STATE OF MICHIGAN

COURT OF APPEALS

LYNNE E. SCHWARTZ,

Plaintiff-Appellee,

v

JAMES COYNE,

Defendant-Appellant.

UNPUBLISHED
April 24, 2003

No. 232981
Washtenaw Circuit Court
LC No. 96-002780-NI

Before: Donofrio, P.J, and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order entering judgment on the jury verdict in favor of plaintiff in the amount of $165,000 in this assault and battery case. We affirm.

This case arises out of three domestic disputes that took place during the course of the parties' failed romantic relationship. Plaintiff filed this suit in February 1996, seeking money damages from defendant for physical and psychological injuries she allegedly sustained from assaults that occurred during August and September 1994, before she moved out of defendant's home. In her two-count complaint, plaintiff alleged assault and battery and intentional infliction of emotional distress. The intentional infliction of emotional distress count was subsequently dismissed following defendant's motion for partial summary disposition, leaving only the claim for assault and battery. Following a jury trial, the jury returned a verdict in favor of plaintiff and awarded her damages in the amount of $75,000. Thereafter, the parties stipulated to the order entering judgment in the amount of $165,000 to reflect the jury verdict of $75,000, costs, interest, attorney fees, and other related costs incurred by plaintiff.

Defendant first argues that the trial court reversibly erred in denying his motion for leave to file a counterclaim under MCL 600.5823 where the trial court's reasons for denying defendant's counterclaim do not constitute legal justification for prohibiting a counterclaim under MCL 600.5823, and in fact, conflict with MCL 600.5823. We disagree. A trial court's decision whether to allow amendments to pleadings is reviewed for an abuse of discretion. *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 75; 592 NW2d 724 (1998). At the same time, the interpretation or construction of a statute is a question of law that this Court reviews de novo. *Christiansen v Gerrish Twp*, 239 Mich App 380, 384; 608 NW2d 83 (2000).

Defendant argues that the trial court's ruling denying his motion for leave to file a counterclaim conflicts with MCL 600.5823 because it is inherent in the application of § 5823

that the sought counterclaim is "untimely," otherwise it would satisfy the statute of limitations in the first instance. Defendant's reliance on MCL 600.5823 is misplaced. Section 5823 states that "[t]o the extent of the amount established as plaintiff's claim the periods of limitations prescribed in this chapter do not bar a claim made by way of counterclaim unless the counterclaim was barred at the time the plaintiff's claim accrued." The clear and unambiguous language of the statute provides that a defendant may bring a counterclaim to setoff the amount of plaintiff's claim despite the expiration of the statute of limitations. Thus, a plaintiff would not be permitted to insist upon the statute of limitations as a defense to the defendant's counterclaim for recoupment, unless, of course, the claim was barred at the time the plaintiff's claim accrued. MCL 600.5823. See also *Wallace v Patterson*, 405 Mich 825; 289 NW2d 924 (1979); *Warner v Sullivan*, 249 Mich 469, 471; 229 NW 484 (1930). Accordingly, the clear and unambiguous language of MCL 600.5823 does not provide defendant with an unlimited time with which to file a counterclaim, but only that the statute of limitations will not serve as a bar to defendant's counterclaim. In this case, because plaintiff has not asserted the statute of limitations as a defense to defendant's proposed counterclaim, MCL 600.5823 is not applicable in determining whether the trial court abused its discretion.

Rather, MCR 2.203 provides that "[a] counterclaim or cross-claim must be filed with the answer or filed as an amendment in the manner provided by MCR 2.118." In turn, MCR 2.118(A)(2) allows a party to "amend a pleading only by leave of the court or by written consent of the adverse party" and that "[l]eave shall be freely given when justice so requires." Although the trial court has discretion in deciding whether to allow amendments, the "leave shall be freely given" language of MCR 2.118(A)(2) favors granting leave and a motion to amend should generally only be denied because of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, or futility. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). In addition, "[i]f a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision." *Id.* at 659. As defendant correctly points out, delay alone, does not warrant denial of a motion to amend. *Id.* "However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Id.*

In this case, the trial court denied defendant's motion for leave to amend his pleadings to include a counterclaim, specifically finding on the record that his motion was untimely. We agree that delay, by itself, was an insufficient reason to deny defendant's motion. See *id.* However, we find no abuse of discretion in the trial court's denial of leave to file a counterclaim because of delay, bad faith, and dilatory motive. Defendant filed his motion for leave to file a counterclaim 2½ years after the filing of the complaint in this case and over four years after the alleged incidents occurred. The trial court also indicated that it was concerned about defendant's conduct and motive in filing such a delayed motion, especially where the facts forming the basis of defendant's counterclaim were known by him from the beginning of the case. Indeed, the trial court noted that defendant pled his case and now 2½ years later wanted to add counterclaims only because facilitation between the parties failed. Thus, this Court cannot conclude that the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, defiance of judgment, or exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Defendant next argues that the trial court erred in refusing to admit the transcribed records of plaintiff's therapy notes and in refusing to strike the therapist's testimony where the therapist thwarted the discovery of her notes by claiming that the transcript was inaccurate. A trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *Chmielewski v Xermac, Inc,* 457 Mich 593, 614; 580 NW2d 817 (1998). Similarly, this Court reviews a trial court's decision to deny a motion for mistrial or a new trial for a clear abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000); *Persichini v William Beaumont Hosp,* 238 Mich App 626, 635; 607 NW2d 100 (1999).

Defendant's argument with regard to this issue is based on a faulty factual premise. Accordingly, there is no support in the record for defendant's claim of error and his argument is without merit. Plaintiff began treating with her therapist, Dr. Wendy Fisher-House, in August 1994. Apparently Dr. Fisher-House took very detailed notes during plaintiff's therapy sessions regarding the incidents that occurred in this case. Defendant sought discovery of those notes during the course of this litigation, which the trial court ordered plaintiff to produce. When the notes were produced, defendant alleged that the notes were illegible and plaintiff agreed to have the notes transcribed. The transcription of the notes was provided to defendant prior to trial. On the second day of trial and prior to the testimony of Dr. Fisher-House, an issue arose regarding the accuracy or reliability of the transcription. Plaintiff claimed that there were errors in the transcription, and therefore, portions of the transcript were not completely accurate and unreliable.[1] As a result, plaintiff objected to the admission of the transcript in its entirety without establishing the trustworthiness of each particular portion. However, the trial court did not exclude the transcript of the notes. In fact, the trial court ruled that the transcript of the notes could be admitted into evidence after defendant established a proper foundation. The trial court reserved its ruling on the issue until the therapist was examined regarding the notes and the differences between the original notes and the transcript, and the transcript or portions thereof were offered as an exhibit in the normal course of trial. At that time, if either party objected, the trial court would make its ruling.[2] Defendant posed no objection to the trial court's ruling with regard to the transcript of the therapy notes.

However, defendant never attempted to admit the transcribed record of the therapy notes or any portion of it. He cross-examined Dr. Fisher-House at length about the notes in an attempt to impeach plaintiff, but did not seek to admit the notes as an exhibit. Accordingly, there can be no abuse of discretion when the trial court was never asked to exercise its discretion. *City of Troy v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986). Thus, defendant's other argument that the trial court erred in refusing to strike Dr. Fisher-House's testimony or grant his motion for mistrial or new trial based on the alleged exclusion of the transcript is similarly without merit. There is simply no support in the record for defendant's assertion that he was not provided with usable medical records, nor is there any evidence that plaintiff committed

[1] There is evidence in the record that defendant was aware that there were inaccuracies and typos in the transcription at Dr Fisher-House's deposition in June 1999. However, defendant argues on appeal that he was not made aware of the inaccuracies until the second day of trial.

[2] The trial court noted that those portions of the transcript not touched on by the parties or deemed inaccurate would not be admitted.

discovery abuses with regard to plaintiff's medical records. Moreover, the trial court did not foreclose the admission of the transcribed therapy notes. Instead, defendant failed to avail itself of the process to have the transcripts admitted to the jury. We find no error.

Last, defendant argues that the trial court abused its discretion in denying his motion for new trial when the jury was improperly informed that defendant was arrested for assaulting plaintiff due to plaintiff's failure to fully redact a medical record. We disagree. This Court reviews a trial court's decision to deny a motion for a new trial for a clear abuse of discretion. *Morinelli, supra.*

The parties agreed before trial that the jury would not be informed of defendant's arrest in connection with the assaults in this case. Plaintiff's Cornell medical record, which was submitted to the jury marked as exhibit three, contained a notation regarding defendant's arrest. Plaintiff redacted that portion of the exhibit by drawing a black line through the notation. On appeal, defendant argues that plaintiff failed to properly redact the medical record because the jury was able to read the notation despite the black line, thereby denying him a fair trial.[3]

First, this Court agrees with plaintiff that defendant failed to provide a proper affidavit as required by MCR 2.611(D)(1) and MCR 2.119(B)(1)(c) in support of his assertions that the medical record was not properly redacted and the jury was improperly influenced by the notation to defendant's arrest. Thus, there is no support in the record for defendant's argument, and as a result, it must fail. MCR 2.611(D)(1).

Next, "MCR 2.611(A)(1)(b) permits a trial court to grant a motion for a new trial if the prevailing party committed 'misconduct,' affecting the moving party's substantial rights." *Hilgendorf v St John Hosp and Medical Center Corp,* 245 Mich App 670, 682; 630 NW2d 356 (2001). With regard to exhibit three, plaintiff's medical record, there is no evidence to conclude that plaintiff committed any sort of misconduct, intentional or unintentional, in redacting the exhibit. There is no dispute that the medical record was redacted and defendant stipulated to its admission at trial. When all the exhibits were placed on the table before they were taken to the jury for deliberations, defendant placed no objections on the record at that time. It is well established that a party is not allowed to assign as error on appeal something which his own counsel deemed proper at trial since do so would permit the party to harbor error as an appellate parachute. *Id.* at 683 (citations omitted). Accordingly, we find no error warranting reversal.[4]

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[3] In support of this assertion, defendant attached a notarized letter from juror Gretchen Norton. In the letter Norton claims a blackened-out potion of plaintiff's exhibit was "CLEARLY readable to" the jury. Norton was able to decipher the words that had been blackened out by holding up the paper. The notation made reference to plaintiff telling her physician that an altercation had occurred with defendant and that defendant had been arrested. Thereafter, the jury discussed the information of the arrest, and immediately, a juror changed his vote, allowing a verdict to be reached in favor of plaintiff, six to two.

[4] For purposes of appellate review, it would have been helpful for the trial court to explain its decision denying defendant's motions for a new trial, particularly on this issue. Nonetheless, it reached the correct result. Defendant is not entitled to relief from the jury's verdict based on this issue.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Christopher M. Murray