In the Missouri Court of Appeals
Eastern District

DIVISION THREE

DOUGLAS ACOL AND NABILA ACOL,	)	No. ED108917
	)	
Appellants,	)	Appeal from the Circuit Court of
	)	St. Louis County
vs.	)	
	)	Honorable Joseph L. Walsh
TRAVERS AUTOPLEX & RV, INC.,	)	
	)	
Respondent.	)	Filed: October 19, 2021

Introduction

Douglas and Nabila Acol ("Appellants") appeal a jury verdict and award of attorney's fees to Travers Autoplex & RV, Inc. ("Respondent"). Appellants allege Respondent failed to adequately repair their RV and raise three points on appeal. In Point I, Appellants argue the trial court erred by failing to give a jury instruction for breach of implied warranty. In Point II, Appellants argue the trial court erred by giving a jury instruction for the economic loss doctrine. In Point III, Appellants argue the trial court abused its discretion by awarding attorney's fees to Respondent.

We affirm in part and reverse in part.

Factual and Procedural Background

Appellants purchased a 2009 Monaco Dynasty RV in 2012. On August 6, 2016, a tire blew out while Appellants were traveling through Illinois, causing an accident damaging the RV. Appellants arranged for the RV to be towed to St. Louis Auto & Truck Repair ("St. Louis Auto")

in St. Louis, Missouri for repairs. After arriving in St. Louis, Appellants discovered the RV was further damaged during the tow.

St. Louis Auto partially repaired the RV but determined it could not make all necessary repairs. On August 10, 2016, St. Louis Auto referred Appellants to Respondent and the RV was taken to Respondent's facility. In March 2017, Respondent notified Appellants the RV was fixed and ready to be picked up. When Appellants inspected the RV, they determined the repairs were inadequate and refused to take possession. Appellants' insurance paid $22,976.64 for repairs related to the accident and the towing company paid $3,996.36 to repair damage caused by the tow.

On June 21, 2017, Respondent sent Appellants a letter notifying them the RV was ready to be picked up and they owed $2,050 for the remaining repair costs and their insurance deductible. When Appellants refused to pay, Respondent offered to waive the $2,050 bill if Appellants would take possession of the RV. Appellants rejected the offer and did not pay the bill or collect the RV.

On July 26, 2017, Appellants sued Respondent, claiming Respondent (1) violated the Missouri Merchandising Practices Act ("MMPA"), Mo. Rev. Stat §§ 407.010-.025;[1] (2-3) breached its contract to repair the RV and for bailment; (4) committed conversion by retaining possession of the RV; (5-7) negligently repaired the RV; (8) breached its repair warranty; (9) was not entitled to the $2,050 charge; and (10) was liable for punitive damages. Respondent counterclaimed for unjust enrichment and suit on account, alleging Appellants failed to pay the agreed-to price for the RV's repairs.

Trial was held on February 3-5, 2020. After Appellants rested their case-in-chief, the trial court granted a directed verdict to Respondent for Appellants' conversion, punitive

[1] All statutory references are to RSMo (2017), unless otherwise indicated.

damages, and declaratory judgment claims, leaving seven counts outstanding. During the jury instruction conference, the trial court permitted Appellants to instruct the jury on four claims: negligent repair, MMPA violations, breach of contract, and breach of bailment. The trial court rejected Appellants' proposed breach of warranty instruction because it was "almost a mirror image" of their breach of contract claim. Appellants' breach of warranty, general negligence, and specific negligence claims were not presented to the jury.

Respondent proposed jury Instruction 12 for the economic loss doctrine as applied to Appellants' negligent repair claim. Appellants objected, arguing the economic loss doctrine applies to the sale of property, not negligent services. The trial court overruled Appellants' objection and Instruction 12 was submitted to the jury. The jury found for Respondent on Appellants' negligent repair, MMPA, breach of contract, and breach of bailment claims. The jury also found for Respondent on both of Respondent's counterclaims, awarding Respondent $8,050 for unpaid bills and attorney's fees.

The trial court entered judgment reflecting the jury verdict, without addressing Appellants' unsubmitted claims for breach of warranty, general negligence, and specific negligence. On March 30, 2020, the trial court awarded Respondent $23,750 in attorney's fees for prevailing on Appellants' MMPA claim. Appellants attempted to appeal the jury verdict and fee award. Respondent moved to dismiss the appeal, arguing the trial court had not yet entered a final, appealable judgment.

On November 9, 2020, this Court took the jurisdictional issue with the case, stating: "it appears [the breach of warranty and negligence counts] remain pending. If so, there is no final, appealable judgment. An appellate court has jurisdiction only over final judgments that dispose of all parties and claims in the case and leave nothing for future determination." (internal

citations omitted). The trial court resolved the jurisdictional issue by amending the judgment on January 10, 2021. The court stated:

> [D]ue to oversight this Court neglected to formally enter its Directed Verdict on the record disposing of Counts 6, 9, and 10 of Plaintiffs' Third Amended Petition. As such, this Amended Judgment—pursuant to Rules 74.01, 75.01 and/or 78.07 and "Plaintiffs' Motion to Correct, Amend, Modify or Enter a Final Judgment" dated December 4, 2020—is being entered for the purposes of clarifying the record and formally disposing of Counts 6, 9 and 10.

This appeal follows. Additional factual and procedural history will be provided below as necessary to address Appellants' claims.

Standard of Review

Points I & II: Jury Instructions

Claims of instructional error are questions of law this Court reviews *de novo*. *Lewellen v. Universal Underwriters Ins. Co.*, 574 S.W.3d 251, 274 (Mo. App. W.D. 2019). "The instruction must be supported by both the evidence presented at trial and the applicable law." *Id.* We will reverse based on instructional error if "the instruction misdirected, misled, or confused the jury and resulted in prejudice." *Id.*

This Court may review unpreserved arguments for plain error. "Plain error review is discretionary with this Court and is rarely granted in civil cases." *Declue v. Dir. of Revenue*, 361 S.W.3d 465, 467 (Mo. App. E.D. 2012). "Our examination of the record must facially establish grounds for a belief that a manifest injustice has occurred." *Id.* Parties are "entitled to relief for plain error only when the error is outcome determinative." *Id.* at 468.

Point III: MMPA Attorney's Fees

Section 407.025.2 provides trial courts have discretion to award punitive damages, attorney's fees, or equitable relief to the prevailing party in MMPA claims. We review attorney's fee awards for abuse of discretion. *Berry v. Volkswagen Grp. of Am., Inc.*, 397 S.W.3d 425, 430 (Mo. banc 2013). Abuse of discretion occurs if the trial court's fee award was "against the logic of the circumstances" and so "arbitrary and unreasonable as to shock one's sense of justice." *Id*. at 431.

Discussion

Point I: Breach of Implied Warranty Instruction

At the close of Appellants' evidence, the trial court entered a one-page handwritten order granting Respondent's motion for directed verdict for Appellants' conversion, punitive damages, and declaratory judgment claims. The order stated the remaining claims would not be granted a directed verdict. During the jury instruction conference following the close of evidence, the trial court rejected Appellants' request for a breach of implied warranty instruction, stating it was "almost a mirror image" of Appellants' breach of contract claim. Appellants argued the instruction should nevertheless be given to the jury because the defenses to breach of contract and breach of implied warranty are different. The trial court rejected Appellants' argument, stating:

> I'm going to stick with my original position, I'm not going to let you submit on the warranty . . . . I think we're just going to leave it like it is now. I think you'll have an opportunity to argue the same things you're talking about irrespective of whether [the breach of warranty instruction is] submitted or not, so I'm going to deny your claim . . . .

The jury was instructed on Appellants' counts of negligent repair, MMPA violations, breach of contract, and breach of bailment contract. The jury returned a verdict for Respondent on each count. Appellants' breach of warranty, general negligence, and specific negligence counts were not formally resolved until the trial court entered its amended judgment on January 10, 2021.

Appellants challenge the trial court's failure to give the jury a breach of warranty instruction. Respondent asserts Appellants' breach of warranty jury instruction claim is unpreserved and should be dismissed because the breach of warranty claim was decided by directed verdict. Respondent argues Appellants should have challenged the directed verdict, *not* the jury instructions because Rule 72.01(a)[2] provides directed verdicts are "effective without any assent of the jury." Respondent reasons Rule 72.01(a) renders challenges to directed verdicts and proposed jury instructions mutually exclusive because directed verdicts preclude jury consideration of a matter. Respondent concludes Appellants' argument would defeat the purpose of directed verdicts, effectively requiring trial courts to submit instructions to the jury for counts already decided by the judge.

We agree with Respondent. Point I is unpreserved and warrants dismissal because the trial court's amended judgment disposed of Appellants' warranty count by directed verdict. *See* Rule 72.01(a). To properly preserve this issue for appeal under the amended judgment, Appellants needed to challenge the directed verdict instead of the jury instructions. *Id*.

Neither Appellants' briefing nor this Court's research reveal a case standing for the principle a trial court errs by failing to instruct the jury for a claim decided by directed verdict. A party on appeal must develop the issue raised in its point relied on and failure to support a point with relevant legal authority or argument beyond conclusory statements preserves nothing

[2] All Rule references are to the Missouri Supreme Court Rules (2020), unless otherwise indicated.

for appeal. *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 384 (Mo. App. E.D. 2014) (internal citations omitted). While we acknowledge Appellants may have been confused by the trial court's failure to decide their breach of warranty claim in its first, non-final judgment, the court's amended judgment disposed of it by directed verdict.

On this record, we cannot determine whether Appellants' breach of warranty count and proposed instruction should have survived the trial court's directed verdict *because Appellants did not challenge the directed verdict*. This Court cannot act as an advocate for the parties and must carefully safeguard its role as a neutral adjudicator. *Carmen v. Olsen*, 611 S.W.3d 368, 372 (Mo. App. E.D. 2020).

In addition to the preservation issues discussed above, Appellants' brief violates the Missouri Supreme Court's briefing rules. While this Court hesitates to dispose of appeals for Rule 84 violations and sometimes elects to review unpreserved claims *ex gratia*, we cannot overlook the deficiencies in briefing and the record. Appellants' brief does not contain the text of the proposed instruction as required by Rule 84.04(e) and the proposed instruction is nowhere in the record.[3] This Court strictly enforces and applies Rule 84.04(e), and failure to comply is fatal. *East v. Landmark Cent. Bank & Trust Co.*, 585 S.W.2d 222 (Mo. App. E.D. 1979); *see also Shuttlewagon, Inc. v. Higgins*, 628 S.W.3d 185, 208 (Mo. App. W.D. 2021) (citing *Mitchem v. Gabbert*, 31 S.W.3d 538, 541 (Mo. App. S.D. 2000)).

Appellants' argument is unpreserved, their briefing violates Rule 84.04(e), and the record is insufficient for this Court to identify error in the trial court's ruling.

Point I is denied.

[3] Rule 84.04(e) provides in relevant part: "If a point relates to the giving, refusal or modification of an instruction, such instruction *shall* be set forth in full in the argument portion of the brief." (emphasis added).

Point II: Economic Loss Doctrine Instruction

During the instruction conference, Respondent proposed jury Instruction 12 for the economic loss doctrine. "The economic loss doctrine prohibits a plaintiff from seeking to recover in tort for economic losses that are contractual in nature." *Captiva Lake Investments, LLC v. Ameristructure, Inc.*, 436 S.W.3d 619, 628 (Mo. App. E.D. 2018). Respondent's proposed Instruction 12 provided:

> With respect to [Appellants'] negligence claim, your verdict must be for [Respondent] if you believe any one or more of the following:
>
> First, that [Appellants] are not seeking or entitled to compensation for any physical personal injuries that they themselves suffered as a consequence of the repair work performed on the Monaco RV; and/or
>
> Second, that [Appellants] are not seeking or entitled to compensation for damages to items of their personal property other than the 2009 Monaco RV; and/or
>
> Third, that [Appellants] are not seeking or entitled to compensation for the destruction of the Monaco RV due to some violent occurrence happening after the Monaco RV was delivered to [Respondent] for repair work.

Appellants objected to the proposed instruction, arguing the economic loss doctrine is irrelevant to cases involving negligent repair services. Appellants make a different argument on appeal, claiming the economic loss doctrine does not apply because Respondent's business provides "professional" services subject to a heightened standard of care in negligence actions. *Bus. Men's Assur. Co. of Am. v. Graham*, 891 S.W.2d 438, 454 (Mo. App. W.D. 1994). Appellants' new argument is unpreserved. We will not "convict a lower court of error on an issue that was not put before it to decide." *Smith v. Shaw*, 159 S.W.3d 830, 835 (Mo. banc

2005). Appellants' argument is therefore limited to plain error review. *Declue*, 361 S.W.3d at 467. The plain error standard of review requires Appellants to establish "manifest injustice has occurred" and the error was "outcome determinative." *Id*. at 467-68.

Nothing in the record suggests the economic loss doctrine instruction caused Appellants to suffer "manifest injustice." *Id*. Appellants did not plead or argue the RV repair industry is subject to the heightened professional standard of care; their pleadings alleged Respondent owed them a duty of *reasonable care*, the standard owed in non-professional negligence claims. *Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC*, 587 S.W.3d 647, 655 (Mo. banc 2019). While Appellants cite several cases to show architects and engineers are held to the professional negligence standard, neither Appellants' briefing nor this Court's research reveal a case establishing the RV repair or similar industry is subject to the heightened professional standard of care. *See Bus. Men's Assur. Co. of Am.*, 891 S.W.2d at 454. Because the trial court's alleged error did not cause Appellants manifest injustice, we need not consider the "outcome determinative" prong of the *Declue* test. The trial court therefore did not plainly err by instructing the jury on the economic loss doctrine.

Point II is denied.

Point III: MMPA Attorney's Fees

On March 30, 2020, the trial court awarded Respondent $23,750 in attorney's fees for defeating Appellants' MMPA claim, finding it "vexatious" and "frivolous." The court's judgment made no modifications to Respondent's proposed findings of fact and conclusions of law. Instead, it appears the court used a pen to insert the word "judgment" and cross out the words "Proposed by Defendant Travers Autoplex & RV, Inc." in the first heading.

A. Point III was preserved

Respondent claims Point III was not preserved. We disagree. Appellants briefed their opposition to Respondent's post-trial motion for fees and included the issue in their notice of appeal. Although we will not "convict a lower court of error on an issue that was not put before it to decide," the parties' fee arguments were before the trial court and decided. *Smith*, 159 S.W.3d at 835. Appellants' written opposition and notice of appeal satisfies Rule 78.09, which provides in relevant part: "it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action that the party desires the court to take . . . ."

B. Analysis

Appellants argue the trial court abused its discretion to award fees because it rubber-stamped Respondent's "self-serving" findings of fact and conclusions of law. Appellants note this Court "[does] not condone such draftsmanship by a trial court, and strongly encourage[s] all trial courts to avoid such a practice." *Arcese v. Daniel Schmitt & Co.*, 504 S.W.3d 772, 778 n.7 (Mo. App. E.D. 2016) (citing *State v. Griffin*, 848 S.W.2d 464 (Mo. banc 1993)).

Next, Appellants argue the court's vexatious and frivolous findings contradict its earlier rulings. Appellants emphasize their MMPA argument survived summary judgment and the trial court's directed verdict, concluding it would never have reached the jury were it truly unreasonable, vexatious, and frivolous. Specifically, Appellants argue Respondent's representations about (1) its status as an authorized repair center; (2) the time it would take to repair the RV; (3) the availability of a warranty for the repairs; (4) the status of the repairs; (5) limits on the cost of the repairs; and (6) Respondent's billing and invoicing practices established a good-faith basis for an MMPA claim.

Respondent argues nothing in the record suggests the trial court abused its discretion by awarding fees. Respondent notes the findings of fact and conclusions of law stated Appellants violated Rule 55.03(c)[4] by failing to plead facts establishing Respondent caused them to suffer an "ascertainable loss of money or property." Respondent next asserts Appellants improperly pled their ascertainable loss of money or property allegations as facts with evidentiary support, not as facts "likely to have evidentiary support" after further investigation. Finally, Respondent argues Appellants stood by their claims after failing to produce evidence supporting them.

"The MMPA is paternalistic legislation designed to protect those that could not otherwise protect themselves." *Berry*, 397 S.W.3d at 433. "Trial courts shall sparingly assess attorney fees against plaintiffs and only when the defendant demonstrates the plaintiff has pursued vexatious and frivolous claims that would warrant dismissal of the claims and imposition of sanctions pursuant to Rule 55.03." *Mitchell v. J&M Sec., LLC*, 590 S.W.3d 853, 865 (Mo. App. E.D. 2020). "Attorney fees are authorized by the MMPA for prevailing defendants, but awarding them 'shall be the extremely rare exception, rather than the rule.'" *Id*. at 864 (quoting *Arcese*, 504 S.W.3d at 789-90).

"While verbatim adoption of a party's proposed findings and judgment is not erroneous *per se*, it is unwise in a contested case and this Court and the Supreme Court of Missouri have repeatedly warned against it." *Tribus, LLC v. Greater Metro, Inc.*, 589 S.W.3d 679, 699 (Mo. App. E.D. 2019). "Even the most conscientious advocate cannot reasonably be expected to prepare a document which would reflect precisely the trial court's view of the evidence." *Id*. (internal citations omitted). "Once parties have had their 'day in court' they are also entitled to

[4] Rule 55.03(c) provides pleadings (1) may not be brought for improper purposes, such as to harass or cause delay; (2) must be supported by existing law or nonfrivolous arguments for changing the law; and (3) must have evidentiary support or "if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

their 'day' in the court's chambers such that the court's judgment is not an advocate's view of the evidence." *Id*.

We disagree with Respondent's characterization of the record and are concerned the fee award reflects "[Respondent's] view of the evidence," rather than the trial court's. *See id*. The trial court's statements during the directed verdict hearing contradict the court's Respondent-provided findings of fact and conclusions of law. For example, the court found Appellants' MMPA claim sufficiently meritorious to deny Respondent's motion for directed verdict "on all the grounds," then reversed course and not only found it meritless, but sanctionable under Rule 55.03.

When determining whether a plaintiff's claim is without foundation, a trial court must not engage in *post hoc* reasoning, concluding the action was unreasonable or lacked foundation because the plaintiff did not prevail at trial. *Willard v. Raga*, 290 S.W.3d 768, 772 (Mo. App. E.D. 2009). Appellants' MMPA claim survived summary judgment and directed verdict, meaning the trial court determined it (1) established a genuine issue of material fact and (2) was supported by substantial evidence from which a reasonable jury could find in Appellants' favor on each element required by the verdict director. *Id*. Thus, the trial court's rulings on Respondent's motions for summary judgment and directed verdict contradict a finding of frivolousness.

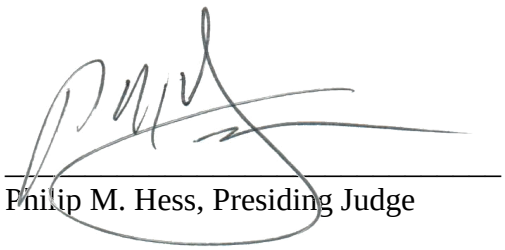
Given (1) the high bar defendants face before they may recover fees in MMPA claims; (2) the trial court adopted Respondent's proposed findings wholesale, ignoring this Court's warning not to "rubber stamp" parties' proposed findings of fact and conclusions of law; and (3) the trial court's inconsistent position regarding the merit of Appellants' MMPA claim, this case is not an "extremely rare exception" justifying a fee award to Respondent. *See Mitchell*, 590

S.W.3d at 864-65. The court's fee award was therefore against the logic of the circumstances and must be reversed. *Berry*, 397 S.W.3d at 430.

Point III is granted.[5]

Conclusion

The trial court's judgment is affirmed except its award of MMPA attorney's fees, which is reversed.



Philip M. Hess, Presiding Judge

Angela T. Quigless, Judge and
Colleen Dolan, Judge concur.

[5] On October 28, 2020, Respondent moved for appellate attorney's fees, alleging Appellants' appeal was frivolous. The motion was taken with the case. Respondent's motion is denied.