STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
February 21, 2008

RUSSELL PLASTERING COMPANY,

Plaintiff-Counter-
Defendant/Appellee,

v

No. 274049
Oakland Circuit Court
LC No. 2004-059387-CK

MICHIGAN CONSTRUCTION INDUSTRY MUTUAL INSURANCE COMPANY,

Defendants-Counter-
Plaintiffs/Appellants,

and

CHLYSTEK & WHITE SERVICES, INC. and TIMOTHY KUIPER,

Defendants.

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

In this breach of contract claim, defendant, Michigan Construction Industry Mutual Insurance Company (MCIM),[1] an insurance company providing workers' compensation insurance, appeals as of right from a judgment entered following a jury verdict in favor of plaintiff, Russell Plastering Company, a plastering contractor. Because defendant is precluded from arguing that it did not breach the parties' contract because it had the right to establish job classifications and insurance premiums, as well as the right to cancel the policy at any time for the reason that defendant never raised the argument before the trial court either in a motion or at trial, and, because defendant did not request the trial court to instruct the jury to limit damages to

[1] Chlystek & White Services, Inc. and Timothy Kuiper are not participating in this appeal.

those incurred during the remaining period of the 2001 policy, did not object to the jury instructions as given, and has not shown manifest injustice, defendant is not entitled to a new trial on damages, we affirm.

After seeking insurance quotes through its insurance agent, Dino Mattei, plaintiff selected the quote provided by defendant for workers' compensation insurance. Plaintiff and defendant then entered into a workers' compensation insurance contract for the year February 1, 2000 through February 1, 2001 (policy year 2000). Plaintiff initially paid defendant a premium deposit of $13,459 and then, as required by defendant, made monthly premium payments based on its actual payroll for the prior month. Plaintiff calculated the monthly premium payment amount using a self-audit report form provided to it by defendant.

In order to complete the self-audit, one of plaintiff's owners, John (Jack) Russell, ran a computerized accounting through its payroll software called a payroll labor distribution report at the end of every month. The payroll labor distribution report summarized the amount of payroll plaintiff expended each month by job classification code. The job classification codes plaintiff used were industry standard as published and defined by the Scopes Manual for worker's compensation insurance. Because plaintiff is a plastering company, the two codes it used most often were 5022 for "hard system" or exterior plaster and finish systems and 5480 for "soft system" or most interior plaster work. According to Russell, due to the nature of the jobs plaintiff worked on during policy year 2000, the majority of the work was "hard system" and involved exterior plaster and exterior finish systems.

Russell would report the amount of work done in each classification code to defendant on the self-audit reports provided by defendant. He would then attach the payroll labor distribution report as well as a check for the monthly premium due based on the payroll paid in each job classification and mail it to defendant each month. For policy year 2000, plaintiff reported to defendant total payroll under job classification number 5022 of $743,411.66 and under job classification number 5480 of $92,810.57.

In January 2001, plaintiff and defendant renewed the workers' compensation insurance contract for the year February 1, 2001 through February 1, 2002 (policy year 2001). When plaintiff renewed with defendant for 2001, defendant charged a premium deposit in the amount of $9,175 which plaintiff paid. Plaintiff continued to submit monthly self-audit reports together with labor distribution reports, and premium checks to defendant through June 2001. Through June 30, 2001, plaintiff reported total payroll under job classification number 5022 of $269,815 and under job classification number 5480 of $52,864.

In April 2001, defendant hired Chlystek & White Services, Inc., an independent insurance auditor, to perform an insurance or premium audit on plaintiff's policy year 2000. Insurance auditor Tim Kuiper performed the audit.[2] Kuiper performed the audit at plaintiff's

[2] Both plaintiff and defendant stipulated at trial that Chlystek & White Services, Inc. and Tim Kuiper were defendant's agents with regard to the audit of plaintiff. Further, that defendant was responsible for any acts or omissions committed by Chlystek & White Services, Inc. or Tim
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offices. Kuiper reviewed payroll documentation provided to him by Russell. Kuiper did not visit any job sites or review any construction contracts. When Kuiper completed the audit he reported payroll exposure in job classification number 5022 to be $92,314 and under job classification number 5480 to be $711,253 in his audit report. Kuiper sent the audit report to defendant. Acting on the numbers represented in the audit report, defendant sent plaintiff an additional premium bill of $16,637. Defendant also sent plaintiff a copy of Kuiper's audit.

Russell reviewed the additional premium bill and audit and immediately believed that Kuiper made a mistake during the audit resulting in the additional premium bill. Russell believed that Kuiper had mistakenly reversed the payroll amounts under job classification numbers 5022 and 5480. Russell sent a letter to Mattei, the insurance agent, describing the mistake and requesting a reaudit. Mattei or someone at his agency forwarded Russell's letter to defendant and requested that defendant not cancel their policy until the problem was resolved. Russell also personally contacted Kuiper about the audit report. According to Russell, Kuiper stated that he could have made a mistake but he could not perform a reaudit unless requested to do so by defendant. Defendant canceled the 2001 policy effective July 11, 2001 for nonpayment of the additional $16,637 premium it assessed to plaintiff for policy year 2000 as a result of Kuiper's audit. Russell testified that after defendant's cancellation of the 2001 policy, plaintiff had to scramble to get replacement insurance and could not obtain coverage in the standard market because of defendant's cancellation of the policy for non-payment.

After the cancellation of the policy, defendant sent Kuiper to plaintiff's offices to perform a termination audit of policy year 2001. Kuiper reported total payroll under job classification number 5022 of $277,122 and under job classification number 5480 of $56,456. Plaintiff continued to dispute the audit performed on policy year 2000 asserting that it did not owe defendant any additional premiums, but in fact defendant owed plaintiff a refund. Defendant ultimately sent Kuiper to perform a third audit on December 8, 2003, which was actually a reaudit of policy year 2000. Kuiper testified that he returned to plaintiff's offices and reviewed the same records that he reviewed the first time he performed the audit in April 2001, over two and a half years prior. In the audit report, he stated specifically, "[t]he original audit appears to have the two class codes switched with the vast bulk of payroll in 5480." At trial he testified that he stood behind all three audit reports he prepared and that all three were accurate based on the information he reviewed at the time.

Russell testified that he never received a copy of the reaudit or was made aware of the result from defendant despite numerous requests. Veronica Golf-Matejko, defendant's corporate compliance and statistics manager testified that she reviewed Kuiper's reaudit of policy year 2000 and rejected it. Golf-Matejko stated that she did not provide a copy of the reaudit to plaintiff, did not contact plaintiff to discuss it, did not review any source documents involved in the reaudit, and did not contact Kuiper to question him about the reaudit or discuss his conclusions.

Plaintiff brought suit against defendant alleging breach of contract, breach of implied covenant of good faith and fair dealing, and negligence. Defendant answered denying the

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Kuiper with regard to the audit of plaintiff.

allegations. Later, defendant filed a counter-complaint against plaintiff alleging that plaintiff owed defendant an outstanding premium balance on policy year 2000 in the amount of $6,118. Defendant calculated that figure by subtracting premiums plaintiff paid on the policy year 2001 contract that defendant canceled in the amount of $10,519 from the $16,637 defendant asserted plaintiff owed in additional premiums for policy year 2000, resulting in a balance due of $6,118. The trial court granted defendant's motion for summary disposition regarding plaintiff's claims of breach of implied covenant of good faith and fair dealing and negligence but allowed both parties' breach of contract claims to go to trial.

Both matters proceeded to jury trial in June 2006. At trial, plaintiff alleged that defendant owed damages to plaintiff in the amount of $164,662 for breach of contract. Russell testified that $164,662 represented $24,885 for plaintiff's deposit and premium overpayment on policy year 2000, plus $55,423 for the increased premiums plaintiff had to pay for the balance of policy year 2001 after defendant cancelled, plus $84,354 for increased premiums plaintiff incurred for the 2002 policy year. The trial court denied defendant's motion for directed verdict, and the matter went to the jury. The jury found specifically that defendant breached its contract with plaintiff, that defendant's breach proximately caused damages to plaintiff, and awarded the damages to plaintiff in the amount of $164,662. The jury further found that plaintiff did not breach its contract with defendant. The trial court denied defendant's post-trial motions for JNOV, new trial, and remittitur. Defendant now appeals.

Defendant argues on appeal that the jury's verdict in the instant case must be vacated because pursuant to the insurance policy, it had the sole right to determine both the job classifications and the insurance premiums applicable under the policy.[3] Defendant also contends that under the insurance policy it had unfettered discretion to cancel the policy at any time for any reason. In response, amongst other arguments, plaintiff asserts that defendant is precluded from raising these arguments on appeal because defendant never raised the arguments before the trial court either in a motion or at trial.

An issue is not properly preserved for appellate review if it is not raised before, addressed, or decided by the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). This Court generally will not address an issue neither raised nor decided by the trial court, on the basis that it is not properly preserved. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Our review is limited to issues actually decided by the trial court. *Preston v Dep't of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991). After reviewing the record, we conclude that defendant did not raise these issues before the trial court and therefore failed to preserve them for our review.

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[3] As support for its contention, defendant cites only an unpublished decision of this Court, *Frame Hardwoods, Inc v Indiana Lumbermens Mut Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2006 (Docket No 271053). Unpublished opinions are not binding on this Court. MCR 7.215(C)(1). Moreover, unlike *Frame Hardwoods*, the issues involved at trial in the instant case involved the payroll amounts represented in the original and reaudit, not disputed classifications in the insurance policy.

Here, defendant did not argue at any time before the trial court or jury that it did not breach the contract because it had the right to establish job classifications and insurance premiums, as well as the right to cancel the policy at any time for any reason.[4] Instead, the record reveals defendant's theory of the case was that Kuiper did not make a mistake and that the audits were properly conducted based on the information provided to Kuiper by Russell. In pursuing this contention at trial, defendant attacked Russell's credibility regarding the manner in which the payroll information was categorized into the job classification codes as well as the information Russell provided to Kuiper at the different audits. Defendant's trial counsel argued during her closing statement that the case turned on the third audit, specifically stating that the jury could review the third audit and reject it as Golf-Matejko did.

In deciding the issues that were presented to the jury, the jury viewed the evidence and assessed the witnesses' credibility and apparently believed Russell and found that Kuiper made a mistake in the first audit. Clearly, it is the province of the jury to determine the credibility of witnesses, to resolve conflicts in the evidence, and to decide the disputed issues. *Martel v Duffy-Mott Corp*, 15 Mich App 67, 73; 166 NW2d 541 (1968). And when there is conflicting evidence and the jury's determination turns at least in part on issues of witness credibility, the jury verdict should ordinarily not be disturbed. See *Ewing v Detroit*, 252 Mich App 149, 169-170; 651 NW2d 780 (2002), rev'd on other grounds 468 Mich 886 (2003).

Because defendant never raised these issues before the trial court, and because these wholly separate and alternatives theories of relief should first be presented to and decided by the trial court or jury, we conclude that defendant failed to preserve these issues for appellate review. Defendant had multiple opportunities to raise these issues before the trial court in its motion for summary disposition, during trial, and during several post-trial motions. Defendant instead chose to rely on other arguments as avenues to relief. A party may not harbor error as an appellate parachute, and we decline to review these issues raised for the first time on appeal. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005).

Finally, defendant argues that the trial court erred when it did not instruct the jury to limit plaintiff's damages award to only those damages plaintiff incurred during the months remaining in policy year 2001. This Court reviews de novo claims of instructional error. *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 8; 651 NW2d 356 (2002). Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories. Jury instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. *Hill v Hoig*, 258 Mich App 538, 540; 672 NW2d 531 (2003); *Meyer v City of Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000).

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[4] In its brief on appeal defendant does not direct this Court to a trial court ruling or jury decision on either of these issues. While we have reviewed the record, this Court is not required to search the record for factual support for a party's claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

To preserve a jury instruction issue for review, a party must object on the record before the jury retires to deliberate. MCR 2.516(C). When properly preserved, this Court reviews assertions of instructional error de novo. *Cox, supra*. However, appellate review of an unpreserved instructional error is limited to instances in which the failure to review would result in manifest injustice. *Meyer, supra*; *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Manifest injustice occurs when a defect in an instruction is so great as to constitute plain error requiring a new trial or when it pertains to a basic and controlling issue in the case. *Phinney, supra*.

Here, the record does not display that defendant requested the trial court to instruct the jury to limit damages to those incurred during the remaining period of the 2001 policy. To the contrary, the record displays that defendant not only did not object to the jury instructions given regarding computation of damages, but in fact affirmatively acquiesced to the jury instructions as given. Therefore, plaintiff effectively waived this issue. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 591; 657 NW2d 804 (2002). In any event, our review of the record reveals that defendant has not shown any manifest injustice in the verdict rendered and damages awarded. The instructions as given accurately and fairly presented the applicable law regarding a party's burden of proof necessary for establishing damages. Further, plaintiff presented significant evidence on the issue of damages and therefore, defendant has not established manifest injustice.

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto