

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

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CURTIS G. KORNEFFEL and MAUREEN A.  
KORNEFFEL,

UNPUBLISHED  
August 1, 2000

Plaintiffs-Appellees,

v

WENDELL C. FLYNN and MARGARET ANN  
FLYNN,

No. 207234; 208899  
Wayne Circuit Court  
LC No. 93-334893-CH

Defendants-Appellants.

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Before: Meter, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

In this action for reasonable rent pursuant to MCL 600.5750; MSA 27A.5750, defendants appeal an order of judgment in the amount of \$1,867,606, rendered in plaintiffs' favor following a bench trial in Wayne Circuit Court. We affirm.

I

These consolidated appeals stem from a land contract default and forfeiture by the vendees, defendants Flynn, of their interest in a mansion and property along the Detroit River in Grosse Ile. The vendors of the property are plaintiffs, the Korneffels. The origins of this case are related in a prior published Michigan Supreme Court decision, *Flynn v Korneffel*, 451 Mich 186, 189-190; 547 NW2d 249 (1996), addressing another aspect of the legal conflict herein:

On February 1, 1980, Michael and Marylou Baghdoian purchased a large residence situated on a valuable parcel of waterfront property on land contract from Sam and Pamela Piunti. Plaintiffs in the present proceeding, Wendell and Margaret Flynn, purchased the Baghdoians' interest and are the current vendees of the land contract. Subsequently, plaintiffs failed to pay a \$376,040.71 balloon payment that became due on February 1, 1988.

Thereafter, the vendors, the Piuntis, declared the contract forfeit and began summary proceedings in the 33rd District Court. The Flynns neither answered the complaint nor defended their interest in the summary proceedings. On March 30, 1988, the district court entered a judgment of forfeiture and possession for breach of land contract. After entry of default, plaintiffs' ninety-day period of redemption commenced. To perfect this right, plaintiffs were obligated to pay approximately \$450,000, inclusive of unpaid real estate taxes. While these proceedings were pending, the current defendants and vendors, Curtis and Maureen Korneffel, purchased the Piunti's interest and were substituted in the summary proceedings action. The redemption period was scheduled to expire June 28, 1988.

The Korneffels obtained a writ of restitution on June 29, 1988.<sup>1</sup> The Flynns thereafter sought to enforce their right of redemption, unsuccessfully pursuing the matter on appeal to this Court and ultimately, the Supreme Court. The Supreme Court, in the opinion set forth above, held that the Flynns did not properly effectuate redemption pursuant to statute and common law; the Court therefore concluded the judgment of forfeiture and writ of restitution had been properly entered against the present defendants. See *id.* at 195-207.

Various stays during the pendency of the Flynns' appeals allowed them to remain in possession of the property. Consequently, because defendants continued to hold over on the property, the present case seeking reasonable rent was instituted by plaintiffs in December 1993. Defendants pleaded only one affirmative defense to the action: "Another action had been initiated by the same parties involving the same claims." Significant to the present appeal, the trial court sanctioned defendants for their failure to comply with discovery by barring them from presenting any witnesses or exhibits at the bench trial held in July 1997. The trial culminated in a damage award being entered in favor of plaintiffs for rent, waste, and taxes owed by defendants. On September 5, 1997, judgment was entered in favor of plaintiffs in the amount of \$1,669,561.80, inclusive of pre-judgment interest, taxable costs, and mediations sanctions. An order denying defendants' motion for a new trial was entered on October 17, 1997. On November 7, 1997, the trial court granted plaintiffs' motion to correct judgment, thereby increasing the amount of the judgment by \$198,045, for a total judgment of \$1,867,606. Defendants now appeal.<sup>2</sup>

## II

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<sup>1</sup> As the Supreme Court noted, *id.* at 190, n 3, the Flynns "not only defaulted in making the final balloon payment, but also had failed to make monthly payments on the land contract, and had not paid real estate taxes on the property for a series of years. In fact, the Flynns did not pay taxes on the property for the years 1984-1987, and paid less than half the amount due on the contract.

<sup>2</sup> Two appeals have been consolidated in the present matter: defendants' appeal by right of the September 5, 1997, judgment and defendants' appeal by leave granted of the November 7, 1997, order correcting judgment.

Defendants first contend the trial court abused its discretion in precluding them from presenting any witnesses or exhibits at trial because of their failure to comply with plaintiffs' pretrial discovery requests. We disagree.

Defendants did not file a witness list, refused to respond to interrogatories or deposition notices directed to both defendants and failed to allow plaintiffs access to the property. No discovery response was given to plaintiffs even though an order to compel discovery was entered on August 12, 1994, and an order to show cause was entered on August 29, 1994. Plaintiffs ultimately obtained an order compelling an inspection of the property by plaintiffs' two expert witnesses. Defendants' counsel signed the final pretrial order which clearly stated defendants were not to have witnesses or exhibits.

MCR 2.313(B)(2) provides in pertinent part:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:

(a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designate claims or defenses, or prohibiting the party from introducing designated matters into evidence.

The trial court's imposition of discovery sanctions is reviewed for an abuse of discretion. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990); *Middleton v Margulis*, 162 Mich App 218, 223; 412 NW2d 268 (1987). As explained in *Dean, supra* at 32-33:

Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive. [Footnotes omitted.]

See also *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999); *Chrysler Corp v Home Ins Co*, 213 Mich App 610, 612; 540 NW2d 485 (1995); *LaCourse v Gupta*, 181 Mich App 293, 296-297; 448 NW2d 827 (1989).

Defendants do not deny there was a failure to comply with discovery in this case. However, defendants blame their former counsel for the transgressions. After changing counsel, defendants moved to amend the final pretrial order barring the presentation of evidence, claiming they were unaware of their former counsel's failure to provide discovery. Defendants now contend they only wanted to present two witnesses at trial – an expert on real property valuations to rebut the estimates and conclusions regarding the property's value proffered by plaintiffs' expert, and defendant Wendell Flynn, who would have testified about improvements made to the property. With regard to the preclusion of exhibits, defendants contend the trial court abused its discretion in barring them from presenting pictures showing the condition of the property prior to their purchase to demonstrate the improvements that they made.

However, the facts defendants now claim they or their expert would have testified to at trial were precisely the objects of plaintiffs' pretrial discovery requests that were ignored by defendants. The unanswered interrogatories and request for production of documents served on defendants included questions concerning improvements made to the property and defendants' perception of the market value of the property, for the purpose of determining potential setoffs or information regarding market and rental value and allowing plaintiffs to validate the potential proofs of defendants. Defendants did not even attempt to provide plaintiffs with any of this information. Although plaintiffs were aware that defendants would be potential witnesses, the record indicates defendants refused to provide any information regarding the substance of their testimony by way of offer of proof prior to trial. Thus, defendants should not now be heard to complain. In any event, the record indicates defendants were not restricted in utilizing any of their information regarding improvements in cross-examining plaintiffs' expert witness at trial.

Defendants cannot sincerely blame their failure to comply with discovery on their former attorney, because it is well established that "notice to an attorney is notice to the client who employs him." *Reinecke v Sheehy*, 47 Mich App 250, 262; 209 NW2d 460 (1973). Moreover, defendant Wendell Flynn's affidavit, in which he indicates he was unaware he would be precluded from calling witnesses at trial, is directly contradicted by the fact that this issue was argued in his presence before the trial court on September 27, 1995 (per plaintiffs' motion in limine to bar witnesses), and defendants' counsel stated on the record there were "probably not" any witnesses that would be presented. "[W]here the client stands by and permits work to be done, or an argument to be made on his behalf \* \* \* we think it may fairly be assumed from his silence and acquiescence that he consented thereto." *Bessman v Weiss*, 11 Mich App 528, 531; 161 NW2d 599 (1968), quoting *Eggleston v Boardman*, 37 Mich 14, 19, 20 (1877). Recourse, if any, lies in an action for professional malpractice against defendants' former counsel.

We conclude the record supports plaintiffs' contention that defendants engaged in a continuous pattern of delay and repeatedly denied plaintiffs the discovery to which they were entitled. Thus, under the circumstances, the trial court did not abuse its discretion in imposing sanctions for defendants' abuse of the discovery process. *Dean, supra*.

### III

Defendants next argue that during trial their counsel attempted to cross-examine plaintiffs' expert about why he failed to use available single family residential reports instead of reports for investment properties when estimating rental return, but the trial court improperly cut off this inquiry. The gist of defendants' complaint is the trial court based its damage award entirely upon plaintiffs' expert's testimony; the expert was, according to defendants, comparing apples to oranges, thereby reflecting on his competency. Defendants also contend the trial court improperly disallowed cross-examination of plaintiff Curtis Korneffel with respect to whether money was tendered to plaintiffs before the redemption period expired; plaintiffs purportedly opened the door to this line of questioning with testimony that defendants did not timely pay the redemption monies.

The scope and duration of cross-examination of witnesses rests in the trial court's sound discretion and exercise of that discretion will not be reversed by the court absent a clear showing of abuse. *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995); *Gibson v Henkin*, 141 Mich App 468, 471; 367 NW2d 418 (1985).

Because this was a bench trial, the trial judge was aware that the issue of timeliness of the redemption payments had been resolved against defendants in *Flynn v Korneffel*, *supra*, and ruled this line of inquiry to be irrelevant in this suit for reasonable rent. We affirm that defendants were properly foreclosed from using the redemption money issue to impeach the credibility of plaintiff Curtis Korneffel because that issue had been resolved and in no way affected the credibility of his testimony.

With regard to defendants' purported inability to cross-examine plaintiffs' expert witness about his use or failure to use single family residential reports as the basis of his rental appraisal, the record belies defendants' contention that there was never an explanation for the expert's failure to examine the residential rental reports. The record indicates the expert testified that the mansion in question, due to its unusual character, was "not the type of property that's typically leased or rented in the marketplace" and, therefore, was not amenable to the usual or typical methods of rent estimations. The expert further testified he did use information regarding returns for residential property as well as the commercial segment of the real estate market, taking a "conservative approach" in estimating the market value of the property. Defendants' counsel was curtailed in his questioning, but only after he persisted in asking a question for which the witness testified that he did not know the answer. The question had been asked and answered. See *In re Wardell Jones*, 142 Mich App 207, 212; 369 NW2d 212 (1985). Because the record shows defendants were not unduly limited in their cross-examination of the witness, we find no abuse of discretion in this regard.

#### IV

Defendants next contend the proofs did not support a finding of waste.<sup>3</sup> At trial, plaintiffs requested damages for waste to the carriage house in the amount of \$224,378, which was the amount in

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<sup>3</sup> "Waste" is defined as "Action or inaction by a possessor of land causing unreasonable injury to the holders of other estates in the same land." Black's Law Dictionary, 6th Ed. See also *Nusbaum v Shapero*, 249 Mich 252, 263; 228 NW 785 (1930).

fact awarded by the trial court. Defendants argue his award is contradicted by the absence of testimony regarding the condition of the carriage house in 1981 compared to its condition in 1996 and the dearth of testimony that the condition of the carriage house detracted from the property's overall value, which increased from \$1,150,000 in 1988 to \$2,250,000 at the time of trial.

Findings of fact are reviewed under a clearly erroneous standard. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Id.*

Plaintiffs' expert testified on cross-examination that he did inspect the interior and exterior of the carriage house in September 1995 while it was occupied by defendants. He took photographs of the property, including the carriage house, at that time and again in January 1997. He testified he was also on the property after possession was returned to plaintiffs. The expert's written estimate of reasonable rental value indicates the wooden frame carriage house "had been partially demolished and was left needing extensive reconstruction and renovation." The report further stated that

The estimated cost to reconstruct and renovate the partially demolished carriage house has been reviewed and is found to be a reasonable estimation to put this home back in livable condition. These costs were prepared by a professional cost estimator utilizing the current R. S. Means cost manual. The total cost before an allowance for contingencies is \$208,681 and with the inclusion of a reasonable allowance of 5% for same is rounded to \$220,000.

Pictures of the demolition are contained in this expert's estimate of reasonable rental. The expert further noted that defendants removed "significant portions of the interior," removed "the eastern portion of the building area and basically the back section . . . of the carriage house has been removed as well as other portions of the structure." The carriage house thus decreased the value of the property as a whole.

A review of the record leads this Court to the conclusion that the testimony and exhibits produced in conjunction with the expert's presentation contradict defendants' contention that there was no evidence the carriage house diminished the property's value in some way. Although the overall value of the mansion and property substantially increased over the term of the holding over by defendants, the values would have increased more but for the waste/damages committed by defendants. Therefore, we conclude the trial court's findings of fact regarding waste were not clearly erroneous. *Walters, supra.*

## V

Defendants next argue they put over \$1.4 million in improvements into the property and were entitled to a setoff or credit for those improvements against reasonable rent. Although the trial court permitted defendants limited questioning regarding improvements, they now maintain they were unfairly precluded, for the reasons stated in subsections I and II of this opinion, *supra*, from presenting proofs

about the substantial improvements they made while in possession of the property. Defendants contend “because this is primarily an action for equitable rent, equitable standards must be applied.”<sup>4</sup>

We have already determined, *supra*, that the trial court properly refused to allow defendants to testify or produce any evidence regarding improvements that were made to the property. Many of plaintiffs’ ignored discovery inquiries were directed to the topic of improvements. Thus, when this issue is viewed in conjunction with the sanctions imposed and the reasons for such sanctions, we conclude the trial court did not abuse its discretion in excluding evidence of a setoff. Moreover, defendants did not plead any affirmative defense in their answer relating to a setoff or improvements as required by MCR 2.111(F)(3)(b) and (c), and therefore have waived this defense. *Travelers Ins Co v Detroit Edison Co*, 237 Mich App 485, 494-495; 603 NW2d 317 (1999). Finally, the land contract itself specifically provided in paragraph 3(f) that

If the purchaser shall fail to perform this contract or any part thereof, the Seller immediately after such default shall have the right to declare the same forfeited and void, and retain whatever may have been paid hereon, and all improvements that may have been made upon the premises, together with additions and accretions thereto, and consider and treat the Purchaser as his tenant holding over without permission. . . .

Consequently, by virtue of the terms of the land contract, when defendants defaulted, they lost whatever they paid on the contract as well as the value of the improvements. For these reasons, defendants’ argument is meritless.

## VI

Defendants next complain the trial court abused its discretion by not excluding and by relying on plaintiffs’ expert’s testimony where his calculations regarding reasonable rent were speculative because such calculations were based on rates of return for investment properties rather than more analogous single family residences. We disagree.

Defendants neither objected to the expert witnesses’ testimony as speculative nor moved to exclude such testimony, and in fact stipulated to entry of the expert’s appraisal report. In any event, as previously noted, the expert testified that this mansion type of residence, is “not the type of property

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<sup>4</sup> This case is in fact grounded in a statutory remedy. It is a request for reasonable rent pursuant to MCL 600.5750; MSA 27A.5750, which states in pertinent part:

The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. . . . The plaintiff obtaining a judgment for possession of any premises under this chapter is entitled to a civil action against the defendant for damages from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be.

that's typically leased or rented in the marketplace" and, therefore, the typical or normal way in which a real estate appraiser would estimate rent was not applicable. The expert did not find any comparable rental properties and thus utilized a return on investment approach. Under the circumstances, the trial court did not abuse its discretion in admitting the expert testimony and, further, did not clearly err in its findings of fact in this regard. *Phillips v Deihm*, 213 Mich App 389, 401-402; 541 NW2d 566 (1995).

## VII

Defendants' remaining appellate issues concern the propriety of the trial court's issuance of an order correcting the original judgment. Plaintiffs served their motion to correct judgment on defendants on October 20, 1997, eight days before defendants filed the present appeal. While the appeal was pending, the trial court modified the judgment by entering its order of November 21, 1997, increasing the judgment by \$198,045. Defendants now claim the trial court was without jurisdiction to correct the judgment, the original judgment amount was stipulated to, and no clerical error in the original judgment warranted amendment. We disagree.

The question of the trial court's jurisdiction is one of law that we review de novo. *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 395; 554 NW2d 345 (1996). We review the trial court's decision to correct the judgment for an abuse of discretion. *Detroit Free Press, Inc v Dep't of State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999); *McDonald's Corp v Twp of Canton*, 177 Mich App 153, 158; 441 NW2d 37 (1989).

In support of their argument that the trial court did not have jurisdiction to amend the judgment after an appeal had been taken, defendants cite MCR 7.208(A), which provides in part:

After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law. . . .

A review of the record indicates the motion to correct judgment was precipitated by the following circumstances. At the time of trial, plaintiffs did not seek to recover, as an element of damages, those taxes which had been paid into an escrow account by defendants at the time of trial, but only taxes that were unpaid from March 1, 1996, amounting to \$24,221. The trial court ultimately compensated plaintiffs for these taxes, including the exact amount requested by plaintiffs in the judgment rendered in their favor. Further, at the conclusion of the bench trial, the trial court expressly determined there would not be a setoff for real estate taxes paid by defendants against the reasonable rent. However, during the course of the parties' argument on posttrial motions, defendants' attorney, without the benefit of the trial transcript, erroneously (but we presume, inadvertently) led the court to believe the matter of a setoff or credit for real estate taxes had not been argued or settled during trial. As a result, the trial court reduced the judgment amount by \$209,000, crediting defendants for taxes paid into the escrow account. Plaintiffs thereafter filed a motion to correct judgment. The day before the motion was heard, both parties' counsel received the trial transcript, which in fact showed that the issue of a setoff for paid taxes in fact had been addressed and rejected by the trial court during the trial. The trial court consequently amended and increased the judgment to conform to the proofs and to reflect its original holding that defendants were not entitled to a setoff for paid taxes.

On the basis of these facts, plaintiffs argue that the language "as otherwise provided by law" contained in MCR 7.208(A) allows an amendment of judgment pursuant to MCR 2.612(C)(1)(a) or (c), which provides in pertinent part:

On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

\* \* \*

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Reconciliation of the provisions of MCR 2.612 with MCR 7.208 is problematic, however, as recognized in Dean & Longhofer, *Michigan Court Rules Practice* (4th ed), Author's Commentary, § 2612.20, pp 487-488:

The effect of a pending appeal on the power of the trial court to grant relief under MCR 2.612(C), however, creates problems. MCR 7.208(A) provides that, after a claim of appeal is filed or leave to appeal granted, the trial court may not set aside or amend the judgment or order appealed from except by order of the court of appeals, by stipulation of the parties, or otherwise provided by law. Yet the time for filing a motion seeking relief from the judgment continues to run while the case is pending on appeal. This leads to undesirable complications, either requiring a party seeking relief from judgment to present its grounds first to the appellate court, which may then remand the case to the trial court if the grounds are well taken, or requiring the motion to be filed in the trial court while the appeal is pending although the court cannot act upon it until the case is remanded. Under the latter approach, the trial court could indicate its intention to grant the motion upon remand, and a remand could then be obtained from the appellate court under MCR 7.211(C).

Such a complicated situation exists here, where at the time the trial court issued its order correcting the judgment, the lower court record had already been transferred to this Court pursuant to defendants' appeal, thereby depriving the trial court of jurisdiction to enter the order. See MCR 7.208(C). However, we conclude that, given the unusual circumstances, it would be a waste of judicial resources to remand this matter to the trial court to do what has already been done. Therefore, in lieu of remanding to the trial court for correction of the judgment, we will treat the order of November 21, 1997, as though it was entered nunc pro tunc. Cf. *Safie Enterprises, Inc v Nationwide Mutual Fire Ins Co*, 146 Mich App 483, 491-493; 381 NW2d 747 (1985); *Jefferson Maintenance Co v Detroit Electrottype Co*, 7 Mich App 619, 622-623; 152 NW2d 699 (1967).

Defendants nonetheless argue that plaintiffs stipulated to a setoff of taxes. However, a review of the record does not bear this out, but rather indicates plaintiffs' attorney expressly told the court that "my clients are not stipulating to the decisions of the court that led to the offset or credit, and we reserve the right of appeal as to the credit; but we have agreed to the amount that if a credit were given for prior taxes that this should be the amount."

Finally, defendants argue there was no clerical mistake warranting a correction of the judgment. Plaintiffs originally filed their motion to correct judgment pursuant to MCR 2.612(A), citing clerical error as the ground for amendment. However, upon receipt and review of the trial transcript, plaintiffs concluded that the grounds cited in MCR 2.612(C) more accurately covered these circumstances and framed their argument accordingly. We agree that the issue falls within the purview of MCR 2.612(C). Most important is that the result properly reflected the trial court's original findings rendered at the conclusion of the trial. The trial court therefore did not abuse its discretion in correcting the judgment.

Affirmed.

/s/ Patrick M. Meter

/s/ Roman S. Gribbs

/s/ Richard Allen Griffin