# STATE OF MICHIGAN

# COURT OF APPEALS

DAVID ANTHONY and HOLLY ANTHONY,

Plaintiffs/Cross-Defendants-Appellants,

v

DELAGRANGE REMODELING, INC.,

Defendant/Cross-Plaintiff-Appellee,

and

DENNIS YODER, GREGORY DALMAN, and DELAGRANGE HOMES, INC.,

Defendants-Appellees.

UNPUBLISHED
March 21, 2013

No. 304097
Branch Circuit Court
LC No. 00-008579-CK

Before: STEPHENS, P.J., and HOEKSTRA and KRAUSE, JJ.

PER CURIAM.

Plaintiffs, David and Holly Anthony, appeal as of right the circuit court's order granting defendant, Dennis Yoder,[1] relief from judgment and ordering plaintiffs to repay Yoder for his overpayment of a civil judgment. For the reasons stated in this opinion, we affirm in part and vacate in part and remand for entry of a repayment order in accordance with this opinion.

This Court's opinion in *People v Yoder*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2008 (Docket No. 273435), is the proper beginning point for analysis of the issues before us because it is the lynchpin that ultimately gives rise to the issues raised on appeal. In that case, this Court remanded to the district court for correction of "manifestly unjust" circumstances regarding Yoder's payment of restitution in a criminal proceeding against Yoder for building without a license. The same instance of building without a license that led to the criminal proceeding against Yoder gave rise to the contract dispute

[1] We note that Dennis Yoder is the only defendant involved in this appeal because he is the only defendant who was ordered to satisfy both the civil judgment and pay restitution.

between the Anthonys and Yoder that resulted in a judgment in favor of the Anthonys.[2] The restitution money was distributed to the Anthony's contrary to the district court's order that the restitution payments remain in escrow pending the outcome of the civil lawsuit.

In *People v Yoder*, this Court specifically held that the circumstances surrounding Yoder's restitution payments were "manifestly unjust," and remanded the case to the district court for further proceedings in regard to the restitution and attorney fee issues.[3] Specifically, this Court found that based on the district court's statements at the July 14, 2003 sentencing hearing, Yoder "reasonably understood that the amounts he would pay in restitution would be held in escrow subject to the ultimate determination in the civil case." *Id.* at *4. This Court noted that the district court entered amended orders of probation, upon petition of the probation department, that increased the amount of restitution to be paid regarding attorney fees on four occasions without holding a hearing. *Id.* The district court also began distribution of the restitution money to plaintiffs in October of 2003; also without holding a hearing. *Id.* Thus, this Court essentially concluded that because the district court released Yoder's restitution payments to the Anthonys, the Anthonys obtained a double recovery.[4] Accordingly, this Court in *People v Yoder*, remanded the case to the district court to effectuate a remedy that would return Yoder's restitution payments and correct the manifest injustice that occurred.

On June 2, 2008, the district court held a hearing regarding this Court's remand, and it issued a written order on June 30, 2008. The district court found that the intent of its probation order was "to provide restitution which tracked the final outcome of the civil action" and noted "district court conditional payments were inadvertently paid to [plaintiffs]." The district court further concluded that Yoder "met the obligation of restitution by payment of $375,000 in the circuit court action" and accordingly, amended the restitution order to provide that "no additional restitution or duplicate restitution is owed" by Yoder. The district court then concluded that Yoder escrowed with the district court during his period of probation a total of $445,892.56 in restitution, and that the entire sum was "inadvertently" paid to plaintiffs. The district court further concluded that as of June 2, 2008, $54,200.20 in interest had accumulated. However, the district court also concluded that plaintiff was entitled to recover attorney fees in the amount of

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[2] The civil proceedings between the Anthonys and Yoder were commenced in August 2000 and continued, including appeals, until July 26, 2007, when the circuit court entered an amended judgment in favor of plaintiffs. That judgment was satisfied by Yoder when the Anthonys converted two letters of credit that served as the appeal bond and totaled $375,000 into a loan. On November 2, 2007, the circuit court entered an order stating that the July 26, 2007 judgment was satisfied in full. We need not further recite the factual and procedural history of the civil action because it has no relevance to the issues on appeal in this case.

[3] In this Court, *People v Yoder* was an appeal by leave granted from the circuit court's review of the district court's denial of Yoder's motion for return of his restitution payments. The circuit court affirmed the district court's denial of Yoder's motion.

[4] The Anthonys obtained a double recovery because a total of $445,892.56 in restitution paid by Yoder was released to the Anthonys in addition to the satisfaction of the civil judgment.

$50,000 for defending Yoder's "unauthorized civil action brought in circuit court."[5] Thus, the district court ordered that after the total amount owed back to Yoder is reduced by $50,000, plaintiffs must repay the district court $450,092.76.

The prosecutor appealed the district court's order to the circuit court, and Yoder cross-appealed challenging the attorney fee portion of the order. The circuit court held a hearing on October 29, 2008. It entered a written order on December 11, 2008, wherein it ordered that the July 14, 2003 order of restitution of $233,000 was affirmed, and that Yoder was liable for attorney fees in the amount of $26,191.87 for plaintiffs' defense of his frivolous counter-complaint. The circuit court vacated all the remaining district court orders and found that setoff was the proper remedy in the circuit court civil action. It ordered a reconciliation conference to determine the proper amount of the setoff. The circuit court retained jurisdiction to enforce the terms of its order.

Apparently, after entry of the circuit court's order, Yoder filed a complaint for collection of money against plaintiffs, who had the action removed to federal court. Eventually this federal action was dismissed without prejudice. Neither party raises any issue regarding the federal action on appeal. In regard to the circuit court action, after entry of the December 11, 2008 order the circuit court record indicates that no action was taken in regard to its order until September 4, 2009, when Yoder filed two motions in an effort to facilitate action by the circuit court in regard to his claim of double payment. Yoder moved for an order of repayment in the circuit court as an appellate body in the criminal case, and he moved for relief from judgment pursuant to MCR 2.612(C)(1)(e) and (f) in the circuit court in regard to the civil case.

In a written opinion and order dated February 19, 2010, the circuit court denied Yoder's motion regarding repayment in the criminal case because it concluded that it lacked personal jurisdiction over plaintiffs to order repayment since plaintiffs were not parties to the criminal action. However, in the same order the circuit court granted Yoder's motion for relief from judgment and reopened the civil case to gain personal jurisdiction over the Anthonys for the purpose of ordering them to pay back the amount they recovered over and above the civil judgment. A hearing regarding the amount of the overpayment and double recovery was held on January 21, 2011. At that hearing Yoder, Gregory Miller, an accountant who also does auditing and tax work, and Stephen Smith, vice president in risk management at Tower Bank who was involved with the letter of credit that was issued as the appeal bond and later converted to satisfy the civil judgment, all testified. Additionally, several exhibits offered by both parties were admitted.

On May 3, 2011, the circuit court issued an order granting Yoder repayment. The circuit court found that plaintiffs "have created a situation involving excess payment in both the criminal and civil cases, primarily by accepting and refusing to release the money that has been

[5] After the Anthonys filed their civil complaint, Yoder filed a counter-complaint that was later dismissed on the ground that the builders were not licensed in Michigan and were accordingly barred from filing a claim for compensation for home construction services under MCL 339.2412.

determined by multiple courts to be the rightful property of [Yoder]." It further found that plaintiffs "have not shown any circumstance that would entitle them to the overpayment that they have received" and that plaintiffs have instead made arguments "concerning [Yoder's] ability to challenge the excess payment." The circuit court stated that it "in accordance with law and equity cannot allow [plaintiffs] to keep the money that they wrongfully received and have since wrongfully withheld from [Yoder]." Thus, the circuit court ordered that a constructive trust be placed upon the money that plaintiffs received in restitution payments in the criminal case that exceeded the final judgment award in the civil case. The circuit court also ordered that plaintiffs return the $375,000 plus interest from the letter of credit redeemed by plaintiffs.

The circuit court noted that despite the fact that several courts (U.S. District Court, Michigan Court of Appeals, Branch County Circuit Court, Branch County District Court) concluded in one way or another that plaintiffs received a windfall and double payment, plaintiffs continued to refuse to pay any money back to Yoder and argued that the circuit court was the proper venue to resolve the overpayment issue because the district court lacked jurisdiction over them because they were not parties to the criminal case. After successfully arguing that position, plaintiffs then claimed that the circuit court lacked jurisdiction on grounds of res judicata, collateral estoppel, laches, and expiration of time for appeal. The circuit court also found that plaintiffs refused to comply with numerous court orders, and engaged in "frivolous delaying tactics" including motions for stay of proceeding, motions for adjournment, and a motion to disqualify. Thus, the circuit court concluded plaintiffs were liable for the amount of overpayment and for attorney fees and interest. The circuit court summarized its conclusions at the end of its opinion and order:

> 1. Plaintiffs received excess payments in both *People v Yoder, supra*, and *Anthony v DeLagrange Remodeling, et al, supra*.
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> 2. Plaintiffs are ordered to repay Defendant Yoder $561,859.21 for overpayment of restitution, conversion of the Letter of Credit, attorneys fees and interest, including interest as of January 21, 2011.
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> 3. Plaintiffs are ordered to pay Defendant Yoder for additional costs associated with conversion of the Letter of Credit in the amount of $5,219.62 as of January 21, 2011.
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> 4. Plaintiffs are ordered to pay Defendant's attorneys' fees plus interest from February 14, 2008. Defendants shall submit proposed attorneys' fees to the Court and Plaintiffs within 15 days of receipt of this order. Plaintiffs have 15 days to file objections.

Accordingly, when interest is factored in, the circuit court ordered plaintiffs to repay defendants a total of $567,078.83 in order to undo their double recovery and remedy Yoder's overpayment.

After entry of the order requiring repayment, Charles Bappert, who represented Yoder throughout the proceedings, submitted fee statements from February 14, 2008 to February 11, 2011. On June 3, 2011, plaintiffs filed objections to defendant's submission of attorney fee statements. A hearing regarding the award of attorney fees was held on June 17, 2011, and on

July 21, 2011, the circuit court issued a written order awarding Yoder attorney fees in the amount of $51,175.03. The circuit court further held that interest would accrue on the attorney fee award, starting from July 1, 2008. When the attorney fee award is added to the amount that the circuit court ordered plaintiffs to repay as a result of their double recovery, the circuit court found plaintiffs liable for $618,254.86, plus interest on the attorney fee award.

Now on appeal, plaintiffs seek to overturn the circuit court's order reopening the case, its order requiring repayment, and its order granting attorney fees.

## I. REOPENING THE CIVIL CASE

On appeal, plaintiffs first argue that the circuit court abused its discretion by reopening the civil case. Plaintiffs raise several arguments to support their contention that reopening the case was inappropriate, specifically plaintiffs argue that it was improper under the relief from judgment rule, and that further action in the civil case was barred by res judicata, collateral estoppel, laches, and judicial estoppel.

We review a trial court's ultimate decision to grant or deny relief from judgment for an abuse of discretion. *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). An abuse of discretion occurs when the decision results in an outcome falling outside the range of reasonable and principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009). The application of legal doctrines such as res judicata and collateral estoppel is reviewed de novo, as is the application of equitable doctrines such as laches, judicial estoppel, and setoff. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008); *Grace v Grace*, 253 Mich App 357, 368; 655 NW2d 595 (2002). A trial court's findings of fact in support of an equitable decision are reviewed for clear error. *Tenneco, Inc*, 281 Mich App at 444. "A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made." *Id.*

Our Supreme Court has recognized that "courts possess an inherent power to afford equitable remedies," and that an equitable remedy need not "derive from any declaration of substantive law" because courts have the power to afford such equitable remedies based on the "broad and flexible jurisdiction of courts of equity to afford remedial relief where justice and good conscience so dictate." *Tkachik v Mandeville*, 487 Mich 38, 59; 790 NW2d 260 (2010) (quotation marks and citation omitted). Moreover, MCL 600.601(1)(b) provides broad power and jurisdiction to circuit courts.[6] Further, Michigan law generally allows only one recovery for

[6] MCL 600.601(1) provides:

> (1) The circuit court has the power and jurisdiction that is any of the following:
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> (a) Possessed by courts of record at the common law, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.

an injury, and "where a recovery is obtained for any injury identical with another in nature, time, and place, that recovery must be deducted from the plaintiff's other award." *Grace*, 253 Mich App at 368-369.

In this case, it is not disputed that the civil judgment awarded to plaintiffs was satisfied. Further, it is not disputed that pursuant to an error in the district court, David Anthony received $445,892.56 in restitution payments. The restitution was ordered to compensate the Anthonys for Yoder's criminal action of building without a license, and at the sentencing hearing the district court specifically recognized that the restitution should be limited to any civil judgment. After this Court's remand in *People v Yoder*, the district court recognized that the payment of the restitution money to David Anthony was inadvertent. Moreover, any damages sustained by the Anthonys from Yoder's criminal action are identical to the civil damages in nature, time, and place since the civil judgment was for the same building activities that led to Yoder's criminal conviction. This Court made clear in *People v Yoder* that the distribution of the restitution payments in addition to the satisfaction of the civil judgment constituted manifest injustice, and that this double recovery must be addressed on remand. Thus, we conclude under the unique circumstances of this case that the circuit court's order reopening the civil case to gain personal jurisdiction over the Anthonys in order to remedy the overpayment by Yoder and to correct the Anthonys' double recovery was within its equitable powers.

Moreover, even assuming, as plaintiffs argue, that the requirements for relief from judgment pursuant to MCR 2.612(C) were not satisfied or that some other doctrine would technically preclude reopening the civil case, the circuit court's imposition of an equitable remedy need not "derive from any declaration of substantive law." *Tkachik*, 487 Mich at 59. It is clear that the equitable action of the circuit court was necessary in order to afford the remedial relief justice requires under the circumstances of this case. *Id.*

Plaintiffs also argue that reopening the civil case is inequitable because Yoder "slept on his appellate rights" by failing to pursue leave to appeal the circuit court's November 2, 2007 order. At the 2007 hearing, Yoder requested setoff for the same reasons articulated several times in both the district and circuit court; namely, that the Anthonys are not entitled to receive both the $375,000 from the letters of credit and the restitution money inadvertently disbursed by the district court because that would constitute a double recovery. The circuit court denied Yoder's requested relief, noting that it already addressed the double recovery issue when Yoder appealed the district court's ruling on the matter and that this Court had granted leave to appeal that decision. In this context, we conclude that Yoder did not sit on his appellate rights by failing to pursue leave to appeal the circuit court's November 2, 2007 order because the double recovery issue was already before this Court. Thus, Yoder's failure to request leave to appeal the circuit court's November 2, 2007 order did not constitute a failure to exercise his appellate rights such

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(b) Possessed by courts and judges in chancery in England on March 1, 1847, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.

(c) Prescribed by the rules of the supreme court.

that equity should bar the circuit court's decision to reopen the civil case to effectuate this Court's remand order in *People v Yoder* because Yoder did pursue those issues on appeal.

Therefore, we conclude that the circuit court properly exercised its equitable powers by reopening the civil case in order to gain the personal jurisdiction necessary to remedy the district court's administrative error of paying out the restitution money and to undo the Anthonys' double recovery. Accordingly, we reject plaintiffs' arguments regarding the circuit court's order reopening the civil case.

## II. THE REPAYMENT ORDER

Next, plaintiffs argue that the circuit court abused its discretion by awarding repayment. A trial court's award of damages following a bench trial is reviewed for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). This Court "will not set aside a nonjury award merely on the basis of a difference of opinion." *Id.* (quotation marks and citation omitted). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Id.*

Specifically, plaintiffs first argue that the circuit court lacked competent evidence of double recovery by plaintiffs, and that plaintiffs "established that the calculations offered by Yoder in support of his motion were based upon faulty assumptions." The only "faulty assumption" that plaintiffs identify is a claim that Yoder's expert, Gregory Miller, "failed to make any comparison of like kind damages in the evidence submitted to the Court and considered orders from the criminal trial court and the circuit court in appeal of the criminal matter." In particular, plaintiffs maintain that Miller failed to consider the fact that $233,000 of the restitution award was for the cost to complete the Anthonys' home, and that only $134,000 of the civil judgment was awarded for cost to complete. Plaintiffs argue that the circuit court's assumption that "money is money" was incorrect, and that "it is inappropriate to setoff for restitution payments made against damages which are not for cost to complete." Plaintiffs similarly argue that because the civil judgment was for different damages than the restitution, the only "overlapping" damages total $134,000, which is the cost to complete amount awarded in the civil judgment. Both of these arguments appear to be premised on the theory that the specific category of damage for which money was awarded is controlling, and that there can be no double recovery unless the money was awarded for the exact same type of damage. Plaintiffs cite no legal authority in support of these contentions. Thus, we consider the arguments abandoned. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001) (when a party fails to sufficiently brief the merits of an allegation of error, the issue is deemed abandoned on appeal).

Nevertheless, we note that this Court explained in *Grace*, 253 Mich App at 368, that determination of whether a double recovery has occurred requires this Court to ascertain what injury is sought to be compensated. In determining what injury is sought to be compensated, "the nature of the conduct causing the injury and the label attached to the plaintiff's claims are of little relevance." *Chicilo v Marshall*, 185 Mich App 68, 70; 460 NW2d 231 (1990). "[W]here a recovery is obtained for any injury identical with another in nature, time, and place, that recovery must be deducted from the plaintiff's other award. *Grace*, 253 Mich App at 369.

In this case, restitution was ordered after Yoder pleaded guilty to building without a license. Plaintiffs' entire civil damage award resulted from Yoder's conduct in building their home. If Yoder had not been building in Michigan without a license, plaintiffs would not have sustained any of the damages for which they recovered in the civil case. Restitution should be awarded for only those losses which are "easily ascertained and measured" and are "a direct result of a defendant's criminal acts." *People v White*, 212 Mich App 298, 316; 536 NW2d 876 (1995). It is clear that restitution was awarded for the losses plaintiffs sustained as a result of Yoder's criminal act of building without a license, and all of the civil damages – cost to complete, billing statement errors, and converted funds – can be said to directly result from Yoder's criminal act of building without a license. The fact that the civil damage award was split up into specific categories is "of little relevance," *Chicilo*, 185 Mich App at 70, because both the civil damage award and the restitution were obtained for identical injuries. *Grace*, 253 Mich App at 369. Thus, there must be a setoff. *Id.* Moreover, the restitution statute itself, MCL 780.766(9), requires that any restitution award be setoff against any amount later recovered as compensatory damages by the victim in a civil proceeding. Consequently, we reject plaintiffs' arguments.

For the same reason, we also reject plaintiffs' argument that the restitution order did not serve as a substitute for the civil damages and should accordingly not be setoff against the civil damages. While plaintiffs are correct that restitution does not serve as a substitute for civil damages, restitution must be setoff against a civil judgment when it would otherwise constitute double recovery. MCL 780.766(9). See also *People v Dimoski*, 286 Mich App 474, 482; 780 NW2d 896 (2009).[7]

Plaintiffs also attack the circuit court's power to order repayment on several grounds. First, plaintiffs argue that the restitution statute, MCL 780.766(9),[8] prohibits setoff because only David Anthony was named as a victim in the criminal case, and both David and Holly Anthony recovered in the civil case. Similarly, defendant argues that there were multiple defendants in the civil case and only Yoder in the criminal case; thus, setoff is not appropriate because it would

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[7] In *Dimoski*, this Court reversed a trial court order reducing an amount of restitution by the amount of an *unpaid* civil judgment. *Dimoski*, 286 Mich App at 482. This Court explained that the victim was entitled to the benefit of both the unpaid civil judgment and the restitution order to try to obtain monetary relief from the defendant. However, this Court made clear that the defendant was not entitled to a double recovery, and that reduction of the restitution award would be proper upon satisfaction of the civil judgment. *Id.*

[8] MCL 780.766(9) provides:

> Any amount paid to a victim or victim's estate under an order of restitution shall be setoff against any amount later recovered as compensatory damages by the victim or the victim's estate in any federal or state civil proceeding and shall reduce the amount payable to a victim or a victim's estate by an award from the crime victim services commission made after an order of restitution under this section.

benefit the other defendants. We review de novo issues of statutory interpretation. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.* at 247.

We find plaintiffs' arguments unavailing. First, ordering the Anthonys to return the excess funds does not affect the other defendants in the civil case. It is not disputed that Yoder was the only defendant who paid restitution. The fact that there were multiple defendants in the civil proceeding has no impact on the repayment of restitution. Next, the fact that only David Anthony was named as a victim in the criminal case should not prevent the circuit court from exercising its equitable powers to remedy the manifest injustice that occurred as a result of Yoder satisfying the civil judgment and paying restitution for the same damages; thus resulting in Yoder paying more than double what the circuit court ultimately determined were the damages to which the Anthonys were entitled in the civil action.

Further, nothing in the plain language of MCL 780.766 prohibits the circuit court's actions, and it is clear that in drafting MCL 780.766(9), which provides that an order of restitution shall be setoff against any amount later recovered as compensatory damages by the victim, the Legislature intended to prevent double recovery. Thus, we conclude that the circuit court's broad equitable powers and the clear inequity that resulted in this case trumps any technical problem that might arise from the fact that only David Anthony was named as a victim.

Next, plaintiffs argue that Yoder lacked standing to assert his claim of double payment because Delagrange Homes, not Yoder, make the restitution payments. Whether a party has standing is a legal question that is also reviewed de novo. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 493; 815 NW2d 132 (2012).

In *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010), our Supreme Court explained the standing requirements:

> a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Even if plaintiffs are correct that Delagrange Homes made the restitution payments and not Yoder, any restitution that was paid was paid on Yoder's behalf because it was Yoder who was ordered to pay restitution as part of his probation. Thus, Yoder still has a "substantial interest" that affects him in a manner different from the citizenry at large, and accordingly, should be accorded standing to challenge any double payment. However, we note that at the hearing regarding repayment, Yoder's attorney stated that Yoder "testified that he did indeed

make the payments as required by the court," and noted that the district court ledger showing the restitution payments indicate that Yoder was the person making the payments. Thus, we reject plaintiffs' argument that Yoder lacks standing to challenge the double recovery.

Therefore, because we find none of plaintiffs arguments attacking the repayment order availing, and because plaintiffs do not challenge the specific mathematical calculations of the circuit court, we affirm the circuit court's conclusion that plaintiffs received an overpayment of $478,576.18, and that this overpayment must be repaid to Yoder in order to undo the unauthorized double recovery and remedy the manifest injustice that this Court recognized in *People v Yoder*.[9]

## III. INTEREST

Next, plaintiffs argue that interest should not have been included in the May 3, 2011 order of repayment because there is no legal authority for the award of interest on a setoff, and neither Yoder nor the circuit court cites any. Plaintiffs note that interest is only permitted on a judgment or settlement, and is calculated from the time the complaint is filed. Plaintiffs argue that in this case, no complaint was filed and, thus, interest is not recoverable. Similarly, plaintiffs argue that there is no legal basis for awarding interest on the costs associated with the conversion of the letters of credit.

We review an award of interest in equity for an abuse of discretion; however, this Court reviews de novo an award of interest pursuant to MCL 600.6013. *Olson v Olson*, 273 Mich App 347, 349; 729 NW2d 908 (2006). Further, whether MCL 600.6013 applies to a particular circumstance is a question of statutory interpretation that we review de novo. *Id.*

MCL 600.6013 governs the interest rate on a judgment or settlement. MCL 600.6013 provides in pertinent part:

> Sec. 6013. (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after

[9] In its May 3, 2011 order requiring repayment, the circuit court found, based on the expert testimony and exhibits, that the original civil judgment in favor of plaintiffs, including interest, was $315,734.83 and the attorney fees to which plaintiffs were entitled, including interest, totaled $26,581.55. Thus, the circuit court concluded that the total amount that plaintiffs were entitled to was $342,316.38. This amount was disbursed to plaintiffs by March 22, 2005. (The district court's records indicate that on that date a total of $356,154.20 in restitution was disbursed to plaintiffs.) Thus, the circuit court concluded that any amount paid after that date to plaintiffs constituted a double recovery. Accordingly, plaintiffs' double recovery included the conversion of the letters of credit for a total of $375,000 on August 21, 2007, and $103,576.18 in excess from the total $445,892.56 in restitution payments released to plaintiffs. Thus, the circuit court concluded that plaintiffs must return a total of $478,576.18 to Yoder. The circuit court also concluded that Yoder was entitled to statutory interest, bringing plaintiffs' total liability to Yoder to $561,859.21.

> October 1, 1986, interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment.
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> * * *
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> (8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

The application of MCL 600.6013 has been interpreted by this Court and our Supreme Court. In *In re Forfeiture of $176,598*, 465 Mich 382, 383; 633 NW2d 367 (2001), the Court held that money ordered returned to its owner under the forfeiture procedure does not constitute "a money judgment recovered in a civil action," and statutory interest is accordingly not payable. The Court explained that for purposes of the judgment interest statute, "a money judgment is one that orders the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred." *Id.* at 386. The Court concluded that because the forfeiture statute makes clear that any money to be returned is specific property, the return of money does not constitute an order to pay a sum of money, but is rather a direction to return property. *Id.* at 386-387.

The Court further explained that forfeiture proceedings do not constitute a "civil action" for purposes of the interest statute. *Id.* at 387. The Court noted that MCL 600.6013 references the filing of a complaint in each section, and concluded that because no complaint was filed by the owner of the property that the prosecutor unsuccessfully sought to seize in a forfeiture action the forfeiture proceeding was not a civil action. *Id.* at 388. The Court concluded by summarizing several scenarios that do not constitute "typical civil actions proceeding an award of a money judgment." *Id.* The Court noted these examples:

> *Reigle v Reigle*, 189 Mich App 386, 392-393, 474 NW2d 297 (1991) (the statute does not apply to money awards in divorce judgments); *Oliver v State Police*, 132 Mich App 558, 572-577, 349 NW2d 211 (1984) (no statutory interest on an award of back pay in a circuit court review of an employee discharge under civil service laws); *In re Cole Estate*, 120 Mich App 539, 548-551, 328 NW2d 76 (1982) (an order awarding a forced share in an estate is not a "money judgment recovered in a civil action" entitling a spouse to an award of judgment interest). [*Id.*]

In *Olson*, 273 Mich App at 350, the plaintiff argued that interest was mandatory in all cases to which the statute applies, and argued that the statute applied to her situation, which was a money award in a divorce action. This Court disagreed with the plaintiff, and citing *Reigle*,

held that MCL 600.6013 does not apply to divorce actions. *Id.* at 351. This Court further explained that "[a] party, despite prevailing in the underlying action, has not obtained a money judgment recovered in a civil action if that party has not filed a complaint in the proceeding." *Id.* at 353 (quotation marks and citation omitted).

Interest can also be awarded in equity. *Id.* at 354. At least in the context of a property settlement in a divorce case, the purpose of equitable interest is not to compensate a party for lost use of funds, but rather, to prevent "the delinquent party from realizing a windfall" and to assure "prompt compliance with court orders." *Id.* at 354-355. In *Olson*, this Court found that the trial court did not abuse its discretion when it denied equitable interest because the plaintiff failed to demonstrate that the defendant would realize a windfall if she were not awarded interest and because the defendant promptly complied with the order to pay attorney fees. *Id.* at 355.

In this case, Yoder never filed a complaint; rather, he filed several motions asking for relief from his restitution obligation and asking for return of his overpayment. The motion that finally led to the hearing that resulted in the order for repayment was a motion for relief from judgment. Thus, we conclude that MCL 600.6013 is inapplicable, and an award of statutory interest is improper because the statute plainly refers to judgments recovered as a result of filed complaints and no complaint was ever filed by Yoder in this case. Nevertheless, we find that interest was warranted in equity. While the circuit court did not base its interest award on equitable principles, we may affirm a trial court order if the right result was reached for the wrong reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). We conclude that plaintiffs would receive a windfall absent the award of interest because they have had the benefit of accrued interest while the money has been in their possession. Further, the record supports the conclusion that plaintiffs were intentionally delaying and refusing to pay back the overpayment despite the fact that since this Court's remand opinion in *People v Yoder*, in February 2008, it was clear that repayment would be required. Additionally, plaintiffs must have been aware that they received double payment for their damages, which after all appeals totaled $313,893.72, when they collected $445,892.56 from the district court in addition to converting the letters of credit to obtain $375,000.

The circuit court calculated interest on the final civil judgment amount from the time of plaintiffs' original complaint, August 29, 2000, and it calculated interest on the attorney fees from July 14, 2003, the date that Yoder pleaded to the code violation charge and the probation order was entered. Finally, it calculated interest on the costs associated with the conversion of the letters of credit from the days those costs were incurred, August 21, 2007 and October 26, 2010, respectively. We find that calculation of interest from the date that plaintiffs filed their complaint in the civil action is inequitable, and we accordingly vacate the circuit court's calculation of interest from that date and remand for calculation of interest beginning on August 5, 2005, which is the date Yoder's first motion asserting overpayment and his entitlement to repayment was filed. We conclude that the interest on the attorney fees should be calculated from February 14, 2008, the date that this Court's opinion in *People v Yoder* finding manifest injustice was released because after *People v Yoder* there was no doubt that repayment of the double recovery was necessary. The circuit court's interest calculations regarding the letters of credit are not erroneous. Similarly, we find no error in the circuit court's use of the statutory interest rates despite the fact that equity compels the award of interest, not the statute, because use of the statutory interest rates appears to be equitable in this case and plaintiffs offer no

argument regarding the interest rate applied. Therefore, we remand for recalculation of interest on the overpayment amount and attorney fees in accordance with this opinion.

## IV. ATTORNEY FEES

Plaintiffs also challenge the circuit court's award of attorney fees. In this case, the circuit court, in its May 3, 2011 order, specifically ordered plaintiffs to pay defendants' attorney fees plus interest from February 14, 2008, despite the fact that neither party moved for attorney fees prior to the entry of its order. It ordered the parties to submit proposed attorney fees and objections within 15 days. The circuit court explained in its May 3, 2011 order that it was awarding attorney fees because plaintiffs have "vehemently refused" to comply with numerous court orders making clear that the Anthonys' double recovery was impermissible. The circuit court stated that:

> Instead of complying with multiple court orders from the district court, plaintiffs argued that the court lacked jurisdiction over plaintiffs as victims in the district court and that the proper venue was the circuit court civil case. After successfully arguing that position, plaintiffs then claim that this court lacks jurisdiction on grounds of res judicata, collateral estoppel, laches and expiration of time for appeal.

The circuit court then noted that plaintiffs also raised standing arguments, which it found to have no merit. The circuit court then noted that plaintiffs

> have filed motions for stay of proceedings, motion for adjournment, and [a] motion to disqualify, all adding to the delay. Taken together, plaintiffs' refusal to comply with numerous court orders as well as frivolous delaying tactics evidences a deliberate and intentional disregard of those prior rulings and an indifference to the rule of law consistent with a consciousness of guilt.

Another order entered on May 3, 2011, further explained that plaintiffs were liable to Yoder for attorney fees regarding plaintiffs' motion for adjournment and motion to disqualify because the circuit court concluded those motions were frivolous and made purely for purposes of delay.

Yoder's attorney thereafter filed a fee statement, and plaintiffs filed an objection. On June 17, 2011, a hearing regarding attorney fees was held. At the hearing, plaintiffs again objected to the fact that no motion for attorney fees was ever made, and the circuit court allowed defendant to make an oral motion on the record for attorney fees. The circuit court reiterated its statements from the May 3, 2011 opinions regarding why it found plaintiffs' defense to Yoder's requests for repayment frivolous. Plaintiffs then objected to the fact that Yoder's attorney's bills included charges from the criminal court action, and argued plaintiffs should not be liable for those attorney fees because they were not involved in the criminal action. The circuit court stated that the matters were "all related to the same subject matter, which is the recoupment of an overpayment," and stressed that plaintiffs' attorneys were actually present at most of the criminal proceedings.

The circuit court then briefly addressed plaintiffs' argument regarding interest, stating that this Court has held that interest on attorney fees is awardable. The circuit court then

apparently referenced this Court's unpublished opinion dealing with one of the appeals from the civil action – *Anthony v Delagrange Remodeling, Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 15, 2005 (Docket No. 252644).

The rest of the hearing regarding attorney fees was dedicated to the testimony of defendant's attorney, Charles Bappert, who testified regarding his fee and whose testimony touched upon most of the reasonableness factors for a fee set forth in MRPC 1.5(a).

On July 21, 2011, the circuit court issued a written order awarding defendant attorney fees. The order specifically notes invoice items from Bappert's fee statement that the circuit court concluded were not awardable, and then concludes that after those identified charges are deducted, plaintiffs are liable to defendant for $47,254 in attorney fees and $3,922.03 in costs. The circuit court further concluded that statutory interest accrued from July 1, 2008. The July 21, 2011 order does not provide the basis for the award of attorney fees, but in its May 3, 2011 order it specifically finds that plaintiffs' legal position on the issue of overpayment was frivolous and without legal merit under MCL 600.2591(3)(a), and it concludes that Yoder "is hereby awarded [attorney] fees and costs under MCL 600.2591(1)."

On appeal, plaintiffs argue that attorney fees were not proper in this case for several reasons. We review for an abuse of discretion a trial court's award of attorney fees and costs. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* We review a trial court's determination regarding whether an action is frivolous under MCL 600.2591(1) for clear error. *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005). Again, "[a] decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

We review de novo issues of statutory interpretation. *Krohn*, 490 Mich at 155. The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Driver*, 490 Mich at 246-247. "When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Id.* at 247.

"The general American rule is that attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Khouri*, 481 Mich at 526 (quotation marks and citation omitted). Michigan law provides for the imposition of sanctions against a party who brings a frivolous lawsuit. MCL 600.2591; *BJ's & Sons Constr Co, Inc*, 266 Mich App at 404. "The purpose of imposing sanctions for asserting frivolous claims 'is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose.'" *Id.* at 405, quoting *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 723; 591 NW2d 676 (1998).

MCL 600.2591(1) provides that "if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action." MCL 600.2591(2) explains that costs and fees awarded under the statute "shall include all reasonable costs actually

incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees." The statute states that an action is "frivolous" if at least one of the following conditions is met:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

If attorney fees are awarded as a sanction for a frivolous lawsuit pursuant to MCL 600.2591(2), the awarded attorney fees must be reasonable and the party requesting fees bears the burden of proving the reasonableness of the fees. *Khouri*, 481 Mich at 528-529. To assess whether a fee is reasonable, courts should consider the non-exhaustive list of factors set forth by MRPC 1.5(a):

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Plaintiffs first argue that attorney fees should not have been awarded because MCL 600.2591(1) does not permit the sua sponte award of attorney fees as a sanction for a frivolous action because the plain language of the statute requires a motion by "any party." While we agree that the plain language of MCL 600.2591(1) does not permit a trial court to sua sponte impose sanctions for filing a frivolous document, MCR 2.114(E)[10] permits a trial court to sua

[10] MCR 2.114(E) provides:

sponte impose sanctions for filing a frivolous document, and sanctions under MCR 2.114(E) also permit the award of reasonable attorney fees. As recently noted by this Court in an unpublished opinion dealing with a similar issue where the trial court sua sponte imposed sanctions ostensibly under MCL 600.2591, "it is the substance of the trial court's order, rather than its label, that steers this Court's review," and because MCR 2.114 permits sanctions for the filing of frivolous documents it provides the same authority for the imposition of attorney fee sanctions. *Davis v Mich High Sch Athletic Ass'n, Inc*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2010 (Docket No. 287623).[11] MCR 2.114(F) provides that a party pleading a frivolous claim or defense under that rule is also subject to costs provided in MCR 2.625(A)(2), which specifically states that "costs shall be awarded as provided by MCL 600.2591." Thus, we conclude that the award of attorney fees in this case was within the power of the circuit court because the circuit court was empowered to sua sponte award sanctions under MCR 2.114. Moreover, MCR 2.114 permits the same sanctions as MCL 600.2591; thus, we find that the circuit court's analysis of MCL 600.2591 was appropriate.

Similarly, plaintiffs also argue that the plain language of MCL 600.2591(1) requires sanctions to be "in connection with the civil action," and that the sanctions awarded in this case were not connected to the civil action. We find this argument unavailing because the sanctions in this case were related to the civil action in that everything revolved around the overpayment of the civil judgment, and the restitution was ordered to be contingent on the civil judgment. Thus, the attorney fees were appropriately connected to the civil action in light of the unique circumstances of this case.

Further, plaintiffs argue that they did not fail to comply with any court order, and that they reasonably refused to repay money that they dispute they owe, and for which no certain sum was established; thus, plaintiffs did not engage in any conduct that would give rise to sanctions under MCL 600.2591. The circuit court specifically found that plaintiffs' action was frivolous, and we review a trial court's determination regarding whether an action is frivolous for clear error. *BJ's & Sons Constr Co, Inc*, 266 Mich App at 405. The circuit court specifically set forth its reasons for finding plaintiffs' refusal to repay frivolous, including the fact that several courts had made it clear that the double recovery was not permissible. Thus, we conclude that the circuit court did not clearly err because under these circumstances we are not left with a definite and firm conviction that a mistake has been made. *Guerrero*, 280 Mich App at 677.

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> **(E) Sanctions for Violation.** If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

[11] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions can be instructive or persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

Plaintiffs also argue that the circuit court failed to consider whether the awarded attorney fee was reasonable, and made no findings of fact in regard to the factors set forth by MRPC 1.5(a).

In actions tried without a jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 2.517(A)(1). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). See also MCR 6.403. This Court has explained "the requirements of MCR 2.517(A)(1) are met where it appears that the trial court was aware of the factual issues and has correctly applied the law." *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990); *People v Lanzo Constr Co*, 272 Mich App 470, 479; 726 NW2d 746 (2006).

While plaintiffs are correct that the circuit court did not make any explicit findings of fact in regard to the reasonableness factors set forth by MRPC 1.5(a), the circuit court did identify specific fee entries that it implicitly found unreasonable because it explicitly excluded these entries from the fee award. Moreover, extensive testimony from Bappert during the hearing provided the circuit court with the information necessary to make factual findings regarding the reasonableness of the fee. Thus, we conclude that under these circumstances, the circuit court's findings were sufficient because there was an evidentiary basis for the circuit court to evaluate the reasonableness of the fee, and it appears that the circuit court was aware of the factual issues and correctly applied the law. Therefore, the circuit court's decision was not outside the range of reasonable and principled outcomes. *Khouri*, 481 Mich at 526.

Alternatively, plaintiffs also argue that the circuit court's award of interest on the attorney fees had no basis in law and was not reasonable under the facts of this case. Plaintiffs cite an unpublished opinion of this court[12] to argue that MCL 600.6013 should not apply to the award of attorney fees. We disagree. Because MCL 600.6013(8) specifically states: "Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs," we find attorney fees are expressly included by the statute. See also *Ayar v Foodland Distrib*, 472 Mich 713,717; 698 NW2d 875 (2005). However, for the same reasons discussed *supra*, regarding judgment interest, we also remand for recalculation of the interest on the attorney fees from February 14, 2008.

## V. EVIDENTIARY ISSUES

Next, plaintiffs argue that the circuit court abused its discretion by refusing to allow testimony from the Anthonys regarding the equities between the parties, and then imposing an equitable remedy. Plaintiffs maintain that the testimony was necessary because the circuit court imposed a constructive trust, and the proffered testimony would have demonstrated that a constructive trust was inappropriate.

[12] *Nartron Corp v Gen Motors*, unpublished opinion per curiam of the Court of Appeals, issue January 6, 2005 (Docket No. 245942).

We review a trial court's decision to admit or preclude evidence for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). An abuse of discretion exists if the results are outside the range of principled outcomes. *Id*. at 158.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999); *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 564 n 6; 766 NW2d 896 (2009). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002); *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). Further, error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected, MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004), or unless the failure to grant relief would be inconsistent with substantial justice, MCR 2.613(A); *Lewis v Legrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003).

In this case, plaintiffs argue that had they been permitted to offer the testimony that the circuit court refused to allow, they would have demonstrated that they "had clean hands" and that equity did not require the repayment ordered by the circuit court. In plaintiffs' offer of proof during the hearing, plaintiffs' counsel explained that the testimony would give the court a "firm understanding" of the roles of the parties in regard to how the case proceeded to this point. Plaintiffs' counsel later explained that the proffered testimony would have allowed the Anthonys to explain "their understanding of how the proceedings evolved" and their understanding of "Yoder's attempts at getting it resolved." Plaintiffs' counsel also explained that the testimony would be relevant to "the conduct of the parties."

In response to plaintiffs' counsel's offer of proof, the circuit court stated that the testimony was not necessary because the parties' relationship was not relevant to its determination, and that the only question was whether Yoder satisfied the civil judgment. The circuit court explicitly stated that it did not want to "go down the road" regarding "clean hands" and that "the sole purpose of this hearing" was to determine what amounts were "ordered by the court," and "justified" by the Court of Appeals, and to determine the exact amount of the overpayment that needed to be repaid.

We reject plaintiffs' argument that the circuit court's refusal to allow the testimony was error. Whether the relief granted by the circuit court was grounded in law or equity is irrelevant to whether the testimony should have been admitted because we agree with the circuit court that the issue of whether repayment was necessary was already determined by this Court in *People v Yoder* and acknowledged by the district court after remand. Thus, the only issues to be decided at the January 21, 2011 hearing were the amount of the overpayment and any interest to be assessed. Plaintiffs' proffered evidence was not relevant to those issues; therefore, the evidence was plainly irrelevant and only relevant evidence is admissible. MRE 402. Accordingly, we conclude that plaintiffs are not entitled to any relief on this issue.

## VI. JUDICIAL DISQUALIFICATION

Finally, plaintiffs argue that the circuit court judge abused his discretion by denying their motion to disqualify under MCR 2.003(C) because he engaged in ex parte communication with defendant's attorney and he is clearly biased against plaintiffs.

"This Court reviews a trial court's factual findings on a motion to disqualify for an abuse of discretion and reviews de novo the trial court's application of the facts to the law." *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable outcomes. *Id.*

"Due process requires that an unbiased and impartial decision-maker hear and decide a case." *Id*. A judge should be disqualified when he cannot hear a case impartially pursuant to MCR 2.003. *Coble v Green*, 271 Mich App 382, 390; 722 NW2d 898 (2006). "A trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption." *Mitchell*, 296 Mich App at 523.

MCR 2.003 provides in pertinent part:

> **(B) Who May Raise.** A party may raise the issue of a judge's disqualification by motion or the judge may raise it.
>
> **(C) Grounds.**
>
> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either (*i*) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556] US [868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (*ii*) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.
>
> (c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> (d) The judge has been consulted or employed as an attorney in the matter in controversy.
>
> (e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.
>
> (f) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

> (g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> > (*i*) is a party to the proceeding, or an officer, director, or trustee of a party;
> >
> > (*ii*) is acting as a lawyer in the proceeding;
> >
> > (*iii*) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or
> >
> > (*iv*) is to the judge's knowledge likely to be a material witness in the proceeding.

In *Caperton*, 556 US at 876, the Court explained that most instances of judicial bias do not rise to a constitutional level; however, due process requires a judge to recuse himself when he was "a direct, personal, substantial, pecuniary interest in a case." (Internal quotation marks and citation omitted). Cannon 2 of the Michigan Code of Judicial Conduct instructs that a judge should avoid impropriety and the appearance of impropriety in all activities.

The hearing regarding plaintiffs' motion to disqualify was held on July 16, 2010. At the hearing, plaintiffs argued that the circuit court judge should be disqualified because he communicated with Yoder's attorney regarding the civil case when Yoder's criminal case was before him, and he was "openly hostile" toward plaintiff, particularly when he admonished plaintiff for not settling the case. Plaintiff also argued that it was clear that the circuit court judge formed opinions regarding the case while the criminal matter was pending before him and before plaintiffs had any chance to participate. Plaintiffs' counsel also argued that the circuit court's refusal to grant his request for an adjournment demonstrated bias, or at least the appearance of bias, against plaintiffs.

The circuit court judge corrected plaintiff on the record and stated that he was admonishing both sides for not settling the case. The judge further found that he had no ex parte communications since the prosecuting attorney and Yoder's attorney were always both present or served with every communication that occurred, and the Anthonys were not parties to the criminal case, and thus, did not need to be present. The judge further stated that he does not personally know, and has never actually seen, any of the parties involved in the case, explaining that he only dealt with the attorneys. The judge cited MCR 2.003 and found that he has no bias or prejudice for or against either party or their attorney and that he has not pre-judged the case. He then denied the motion for disqualification. After the judge made his ruling, plaintiffs' motion to disqualify was assigned to Cass County Circuit Court Judge Michael Dodge by the State Court Administrative Office (SCAO) for de novo review. On September 8, 2010, Judge Dodge also issued an order denying plaintiffs' motion to disqualify the circuit court judge.

On appeal, plaintiffs do not identify any specific ground for disqualification stated in MCR 2.003 that governs the instant matter. Rather, plaintiffs merely argue that the circuit court judge was clearly biased against the Anthonys and clearly pre-judged the case. Plaintiffs rely on what they characterize as a "hostile nature" toward the Anthonys, and the fact that the court denied their motion for adjournment as evidence of this alleged bias. Plaintiffs also maintain that

ex-parte communications between defendant's counsel and the circuit court judge require the judge's disqualification.

First, we conclude that there is no evidence in the record of the circuit court acting with a "hostile nature" toward the Anthonys, and the excerpt from the January 21, 2011 hearing that plaintiffs cite as evidence does not rise to the level of hostility demonstrating bias. Further, the quoted hearing occurred after plaintiffs' motion for disqualification was brought and denied; thus, its evidentiary value toward whether plaintiffs' motion should have been granted is limited. Similarly, the fact that the circuit court judge denied a motion for adjournment in this case, that has been going on since August of 2000, is not evidence that he is biased against plaintiffs; nor does it create any appearance of impropriety.

Next, in regard to the alleged ex parte communication, we conclude the correspondence was not improper and does not create any appearance of impropriety. First, all the letters were sent during the criminal proceedings in the district court to which the Anthonys were not parties. Further, all the letters were also served upon the prosecuting attorney, who was representing the Anthonys' interests, as victims, in that case. Thus, it is not as if Yoder's attorney was engaged in secret communication with the judge; rather, the letters were served upon all parties to the case. Second, the letters deal with inconsequential matters. The first letter discusses consolidation of the civil case and the criminal case. The second letter is a cover letter to a proposed order memorializing the district court's rulings from the bench. The third letter is in regard to Edward DeVito and whether he would provide an accounting. The fourth letter is a cover letter informing the judge regarding the outcome of the federal case and informing the judge that Bappert has filed two motions in the circuit court (motions that were served on the Anthonys) regarding repayment, and the final letter requests a hearing regarding the filed motions and indicates that copies of the hearing notices were going to be served on the Anthonys. Therefore, we conclude that the circuit court did not abuse its discretion by denying plaintiffs' motion for disqualification.

## VII. CONCLUSION

In summary, we conclude that the circuit court had authority under its broad equitable powers to reopen the civil case and order repayment. We find no error in the circuit court's conclusion that plaintiffs received an excess recovery of $478,576.18, and accordingly, must repay that amount. Similarly, we find no error in the circuit court's order of attorney fees and costs of $51,176.03. However, we remand for recalculation of interest on both awards. The interest on the repayment for the judgment double recovery must be calculated from August 5, 2005; and the interest on the attorney fees and costs must be calculated from February 14, 2008. We find no error regarding the circuit court's evidentiary decisions during the repayment hearing, and we similarly find no error regarding the denial of plaintiffs' disqualification motion.

Affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion. We retain jurisdiction. No costs pursuant to MCR 2.625(A)(1), neither party having prevailed in full.

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause

# Court of Appeals, State of Michigan

## ORDER

David Anthony v Delagrange Remodeling Inc.

Docket No. 304097

LC No. 00-008579-CK

Cynthia Diane Stephens
Presiding Judge

Joel P. Hoekstra

Amy Ronayne Krause
Judges

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Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we remand for recalculation of interest on both awards. The interest on the repayment for the judgment double recovery must be calculated from August 5, 2005; and the interest on the attorney fees and costs must be calculated from February 15, 2008. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

COURT OF APPEALS OF THE STATE OF MICHIGAN
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A true copy entered and certified by Larry S. Royster, Chief Clerk, on

MAR 21 2013
Date

Chief Clerk