STATE OF MICHIGAN

COURT OF APPEALS

ROY FICK and BRENDA FICK,

Plaintiffs-Appellees,

v

LONG'S TRI-COUNTY HOMES, INC.,

Defendant-Appellant,

and

COMMODORE HOMES, INC.,

Defendant,

.
and

MARVIN WILCOX, d/b/a/ MARVIN WILCOX CONSTRUCTION,

Defendant-Appellee.

UNPUBLISHED
July 21, 2000

No. 216133
Lapeer Circuit Court
LC No. 96-022331-CK

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Following the bench trial in this breach of contract action involving allegedly faulty construction of a basement, the trial court entered a $15,000 judgment in favor of plaintiffs Roy and Brenda Fick.[1] Defendant Long's Tri-County Homes, Inc. (LTCH) appeals as of right. We affirm.

[1] The trial court held that there was no cause of action against Marvin Wilcox. Before trial, the Ficks and Commodore entered into a consent judgment for $2,000.

I. Basic Facts And Procedural History

The Ficks bought a double-wide mobile home from LTCH in April 1994. At that time, they contracted with LTCH to construct a basement for the mobile home. LTCH orally agreed to act as the general contractor for the construction, taking a fifteen percent commission on all subcontracting fees.

Originally, the parties contracted for a "thirteen-block" basement, i.e. a cement basement consisting of thirteen rows of cement blocks stacked on each other; each cement block is approximately eight inches tall. In mid-December 1994, the Ficks went to the construction site to discuss the building plans with the subcontractor, Marvin Wilcox, and Jerry Wilcox, who was acting as LTCH site coordinator.[2] During the discussion, Marvin Wilcox stated that weather constraints would delay construction. However, Jerry and Marvin Wilcox both suggested that construction would not be delayed if the Ficks chose a cement "foam-style" basement, which would consist of sixteen-inch blocks that are insulated on the outside and filled with cement. The Ficks stated that they were unsure what a cement foam basement was, so Jerry and Marvin Wilcox suggested that the Ficks look at an example.

During this discussion concerning possible basement design, neither Marvin nor Jerry Wilcox explained to the Ficks how tall their basement ceiling would be with a cement foam basement. However, Marvin Wilcox took the Ficks to Margaret and Hugh Peters' home, which had such a basement. While in the Peters' residence, the Ficks claimed, Marvin Wilcox told them that their basement walls would be at least as tall, if not taller than the eight foot five inch walls they were examining. Additionally, Brenda Fick said, she asked Marvin Wilcox whether the poured concrete foam basement wall would give her the same height as the initial plan and he told her that it would be that tall. Evidently, the Ficks were concerned that, if their ceiling was too low, when they played pool their sticks would leave marks on the ceiling. Marvin Wilcox, testified, however, that he did not recall anyone mentioning ceiling height while the parties were examining the Peters' home.

The Ficks ultimately agreed to the cement foam style basement and Marvin Wilcox discussed the billing procedures for the new basement. They decided that Marvin Wilcox would bill LTCH for the basement. However, the Ficks agreed to pay him directly for the additional cost of the new basement and for the cost of a certain style of doors leading to the basement. Marvin Wilcox and LTCH executed a written agreement for constructing the basement, which noted that Marvin Wilcox was to use "12" block 13 block [sic] high," but did not specify whether those blocks were standard cement or foam. Nor did that agreement indicate any height for the basement ceiling.

Marvin Wilcox constructed a thirteen-block basement out of cement foam and Jerry Wilcox went to the site periodically to inspect all the subcontracted work. In January 1995, Marvin Wilcox completed the basement and LTCH paid him nearly $18,000 for the work. Later that month, the Ficks' house was set on the basement and the other subcontractors LTCH hired finished the electrical wiring and plumbing. In February or March 1995, when the Ficks were hanging drywall in their basement, they discovered for the first time that their basement ceiling was not eight feet tall, as

[2] Marvin and Jerry Wilcox are brothers.

requested, but only about seven feet tall. Brenda Fick complained to LTCH immediately, but still closed on the home that same month because she did not see withdrawing from the transaction was a possibility at that late date. This low ceiling prevented the Ficks from using the chimney for the wood stove installed in the basement because of local building codes.

At trial, plaintiffs' expert in residential building stated that he had measured the Fick's basement and concluded that it is equivalent to an eleven-block basement, not a thirteen-block basement, if measured from the floor to the ceiling, excluding the knee wall. The expert estimated that it would cost the Ficks approximately $20,230 to add an extra sixteen-inch block to the basement in order to raise the ceiling.

LTCH's expert in basement installation and mobile home foundations stated that a thirteen-block wall ordinarily measures eight feet, four inches from the top of the footing to the top of the structural wall, depending on the type of home. He estimated that the Fick's basement walls were between seven and eight feet high and equivalent to a thirteen-block wall including the knee wall, but that the Ficks would need a fourteen- or fifteen-block wall to have an eight-foot ceiling clearance. The Ficks could increase the headroom in their basement if they inserted a larger knee wall and reset the house, but that would be impractical and involve "considerable expense" because it would require rewiring and replumbing. He did not advocate inserting an additional sixteen-inch block because doing so typically leads to structural problems.

LTCH's expert did say that he was in the practice of telling customers that a double-wide home's basement wall is shorter than basement walls in other homes. He conceded that this lower height would not be immediately apparent to an average customer without construction experience who hears about a thirteen-block wall and assumes that there will be a full 104 inch clearance when the eight-inch blocks are stacked on each other.

LTCH's office manager, Kimberly Gerstenberger thought that the Ficks could repair their basement for far less than the Fick's expert estimated. For instance, she thought that it would cost less than $2,000 to making heating adjustments and closer to $2,000, not $6,000, to lift the house off the foundation.

The trial court rendered it decision from the bench. First addressing the question of contractual privity between the Ficks and Marvin Wilcox, the subcontractor, concerning the basement construction, the trial court found that there was no privity. The Ficks and Wilcox never entered into a written agreement. Rather, Marvin Wilcox entered into an agreement with LTCH to construct the basement and LTCH in turn had a contract with the Ficks to act as their general contractor. Accordingly, the trial court rejected the idea that Marvin Wilcox could be held liable for any construction defects, rather than LTCH, because he specifically acted as LTCH's agent or subcontractor.

As for the breach of contract claim against LTCH, the trial court found that the contract between LTCH and the Ficks had three parts. The first part was LTCH's agreement in writing to act as the Ficks' general contractor for a fifteen percent fee. The second part was LTCH's agreement with Marvin Wilcox to construct a thirteen-block basement. The third part was Marvin Wilcox's

representation that the Ficks' ceiling would be higher than the one in the Peters' home, which the trial court considered "an oral representation which clarifies the contract and is part of the contract." Because of these additional representations, the trial court rejected LTCH's suggestion that, if the Ficks' wall met industry standards, it fully complied with the contract.

In light of these contractual provisions, the trial court examined the evidence adduced at trial, noting that a thirteen-block wall is a term of art in the construction industry and does not clearly indicate how high the resulting wall and ceiling would be in a basement made that way. The trial court did not find a defect in the construction itself. Nor did it question that there were many other homes with the same ceiling clearance. However, the trial court concluded that, pursuant to the parts of the contract it identified,

> Plaintiffs would receive a basement with a ceiling height at the most equivalent to the Peters' home and at least they would have a contract for a ceiling height of 100 inches which is the clearance for a 13 block wall for anything other than a mobile home.
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> If it's stick built, I believe you're going to have a 100 foot [sic] of clearance in the ceiling or if it's a modular, you're going to have 100 inches. Sure, there may be some duct work in those constructions that may cut into that but it's nowhere near the intrusion that you have with a mobile home where you've got beams every twelve feet and the rest of the support system and the result of that is . . . Plaintiffs actually got . . . about 84 inches of ceiling clearance and that's a significant difference of about 16 inches and that is significant. That is significant and I'm not saying either that some people don't receive that on a regular basis and live with it but I don't think the Plaintiffs contracted for or expected that.
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> Again, the consequence of that is that if they want a ceiling below the lowest beam and if it's a suspended ceiling or a ceiling with any kind of framing under it, they're going to be down to six and a half or six and three-quarters feet of clearance and I think that's unreasonable or if they want to box in the beams and put a higher ceiling in, they can but then they're going to have false beam boxes every twelve feet to that ceiling. I don't think they bargained for that either.

The trial court rejected LTCH's argument that they were forced to install the shorter wall because of engineering concerns and commented that "in a lot of these the defenses that are raised, a lot of it comes down to a question of but if the Plaintiffs had known that, they may have had a choice" to spend additional money to obtain what they desired or reconsider their plans altogether. Although the Ficks may have been able to complain about the basement before instituting this action, the trial court said, they had few choices about a remedy because it would have been unreasonable at that stage to demand that LTCH redo the entire basement in light of their financial obligations.

Finally, having found a breach of contract, the trial court determined that the proper measure of damages in this case would be the cost of repair rather than the difference in value between the bargained-for and actual construction. In light of the overall cost of the home project, which was near

$100,000, the trial court determined that repairing the basement for $20,000 to raise the ceiling was expensive but reasonable. The court deducted $5,000 from the award for the Ficks' failure to mitigate their damages and also some additional costs of repair that it found unnecessary, resulting in a $15,000 judgment.

II. Arguments On Appeal

On appeal, LTCH advances three arguments. First, it contends that if there was a contract for a higher basement ceiling, the contract was between the Ficks and Marvin Wilcox, the subcontractor. Accordingly, the trial court erroneously determined that there was *no* privity of contract between the Ficks and Marvin Wilcox, and therefore that he was not the liable party. Second, LTCH asserts that the trial court erred when it found that it breached its contract with the Ficks. Finally, LTCH argues that the trial court incorrectly measured the damages in this case.

III. The Trial Court's Findings

A. Standard Of Review

We review the trial court's findings of fact supporting its decision that there was no privity of contract between Marvin Wilcox and the Ficks and that LTCH breached its contract with the Ficks for clear error.[3] "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made."[4]

B. Subcontractor As Agent

LTCH first challenges the trial court finding that Marvin Wilcox was its agent and, therefore, LTCH could be held liable for Marvin Wilcox's work. We do not find that this finding was clearly erroneous. "An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account."[5] An agent with either actual or apparent authority may bind a principal; apparent authority exists when "acts and appearances lead a third person reasonably to believe" that there is an agency relationship.[6] In determining whether an agent had apparent authority, this Court looks to all the surrounding facts and circumstances, and determines whether an ordinarily prudent person would be justified in assuming that one had the authority to bind another.[7]

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[3] MCR 2.613(C).

[4] *Bracco v Michigan Technological Institute*, 231 Mich App 578, 584; 588 NW2d 467 (1998), quoting *In re Forfeiture of $19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995).

[5] *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992), citing 1 Restatement Agency, 2d § 15, p 82.

[6] *Id*. at 698.

[7] *Id.* at 699.

Here, at the time Marvin Wilcox made the representations regarding the Ficks' basement ceiling height at the Peters' residence, the Ficks knew: (1) LTCH was in charge of hiring and retaining all subcontractors regarding the contract; (2) Jerry Wilcox, LTCH's representative participated in the discussions regarding a cement foam style basement; (3) Jerry Wilcox prompted them to look at an example with the subcontractor, who happened to be his brother; (4) LTCH would pay the subcontractor for building the basement. Based on all the surrounding facts and circumstances, the Ficks were reasonably justified in assuming that the subcontractor had the authority to bind LTCH.[8] Thus, the trial court's determination that Marvin Wilcox was LTCH's agent was not clearly erroneous.

C. Privity Of Contract

LTCH claims that *National Cash Register Co v UNARCO Industries, Inc*[9] and *Bacco Construction Co v American Colloid Co*[10] demonstrate that the trial court erred when it found that there was no privity of contract between the Ficks and Marvin Wilcox. However, both cases are distinguishable from this case.

In *National Cash Register*, the Court held that the plaintiff, despite lacking privity, had standing to sue a party based on subrogation rights because the plaintiff was "instrumental" in forming the contract between the defendant and a subcontractor.[11] However, the "instrumental" argument in *National Cash Register* was solely in the context of subrogation rights.[12] Here, LTCH does not argue for privity based on subrogation rights.

LTCH's reliance on *Bacco, supra*, in which this Court held that the plaintiff could maintain a negligence action without privity of contract, is similarly misplaced.[13] Unlike *Bacco*, this case sounds in contract, not tort, which still requires privity of contract to maintain an action.[14] Further, in *Bacco*, this Court implicitly held that the plaintiff and the project engineer were not in privity of contract because there was no contract between them.[15] Likewise, the contract in this case for the specific work to construct the Ficks' basement was between LTCH and Marvin Wilcox. Hence, without a contractual relationship between the Ficks and the subcontractor, Marvin Wilcox could not be held liable for breach

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[8] *Id.*

[9] 490 F2d 285, 286 (CA 7, 1974).

[10] 148 Mich App 397; 384 NW2d 427 (1986).

[11] *National Cash Register, supra*. at 286-287.

[12] *Id.*

[13] *Bacco, supra* at 414.

[14] *National Sand v Nagel Construction, Inc*, 182 Mich App 327, 331; 451 NW2d 618 (1990).

[15] *Bacco, supra* at 414, 416.

of the construction contract, instead of LTCH.[16] Therefore, the trial court's finding that the Ficks and Marvin Wilcox were not in privity of contract was not clearly erroneous.

D. Breach Of Contract

LTCH contends that the trial court clearly erred in finding that Marvin Wilcox's representations regarding the basement ceiling height constituted the sole terms of the contract between LTCH and the Ficks. Essentially, LTCH argues that the trial erred in considering parol evidence to determine the terms of the contract.[17] Furthermore, LTCH asserts that the Ficks bargained for and received a thirteen-block basement. There are several flaws with both of these contentions.

In *UAW-GM Human Resource Center v KSL Recreation Group*,[18] this Court explained the parol evidence rule in detail.

> The parol evidence rule may be summarized as follows: "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). This rule recognizes that in "[b]ack of nearly every written instrument lies a parol agreement, merged therein." *Lee State Bank v McElheny*, 227 Mich 322, 327; 198 NW 928 (1924). "The practical justification for the rule lies in the stability that it gives to written contracts; for otherwise either party might avoid his obligation by testifying that a contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing." 4 Williston, Contracts, § 631. In other words, the parol evidence rule addresses the fact that "disappointed parties will have a great incentive to describe circumstances in ways that escape the explicit terms of their contracts." Fried, Contract as Promise (Cambridge: Harvard University Press, 1981) at 60.
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> However, parol evidence of prior or contemporaneous agreements or negotiations is admissible on the threshold question whether a written contract is an integrated instrument that is a complete expression of the parties' agreement. *In re Skotzke Estate*, 216 Mich App 247, 251-252; 548 NW2d 695 (1996); *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich. 407, 410-411; 285 NW2d

[16] *National Sand*, *supra* at 331.

[17] LTCH argues that the Ficks did not provide any additional consideration to modify their original contract in order to obtain a higher ceiling. However, that argument merely begs the question we address here: what did the parties agree to concerning the ceiling height? Our answer to this question, that the parties agreed to a ceiling higher than the one the Ficks actually received, makes it unnecessary to determine whether there was consideration to modify the contract. We examine the role Marvin Wilcox's testimony played at trial in terms of the parol evidence rule in order not to deprive LTCH of its underlying legal proposition that relying on the testimony was error that led to clearly erroneous findings.

[18] 228 Mich App 486, 491-493; 579 NW2d 411 (1998).

> 770 (1979). The *NAG* Court noted four exceptions to the parol evidence rule, stating that extrinsic evidence is admissible to show (1) that the writing was a sham, not intended to create legal relations, (2) that the contract has no efficacy or effect because of fraud, illegality, or mistake, (3) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (4) that the agreement was only partially integrated because essential elements were not reduced to writing. *NAG*, *supra* at 410-411; 285 NW2d 770. See also 4 Williston, Contracts, § 631. . . .

In this case, the trial court properly relied on evidence of Marvin Wilcox's representations to the Ficks because the writing itself was ambiguous. The term "thirteen-block wall" says nothing whatsoever about ceiling height and, as LTCH's own expert conceded, ceiling height can vary significantly with this type of construction. Thus, without this extrinsic evidence, there would be no way for the trial court to carry-out the parties' intent when enforcing the contract, which is its primary duty.[19] In other words, nothing within the four corners of the document that LTCH contends is the sole, integrated embodiment of its agreement with the Ficks concerning the basement gives any guidance concerning what height the parties agreed the ceiling would ultimately be. As a result, this other evidence was necessary to resolve whether LTCH fulfilled its commitment concerning the ceiling height as a function of the wall height.

This same ambiguity suggests that the writing LTCH points to was not an integrated agreement because the written agreement between LTCH and Marvin Wilcox did not attempt to specify how the wall size related to the basement ceiling height. This, plainly, fits within either the third or fourth exceptions identified in *NAG*, *supra*. Although the parties agreed to a thirteen-block wall, the evidence at trial indicated that different construction techniques could result in different ceiling clearances. Given this basic construction reality, we must assume that the ceiling height was not fixed in writing either because the parties specifically intended for the discussion between Marvin Wilcox and the Ficks to establish the ceiling height, in which case they did not intend for the writing to be integrated, or that the writing was only partially integrated because they omitted this essential element. To be certain, ceiling height is a critical aspect to basement construction because it affects how homeowners can use that space. Accordingly, there is no error in the trial court's decision to consider and rely on evidence of the discussion between the Ficks and Marvin Wilcox to determine how high the parties agreed the ceiling would be in the finished basement.

We cannot agree with LTCH that the trial court clearly erred when it found that LTCH breached the contract because the Ficks' ceiling is only about eighty-four inches instead of the 100 inches they expected. The experts for each party provided conflicting evidence concerning how the walls should be measured and whether that measurement should include the knee wall when determining if the wall was indeed a thirteen-block wall. The trial court's duty, as factfinder, was to listen to this evidence, weigh it, and then determine which viewpoint was most

[19] *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994).

relevant and valid.[20] The presence of conflicting evidence does not automatically cast any doubt on the trial court's determination in this case.[21] "[T]he trial court's account of the evidence is plausible in light of the record viewed in its entirety," and accordingly we see no error in this finding.[22]

III. Damages

A. Standard Of Review

Typically, we review a challenge to damages in a bench trial for clear error.[23] However, to the extent that the proper measure of damages revolves around a question of law, we apply review de novo to this issue.[24]

B. *Schultz v Sapiro*

LTCH claims that the proper measure of damages in this case is the difference in value between the bargained-for thirteen-block wall and the wall actually constructed, not the cost of repair as the trial court determined. To apply this other measure, LTCH claims, would be unreasonable and economic waste. In support of its damages argument, LTCH cites the following passage from *Schultz v Sapiro*,[25] contending that it establishes the proper measure of damages:

> "76 ALR2d 808 has the most recent annotation on the subject. The general rule seems to be that where the particular omission or defect in the builder's performance may be remedied by the owner at reasonable expense, the cost of remedying the defects is the owner's measure of damages. If, however, the contractor has failed in performance, but to repair would require a substantial tearing down or rebuilding and would be unreasonably expensive, then the measure of damage is the difference between the value of the defective structure and that of the structure if properly completed. Michigan follows this view."[26]

Although we agree that this generally states the applicable rule of damages in Michigan,[27] we see no error in the trial court's decision to measure damages in this case by the cost of repair. Repairing

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[20] See generally *Nesbitt v American Community Mutual Ins Co*, 236 Mich App 215, 226; 600 NW2d 427 (1999).

[21] See *Bracco, supra*.

[22] *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990).

[23] *Peterson v Dep't of Transportation*, 154 Mich App 790, 799; 399 NW2d 414 (1986).

[24] *Cardinal Mooney High School v Mich High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

[25] 23 Mich App 324, 327; 178 NW2d 521 (1970).

[26] *Id*. (citations omitted). Contrary to LTCH's suggestion, that passage is not the holding in *Schultz*. Rather it is a quotation from the trial court's ruling in that case.

[27] *Kokkonen v Wausau Homes, Inc*, 94 Mich App 603, 615-616; 289 NW2d 382 (1980).

the Ficks' basement does not involve either demolishing the structure,[28] or a cost that exceeds the contract price,[29] both of which are factors that may weigh against a cost-of-repair recovery. Further, the very nature of the home at issue makes repair feasible and, in light of the intended use of the room and overall cost of the project, desirable. There is no economic waste here. This award makes the Ficks whole, which is the object in awarding damages in a breach of contract action.[30] Accordingly, we have no reason to conclude that the trial court's measure of damages was improper.

Affirmed.

/s/ Peter D. O'Connell
/s/ William C. Whitbeck

I concur in result only.

/s/ Michael J. Kelly

[28] *Id*. at 616, quoting *Gutov v Clark*, 190 Mich 381; 157 NW 49 (1916).

[29] *Caradonna v Thorious*, 17 Mich App 41, 44-45; 169 NW2d 179 (1969).

[30] *Goodwin Inc v Coe (On Remand)*, 62 Mich App 405, 412-413; 233 NW2d 598 (1975).