STATE OF MICHIGAN

COURT OF APPEALS

LAMAR CONSTRUCTION COMPANY,

        Plaintiff-Counter-Defendant-
        Appellee/Cross-Appellant,

v

DANIEL D. DISSELKOEN, DIANE
DISSELKOEN, and ZEELAND COLLISION,
INC.,

        Defendants-Counter-Plaintiffs-
        Appellants/Cross-Appellees,

and

FIRST MICHIGAN BANK,

        Defendant.

UNPUBLISHED
September 17, 2002

No. 230427
Ottawa Circuit Court
LC No. 96-026522-CH

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

The appeal by defendants Zeeland Collision, Inc., Daniel D. Disselkoen, and Diane Disselkoen having been involuntarily dismissed, the sole issue remaining before this Court is presented by plaintiff Lamar Construction Company's cross-appeal challenging the trial court's order reducing the amount awarded by the jury to Lamar on its breach of contract claim from $16,461.90 to $13,492.10. We reverse and remand.

Lamar first argues that the trial court did not have power to reduce the amount of the judgment in the manner that it did. We agree. MCR 2.611(E)(1) provides that a change in the amount of damages entered on a jury verdict may be directed in lieu of a new trial only "on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the . . . highest (if the verdict was excessive) amount the evidence will support." Here, Lamar, as the non-moving party, did not so consent. Accordingly, the trial court had no power to reduce the amount of damages awarded by the jury.

Lamar next argues that the trial court abused its discretion in reducing the amount of the jury award because the amount awarded by the jury was supported by the evidence and,

therefore, was appropriate. Lamar is correct that the proper inquiry is whether the evidence supports the jury award. See *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997). However, we disagree that the evidence here supports the amount awarded by the jury. There were discrepancies in the testimony offered by Lamar officials as to the gross amount owed it by Zeeland, but the highest figure mentioned was $19,588.35. It was also conceded by Lamar's president that Lamar included in this sum charges of $157.60 for concrete testing services, $1,784 for door openers, and $2,969.80 for installation of estimating area liner panels, each of which represented either costs Lamar did not incur or services Lamar did not perform. In his testimony, Lamar's president referred to these superfluous billings as "minor dollar amounts" claimed in good faith, which it was possible to deduct from the amount billed to determine the net amount owed. No other witness for Lamar contradicted this testimony; one witness merely stated that he did not know whether the liner panels were installed in the estimating area. Daniel D. Disselkoen, president of Zeeland, testified affirmatively that Zeeland did not receive these services from Lamar, and that Zeeland had to pay for these services itself. Accordingly, there was no evidence to support inclusion of these amounts, which total $4,911.40, and so the sum of $4,911.40 must, under *Setterington*, *supra*, be deducted from the sum of $19,588.35 to determine the highest allowable jury award. MCR 2.611(E)(1). That amount is $14,676.95, which is not the amount to which the trial court reduced the judgment, but is still a lower amount than awarded by the jury.

Upon remand, the trial court must reconsider the amount to be properly awarded in a judgment reduced from the jury award and should better articulate its reasoning for awarding that reduced amount. Further, the procedure required by MCR 2.611(E)(1) must be followed. Lamar must be provided fourteen days in which to avoid the necessity of a new trial by accepting the reduced judgment. If it does not do so in writing within a fourteen-day period, a new trial must be ordered because the amount of damages awarded by the jury was excessive.

We reverse and remand. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot