STATE OF MICHIGAN

COURT OF APPEALS

DONALD O. VANDENBERG, PAUL VANDENBERG, and JUA!DY VANDENBERG,

Plaintiffs-Appellants,

v

CONSUMERS POWER COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 12, 1998

No. 194378
Allegan Circuit Court
LC No. 92-014969 NZ

Before: Gage, P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action in favor of defendant, with costs and attorney fees ordered under MCR 2.625 and MCR 2.403(O). We affirm.

Defendant provides electrical service to plaintiffs' dairy farm and maintains electrical distribution lines across the street from the dairy farm. In 1985, plaintiffs filed a lawsuit against defendant alleging that stray voltage, described as neutral-to-earth voltage, had leaked from the power lines into the ground owned by plaintiffs, decreasing the milk production of the dairy cattle. The lawsuit was dismissed in 1988 pursuant to a settlement. Defendant subsequently converted the electrical system on plaintiffs' property from a grounded to an ungrounded system. The parties delayed execution of the release effectuating the settlement so they could monitor the new ungrounded system. Plaintiffs did not execute the release until June 1, 1990. The release document specified a consideration of $750,000, but excepted "future personal injury and death and future incidents and claims which are unrelated, separate and apart from the incidents and claims from which this document is intended to release as hereinafter set forth, whether past, present or future . . . ." The release also specified that defendant agreed to "take reasonable steps at its expense to isolate the VanDenBerg farms . . . by converting the line serving said farms to operate at 4,800 volts, ungrounded, and to monitor said conversion in an effort to eliminate the . . . electric distribution system as a source of stray voltage on said farms." The release parenthetically referred to "stray voltage" as "also known as transient voltage and neutral to earth voltage." Further, the release contained an integration clause declaring that, "no promise, inducement or agreement not herein expressed has been made to the undersigned, that this Release contains the entire

agreement between the parties, and that the terms of this Release are contractual and not a mere recital."

In 1992, plaintiffs filed the instant lawsuit, setting forth a number of counts based on allegations that, notwithstanding the new system installed by defendant, milk production continued at a decreased level as a direct result of stray voltage, transients and the harmonics created by the electrical system. The trial court ordered directed verdicts on all counts in plaintiffs' complaint, except for contract and negligence theories of liability. The jury, by special verdict, found in favor of defendant based on the June 1, 1990 release. The jury answered "no" to the following question, which the parties failed to challenge: "Do you find that plaintiffs are entitled to sue Consumers Power again, despite their settlement of the prior lawsuit and their signing the June 1, 1990 out-of-court settlement and release agreement?"

Plaintiffs contend that it is against public policy to interpret the release between a customer and a public utility as barring any future suit over the quality of service when the customer has no other utility to bargain with for services. We find that this issue is not properly before us because plaintiffs have insufficiently briefed any particular decision of the trial court that they believe was in error. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). We note that the record does not show that plaintiffs' attorney asked the trial court to construe the consequences of the release as a matter of law until moving for a new trial or judgment notwithstanding the verdict. During trial, plaintiffs opposed defendant's motion for a directed verdict by offering parol evidence to aid the factfinder in construing the release. Because reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence, plaintiffs, having offered evidence of the release's ambiguity, cannot now argue that the trial court rather than the jury should have construed the release. *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993).

More importantly, we find no support for plaintiffs' argument that the jury was permitted to construe the release in a manner that violates public policy. Although plaintiffs characterize this issue as one involving a release of a future action, the jury was instructed that it must find a release of "future damages." Further, the principal case relied on by plaintiffs, *Southwestern Public Service Co v Artesia Alfalfa Growers' Ass'n*, 67 NM 108; 353 P 2d 62 (1960), which involved a covenant not to sue in the ordinary course of business, is distinguishable from the instant case involving a release executed as part of a monetary lawsuit settlement. Releases given in exchange for a compromised settlement of an action or preexisting claim have been upheld as valid. See generally *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 387-388 n 8; 525 NW2d 891 (1994). Indeed, the law favors settlements. *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 163; 458 NW2d 56 (1990). The instant release was executed as part of a settlement of plaintiffs' preexisting action against defendant. Because the release did not purport to exculpate defendant from any potential claim arising from its operation of the electricity distribution system, we find that plaintiffs have established no public policy basis for relief.

Plaintiffs next argue that the trial court improperly denied their request to amend the contract count before mediation and trial. We disagree. Although plaintiffs argue that they moved to amend the complaint to clarify the contract claim, the trial court denied the motion based on plaintiffs' attorney's

representation that he sought to add a cause of action for breach of an alleged August 31, 1988 agreement to trim trees, as distinguished from a claim that defendant had breached the June 1, 1990 release. We conclude that the trial court acted within its discretion in denying this motion to amend when plaintiffs sought leave to amend to add the new contract claim only three months prior to trial and after mediation had occurred and discovery had closed. *Weymers v Khera*, 454 Mich 639, 658-660; 563 NW2d 647 (1997).

Plaintiffs next contend that the trial court abused its discretion in a number of rulings, thus denying them substantial justice. We decline to consider these arguments because they have been insufficiently briefed. A party may not merely announce a position and then leave it to this Court to discover and rationalize the basis of the claim. *Goolsby, supra* at 655 n 1; *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

Plaintiffs next claim the jury's verdict was inherently inconsistent, arguing that because the release establishes the contract under which defendant agreed to trim trees, the jury could not have also found that this same release bars plaintiffs' claim under the tree-trimming agreement. Because the form of the verdict is in essence a jury instruction and plaintiffs failed to timely raise this issue, we will review this issue only if necessary to prevent manifest injustice. *Bieszck v Avis Rent-A-Car System, Inc*, 224 Mich App 295, 302; 568 NW2d 401 (1997). We conclude that no manifest exists because special verdict question number one was not inherently inconsistent.

We note that cases discussing inconsistencies in the verdict generally address situations where a jury answers more than one question. See, e.g., *Harrington v Velat*, 395 Mich 359, 359-360; 235 NW2d 357 (1975); *Granger v Fruehauf Corp*, 429 Mich. 1, 5-10; 412 NW2d 199 (1987). In the case at bar, the jury only rendered a verdict on the first question of the special verdict form because that question instructed the jury not to answer any further questions if it answered "no." However, the principles applied in cases of multiple verdicts are instructive regarding the proper approach to apply to plaintiffs' claim of inconsistency. Hence, we will make every attempt to harmonize the jury's "no" answer to question number one with plaintiffs' contract claim alleging a breach of the release document. *Granger, supra* at 9.

We find that the jury's negative response to question number one reconciles with plaintiffs' contract claim once it is recognized that a factual question existed for the jury on whether the June 1, 1990 release provision requiring that defendant "take reasonable steps at its expense to isolate the VanDenberg farms" can be construed as containing an agreement to trim trees, as plaintiffs claimed at trial. The jury could have determined that the release did not contemplate that defendant agreed to trim trees. If the jury found no such agreement within the release, it would be left with the task of determining whether the alleged voltage and associated damage to cows (caused by untrimmed trees coming into contact with power lines after the June 1, 1990 release was signed) came within the scope of the $750,000 settlement paid by defendant in exchange for plaintiffs' release in the prior lawsuit. If the jury found that the alleged damages came within the scope of this settlement (e.g., that plaintiffs gave up their right to obtain future damages), the jury could logically have found that plaintiffs could not sue defendant again in response to question number one. Because the jury's verdict can be harmonized with plaintiffs' contract claim, we hold that the form of the verdict caused no manifest injustice.

Plaintiffs next contend that the trial court should have granted their request for a res ipsa loquitur instruction. Because plaintiffs did not object on the record to the jury instructions on this

ground, we will only consider this issue if necessary to prevent manifest injustice. *Mina v General Star Indemnity Co*, 218 Mich App 678, 680; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 865 (1997). No manifest injustice resulted from the absence of a res ipsa loquitur instruction because this doctrine did not apply to the instant facts. Plaintiffs' attorney argued at trial that plaintiffs had proven a negligent act, the failure to trim trees, and furthermore, the jury's answer to question number one made it unnecessary for the jury to decide whether plaintiffs proved their negligence theory. See generally *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193-194; 540 NW2d 297 (1995) (major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence where the plaintiff is unable to prove the occurrence of a negligent act).

Finally, we consider the issues raised by plaintiffs concerning the trial court's award of mediation sanctions. Plaintiffs first argue that the trial court erroneously awarded investigation and preparation fees occurring after their rejection of a mediation evaluation because these fees were not necessitated by their rejection. We reject plaintiffs' claim because MCR 2.403(O)(6) does not limit an award of attorney fees to services performed at the trial. *Joerger v Gordon Food Service, Inc*, 224 Mich App. 167, 179; 568 NW2d 365 (1997). The phrase "necessitated by the rejection of the mediation evaluation" denotes only a temporal demarcation, precluding recovery of fees for hours spent before rejection of the mediation evaluation. *Severn v Sperry Corp*, 212 Mich App 406, 417; 538 NW2d 50 (1995). Further, we are not persuaded that the trial court abused its discretion in determining the amount of attorney fees. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 428; 552 NW2d 466 (1996); *Haberkorn v Chrysler Corp*, 210 Mich App 354, 379-380; 533 NW2d 373 (1995).

We refuse to analyze plaintiffs' remaining allegations of error regarding the trial court's award of mediation sanctions. Plaintiffs' contention that defendant is not entitled to any mediation sanction because they improved their position before the trial is not properly before us because it lacks citation to supporting authority. *Goolsby, supra* at 655 n 1. Plaintiffs' argument concerning expert witness fees is not properly before us because it is not included in the statement of the issues. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). Finally, plaintiffs' assertion that defendant is not entitled to all requested expenses is not properly before us because it has been insufficiently briefed. *Goolsby, supra* at 655 n 1.

Affirmed.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski