STATE OF MICHIGAN

COURT OF APPEALS

THOMAS MARK PROSE,

Plaintiff-Appellee,

v

W. EDWARD WENDOVER and SALLY REPECK,

Defendants-Appellants,

and

ROBERT L. SCROGGINS, DON DISMUKE, JOE KOCH, STEVE WALTERS, and CITY OF PLYMOUTH,

Defendants.

UNPUBLISHED
May 15, 2007

No. 266014
Wayne Circuit Court
LC No. 99-933730-NZ

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendants-appellants ("defendants") appeal as of right from a judgment entered against them after a jury trial in this malicious prosecution case. The jury found defendant W. Edward Wendover liable for $1,437,500 in damages and defendant Sally Repeck liable for $862,500 in damages. We affirm.

Wendover, whose wife is Repeck, owned and published the local newspaper, *The Plymouth-Canton Community Crier*, in Plymouth. Plaintiff purchased a building located next to the building that housed both the *Crier* offices and defendants' personal residence. Plaintiff and defendants had disputes over Wendover's allegedly placing a vehicle on and otherwise using plaintiff's property, and the parties leveled various negative allegations at one another. Eventually, Wendover signed a "misdemeanor charging ticket" alleging that plaintiff committed various misdemeanors; the charges were associated with plaintiff's visit to the *Crier* lobby on November 3, 1998. The charges stemming from this ticket were eventually dismissed and were not further pursued by the Plymouth city attorney, but the Wayne County Prosecutor's office eventually issued two misdemeanor stalking charges against plaintiff after reviewing the history of the parties' dispute. These charges, too, were dismissed. Plaintiff then filed a malicious prosecution claim, and the jury rendered a verdict as set forth above.

Defendants first argue on appeal that the trial court should have granted a directed verdict "for both defendant-appellants as to both counts of malicious prosecution" because plaintiff failed to demonstrate that the "criminal proceedings terminated in his favor," a necessary element for a malicious prosecution claim. See *Cox v Williams*, 233 Mich App 388, 391; 593 NW2d 173 (1999). We review de novo questions concerning what type of action constitutes a termination in the plaintiff's favor for purposes of a malicious prosecution claim. See *id*. We also review de novo a trial court's decision regarding a motion for a directed verdict. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

> When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ. [*Id*. (citations omitted).]

As noted in *Cox*:

> In an action for malicious prosecution, the plaintiff has the burden of proving (1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his action, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. [*Cox, supra* at 391.]

Citing 2 Restatement Torts, 2d, § 658, p 417, the Court further stated that

> criminal proceedings are terminated in favor of the accused by (1) a discharge by a magistrate at a preliminary hearing, or (2) the refusal of a grand jury to indict, or (3) the formal abandonment of the proceedings by the public prosecutor, or (4) the quashing of an indictment or information, or (5) an acquittal, or (6) a final order in favor of the accused by a trial or appellate court. [*Cox, supra* at 391-392.]

The Court also noted that "[i]n accordance with the Restatement, courts of other jurisdictions have generally held that a proceeding is terminated in favor of the accused where its final disposition suggests that the accused is innocent." *Id*. at 392. The Court discussed several cases and stated that

> [t]he preceding cases demonstrate the general rule that dismissal of criminal charges at the instance of the prosecutor or the complaining witness implies a lack of reasonable ground for prosecution and is a favorable termination of the proceeding for purposes of a malicious prosecution cause of action. [*Id*. at 393.]

The Court quoted and cited favorably to the following excerpt from 52 Am Jur 2d, Malicious Prosecution, § 36, p 208:

> "[A] dismissal of a prosecution and discharge of the accused by a trial court, without a trial on the merits, is such a termination as will sustain an action

> for malicious prosecution, unless the dismissal was procured by the accused as a favor. A dismissal procured by the complainant or at the request of the prosecuting attorney is a sufficient termination, as is a dismissal on motion of the accused." [*Cox*, *supra* at 393, quoting 52 Am Jur 2d, Malicious Prosecution, § 36, p 208.]

Here, a copy of the misdemeanor charging ticket that was admitted at the malicious prosecution trial indicated that plaintiff had been charged with the following in connection with his visit to the *Crier* lobby on November 3, 1998: "disorderly conduct (harassment), disorderly conduct (use of profane language in front of woman)," and "disorderly conduct (telephone harassment)." Wendover signed the ticket as the complainant, even though he had not been present in the *Crier* lobby when the alleged offenses occurred. Plaintiff testified that he moved to dismiss the charges and that the trial court presiding over the criminal matters granted the motion. In a transcript that was submitted as an exhibit at the malicious prosecution trial, the court presiding over the criminal matters stated:

> I just don't think there is enough information to inform the Defendant of the charges against him, who the complainant is. You need to be specific in order for him to respond.
>
> Maybe he agrees, maybe he is going to plead guilty after he finds out what the charges are. Due process would require, if not the Code of Criminal Conduct, that you specify the action, the behavior upon which the charges are made. There is nothing in here.
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> You can't use the police report, because that is not verified. It is not – it does not take on the form as required under the procedural rules of a complaint. That is a police report. That is a separate matter, it cannot be used in a court pleading. It can't be used as court records.
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> A complaint is a court record, which is provided under the Rules of Criminal Procedure.
>
> I agree with you counsel, a lot of jurisdictions issue these tickets, appearance tickets for undescribed things but somewhere in the procedure a complaint has to be filed and signed under the Court rules – under the Rules of Criminal Procedure.
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> So, I am going to grant the Motion, but it will be dismissed without prejudice. If the City wants to take a complaint from the complainant in this case, specifying the activity, the behavior upon which the charges are based without prejudicing any rights of the Defendant to object to that further on, – but at least they have got to be informed. Due process requires that. You can't answer for something you don't know.
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> Was I a disorderly person? I don't know, maybe I was. What are you saying, – how do you say I was disorderly? You know. What harassing things did I do? What did I say on the telephone?

Lieutenant Edward Ochal of the Plymouth Police Department indicated that, after the *Crier* lobby charges were dismissed, the city "didn't continue to prosecute that case." Robert Scoggins, the former Plymouth Chief of Police, testified that John Martin, the Plymouth city attorney, told him that "there [were] flaws in the case." Scoggins acknowledged that Martin "never reissued the case . . . ." Scoggins stated that he "made a determination that [Martin] had concerns about the case" and that, therefore, he (Scoggins) decided to "[take] the case somewhere else[.]" Scoggins testified that he "wanted a different review by a different prosecutor to see if there was probable cause to believe the man committed a crime." Accordingly, Scoggins directed Ochal to prepare an "investigator's report" to "summarize the details of the ongoing matter . . . ." This report was submitted to Ray Walsh of the Wayne County Prosecutor's Office. The Wayne County Prosecutor's Office ended up charging plaintiff with two counts of misdemeanor stalking, one relating to Wendover and one relating to Repeck. At the malicious prosecution trial, Wendover testified that the alleged stalking consisted of (1) plaintiff's allegedly stopping his vehicle behind Wendover's van on a Plymouth street while Wendover and Repeck were in the van and (2) plaintiff's following Wendover and Repeck into a restaurant and sitting in a booth next to them. Plaintiff again moved to dismiss the charges. In a transcript that was admitted as an exhibit at the malicious prosecution trial, the court presiding over the criminal matters stated:

> We have the example cited by the prosecutor here, [that] unwanted conduct from the viewpoint of the victim should be protected – or should not be protected, it should be subject to criminal process. Well, yes and no. That's a very, very broad brush to say that all unwanted conduct, in terms of how the – the victim looks at it, should be considered criminal conduct . . . .
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> There are many instances where unwanted conduct with an alleged victim is not necessarily criminal conduct, and to leave that to a trier of fact does not establish a law which can be interpreted and construed on a – on a rational basis. There – there is no way to interpret that law, broadly, to – to define which conduct is criminal and which conduct is not . . . .
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> * * *
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> It is the other conduct, the – the appearing at the Town Crier, a public newspaper, conversations that the Court has previously heard in the evidentiary hearing brought forth by the Defendant, some of it obnoxious, some of it peaceful. And it's based on those facts the Court find that the – the statute as applied – applied in this case is un – is unconstitutional, and I will grant the Defendant's motion to dismiss.

In an order, a copy of which was admitted as an exhibit at the malicious prosecution trial, the court stated that plaintiff's motion to dismiss was granted and that the case was dismissed without prejudice.

It cannot be seriously argued that the dismissal of the *Crier* lobby charges and the stalking charges did not, as a matter of law, constitute a termination in plaintiff's favor for purposes of the malicious prosecution claim. The testimony established that, after the initial charges stemming from the *Crier* lobby charges were dismissed, the Plymouth city attorney

never reissued the case. Moreover, the dismissals were granted upon a motion by the accused and were clearly not granted as a favor to plaintiff. See *Cox*, *supra* at 393. Under these circumstances, there was sufficient evidence from which the jury could properly conclude that plaintiff established the "termination" element of the malicious prosecution claim with respect the *Crier* lobby charges.

The dismissals of the stalking charges, too, occurred upon a motion by the accused and did not occur as a favor to him. *Id*. The court presiding over the charges essentially concluded that plaintiff could not be deemed guilty of the stalking charges because of constitutional concerns; this was evidence of a "lack of reasonable ground for prosecution." See *id*. As with the *Crier* lobby charges, there was sufficient evidence from which the jury could properly conclude that plaintiff established the termination element of the malicious prosecution claim with respect to the stalking charges. A directed verdict was unwarranted.

Defendants next argue that the trial court should have granted a partial directed verdict because there was no evidence that Repeck was liable with regard to the *Crier* lobby charges. Defendants contend that "no testimony tied her to [the *Crier* lobby] incident and she did not initiate or continue prosecution of that incident[.]" This argument is without merit. Repeck gave a statement relating to the charges associated with the *Crier* lobby incident. Ochal testified that the first charge in connection with the *Crier* lobby incident was "harassment" and that "harassment would have been a series of contacts." Ochal testified:

> I believe the reason Sally Repeck was involved in that was because Chief Scoggins had picked a harassment charge and that there were several incidents besides that incident that happened then, and he probably wanted to have them all there.

Ochal testified that Repeck gave a statement relating to "certain things that [she] says she observed or witnessed or complained about[.]" Ochal stated, "I believe she told me these things first and I told her to do a written statement and let us know about it." From this evidence, the jury could have reasonably concluded that Repeck maintained the prosecution against plaintiff. See *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 379; 572 NW2d 603 (1998) ("[a] plaintiff's prima facie case against a private person requires proof that the private person instituted or maintained the prosecution"). Reversal is unwarranted.

Defendants next argue that the trial court erred in instructing the jury with regard to the element of "termination in favor of the accused." We review de novo claims of instructional error. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). As further noted in *Case*:

> In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. We will only reverse for

> instructional error where failure to do so would be inconsistent with substantial justice. [*Id*. (citations omitted).]

Over defendants' objection, the trial court instructed the jury as follows with regard to the termination element:

> Second, that the proceeding was terminated in favor of the plaintiff. What's required for terminating in favor of the plaintiff? What's required is that it's dismissed without a conviction, so long as the dismissal is not bargained for by the defendant.

In their appellate brief, defendants state that "[t]he court completely ignored othe[r] terminations of proceedings that were not in favor of the accused, such as for procedural reasons, statutes of limitations, or lack of jurisdiction . . . ." Defendants further argue that the court erred in failing to instruct the jury that a proceeding is "terminated in favor of the accused" when the dismissal of the charges "suggests that the accused is innocent." We cannot agree that the court committed an error requiring reversal. Again, as noted in *Cox*, *supra* at 393, quoting 52 Am Jur 2d, Malicious Prosecution, § 36, p 208,

> "[a] dismissal of a prosecution and discharge of the accused by a trial court, without a trial on the merits, is such a termination as will sustain an action for malicious prosecution, unless the dismissal was procured by the accused as a favor."

The court's instruction was in accordance with this precept. Moreover, "[w]e will only reverse for instructional error where failure to do so would be inconsistent with substantial justice." *Case*, *supra* at 6. Given the factual situation here, where the Plymouth city attorney clearly declined to continue pursuing the *Crier* lobby charges and where the stalking charges essentially were dismissed because of a lack of reasonable grounds for prosecution, we simply cannot conclude that the instruction given was "inconsistent with substantial justice." *Id*. The applicable law was adequately and fairly presented to the jury. *Id*.[1]

Next, defendant argues that the trial court erred in its instruction to the jury concerning the element of a lack of probable case, see *Cox*, *supra* at 391, because certain aspects of that element were to be evaluated by the trial court as a matter of law and *not* submitted to the jury. However, defense counsel not only failed to object to the proposed "probable cause" instruction given to the trial court, but he *specifically stated that he "agreed with"* all the proposed instructions,[2] with the exception of the instruction relating to "termination in favor of the

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[1] In the context of this appellate issue, defendants argue that the trial court gave further erroneous instructions to the jury. However, the record makes clear that the additional "instructions" about which defendants take issue were merely comments made by the court *after the jury was discharged*. Accordingly, they do not provide a basis for reversal.

[2] The record reflects that the proposed jury instructions were submitted jointly by the parties in a document entitled "parties' joint proposed jury instructions."

accused." After the trial court gave the instructions, defense counsel reiterated that he was objecting only to the instruction relating to the termination element of the malicious prosecution claim. Under the circumstances, defendant waived the argument he now seeks to raise on appeal. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).[3] Therefore, any possible error has been extinguished. *Id*. As noted in *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989), "[a] party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." Reversal is not warranted.

Finally, defendants argue that the damages award was excessive because it likely stemmed from improper and inflammatory testimony. However, we need not consider the argument about excessive damages because it was not raised in the trial court. See *McCue v Detroit United Rwy*, 210 Mich 554, 557; 178 NW 68 (1920), and *Pena v Ingham Co Road Comm'n*, 255 Mich App 299, 315-316; 660 NW2d 351 (2003). Nevertheless, certain of defendants' arguments raised in the context of this issue are more accurately characterized as arguments relating to the allegedly improper admission of evidence, so we will review them.

Defendants object to the testimony given by Maria Prose (Prose), plaintiff's wife, that (1) plaintiff received death threats, (2) a person calling herself "Samantha" called Prose and said that she was having an affair with plaintiff, and (3) a person calling herself "Gina"[4] sent flowers to plaintiff. With regard to the flower delivery, Prose stated, "I believe it was an attack on our marriage." Plaintiff also testified about the "attack on the marriage," and defendants suggest on appeal that this was inappropriate. Defendants further object to the testimony of Sandy Wrona, one of plaintiff's employees, that a man with a "scruffy beard" delivered a box to plaintiff's office. Defendants state in their appellate brief:

> Sandy Wrona . . . was allowed to testify about a man with ragged, dirty jeans, a hooded sweatshirt and "like this really scruffy beard" who entered the office and handed her a white box and then walked to the door. The impression was left hanging that this was Mr. Wendover, who had a medium length beard at trial. An objection that counsel was implying this person was Mr. Wendover was overruled. It wasn't until cross examination that Ms. Wrona was asked and confirmed that the man was not Mr. Wendover.
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> Although there was no connection to Mr. Wendover, Dr. Prose was allowed to talk about this man as the "Unibomber" who delivered a box with a skull and crossbones on it that Plaintiff sent to the Michigan State Police for fingerprinting. The objection that it was not relevant to Mr. Wendover was overruled.

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[3] The concepts discussed in *Carter* are applicable in civil cases. See, e.g., *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002).

[4] "Gina" is alternately referred to as "Genna" in the record.

Defendants contend that this various testimony should have been disallowed by the trial court because there was insufficient evidence to connect the negative incidents to defendants. Defendants contend that the testimony was not relevant or that its relevance was substantially outweighed by the danger of unfair prejudice. See MRE 401 and 403. Defendants state that the testimony was "inserted into the trial by Plaintiff solely to arouse the passions of the jury regarding damages."

With regard to the testimony about death threats, the trial court stated, "[i]f they don't make a rational connection to the defendants, the jury will disregard it." During the testimony regarding "Samantha," the court stated:

> A case is not made in one question and one witness. When we are done, if the jury believes that these threats were made but the defendants didn't have any participation in it, you and they will all agree that your clients will not suffer one bit. If they prove that it came from you – that's what a trial is about. That's what evidence is for. It doesn't happen in thirty seconds. To tell the whole story, it's going to take a long time. And when it's done, the jury will weigh the evidence and if it's not connected to the defendants, well, then it won't be.

In our opinion, given that there was an ongoing dispute between defendants, on the one hand, and plaintiff and Prose, on the other hand, the testimony was arguably relevant to the case,[5] and the court's giving of these warnings to the jury served to ensure that the jury did not react to the testimony in an improper or irrational manner.[6] With regard to plaintiff's objection about Wrona's testimony, the jury *was informed on cross-examination* that the bearded man was not Wendover. When plaintiff testified about the man with the white box, the court stated:

> The evidence takes care of itself. This is a completely factual matter, there is no law involved. This is for the jury to consider. If they conclude that what you say is true, that this couldn't possibly have come from the defendant, they won't hold it against him. On the other hand, you know, there's evidence that they might conclude otherwise. That's for them to determine. The point is, it's not irrelevant.

Again, the evidence was arguably relevant, and the trial court's comments served to ensure that the jury did not react to the testimony improperly or irrationally. We find no basis for reversal.

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[5] Prose testified that she and plaintiff had not ever received death threats "before this event or th[is] ongoing dispute with Mr. Wendover and Ms. Repeck . . . ."

[6] While the court did not give a specific warning during the testimony about "Gina," it is clear from the record that this testimony was similar to the testimony relating to "Samantha" and that the court's warning given during the "Samantha" testimony was applicable also to the testimony about "Gina."

Defendants contend that the testimony given by Dr. Michael Abramsky, who testified about plaintiff's mental and other medical issues stemming from the dispute, was unduly prejudicial because, for example, Abramsky stated that plaintiff had "police-related fears" (in contrast to fears relating directly to Wendover and Repeck) and because Abramsky's analysis of plaintiff was based "solely . . . on the history of events provided to him by [plaintiff]." Defendants' objections are without merit. They largely go to the weight, not the admissibility, of Abramsky's testimony, and certain areas of questioning that defendants could not pursue were off-limits *because of stipulations entered into by defense counsel*. While defendants may not have been pleased with Abramsky's testimony, there is simply no evidence that the court erred in allowing it into the trial.

Defendants claim that plaintiff's attorney improperly elicited testimony from Wendover about how he obtained a personal protection order (PPO) against plaintiff because counsel "sought to arouse juror passions against Mr. Wendover for following the very ex parte legal procedures required of him." We disagree that counsel was attempting to arouse juror passions in eliciting this testimony; the record demonstrates that he was simply informing the jury how the PPO was obtained. Defendants also state that "[c]ounsel for plaintiff claimed attorney fees for a string of eight named lawyers that included lawyers who were working on [plaintiff's] other civil litigation as damages in the instant case." However, the court *sustained defendants' objection* with regard to the lawyers who worked on the civil case, so it is unclear exactly to what defendants are objecting on appeal. As noted in *Palo Grp Foster Care, Inc v Michigan Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998):

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [Internal citation and quotation marks omitted.]

Similarly, defendants provide no citation to the record and no cogent argument with regard to their next claim concerning testimony about "questionable things" occurring at the *Crier*. Accordingly, no basis for reversal is apparent. *Id*.

Defendants raise further claims that the "evidence on actual damages was imprecise and unreliable," that "[t]he claim for damages for medical treatment was . . . vague," that the damages award was unreasonable, and that the damages were excessive as compared to those in similar cases. In our opinion, these arguments go directly to the issue of allegedly excessive damages and thus should not be considered on appeal if they were not raised below. See *McCue*, *supra* at 557, and *Pena*, *supra* at 315-316. Accordingly, we decline to consider them.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood