STATE OF MICHIGAN

COURT OF APPEALS

KEVIN ABRAMCZYK, GERALD NORTON, and DANIEL WLODKOWSKI,

Plaintiffs-Appellants/Cross-Appellees,

and

ERIC BLAZ, MICHAEL BOYD, PAUL DIEDRICH, PATRICK KAKOS, SEAN LAFOUNTAINE, CHARLES PRATHER, GERALD SCHULZ, and RICHARD SCHULZ,[1]

Plaintiffs,

v

THE CITY OF SOUTHGATE, a Michigan Municipal Corporation,

Defendant-Appellee/Cross-Appellant,

and

STEPHEN AHLES, in an individual and official capacity,

Defendant-Appellee,

and

NORMA WURMLINGER, in an individual and official capacity,

Defendant.

UNPUBLISHED
April 9, 2002

No. 224222
Wayne Circuit Court
LC No. 96-640658-NO

[1] By stipulation of the parties, this Court entered an order on March 1, 2002 dismissing plaintiffs from this appeal with prejudice and without costs.

KEVIN ABRAMCZYK, GERALD NORTON, and DANIEL WLODKOWSKI,

Plaintiffs-Appellees/Cross-Appellants,

and

ERIC BLAZ, MICHAEL BOYD, PAUL DIEDRICH, PATRICK KAKOS, SEAN LAFOUNTAINE, CHARLES PRATHER, GERALD SCHULZ, and RICHARD SCHULZ,[2]

Plaintiffs,

v

No. 224223
Wayne Circuit Court
LC No. 96-640658-NO

THE CITY OF SOUTHGATE,

Defendant-Appellant/Cross-Appellee,

and

STEPHEN AHLES, in an individual and official capacity, and NORMA WURMLINGER, in an individual and official capacity,

Defendants.

KEVIN ABRAMCZYK, GERALD NORTON, and DANIEL WLODKOWSKI,

Plaintiffs-Appellees/Cross Appellants,

and

ERIC BLAZ, MICHAEL BOYD, PAUL DIEDRICH, PATRICK KAKOS, SEAN

[2] See footnote 1.

LAFOUNTAINE, CHARLES PRATHER, GERALD SCHULZ, and RICHARD SCHULZ,[3]

Plaintiffs,

v

No. 224260
Wayne Circuit Court
LC No. 96-640658-NO

STEPHEN AHLES, in an individual and official capacity,

Defendant-Appellant/Cross-Appellee,

and

THE CITY OF SOUTHGATE, a Michigan Municipal Corporation, and NORMA WURMLINGER, in an individual and official capacity,

Defendants.

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal as of right the trial court's November 30, 1999, Final Amended Judgment following a jury trial verdict for plaintiffs against defendants Stephen Ahles and City of Southgate (City).[4] Defendant Ahles also appeals as of right from the trial court's Final Amended Judgment granting remittitur in favor of defendant Ahles. Defendant City appeals as of right from the trial court's October 28, 1997, partial denial of its motion for summary disposition, the trial court's April 6, 1999, Judgment, and the trial court's Final Amended Judgment. We affirm in part, reverse in part, and remand for further proceedings.

(…continued)

[3] See footnote 1.

[4] Defendant Norma Wurmlinger is not a party to this appeal.

I. Background Facts and Procedural History

This case arises out of the tape recording of the business lines at the City of Southgate's fire department from the Fall of 1994 until February 1996. According to defendant fire chief Ahles, he believed that the business lines at the fire department were always recorded. However, defendant Ahles discovered that the lines were not recorded when he tried to get a copy of a complaint that was telephoned into the department. To safeguard the fire department against future complaints defendant Ahles decided to "reinstate" the recording of the business lines. To accomplish this defendant Ahles connected his personal tape machine to a voice activated recorder located behind a closed bookcase in his office. This machine was attached to the phone jack used by the fire department's business lines. The tape ran on a continuous loop and was recorded over approximately every two weeks.

Plaintiffs, several firefighters with the fire department, testified that they were unaware that the business lines were recorded and that it was common practice for the firefighters to use these lines for personal telephone calls. There were no signs posted or any written policy announcing the recording of the business lines. However, defendant Ahles claimed that the recording of the business lines was common knowledge. In contrast, plaintiffs unanimously testified that they were unaware that the business lines were recorded or that this had ever been the fire department's policy. The mayor also claimed that she was unaware that the fire department's business lines were recorded until the audiotape was discovered.

Defendant Ahles denied ever listening to the tapes. However, testimony revealed that defendant Ahles knew about the contents of private telephone conversations. Specifically, plaintiff Kakos testified that he had done some business for defendant Ahles' wife but that he underestimated the cost of his work to her. Thereafter, plaintiff Kakos told his own wife, over the business line at the fire department, the actual cost of the work. Plaintiff Kakos claimed that he never told defendant Ahles of the correct amount but that shortly after the telephone call he was paid the correct amount.

On February 3, 1996, a tape was discovered in defendant Ahles' vehicle that contained telephone conversations from the fire department's business lines. Defendant Ahles received a five day suspension from defendant City for his actions. After the initial complaints were made against defendant Ahles, plaintiffs claimed that they were retaliated against. Specifically, plaintiffs testified that defendant Ahles instituted harsh policies, gave unjustified reprimands, and threatened plaintiffs with the loss of their jobs.

On September 18, 1996, all plaintiffs filed a multi-count complaint against defendant City and defendant Ahles.[5] Thereafter, on August 8, 1997, defendant City filed a motion for

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[5] The complaint alleged: (1) violations of the Michigan Eavesdropping Statutes, MCL 750.539 *et seq*., against both defendants; (2) a violation of the Michigan Constitution right against illegal search and seizure by both defendants; (3) negligent and intentional infliction of emotional distress by both defendants; (3) a violation of the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., against both defendants; (4) a failure to hire, train or supervise the fire chief on the part of defendant City; (5) a violation of plaintiffs' privacy rights by both

(continued…)

summary disposition pursuant to MCR 2.116(C)(7), (8), and (10).[6] The trial court granted partial summary disposition for defendant City on the intentional infliction of emotional distress claim but found that questions of fact existed on the remainder of plaintiffs' issues.

After a month long trial, the jury found in favor of plaintiffs and against defendant Ahles on all claims, except for violations of the Whistleblowers' Protection Act (WPA),[7] and awarded $115,000 in compensatory damages and $19,250,000 in punitive damages. Conversely, the jury found for defendant City, and against plaintiffs, on all claims except the violation of public policy. While the jury was specifically instructed on the verdict form not to award punitive damages unless it found a violation of the Michigan Eavesdropping Statute, the jury awarded $110,000 in compensatory damages and $13,750,000 in punitive damages against defendant City.

On March 30, 1999, defendant City filed a motion for judgment notwithstanding the verdict, remittitur or new trial. The trial court denied defendant City's motion for judgment notwithstanding the verdict or a new trial concerning the public policy tort. The court reasoned that plaintiffs' theory of the case, and the jury's ultimate finding, was that defendant City permitted a violation of the state policy against eavesdropping. Finding that this theory was supported by law, the trial court held that there was a tort against public policy. However, the trial court granted defendant City's motion for judgment notwithstanding the verdict regarding the punitive damages awarded against defendant City. In this regard, the trial court stated that the award of punitive damages was contrary to the court's instructions and the jury's findings that defendant City had not violated the eavesdropping statute.

On April 27, 1999, defendant Ahles filed a separate motion for remittitur or a new trial. The trial court issued a written opinion granting remittitur of the punitive damages assessed against defendant Ahles. After analyzing the factors articulated in *BMW of North America, Inc v Gore*, 517 US 559; 116 S Ct 1589; 134 L Ed 2d 809 (1996) and *Palenkas v Beaumont Hospital*, 432 Mich 527; 433 NW2d 354 (1989), the trial court reduced the punitive damages award from $1,750,000 per plaintiff to $1,750,000 split amongst the plaintiffs.

II. Legal Analysis

A. Defendant Ahles' Status as a Licensed Attorney

Plaintiffs first contend that the trial court erred in excluding evidence that defendant Ahles was a licensed attorney. Essentially, plaintiffs opine that this information would have increased the culpability of both defendants. We disagree.

(…continued)

defendants; and (6) a violation of public policy by both defendants.

[6] Defendant City's first motion for summary disposition was denied because discovery was incomplete.

[7] For the WPA claim, the jury found in favor of plaintiffs Kakos, G. Schultz, LaFountaine, and Norton.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). An abuse of discretion is found where the result is so violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id*.

Plaintiff has failed to present any evidence that defendant Ahles was personally aware of the provisions in the eavesdropping statutes. Without this personal awareness defendant Ahles' status as an attorney could not have increased his culpability. This Court is not required to search for a factual basis to sustain or reject plaintiffs' position. *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). Regardless, defendant Ahles' status as an attorney would not impute any greater knowledge on him because knowledge of the law is presumed. *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17, 27, n 7; 614 NW2d 634 (2000). Moreover, any error in excluding the evidence would be harmless in light of the jury's finding against defendant Ahles and award of substantial damages.

To the extent plaintiffs argue that defendant Ahles status as an attorney would have further implicated defendant City, they have failed to provide any nexus between this evidence and defendant City's actions. In fact, when defendant City discovered that defendant Ahles' was eavesdropping it suspended him. It is unclear how evidence that defendant Ahles was an attorney could have increased defendant City's culpability. See *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 557 NW2d 200 (1998).

B. Remittitur of Defendant Ahles Punitive Damages

Next, plaintiffs and defendant Ahles contend that the trial court's award of remittitur was an abuse of discretion. Specifically, plaintiffs allege that remittitur was unwarranted based on defendant Ahles' egregious actions in this case. Conversely, defendant Ahles suggests that the remitted award was still grossly excessive. We find that the trial court erred by ordering remittitur without allowing plaintiffs the opportunity to accept or reject the remitted amount.

When the only error in the trial was the excessiveness of the verdict, the trial court may deny a motion for new trial on condition that the nonmoving party consent to remittitur to the highest amount the evidence will support. MCR 2.611(E)(1). A trial court's decision concerning remittitur is reviewed on appeal for an abuse of discretion. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 305; 616 NW2d 175 (2000). An abuse of discretion exists when an unprejudiced person considering the facts would find no justification for the trial court's ruling. *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997).

The court rule governing remittitur provides:

> (1) If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial *on condition that within 14 days the nonmoving party consent* in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support. [MCR 2.611(E)(1), emphasis supplied.]

If a party refuses to consent to remittitur the trial court cannot unilaterally reduce the verdict by the amount deemed to be excessive. See *Kellom v City of Ecorse*, 329 Mich 303; 45 NW2d 293 (1951); 3 Dean & Longhofer, Michigan Court Rules Practice (4th ed), p 415.

In the case at bar, the trial court did not offer plaintiffs the opportunity to accept the remitted amount. The trial court abused its discretion by failing to comply with the requirements of MCR 2.611(E)(1). Therefore the issue of remittitur is remanded to the trial court to allow plaintiffs the opportunity to accept the remitted award. If plaintiffs refuse to accept remittitur then a new trial on the issue of damages should be granted. See *Kellom, supra* at 308.

However, we do find that the trial court's ultimate decision to grant remittitur was proper. According to the factors suggested in *Gore, supra*, the remitted punitive damages award was adequate and not overly excessive. While defendant Ahles' actions were inappropriate, there was no evidence of violence to merit a higher award. Indeed, this is reflected in the comparatively lower compensatory damages that were awarded by the jury. Moreover, the ratio between the compensatory damages and the punitive damages in this case dramatically exceeded the 4 to 1 ratio that the Supreme Court stated might be "close to the line" of constitutional impropriety.[8] *Id*. at 581, citing *Pacific Mutual Life Ins Co v Haslip*, 499 US 1; 111 S Ct 1032; 113 L Ed 2d 1 (1991). Further, the $1,750,000 per plaintiff that the jury awarded in punitive damages is not comparable to the potential statutory penalties for eavesdropping. *Gore, supra* at 583-584; see also MCL 750.539 *et seq*.

The remittitur was also appropriate under the standards set forth in *Palenkas, supra*. Clear evidence was presented that defendant Ahles was guilty of illegal eavesdropping. Defendant Ahles admitted to installing a recording device and there was evidence that he listened to the tapes. See MCL 750.539 *et seq*. Moreover, the trial court did not abuse its discretion in concluding that the jury's assessed punitive damages were the result of prejudice, passion, or bias. See *Palenkas, supra* at 532. Indeed, the trial court could have reasonably determined that the jury intended to financially ruin defendant Ahles by awarding punitive damages in excess of $19 million. See *id*. at 534. Further, in light of the much lower compensatory damages award, reasonable minds could not consider the jury's punitive award to be just punishment. We also find that the remitted award is comparable with awards that have been permitted in other cases.

While defendant Ahles cites cases with lower compensatory and punitive damages ratios, he fails to argue how the trial court's remitted amount grossly violated fact or logic. We note that $2,000 per plaintiff, the amount defendant Ahles requested in his motion as a maximum punitive penalty, is even below the compensatory damages allotted in this case. Moreover, the amount awarded by the trial court is between the amounts requested by both plaintiffs and

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[8] We note that the Supreme Court upheld a ratio between punitive and compensatory damages of 561 to 1 in *TXO Production Corp v Alliance Resources Corp*, 509 US 443; 113 S Ct 2711; 125 L Ed 2d 366 (1993). However, the punitive damages in *TXO* reflected the potential harm that the defendant's wrongful conduct could have caused. *Id*. at 460-461. The Supreme Court in *Gore, supra* at 581, found that when considering the potential harm in *TXO* the relevant ratio was not more than 10 to 1.

defendant Ahles. Accordingly, we find that the trial court's award of $159,090.00 in punitive damages for each plaintiff was not an abuse of discretion.

C. Reduction of Attorney Fees

Plaintiffs further contend that the trial court abused its discretion in lowering Attorney Seifman's hourly rate from $250.00 to $150.00. We disagree.

A trial court's determination of a reasonable attorney fee award under MCR 2.403 is reviewed for an abuse of discretion. *Michigan Basic Property Ins Assoc v Hackert Furniture Distributing Co, Inc,* 194 Mich App 230, 234; 486 NW2d 68 (1992).

A party who rejects a case evaluation is subject to mandatory sanctions if the party fails to improve its position at trial. MCR 2.403(O)(1); *Elia v Hazen*, 242 Mich App 374, 378; 619 NW2d 1 (2000). Sanctions include actual costs and reasonable attorney fees. MCR 2.403(O)(1) and (6).

Reasonable attorney fees are not necessarily equivalent to the actual fees charged. *McPeak v McPeak,* 233 Mich App 483, 497; 593 NW2d 180 (1999). Rather, to determine a reasonable hourly or daily rate, a trial court may consider: "[1] the professional standing and experience of the attorney; [2] the skill, time, and labor involved; [3] the amount in question and the results achieved; [4] the difficulty of the case; [5] the expenses incurred; and [6] the nature and length of the professional relationship with the client." *Temple v Kelel Distributing Co,* 183 Mich App 326, 333; 454 NW2d 610 (1990). These factors are not all-inclusive and the trial court may consider other factors in making its determination. See *Wood v DAIIE,* 413 Mich 573, 588; 321 NW2d 653 (1982). "[T]he trial court need not detail its findings as to each specific factor considered." *Id.*

In this case, the trial court noted that the trial was lengthy, involved several plaintiffs, and that the jury instructions were somewhat complicated. However, the trial court further stated that the legal issues were not extremely complex and that mediation sanctions were based on reasonable attorney fees. Finding that a reasonable attorney fee was not necessarily what attorney Seifman charged, the trial court reduced his hourly rate to $150.00. We find that this reduction did not amount to an abuse of discretion. Indeed, the trial court rejected defendant City's argument that attorney Seifman should only receive $100 an hour, stating that such a low amount was unreasonable. Rather, the trial court correctly considered the complexity of the litigation and attorney Seifman's experience. While attorney Seifman may legitimately charge $250.00 an hour, plaintiffs have failed to show that an hourly rate of $150.00 was unreasonable.

D. Public Policy Tort

Defendant City claims that the trial court erred in denying its motion for judgment notwithstanding the verdict because there was no legal authority to create a public policy tort and the evidence failed to support such a claim. We agree.

This Court reviews a trial court's decision on a motion for judgment notwithstanding the verdict de novo. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). A motion for judgment notwithstanding the verdict should be granted only if

the evidence, when viewed in favor of the nonmoving party, fails to establish a claim as a matter of law. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998), quoting *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

There is a clearly stated public policy against eavesdropping in Michigan. MCL 750.539 *et seq*. Defendant City has a duty to obey the laws of Michigan and to enforce the provisions in its charter. In this respect plaintiffs contend that defendant City ignored its charter requirements to oversee and approve all of the fire department's policies. According to plaintiffs, defendant City's failure to follow its charter inadvertently made defendant Ahles a policy maker for defendant City. The charter's language requires the mayor and the Public Service Commission to approve the fire department's policies. The testimony of the mayor and defendant Ahles indicated that, contrary to the charter, fire department policies were not presented regularly to either the mayor or the Public Service Commission. Consequently, if defendant Ahles instituted a fire department policy of eavesdropping, defendant City would be liable for the policy.

However, plaintiffs have failed to show that an actual fire department policy condoning eavesdropping existed in this case. The fact defendant Ahles labeled his eavesdropping activity as "policy" does not necessarily make it a policy. The evidence shows that defendant Ahles failed to inform anybody that he was taping the business lines at the fire department. Defendant Ahles admitted that he did not tell the Public Service Commission or the mayor of his actions. Further, while defendant Ahles claims that everybody in the fire department knew the business lines were recorded, plaintiffs provided unanimous testimony that they were unaware of this practice.

The facts show that defendant Ahles was intentionally trying to keep his conduct a secret and that he succeeded in doing so for seventeen months. Indeed, defendant Ahles concealed the recording device behind closed doors in his office bookcase. Defendant Ahles also used his own equipment to accomplish the eavesdropping. Moreover, defendant Ahles' professed purpose for instituting this "policy," namely to protect the fire department from complaints relating to telephone communications, was proven suspect. When the fire department received a complaint over its business lines about a sixteen minute response time defendant Ahles, instead of offering the tape as a complete record of the event, had a firefighter draft a memorandum recording the incident. Defendant Ahles not only chose to conceal the recording device, but, when the opportunity arose to constructively utilize the tapes he elected to keep their existence secret.

Based on the facts in this case there was no fire department policy of eavesdropping. Rather, the evidence shows that defendant Ahles acted intentionally, unilaterally, and that his "policy" was never in writing or even orally related to anybody associated with defendant City or the fire department. Defendant Ahles' conduct in this case did not amount to policy-making for the fire department or defendant City, but in reality was a "personal policy" and an intentional tort. For something to be a departmental policy, and not merely an individual's course of action, others need to be aware of the policy's existence. Absent the existence of a public policy authorizing eavesdropping there can be no public policy tort against defendant City.

Even if defendant Ahles had established a public policy of eavesdropping, a jury could not reasonably conclude that defendant City's actions were the cause in fact or proximate cause

of plaintiffs' injuries. The secretive nature and extent of defendant Ahles' actions makes this "policy" different from the other policies he had established in the past. For instance, when defendant Ahles' enacted the "no napping" policy he issued a memorandum to the department. The secretive nature of defendant Ahles' actions shows that he would not have informed defendant City about his "policy" even if the charter's provisions were enforced. Moreover, when defendant City discovered the tapes it suspended defendant Ahles. Indeed, a municipality cannot create a policy that directly conflicts with a Michigan criminal statute. See *Frericks v Highland Twp*, 228 Mich App 575, 585-586; 579 NW2d 441 (1998).[9] Thus, a jury could not reasonably conclude that defendant City's failure to enforce the provisions of its charter was the cause of plaintiffs' injuries.

Because we conclude that plaintiffs failed to establish the existence of a fire department policy permitting eavesdropping, defendant City is not liable for a public policy tort. Thus, the punitive damages assessed against defendant City are necessarily dismissed. We do not need to address the remainder of defendant City's issues on appeal because our decision on the public policy tort is dispositive.[10]

Affirmed in part and reversed in part. We remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Jessica R. Cooper

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[9] The Court in *Frericks* stated that:

> A municipality may not enact an ordinance if (1) the ordinance directly conflicts with the state statutory scheme, or (2) the state statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. [*Frericks, supra* at 585, quoting *John's Corvette Care, Inc v Dearborn*, 204 Mich App 616, 618; 516 NW2d 527 (1994) (citation omitted).]

[10] We note that defendant City lacked standing as an "aggrieved party" to raise several of its issues on appeal. MCR 7.203(A). The jury found of behalf of defendant City concerning any violation of the Michigan Eavesdropping Statutes, the WPA, or the Michigan Constitution. This Court only has jurisdiction over appeals filed by an "aggrieved party." MCR 7.203(A); *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994).

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Defendants.

Before: O'Connell, P.J., and White and Cooper, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I concur in all respects with the majority opinion, except section D, addressing the public policy claim against defendant City. On that claim, I agree that the trial court properly vacated the award of punitive damages against defendant City, but on the basis that the jury's award of such damages was contrary to the jury instructions, and contrary to the jury's findings that defendant City did not violate the eavesdropping statutes.

I would affirm the trial court's determination not to disturb the jury's award of compensatory damages against defendant City on the public policy claim. The jury was permitted to make nuanced distinctions between defendant City directly violating the eavesdropping statutes, and defendant City permitting, at the highest level of City government, a violation of the eavesdropping statutes. I conclude that the evidence was such that the issues of policy and proximate cause discussed by the majority were properly left to the jury.

/s/ Helene N. White

(…continued)

[3] See footnote 1.