

STATE OF MICHIGAN
COURT OF APPEALS

NICOLA CONSTRUCTION CORPORATION,

Plaintiff-Counterdefendant-
Appellee,

V

RICHARD MCDONALD and SANDY
MCDONALD,

Defendants-Counterplaintiffs-
Appellants.

UNPUBLISHED
September 18, 2001

No. 222290
Kent Circuit Court
LC No. 96-004275-CH

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

In this construction contract dispute, defendants appeal as of right from the judgment entered after the trial court granted plaintiff's motion for reconsideration. We vacate the judgment in part, reverse in part, and remand for a new trial on the economic damages to be awarded to defendants on their counterclaim.

Plaintiff, a home builder, and defendants, a couple desiring to have a home built for them, entered into a cost-plus contract. Plaintiff was to build defendants' home and defendants were to pay plaintiff's costs, plus a certain percentage. Before construction was completed, a dispute arose between the parties regarding the construction costs. Because of the dispute, defendants refused to pay certain charges that plaintiff billed to them. Despite this breakdown in the parties' relationship, the project was completed to a point where defendants were able to take possession of and reside in the home. After the dispute arose between the parties, defendants' bank, which provided construction financing, issued a check in the amount of \$32,000 payable to both plaintiff and defendants and sent the check to plaintiff. Defendants refused to endorse the check and plaintiff maintained possession of it.

Plaintiff filed a construction lien on the home pursuant to MCL 570.1111(5) and commenced this action. Defendants answered plaintiff's lien complaint and counterclaimed for economic damages.¹ The case eventually proceeded to trial. The trial court, sitting without a

¹ Defendants also counterclaimed for noneconomic damages, but the jury found none and
(continued...)

jury, heard and decided plaintiff's lien claim because it sounded in equity. However, defendants' counterclaims, being claims at law, were tried to a jury. While the jury was deliberating on defendants' counterclaims, the trial court rendered its verdict on plaintiff's lien claim.² The trial court found that plaintiff was owed "\$37,000 or less," but that plaintiff was not entitled to judgment on the lien because of the construction problems for which plaintiff was responsible, but which defendants would have to fix. In effect, at least to the extent that plaintiff was underpaid, the trial court set off the costs of repairs against the amount owed to plaintiff. The trial court, in response to questioning by defendants' counsel, also indicated that plaintiff's counsel, who was in possession of the \$32,000 bank check, must turn it over to defendants, presumably because plaintiff had no claim for additional payment and, therefore, no entitlement to the funds.

Thereafter, the jury returned its verdict. It is the jury verdict that gives rise to the confusion that ultimately forms the basis for this appeal. The record shows that the jury was given a "JURY VERDICT FORM" that asked them to answer a series of questions. In pertinent part, the jury, by its answers, found that the parties entered into a contract on September 1, 1994, and that plaintiff breached the contract, resulting in damages to defendants of \$16,036.³ Further, the jury found that plaintiff negligently supervised the subcontractors and employees that worked on the project and that plaintiff's negligence in this regard caused defendants economic damages in the amount of \$20,000. Until this point, there is no problem interpreting the jury's verdict.

However, the form concluded with a section called "VERDICT SUMMARY" that directed the jury to enter the total damages awarded. Under this section, the jury listed the following:

Economic damages:	<u>\$36,036.00</u>
Non-economic damages:	<u>-0-</u>
TOTAL	<u>\$36,036.00</u> +
	32,000.00 must be returned (\$68,036.00)

When explaining this entry on the jury form, the jury foreperson stated:

JUROR NUMBER 7: Your Honor, I thought that you would look at this before it was read. There was a lot of talk in there concerning the \$32,000 check as well, and that was not part of the \$36,000 ruling.

(...continued)

defendants have not appealed that aspect of the case.

² Plaintiff has not appealed from this verdict.

³ We note that the final judgment erroneously states this amount as \$16,013.

We wrote a note under here that we found that that check should also be returned so the total would actually be \$68,036. We weren't sure how to word it because there is the \$32,000 up in the air no matter what.

Following trial, defendants filed a proposed judgment and a motion for taxation of costs and mediation sanctions. Plaintiff objected to defendants' proposed judgment and the taxation of costs and mediation sanctions and moved for reconsideration and/or new trial/remittitur. In what was labeled as the order granting plaintiff's motion for reconsideration, the trial court interpreted the jury's verdict and reconciled it to its own.⁴ Ultimately, the trial court held that the two verdicts exactly set off each other. Further, the trial court denied defendants' claims for taxation of costs and mediation sanctions. Thereafter, a judgment consistent with the trial court's decision after reconsideration was entered and defendants appeal.

On appeal, defendants claim that the trial court erred in granting plaintiff's motion for reconsideration and in denying their motion for taxation of costs and mediation sanctions. Defendants' arguments on these issues are predicated on the assumption that the jury awarded them economic damages of \$68,036. In response, plaintiff asserts that the damages awarded defendants for economic damages was not \$68,036, but rather \$36,036. The difference between the two is each sides' interpretation of what the jury intended when it indicated on the verdict form that plaintiff was to return the \$32,000 check and then placed in parenthesis the amount of \$68,036.

Although tempting, we decline to resolve this factual dispute regarding the intent of the jury. We do so for several reasons. First, we do not believe that either interpretation is obviously more correct than the other. Given the opportunity, we believe that an entirely plausible argument for either interpretation can be constructed. Further, this is essentially a factual, not a legal question, which is beyond the scope of the authority of this Court. Any interpretation that we would assign to the verdict would not be based on law, but rather, would be merely our best guess concerning what the jury intended. Also, and perhaps most importantly, the verdict of this jury, to the extent that it orders plaintiff to return the \$32,000 check, is illegal. Juries do not have the authority to order a party to do or refrain from doing an act; rather, that is the function of a court sitting in equity. Cf. *Anzaldúa v Band*, 457 Mich 530, 538; 578 NW2d 306 (1998); *ECCO, Ltd v Balimoy Mfg Co, Inc*, 179 Mich App 748, 751; 446 NW2d 546 (1989). When the jury directed plaintiff to return the check, it was exceeding its authority. The court and the parties should have recognized that improper act and instructed the jury to ignore the check and simply return a verdict that expresses defendants total amount of economic damages. Because the jury exceeded its scope of authority by directing plaintiff to return the check, we believe that the verdict cannot be enforced.

⁴ The trial court stated that it was limiting reconsideration to its verdict on the lien action. In doing so, the trial court explained that reconsideration was necessary because otherwise plaintiff unfairly would be "double-dipped." We do not pretend to have a complete understanding what exactly the trial court's reconsideration meant, other than it being an attempt to reconcile the two verdicts. For the reasons we explain in this opinion, any attempt to reconcile the verdicts would be futile because the jury's verdict is subject to two reasonable interpretations.

Consequently, we vacate paragraph 6 of the judgment entered in this case, which states the jury's verdict. In addition, to the extent that paragraph 4 suggests that the parties' awards are fully setoff, we vacate that paragraph because the extent of any setoff cannot be determined until after a jury verdict is received in the new trial on economic damages. Further, because the trial court's denial of taxation of costs and mediation sanctions in paragraph 1 and its resolution of the motion for reconsideration in paragraph 2 are predicated on the trial court's interpretation of the jury verdict, we also vacate those paragraphs in pertinent part. In all other respects, the judgment that the trial court entered remains enforceable. Because the jury verdict is clear with regard to liability, those decisions are not disturbed. Remand is ordered for purposes of retrial regarding defendants' economic damages only. Further, it is apparent to us that the benchmark for determining the parties' entitlement to taxation of costs and mediation sanctions is the trial court's finding that plaintiff's lien claim was "\$37,000 or less," compared to whatever is ultimately determined to be defendants' economic damages.

Vacated in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper