STATE OF MICHIGAN

COURT OF APPEALS

L H JOHNSON CONSULTING LLC and LUKE JOHNSON,

Plaintiffs-Appellees,

v

HORIZON UNLIMITED ENVIRONMENTAL INC and MELVIN CENTER,

Defendants-Appellants,

and

ERIC JACOBSEN,

Defendant.[1]

UNPUBLISHED
April 26, 2016

No. 327150
Calhoun Circuit Court
LC No. 2014-000079-CZ

Before: SAWYER, P.J., and MURPHY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendants Horizon Unlimited Environmental, Inc. (Horizon) and Melvin Center (Center) appeal by leave granted an order denying their motion to set aside a default judgment entered against them. The order was entered by the second judge to preside over this case, who, instead of addressing the substantive merits of defendants' motion, expressed the opinion that revisiting the predecessor judge's decision would be inappropriate. We vacate the order and remand for further proceedings.

"A trial court's decision regarding a motion to set aside a default judgment is reviewed for an abuse of discretion." *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 272; 803 NW2d 151 (2011). This Court reviews the construction of court rules and statutes, as well as other determinations of law, de novo. *Id.*; *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006); *Weakland v Toledo Engineering Co, Inc*, 467

[1] Jacobsen did not participate in any of the proceedings. Unless otherwise indicated, references to "defendants" in this opinion therefore are to Horizon and Center.

Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). "[F]ailure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion." *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998), quoting *People v Stafford*, 434 Mich 125, n 4; 450 NW2d 559 (1990). However, if only one correct outcome could be permissible or the appealing party was otherwise not actually prejudiced by any such failure to exercise, and thus automatic abuse of, discretion, the result will not be disturbed. See generally *Polhemus v Ann Arbor Savings Bank*, 27 Mich 44 (1873), overruled in part on other grounds by *Daly v Blair*, 183 Mich 351, 354-355; 150 NW 134 (1914) (holding in relevant part that trial courts' failures to exercise discretion due to mistaken beliefs that they lack such discretion are reviewable).

Initially, the trial court clearly believed that it could not or should not review or reconsider the prior entry of the default and default judgment. In fact, the trial court is expressly authorized to set aside default judgments. MCR 2.603(D). The trial court expressed the view that it was improper for a successor judge to revisit an action taken by a predecessor judge. This is incorrect: a successor judge *is* the same trial court, and as a consequence, has the full authority to enter any order that the predecessor judge could have entered. *People v Herbert*, 444 Mich 466, 471-472; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemon*, 456 Mich 625; 576 NW2d 129 (1998). A trial court is *always* within its full authority to reconsider an action it previously took unless divested of that authority by an appeal or some other occurrence. *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). The trial court refused to even consider defendants' motion to set aside the default on the incorrect belief that it would be impermissible or inappropriate to do so. This is essentially the abdication, and therefore automatic abuse of discretion, contemplated by *Rieth*, 230 Mich App at 348.

However, that does not entirely end the matter, because if only one outcome would be proper in any event, then either defendants were not truly prejudiced or it would be a waste of judicial economy to send the matter back for what would amount to a rubber stamp. On this record, we do not find that any particular outcome was mandated.

The critical problem is that the case evaluation award itself is either vague to the point of hopelessness or simply a mistake. Plaintiffs' complaint set forth three counts: one count of breach of contract on behalf of one plaintiff against Horizon only, one count of breach of contract by the other plaintiff also against Horizon only, and one count alleging a violation of "Michigan's securities law" that apparently was on behalf of all plaintiffs against all defendants. The case evaluation award, on its face, recognized all three defendants but only one plaintiff, and the award was "$150,000 to TT [sic] against Horizon Unlimited Environmental, Inc. and Melvin Center Jointly, and $222,000 against Eric Jacobsen only," with no specific mention of any of the discrete claims or any recognition that more than one plaintiff was participating. Center filed an unconditional, blanket acceptance of the award, and he was treated by the trial court as also acting on behalf of Horizon. Jacobsen did not participate. Plaintiffs accepted the award, but also filed notice that they were rejecting "the award of $0 against [Horizon and Center]."

Pursuant to MCR 2.403(K)(2):

> Except as provided in subrule (H)(3) [stating that derivative claims must be treated as a single claim], the evaluation must include a separate award as to each

> plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

The award failed to comply with the court rule. The evaluation award would have been required to effectively consolidate all claims by any one party against any one other party. If only one plaintiff participated in the matter, or possibly even if all three counts in the complaint were on behalf of both plaintiffs, the award would make sense. However, the case evaluation award is in clear violation of MCR 2.403(K)(2) because it does not address the distinct claims made by the distinct plaintiffs.

Defendants' attempted acceptance of a defective award is at least plausible from their perspective, particularly given that Center was appearing in propria persona at the time. Furthermore, had both parties accepted the awards *that were actually stated*, and indeed, plaintiffs *did* accept the stated awards, then the case should nevertheless have been completely terminated and the scheduled trial should never have occurred. See *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 555-557; 640 NW2d 256 (2002). In which case, defendants' failure to appear at trial, especially after the judgment *on* the case evaluation award was entered, was entirely reasonable. However, a party's rejection of any part of the award requires the matter to proceed to trial, and a response that does not conform to the court rules is considered a rejection. *Mercantile Bank Mortgage Co*, *LLC v NGPCP/BRYS Centre*, *LLC*, 305 Mich App 215, 224; 852 NW2d 210 (2014). Plaintiffs' attempt to reject an award that was not actually made could be deemed a failure to comply with the court rules, thus mandating that *all* claims go to trial, which would be nonsensical after the trial court actually entered a judgment on the rest of the award.

We accept as reasonable plaintiffs' contention that defendants either received or should have received additional service that should have alerted them that the action was still proceeding, and so defendants should have at least inquired instead of simply not appearing. Defendants contend that they did not in fact receive any such notice, but that would constitute a factual issue that this Court is not in a position to resolve. Nonetheless, for that reason we find that the matter is not entirely "open and shut." Clearly, however, all parties were confused[2] by the case evaluation award, and understandably so. We decline to further consider whether defendants presented a sufficient case to the trial court to set aside the default judgment; that decision is within the trial court's discretion, so the matter must be remanded for the trial court to exercise that discretion.

[2] We choose to presume that plaintiffs' contention that a "$0 award" exists despite it not having been made in the award is due to understandable confusion rather than disingenuity.

Vacated and remanded for further proceedings consistent with this opinion. In addition to any other proceedings the trial court deems proper, the trial court shall consider the substantive merits of defendants' motion to set aside the default judgment. We do not retain jurisdiction. Defendants, being the prevailing party, may tax costs. MCR 7.219(A).

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Amy Ronayne Krause