STATE OF MICHIGAN

COURT OF APPEALS

OMEGA ENVIRONMENTAL, INC.,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

SACO & SONS, INC.,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellant/Cross-Appellee,

and

MARK SACO, FRANK SACO, ELMOND K. NOLFF, BERNADEAN NOLFF, and E.K. NOLFF, INC.,

Defendants,

and

C.F. FICK & SONS, INC.,

Third-Party Defendant/Third-Party Plainitff-Appellee/Cross-Appellant,

and

SCHLUMBERGER TECHNOLOGIES, INC.,

Third-Party Defendant.[1]

UNPUBLISHED
September 20, 2002

No. 223195
Kalkaska Circuit Court
LC No. 97-005888-CK

[1] Mark Saco, Frank Saco, Elmond K. Nolff, Bernadean Nolff, E.K. Nolff, Inc., and Schlumberger Technologies, Inc. are non-parties on appeal.

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Defendant Saco & Sons, Inc. (hereinafter Saco) appeals as of right from a judgment effectuating a jury verdict that awarded it damages on its countercomplaint against plaintiff Omega Environmental, Inc. (hereinafter Omega) in the amount of $4,100 and declared no cause of action on its third-party complaint against C.F. Fick & Sons (hereinafter Fick). Omega and Fick cross-appeal, challenging the trial court's order denying their motions for case-evaluation sanctions. We affirm in part, reverse in part, and remand for further proceedings.

Saco first argues that the trial court erred in failing to find as a matter of law that the gasoline dispensers in this case constituted a "facility" under part 201 of the Michigan Natural Resources and Environmental Protection Act (NREPA), MCL 324.02101 *et seq*. We hold that the trial court erred in submitting the question to the jury, but find such error harmless as the jury arrived at the correct result in finding that Fick was not the owner of a "facility" for purposes of MCL 324.20101(1)(o).

We review a trial court's decision on a motion for directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). Similarly, issues of statutory construction are questions of law, which this Court reviews de novo on appeal. *Oakland Co Bd of Road Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Initially, we note that the trial court erred in submitting the question of whether gasoline dispensers in this case constituted a "facility" under the statute, as it is the trial court's exclusive job to expound and interpret the applicable law. *People v Sheets*, 223 Mich App 651, 659; 567 NW2d 478 (1997). Nevertheless, we find such error harmless in light of the result reached by the jury.

A review of the relevant statute in this case leads us to the firm conclusion that a gasoline dispenser was not intended to be included within the definition of "facility" for purposes of MCL 324.20101(1)(o). "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Kokx v Bylenga*, 241 Mich App 655, 661; 617 NW2d 368 (2000). "This Court will not read into a statute anything that is not within the manifest intention of the Legislature as gathered from the act itself." *Id.* The first step in determining intent is to review the specific language of the statute itself. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). If the plain and ordinary meaning of the language is clear and the statute is unambiguous on its face, the Legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permitted. *Id.*

The definition of "facility" as defined in MCL 324.20101(1)(o) refers to any "area, place, or property where a hazardous substance . . . has been released, deposited, disposed of, or otherwise comes to be located." When read as a whole, it is clear from the plain language of the statute that the definition of "facility" does not encompass pieces of personal property such as gasoline dispensers. The use of the term "where," instead of "in which", suggests that the focus is on locations of real property, not instruments, such as gasoline-dispensing equipment. This

conclusion is also supported by the use of the phrase "comes to be located," instead of "is stored" or "contained." The other uses of "facility" within the companion provisions of the NREPA further support our conclusion regarding the legislative intent at issue. "To the extent possible, each provision of a statute should be given effect, and each should be read to harmonize with all others." *Michigan Basic Property Ins Ass'n v Ware*, 230 Mich App 44, 49; 583 NW2d 240 (1998). Thus, in light of the clear and unambiguous language of the statute and in the absence of more specific language inviting the inclusion of separately owned gasoline dispensing equipment, the gasoline station dispenser in this case does not fall within the definition of "facility" for purposes of the NREPA, MCL 324.20101(1)(o). As such, Fick cannot be held statutorily liable under MCL 324.20126.

Saco next argues that the trial court erred in denying its motion for JNOV or a new trial because the great weight of the evidence established that Fick was incontestably guilty of negligence under the inherently dangerous activity doctrine. We disagree. This Court reviews de novo a trial court's decision with regard to a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). On the other hand, "[a] trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion." *Meyer v City of Centerline*, 242 Mich App 560, 564; 619 NW2d 182 (2000).

We find that the trial court erred in ruling as a matter of law that Fick had a duty to supervise and inspect the installation of the dispensing equipment under a theory of strict liability. We hold that not every act involving an inflammable or explosive substance, such as gasoline, implicates all parties to the action in strict liability. Rather, review of the case law addressing the inherently dangerous activity doctrine indicates that it is the special risk of physical injury that brings the inherently dangerous doctrine to bear. Indeed, an independent contractor is subject to liability for *physical harm* caused to others by the contractor's failure to take reasonable precautions against such special dangers. *Bosak v Hutchinson*, 422 Mich 712, 726; 375 NW2d 333 (1985). The dispute in this case does not involve any physical harm that occurred as a result of an inherently dangerous activity, but rather environmental contamination caused by a gasoline leak. Thus, the inherently dangerous activity doctrine is inapplicable to the facts of this case. As a result, the trial court erred in instructing the jury in such a manner. However, we hold that such error was again harmless due to the jury's finding that Fick was not liable. Accordingly, reversal is not required.

Saco also argues that the jury verdict awarding damages against Omega was internally inconsistent, and therefore, must be set aside and a new trial must be ordered. We disagree. Again, "[a] trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion." *Meyer, supra*. "A jury's verdict is to be upheld, even if it is arguably inconsistent, 'if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" *Bean v Directions, Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000) (citations omitted). A court must make every effort to reconcile the seemingly inconsistent verdicts and only verdicts that are so logically and legally inconsistent that they cannot be reconciled will be set aside. *Id.*; *Legalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998).

In this case, the trial court attempted to harmonize the jury verdict when it recalled the jury and elicited from the foreperson that the jury determined Omega's total liability to be $4,100 and that was its intent in apportioning one-half percent fault to Omega. Thereafter, with the consent of counsel, the trial court entered the verdict as orally presented and not as written. This

verdict, even if arguably inconsistent, must be upheld because the evidence and arguments as applied in the context of this specific case provide a logical explanation for the findings of the jury. See *Bean, supra* at 31-32. During closing argument, Omega's counsel summarized the evidence of the costs of remedying the soil contamination and suggested that if Omega were liable at all, it should be for "[r]oughly forty-one hundred dollars for the cleanup of the soil." Because that is precisely the figure that the jury arrived at, it seems a logical explanation that the jury accepted this figure in arriving at its verdict and calculated that the figure was roughly one-half percent of the total damages involved in this case. Accordingly, the jury's verdict is to be upheld.[2]

Finally, Saco argues that such a grossly inadequate verdict was influenced by passion or prejudice resulting from the evidence that the Sacos are immigrants from Iraq. A new trial may be granted based on inadequate damages if the verdict was secured by improper means, passion, prejudice, or sympathy. MCR 2.611(A)(1); see also *Kelly v Builders Square, Inc*, 465 Mich 29, 36; 632 NW2d 912 (2001). However, Saco's assertion of prejudice is based on mere speculation and unsupported by the record in this case. Further, the trial court instructed the jury that its decision must not be influenced by prejudice regarding race, religion, or national origin. Jurors are presumed to follow their instructions. *Bordeaux v The Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993).

Fick and Omega cross-appeal, arguing that the trial court erred in refusing to award actual costs and reasonable attorney fees against Saco as mediation sanctions required by MCR 2.403(O)(1) and (6). We agree. This Court reviews a trial court's decision to award attorney fees and costs for an abuse of discretion. *Egan v City of Detroit*, 150 Mich App 14, 28; 387 NW2d 861 (1986). However, we review the court's decision whether to grant mediation sanctions de novo because it is not a discretionary matter. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997).

MCR 2.403(O), which governs a rejecting party's liability for costs states in pertinent part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

"Our Supreme Court's use of the word 'must' indicates that the award of costs is mandatory, not discretionary." *Id.* at 130. Thus, by rejecting the mediation evaluation, Saco became liable to pay as a sanction Fick and Omega's "actual costs" when this suit concluded with a jury verdict more favorable to Fick and Omega than the case evaluation. MCR 2.403(O)(1). MCR

[2] Saco asserts in error that "inconsistent verdicts always require a new trial." Contrary to Saco's argument, "MCR 2.611(A)(1) does not identify inconsistency or incongruity as a ground for granting a new trial." *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001). Rather, Saco must establish one of the grounds articulated in the court rule as a bases for granting a new trial. See *id.* at 38-39. See also MCR 2.611(A)(1).

2.403(O)(6) provides that "actual costs are those costs taxable in any civil action, and a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(a) and (b). Accordingly, the trial court erred in refusing to award Fick and Omega actual costs. This case is remanded to the trial court with instructions to award costs as required by MCR 2.403(O).

Due to the resolution of the foregoing issues, Fick and Omega's remaining issues on cross-appeal need not be addressed.

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

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray