

STATE OF MICHIGAN
COURT OF APPEALS

LANSING PAVILION, L.L.C.,

Plaintiff/Counter-Defendant,

v

EASTWOOD, L.L.C.,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff/Third-Party
Defendant-Appellee,

and

LL & 127, L.L.C.,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellee,

and

J.R. ANDERSON DEVELOPMENT COMPANY,
and JEFFREY R. ANDERSON REAL ESTATE
INC.,

Third-Party Defendants-Appellants,

and

STS CONSULTANTS, LTD.,

Third-Party Defendant/Third-Party
Plaintiff,

and

D.J. MCQUESTION & SONS, INC.,

Third-Party Defendant.

UNPUBLISHED

August 8, 2006

No. 265970

Ingham Circuit Court

LC No. 02-001734-CK

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Third-party defendants J.R. Anderson Development Company and Jeffrey R. Anderson Real Estate, Inc. (collectively “Anderson”), appeal by leave granted from an order denying their motion for partial summary disposition under MCR 2.116(C)(7) and (C)(10) against third-party plaintiffs Eastwood, L.L.C., and LL & 127, L.L.C. (collectively “Eastwood”). We affirm.

Anderson argues that Eastwood’s third-party claims for breach of contract and negligence are, in substance, claims for indemnification on a judgment in favor of Lowe’s Home Centers entered against Eastwood in a separate lawsuit. Anderson further contends that, because Eastwood is not free from negligence or fault for the judgment, Eastwood may not recover under an indemnification theory. Anderson additionally argues that it is entitled to summary disposition because Eastwood cannot, as a matter of law, prove that the judgment against it was proximately caused by Anderson’s alleged misconduct. We disagree with each contention.

A trial court’s grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

In its third-party complaint against Anderson, Eastwood did not plead an indemnification claim. Instead, Eastwood argued that the judgment entered against Eastwood in the Lowe’s litigation constituted damages recoverable under various theories including breach of contract, breach of fiduciary duty and negligence. Anderson contends that any claim seeking recovery for the judgment entered against Eastwood in the Lowe’s litigation is, in effect, a claim for indemnification. Although Anderson correctly notes that courts are not bound by the labels that a party chooses for its claims and will look to the “true nature” of the claims, *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998), Anderson cites no authority in support of their argument that whenever a party to an action seeks to recover the amount of a judgment from a separate lawsuit as an element of damages, the “true nature” of the claim is one for indemnification. Further, Anderson has failed to cite any Michigan authority that precludes a plaintiff from recovering costs incurred as a result of prior litigation as damages under a breach of contract or breach of fiduciary duty claim.

In Michigan, a party damaged by another party’s breach of contract may recover “those damages that are the direct, natural, and proximate result of the breach.” *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). “The damages recoverable are those damages that arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contact was made.” *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980). Consequential damages may include litigation or settlement costs from prior litigation with a third-party where those costs were occasioned by a breach of contract. See *State Farm Mut Auto Ins Co v Allen*, 50 Mich App 71

78-79; 212 NW2d 821 (1973), citing McCormick, Damages, § 66, p 246; 2 Restatement Contracts, 2d, § 351.¹ Comment c to § 351 of the Restatement of Contracts, 2d, explains:

Sometimes a breach of contract results in claims by third persons against the injured party. The party in breach is liable for the amount of any judgment against the injured party together with his reasonable expenditures in the litigation, if the party in breach had reason to foresee such expenditures as the probable result of his breach at the time he made the contract.

Likewise, expenses incurred in prosecuting or defending prior litigation that were proximately caused by another person's tortious conduct are recoverable as damages. See *Birkenshaw v Detroit*, 110 Mich App 500, 510; 313 NW2d 334 (1981); see also 4 Restatement Torts, 2d, § 914. Because a breach of fiduciary duty sounds in tort, see *Miller v Magline Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977), Eastwood may also seek recovery of its litigation expenses incurred in the Lowe's action under its alternate claim for breach of fiduciary duty. Hence, Eastwood may seek compensation for the litigation costs incurred in the Lowe's action as damages proximately caused by Anderson's breach of contract, breach of fiduciary duty, or breach of its duty of ordinary care.²

As Anderson argues, *if* Eastwood were making a claim for common-law indemnification, recovery would be precluded because Eastwood was found to be at fault in the Lowe's litigation. See *Darin & Armstrong, Inc v Ben Agree Co*, 88 Mich App 128, 133; 276 NW2d 869 (1979). Likewise, *if* Eastwood were making an indemnification claim, Anderson would be able to assert the doctrine of collateral estoppel defensively—despite the lack of mutuality—to preclude Eastwood from relitigating issues fully and finally determined in the Lowe's action. *Id.* at 134-135. However, we agree with the trial court's determination that Eastwood's third-party complaint does not allege an indemnification claim. Rather, Eastwood seeks to recover the amount of the Lowe's judgment as an element of damages for Anderson's alleged breach of contract, breach of fiduciary duty and negligence. The trial court properly denied Anderson's motion for partial summary disposition on this basis.

We also disagree with Anderson's claim that Eastwood cannot prove causation as a matter of law.³

¹ Relying on *Darin & Armstrong, Inc v Ben Agree Co*, 88 Mich App 128, 136; 276 NW2d 869 (1979), Eastwood argues that Michigan law does not foreclose the possibility that a judgment may be recovered as an element of damages in an appropriate case. Although *Darin & Armstrong* contemplates that a judgment in a separate lawsuit may be recovered as an element of contract damages in a subsequent lawsuit, it falls short of squarely establishing a rule of law on this point.

² We note that, where the injured party's own conduct contributed to the injury, damages are proportionately reduced, not precluded. See *Lamp v Reynolds*, 249 Mich App 591, 596-605; 645 NW2d 311 (2002).

³ The trial court did not address this issue. However, because this issue involves a question of
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Eastwood seeks to recover the amount of the Lowe's judgment as an element of damages under its claim based on Anderson's alleged breach of contract and breach of fiduciary duty as well as under a claim based on Anderson's alleged negligence.

With respect to the claim based on breach of contract and breach of fiduciary duty, recovery depends on whether Eastwood can demonstrate that its liability for the Lowe's judgment arose naturally from Anderson's alleged breaches, or can *reasonably* be said to have been in contemplation of the parties at the time their contract was made. See *Kewin, supra* at 419, and *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 13; 516 NW2d 43 (1994). This is an objective test. *Lawrence, supra* at 12-13. If there is enough evidence for a reasonable person to conclude that the parties knew or had reason to know (i.e., should have known) that the damages would result from a breach of the contract, the issue of causation is a question of fact for the jury. *Id.* at 13, 15-16.

With respect to the negligence claim, the Eastwood parties must prove the existence of both cause in fact and legal cause. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). "Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct." *Haliw v City of Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001). "Legal, or proximate, cause is 'that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred.'" *Lamp v Reynolds*, 249 Mich App 591, 600; 645 NW2d 311 (2002), quoting *Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999). Generally, proximate cause is a factual issue to be decided by the trier of fact, unless reasonable minds could not differ regarding the proximate cause of the plaintiff's injury. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). "However, if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should decide the issue as a matter of law." *Id.* As explained in *McMillan v State Hwy Comm*, 426 Mich 46, 63 n 8; 393 NW2d 332 (1986):

If the facts bearing upon other aspects of 'proximate cause' (that is, aspects other than causation in fact) are not in dispute and reasonable persons could not differ about the application to those facts of the legal concept of 'proximate cause,' the court determines that issue. *But if reasonable persons could differ*, either because relevant facts are in dispute *or because application of the legal concept of 'proximate cause' to the case at hand is an evaluative determination as to which reasonable persons might differ*, the issue of 'proximate cause' is submitted to the jury with appropriate instructions on the law. [Quoting Prosser & Keeton, Torts (5th ed), p 321 (emphasis in the original).]

Eastwood alleges that it was reasonably foreseeable at the time the parties signed the management agreement that if Anderson engaged in secret negotiations with the prospective "big box" tenants, Eastwood could be exposed to potential litigation with the prospective tenants. Eastwood contends that Anderson's secret negotiations with Lowe's, which Anderson initially

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law and the facts necessary for its resolution have been presented, we elect to address it. *Smith v Foerster-Bolser Constr Co*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

denied, naturally resulted in conflict between Eastwood and Lowe's and culminated in the Lowe's judgment. Eastwood also argues that Anderson was the cause in fact of their liability for the Lowe's judgment because, but for Anderson's alleged misconduct, the litigation with Lowe's would never have occurred. In particular, if Anderson had not secretly negotiated the terms of the Site Development Agreement with Lowe's, and then lied to Eastwood about it, Eastwood would not have taken the hard negotiating position with Lowe's, which ultimately resulted in the Lowe's judgment.

We agree with Eastwood's contentions. On the facts presented, a reasonable jury could conclude that Anderson's acts and omissions proximately caused the litigation between Eastwood and Lowe's. Therefore, summary disposition on this basis is not warranted.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot