# STATE OF MICHIGAN

# COURT OF APPEALS

WESTRIDGE OFFICE CENTER, LLC,

Plaintiff/Counter-Defendant/Appellant,

V

JAMES E. LOGAN & ASSOCIATES, LTD,

Defendant/Counter-Plaintiff/Appellee,

and

NATE'S CONSTRUCTION CLEANING, INC.,

Defendant-Appellee.

UNPUBLISHED
June 10, 2014

No. 308950
Oakland Circuit Court
LC No. 2009-098533-CK

Before: GLEICHER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

Plaintiff, Westridge Office Center, LLC ("Westridge"), appeals as of right the judgment entered upon a jury verdict in favor of defendant James E. Logan & Associates LTD ("Logan") on Logan's counter-complaint against Westridge. Westridge further appeals the trial court's award of case evaluations sanctions in favor of defendant Nate's Construction Cleaning, Inc. ("Nate's"). We affirm.

Logan was a long time tenant of Westridge, occupying a large office suite in a building owned by Westridge in West Bloomfield. On June 8, 2008, a portion of the building's roof over office space adjacent to that leased to Logan collapsed. Westridge hired Nate's to clean and prepare the premises for repair and, on July 13, 2008, a structure or covering erected by Nate's collapsed causing flooding and damage to Logan's office space and rendering it temporarily untenantable. Westridge asserted that its lease agreement provided it 90 days to restore and repair the damaged space before Logan had the right to terminate the lease. Westridge asserted that on August 20, 2008, it advised Logan that it would have the space repaired within the required 90-day period and that it did, in fact do so, but that Logan did not wait for repairs and instead, on August 21, 2008, provided Westridge with a notice of lease termination. Westridge thus initiated suit against Logan for breach of contract and against Nate's for breach of contract and negligence.

Logan filed a counter-complaint against Westridge for declaratory relief, breach of contract, and negligence. Logan asserted that the parties' lease allowed Logan to terminate the contract if it was effectively evicted and that under the contract language, effective eviction occurred if landlord improvements or repairs prevented the tenant from using the premises for a consecutive 30 day period. Logan alleged that it was effectively evicted from the premises and that resolution of this matter required the trial court to determine which provision of the parties' lease governed. Logan further asserted that Westridge breached the parties' lease by failing to return the premises to Logan within 30 days of the water damage and causing Logan to overpay utilities and rent, and that Westridge was negligent in, among other things, violating its duty to properly assess the scope and extent of the roof repairs.

Upon Logan's motion, the trial court granted summary disposition in favor of Logan on its declaratory action and on Westridge's breach of contract action against it. The court found the parties' lease to be ambiguous; specifically finding the provisions relied upon by the parties in support of their differing positions to conflict. The trial court further found that because the contract was ambiguous, it must be construed against the drafter which, in this case, was Westridge. It thus found that Logan was entitled to terminate the lease when it could not occupy the premises for 30 continuous days.

A jury trial proceeded with respect to Westridge's claims of breach of contract and negligence against Nate's and on Logan's counter-claims of negligence and breach of contract against Westridge. As to Westridge's claims against Nate's, the jury found that Nate's was not negligent and did not breach its contract with Westridge. Concerning Logan's counter-claims against Westridge, the jury found that Westridge did not breach the lease agreement but that Westridge was negligent, that Westridge's negligence was a proximate cause of the damage to Logan, and that the total amount of Logan's negligence damages was $28,356.85. The trial court thereafter awarded both Logan and Nate's their requested case evaluation sanctions and entered judgments consistent with these awards and the jury verdicts. This appeal followed.

On appeal, Westridge first contends that the trial court erred in granting summary disposition in favor of Logan with respect to Westridge's breach of contract claim because the lease was drafted by both parties and any ambiguity in the lease thus should have been resolved by the jury. We disagree.

We review a grant of summary disposition de novo. *Peters v Dept of Corr*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31.

We also review de novo issues of proper contract interpretation. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Whether contractual terms are ambiguous is a question of law reviewed de novo. *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 581; 739 NW2d 696 (2007). And, whether extrinsic evidence should be used in contract

interpretation is also a question of law that this Court reviews de novo. *In re Kramek Estate*, 268 Mich App 565, 573; 710 NW2d 753 (2005).

A contract must be interpreted according to its plain and ordinary meaning. *St. Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). When the language of the contract is clear and unambiguous, interpretation is limited to the actual words used, and an unambiguous contract must be enforced according to its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

A contract is ambiguous "when its provisions are capable of conflicting interpretations." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). The language of the contract is also ambiguous if two provisions of the same contract irreconcilably conflict with each other. *Id.* It is well settled that the *meaning* of an ambiguous contract is a generally question of fact that must be decided by the jury. *Id*. at 469 (emphasis added). However, where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; it is when the contract's meaning is obscure and its construction depends upon other and extrinsic facts that the contract meaning should be submitted to the jury. *Id*.

The relevant provisions of the lease upon which each party relies are as follows:

> *Repairs* 6. Landlord shall make all necessary repairs and replacements to the building . . . and landlord shall also make all repairs at Landlord's expense to the demised premises which are structural in nature or required due to fire, casualty or other act of God . . . .
>
> In the event that the landlord shall deem it necessary or be required by any governmental authority to repair, alter, remove, reconstruct or improve any part of the demised premises or of the building in which the demised premises are located . . . then the same shall be made by Landlord with reasonable dispatch, at landlord's expense, and should the making of such repairs, alterations or improvements cause any interference with Tenant's use of the demised premises, such interference shall not relieve tenant from the performance of its obligations hereunder nor shall such interference be deemed an actual or constructive eviction or result in an abatement of rental; unless such interference shall continue for a consecutive 30 day period . . . .
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> *Fire* 10. In the event the demised premises are damaged or destroyed in whole or in part by fire or other insured casualty doctrine during the term hereof, Landlord shall, at its own costs and expenses, repair and restore the same to tenantable condition . . . . If the demised premises cannot be restored to tenantable condition within a period of ninety (90) days, Landlord and Tenant shall each have the right to terminate this lease upon written notice to the other . . . .

Because both parties agree that the lease provisions above conflict and are thus ambiguous, that portion of the trial court's ruling is not at issue. The actual meaning of the

contract is also not at issue. Instead, the only issue presented for our review is framed as whether the trial court erred in finding that subsection (6) is applicable, as argued by Logan, rather than the conflicting subsection (10) as argued as being applicable by Westridge because Westridge was (as also determined by the trial court) the drafter of the lease. According to Westridge, the lease was negotiated between and thus drafted by *both* parties such that the trial court's construing the lease against Westridge as the sole drafter was in error.

In support of its argument that both parties drafted the lease, Westridge directs us to the deposition testimony of James Logan. In his deposition testimony, Logan stated several times that the terms of the lease were negotiated with Westridge. The only specifically negotiated term referenced by Logan in his deposition, however, was the build-out of the suite that he required. And, negotiating certain terms of a lease is not necessarily the same as drafting the lease. Westridge has provided no law suggesting that when two parties negotiate *any* term of a contract, they are both deemed to have drafted it. In addition, while certain terms of the lease may have been negotiated (price, the build out, etc.), there is no indication that the specific provisions at issue were negotiated. The language at issue instead appears to be boilerplate language that was simply placed in the lease by Westridge.

More significantly, in support of its motion for summary disposition Logan provided the deposition testimony of Michael Guerra, Westridge's agent. When asked who prepared the 2007 Logan-Westridge lease, Guerra testified that he believed he did, "following the same template that we had in the prior five years. So I would have been the one using as much language as the prior tenancy with whatever—how should we say it, whatever customizations that Jim and I were comfortable with for five years, and I would have been the fellow-I would have been the one drafting this, changing the square footage, changing the term, and changing the rates down here." Guerra further testified that the first lease Westridge had entered into with Logan, upon which the second lease was patterned, was prepared by the Friedman Real Estate Group, a broker Westridge had used to procure tenants.

Based upon this testimony, there is no question of material fact that Westridge was, in fact, the drafter of the lease at issue and the trial court did not err in so finding. The trial court also did not err in applying the rule of *contra proferentem*. *Contra proferentem* is a common law rule in which an agreement is construed against its drafter. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010). This rule is generally one of last resort, and is applied only when secondary means of interpreting ambiguities in a contract have left the trier of fact unable to discern the parties' intent. *Klapp*, 468 Mich at 472-473. Where, however, there is no way to determine the parties' intent, or where there is no relevant extrinsic evidence available to help make such a determination, application of the rule of *contra proferentem* is also proper. *Id*. at 476-477.

Westridge concedes that two provisions in the parties lease conflict; it does note that they are susceptible to different meanings. Thus, either the 90-day repair provision applies or the 30-day provision applies. Extrinsic evidence is not likely to resolve any conflict in these contract terms. And, neither party had or has indicated the existence of any extrinsic evidence that would assist in ascertaining the parties' intent as to which provision should apply in this situation. Thus, application of *contra proferentem* was appropriate.

Westridge next contends that Logan's negligence claim against it fails because Logan alleged no duty independent from the lease agreement itself and that the trial court thus erred in denying Westridge's pre-trial motions to preclude Logan's negligence claims. We disagree.

Because Westridge sought to preclude Logan from seeking any damages on its negligence claim, it was essentially a motion for partial summary disposition pursuant to MCR 2.116(C)(8). We review decisions on summary disposition motions de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). A motion for summary disposition under subrule (C)(8) tests the legal sufficiency of the pleadings alone. *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005).

Michigan courts recognize that actionable negligence may arise from a contractual relationship, the theory being that "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract." *Fultz v Union-Commerce Associates*, 470 Mich 460, 465; 683 NW2d 587 (2004), quoting *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). "The question whether an action in tort may arise out of a contractual promise has not been without difficulty." *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 83; 559 NW2d 647 (1997). Ultimately, when a party to the contract brings a claim of negligent performance of the contract, the courts distinguish between misfeasance (negligent action) and nonfeasance (inaction) of the contractual duty; complete nonfeasance is actionable only in contract. *Fultz*, 470 Mich at 465-466. In other words, the inquiry is whether the plaintiff alleges the violation of a duty separate and distinct from the contractual obligation. *Rinaldo's Constr Corp*, 454 Mich at 83–84. The creation of a "new hazard" may give rise to a breach of a duty separate and distinct from the contract. *Boylan v Fifty Eight LLC*, 289 Mich App 709, 716-717; 808 NW2d 277 (2010).

In *Rinaldo's Constr Corp*, 454 Mich 66-68, a commercial client sued the telephone company, in tort, for alleged negligence in performing its contractual obligation to transfer the plaintiff's telephone service to its new address, resulting in economic damages to the plaintiff. The plaintiff specifically alleged that "Michigan Bell . . . owed Plaintiff a duty to conduct its business in a reasonable manner; to provide the Plaintiff with adequate telephone service . . . ; to employ competent trained personnel; to maintain, inspect and use equipment in an appropriate manner so as not to injure the Plaintiff in business; and to be honest and forthright in its dealings with Plaintiff." *Id*. at 78-79. The Supreme Court concluded that all of the alleged duties arose solely out of the contractual relationship between the parties and not from any independent legal obligations supporting a cause of action in tort. Relevant to the instant action, the *Rinaldo's Constr Corp* Court, quoting *Hart v Ludwig*, 347 Mich 559, 566; 79 NW2d 895 (1956), explained that misfeasance on a contract was found to support an action in tort when:

> [I]n each a situation of peril [was] created, with respect to which a tort action would lie without having recourse to the contract itself. Machinery [was] set in motion and *life or property [was] endangered* . . . . In such cases . . . we have a "breach of duty distinct from . . . contract." Or, as Prosser puts it . . . "if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not.

Relying on *Hart*, the Court in *Rinaldo's Constr, supra* at 85, concluded that "[w]hile plaintiff's allegations arguably make out a claim for 'negligent performance' of the contract, there is no allegation that this conduct by the defendant constitutes tortious activity in that it caused physical harm to persons or tangible property; and plaintiff does not allege violation of an independent legal duty distinct from the duties arising out of the contractual relationship . . . [plaintiff is] basically complaining of inadequate service and equipment . . . ." (internal citation omitted).

In its counter-complaint, Logan alleged that Westridge was liable to it for negligence because it had a duty to perform its obligations under the lease to conduct the repairs in a way that did not damage Logan. Logan alleged that Westridge violated its duty of care owed to Logan because "it failed to competently assess the scope and extent of the roof repair which was required, failed to exercise ordinary care in the selection and supervision of the construction and repair contractors to ensure the protection of Logan's leased premises and its contents, and failed to adequately inspect and protect the roof area of the office building to prevent the catastrophic collapse of the temporary roof support structure and roof surface so as to avoid catastrophic water damage to the demised premises on or about July 13, 2008." Logan further alleged that "Westridge is fully liable and responsible for the careless and negligent acts of its agents, servants and contractors, including but not limited to Nate's Construction Cleaning, Inc. Westridge's agents, servants and contractor employees were careless and negligent in assessing the character and scope of the needed repairs, taking appropriate precautions to prevent further catastrophic roof collapse, failed to temporarily support the roof structure and to ensure that the building sprinkler system would not be fractured and otherwise were careless and negligent in their performance of repairs."

The parties' lease required that Westridge make all necessary repairs and replacements to the building at its expense and with reasonable dispatch. The allegations in Logan's complaint were not that Westridge failed to undertake necessary repairs at its own expense. Instead, Logan alleged that Westridge breached a duty, not set forth in the contract, and reasonably construed to be a common law duty, separate and distinct from its contractual obligations, to use ordinary care in assessing the roofing needs and adequately protecting Logan's suite from damage while roofing repairs were being made. Logan further alleged that Westridge's actions caused (or set in motion forces which caused) its property to be endangered and damaged through its actions and it was vicariously liable for the actions of Nate's. Even without enforcing the contract provision requiring Westridge to repair the premises at its own cost, Logan alleged that Westridge created peril that could support a tort action. Logan was not complaining about the quality of Westridge's service, but that Westridge's actions constituted tortious activity in that they caused or allowed the danger of physical harm to persons and actual harm to tangible property. *Rinaldo's Constr Corp*, 454 Mich at 85. Thus, Logan sufficiently alleged that Westridge owed Logan a duty separate and distinct from the contract to allow its negligence claim to proceed to the jury.

Westridge next asserts that it was entitled to a directed verdict in its favor, JNOV, or a new trial on Logan's negligence claim because the evidence at trial established that Logan's damages, if any, were caused by the collapse of the shoring wall built by Nate's and there was no evidence of any independent negligent conduct of Westridge. We disagree.

We review a trial court's denial of motion for directed verdict and motions for JNOV de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). A motion for directed verdict or JNOV should be granted only if the evidence and all legitimate inferences, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Id*. We review the trial court's denial of a motion for a new trial for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006).

It is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Causation" encompasses both cause in fact and proximate or legal cause. *Id.* at n.6. "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). A "plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164–165. A plaintiff cannot establish legal or proximate cause without first establishing cause in fact. *Id.* at 163. "While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004).

"Vicarious liability is indirect responsibility imposed by operation of law." *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988). A principal may be vicariously liable to a third-party for harms inflicted by his or her agent even though the principal did not participate by act or omission in the agent's tort. See *Al–Shimmari v Detroit Med Ctr*, 477 Mich 280, 294; 731 NW2d 29 (2007). A principal remains directly liable for his or her own tortious conduct. See *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 11; 651 NW2d 356 (2002) (recognizing that a principal may be directly liable for its own torts or vicariously liable for the torts committed by its agents).

"It has been long established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes." *DeShambo v Nielsen*, 471 Mich 27, 31; 684 NW2d 332 (2004). See also, *Campbell v Kovich*, 273 Mich App 227, 235; 731 NW2d 112 (2006) (stating that Michigan law does not recognize a cause of action for negligently hiring an independent contractor). Whether a worker is an independent contractor or an employee depends upon whether the worker has control over the method of his or her work. "If the employer of a person or business ostensibly labeled an 'independent contractor' retains control over the method of the work, there is in fact no contractee-contractor relationship, and the employer may be vicariously liable under the principles of master and servant." *Campbell*, 273 Mich App at 234, quoting *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 73; 600 NW2d 348 (1999). In other words: "An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work." *Utley v Taylor & Gaskin, Inc*, 305 Mich 561, 570; 9 NW2d 842 (1943) (citations omitted).

In this matter, Logan alleged that Westridge was liable to it for negligence on both a direct and vicarious liability theory. At trial, Michael Guerra, Westridge's principal, testified that on June 8, 2008, when he became aware of the roof sagging, he called Nate's and told them to come and cover it with a tarp or something until they got direction from the insurance company. Guerra testified that he did not instruct Nate's how to cover the roof or what to do, but relied upon their discretion. Guerra further testified that at the advice of the structural engineering firm, he had Nate's remove some of the trusses to help stabilize the area. Over several days, a 40 foot by 20 foot area of the roof was completely removed by Nate's and that area of the building was open to the sky. Guerra's understanding was that the open roof area was covered by tarps at night and when not being worked on. According to Guerra, Nate's did not consult with him on how to cover the space and he did not authorize any type of partition to be built over the opening. He did not learn of the partition wall that Nate's had built under the tarp until the July 14, 2008, flood and saw the broken sprinkler pipe and with shredded lumber all around it.

Nate's owner, Shawn Mykolaitis, testified at trial that he first learned of significant sagging of the roof at Westridge around June 8, 2008, when Guerra asked him to come out and tarp the roof in the area affected by water. He testified that he is not licensed and is an independent contractor. Mykolaitis had never tarped a flat roof such as the one on the Westridge building, only angled roofs, and testified that while Guerra did not instruct him on how to tarp the roof, Mykolaitis felt confident he could do so. Mykolaitis testified that the hole in the roof was initially small, so that the first tarp was a simple process, but that Guerra later asked him to remove some trusses and the hole was opened up much larger. Mykolaitis testified that Guerra called him over the weekend of July 11, 2008, indicating that the tarping in place was failing and that Nate's undertook, on their own, to construct a partition wall to help with the tarping. Mykolaitis testified that he never told Guerra that they built the partition wall.

Mykolaitis testified that he received a call on July 14, 2008, that the tarp had again failed. When he arrived at Westridge, the partition wall that he had built was broken apart on the floor and a sprinkler was also broken, allowing water to flood Logan's suite. According to Mykolaitis, the sprinkler looked as if it had been hit by something, which could have been a piece of the lumber holding up the tarp.

We will assume for purposes of this argument that Westridge's assertions that the partition wall constructed by Nate's fell and broke the pipe causing the flooding of Logan's suite are correct. Indeed, while no one saw the damage take place, there was no evidence at trial to suggest anything other than what was asserted took place. While the above testimony establishes that Nate's was an independent contractor and that it was Nate's idea to construct, without the knowledge of Westridge, the partition wall, that does not require a finding of no cause of action on Logan's negligence action against Westridge. This is so because Guerra unequivocally testified that he directed Nate's to tarp the roof in the first place, to remove trusses, and to make the hole in the roof bigger, requiring more tarping than what was over the initial, smaller hole. Expert witnesses testified that Guerra's directions to Nate's and his handling of the roofing situation were not appropriate.

Chris Gentile, an expert in the areas of commercial roof consulting and roof construction, testified that when a new roof would have had to be installed as of June 2008, it would have been

prudent for the owner to consult with a roofing engineer. Rick Widener, an expert in structural engineering, testified that he was surprised there was not a general contractor involved from the beginning and there was a need to also get city officials involved in the roofing project. Widener testified that Guerra should have sought out the opinion of an engineer regarding stabilization of the building and that tarping is not the way to keep water out of a building with a flat roof. According to Widener, a roofing membrane would need to be put down. Widener further testified that one also does not remove trusses until the replacements are there, and then the trusses are replaced one section at a time. Widener opined that building a stud wall and draping tarp over it to keep water out is not an efficient tarping system and indicted that his criticism is directed at the person who told Nate's to tarp the roof.

Thus, while Westridge contends there was no evidence at trial to suggest it could be found liable for negligence, independent of the lease obligations, the record reveals otherwise. The record also refutes Westridge's assertion that the only way the jury could have found it liable was based on a theory of vicarious liability for Nate's negligence. The jury could well have found that Guerra was negligent in failing to obtain the services of a contractor, in directing Nate's to tarp the roof in the first place rather than having a membrane applied as stated by one of the experts, by directing Nate's to remove approximately 16 trusses without having the replacements on hand, and by turning a small hole into a gaping one, which led to the requirement of significant tarping in the first place. The trial court thus did not err in denying Westridge's motions for directed verdict and JNOV or abuse its discretion in denying Westridge's motion for a new trial.

Contrary to Westridge's assertion, Logan did not simply contend that Westridge should be held liable based on the theory of vicarious liability. Thus, the jury's conclusion that Nate's was not negligent does not require a finding that Westridge was also not negligent and Westridge's claim that the jury's verdicts are irreconcilably inconsistent fails for the reasons explained above.

Westridge next contends that the trial court's admission of Logan's expert witness, Patrick Dunleavy's, report at trial was in contravention of MRE 803(6) and that, further, the admission prejudiced Westridge. While the report was indeed inadmissible, Westridge has failed to establish that the report's admission was prejudicial.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, when the decision involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence, we review those questions of law de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12, 17 (2003). And, when such preliminary questions are involved, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id*.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579, 586 (2010). Hearsay is not admissible except as provided by the rules of evidence. *Id.* Among exceptions to the hearsay rule are "records of regularly conducted activity" defined at MRE 803(6) as:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the Supreme Court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

"The business records exception is based on the inherent trustworthiness of business records. But that trustworthiness is undermined and can no longer be presumed when the records are prepared in anticipation of litigation." *People v Jambor*, 273 Mich App 477, 482; 729 NW2d 569 (2007). See, e.g., *Solomon v Shuell*, 435 Mich 104, 120-121; 457 NW2d 669 (1990) (police reports are inadmissible under MRE 803(6) because the police officers who prepared the reports knew that they were the subjects of a homicide investigation).

The trial court admitted the report prepared by Dunleavy based upon MRE 803(6). Dunleavy testified that he was retained by Logan to be an expert witness in this case. Dunleavy testified that Logan's counsel contacted him sometime in 2010 and that he was aware there was ongoing litigation. According to Dunleavy, he was asked to perform a forensic evaluation of an economic claim in this case and that after he concludes his evaluation he generally prepares a report, which he did in this case. Because Dunleavy's report was prepared for purposes of litigation it was not admissible under MRE 803(6) and the trial court abused its discretion in allowing the report in under this rule.

Westridge contends that the report was nevertheless admissible under MRE 703. That rule provides, in relevant part, "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." Evidence that is admitted under MRE 703 is admitted for the purpose of providing context to the expert's opinion, "thereby enabling the trier of fact to determine the weight due an expert's opinion." *People v Pickens*, 446 Mich 298, 335; 521 NW2d 797 (1994).

The report would not be admissible under MRE 703. Dunleavy did not testify that he *based* his expert opinions on the facts and data contained in the admitted report. Rather, he undertook an evaluation and prepared the report based on his findings (both for purposes of litigation).

Admission of the report constituted an abuse of discretion. However, error may not be predicated on the erroneous admission of evidence unless a substantial right of the party is affected. MRE 103(a). *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). Westridge asserts that it was substantially prejudiced by the admission of the report because the submission of the report left the jury with the impression that Dunleavy's opinion should be given more weight or credibility. According to Westridge, Dunleavy was the only

expert to opine that Logan suffered an economic loss due to the flood and his report was the only one submitted as evidence of Logan's alleged damages, which must have convinced the jury that economic losses were suffered. However, what Westridge fails to point out is that Dunleavy testified to exactly what his report stated--that Logan suffered $234,242 in damages as a result of the flood, but the jury only awarded Logan $28,356.85 in damages. It is questionable then, the effect that the report truly had on the jury.

And, Dunleavy testified that part of the damages he included in his final figure were lease-related expenses Logan sought reimbursement for such as his security deposit, overpayment of electrical bill and prepaid rent in the amount of $12,197, and legal fees he paid to negotiate the lease of his new place in the amount of $16,147. The total of those two figures is $28,344—which is very close to the jury award. There is an indication that Dunleavy's report, which in large part detailed the economic loss analysis, was a nonfactor in the jury's award. Thus, while admission of Dunleavy's report was an abuse of discretion, Westridge has demonstrated no substantial prejudice from its erroneous admission.

Westridge next argues that even if a negligence claim could be maintained against it, the jury verdict must be vacated because Logan suffered no damages. Westridge did not, however, challenge the evidence concerning the issue of damages before the trial court. This issue is thus not preserved for review and we need not consider it on appeal. *Coates v Bastian Bros, Inc,* 276 Mich App 498, 509-510; 741 NW2d 539 (2007).

In its final argument concerning Logan, Westridge contends that the case evaluation sanctions award in favor of Logan must be vacated. "[A] party who rejects a case-evaluation award is generally subject to sanctions if he fails to improve his position at trial." *Campbell v Sullins*, 257 Mich App 179, 198; 667 NW2d 887 (2003), superseded by statute on other grounds as stated in MCL 600.2919a. The decision to award case evaluation sanctions is a question of law that is reviewed de novo. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997).

In support of this argument Westridge offers two theories. First, Westridge proposes the novel theory that case evaluation sanctions were not warranted because it did not imprudently reject the case evaluation award but instead chose not to accept the evaluation award based upon logical thought and reasoning. The argument that case evaluation sanctions should not be awarded when there "is a good reason" for not accepting them is certainly original and would likely apply, in most parties opinions, to their circumstances as well. Unfortunately, there is no support for this theory and the argument necessarily fails based upon the specific language in MCR 2.403(O).

That rule provides:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

(2) For the purpose of this rule "verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,

(c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

(3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

The use of the word "must" indicates that the imposition of these sanctions is mandatory in unanimous evaluation awards. *Allard*, 271 Mich App at 398-399. There are only three narrow exceptions to the mandatory imposition of case evaluation sanctions. Under the first exception, the trial court may decline to award costs in a case involving equitable relief when the verdict (considering both equitable and monetary relief) is more favorable to the rejecting party than the evaluated award. MCR 2.403(O)(5); *Id*. The second exception applies only to dramshop actions. MCR 2.403(O)(9); *Id*. Finally, the trial court "may, in the interest of justice, refuse to award costs" when the judgment is "entered as a result of a ruling on a motion after the party rejected the [case] evaluation." MCR 2.403(O)(11); MCR 2.403(2)(c); *Id*. Thus, the trial court's discretion to *not* award case evaluation sanctions is very limited.

Westridge's second argument for vacating the case evaluation sanctions awarded to Logan is that Logan was not the prevailing party on its breach of contract claim and, since that was the only claim Logan had identified damages as stemming from at the time of case evaluation, that was the only theory upon which the case evaluators could have made their unanimous $12,000.00 award to Logan. At most, Westridge objected to the entry of a judgment in Logan's behalf and requested an evidentiary hearing.

Not only did Westridge not preserve this claim for our review such that we need not address it (see, e.g., *Coates*, 276 Mich App at 509-510), Westridge has not demonstrated that the case evaluation was awarded strictly on Logan's breach of contract claim. The award itself has not been provided to this Court and it has not been alleged that the evaluators distinctly awarded damages on one claim as opposed to the other or both.

Westridge also argues that the trial court erred in awarding Nate's case evaluation sanctions. However, this argument is simply another version of Westridge's argument that the jury verdicts were inconsistent. As previously discussed, the jury verdicts in this matter were not inconsistent. The jury's verdict finding Westridge negligent has already been logically explained. The jury could also have logically found that Nate's was not negligent. As also

previously discussed, "[A] party who rejects a case-evaluation award is generally subject to sanctions if he fails to improve his position at trial." *Campbell*, 257 Mich App at 198. The use of the word "must" indicates that the imposition of these sanctions is mandatory in unanimous evaluation awards. *Allard*, 271 Mich App at 398-399. Where the jury rendered judgments of no cause of action in favor of Nate's on Westridge's claims against it and the case evaluated for $100,000 in favor of Westridge and against Nate's and both parties rejected the award, Westridge did not better its position at trial. MCR 2.403(O)(1). It was liable for case evaluation sanctions to Nate's.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto