STATE OF MICHIGAN

COURT OF APPEALS

DEWITT BUILDING CO., INC., d/b/a BLUE WATER SUNSHINE POOLS, a Michigan corporation, Plaintiff-Appellant-Counter-Defendant,	UNPUBLISHED April 5, 2005
v	No. 252607 Oakland Circuit Court
MATTHEW HUTTON and NICHOLE HUTTON, jointly and severally, Defendants-Appellees-Counter-Plaintiffs.	LC No. 2001-030928-CK

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

In this breach of contract action, plaintiff DeWitt Building Company appeals as of right from a judgment in the amount of $51,515.61 entered by the trial court in favor of defendants, Matthew and Nichole Hutton, following a jury trial. We reverse and remand for a new trial.

I

This action was initially brought by plaintiff, seeking enforcement of a written contract signed by defendants for the purchase of an above-ground pool and hot tub. Defendants acknowledged at trial that the pool and hot tub were a "package" deal; if defendants did not purchase the pool, they would not receive the hot tub. The contract was signed on August 5, 2000. The total purchase price for the pool and hot tub was $16,500, and, upon signing the contract, defendants paid plaintiff a $1,000 deposit. Although the Huttons claimed that they wanted the pool delivered before "the end of the summer,"[1] they acknowledged that there was no language in the contract that specified a time for delivery. However, at trial, defendants maintained that one of the main reasons they agreed to sign the contract was that they were assured by plaintiff that the pool would be delivered within two weeks, and they would be able to

[1] Matthew Hutton stated that he believed summer "ended" on Labor Day.

enjoy the pool for the remainder of the summer. Pursuant to the contract, the hot tub was dropped off at defendants' house on August 23, 2000. Even though the pool had yet to be delivered, defendants did not object to delivery of the hot tub and, indeed, used and enjoyed it. In the mean time, the pool was never delivered.

The parties vary in their accounts as to why the pool was never delivered. Plaintiff claims that on August 24, 2000, Matthew Hutton received a call from plaintiff that the pool was ready to be delivered the next day; however, Matthew Hutton stated that he could not be home that day as he had to work and that another date would have to be arranged for delivery. Plaintiff alleges that on August 31, 2000, defendants unilaterally decided to cancel the contract because the pool had not arrived. Defendants purportedly instructed plaintiff that it was to keep the $1,000 deposit, and defendants would keep the hot tub, which retailed for $4,995.99. Plaintiff did not agree and demanded full payment for the hot tub which defendants had already received. When they refused to pay for the hot tub, plaintiff placed a lien on defendants' home in the amount of $4,829.70, which reflected the balance of the cost of the hot tub and a small delivery charge. The lien was filed on September 12, 2000.

Defendants, on the other hand, alleged that, after numerous attempts to coordinate the delivery of the pool with plaintiff and after essentially being ignored by plaintiff, defendants informed plaintiff that they no longer wanted the pool. Defendants allegedly requested that plaintiff pick up its hot tub and return defendants' $1,000 deposit, which plaintiff refused to do.

Plaintiff initiated a collection action in district court on October 24, 2000. Defendants thereafter filed a thirteen-count counter-complaint alleging various theories of recovery, including, in pertinent part, claims for violation of the federal truth in lending acts, violation of the Michigan consumer protection act (MCL 445.901 *et seq.*), breach of contract, unjust enrichment, violation of the construction lien act (MCL 570.1101 *et seq.*), and statutory (MCL 565.108) and common law slander of title. The case was transferred to circuit court.

Prior to the scheduled jury trial, plaintiff voluntarily dismissed the lien. Pursuant to a motion in limine filed by plaintiff, the trial court entered a pretrial order stating that the statutory slander of title claim would be decided by the court, while the common law slander of title claim would be tried before the jury. At the conclusion of the trial, the jury awarded defendants $48,580 on their counterclaims alleging violation of the consumer protection act, breach of contract, and slander of title. Specifically, in the verdict form, the jury awarded defendants $1,000 for lost wages incurred by a violation of the consumer protection act, $44,000 in attorney fees related to the common law slander claim, and $3,580 for the "injury per diem amount" of the slander claim (based on a calculation of a $10 per day charge for the 358 days that the lien was in place). The jury found no cause of action on defendants' breach of contract and unjust enrichment counterclaims. The jury also awarded plaintiff $2,300 for the breach of contract claim and unjust enrichment in its original action.

The trial court subsequently issued a written opinion and order disposing of the remaining issues before the court. The trial court held that defendants had stated no cause of action with regard to their claims of statutory slander of title and violation of the construction lien act. On February 25, 2003, the trial court entered judgment, inclusive of costs and interest, in favor of defendants in the amount of $51,515.61. Following the entry of judgment, defendants filed a petition for Chapter 7 bankruptcy and were eventually granted a discharge of certain debts

by the bankruptcy court. After obtaining relief from the automatic stay, the trial court issued its opinion and order denying plaintiff's motions for judgment notwithstanding the verdict, for new trial and/or remittitur. Plaintiff now appeals.

II

Plaintiff first contends that it is entitled to a new trial because the trial court erroneously allowed defendants' lay witness, Mila Kapusta, who had no personal knowledge of any of the facts and circumstances involving this case, to testify as to matters that were within the sole province of the jury. We agree.

This Court reviews a trial court's decision to grant or deny a new trial for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001); *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 196; 600 NW2d 129 (1999); *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). "An abuse of discretion exists when an unbiased person, considering the facts on which the trial court relied, would conclude that there was no justification or excuse for the decision." *Miller v Hensley*, 244 Mich App 528, 529; 624 NW2d 582 (2001). A trial court's decision concerning the admissibility of lay opinions is likewise reviewed by this Court for an abuse of discretion. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 588; 657 NW2d 804 (2002); *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454-455; 540 NW2d 696 (1995).

Defendants offered Mila Kapusta as an expert witness to testify at trial regarding certain matters. Specifically, the defense proposed that she would offer her opinion: (1) that plaintiff's filing of the construction lien violated the consumer protection act, the construction lien act, and constituted a slander of title on defendants' property; (2) how defendants were damaged by the filing of the lien; and (3) that there were other legal options that plaintiff could have pursued other than filing the lien. During voir dire, Ms. Kapusta testified that she is a licensed real estate broker, licensed residential appraiser, licensed builder, and a practicing attorney. The trial court, however, declined to qualify her as an expert witness pursuant to MRE 702, based on its conclusion that she had never testified as an expert before on issues related to the present case.[2] The trial court did determine that Ms. Kapusta could testify as a lay witness. The trial record indicates that, although she was not qualified as an expert witness, Ms. Kapusta nevertheless was allowed to testify freely, over plaintiff's counsel's objections, concerning the very matters for which she had been offered as an expert. Ms. Kapusta offered her "lay opinion" to the jury that the contract between the parties was illegal, the illegal lien constituted a slander of title, the malice element of slander of title could be inferred from the conduct of plaintiff, and defendants suffered damages as a result of plaintiff's illegal conduct, primarily because their property could not be sold or refinanced with the lien in effect. She also rendered her own unsubstantiated formulation of damages based on a per diem charge ($10) for each day the "illegal lien" had been in place (358 days). Of note is the fact that this damage calculation was adopted verbatim by the jury, even using the same terminology used by Ms. Kapusta on their verdict form.

[2] Neither of the parties challenge the trial court's ruling in this regard.

MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

A lay witness may express an opinion regarding the ultimate issue to be decided by the trier of fact if the facts and circumstances indicate that the opinion is based on the witness' own knowledge. MRE 704; *People v Drossart*, 99 Mich App 66, 73; 297 NW2d 863 (1980). However, "[a] jury determines the outcome of a case, and a witness is not permitted to tell the jury how to decide the case." *Piccalo v Nix*, 246 Mich App 27, 36; 630 NW2d 900 (2001), vacated on other grounds 466 Mich 861 (2002). See also *Carson, Fischer, Potts & Hyman v Hyman*, 220 Mich App 116, 122-123; 559 NW2d 54 (1996). A lay witness is not to invade the province of the jury and the court by interpreting the facts, *id*., giving testimony regarding a question of law, or rendering legal conclusions and opinions. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 704; 513 NW2d 230 (1994); *Carson, supra* at 122-123. "Allowing witnesses to testify as to questions of law invites jury confusion and the possibility that the jury will accept as law the witness's conclusion rather than the trial judge's instructions [on applicable law]." *People v Lyons*, 93 Mich App 35, 47; 285 NW2d 788 (1979).

Here, Mila Kapusta's testimony clearly exceeded the permissible scope of lay witness testimony set forth in MRE 701. *Piccalo, supra*; *Thorin, supra*. Over plaintiff's objection, she rendered legal conclusions regarding each of the principal claims and offered a per diem formulation of damages regarding the "illegal lien" without basis in law or fact. It is readily apparent from the record that the jury was unduly swayed by her impermissible testimony and rendered a verdict precisely in conformance with that testimony. See *Lyons, supra*. Further, pursuant to MRE 701, a lay witness' testimony in the form of opinion is limited to those opinions or inferences that are rationally based on the perception of the witness and are helpful to a clear understanding of the witness' testimony or the determination of a fact at issue. However, Ms. Kapusta had no personal knowledge of any of the facts or circumstances involving this case. We therefore conclude that the trial court's admission of this testimony was improper and highly prejudicial. "Evidentiary errors are not a basis for vacating, modifying, or otherwise disturbing a judgment unless declining to take such action would be inconsistent with substantial justice," *Miller, supra* at 531, or a substantial right of a party is affected. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), MCR 2.613(A), MRE 103(a). Here, where the impermissible testimony of a lay witness so pervasively intruded on the province of the jury, *Lyons, supra*, substantial justice requires that we reverse the judgment for defendants and remand this matter for a new trial.

III

Additional grounds for reversal of the judgment in favor of defendants exist because we agree with plaintiff that the jury's award of $44,000 in attorney fees – the most significant and substantial portion of the jury verdict – in conjunction with defendants' common law slander of title counterclaim, was based entirely on speculation and conjecture. Plaintiff's motion for judgment notwithstanding the verdict or a new trial, on the ground that the jury's award in this regard was unsupported by the evidence, was denied by the trial court.

This Court reviews de novo a trial court's ruling on a motion for JNOV. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). In reviewing a trial court's denial of a motion for JNOV, this Court should examine the testimony and all legitimate inferences therefrom in the light most favorable to the nonmoving party. *Id.* "A trial court should grant a motion for JNOV only when there is insufficient evidence presented to create an issue for the jury." *Id.* "Thus, a trial court should grant a party's motion for JNOV with respect to certain damages if the jury was permitted to speculate concerning the amount of those damages." *Id.*

The sole testimony presented to the jury on the issue of attorney fees incurred in this action was that of defendants. Matthew Hutton testified at trial that his attorney fees to date were "over forty thousand" dollars. Nichole Hutton likewise testified that her attorney fees were "approximately forty thousand dollars." She further offered that she owed "a couple thousand" more in legal fees. Defendants indicated that unspecified portions of two home equity loans were used to pay their attorney. However, no specific evidence was presented concerning the terms and conditions of defense counsel's representation or the hourly rate at which he was retained, and no billing records were submitted for consideration by the jury. Defendants' trial counsel did not testify concerning his billings or fees.

In Michigan, it is well established that the recovery of attorney fees is generally not allowed, as to either costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception. *Radenbaugh v Farm Bureau Gen Ins Co of Mich*, 240 Mich App 134, 152; 610 NW2d 272 (2000). Litigation costs, including reasonable attorney fees, have been held to constitute special damages recoverable in slander of title cases. *B & B Investment Group v Gitler*, 229 Mich App 1, 9, 13-14; 581 NW2d 17 (1998).

However, damages, including attorney fees, based on speculation and conjecture are not recoverable. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995); *Markowicz v Pappas*, 102 Mich App 1, 10; 300 NW2d 713 (1980). Typically, "[t]he most useful starting point for determining the amount of a reasonable attorney fee is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. The party seeking the fee bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Howard v Canteen Corp*, 192 Mich App 427, 437; 481 NW2d 718 (1991), overruled in part on other grounds by *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999). "The factors listed in MRPC 1.5(a) are properly considered when deciding if attorney fees are reasonable in a given case." *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 198; 555 NW2d 733 (1996).[3]

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[3] MRPC 1.5(a) provides in pertinent part:

> The factors to be considered in determining the reasonableness of a fee include the following:

(continued…)

Here, the scant testimony that defendants incurred "about $44,000" in legal fees was never verified by particulars. Because the record is devoid of evidence comporting with MRPC 1.5(a) or providing a basis for the jury's $44,000 award of attorney fees pursuant to factors appropriately considered for such a determination, see *Morris v Detroit*, 189 Mich App 271, 278-279; 472 NW2d 43 (1991); *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973), we conclude that the jury verdict in this regard could only have been based on speculation and conjecture and cannot be sustained. We therefore conclude that the trial court abused its discretion in denying plaintiff's motion for judgment notwithstanding the verdict or a new trial on the issue of these damages. *Attard, supra*.

In light of our disposition of these issues, we need not consider plaintiff's remaining arguments raised on appeal. Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio

(…continued)

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.