STATE OF MICHIGAN

COURT OF APPEALS

ROY PETERSON,

Plaintiff-Appellant/Cross-Appellee,

v

BOAT SALES, INC. d/b/a ANDERSON BOAT SALES, a Michigan Corporation, BAY FINANCIAL L.L.C., a Michigan Limited Liability Company, REGINA ANDERSON, and JUDY ANDERSON, Jointly and Severally,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
December 21, 2004

No. 248733
Oakland Circuit Court
LC No. 1999-013960-CK

Before: Whitbeck, C.J., and Saad, and Talbot, JJ.

PER CURIAM.

This case arose from plaintiff's 1998 purchase of a boat from defendant Anderson Boat Sales at a cost of $27,150.00. In 1999, plaintiff filed an action alleging breach of contract, fraud, innocent misrepresentation, breach of warranties, and violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*. Two jury trials were held in this matter, the second action was filed after plaintiff was unable to collect on the judgment he received in the first trial. In both trials, the juries found that defendants were in violation of the consumer protection act. Plaintiff appeals as of right on issues involving attorney fees and costs; defendants have filed a cross-appeal. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff argues on appeal that the trial court erred in awarding him only $5,000 in attorney fees following the first trial because, the court said, the matter, involving a "used boat," "could have been handled by negotiation in the first place, rather than protracted litigation." In plaintiff's original action, the jury found breach of contract, breach of warranties, and violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq.* The Michigan Consumer Protection Act, MCL 445.901 *et seq.*, is a remedial statute designed to "protect consumers in the purchase of goods and services" and must be "liberally construed to achieve its intended goals." *Forton v Laszar,* 239 Mich App 711, 715; 609 NW2d 850 (2000). One of the purposes of the act is "to provide, via an award of attorney fees, a means for consumers to protect their rights and obtain judgments where otherwise prohibited by monetary constraints." *Jordan v Transnat'l Motors,* 212 Mich App 94, 97-98; 537 NW2d 471 (1995). Under the act, a consumer may bring a civil action to "recover actual damages or $250.00, whichever is greater, together with

reasonable attorney fees." MCL 445.911(2). In consumer protection cases, "the monetary value of the case is typically low." *Id.* Without the award of attorney fees, it will often be "economically impossible for attorneys to represent their clients." *Id.*

Here, plaintiff claimed actual costs of $1,242.83, and attorney fees for the first trial in the amount of $51,964.50. Although the trial court listed the factors found in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), it gave no indication whether it took into consideration the remedial nature of the consumer protection act, the success of plaintiff's action, or even whether it considered the attorney's standing, the result of the case, or the nature of the relationship with the client at all. There was no apparent recognition of the negotiations between the parties or of the reasons that negotiations were not successful. In light of the jury verdict that defendants were in violation of the consumer protection act, it was insufficient for the trial judge to summarily conclude that the case should have been resolved through negotiations. Accordingly, we reverse the $5,000 award and remand for a hearing and evaluation of a reasonable attorney fee. *Jordan, supra.*

Following the second trial, plaintiff petitioned the court for $3,044.64 in costs, and $57,640.00 in attorney fees pursuant, to the Michigan Consumer Protection Act; at the same time, defendants moved for mediation sanctions under MCR 2.403, because the jury verdict of $1000 in statutory damages was "considerably less than the case evaluation award of $17,500.00." Plaintiff also argues that the trial court erred in finding, after the second trial, that "plaintiff's request for attorney fees under the Michigan Consumer Protection Act and defendants' request for case evaluation sanctions under MCR 2.403 are of equal merit and offset each other." Again, the court did not analyze the appropriate factors or circumstances of the case, nor did it give any recognition of the remedial nature of the consumer protection act or the equitable nature of the remedy.

In *O'Neill v Home IV Care, Inc.*, 249 Mich App 606, 612-615; 643 NW2d 600 (2002), a panel of this Court considered the question of appropriate attorney fees and mediation sanctions under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, another remedial statute. In *O'Neill*, this Court found that the trial court's "focus on mediation in determining attorney fees and costs" under the WPA was "contrary to the purpose" of the statute. *Id.* "We are of the opinion that judicial impartiality dictates that a judge not consider a mediation evaluation, and the potential sanctions, when determining an award of attorney fees and costs, as was done in the present case." *Id.* As is true of the WPA, the consumer protection act is also a remedial statute, *Forton, supra*, and it was improper for the trial court to consider defendants' claim for mediation sanctions when determining plaintiff's reasonable attorney fees under the consumer protection act. Accordingly, we reverse the zero-award and remand for a hearing and evaluation of a reasonable attorney fee. *Jordan, supra.* Only after that has been determined, should the trial court turn to the question of discretionary mediation sanctions, with consideration given to plaintiff's successful action and the equitable nature of the plaintiff's relief. MCR 2.403(O)(5); *O'Neill, supra.*

Next, plaintiff contends that the trial court erred in granting defendants a set off following the jury's verdict in the first trial. We agree. During the first trial, the jurors were aware that plaintiff had not returned the boat to defendants, and that it was in storage with plaintiff's mechanic. During deliberations, the jury submitted the question, "can we agree to a lower damage award without itemizing and include the return of the boat to the dealership?" The

parties stipulated to send the following answer into the jury room: "If you find there has been a revocation of the contract the boat will be returned to the dealership, you need not itemize damages." Following the jury verdict in the first trial of $29,018.00, plaintiff submitted a proposed order of judgment of $29, 018.00, and defendants responded with the complaint that the judgment should be "reduced by the amount of the boat because the Jury found that plaintiff was entitled to revocation." The trial court entered an order to the effect that it had "reviewed Plaintiff's proposed judgment and Defendant's objections to same," and that plaintiff's proposed judgment comported with the jury verdict with the addition that "defendant is entitled to a set-off in the amount of $27,150 based upon the revocation of acceptance."

A trial court's grant of remittitur is reviewed for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533; 443 NW2d 354 (1989). Although a jury verdict may be amended to conform with the intention of the jury, *Johnson v Auto-Owners*, 202 Mich App 525, 528; 509 NW2d 538 (1993), it appears from the record that the jury intended to award plaintiff $29,018.00 and have the boat returned to the dealership. The trial court made no finding that the jury verdict was excessive, MCR 2.611(E), and, at best, it appears that both the trial court and defendants' counsel simply forgot that they had advised the jury that it could limit damages with the knowledge that the boat would be returned to defendants. It also appears from the record that defendants did, in fact, get the boat back. We therefore modify the first verdict to reflect the actual jury award to plaintiff of $29,018.00, a net award that already took into consideration the return of the boat.

Plaintiff also argues that the second jury verdict should be amended to $1,300,000, the amount of the letter of credit. There is no merit to this issue. The jury in the second trial found that there was a fraudulent conveyance between defendant Bay Financial and defendant Boat Sales, that plaintiff could pierce the corporate veil and that each of the defendants violated the consumer protection act. The jury found that the amount of plaintiff's exemplary damages was "zero," and awarded the statutory amount of $250 for each of defendants' violations of the consumer protection act. Plaintiff is not entitled to the amount of the $1,300,000 letter of credit that was the subject of the fraudulent conveyance.

Defendants argue on cross appeal that there was insufficient evidence to support the jury verdict in the second trial and that the trial court improperly denied defendants' motions for jnov and directed verdict. This Court reviews de novo a trial court's grant or denial of a motion for directed verdict or jnov. *Wiley v Henry Ford Cottage Hospital*, 257 Mich App 488, 491; 668 NW2d 402 (2003). The evidence and legitimate inferences are reviewed in the light most favorable to the nonmoving party; the motion should be granted only if the evidence fails to establish a claim as a matter of law. *Id.* "If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury." *Id.*

Here, defendants agreed to the jury instruction on this issue, which essentially instructed that a conveyance is fraudulent if it is made without fair consideration, and the person making it intends or believes it will leave inadequate property to pay present and future creditors. The jury was also instructed that plaintiff had the burden of proof, and that "often recognized badges of fraud include: lack of consideration for the conveyance, a close relationship between the transferor and the transferee, pending threat of litigation, financial difficulties of the transferor, and retention of the possession, control or benefit of the property by the transferor." Both counsel indicated satisfaction with the instructions.

On appeal, defendants argue that plaintiff did not meet his burden. However, the undisputed evidence showed that both defendant Boat Sales and defendant Bay Financial were owned by defendants Regina and Judy Anderson, and that defendant Boat Sales was managed by defendants' husbands, David and Dale Anderson. Defendant Bay Financial gave defendant Boat Sales a $1,300,000 letter of credit, an amount representing the Anderson family's "life savings" but no documentation was presented to show that any money was transferred from one corporation to the other. Defendant Bay Financial obtained a consent judgment for the same amount, but did not act to execute the judgment until more than two years later, during which time defendant Boat Sales was losing money. Accountants for both parties testified that it was not to defendant Bay Financial's advantage to put off collecting on the debt, but that collection would have had tax implications for defendant Boat Sales and, therefore, for defendants Regina and Judy Anderson. On this evidence, a jury could have reasonably inferred that the conveyance was made without fair consideration, with the belief or intent that it would not leave enough property to pay present and future creditors. *Wiley, supra.*

Defendants also allege on cross appeal that the trial court improperly admitted, over objection, information about a prior lawsuit, testimony by plaintiff's expert suggesting that defendant Bay Financial may not have made a loan to defendant Boat Sales, testimony regarding settlement negotiations, and testimony about the jury verdict in the first trial. Defendants do not provide any citations to the transcript of specific instances of error, and have waived this issue by not citing to the record or making specific arguments to support their broad allegation that the trial court erred in admitting prejudicial information. MCL 7.212(C)(7); *Great Lakes v Ecorse*, 227 Mich App 379, 422; 576 NW2d 667 (1998).

Finally, defendants argue that all of plaintiff's claims were asserted in the first case, that no additional damages were shown at the second trial, and that, under the tort reform statute, the trial court should have granted defendants remittitur. A trial court's grant of remittitur is reviewed for an abuse of discretion. *Palenkas, supra.* Again, defendants offer no citations to the record, and little analysis. However, the tort reform act applies to actions "based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death." MCL 600.6304. The second trial in this case involved defendants' fraudulent scheme to avoid paying the judgment on their previous breach of contract. Defendants reliance on *Holton v A+ Insurance*, 255 Mich App 318, 323-324; 661 NW2d 248 (2003), that damages in a "*tort based action*" must be allocated among those at fault, is misplaced. *Id.*, emphasis in original.

Affirmed in part, reversed in part, and remanded for determination of plaintiff's costs and reasonable attorney fees for both trials and for this appeal. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot