STATE OF MICHIGAN

COURT OF APPEALS

HARRY BLACKWARD and D'ANNE KLEINSMITH,

Plaintiffs-Appellants,

v

SIMPLEX PRODUCTS DIVISION, K2, Inc.,

Defendant-Appellee.

UNPUBLISHED
December 20, 2005

No. 258138
Oakland Circuit Court
LC No. 1997-551584-NP

HARRY BLACKWARD and D'ANNE KLEINSMITH,

Plaintiffs-Appellants,

v

SIMPLEX PRODUCTS DIVISION, K2, Inc.,

Defendant-Appellee,

and

DAVID SELLARDS and D.A. SELLARDS ASSOCIATES, Inc.,

Defendants.

No. 261288
Oakland Circuit Court
LC No. 1997-551584-NP

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In docket number 258138, plaintiffs appeal as of right from the jury's verdict of no cause of action on plaintiffs' implied warranty and negligent design claims. In docket number 261288,

plaintiffs appeal as of right the grant of defendant Simplex's motion for case evaluation sanctions.[1] We affirm.

I. Facts and Procedural History

In 1989 plaintiffs began construction of a 7,200 square foot home designed by their architect, David Sellards. On Sellards' recommendation, plaintiffs selected an Exterior Insulating and Finishing System (EIFS)[2] called Finestone that was manufactured by defendant. Plaintiffs moved into the home in 1991.

Shortly after plaintiffs moved into their home, they began to have problems with water intrusion into the residence. Most of the wooden doors and windows of the house began to swell and stick and water damage and mold appeared at various places throughout the home. Plaintiffs stated that they initially suspected poor construction and or defective windows and doors. Based on plaintiffs' complaints, the door and window manufacturer provided replacement doors and windows, but the problems persisted.

In 1996, plaintiffs claim to have learned of similar problems with homes utilizing EIFS for their exterior cladding. Based on this information, plaintiffs contacted defendant and expressed their belief that defendant's product was the cause of their water intrusion problems. Defendant responded by sending an agent to inspect plaintiffs' home and eventually offered to assist them in the repair of the home. Plaintiffs rejected defendant's offer and, in September of 1997, initiated the present lawsuit.[3]

In December of 1998, defendant filed a motion for summary disposition based on a release signed by plaintiffs in conjunction with an earlier lawsuit against their general contractor and application of the economic loss doctrine. The trial court granted defendant's motion in May of 1999, but in October of 2001 this Court reversed the trial court's grant of summary disposition in favor of defendant and remanded the case for further proceedings. See *Blackward v Simplex Products Div,* unpublished opinion per curiam of the Court of Appeals, issued October 19, 2001 (Docket No. 221066), lv den 467 Mich 889 (2002). In October of 2003, defendant again moved for summary disposition, but the trial court denied the motion for all but plaintiffs' fraud claims. The case proceeded to trial in June of 2004 and on June 18, 2004, the jury returned a verdict of no cause of action. The order of judgment was entered on July 1, 2004.

---

[1] Defendants David Sellards and D.A. Sellards Associates, Inc. were not parties to either appeal. By the time of the trial, defendant David Sellards was deceased and plaintiffs had ceased efforts to continue their claims against him and his dissolved Michigan corporation. Therefore, we shall use defendant to refer solely to defendant Simplex.

[2] EIFS is sometimes referred to as synthetic stucco.

[3] Plaintiffs never repaired the home. Instead, they placed the home on the market with disclosures concerning the water intrusion problem. The home eventually sold for substantially less than the value that the home would have had without the water related damage and problems.

In July of 2004 plaintiffs filed a motion for judgment notwithstanding the verdict or a new trial. In the motion, plaintiffs argued that defendant's trial counsel engaged in misconduct, the verdict was against the great weight of the evidence, the jury was improperly instructed and the jury was improperly exposed to a newspaper article discussing water problems in new home construction. On July 28, 2004, defendant moved for imposition of case evaluation sanctions. On August 10, 2004, plaintiffs amended their motion for judgment notwithstanding the verdict or a new trial to include a claim that defendant improperly compensated lay witnesses. On September 13, 2004, the trial court denied plaintiffs' motion. On February 11, 2005 the trial court granted defendant's motion for case evaluation sanctions and ordered plaintiffs to pay defendant $103,748.53. This appeal followed.

II. Instructional Error

Plaintiffs first argue that the trial court committed error warranting reversal when it failed to properly instruct the jury on the law applicable to plaintiffs' claim that defendant's product was negligently designed. We disagree.

This Court reviews de novo claims of instructional error. *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 8; 651 NW2d 356 (2002). In conducting our review, we examine the instructions as a whole, rather than extracting them piecemeal, to determine whether there is error warranting reversal. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Id.* "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id.*, citing *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). "Instructional error warrants reversal if the error 'resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be "inconsistent with substantial justice."'" *Cox*, *supra* at 8, quoting *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985); MCR 2.613(A).

We shall first address defendant's argument that plaintiffs waived appellate review of this issue by failing to object to the instruction given and by affirmatively agreeing to the proposed instruction.

By the time for jury deliberations, there were only two claims remaining for the jury to consider: breach of implied warranty and negligent product design.[4] After summarizing the positions of the parties, the trial court instructed the jury concerning the elements of implied warranty. After some general instructions and instructions on damages, the trial court concluded by reviewing the questions contained on the verdict form. The trial court then asked the parties' trial counsel if there were any other instructions needed. Defendant's trial counsel, John Koselka, mentioned a missing instruction, to which the trial court responded, "You're right.

[4] In his closing argument, plaintiffs' trial counsel stated, "When this is all over, I'm going to tell the Judge I don't think we've presented anything on express warrant[y], so I don't think you should consider it."

What happened to that?" Plaintiffs' trial counsel, Patrick Bruetsch, noted, "Judge, it's not in the standard jury book any more. They only have one on negligent production, which could be altered for design." Koselka then stated, "That's the one we put in." The following discussion then occurred,

MR. BRUETSCH: Negligent production doesn't apply.

MR. KOSELKA: Oh, then I (inaudible).

THE COURT: You've given the measure of damage.

MR. KOSELKA: You just – I (inaudible).

MR. BRUETSCH: Your Honor, I would think that –

THE COURT: Okay. I'll just read this.

MR. BRUETSCH: Which one's that, your Honor?

THE COURT: It's two.

MR. BRUETSCH: May I look at that?

THE COURT: (Inaudible) negligence.

MR. BRUETSCH: Well, see, that's negligent production. I think we should use this one. Just (inaudible) more of the ways claimed by the plaintiff to – that the defendant was negligent in the design of its product.

I mean, I don't have more than one negligent way. I only have one negligent way.

MR. KOSELKA: Your Honor, I truthfully (inaudible) we're doing something very quickly on the fly here which probably should have been discussed beforehand. I guess for purpose of – if you want to change it, I guess I'd ask your Honor (inaudible).

MR. BRUETSCH: For example, I think that we should say that the plaintiff has the burden of proof and shall negative with – the defendant was negligent in designing its product.

MR. KOSELKA: I just –

MR. BRUETSCH: And down here I think we should say, instead of sustained injuries, was sustained damage.

THE COURT: That's – that's right. I'll give it this way in the standard form.

MR. BRUETSCH: Okay. Whatever you think, Judge.

After this exchange, the trial court recalled the jury and instructed it concerning negligent production without modifying it to reflect plaintiffs' negligent design theory.

In order to preserve instructional error for review by this Court, the complaining party must object "on the record before the jury retires to consider the verdict . . ., stating specifically the matter to which the party objects and the grounds for the objection." MCR 2.516(C). Where the complaining party fails to object in this manner, this Court will review the issue only where necessary to avoid manifest injustice. *Meyer v Centerline*, 242 Mich App 560, 566; 619 NW2d 182 (2000).

While defendant correctly notes that plaintiffs' trial counsel did not offer an instruction on negligent design and did not explicitly state that he objected to defendant's proposed instruction, a fair reading of the record reveals that plaintiffs' trial counsel properly raised this issue before the trial court. During the discussion quoted above, plaintiffs' trial counsel stated that the negligent production instruction offered by defendant did not apply and suggested that the instruction could be modified to refer to negligent design. This was sufficient to apprise the trial court of plaintiffs' position and give the trial court the opportunity to rule on the issue. Furthermore, we disagree with defendant's contention that plaintiffs' trial counsel affirmatively waived any objection to the trial court's decision to read the instruction in its standard form. While plaintiffs' trial counsel's final statement could be construed as approval of the trial court's ruling, it could also constitute mere acknowledgment of the trial court's ruling. For this reason we are unable to conclude that plaintiffs' trial counsel intentionally relinquished or abandoned a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Consequently, this issue was not waived.

At trial, plaintiffs' entire negligence theory centered on the fact that defendant's product was improperly designed. Plaintiffs consistently and repeatedly argued that, at the time defendant's product was applied to their home, defendant knew that its EIFS posed a significant risk for water damage and knew that the risk could have been alleviated by integrating a drainage plane into the system design. Despite the fact that this claim was based on negligent design, the trial court gave the following instructions:[5]

> Ladies and gentleman, there is an additional instruction with regard to the plaintiffs' claim of negligence, and I'll instruct you as to that at this time.
>
> The plaintiff has the burden of proof on the following propositions. First of all, the defendant had a duty to use reasonable care at the time of the production of the product, so as to eliminate unreasonable risk of harm or injury that reasonably – or is reasonably foreseeable.

[5] The quoted instructions were based on M Civ JI 25.31 and M Civ JI 25.32, which are properly applicable to claims of negligent product design.

> Reasonable care means the degree of care that a reasonably prudent manufacturer would exercise under the circumstances that you find existed in this case. It is for you to decide, based on the evidence, what a reasonably prudent manufacturer would do or would not do under those circumstances.
>
> A failure to fulfill a duty to use reasonable care is negligence. However, the defendant had no duty to produce the product, which is described as EIFS, to eliminate reasonable risk of harm or risk – injury or risks that were not reasonably foreseeable.
>
> The (indiscernible) has the burden of proof on these propositions, that the plaintiff – that the defendant was negligent in one or more ways claimed by the plaintiff. That the plaintiff sustained damage. That the negligence of the defendant was a proximate cause of the damages to the plaintiff. That the product was not reasonably safe at the time it left the defendant's control. That, according to generally accepted production practices at the time, the specific unit of the product left the control of the defendant a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others.
>
> An alternative production practice is practical and feasible only if the technical, medical or scientific knowledge relating to the production of the product at the time the specific unit of the product left the control of the defendant was developed, available and capable of use in the production of the product and was economically feasible for use by the manufacturer.
>
> Technical, medical or scientific knowledge is not economically feasible for use by the manufacturer if use of that knowledge in the production of the product would significantly compromise the product's usefulness or desirability. [emphases added]

Given that neither party presented any evidence regarding the production methods employed by defendant in the manufacture of EIFS or argued that negligent production methods led to plaintiffs' claimed damages, this instruction would not, by itself, adequately and fairly present the theories of the parties or the applicable law. *Case*, *supra* at 6. Instead, as noted in the instructions to M Civ JI 25.31, the trial court should have modified the language underlined to reflect plaintiffs' negligent design theory.[6] However, we will not extract instructions piecemeal

---

[6] We disagree with defendant's contention that, because MCL 600.2945(i) defines production to mean "manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling," the use of production in M Civ JI 25.31 necessarily includes negligent design. Under the instructions for M Civ JI 25.31, the trial court is specifically told to select the appropriate word or words from this statutory definition. In the present case, the only word that properly reflected plaintiffs' theory of the case was "design."

to find error, but rather must examine them as a whole to determine whether the issues and law were fairly and adequately presented to the jury. *Id.*

Before giving the above quoted instruction, the trial court told the jury that,

> Plaintiffs claim that defendant's product, EIFS, was poorly designed and virtually destroyed their new home. They claim defendants expressly or impliedly warranted that their product was suitable for residential construction while knowing the product had damaged many homes prior to supplying it for use in plaintiff[s'] home.
>
> The product was poorly designed so that water which got behind it could not escape or evaporate as it does with brick, stone or siding. The product holds water, swelling and rotting all the wooden structures as well as wooden doors and windows, and destroying the structure and causing extreme mold damage.

After summarizing plaintiffs' claims, the trial court explained that defendant denied that its product was negligently designed, but rather argued that "the exterior cladding commonly referred to as synthetic stucco or EIFS performed as intended and designed." In addition to this summary of the parties' positions, the trial court told the jury that, under question two of the verdict form, it would have to decide "was the defendant Simplex Finestone negligent in the design of their EIFS product?" The court further noted that if the jury found that defendant's product was negligently designed, it should then answer question three of the verdict form, which asked the jury to decide whether the negligent design proximately caused plaintiffs' damages.

Taken together, these instructions adequately presented the applicable law and plaintiffs' theory of the case. While the negligent production instruction should have been modified to include negligent design language,[7] the instruction did accurately relate the law applicable to products liability actions. Further, the trial court stated that this instruction applied to plaintiffs' negligence claim, which the trial court had earlier described as a negligent design claim, and the verdict form unequivocally indicated that the jury had to determine whether defendant negligently designed its EIFS product. Hence, the instructions on the whole fairly and adequately presented the applicable law and plaintiffs' theory of the case.

Even were we to conclude that the instructions were inadequate, we would not conclude that the error "resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice." *Cox*, *supra* at 8 (internal quotations omitted). Throughout the trial, both plaintiffs' and defendant's trial counsel argued and presented evidence concerning the design of defendant's product. Indeed plaintiffs' expert

---

[7] Although M Civ JI 25.31 should have been modified to reflect plaintiffs' negligent design theory, M Civ JI 25.32 does not contain any instruction for altering its language to reflect the specific theory of products liability proffered by the plaintiff. Therefore, M Civ JI 25.32 was proper as read by the trial court.

witness testified at length as to how defendant's product was defective and testified concerning a readily available and feasible alternate design. To rebut this testimony, defendant presented experts who opined that the design was not inherently defective, but rather worked as designed when installed properly. These witnesses further stated that any water damage caused to plaintiffs' home was the result of construction defects and defects in the architectural design rather than in the design of the EIFS. Finally, both attorneys' closing statements addressed plaintiffs' claims that defendant's EIFS was improperly designed. When this testimony and the evidence and arguments are considered together with the trial court's instructions summarizing the parties positions and the verdict form, we conclude that the jury must have been aware that the primary issue before it was whether the design of defendant's product was defective and caused the damage suffered by plaintiffs. Hence, the jury was likely not confused by the trial court's failure to alter the instruction. Therefore, any error in the instructions was harmless.

III. Lay Witness Fees

Plaintiffs next contend that the trial court erred by not granting their motion for judgment notwithstanding the verdict or a new trial based on defendant's trial counsel's payment of exorbitant fees to lay witnesses. Plaintiffs argue that defendant's failure to disclose the compensation paid to three of its lay witnesses, Michael Irving, Robert Dazel and Dennis Deppner, which exceeded the maximum permitted under MCL 600.2552, constituted a fraud upon the court and deprived plaintiffs of the ability to cross-examine these witnesses regarding their motivation to testify. We disagree.

As a preliminary matter, we note that plaintiffs did not allege in their amended motion for judgment notwithstanding the verdict or a new trial that defendant had committed a fraud on the court. Hence, the issue was not raised before the trial court and, therefore, was not properly preserved for our review. *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). However, we shall address plaintiffs' claims of error to the extent that they allege that the payments were illegal and that defendant's failure to disclose the payments deprived plaintiffs of a fair trial.

This Court reviews a trial court's refusal to grant a new trial for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "The determination that a trial court abused its discretion 'involves far more than a difference in judicial opinion.'" *Id.*, quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). An abuse of discretion will only be found when an unprejudiced person considering the facts upon which the trial court based its opinion, would say that there was no justification or excuse for the ruling made. *Id.* at 761-762.

While their compensation was high, defendant's payments to the lay witness were not prohibited by MCL 600.2552.[8] Under MCL 600.2552, "[a] witness who attends any action or proceeding pending in a court of record shall be paid a witness fee of $12.00 for each day and $6.00 for each half day, or may be paid for his or her loss of working time but not more than

[8] Defendant paid Irving $2,330.18, Dazel $1,923.00, and Deppner $1,532.00.

$15.00 for each day shall be taxable as costs as his or her witness fee." Hence, according to the plain language of the statute, these witnesses could properly be compensated for their loss of work time, which might have corresponded to the actual amounts paid. Consequently, defendant's conduct was not inherently illegal.

Aside from their assertion that defendant's violated MCL 600.2552, plaintiffs have failed to present any discovery request or legal authority requiring defendant's to disclose the compensation paid to its lay witnesses for their lost work time. Likewise, plaintiffs have presented no evidence that they were prevented from inquiring into the motivation behind these witnesses' testimony or their compensation for appearing during cross-examination. Indeed, during closing arguments, plaintiffs' trial counsel actually suggested that the testimony of these witnesses could not be trusted due to their financial interests in EIFS products. Plaintiffs' trial counsel explained,

> But, of course, all of the people they brought to you, every single one of them, has a financial interest in the success of EIFS. They all work for EIFS companies. They've all worked for EIFS companies all their life. They're all taking checks from EIFS companies now, and they're all running out saying EIFS is good . . . .
>
> * * *
>
> And I didn't ask them how much they make. I'm not trying to – you know, it's not my business. I don't care what they charge an hour. Lawyers do that all the time.
>
> The big picture is they all worked for Simplex, and then they went to another one. And this is like a big – well, you come testify for me. I'll come testify for you when you get sued.

Because defendant was not required to disclose the amount of compensation paid to its lay witnesses and plaintiffs were not prevented from cross-examining the lay witnesses regarding their compensation and actually raised the issue of the lay witnesses' financial stake in EIFS, we cannot conclude that plaintiffs' were deprived of a fair trial by defendant's failure to disclose the compensation paid to these lay witnesses. Therefore, the trial court did not abuse its discretion by refusing to grant plaintiffs' motion.

IV. Case Evaluation Sanctions

Finally, plaintiffs argue the court abused its discretion when it awarded defendant's $94,309.27 in attorney fees as case evaluation sanctions. We disagree.

This Court reviews de novo the trial court's decision to award case evaluation sanctions. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). However, the amount of case evaluation sanctions awarded is reviewed for an abuse of discretion. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 520; 664 NW2d 263 (2003). An abuse of discretion is found where an unprejudiced person, considering the facts on which the

trial court acted, would say that there was no justification or excuse for the ruling made. *Gilbert*, *supra* at 761-762.

On appeal, plaintiffs do not dispute that defendant is entitled to its reasonable attorney fees under MCR 2.403(O), but rather contend that the court's grant of fees must be reversed because it failed to recognize that it had the discretion to reduce defendant's unreasonable request for attorney fees. However, this claim is not supported by the record.

During the October 27, 2004 hearing, the court examined the reasonableness of defendant's requested costs and fees. At the hearing, the court rejected defendant's trial counsel's request for reasonable attorney fees at $200 an hour, but rather limited him to the $150 an hour actually charged to defendant's insurance carrier. The court also determined that the hours related to defendant's trial counsel's e-mails should not be charged to plaintiffs because they were unreasonable. The court further determined that the hourly rate for one of defendant's trial counsel's law clerks was unreasonable and reduced it from the $65 an hour actually charged to $30 an hour.

Despite these determinations, plaintiffs' counsel still objected to the total number of hours billed by defendant's trial counsel as excessive. Plaintiffs' trial counsel explained, "A hundred and 14 thousand dollars to prepare for and put on a three and a half day trial, I mean, give him a month to get ready for trial and give him the four days at 15 hundred dollars." After this, the following discussion occurred.

> THE COURT: Unfortunately, the rule is it's from the accepting or rejection of –
>
> MR. BRUETSCH: No, there's no question about that, but nobody works full-time from the time that the mediation award is granted until the time of the trial on one case. I mean, it's – it's just incredible to believe that you can take e-mails and discussions between him and the law clerk and discussions – all this work from this trial –
>
> THE COURT: Well, he's going to take the e-mails out.
>
> MR. BRUETSCH: Well –
>
> THE COURT: The other [hours] will be at the rate of hundred and 50 dollars an hour, and –
>
> MR. BRUETSCH: How many hours are you going to allow him, your honor?
>
> THE COURT: I'm going to allow him as billed, because I can't – I don't know how I can do anything else. I know it's reasonable, and – I think it's reasonable based on what they actually paid him for his legal services . . . .

Contrary to plaintiffs' contention, the trial court was not stating that it had no choice but to award fees for each and every hour billed regardless of whether they were reasonable, but rather was simply noting that the rule includes all reasonable expenses incurred after plaintiffs' rejected the case evaluation and not just those hours spent in preparation for or at trial. With that

understanding, the court determined that the number of hours actually billed was reasonable.[9] Hence, under a fair reading of the record, the trial court recognized and properly exercised its discretion to determine the reasonableness of the requested fees. Therefore, we must reject plaintiffs' claim of error.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello

[9] While the court did award defendants the costs and fees incurred in association with some appellate matters, at the February 2, 2005 hearing those costs and fees were dropped in accordance with the decision in *Haliw v City of Sterling Heights*, 471 Mich 700, 711; 691 NW2d 753 (2005) (holding that appellate costs and fees were not awardable under MCR 2.403(O)).