

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ROBERT J. STORCH and CYNTHIA M.  
STORCH,

UNPUBLISHED  
April 25, 2000

Plaintiffs-Appellants/Cross-Appellees,

v

No. 203636  
Wayne Circuit Court  
LC No. 94-436307-NO

ANTHONY LIGI,

Defendant-Appellee/Cross-Appellant.

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Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the following judgments and orders issued by the trial court, following a jury trial: (1) a judgment for \$20,000 against plaintiff Robert Storch based on the jury's verdict on defendant's malicious prosecution counterclaim; (2) a judgment awarding defendant over \$14,000 in mediation sanctions against both plaintiffs; and (3) an order denying plaintiffs' motion for a new trial or judgment notwithstanding the verdict (JNOV). Defendant cross-appeals, challenging the trial court's refusal to treble the jury verdict on his counterclaim pursuant to MCL 600.2907; MSA 27A.2907. We reverse the jury verdict in favor of defendant on the malicious prosecution counterclaim, but affirm the award of mediation sanctions and the order denying plaintiffs' motion for a new trial or JNOV.

Plaintiffs sued defendant for assault and battery arising from defendant's alleged assault of plaintiff Robert Storch. Plaintiff Cynthia Storch is Robert Storch's wife; her claims against defendant are derivative. Defendant brought a counterclaim against plaintiff Robert Storch, alleging malicious prosecution. Following a trial, the jury rendered a no-cause verdict on plaintiffs' claims and awarded defendant \$20,000 on his malicious prosecution claim. Defendant moved for mediation sanctions pursuant to MCR 2.403(O) and to treble the damage award pursuant to MCL 600.2907; MSA 27A.2907. The trial court granted defendant mediation sanctions but denied him treble damages. Plaintiffs moved for a new trial or JNOV, arguing that defense counsel's misconduct denied them a fair trial. The trial court denied that motion.

Plaintiffs argue that the trial court erred by denying their motion for directed verdict of defendant's malicious prosecution counterclaim. We agree. Even if one considers the evidence presented in a light most favorable to defendant, as we must, *Garabedian v William Beaumont Hospital*, 208 Mich App 473, 475; 528 NW2d 809 (1995), the evidence did not show that plaintiff Robert Storch lacked probable cause to accuse defendant of assault. Defendant's own testimony established that when Storch opened his car door into defendant's legs, defendant proceeded to completely open the door, step directly in front of the door opening, and then put his hands on Storch's lapels. These facts would warrant an ordinarily cautious man to believe that defendant had assaulted Storch by attempting to commit or actually committing a battery against him. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 387-388; 572 NW2d 603 (1998). Defendant did not meet his burden of proving that Storch lacked probable cause to report his actions to the police, so Storch was entitled to a directed verdict of defendant's counterclaim. *Matthews, supra* at 378.

Plaintiffs argue that the trial court erred by denying their motion for a new trial or JNOV based upon alleged misconduct by defense counsel. We find no error. The record shows that plaintiffs' trial counsel agreed in advance that defense counsel could cross-examine Robert Storch regarding the four court cases referenced in the August 1983 medical report. Defense counsel limited his cross-examination regarding previous litigation to the court cases referred to in the medical report and did not go into the details of those cases. Since their trial counsel acquiesced to this questioning, plaintiffs cannot now assert error based upon this cross-examination. *Phinney v Perlmutter*, 222 Mich App 513, 537-538; 564 NW2d 532 (1997). The remaining conduct complained of by plaintiffs was either not erroneous or was harmless and cannot provide the basis for ordering a new trial or JNOV. *Szymanski v Brown*, 221 Mich App 423, 426-427; 562 NW2d 212 (1997).

The trial court did not err by awarding mediation sanctions in favor of defendant. It is undisputed that plaintiffs rejected the mediation evaluation of their assault and battery claim and instead proceeded to trial. Plaintiffs do not dispute the amount of fees and expenses incurred by defendant in having to defend this claim from mediation to verdict. The no-cause verdict was not more favorable to plaintiffs than the \$30,000 mediation amount. Under the clear language of MCR 2.403(O)(1) and (O)(6), defendant was entitled to actual costs, including reasonable attorney fees, incurred as a result of plaintiffs' rejection.

Because we are reversing the jury's verdict and resulting judgment in favor of defendant on his malicious prosecution counterclaim, it is not necessary to consider whether the trial court should have trebled that verdict pursuant to MCL 600.2907; MSA 27A.2907.

In sum, the judgment in favor of defendant on his malicious prosecution counterclaim is reversed. The trial court's award of mediation sanctions and denial of plaintiffs' motion for a new trial or JNOV is affirmed.

Affirmed in part and reversed in part.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Jane E. Markey