

STATE OF MICHIGAN
COURT OF APPEALS

NATIONWIDE PROPERTY & CASUALTY
INSURANCE COMPANY and NADIA
SLEMAN,

UNPUBLISHED
August 14, 2014

Plaintiffs-Appellees,

v

Nos. 311308; 312384; 313533
Macomb Circuit Court
LC No. 2010-001613-NP

BISSELL HOMECARE, INC.,

Defendant-Appellant.

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 311308, defendant Bissell Homecare, Incorporated (Bissell) appeals from a judgment awarding plaintiff Nadia Sleman noneconomic damages of \$30,000 for mental anguish and distress following a jury trial.¹ In Docket No. 312384, Bissell challenges the trial court's order denying its motion for case evaluation sanctions against plaintiff Nationwide Property & Casualty Insurance Company (Nationwide). In Docket No. 313533, Bissell challenges the trial court's award of taxable costs to Nationwide. Because we conclude that Sleman is not entitled to noneconomic damages for mental anguish and distress associated with the loss or destruction of her real and personal property, we reverse in part the judgment for Sleman and vacate the award of \$30,000 in noneconomic damages. In Docket No. 312384, we reverse the trial court's order denying Bissell's motion for case evaluation sanctions against Nationwide and remand for determination of an appropriate award of case evaluation sanctions. In Docket No. 313533, because our conclusion that Bissell was entitled to case evaluation sanctions means that Bissell, not Nationwide, was the prevailing party for purposes of determining taxable costs under MCR 2.625, we vacate the trial court's award of taxable costs to Nationwide and remand for determination of an appropriate taxable cost award.

This action arises from a fire that damaged a home owned by plaintiff Sleman and insured by Nationwide. Plaintiffs claim that the fire was caused by a Bissell ProHeat carpet

¹ Sleman was also awarded economic damages of \$1,000. Bissell does not challenge that portion of the judgment on appeal.

cleaner manufactured by Bissell. The fire damaged or destroyed many of Sleman's personal items. Nationwide reimbursed Sleman for her economic expenses associated with the repair of the home and replacement of damaged or destroyed property. Plaintiffs thereafter brought this action against Bissell for breach of implied warranty. Nationwide, as Sleman's subrogee, sought reimbursement of claims paid to Sleman and Sleman sought compensation for both unreimbursed economic expenses and noneconomic damages for mental anguish and emotional distress attributable to the loss of sentimental personal property.

The case was submitted to case evaluation and resulted in awards of \$40,000 for Sleman and \$150,000 for Nationwide, each against Bissell. Bissell conditionally accepted the awards, stating, "BISSELL conditions its acceptance on both Plaintiffs accepting. IF only one Plaintiff accepts, then BISSELL is deemed to have rejected as to both." Sleman accepted her award of \$40,000, but Nationwide rejected its award of \$150,000. Accordingly, the case proceeded to trial on plaintiffs' claim for breach of implied warranty. The jury returned a verdict of \$130,000 for Nationwide and \$31,000 for Sleman. The latter verdict consisted of an award of \$1,000 for Sleman's economic loss and an award of noneconomic damages of \$30,000 for Sleman's mental anguish and emotional distress.

After the trial court issued its judgment for plaintiffs, Bissell moved for case evaluation sanctions against Nationwide pursuant to MCR 2.403(O). The trial court determined that Bissell had rejected the case evaluation award with respect to Nationwide and, therefore, it was entitled to case evaluation sanctions only if it improved its position at trial by more than 10 percent, meaning that it was entitled to sanctions only if Nationwide's adjusted verdict was less than \$135,000. The court ruled that because it awarded Nationwide prejudgment interest of \$8,127.71, the adjusted verdict exceeded the \$135,000 threshold and, therefore, Bissell was not entitled to case evaluation sanctions. The trial court thereafter determined that Nationwide was a prevailing party entitled to taxable costs under MCR 2.625, and awarded costs of \$20,363.82.

I. SLEMAN'S ENTITLEMENT TO NONECONOMIC DAMAGES

Bissell argues that the trial court erred by denying its motion for a directed verdict with respect to Sleman's claim for noneconomic damages for mental anguish and emotional distress attributable to the damage or destruction of her property.² Bissell does not dispute that Sleman presented evidence of mental anguish and other emotional injury associated with the house fire. Rather, Bissell argues that Sleman was not legally entitled to recover noneconomic damages for psychological injury arising from the loss of her real and personal property.

² A trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). A court must "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Id.* (citation omitted). "A motion for directed verdict . . . should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id.* Questions of law are reviewed de novo. *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242; 828 NW2d 660 (2013).

Sleman's original complaint did not state a claim for noneconomic damages for psychological injury. However, the trial court permitted Sleman to amend her complaint after this Court decided *Price v High Pointe Oil Co, Inc*, 294 Mich App 42; 817 NW2d 853 (2011), rev'd 493 Mich 238 (2013). In *Price*, this Court acknowledged that emotional distress damages are not recoverable for the loss of personal property, but declined to extend that rule to the loss of real property. *Id.* at 53-55. We note that Sleman sought recovery of damages for mental anguish associated with the loss of both her personal property and her house. Although this Court's decision in *Price* permitted recovery only for noneconomic damages arising from the loss of real property, not personal property, the jury in this case was not asked to distinguish between real and personal property when awarding noneconomic damages. The jury awarded Sleman \$30,000 in noneconomic damages for her mental anguish and stress related to the loss of her real and personal property.

