

STATE OF MICHIGAN
COURT OF APPEALS

JEANNINE WESTWOOD,

Plaintiff-Appellee,

v

WILLIAM BASHAM, MD,

Defendant-Appellant,

and

KAREN BASHAM,

Defendant.

UNPUBLISHED

May 22, 1998

No. 195603

Oakland Circuit Court

LC No. 90-388804-NZ

Before: Corrigan, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendant William Basham, MD, appeals by right the judgment for plaintiff on her claims of invasion of privacy, defamation, and intentional infliction of emotional distress. We affirm.

I. Factual Background & Procedural Posture

Defendant and his ex-wife, Karen Basham, employed plaintiff as a housekeeper and child care provider for their three-year-old son and seven year-old daughter from the summer of 1987 until November 1988. In June 1988, defendant apparently began confiding in plaintiff regarding personal matters, including problems with his marriage. Although defendant made no overt sexual advances, he eventually inquired whether plaintiff would consider a romantic relationship with him. Plaintiff resigned from her job after her initial attempts to avoid defendant failed and her repeated threats to quit did not dissuade defendant from pursuing a romantic relationship. Defendant, however, repeatedly called plaintiff, wrote her letters, and sent her money during the ensuing months. Plaintiff returned the final letter to sender in May 1989, after her threats to do so failed to deter defendant. Karen Basham read the letter and called plaintiff. The women believed that they had resolved the problem and that

defendant would no longer contact plaintiff. Defendant nevertheless continued to send plaintiff money until early July 1989.

In mid to late July 1989, Karen Basham observed her son kissing another child. On questioning, the Bashams' son allegedly disclosed to the Bashams that that he had taken showers with plaintiff. The Bashams indicated that they repeatedly questioned their son during the next few weeks. Karen Basham took notes during these interviews, which defendant later transcribed into written statements. According to the Bashams, their son slowly disclosed that he had been sexually abused, and in mid-August, the Bashams' daughter likewise began disclosing past abuse. The children allegedly related numerous instances of abuse by plaintiff and several men during 1987 and 1988, that included torture and the abuse of other children. Neither defendant nor his wife, however, reported the alleged abuse to the police. Instead, defendant hired a private investigator and, along with the investigator, conducted an investigation in an attempt to produce evidence of the ring of pedophiles to which he believed plaintiff belonged. Defendant photographed and videotaped plaintiff at her home, and conducted surveillance at the homes of plaintiff's family members and her former boyfriend. Defendant also searched their garbage in an attempt to locate evidence of the ring of pedophiles. Defendant additionally set up surveillance at a gas station, including placing a tape recorder in the restroom, because plaintiff's boyfriend once visited the station and defendant believed that the workers were part of the ring of pedophiles.

In early October 1989, the private investigator hired by defendant reported the sexual abuse to the police. Police Investigator Sandra Rochford and Protective Services worker Rick Kleinstiver then investigated the allegations. The children related the alleged instances of abuse during interviews with the investigators and psychologists. Subsequent examinations by physicians revealed evidence of sexual abuse. As the investigation continued with plaintiff's cooperation, defendant's daughter reported that she had been raped by a janitor at her school on November 1, 1989. She stated that plaintiff was present during the assault, that the janitor was involved in past instances of abuse, and that the janitor had recently raped her three other times, including two days after plaintiff learned of the investigation. A medical examination of the child the following day revealed evidence of recent sexual abuse.

Protective Services worker Kleinstiver filed a petition with the probate court to remove the children from defendants' home in November 1989 because of emotional abuse. The court placed the children in its temporary custody, but eventually returned them to their parents. The investigators completed their investigation and concluded that the children had been sexually abused. They did not, however, recommend criminal charges against anyone because of a lack of evidence regarding the identity of the perpetrator.

Plaintiff subsequently commenced this action, asserting claims for invasion of privacy, defamation, and intentional infliction of emotional distress arising from defendant and his ex-wife's conduct in pursuing the children's allegations of sexual abuse. The instant trial was the second time the parties tried this case. The jury in the first trial returned a verdict for plaintiff, but the trial court granted defendants' motion for a new trial because the jury viewed an exhibit that the court had not entered into evidence. This Court granted plaintiff's application for leave to appeal, and affirmed in an unpublished opinion. On remand, the jury found for plaintiff on all her claims against defendant at the conclusion of a

six day trial. The jury awarded plaintiff \$100,000 for invasion of privacy, \$125,000 for defamation and intentional infliction of emotional distress, and \$50,000 in exemplary damages. The trial court entered judgment on the verdict and granted plaintiff mediation sanctions consisting of \$31,400 in attorneys fees and \$1,196 in costs. The trial court subsequently denied defendant's motion for judgment notwithstanding the verdict regarding the defamation claim on the ground that his statements were privileged. The trial court likewise denied defendant's motion for new trial, which alleged that the trial court erred in excluding evidence, plaintiff committed perjury, and plaintiff's counsel made improper remarks during closing argument. The trial court, however, determined that the jury verdict should be remitted by the amount of exemplary damages. The trial court gave plaintiff the option of accepting remittitur or conducting a new trial. After the trial court extended the time for accepting remittitur, plaintiff accepted.

II. Statutory Immunity & Common Law Privileges

Defendant first argues that the trial court abused its discretion in admitting evidence of his statements to the police officers and protective services workers regarding the suspected child abuse because he acted in good faith and his statements were privileged under common law. Defendant further argues that the trial court erred in denying his motion for judgment notwithstanding the verdict (JNOV) on these same grounds. This Court reviews the trial court's evidentiary rulings for an abuse of discretion. *Koenig v South Haven*, 221 Mich App 711, 724; 562 NW2d 509 (1997). We will not reverse on the basis of an evidentiary error, however, unless the trial court's ruling affected a party's substantial rights. MCR 2.613(A); MRE 103(a); *Temple v Kelel Distributing Co*, 183 Mich App 326, 329; 454 NW2d 610 (1990). In reviewing the trial court's decision on a motion for JNOV, by contrast, we view the evidence in a light most favorable to the nonmoving party to determine whether reasonable jurors could reach different conclusions. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. *Id.*

We initially reject defendant's contention that a common law privilege applies in this case. In 1975, the Legislature enacted the child protection law, MCL 722.621 *et seq.*; MSA 25.248(1) *et seq.*, a comprehensive statute governing the reporting of suspected child abuse and neglect. Under the act, various health care professionals, teachers, and other enumerated professionals are required to report suspected child abuse. MCL 722.623; MSA 25.248(3). Other persons who have reasonable cause to suspect child abuse or neglect may report the matter to law enforcement or the Department of Social Services.¹ MCL 722.624; MSA 25.248(4). The Legislature shielded those reporting abuse and neglect with qualified immunity. MCL 722.625; MSA 25.248(5). In enacting the statute, the Legislature provided that persons reporting suspected child abuse and neglect shall have qualified immunity and clearly intended to abrogate any common law privileges and immunity that would otherwise apply. See *Williams v Coleman*, 194 Mich App 606, 612-615; 488 NW2d 464 (1992). Accordingly, the statutory qualified² immunity, not common law privileges, applies in this case.

We reject defendant's argument that because he is a physician, he was required to report the abuse on the basis of his children's mere statement that it occurred. To the extent that our decisions in *Williams, supra*, and *People v Cavaiani*, 172 Mich App 706; 432 NW2d 409 (1988), stand for the

proposition that a child's statement to a health care professional that abuse occurred automatically triggers the duty to report, the proposition has no application in a case, such as this one, where a question exists whether the professional either is the abuser or orchestrated the abuse allegation. Further, defendant can hardly rely on his duty to report abuse under the statute when he did not satisfy that obligation. The statute requires that the professional "immediately" make an oral report of the suspected abuse, followed by a written report 72 hours later. MCL 722.623(1); MSA 25.248(3)(1). Here, defendant never actually reported the abuse. Rather, defendant's private investigator reported the abuse and defendant cooperated in the subsequent investigation. Further, even if the trial court could consider the investigator's report as made on defendant's behalf, defendant did not report the abuse until over two months after the children first made their accusations.

Defendant's argument that he cannot be held liable for any damages caused by his report of suspected child abuse because law enforcement should not have disseminated the information to plaintiff is also without merit. Under MCL 722.627(1)(f); MSA 25.248(7)(1)(f), a person named in a report of child abuse or neglect is entitled to view it (except for the identity of the reporting person). Further, under MCL 722.627(1)(g); MSA 25.248(7)(1)(g), the trial court may order the production of the information for use in proceedings, such as the instant one, where the information is needed to evaluate a plaintiff's claim for defamation. *Warner v Mitts*, 211 Mich App 557, 560-561; 536 NW2d 564 (1995).

We likewise reject defendant's argument that because he acted in good faith, the trial court abused its discretion in admitting the evidence and erred in denying his motion for JNOV. At the time of defendant's statements, MCL 722.625; MSA 25.248(5), provided in relevant part as follows:

A person acting in good faith who makes a report, cooperates in an investigation, or assists in any other requirement of this act shall be immune from civil or criminal liability which might otherwise be incurred thereby. A person making a report or assisting in any other requirement of this act shall be presumed to have acted in good faith. This immunity from civil or criminal liability extends only to acts done pursuant to this act and does not extend to a negligent act which causes personal injury or death or to the malpractice of a physician which results in personal injury or death.

The immunity extends to reports of suspected child abuse regardless of the outcome of the subsequent investigation. *Warner, supra* at 559. The statute provides a presumption of good faith. Good faith in this context is a "reasonable suspicion" of abuse or neglect. *Id.* at 559-560.

We conclude that the trial court properly submitted the question of whether defendant acted in good faith to the jury. This case turns in large part on defendant's credibility because he and his ex-wife interviewed the children to elicit the allegations and did not report the abuse to the police until two months after the children allegedly first accused plaintiff. Further, the circumstances surrounding the allegations also suggest that defendant may have orchestrated them because of his hostility toward plaintiff. The allegations surfaced shortly after defendant's ex-wife learned that defendant had not ceased his romantic pursuit of plaintiff. In addition, the children's accusations include implausible instances of abuse, and some of the allegations paralleled abuse that defendant and his ex-wife allegedly

suffered as children. Notably, Investigator Rochford opined that statements by defendant's son sounded rehearsed and that he used words that were not age appropriate.

Other evidence likewise supported the inference that the abuse occurred long after plaintiff left defendant's employ. The children's pediatrician testified that he first learned of the abuse allegations in November 1989. He stated that he observed no signs of abuse when examining the children during their annual physicals in 1987, 1988, and June 1989. He observed signs of abuse, however, when he examined the children in June 1990, and testified that he believed that someone had molested the children.

The jury could also infer the absence of good faith from defendant's actions after he learned of the alleged abuse. Instead of reporting the matter to the police, defendant engaged in his own investigation and surveillance of plaintiff. Once the police became involved, defendant did not cease this activity even after providing the investigators with all the "evidence" he had gathered. Rather, defendant ignored police advice and continued his independent investigation, including hiding in a closet at his daughter's school to tape a conversation between an unidentified woman and a child. He also contacted plaintiff, calling her at 4:00 a.m., to inform her that the FBI was investigating her involvement with child pornography.

We conclude that a reasonable jury could find on the basis of this evidence that defendant did not act in good faith in reporting the abuse and cooperating in the subsequent investigation. The jury could infer that defendant did not have a reasonable suspicion of abuse from the timing of the allegations, defendant's conduct in eliciting the accusations, and defendant's actions during his independent investigation of plaintiff. Accordingly, the trial court did not abuse its discretion in admitting the evidence and did not err in denying defendant's motion for JNOV. *Koenig, supra* at 724; *Zander, supra* at 441.

III. Remaining Issues

Defendant next argues that the trial court abused its discretion in restricting his cross-examination of witness Kleinstiver. We disagree. The trial court may exercise discretion to control the mode and order of the parties' interrogation of witnesses and presentation of evidence. MRE 611; *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). In this case, the trial court did not abuse that discretion in restricting defendant's cross-examination to avoid repetitive questions. See MRE 403. The record contains no support for defendant's assertion that he abandoned his cross-examination because the trial court threatened him. Further, contrary to defendant's allegation of perjury and bias, the record reflects that Kleinstiver simply had difficulty remembering the details of his investigation and repeatedly sought to refresh his recollection by reviewing his notes. In any event, evaluation of witness credibility is in the province of the jury. *Detroit v Larned Associates*, 199 Mich App 36, 41; 501 NW2d 189 (1993) (weight of testimony was for jury to determine).

We likewise reject defendant's argument that the trial court abused its discretion in excluding a videotape containing excerpts of his daughter's interview with a psychologist. The videotape was not

admissible under MRE 801(d)(2) because it was not defendant's statement, but rather contained his daughter's statements. Further, defendant never produced evidence to authenticate the videotape. MRE 901; *Haberkorn v Chrysler Corp*, 210 Mich App 354, 366; 533 NW2d 373 (1995).

Defendant further contends that the trial court erred in ruling that he had withdrawn his counterclaim for abuse of process. We find no error requiring reversal. Although the record reflects that trial counsel withdrew the counterclaim at the close of plaintiff's proofs in the first trial, the record does not contain a written stipulation to dismiss or order of dismissal, as is required by MCR 2.504. Nevertheless, the trial court's error was harmless. Defendant's counterclaim for abuse of process was premised on his allegation that plaintiff's complaint had no basis in fact. In order to recover for abuse of process, the plaintiff must plead and prove (1) the existence of an ulterior purpose and (2) an act in using process that is improper in the regular prosecution of the proceeding. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). In this case, defendant did not plead any ulterior purpose and, in any event, the jury found for plaintiff on her claims.

Defendant next argues that the trial court abused its discretion in denying his motion for new trial on grounds that plaintiff committed perjury and fraud in testifying regarding the circumstances surrounding her drunk-driving conviction and that plaintiff's counsel made improper remarks during closing argument. We disagree. This Court reviews the trial court's decision on a motion for new trial for an abuse of discretion. *Settington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). In this case, the record reveals that plaintiff was merely confused during defendant's cross-examination and subsequently clarified her testimony. Defendant fully explored the drunk-driving issue during this cross-examination. Further, counsel's remarks merely reflected the nature of this case and did not deny defendant a fair trial because a curative instruction could have removed the claimed error had defendant objected. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). Accordingly, the trial court did not abuse its discretion in denying defendant's motion.

We likewise reject defendant's argument that the trial court erred in denying his motion for JNOV on the ground that plaintiff did not present expert testimony to establish her damages. Plaintiff may recover actual damages flowing from defendant's conduct, including damages for emotional distress and mental anguish. *Haverbush v Powelson*, 217 Mich App 228, 225; 551 NW2d 206 (1996); *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993); *Chrum v Charles Heating, Inc*, 121 Mich App 17, 22; 327 NW2d 568 (1982). No general requirement exists that a plaintiff proffer expert testimony to prove the extent of personal injury. See *Gibson v Traver*, 328 Mich 698, 702; 44 NW2d 834 (1950); *Haverbush, supra* at 234-236. Here, the trial court properly denied defendant's motion because defendant's conduct unquestionably would cause mental distress to an ordinary person and plaintiff testified regarding both economic damages and emotional distress.

Defendant next argues that the trial court erred in granting mediation sanctions against him. We disagree. This Court reviews de novo the trial court's decision to grant mediation sanctions. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997). In this case, we conclude that the mediation panel's failure to comply with the requirement under MCR 2.403 that it include separate awards for each defendant does not constitute error requiring reversal because defendant did not raise this issue until after the second trial. See *Phinney v*

Perlmutter, 222 Mich App 513, 537; 564 NW2d 532 (1997) (error requiring reversal may not be error to which the party contributed by plan or neglect). Further, the trial court properly awarded attorney fees for work performed during the first trial because defendant's rejection of the mediation evaluation necessitated both trials since these proceedings took place after the date of rejection. *Severn v Sperry Corp*, 212 Mich App 406, 417; 538 NW2d 50 (1995).

Finally, we reject defendant's contention that the trial court abused its discretion in extending the period for plaintiff to accept remittitur. This Court reviews the lower court's decision to extend a period of time for taking an action for an abuse of discretion. See *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 549-550; 493 NW2d 492 (1992); *Muntean v Detroit*, 143 Mich App 500, 510-511; 372 NW2d 348 (1985). MCR 2.611(E) provides that in the event the only error at trial is the inadequacy or excessiveness of the verdict, the trial court may deny a motion for new trial on the condition that within fourteen days the nonmoving party consent to entry of judgment in an amount the trial court finds that the evidence will support. After expiration of the original period, the trial court may extend the time for doing any act if the failure to act was the result of "excusable neglect." MCR 2.108(E); see *Arrington, supra* at 548-550. We conclude that the trial court did not abuse its discretion in this case because plaintiff's counsel proffered an explanation for not accepting remittitur within the original period, defendant does not argue that he was prejudiced by the delay, and granting the motion promoted the finality of the litigation by avoiding the need for a third trial. See *Muntean, supra* at 510-511.

Affirmed. Plaintiff, being the prevailing party, may tax costs under MCR 7.219.

/s/ Maura D. Corrigan
/s/ Kathleen Jansen
/s/ William C. Whitbeck

¹ In 1996, the Legislature abolished the Department of Social Services and assigned its responsibilities to the newly created Family Independence Agency. MCL 400.1 *et seq.*; MSA 16.401 *et seq.*

² Defendant must address his argument that public policy is better served by absolute immunity to the Legislature because the statute clearly provides qualified, not absolute, immunity.