# STATE OF MICHIGAN

# COURT OF APPEALS

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ROY D. NICHOLS,

Plaintiff/Counterdefendant/Appellee,

v

GENE JOHN SQUIRE, JR.,

Defendant/Counterplaintiff/Appellant.

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UNPUBLISHED
November 1, 1996

No. 183246
LC No. 93-010286-CZ

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right a judgment entered in favor of plaintiff following a jury trial in this case involving a claim of intentional infliction of emotional distress. We remand.

Plaintiff's testimony indicated that over five hundred unwanted and unordered magazine subscriptions were sent to him. The magazines included sexually explicit magazines and gift subscriptions purporting to have been sent to others by plaintiff. Many of the magazines were sent to plaintiff's church. Beside the magazines, plaintiff received about eighty other items through the mail that he had never ordered. The names used with regard to some of this mail included "Mong O. Lloyd" and similar names in apparent reference to a child born with Down's Syndrome to plaintiff and his former wife. In all, plaintiff spent over 1100 hours responding to the materials sent to him. In addition, about forty-five copies of a letter were distributed to various people and organizations charging that plaintiff put his personal finances before his obligations to employees and chastising plaintiff for having given up his child for adoption.

Although plaintiff had previously employed defendant at plaintiff's business, defendant stopped working for plaintiff in connection with a dispute over whether plaintiff had paid defendant for all the time that defendant had worked. Plaintiff started receiving a substantial volume of unwanted mail about one or two months after the termination of defendant's employment. Defendant denied sending plaintiff anything in the mail. Two psychologists testified that it was highly unlikely that defendant could have planned and executed a scheme of sending out subscriptions as a scheme of harassment. A handwriting

expert testified that the writing on the subscription cards was done by the same person, but not by defendant.

Defendant argues that the jury's award of exemplary damages duplicated damages already awarded by the jury for emotional distress. In its special verdict form, the jury indicated that it awarded plaintiff $20,000 in compensation "for all emotional distress resulting from [d]efendant's conduct." The jury also awarded plaintiff $5,000 for future damages including emotional damages that defendant was reasonably certain to suffer in the future. Finally, the jury awarded plaintiff $15,000 in exemplary damages for "incremental or increased injury to [plaintiff's] feelings that were caused by [d]efendant's bad faith or ill will."

In its instructions on damages, the trial court stated as follows:

> You should include each of the following elements of damage which you decide has been sustained by the plaintiff to the present time. Mental anguish, anger, embarrassment, humiliation, worry, grief, chagrin, disappointment, frustration, loss of social pleasures and enjoyment, out of pocket expense, and lost time. You should also include each of the following elements of damage which you decide plaintiff is reasonably certain to sustain in the future. Mental anguish, anger, embarrassment and humiliation, worry, grief, chagrin, disappointment, frustration, loss of social pleasures and enjoyment, out of pocket expense, and lost time.
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> The damages on which I have already instructed you are called actual damages. If you find that plaintiff is entitled to actual damages, you may then consider an award of exemplary damages. Exemplary damages may not be awarded to punish or to make an example of the defendant, but may only be awarded to compensate the plaintiff for any incremental or increased injury to plaintiff's feelings that you find were caused by defendant's bad faith or ill will.
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> However, you may not award exemplary damages for any injury to feelings which you include in your award of actual damages. In order to recover exemplary damages, plaintiff has the burden of proving the following elements. That defendant intentionally or recklessly engaged in extreme and outrageous conduct, causing plaintiff severe emotional distress, and the defendant engaged in such conduct with bad faith or ill will. That any such incremental or increased injury to feelings was caused by defendant's bad faith or ill will.

Defense counsel did not object to the trial court's instruction on exemplary damages. Compare *Veselenak v Smith*, 414 Mich 567, 575; 327 NW2d 261 (1982). Plaintiff filed his request for this instruction, which was a modification of SJI2d 118.21, three and a half months prior to trial. The verdict form was taken directly from the trial court's instructions. Where a party fails to object to jury instructions, appellate review is precluded absent manifest injustice. *Phillips v Deihm*, 213 Mich App 389, 403; 541 NW2d 566 (1995).

Although it is possible that the jury duplicated actual damages in its award of exemplary damages, the trial court explicitly instructed the jury not to award any exemplary damages for injuries which were included in their award for actual damages. Accordingly, the court's instructions permitted the jury to divide the total emotional damages that it determined plaintiff had suffered between "actual" damages and "exemplary" damages. That would result in the same total amount of damages as would have been awarded had the instructions been given which defendant now implicitly proposes on appeal. Defendant is not entitled to two bites of the same apple. No manifest injustice would occur by our failure to review this issue. *Id.*

In addition, defendant did not offer an alternate verdict form to the one that the trial court used. Reversible error cannot be error to which the aggrieved party contributed by plan or negligence. *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 184; 475 NW2d 854 (1991). Therefore, defendant has waived this issue. *Id.*

Defendant argues that the trial court abused its discretion by admitting subscription cards and the letter which was sent to various people and organizations. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Foehr v Republic Automotive Parts, Inc*, 212 Mich App 663, 669; 538 NW2d 420 (1995).

The trial court admitted into evidence over a dozen subscription and information cards which the Cadillac postmaster intercepted at the request of plaintiff. MRE 901(b)(3) provides that comparison by the trier of fact of an item with specimens that have been authenticated may provide sufficient authentication to support a finding that an item of evidence is what its proponent claims. Accordingly, the trial court did not abuse its discretion by admitting the handprinted cards in evidence so that the jury could compare them with an acknowledged sample of defendant's writing. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987); *People v Martin*, 150 Mich App 630, 637; 389 NW2d 713 (1986); see *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991).

The trial court also admitted into evidence a letter that was sent to various people and organizations. This letter referred to plaintiff letting his personal expenses come before his financial obligations to his employees. Defendant asserted that he quit working for plaintiff because plaintiff would not pay him. In addition, Franklin Horne, plaintiff's minister, testified that he received a telephone call from a man identifying himself as "John Squires." The caller told Horne that plaintiff had cheated him and "shouldn't even be a Christian and shouldn't even wear the name Christian, and that I should do something about it, and I should not even have him in my congregation because he's such a bad guy." This is similar in content to the letter which asked plaintiff to "do God and true Christians everywhere a big favor and stop referring to yourself as a Christian." A writing may be authenticated by distinctive characteristics contained within its contents. *Martin, supra*, pp 637-638. Here, the letter was sufficiently connected to defendant as to be admissible. *Martin, supra*, pp 637-638; see *Berkey, supra*, p 52.

Defendant argues that the trial court erred by admitting evidence of his conviction for second-degree retail fraud. We disagree.

Crimes having an element of dishonesty or false statement are directly probative of truthfulness, and present little possibility for prejudice. *People v Allen*, 429 Mich 558, 571; 420 NW2d 499 (1988). Evidence of such crimes is therefore admissible under MRE 609(a)(1) without consideration of the balancing test of MRE 609(a)(2)(B). *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). On the other hand, MRE 609 bars impeachment by a prior conviction not punishable by more than one year's imprisonment unless dishonesty or false statement was an element of that prior offense. *Allen, supra*, pp 605-606 n 31.

Here, defendant's counsel objected at trial that the prejudicial effect of evidence of defendant's conviction would outweigh its probative value. On appeal, defendant makes the separate argument that because second-degree retail fraud does not contain an element of dishonesty or false statement, evidence of that conviction should have been automatically excluded. See *id.*; *Bartlett, supra*, p 19. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; ___ NW2d ___ (1996); *Begola Services v Wild Bros*, 210 Mich App 636, 642; 534 NW2d 217 (1995). In any case, given the dissimilarity of the offense of retail fraud and the conduct at issue in this case, any error was harmless. See *People v Cross*, 202 Mich App 138, 147; 508 NW2d 144 (1993).

Defendant argues that the trial court should have granted his motions for directed verdict and judgment notwithstanding the verdict. We disagree. The elements of the tort of intentional infliction of emotional distress are: (1) outrageous and extreme conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995).

Here, revealing the purely private information that plaintiff had a child born with birth defects and gave up the child for adoption constitutes extreme and outrageous conduct. See *id.*, p 92. In addition, the ordering of over five hundred magazine subscriptions, the sending of eighty other items, and the distribution of the letter is conduct "that might cause an average member of the community, upon learning of [the] conduct to exclaim, 'Outrageous!'" *Id.*, p 93. There is no question that the letters, subscriptions, and other items were intentionally sent.

As to agency, plaintiff opined that the writing on the subscription cards was that of defendant. Second, the jury was able to compare the handwriting on these cards with a known sample of defendant's printing. Third, plaintiff testified that the same people who received gifts and/or gift subscriptions purportedly from him were the same people who received copies of the letter. Fourth, plaintiff had told defendant about his child born with Down's Syndrome. Plaintiff had only told eight to ten other people about the child. Fifth, the letter that was distributed charged that plaintiff put his personal finances before his obligations to his employees. Defendant left his job at plaintiff's business when he alleged that plaintiff had not paid him for his time worked. Finally, the timing of the harassment coincided with defendant's departure from plaintiff's business.

There was evidence that the conduct actually caused plaintiff severe emotional distress. Plaintiff testified that he was "really extremely outraged," "so mad," and worried that the letters might impact his business. He began crying on the witness stand when this subject was addressed. Seeking and

receiving medical treatment is not a condition precedent to satisfying the element of extreme emotional distress. *McCahill v Commercial Union Ins Co*, 179 Mich App 761, 771; 446 NW2d 579 (1989). In contrast to the case in *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 611; 374 NW2d 905 (1985), there was evidence that plaintiff's life was substantially disrupted. Plaintiff spent over 1,100 hours responding to the subscriptions and items sent through the mail.

Examining the evidence and all legitimate inferences that may be drawn therefrom in the light most favorable to plaintiff, sufficient evidence was presented to support a verdict in plaintiff's favor. *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 639; 540 NW2d 777 (1995).

Defendant also argues that the jury verdict was against the great weight of the evidence. With respect to a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). This Court's function is to determine whether the trial court abused its discretion in making such a finding. This Court gives substantial deference to the conclusion of a trial court that a verdict was not against the great weight of the evidence. However, less deference is afforded a determination that the verdict was against the great weight of the evidence. *Id.*, pp 412-413.

In denying defendant's motion for a new trial, the trial court appeared to use a standard similar to the one used to determine a motion for a directed verdict in which the judge analyzes the evidence in a light most favorable to the nonmoving party. However, in contrast to the judge's role in deciding a motion for a directed verdict, to determine whether a verdict is against the great weight of the evidence, a judge necessarily reviews the whole body of proofs. *People v Herbert*, 444 Mich 466, 475 n 14 and accompanying text; 511 NW2d 654 (1993). Specifically, a judge may grant a new trial after finding testimony for the prevailing party not to be credible, although this should be undertaken with great caution. *Id.*, p 477. Accordingly, we remand to the trial court solely to allow it to give independent consideration of the proofs to determine whether the jury's verdict was against the great weight of the evidence.

Remanded for proceedings consistent with this opinion.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski