

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

and

WAYNE COUNTY SHERIFF,

Intervening Plaintiff-Appellant,

v

CLUB 747, TOP FLIGHT ENTERTAINMENT,  
and ALAN MARKOVITZ,

Defendants-Appellees.

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UNPUBLISHED

October 17, 2006

No. 260188

Wayne Circuit Court

LC No. 97-790200-CF

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Intervening plaintiff, the Wayne County Sheriff, appeals by leave granted from the trial court's January 6, 2005, order clarifying the scope of a 2002 consent judgment to explicitly provide that the Wayne County Sheriff is bound by the terms of the judgment. For the reasons set forth in this opinion, we vacate the order entered by the trial court and remand for entry of an order dismissing the show cause proceedings against the Wayne County Sheriff.

The Wayne County Prosecutor's Office initiated a series of nuisance abatement/forfeiture actions against defendant Club 747, which was owned by defendant Top Flight Entertainment, which in turn was owned by defendant Alan Markovitz. These actions alleged that various lewd sexual acts were occurring at defendant club. Each action was resolved by entry of a consent judgment between the prosecutor's office and defendant club. This appeal involves whether the Wayne County Sheriff, which was not a party to a 2002 consent judgment entered into by the prosecutor and defendant club, was bound by the terms and conditions of the judgment, particularly those that purported to restrict the sheriff's ability to police defendant club's future conduct. In order to understand the questions of law presented in this appeal it is important to set forth the procedural history of this matter.

In 1997, plaintiff filed a nuisance abatement/forfeiture action against defendants pursuant to MCL 600.3801 *et seq.* Plaintiff's complaint alleged that lewd sexual acts were being

performed by dancers at defendant club. The parties settled the action through a 1998 consent judgment that permanently enjoined dancers at defendants' clubs from engaging in certain proscribed conduct. The consent judgment provided that observations of any proscribed conduct were to be reported to plaintiff within two business days after they were reported to the managerial staff of defendant club. The agreement provided that if there was a finding that the violations occurred, a show cause hearing would be held and monetary damages assessed against the Club if the violations were proven by a preponderance of the evidence. The Wayne County Sheriff was not a party to the 1998 consent judgment.

In 2002, Wayne County Sheriff's deputies conducted undercover surveillance and discovered that dancers at defendant club were still performing lewd sexual acts. They issued tickets, made arrests, and the club was shut down. In response, plaintiff filed another nuisance abatement/forfeiture action against defendants alleging that the lewd sexual acts violated public nuisance laws and the 1998 consent judgment. Plaintiff sought an order to show cause why defendants should not be held in contempt of court. The trial court issued an order to show cause, but the parties entered into a settlement agreement that resulted in another consent judgment in the 1997 action. The same day the 2002 consent judgment was entered in the 1997 action, an order was entered in the 2002 action by stipulation of plaintiff and defendants that amended the 2002 complaint by adding the Wayne County Sheriff as a party to that case. Although only plaintiff and defendants approved the order, the Wayne County Sheriff concedes on appeal that it consented to its addition to the 2002 action. The Wayne County Sheriff was also a party to another order entered that same day entitled, "Order between Wayne County Sheriff's Department and Defendants." This order was entered to effectuate the settlement agreement terms contained within it. It provided that the Sheriff's department would close and not re-open its investigation in connection with defendants who were named in the 2002 action and protected defendants from being charged with any violation stemming from activities up to the date of the order. However, the settlement agreement clearly provided that future violations of the law were not protected. Specifically, the order provided that "[t]his settlement agreement does not bar any criminal investigation, request or issuance of criminal charges, or prosecution of criminal charges arising out of events that occur after the date this settlement is entered." The order also provided that the terms of the settlement agreement applied to the Wayne County Sheriff and defendants and that the signatories promised to fully perform the terms of the agreement. Plaintiff, defendants and the Wayne County Sheriff were all signatories to this agreement, which led to dismissal of the 2002 action.

The 2002 consent judgment in the 1997 action was then entered, with only plaintiff and defendants listed as parties. This consent judgment provided:

All future actions which allege substantially the same conduct as alleged in this case (Case No. 97-790200-CF) and/or the 2002 (Case No. 02-290264 CF) case referenced above, shall only be brought by the filing and service of a Motion to Show Cause with this court, with service to Defendant and Defendant's counsel and shall not be filed as a separate action or in any other manner. The terms of this Amended Consent Judgment shall govern the Court's disposition of those future matters, if any.

Again, defendants were permanently enjoined from allowing their employees to engage in certain acts of sexual conduct, including lap dancing, masturbation, or the exposure of dancers' genitalia or anus. Defendants' security guards were to report any alleged violations to the managerial staff. If the staff failed to take corrective action, plaintiff could request a show cause hearing. However, if plaintiff or "any law enforcement agency" discovered an alleged consent judgment violation, then the 2002 consent judgment provided, in part, that:

. . . the Plaintiff shall, within seven (7) days of the alleged violation, give notice to the Defendant of the alleged violation ("Notice to Cure"). This notice shall describe the alleged violation and shall include all information regarding the alleged violation known to the plaintiff regarding the alleged violation. . . . The Defendant shall have seven days from the expiration of the notice period to cure the alleged violation (the "cure period") and a Notice of Cure shall be immediately given to the Plaintiff.

In 2004, the Wayne County Sheriff conducted a raid of defendant club and again arrested several dancers for performing lewd acts and issued citations. Defendants subsequently filed a motion in the 1997 case, requesting an order to show cause why the Wayne County Sheriff should not be held in contempt for violating the 2002 consent judgment by conducting the raid and making arrests instead of adhering to the procedures prescribed in the 2002 consent judgment. The Wayne County Sheriff moved to dismiss the motion, alleging that it was not a party to the 1997 case or the 2002 consent judgment and, therefore, was not bound by the judgment. The trial court declined to dismiss defendants' motion. Although it also declined to find the Wayne County Sheriff in contempt, it entered an order clarifying the scope of the 2002 consent judgment to provide that the Wayne County Sheriff was bound by its terms. That order, which was entered on January 6, 2005, states as follows:

IT IS HEREBY ORDERED that the July 18, 2002 First Amended Consent Judgment be and is clarified as follows for the reasons set forth on the record:

The First Amended Consent Judgment is binding on the Sheriff and all future actions which allege substantially the same conduct as alleged in this case (case no. 97-790200-CF) and/or the 2002 (case no. 02-290264-CF) case referenced above, shall only be brought by filing and service of a Motion to Show Cause with this court, with service to Defendant and Defendants' counsel and shall not be filed as a separate action or in any other matter whatsoever.

On January 11, 2005, the Wayne County Sheriff filed an application for leave to appeal the January 6 order, and this Court granted leave on February 16, 2005. On March 30, 2005, plaintiff filed a motion to clarify or modify the order, and on May 4, 2005, the trial court entered the following order clarifying the January 6 order:

THIS MATTER having come before the Court on the People of the State of Michigan's Ex Rel Kym L. Worthy's Motion to Clarify and/or Modify the Court's Order dated January 6, 2005, the Defendants having filed a response and the Court having heard arguments of counsel on April 22, 2005 and the Court being fully apprized [sic] in the premises,

IT IS HEREBY ORDERED that January 6, 2005 Order Denying Motion To Hold Wayne County Sheriff in Contempt and Clarifying Scope of Consent Judgment shall be and is further clarified as follows for the reasons set forth on the record:

The First Amended Consent Judgment of Nuisance Abatement (Case No. 97-790200-CF) and/or the 2002 (Case No. 02-290264-CF) is further clarified and does not preclude the Wayne County Sheriff and/or any other law enforcement agency from enforcing the criminal laws at the Defendant Club 747 aka Flight Club, and/or to arrest any person that is violating the criminal laws of this state, even if the civil nuisance abatement activities pursuant to MCL 600.3801 et seq and the criminal activity are overlapping.

The Wayne County Prosecutor may issue all criminal charges arising at the Defendant Club 747 aka Flight Club for any criminal law violation past or present even if the civil nuisance abatement activities pursuant to MCL 600.3801 and the criminal activity are overlapping, and the Wayne County Prosecutor is free to issue any criminal charges arising out [of] criminal law violations in the future even if the civil nuisance abatement activities pursuant to MCL 600.3801 et seq and the criminal activity are overlapping.

IT IS FURTHER ORDERED that the First Amended Consent Judgment of Nuisance Abatement (Case No. 97-790200-CF) and/or the 2002 (Case No. 02-290264-CF) only applies to the procedure to be followed in the civil nuisance abatement proceeding and does not in anyway prohibit and/or limit the ability of any law enforcement agency to enforce the criminal laws of this state and/or the issuing of criminal charges by the Wayne County Prosecutor.

In its May 4, 2005, order, the trial court gave the Wayne County Sheriff the relief it sought. This fact raises the issue whether the Wayne County Sheriff's appeal is moot. Therefore, as a preliminary matter, we first address the issue of mootness. An issue is moot if events have rendered it impossible for the court to fashion a remedy. *In re Dudzinski Contempt*, 257 Mich App 96, 112; 667 NW2d 68 (2003). A reviewing court will not reach moot issues or declare principles or rules of law that have no practical effect on the case before it "unless the issue is one of public significance which is likely to recur and yet evade judicial review." *Federated Publications, Inc v Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002). Throughout the lower court proceedings and on appeal, the Wayne County Sheriff sought the freedom to enforce the criminal laws of this state without restriction. Thus, it would seem that because the Wayne County Sheriff already effectively obtained the relief it sought through the May 4, 2005, order, the appeal is moot. *Detroit Edison Co v Pub Service Comm*, 264 Mich App 462, 474; 691 NW2d 61 (2004).

However, MCR 7.208(A) provides that, in civil cases, a trial court may not amend the judgment or order appealed from after a claim of appeal is filed or leave to appeal is granted, except in certain circumstances. Three of these exceptions are clearly inapplicable because this Court did not allow the May 4, 2005 order, the parties did not stipulate to it, and a preliminary injunction was not involved. Defendants expressly objected below to the trial court entertaining plaintiff's motion to clarify because of this pending appeal. The final exception permits an

amendment as provided by law. We are not aware of, and the parties have not cited, any applicable law that would enable the trial court to modify its January 6, 2005, order. Therefore, we find that because the May 4, 2005 order violates MCR 7.208(A), it is void and we reverse it. See *Wison v General Motors Corp*, 183 Mich App 21, 41; 454 NW2d 405 (1990) (the remedy for a violation of MCR 7.208(A) is to reverse the trial court's order without prejudice to the moving party's right to renew the issue that gave rise to the order). We therefore consider the substance of the Wayne County Sheriff's appeal.

We concur with the Wayne County Sheriff's argument that the trial court erred in finding that it was bound by the terms of the 2002 consent agreement.

A consent judgment is in the nature of a contract and is to be construed and applied as such. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). The trial court's interpretation of a contract is a question of law that is reviewed de novo. *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

The Wayne County Sheriff asserts that it could not be bound by the 2002 consent judgment because it was not a party to it. Because a consent judgment is the product of an agreement between the parties, *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 75; 463 NW2d 129 (1990), and plaintiff and defendants were the only parties to the 1997 and 2002 consent judgments, the Wayne County Sheriff, never being a party to the consent judgments, cannot be bound by their terms. The record shows that the Wayne County Sheriff was only added as a party to the 2002 case, and that it entered into a separate agreement with defendants in that case whereby it was expressly permitted to pursue criminal investigations and request issuance of criminal charges for conduct occurring after the date of the order entered in that case.

Because the Wayne County Sheriff was not a party to the 1997 case or the 2002 consent judgment, the trial court did not have the authority to amend the 2002 consent judgment through its January 6, 2005, order to effectively add the Wayne County Sheriff as a party. See 49 CJS, Judgments, § 29, p 80 (trial court cannot render a judgment against a nonparty); *Capitol S&L Co v Standard S&L Ass'n*, 264 Mich 550, 553; 250 NW 309 (1933) (trial court cannot adjudicate rights of a nonparty).

Defendants maintain that even if the Wayne County Sheriff was not a party to the 1997 case or the 2002 consent judgment, it can nevertheless be bound by the consent judgment. To form a valid contract, there must be mutual assent on all the material terms. Whether there is such agreement is determined by objectively viewing the express words of the parties and their visible acts. *Sanchez v Eagle Alloy Inc*, 254 Mich App 651, 665; 658 NW2d 510 (2003). Here, the record provides no basis for concluding that the Wayne County Sheriff agreed to the terms of the 2002 consent judgment or intended to be bound by it. First, the Wayne County Sheriff did not sign the 2002 consent judgment. Second, even if the Wayne County Sheriff's counsel was present during the negotiations that resulted in the 2002 consent judgment, the Wayne County Sheriff affirmatively entered into a separate agreement with defendants that did not restrict its future law enforcement conduct. Third, even if the Wayne County Sheriff was present in court when the settlement agreement that resulted in the 2002 consent judgment was placed on the record, there is no evidence that the Wayne County Sheriff made any statements reflecting its intent to be bound by its terms. For these reasons, the trial court clearly erred in concluding that the Wayne County Sheriff agreed to be bound by the 2002 consent judgment.

Additionally, the Wayne County Sheriff cannot be bound to the 2002 consent judgment solely by virtue of plaintiff's participation. Wayne County established the department of corporate counsel to represent it in all civil matters. Therefore, the prosecutor, who represented plaintiff, was prohibited from representing the Wayne County Sheriff absent a request from Wayne County. See MCL 49.72. There is no evidence that Wayne County ever made such a request. On the contrary, the record demonstrates that corporate counsel represented the Wayne County Sheriff in the 2002 action to which it was actually made a party.

Accordingly, the trial court's January 6, 2005, order is reversed and vacated and we remand for entry of an order dismissing the show cause proceedings against the Wayne County Sheriff in the 1997 case.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello