STATE OF MICHIGAN

COURT OF APPEALS

RONALD BROWNLOW and SUSAN TRAVIS,

Plaintiff-Appellant,

v

MCCALL ENTERPRISE INC, d/b/a PAUL DAVIS RESTORATION OF WASHTENAW COUNTY,

Defendant-Appellee.

and

STATE FARM FIRE & CASUALTY CO,

Defendant

UNPUBLISHED
February 12, 2013

Nos. 306190, 307883
Washtenaw Circuit Court
LC No. 10-000049-NZ

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this consolidated appeal, plaintiffs appeal two orders. In docket no. 306190, plaintiffs appeal the order granting summary disposition in favor of defendant McCall Enterprise Inc. (McCall). In docket no. 307883, plaintiffs appeal the order granting attorney fees and costs as case evaluation sanctions. We reverse the order granting summary disposition because the Michigan Consumer Protection Act (MCPA) does apply and plaintiffs have presented sufficient evidence to create a question of fact for a jury regarding whether defendant's actions resulted in damage to plaintiffs' home. We therefore also reverse the trial court's award of attorney fees and costs as case evaluation sanctions.

I. FACTS AND PROCEDURAL HISTORY

A small fire occurred in plaintiffs' microwave on March 12, 2007. The fire filled plaintiffs' house with smoke. Plaintiffs reported the claim to their insurer, State Farm Fire & Casualty Co. who a few days later, retained defendant McCall to remove the lingering smoke

odor from plaintiffs' home. Defendant placed an ozone generator[1] in plaintiff's kitchen, turned it on and let it run for more than HOW LONG?24 hours. Plaintiffs stayed elsewhere during this time, and when they returned, the ozone generator was removed and their house was aired out. According to plaintiffs, the smoke odor was gone, but there was significant damage to the inside of the house, particularly to tile and rubber surfaces. They also alleged health problems resulting from the level of ozone and the products of ozone reactions.

Plaintiffs filed a complaint against State Farm and McCall, alleging personal injuries and property damage from excessive ozone exposure. Plaintiffs asserted claims of negligence against State Farm and McCall. Additionally, plaintiffs asserted a claim against McCall under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* Plaintiffs' negligence claims against State Farm and McCall were dismissed and plaintiffs do not appeal that dismissal.

Subsequently, McCall filed a motion for summary disposition on plaintiffs' MCPA claim, arguing that plaintiffs could not prove causation and that McCall was exempt from the act under MCL 445.904(1)(a), which provides that the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." The trial court agreed, concluding that the transaction was specifically authorized by McCall's contractor license. McCall then filed a motion for case evaluation sanctions, which was granted. Plaintiffs were ordered to pay costs and fees in the amount of $52,543. Plaintiffs now appeal the summary disposition of their MCPA claim against McCall as well as the case evaluation sanctions.

II. MICHIGAN CONSUMER PROTECTION ACT

In docket no. 306190, plaintiffs argue that that the trial court erred when it granted summary disposition on their claim under the MCPA. A trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When reviewing a motion under MCR 2.116(C)(10), we "consider[] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). We "also review[] de novo as a question of law the interpretation and application of a statute." *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1, 8-9; 807 NW2d 343 (2011).

Under the MCPA, "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful." MCL 445.903(1). However, MCL 445.904(1)(a) provides that the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory

[1] The "use of ozone for the removal of indoor contaminants, including odors, evidentially was conceived originally more than 100 years ago. The presumption made to promote ozone for this purpose is that it will oxidize organic compounds to the extent that only carbon dioxide and water vapor remain." Boeniger, *Use of Ozone Generating Devices to Improve Indoor Air Quality*, 56 Am Ind Hyg Assoc J 590-8 (1995).

authority of this state or the United States." In *Smith v Globe Life Ins Co*, 460 Mich 446, 465; 597 NW2d 28 (1999), our Supreme Court explained that

> when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. . . . [W]e conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.

Smith was reaffirmed by the Supreme Court in *Liss v Lewiston-Richards, Inc*, 478 Mich 203; 732 NW2d 514 (2007), where the Court stated: "Applying the *Smith* test, the relevant inquiry 'is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.'" *Id*. at 212, quoting *Smith*, 496 Mich at 465.

In this case, McCall was hired to clean the air in plaintiffs' home of the odor of smoke. The inquiry is thus whether the general transaction of cleaning a home is specifically authorized by the statute governing McCall's licensure as a residential builder.

> "Residential builder" means a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person's own use and occupancy on the person's property. [MCL 339.2401(a).]

The language of the statute makes no reference to cleaning a home. McCall argues that the when it undertook the remediation of smoke odor, it was engaged in repair and alteration of plaintiffs' home. We disagree. "Repair" and "alteration" are specifically authorized activities under MCL 339.2401(a), but neither term is statutorily defined. Therefore, these terms must be accorded their plain and ordinary meanings, informed by the context of the surrounding statute. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005). The statute as a whole defines a residential builder as someone engaged in "construction," and the terms "repair" and "alteration" fall within a list of types of construction—erection, demolition, addition to, etc—that all involve changes to the physical structure of a building.

Therefore, in the context of MCL 339.2401(a), "repair" means to restore the physical structure of a residential structure after decay or damage. And "alteration" means to "modify" the physical structure of a residential building. Here, the ozone generator was not meant to

modify or restore the physical structure of plaintiffs' home. Rather, it was supposed to remove the smell of smoke from the house. Defendant conceded that operation of the ozone generator required no special knowledge or skill. The fact that removing the odor was done with an ozone generator rather than a can of room deodorizer does not bring the transaction within the ambit of the licensing requirements for residential builders. McCall argues that the machine removed smoke from the structure of the house, but if that were sufficient to bring this activity within the scope of the statute, so would use of a broom or mop as they remove dirt from the structure of a building. Michigan does not require a license for cleaning or janitorial services, but McCall's argument would practically require providers of such services to be licensed as builders. We decline to distort the law in this manner. Therefore, the trial court erred when it determined that the transaction at issue in this case was exempt from the MCPA.

III. CAUSATION UNDER THE MCPA

McCall also argues that summary disposition was appropriate because plaintiffs could not establish causation under the MCPA. Plaintiffs have not appealed the dismissal of their negligence claims and so the only causation issue relevant on appeal concerns the claim for property damage under the MCPA. However, at the trial level the question of causation as to bodily injury was part and parcel of the causation issue and much of the proofs were addressed to those injuries.

McCall[2] requested that the court bar plaintiffs from "relying upon proofs of claimed ozone exposure" and dismiss the complaint or set the matter for a *Daubert*[3] hearing "at which point the court shall makes [sic] its determination as to the admissibility of expert opinions supporting plaintiffs' contentions regarding alleged injuries and damages caused by exposure to ozone."

At the conclusion of the hearing, the trial court dismissed the negligence claims, but not the claims under the MCPA, which included only damages to plaintiffs' home and not for personal injury. Subsequently, defendant sought summary disposition on the MCPA claim, the trial court granted the motion and plaintiff appealed.

We "consider[] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621.

A review of the record reveals that plaintiffs submitted a substantial amount of scientific literature regarding ozone exposure to the trial court. One article references the reactivity of household products to ozone exposure and states: "these heterogeneous reactions have been noted to cause material aging, damage to pigments and damage to cultural artifacts."

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[2] State Farm was dismissed earlier in the case.

[3] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Poppendieck, et al, *Ozone Reactions with Indoor Materials during Building Disinfection*, 41 Atmospheric Environment 3166-3176 (2007). Another article states, "Heterogeneous reactions involving ozone have a number of undesirable consequences, including cracking of stressed rubber, fading of dyes, damage to photographic materials and deterioration of books. Weschler, *Ozone in Indoor Environments: Concentration and Chemistry*, 10 Indoor Air 269-288 (2000) The articles explain that the damage is a result of reactions that also release chemicals into the air. Other articles noted that ozone interacted with household materials, causing them to release chemicals including formeldahyde into the air, but did not specifically reference any degradation in the function or appearance of the household materials. Moriske, et al, *Concentrations and Decay Rates of Ozone in Indoor Air in Dependence on Building and Surface Materials*, 96, 97 Toxicology Letters 319-323 (1998); Nicolas, et al, *Reactions Between Ozone and Building Products: Impact on Primary and Secondary Emissions*, 41 Atmospheric Environment 3129-3138 (2007). While these latter articles do not directly support plaintiff's position, they tend to confirm that ozone interacts with household materials in a manner that can change the basic chemical structure of the materials.

Plaintiffs also submitted reports from lay and expert witnesses. Daniel Smith wrote that he installed tile and trim work in plaintiffs' home in 2005, and during a walkthrough on May 29, 2007, after the ozone exposure, noted extensive damage to many surfaces and materials that would require repair or replacement. He did not opine regarding the cause of the damages, but estimated repair costs at $150,000-280,000. Verne Brown stated that, if McCall had done its work properly, the ozone levels in the house would not have been high enough to cause structural damage. In a later affidavit he explained how he concluded that the ozone levels in the house were in fact high enough to cause such damage. Roger Wabeke, while focusing mainly on the health risks of ozone, did opine that McCall should have warned plaintiffs of possible damage to materials from ozone exposure. In addition, plaintiffs provided deposition testimony from defendant's employee that the ozone generator placed in their home by McCall had been set at level "8" on a scale of 0 to 10. Defendant's owner testified that he was aware of the possibility of harm from ozone to humans and building materials, but did not know what levels could cause such harm. Finally, Norbert Schiller testified during the *Daubert* hearing that a study done in the home some time after the incident did find levels of formaldehyde that were "fairly high, above what one would expect in a normal residence."

In response to McCall's final motion for summary disposition, the trial court held that because plaintiffs could not establish the amount of ozone that had been in their home, they could not prove there had been enough ozone to cause the alleged damages. Under these circumstances, however, plaintiffs do not need to establish the precise amount of ozone that McCall released into their home in order to establish that the ozone caused the damage. The trial court found that there was sufficiently reliable information to allow testimony that ozone can cause damage to building materials, stating "it was clear that ozone might have a deleterious effect if it reaches a certain level. And, there was certainly identification of literature that would identify that." The literature and expert reports provided by plaintiffs certainly support the conclusion that ozone can damage household materials. McCall does not dispute that ozone can cause damage to building materials. It is also undisputed that McCall placed an ozone generator in plaintiffs' home, turned it on at a high setting, and left it running for a weekend. Plaintiffs further allege that when they left at the beginning of the weekend in question their home was in good condition, but after it had been exposed to ozone over the weekend a variety of exposed

surfaces—including carpet, upholstery, wood, brick, and plastic—had been damaged. Among other things, finish had come off of wood, furniture changed color, bricks were crumbling, plastic had aged, and carpets were sticky. Verne Brown's affidavit states that these deteriorations of materials are consistent with ozone exposure, and one of the articles submitted by plaintiff[4] states that ozone reactions "have been noted to cause material aging, damage to pigments, and damage to cultural artifacts," which is entirely consistent with the damages alleged by plaintiffs. In his affidavit, Verne Brown also calculated the ozone concentrations produced in plaintiffs' home, and concluded that the concentration was extremely high. The record does not contain any evidence contrary to plaintiffs' testimony, and defendants do not directly challenge the existence of these physical changes on appeal, though they do not concede that any damages occurred over the weekend.[5]

Thus, plaintiffs have provided scientific evidence that high levels of ozone damage building materials, that there was a high level of ozone in their house, and that their house suffered damages consistent with exposure to high levels of ozone during the time the exposure occurred. Further, no witness, lay or expert, has advanced any possible cause of the alleged property damages other than the ozone exposure. Therefore, there is sufficient evidence for a jury to conclude that the ozone generator caused the damage to plaintiffs' house without resort to speculation.

IV. CONCLUSION

In Docket No. 306190, we conclude that the trial court erred when it granted summary disposition in favor of McCall on plaintiffs' MCPA claim for damages to their house. We therefore also reverse the award of case evaluation sanctions in Docket No. 307883.

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[4] Poppendieck, et al, *Ozone Reactions with Indoor Material During Building Disinfection*, 41 Atmospheric Environment, 3166-3176 (2007).

[5] Defendant McCall suggests that the trial court's ruling on the motion in limine, which was not appealed by plaintiff, precludes any finding that plaintiffs have established causation. However, the trial court only barred testimony regarding the level of ozone in the house *after plaintiffs returned* to their home, which was after the ozone generation had ended and the home had been aired out. The court correctly concluded, "There's been no evidence on this record to support a claim that any hazardous or dangerous levels of ozone remained in the home after the ozone generator was in fact turned off." However, the court did not bar testimony that ozone can cause the type of property damages alleged in this case or that there was a sufficient concentration of ozone during the period the generator was operating to cause such damages.

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

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause