

STATE OF MICHIGAN
COURT OF APPEALS

SAF CONSTRUCTION, INC., f/k/a CRESCENT
BUILDERS,

UNPUBLISHED
February 5, 2004

Plaintiff/Counterdefendant-
Appellant/Cross-Appellee,

v

No. 241980
Macomb Circuit Court
LC No. 96-002352-CH

AKR & ASSOCIATES,

Defendant/Counterplaintiff/Third-
Party Plaintiff-Appellee/Cross-
Appellant,

and

SIRJUDDIN AHMAD,

Third-Party Defendant-
Appellant/Cross-Appellee.

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Plaintiff SAF Construction, Inc. (SAF), and its owner, third-party defendant Sirjuddin Ahmad, appeal as of right, challenging the trial court's judgment, entered after a bench trial, awarding defendant AKR & Associates (AKR) \$123,814 on its third-party complaint for breach of fiduciary duty against Ahmad. SAF also challenges an earlier judgment, entered after a jury trial, awarding AKR damages of \$1,805,181, plus interest, on its countercomplaint for breach of contract against SAF. We affirm in part, reverse in part, and remand for further proceedings.

Appellants first argue that reversal of the jury award in favor of AKR is required because the trial court erroneously denied its request to instruct the jury on AKR's alleged failure to mitigate damages. We disagree.

"This Court reviews claims of instructional error de novo." *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). A trial court's jury instructions must include all elements of the plaintiff's claims and should not omit any material issues, defenses, or theories of the parties that the evidence supports. *Id.* MCR 2.516(D)(2) provides that the trial court must give a

requested jury instruction if it is applicable to the case. *Lewis, supra*. But instructions not supported by the evidence should not be given. *Id.* An instruction on mitigation of damages is appropriate where the plaintiff fails to mitigate damages after knowing of the injury. *Id.* We review for an abuse of discretion the trial court's determination whether a standard jury instruction is applicable and accurate. *Id.* Moreover, reversal based on an instructional error is required only when the failure to reverse would be inconsistent with substantial justice. *Id.* at 211-212.

Here, the trial court concluded that a mitigation instruction was not warranted because SAF had filed construction liens against AKR's property, which prevented AKR from completing the project. We do not agree with the trial court's rationale for declining to give a mitigation instruction. The record discloses that SAF stopped work toward completing the project in 1990, but it was not until 1993 that SAF first filed a construction lien against the property. Thus, there was a two to three year time frame after SAF ceased its work during which no liens were filed. Moreover, the effect of the liens on AKR's ability to complete the project with a different contractor was not an issue explored at trial. In light of this record, we cannot agree with the trial court's rationale that a mitigation instruction was not warranted for the reason that the liens filed by SAF prevented AKR from finishing the project.

Nonetheless, this Court will affirm a trial court's decision if it reached the right result, even if for the wrong reason. *Wickings v Artic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). Here, notwithstanding the trial court's erroneous rationale, we conclude that the evidence did not support an instruction on AKR's failure to mitigate damages. *Lewis, supra* at 211. While SAF maintains that the testimony of Jayand Shah supported a mitigation instruction, Shah's testimony merely established the profit that AKR could have expected to realize had the project been completed. Shah also indicated that AKR could have completed the project for less than the original contract price with SAF. But SAF had the burden of presenting evidence that AKR failed to make a reasonable effort to minimize their damages. *Gorman v Soble*, 120 Mich App 831, 846; 328 NW2d 119 (1982); *Maraldo Asphalt Paving, Inc v Harry D Osgood Co, Inc*, 53 Mich App 324, 326; 220 NW2d 50 (1974). The limited testimony on which SAF relied below did not satisfy this burden, because it failed to show that AKR had the means by which to actually complete the project. In any event, we are also persuaded by AKR's argument that SAF waived the defense of mitigation because it failed to assert this defense in a responsive pleading or appropriate motion below. MCR 2.111(F)(2); *Campbell v St John Hospital*, 434 Mich 608, 616; 445 NW2d 695 (1990). Accordingly, this claim of instructional error does not warrant reversal.

Next, appellants challenge the bench trial judgment against Ahmad, arguing that the trial court impermissibly delegated its judicial function by appointing an expert witness, Mark Robinson, to conduct an accounting and prepare a report, and by then adopting Robinson's

findings and conclusions without affording appellants the opportunity to cross-examine Robinson with respect to his findings.¹

Appellants rely on *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116; 559 NW2d 54 (1996), in support of their argument. In that case, however, the order appointing the expert witness delegated to the witness the power to “make findings of fact, conclusions of law and a final recommendation and proposed judgment as to the disposition of [the] matter” *Id.* at 118. The expert witness in that case was also given the duties to review all motions and submit findings of fact to the trial court before the scheduled hearing date, to required the production of evidence, to issue subpoenas through the court, to conduct and regulate miscellaneous proceedings, to examine documents and witnesses, and to prepare final findings of fact and recommendations for judgment. *Id.* at 121. This Court held that the trial court had no constitutional authority to delegate specific judicial functions to an expert witness, stating that “[I]t is within the peculiar province of the judiciary to adjudicate upon and protect the rights and interests of the citizens and to construe and apply the laws.” *Id.*, citing *Johnson v Kramer Bros Freight Lines, Inc.*, 357 Mich 254, 258; 98 NW2d 586 (1959). The Court further found that the trial court’s order appointing the expert witness “exceeded the authority implicit in MRE 706 by requiring the expert to perform duties outside the scope of the duties of an expert witness and within the purview of the court.” *Carson, supra* at 123-124.

In this case, there was no unlawful delegation of the trial court’s functions. The appointment of Robinson was proper under MRE 706, which provides:

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness’ duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness’

¹ We recognize that, as argued by AKR, it is questionable whether either of these issues have been preserved for appeal. However, this Court may consider even unpreserved issues where the question presented is one of law and the facts necessary for resolution of that question have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998). Here, it is not disputed that the trial court appointed Robinson for the purpose of conducting an accounting, or that the trial court adopted the findings from that accounting without affording the parties an opportunity to comment on or otherwise challenge those findings, and despite the rather substantial discrepancy between Robinson’s initial conclusions and those ultimately submitted to the trial court. Because the propriety of the trial court’s conduct in this regard is a question of law, see, generally, *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116; 559 NW2d 54 (1996), and the facts necessary for resolution of these issues are available, we will review the matter despite the preservation concerns raised by AKR. *Poch, supra*.

findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

Unlike in *Carson, supra*, the trial court here did not exceed the authority implicit in MRE 706 because it merely authorized Robinson to conduct an accounting and prepare a report for the court's review. Moreover, MRE 702 permits an expert witness to give an opinion on technical or specialized concepts, and the court here properly could determine that an expert's technical or specialized knowledge was necessary in order to properly evaluate the claim for damages due to Ahmad's alleged breach of fiduciary duty.

But we agree that the trial court erred by adopting Robinson's report without affording appellants an opportunity to challenge the findings and conclusions in his report. Although we conclude that Robinson's appointment was proper under MRE 706, that rule provides that "[t]he witness shall be subject to cross-examination by each party." A party's right to cross-examine witnesses is a basic due process right, which should not be unduly interfered with by the trial court. *Hayes v Coleman*, 338 Mich 371, 380; 61 NW2d 634 (1953); *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 502; 421 NW2d 213 (1988). Accordingly, the trial court erred by adopting Robinson's report and recommendations without affording appellants an opportunity to cross-examine Robinson concerning his various findings and conclusions. We therefore reverse the trial court's judgment awarding damages against Ahmad for breach of fiduciary duty and remand this matter to the trial court so that appellants may be afforded an opportunity to cross-examine Robinson concerning his final report.

We affirm in part, reverse in part, and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ Richard A. Bandstra