

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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THOMAS BRODEUR and MARY BRODEUR,

Plaintiffs/Counterdefendants-  
Appellees,

v

WAYNE KLEIN, d/b/a KLEIN CONSTRUCTION,

Defendant/Counterplaintiff and Third-  
Party Plaintiff-Appellee

v

DON’S TREE SERVICE,

Third-Party Defendant-Nonparty,

and

JOHN PASTOTNIK, d/b/a JDL Construction,

Third-Party Defendant-Appellant.

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Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Third-party defendant appeals the trial court’s post-trial grant of plaintiffs’ motion for leave to amend their complaint to add a direct claim against third-party defendant to conform to the evidence. We vacate and remand for further proceedings.

**I**

Plaintiffs hired defendant Klein as a general contractor for construction of their new home, a one-story ranch with a walkout basement. Plaintiffs retained control over certain jobs, including

painting, electrical work, landscaping, and excavation. Tony Burrington was plaintiffs' friend and was employed by Pastotnik, owner of JDL Construction. Plaintiffs discussed Pastotnik with Burrington and hired Pastotnik to perform the initial excavation work. Pastotnik excavated the basement. After the excavation, defendant Klein poured the foundation, built the basement, and began erecting the house. Pastotnik then backfilled the area around the basement. However, plaintiffs later realized that defendant Klein had not sealed the basement with tar. Although defendant Klein denied that sealing the basement was part of the contract, he agreed to have the basement re-excavated and sealed. Don's Tree Service was hired to re-excavate. After Don's Tree Service re-excavated the basement, a sub-contractor sealed the basement. However, Klein did not arrange to have the basement backfilled. Plaintiffs believed Klein was responsible for the second backfill and Klein believed plaintiffs were responsible. Ultimately, without clarifying who was responsible for the cost, plaintiffs suggested to Klein that Pastotnik backfill the basement on the same day his workers were to install the septic tank. Plaintiffs related Pastotnik's estimate to Klein, and Klein approved the amount as reasonable.<sup>1</sup>

Sometime after the second backfill, the south basement wall buckled and cracked. Who caused the damage was a central question at trial. Several witnesses testified that they saw hairline cracks in the exterior basement wall before the large cracks appeared, but the consensus was that such cracks were insignificant, and the trial court ultimately determined that they were inconsequential.

After the second backfill but before anyone discovered the larger cracks, Burrington took a bulldozer (referred to in the proceedings below as simply a "dozer") to plaintiffs' property. He testified that he and the dozer's operator were "grading" the yard, leveling off dirt that another company had dumped. At trial, the construction workers and contractors agreed that driving a heavy piece of machinery, like a dozer, close and parallel to a basement wall causes the soil to compact downward and expand outward, putting pressure on the wall causing cracking. At trial, Burrington testified that they never used the dozer near the south wall but the trial court chose not to believe this portion of his testimony. The day Burrington helped grade the property, he noticed cracks in the interior basement walls. He notified plaintiffs that night, and together they visited the property to view the cracked walls. Plaintiffs spoke with Klein, who by that time had already seen the cracks. A meeting was held with those who might have been responsible for the damaged walls, including plaintiff Thomas Brodeur, defendant Klein, Burrington, Pastotnik, Heethius (a blocklayer), and Roger Westfeld (a concrete worker). While most of the participants appeared to want to work together to solve the problem, Pastotnik said he needed to think about whether he would assist by re-excavating the basement. Ultimately, Pastotnik decided that he had done nothing wrong and would not donate time and equipment to fix the basement. Plaintiffs apparently accepted that Pastotnik was not responsible and continued to look to Klein to finish the work.

On or around December 15, 1992, the housing inspector, Donald Whitney, formally stopped construction on the house until the basement was repaired. While inspecting the house, he noticed dozer tracks running parallel to the house about eighteen to twenty-four inches from the wall. Despite plaintiffs' efforts to resolve the matter, the house sat relatively untouched for the next several months. None of the parties involved wanted to claim responsibility for the damaged wall. During this time, plaintiff incurred damages in the form of construction loan renewals, a higher interest rate on his

construction loan (because it had not been converted to a mortgage), rent, and storage costs. Plaintiffs also had to pay one contractor to fix the wall and another to finish the house at a price higher than the original contract price.

## II

Plaintiffs brought this action against defendant Klein only, alleging that re-excavation was necessitated by Klein's failure to waterproof initially, and that in the course of the re-excavation and backfilling the walls were damaged. Klein filed third-party complaints against Don's Tree Service and Pastotnik.<sup>2</sup> The third-party complaint against Pastotnik took the position that Pastotnik was plaintiffs' agent in the second backfilling operation, not Klein's, and that if the court were to find that Klein is responsible for Pastotnik's actions in causing damage to the wall, Pastotnik would be liable to Klein. After trial, the trial court filed an opinion finding that Pastotnik's employees damaged the wall while grading the property for landscaping, not during the re-excavation, and that Klein was not liable for the damage to the wall. The opinion allowed plaintiffs' to seek leave to amend their complaint to file a direct claim against Pastotnik.<sup>3</sup> The trial court granted plaintiffs' subsequent motion to amend and denied Pastotnik's motion for reconsideration. The trial court found against Pastotnik, awarding plaintiffs \$24,986 in damages. This appeal ensued.

## III

Pastotnik argues that allowing plaintiffs to amend their complaint post-trial to add him as a principal defendant unfairly prejudiced him and that the trial court improperly denied his motion for reconsideration. We conclude that while the trial court was within its discretion to permit the amendment, it abused its discretion by failing to allow Pastotnik to reopen the proofs.

We review the trial court's grant of leave to amend and its denial of third-party defendant's motion for reconsideration for abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), *Michigan Bank v Reynaert, Inc*, 165 Mich App 630, 645-646; 419 NW2d 439 (1988).

MCR 2.118(C) provides:

- (1) When issues not raised by the pleadings are tried by express or implied consent by the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment
- (2) If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

Plaintiffs' motion for leave to amend argued that testimony was admitted at trial, without objection by Pastotnik, regarding the contractual relationship between Pastotnik, Klein and the Brodeurs, and regarding damages that resulted from the collapse of the basement wall. Plaintiffs' brief argued that Pastotnik had impliedly consented to litigation of these issues, that Pastotnik had notice of the litigation and that he was not prejudiced "because there is no change in the cause of action or the theory of the case."

Pastotnik argued that he did not consent to these issues being tried and that he would be prejudiced by the amendment:

2. On January 17<sup>th</sup>, [1994], Tony Burrington stated in paragraph 14 of the attached affidavit:

Several weeks after the [second] back-filling, John Pastotnik returned with a bull dozer and with affiant's assistance attempted to grade the back fill area and at that time they both noticed that the interior sections of the basement wall, including the cement blocks, were cracked throughout the interior of the basement wall.

3. The Brodeurs forwarded said affidavit to Klein shortly after execution of same.
4. On October 10, 1994 Klein brought a third party complaint against Pastotnik, alleging that Pastotnik damaged the wall during the second back-fill and that Pastotnik was the agent of the Brodeurs during the second back-fill.
5. Despite having possession of the above stated affidavit, the Brodeurs did not, prior to the present motion [which was filed on November 1, 1996], request leave to amend their complaint to add Pastotnik as a Defendant and to claim that the wall was damaged subsequent to the second back-filling and/or during landscaping operations.
6. To the contrary, the testimony during trial evidenced that the Brodeurs stated to Pastotnik numerous times through out [sic] these proceedings (commencing with shortly after the discovery of the damage), that based on their own observations they did not believe that Pastotnik nor his agents or employees were the cause of the damage to the basement wall.

\* \* \*

17. Had the Brodeurs alleged in their complaint that the damages to the basement wall occurred during landscaping performed by Pastotnik which was subsequent to the second back-fill, Pastotnik would have:

- a. Sought people to testify as to when said landscaping occurred.
  - b. Sought people who examined the premises immediately after subject landscaping occurred.
  - c. Attempted to discover the location in Florida of Gene Van Lue (and obtain the deposition of him), the former employee who, pursuant to Tony Burrington's testimony, operated the dozer during said landscaping.
  - d. Attempted to obtain old logs, records, billings, or sworn statements which would have shown the date or time frame of subject landscaping.
  - e. Questioned Donald Whitney, the township building inspector [,] regarding the condition of the premises and the state of the landscaping during his numerous visits to the property, several of which occurred after the first back-fill and prior to the second back-fill . . .
18. The Brodeurs had the above mentioned affidavit 34 months prior to their motion to amend their complaint.
19. Additionally, the Brodeurs heard the testimony of Tony Burrington during the second day of trial; however, not only was no motion to amend their pleadings entered, the Brodeurs testified shortly after said testimony that Mr. Burrington was mistaken.
20. If the Brodeurs had requested to amend their complaint shortly after Mr. Burrington's testimony or if the Brodeurs had not informed Pastotnik that Mr. Burrington was mistaken, Pastotnik would still have had the opportunity to obtain the above stated information, since the trial of this matter spanned seven (7) months.

The trial court granted the motion to amend, concluding that the issues had been adequately covered, that issues of liability, time frame and causation were involved in the trial regardless of the pleadings, and that the evidence adequately covered issues that would have been presented in a direct suit by Brodeur against Pastotnik because they were the same issues raised by Klein in his third-party action.<sup>4</sup>

The trial court concluded that the wall was damaged in a manner not initially advanced by the parties. While the evidence can reasonably be seen as supporting this conclusion, Pastotnik was not defending against this claim. He was defending against the claim that he caused damage during the

second backfilling operation. Further, plaintiffs took the position that Pastotnik was not responsible for the damage. While evidence on the subject was admitted without objection, the evidence was relevant to other issues. When the trial court made its preliminary findings and suggested amendment, the evidence took on new significance as supporting a theory of direct liability against Pastotnik that had not been pled. Under these circumstances, once the court determined to allow plaintiffs to amend their complaint to allege the direct claim against Pastotnik arising from the grading/landscaping operation, it was obliged to permit Pastotnik to present additional evidence in order to avoid prejudice. Although the court may have felt convinced by the evidence it had heard, Pastotnik was entitled to present additional evidence relative to liability, damages, and mitigation of damages, that might have undermined the evidence relied on by the court. We therefore vacate the judgment, and remand for further proceedings consistent with this opinion.<sup>5</sup> We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Helene N. White

/s/ Jane E. Markey

<sup>1</sup> Responsibility for this re-excavation was a major issue below because both sides initially believed that the basement was damaged during re-excavation. If defendant Klein was responsible for backfilling after the re-excavation, Pastotnik would have been his subcontractor, making defendant Klein responsible to plaintiffs for Pastotnik's errors. Defendant Klein claimed that sealing the basement was not part of the original estimate, but the house was to be built according to code and a building inspector testified that the local code required that basements be sealed. The trial court decided that defendant Klein was responsible for the second excavation and backfill. However, the trial court decided that Pastotnik caused the damage while *landscaping* the property, a job for which he had contracted directly with plaintiffs, and that Klein was not responsible for the damage.

<sup>2</sup> Not at issue in this appeal is Klein's counter-complaint against plaintiffs, alleging breach of contract and seeking damages for work performed and materials, and Klein's third-party complaint against Don's Tree Service, which was dismissed by stipulation in July 1995, shortly after trial began.

<sup>3</sup> The trial court's opinion stated in pertinent part:

This leads us to the nature of this complaint *in which Brodeur decided not to sue Pastotnik or his company*. He was brought in only if Klein would be held responsible for those actions if the damage was found to have been caused by the re-excavation and the re-back-fill. . . . *Had Brodeur sued JDL* this Court would have found John Pastotnik and his company responsible for causing the damages by a dozer traveling too close to the wall in the vicinity of the damage to the south wall. However, they were only brought in the event this Court found Klein responsible for re-excavation and the re-back-filling processes and further found that the damage was caused by one of these two actions. I do not so find and I cannot find based on the evidence that any material change in the condition of the wall occurred as a result of re-excavating or re-back-filling the wall. Therefore, JDL is not responsible to Klein because Klein did not cause

the injury complaint regarding the wall. Therefore, all of the damages consequential to the wall, the delay in the construction, and the new construction costs cannot be found to be the fault of Klein, but rather of JDL. *However, JDL had not been sued by any party on these grounds at this time.*

\* \* \*

This Court feels that all of the issues that needed to be litigated have been litigated in order to determine the respective damages and the assigned liabilities in this matter. The appropriate motion may be filed to conform the pleadings with the proofs as to conclude the matter between these respective parties. Such action must be taken within 21 days after the issuance of this opinion. No costs against Klein in the action filed by Brodeurs versus Klein since Klein shall be deemed the prevailing party. Brodeurs shall pay costs to Klein because Klein had prevailed in their action under their Counter-Claim on most of their claim. The Court will reserve the question of costs for Brodeurs against JDL pending any further motions to assess same. The Court will await the outcome of the motion to be filed by Plaintiff if they so choose . . .

<sup>4</sup> The trial court stated:

Okay. The motion to allow an amendment of the complaint is going to be granted. The motion for reconsideration by Defendant Pastotnik is denied . . . .

The reason for the decision of the Court in the first place is that this—and I must state that this was probably one of the more difficult cases that this Court ever had to be faced with; not necessarily because of a paucity of evidence, but a paucity of evidence concerning the legal, not only liability issues but the intertangling relations of these parties, who are making deals every day, to find out who was responsible to whom.

And I think that the issues and the reason that I felt that the issues were finally pretty clear, at least to my way of thinking is that it was pretty certain that a bulldozer caused the damage, and the only people that had a bulldozer on the premises at all was the Defendant Pastotnik. Granted, they did the backfill by hand, and I don't think there was any complaint about that, and there was some evidence to tie in their dozers to the being on the property.

I do not believe that I am required to believe every witness, especially the employees of one of the Defendants, who say they weren't near the wall when the tracks clearly indicate they were. And, furthermore, that when one of their own employees seems to indicate that they were there after the second backfill, and when nobody else was there except their employees, I think that this Court is free to draw an inference.

I believe that this case was tried to death, and there wasn't anything . . . any stone that was left unturned after the completion of the testimony in this matter. And I believe that an injustice would be done not to – having gone through the tremendous amount of time and effort that all the parties did, not to analyse the evidence and the issues in light of the evidence and try to make a determination based on all those facts.

I extensively considered the arguments that have been raised here by Mr. Byrne [Pastotnik's counsel] on behalf of his Defendant, and I reviewed my notes and the evidence, and I could not find a reason why this Court should not make the unusual determination that it did to allow Plaintiffs' pleadings to be amended to conform to the proofs, because I feel the issues were adequately covered, more than adequately covered. I do not believe there was much else that could have been done.

There was testimony that was introduced to support the findings, and I think that the parties had an adequate amount of time and ability to address those issues. The issue of liability was clearly on the table for Pastotnik, and the issue of time and causation was also involved in each one of the complaints that were there and, therefore, I think that the evidence covered any issue that could have been brought out by Brodeur in a direct suit against Pastotnik, because Klein was bringing out the same issues that were brought against him of liability and relationship against Pastotnik in his third-party complaint that were brought against him, so I think that everything was covered.

And if we were to completely re-try this, I doubt very much that there would be much significant difference in any of the evidence that could be submitted, to more clearly enunciate and lay out the issues than were laid out.

<sup>5</sup> The issue whether the applicable statute of limitations bars plaintiffs claim against Pastotnik was not raised below, was not addressed by the trial court, and was not identified as an issue on appeal. However, Pastotnik makes an assertion in his brief that the statute has run. If Pastotnik seeks to pursue this defense, he may raise it in the trial court on remand.