S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JOHN KUBIAK and JANET KUBIAK,

Plaintiffs-Appellees,

v

HERITAGE INSURANCE COMPANY,

Defendant-Appellant,

and

FIRE INSURANCE EXCHANGE, MICHAEL C. ENGLISH, and WESTFIELD INSURANCE,

Defendants-Not-Participating.

UNPUBLISHED
January 27, 2004

No. 240936
LC No. 99-065813-CK

Before: Murray, P.J. and Gage and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right a judgment for plaintiffs resulting from a jury verdict awarding plaintiffs $107,000. We affirm.

I. Sufficiency of Pleadings

Defendant first argues that plaintiffs failed to comply with MCR 2.113(F)(1) which requires, when a claim is based on a written instrument, that a copy of that instrument must be attached to the pleading as an exhibit. Because this issue was not raised in or addressed by the trial court, we need not address it. *Fast Air, Inc v Knight,* 235 Mich App 541, 549; 599 NW2d 489 (1999).

Even if it were properly preserved, we conclude that plaintiffs complied with the requirements of MCR 2.113(F). The complaint implicitly if not expressly states that the quote was in defendant's possession when it states: "Defendant Heritage provided quotes for a policy of homeowners insurance." Similarly, the complaint alleged that plaintiffs requested the coverage and sent defendant a check for the premium. In defendant's answer to plaintiffs' complaint, it admitted that it provided "quotes for policies of homeowner's insurance, as well as for the contents generally." It also admitted that plaintiffs "did request coverage for the home" and "did pay $400, $372 of which was to be applied to the homeowner's policy, with $28 to be

applied to specified personal property." If defendant generated and provided these quotes to plaintiffs, it must necessarily have had them in its possession. Similarly, if defendant received plaintiffs' request and check for the premium amount, it must have had it in its possession. Accordingly, plaintiffs' complaint complied with MCR 2.113(F)(1).

Defendant also argues that plaintiffs failed to allege that the quote was an offer and plaintiffs' responsive letter was an acceptance. This issue was also not preserved. In any event, plaintiffs' complaint adequately sets forth the facts upon which the breach of contract claim was based. Moreover, defendant's answer to plaintiffs' complaint clearly indicates that defendant was aware that plaintiffs' complaint alleged breach of contract based on the quote and subsequent communications. In addition, both parties filed pretrial statements addressing plaintiffs' breach of contract claim. Therefore, it is clear that defendant was sufficiently notified of plaintiffs' breach of contract claim.

II. Directed Verdict

Defendant argues that the trial court erred in denying its motion for directed verdict. We disagree.

A. Standard of Review

We review a trial court's ruling on a motion for directed verdict de novo as a question of law. *Meagher v Wayne State University,* 222 Mich App 700, 708; 565 NW2d 401 (1997). This Court reviews the evidence in the light most favorable to the nonmoving party to determine whether a factual questions existed over which reasonable minds could differ. *Id.*

B. Breach of Contract

Defendant argues that the trial court should have granted directed verdict as to plaintiffs' breach of contract claim. We disagree.

Defendant contends that the trial court should have granted directed verdict because, as a matter of law, the quote was not an offer. But the evidence presented a factual dispute such that reasonable minds could differ on whether defendant's quote was a "manifestation of willingness to enter into a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Eerdmans v Maki,* 226 Mich App 360, 364; 573 NW2d 329 (1997). First, the quote states at the top "Quoted on July 1, 1998 by Lisa Effective July 1, 1998." Although defendant's witnesses testified that this phrase indicates the date the quote was effective, not the date the insurance was effective, reasonable minds could differ on its interpretation. Additionally, the quote states at the bottom: "No coverage afforded unless limit and/or premium shown." The quote showed both a limit and a premium. Therefore, the trial court did not err in denying defendant's motion for directed verdict on this basis.

Defendant also argues that plaintiffs failed to present any evidence that the parties contracted for homeowner's insurance. Defendant's argument is premised upon the assertion that the quote did not constitute an offer and plaintiffs' subsequent letter and payment of the premium did not constitute acceptance. For the reasons stated above, the quote itself was evidence of an offer. With regard to acceptance, it may be implied from the offeree's conduct if

the offeror does not require a specific form of acceptance. *St Paul Fire & Marine Ins Co v Ingall,* 228 Mich App 101, 106; 577 NW2d 188 (1998). Here, there was sufficient evidence of acceptance in plaintiffs' letter responding to the quote and requesting coverage effective July 1, 1998, along with a check for the premium. Therefore, the trial court did not err in denying defendant's motion for directed verdict on this basis.

C. MCPA

Defendant also argues that the trial court erred in denying its motion for directed verdict because the Michigan Consumer Protection Act, MCL 445.901 *et seq.* (MCPA) bars plaintiffs' claim. We disagree.

Before March 28, 2001, MCL 445.904 provided in relevant part:

> (1) This act does not apply to either of the following:
>
> > (a) A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.
>
> * * *
>
> (2) Except for the purposes of an action filed by a person under section 11, this act does not apply to an unfair, unconscionable or deceptive method, act or practice that is made unlawful by:
>
> > (a) Chapter 20 of the Insurance Code of 1956, Act No. 218 of the Public Acts of 1956, as amended, being sections 500.2001 to 500.2093 of the Michigan Compiled Laws.

Effective March 28, 2001, the statute was amended to omit from the purview of the MCPA actions rendered unlawful by chapter 20 of the Insurance Code:

> 3. This act does not apply to or create a cause of action for an unfair, unconscionable, or deceptive method, act, or practice that is made unlawful by Chapter 20 of the Insurance Code of 1956, 1956 Public Act 218, MCL 500.2001 to 500.2093.

Defendant argues that because the amendment was effective "prior to trial" it precludes plaintiffs' claim based on unlawful insurance practices. "Amendments of statues are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Tobin v Providence Hosp,* 244 Mich App 626, 661-662; 624 NW2d 548 (2001). Generally, when a statute is amended, the pertinent date for determining whether to apply the amended statute is the date the cause of action arose. *Hill v General Motors Acceptance Corp,* 207 Mich App 504, 513-514; 525 NW2d 905 (1994). Unless the Legislature clearly indicates otherwise, a statute is not given retroactive effect if it impairs vested rights. On the other hand, a statute may be given retroactive effect if the statute is remedial or procedural in nature. *Tobin, supra* at 661-663. The amendment at issue here is not remedial or procedural in nature. But it does abolish a

cause of action under the MCPA for actions that are unlawful under chapter 20 of the Insurance Code.[1] Accordingly, because the Legislature has not otherwise stated, the amendment should not be applied retroactively. Because the amendment was effective after plaintiffs' claim arose and after their complaint was filed, it does not apply to plaintiffs' claim.

Applying the unamended statute to this case, plaintiffs' claim could have been brought under section 11 of the MCPA if the act alleged was unlawful under chapter 20 of the Insurance Code. *Smith v Globe Life Ins Co,* 460 Mich 446, 447; 597 NW2d 28 (1999). On appeal, defendant argues that even under the unamended statute plaintiffs failed to state a claim upon which relief could be granted. Although plaintiffs' complaint did not specifically reference section 11 of the MCPA or chapter 20 of the Insurance code, it referenced the MCPA and set forth the facts upon which the MCPA claim was based. This was sufficient to state a claim under the statute. Because defendant had sufficient notice of plaintiffs' claims that could have been further elucidated through discovery or timely motions and because plaintiffs claim is cognizable under the MCPA, the trial court did not err in denying defendant's motion for directed verdict of plaintiffs' MCPA claim.

Defendant also argues that there was no evidence that defendant misrepresented anything to plaintiffs. We disagree. The quote itself was evidence of the representation that the insurance was effective as of July 1, 1998. The evidence that defendant did not provide insurance coverage for the fire that occurred after that date was evidence that the representation was false. The testimony to the contrary merely created an issue of fact for the jury to decide.

Defendant also argues that the trial court erred in instructing the jury on plaintiffs' breach of contract and MCPA claims. Because the trial court did not err in denying defendant's motion for directed verdict of plaintiffs' breach of contract and MCPA claims, it was proper for the trial court to instruct the jury on these claims. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

III. Noneconomic Damages Under the MCPA

Defendant also argues that the trial court erred in instructing the jury that they could award non-economic damages under the MCPA. Claims of instructional error are generally reviewed de novo. *Cox v Flint Bd of Hospital Managers,* 467 Mich 1, 8; 651 NW2d 356 (2002). Issues of statutory construction present questions of law that we review de novo. *Cruz v State Farm Mut Automobile Ins Co,* 466 Mich 588, 594; 648 NW2d 591 (2002).

Defendant argues that MCL 445.911 does not allow plaintiffs to recover noneconomic damages. MCL 445.911 provides: "Except in a class action, a person who suffers loss as a result of a violation of this Act may bring an action to recover actual damages or $250.00 whichever is greater, together with reasonable attorneys' fees."

---

[1] The amendment does not prevent a plaintiff from recovering for the same action under section 20 of the Insurance Code. It appears that before the amendment, a plaintiff could have recovered under either statute.

> When interpreting statutory language, our obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute. When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. . . . Further, we give undefined statutory terms their plain and ordinary meanings. In those situations, we may consult dictionary definitions. [*Koontz v Ameritech Services, Inc,* 466 Mich 304, 312; 645 NW2d 34 (2002) (citations omitted).]

Black's Law Dictionary defines "actual damages" as:

> Real, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed on the one had to "nominal" damages, and on the other to "exemplary" or "punitive" damages. Synonymous with "compensatory damages" and with "general damages."

According to this definition, "actual damages" includes noneconomic damages.

Defendant argues that even if noneconomic damages are allowed under the MCPA, plaintiffs did not specifically allege that they suffered noneconomic damages. The primary function of a pleading is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position. *Stanke v State Farm Mutual Automobile Ins Co,* 200 Mich App 307, 317; 503 NW2d 758 (1993). Plaintiffs' complaint was required only to set forth the specific allegations reasonably necessary to inform defendants of the nature of the claims they were called on to defend. See MCR 2.111. Plaintiffs' complaint informed defendants that plaintiffs claimed injuries resulting from defendant's failure to provide the contracted for insurance. Plaintiffs were not required to plead the precise nature of their injuries or the damages sustained. More particularized information on these topics was obtainable through discovery. See *Major v Schmidt Trucking,* 15 Mich App 75, 81-82; 166 NW2d 517 (1968).

Defendant also argues that there was no evidence to support the instruction on noneconomic damages. A trial court's determination that an instruction on damages is supported by the evidence is entitled to deference. *Keywell & Rosenfeld v Bithell,* 254 Mich App 300, 339; 657 NW2d 759 (2002). Janet testified that she felt panicked when the money was not coming in and the bank threatened to take their house. There was also testimony that plaintiffs' family's enjoyment was diminished because they had less money at their disposal. Therefore, the trial Court did not err in instructing the jury that they could award noneconomic damages under plaintiffs' MCPA claim.

IV. Embezzlement and Arson

Defendant also argues that the trial court committed "evidentiary errors" in precluding defendant's arson defense and precluding evidence that defendants embezzled.

A. Standard of Review

A trial court's evidentiary decisions are reviewed 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 only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id.* A jury's verdict will not be disturbed on the basis of evidentiary error unless refusal to take such action would be inconsistent with substantial justice. *Chastain v General Motors Corp,* 467 Mich 888; 645 NW2d 326 (2002); *Krohn v Sedgwich James of Michigan, Inc,* 244 Mich App 289, 295; 624 NW2d 212 (2001); MRE 103; MCR 2.613(A).

B. Embezzlement

Defendant argues that the trial court erred in precluding evidence that plaintiffs embezzled funds from Pheasants Forever. Under MRE 404(b)(1), evidence of other acts may be admitted if (1) it is offered for a proper purpose, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *People v Rice (On Remand),* 235 Mich App 429, 439-440; 597 NW2d 843 (1999).[2] As contemplated by MRE 403, "unfair prejudice exists when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow use of such evidence." *Allen v Owens-Corning Fiberglass Corp,* 225 Mich App 397, 404; 571 NW2d 530 (1997).

The trial court did not err by precluding evidence that plaintiffs embezzled. The proposed evidence was only marginally relevant to the case. Defendant offered the evidence to prove that plaintiffs burned down their house both to obtain the insurance money and to destroy some documents related to their misappropriation of funds from Pheasants Forever. To suggest that someone would burn down their entire house to destroy incriminating documents (rather than burn the documents alone) stretches the imagination. In addition, the proposed testimony did not indicate that plaintiffs in fact committed acts that constituted embezzlement. If the trial court had admitted the evidence, there would have been a substantial likelihood that the jury would have focused on the elements of embezzlement rather than the elements of the claims alleged. Even with a limiting instruction, it is likely that the jury would have given undue or preemptive weight to this evidence. For these reasons, this evidence, with little if any probative value, was substantially outweighed by the danger of unfair prejudice.

C. Arson Defense

Defendant argues that the trial court "improperly precluded defendant's argument to the jury on its claim of arson by the plaintiffs." Although this was framed as an evidentiary issue in defendant's statement of the issues presented, it is clearly not an evidentiary issue. The precise issue argued by defendant is whether the trial court erred in granting plaintiffs' motion for directed verdict on defendant's arson defense. After a review of the record and hearing oral

[2] Although MRE 404(b) is usually applied in a criminal context and has previously been held to apply only in criminal cases, *Gainey v Sieloff,* 163 Mich App 538; 415 NW2d 268 (1987), the rule was amended in 1991 to replace "the crime charged" with "the conduct at issue in the case" thereby bringing civil cases within its purview.

argument on this issue, we conclude that the trial court did not err in precluding this defense because there was no evidence that arson was the cause of the fire.

V. Attorney Fees

Defendant also argues that the trial court abused its discretion with regard to the amount of attorney fees awarded to plaintiffs.[3] We disagree.

If the trial court properly finds that an award of costs and attorney fees is appropriate, this Court reviews the trial court's determination of a reasonable award for an abuse of discretion. *Wood v DAIIE,* 413 Mich 573, 588; 321 NW2d 653 (1982); *Bolt v Lansing (On Remand),* 238 Mich App 37, 61; 604 NW2d 745 (1999). No set formula is applied in making such a determination, but the trial court should consider the following factors: (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. *Wood, supra,* adopting guidelines from *Crawley v Schick,* 48 Mich App 728, 737; 211 NW2d 217 (1973).

Although there is no requirement that the trial court detail its findings with respect to each specific factor considered, *Wood*, *supra,* the trial court made extensive findings with respect to these factors. The trial court found that plaintiffs' attorney had twenty-five years' experience and presented a well-thought-out case, that this was a complex case involving several claims, that plaintiffs' attorney recovered an award greater that the mediation award which spoke to the attorney's diligence, and that plaintiffs' attorney developed a good client-attorney relationship with plaintiffs over the course of the lengthy litigation. The trial court also determined that the rates for the legal assistant and paralegal were reasonable in light of their experience. Based on these factors, the trial court did not abuse its discretion in its award of attorney fees.

Affirmed.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly

---

[3] Plaintiffs requested and the trial court apparently awarded attorney fees pursuant to the case evaluation rule, MCR 2.403 and the MCPA. Defendant does not argue that the trial court erred in awarding attorney fees, only that the amount was excessive.