After the jury rendered its verdict, our Supreme Court reversed this Court's decision in *Price*. The Court observed:

[T]he long-held common-law rule in Michigan is that the measure of damages for the negligent destruction of property is the cost of replacement or repair. Because replacement and repair costs reflect *economic* damages, the logical implication of this rule is that the measure of damages excludes *noneconomic* damages and the latter are not recoverable for the negligent destruction of property. [*Price*, 493 Mich at 246-248.]

The Court rejected the distinction drawn by this Court between personal and real property, stating:

Although the Court of Appeals in the instant case seeks to draw distinctions between personal and real property, neither that Court nor plaintiff has explained how any of those distinctions, even if they had some pertinent foundation in the law, are relevant with regard to the propriety of awarding noneconomic damages. In short, while it is doubtlessly true that many people are highly emotionally attached to their houses, many people are also emotionally attached to their pets, their heirlooms, their collections, and any number of things. But there is no legally relevant basis that would logically justify prohibiting the recovery of noneconomic damages for the negligent killing of a pet or the negligent loss of a family heirloom but allow such a recovery for the negligent destruction of a house. Accordingly, *Koester* and *Bernhard* underscore *O'Donnell's* exclusion of noneconomic damages for negligent injury to real and personal property. [*Id.* at 253-254.]

The Supreme Court's decision in *Price* is dispositive in this case because it comprehensively precludes Sleman's recovery of noneconomic damages for the loss of her

property, real or personal.³ Accordingly, we reverse in part the judgment for Sleman and vacate the award of \$30,000 in noneconomic damages for mental anguish and emotional distress.

II. DEFENDANT’S ENTITLEMENT TO CASE EVALUATION SANCTIONS

Bissell argues that the trial court erred by denying its motion for case evaluation sanctions against Nationwide.⁴

As a preliminary matter, we agree with Bissell’s argument that the trial court erred by determining that Bissell effectively rejected the case evaluation award with respect to both plaintiffs, particularly Nationwide. The case evaluation panel issued awards of \$40,000 for Sleman and \$150,000 for Nationwide. On the case evaluation form, Bissell chose “conditional” with respect to both plaintiffs and wrote at the bottom of the form:

BISSELL conditions its acceptance on both Plaintiffs accepting. IF only one Plaintiff accepts, then BISSELL is deemed to have rejected as to both.

Sleman accepted the award, but Nationwide rejected it. Bissell argues that notwithstanding its “bungled” language on the case evaluation form, the trial court was required by MCR 2.403(L)(3) to construe its notice as a deemed acceptance with respect to Nationwide, an opposing party who rejected the case evaluation. MCR 2.403(L)(3) provides:

³ We note that *Price* involved a cause of action for negligence, whereas this case involves a claim for breach of implied warranty. This distinction does not affect our analysis. This Court has observed that “damages for mental anguish under a theory of breach of implied warranty should [not] be extended beyond those well-established parameters under theories of contract or tort.” *Groh v Broadland Builders, Inc*, 120 Mich App 214, 219; 327 NW2d 443 (1982). In the context of a breach of contract claim, “[t]he general rule is that damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made.” *Id.* at 217. “Thus, it is generally held that damages for mental distress cannot be recovered in an action for breach of a contract.” *Id.* at 217-218, quoting *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980). Sleman makes no attempt to argue entitlement to damages for mental anguish under a contract-based theory, and she does not identify any evidence suggesting that such damages for an injury to real or personal property were within the contemplation of the parties. As indicated previously, our Supreme Court’s decision in *Price* establishes that such damages are not recoverable in tort. Accordingly, the fact that this case involves a claim for breach of implied warranty does not compel a different result.

⁴ A trial court’s decision regarding whether a party is entitled to case evaluation sanctions under MCR 2.403(O) is reviewed de novo as a question of law. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). The interpretation and application of the court rules presents a question of law and thus is also subject to de novo review. *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002).

In case evaluations involving multiple parties the following rules apply:

(a) Each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.

(b) A party who accepts all of the awards may specifically indicate that he or she intends the acceptance to be effective only if

(i) all opposing parties accept, and/or

(ii) the opposing parties accept as to specified coparties.

If such a limitation is not included in the acceptance, an accepting party is deemed to have agreed to entry of judgment, or dismissal as provided in subrule (M)(1), as to that party and those of the opposing parties who accept, with the action to continue between the accepting party and those opposing parties who reject.

(c) If a party makes a limited acceptance under subrule (L)(3)(b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subrule (O) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept.

In *Dykes v William Beaumont Hosp*, 246 Mich App 471, 484-485; 633 NW2d 440 (2001), this Court addressed the operation of MCR 2.403(L)(3)(c), explaining:

MCR 2.403(L)(3)(c) specifies that “the party who made the limited acceptance is deemed to have rejected as to those opposing parties *who accept*” (emphasis added). This part of the court rule would be rendered nugatory, contrary to the rules of construction, if the limited acceptance party was also deemed a rejecting party with respect to opposing parties *who reject*. Further, the purpose of the mediation sanction rule “is to encourage settlement and deter protracted litigation by placing the burden of litigation costs upon the party that required that the case proceed toward trial by rejecting the mediator's evaluation.” *Broadway Coney Island, Inc v Commercial Union Ins Co (Amended Opinion)*, 217 Mich App 109, 114; 550 NW2d 838 (1996). In this case, had defendant accepted the mediation evaluation, the litigation would have concluded, given plaintiff's prior limited acceptance. Thus, we conclude that *under the language of MCR 2.403(L)(3)(c), a party who makes a limited acceptance of an award is deemed to have rejected it only with respect to those opposing parties who accepted, but not with respect to those who rejected, the award.* [Emphasis added.]

In accordance with *Dykes*, we agree with Bissell that a limited or conditional acceptance against opposing parties must be deemed an acceptance with respect to an opposing party who rejects the award. Nationwide rejected the case evaluation award and proceeded to trial.

Therefore, for the purposes of Nationwide, Bissell was the accepting party. See *id.* The language in Bissell’s conditional acceptance, while perhaps inartful, is not inconsistent with MCR 2.403 or *Dykes*. The purpose of case evaluation is to limit unnecessary and costly litigation by “shift[ing] the financial burden of trial onto the party who demands a trial by rejecting a proposed case evaluation award.” *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006) (citation, quotation marks, and brackets omitted). In furtherance of that purpose, a party facing multiple parties may condition its acceptance of a case evaluation award on all of the opposing parties accepting the award. MCR 2.403(L)(3)(b)(i). Bissell’s language is consistent with that purpose, i.e., were either Sleman or Nationwide to reject the case evaluation award, the case would not be settled as to either plaintiff and would proceed to trial. Bissell was content to accept the case evaluation award as to both parties in this case; it was Nationwide that rejected the award, and therefore Bissell’s acceptance, and effectively demanded a trial. Thus, Nationwide properly bore the financial burden of the trial unless the trial resulted in an award more than 10 percent greater than the case evaluation award. MCR 2.403(O)(3); *Allard*, 271 Mich App at 398. In other words, Bissell’s language meant that if Sleman or Nationwide, but not both, accepted the case evaluation award, Bissell would be deemed to have rejected the award *for the purpose of settling the entire lawsuit*. Whether Bissell was the accepting or rejecting party for purposes of case evaluation sanctions is a question of law under MCR 2.403 and is not dependent on the language employed by Bissell’s conditional acceptance form. See *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 553; 652 NW2d 851 (2002) (“Interpretation of a court rule is a question of law that this Court reviews de novo”).

Accordingly, we conclude that the trial court erred by concluding that Bissell rejected the case evaluation award with respect to Nationwide.

Because Nationwide rejected the case evaluation award, Bissell was entitled to case evaluation sanctions unless Nationwide improved its position at trial by more than 10 percent. MCR 2.403(O)(1) and (3). That is, Bissell was entitled to case evaluation sanctions unless the verdict for Nationwide, as adjusted in accordance with MCR 2.403(O)(3), was greater than \$165,000, which represents a 10 percent increase in the \$150,000 case evaluation award.

Nationwide received a jury verdict of \$130,000. The trial court concluded that the adjusted verdict was \$138,127.71. In its brief on appeal, Nationwide asserts that the adjusted verdict was \$140,370. Either amount is far short of the necessary \$165,000 and, therefore, the trial court erred by ruling that Bissell was not entitled to case evaluation sanctions. Accordingly, we reverse the trial court’s order denying case evaluation sanctions to Bissell against Nationwide and remand for determination of an appropriate award of sanctions pursuant to MCR 2.403(O).

III. AWARD OF TAXABLE COSTS TO NATIONWIDE

In Docket No. 313533, Bissell challenges the trial court's award of taxable costs to Nationwide.⁵

MCR 2.625(A)(1) provides that “[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.” MCR 2.403(O)(6) provides that a party entitled to recover case evaluation sanctions under MCR 2.403(O) is the prevailing party for purposes of taxable costs under MCR 2.625.

As discussed in section II, Nationwide failed to improve its position at trial by more than 10 percent of the case evaluation award it rejected and, therefore, Bissell was entitled to case evaluation sanctions. Thus, under MCR 2.403(O)(6), Bissell is considered the prevailing party for the purpose of determining taxable costs under MCR 2.625. Because Nationwide was not the prevailing party for purposes of MCR 2.625, it was not entitled to taxable costs. Accordingly, we vacate the trial court's award of taxable costs to Nationwide and remand for determination of the taxable cost award to which Bissell is entitled.

Reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro

⁵ A trial court's decision on a motion for costs under MCR 2.625 is generally reviewed for an abuse of discretion. *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 367; 737 NW2d 807 (2007).