STATE OF MICHIGAN

COURT OF APPEALS

GERALD KEYES and TAMARA KEYES,

Plaintiffs-Appellants,

v

JACKSON HOUSING CENTER, INC., EDDY L. ROGERS and RAY MOORE,

Defendants-Appellees.

UNPUBLISHED
June 25, 1999

No. 204089
Jackson Circuit Court
LC No. 96-075669 CE

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court judgment, following a jury trial, that (1) granted a directed verdict of no cause of action in favor of individual defendants Eddy Rogers and Ray Moore; (2) found no cause of action on plaintiffs' claim for breach of contract, (3) awarded plaintiffs $250 against defendant Jackson Housing Center, Inc. based on the jury's finding of a single violation of the Michigan Consumers Protection Act, (4) awarded plaintiffs $3,000 in attorney fees under the Michigan Consumers Protection Act, and (5) awarded defendant Jackson Housing Center mediation sanctions in the amount of $9,157.50. We affirm.

This case arises out of the sale and delivery by defendant, Jackson Housing Center, of a manufactured home. Plaintiffs sued Jackson Housing Center and two of its officers, Eddy Rogers and Ray Moore, alleging causes of action for breach of contract and violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.;* MSA 19.418(1) *et seq*. At trial, the individual defendants were dismissed from the case after the trial court granted their motion for a directed verdict and the case was submitted to the jury as to defendant Jackson Housing Center only. The jury found that Jackson Housing Center did not breach its sales contract with plaintiffs, but did misrepresent to them that the house would be set into place with a crane, in violation of the MCPA. The trial court later awarded plaintiffs statutory damages of $250 for the MCPA violation. Although the jury also determined that Jackson Housing Center had removed tress from plaintiffs' property without permission in order to install the house, the jury was not permitted to award damages for this violation based on the trial court's determination that plaintiffs had failed to present competent evidence of damages.

Plaintiffs first argue on appeal that the trial court abused its discretion in denying their request to allow an unlisted witness to testify on the second day of trial. We disagree. The decision whether to allow an unlisted witness to testify is within the trial court's discretion. *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 188; 364 NW2d 609 (1984). Although plaintiffs contend that no pretrial order was issued governing the submission of witness lists, the record indicates that a case scheduling order was entered pursuant to MCR 2.301 and MCR 2.401(B)(2), requiring plaintiffs to disclose their witnesses two months from the date the complaint was filed. The trial court found that plaintiffs failed to establish good cause for not disclosing the witness in a timely fashion and that defendants would be prejudiced by the late addition because they would not be able to present their own rebuttal witness without an adjournment. The trial court did not abuse its discretion in refusing to allow the witness to testify.

Plaintiffs also argue that the trial court abused its discretion in not allowing them to introduce two exhibits that were not disclosed before trial. We disagree. The case scheduling order explicitly provided that "[a]ny exhibits not disclosed will not be admitted . . . unless good cause is shown." We agree that plaintiffs failed to show good cause for not timely disclosing the exhibits. Thus, the trial court did not abuse its discretion in refusing to admit the exhibits.

Next, plaintiffs contend that the trial court abused its discretion when it precluded their expert horticulturist from testifying on the issue of damages in connection with the lost trees. MCL 445.911(2); MSA 19.418(11)(2) permits an award of actual damages for a violation of the MCPA. Damages associated with a trespass to land generally are measured by the difference between the value of the land before the harm and the value after the harm. *Schankin v Buskirk*, 354 Mich 490, 494; 93 NW2d 293 (1958); *Szymanski v Brown*, 221 Mich App 423, 430-431; 562 NW2d 212 (1997). In some circumstances, the cost of replacement or restoration may be considered, but a measure of damages under this theory must not exceed the value of the property before the injury. *Id.*

Plaintiffs did not present evidence of the value of the property before or after removal of the trees. Further, although plaintiffs sought to offer the testimony of their expert horticulturist on the replacement value of the trees, the testimony established that plaintiffs' expert did not have independent expert knowledge regarding the valuation of the trees. Rather, he referred to a guide to determine the replacement value of trees, but admittedly did not know how the guide arrived at the figures. We conclude that the trial court did not abuse its discretion when it determined that plaintiffs failed to establish a proper foundation for admission of the expert's testimony with regard to the replacement value of the trees.

Next, plaintiffs contend that the trial court erred in not allowing them to call certain witnesses during their case in chief. We disagree. Plaintiffs sought to call four witnesses, all prior customers of Jackson Housing Center, who would testify regarding similar misrepresentations allegedly made to them by defendants. Plaintiffs argued that the testimony was admissible to show a pattern and practice of behavior under MRE 406. The trial court refused to admit the testimony in plaintiffs' case in chief, but later permitted limited testimony in rebuttal. Plaintiffs called one of the four witnesses, who testified that defendants had represented that it would use a crane to set the witness' house, but never did.

We find that the trial court did not abuse its discretion when it did not permit plaintiffs to introduce this evidence in its case-in-chief. Rather, we agree that the testimony was properly designated as rebuttal evidence. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985); *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). The testimony established that defendants had placed approximately 55 homes a year, or 250 homes in the last four years. One customer's testimony does not establish a habit or routine practice under MRE 406. However, the evidence contradicted defendants' denial that they had promised to use a crane. It was responsive to evidence introduced by defendants. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

Next, we conclude that the trial court did not abuse its discretion in denying plaintiffs' motion to amend their pleadings to add an additional claim based on a "twist" in the frame of the manufactured home. MCR 2.118(C); *Kemp v Harper-Grace Hospital*, 180 Mich App 473, 478; 447 NW2d 780 (1989). Defense counsel's statements to the jury during opening statement were not facts for the jury to consider. Counsel's arguments are not evidence and do not constitute a stipulation of facts. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 364; 503 NW2d 915 (1993). The manufacturer accepted responsibility for the "camber," and determined that it was within acceptable range. There was no evidence to support a finding that defendants were in any way responsible for the "twist." Thus, the trial court did not abuse its discretion in refusing to allow plaintiffs to amend their pleadings to add this additional claim.

Plaintiffs also contend that the trial court erred in granting a directed verdict for the individual defendants because "sufficient evidence was offered to support the piercing of the corporate veil." There are three requisites to piercing the corporate veil. First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 381; 512 NW2d 86 (1994). In order to justify a court's piercing the corporate veil, there must be some showing of fraud, sham or other improper use of the corporate form. *Michigan Bell Communications, Inc v Michigan Public Service Comm*, 155 Mich App 40, 46-47; 399 NW2d 49 (1986). Here, plaintiffs do not identify on appeal, nor does our review of the record reveal, any specific facts showing that the three requisites for piercing the corporate veil were established. Accordingly, we find no error.

Plaintiffs also argue that the trial court abused its discretion in denying their request for an instruction on exemplary damages. When requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2); *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997). Jury instructions are reviewed in their entirety to determine whether the instructions given adequately informed the jury regarding the applicable law reflecting and reflected by the evidentiary claims in the particular case. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 101; 485 NW2d 676 (1992); *Walker v Flint*, 213 Mich App 18, 20; 539 NW2d 535 (1995). In order for the court to give a jury instruction, sufficient evidence must be presented by the party to warrant it. *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 182; 475 NW2d 854 (1991). Here, because plaintiffs did not allege or present sufficient evidence of tortious conduct independent of the alleged breach of contract,

an instruction on exemplary damages was not warranted. *Phinney v Perlmutter*, 222 Mich App 513, 530-532; 564 NW2d 532 (1997).

Next, the trial court did not abuse its discretion in denying plaintiffs' request to have defendants' witnesses sequestered where the request was not made until the fourth day of trial, after plaintiffs' own witnesses had testified. *Werthman v General Motors Corp*, 187 Mich App 238, 244; 466 NW2d 305 (1991).

We also conclude that the trial court did not abuse its discretion when it denied plaintiffs' motion to correct the verdict or grant a new trial on the basis of an allegedly inconsistent verdict. *Harrington v Velat*, 395 Mich 359, 360; 235 NW2d 357 (1975). A verdict is not inconsistent if there is an interpretation of the evidence that provides a logical explanation for the verdict. *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987). The verdict properly reflects the jury's understanding that the issues involving the alleged misrepresentation of the crane and the destruction of the trees were outside the contract. It was not inconsistent for the jury to find that defendants misrepresented that the house would be set with a crane and also cut trees without plaintiffs' permission, but did not otherwise breach the contract for the sale and delivery of the manufactured home. Accordingly, we find no abuse of discretion in the trial court's refusal to correct the verdict or grant a new trial. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

Finally, we conclude that the trial court did not abuse its discretion in its award of attorney fees. The MCPA gives the trial court discretion to assess reasonable attorney fees. *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292, 295; 463 NW2d 261 (1990). An award of attorney fees will be upheld unless it appears, upon appellate review, that the trial court's findings on the "reasonableness" issue was an abuse of discretion. The record indicates that the trial court considered the reasonableness factors set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), and awarded an amount that it believed was reasonable in light of counsel's experience, skill, time and labor involved, preparation for trial and results achieved. The trial court did not abuse its discretion in its determination of reasonable attorney fees.

Affirmed.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald