STATE OF MICHIGAN

COURT OF APPEALS

GWINIOV J. RILEY,

Plaintiff-Appellant,

v

STATE FARM FIRE AND CASUALTY CO.,

Defendant-Appellee,

and

ENVIRONMENTAL HEALTH RESOURCES, SERVPRO OF MUSKEGON, and RANDALL C. MULDER,

Defendants.

UNPUBLISHED
September 25, 2008

No. 276195
Muskegon Circuit Court
LC No. 03-042817-CZ

Before: Meter, P.J., and Talbot and Servitto, JJ.

TALBOT, J. (*dissenting)*

I respectfully dissent from the majority's decision to vacate the financial offsets to the jury verdict ordered by the trial court and the award of case evaluation sanctions.

I believe the majority's decision is based on an incorrect premise regarding the lower court record. Specifically, the majority indicates, "the jury was not instructed to determine the total amount of benefits plaintiff was entitled to recover under the contract." The full jury instruction, pertinent to this issue, is as follows:

> Gwin Riley must prove by a preponderance of the evidence the amount of any damages to be awarded, however, Gwin Riley is not required to prove her damages with mathematical precision because it is not always possible that a party can prove the exact amount of her damages. Therefore, it's necessary only that Gwin Riley prove her damages to a reasonable certainty or a reasonable probability. However, you may not award damages on the basis of guess, speculation or conjecture. Contract damages are intended to give the party the benefit of the party's bargain by awarding her a sum of money that will, to the extent possible, put her in as good a position as she would have been in had the contract been fully performed. The injured party – the injured party should

> receive those damages naturally arising from the breach. Gwin Riley cannot receive a greater amount as damages than she could have gained by the full performance of the contract. In this case, the following types of damages are available if you can find Gwin Riley to have met her burden of proof: a) The cost of repair or replacement of the property itself. b) The cost of cleaning or replacing contents damaged. c) Additional living expenses. *Whether or not State Farm is entitled to a credit or offset for amounts already paid is a question of law for the Court to determine. In making your assessment, therefore, I am asking you to award such sums to the plaintiff as you find she has proved regardless of any offset for amounts paid. If I find that State Farm is entitled to such a credit or offset, I will make that decision as a matter of law after the trial. You may, however, evaluate the amounts allegedly paid and the timing of those payments in making all other decisions you need to make.* [Emphasis added.]

Notably, the trial court and counsel for the parties engaged in multiple discussions pertaining to these jury instructions. Following completion of the instructions to the jury, plaintiff's counsel was afforded the opportunity to make any corrections, but declined. In addition, before closing arguments, the trial court specifically indicated to both counsel:

> So, except for those changes, I'm going to go with those instructions as presented to you. Anything about that you – anything in addition that needs to be memorialized about that . . . ?

Plaintiff's attorney specifically responded, "No." It is well established that error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Because plaintiff expressly indicated satisfaction with the jury instructions and verdict form, any objection is deemed waived. *Chastain v GMC*, 254 Mich App 576, 591-592; 657 NW2d 804 (2002). See also, *Hilgendorf v St John Hosp and Medical Ctr Corp*, 245 Mich App 670, 695-696; 630 NW2d 356 (2001); *Phinney*, *supra* at 537-538. Further, on the verdict form used by the jury, and approved by counsel, when determining damages the jury responded to the following:

> Question 2: What is amount of damages plaintiff has sustained, as defined in these instructions?
>
> A. The cost of repair or replacement of the property itself. $_____
>
> B. The cost of cleaning or replacing contents damaged. $_____
>
> C. Additional living expenses. $_____

This wording does not indicate a temporal limitation, as asserted by the majority, regarding the incurrence of damages by plaintiff. In particular, the reference to "[t]he cost of repair or replacement of the property itself" is inclusive and should be interpreted expansively.

I would further note that plaintiff also argues that the trial court erred regarding the apportionment of offsets against damages already paid. However, based on the majority determination that the imposition of any offsets was error, a review of the methodology and

proofs used by the trial court in its determination regarding the apportionment of offsets would be superfluous to address within this dissent.

I find that the complete text and context of the trial court's instruction on the issue of damages is clear and demonstrates that the jury was instructed to determine "the total amount of benefits plaintiff was entitled to recover under the contract." This Court "must presume that the jurors understood and followed these instructions." *Dep't of Transportation v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 178-179; 700 NW2d 380 (2005). Based on this record, I would affirm the trial court's imposition of offsets, but do not render an opinion regarding the propriety of the apportionment of the offsets.

/s/ Michael J. Talbot