STATE OF MICHIGAN

COURT OF APPEALS

BFC MANAGEMENT CO., d/b/a CHEETAH'S ON THE STRIP, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED August 10, 2010
v	No. 290043 Wayne Circuit Court LC No. 06-618130-NO
JANI-KING OF MICHIGAN, INC., JANI-KING LEASING, INC., and JANI-KING FRANCHISING, INC., Defendants-Appellees/Cross-Appellants.	

Before: M. J. KELLY, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

In this suit to recover losses incurred after a fire at a commercial business, plaintiff BFC Management, Inc. appeals as of right the judgment of no cause for action entered in favor of defendants Jani-King of Michigan, Inc., Jani-King Leasing, Inc., and Jani-King Franchising, Inc. (collectively Jani-King), after a jury trial. On appeal, BFC Management contends that it is entitled to a new trial on the basis of the trial court's erroneous decision to preclude BFC Management from presenting evidence concerning Jani-King's representation that its personnel are insured against certain types of losses and because Jani-King's trial counsel engaged in misconduct. BFC Management also argues that the trial court erred to the extent that it ordered BFC Management to pay Jani-King's attorney fees under the terms of the cleaning contract between BFC Management and Jani-King. Because we conclude that there were no errors warranting a new trial, we affirm the verdict of no cause for action. However, we also conclude that the terms of the cleaning contract between the parties did not authorize an award of attorney fees in this case. For that reason, we vacate the trial court's order compelling BFC Management to pay Jani-King's attorney fees under the terms of the cleaning contract.

I. BASIC FACTS AND PROCEDURAL HISTORY

BFC Management owns and operates an adult entertainment establishment that does business as Cheetah's on the Strip. On March 3, 2005, Cheetah's burned to the ground. It was later determined that Terry Crooks, who was at one time an employee of the franchisee that Jani-King assigned to clean Cheetah's, gained entry to the club while it was closed and set it on fire. BFC Management sued Jani-King in June 2006 for damages arising out of the fire set by Crooks.

In its complaint, BFC Management alleged that Jani-King entered into a contract to provide cleaning services for Cheetah's and that Crooks performed those services on Jani-King's behalf. BFC Management stated that, after Jani-King's franchisee informed Crooks that Cheetah's management had accused him of stealing more than $1500 in Keno bets, Crooks used the key that he had been provided for cleaning after hours to gain access to Cheetah's and deliberately set the premises on fire. BFC Management alleged that Jani-King was responsible for Crooks' actions under several theories premised on negligence, including negligent hiring and supervision, and under agency principles. BFC Management also alleged that Jani-King fraudulently induced it into entering into the contract for cleaning services on the representation that all of Jani-King's personnel are insured against damages from theft and deliberate damage.

BFC Management's claims eventually proceeded to trial.

At trial, Michael Cronk testified that he formerly managed Cheetah's. He supervised employees, hired dancers, dealt with permitting issues, supervised the kitchen and was responsible for ordering the liquor. Cronk stated that a representative from Jani-King, Mark Adams, visited Cheetah's and tried to persuade him to switch from his current cleaners to Jani-King. Cronk said Adams showed him a brochure and discussed "all the wonderful things that Jani-King has done, the way that they train their employees, the supplying of all chemicals, the taking care of the entire cleaning process." Adams also assured him that their employees were trained, screened, and trustworthy and stated that Cheetah's "didn't have to worry about any destruction, that anything that happened like that was covered by Jani-King. If there was anything missing, anything broke then Jani-King would be there to back it up." Cronk stated that he wanted to go with Jani-King because the price was better than what Cheetah's was currently paying so he spoke with the owner, Masoud Sesi, and got permission to change cleaners.

Sesi testified that Cronk came to him and stated that he wanted to change cleaners because of the lower costs and the benefits of going with a larger company. Sesi said he looked over the documents that were given to Cronk and also some literature that he received in the mail and decided to give Cronk permission to change to Jani-King. Sesi stated that he specifically remembered Cronk telling him that Jani-King would take care of any problems caused by its cleaning personnel; they would be responsible for any destruction of property, dishonesty, or theft. He also testified that he reviewed a letter that made similar promises and that this letter was very much an inducement to switch to Jani-King.

Mark Adams testified that he was formerly a salesman for Jani-King and that he approached the manager of Cheetah's to inquire about whether the manager would like to use Jani-King for its cleaning services. Adams said he explained that Jani-King worked through franchisees and that the actual cleaning would be performed by an independent business owner—a franchisee—who would be assigned to Cheetah's by Jani-King. Adams admitted that he "would normally discuss . . . damages that the franchisee may do," but stated that his representations would not include a reference to fires. Instead, he discussed the kinds of damage that the franchisee might do "in the duties of cleaning the building." Adams said that, once assigned to the new client, the franchisee would do a walk through the premises with the client and the client always had the option to reject the franchisee. Adams signed the cleaning services contract with Cheetah's on behalf of Jani-King. Once he sold the contract, he turned the contract over to a different department and had no further interaction with the client.

Jani-King and Cheetah's executed the cleaning contract in March 2004 and agreed that it would last for one year. Under the terms of the agreement, Jani-King assigned the actual cleaning duties to one of its franchisees, James Jones.

Jones testified that he was a franchisee of Jani-King and that Jani-King selected him to perform the cleaning at Cheetah's. Jones said that he was not able to personally perform the cleaning at Cheetah's as a result of a conflict with his schedule at his full time job. After he told someone at Jani-King about the problem, he was told to hire someone to help. For that reason, he hired Crooks, who was a friend of his niece. Jones did not require Crooks to fill out an application and did not do any kind of background check on him. Jones said he gave Crooks the key and the alarm code supplied by Cheetah's. He also said he paid Crooks in cash.

Sesi testified that his office person informed him that the receipts for the Keno machine in the bar were off by more than $1300 for February 27, 2005 and by more than $300 for the next day. For that reason, Sesi ordered reports on the Keno transactions for those days.

Cronk stated that the Keno machine was a state lottery machine. A patron could place bets on the machine, and, if the patron won, the machine would print a ticket. The ticket could be cashed at Cheetah's as well as most party stores if the winning amount were below a specified limit. However, tickets with larger winning amounts had to be cashed at a state lottery office. Cronk said that the Keno machine was only activated during times set by the state lottery and that it required a code before it would allow bets. The code for the Keno machine was kept in a notebook next to a cash register.

Sesi testified that he got the reports back and determined that the Keno machine had been played when the bar was closed. Sesi noted that the alarm code used during the relevant times was the code assigned to the cleaners. In addition, the lottery report showed that Crooks had cashed winning tickets that were printed during those times. After contacting Jani-King, Sesi confronted Jones with this evidence. Sesi said he told Jones that he no longer wanted Jani-King's services and asked for his key back. Sesi also had the alarm code for Cheetah's changed.

Jones testified that he did not at first believe that Crooks could have stolen the Keno bets, but was convinced when he saw Sesi's evidence. Jones said that Sesi did not ask for the return of the key and that he did not give it back because he did not have it—Crooks did. Jones said he called Crooks and told him about the problem with the Keno machine. Jones said that Crooks denied having used the Keno machine. Jones explained that he had seen the paperwork, which including Crooks' signature and identification, and told Crooks that it was hard to believe his denial. Jones said he wanted to meet with Crooks over at Cheetah's on the next day to sort it out, but Crooks did not show. Jones said he also told Crooks that he was no longer employed. Jones said he called Crooks several times thereafter, but Crooks did not return his calls. Jones admitted that he did not get the key from Crooks and did not inform anyone at Cheetah's that he had told Crooks about the accusations or that he was unable to get the key from Crooks. Sesi testified that, had he been informed about Jones' failure to get the key, he would have changed the locks.

Sesi testified that during the early morning hours of March 3, 2005, personnel from his alarm company contacted him and told him that the security alarm at his business had been triggered. At that time, Crooks apparently entered Cheetah's and set it on fire. Records from the alarm company showed that someone tried to use the alarm code previously assigned to the

cleaners to disable the alarm. There was also a video, which shows Crooks setting the building on fire. Sesi testified that the building and its contents were a total loss. Sesi's expert adjuster testified that the cost to rebuild was estimated at $594,000, the value of the contents was $314,000, and the projected business losses for one year were $585,000. However, his expert noted that Cheetah's was actually closed for only ten months.

In closing, BFC Management's trial attorney argued that the jury should find Jani-King responsible for the fire on the basis of Jani-King's failure to properly screen and supervise Crooks, and for negligently failing to obtain the key or otherwise inform Sesi that Crooks still had the key. He also argued that Jani-King fraudulently induced BFC Management into entering into the cleaning services agreement by making various representations including that that it would be responsible for losses caused by its personnel.

Jani-King's trial counsel argued that the jury should not find for BFC Management because Jani-King's personnel did not make any misrepresentations with regard to the cleaning contract and that Crooks was not its employee. He also noted that there was no evidence that Crooks had a history that suggested that he might commit arson and contended that the evidence showed that Crooks was supervised to the extent that could be expected. He stated that Jones also took reasonable steps to recover the key from Crooks. Finally, Jani-King's counsel stated that the evidence showed that Crooks had been terminated from employment by the time he set fire to Cheetah's. For these reasons, he concluded, Jani-King should not be held responsible for Crooks' actions.

The parties submitted a verdict form to the jury that asked the jury, in relevant part, whether Jani-King fraudulently induced BFC Management into entering into the contract for cleaning services and whether Jani-King was negligent. The jury answered both questions with "no." Because the jury answered these questions in the negative, it did not address the remaining questions.

In January 2009, the trial court entered a judgment of no cause of action in favor of Jani-King and ordered BFC Management to pay $117,000 to Jani-King for its costs and attorney fees as required under the contract for cleaning services.

This appeal followed.

II. EVIDENCE CONCERNING INSURANCE

A. STANDARD OF REVIEW

BFC Management first argues that the trial court erred when it precluded its trial counsel from eliciting any testimony or presenting evidence that Jani-King had made representations that its personnel were insured against losses from theft, dishonesty, and destruction. This error, BFC Management further contends, so prejudiced its trial that this Court must order a new trial. Trial courts have the inherent authority to exclude or limit the presentation of evidence. See MRE 403; MRE 611. And this Court reviews a trial court's evidentiary decisions for an abuse of discretion. *Taylor v Kent Radiology*, 286 Mich App 490, 519; 780 NW2d 900 (2009). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809

(2006). To the extent that this issue involves the proper interpretation of court rules or statutes, this Court's review is de novo. *Taylor*, 286 Mich App at 515.

B. ANALYSIS

1. PROCEDURAL BACKGROUND

Before trial, Jani-King moved in limine to preclude BFC Management from presenting any evidence regarding whether Jani-King did or did not have insurance to cover losses caused by its personnel and BFC Management moved in limine to preclude Jani-King from presenting evidence that BFC Management had received compensation for its fire loss from its own insurer.

On the first day of trial, the trial court addressed BFC Management's motion and excluded any reference to the payment made to BFC Management by its insurer. However, Jani-King's trial counsel argued that he would have to at least be able to refer to the insurance that BFC Management had. This was necessary, he explained, in order to effectively cross-examine BFC Management's expert on damages because the expert's current calculations differed from his previous calculations as a result of the terms of the insurance agreement. The trial court disagreed that the expert would be unable to testify about the difference: "No, he can explain, he just can't mention the word insurance."

At that point in the discussion, Jani-King's trial counsel asked the trial court to also address his motion to exclude any reference to whether Jani-King had insurance on its personnel. The Court concluded that both parties would be subject to its ruling at trial: "there's no mention of insurance [by] either side."

On the next day, the trial court addressed a motion by Jani-King to preclude evidence of prior negotiations before the parties signed the contract for cleaning services. During the discussion, Jani-King's trial counsel told the trial court that he merely wanted the court to exclude any "references to insurance, the fact that we would be protected by insurance." He also specifically asked the trial court to exclude a letter sent by Jani-King to Sesi that referenced a comprehensive insurance program. The letter stated that all Jani-King cleaning personnel were insured:

> Each Jani-King representative is fully covered by an insurance program that protects you and your business in several ways. This comprehensive program provides complete coverage, including General Liability, Workers' Compensation, Destruction, Dishonesty, and Disappearance Crime Insurance and Lost Key Insurance.

BFC Management's trial counsel argued that he should be permitted to present evidence regarding the insurance because it was highly relevant:

> Now, they're saying that that should not be introduced. That is certainly one of the inducements, it's attached to the contract, it explains the provisions of the contract, it is certainly relevant to our fraud in the inducement claim because these were the representations that were made that got him to switch from one cleaning company to Jani-King.

The trial court, nevertheless, continued to adhere to its prior ruling regarding any mention of insurance. However, it did permit the admission of the letter on condition that the parties redact the paragraph referencing an insurance package. Later during the trial, the court clarified the limits of its earlier ruling:

> The ruling of the Court is as follows: I exclude everyone from mentioning the word insurance, it hasn't been mentioned. The word protection can be used because it has to do with the terms under which they agreed to hire Jani-King, so the objection is noted but you'll be limited to just using the word protection as to an incentive to sign the contract.

2. THE DECISION TO EXCLUDE REFERENCES TO INSURANCE

Michigan has long had a policy of limiting the admission of evidence and statements tending to show that a party has liability insurance. See *Darr v Buckley*, 355 Mich 392; 94 NW2d 837 (1959); MCL 500.3030. The modern expression of this rule is stated under MRE 411. See *Palmiter v Monroe Co Rd Comm'rs*, 149 Mich App 678, 699-700; 387 NW2d 388 (1986). Under MRE 411, "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." Thus, MRE 411 precludes evidence concerning the existence or nonexistence of a policy of insurance to prove that the person who was or was not insured acted negligently or wrongfully.

In this case, it is clear that BFC Management was not offering evidence that Jani-King or its representative was or was not insured. Further, the evidence was not proffered to show that the "representative" acted negligently or wrongfully—that is, BFC Management was not offering the evidence to prove that Crooks engaged in negligent or wrongful conduct. The evidence was also not offered to show that Jani-King acted negligently or wrongfully. Rather the evidence was offered to show that Jani-King made a particular representation regarding their franchisees and that Sesi relied on that representation when he agreed to enter into the cleaning contract. Consequently, this evidence was not barred under MRE 411. There was also no basis for excluding the reference to the insurance program under other statutory or common law authority. See *Darr*, 355 Mich 392; MCL 500.3030. Because the representation regarding the insurance program was relevant, see MRE 401, and not otherwise barred under the rules of evidence, the trial court should have permitted its admission. MRE 402. The trial court abused its discretion when it decided to limit BFC Management's ability to refer to and present evidence concerning Jani-King's representation each of its representatives had coverage under a comprehensive insurance program.

3. HARMLESS ERROR

This Court's ability to grant relief for errors in the admission of evidence is limited: "An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A); see also MRE 103. Accordingly, this Court may not grant relief if the trial court's erroneous decision to exclude all reference to insurance with regard to Jani-King's representations was harmless.

During the trial, the trial court limited BFC Management's ability to present evidence that Jani-King had represented that its cleaning personnel were insured against certain types of losses. Specifically, it ordered the parties to redact the paragraph in the letter to Sesi that represented that Jani-King's representatives were covered by a comprehensive insurance program that would protect Sesi' business from theft and destruction. And, although the trial court allowed BFC Management to elicit testimony regarding this representation, it compelled the parties to refer to the terms of this representation as one for protection—that is, the jury heard evidence that Jani-King would protect BFC Management from certain losses.

Jani-King's purported offer to protect Sesi's business from losses occasioned by Jani-King's personnel is substantively and qualitatively different from a representation that the personnel are *actually* insured against such losses. The jury might have concluded that Sesi's reliance on a representation that Jani-King would protect its clients from potential harm by its personnel—as opposed to a representation that the personnel were actually insured against the harms—was not reasonable or that it did not play a significant role in his decision to agree to change cleaning services. In contrast, the evidence that Jani-King represented that its personnel were actually insured against a full range of losses was evidence of a powerful inducement to switch services. And the jury might have concluded that such a representation would more readily induce reliance. Nevertheless, the trial court did permit BFC Management to present evidence that Jani-King made representations that it would take responsibility for the actions of its personnel that were akin to a representation that the personnel were insured. In addition, the trial court did not at all restrict BFC Management's ability to present evidence of Jani-King's representations regarding the training and supervision of its personnel. Thus, the trial court's erroneous decision affected the weight of the evidence regarding one specific representation rather than depriving BFC Management of the ability to present this claim at all. Given that BFC Management was allowed to present its fraudulent inducement claim and that the error only affected the weight of the evidence regarding one specific representation, we cannot conclude that this error warrants relief.

In order to prevail on its claim of fraudulent inducement, BFC Management had to prove that Jani-King made a material representation that was false, that it knew the representation was false when it made it, or made it recklessly without knowledge of its truth and as a positive assertion, that it made the representation with the intent that BFC Management would rely on it, that BFC Management did rely on it, and that BFC Management suffered damage. *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 243; 733 NW2d 102 (2006). At trial, there was no evidence that Jani-King made the representation affected by the trial court's evidentiary decision with the knowledge that it was false or made it recklessly without knowledge of its truth as a positive assertion. Thus, the jury was left to speculate as to whether, at the time that Jani-King's salesman purportedly made the representation, Jani-King knew or reasonably understood that all its personnel were insured—or covered by protection, as it was framed for the jury.[1] If Jani-King had reason to believe that its personnel were protected in the

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[1] We note that the lower court record contains a copy of Jani-King's franchise agreement and this agreement requires each of its franchisees to obtain insurance for various losses or, in the alternative, to participate in a protection plan administered by Jani-King. On the basis of these

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way represented, then it cannot be said to have induced BFC Management's decision to contract for services through fraud. *Id.* Given the absence of evidence regarding Jani-King's knowledge that the representation was false or that it made the representation recklessly, Jani-King was entitled to a directed verdict on BFC Management's claim, at least with regard to the representation that BFC Management would be protected from losses occasioned by its personnel. For that reason, we cannot conclude that the trial court's error in limiting the weight of the evidence regarding that specific representation prejudiced BFC Management's trial. MCR 2.613(A); see also *Anglers of Ausable, Inc v Department of Environmental Quality*, 283 Mich App 115, 148; 770 NW2d 359 (2009) (noting that an evidentiary error is harmless if it did not cause prejudice).

III. ATTORNEY MISCONDUCT

BFC Management next argues that Jani-King's trial counsel made improper remarks during his closing statement that deprived BFC Management of a fair trial. On appeal, BFC Management acknowledges that it did not preserve its claim of error by objection before the trial court, but nevertheless contends that this Court should review the claim for plain error. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (noting that in criminal cases this Court will review forfeited errors for plain error). As our Supreme Court has explained, in a civil case, this Court has no obligation to consider a claim of error that was not properly preserved by an objection before the trial court. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (noting that Michigan follows a raise or waive rule for appellate review in civil cases). And, on the record before us, we decline to exercise our discretion to address this claim. See *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006) (stating the criteria under which this Court may overlook preservation requirements to reach an issue not properly preserved before the trial court). In any event, we have reviewed Jani-King's trial counsel's closing remarks, and, even if we were to conclude that the remarks were improper, we would nevertheless conclude that any prejudice occasioned by the remarks could readily have been cured by an instruction from the trial court. For that reason, any error would not warrant relief. See *Badiee v Brighton Area Schools*, 265 Mich App 343, 373-374; 695 NW2d 521 (2005).

IV. ATTORNEY FEES

A. STANDARD OF REVIEW

BFC Management next argues that the trial court erred to the extent that it awarded costs and attorney fees to Jani-King under the parties' contract for cleaning services. The proper interpretation of a contract is a question of law that this Court reviews de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

B. ANALYSIS

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requirements, Jani-King might reasonably have believed that its representation was true when made.

The trial court in this case determined that Jani-King was entitled to have BFC Management reimburse it for its attorney fees and costs under § 5.1 of the parties' contract for cleaning services. Michigan courts follow the American Rule with respect to the payment of attorney fees and costs. *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005). Under that rule, each party is obligated to pay his or her own attorney fees in the absence of an exception authorizing an award of attorney fees. *Id.* at 707. However, it is well settled that the parties to a contract may vary application of that rule and that courts can and will enforce the parties' decision. See *Fleet Business Credit v Krapohl Ford Lincoln Mercury, Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007) (noting that contractual provisions for the payment of attorney fees are judicially enforceable).

In the present case, the parties entered into an agreement concerning the provision of cleaning services and that agreement included a provision modifying the application of the American Rule:

> 5.1 In the event it becomes necessary for either party to institute suit against the other to secure or protect its rights under this Agreement, the prevailing party shall be entitled to all associated costs of the suit, including reasonable attorney's fees, administrative fees, court costs and damages as part of any judgment entered in its favor.

With this section, a prevailing party is entitled to "all associated costs of the suit, including attorney fees" if the suit was brought by "either party" in order to "secure or protect its rights under this Agreement." However, under the plain terms of § 5.1, the prevailing party to a suit between the parties to this agreement will be entitled to attorney fees only if the suit was brought to "secure" or "protect" a right under the agreement. By referring to the securing or protecting of *rights* under the agreement, the parties clearly limited the fee shifting provision to those suits involving something more than a tangential connection to the contract—the suit must have been brought to vindicate some right held by reason of the agreement itself. Because this provision is unambiguous, this Court must enforce it as written. *Rory*, 473 Mich at 468.

In this case, although BFC Management's trial counsel sometimes loosely referred to the claims in a way that suggested that there was a contract claim, BFC Management's claims against Jani-King were clearly not founded on any provision of the contract. Rather, the claims were for general negligence and fraud in procuring the agreement itself. Because the suit at issue was not brought to "secure" or "protect" rights under the agreement, the trial court could not order BFC Management to pay costs and attorney fees under this provision.[2]

V. CONCLUSION

There were no errors warranting reversal of the jury's verdict. However, the trial court erred when it determined that Jani-King was entitled to the payment of its attorney fees and costs

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[2] We express no opinion as to whether Jani-King might be entitled to its attorney fees under other applicable law.

under § 5.1 of the parties' agreement for cleaning services. Therefore, we vacate the judgment of the trial court to the extent that it ordered BFC Management to pay Jani-King's attorney fees and costs under § 5.1 of the parties' agreement. In all other respects, we affirm the judgment.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. None of the parties having prevailed in full, none may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Donald S. Owens