

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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10 AND SCOTIA EXPRESS, LLC, SALIM  
YALDO, and SCOTT YALDO,

UNPUBLISHED  
July 15, 2004

Plaintiffs-Appellees/Cross-  
Appellants,

v

TARGET CONSTRUCTION, INC.,

No. 244827  
Oakland Circuit Court  
LC No. 01-028946-CK

Defendant-Appellant/Cross-  
Appellee.

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Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant appeals as of right a jury verdict in favor of plaintiffs on breach of contract and negligence claims in this construction contract dispute. Plaintiffs cross appeal an award to defendant of the unpaid balance on the original contract with respect to defendant's counterclaim. We affirm.

In 1998, plaintiffs, owners of a retail strip mall, contracted with defendant for building renovations that included adding a new canopy over the existing roof. Plaintiffs reference the renovation as the installation of a "canopy roof." Defendant's subcontractor finished installing the new canopy roof in late 1999, but building tenants soon complained of leaks from the roof. Plaintiffs notified defendant about the leaks; however, defendant's responses were ineffective. When defendant presented plaintiffs with an invoice for the balance owed in January 2000, the parties negotiated an agreement to address the problem roof and further payments. Defendant wrote the results of the negotiations on the invoice, which one of the plaintiffs signed. In this writing, defendant acknowledged responsibility for any leaks, and plaintiffs agreed to make a payment of \$8,000 and to withhold \$2,000 "until we get a heavy wind to make sure no problems will happen and then the [\$]2,000 will be paid immediately." Including the \$8,000 payment, plaintiffs paid \$143,000 of the \$147,170 defendant claimed they owed. In late 2000, plaintiffs paid \$650 for an independent inspection and then \$20,150 to have another firm fix the canopy roof. This corrected the leaks. Plaintiffs sued, alleging claims sounding in breach of contract and negligence, and defendant filed a counterclaim for breach of contract.

During trial, the court denied defendant's motion for a directed verdict on the negligence claim, holding that the contract claim did not preclude a negligence action. The court also

refused to admit the city building code into evidence when defense counsel tried to proffer it as a learned treatise during direct examination of a defense witness. The jury found for plaintiffs on both the breach of contract and negligence claims and for defendant on the breach of contract cause of action. The jury awarded \$20,800 to plaintiffs and awarded defendant \$4,170, the remaining amount owed under the original contract. Defendant and plaintiffs filed appeals, and we affirm both awards.

Defendant first appeals the trial court's failure to admit into evidence the local building code, which incorporates the BOCA<sup>1</sup> code. Defendant focuses on whether underlayment<sup>2</sup> was required under BOCA provisions. Defendant attempted to admit the code through its witness Vincent George, who was the subcontractor responsible for installing the canopy roof. The trial court initially ruled that defendant could introduce specific relevant sections of the code, but the jury would not receive the entire BOCA code. George testified, referencing the code and asserting no violations with respect to the installation of the canopy roof, which was categorized as a metal roof panel system. After objections by plaintiffs' counsel, and when it became clear to the trial court that numerous other sections of the BOCA code may also be relevant and that George was not knowledgeable on the entire code, the court ruled that "I'm going to instruct the jury that they should not rely on the testimony of this witness as to what is or is not contained in the" BOCA code. The code was not admitted into evidence, and defendant complains that the jury was left with the impression that the code was applicable and was violated on the basis of testimony by plaintiffs' expert witnesses.

On appeal, defendant argues that the evidentiary mechanism under which the code should have been admitted is through judicial notice as reflected in MRE 202(b). MRE 202(b) provides that "[a] court shall take judicial notice of each matter specified in paragraph (a) of this rule [, which would cover the building code,] *if a party requests it[.]*" (Emphasis added.) Because defendant never requested that the court take judicial notice of the building code, this issue was not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). "It is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003)(citation omitted).

Assuming that the BOCA code could have been admitted through George's testimony without reliance on judicial notice<sup>3</sup> and that the court erred in failing to permit its admission and in striking portions of George's testimony, any error was harmless. MCR 2.613(A). We first note that plaintiffs' expert witnesses, Jeffrey Seyka and Timothy Reeha, could not state with absolute certainty that the BOCA code was even applicable, and defendant did not attempt to impeach the witnesses through use of the code. There was no definitive testimony from

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<sup>1</sup> Building Officials and Code Administrators International.

<sup>2</sup> Underlayment, according to testimony, is a material placed between the plywood and the metal panel roof.

<sup>3</sup> It would have been more appropriate to attempt introduction through Greg Winer, the city building inspector.

plaintiffs' witnesses that the BOCA code governed. Defendant's own witness, city inspector Greg Winer who was familiar with the BOCA code, testified extensively that the BOCA code set forth numerous requirements and that the canopy roof was not installed in a workmanlike manner, in that it failed to fully weatherproof the facility. However, on further examination by defense counsel, Winer did testify that, as to this particular type of roof, some code provisions were not violated.

*Q.* Okay. The – in fact, isn't it true that under the BOCA code, when you're dealing with metal roof panels as opposed to any other kind of roofing that would be installed, now you're familiar with different kinds of roofing --

*A.* Yes.

*Q.* [W]hen you're dealing with metal roof panels in particular, BOCA code relies almost exclusively upon whatever the manufacturer recommends?

*A.* Correct.

*Q.* Correct? Okay. So there is no BOCA code with respect to flashing for roof, for metal roof panels, correct? They just said whatever the manufacturer requires.

*A.* Correct.

*Q.* Right. And there's no BOCA code with respect to underlayment for metal roof panels. It just says whatever the manufacturer requires.

*A.* Correct.

*Q.* Right. And there is no BOCA code with respect to how many fasteners and where you place the fasteners on metal roof panels. . . .

*A.* Correct.

Although the code itself was not admitted and George's responses relative to the code were stricken, Winer's clear, definitive, and knowledgeable testimony in regard to the code and metal roof panel system placed evidence before the jury that underlayment, among other things, was not necessary under the BOCA code for this particular roof. Plaintiffs' counsel did not challenge this testimony on cross-examination. Arguably, this alone is insufficient to negate prejudice, but when considered with the extensive amount of evidence showing poor workmanship, any assumed error was harmless.

Winer indicated that there were provisions of the code relating to workmanship and weatherproofing that were violated, and had the jury received the entire code or *all* relevant portions, it would more than likely have been equally damaging to defendant's case. Winer – again defendant's own witness – was emphatic that the installation work was unacceptable. Plaintiffs' four construction professionals offered very little testimony about the code, but all four unambiguously condemned the quality of defendant's work, independently citing many of the same deficiencies. The photographic evidence alone would likely have been more than

sufficient to justify the jury in concluding that the canopy roof installation had not been performed in a workmanlike manner. Reversal is not warranted.

Defendant also appeals the court's failure to grant a directed verdict on plaintiffs' negligence claim. Motions for directed verdicts are reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). Defendant relies on our Supreme Court's ruling in *Rinaldo's Constr Corp v Michigan Bell Telephone Co*, 454 Mich 65; 559 NW2d 647 (1997), in which the Court discussed the distinctions between tort and contract actions, along with addressing the question whether an action in tort may arise out of a contractual promise. We deem it unnecessary to analyze the case at bar under the principles enunciated in *Rinaldo's*, because, assuming error in failing to direct a verdict in defendant's favor on the negligence claim, the error was harmless. MCR 2.613(A). The special verdict form utilized in the action required the jury to independently find whether defendant was negligent and whether defendant breached the contract. As noted above, the jurors found liability on both causes of action. On finding liability, the jury was then asked, through use of the verdict form, to determine the amount of damages suffered by plaintiffs. The jurors responded by finding damages in the amount of \$20,800; this was the answer to the sole question posed to the jury concerning damages, and there was no distinction between damages attributable to negligent conduct and those attributable to breach of contract. The total amount of damages thus flowed from liability premised on either claim. In closing arguments, plaintiffs' counsel stated:

The damages that we're seeking are quite simple. For both the negligence and the breach of contract claim, we're seeking damages in the amount of the replacement of the roof, which they paid, the plaintiff paid G.A. Freesch \$20,150. In addition to that, we are seeking the incidental damage in the amount of 650 dollars for DRS to prepare their report.

Accordingly, any error in presenting the negligence claim to the jury was harmless, where the jury found liability for breach of contract and necessarily found damages for the breach in the amount of \$20,800.

Plaintiffs cross-appeal the award to defendant on its counterclaim, raising two arguments. The first is that the contract amendment was actually a novation that replaced the first contract entirely. The second is that defendant failed to fulfill the condition precedent to plaintiffs' obligation to pay the remaining \$2,000, namely that defendant correct the leaks. To better understand plaintiffs' argument, it is necessary to review their related assertions concerning the dollar amounts involved. The initial contract price was \$142,000. With agreed to additions, the contract price rose to \$147,170. At the time of the January 2000 negotiated agreement, plaintiffs had already paid defendant \$135,000. This left a contract balance of \$12,170. The contract "amendment" that arose out of negotiations regarding the leaking roof resulted in, as noted above, an agreement by plaintiffs to pay \$8,000, which was immediately paid. Further, an additional \$2,000 was to be subsequently paid by plaintiffs to defendant subject to the canopy withstanding adverse weather conditions without problems arising. This \$2,000 was never paid to defendant. In total, plaintiffs paid \$143,000 (\$135,000 in earlier payments plus the newly negotiated \$8,000). The January 2000 negotiated agreement concerned, in total, a sum of \$10,000 (\$8,000 payment and \$2,000 to be paid on condition), although, at the time, \$12,170 remained outstanding on the original contract. This left a question concerning the disposition of

the remaining \$2,170 balance that was unaccounted for in the negotiated agreement (\$12,170 balance minus \$10,000 addressed in negotiated agreement). Additionally, there remained the \$2,000 that was not paid by plaintiffs on the ground that the defects were not corrected. Accordingly, the amount at issue on defendant's counterclaim was \$4,170 (\$2,170 balance not mentioned in negotiated agreement plus \$2,000 conditional payment).

The jury awarded defendant the full \$4,170, thereby necessarily finding that plaintiffs remained responsible for the \$2,170 balance on the original contract, despite the fact that said amount was not specifically addressed or mentioned in the negotiated agreement, and that plaintiffs were obligated to pay the \$2,000 conditional payment, despite finding defendant liable to plaintiffs for breach of contract and negligence. Plaintiffs' position, essentially, is that the \$2,170 balance was forgiven through the execution of the negotiated agreement, which constituted a novation. With respect to the \$2,000 conditional payment, plaintiffs' position is that defendant failed to show satisfaction of the condition precedent. In closing argument, defense counsel contended that defendant was entitled to the \$2,000 conditional payment for having completed the necessary work and that it was also entitled to the \$2,170 "discount" it had given plaintiffs because plaintiffs failed to pay the \$2,000 conditional payment as required by the negotiated agreement. The argument suggests that defendant intended to forgive the \$2,170 outstanding balance as a discount for purposes of negotiation when the parties reached the agreement, but later decided against the discount on the basis that plaintiffs should not reap the benefit of the savings when they failed to honor the new agreement by not making the \$2,000 conditional payment.

Regarding the novation argument, plaintiffs' claim fails on multiple levels. First, plaintiffs frame the argument as one in which the trial court's award was clearly erroneous. The trial court was not the trier of fact, it did not award damages, and it made no factual findings that would be subject to review for clear error. The jury sat as the trier of fact and found plaintiffs responsible for the full \$4,170. The argument has not been properly presented. Second, plaintiffs' argument can be interpreted as voicing error in relation to the jury instructions; however, there was no demand by plaintiffs that the trial court instruct on the elements of novation and no objection to the court's instruction on defendant's breach of contract claim.<sup>4</sup> Therefore, the issue has not been properly preserved. *Fast Air, supra* at 549. Third, plaintiffs' position can be interpreted as a claim that the jury's verdict was against the great weight of the evidence or that the damage award was excessive. Plaintiffs argued to the jury, in the context of damages, that the \$2,170 was forgiven and constituted a discount for which plaintiffs were no longer contractually liable. The jury rejected this argument. If plaintiffs wished to preserve the

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<sup>4</sup> The court simply instructed the jury that "[i]f you find that the plaintiff[s] . . . breached the contract by failing to pay the full contract price, the defendant . . . is entitled to receive the compensation you determine is due under the contract." During discussions regarding instructions, the trial court indicated its belief that there was a single contract that was amended by subsequent change orders. We question, without deciding, whether plaintiffs would be benefited by a true novation as opposed to the simple argument that the contract was modified, resulting in forgiveness of the \$2,170 balance, which was the argument presented below to the jury.

issue, it was necessary to file a motion for new trial or motion for judgment notwithstanding the verdict. *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997); *Brown v Swartz Creek Mem Post 3720 – Veterans of Foreign Wars, Inc*, 214 Mich App 15, 27; 542 NW2d 588 (1995). This was not done, and thus the issue was not preserved. Our preservation analysis above applies equally to the argument regarding the \$2,000 and conditions precedent. In conclusion, we find no grounds to disturb the jury's verdicts.

Affirmed.

/s/ William B. Murphy  
/s/ Richard Allen Griffin  
/s/ Helene N. White