# STATE OF MICHIGAN

# COURT OF APPEALS

CHARTER TOWNSHIP OF YPSILANTI,

Plaintiff-Appellee,

v

DAVID KIRCHER, d/b/a EASTERN HIGHLANDS,

Defendant-Appellant,

and

ROBERT C. BARNES, Receiver,

Appellee.

UNPUBLISHED
June 9, 2011

No. 292661
Washtenaw Circuit Court
LC No. 04-001074-CZ

Before: MARKEY, P.J., AND WILDER AND STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right an order granting $2,259,786.09 in expenses to receiver Robert Barnes ("Barnes."). The award is the sum of expenses incurred in abating alleged public nuisances, other reasonably incurred expenses and attorney fees. On appeal, defendant argues that the trial court's award was improper where it was not based on admissible evidence and was grossly excessive because it awarded fees for unnecessary expenses and permitted an improper markup. Defendant also asks this Court to reexamine portions of its holding in *Charter Twp of Ypsilanti v Kircher*, 281 Mich App 251; 761 NW2d 761 (2008), in which this Court ordered the trial court to determine which fees incurred by the receiver were necessary to abate public nuisances. We affirm in part, vacate in part and remand for further proceedings.

Defendant first argues that the trial court's decision after remand was based on improper hearsay evidence and an inadequate record and that as a result, the trial court awarded Barnes for improper expenditures. We disagree regarding the evidentiary arguments. However, while we generally conclude that the trial court's award was proper, we note that a portion of the award must be vacated as it contradicts this Court's opinion before remand.

The parties agree that this issue presents an issue of law that this Court reviews de novo. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008). To the

extent that the trial court made any factual findings, those findings are generally reviewed for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). The parties fail to recognize that the lower court's decision setting compensation for a receiver is reviewed for an abuse of discretion. *Kircher*, 281 Mich App at 280. Finally, we note that defendant asserts on appeal that a portion of plaintiff's argument below was dependant on inadmissible hearsay. "This Court ordinarily reviews preserved evidentiary issues for an abuse of the trial court's discretion and unpreserved evidentiary issues to determine whether there was plain error affecting a party's substantial rights." *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Defendant asserts on appeal that Ronald Fulton's affidavit and the corresponding highlighted list of code violations are inadmissible hearsay and should not have been considered by the trial court. Defendant failed to make this argument below. Rather, defendant merely argued that the trial court should not have considered the "reworked evidence" because this Court intended the parties to be limited to the record as it existed before remand. As a result, this argument is not preserved for appeal and need not be addressed by this Court. It is true that "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). The issue was given only cursory attention on appeal. Defendant concludes that the affidavit and corresponding list of violations is hearsay without providing any explanation of how the evidence in question fits the definition of hearsay found in the Michigan Rules of Evidence. As is well-established, it is not this Court's duty to address an issue when an appellant merely gives the issue cursory attention or announces his position without providing adequate legal support. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

In addition to arguing that the evidence is inadmissible hearsay, defendant also implies the evidence should not have been considered because it was "new evidence" and its consideration was contrary to the opinion before remand. Defendant's characterization of the opinion before remand is inaccurate. This Court merely stated that the trial court did not "necessarily" need to permit additional evidence. It did not prohibit the Court from considering any evidence that would otherwise be admissible. The trial court expressly permitted plaintiff to introduce the evidence in question. Defendant cites no authority for the proposition that the trial court somehow abused its power in doing so. Furthermore, even if plaintiff was required to base its brief on evidence already in the record, defendant would not be entitled to relief. Plaintiff's brief was entirely *based* on evidence that already existed. While the briefs included additional commentary about that evidence, the list of property code violations had been in the record before remand.

Because this Court determines that the evidence in question was properly considered, it must next determine whether the record contained sufficient evidence to allow the trial court to conclude which violations constituted a public nuisance and whether the trial court erroneously awarded Barnes for making unnecessary improvements. As this Court indicated before remand, the existence of a nuisance must be determined on the basis of the facts and circumstances of each case. *Kircher*, 281 Mich App at 276. As has been previously established, "[p]ublic nuisance includes interference with the public health, the public safety, the public morals, the

public peace, the public comfort, and the public convenience in travel." *Bronson v Oscoda Twp* (On Second Remand), 188 Mich App 679, 684; 470 NW2d 688 (1991). Consequently, this Court directed the trial court to determine which of the alleged code violations were "harmful to the public health, safety, morals, or welfare." *Kircher*, 281 Mich App at 278.

Upon reviewing the lower court record, it is evident that the trial court's conclusions regarding which code violations amounted to a public nuisance were completely dependent on Fulton's affidavit and highlighted list. It is well-established that, pursuant to MCR 2.613(C), a trial court is in a superior position to judge the credibility of a witness and, as a consequence, the trial court's conclusions that are based on credibility determinations should be shown deference. In this case, the trial court had observed Fulton testify at evidentiary hearings prior to remand. The court was able to develop an informed opinion regarding Fulton's credibility. Therefore, although the record could potentially be more complete in this matter, the trial court did not err where its conclusion was supported by a witness it found to be credible and was not refuted by any evidence presented by defendant.

Although we generally conclude that the trial court did not err in determining which of the code violations amounted to a nuisance, it must be noted that the trial court's order directly conflicts with this Court's order prior to remand. This Court expressly stated that "[c]ode violations such as chipped paint, dripping faucets, improperly caulked bathtubs, improperly caulked windows, missing roof flashing, and small holes in the drywall simply did not rise to the level of public nuisance conditions." *Kircher*, 281 Mich App at 277. After remand, Fulton disagreed with this Court's opinion and stated that the seemingly minor violations could carry large health risks for the general public. The trial court agreed with Fulton and awarded Barnes for making repairs. Any such portion of the trial court's award was improper. "Generally, this Court's ruling on an issue in a case will bind a trial court on remand and the appellate court in subsequent appeals." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007). Stated differently, a trial court must strictly comply with the mandate of this Court after remand. *Id*. at 128. In awarding Barnes for repairs to conditions that this Court already stated did not rise to the level of a nuisance, the trial court failed to strictly comply with this Court's order. While the trial court may have found Fulton to be persuasive, the issue had already been decided. Therefore, on remand, the trial court is instructed to recalculate its award after subtracting any expenses that were already disallowed by this Court's previous opinion.

In addition to arguing that the trial court awarded Barnes for unnecessary repairs and improvements, defendant also implies that the amount charged for each of the repairs was excessive. On appeal, defendant only offers minimal argument regarding this point. Defendant essentially asserts that because the expenditures were not authorized by a court before they were made, plaintiff bears a burden of proving that the expenditures were reasonable. Quoting Judge Swartz, who was originally assigned to this matter in the Circuit Court, defendant states that the sheer cost of the expenditures is evidence that the expenditures were not reasonable because the apartment complex "is not the Taj Mahal." Defendant believes that Barnes failed to limit his expenditures and that his spending was unjustified. However, the record does not support this contention. It is uncontested that Fulton had previously testified that he believed Barnes's assessed charges were reasonable and were lower than Fulton himself would have charged. In contrast, defendant merely cites to the fact that the assessed value of the property decreased after Barnes completed his work. Defendant illogically correlates the two events and implies that

Barnes actually *caused* the drop in value. In doing so, defendant fails to consider the multitude of factors that can impact the value of property. Defendant does not present this Court with any persuasive argument regarding the amount of Barnes's expenditures. As a result, that portion of the court's award is affirmed, with the exception of the previously disallowed expenses referenced above.

Defendant next asserts that the trial court erred in awarding Barnes compensation in the form of a 22.5 percent mark-up. We disagree. This Court reviews a trial court's decision regarding the proper amount of compensation for a receiver for an abuse of discretion. *Kircher*, 281 Mich App at 273. "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id*.

As this Court explained in *Kircher*, 281 Mich App at 281-282, a receiver has a right to reasonable, not excessive, compensation for his services. Originally, the trial court awarded Barnes compensation in the form of a 25 percent markup on all of his expenditures. This Court declared that the compensation was excessive. *Id*. On remand, the trial court awarded compensation in the form of a 22.5 percent markup after receiving briefs from the parties. The brief submitted by Barnes was supported by his own affidavit, in which he stated that his previous request for a 25 percent markup represented the recommendation from the National Construction Estimator, which is the standard manual for the construction industry. Barnes stated that a markup of 22.5 percent would be fair and that anything less than 20 percent would be unreasonable.

On appeal, defendant asserts that a markup of 22.5 percent is unreasonable and unprecedented. In support of his position, defendant cites to a law professor's survey on receiver compensation, which cites individual receiver awards from various states. We are not persuaded by the evidence. To begin, it is disingenuous to state that a 22.5 percent markup is unprecedented. Rather, defendant has previously been required to pay Barnes a 25 percent markup in litigation before this Court. See *Ichesco v Rankin*, unpublished opinion of the Court of Appeals, entered March 13, 2008 (Docket No. 272905). Further, defendant offers no evidence that 25 percent is not the customary markup in the construction industry. Consequently, defendant has not established that the trial court acted outside the principled range of outcomes in awarding a 22.5 percent markup.

Finally, defendant urges this Court to reconsider its opinion before remand and determine that plaintiff was improperly awarded costs and fees and that it was improper to appoint a receiver prior to a proper finding of nuisance. Defendant asserts that it is proper to revisit these issues pursuant to MCR 2.604. We disagree.

As this Court has previously explained:

> The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. 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. The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing

> lawsuit. [*Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001) (internal citations omitted).]

Defendant does not contest that the issues in question have already been decided by this Court in the course of this litigation. Rather, he relies on MCR 2.604, which provides:

> (A) Except as provided in subrule (B), an order or other form of decision adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. Such an order or other form of decision is not appealable as of right before entry of final judgment. A party may file an application for leave to appeal from such an order.
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> (B) In receivership and similar actions, the court may direct that an order entered before adjudication of all of the claims and rights and liabilities of all the parties constitutes a final order on an express determination that there is no just reason for delay.

As this Court has previously described, MCR 2.604 permits a trial court to correct its own orders while particular forms of litigation are proceeding. *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). Defendant offers no authority for the proposition that the rule applies to this Court and that it renders the law of the case doctrine inapplicable and eliminates the procedural necessity of a motion for reconsideration. Absent such authority, it would be improper for this Court to disregard its previous opinion.

Affirmed in part, vacated in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens