STATE OF MICHIGAN

COURT OF APPEALS

LAUREL WOODS APARTMENTS,

Plaintiff-Appellant,

UNPUBLISHED
December 11, 2012

v

NAJAH ROUMAYAH and REBECCA ROUMAYAH,

Defendants-Appellees.

No. 299396
Oakland Circuit Court
LC No. 2005-069007-CZ

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff Laurel Woods Apartments appeals as of right from a final judgment awarding it $13,086 against defendants Najah Roumayah and Rebecca Roumayah, jointly and severally, in accordance with a jury's verdict. On appeal, plaintiff raises numerous issues challenging various pretrial rulings, trial-related matters, and the trial court's post-trial decisions. We affirm.

I. FACTS AND PROCEEDINGS

Plaintiff brought this action for breach of contract and attorney fees against defendants, its tenants, alleging that the parties' lease agreement obligated defendants to compensate plaintiff for restoration costs following a fire that was caused by Rebecca Roumayah's negligence. In March 2006, the trial court concluded that there was no express agreement establishing defendants' liability for fire damage and, accordingly, granted defendants' motion for summary disposition. In a prior appeal, this Court reversed that order and remanded the case for further proceedings. *Laurel Woods Apartments v Roumayah*, 274 Mich App 631; 734 NW2d 217 (2007). This Court held that a provision in the lease providing that the "[t]enant shall also be liable for any damage to the Premises . . . caused by the acts or omissions of Tenant or Tenant's guests" "unambiguously provided that both defendants were jointly and severally liable for damage that one or both of them caused to the premises." *Id.* at 638, 643. Accordingly, plaintiff, not defendants, was entitled to partial summary disposition on that issue. *Id.* at 643. However, this Court remanded the case for further proceedings because there was a question of fact as to whether Rebecca caused the fire damage. *Id.*

On remand, the trial court granted summary disposition for plaintiff pursuant to MCR 2.116(C)(10) on the issue of defendants' liability, finding no genuine issue of material fact that Rebecca's negligence caused the fire. The case proceeded to trial on the issue of damages. Plaintiff requested damages in excess of $64,000. Defendants disputed plaintiff's entitlement to damages in that amount, arguing in part that plaintiff was requesting reimbursement for items not directly related to the fire damage, and for items and materials that were of superior quality to the property damaged in the fire. A jury awarded plaintiff damages of $13,086.

The trial court thereafter denied plaintiff's postjudgment motions for judgment notwithstanding the verdict (JNOV), a new trial, or additur, and also denied plaintiff's motion for attorney fees pursuant to the lease agreement, statute, or court rule. The trial court initially denied defendants' motion for case evaluation sanctions under the interests of justice exception in MCR 2.403(O)(11), but then subsequently granted defendants' motion for reconsideration and awarded it case evaluation sanctions.

II. THIS COURT'S JURISDICTION

Initially, we disagree with defendants' argument that this Court lacks jurisdiction to consider all but two of plaintiff's issues on appeal. This Court has jurisdiction of an appeal of right from a "final judgment" or "final order". MCR 7.203(A)(1). MCR 7.202(6)(a) defines what constitutes a "final judgment" or "final order" (hereafter, "final order") in a civil case. In pertinent part, MCR 7.202 defines a final order as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). It also defines a final order as "a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule." MCR 7.202(6)(a)(iv).

MCR 7.204(A) provides the time limits for the filing of an appeal by right, and states in relevant part:

> **(A) Time Requirements**. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.
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> (1) An appeal of right in a civil action must be taken within
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> (a) 21 days after entry of the judgment or order appealed from;
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> (b) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief, if the motion was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period . . . .

Prior to trial, the trial court instructed the parties that it would decide the issue of plaintiff's claim for contractual attorney fees after the jury trial. Plaintiff's claim for attorney fees thus was not an issue in the jury trial. Following the trial, defendants moved the trial court for entry of a judgment on the verdict and for the entry of case evaluation sanctions, while

plaintiff moved the trial court for resolution of its claim for attorney fees under the contract and otherwise. The trial court granted defendants' motion for entry of judgment at the November 18, 2009 motion hearing, but took plaintiff's motion for attorney fees under advisement. The trial court then denied plaintiff's request for attorney fees in an order dated November 20, 2009 (hereinafter "attorney fees order"), which order was entered on the trial court's register of actions on December 1, 2009. The trial court also issued a judgment on the verdict dated November 23, 2009, which judgment was entered on the trial court's register of action on November 29, 2009.

Subsequently, plaintiff timely moved for reconsideration of the attorney fees order on December 11, 2009, and timely moved for judgment notwithstanding the verdict (JNOV), a new trial, and/or additur (hereinafter "JNOV motion") on December 14, 2009. The trial court denied plaintiff's JNOV motion on June 4, 2010. Plaintiff then moved for reconsideration of that denial. The trial court denied plaintiff's motion for reconsideration of the attorney fees order, as well as plaintiff's motion for reconsideration of the denial of its JNOV motion, on July 13, 2010. Plaintiff filed its claim of appeal on August 3, 2010.

Defendants argue that, apart from the issues of attorney fees and case evaluation sanctions, this Court lacks jurisdiction over the issues raised by plaintiff, because plaintiff did not take a timely appeal from the judgment. Defendants argue that, pursuant to MCR 7.204(A)(1)(b), plaintiff's motion for reconsideration of the trial court's denial of the JNOV motion did not toll the period of time for filing an appeal; thus, plaintiff was required to file a claim of appeal within 21 days of that denial. See *Allied Elec Supply Co, Inc v Tenaglia*, 461 Mich 285, 288-289; 602 NW2d 572 (1999). Defendants concede, however (although for erroneous reasons), that plaintiff timely appealed the attorney fees order.[1]

Allied concluded that a motion for reconsideration of a denial of a motion to set aside a default judgment, filed more than 21 days after the judgment is entered, does not extend the time for taking appeal an right from that judgment. *Id.* at 574. Although *Allied* thus arises in a different context, language in *Allied* does support defendants' argument:

> The definition of a final judgment or final order found in MCR 7.202(8)(a)(i) took effect January 1, 1996. The definition supersedes prior case law, which had indicated that a denial of a motion to set aside a default judgment is appealable by right. Because an order denying a motion to set aside a default judgment is no longer deemed a final judgment, a motion for reconsideration that is filed more than twenty-one days after the final judgment does not extend the time for taking an appeal of right. [*Id.* (citations and footnotes omitted).]

[1] Plaintiff contends that the attorney fees order was a postjudgment order under MCR 7.202(6)(a)(iv) (and therefore properly appealable as such). To the contrary, and for the reasons set forth in this opinion, we find that the attorney fees order was the "first" final appealable order under MCR 7.202(6)(a)(i).

Similarly, an order denying a motion for JNOV is also not defined as a "final order" under MCR 7.202(6)(a)(i).[2] Therefore, *Allied* supports the general proposition that a motion for reconsideration of a trial court's denial of a JNOV motion filed more than 21 days after the original judgment fails to extend the time for taking an appeal of right from that judgment.

However, defendants' argument relies upon the characterization of the attorney fees order as a "postjudgment" order, rather than a final order under MCR 7.202(6)(a)(i). Only *prior* non-final rules and orders are incorporated into a final order for the purposes of appeal. *People v Torres*, 452 Mich 43, 57 n 15; 549 NW2d 540 (1996), citing *Washington v Starke*, 173 Mich App 230, 241-242; 433 NW2d 834 (1988). However, the peculiar procedural posture of this case, combined with an ambiguity contained in MCR 7.204(A), prevent us from concluding that the attorney fees order was not the "first" "final order" in the instant case under MCR 7.202(6)(a)(i).[3] Instead, we are compelled to conclude that it was.

Although the judgment states that it closes the case, it also states that such closure is "subject to both Plaintiff and Defendants' rights to submit [sic] proposed Bill of Costs[.]" At the motion hearing on November 18, the parties also discussed the issue of contractual attorney fees and whether the proposed judgment would close the case, although the trial court's position on the matter was not entirely clear.

Viewed in isolation, neither the judgment nor the attorney fees order clearly constitutes a "final order" under MCR 7.202(6)(a)(i), in the sense that it alone "dispose[d] of all the claims and adjudicate[d] the rights and liabilities of all the parties." The judgment did not resolve the issue of contractual attorney fees,[4] and the attorney fees order did not resolve the other issues in the case.[5] Together, however, the order and the judgment disposed of all the claims and adjudicated the rights and liabilities of the parties. The question then becomes which (the

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[2] This citation is to the current version of the court rule referred to in *Allied.*

[3] As noted, MCR 7.204(A) defines "entry" as "the date a judgment or order is signed, *or* the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions." (Emphasis added).

[4] Plaintiff's claim for attorney fees under the contract, as discussed more fully below, is distinct from a postjudgment claim for attorney fees.

[5] The issue is not resolved merely by treating the judgment as a final order because it is labeled a "judgment;" MCR 2.604(A) states in relevant part that "an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties . . . . Such an order or other form of decision is not appealable as of right before entry of a final judgment." Staff comment to this court rule indicates that it was amended in 1995 to "eliminate[] the procedure under which a trial court could direct entry of final judgment on an order disposing of fewer than all the claims or parties, permitting an appeal of right from such orders. MCR 2.604, Staff Comment to July, 1995 Amendment. Therefore, if the judgment does not dispose of all claims, it is not a final judgment from which an appeal of right may be taken, despite being labeled as such.

attorney fees order or the judgment) was the "first" to do so. See MCR 7.202(6)(a)(i). To put it simply, it appears that whichever came *last* between the judgment and the attorney fees order would be the "first" "final order" in the instant case. Unfortunately, it is possible to consider either the attorney fees order or the judgment as "entered" first under MCR 7.204(A): the order is dated prior to the judgment,[6] but the judgment was entered on the register of actions prior to the order.

Plaintiff timely moved for reconsideration of the attorney fees order, and filed its appeal within 21 days of the trial court's order denying that motion. Thus, if the attorney fees order is the "first" "final order" of the case, plaintiff's appeal is timely. MCR 7.204(A)(1)(b). However, as stated above, if the judgment was the "first" "final order" of the case, then plaintiff's appeal is arguably untimely under the rule of *Allied* and MCR 7.204(A)(1)(b), as plaintiff was required to file its claim of appeal within 21 days of that denial.

It is an extremely close call, in light of the fact that the determination of the dates of "entry" for either the attorney fees order or the judgment differs depending on which calculus from MCR 7.204(A) is applied, whether the attorney fees order or the judgment was the "first" "final order" in the case. We thereby err on the side of avoiding a denial of plaintiff's statutory right to appeal. See MCL 600.308; MCL 600.309. We conclude that the order dated November 20, 2009, and entered on the trial court's register of actions on December 1, 2009, was the first "final order" that was appealable by right in the instant case.

"Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case." *Bonner v Chicago Title Insurance Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). However, where the appeal is brought from a postjudgment attorney fees and costs order, the appeal is limited to "the portion of the order with respect to which there is an appeal of right." MCR 7.203(A).

Plaintiff filed this appeal from orders issued on July 13, 2010, which denied reconsideration of earlier orders, one of which, defendants argue, was not timely appealed, and the other of which, defendants argue, only dealt with postjudgment attorney fees and case evaluation sanctions. Therefore, defendants contend that this appeal should be limited to a review of those issues. As stated above, however, defendants' argument is based on the notion that the attorney fees in question were postjudgment in nature. While some of the attorney fee claims were postjudgment, plaintiff also claimed attorney fees in count II of its complaint pursuant to a provision of the parties' lease. As such, this contractual attorney fees claim needed to be adjudicated in order to dispose of all the claims in the complaint. That claim was resolved in the attorney fees order. As we conclude that the attorney fees order was entered after the judgment, the attorney fees order was the "first" "final order" under MCR 7.202(6)(a)(i). Plaintiff challenged the attorney fees order in a timely filed motion for reconsideration. The

[6] Adding to the confusion is the fact that November 23, 2009, the date written on the judgment, has *no* corresponding register of actions entry. No actions are recorded concerning the judgment other than the November 18 grant of defendants' motion for entry of judgment and the November 29 filing of the judgment.

filing of that motion suspended the time for filing an appeal of right from the final order until 21 days after the disposition of the motion. MCR 7.204(A)(1)(b). The trial court ultimately denied the motion for reconsideration in an order entered on July 13, 2010. Plaintiff timely filed the claim of appeal from that order. Therefore, this Court has jurisdiction to consider each of plaintiff's issues on appeal.

III. PLAINTIFF'S PRETRIAL MOTIONS

Plaintiff argues that the trial court erred in denying its motion for summary disposition on the issue of damages. Plaintiff also argues that the trial court erred by denying its motion for entry of judgment before trial. Plaintiff maintains that it was entitled to a judgment because there was no genuine issue of material fact with respect to damages, and that the trial court therefore erred by submitting the question of damages to a jury.

We review a trial court's decision regarding a motion for summary disposition de novo. *Patterson v CitiFinancial Mtg Corp*, 288 Mich App 526, 528; 794 NW2d 634 (2010). MCR 2.116(C)(10) provides that a party may move for summary disposition where, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The reviewing court must consider any affidavits, pleadings, depositions, admissions, or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 96; 815 NW2d 811 (2012). The question whether the trial court erred in denying entry of judgment under MCR 2.602 is a question of law we review de novo. See *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). The interpretation of clear contractual language is also a question of law we review de novo. See *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich 359, 366-367; 817 NW2d 504 (2012).

The court rule regarding summary disposition does not prohibit a court from awarding damages on summary disposition if there is no genuine factual dispute regarding the amount of damages. MCR 2.116(C)(10). In this case, however, plaintiff did not demonstrate that there was no genuine issue of material fact regarding damages.

Plaintiff's contention that it was entitled to summary disposition on the issue of damages is based on its position that the lease agreement required defendants to pay all of plaintiff's out-of-pocket expenses that allegedly were associated with the fire damage, without an opportunity to contest the expenditures. When interpreting a contract, the language in the contract should be given its plain and ordinary meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). "If the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Paragraph 9 of the parties' lease agreement states, in pertinent part:

> Tenant shall also be liable for any damage to the Premises or to Landlord's other property . . . *that is caused by the acts or omissions of Tenant* or Tenant's guests. *Landlord shall perform all maintenance* and repairs to the roof, walls and structural elements, all mechanical, plumbing and electrical systems *at Landlord's cost and expense, unless* such damage *is caused by Tenant's* acts or

> neglect, *in which case such cost and expense incurred by Landlord shall be paid by Tenant*. [Emphasis added.]

Paragraph 9 requires the tenant to pay for expenses "incurred by" the landlord for damage "that is caused by" the tenant's acts or omissions. The tenant's liability is limited to "any damage to the Premises or to Landlord's other property . . . *that is caused by the acts or omissions of Tenant*," resulting in an "expense incurred by landlord." (Emphasis added). This does not mean, however, that a tenant is prohibited from questioning any expense that a landlord asserts was related to the fire damage. Nothing in this section denies the tenant the right to ascertain whether any repair or replacement expenses were causally related to the tenant's negligence, and whether any claimed expenses were actually incurred. Further, nothing in this section explicitly abrogates the general rule that a tenant is not liable for costs involving any improvement or upgrade of the property from its prior condition. See *Cleland v Clark*, 123 Mich 179, 183; 81 NW 1086 (1900). Plaintiff also cites Paragraph 4 of the lease agreement, which requires the tenant to tender a $950 security deposit "to reimburse Landlord for actual damages to the Premises or any ancillary facilities that directly result from conduct not reasonably expected in the normal course of habitation of a dwelling[.]" As in Paragraph 9, the phrase limits a tenant's liability to "actual damages" that "directly result" from the tenant's conduct.

In this case, there were questions of fact concerning whether all of plaintiff's claimed expenses were for "damage . . . caused by [defendants'] acts or omissions," and whether the claimed expenses were actually incurred. During the motion hearing, the parties chiefly argued over liability, not damages. Although plaintiff now argues that it presented unrebutted expert testimony and documentary evidence regarding damages, it appears that this evidence was presented *at trial*, not at the summary disposition hearing. Plaintiff did not attach repair bills, estimates, or other documentary evidence establishing the sum certain of the damages claimed at the summary disposition hearing.[7] The movant at a summary disposition hearing has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). We conclude that plaintiff did not carry the burden of establishing that no issue of material fact existed as to the amount of damages. The trial court therefore did not err in denying plaintiff's motion for summary disposition with respect to damages.

Before trial, plaintiff also moved the trial court for entry of a judgment awarding plaintiff its requested damages pursuant to MCR 2.602(B)(3), which provides, in pertinent part:

> Within 7 days *after the granting of the judgment or order*, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days. [Emphasis added.]

[7] In fact, one of the only exhibits attached to the motion that specifies an amount of damages is a letter from plaintiff's counsel to defendant Rebecca Roumayah's father; however even that letter lists damages for "Hallway Carpet" and "Re-Paint Hallways" as "TBD."

Because the trial court had never granted plaintiff relief on the issue of damages, the rule clearly was not applicable. Indeed, the trial court's summary disposition order specifically stated that the question of damages was to be resolved through case evaluation or trial. Thus, the trial court did not err by failing to enter judgment before trial.

IV. PLAINTIFF'S EVIDENTIARY ISSUES

Plaintiff raises several claims of evidentiary error. A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011). An affirmative waiver of objection to the admission of evidence waives any error in its admission. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). However, the mere failure to object constitutes a forfeiture of the alleged error, and appellate review is permissible for plain error affecting substantial rights. *Id.*; *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Plaintiff first argues that the trial court erred by excluding all evidence related to insurance under MRE 411. We find no merit to this issue. The record discloses that the trial court never decided this issue because, after a discussion in chambers, the parties agreed not to present evidence on the subject of insurance. Plaintiff's counsel stated on the record that he had agreed not to "directly mention any insurance at all," but asserted that if defendants decided to "try to argue it for less than ten thousand, . . . it may come up later but . . . we're definitely not going to bring up insurance." There is no indication in the record that plaintiff thereafter sought to present evidence of insurance. Plaintiff's counsel's statement that "we're definitely not going to bring up insurance" waived any claim concerning the admissibility of the evidence. A waiver extinguishes any error, leaving no error to be reviewed. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Further, a party may not waive an objection and then argue on appeal that the resultant action was error. *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 168; 761 NW2d 784 (2008).

Plaintiff also argues that the trial court erred by excluding evidence of defendants' alleged prior agreement with the amount of plaintiff's claimed damages. Plaintiff does not indicate where or how it preserved this issue at trial, and our review of the record fails to disclose any offer of proof regarding evidence of defendants' alleged admissions regarding the amount of damages. Accordingly, this issue is unpreserved, MRE 103(a)(2); *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich 589, 619; 792 NW2d 344 (2010), and plaintiff has the burden of demonstrating a plain error affecting its substantial right. Plaintiff refers to correspondence from plaintiff's counsel to defendant Najah Roumayah and Wafie Roumayah (Rebecca Roumayah's father), a copy of Wafie Roumayah's check for $10,000 toward fire repairs; and an excerpt from a deposition transcript wherein Wafie Roumayah appears to acquiesce to paying "the remainder of the fire damages" if they were not covered by insurance. Contrary to what plaintiff argues, the evidence in question refers only to defendants' admissions of liability for the fire damage, and does not contain any admissions concerning the amount of damages or reflect defendants' agreement concerning the cost of the fire repair and restoration. Accordingly, plaintiff has not established plain error requiring reversal on this issue.

Plaintiff next argues that the trial court erred by excluding the affidavit of plaintiff's contractor, Richard Gallagher, concerning the cost of repairing and restoring the property after

the fire. Plaintiff does not dispute that Gallagher's affidavit was hearsay under MRE 801(c), but argues that it was admissible under MRE 804 because Gallagher died before trial and, therefore, was unavailable. Although we do not disagree that Gallagher was unavailable under MRE 804(a), unavailability alone does not allow hearsay evidence to be admitted. See *Sackett v Atyeo*, 217 Mich App 676, 684; 552 NW2d 536 (1996). The evidence must still be admissible under one of the exceptions in MRE 804. *Id.* Plaintiff relies solely on the catch-all exception in MRE 804(b)(7), which provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Gallagher's affidavit does not meet the criteria in subparts (B) and (C). The affidavit is not more probative on the point of damages than any other evidence that plaintiff could have procured. Other witnesses were available to testify regarding the extent of the damages and the repairs that were made. In addition, plaintiff has not explained why no other person associated with Gallagher's business could have testified regarding the restoration estimates and costs. Further, plaintiff has not shown that admission of the affidavit was necessary to serve the general purposes of the rules of evidence. The affidavit was offered as the declarant's self-serving assertions regarding contested matters for which defendants had no prior opportunity to question or cross-examine Gallagher. The trial court did not abuse its discretion by excluding the affidavit. Additionally, any error in the denial of admission of Gallagher's affidavit was harmless, because several of plaintiff's witnesses testified that Gallagher's cost estimate was the lower of two estimates received, and that it was reasonable in view of the extensive repairs necessitated by the fire. A trial court's denial of the admission of merely cumulative evidence is harmless error. *Sackett*, 217 Mich App at 685.

V. CLAIMS OF INSTRUCTIONAL ERROR

Plaintiff also raises several claims of instructional error. Claims of instructional error are preserved for appellate review only if the party claiming error "objects on the record before the jury retires to consider the verdict, . . . stating specifically the matter to which the party objects and the grounds for the objection." MCR 2.512(C); *Heaton v Benton Constr Co*, 286 Mich App 528, 537; 780 NW2d 618 (2009). The trial court must allow the parties the opportunity to make the objection outside the jury's presence. MCR 2.512(C). Here, plaintiff did not preserve its

claims of instructional error either by objecting to the trial court's instructions at trial, or by requesting instructions that were not given.[8] Accordingly, plaintiff's claims are not preserved and this Court's review is limited to plain error affecting plaintiff's substantial rights. *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 89; 795 NW2d 205 (2010).

Plaintiff argues that the trial court did not properly instruct the jury on the measure of damages. This argument is based on plaintiff's flawed contention that defendants were required to pay all of plaintiff's out-of-pocket expenses that it claimed were associated with the fire damage, and that defendants were not permitted to question those expenses. We rejected this argument in section III, *supra*. Accordingly, we likewise reject this claim of instructional error.

Plaintiff also argues that the jury should have been instructed not to consider depreciation because defense counsel waived depreciation in his opening statement. Apart from the fact that plaintiff failed to request such an instruction, the record discloses that other than nonspecific references to the age of the building, there was no evidence from which the jury could have drawn inferences regarding depreciation. There also was no evidence regarding the fair market value of the property before or after the fire. Under these circumstances, there is no basis for concluding that the jury's verdict might have been influenced by considerations of depreciation. Thus, plaintiff has failed to establish a plain error affecting substantial rights.

Plaintiff next argues that the trial court erred by instructing the jury on mitigation, a matter that once again drew no objection at trial. We disagree with plaintiff's argument that defendants waived any mitigation defense by stating, in response to plaintiff's request for admissions, that it had no evidence "at this time" that plaintiff failed to mitigate damages. This statement only refers to defendants' evidentiary support for the defense at the time it responded to plaintiff's requests for admissions. It did not constitute a complete waiver of the defense. In its answer to plaintiff's complaint, defendants raised the defense of mitigation, thus preserving this defense for trial. MCR 2.111(F)(3).

The trial court's instruction on mitigation was not erroneous. Mitigation of damages is an affirmative defense, to be established by the defendant, which is related to the broader principle of "avoidable consequences." See *Rasheed v Chrysler Corp*, 445 Mich 109, 123-124; 517 NW2d 19 (1994). The trial court instructed the jury as follows:

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[8] Plaintiff argues that it preserved its claims of instructional error by raising them in its motion for entry of judgment, its motion for JNOV, and its trial brief. However, MCR 2.512(C) clearly provides that "[a] party may assign as error the giving of or the failure to give an instruction, only if the party objects on the record before the jury retires to consider the verdict . . . stating specifically the matter to which the party objects and the grounds for an objection." Raising the issue in a trial brief or postjudgment motion is not sufficient. At trial, after it instructed the jury, the trial court asked the parties whether "there [was] anything else that has to go on the record." Plaintiff's counsel replied, "Not from our perspective." While we do not go so far as to view this statement as an affirmative waiver of objection, it is clear that plaintiff failed to object to the instructions as given. The issue is therefore not preserved for appeal.

> [I]n fixing the amount of damages, that you should not include any loss that Laurel Woods Apartments could have prevented by exercising diligence in arranging for the repair and renovation work required because of the damage caused by the fire.
>
> The Defendants have the burden of proving or of showing, I should say, that the damages claimed by Laurel Woods Apartments are grossly excessive and involved unreasonable charges. The Defendants have the duty to show that the Plaintiff did not use materials of like kind and quality in repairing the damages caused by the fire.

Contrary to what plaintiff argues, the instruction was not inherently inflammatory or prejudicial, and did not improperly shift the burden of proof to plaintiff. The instruction was closely tailored to the factual disputes presented at trial. Moreover, the instruction tracks the Michigan Model Civil Jury Instruction, M Civ JI 53.05,[9] which provides:

> A person has a duty to use ordinary care to minimize his or her damages after [*he or she/his or her property*] has been [*injured/damaged*]. It is for you to decide whether plaintiff failed to use such ordinary care and, if so, whether any damage resulted from such failure. You must not compensate the plaintiff for any portion of [*his/her*] damages which resulted from [*his/her*] failure to use such care.

Whereas the model instruction does not explicitly state a burden of proof, the trial court specifically stated that defendants had the burden to show that plaintiff's claimed damages were "grossly excessive" or "unreasonable," and that plaintiff "did not use materials of like kind and quality" in repairing damages caused by the fire. We find no error in the trial court's instruction.

Plaintiff also argues that the trial court failed to properly instruct the jury on the law of "betterment." Defendants stated in their affirmative defenses that plaintiff's repair costs were "excessive, unreasonable and include an element of 'betterment' for which Defendants cannot be held liable." Black's Law Dictionary (7th ed), p 153, defines "betterment" as "[a]n improvement that increases the value of real property." The concept of "betterment" as a distinct and specific affirmative defense to a claim for damages arising from repairs to real property may be an anachronism in that the concept is subsumed by general principles regarding liability for property damage and repairs. See *Clark*, 123 Mich at 183 (holding that "[t]he theory of all the betterment laws is that no one should be made richer at the expense of another").

At trial, defendants did not explicitly argue betterment as a distinct legal defense theory, although they generally argued that plaintiff used the fire restoration as an opportunity to improve the property above its pre-fire condition. The only use of the term betterment during

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[9] A model civil jury instruction does not have force and effect of law. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 350 n 8; 660 NW2d 361 (2004). However, we find that the model instruction buttresses our conclusion that the trial court did not err in its instruction.

trial was by plaintiff's counsel in closing argument. The trial court did not instruct the jury on betterment as a distinct concept, but its instructions regarding unreasonable charges and "like kind and quality" of repair materials covered the substance of defendants' argument that they were not liable for improvements beyond the restoration of the apartment to its pre-fire condition. A trial court does not commit error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). The trial court's instructions fairly and adequately instructed the jury that defendants were liable for the costs that plaintiff incurred to return the property to its pre-fire condition. The circumstances of this case did not require more detailed instructions on betterment. The trial court protected plaintiff's rights by instructing the jury that defendants had the burden of showing that plaintiff's requested damages were grossly excessive or involved unreasonable charges, or that plaintiff did not use materials of like kind and quality in repairing the damages caused by the fire.

Plaintiff also argues that the trial court erred by failing to instruct the jury on damages for lost rent while the apartment was being repaired. Such an instruction would arguably have been appropriate in view of plaintiff's inclusion of two-and-a-half months rent in its damages. Any error could have been easily resolved with a timely request for the instruction. Nonetheless, the issue of lost rent was not a principal issue at trial, and we conclude that plaintiff's failure to request such an instruction precludes relief with respect to this unpreserved issue. See *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 680-681; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866; 568 NW2d 80 (1997) (stating that reversal for an unpreserved instructional error is only warranted where it "pertains to a basic and controlling issue in the case").

VI. ATTORNEY MISCONDUCT

Plaintiff next argues that the jury's verdict was unduly influenced by defense counsel's misconduct during trial, thereby entitling plaintiff to a new trial. A new trial may be warranted by improper conduct of a party's counsel at trial. *Hilgendorf v St. John Hosp & Med Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). However, plaintiff's failure to object to counsel's alleged misconduct renders this issue unpreserved. *Badiee v Brighton Area Schs*, 265 Mich App 343, 373-374; 695 NW2d 521 (2005). When reviewing an unpreserved claim of attorney misconduct at trial, reversal is warranted only if "(1) the remarks were so prejudicial as to have denied the party a fair trial and . . . (2) any resulting prejudice could not have been cured by a curative instruction." *Id.* at 374.

Plaintiff argues that defense counsel engaged in misconduct by (1) introducing evidence of the cost of painting and carpeting replacement at the apartment before the fire; (2) stating in closing argument that plaintiff should be punished for misrepresenting the amount of its damages; and (3) falsely stating at trial that he had made discovery requests for cancelled checks of plaintiff's payments to Gallagher.

Plaintiff's argument regarding the evidence of the cosmetic improvements before the fire does not support its claim of attorney misconduct. Good-faith efforts to admit evidence, even marginally relevant evidence, does not constitute misconduct. Cf. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). The evidence of the costs of painting the apartment

and replacing the carpeting before the fire was relevant to the reasonableness of Gallagher's restoration costs for these same items after the fire. MRE 401. Although plaintiff contends that the evidence involved an unreliable "apples to oranges" comparison because fire damage restoration is more complicated and costly, this argument affects only the weight of the evidence, not its admissibility. Further, plaintiff was afforded ample opportunity to offer testimony explaining why carpeting replacement and painting are much more complicated and expensive jobs after a fire because of damage to the drywall, insulation, and subflooring. Counsel's efforts to introduce the pre-fire costs of these items did not constitute misconduct.

Plaintiff also argues that defense counsel improperly inflamed and unduly influenced the jury by arguing that plaintiff should be "punished" for misrepresenting evidence and engaging in "bad behavior" in the presentation of the case. Plaintiff cites *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), in support of its argument that it is entitled to a new trial because the jury verdict was the product of inflammatory rhetoric. In *Gilbert*, the plaintiff's counsel gave a dramatic and overwrought closing argument equating the sexual harassment endured by the plaintiff in the defendant's workplace to the Holocaust. The plaintiff's counsel expanded on the Holocaust comparison by emphasizing the defendant's German ownership and urging the jurors to "ring the bell of justice" so that the verdict would be heard in Germany. *Id.* at 772-774. The closing argument described the plaintiff as a "lowly woman millwright" who was subjected to abuse similar to a dog that had been kicked, beaten, and physically abused on a daily basis. *Id.* at 773. The Supreme Court described these tactics as "a naked appeal to passion and prejudice and an attempt to divert the jury from the facts and the law relevant to this case." *Id.* Defense counsel's comments in this case that plaintiff should be punished for misrepresenting evidence, and his comparison of plaintiff to a greedy child throwing a temper tantrum, are mild in comparison to the attorney's remarks in *Gilbert*. These isolated remarks were not "so prejudicial" as to deny plaintiff a fair trial. *Badiee*, 265 Mich App at 374. Moreover, the trial court instructed the jury that the attorneys' comments are not evidence. The court's instruction was sufficient to cure any prejudice and protect plaintiff's rights. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001).

Plaintiff lastly accuses defense counsel of deliberately lying to the trial court and misleading the jury about his discovery request for cancelled checks documenting plaintiff's payment to Gallagher. However, in the jury's presence, counsel eventually conceded that he did not specifically request the cancelled checks, and the trial court instructed him to stop inquiring about the non-production of cancelled checks unless he could show that a request was made. We conclude that the jury was not misled by these statements and plaintiff was not denied a fair trial. *Badiee*, 265 Mich App at 374.

VII. MOTION FOR JNOV, NEW TRIAL, OR ADDITUR

Plaintiff next argues that the trial court erred in denying its post-trial motion for JNOV, a new trial, or additur, and also erred in denying plaintiff's motion for reconsideration of the court's earlier decision. We disagree.

We review de novo a trial court's decision on a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). The trial court should grant a JNOV only when there is insufficient evidence to establish a question of fact for the jury

to resolve. *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). "When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law." *Id*. at 123–124. "The grant or denial of a motion for a new trial on the ground that the verdict is against the great weight of the evidence is a matter addressed to the sound discretion of the trial judge, whose exercise of that discretion will not be disturbed on appeal unless a clear abuse is shown." *Harrigan v Ford Motor Co*, 159 Mich App 776, 788; 406 NW2d 917 (1987). Similarly, this Court also reviews for an abuse of discretion both a trial court's decision on a motion for additur, *Hill v Sacka*, 256 Mich App 443, 460; 666 NW2d 282 (2003), and a trial court's decision denying a motion for reconsideration, *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004).

There were factual disputes in this case concerning whether plaintiff actually incurred all of the expenses that it claimed were attributable to the fire damage, whether expenses that were incurred were attributable to the fire damage, and whether some of the expenses involved replacement of damaged items with items of superior quality. Although plaintiff argues that its evidence of repair and replacement costs went essentially unchallenged, the record reflects that defendants offered evidence that (1) plaintiff did not scrutinize Gallagher's estimate because it did not want to "nickel and dime" him, (2) the alleged higher estimate obtained by plaintiff was not produced at trial, (3) plaintiff had recently had the apartment painted and carpeted for far less than Gallagher's estimated cost, (4) defendant Rebecca Roumayah testified that the apartment outside the kitchen was not extensively damaged, and (5) the kitchen cabinets appeared to be made of oak or maple and plaintiff's witnesses could not testify that they were made of ordinary building grade materials. The jury could have found that some of the repairs were excessive or that some of the replacements were made with higher-end materials. "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Smith v Foerster-Bolser Construction*, 269 Mich 424, 427-428; 711 NW2d 421 (2006). Given these factual disputes, the trial court did not err in denying plaintiff's motion for JNOV.

For the same reasons, although there was evidence that could have supported a larger award of damages, the jury's determination of damages was not against the great weight of the evidence. Therefore, trial court did not abuse its discretion in denying plaintiff's motion for a new trial or additur under MCR 2.611(A)(1)(c), (d), and (e), or (E).

Finally, the trial court did not err in denying plaintiff's motion for reconsideration. In a motion for reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3) "Generally, . . . a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." *Id.* Here, plaintiff's motion for reconsideration was essentially a more detailed version of its prior motion for JNOV, new trial, or additur. Plaintiff failed to demonstrate a palpable error in the trial court's denial of that motion. Therefore, the trial court did not abuse its discretion in denying the motion for reconsideration.

VIII. ATTORNEY FEES AND COSTS

Plaintiff argues that the trial court erred in denying its requests for attorney fees and costs. A trial court's award of costs and attorney fees is generally reviewed for an abuse of discretion, but a determination whether costs and fees are authorized is reviewed de novo as a question of law. *LaVene v Winnebago Industries*, 266 Mich App 470, 473; 702 NW2d 652 (2005). A trial court's decision whether a claim is frivolous for purpose of awarding sanctions is reviewed for clear error. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 195; 565 NW2d 887 (1997). A trial court's interpretation of contract language is reviewed de novo. See *DeFrain v State Farm Mut Automobile Ins Co*, 491 Mich at 366-367.

Generally, the "American rule" holds that attorney fees are not ordinarily recoverable unless provided for by statute, court rule, contract, or common-law exception. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004); *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). Here, plaintiff claims entitlement to attorney fees both as contractual damages and as sanctions for frivolous and vexatious conduct on the part of defense counsel.

CONTRACTUAL ATTORNEY FEES

Plaintiff first argues that it was entitled to contractual attorney fees under ¶¶ 3 and 20(b) of its lease agreement with defendants. We disagree. Paragraph 3 provides that the tenant must pay monthly rent in the amount of $950 on the first day of each month. Paragraph 3 further requires the tenant to pay an extra fee of $25 for payments made more than five days after the first of the month. The paragraph further provides:

> If Tenant fails to pay Rent or any other sums when due to Landlord, Landlord serves a notice of default on Tenant as required by law, and Tenant fails to remit the amounts due before the notice period expires, *the amount of court costs and attorney fees incurred by Landlord in enforcing Landlord's remedies and allowed by law shall be added to the amount of the arrearage*. [Emphasis added.]

Paragraph 3 clearly applies only to court costs and attorney fees that the landlord incurs in enforcing the landlord's remedies when a tenant fails to satisfy rent obligations. Plaintiff argues that this action included a claim for the last month's rent. Plaintiff did not, however, state a claim for unpaid rent or allege unpaid rent in its complaint. Further, plaintiff's property manager, Lisa Porcasi, testified at trial that defendants notified plaintiff that they intended to apply their security deposit toward their last month's rent. Porcasi testified that the security deposit was not refunded, but was applied toward the last month's rent. Therefore, despite plaintiff's insistence that the last month's rent was never paid, we conclude that Porcasi's testimony was that the security deposit was used to pay the last month's rent. Although such an application may have been in contravention of plaintiff's normal policy, it nonetheless appears that such an application occurred. Because ¶ 3 of the lease agreement only entitles plaintiff to recover attorney fees incurred for the cost of recovering unpaid rent, this action focused overwhelmingly on the fire damage claim, plaintiff made no attempt to differentiate any attorney fees arising from the prosecution of its claim for fire damages from attorney fees related to the recovery of the last month's rent, and Porcasi admitted that the security deposit had already been

applied toward plaintiff's rent, the trial court did not err in ruling that plaintiff was not entitled to attorney fees under ¶ 3.

Paragraph 20(b) of the lease agreement, labeled "Default and Landlord's Remedies," provides, in pertinent part:

> If Tenant *defaults on any obligations* under this Lease, or misrepresents any information reflected in this Lease or the Rental Application, *or violates any of the Rules and Regulation governing the Premises and Landlord's other property*, then *Landlord may, on written notice to Tenant, terminate the Lease* and obtain possession of the Premises by summary proceedings or other lawful means and/or sue for damages. . . . *If Landlord terminates the Lease, Landlord may recover Landlord's expenses* for enforcing Landlord's rights under the Lease and applicable law, *including court costs and attorney fees*, from Tenant, to the extent permitted by law, and Rent for the remainder of the Lease Term shall immediately become due. [Emphasis added.]

Although ¶ 20(b) broadly applies to "any obligations" of the tenant, the provision allowing the landlord to recover its "expenses . . . including court costs and attorney fees," is immediately preceded by the qualifying condition, "If Landlord terminates the Lease . . . ." When a modifying phrase is set off by a comma, it generally applies to only to the last antecedent. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999). Thus, the phrase allowing the Landlord to recover expenses refers to situations in which the Landlord terminated the lease. Because this case did not involve a termination of the lease by the landlord, that condition is not present.[10] Accordingly, ¶ 20(b) did not authorize an award of attorney fees in this case.

ATTORNEY FEE SANCTIONS

Plaintiff also requested attorney fees and costs as part of an award of sanctions under MCL 600.2591, which provides, in pertinent part:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees *against the nonprevailing party* and their attorney.

[10] We decline to accept plaintiff's construction of this clause, which would hold that attorney fees are recoverable whenever a tenancy is terminated. Plaintiff's property manager testified that defendant Rebecca Roumayah was "relocated" to an available apartment and paid rent on the new apartment until "she left and said, you know, I'm going to use my security deposit as my last month's rent." The record contains no evidence that the Landlord terminated Rebecca Roumayah's lease by written notice, or indeed that the lease was ever "terminated" rather than merely not renewed.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

(b) "Prevailing party" means a party who wins on the entire record.

Plaintiff also cites MCR 2.114(E), which allows a court to impose sanctions when a party or attorney signs a document in violation of subrule (D), which provides:

(D) The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

To determine whether a claim is frivolous, the claim or defense must be evaluated at the time it was made. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). The court must examine "the particular facts and circumstances of the claim involved." *Id.* at 95. The purpose of imposing sanctions is "to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005) (internal quotations and citation omitted). However, sanctions should not be used to "penalize[ ] a party whose claim initially appears viable but later becomes unpersuasive." *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991).

We find no error in the trial court's denial of sanctions in this case. There is no indication in the record that a primary purpose in asserting any defense was to harass, embarrass,

or injure plaintiff. In addition, although plaintiff ultimately prevailed in establishing defendants' liability for the fire damage, we are not persuaded that defendants' efforts to contest liability were either devoid of arguable legal merit or not well-grounded in fact. This Court's prior decision in *New Hampshire Ins Group v Labombard*, 155 Mich App 369; 399 NW2d 527 (1986), provided arguable legal support for defendants' attempt to avoid legal liability for the fire damage. Although this Court later determined in *Laurel Woods Apartments*, 274 Mich App at 638, that *Labombard* was distinguishable, defendants' reliance on that case was not frivolous.

Plaintiff also contends that defendants' denial of joint and several liability under the lease was a frivolous argument because it was based on a provision of the tort reform statute, MCL 600.2956, which has no application in a breach of contract action. In *Laurel Woods Apartments*, 274 Mich App at 641-642, this Court rejected defendants' argument under MCL 600.2956 because "this case does not sound in tort[;] [i]t is strictly a breach of contract claim[.]" This Court noted that the lease agreement specifically identified the tenants as "(jointly and severally) Najah Roumayah & Rebecca Roumayah." Defendants' argument was premised in part on language in MCL 600.2956 that states that "in an action based on tort *or another legal theory seeking damages for* personal injury, *property damage*, or wrongful death, the liability of each defendant for damages is several only and is not joint." (Emphasis added). Although defendants ultimately did not prevail in advancing this argument, the trial court did not clearly err by finding that it was not frivolous.

Plaintiff's list of alleged frivolous defenses warranting sanctions includes defendants' insurer's allegedly unjustified denial of coverage to defendants in a separate action, resulting in unnecessary litigation that ended when the insurer ultimately agreed to provide insurance coverage. However, the insurer's conduct in that other case cannot be attributed to defendants in this case. Plaintiff also argues that defendants asserted a frivolous defense by contesting the cause of the fire. We disagree. Rebecca Roumayah stated several times in her deposition that she was certain that she had turned off the stove burner and moved the pot to a different burner to allow the oil to cool. She also denied seeing flames coming from the pot. Rebecca admitted in her written statement that she left the stove unattended, not that she left the burner on. Rebecca also testified that she immediately went for a fire extinguisher, but found the cabinet locked, and had no available means of breaking the glass door. Although the trial court ultimately granted partial summary disposition for plaintiff on the ground that there was no genuine issue of material fact regarding this issue, we do not agree that defendants' denial of causation was a frivolous defense. The trial court did not clearly err in denying sanctions for defendants' unsuccessful attempt to dispute causation.

Finally, plaintiff contends that defendants' attempt to assert a comparative negligence defense without any legal justification resulted in costly discovery. Plaintiff cites *Nelson v Northwestern Savings & Loan Ass'n*, 146 Mich App 505; 381 NW2d 757 (1985), as authority for the principle that comparative negligence is not an available defense in a breach of contract action. In that case, this Court affirmed a judgment for the plaintiff and held that "the defense of comparative negligence is not available to defendant" because the plaintiff's claim was based on breach of contract, and not tort. *Id.* at 509. Despite this Court's holding in *Nelson*, defendants' attempt to assert a comparative negligence defense was not devoid of arguable legal merit. Plaintiff's claim was based on the theory that defendants breached the lease agreement by failing to pay for damage that was "caused by the acts or omissions of Tenant or Tenant's guests."

Accordingly, to prove that defendants breached the lease, plaintiff was required to prove that defendants' acts or omissions caused the damage. It was not wholly unreasonable to argue that a party who is contractually liable for property damage caused by the party's negligence is only liable to the extent that the party's negligence actually caused the damage, and that tort law principles of causation and comparative negligence were relevant to this determination.

In sum, the trial court did not err in denying plaintiff's requests for either contractual attorney or sanctions for frivolous defenses.

IX. INTEREST

Plaintiff also argues that it was entitled to an awarded of "interest at the highest rate permitted by law" in accordance with ¶ 20(b) of the lease agreement, or alternatively, 12 percent penalty interest under MCL 500.2006(4). We disagree. Paragraph 20(b) of the lease agreement provides that "[a]ny monetary charges or costs owed by Tenant shall accrue interest at the highest rate permitted by law." As previously explained in section VIII, *supra*, ¶ 20(b) is applicable only when the landlord terminates the lease. Because plaintiff did not terminate the lease, that provision does not apply. Further, MCL 500.2006(4) only applies to benefits owed pursuant to a contract of insurance. Defendants are not an insurer and their failure to pay damages as required by the lease agreement did not involve a failure to timely pay benefits due under a contract of insurance. Therefore, the statute is not applicable.

X. CASE EVALUATION SANCTIONS

Plaintiff lastly argues that the trial court erred when it granted defendants' motion for reconsideration of its decision denying defendants case evaluation sanctions. Plaintiff never disputed that defendants were entitled to case evaluation sanctions under MCR 2.403(O)(1), but urged the trial court to deny sanctions under the "interests of justice" exception in MCR 2.403(O)(11). The trial court agreed to apply that exception and declined to award case evaluation sanctions. As defendants correctly asserted in their motion for reconsideration, however, that exception is available only where a judgment was entered "as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(11). In this case, the verdict was not the result of a ruling on a motion, but rather the result of a jury trial. Therefore, MCR 2.403(O)(11) was not applicable and the trial court did not have discretion to deny case evaluation sanctions. *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006). Because the trial court's initial decision denying case evaluation sanctions was based on its erroneous belief that it had discretion to deny sanctions in the interests of justice, the trial court properly granted defendants' motion for reconsideration because it had been misled by a "palpable error." MCR 2.119(F)(3).

Affirmed. Having prevailed in full, defendants may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra