STATE OF MICHIGAN

COURT OF APPEALS

ELMER'S CRANE & DOZER, INC.,

Plaintiff-Appellant,

v

AWM CORPORATION, d/b/a NATIONAL CONCRETE CONSTRUCTION ASSOCIATES,

Defendant,

and

JOSEPH F. DOA,

Defendant-Appellee.

UNPUBLISHED
July 24, 2008

No. 278229
Roscommon Circuit Court
LC No. 04-725031-CK

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Plaintiff Elmer's Crane & Dozer (Elmer's) appeals by right the circuit court's order granting summary disposition for defendant Joseph F. Doa (Doa) and denying summary disposition for Elmer's. We reverse and remand for entry of judgment in favor of Elmer's in an amount to be determined by the circuit court.

I

This case arises out of the construction of a Wal-Mart store near Houghton Lake, Michigan. The general contractor on the Wal-Mart job was Hallmark Construction (Hallmark). In March 2004, Hallmark subcontracted with an entity known as "National Concrete Construction" to "[p]rovide the interior concrete flatwork" for the new Wal-Mart store. Hallmark agreed to pay National Concrete Construction $371,640 for the job.

"National Concrete Construction Associates" was a partnership with two partners. According to deposition testimony given by Doa, one of the partners of National Concrete Construction Associates was a corporation named "DDP Holdings," which is or was owned by Dino Bravo, Paul Bravo, and Dennis Seguin. Doa explained that the other partner of National Concrete Construction Associates was defendant AWM Corporation. Doa was the president,

sole shareholder, and owner of AWM Corporation. DDP Holdings and AWM Corporation each owned 50 percent of National Concrete Construction Associates.

Because Dino Bravo, Paul Bravo, and Dennis Seguin apparently lived in Canada, Doa oversaw certain day-to-day operations of not only AWM Corporation, but also of the partnership, National Concrete Construction Associates. For example, Doa testified that he was responsible for making hiring and firing decisions at National Concrete Corporation Associates. Moreover, both AWM Corporation and National Concrete Construction Associates operated from the same address at 28807 Reilly Road in New Hudson, Michigan.

Even though AWM Corporation and National Concrete Construction Associates were ostensibly separate entities, AWM Corporation often used the title "National Concrete Construction" or "National Concrete Construction Associates" as an assumed name or "d/b/a." Indeed, it is beyond dispute that AWM Corporation routinely operated under the name "National Concrete Construction" or "National Concrete Construction Associates," even when it was functioning as a separate, independent entity and not as a partner of National Concrete Construction Associates.

In 2004, Elmer's contracted with "National Concrete Construction" to provide labor, materials or supplies for the Houghton Lake Wal-Mart project.[1] However, it is not clear whether the entity with which Elmer's contracted was actually AWM Corporation or National Concrete Construction Associates (the partnership). According to Doa's motion for summary disposition, Elmer's contracted with "AWM Corporation, d/b/a National Concrete Construction Associates." However, Doa's counsel represented at oral argument before the circuit court that "obviously, Elmer's contracted with National Concrete, the partnership."[2]

On July 25, 2004, general contractor Hallmark issued a check, payable to "National Concrete Construction," in the amount of $267,829.90. Hallmark did not actually release the check on July 25, 2004, but decided to wait until it had received confirmation in the form of a lien waiver that Elmer's had been paid in full.

On August 2, 2004, "National Concrete Construction" issued to Elmer's a check in the amount of $127,000. The check was signed by Doa. Also on August 2, 2004, Elmer's executed a lien waiver, waiving its construction lien in the amount of $127,000, acknowledging receipt of the $127,000 check, and confirming that the $127,000 payment "cover[s] all amounts due to [Elmer's] . . . through [June 26, 2004]." Marynell Ripmaster, an Elmer's employee, averred that she had personally accepted the $127,000 check from Doa on August 2, 2004, and that she had

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[1] Although this contract, itself, has not been provided to this Court on appeal, the lien waiver executed by Elmer's states that that Elmer's "ha[s] a contract with National Concrete Construction to provide labor and/or materials for improvement to the property described as Wal-Mart".

[2] As explained more fully below, we conclude that Doa may be held personally liable regardless of which entity technically contracted with Elmer's and irrespective of which entity actually violated the Michigan Builders Trust Fund Act.

given him in exchange for the check the signed lien waiver from Elmer's. Upon receiving the signed lien waiver from Elmer's, Doa presented it to Hallmark; Hallmark thereupon released to Doa the $267,829.90 check.

Although the $267,829.90 check from Hallmark was made out to "National Concrete Construction," it is undisputed that it was never deposited into the account of the National Concrete Construction Associates partnership. As the circuit court explained, "The check from Hallmark never made it into [the partnership's] account. No, we know it went into AWM's account."

As soon as the $267,829.90 check from Hallmark had been deposited into AWM Corporation's account, a Stop Payment Request was authorized with respect to the $127,000 check to Elmer's. National Concrete Construction Associates's controller signed the Stop Payment Request. Marynell Ripmaster averred that she never would have provided Doa with the signed lien waiver had she known that AWM Corporation or National Concrete Construction Associates was going to stop payment on the $127,000 check. As Ripmaster explained, by executing the lien waiver, Elmer's had lost its right to enforce its $127,000 lien.

On September 3, 2004, Hallmark's attorneys wrote a letter to Doa informing him that the $267,829.90 payment had been made "based upon [the] issuance of . . . check number 36321 dated August 2, 2004 in the amount of $127,000.00 to your firm's supplier on the Project, Elmer's." The letter continued:

> Hallmark has since been advised by Elmer's . . . that your firm has stop[ped] payment on the check to Elmer's, depriving Elmer's of the funds your firm agreed to pay on the Project.
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> The payment made by Hallmark to your firm was trust monies under the Michigan Builders Trust Fund Act (MCLA 570.151 et. seq.). The beneficiary of that Act is <u>your</u> labor and material suppliers such as Elmer's. The causing of your check to be dishonored by your bank constitutes a clear violation of the Michigan Builders Trust Fund Act.

In November 2004, Elmer's filed suit. Elmer's set forth claims of account stated, breach of contract, fraud, and violation of the Michigan Builders Trust Fund Act. Plaintiff moved for summary disposition, arguing that judgment should not be entered against Doa in his personal capacity because there was a factual dispute concerning who had actually authorized the Stop Payment Order on the $127,000 check. The circuit court observed that defendants had rested on mere denials of Elmer's allegations and had not set forth any specific evidence to show that they should not be held liable. The circuit court therefore granted Elmer's motion for summary disposition and entered judgment against "Defendant Joseph F. Doa in the amount of $160,517.50."

As this Court explained on appeal in *Elmer's Crane & Dozer, Inc v AWM Corp*, unpublished opinion per curiam of the Court of Appeals, issued June 22, 2006 (Docket No. 266666), slip op at 1-2:

> [Elmer's] argued before the trial court that defendant violated the Michigan Builders Trust Fund Act (MBTFA), MCL 570.151 *et seq*., by failing to pay plaintiff, and that both civil and personal liability could be imposed on [Doa] as an officer of the corporation. [Elmer's] argued that [Doa] committed fraud when he induced plaintiff to sign a partial unconditional [lien] waiver in exchange for a check that was written upon insufficient funds.
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> [Doa] argued to the trial court that he did not divert or misappropriate the funds at issue. Rather, [Doa argued that] a third party placed the stop payment on the check and that third party was acting adversely to defendant. [Doa] also denied that he was aware that National [Concrete Construction]'s checking account contained insufficient funds to cover the $127,000 check.
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> The trial court granted [Elmer's] motion for summary disposition based on its determination that [Doa] merely rested on his pleadings, and he did not respond with more than mere denials, allegations or supposition.

This Court continued:

> In the instant case, the evidence shows that National [Concrete Construction] was a subcontractor and received funds from Hallmark for the project. There is no dispute that a stop payment was placed on the $127,000 check from National [Concrete Construction] to [Elmer's] and which [Doa] signed. [Elmer's] has not been paid in full for the materials or services it provided to National [Concrete Construction] on the project. Accordingly, the MBTFA has been violated. The issue at hand is whether [Doa] *personally* misappropriated funds after National [Concrete Construction] received them thereby allowing him to be held individually liable. [*Id*., slip op at 3 (emphasis in original).]

The Court then concluded:

> [Elmer's] provided evidence that (1) Hallmark made payment to National [Concrete Construction]; (2) the check from Hallmark never made it into National [Concrete Construction]'s account; (3) [Doa] signed a check to [Elmer's]; (4) a stop payment was placed on [the] check, and (5) [Elmer's] was not paid. [Elmer's] has not, however, set forth evidence showing that [Doa] personally misappropriated the funds or personally participated in the diversion of funds after National [Concrete Construction] received them. Therefore, [Elmer's] did not meet its initial burden under MCR 2.116(C)(10) to support its position concerning all elements of its claim. [*Elmer's Crane & Dozer*, *supra*, slip op at 3.]

On remand, Doa moved for summary disposition. Elmer's then sought summary disposition in its favor. The only new evidence submitted to the circuit court on remand consisted of five checks, all signed by Doa, written from "AWM Corporation" to "National Concrete Construction." The five checks were dated August 3, 2004, August 5, 2004, August 9, 2004, August 11, 2004, and August 13, 2004, and together totaled $180,000.

Doa's attorney explained the five checks by arguing that "funds were routinely transferred from the AWM account into the National [Concrete Construction] account." Doa's attorney argued that the checks were not evidence that Doa had misappropriated funds, but were conversely evidence that Doa had transferred money from AWM to National Concrete Construction Associates *for the very purpose of paying* the obligation to Elmer's. Thus, counsel argued that evidence of the five checks actually favored Doa in this matter. The circuit court concluded:

> The only [new] thing I have today are those five checks totaling one hundred eighty thousand. Nothing else that we have is any different than what we had before. We do have Mr. Doa's signature on those five checks from AWM. We know that the [$267,829.90] check made out [by Hallmark] went into AWM's account . . . .
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> We know that a check was written on National [Concrete Construction]'s account on . . . August 2nd that was stopped on August 3rd by someone else. We also know that there was money transferred from AWM less than the [$267,829.90, by way of the five checks signed by Doa] . . . .
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> But I don't find there is anything showing personally misappropriated funds or [that Doa] personally participated in the diversion of funds. I don't find it. And that is the thing that the Court of Appeals said I lacked before. For the reasons stated on the record, the defendant's motion is granted.

The circuit court thereafter entered an order granting Doa's motion for summary disposition, denying Elmer's motion for summary disposition, and dismissing Elmer's claims.

II

We review de novo the circuit court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Whether the law of the case doctrine applies is a question of law that we also review de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

III

The central question presented in this case is whether Doa may be held personally liable to Elmer's for violating of the Michigan Builders Trust Fund Act. The Michigan Builders Trust Fund Act (MBTFA), MCL 570.151 *et seq*., is a brief act that provides in full:

> Sec. 1. In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

> Sec. 2. Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court.
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> Sec. 3. The appropriation by a contractor, or any subcontractor, of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud.

The MBTFA imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts. *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 518; 742 NW2d 140 (2007); see also *National Bank of Detroit v Eames & Brown*, 396 Mich 611, 622; 242 NW2d 412 (1976). "The MBTFA is a penal statute, but our Supreme Court recognizes a civil cause of action for its violation." *Livonia Bldg Materials*, *supra* at 519; see also *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 48; 631 NW2d 59 (2001). Because the MBTFA is remedial, it is to be construed liberally for the advancement of the remedy. *Weathervane Window, Inc v White Lake Constr Co*, 192 Mich App 316, 325; 480 NW2d 337 (1991). The contractor or subcontractor holds the money paid for the construction project as a trustee. *Id*. "The primary duty of the trustee is to ensure that trust funds are spent on the particular project for which the trust funds were deposited. As trustee, the contractor [or subcontractor] owes a fiduciary duty to the beneficiaries to exercise proper and honest judgment, considering the nature and object of the trust." *Id*. at 325-326.

"To establish a claim under the MBTFA, a plaintiff must show: (1) that the defendant is a contractor or subcontractor engaged in the building construction industry, (2) that the defendant was paid for labor or materials provided on a construction project, (3) that the defendant retained or used those funds, or any part of those funds, (4) that the funds were retained for any purpose other than to first pay laborers, subcontractors, and materialmen, and (5) that the laborers, subcontractors and materialmen were engaged by the defendant to perform labor or furnish material for the specific construction project." *Livonia Bldg Materials*, *supra* at 519-520.

A reasonable inference of appropriation arises from the payment of construction funds to a contractor or subcontractor and the subsequent failure of the contractor or subcontractor to pay laborers, materialmen, or others entitled to payment. MCL 570.153; *Livonia Bldg Materials*, *supra* at 520; see also *People v Whipple*, 202 Mich App 428, 435; 509 NW2d 837 (1993). As long as a reasonable inference of appropriation is present, it is not necessary to prove what the defendant actually did with the money. *Livonia Bldg Materials*, *supra* at 521.

A

In this case, it is undisputed that Elmer's provided labor, materials, or supplies on the Wal-Mart job site, but that it was never paid. It is also undisputed that part of the $267,829.90 check from general contractor Hallmark represented the sum due to Elmer's for its work on the project. Therefore, as this Court has already recognized in Docket No. 266666, "[Elmer's] has not been paid in full for the materials or services it provided . . . on the project. Accordingly, the MBTFA has been violated."

The evidence does not establish with certainty whether Elmer's actually contracted with AWM Corporation or National Concrete Construction Associates. Nonetheless, we conclude that Doa can be held personally liable to Elmer's regardless of whether the subcontract agreement was signed on behalf of National Concrete Construction Associates or on behalf of AWM Corporation, and irrespective of which entity actually committed the MBTFA violation at issue in this case.

The existence of separate business entities is generally respected in Michigan unless doing so would subvert justice or cause a result that would be contrary to some other clearly overriding public policy. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). However, separate business entities may be disregarded when one entity's domination of the other is so complete as to make them practically indistinguishable or to make one of the entities a mere tool, agency, or instrumentality of the other, see *Cinderella Theatre Co v United Detroit Theatres Corp*, 367 Mich 424, 436-437; 116 NW2d 825 (1962), or when the formalities of separate business organizations are not observed by either entity, see *Herman v Mobile Homes Corp*, 317 Mich 233, 246; 26 NW2d 757 (1947). Where an entity is so organized and controlled and its affairs are so conducted as to make it a mere instrumentality or agent or adjunct of another entity, its separate existence as a distinct entity will be ignored and the two entities may be regarded in legal contemplation as one unit. *In re Culhane's Estate*, 269 Mich 68, 77; 256 NW 807 (1934).

As the record makes clear in this case, although AWM Corporation and National Concrete Construction Associates were organized as separate entities, AWM Corporation often conducted business under the name "National Concrete Construction." The deposition testimony reveals that Doa, himself, was not certain about many of the differences between the two entities. Further, AWM Corporation and National Concrete Construction Associates had their offices at the same address in New Hudson, Michigan, and had at least some interlocking officers or employees. See, e.g., *Shirley v Drackett Products Co*, 26 Mich App 644, 648-649; 182 NW2d 726 (1970). Lastly, it is undisputed that AWM Corporation has frequently held itself out to the public as "National Concrete Construction," and as is evidenced by our opinion in Docket No. 266666, even this Court has had a difficult time discerning the actual distinctions between AWM Corporation and National Concrete Construction Associates.

The courts may exercise their equitable powers when fashioning a remedy under the MBTFA. See *Weathervane Window*, *supra* at 326. We conclude that the principles of equity require us to look beyond the distinctions between AWM Corporation and National Concrete Construction Associates and to treat them as the same entity for purposes of this appeal. See, e.g., *Brown Bros Equipment Co v Michigan*, 51 Mich App 448, 453; 215 NW2d 591 (1974).

Doa held a substantial ownership and management interest in both AWM Corporation and National Concrete Construction Associates. When Doa received the $267,829.90 check from Hallmark and the subsequent letter from Hallmark's attorneys explaining the purpose of the $267,829.90 payment, he was placed on notice that some portion of the $267,829.90 payment represented the sum due to Elmer's. Nonetheless, Doa wrote five checks totaling $180,000 to National Concrete Construction Associates without first paying Elmer's. This evidence establishes a reasonable inference of misappropriation by Doa, MCL 570.153; *Livonia Bldg Materials, supra* at 520, irrespective of which of the two business entities he was technically serving at the time. And as the holder of substantial ownership and management interests in both AWM Corporation and National Concrete Construction Associates, Doa became personally liable for any violation of the MBTFA by either entity.

As owner of AWM Corporation, Doa personally wrote all AWM corporate checks—including the five checks written to National Concrete Construction Associates. It is well settled that the principal of a sole proprietorship that violates the MBTFA may be held personally responsible for the violation. *People v Brown*, 239 Mich App 735, 739; 610 NW2d 234 (2000). Moreover, as this Court has stated:

> Officers of a corporation may be held individually liable when they personally cause their corporation to act unlawfully. [*Id*.] "'[A] corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation.'" *Id.*, quoting *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986). If a defendant personally misappropriates funds after they are received by the corporation, he or she can be held personally responsible under the MBTFA. *Brown, supra* at 743-744. [*Livonia Bldg Materials, supra* at 519.]

Doa was the sole proprietor of AWM Corporation, *Brown, supra* at 739, and "personally cause[d]" AWM Corporation to act unlawfully by transferring the money to National Concrete Construction Associates without first paying Elmer's, *Livonia Bldg Materials, supra* at 519. Doa may thus be held personally liable for any violation of the MBTFA by AWM Corporation. *Id.*[3]

Furthermore, even if the MBTFA violation in this case was actually attributable to National Concrete Construction Associates, the partnership, Doa may still be held personally responsible. Doa was the sole owner of one of the two partners of National Concrete Construction Associates. At common law, a member of a partnership is jointly and severally

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[3] Doa argues that he did not personally stop payment on the $127,000 check to Elmer's. He asserts that some other person directed the controller of National Concrete Construction Associates to stop payment on the check. The identity of the specific person that stopped payment, however, does not control our decision. Instead, our decision turns on the mere facts that (1) Doa did not ensure that Elmer's was paid after the $267,829.90 from Hallmark was deposited into AWM's account, and (2) Doa wrote five checks totaling $180,000 from AWM to National Concrete Construction Associates without first paying Elmer's.

personally liable for the tortious act of one of the other partners if committed within the scope of the partnership. *Soberg v Sanders*, 243 Mich 429, 431; 220 NW 781 (1928); *Sunlin v Skutt*, 133 Mich 208, 211; 94 NW 733 (1903). Doa, as owner and sole shareholder of one of the two partners, was in essence a partner of National Concrete Construction Associates himself. He may therefore be held personally liable to the extent that the National Concrete Construction Associates partnership violated the MBTFA. We conclude that, irrespective of which of the two business entities actually violated the MBTFA in this case, Doa may be held personally liable to Elmer's for misappropriation of the funds.

Doa suggests that the five checks were written to National Concrete Construction Associates for the very purpose of providing money to pay the amount due to Elmer's. This argument is unconvincing. If Doa had truly intended to pay Elmer's out of the $267,829.90 received from Hallmark, he could have simply issued a check directly from AWM Corporation to Elmer's. Instead, however, he issued five separate checks to National Concrete Construction Associates before paying a single dollar to Elmer's. The assertion that Doa needed to first transfer the money to National Concrete Construction Associates before paying Elmer's is not sufficient to rebut the presumption of misappropriation. See *Livonia Bldg Materials*, *supra* at 521 (observing that "the general assertion that there was not enough money 'to go around' is not sufficient to rebut the presumption of misappropriation"); see also *People v Miller*, 78 Mich App 336, 342; 259 NW2d 877 (1977) (observing that the purpose of the MBTFA is to prevent contractors and subcontractors "from juggling funds between unrelated projects"). Even if Doa did not act with bad faith and was simply trying to keep National Concrete Construction Associates afloat by transferring money to the partnership's account, "the MBTFA's requirements must still be followed, and [Doa was] certainly required to pay [Elmer's] on its projects when monies came in on those particular projects." *Livonia Bldg Materials*, *supra* at 522. The actual reasons for Doa's misappropriation of the money are technically irrelevant; the fact remains that he personally transferred the earmarked money to another entity when that very money should have been paid to Elmer's.

B

"The law of the case doctrine provides that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). "Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Id.* "This rule applies without regard to the correctness of the prior determination." *Id.*

"However, the law of the case doctrine controls only if the facts have remained materially the same." *Id*. The law of the case doctrine does not apply when new or previously unknown facts are adduced on remand. *Mitchell v Reolds Farms Co*, 261 Mich 615, 617; 247 NW2d 89 (1933); *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2001). Here, evidence of the five checks written by Doa to National Concrete Construction Associates was first presented on remand to the circuit court. Because the circuit court had before it new evidence—namely, evidence that Doa had personally paid money to National Concrete Construction Associates before first paying the sum due to Elmer's—it was not bound on remand by this Court's previous decision in Docket No. 266666. *Id*. On remand, the circuit

court was free to consider the new evidence, which established the fact and extent of Doa's personal involvement in this case.

IV

The evidence before this Court in Docket No. 266666 was sufficient to establish a violation of the MBTFA by either AWM Corporation or National Concrete Construction Associates, but was not sufficient to prove that Doa had "personally misappropriated the funds or personally participated in the diversion of funds . . . ." On remand, this evidentiary deficiency was cured. The new evidence, first adduced on remand, established beyond dispute that Doa personally wrote five checks from AWM Corporation's account to National Concrete Construction Associates before first paying the sum due to Elmer's. This was sufficient to establish a presumption of misappropriation by Doa, himself. Doa may be held personally liable for the violation of the MBTFA in this case.

We reverse and remand for entry of judgment in favor of Elmer's. On remand, the circuit court shall determine the amount owed to Elmer's and shall enter judgment against Doa in the proper amount.

Reversed and remanded for entry of judgment in favor of Elmer's in an amount to be determined by the circuit court. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra