STATE OF MICHIGAN

COURT OF APPEALS

VAN DYKE LIQUOR MARKET, INC. and ABLAHAD BAHOURA,

Plaintiffs-Appellees,

v

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,

Defendant-Appellant,

and

WILLIAM HAYGOOD, CHARLES T. PUGH COMPANY, and BERNARD MOSS,

Defendants.

UNPUBLISHED
October 28, 2008

No. 278892
Wayne Circuit Court
LC No. 05-526728-NZ

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

In this action to recover proceeds under a property insurance policy, defendant Michigan Basic Property Insurance Association appeals as of right from a judgment in plaintiffs' favor, following a jury trial. The judgment awarded plaintiffs $260,051.36, which was based on the jury's verdict of $1.4 million, less setoffs for amounts previously paid. The trial court denied defendant's motion for a new trial or remittitur. We reverse the trial court's order denying defendant's motion for a new trial and remand for remittitur in the amount of $260,051.36, thus reducing the jury's award of actual damages to $939,948.64.

I. FACTS

Defendant issued a property insurance policy to plaintiffs. The policy limits were $1.2 million for the building and $200,000 for its contents. Plaintiffs claimed losses of approximately $1.14 million, yet the jury awarded them $1.4 million. Defendant moved for a new trial or remittitur. The parties agreed that defendant was entitled to a setoff for $490,042.46 that was paid to a mortgage holder, but the court declined to reduce the verdict further on the ground that plaintiffs' claimed loss might have been greater than what was shown by the proofs.

II. STANDARD OF REVIEW

"A trial court's decision to grant or deny a motion for a new trial under MCR 2.611 is reviewed for an abuse of discretion." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). The trial court's decision regarding remittitur is also reviewed for an abuse of discretion. *Palenkas v Beaumont Hosp*, 432 Mich 527, 533; 443 NW2d 354 (1989). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

III. ANALYSIS

The trial court may order a new trial when a party's substantial rights have been materially affected, as where the verdict is clearly or grossly excessive. MCR 2.611(A)(1)(d). If the court finds that the only error is the excessiveness of the verdict, it may deny the motion for a new trial on the condition that the nonmoving party consent to a judgment in an amount found by the court to be the highest the evidence will support. MCR 2.611(E)(1). A verdict is excessive when it is not supported by the record. *Gilbert*, *supra* at 765. In determining whether remittitur is appropriate, a trial court must view the evidence in the light most favorable to the nonmoving party and decide whether the evidence supported the jury award. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008); *Diamond v Witherspoon*, 265 Mich App 673, 692-693; 696 NW2d 770 (2005).

"In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). "The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625; 544 NW2d 278 (1996). "The proper measure of damages for a breach of contract is 'the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached.'" *Ferguson*, *supra* at 54 (citation omitted). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "When a plaintiff proves injury, recovery is not precluded simply because proof of the amount of damages is not mathematically precise." *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995). However, damages that are based on speculation or conjecture are not recoverable. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997).

The evidence showed that the policy issued by defendant insured the building for $1.2 million.[1] Plaintiffs' insurance agent testified that an insured is not automatically entitled to collect the policy limits, and the policy provided that defendant will pay the value of the loss incurred up to the policy limits. The policy further provided that if the declarations page does not include a replacement cost, as is the case here, then the value "is based on the actual cash

[1] The policy also insured the building's contents for $200,000. The parties do not dispute that plaintiffs were entitled to $200,000 for the lost contents.

value at the time of the loss" except as otherwise provided. The complaint alleged that the value of the loss to the building was $939,948.64, and plaintiffs' public adjuster testified that the building was a complete loss and the value of the loss was $939,948.64. Although he testified that he derived that value from an appraisal done sometime before the fire, it is clear from his statement of loss that the appraisal simply established the then current market value of the building and that he added in fixtures, equipment, and other items to reach the value given. While Bahoura testified to various improvements made to the property, he presented no evidence that they had some additional value not accounted for by his adjuster's valuation. Plaintiffs' proofs established that their actual loss for the building was approximately $260,000 less than the policy limits. Thus, the verdict of $1.2 million is clearly excessive because it exceeds the highest amount supported by the evidence.

Accordingly, the trial court abused its discretion in denying defendant's motion and we remand for remittitur in the amount of $260,051.36, thus reducing the jury's award of actual damages to $939,948.64. *Szymanski v Brown*, 221 Mich App 423, 431-432; 562 NW2d 212 (1997).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald