

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA COLEMAN, individually and as next
friend of RONALD L. COLEMAN, II, a minor,

Plaintiffs-Appellants/
Cross-Appellees,

v

ALBERT'S INSURANCE AGENCY,

Defendant-Appellee/
Cross-Appellant.

UNPUBLISHED

January 10, 1997

No. 185438

Berrien Circuit Court

LC No. 90000424 CK

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

This appeal comes before this Court on remand from the Supreme Court for consideration as on leave granted. 448 Mich 915; 533 NW2d 585 (1995). Plaintiffs challenge the trial court's decision to order remittitur. Defendant cross-appeals from the \$100,000 verdict which the jury returned in favor of plaintiffs. We affirm the jury verdict and vacate the remittitur.

I

Defendant argues that the trial court abused its discretion in denying the motion for a new trial based on the verdict being against the great weight of the evidence. It asserts that the court acted on the erroneous belief that it could not consider the credibility of the witnesses when addressing the merits of the motion.

Defendant is correct that a judge may grant a new trial based on the great weight of the evidence upon finding that the testimony of witnesses for the prevailing party was not credible. *People v Herbert*, 444 Mich 466, 476-477; 511 NW2d 654 (1993). However, after reviewing the record,

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

we find that the trial court did assess the credibility of plaintiff's witness Kelley, finding that she made a good appearance and was believable. Therefore, the argument is without merit.

Moreover, the judge was not obligated to consider the credibility of plaintiffs' expert in ruling on the motion for a new trial. The expert testified only regarding whether there was a special relationship between the parties. The judge granted a directed verdict for defendant on that issue. Therefore, whether the judge found the expert unbelievable is inconsequential to defendant's great weight challenge.

II

Our review of the record persuades us that the trial court did abuse its discretion in granting defendant's request for remittitur. *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). Judges should exercise restraint in allowing remittitur. *Hines v Grand Trunk W R Co*, 151 Mich App 585, 595; 391 NW2d 750 (1985). The proper consideration in determining the merits of a motion for remittitur is whether the evidence supported the jury award. *Id.* The determination must be based on objective criteria regarding the conduct of the trial and the evidence adduced. *Id.* Objective criteria include whether the verdict was influenced by bias or prejudice. *Howard v Canteen Corp*, 192 Mich App 427, 436; 481 NW2d 718 (1991).

The proper measure of damages for an insurance agent's failure to procure insurance is the amount that would have been due under the policy properly obtained, plus consequential damages. 3 Couch on Insurance 3d, § 45:74, pp 46-109-46-110 & nn 61, 62 and cases cited therein.

In the instant case, there was sufficient testimony for the jury to award \$100,000 in damages. Annie Kelley's father's insurance policy provided liability coverage in the amount of \$100,000 at the time of the accident. The evidence supported the jury's finding that Kelley had requested the same insurance on her property that her father had on his property.

III

The trial court correctly rejected defendant's request for a judgment notwithstanding the verdict. Kelley testified regarding a conversation she overheard between her father and two representatives of defendant. The testimony was correctly admitted to show the existence of a legal relationship between Kelley and defendant. Lilly, Law of Evidence 2d, § 6.2, pp 183-184. Given Kelley's testimony and other record evidence, reasonable jurors could have honestly reached different conclusions as to whether plaintiffs had established their claim of a negligent failure to procure insurance. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 696; 513 NW2d 230 (1994); *Barnett v Security Ins Co of Hartford*, 352 SE2d 855, 856-857 (NC App 1987); *Sanchez v Martinez*, 653 P2d 897, 900-901 (NM, 1982); 3 Couch on Insurance 3d, § 46:46, p 46-60.

IV

We decline consideration of defendant's challenge to the testimony of plaintiffs' expert witness on two grounds. First, defendant failed to provide relevant authority to support its claim that the

witness' testimony concerning the obligations of an insurance agent to a prospective customer was contrary to law. Therefore, defendant has waived appellate consideration of this claim. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Second, the remainder of the challenged testimony was elicited by defense counsel on cross-examination. Defendant may not seek reversal based on error which it caused. *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993).

The trial court did not abuse its discretion when it denied defendant's motion for a new trial premised on an instructional error. *Constantineau v DCI Food Equipment, Inc*, 195 Mich App 511, 514; 491 NW2d 262 (1992). No substantial right of defendant was affected by the alleged error, because the instruction addressed a point of law irrelevant to any question before the jury. *Thorin, supra*, 704.

It was not an abuse of discretion to deny a new trial where the finding that Kelley had not been comparatively negligent fell within the range of evidence at trial. *Constantineau, supra*.

We reinstate the jury's verdict of \$100,000.

/s/ Marilyn Kelly

/s/ Janet T. Neff

/s/ Jeanne Stempien