STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1738

Paulette Pahnke, individually and as Parent and Natural Guardian of Brittany Newman, Alyssa Newman and Michael Newman, Minors,
Appellant,

vs.

Anderson Moving and Storage,
Respondent,

Home Apartment Development, LLC,
Respondent.

Filed October 5, 2010
Affirmed
Peterson, Judge

Houston County District Court
File No. 28-C4-04-000130

William L. French, Rochester, Minnesota 55904 (for appellant)

Joseph J. Langel, Ratwik, Roszak & Maloney, P.A., Minneapolis, Minnesota (for respondent Anderson Moving and Storage)

Thomas A. Gilligan Jr., Murnane Brandt, St. Paul, Minnesota (for respondent Home Apartment Development)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from a judgment in an eviction-related dispute, appellant-former tenant argues that she is entitled to (1) judgment as a matter of law (JMOL) on liability because respondents violated statutory provisions requiring an officer to perform or supervise removal of personal property from a rental unit, requiring 24 hours notice before removal, and making the landlord responsible for proper removal and storage of the property; (2) JMOL on a usury claim against respondent moving company; and (3) a new trial due to the district court's refusal to admit appellant's expert testimony and the inadequacy of damages. We affirm.

FACTS

After appellant Paulette Pahnke failed to comply with an eviction order, respondent Home Apartment Development, LLC, obtained from the district court a writ of recovery of the premises and order to vacate directing the Houston County Sheriff to "cause [appellant] to be immediately removed from the premises, and [Home Apartment] to recover the premises." At about 6:00 p.m. on December 4, 2002, Sheriff's Deputy Luke Sass served the writ of recovery on appellant. Sass stayed at the apartment for one to one and one-half hours to allow appellant time to remove personal belongings. Sass informed appellant that she would have a couple of days to remove the rest of her belongings from the apartment.

The next day, appellant spoke to Shirley Levock, an administrative assistant for Home Apartment, and appellant agreed to be at the apartment at 9:00 a.m. on

December 6. Home Apartment's property director, Deborah Hulberg, went to the apartment at the scheduled time and waited for one and one-half hours. Appellant did not show up at the apartment, and Hulberg had no way of contacting her. Appellant called Hulberg in the afternoon, and Hulberg told appellant that she could have access to the apartment during the next one hour and 45 minutes. Appellant said that that would not give her enough time, and Hulberg told appellant that a moving company would be removing her property on December 9.

Hulberg contacted respondent Anderson Moving and Storage to make arrangements to have appellant's property removed from the apartment. Hulberg and a LaCrescent police officer were present when Anderson removed appellant's property from the apartment. Appellant did not retrieve her property from Anderson until July 2008. Charges for the five and one-half years of storage, including interest, totaled $20,326.61.

In 2004, appellant brought an action against respondents, Houston County, the City of LaCrescent, and the individual law-enforcement officers who served and executed the writ of recovery, claiming violations of state and federal laws governing evictions. The district court granted partial summary judgment for Houston County, LaCrescent, and the law-enforcement officers based on immunity on all claims except breach-of contract and promissory estoppel claims against Houston County. This court affirmed.

Pahnke v. Anderson Moving & Storage, 720 N.W.2d 875, 879 (Minn. App. 2006), *review denied* (Minn. Nov. 22, 2006).[1]

In November 2007, appellant filed a declaratory-judgment action against respondents. The liability and declaratory-judgment actions were consolidated. The district court denied the parties' cross-motions for summary judgment, and the case was tried to a jury. The district court directed a verdict for respondents on appellant's claims under Minn. Stat. § 504B.365, subds. 1(a), 3(b), 3(c), and 3(f) (2008), and the jury returned a verdict finding that respondents' actions did not cause any damages to appellant. The district court denied appellant's posttrial motions. This appeal followed.

D E C I S I O N

JMOL is appropriate under Minn. R. Civ. P. 50 if, when the evidence is viewed in the light most favorable to the nonmoving party, the verdict is "manifestly against the entire evidence" or contrary to law. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003) (quotation omitted); *see also Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009) (applying de novo standard of review for denial of JNOV to denial of JMOL). The reviewing court applies a de novo standard of review to a district court's denial of a motion for JMOL. *Langeslag*, 664 N.W.2d at 864.

In reviewing a directed verdict, appellate courts review the evidence and its inferences to determine independently whether the evidence is sufficient to present a fact question for the jury. *Nemanic v. Gopher Heating & Sheet Metal, Inc.*, 337 N.W.2d 667,

[1] *See also Pahnke v. Anderson Moving & Storage*, 393 F. Supp. 2d 892 (D. Minn. 2005) (concluding that appellant's federal claims had no merit and remanding to state court).

669 (Minn. 1983). A directed verdict should be granted only if: (1) it would be the duty of the district court to set aside a contrary verdict as being manifestly against the entire evidence when viewed in the light most favorable to the nonmoving party; or (2) the verdict would be contrary to the applicable law. *Lester Bldg. Sys. v. La.-Pac. Corp.*, 761 N.W.2d 877, 881 (Minn. 2009).

I.

Appellant argues that the district court erred in denying her motion for JMOL on her claim for damages under Minn. Stat. § 504B.365, subd. 5 (2008), which states:

> Unless the premises has been abandoned, a [landlord], an agent, or other person acting under the [landlord's] direction or control who enters the premises and removes the [tenant's] personal property in violation of this section is guilty of an unlawful ouster under section 504B.231 and is subject to penalty under section 504B.225.[2]

Appellant contends that because there was an unlawful ouster under section 504B.225, respondents are subject to a penalty under section 504B.231, which states: "If a landlord, an agent, or other person acting under the landlord's direction or control unlawfully and in bad faith removes, excludes, or forcibly keeps out a tenant from residential premises, the tenant may recover from the landlord treble damages or $500, whichever is greater, and reasonable attorneys fees." Minn. Stat.

[2] The citations in section 504B.365, subd. 5, to sections 504B.231 and 504B.225 are transposed. Section 504B.225 makes an ouster a misdemeanor, and section 504B.231 provides a penalty.

§ 504B.231(a) (2008) Appellant contends that because multiple violations of section 504B.365 occurred, she is entitled to recover damages under section 504B.231(a).

Appellant argues first that she is entitled to recover damages for respondents' violation of Minn. Stat. § 504B.365, subd. 3(a) (2008), which states, "If the [tenant's] personal property is to be stored in a place other than the premises, the officer shall remove all personal property of the [tenant] at the expense of the [landlord]." Appellant contends that because the jury determined that respondents, rather than an officer, removed appellant's property from the premises, respondents violated section 504B.365, subd. 3(a). The district court determined that the jury's additional finding that respondent's removal of appellant's personal property was not a direct cause of damage to appellant was supported by the evidence and did not award appellant damages.

Appellant contends that this court must rule that respondents' violation "did directly cause damage because the person who removed the property testified that he simply threw away certain property in Appellants' apartment. Included were house plants, food stored in the refrigerator/freezer, items being held for school fundraising activities, and pet fish." But the testimony does not support appellant's claim. When asked what was Anderson's policy regarding perishable items, an Anderson employee testified that Anderson would not have taken any food that would have spoiled and put it in storage, he did not recall there being any plants, and Anderson would not have taken any gold fish.

Appellant argues that she is entitled to a minimum of $500 in damages under section 504B.231(a) without regard to causation. But under the plain language of the statute, damages do not have to be awarded every time a violation of section 504B.225 is proved. The statute states that the tenant *may* recover from the landlord treble damages or $500. "'May' is permissive." Minn. Stat. § 645.44, subd. 15 (2008).

Appellant argues that the district court erred in granting a directed verdict for Home Apartment on appellant's claim under Minn. Stat. § 504B.365, subd. 1(a), and that appellant should be granted JMOL. Minn. Stat. § 504B.365, subd. 1(a), states: "The officer who holds the order to vacate shall execute it by demanding that the defendant . . . relinquish possession and leave, taking family and all personal property from the premises within 24 hours." Appellant contends that Home Apartment did not give her 24 hours to remove personal property from the apartment as required under the statute. But Minn. Stat. § 504B.365, subd. 1(a), is a directive to the officer executing the writ of recovery and order to vacate. This court held that Sass and the officer who assisted him were immune from liability and affirmed the partial summary judgment in their favor. *Pahnke*, 720 N.W.2d at 884. Because the officers are no longer parties to the action and because Minn. Stat. § 504B.365, subd. 1(a), applies only to officers and not to landlords or moving companies, the district court properly granted a directed verdict for Home Apartment and Anderson on appellant's claim under Minn. Stat. § 504B.365, subd. 1(a).

Appellant argues that the district court erred in granting a directed verdict for respondents on appellant's claim under Minn. Stat. § 504B.365, subd. 3(f), and that appellant should be granted JMOL. Minn. Stat. § 504B.365, subd. 3(f), states, "The [landlord] is responsible for the proper removal, storage, and care of the [tenant's] personal property and is liable for damages for loss of or injury to it caused by the [landlord's] failure to exercise the same care that a reasonably careful person would exercise under similar circumstances."

During a discussion among counsel and the district court on the final day of trial, counsel for Home Apartment questioned whether the amended complaint alleged a claim under Minn. Stat. § 504B.365, subd. 3(f). Counsel for appellant responded that the "claim may be picked up by the conversion claim, too. So I don't see it as critical to our case. I think it should be in the case but it is kind of redundant I think with a common law count of conversion." Counsel for appellant argued that the claim was in the case and stated that, "if it is a matter of amended pleading, we would ask for leave to amend so it can conform to the -- it can conform to the fact that it has been in the case for years."

The memorandum that accompanied the district court order that disposed of several motions by the parties addressed this issue as follows:

> There was some discussion between the parties and the Court as to whether § 504B.365(f) had been sufficiently plead. The specific statute was not included in the original complaint. The Court determined that [if a] claim under § 504B.365(f) was sufficiently plead, the [respondent's] directed verdict was granted. If the matter had not been sufficiently plead, [appellant's] request for

> leave to amend the complaint was denied. Additionally, the Court determined that any claim under this section was sufficiently covered under [appellant's] conversion claim.

Appellant argues that the district court's belief that the claim for damage to property was sufficiently covered under appellant's conversion claim was not a sufficient basis for granting a directed verdict and, therefore, appellant is entitled to JMOL. Appellant does not address whether a claim under Minn. Stat. § 504B.365, subd. 3(f), was sufficiently pleaded and simply contends that "given that it was admitted that certain items of personal property were simply thrown away, . . . Respondents violated [Minn. Stat. § 504B.365, subd. 3(f)] as a matter of law."

Even if we assume that appellant sufficiently pleaded a claim under Minn. Stat. § 504B.365, subd. 3(f), we conclude that appellant has not shown that the district court erred in granting respondents a directed verdict and denying appellant a JMOL on that claim. As we have already explained, the evidence does not support appellant's claim that movers simply threw away some items that were in her apartment. Appellant does not cite any other evidence that indicates how items that were in the apartment in December 2002 were cared for until July 2008, when appellant claimed her property. Without any evidence that shows what respondents did with items that appellant claims were thrown out, a verdict that they violated Minn. Stat. § 504B.365, subd. 3(f), by failing to exercise the same care that a reasonably careful person would exercise under similar circumstances would be manifestly against the entire evidence.

Appellant argues that the district court erred in granting a directed verdict on her claim under Minn. Stat. § 504B.271 (2008) and that she is entitled to JMOL. Appellant contends that because her personal property was unlawfully removed from her apartment, Home Apartment is not entitled to a lien under Minn. Stat. § 504B.365, subd. 3(b), for the costs of removing and storing the property, and, instead, Home Apartment is responsible for those costs under Minn. Stat. § 504B.271, subd. 3. Because section 504B.271, subd. 3, applies when a tenant abandons premises and leaves personal property behind, the district court properly granted a directed verdict on appellant's claim under that statute, and appellant's claim that Anderson is not entitled to a lien on appellant's property due to the violation of Minn. Stat. § 504B.271 also fails.

II.

Appellant argues that Anderson committed usury by charging interest at the rate of one percent per month and that the district court erred in granting Anderson a directed verdict on her usury claim.

"Usury is the taking or receiving of more interest or profit on a loan or forbearance than the law allows." *Barton v. Moore*, 558 N.W.2d 746, 750 (Minn. 1997). A party must prove four elements to establish a violation of the usury statutes:

> (1) a loan of money or forbearance of debt,
>
> (2) an agreement between the parties that the principal shall be repayable absolutely,

> (3) the exaction of a greater amount of interest or profit than is allowed by law, and
>
> (4) the presence of an intention to evade the law at the inception of the transaction.

Citizen's Nat'l Bank of Willmar v. Taylor, 368 N.W.2d 913, 918 (Minn. 1985). "There can be no usury without a *contract* obligating the debtor to pay interest or return in excess of that provided by law . . . ." *Id.* at 918-19 (quotation omitted).

There was no evidence of a contract between appellant and Anderson. Because the evidence was insufficient to establish a required element of a usury claim, the district court properly granted a directed verdict for Anderson.

III.

Appellant argues that she is entitled to a new trial because (1) the district court made several errors of law, (2) the district court abused its discretion by not allowing expert testimony, and (3) damages were insufficient. Because the district court has the discretion to grant a new trial, we will not disturb the decision absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). We have already addressed appellant's claimed errors of law and will not address them again as a basis for obtaining a new trial.

Expert testimony

This court will not disturb a district court's decision to admit expert testimony unless an abuse of discretion has occurred. *Dunshee v. Douglas*, 255 N.W.2d 42, 47 (Minn. 1977). If an expert's specialized knowledge will aid the

fact-finder to understand the evidence or to determine a factual issue, the expert's testimony is admissible. Minn. R. Evid. 702.

Appellant argues that the district court erred in not allowing licensed psychologist Leslie MacBride to testify that appellant suffered severe emotional distress as a direct result of losing her and her children's personal property in December 2002. MacBride met appellant only twice less than two weeks before trial for a total of about two and one-half hours. MacBride took only an attenuated history from appellant due to time constraints and reviewed appellant's medical records, which did not include any psychological evaluations.

The district court explained its ruling as follows:

> There is not enough at this point at least at this point in my mind to justify letting [MacBride] make an opinion on the basis of that single incident.[3] I don't really have much problem and apparently if there was no objections either with her giving a diagnosis as to what she thinks currently exists, but the relation back does not show enough. There is not enough foundation to show that she can make that opinion.
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> . . . .
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> . . . [T]he issue with me is not can [MacBride] say that she feels [appellant] has this, although I note that if it is an acute stress syndrome, which I understand is what she has diagnosed, and if by definition acute stress syndrome doesn't last more than six months, I am not sure how we go back six years or more.

[3] The single incident to which the district court was referring was appellant's loss of her and her children's personal property.

> But the issue is with the education and training and what she has done with that education and training. The fact that she has an inadequate history, the fact that her causation opinion cannot be based on empirical evidence . . . . Maybe in my practice I ran into it more. Physicians take what somebody says happened and all you need to do is deal with battered women and children to know what they tell the physician what happened is not what he bases his opinion on. It is based on what the empirical data is.
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> . . . It is whether or not she can in fact have a valid opinion to testify on the causal relationship between the current existence of what she checked and what occurred six years ago, or if I have got the years wrong, excuse me, but some time back. She doesn't.

The district court did not abuse its discretion in excluding MacBride's testimony.

Insufficient damages

An appellate court "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Wash. Cnty. Schs.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted). In answers to special-verdict questions, the jury found that appellant suffered $0 in damages for personal property that was damaged or stolen and $0 in damages for the loss of use of personal property. Appellant argues that by granting respondents' motions for directed verdicts on statutory violations, the district court prevented appellant from proving damages arising from the violations. But this is just another way of arguing that the district court erred in granting the directed verdicts, and we have already addressed appellant's challenges to the directed verdicts.

Appellant also argues that it is difficult to imagine how the jury completely overlooked the claims of the children, each of whom testified about losing certain personal property, particularly in light of the undisputed proof that Anderson employees simply threw out items of personal property. We have already addressed appellant's claim that employees simply threw out items of personal property. And with respect to the children's testimony about losing certain personal property, the district court noted that "the jury simply may not have found the Plaintiffs' testimony that these items existed, or were missing when she finally retrieved her property, as credible." Viewing the evidence as a whole and in the light most favorable to the verdict, the jury's verdict that respondents caused appellant no damages is not manifestly and palpably contrary to the evidence, and the district court did not abuse its discretion when it denied appellant a new trial.

Affirmed.