STATE OF MICHIGAN

COURT OF APPEALS

JOHNA BENEFIELD,

Plaintiff-Appellant,

v

THE CINCINNATI INSURANCE COMPANY, THE VILLAGE AT STONEGATE POINTE CONDOMINIUM ASSOCIATION, and NORTH MANAGEMENT INC.,

Defendants-Appellees.

UNPUBLISHED
March 19, 2013

No. 300307
Oakland Circuit Court
LC No. 2008-092119-CZ

JOHNA BENEFIELD,

Plaintiff-Appellant,

v

BYRON CRAFT and RICHARD R. KOLAR,

Defendants-Appellees.

Oakland Circuit Court
LC No. 2008-097062-CZ

Before: JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff Johna Benefield sustained damage to her condominium unit resulting from a ruptured water pipe caused by defendant Bryon R. Kolar; at the time, Kolar was a guest of defendant Byron Craft. Defendant Village at Stonegate Pointe Condominium Association (the Association) and its insurer, defendant Cincinnati Insurance Company (CIC), denied plaintiff's requests to repair the common elements of her unit. Thereafter, plaintiff sued defendant Craft, Kolar, the Association, CIC, and defendant North Management Inc., who was responsible for managing the Association's business affairs. The trial court granted summary disposition in favor of CIC, the Association, and North Management and the matter proceeded to trial as to Kolar and Craft, only. The final judgment entered in favor of Benefield reflected that Craft was liable for $6,633.79 and Kolar was liable for $6,128.64. We affirm in part, reverse in part and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff owned condominium Unit 56, commonly referred to as 638 Lydia Lane Drive. On December 21, 2007, Kolar was visiting Craft in the condominium immediately above plaintiff's unit. Kolar picked up Craft's loaded gun and fired a bullet into the floor of Craft's unit, rupturing a water line within the space between the ceiling of plaintiff's unit and the floor of Craft's unit. As a result, water flowed into plaintiff's unit, causing damage to the ceiling, walls and flooring. Plaintiff unsuccessfully sought coverage for the damage to the common elements of her unit from CIC and the Association.

Plaintiff filed a complaint alleging negligence as to Craft and Kolar, as well as breach of contract against Craft for his failure to act in conformity with condominium regulations and in failing to restore plaintiff's unit. The complaint also alleged breach of contract against CIC and the Association for its failure to repair the damage to plaintiff's condo in accordance with the policy of insurance and the condominium documents.[1]

CIC moved for summary disposition, which the trial court granted. It found that while plaintiff may be an incidental beneficiary of the insurance policy, she was not a third-party beneficiary under the CIC policy within the purview of MCL 600.1405.

Thereafter, plaintiff filed a revised and consolidated amended complaint on July 1, 2009, adding "Count II," for "specific performance by the Association," wherein plaintiff asked the court to exercise its equitable power and order the Association to enforce the policy agreement with CIC. Plaintiff also added North Management to the complaint, alleging both breach of contract and negligence.

The Association sought partial summary disposition of Count II of the amended complaint arguing that there was no relationship between the Association and Kolar; Kolar was simply a one-time guest of unit-owner Craft. As such, it could not be held liable for Kolar's criminal conduct. North Management, Craft, and plaintiff also later filed competing motions for summary disposition. North Management argued that the management agreement was between North Management and the Association and that plaintiff was neither a direct party nor a third-party beneficiary. North Management further argued that it owed no common law duty to plaintiff. Craft argued that plaintiff's claims for negligence and breach of contract had to be dismissed because he and plaintiff did not have a contract with one another, nor was plaintiff a third-party beneficiary to Craft's contract with the Association. Craft further argued that Kolar's actions caused plaintiff's damages and that Kolar's intentional act of firing the gun was an intervening cause, severing the causal link between Craft's alleged negligence and plaintiff's damages.

[1] Because service could not be completed on Craft or Kolar prior to expiration of the summons, plaintiff filed a second action on December 30, 2008. The allegations against Kolar and Craft were identical to those in the original complaint. The two cases were ultimately consolidated.

In response, plaintiff argued that, in accordance with the condominium documents, both the Association and North Management had a duty to see to the prompt repair of the damaged common elements in plaintiff's unit. Plaintiff further argued that Craft's contract with the Association required him to repair damage caused by his guests and that Kolar's acts did not sever the causal connection between Craft's negligence and plaintiff's damages.

The trial court granted summary disposition for Craft as to plaintiff's breach of contract claim and also granted summary disposition to the Association and North Management, finding that plaintiff was not a third-party beneficiary of the insurance policy between CIC and the named insured, Village at Stonegate Pointe. Plaintiff's negligence action against Craft remained intact.

A jury found that Craft was 60 percent negligent and Kolar was 40 percent negligent. Craft was ordered to pay $9,192.94, which included prejudgment interest and taxable costs. That amount was reduced by $2,559.15 based on the trial court's July 28, 2010, order that plaintiff was responsible for paying Craft's attorney fees for additional discovery. Kolar was ordered to pay a final amount of $6,128.64. Plaintiff now appeals as of right.

II. SUMMARY DISPOSITION

We review de novo a trial court's decision on a motion for summary disposition.

> Summary disposition is proper under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone. All well-pleaded allegations must be accepted as true and construed in the light most favorable to the nonmoving party. Only when no factual development could possibly justify recovery, should the motion be granted.
>
> Summary disposition is proper under MCR 2.116(C)(10) if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. A motion under MCR 2.116(C)(10) tests the factual support of a complaint. A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Hanlin v Saugatuck Twp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 300415, issued January 15, 2013) slip op pp 2-3 (citations and quotation marks omitted).]

A. THE ASSOCIATION

1. BREACH OF CONTRACT

The Association conceded the condominium documents formed a contract between it and plaintiff. However, it argues that it was relieved of its obligation under those documents as a result of Kolar's criminal acts. We disagree.

In granting summary disposition, the trial court looked to *Gouch v Grand Trunk Western R Co*, 187 Mich App 413; 468 NW2d 68 (1991), and concluded that the Association's "common law duties to Plaintiff set forth in the master deed and bylaws do not extend to the intentional criminal acts of third parties." The trial court's reliance on *Gouch* was misplaced; it clearly erred in applying tort principles to plaintiff's breach of contract action.

At issue in *Gouch* was whether the defendant, a railway company, was entitled to a directed verdict on the plaintiff's attractive nuisance claim. *Id.* at 415. The plaintiff, a minor, was playing with his friends on a railroad track, throwing objects at a train that was passing by. Gunfire came from the train, striking the plaintiff. The plaintiff brought an action against the railroad for, *inter alia*, attractive nuisance. The railroad argued that it had no duty to protect a child trespasser attracted to its land from the criminal acts of an unknown third party. *Id.* at 414-415. This Court agreed:

> We cannot hold that an owner of land, such as the defendant, has a duty to protect all people using its land, be they invitees, licensees, or trespassers, from the criminal acts of third parties. To do so would place upon the landowner a greater burden than that which is placed upon the community for the protection of its members. As long as the landowner does not actively create or maintain the criminal activity or fail to act reasonably to end criminal activity which takes place in its presence, there should be no liability for injuries that result from the criminal acts of those third parties.
>
> We find this logic especially compelling in a trespass situation, be the trespasser an adult or child. Unlike a business invitee, a trespasser does not give any financial benefit to the owner of the land. Thus, if in a merchant-business invitee situation, as was the case in *Williams* [*v Cunningham Drug Stores, Inc*, 429 Mich. 495, 418 N.W.2d 381 (1988)], the shifting of the burden of a financial loss caused by crime from one innocent victim to another is improper, it would be even more improper to do so in a landowner-trespasser situation.
>
> We therefore hold that defendant should not be held liable under the attractive nuisance doctrine for injuries resulting to plaintiff, a child trespasser, as a result of the criminal acts of a third person whom defendant could not and did not control. [*Id.* at 416-417.]

Premises liability and tort law principles have no application in this case. Plaintiff does not argue that the Association was negligent in failing to protect her from the criminal act of a third party. In no way does plaintiff suggest or argue that the Association could have or should have prevented the incident that caused the damage to the common elements of her condominium. Instead, plaintiff seeks to enforce the condominium documents against the Association to compel it to repair the damage. The Association is required to repair and maintain common elements and never contested that a common element was at issue. The cause of damage, absent a showing that plaintiff was responsible, is of no moment.

For these same reasons, the Association's alternative claim that it was not the cause of plaintiff's damages must fail. The elements of a breach of contract action are (1) the existence of

a contract between the parties, (2) the terms of the contract require performance of a certain action by the defendant, (3) the defendant breached its obligation to perform, and (4) the plaintiff incurred damages as a result of the breach. *Synthes Spine Co, LP v Calvert*, 270 F Supp 2d 939, 942 (ED Mich, 2003). The Association argues that Kolar, or the combined negligence of Kolar and Craft, caused plaintiff's damages. It may be true that their actions caused the pipe to burst and caused the resultant damage to plaintiff's property and the common elements of her condominium, but those are not plaintiff's damages in this case. Plaintiff's damages as alleged in her amended complaint are the result of the Association's failure to comply with the condominium documents to undertake the necessary repairs of the common elements of plaintiff's condominium. Plaintiff alleged that the damages resulting from the Association's conduct included plaintiff having to reside in a condominium that was substandard for a number of years. In no way does plaintiff assert that the Association could have or should have prevented the original damage from occurring. She simply argues that, regardless of the cause, the Association shirked its obligation under the condominium documents.

Because the Association's only claim is that it was relieved of its obligations under the condominium documents because of Kolar's acts, and such a position is untenable, the trial court erred in granting summary disposition. Moreover, as discussed *infra*, plaintiff is a third-party beneficiary. See *Vanerian v Charles L Pugh Co, Inc*, 279 Mich App 431, 443; 761 NW2d 108 (2008):

2. SPECIFIC PERFORMANCE

Plaintiff argues that the trial court erred in dismissing Count II of the amended complaint in which plaintiff sought to compel the Association to file a claim against its insurer – CIC. We agree.

In its order granting summary disposition for the Association as to Count II of plaintiff's complaint, the trial court noted:

> Plaintiff's rationale for her request for equitable relief, that is, that this is "Plaintiff's only remedy," is simply wrong. Plaintiff's damages arise out of the criminal or negligent acts of Defendants Craft and Kolar; her remedy is to make a claim against her own insurer, or to make a claim against those Defendants, which she has done.

However, plaintiff brought this action under the Michigan Condominium Act, MCL 559.101 *et seq*, to enforce the provisions of the condominium documents. MCL 559.207 provides, in relevant part:

> *A co-owner may maintain an action against the association of co-owners and its officers and directors to compel these persons to enforce the terms and provisions of the condominium documents.* . . .A co-owner may maintain an action against any other co-owner for injunctive relief or for damages or any combination thereof for noncompliance with the terms and provisions of the condominium documents or this act. [Emphasis added.]

MCL 559.215 also provides, in relevant part:

> A person or association of co-owners adversely affected by a violation of or failure to comply with this act, rules promulgated under this act, or any provision of an agreement or a master deed may bring an action for relief in a court of competent jurisdiction. The court may award costs to the prevailing party.

Again, the Association focuses on the cause of the damage to plaintiff's unit, which is irrelevant to plaintiff's breach of contract claim. At issue in this case is simply whether the Association, in failing to repair the common elements of plaintiff's unit, violated the condominium documents. It was reasonable for plaintiff to not only sue the Association for breach of contract, but also to sue in equity to compel the Association to seek insurance benefits from CIC. This is especially true in light of the trial court's earlier order granting CIC summary disposition upon the trial court's finding that plaintiff did not enjoy third-party beneficiary status under the insurance policy. Additionally, the fact that the same attorney represented both parties is further indication that the Association had no intention of pursuing a claim against CIC absent a court order.[2]

B. NORTH MANAGEMENT

1. BREACH OF CONTRACT

North Management argued, and the trial court agreed, that plaintiff has no cause of action because she was not a third-party beneficiary under its management agreement with the Association. We disagree.

MCL 600.1405 provides a right of action for a third-party beneficiary:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2) (a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the

[2] To the extent plaintiff argues that there was a conflict of interest where the same attorney represented both CIC and the Association, the rules prohibiting an attorney from representing clients with potentially conflicting interests were drafted for the benefit of the attorney-client relationship and do not afford protection to plaintiff under these circumstances. See MRPC 1.7.

> promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.
>
> (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.
>
> (c) If the promisee is indebted or otherwise obligated to the person for whose benefit the promise was made and the promise in question is intended when performed to discharge that debt or obligation, then the promisor and the promisee may, by mutual agreement, divest said person of his rights, if this is done without intent to hinder, delay or defraud said person in the collection or enforcement of the said debt or other obligation which the promisee owes him and before he has taken any legal steps to enforce said promise made for his benefit.

In *Koenig v City of South Haven*, 460 Mich 667; 597 NW2d 99 (1999), our Supreme Court noted that:

> as a general matter, even as it is with our statute, only intended third-party beneficiaries, not incidental beneficiaries, may enforce a contract under § 1405. Similarly, consistent with our specific rule (subsection 1405[2][b]), this Court has adopted the persuasive rule that a third-party beneficiary 'may be one of a class of persons, if the class is sufficiently described or designated. That is, a third-party beneficiary may be a member of a class, but the class must be sufficiently described. [*Id.* at 680-681 (citations omitted).]

Therefore, "the class must be something less than the entire universe" or "the public;" "a contracting party can only be held to have knowingly undertaken an obligation directly for the benefit of a class of persons if the class is reasonably identified." *Id.* at 680.

In *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422; 670 NW2d 651 (2003), the plaintiff sued a bar's insurer under its commercial liability insurance policy to secure payment of his dental bills following a fight at the bar. At issue was whether the plaintiff was a third-party beneficiary of the policy of insurance between the bar and the insurer. *Id.* at 423-424. Our Supreme Court held:

> Nothing in the insurance policy specifically designates [the plaintiff], or the class of business patrons of the insured of which he was one, as an intended third-party beneficiary of the medical benefits provision. At best, the policy recognizes the possibility of some incidental benefit to members of the public at large, but such a class is too broad to qualify for third-party status under the statute.
>
> Only intended beneficiaries, not incidental beneficiaries, may enforce a contract under 1405. Here, the contract primarily benefits the contracting parties because it defines and limits the circumstances under which the policy will cover medical expenses without a determination of fault. This agreement is between the

> contracting parties, and [the plaintiff] is only an incidental beneficiary without a right to sue for contract benefits. [*Id.* at 429.]

Koenig, Schmalfeldt, and *Shay v Aldrich*, 487 Mich 648, 790 NW2d 629 (2010), are the cases North Management relies upon in arguing that plaintiff did not enjoy third-party beneficiary status under MCL 600.1405. However, the facts and circumstances of the aforementioned cases are readily distinguishable from the case at bar. Aside from *Shay's* admonition to utilize an objective standard when determining whether a plaintiff is a third-party beneficiary to a contract, the case otherwise has no application. As for *Koenig* and *Schmalfeldt*, the class of individuals to be covered – the public in general and unidentified claimants – is different from the class of individuals to which plaintiff belongs. She is one of only 140 unit members and sufficiently identifiable.[3] As a matter of law, plaintiff is a third-party beneficiary. See *Vanerian*, 279 Mich App at 443.

2. NEGLIGENCE

Citing *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004), North Management argues that an action cannot lie in tort because plaintiff's claims are based solely on nonperformance of a contractual duty.

In *Fultz*, the plaintiff was injured when she slipped and fell in an icy parking lot. She brought a negligence action against the property owner as well as the snow removal contractor. The Michigan Supreme Court held that, because the plaintiff failed to allege that the contractor owed her a duty independent of the contract, she failed to satisfy the threshold requirement of establishing that the contractor owed her a "separate and distinct" duty beyond the contract. *Id.* at 468.

> To summarize, if defendant fails or refuses to perform a promise, the action is in contract. If defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made. [*Id.* at 469-470.]

Here, plaintiff filed her appeal before the Supreme Court decided *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 809 NW2d 553 (2011). Recognizing that *Fultz* and

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[3] North Management cites *Cowan v Lakeview Village Condo Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued February 1, 2005 (Docket Nos. 250251, 251645), for the notion that a condominium co-owner cannot be a third-party beneficiary of a contract between an association and its servicers. However, *Cowan* is an unpublished opinion lacking precedential value. MCR 7.215(C)(1). The *Cowan* Court specifically concluded that the issue of third-party beneficiary status had not been adequately argued or briefed. In contrast, plaintiff in the case at bar has succinctly argued that she is a third party beneficiary of the management agreement by virtue of the fact that she is a member of a readily identified group.

its progeny had caused confusion, the *Loweke* Court adopted the reasoning in *Davis v Venture One Constr, Inc*, 568 F3d 570, 575, 577 (CA 6, 2009), and held "that a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract." *Loweke*, 489 Mich at 159. The *Loweke* Court admonished that it is error to focus only on a contract in determining whether a defendant owes a legal duty to a plaintiff. Rather, in determining whether a legal duty exists, *Fultz* directs courts to look to whether a "separate and distinct" duty independent of the contract exists, utilizing "preexisting tort principles, including duties imposed because of a special relationship between the parties and the generally recognized common-law duty to use due care in undertakings." *Loweke*, 489 Mich at 169-170. The Court wrote:

> In summary, "[w]hether a particular defendant owes any duty at all to a particular plaintiff [in tort]," *Fultz*, 470 Mich at 467 (emphasis added), is generally determined without regard to the obligations contained within the contract, *Davis*, 568 F3d at 577. See, also, *Churchill v Howe*, 186 Mich 107, 114; 152 NW 989 (1915) (explaining that although a tort can grow out of a contract, in general, a tort is a "wrong independent of a contract"). Accordingly, with the aforementioned principles in mind, we clarify that when engaging in the "separate and distinct mode of analysis" in *Fultz's* analytical framework, see 470 Mich. at 469–470, courts should not permit the contents of the contract to obscure the threshold question of whether any independent legal duty to the noncontracting third party exists, the breach of which could result in tort liability. Instead, in determining whether the action arises in tort, and thus whether a separate and distinct duty independent of the contract exists, the operative question under *Fultz* is whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort, including those duties that are imposed by law. [*Id.* at 170-171.]

The Supreme Court concluded that "[b]ecause defendant's motion was brought solely under the mistaken belief that *Fultz* extinguished preexisting common-law duties, we need not and do not preemptively decide whether *this particular plaintiff* was owed a duty of care under the common law." *Id.* at 172 (emphasis in original).

The same holds true for the case at bar. The trial court granted summary disposition in North Management's favor under the belief that *Fultz* extinguished North Management's common law duties. Because *Loweke* was decided while this case was pending on appeal and the issue of North Management's duty to plaintiff separate and apart from the contract, if any, was never addressed, the matter must be remanded. To the extent the trial court found that North Management was entitled to summary disposition on plaintiff's negligence theory because it did not cause the damage to her condominium unit, the trial court erred. Plaintiff did not argue that North Management could have or should have prevented the damage to her unit; instead, she argued that North Management was contractually bound to repair the damage, whatever the cause.

C. CRAFT - BREACH OF CONTRACT

Plaintiff argues that she was a third-party beneficiary of the contract between Craft and the Association. We agree.

The trial court and Craft cited *Dynamic Constr Co v Barton Malow Co*, 214 Mich App 425; 583 NW2d 31 (1995), for the notion that plaintiff was not a third-party beneficiary of the condominium documents between Craft and the Association. In *Dynamic*, a general contractor sued the University of Michigan and the construction manager hired by the university to supervise the construction project, arguing that it was a third-party beneficiary of the contract between the U of M and the construction manager. *Dynamic*, 214 Mich App at 426. In reversing the trial court's denial of summary disposition for the construction manager, this Court noted that the plaintiff was, at most, incidentally benefitted under the contract. *Id.* at 430. However, as plaintiff aptly points out, the facts in *Dynamic* are very different from the case at bar. In *Dynamic*, the contracting parties specifically undertook to exclude any potential third-party beneficiaries. Here, there was no such undertaking.

Although plaintiff was able to proceed against Craft on a negligence claim, had plaintiff been able to pursue a breach of contract claim, she would have been able to recover her costs of bringing the action under MCL 559.207. Therefore, although plaintiff was not entirely foreclosed from seeking judgment against Craft, she should have been able to pursue an alternative theory for breach of contract.

III. MOTIONS IN LIMINE

The trial court granted four motions in limine. We review a trial court's decision on an evidentiary issue for an abuse of discretion. See *Elezovic v Ford Motor Co*, 472 Mich 408, 431; 697 NW2d 851 (2005).

A. THE THORNBURY INCIDENT

Plaintiff argues that the trial court erred in excluding evidence of "the Thornbury incident." We agree.

After plaintiff's unit suffered its damages, plaintiff's neighbor, Aron Thornbury, suffered similar damage to the common elements of her unit when a fire sprinkler malfunctioned. The damage was repaired. The trial court granted the Association's motion to prevent plaintiff from referencing the incident, concluding that it was an irrelevant collateral issue, would be confusing to the jury, and was more prejudicial than probative.

"'Relevant evidence'" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "'Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point.'" *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 407; 808 NW2d 240 (2010) quoting *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). However, MRE 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

> issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Plaintiff, as the proponent of the evidence, bears the burden of establishing its relevance and admissibility. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

The trial court abused its discretion when it excluded evidence of the Thornbury incident. Again, the trial court in this case was laboring under the misconception that plaintiff alleged that the Association and North Management could have or should have prevented the damage to her property. That is incorrect. Plaintiff alleged that, regardless of the cause of the damage, defendants were contractually bound by the condominium documents to repair the common areas of her unit. As demonstrated from the record, the trial court excluded the Thornbury evidence because it was focused on the cause of the damage to plaintiff's unit. But plaintiff would have used evidence that CIC paid for Thornbury's repair as evidence that the Association interpreted the condominium documents in plaintiff's incident in a manner that was inconsistent with the Thornbury incident. Therefore, at a minimum, the Thornbury incident should have been available to plaintiff as impeachment evidence. Evidence of the Thornbury incident would have a tendency to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without the evidence.[4]

Additionally, the Association's reliance on *Madison Heights v Elgin Sweeper Co*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2007 (Docket No. 266333), for the notion that the evidence, even if relevant, would somehow be confusing and prejudicial is misplaced. It is an unpublished opinion lacking precedential value. MCR 7.215(C)(1). In addition, *Madison Heights* was a products liability action in which the defendants sought to exclude "other acts" evidence that similar engine fires had occurred before the incident leading to the plaintiffs' damages. *Id.* at unpub op pp 1-2. This Court concluded that, even if the instances were relevant as to time and substance, the trial court did not abuse its discretion in excluding the evidence because it would result in "minitrials on collateral matters" posing "a significant danger of misleading or confusing the jury." *Id.* at unpub op p 4.

Unlike in *Madison Heights*, MRE 403 is not a bar to the Thornbury evidence. A collateral matter is "'[a]ny matter on which evidence could not have been introduced for a relevant purpose." *People v Steele*, 283 Mich App 472, 488; 769 NW2d 256 (2009) quoting Black's Law Dictionary (8th ed). The Association's interpretation of the condominium documents was not a collateral issue.

B. ATTORNEY FEES

Plaintiff also argues that the trial court erred in striking her request for attorney fees. We disagree. Defendants moved to strike plaintiff's request for attorney fees, arguing that, under the American rule, plaintiff is responsible for her own fees absent allegations of fraud.

[4] This is especially true in light of the trial court's indication that it was skeptical that the damage to plaintiff's unit involved common elements, even though the parties never raised the issue.

As mentioned above, MCL 559.215 of the Condominium Act specifically allows a co-owner to recover *costs* when forced to bring an action; however, the language does not support an award of attorney fees. "[T]he term 'costs' ordinarily does not encompass attorney fees unless the statute or court rule specifically defines 'costs' as including attorney fees." *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). While plaintiff was empowered to bring suit under the Condominium Act, as a third-party beneficiary, she was limited to recovering her costs. Accordingly, the trial court did not abuse its discretion in striking plaintiff's request for attorney fees.

C. PLAINTIFF'S NON-ECONOMIC DAMAGES

Plaintiff argues that the trial court abused its discretion in excluding evidence of plaintiff's "non-economic" damages. We agree.

Defendants artfully refer to plaintiff's claims as "personal injury" claims. They are not. Again, it cannot be overstated that plaintiff never argued that defendants could have or should have prevented the damage to her condominium. Instead, she argued that the Association and North Management breached their contractual obligations under the condominium documents to repair the common elements of her unit. Plaintiff did not claim to have suffered personal injury. She argued that, because of defendants' inexplicable refusal to timely repair her unit, she suffered the full use and enjoyment of her unit for a period of years. She not only incurred expenses to partially repair the unit, but also suffered "mental distress related to the prolonged disruption of her unit." In the case at bar, such damages are the type that would "naturally flow" from the breach. See *Kewin v Massachusetts Life Ins Co*, 409 Mich 401; 295 NW2d 50 (1980)

D. REFERENCE TO THE INSURANCE POLICY

Plaintiff argues that the trial court erred in prohibiting plaintiff from referencing the CIC insurance policy. We agree.

In moving to exclude evidence of the CIC insurance policy, the Association argued that "evidence that a defendant was or was not insured against liability is not admissible upon the issue whether the defendant acted negligently or otherwise wrongfully," citing MCL 500.3030. The trial court concluded that it was "not going to allow any reference to the insurance. As it relates to the condominium bylaws and whatnot that reference insurance, that's gonna be allowed and there will be - - you certainly can - - bylaws have insurance written in them. That reference will be allowed. But with respect to the insurance policy Cincinnati being brought in, no."

As applied to casualty insurance, MCL 500.3030 provides:

> In the original action brought by the injured person, or his or her personal representative in case death results from the accident, as mentioned in section 3006, the insurer shall not be made or joined as a party defendant, nor, except as otherwise provided by law, shall any reference whatever be made to such insurer or to the question of carrying of such insurance during the course of trial.

The statute has no application to the case at bar because this was not an action brought by an injured person or his estate following an accident. Again, though defendants attempt to couch

plaintiff's claim in terms of a premises liability or personal injury action, it is simply a breach of contract case.

Defendants also cited MRE 411, which provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, if controverted, or bias or prejudice of a witness.

The policy of insurance would not have been offered to show that the Association or North Management was negligent; it would have been offered to show that a policy of insurance was in place and that these defendants breached their contract with plaintiff in failing to pursue a claim under the policy. The trial court abused its discretion when it excluded evidence of the CIC policy.

IV. TRIAL COURT'S REFUSAL TO ACCEPT LATE BRIEFS

Plaintiff argues that the trial court abused its discretion in denying plaintiff's request to file responsive briefs after the time set for filing and that the trial court's actions were unreasonable in light of the increased activity in this case at the time the responses came due. We disagree. This Court reviews for an abuse of discretion a trial court's refusal to consider a brief filed after the deadline set in its scheduling order. See *Kemerko Clawson, LLC v RXIV, Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005).

The trial court's statements for denying plaintiff's motion did not fall outside the range of principled outcomes. It was clear that plaintiff's attorney was having difficulty following motion protocol and the trial court's reasons for denying the motion were sound. Additionally, under *Edi Holdings, LLC v Lear Corp*, 469 Mich 1021 (2004), a trial court cannot abuse its discretion when it simply enforces a scheduling order.

V. DISCOVERY COSTS

Plaintiff argues that the trial court erred in assessing $2,559.15 for Craft's additional discovery expenses where plaintiff's amended complaint did not request damages for personal injuries. We agree.[5] This Court reviews for an abuse of discretion an order of the trial court granting a motion to amend the complaint with the condition that plaintiff pay all costs and attorney fees related to any additional discovery undertaken as a result of the new allegations. See *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 320-321; 503 NW2d 758 (1993).

[5] We reject Craft's argument that plaintiff's stipulation of the amount of fees somehow forecloses appellate review of whether the trial court properly awarded fees in the first place.

In granting plaintiff's motion to amend her complaint, the trial court's May 7, 2010 order provided:

> **IT IS HEREBY ORDERED** that Plaintiff must choose if she is seeking personal injury damages in this lawsuit;
>
> **IT IS FURTHER ORDERED** that if Plaintiff is seeking personal injury damages in this lawsuit, she must pay for attorney fees and costs for any and all discovery, including depositions, written discovery, document requests, and review of Plaintiffs['] responses by Defendants Byron Craft and the Village at Stonegate Pointe Condominium Association;
>
> **IT IS FURTHER ORDERED** if Plaintiff chooses not to pursue personal injury damages, the depositions of Johna Benefield, Aron Thornbury, and Pat Nemeth are cancelled and Plaintiff agrees not to seek personal injury damages at trial.

MCR 2.118(A)(3) provides justification for assessing discovery costs against a party:

> On a finding that inexcusable delay in requesting an amendment has caused or will cause the adverse party additional expense that would have been unnecessary had the request for amendment been filed earlier, the court may condition the order allowing amendment on the offending party's reimbursing the adverse party for the additional expense, including reasonable attorney fees.

The trial court abused its discretion in ordering plaintiff to pay Craft's additional expenses. Although Craft argues that plaintiff amended her complaint to assert personal injury claims, that is not what occurred. Instead, plaintiff's amended complaint substantively changed by adding a cause of action against the Association (for specific performance), and also by adding North Management as a defendant. The remainder of the amended complaint was virtually unchanged. In fact, the only reference to "personal injury" in the complaint was plaintiff's negligence allegation against *Kolar* in which she writes that she "endured physical and emotional injury and damage" as a result of his actions. As discussed above, plaintiff sought damages that "naturally flow" from defendants' breach of contract. Such damages included the loss of her enjoyment of her condominium unit. See *Kewin,* 409 Mich 401.

VI. SANCTIONS

Plaintiff argues that the trial court erred in ordering plaintiff to pay costs arising out of plaintiff's naming of CIC in her amended complaint. We disagree. Our review of the issue is as follows:

> Since the imposition of a sanction under MCR 2.114 is mandatory upon the finding that a pleading was signed in violation of the court rule, or a frivolous action or defense had been pled, there is no discretion for the trial court to exercise in determining if a sanction should be awarded. Rather, the relevant inquiry is whether the trial court erred in finding that the court rule had been violated and, therefore, that the imposition of a sanction was required. Since this

> involves a finding of fact by the trial court, that finding must be reviewed to determine if it is clearly erroneous. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. [*Contel Sys Corp v Gores*, 183 Mich App 706, 710; 455 NW2d 398 (1990).]

Plaintiff filed a revised and consolidated amended complaint on July 1, 2009, and although CIC received summary disposition in its favor several months prior, plaintiff continued to name CIC as a party. In Count V of the complaint, plaintiff re-alleged a breach of contract claim against CIC: "Solely for the purpose of expressing her intent not to waive any appellate rights which may exist as to her previously dismissed claim against Defendant CIC, Plaintiff incorporates the allegations of paragraphs 1 through 38, as though fully set forth herein and alleges further as follows . . .." Plaintiff then went on to claim that she was a third-party beneficiary and could enforce the insurance contract against CIC.

We can discern no fault with the trial court's order awarding CIC sanctions against plaintiff. Plaintiff cites *Dawson v DeLisle*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2009 (Docket No. 283195), for the premise that she had to keep CIC as a named defendant in order to retain her appellate rights. However, the facts in *Dawson* are different from the case at bar. In *Dawson*, the defendants filed a motion for summary disposition, which was denied. The plaintiff then filed an amended complaint and omitted several of the original claims. This Court found that the plaintiff abandoned the claims in filing the amended complaint. *Id.* at unpub op at 1-2. Here, plaintiff filed an amended complaint after summary disposition was *granted* in CIC's favor.

The trial court's order granting CIC summary disposition was not a "final order" for purposes of an appeal as of right because it did not dispose of all of the claims of all the parties. MCR 7.202(6)(a)(i). Plaintiff could have filed an application for leave to appeal from the order as the non-final order of the trial court granting summary disposition, MCR 7.203(B); MCR 7.205, or appeal when a final order was issued. Instead, she simply continued to name CIC as a party. Because there was no basis in law for her to do so and because CIC was required to appear and argue the issue, the trial court was within its right to sanction plaintiff.

VII. RESTRICTING PLAINTIFF'S RECOVERABLE DAMAGES

Plaintiff argues that the trial court erred in limiting plaintiff's recovery against Craft and Kolar where the measure of damages included injuries resulting from their wrongful conduct. We agree. A trial court's order limiting damages is reviewed for clear error. See *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176-177; 530 NW2d 772 (1995).

At trial, the parties entered into the following agreement:

> **IT IS HEREBY ORDERED** that if Plaintiff, Johna Benefield, receives a verdict in her favor the parties have stipulated to the amount of damages; and
>
> **IT IS FURTHER ORDERED** that the amount of damages is $14,080.59.

"A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Holmes v Holmes*, 281 Mich App 575, 588; 760 NW2d 300 (2008) quoting *Chapdelaine v Sochocki*, 247 Mich App. 167, 177; 635 NW2d 339 (2001). However, at Craft and Kolar's jury trial, plaintiff's counsel indicated that "this stipulates and was executed by the Plaintiff solely because of the Court's limiting rulings in the past and we are not waiving any further Rights the Plaintiff might have to assert additional claims in the event of an appeal."

The trial court erred in limiting plaintiff's recovery against Craft and Kolar. As we have previously discussed, plaintiff was entitled to seek non-economic damages that naturally flow from defendants' breach.

We affirm in part, reverse in part and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly