EFiled: May 31 2023 12:54PM EDT
Filing ID 70113384
Case Number 94,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SALT MEADOWS HOMEOWNERS, ASSOCIATION, INC., et al.,	)	Case No. 94,2023
Plaintiffs Below / Appellants,	)	On Appeal from the Delaware Superior Court
v.	)	
ZONKO BUILDERS, INC.,	)	C.A. No. S17C-05-018 RHR
Defendant Below / Appellee.	)	

DEFENDANT BELOW, APPELLEE'S ANSWERING BRIEF

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Dated: May 31, 2023

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NATURE OF PROCEEDINGS

The trial court issued a Pretrial Scheduling Order on March 15, 2019 calling for a trial date of February 1, 2021. (A183). Plaintiffs expert report deadline in the Pretrial Scheduling Order was subsequently amended on August 28, 2019 to provide a new Plaintiffs expert deadline of November 1, 2019. (A491). Plaintiffs four expert identifications and reports were produced on November 1, 2019. (A495). The original discovery deadline of May 29, 2019 was amended on August 28, 2019 to provide a new discovery deadline of June 22, 2020. (A491). The discovery was concluded in June 2020.

Michael Lewis (Custom Carpentry) was identified as one of the Plaintiffs experts and his report was produced on November 1, 2019. (A495). Lewis testified in his deposition on June 11, 2020 that the repair work at Salt Meadows was not complete even through the then current work schedule ran through May, 2022. (A2640, 2642).

Because of the ongoing COVID pandemic and the administrative orders of this Court closing the courts for trials, the February 1, 2021 trial date was continued by the trial court on December 17, 2020. (A550). The court then issued a letter on September 22, 2021 setting a teleconference for October 11, 2021 to re-schedule the trial. (B1). The scheduling teleconference with Commissioner Howard was held on October 11, 2021. For some reason the court docket does not reflect either the

scheduling teleconference or a Judicial Action Form. Attached is a redacted email from defense counsel confirming the holding of teleconference confirming also that Defendant was given a month to file a motion to extend the discovery deadline. (B3).

Although the court permitted Defendant to file a motion for additional discovery Plaintiffs filed a Motion to Preclude Supplemental Discovery or the Alternative to Limit Amendment of the Scheduling Order on October 15, 2021. (A561). Defendant responded to Plaintiffs motion on October 21, 2021. (A570). Defendant further filed its own Motion to Permit Additional Discovery on October 21, 2021. (A922). The seven supplemental discovery requests appended to Defendant's motion were permitted by Judge Robinson at the November 12, 2021 oral argument and filed as a separate document following the motion on that even date. (A1063, 1064, 1065).

Plaintiffs filed responses to the supplemental requests ordered by the trial court on December 14, 2021. (A1068). Although the trial court found the seven supplemental requests to be appropriate Plaintiffs objected to all of them and in particular to supplementing Plaintiffs expert reports. (B-3, 9).

Defendant file a Motion to Compel and Request for Sanctions on December 23, 2021. (A1071). The motion was heard by the court on March 25, 2022 and granted. (A116). Between the filing of the motion to compel and the oral argument on the motion on March 25, 2022, Defendant filed a Motion in Limine to Exclude

Certain Testimony of Custom Carpentry, LLC, (Michael Lewis) and Becker Morgan Group, Inc. (Jeremy Walbert, P.E.) on January 26, 2022. (A1156). The March 25, 2022 motion order reserved decision on the motion in limine to bar testimony as stated. (A1600). The motion was denied. (A1610, 13). The motion was renewed during trial and denied by the court. (A4689). A motion for judgment as a matter of law was requested during trial and also denied by the court. (A4689). The motions in limine and the trial motions all concerned the unit columns not investigated.

Plaintiffs Second Supplemental Responses were filed on April 1, 2022. (A1603). Plaintiffs again objected to the requests and in particular declined to supplement the expert responses by stating Plaintiffs' expert reports and any supplements were previously provided. (B12, 19). No additional reports beyond November 1, 2019 or supplements were actually provided.

The jury returned the verdict on May 12, 2022 for $12.3 million for non-column damages and $1.6 million for column damages. Following the jury verdict, Defendant filed its Opening Brief in Support of its Renewed Motion for Judgment as a Matter of Law on May 24, 2022. (A1878). Plaintiffs filed their Answering Brief on June 6, 2022. (A2552). Defendant filed a Motion for a New Trial Remittitur on May 20, 2022. (A1827). Plaintiffs filed their Opposition to Defendants Motion on June 6, 2022. (A2552). Plaintiffs filed a Motion for Costs and Interest on May 26,

2022. (A1972). Defendant filed its response to Plaintiffs Motion for Costs and Interest on June 8, 2022. (A2589).

The trial court heard oral argument and two of the three motions on Wednesday, October 19, 2022, commencing at 1:00 p.m. (A4799). The oral argument on two of the three motions which concluded at 4:17 p.m. (A4955).

Oral argument was heard on the third motion by telephone on October 27, 2022 at 11:00 a.m. (A4957). The third motion was concluded two hours later. (5042).

The trial court issued its decision on post-trial motions on January 31, 2023. Defendant's Motion for a New Trial and Remittitur was granted in part and denied it in part. The trial court granted Defendants Renewed Motion for Judgment as a Matter of Law pursuant to Superior Court Civil Rule 50(b). It also granted Plaintiffs Motion for Costs and Interest in part and denied in part.

SUMMARY OF ARGUMENT

1. Admitted that the date of the judgment is the proper date for the commencement of post-judgment interest.

2. Denied that the date of injury pursuant to 6 Del. C. §2301(d) should be April 11, 2007 rather than when the injuries were discovered on February 15, 2016. It is denied that the plain meaning of 6 Del. C. §2301(d) and legislative intent was to make the date of the injury and date of the tort as the same date. The trial court properly interpreted 6 Del. C. §2301(d) to conclude that the statute as amended in 2000 is ambiguous because the tort and the date of injury are not synonymous and can be two different dates and in this case the appropriate starting point for pre-judgment interest is February 15, 2016.

3. Denied that the court erred in deleting or striking the additional award of non-column damages beyond the amount offered in discovery prior to trial. The trial court properly struck the additional $3 million verdict over and above the $8.3 million sought before the trial and beyond the evidence presented during the trial because it shocked the courts conscience and sense of justice. The testimony as to inflation should not have been permitted and nor should the testimony as to the additional sum of $500,000 in painting and cleaning not covered in the Lewis pre-trial expert report. The jury improperly added 30% to the amount sought before trial.

4. Denied that the court erred in granting Zonko judgment as a matter of law on the column damage issue. The trial court properly concluded that all columns were not the same and did not have the same purpose of support. The trial court should not have allowed the issue of damages to any unit columns other than to Unit 40149 based upon the lack of testimony by either of the Plaintiffs experts as to investigations or damages to the other 19 units. Having permitted this issue to go to the jury, the trial court properly stuck the verdict with the column damages having alerted the parties prior to the verdict that if there was a verdict for column damages it might not let that verdict stand.

COUNTER STATEMENT OF FACTS

Defendants Counter Statement of Facts does not repeat any facts identified by Plaintiffs. Any facts necessary to support Defendants arguments are found in the text of the arguments.

I. DEFENDANT ADMITS THAT THE DATE OF JUDGMENT IS THE PROPER DATE TO COMMENCE THE CALCULATION OF POST-JUDGMENT INTEREST.

A. Question Presented

Did the trial court properly conclude that the date of the judgment is the proper date to commence the calculation of post-trial interest?

B. Standard Review

Appellant courts review a trial court's interpretation of a state de novo. *Wyatt v. Rescare Homecare*, 81 A.3d 1253, 1260 (Del. 2007); *Gonzalez v. State*, 207 A.3d 147, 152 (Del. 2019).

C. Merits of the Argument

Defendant admits that the date of judgment is the proper date to commence the calculation of post-judgment interest.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT THE 2000 AMENDMENT TO 6 DEL. C. §2301(d) SEPARATED THE WORD "TORT" FROM THE WORD "INJURY" AND THE AWARD OF INTEREST DID NOT COMMENCE ON THE DATE OF THE TORT WHEN THE DATE OF THE INJURY IS DIFFERENT. ZONKO PRESERVED THE LEGAL ARGUMENT ON APPEAL (4799,4838-4857) (A2589-A2595, A4799).

A. Question Presented

Did the trial court properly conclude that 6 Del. C. §2301(d) is ambiguous and if the legislature had intended the date of the tort to be the starting point for prejudgment interest it would have used the word "tort" instead of "injury" in the statute. Based upon the unique facts of this case the date of injury can be different from the tort.

B. Standard of Review

Appellate courts review a trial judge's interpretation of a statute *de novo Wyatt v. Rescare Homecare*, 81 A.3d 1253, 1260 (Del. 2007); *Gonzalez v. State*, 207 A.3d 147, 152 (Del. 2019).

C. Merits of the Argument

Senate Bill 310 which became the amendment to *6 Del. C.* §2301(d) makes it clear that the current (prior law), limited pre-judgment interest only to those cases involving contract disputes and liquidated amounts which did not provide a financial incentive for insurance companies or wrongdoers to make prompt good faith offers of settlement. The bill amended the Delaware interest statute 6 Del. C. §2301 to provide for pre-judgment interest on awards of damages in tort cases where a

plaintiff has made a demand…and with the legal rate commencing from the "date of injury." 6 Del. C. §2301(d). (B3). While the Plaintiffs interpret the word "tort" and the "injury" to be synonymous had the Delaware General Assembly intended the tort and the injury to be one and the same then the amended statute would simply have read that in tort cases where the appropriate demand had been made the interest would be calculated at the legal rate commencing from the date of the tort. There is no indication in the amended statute that the Delaware General Assembly intended to re-define the word "injury" as opposed to permitting a mechanism to provide pre-judgment interest under certain circumstances.

A statute is ambiguous "if it is susceptible of two reasonable interpretations" *In the Matter of the Rehabilitation of Scottish RE (U.S.), Inc.*, 273, A.3d 277, 300 (Del. Ch. 2022); *CML V., LLC v. Bax*, 28 A.3d 1037, 1047 (Del. Ch. 2011) "If the statute is unambiguous, there is no need for judicial interpretation, and the plain meaning of the statutory language controls. If the statue is ambiguous, it should be construed in a way that will promote its apparent purpose and harmonize with other statutes." *Eliason v. Englehart*, 733. A2d 944, 946 (Del. 1999).

In this case the general assembly clearly distinguished between the statute as it existed before the 2000 amendment and the point of the 2000 amendment. The bill states "this Bill promotes the earlier settlement of claims, including prior to the filing of suit, by encouraging fair offers from defendants sooner, with the effect of

reducing Court congestion." (B23). It is quite clear that the general assembly expanded tort claims subject to pre-judgment interest when certain timing requirements are met. There is nothing about the bill suggesting that the Delaware General Assembly had any intention to redefine "injury" or the "date of injury" in any manner other than the typical use of injury in tort claims.

Plaintiffs claim that this Court has repeatedly held Section 2301 to be plain, unambiguous, and to be applied as written. (Appellants' Opening Brief, page 19). However, to the extent the courts of this state have found no ambiguities in Section 2301 this is limited to the written settlement demand, the timing of the extension of the offer, and the judgment awarded to the plaintiff. There are no prior decisions attempting to interpret the date of the injury in tort cases.

Plaintiffs makes the bold and clearly incorrect statement that there is no credible argument that the term "date of injury" is reasonably susceptible to more than one interpretation. (Appellants' Opening Brief, page 20). In fact, there is no credible argument that the term "date of injury" is limited to just one interpretation. To be sure where a violation of a legal right is concerned the word "tort" may be synonymous with the word "injury." However, in common language an injury is the consequence of the tort and not the tort itself.

The very first decision cited by Plaintiffs from this Court in the matter of *Rapposelli v. State Farm Mutual Auto. Ins. Co.*, 998 A.2d 425, 429 (Del. 2010) lays

bare the core failure of the Plaintiffs to understand that an injury can have more than one interpretation. The very first sentence of the Rapposelli case following the caption "Factual and Procedural Background" states that Rapposelli suffered injuries arising from a motor vehicle accident on January 4, 2012. Clearly the Rapposelli Court was distinguishing the difference between the negligent act which was the tort and the consequence of the negligent act which was the injury.

The meaning of injury is hurt, damage, or loss sustained. https://www.merriam-webster.com <dictionary> injury. It can also mean the violation of anothers rights for which the law allows an action to recover damages. The injury also means physical harm or damage to someones body caused by an accident or attack. https://dictionary.cambridge.org <dictionary> injury. The harm or damage is done or sustained to, escape without injury. A particular form of harm. https://www.collinsdictionary.com <dictionary> injury. In common language, the injuries are as a consequence the act and not the act itself. Victims of accidents seeking counsel, filing suit, and eventually ending up in trial do not seek to prove that they were involved in a tort, the point is to seek damages for the injuries suffered because a tort without damages produces nothing.

There is certainly no indication in the bill of the general assembly that it was consulting Blacks Law Dictionary or the Restatement of Torts to define the word tort and injury as synonymous. It would certainly come as a surprise to a layman that

injury has only one meaning and the meaning is contrary to the common understanding that an injury is the consequence of the act as opposed to the act itself.

In the trial court Plaintiffs' claimed that the tort occurred when the homeowners first built the homes which was concluded by April 11, 2007 (A1976). Plaintiffs' motion filed on May 26, 2022, speaks only to the date of the tort without attempting to define the date of the injury. (A1976). To Plaintiffs the phrase "date of injury" appears to be surplusage and which requires no explanation or interpretation. As stated an injury can be two things either being the tort itself or the consequence of the tort and they are not necessarily contemporaneous.

The trial court concluded that given the uniqueness of the case it adopted the Zonko argument that the "date of injury" "is the date when the damages were discovered and which would have been in 2016 (January 31, 2023 decision on post-trial motions pages 17-21). The statute is clearly ambiguous. First because it separates the tort action from the damages being calculated from the date of the injury and secondly because the injury itself is subject to more than one meaning.

PATTERN JURY INSTRUCTIONS for CIVIL PRACTICE in the SUPERIOR COURT of the State of Delaware ed. 2000, revised in part 8/15/2001, DAMAGES – PERSONAL INJURY (22.1)(Del. P.J.I. Civ. Section 22.1(2000) states that the purpose of damages awarded in a civil lawsuit is reasonable compensation for the harm or injury done. Certainly a jury being instructed on the measure of

damages speaks to the injury and harm done which makes it clear that the trial court is informing the jury that the injury is the consequence of the act and not the act itself.

"As a general rule, interest accumulates from the date payment was due the plaintiff, because full compensation requires an allowance for the detention of compensation awarded and interest is used as basis for measuring that allowance." *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978), *Metropolitan Mut. Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778 (Del. 1966). Pre-judgment interest serves two purposes: first it compensates the plaintiff for the loss of the use of his or her money; and second, it forces the defendant to relinquish any benefit that it has received by retaining the plaintiff's money in the interim." *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.2d 482, 486 (Del. 2011).

To be sure the 2000 amendment to 6 Del. C. §2301(d) does not require proof of loss per se. Plaintiffs do recognize the correctness of the general statement that the award of interest serves two purposes being compensation to a plaintiff for the loss of use of money and disgorging of the defendant of any benefit it received by retaining the plaintiffs money during the pendency of the case. *Fortis Advisers, LLC v. Dematic Corp.*, 2023 WL 2967781 (Del. Super. April 13, 2023); (Appellants' Opening Brief, page 25).

III. THE TRIAL COURT PROPERLY STRUCK THE JURIES ADDITIONAL VERDICT FOR NON-COLUMN DAMAGES BEYOND THOSE STATED IN THE CUSTOM CARPENTRY/LEWIS EXPERT REPORT IDENTIFIED ON NOVEMBER 1, 2019.

A. Questions Presented

Did the trial court properly conclude that the additional sum of $3 million bringing the amount claimed from $8.3 million to the verdict of $11.3 million shocked the courts conscience and sense of justice? Should the court have concluded also that the Plaintiffs failure to supplement their expert discovery should have precluded any testimony by Plaintiffs as to any damages for the non-column damages in excess of the amount identified in the November 1, 2019 Lewis/Custom Carpentry report? Defendant preserved the issue at A3627 to A3636 and A1827.

B. Standard of Review

The decision to grant or deny a remittitur is based upon an abuse of discretion standard. *In re Asbestos Litigation*, 223 A.3d 432 (Del. 2019). The Court reviews evidentiary rulings restricting or allowing expert testimony under an abuse of discretion standard. *Sammons v. Doctors for Emergency Services, et al*, 913 A.2d 519, 528 (Del. 2006).

C. Merits of the Argument

1. The trial court properly concluded that there were two reasons that the verdict shocked the conscience of the court and sense of justice. First that testimony about inflation and added costs related to the pandemic were improperly put before

the jury. Secondly the $8.3 million total was the worst case scenario and that some of the units had no work done at all.[1] (A3402, 3401).

"A verdict will not be disturbed as excessive unless it is so clearly so as to indicate that it was the result of passion, prejudice, partiality or corruption; or that it was manifestly the result of disregard of the evidence or applicable rules of law. A verdict should not be set aside unless it is so grossly excessive as to shock the Court's conscience and sense of justice; and unless the injustice of allowing the verdict to stand is clear. *Riegel v. Aastad*, 272 A.d 715, 717 (Del. 1970). *Bennett v. Barber*, 79 A.2d 363 (Del. 1951).

In the courts decision below the trial judge permitted testimony about inflation and additional costs despite objection by defendant and continued to permit that testimony because it seemed proper at the time. However upon reflection the court concluded that the testimony was improperly admitted. (Decision, pages 3, 2, 7).

Plaintiffs contend that the additional $3 million is supported by "common sense." (Appellants Opening Brief, page 32). They also contend that the finder of fact may consider testimony based upon a property owners personal knowledge when establishing the amount of damages. (Appellants Opening Brief, pages 32, 33). They then identify Kathy Lambrow as a homeowner and the president of the

[1] Kathy Lambrow testified that at the time of the trial in May, 2022, 6 years after the repairs commenced in 2016 that Units 40144, 40146, 40148, 40151, and 40167 had no repairs done other than the roof over the buildings. (A3402-3410)

homeowners association who should be permitted to testify as a "homeowner" to more than $6 million worth in additional work to be done, additional repairs to columns should be $1.6 million as well as $500,000 for additional repair costs such as dry wall painting and cleaning. In other words Plaintiffs claim that from the mere fact from being a homeowner that Lambrow should be permitted to testify to future construction costs over $6 million and that columns not investigated needing repairs in the amount of $1.6 million plus $500,000 for additional costs in the future. It is not sensible to conclude that the owner of one unit could possibly offer such testimony and nor did she.

2. Plaintiffs discovery abuses for the failure to supplement Plaintiffs expert reports pursuant to Superior Court Civil Rule 26(e) and the failure to supplement Plaintiffs expert reports pursuant to the rulings of the trial court on November 12, 2021 and March 25, 2022 should have barred any such testimony by Plaintiffs' experts during the trial.

The trial court permitted Plaintiffs' experts to offer both expert and non-expert testimony at the trial to supplement the March 15, 2019 Custom Carpentry/Michael Lewis report although the court had previously required Plaintiffs to supplement their expert reports before the trial and they refused to do so. Plaintiffs then attempted to supplement their reports on the fly during trial. The Court post-trial properly granted Defendant's Motion for New Trial or Remittitur by removing $3

million of the verdict from the $8.3 million identified in the March 15, 2019 report and which was produced as a Plaintiffs' expert report on November 1, 2019. Plaintiffs attempted to sandbag the Defendant by refusing to provide expert evidence started months before the start of the trial in May, 2022.

Michael Lewis testified he was paid for the work in the amount of approximately $2.4 million to the point of the trial. (A3624). He prepared a "rough estimate" for the work that was still needed to be performed at Salt Meadows as of March 15, 2019. (A3624). He projected $6.3 million in additional costs in the future based upon the March 15, 2019 estimate.[2] (A3625). He then agreed based upon his 2019 numbers that there would approximately "give or take" $6.3 million in additional work to be done based upon the estimate. However, if you subtract $2.4 million from $8.3 million the result is $5.9 million. Although the work had been ongoing at Salt Meadows since commencing in March 2016 approximately twice as much work was needed to be done in the future. (A3625).

Pursuant to administrative orders of this Court, the courts were closed to the public effective in March, 2020. The administrative orders were still in effect when case manager, Marco Suarez wrote to counsel on December 17, 2020, removing the February 1, 2021 trial from the court's calendar. (A550).

[2] Lewis testified at A3625 of this trial testimony that his March 15, 2019 projection was for $8.3 million of which $2.4 million had been paid.

The trial court scheduled a telephone scheduling conference with Commissioner Alicia B. Howard for October 11, 2021. (B1). Zonko wanted additional discovery since the discovery deadline was in June, 2020, although the construction work at Salt Meadows continued after that point and as of October 11, 2021 the court's had not yet opened to the public and no jury trials were being conducted. Commissioner Howard did not schedule the trial as of October 11, 2021 and permitted Zonko to have a month to file a motion to seek additional discovery.[3] Plaintiffs leaped ahead and filed Plaintiffs' Motion to Preclude Supplemental Discovery, or in the Alternative, Limited Amendment of the Case Scheduling Order. (A561). Plaintiffs opposed any additional discovery and proposed to limit the evidentiary record to matters discovered before July 1, 2020, although by the time they filed the motion more than a year had gone past. (A562). The seven discovery requests appended to Defendant's motion were permitted by Judge Robinson at the November 12, 2021 oral argument and filed as separate document following the motion on November 12, 2021. (A1063, 1064).

[3] For some reason there is no docket entry or civil judicial action form for the October 11, 2021 teleconference with Commissioner Howard. Attached is a redacted email from defense counsel dated October 11, 2021 at 11:02 a.m. referencing the scheduling teleconference that morning, although nothing was scheduled, and stating the defense was given a month to file a motion to permit additional discovery. (B3). Judge Robinson alluded to the scheduling to October 11, 2021 scheduling conference with Commissioner Howard in the text of the November 12, 2021 oral argument which pertained to a discovery extension for the defendant. (A2774, 2775).

At the oral argument on the discovery issue on November 12, 2021, Judge Robinson stated:

> What I was going to do was to allow Zonko to be very specific about any additional discovery that they would want, and they provided that, without my saying that. On October 21st, they filed their own motion to permit additional discovery and they have seven very specific requests. I am going to go ahead and allow - - order plaintiff to respond to those. I believe that those are limited in scope. I think that they, considering the amount of time that has elapsed during the pendency of this litigation, I think it's appropriate to clean up those few matters. I think it would be minimal difficulty for plaintiff to respond to those, and I also think most importantly it will help narrow the issues for trial. (A2776, 2777).

The Plaintiffs' Appendix filed in this Court included the Notice of Service for the request for production responses dated December 13, 2021 and titled "Responses and Objections to Defendants/Third-Party Plaintiff Zonko Builders, Inc.'s Second Supplemental Request for Production Directed to Plaintiffs." (A1068). However, Plaintiffs did not include with their appendix the actual responses which are included to the Defendant's Appendix. (B3).

Although the trial court found the requests to be narrow and easy to answer, Plaintiffs objected to every one of them. With regard to Request #7 "all Plaintiff expert reports beyond those provided on or before July 1, 2020" there were numerous objections to include the objection that the term "expert reports" is vague or otherwise open to multiple interpretations. However, when the Plaintiffs filed

their required expert identification and reports on November 1, 2019, they titled the notice of service "Plaintiffs' Expert Reports."

Zonko filed a motion to compel better discovery responses which was scheduled for January 21, 2022. Unfortunately because of the courts schedule the matter was not heard until March 25, 2023 and the court granted the motion without sanctions. (A1600).

The Plaintiffs provided supplemental responses as ordered by the court on April 1, 2022. (B12). The second set of discovery responses was no better than the first. There was one additional sentence which states "Plaintiffs' Expert Reports and any supplements thereto were previously provided." (B12). The only reports produced were dated November 1, 2019 and no supplements were actually provided at any point. Defendant went into the trial commencing in May, 2022 with the same expert reports produced on November 1, 2019 and never supplemented at any point up to the point of the expert testimony at trial. This brings us to the trial.

By the time of the trial, on May 4, 2022, and during direct testimony Plaintiffs' counsel asked Michael Lewis whether the $8,300,925.76 amount was a "rough estimate" for the work to be done as of March 15, 2019. (A3624). Lewis acknowledged that of that sum $2.4 million in work had already been done. (A3625). There was then a question that based upon Lewis' "knowledge and experience" in the industry whether prices would go up and Lewis said "yes." (A3625). The

question then became "All right. And based upon your understanding of industry standards, approximately how much do you think above that $8.3 million Salt Meadows would be looking at? Again, that's a rough estimate. This is a rough estimate." (A3626, 3627). At that point, Defense counsel objected.

What proceeded from pages A3627 to A3636 was a colloquy between the court and counsel and with two specific objections by defense counsel that Lewis could not decide for himself what the industry standards were and the court stated it did not want the witness to state a specific percentage amount although Lewis had the "expertise to testify". (A3628).

The trial judge asked Plaintiff's counsel to rephrase the question about industry standards and to keep it "vague and general." (A3631). Plaintiff's counsel then said "I just want to make that clear. I wasn't looking for an expert opinion." (A3631, 3632). Lewis was then asked based upon his training and experience and his knowledge of Salt Meadows to answer the question. Defense counsel then said "Your Honor, but he is the expert. Nobody else knows this in this room except for him. November 1, 2019 was an expert witness deadline. Four experts were identified. He was one of them. He has been identified as the plaintiff - - as an expert. So what is he on the stand doing now? If he is not an expert, who is he?" (A3632).

Plaintiff's counsel then stated that this gentleman is the man who has been doing all the work, which is why we are here trying to determine a dollar amount that is fair, reasonable and related to the liability of Zonko Builders. He is much more than an expert. He is the man doing it." (A3632, A3633).

The court then told Defense counsel that the estimate is going to be higher (although the record misstates 2009 rather than 2019) "so I don't think we need any kind of expertise to testify to that." (A3632, A3633). However, Defense counsel disagreed pointing out that supplemental discovery had been served with regard to expert reports and yet none were provided despite the court permitting discovery and the court entering an order to the compel better answers then the ones that were filed on December 14, 2022. (A3633-3634). By the time of the trial Lewis was testifying as an expert, but the expert reports were not supplemented whether based upon the supplemental discovery or Superior Court Civil Rule 26(e). The very questions that he is going to be asked on the stand were part of the supplemental responses that should have been filed with regard to the supplemental discovery that the Court permitted. The court ruled that Lewis did have a basis because "he is a contractor that routinely prices jobs." (A3634). While Lewis did price the job on March 15, 2019, and that pricing was identified pursuant to the expert responses on November 1, 2019, somehow by the time of the trial he was permitted to testify as an expert without supplementing the reports. During the colloquy with the court, Plaintiffs'

counsel told the court "I just want to make that clear. I wasn't looking for an expert opinion." (A3631, 3632). Somehow during this colloquy the person identified as an expert was said by the court to have the expertise to testify even though he wasn't being offered as an expert on the very subject of which his expert report of March 15, 2019 and produced on November 1, 2019 claiming that he is an expert.

The Court made it clear it did not want a percentage and Plaintiffs' counsel specifically told the court that he would not ask for one. (A3628). Following the conference, Plaintiffs counsel asked Lewis whether the quote for additional costs was simply "plus" and Defense counsel objected again and asked that the answer be stricken because simply saying it's plus is of no aid to the jury. (A3636). Telling the jury that the additional costs are simply "plus" is "just useless". (A3636). The court then said "(i)t's useless for both sides, and you will get to cross-examine him, that goes to the crux of the matter whether it's plus or minus." (A3636). The defense objection was overruled.

Although the trial judge said that he did not want a percentage of increase and Plaintiffs counsel agreed not to ask for that when colloquy ended and Lewis was asked to state whether there were additional costs he then said "I would say it's 30%." (A3637). The court immediately struck the answer. (A3637). However, as the court noted in the January 31, 2023 decision the 30% figure reinforced Kathy Lambrow's testimony and it appears that this jury improperly added 30% to the $8.3

million and also improperly added to the $500,00 claim by Lambrow as an estimate for repairs not included in the Lewis estimate. (Decision, page 6).

Lewis was then asked a series of questions about increases to different items in the construction. He said that plywood goes up and down. You know during COVID it went up really high and then it went back down now its going up again so it fluctuates. (A3640). Siding and APM Rubber have gone up and flashing has skyrocketed. Dumpsters have gone up because fuel charges are higher. (A3639-3641). Defense counsel then asked for a moment with the Court and during the colloquy asked for a continuing objection rather than standing up each time. The Court agreed. (A3641). None of these items were included in the March 15, 2019 estimate.

There was a second Plaintiffs expert, a professional engineer by the name of Jeremy Walbert. Walbert never produced any reports identifying the costs of repair before trial except to echo the March 15, 2019 report. When Walbert took the stand after Lewis finished, Plaintiffs counsel asked about price increases and obtained an answer that included the exact same 30% price increase which Plaintiffs counsel was told by the Court not to ask and which Plaintiffs counsel told the Court would not be requested. (A3973).

The court said that Lewis had the expertise to calculate the increased costs and that may be true. (A3638). He was represented to have the expertise to produce

the cost estimate of March 15, 2019 and which was produced as part of the Plaintiffs' expert identification on November 1, 2019. Lewis was then identified to the Defendants as an expert witness and the Plaintiffs represented to the jury that Lewis was an expert. If he was an expert and he intended to amend the March 15, 2019 expert report, then he had every opportunity to do so pursuant to Superior Court Civil Rule 26(e).

Plaintiff's counsel stated that $2,400,000.00 is the money previously paid and $5,900,000.00 is the money necessary to complete the construction and being the total coming to the March 15, 2019 estimate. 30% of the March 15, 2019 estimate of $8,3000,000.00 comes to $2,490,000.00. The total of the two comes to $10,790,000.00 which was rounded up by $10,000.00 comes to $10,800,000.00. Kathy Lambrow testified that she projected $500,000.00 in future repair costs without any calculations and if you add everything up it comes to exactly $11,300,000.00 which is the verdict. Indeed the jury also added a future inflation factor to the $2.4 million already paid.

The Plaintiffs claim that the jury should be permitted to use common sense to reach conclusions based upon the evidence and that's correct. However, the issue is whether the Plaintiffs expert is simply permitted to use common sense when he did not offer expert testimony necessary to pass the gate keeper. While the court properly granted Defendants Motion for New Trial or Remittitur by removing $3

million of the verdict being the inflationary figure unsupported by proper evidence there was also a discovery violation based upon the failure of Plaintiffs to supplement their expert reports as ordered by the court on November 12, 2021 and as further ordered by the court on March 25, 2022. The court abused its discretion allowing any supplementation of the expert testimony during trial because of the refusal to update the reports either as required by Superior Court Civil Rule 26(e) or based upon the discovery permitted by the court and which was improperly answered twice. All of these points were raised in the colloquy with the court while Michael Lewis was on the stand. (A3626 – A3641).

IV. THE TRIAL COURT SHOULD NOT HAVE PERMITTED THE JURY TO CONSIDER A VERDICT FOR COLUMN REPAIRS OTHER THAN FOR UNIT 40149. THE COURT SHOULD HAVE GRANTED ZONKO'S MOTION IN LIMINE BEFORE TRIAL AND AS RENEWED DURING TRIAL AND FAILING THAT IT SHOULD HAVE GRANTED ZONKO'S MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO SUPERIOR COURT CIVIL RULE 50. IT WAS CORRECT IN GRANTING THE RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW POST TRIAL. ISSUES WERE PRESERVED AT A1156, A3716-A3718, A4045-4055, A4688, A4689, A4690, A1878.

A. Questions Presented

Did the trial court properly grant the Zonko Renewed Motion for Judgment as a Matter of Law post-trial striking the verdict for column repair other than for the one unit that was inspected and repaired being Unit 40149? Should the court have granted the Motion in Limine or the Motion for Judgment as a Matter of Law at the conclusion of the trial?

B. Standard of Review

This Court's standard of review of a Superior Court ruling on a motion for judgment as a matter of law is whether the evidence and all reasonable inferences therefrom, taken in the light most favorable to the non-moving party, raise an issue of material fact for consideration by the jury." *Mazda Motor Corp v. Lindahl*, 706 A.2d 526,530 (Del. 1998).

C. Merits of the Argument

This argument is probably the easiest for the Court to decide. The Plaintiffs provided no testimony or evidence of damages to columns other than Unit 40149

despite being given numerous opportunities by the court to do so. Plaintiffs' argument with regard to the column evidence bears no relationship to what actually happened before the trial and during the trial. Any evidence other than evidence as to the columns at Unit 40149 was completely lacking and it will be clear to this Court that the trial judge understood before the trial and during the trial that the evidence as to column repairs other than the one unit was lacking and that is why the Jury Verdict Form included a separate line for the column repairs so the court could tell whether any part of the award included the column repairs. It was quite easy for the trial court after the verdict to segregate the verdict for the column repairs and to eliminate it as a part of the verdict.

Plaintiffs acknowledge that the November 1, 2019 experts identification and reports did not include any reference to column repairs for any of the 20 units at Salt Meadows. (Appellants Opening Brief, page 20, subparagraph 7.) There is not one iota of evidence or testimony that any of the units at Salt Meadows other than Unit 40149 were investigated or found in need of repairs.

Plaintiffs state at page 7 of their brief that the contractor (who is presumably Michael Lewis) issued an invoice being 10129F noting that the contractor found damage on the decks under the columns at Unit 40149. (A5459). The brief then states that homeowners promptly scheduled an investigation with Jason Boyd of CED Technologies being Zonko's engineer. It is true that such an invitation was

offered. (B26). The invitation was an email from Plaintiffs' counsel to all counsel stating "(o)ur contractor has discovered additional water damage in the columns supporting the rear deck on Unit 40149 (Building A). Accordingly, I write on behalf of Salt Meadows to invite all experts to investigate the columns before repairs on this unit are concluded." (B26).

As stated at page 8 of the Appellants' Opening Brief, the investigation was held on April 1, 2020. Pages 7, 8, and the top of page 9 of the Appellants' Opening Brief are almost completely irrelevant. Plaintiffs concentrate on Unit 40149 and state that Zonko's engineer did not produce a report of his investigation of Unit 40149. The problem is that at no point did Zonko ever contest the need to repair Unit 40149 and at no point during the trial did Zonko object to any of the evidence as it dealt with this unit. The issue during the trial and the issue in the Motion in Limine and the Motion for Judgment as a Matter of Law is that at no point was there any testimony or evidence that any of the other units were inspected or that there was any other damage to any other units that required repair. It was the lack of evidence that pervaded at trial and the reason that the trial judge specifically added a second line to the Jury Verdict Form specific to the column repairs. (A4689).

Plaintiffs state in their brief at page 8 that "(contractor)" further testified that Homeowners anticipated that repairs would be required to the columns located at all 20 units of Salt Meadows." (Appellants' Opening Brief, page 8). Aside from the fact

that this statement would be legally insufficient if made, the problem is that it is also not accurate. That is not what the contractor said.

Plaintiffs cite to A2641:1-14 being a part of the Lewis deposition testimony on June 11, 2020. What Lewis actually said was that the rest of the columns should be investigated based upon what he found at Unit 40149 and Unit 40154. What he said was that he only investigated the columns on Unit 40149 and when defense counsel mentioned 40154 he said that he had not investigated that thoroughly. (A2641,2642). When asked whether he intended to investigate the rest of them he said he would probably do so starting in September (2020). (A2642). Later in the same deposition he repeated that the columns in the other units needed to be investigated. (A2647). The Plaintiffs citations to the Lewis deposition testimony stating that the Homeowners anticipated that repairs were required to the columns located on all 20 homes is factually inaccurate.

Plaintiffs' claim at page 8 that at no point did Zonko request an investigation of any of the Homeowners columns other than the investigation on April 1, 2020, and that's true. Zonko and the other 3rd Party Defendant's were specifically invited by Plaintiffs' counsel pursuant to investigate the columns at Unit 40149. (B26). Since there was never any investigations of the other columns in the other units and no invitation to inspect any other columns or units other than Unit 40149 and no indication that any of the other columns or units were ever inspected or repaired,

why would Zonko request to inspect columns at units of which there were no complaints? Why would Zonko need to accept a second invitation as to the columns at Unit 40149 when it had no plans to dispute the need for repairs to these columns? As stated there was no objection at trial as to any of the costs for the repairs to Unit 40149.

As stated in Argument III of this brief, Zonko worked hard to obtain additional discovery as to any expert reports and which would certainly include the columns. In the trial court decision of January 31, 2023, the court stated:

> (a)s a preliminary matter, I note that Plaintiffs had ample time to have Lewis and Walbert investigate the columns further but did not do so. They claimed that because a full investigation required demolition and reconstruction of all the columns, it would be too expensive to undertake. However, Lewis acknowledged that after a cursory inspection he could see possible problems at a second unit, and he agreed that all the decks should be investigated further. Plaintiffs did not undertake even a basic superficial examination, and Plaintiffs vigorously argued against any reopening of even limited discovery. (January 31, 2023, Decision, page 13).

Although the Plaintiffs opposed any additional discovery the court granted it anyway and when offered the opportunity – twice - to give a proper response to the expert requests at request #7, they avoided it twice, once each on December 14, 2021 and after being ordered by the trial court to redo the discovery they again objected to it on April 1, 2022. April 1, 2022 supplemental responses are worse than the first because they refer to the previous Plaintiffs' expert reports (which are the only ones

produced on November 1, 2019) and to a supplementation of those reports which does not exist. (B12).

As stated when Lewis was deposed on June 11, 2020, he only investigated and repaired one unit being Unit 40149. However, on September 23, 2021, over year later, Plaintiffs demand included at subsection iv the sum of $1,443,396.40 for additional costs to repair the columns supporting the decks to all units. (A1179, 1180). The September 23, 2021 demand states that the damage to the external columns at the property was discovered in "Spring" 2020. (A1179, 1180). The only column repairs discovered in the spring of 2020 were for the one unit and yet the demand identifies all 20 units.

It was Lewis who set the standard by stating that an investigation of the additional units was needed and it was Lewis who declined to do any further investigations. To the extent that Plaintiffs made a demand on September 23, 2021 by increasing the costs from the $72,000 plus to over $1.4 million by stating that the damage to the other columns in the other units was discovered in the spring of 2020 then only two options exist. Either the demand is inaccurate, or Lewis lied in his deposition of June 11, 2020.

Shortly after the September 23, 2021 demand came increasing the repair costs of the columns from one unit to all 20 and misstating that all of the columns were

discovered to have problems in the spring of 2020 the supplemental draft discovery was sent to Plaintiffs as previously requested.

On January 26, 2022, having received no supplemental expert reports from the Plaintiffs with regard to the additional columns notwithstanding the September 23, 2021 demand letter and having received no expert reports from the Plaintiffs' in response to the supplemental discovery approved by the court, Defendant filed Zonko Builders, Inc.'s Motion in Limine to Exclude Certain Testimony of Custom Carpentry, LLC. (Michael Lewis) and Becker Morgan Group, Inc. (Jeremy Walbert, P.E.). (A1156).

Plaintiffs filed a response to Defendant's Motion in Limine claiming that Defendant has been on notice of the specific damages for 22 months. (A1351). However, the first notice to Zonko was the email from Plaintiffs' counsel on March 5, 2020, and which was approximately 18 months before the September 23, 2021 demand and before Lewis was even aware of any of the column damages to the only unit discovered, investigated and repaired being Unit 40149. (A1352, B26). Having examined exactly one set of columns to one unit thirteen years after the units were finished and Lewis having testified that he needed to investigate the additional columns and not having done so the Plaintiffs' blamed the Defendant for not investigating the columns that Lewis chose not to investigate. (A1351).

There was an oral argument during the Motion in Limine on March 25, 2022, with a Judicial Action Form filed on March 28, 2022, stating that the motion relative to Custom Carpentry and Becker Morgan Group, Inc. (Lewis and Walbert) was "reserved". (A1600). The trial court issued a decision on the Motions in Limine on April 27, 2022, and which at that point was less than one week before the trial. (A1610). At page 4 of the decision, the trial court stated that based upon the one assessment for the one column the two experts opined that all of all 20 units need to be repaired. (A1613). In fact as of that point, neither Walbert nor Lewis had testified that anymore than the columns for Unit 40149 needed repair and has been previously stated, Plaintiffs had two opportunities to identify any supplemental reports by Lewis or Walbert being the discovery responses of December 14, 2021, and April 1, 2022.

While Motions in Limine are filed to preclude evidence, or to anticipate the inclusion of evidence at trial, they are filed with the hope and expectation that they will be granted. However, a second, and equally important reason, is to alert the trial judge of the issues so that when the evidence comes in at the trial, the trial judge will have a better understanding of the issues necessary to make a ruling.

On Tuesday, May 10, 2022, the issue of the columns came up again at trial. (A4045). At that point Defense counsel pointed out to the court that the person (Lewis) didn't examine any of the other units, took no photographs and prepared no estimates. The court was reminded that Michael Lewis was only asked one question

about the columns on direct examination and all he was asked was what would it cost to repair all of the columns without saying that any of the other columns needed repair. (A4046). The trial judge said "well, there were references to the columns. They were brief, and, yes, I was wondering why they weren't developed a little bit more with that much money at stake. (A4048, A4049). I do know that your motion in limine was to exclude the testimony of Mike Lewis and Jeremy Walbert. Mr. Walbert is on the stand now so I am wondering if maybe your motion is a little premature and we will see what the Plaintiffs can come up with." (A4048, 4049). At some point during the dialogue Plaintiffs counsel said that "...Jeremy Walbert is the civil engineer that's going to identify the problems. So we have to look at the, you know, testimony in totality" (A4051). Plaintiffs counsel also stated that Lewis was subject to recall. (A4049). Walbert did not identify damage to any units other than to Unit 40149 and Lewis was not recalled.

As the trial judge stated in the January 31, 2023 decision Lewis testified that there were hundreds of columns that needed repair and Zonko objected citing Perry v. Berkley, but the court denied the motion without prejudice to see if Walbert could add to the testimony. (Decision page 10). Plaintiffs counsel then led Walbert on an exercise of "count the columns". (Decision page 10). Although it was Michael Lewis who actually repaired the columns at Unit 40149 and testified that only two columns repaired but during the count the column exercise and re-direct at the

conclusion of trial, Walbert testified by counting the columns in the photographs stating that there were actually 128 columns.

The trial court then said "... I don't think the idea of playing counting columns of using photographs that do not show columns showing other damage and things like that, playing this game of counting columns. I also don't think it's clear when we talk about a column whether we are talking about a two columns or whether it's $70,000 per column. He thinks there is 50. Michael Lewis thinks there could be hundreds. I understand where you are coming from. (A4511, 4512).

At the conclusion of all of the evidence, Defense counsel asked the court whether the issues of the columns and the costs of the columns are still before the jury. (A4688). The trial judge said yes but its clear that the court was concerned about the column testimony and he planned a separate line item in the verdict form for the column issue. (A4689). He said that he had significant doubts about the column issues and that if there is an award for the columns he was not sure if he was ultimately allow those damages to be awarded and that is what he did post-trial. (A4689).

Two things are patently clear. First, Defendant did everything possible to bring all of the issues which are the subject of expert opinions to the attention of the court before trial. Secondly, the trial judge gave the Plaintiffs every possible opportunity to develop evidence that there was damage to the other 19 units during

trial. At no point did the Plaintiffs provide any evidence that any of the other columns were inspected much less that any other columns had damage.

CONCLUSION

I. Post Judgment Interest

Defendant admits that post judgment interest should be calculated at the applicable rate based upon the federal discount rate and an additional 5% pursuant to 6 Del. C. §2301(d) as of February 14, 2023.

II. Pre-Trial Interest

6 Del. C. §2301(d) was amended in 2000 to permit interest in tort cases in limited circumstances. Where permitted in tort the interest would accrue from the date of the injury. Plaintiffs take the position that the words "tort" and "injury" are synonymous because there are definitions in Blacks Law Dictionary and the Restatement of Torts making the words interchangeable. However, the synopsis of the statute reflects no intent to change the meaning of the word injury. While the Plaintiffs claim that it is only one interpretation of injury in fact an injury can be the consequence of the tort as opposed to the tort and the injury being synonymous. Clearly the statute is ambiguous and would be anomalous to conclude the interest should go back to April 2007 rather than starting at 2016 with no claim of any damage or consequence of the improper construction until 2016. The trial judge had discretion to pick a date of injury and he properly exercised that discretion.

III. Non-Column Damages

The Plaintiffs worked harder to block any attempt to supplement the Custom Carpentry/Lewis report of March 15, 2019 and later identified as the construction expert report on November 1, 2019 than the time it would have taken to simply update the report as required by Superior Court Civil Rule 26(e) and the supplemental discovery requests. It's unlikely that every single item needed for repair would be subject to a 30% price increase. In the colloquy with the court, Lewis who is previously identified on November 1, 2019, as a Plaintiffs expert and presented to the jury as such, somehow became a fact witness on the very issue which is the subject of this expert report and indemnification. The court concluded that Lewis had the expertise to offer price increases and if he did then he was required to supplement the expert reports. In addition to opposing efforts to requires the Plaintiffs to update discovery, Plaintiffs continued the opposition by producing not once but twice improper discovery responses and in particular with regard to Plaintiffs expert reports. The court should not have denied the motion in limine and the court gave the Plaintiffs too much leeway by permitting them to update their expert opinions (or perhaps lay opinions as Plaintiffs would have it) during the trial. The court properly granted a remittitur.

IV. Column Damages

Plaintiffs expert Lewis and the one who repaired the two columns on Unit 40149 testified on June 11, 2020 that the others columns need to be investigated. He set the standard for what needed to be done relative to the other 19 units. However, at no point after June 11, 2020 were any of the other units investigated either by Lewis or the professional engineer, Walbert.

The September 23, 2021 demand letter identified $1.4 million in damages for columns and stated that the columns were all discovered as damaged in the spring of 2020. This is clearly incorrect because Lewis testified that he only examined the several columns of Unit 40149. While the request for Plaintiffs expert reports was not limited to the columns (and there were four experts identified in the November 1, 2019 expert witnesses disclosures even though two were later abandoned) the request for additional reports was not limited to the columns although it certainly included the columns. A Motion in Limine filed before trial was denied by the court and it should have been granted. When Lewis testified at the trial he didn't offer any testimony that the other columns needed to be repaired. The court declined to strike the Lewis testimony based upon the representation of Plaintiffs counsel that Walbert would supplement the testimony but Walbert did not. The trial judge denied the Motion in Limine as to columns and denied the Motion for Judgment as a Matter of Law but he expressed grave concern about the damages issue and that is why he

provided an additional line in the Jury Verdict Form as to the columns. He made it clear to counsel that if awarded he may not let that verdict stand. Although the trial court was concerned in the January 31, 2023 decision about the different types of columns and some being non bearing the large issue is that the court should not have let the issue of column damages to go to the jury. No one tried to extrapolate the two columns repaired by Lewis to the other 128 columns counted by Walbert on redirect but in addition, no one testified that any of the columns in the other 19 units had any damage at all.

Defendant requests three things. First, that this Court sustain the post-trial decision granting the Motion for Judgment as a Matter of Law. Defendant also requests that the Court sustain the remittitur granted by the Court. Finally, the Court should conclude that the interest should commence as of February 2016 given the ambiguity in the amendment to 21 Del. C. §2301(d).

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