STATE OF MICHIGAN

COURT OF APPEALS

DANIEL R. MCLAUGHLIN and KAREN E. MCLAUGHLIN,

Plaintiffs-Appellants,

v

JAMES ROURKE, JAMES ROURKE CUSTOM BUILDER, INC., LAFOND ELECTRIC COMPANY, INC., and REYNOLD LAFOND,

Defendants-Appellees.

UNPUBLISHED
December 29, 1998

No. 195897
Mackinac Circuit Court
LC No. 91-003146 CK

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's judgment and the jury verdict in favor of defendants in a suit regarding a contract to build an addition on plaintiffs' home. The trial court granted a directed verdict as to all counts against individual defendants James Rourke and Reynold LaFond; and the jury rendered a verdict of no cause of action on the remaining claims in favor of defendants James Rourke Custom Builder, Inc., and LaFond Electric Co., Inc. We affirm.

On October 26, 1988, plaintiffs hired defendants James Rourke Custom Builder, Inc. and its owner and operator James Rourke ("Rourke") as the general contractor to build an addition on their house, which is located on Lake Michigan in Naubinway, Michigan. Rourke wrote up a proposal, signed by himself and plaintiffs on the letterhead of James Rourke Custom Builder, Inc., containing an estimated cost of $107,155, a defined installment payment plan and a schedule of performance. Using a bid from Wickes Lumber Company, Rourke listed the material specifications on the proposal based on plaintiffs' preferences and standard materials. The proposal contained the following warranty statement:

> All materials guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra cost will be executed only upon written orders, and will

> become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or the delays beyond our control. Owner to carry fire, tornado and other necessary insurance. Our workers are fully covered by Workmen's Compensation insurance.

There was no mention of a surcharge or an additional fee to the general contractor. Plaintiffs believed that the total price they would pay was what was stated on the contract: $107,155. Plaintiffs were required to pay any subcontractors personally for their work. The remainder of the money was payable to James Rourke. Defendants LaFond Electric Company, Inc., and its owner and operator, Reynold LaFond ("LaFond"), were hired as the subcontractor to do the electrical work pursuant to Rourke's recommendation.

During construction, when the rough wiring was being installed, LaFond was not present at the construction site for several weeks. Two of LaFond's unlicensed apprentices installed the electrical work during this time. Rourke called LaFond in Florida repeatedly because he was required to supervise while any unlicensed apprentices were working. However, LaFond did not return until three or four weeks later. Nevertheless, the wiring passed the rough inspection by the state inspector, which is required before the drywall goes up.

When Rourke was finished with the construction on April 27, 1989, he met with plaintiffs to finalize the payments. Rourke stated that when he drew up the proposal, he tried to include a customary profit margin. However, unforeseen charges were paid by the corporation, Rourke Custom Builder, Inc., leaving it with no profits. Rourke showed plaintiffs every bill that came in, and showed them all of his actual costs for material and labor. Rourke stated he did not require written change orders because he felt that if he informally spoke with plaintiffs about it and they agreed, then there would be no problems. Rourke stated in this regard:

> I didn't make any representations. I was just asking, you know, the project, we had extras, bad weather delays, they could see the bills. I had shown them the bills which were something, the bills, normally, only the contractor sees. That we basically broke even on the job. I said I would like to get an extra $10,000. All they had to say was no. They wrote me a check and I left. . . .

Plaintiffs on the other hand stated that Rourke said it was customary for the contractor to get ten percent over the contract price and represented that $10,000 was due under the contract. Although plaintiffs did not agree with him, they did not believe they had any choice but to pay him since they did not have their contract with them at that time and they felt that Rourke had them "over a barrel" because the electric system was causing problems for them.

On April 27, 1989, the final payment was made. The next day Rourke received a list of electrical problems from plaintiffs. He stated that he called LaFond to find out if he was going to take care of these problems, but LaFond told him that he had not been allowed back on the property to fix any problems. Further, about six to eight months after the construction ended, shingles started blowing off the roof. Rourke's employees repaired the roof twice under the warranty. After the warranty

expired, plaintiffs paid Rourke to repair the roof once, then hired other workers to repair the roof. Witnesses at trial disagreed about whether the shingles blew off the roof because they were only warranted to resist winds up to fifty-five miles per hour and unusually high winds around the lake had been in excess of this speed, or because the shingles did not seal properly because they had been installed in the winter and the wrong fasteners had been used to install them.

When a state inspector, John Hillock, performed four electrical inspections on the addition in April 1989, June 1989, July 1990 and August 1990, he found several code violations, referred to as "punch list" items because they are relatively common violations, and are fixed with relative ease. These were generally of the type that are routinely found at a final inspection and that a contractor could have corrected within several days. LaFond received notification of the violations from Hillock and testified that he would have corrected the problems without charge because he guaranteed that he would correct any violations. However, he was not allowed back onto the property by plaintiffs after the problems were discovered in order to fix them. After the inspections, plaintiffs decided that since Hillock had "lightly passed over the serious situation" of their electrical problems, he must be protecting his friend, LaFond. Thus, plaintiffs did not wish to have Hillock conduct the final inspection, which is required by law. A second state inspector, Virgil Monroe, then inspected the addition and found the same relatively minor violations. Subsequently, plaintiffs wrote a letter to the governor, complaining that Monroe too was a "personal friend of the electrician in question." A letter from the Department of Labor in response to plaintiffs' complaints conveyed the department's satisfaction with the inspections of both Hillock and Monroe.

Plaintiffs did not allow LaFond to correct the electrical problems. Indeed, they did not hire anyone to fix the violations, which remained uncorrected at the time of trial. Thus, they also have not had a final inspection of the work as required by law more than six years after the construction. Plaintiffs testified that they did not fix the problems because they wanted to have evidence of the violations so that there would be no argument about them.

In 1991, plaintiffs filed a complaint against defendants, alleging breach of contract and negligence against all four defendants; negligent supervision, misrepresentation and unjust enrichment against Rourke and James Rourke Custom Builder, Inc.; and a violation of the Michigan Consumer Protection Act (MCPA) by Rourke. At the close of proofs at trial, the trial court granted a directed verdict with regard to all counts against the individual defendants. The jury returned a verdict of no cause of action on the remaining breach of contract, negligence and misrepresentation claims against the corporate defendants. Thereafter, plaintiffs filed a motion to correct judgment and a motion for a new trial. The trial court entered a corrected judgment, but denied the motion for a new trial.

Plaintiffs first argue that the trial court abused its discretion at trial when it excluded expert witness Walter Anderson's opinion regarding the integrity of the electrical system. Plaintiffs assert that the testimony was improperly excluded because it embraced the ultimate issue, i.e. whether the integrity of the entire electrical installation was suspect. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). Plaintiffs correctly argue that it is improper, pursuant to MRE 704, to preclude the admission of testimony simply because it touches on or embraces the ultimate issue in the case. *Ruddock v Lodise*,

413 Mich 499, 503-504; 320 NW2d 663 (1982). However, where expert testimony is purely speculative, it may be excluded or stricken pursuant to MRE 403. Indeed, it is precisely to avoid speculation that expert testimony is ordinarily required. *Locke v Pachtman*, 446 Mich 216, 229; 521 NW2d 786 (1994).

In this case, plaintiffs' expert was precluded from testifying to the jury that, based on the finding of one additional violation over that found by the two state inspectors, the integrity of the entire electrical system was disturbed. The expert made it clear he had done only a cursory inspection of the electrical wiring. Yet he opined to the court that, based on his finding of one additional skinned wire, there was reason to suspect that the wire throughout the entire addition was skinned and therefore the entire job was faulty. In fact, the court did not exclude this testimony because it embraced an ultimate issue pursuant to MRE 704, but rather because it was purely speculative. In our judgment, Anderson's opinion that the entire electrical installation was suspect, based only on his cursory examination, was indeed speculative. Thus, the trial court did not abuse its discretion by sustaining defendants' objection to the testimony.

Next, plaintiffs claim that the trial court improperly refused to instruct the jury regarding Rourke's "admissions" to interrogatory questions. When a party requests an instruction that is not covered by the standard jury instructions, the trial court may, in its discretion, provide additional instructions, provided they are applicable and accurately state the law. MCR 2.516(D)(4); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 713-714; 550 NW2d 797 (1996). Jury instructions are to be reviewed in their entirety: There is no error requiring reversal if the instructions sufficiently protect the rights of the parties and fairly present to the jury the issues to be tried. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 605; 568 NW2d 93 (1997); *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994).

MCR 2.312(D)(1) provides for "judicial" admissions:

> *A matter admitted under this rule is conclusively established* unless the court on motion permits withdrawal or amendment of an admission. For good cause the court may allow a party to amend or withdraw an admission. The court may condition amendment or withdrawal of the admission on terms that are just. [Emphasis added.]

"In contrast to 'evidentiary' admissions, i.e., admissions of a party opponent under MRE 801(d)(2), judicial admissions are not really 'evidence' at all." *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 420; 551 NW2d 698 (1996), citing to 2 McCormick, Evidence (4th ed), § 254 at 142, n 11. In reliance upon McCormick, the Court continued:

> Rather, they are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. [*Radtke, supra* at 420, quoting McCormick, *supra* at 142.]

However, "[a] party's response to a request for admission cannot be read more broadly than the request itself, for purposes of determining what part constitutes a judicial admission. Only that portion of the response that directly meets and admits the request is a judicial admission under MCR 2.312, so that it is conclusively binding for the pending action." *Id*. at 425. Qualifying or explanatory statements are considered only evidentiary admissions. *Id*. at 425-426.

In this case, the trial court did not abuse its discretion by refusing to give plaintiffs' requested jury instruction regarding Rourke's answers to plaintiffs' "request for admissions." First, Rourke's statement that the $10,000 additional payment was a "compromise" for additional work performed and that plaintiffs "certainly did have a duty to pay this amount because of that" was a qualifying or explanatory statement, and did not "directly meet and admit the request." Thus, pursuant to *Radtke, supra*, it could not be "conclusively binding." Accordingly, the proposed jury instruction did not accurately state the law in that respect and should not have been given to the jury. Second, pursuant to MCR 2.312(D)(1), Rourke's statements that he intended plaintiffs to rely on his statement that they were required to pay an additional ten percent and had a "duty" to do so are conclusively established. However, plaintiffs have provided no support for the contention that the court is required to inform the jury of this with a jury instruction. The court permitted plaintiffs to read the admissions into evidence, to question Rourke twice about them, and to read them again to the jury during closing arguments. In our judgment, the jury was sufficiently aware of what Rourke had admitted, and the trial court did not abuse its discretion by not allowing the jury instruction on this point.

Next, plaintiffs contend that the trial court abused its discretion by denying their motion for a new trial because the verdict was against the great weight of the evidence. A trial court's denial of a motion for a new trial based on a claim that a verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 524-525; 564 NW2d 532 (1997). "'[A] new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.'" *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (citation omitted). "[W]hen testimony is in direct conflict and testimony supporting the verdict has been impeached, if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury." *Id.* at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942).

In this case, the evidence did not preponderate heavily against the verdict. First, despite the fact that the evidence demonstrated violations of the electrical code, there was sufficient evidence to show that these problems would have been corrected but for plaintiffs' refusal to permit correction by defendants. The jury could readily determine that defendants did not breach a contract they were thwarted from completing and they were not negligent in their performance because they were not able to correct any of the problems to complete their performance.

Second, the evidence supported the jury's finding that Rourke did not misrepresent the $10,000 payment. The evidence showed that Rourke continually informed plaintiffs as to the costs of the project and the money he was advancing for materials and labor and plaintiffs knew he was not making a profit on the project. The evidence showed that Rourke told plaintiffs that he believed he was entitled to

make a profit on the project, they disputed his right to the $10,000, but then decided to pay it. For over two years, until plaintiffs filed the lawsuit, they never contested the $10,000 payment and never requested that Rourke return it. Thus, the evidence also supports the jury's verdict on this claim.

Third, the only alleged problem regarding the roof was the fact that Rourke and his employees installed the shingles with staples, not nails. However, the manufacturer instructed that staples could be used, the construction code permitted it, and several witnesses testified that they installed shingles with staples. Thus, the trial court correctly determined that this credibility question was for the jury. *Lemmon, supra* at 643.

Overall, plaintiffs' refusal to correct the problems for over six years seriously hurt their credibility in arguing that the problems were serious. In fact, as the trial court stated, the jury probably found plaintiffs much less credible than defendants, based on this fact alone. Thus, we believe that the trial court did not abuse its discretion in determining that the verdict was not against the great weight of the evidence.

Plaintiffs next contend that the trial court improperly granted directed verdicts against plaintiffs as to two different issues. This Court reviews decisions on motions for a directed verdict de novo to determine if the moving party was entitled to judgment as a matter of law. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). "When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party." *Id*. Thus, this Court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party to determine whether a factual question exists. "A motion for a directed verdict should be denied if reasonable minds could differ with regard to whether the plaintiff has met the burden of proof." *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1995). However, as in all cases on appeal, if this Court finds error, we must consider whether it requires reversal or was harmless overall:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. [MCR 2.613(A).]

Plaintiffs first argue that the trial court improperly granted a directed verdict as to all claims against Rourke and LaFond in their individual capacities. The trial court determined that plaintiffs could only sue the individual officers of defendant corporations if they "pierced the corporate veil," and it subsequently determined that "you can only sue the corporation here. I mean, there is no testimony the corporations aren't valid, were incorporated to operate as a sham." Generally, shareholders, directors and officers of a corporation cannot be held personally liable for the corporation's acts or debts, unless unusual circumstances justify disregarding the corporate entity. *Bitar v Wakim*, 456 Mich 428, 431; 572 NW2d 191 (1998) (Brickley, J., joined by Cavanagh and Kelly, JJ.); see also Henn, Laws of Corporations (3d ed), § 146, pp 344-349. However, under agency law, corporate employees and

officers are personally liable for all tortious acts in which they participate personally, regardless of whether they acted for the corporation or personally. *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986); see also *Allen v Morris Building Co*, 360 Mich 214, 218; 103 NW2d 491 (1960). This includes liability for negligence, but does not extend to contract liability unless the agent acts only on his own behalf in contracting or does not disclose the involvement or existence of the corporation. *Baranowski v Strating*, 72 Mich App 548, 559-560; 250 NW2d 744 (1976); Henn, supra at § 230, pp 607-608.

Accordingly, in the case at hand, we first note that the trial court properly granted directed verdicts as to plaintiffs' contract claims against the individual defendants, since the contractor was the corporation, not the individuals, and there was no evidence presented to justify "piercing the corporate veil" in order to hold the individual defendants liable. Second, we turn to the tort claims. Individual defendants Rourke and LaFond were the owners and operators of their respective corporations. They also both participated in the construction and supervised the work of their employees on plaintiffs' addition. Thus, to the extent that the alleged tortious conduct was alleged to have been personally participated in by either individual defendant, the law regarding corporate veil-piercing does not apply. Assuming that all of the elements of plaintiffs' negligence claims could be proven, Rourke and/or LaFond could be held personally liable for torts in which they actively participated. Thus, the trial court erred by determining that plaintiffs' tort claims against the individual defendants were barred.

However, the jury determined that there was no negligence or misrepresentation as to the corporate defendants on the same claims and evidence that it would have considered if faced with the individual defendants. Thus, we can rationally infer from the jury's verdict regarding the corporate defendants that it would also have found that there was no negligence or misrepresentation as to the individual defendants. In light of the jury's findings, we find that the trial court's grant of directed verdicts as to the tort claims against the individual defendants was harmless error.

Plaintiffs second contention is that the trial court improperly determined that the Michigan Consumer Protection Act (MCPA) was not applicable to the field of building construction and thus granted a directed verdict as to such claims against defendant Rourke. The MCPA provides that "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined" according to this law. MCL 445.903(1); MSA 19.418(3)(1). The great majority of the specific prohibited practices enumerated in the statute-- including those relied upon by plaintiff-- involve fraud and are thus construed with reference to the common-law tort of fraud, see MCL 445.903(1)(a)-(cc); MSA 19.418(a)-(cc). *Mayhall v A.H. Pond Co, Inc*, 129 Mich App 178, 182-183; 341 NW2d 268 (1983). "The purpose of the MCPA is to prohibit certain practices in trade or commerce, and to provide for certain remedies." *Price v Long Realty, Inc*, 199 Mich App 461, 470; 502 NW2d 337 (1993).

In this case, plaintiffs did not specifically delineate their MCPA claims in their complaint. Instead, the complaint referenced the allegations of counts I-VI and simply alleged that the services provided by Rourke "are services that fall within the scope of the Consumer Protection Act" and that "the actions of Rourke violated the Consumer Protection Act." Subsequently, in a motion for summary disposition, plaintiffs claimed that Rourke violated six specific sections of the MCPA by (1) representing

that LaFond was competent when he knew that LaFond had had complaints raised against him; and (2) demanding additional money when the contract did not allow for the payment of additional money. Still later, while arguing against a motion for a directed verdict, plaintiffs mentioned several different MCPA violations, although without specificity as to what section of the MCPA was violated or the facts of the violations. In granting a directed verdict as to the MCPA claims, the trial court stated:

> The Court will grant a directed verdict under the Michigan Consumer Protection Act. It doesn't even apply here. This is not an act for this type of an activity. There is not one case cited under the act that is a building construction.

In our judgment, it seems clear that plaintiffs' claim that Rourke violated the MCPA by making a false representation about additional money due under the contract was essentially duplicative of the misrepresentation claim on which the jury returned a verdict of no cause of action. The fraud claims are essentially identical and there is virtually no prospect for a different result upon remand. The dismissal of this claim, therefore, if error, was harmless error.

Plaintiffs' other specific claim under the MCPA was that Rourke represented that LaFond was competent when he knew otherwise. This is not the subject of another fraud claim in this case, but does form the basis of breach of contract and negligence claims: Plaintiffs claimed that Rourke and LaFond breached the contract by not having the electrical work completed in a workmanlike manner, and that Rourke was negligent in employing LaFond because he had numerous complaints against him and was thus not competent. Since the jury found no negligence or breach of contract by either LaFond or Rourke, we can reasonably conclude that the jury would have found that Rourke did not misrepresent LaFond's competence. Thus, dismissal of this claim, if error, was also harmless error.

Although plaintiffs did not specifically delineate any other claims, they did list several fact situations that they believed violated the MCPA at the directed verdict hearing. First, they claimed that contract items were not performed. However, since the jury found no breach of contract, they in essence also determined that Rourke did not misrepresent that contract items would be performed when they actually would not be finished. Second, plaintiffs claimed, apparently, that Rourke disclaimed the implied warranty in the contract regarding workmanlike manner and fitness of use. However, the jury determined that neither Rourke nor LaFond was negligent in their work. Thus, their work met the general standards required by their industries, and this argument is moot. Third, plaintiffs claimed that Rourke represented that the work under the contract was all done when it was not. This seems to be the same argument as the first additional argument, above. Since the jury determined that the contract was not breached, any representation that the contract was finished was correct, not a misrepresentation.

Although plaintiffs seem to imply, by the language in their complaint, that all of Rourke's actions could violate the MCPA, they do not delineate specific claims. Therefore, it is not the Court's burden to try to determine their claims. However, the language of the complaint does illustrate clearly that all of the MCPA claims were essentially duplicative of the contract, negligence and misrepresentation claims that the jury rejected. Since these same factual claims are necessary to prove a violation of the MCPA,

we can reasonably conclude that the dismissal of the MCPA claims, if error, was harmless error. Consequently, remanding this issue is unnecessary.

For these reasons, we affirm the trial court's judgment and the jury verdict in favor of defendants.

Affirmed.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck