

OP 20-0526

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 192

RANDALL CHILDRESS and CLAUDIA CHILDRESS,

Plaintiffs, Appellees,
and Cross-Appellants.

v.

COSTCO WHOLESALE CORPORATION,

Defendant, Appellant,
and Cross-Appellees.

ORIGINAL PROCEEDING: Certified Question
 In and For the United States Court of Appeals for the Ninth
 Circuit, Cause Nos. 19-35441 and 19-035493
 Honorable Jay S. Bybee and Daniel P. Collins, Circuit Judges,
 Hon. James Alan Soto, United States District Judge for the
 District of Arizona, sitting by designation

COUNSEL OF RECORD:

For Appellant:

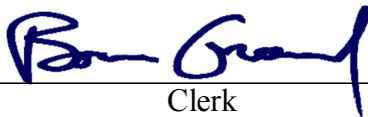
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Submitted on Briefs: May 12, 2021
Decided: August 3, 2021

Filed:


Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 The United States Court of Appeals for the Ninth Circuit has submitted the following certified state law question to this Court:

Whether, under Montana law, parasitic emotional distress damages are available for an underlying negligence claim for personal property damage or loss?

We accepted certification by order dated November 4, 2020. For the reasons set forth below, we answer the question as posed in the negative.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The following background information is drawn from the Ninth Circuit Court’s certification order.

¶3 On September 23, 2016, Randall and Claudia Childress (the “Childresses”) took their vehicle to Costco’s tire center in Missoula, Montana, for routine work. When finished, a Costco employee gave the keys to their vehicle to a man in the garage bay who falsely claimed to be the Childresses’ son. The man drove off in the vehicle. Although the Childresses located their vehicle a short time later, its content had been disturbed and several items had been stolen, including a handgun, ammunition, documents containing their home address, and keys to their home. Costco denied liability, and the Childresses brought suit in federal court.

¶4 The Childresses initially asserted various causes of action, including an independent claim for negligent infliction of emotional distress, but ultimately proceeded to trial on only claims of bailment and negligence. At trial, the Childresses presented evidence that

Randall suffered post-traumatic stress disorder (PTSD) following his military service and tours in Vietnam. Randall had successfully treated his symptoms, but the car theft exacerbated them, causing him stress, paranoia, sleeplessness, fear, adverse appetite, irritability, anger, lack of intimacy, and anxiety, for which Randall received 17 treatment sessions. The Childresses also offered evidence that Claudia suffered from stress, sleeplessness, fear, and nightmares following the theft.

¶5 Near the end of the trial, the United States District Court conducted a conference to settle jury instructions. Costco moved to exclude any claim for emotional distress damages on the ground that Montana law does not permit such damages as “parasitic” to claims for negligent damage to personal property.¹ Further discussed herein, the United States District Court, over Costco’s objection, modified Montana Pattern Jury Instruction 25.02 (2d ed. 2003), entitled “Personal Injury (Emotional Distress – Generally)[,]” and instructed the jury that if it found for the Childresses on the negligence claim, it “must determine the amount of damages” to compensate them for any parasitic damages caused, including “the mental, physical, and emotional pain and suffering experienced and that with reasonable probability will be experienced in the future.”

¶6 The jury returned a verdict in favor of the Childresses, awarding them \$2,278.43 in property damages on their bailment claim, and \$62,750 in “unspecified, non-property

¹ “Parasitic” emotional distress damages are those “claimed as an element of damage for an underlying tort claim.” *McKay v. Wilderness Dev., LLC*, 2009 MT 410, ¶ 56, 353 Mont. 471, 221 P.3d 1184.

damages” on their negligence claim. Costco appealed the \$62,750 in unspecified, non-property damages to the Ninth Circuit Court of Appeals, arguing the verdict was premised on the United States District Court’s incorrect instruction for consideration of parasitic emotional distress damages arising from the loss of personal property. Noting that “[t]he Montana Supreme Court has not decided whether parasitic emotional distress damages are available for an underlying negligence claim for personal property damage or loss,” the Ninth Circuit Court has certified to this Court this state law question.

STANDARD OF REVIEW

¶7 M. R. App. P. 15(3) permits this Court to answer questions of law certified to it by another qualifying court. As a question of law, “[o]ur review of a certified question is ‘purely an interpretation of the law as applied to the agreed facts underlying the action.’” *Murray v. BEJ Minerals, LLC*, 2020 MT 131, ¶ 11, 400 Mont. 135, 464 P.3d 80 (quoting *BNSF Ry. Co. v. Feit*, 2012 MT 147, ¶ 6, 365 Mont. 359, 281 P.3d 225). The scope of our review is limited to the certified question. *Frontline Processing Corp. v. Am. Econ. Ins. Co.*, 2006 MT 344, ¶ 31, 335 Mont. 192, 149 P.3d 906.

DISCUSSION

¶8 In *Sacco v. High Country Indep. Press*, 271 Mont. 209, 896 P.2d 411 (1995), this Court conducted an extensive review of Montana jurisprudence governing emotional distress claims, recognized torts of both negligent and intentional infliction of emotional distress, and held that “[a]n independent cause of action for infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff

was the reasonably foreseeable consequence of the defendant's negligent or intentional act or omission," *Sacco*, 272 Mont. at 220, 896 P.2d at 418, provided that the distress was "so severe that no reasonable person could be expected to endure it." *Sacco*, 271 Mont. at 235, 896 P.2d at 426 (citing Restatement (Second) of Torts § 46 cmt. j) (bracketing omitted).

¶9 We have recognized several instances in which emotional distress damages may be sought as an element of damages for other claims, or parasitic claims, which "do[] not have to demonstrate the heightened standard of proof required for an independent, stand-alone claim of negligent or intentional infliction of emotional distress." *McVey v. USAA Cas. Ins. Co.*, 2013 MT 346, ¶ 28, 372 Mont. 511, 313 P.3d 191 (citing *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 190, 345 Mont. 12, 192 P.3d 186; *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 66, 351 Mont. 464, 215 P.3d 649 (stating that applying the heightened standard as a threshold for parasitic claims would "render meaningless" *Sacco*'s holding for independent claims)). The discrete instances for which we have recognized the availability of parasitic emotional distress damages are: (i) disrupting the quiet use and enjoyment of real property, *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶¶ 71, 72, 298 Mont. 213, 994 P.2d 1124; (ii) discrimination and civil right violations, *Vortex Fishing Sys. v. Foss*, 2001 MT 312, ¶ 34, 308 Mont. 8, 38 P.3d 836; (iii) bad faith and insurance fraud under the Montana Unfair Trade Practice Act, *Jacobsen*, ¶ 67; and (iv) wrongful death, *Dawson v. Hill & Hill Truck Lines*, 206 Mont. 325, 333, 671 P.2d 589, 594 (1983). For parasitic claims, we employ "the standard set forth in the Montana Pattern Jury Instruction (M.P.I.2d 25.02, 15.01-03)," *Jacobsen*, ¶ 66, which explains that "the law does not set a definite

standard by which to calculate compensation for mental and emotional suffering and distress.” *Jacobsen*, ¶ 65 (bracketing omitted); *see also White v. Longley*, 2010 MT 254, ¶ 48, 358 Mont. 268, 244 P.3d 753 (noting that “there is no heightened threshold standard for parasitic emotional distress claims, and [] the severity of the distress affects the amount of damages recovered but not the underlying entitlement to recover”).

¶10 While we have noted that “some degree” of emotional distress is common in virtually all wrongs, *Sacco*, 271 Mont. at 234, 896 P.2d at 426, we have nonetheless recognized that the “proscription against recovery for emotional injury when the underlying harm is economic is nearly universal.” *Maloney*, ¶ 65 (quoting Leslie Benton Sandor & Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment*, 37 Ariz. L. Rev. 1247, 1268 (1995)). We explained in *Sacco* that policy concerns such as “fraudulent claims, a floodgate of litigation and unlimited liability for defendants” generally weighed against allowing recovery for emotional distress. *Sacco*, 271 Mont. at 221, 896 P.2d at 418.

¶11 We applied an exception to this “nearly universal” prohibition in *Maloney*. There, the plaintiffs sought emotional distress damages parasitic to their claim for loss of use and enjoyment of real property after a real estate agent sold the parcel adjacent to their property to a third party despite a written commitment from the seller to first offer the property to them. *Maloney*, ¶¶ 6-10. We reasoned that the loss of “the use and enjoyment of land[.]” *Maloney*, ¶ 69, was a unique property interest that qualified for emotional distress damages:

[t]he Maloneys, after all, were not developers in search of investment property to buy, improve, and then sell for purely economic gain; rather, they

had formed a subjective relationship with the property on a “personal-identity” level. That compensable emotional distress would arise from the tortious interference with the Maloneys’ rights to the property in question should have been clearly foreseeable by any person professionally involved with such transactions.

Maloney, ¶ 71. We noted that the Maloneys “painfully” watched as a home was built “on the precise location where they envisioned their own retirement home would rest[,]” *Maloney*, ¶ 70, and concluded the trial court had not erred by “award[ing] damages to the Maloneys for emotional distress under these fact-specific circumstances.” *Maloney*, ¶ 72; *see generally*, Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 1002-1008 (1982) (distinguishing purely economic and fungible property loss—for which courts are reluctant to award emotional distress damages given how easily the property may be replaced—from nonfungible, personal and identifying property loss—which is not readily replaceable, leaving courts more open to emotional distress damages).²

¶12 However, while “it is well settled in our case law, in point of fact, that emotional distress damages may result from negligent or intentional damage to property arising from interference and quiet enjoyment of land[,]” that rule has not been applied for personal property or chattel. *Maloney*, ¶ 68 (citing *French v. Ralph E. Moore, Inc.*, 203 Mont. 327, 661 P.2d 844 (1983)); *see also Johnson v. Murray*, 201 Mont. 495, 507-508, 656 P.2d 170, 176-77 (1982) (affirming compensation for distress associated with wrongful imposition of a lien on plaintiff’s real property). This distinction follows the “historic common law

² Judgment on liability for the Defendants’ tortious interference with Maloneys’ interests in the property was entered as a sanction for litigation conduct. *Maloney*, ¶ 38.

proposition that all real property is unique,” *Real Estate Analytics, LLC v. Vallas*, 160 Cal. App. 4th 463, 478, 72 Cal. Rptr. 3d 835, 845 (2008) (citation omitted), which supports a postulation that real property harms are far more likely to cause emotional response. This proposition forms the basis for the remedy of specific performance of land-sale contracts by the courts and is a distinction found in statute. *See Brown v. Griffin*, 150 Mont. 498, 509-10, 436 P.2d 695, 701 (1968) (concluding “restitution of the purchase price” of real property would be an inadequate remedy because the “purchaser not only has lost the benefit of his bargain but the land cannot be duplicated, it being a unique commodity”); § 27-1-419, MCA (stating that “[i]t is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation and that the breach of an agreement to transfer personal property can be thus relieved”); *see also Newnham v. United States*, 813 F.2d 1384, 1386 (9th Cir. 1987) (noting that “the remedy of specific performance is available to purchasers of land precisely because land is considered so unique”). This distinction between emotional impact of harm to real property and harm to personal property or chattel is recognized by the Restatement (Second) of Torts, which contemplated emotional distress damages only when real property is implicated. *Compare* Restatement (Second) of Torts: Harm to Chattels § 928, *with* Restatement (Second) of Torts: Harm to Land From Past Invasions § 929(1)(c).

¶13 Turning to the case before us, the United States District Court, when denying Costco’s motion to dismiss the Childresses’ emotional distress claims for failure to establish the *Sacco* standard, orally offered that “the distinction between real and personal

property is really a distinction that doesn't have much of a difference," going on to state that "the Montana Supreme Court has acknowledged that there can be general kinds of damages from injuries to personal property." While these off-the-cuff remarks are not entirely accurate, they are not entirely without merit, either. A review of our precedent reveals that we have differentiated between real and personal property, and recognized the uniqueness of real property, extending parasitic emotional distress damages to the loss of the use and enjoyment of land; but we have never explicitly foreclosed parasitic emotional distress as an element of damage for loss to personal property.

¶14 Costco's negligent treatment of the Childresses' vehicle resulted in the loss of a handgun, ammunition, a house key, and documents containing their home address. The Childresses argue that *Jacobsen* contains no limiting language that could be construed to prohibit parasitic emotional distress damages being available for the loss of non-real property, and this is correct. However, Childresses did not establish the basis for parasitic emotional distress damages we approved in *Maloney*, where plaintiffs proved "a subjective relationship with the property on a 'personal-identity' level." *Maloney*, ¶ 71; *see also* *Radin*, *supra*, at 1005. Nothing in the facts provided to this Court indicate that the handgun was an heirloom, nor were the house keys, documents, or ammunition so intrinsically intertwined with the Childress family dynamic that without these articles their "personal identity" would be irreparably impacted. Rather, under the facts as provided, the Childresses were deprived of fungible property whose value is derived from its utility, not for its intrinsic value. While the Childresses now offer a loss of use and enjoyment of *real*

property argument, it appears this argument was not made to the United States District Court or Circuit Court of Appeals, and is not part of the question posed in this certification request.³ We therefore decline to address the issue further, and answer the question posed in the negative.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR

³ Specifically, Childresses argue “[t]he Childress family home is real property and qualifies as ‘land’ in this context. *Maloney*, ¶ 68. The effects on the Childresses’ use and enjoyment of their home, caused by the theft of their house keys, personal documents disclosing their home address, and a gun is more than sufficient to satisfy the standard articulated in *Maloney* and its lineage.”