STATE OF MICHIGAN

COURT OF APPEALS

JOHN BRADLEY and
DOROTHY BRADLEY,

Plaintiffs-Counterdefendants-
Appellees,

v

ANDREW BEHNKE,

Defendant-Counterplaintiff-Appellant,

and

TODD ALLEN RUBLE,

Defendant.

UNPUBLISHED
October 6, 2000

No. 219087
Calhoun Circuit Court
LC No. 96-000298-CZ

Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.

PER CURIAM.

Defendant Andrew Behnke appeals as of right from a judgment in favor of plaintiffs following a jury trial. We affirm.

This case arises out of plaintiff Dorothy Bradley's claim that an individual improperly groped her while she was sleeping. Although she did not recognize the individual in the darkness, her scream awoke her husband, who chased the individual out of the house. Plaintiffs' son also joined in the chase, and both identified defendant Behnke as the individual they chased. Plaintiffs' son also testified that defendant Ruble[1] was admittedly in plaintiffs' house that evening, and was driven there by defendant Behnke. Plaintiffs sought damages from defendant Behnke and defendant Ruble, alleging the following

[1] We note that defendant Ruble is plaintiffs' former son-in-law.

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

claims: (1) trespass, (2) assault, battery, and sexual assault, (3) invasion of privacy, (4) intentional infliction of emotional distress, (5) negligence, (6) gross negligence, and (7) loss of consortium.

Defendant Ruble defaulted, and a $687,500 judgment was entered against him in plaintiffs' favor. Defendant Behnke, however, denied involvement and filed a counterclaim alleging intentional infliction of emotional distress and malicious prosecution. The trial court granted plaintiffs' motion for a directed verdict on both of defendant Behnke's counterclaims. The jury found defendant Behnke liable and awarded plaintiffs damages totaling $1,000,000. Despite denying defendant Behnke's motion for a new trial, the trial court sua sponte entered an order of remititur and reduced the judgment to $687,500. This appeal followed.

Defendant Behnke first argues that the trial court erred by granting plaintiffs' motion for a directed verdict against his counterclaim of malicious prosecution. We review de novo a trial court's ruling on a motion for a directed verdict. *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). In doing so, we review all the evidence in a light most favorable to the nonmoving party, and a directed verdict is inappropriate where reasonable minds could differ on a material factual question. *Id.*, pp 71-72.

In a malicious prosecution action, our Supreme Court has stated that a "prosecutor's exercise of his independent discretion in initiating and maintaining a prosecution is a complete defense." *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 385; 572 NW2d 603 (1998). With regard to a malicious prosecution action against a private person, a prima facie case requires proof that the person instituted or maintained the prosecution, and "that the prosecutor acted on the basis of information submitted by the private person that did not constitute probable cause." *Id.*, p 379.

In the present case, defendant Behnke introduced no evidence suggesting that the investigation conducted by the prosecution relied on any statement attributable to plaintiffs. Rather, judicial notice was taken that plaintiffs did not have any authority to determine who was arrested or charged. Thus, we do not believe that any evidence was introduced establishing that plaintiffs initiated or maintained the prosecution, or that the prosecutor acted on the basis of information supplied by them. To the extent that defendant Behnke contends that plaintiffs should have instructed the police officers that they were aware of defendant Ruble's presence in their home, the evidence indicated that plaintiffs' son, a nonparty to the action, was actually aware of this fact. Accordingly, we do not believe that a prima facie case of malicious prosecution was presented. Consequently, we conclude that the trial court did not err by granting plaintiffs' motion for a directed verdict against defendant Behnke's malicious prosecution claim.

Defendant Behnke next argues that the trial court erred by not granting his motion for a new trial based on several arguments. A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *McPeak v McPeak*, 233 Mich App 483, 490; 593 NW2d 180 (1999).

Defendant Behnke argues that a new trial was justified by jury misconduct, alleging that the jury based its verdict on an improper source: the default judgment of $687,500 entered against defendant Ruble. MCR 2.611(A)(1)(b) provides that a new trial may be granted where a party's substantial rights

are materially affected by the misconduct of the jury. Here, the record reveals that defendant Behnke introduced the amount of the judgment against defendant Ruble during his cross-examination of plaintiff Dorothy Bradley in an apparent effort to weaken her credibility by implying that she was unnecessarily seeking a second judgment, rather than collecting on an existing judgment. Regardless of the purpose, however, we conclude that reversal is not appropriate where defendant Behnke intentionally injected the issue and then seeks to raise it as error on appeal. See, e.g., *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000); *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997) (error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence). Accordingly, the trial court did not abuse its discretion by denying defendant Behnke's motion for a new trial based on jury misconduct.

Defendant Behnke also argues that the trial court should have granted a new trial because the jury's verdict was against the great weight of evidence. The record reveals that plaintiffs, as well as their son, testified that they believed defendant Behnke engaged in the unwanted physical contact, and that they did not believe that defendant Ruble was the perpetrator. On the other hand, defendant Behnke testified that he did not engage in the conduct, and attempted to persuade the jury that defendant Ruble was indeed the perpetrator. The trial court rejected defendant Behnke's argument that the great weight of the evidence implicated defendant Ruble, and concluded that a credibility issue was simply resolved in plaintiffs' favor. We agree. Issues of witness credibility are for the jury and the trial court may not substitute its view of credibility, *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), and the trial court cannot substitute its judgment for that of the factfinder and the jury's verdict should not be set aside if there is competent evidence to support it, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Here, the plaintiffs' credibility was for the jury to decide and their testimony provided competent evidence in support of the jury's verdict. Therefore, we do not believe that the trial court abused its discretion by denying defendant Behnke's motion for a new trial on this ground.

Defendant Behnke also contends that a new trial should be granted because the jury verdict was a product of bias or prejudice. In particular, he contends that he was prejudiced by testimony relating to his sexuality. During plaintiffs' questioning of defendant Behnke, he testified that he is not attracted to women. However, he also admitted that he raised this fact as a defense at the criminal trial and during a deposition in this case. Further, introduction of this evidence apparently counters plaintiffs' allegation that defendant Behnke sexually assaulted plaintiff Dorothy Bradley. Finally, we note that the trial court instructed the jurors not to base their verdict on any matter not relevant to the rights of the parties. Consequently, we find no error.

Defendant Behnke also argues that he was prejudiced by references to alcohol and drug use on the night in question. We initially note that defendant Behnke was the sole source of any evidence relating to drug use. As stated above, error requiring reversal will not be found where the error was contributed to by the moving party. *Phinney, supra*, p 537. We further note that defendant Behnke testified that he did not drink a substantial amount that evening, and only consumed five or six beers. We are not persuaded that this testimony was sufficient to cause bias or prejudice, especially in light of the trial court's instruction to the jury to consider only those facts relevant to the rights of the parties.

For these reasons we do not believe that the trial court abused its discretion by denying defendant Behnke's motion for a new trial on this ground as well.

Defendant Behnke further contends that a new trial should have been granted because the jury verdict was clearly and grossly excessive. Our Supreme Court has held that appellate courts should give deference to the trial court's decision regarding the excessiveness of a jury award because the trial court is in the best position to both observe the testimony of the witnesses and determine whether the jury based its decision on improper evidence. *Palenkas v Beaumont Hosp*, 432 Mich 527, 532-533; 443 NW2d 354 (1989). A trial court's ultimate decision regarding a jury award is, therefore, reviewed for an abuse of discretion. *Id.*, p 531.

We note that two trial courts and one jury have concluded that plaintiffs' actual damages were at least $687,500—the post remittitur verdict in this case. Regardless, ample testimony was presented regarding the impact of defendant Behnke's conduct on both plaintiffs, especially as it related to noneconomic damages. Thus, we are unwilling to disturb the trial court's conclusion that remititur, and not a new trial, was the appropriate remedy in this matter. MCR 2.611(E). Therefore, we conclude that the trial court did not err by denying defendant Behnke's motion for a new trial.

Finally, we decline to address defendant Behnke's remaining arguments concerning his motion for a new trial because they were neither raised nor decided by the trial court below. *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 308; 600 NW2d 664 (1999).

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Robert B. Burns