STATE OF MICHIGAN

COURT OF APPEALS

MARCY TRICE,

Plaintiff-Appellee/Cross-Appellee,

v

ORKIN EXTERMINATING COMPANY,

Defendant/Cross-Defendant-Appellee/Cross-Appellant,

and

ANDOVER REALTY INVESTMENTS LIMITED PARTNERSHIP,

Defendant/Cross-Plaintiff-Appellant/Cross-Appellee.

UNPUBLISHED
August 1, 2000

No. 212178
Oakland Circuit Court
LC No. 93-453463-NP

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Following a voluntary dismissal of plaintiff Marcy Trice's negligence lawsuit, the trial court entered a judgment awarding defendants Orkin Exterminating Company and Andover Realty Investments Limited Partnership their reasonable costs and attorney fees. The judgment also provided that paying those costs and fees "will not be a precondition to the maintenance of any subsequent lawsuit by plaintiff." Defendants now respectively appeal and cross-appeal as of right challenging that additional condition. Orkin also challenges the court's earlier order denying its motion for summary disposition.[1] We affirm.

[1] Trice argues that Orkin's cross appeal, except as it applies to the final May 1998 order, is defective for lack of jurisdiction because the claim of cross-appeal does not identify which other orders, and their dates, are being appealed. However, Trice did not move to dismiss the cross appeal on this basis before the appeal was placed on a session calendar as required by MCR 7.211(C)(2)(a). Therefore,

I. Basic Facts And Procedural History

When Trice first filed this lawsuit in Wayne Circuit Court in early August 1992, she alleged that from March 1990 to January 27, 1992, she worked in a building Andover owned and advised the building management that she had asthma and was hypersensitive to pyrethrin, a chemical used in pesticides. Nevertheless, according to the complaint, Orkin sprayed the building from March 1990 to late January 1992 using pyrethrin, which caused her severe side effects and apparently exacerbated the symptoms of her preexisting sensitivity.

Both Andover and Orkin moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court denied Orkin's motion, noting that it had sprayed the building at least seven times between January 1990 and November 1991 and that "reasonable minds could differ regarding whether the pyrethrin[-]containing insecticide sprayings was a substantial factor in producing Plaintiff's symptoms."

Throughout the proceedings in the trial court, Trice experienced significant problems with her lawyers. Ultimately, the trial court granted a motion for Trice's original counsel to withdraw and Trice subsequently attempted to represent herself for a period of time. On the day set for trial, while Trice was still representing herself and after she had indicated that she was not prepared to proceed to trial, the trial court dismissed the matter without prejudice and ordered reasonable costs for both defendants. The trial court indicated that it would consider affidavits from counsel relative to costs and that it would award costs if the case was reinstated or if Trice asked to reinstate the suit. Orkin then submitted a motion for costs, indicating that its costs since mediation were $29,473.71 and its total costs for the case were $68,271.04. Andover submitted a summary of costs in the amount of $97,023.99. At a proceeding in early August 1995, the trial court indicated that it was unwilling to order costs because Trice had not commenced another action against defendants. The trial court then entered an order of dismissal without prejudice under MCR 2.504(A). The order provided that the trial court would determine costs for defendants and would require Trice to pay those costs before she could file any subsequent action arising out of the same matter.

After securing counsel, Trice subsequently moved to vacate the order of voluntary dismissal, contending that she did not previously understand that she could either accept its terms and conditions or proceed with the action. Trice also contended that she had not received proper notice of the proposed dismissal order. When the trial court denied Trice 's motion to vacate the order, she requested an evidentiary hearing to determine the amount of costs and attorney fees she would have to pay if she reinstated her case or commenced a subsequent action. Trice then commenced a new action against defendants.

Following motions by both defendants, the trial court stayed the new lawsuit pending further order. The trial court also entered an order appointing a special master to meet with counsel and to "provide a recommendation [to the trial court] as to the costs (including attorney fees if determined to be appropriate) to be assessed against Plaintiff pursuant to the Amended Order of Dismissal[.]" The

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she waived this argument.

trial court's order also gave the master "authority to conduct a settlement conference if deemed appropriate." The trial court denied Trice's motion for an evidentiary hearing without prejudice at the same time.

The special master's first advisory opinion suggested that requiring Trice to pay costs and attorney fees exceeding $300,000 as a precondition to maintaining a second lawsuit would impermissibly affect her constitutional right of access to the courts. However, because Trice had accepted the benefit of being allowed to dismiss her first lawsuit without prejudice, and because the trial court had the discretion to order payment of costs as it deemed proper, the special master recommended that the trial court enter a judgment in favor of defendants and against Trice in the full amount of reasonable costs and attorney fees as it had determined. Both defendants filed objections to the special master's opinion, arguing, among other things, that the special master had exceeded his authority by not recommending that the trial court require payment as a precondition to refiling the lawsuit.

In May 1998, the trial court issued an opinion and order holding that the special master had not exceeded his authority. The trial court agreed with the special master's analysis and adopting his recommendations. The trial court then entered judgment in favor of defendants for the full amount of their reasonable costs and attorney fees incurred in the initial lawsuit, which the trial court found to be $74,737.68 for Andover and $109,381.29 for Orkin. The trial court also clarified in its order that Trice did not have to pay these costs and attorney fees before maintaining a subsequent lawsuit.

II. May 1998 Order

A. Standard Of Review

Defendants argue that the special master exceeded the authority the trial court granted him by concluding that Trice's constitutional right of access to the courts would be impermissibly affected by requiring her to pay defendants' costs and attorney fees as a condition of filing a second suit. Instead, they argue, the special master should have simply reviewed the bills for costs and confined his recommendation to the amount Trice owed them in order to avoid acting under the order in a way that would improperly assume judicial authority.[2] They contend that the trial court's order is erroneous as a matter of law because the trial court relied on the special master's recommendation and, as such, this Court should review this issue de novo.

Trice, however, cites *McKelvie v City of Mount Clemens*[3] for the proposition that a trial court's decision to dismiss an action under MCR 2.504(A)(2), without requiring a plaintiff to pay costs, is reviewed for an abuse of discretion. We agree with Trice because, as we discuss below, the special master did not exceed his express authority and, therefore, the only legal matter truly at issue is the trial court's decision to dismiss this action under MCR 2.504(A)(2).

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[2] See Const 1963, art 6, §§ 1, 27.

[3] 193 Mich App 81, 86; 483 NW2d 442 (1992).

B. Appointing A Special Master

Unlike in the federal judicial system, Michigan lacks a court rule that governs how to appoint a special master.[4] Michigan case law is virtually silent on the subject. However, both defendants assume that a trial court does have the authority to appoint a special master and that an order of appointment limits the scope of the special master's power. Likewise, we assume without deciding that the trial court acted properly by appointing a special master and limiting his authority in this fashion.

Despite this initial agreement, we start with the very basic and long-held premise that courts speak only through their orders, judgments, and other decrees.[5] Thus, our view of the case diverges from defendants' view of the case once we examine the special master's express authority, as described in the order. The order very clearly limited the special master's authority to making a "recommendation as to" costs and fees, if they were appropriate. Nothing in the order expressly limited the special master's authority to calculating, determining, tallying, estimating, or taking any other action that would imply finding a sum certain from the bills defendants submitted and going no further. The special master did, in fact, make a "recommendation" by suggesting a course of action the trial court should take, and that recommendation was "as to" the costs and fees issue.[6]

The case law defendants cite is not persuasive on this issue. For instance, in *Rockwell v Crestwood School District Board of Education*,[7] the Supreme Court wrote, "A special master, receiver or monitor exercises the powers conferred upon him subject to the judge's power to substitute his own independent judgment at any time for the judgment of the special master, receiver or monitor . . . ." In one respect, this statement confirms the proposition, above, that the trial court generally had the authority to appoint the special master in this case. However, to the extent that defendants urge us to reverse the trial court in this case on the basis of the outcome in *Rockwell*, we cannot do so because the relevant portion of *Rockwell* concerned a compulsory arbitration order on appeal and is therefore significantly distinguishable from a case in which the parties apparently conceded to submit the case to a special master in the trial court.[8]

Nor does *Carson, Fischer, Potts and Hyman v Hyman*[9] prove instructive on a special master's authority. *Carson* concerned a trial court's decision to appoint an expert witness pursuant to

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[4] See FRCP 53.

[5] *People v Batten*, 9 Mich App 195, 203; 156 NW2d 640 (1967), quoting *Michigamme Oil Co v Huron Valley Building & Savings Ass'n*, 280 Mich 12, 14; 273 NW 329 (1937).

[6] *Random House Webster's College Dictionary* (2d ed) defines a recommendation as "the act of recommending." In turn, that dictionary defines "to recommend" as "to present as worthy of confidence, acceptance, or use" or "to urge or suggest as appropriate, satisfying, or beneficial." "As to" merely means "with respect to," "about," or "concerning."

[7] 393 Mich 616, 644-645; 227 NW2d 736 (1975).

[8] *Rockwell*, *supra* at 644-645.

[9] 220 Mich App 116; 559 NW2d 54 (1996).

MRE 706 "to make findings of fact, conclusions of law and a final recommendation and proposed judgment as to the disposition of this matter by August 31, 1993."[10] Furthermore,

> [t]he expert was also given the duties to review all motions and submit findings of fact to the court before the scheduled hearing date, to require the production of evidence, to issue subpoenas through the court, to conduct and regulate miscellaneous proceedings, to examine documents.[11]

Clearly, even if we could ignore the substantive differences between an expert appointed under MRE 706 and a special master,[12] the trial court's order in *Carson* went far beyond the order in this case. Critically, nothing in the trial court's order in this case implicitly or explicitly attempted to make the special master the ultimate decisionmaker on any issue. The special master recognized the limitation of his role to that of an advisor rather than a judge by mentioning the trial court's discretion in this case. The trial court's subsequent order also recognized that it, and not the special master, was making the ultimate decision in this case. That the trial court agreed with the special master's reasoning does not, in any sense, indicate that it had abdicated its judicial authority. The trial court was just as free to indicate that it agreed with one party's reasoning over the others'. Thus, we must consider the merits of the trial court's decision, rather than its form, to determine if it erred.

C. MCR 2.504(A)(2)

Under MCR 2.504(A)(2),

> "the plaintiff may submit a motion for voluntary dismissal which states the terms and conditions acceptable to plaintiff. The court may then grant or deny that motion. Secondly, the plaintiff may submit a general motion for voluntary dismissal, and should the court indicate that the motion will be granted only on certain terms and conditions, indicate to the court at that time whether or not the proposed conditions are acceptable."[13]

"The final choice whether to accept the conditions imposed by the trial court lies with the plaintiff."[14] If the amount of the costs and attorney fees are disputed, the trial court should hold an evidentiary hearing to determine the amounts.[15] The plaintiff should not be required to pay those costs and attorney fees for

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[10] *Carson, supra* at 118.

[11] *Id*. at 121.

[12] *See id*. at 122-123.

[13] *Mleczko v Stan's Trucking, Inc*, 193 Mich App 154, 156; 484 NW2d 5 (1992), quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice, Rule 2.504, p 51.

[14] *Id*.

[15] *McKelvie, supra* at 85.

work that can be used in a subsequent action.[16] If an evidentiary hearing is held and costs and attorney fees are to be imposed as a condition of voluntary dismissal, "the plaintiff should be given an opportunity either to accept the condition or to decline the dismissal and proceed with the action."[17]

The present case is similar to *McKelvie*, in which the plaintiffs filed an action against the defendant in circuit court and a second suit in federal court.[18] When the plaintiffs moved to dismiss the circuit court action without prejudice, the circuit court granted the plaintiffs' motion for voluntary dismissal but ordered them to pay actual costs and attorney fees.[19] Because the plaintiffs objected, the circuit court held an evidentiary hearing on the issue.[20] The plaintiffs' counsel argued financial hardship and the circuit court agreed that the plaintiffs did not have to pay the costs and fees before obtaining the dismissal.[21] The circuit court entered a separate judgment imposing costs and attorney fees upon the plaintiffs.[22] Because it was not clear whether the plaintiffs had been given an opportunity to decline voluntary dismissal subject to paying costs and attorney fees, this Court remanded the case to allow the plaintiffs either to accept the dismissal as conditioned by the circuit court or decline it and proceed to trial.[23]

Here, the trial court should have given Trice the opportunity to withdraw her request for voluntary dismissal when it determined the amount of costs and attorney fees that she would have to pay for instituting a second suit. However, the trial court removed the payment condition from the judgment in favor of defendants. To paraphrase MCR 2.504(A)(2), this was a term or condition that the trial court "deemed proper." We see no error in the trial court's exercise of discretion. Had the trial court not reached this decision, Trice may very well have been entitled to some relief that would have an identical effect as the trial court's order in this case.

Moreover, we reject Andover's attempt to portray the costs and attorney fees award as sanctions for Trice's misconduct. The court rules permit costs and attorney fees as a condition of voluntary dismissal.[24] Andover also argues that the trial court should have required Trice to provide reliable evidence that she was indigent. However, evidently, defendants never disputed her financial status in the lower court and neither the special master's advisory opinion nor the trial court's May 1998 order relied on her indigency to reach a conclusion. Thus, this matter is wholly irrelevant. Andover also

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[16] *Id.*

[17] *Id.*

[18] *Id*. at 83.

[19] *Id*.

[20] *Id*.

[21] *Id*. at 84.

[22] *Id.* at 83-84.

[23] *Id.* at 85.

[24] *Id*. at 84.

briefly contends that that trial court should have expressly ruled that the judgment in favor of defendants for their costs and attorney fees should "operate as a first priority set off against any damages that may be awarded in the second case." Andover provides no authority for this argument and, therefore, has abandoned the issue.[25]

III. Dismissal With Prejudice

A. Standard Of Review

Orkin argues that the trial court abused its discretion in refusing to dismiss plaintiff's case with prejudice. "A motion to grant voluntary dismissal made by a plaintiff is addressed to the sound discretion of the trial court and we will not reverse absent an abuse of discretion."[26]

B. MCR 2.504(A)

MCR 2.504(A)(2)(b) specifically provides that dismissal under MCR 2.504(A)(2) is without prejudice "[u]nless the order specifies otherwise . . ." Contrary to Orkin's argument, the trial court dismissed the case on Trice's motion and under MCR 2.504(A), not MCR 2.504(B) which treats involuntary dismissal as an adjudication on the merits under most circumstances. Much of Orkin's argument boils down to whether the trial court dismissed the case pursuant to a defense or plaintiff's motion. The order of dismissal and the amended order of dismissal both plainly state that the action was dismissed pursuant to MCR 2.504(A). Thus, dismissal occurred as a result of Trice's motion, not Orkin's. Because Trice first moved for dismissal, and Orkin did not formally move to dismiss pursuant to MCR 2.504(B), the trial court did not abuse its discretion in dismissing the case without prejudice.

IV. Summary Disposition

A. Standard Of Review

Orkin argues that the trial court erred in denying its motion for summary disposition because Trice could not prove that its conduct caused her injuries. We review the grant or denial of a motion for summary disposition de novo.[27]

B. Negligence, Causation, And Summary Disposition

To sue for negligence, there must be evidence of a duty, a breach of the duty, causation in fact, legal or proximate causation, and damages.[28] "Proving proximate cause actually entails proof of two separate elements: (1) cause in fact; and (2) legal cause, also known as 'proximate cause.'"[29]

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[25] *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 14; 527 NW2d 13 (1994).

[26] *Mleczko, supra*.

[27] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[28] *Theisen v Knake*, 236 Mich App 249, 257; 599 NW2d 777 (1999).

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue.[30]

"While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care."[31]

To survive a motion for summary disposition in a negligence action, a plaintiff may present circumstantial proof of causation, but the proof must facilitate reasonable inferences of causation and not mere speculation.[32] "[T]he plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred."[33] "However, where several factors combine to produce an injury, and where any one of them, operating alone, would have been sufficient to cause the harm, a plaintiff may establish factual causation by showing that the defendant's actions, more likely than not, were a 'substantial factor' in producing a plaintiff's injuries."[34]

C. Pyrethrin And Causation

In moving for summary disposition, Orkin argued that Trice could not establish causation between her alleged toxic exposure and her alleged injury merely by showing that the toxin was present in her workplace. Rather, Orkin contended, she must show that the product was sprayed in her work area or that she was in the building at the time of the spraying. In any event, according to Orkin, Trice failed to establish that it was more likely than not that an alleged exposure caused her symptoms because her symptoms predated her alleged exposure and those same symptoms stemmed from her medications and psychiatric problems.

Trice, however, presented documentary evidence indicating that the building in which she worked had been sprayed by Orkin on at least seven different dates and that her particular office location was specifically targeted for treatment on at least two of those date. She also submitted a copy of a complaint filed with MIOSHA indicating that an Orkin canister containing pyrethrin had been in her

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[29] *Helmus v Dep't of Transportation*, 238 Mich App 250, 255; 604 NW2d 793 (1999), citing *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

[30] *Skinner*, *supra* at 163 (citations omitted).

[31] *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977).

[32] *Skinner*, *supra* at 164.

[33] *Id.* at 164-165.

[34] *Id.* at 165, n 8.

work place, although Orkin had previously denied using pyrethrins at that location. Even though a jury may have ultimately agreed with Orkin over Trice on this causation issue if this case had gone to trial, Trice's circumstantial evidence permitted a reasonable inference that, more likely than not, Trice's injuries occurred because Orkin sprayed pesticide containing pyrethrin in her office building.[35]

Affirmed.

/s/ Peter D. O'Connell
/s/ William C. Whitbeck

I concur in result only.

/s/ Michael J. Kelly

[35] *Skinner*, *supra* at 164-165.