep't of Transportation, supra*. Thus, defendants are not entitled to relief in this regard.

V. Motion for Separate Trials

A. Standard of Review

This Court reviews for abuse of discretion the circuit court's grant of a motion to sever. However, "the decision to sever trials should be ordered only upon the most persuasive showing that the convenience of all parties and the court requires it." *LeGendre v Monroe County*, 234 Mich App 708, 719; 600 NW2d 78 (1999), citing *Hodgins v Times Herald Co*, 169 Mich App 245, 261; 425 NW2d 522 (1988).

B. Analysis

Defendants argue the trial court abused its discretion in refusing to separate plaintiff's negligence claim from the remaining claims based on Williams' communications.

MCR 2.505(B) provides that: "For convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, the court may order a separate trial of one or more claims, cross-claims, counterclaims, third-party claims, or issues." The power to sever, however, "should be exercised only upon the most persuasive showing that the convenience of all parties and of the court requires such drastic action or that prejudice to a party cannot otherwise be avoided than by such order of separation." *Danyo v Great Lakes Steel Corp*, 93 Mich App 91; 286 NW2d 50 (1979), citing *Osgerby v Tuscola Circuit Judge*, 373 Mich 237, 241; 128 NW2d 351 (1964).

We cannot conclude that reversal is required because the trial court refused to separate plaintiff's negligence claim from the defamation claims. Although a claim for negligence is legally distinct from a claim of defamation, here the defamation claim was largely based on Williams' response to plaintiff's claim for negligence. Thus, many of the same witnesses would testify in regard to the negligence and defamation claims. Also, much of the same evidence would be admitted to establish the negligence and defamation claims. Further, the parties are the same and there is no indication of any conflict of interest that prevented testimony from being admitted.

Plaintiff maintains that the claims should have been separated because evidence of insurance would be admissible in plaintiff's defamation claims though evidence of insurance is not admissible in a negligence claim. While defendants' concern that jurors would misuse evidence of insurance is legitimate, there is no evidence that the jury considered that defendants were insured in determining whether to hold defendants liable for negligence or in its award for negligence. Further, the trial court instructed the jury that: "Whether a party is insured has no bearing whatever on any issue that you must decide. You must refrain from any inference, speculation, or discussion about insurance." This Court presumes that the jurors followed the instructions. *Dep't of Transportation, supra*. Reversal is not required.

VI. Conclusion

We affirm the jury award for plaintiff's negligence claim. We reverse the jury verdict for plaintiff's claims of false light, libel and slander, and remand for a new trial consistent with this opinion. Jurisdiction is not retained.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra