

1996 WL 33348743

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

FRANK W. LYNCH & CO., Plaintiff-Appellant,

v.

FLEX TECHNOLOGIES, INC., a foreign corporation, Flex Technologies, Ltd., a foreign or alien corporation, and 828965 Ontario, Inc., a foreign or alien corporation, jointly and severally, Defendants-Appellees.

No. 169747. | Oct. 22, 1996.

Before: WHITE, P.J. and SMOLENSKI and R.R. LAMB, JJ.

Opinion

UNPUBLISHED

PER CURIAM.

\*1 Plaintiff appeals the circuit court's orders granting defendants summary disposition and plaintiff partial summary disposition, entering judgment in plaintiff's favor in the amount of \$115,101, and denying plaintiff's motion to amend its complaint to seek certain statutory damages. We affirm the denial of the motion to amend and the entry of immediate judgment for plaintiff, but reverse the grant of summary disposition to defendant, and remand for further proceedings.

I

Plaintiff entered into a Manufacturer's Representative Agreement (Agreement) with Drut Industries effective July 1, 1982, pursuant to which the parties agreed on terms specified therein "unless otherwise agreed upon in writing by supplemental agreement signed by both parties." Drut agreed to pay plaintiff a five percent commission on net sales to certain customers. The agreement was signed by Harry Kearney, Drut's president, and G. Peter Smith, plaintiff's

president. Sometime later, Drut Industries was renamed Mechanical Cables, Ltd. (MCL). In April 1989, M.C.L. § was acquired by defendants.

Paragraphs eleven and twelve of the original agreement state:

11. The effective date of this agreement is July 1, 1982.<sup>1</sup> This agreement may be terminated by either party by written sixty (60) day notice to the other at the above addresses by Certified Mail return receipt requested.

12. Upon termination of this agreement Drut Industries, Ltd. shall continue to pay commissions (as defined herein) to Frank W. Lynch & Co. for all sales of the type of products sold by Frank W. Lynch & Co. hereunder to the customers set forth on Exhibit "A" for one year after said termination. [Emphasis added.]

The original agreement also specified that the agreement "may not be modified unless in writing signed by both parties."

Two amendments were made to the agreement. The first amendment was proposed by letter dated September 10, 1982, from Smith to Kearney. The following sentence was added to ¶ 12:

In the event shipments against orders by Frank W. Lynch & Co. do not start until after termination, the commissions will be paid on the first year of shipments against said orders.

The letter bears Kearney's signature below the words "acknowledged and approved."

The second amendment (1983 amendment), the effect of which is at issue in this case, is stated in a letter dated October 17, 1983, from Smith to Kearney, acknowledged and approved by Kearney's signature:

In accordance with our recent conversation, in view of our mutual interest in continuing our successful and profitable association, I would suggest we amend our Manufacturers Representation Agreement of July 31, 1982, to establish a term for said agreement, as follows:

"The initial term of this Agreement shall be until July 31, 1987. On July 31, 1986 this Agreement shall be automatically extended until July 31, 1989 and will continue to be automatically extended every two years, so the term

of the contract will float in between one year and three years." [Emphasis added.]

\*2 More than four years later, on December 29, 1987, Smith sent Kearney a letter referring to an earlier conversation:

Per our conversation in Barrie, it is regrettable [sic] the company is in bad financial shape. We are certain, through your efforts and Gus's, that this will be a temporary situation. We are agreeable to a commission reduction in the interest of helping the borrowing capability of the company to achieve long term growth beneficial to all of us. We would like to suggest in consideration for the temporary reduction you suggested to 2.5% our current contract be extended now to July 1, 1991 and the automatic renewable feature referred to in my letter amendment dated 10/17/83 be continued so that the contract term floats between 1 and 3 years. Commission rate to be 2.5% in 1988, 3.0% in 1989 and 4% in 1990. [Emphasis added.]

This letter was not signed by Kearney. However, on March 16, 1988, E.J. Robillard, vice president and general manager of MCL, wrote plaintiff a letter, which was carbon copied to Kearney.<sup>2</sup>

Thank you for your letter of Dec 29 in response to our request for an alternative commission structure. I appreciate the position you've outlined in reference to the commission but would like to suggest changes which would be beneficial both to you and M.C.L. over the longterm:  
The plan I would suggest would be as follows:

Jan 1/88 through March 31/89-2.5% commissions on all parts.

April 1/89 through Mar 31/90-3% on all *new* business for first year of shipments and 3% on retained business.

April 1990 forward 5% on all *new* business for first year of shipments & 2.5% on all retained business.

This plan would help stimulate the effort for new business while reflecting the reality of declining margins on retained business.

If this plan is agreeable the contract would be extended through 1991 and we would add Ford to your account list. [Underlined emphasis in original, other emphasis added.]

The above letter contained no signature line for, and was not signed by, plaintiff. An inter-office memorandum dated a little over a year later, April 5, 1989, from Smith to Kearney, and signed by Smith, states:

I realize you and the company are going through some very trying times, and I certainly hope your negotiations will work out for the best for both.

I do feel it necessary to remind you again that you are substantially in arrears on commissions. We agreed to a commission reduction over a year ago to help you restore profitability to the company. Despite the fact you have been in arrears since then, which has now reached 7 months owing, we have continued to devote our time and money to representing Mechanical Cables in good faith.

We would like to suggest you commence regular payments to us immediately. Also, in the event of a restructuring or sale of the company, we would like it understood we expect to get paid in strict accordance with the terms of our existing contract.

\*3 We look forward to your comments. [Emphasis added.]

On April 28, 1989, defendants purchased MCL's assets.

By letter to Smith dated October 27, 1989, Duane Herchler, vice president of marketing for Flex Technologies, Inc., gave notice of termination of plaintiff's services effective January 1, 1990:

This letter is to confirm our phone conversation of 10-24-89. We are planning on going direct with our CPS and Truck & Bus Cable representation. Effective January 1st, 1990 we would like to have all sales coverage transferred [sic] to us. This is necessary due to the position we are still in at Flex Canada.

As I mentioned, we will be paying all of your past due commissions plus current commissions earned thru [sic] December 31st, 1989.

I will be in touch with you to work out the details. [Emphasis added.]

The next communication in the record is a letter from Herchler to Smith, dated December 1, 1989, stating in pertinent part:

Re: Termination

We are in receipt of your letter dated November 28, 1989 and are not aware of any continuing obligations on MCL's or Flex Technologies part. The only agreement we have made (verbally) was to pay the prior past due commissions that M.C.L. § had accumulated prior to taking over. Therefore all commission payments will be discontinued after December 31, 1989 when your representation stops.

Smith's November 28, 1989, letter is not before us.

## II

Plaintiff brought suit against defendants in July 1990, asserting, alternatively, breach of express contract and quantum meruit/unjust enrichment. Plaintiff's complaint alleged that defendants were required to retain plaintiff until July 31, 1992, and to pay post-termination commissions at a rate of five per cent. Plaintiff attached to its complaint a copy of the Agreement.

For approximately thirty months, throughout discovery and at a special mediation in January 1993, defendants maintained they were not bound by the Agreement, and that they were unaware of the existence of the Agreement.

In early February 1993, defendants filed a motion in limine. Plaintiff filed a cross-motion in limine in March 1993. In their motion, defendants argued for the first time that they were bound by the written Agreement, and sought to exclude evidence of damages beyond one year from the contract termination date. Defendants argued that the Agreement, as amended, established a floating contract term of one to three years, subject to termination on sixty days' notice by either party. Defendants admitted liability only for post-termination commissions accruing between December 31, 1989 and December 31, 1990 at a rate of 2½%, or \$115,101.

Defendants did not move to amend their answer<sup>3</sup>.

Plaintiff's motion in limine sought to prevent defendants from availing themselves of their new position that the Agreement bound them, and requested that the case go forward on certain facts set forth in defendants' mediation summary, throughout which defendants maintained the Agreement did not bind them. Plaintiff attached to its motion copies of the October 27, 1989 and December 1, 1989 correspondence summarized above, and the first twenty-two pages of defendants' mediation summary, which frequently cited Smith's deposition testimony.

\*4 Before the June 9, 1993 hearing on the cross-motions in limine, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the sole question raised by plaintiff's complaint was the amount of post-termination commissions plaintiff was entitled to, and no genuine issue of fact remained on that question. Defendants argued that the written Agreement applied, the sixty-day termination notice provision survived the 1983 amendment, and defendants' termination of plaintiff with sixty days' notice was permitted. Defendants requested partial summary disposition as to all plaintiff's claims except its claim for 1990 commissions under the Agreement.

Following the filing of the cross-motions in limine, the parties filed a Final Joint Pre-Trial Order on March 25, 1993. Trial was at that time set to start on March 29, 1993. Defendants stated under the section entitled "Defendants' Claims," that "[a]lthough Flex was unaware of the FWL & Co [plaintiff]/MCL Representative Agreement, Flex will not contest that the Agreement controls." Flex stated under "Defendants' Claims" that, pursuant to paragraph 12, Flex owes plaintiff \$115,101 in post-termination commissions for 1990 shipments, representing a commission rate of 2½%. Under "Uncontested Facts" the pre-trial order states in pertinent part:

a. From 1988 until its termination in 1989 FWL & Co. [plaintiff] was paid a commission rate of 2-1/2% by MC and then Flex.

b. On October 27, 1989, Flex sent FWL & Co. written notice of its termination effective December 31, 1989.

c. The MC/FWL & Co. July 31, 1982 Representative Agreement as amended provides for one year of post-termination commissions.

d. 1990 sales on which commissions are owed amount to \$4,604,043.

e. Two and one-half percent of \$4,604,043 is \$115,101.

Under "Plaintiff's Statement of Issues" the pre-trial order states:

a. Whether a 5% commission rate may be used to calculate damages when that rate was modified downward to 2½% by agreement and never thereafter raised to 5% although negotiations had been conducted with MC and Flex and FWL & Co.'s acquiescence in the 2½% rate with Flex was conditioned on a long-term relationship which Flex refused by its actions to maintain?

b. Whether the procuring cause doctrine applies where the existence of a written contract between FWL & Co. and MC, Flex's predecessor, has been repudiated because Flex did not know of its existence and there was no "meeting of the minds" and Flex operated under the belief that only a "handshake deal" existed, and Flex continued at all times to operate under a "handshake deal"?

c. Whether the terms of the written agreement are applicable where there has been no "meeting of the minds" because the Defendants were unaware of the existence of the agreement and in fact were told that no written agreement existed and were operating on the basis of what it believed to be a "handshake deal" and consistently repudiated any express written agreement?

\*5 d. If the Court determines the written contract is applicable, whether the Court should interpret the October 17, 1983 amendment as replacing the sixty-days' notice provision; or read it as a[sic] requiring the notice to be given prior to the end of a term (i.e. [sic] 60-day notice before July 31, 1988 or by July 31, 1988 where the term ends July 31, 1989 or by July 31, 1988 where the term ends July 31, 1989 so as to make it rolling between one and three years, through 7-31-92); or reading it as requiring the notice to be given sixty days prior to the July 31, 1989 termination which would then renew the term until July 31, 1992.

e. Whether the denial of knowledge of the written contract and the admitted understanding of Flex that MC had a "handshake deal" with FWL & Co. and that Flex would continue with such an arrangement entitles FWL & Co. to proceed on the doctrine enunciated in *Reed* and other applicable law?

"Defendant's Statement of Issues" states as follows:

a. Whether a 5 percent commission rate may be used to calculate contract damages when that rate was modified downward to 2½% by agreement and never thereafter raised to 5%?

b. Whether the Court should ignore the provision in the Agreement providing for sixty days' notice for termination when that is the only means of terminating the Agreement?

c. Whether the Court should ignore the provision in the Agreement providing for sixty days' notice for termination when that provision is not, as a matter of law, inconsistent with the contract modification that set automatically renewing terms?

d. Whether the procuring cause doctrine applies in the face of an express contractual provision governing post-termination commissions?

e. Whether the Agreement is an exclusive contract when there is no provision identifying it as such?

At the June 9, 1993 hearing on the motions in limine, plaintiff's counsel referred to Smith's deposition testimony on pertinent points and referred a number of times to what Smith would testify to, if necessary, regarding the intent of the Agreement. After hearing arguments from both counsel, the circuit court did not rule, but, rather, suggested that the matters were more amenable to resolution by motions for summary disposition.

Following the hearing on the cross-motions in limine, plaintiff filed a motion for partial summary disposition, noting that it continued to contest defendants' newly asserted reliance on the Agreement. Plaintiff argued that assuming the Agreement applied, it was entitled to judgment as a matter of law for, at minimum, \$115,101, a figure agreed to by defendants in the final pre-trial order. Plaintiff argued that the court must interpret the Agreement, giving effect to the parties' intent and the surrounding circumstances, and that the parties to the contract at the time of its making are best able to give definition to the contract where an ambiguity may exist. Plaintiff further argued that the parties intended to establish a term for their relationship with an automatic renewal and provide for a one year notice of termination—the initial term was until July 31, 1987, and if notice was not given by July 31, 1986, the contract renewed itself and extended to

July 31, 1989. Notice of termination was therefore required by July 31, 1988, or the contract would automatically renew until July 31, 1992.<sup>4</sup> Plaintiff argued that since defendants did not give notice of termination by July 31, 1988, the contract extended until July 31, 1992,<sup>5</sup> and plaintiff was thus entitled to post-termination commissions until July 31, 1993.<sup>6</sup> Plaintiff argued that paragraph 11 of the Agreement did not survive the 1983 amendment, because the purpose of the amendment would be nullified if defendants could prematurely cancel it, without penalty, on sixty days' notice. Alternatively, plaintiff argued that if paragraph 11 is deemed to survive, it creates an ambiguity and, in that situation, the parties to the agreement *at the time*, i.e., Smith and Kearney, are best able to give definition and construction to the terms of a contract and parol evidence is needed to ascertain their intent. Plaintiff argued that under these circumstances, summary disposition is inappropriate. As another alternative, plaintiff argued that, should the court conclude paragraph 11 survived the amendment, notice nevertheless had to be tendered sixty days prior to the expiration of the contract, i.e., by May 31, 1989. Plaintiff argued that no such notice was received and that, therefore, under either interpretation of the applicable termination notice provision, the agreement extended to July 31, 1992.<sup>7</sup>

\*6 Finally, plaintiff argued that defendants' literal interpretation of the Agreement obligated them to pay plaintiff the five percent commission rate on sales stated in the Agreement. Plaintiff urged that paragraph four of the Agreement was not amended in a writing signed by both parties, and the reduction of the commission rate to 2½% was temporary and on an interim basis to help defendants' predecessor, MCL, with its borrowing capability. Plaintiff sought immediate judgment in the amount of \$115,101 plus interest, costs, and attorney fees, including sanctions, and asked that the court determine that plaintiff is entitled to post-termination commissions through July 31, 1993 at a 5% commission rate on all parts sold from 1/1/90 through at least 7/31/93.

No oral argument was heard on the summary disposition motions. The circuit court's opinion and order states that "the parties assert that there are no facts in dispute in this matter, and that the issue of law to be resolved is whether paragraphs 11 and 12 survive the Amendment." The circuit court concluded that the 1983 amendment rendered the contract ambiguous because it could be interpreted either to abrogate or co-exist with the sixty-day notice of termination

provision. The court resolved the ambiguity against plaintiff, the drafting party of the October 1983 amendment:

This Court finds that the [1983] Amendment renders the contract ambiguous. A contract is ambiguous when either the general language or particular words or phrases used are doubtful as to meaning, or, in the light of other facts, reasonably capable of having more than one meaning. Reading those paragraphs together, the Amendment could replace paragraph 11 or coexist with it.

Read as if the Amendment replaces paragraph 11, the contract indicates that Flex must give Lynch notice of cancellation at least one year before the end of the contract term, otherwise the contract is automatically renewed for another two years beyond the end of the contract term.

Alternatively, the Amendment could coexist with paragraph 11. Flex can terminate the agreement at any time as long as it gives Lynch sixty days' notice. To renew the contract, the parties either draw up a new agreement, or, one year before the term expires, the current agreement is extended for an additional two years from the expiration date.

Extrinsic evidence, including parol evidence, is admissible to clarify the meaning of an ambiguous contract. Lynch proposes to offer the testimony of G. Peter Smith, Lynch's President and drafter of the Amendment to resolve any ambiguity surrounding the Amendment. But a one-sided self-serving interpretation by one party is of no assistance in interpretation. *Davis v Kramer-Brothers Freight Lines, Inc.*, 361 Mich. 371, 376; 105 NW2d 29, 31-32 (1960); *Gaydos v White Motor Corp.*, 54 Mich.App 143, 149-50; 220 NW2d 697 (1974).

Moreover, any imperfection or ambiguity in a contract must be construed against the drafter. In this case, because Lynch was the drafter of the Amendment, any ambiguity would have to be resolved in favor of Flex, the nondrafting party.

\*7 Resolving the ambiguity in favor of the nondrafting party means that paragraph 11 would survive the Amendment. Under this interpretation, Flex was required to give Lynch sixty days' notice (per paragraph 11), and then pay Lynch one year of post termination commissions (per paragraph 12). Therefore, Lynch's argument that it is due post-termination commissions through at least July 31, 1993 fails.

Lynch also argues that paragraph 4 of the Agreement obligates Flex to pay Lynch the 5% commission rate on sales

of all General Motors Divisions as stated in the Agreement. Lynch admits that the parties reduced the commission rate to 2.5%, and this rate continued from 1988 until Flex's termination of Lynch became effective on December 31, 1989 (Final Pretrial Order, March 22, 1993, uncontested fact (a) at 4). However, Lynch asserts that this arrangement was only temporary.

Although several modifications of the commission rate were proposed, neither party has provided an amended commission rate agreement in a writing that is signed by both parties as required per paragraphs 4 and 16 of the original Agreement. Therefore neither party has established any other terms or the duration of a reduced commission rate arrangement. The only term presented to this Court is the 2.5% paid from 1988 through December 31, 1989. Therefore, Flex does not owe Lynch a 5% commission. [Several citations omitted.]

The circuit court granted plaintiff's motion for immediate judgment, requiring defendants to pay \$115,101 plus statutory interest, and granted defendants' motion for summary disposition as to all other claims pursuant to MCR 2.116(C)(10). Plaintiff's request for costs, attorney fees and sanctions was denied.

### III

Plaintiff argues that the circuit court erred in permitting defendants to rely on the Agreement, which they had previously repudiated and by which they denied being bound. Plaintiff argues that defendants cannot accept and reject the same instrument, or having availed themselves as to part, defeat its provisions in any other part. Further, plaintiff argues that defendants waived the defense under MCR 2.111(A)(2), for failure to assert it. Plaintiff also argues that defendants were estopped from relying on any of the Agreement's provisions, and that defendants' protracted defense on the basis they were not bound by the Agreement prejudiced plaintiff.

Defendants argue that they did not simultaneously advance conflicting positions, but abandoned their defense that there was no binding contract, and conceded partial liability under the Agreement. Defendants argue that they were not required to move to amend their answer to add this defense because it is one involving interpretation of the contract.

MCR 2.111(F)(2) requires that defenses be asserted in a responsive pleading, and provides that a defense not asserted in the responsive pleading or by motion is waived, except for the defenses of lack of jurisdiction over the subject matter and failure to state a claim on which relief can be granted. Defendants' answer denied liability to plaintiff under the Agreement, and that position was adhered to for approximately thirty months. Defendants never moved to amend their answer to assert the defense that damages were limited by the contract. Further, regardless of whether defendants were required to plead this defense, it is uncontested that defendants asserted a different defense and denied the applicability of the Agreement for thirty months.

\*8 At the hearing on the motions in limine, when plaintiff's counsel argued that defendants should not be permitted at that late date to avail themselves of the Agreement, the court asked plaintiff's counsel whether he was asking the court not to allow defendants to amend their answer:

[Plaintiff's counsel]: ... I think this Court has the authority to get to the position that we are asking it to get to with regard to saying, okay, because you have denied [the Agreement's] existence and because we've gone to these lengths, we-you now at this late, at this late date-

THE COURT: You can't amend your answer.

[Plaintiff's counsel]:-you can't-

THE COURT: Is what you're asking me to do is to not allow them to amend their answer?

[Plaintiff's counsel]: Oh, I think that's right, Judge. Exactly it. Because that's exactly what this turns into. It turns into an absolute amendment of their answer which, if the Court goes back and looks up the answer and we've cited it-

THE COURT: So what you're saying is that you want me to-

[Plaintiff's counsel]: It's an admission.

THE COURT:-to exercise my discretionary powers to refuse to allow them-

[Plaintiff's counsel]: Yes.

THE COURT:-to amend their answer?

[Plaintiff's counsel]: Yes, Your Honor. Because, in fact-

THE COURT: We took about a half hour to—that what you're saying is—and if they can't amend their answer, then the proofs that you will present at trial, you will not present these, and they can't come back and present it because they can't amend their answer.

[Plaintiff's counsel]: Yes. And, Judge, you know, from our perspective, I think that the Court, with that understanding, can understand our position with regard to the lengths that we've gone to bring a case before this Court—

THE COURT: Trust me. If I appointed Judge Thorburn as the discovery master, you know that I understood that there were problems.

THE COURT: All right. I see the cases, but I don't see the interpretation of the cases. The doctrine is, of course, that one, you know, that, in essence, that a person cannot accept or reject the same instrument [and] having availed themselves of a part of that instrument, turn around and defeat it.

But in the two recent Michigan cases that you've cited, one you're talking about wills and people who have taken under the provisions of the wills and what the Courts have said is that if you have taken under the provisions, you can't deny its existence, and therefore, it exists [sic]. It doesn't mean that if they say it doesn't exist and you produce a document that I can then as a Judge say, "Excuse me, but it doesn't exist because because you came too late."

The only thing that I can think of again is what I said earlier is that what you would like me to do is to refuse to allow them to amend their pleadings, but that would not in essence, and I don't really want to talk about it in terms of equity, it wouldn't be factually, it wouldn't be logical for me to indicate that they couldn't when I have the document in front of me.

\*9 So if they were to say it didn't exist and you were to come forward and say, "Look, they benefited under this contract X, Y and Z." Then that doctrine would apply and I would say, "Yes, it does exist." And you're estopped from denying its existence, but the cases that have been cited are more in the doctrine of estoppel that they are denied, they are estopped from denying the existence. Not that I can say in the face of a written document you're estopped from asserting that there is a document. I don't think that it goes that way and I don't think that it can be reversed that way.

The circuit court in effect permitted defendants to amend by granting defendant's motion for summary disposition. We review a circuit court's determination regarding leave to amend an answer for abuse of discretion. *Horn v. Dept of Corrections*, 216 Mich.App 58, 65; 548 NW2d 660 (1996). We cannot conclude that the court's determination to permit defendants to assert that the Agreement applied and limited damages was an abuse of discretion.<sup>8</sup>

Further, we reject plaintiff's estoppel argument.<sup>9</sup> Equitable estoppel arises where a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe certain facts; the second party not only must have relied justifiably on this belief, but also must be subject to prejudice if the first party is permitted to deny the facts upon which the second party relied. *Penny v. ABA Pharmaceutical Co.*, 203 Mich.App 178; 511 NW2d 896 (1993). There is no indication that plaintiff was induced by defendants to believe that the Agreement was not binding. Further, although plaintiff does not invoke the doctrine of judicial estoppel specifically, we note that it is inapplicable here because it pertains to a party who asserts a position in a prior proceeding and an inconsistent position in a subsequent proceeding. *Paschke v. Retool Industries*, 445 Mich. 502, 509; 519 NW2d 441 (1994). There was only one proceeding here.

Nevertheless, we observe that the only conclusion supported by the record is that defendants repeatedly asserted that they were unaware of, and were not bound by, the Agreement, and did not admit to the Agreement's applicability until March, 1993. The record is devoid of any reasonable explanation for defendants' failure to admit the Agreement's applicability and assert their defenses based on the contract until the eve of a scheduled trial. Under these circumstances, the circuit court's decision to allow defendants to raise the belated defense that the Agreement limited damages to \$115,101 should have been counterbalanced by conditioning the "amendment" on defendants' reimbursing plaintiff for the additional expenses, including attorney fees, that would have been unnecessary had a request for amendment been filed earlier. MCR 2.118(A)(3); *Stanke v. State Farm Mutual*, 200 Mich.App 307, 321; 503 NW2d 758 (1993); see also, e.g., *Weymers v. Khera*, 210 Mich.App 231, 242, n 7. Moreover, while we conclude that the court's analysis in the "Costs, Attorney Fees, and Sanctions" section of its written opinion does not constitute an abuse of discretion, the analysis focuses on defendants' pleading, and does not address the

additional papers and documents filed by defendants during the course of the proceedings. MCR 2.114(A). We remand with directions that the circuit court again address the issue of sanctions.

#### IV

\*10 Plaintiff next argues that the circuit court did not consider the parties' intent in interpreting the Agreement, which was to establish a multi-year term for their relationship, with an automatic extension, absent a one-year notice of termination. Plaintiff further argues that after the 1983 amendment, plaintiff and Flex's predecessor continued a course of performance consistent with this interpretation. Plaintiff argues that although an ambiguity is to be construed against the drafter, that rule of construction is subordinate to the rule of practical contract interpretation, which is to ascertain and give effect to the parties' intent. We agree.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *St Paul Fire & Marine Ins Co v. Quintana*, 165 Mich.App 719, 722; 419 NW2d 60 (1988). The circuit court must consider the pleadings, affidavits, depositions, and other documentary evidence. The test is whether the kind of record which might be developed, giving the benefit of any reasonable doubt to the non-movant, would leave open an issue upon which reasonable minds might differ. *Linebaugh v. Berdish*, 144 Mich.App 750, 754; 376 NW2d 400 (1985).

The construction of an unambiguous and unequivocal contract is a question of law for the court. *Skotak v. Vic Tanny, Int'l*, 203 Mich.App 616, 619; 513 NW2d 428 (1994). However, where an ambiguity exists, a court must construe the contract so as to effectuate the intent of the parties, if ascertainable. *Fox v. Detroit Trust Co*, 285 Mich. 669, 675-677; 281 NW 399 (1938). A contract must be construed and given effect with reference to the intention of the parties as it existed at the time of entering into the contract. 17A CJS, Contracts, § 295, p 63. The intention of the parties may be gathered from all the pertinent facts and circumstances. *Id.* at 46. Extrinsic evidence is admissible to clarify the meaning of an ambiguous contract. *Sturgis Savings & Loan Ass'n v. Italian Village, Inc.*, 81 Mich.App 577, 580; 265 NW2d 755 (1978).

We agree with plaintiff that the rule of construing ambiguities against the drafter is subordinate to the rule of practical

contract interpretation. 17A CJS, Contracts, § 295, p 45, 56-57 ("The fundamental, basic, primary, ultimate, or paramount question to be determined in the legal construction of all contracts is what the real intention of the parties was," and "[i]t is the duty, function, or obligation of the court to apply this rule; and it is the one which should *first* be applied." Emphasis added.)

The circuit court's opinion makes no mention of an attempt to ascertain the intent of the parties to the Agreement-Smith and Kearney-at the time of the 1983 amendment. While the filing of the cross-motions for summary disposition does imply that "the parties assert no facts are in dispute," plaintiff's brief clearly argued that if the court rejected its interpretation of the contract and concluded that the contract was ambiguous, parol evidence would be necessary and summary disposition would be inappropriate. Further, at the hearing on the cross-motions in limine, plaintiff argued Smith's position as to the 1983 amendment's effect on the original agreement and stated that if necessary Smith would so testify. The circuit court's determination that Smith's testimony would be one-sided and self-serving disregarded that Smith was a party to the original Agreement and to the 1983 amendment, while defendants, who acquired M.C.L. § in 1989 and disclaimed knowledge of the existence of the Agreement until 1993, were not. The two cases cited by the circuit court do not support the court's decision to preclude Smith's testimony in the instant case. <sup>10</sup>

\*11 We therefore remand to allow presentation of evidence regarding the intent of the parties in entering into the Agreement, and the 1983 amendment's effect on the Agreement, particularly, but not solely, as to the continued viability and effect of the sixty-day notice of termination provision. In this regard, we further note that the circuit court did not address plaintiff's argument that, assuming the sixty-day notice provision survived the 1983 amendment, defendants failed to give notice sixty days prior to the expiration date stated in the Agreement.

#### V

While we reject plaintiff's argument that the court erred in not applying the original written Agreement's provision for a 5% commission on sales of parts to all General Motors divisions, we conclude a genuine issue of fact remained as to what percentage rate of commissions should apply. Under the Agreement, the commission rate was five percent. The December 29, 1987 letter from Smith to Kearney states "we

would like to suggest in consideration for the temporary reduction you suggested to 2.5% ...," and included a proposal that the commission rate increase to 3% in 1989 and 4% in 1990. MCL responded to this letter, suggesting that the 2.5% commission rate continue through March 31, 1989, and then increase to 3% on April 1, 1989, and to 5% on all new business from April 1990 forward, with a 2.5% rate on retained business. While neither letter was signed by the other party, the commission rate was in fact reduced, and an April 5, 1989 letter from Smith to Kearney states "[w]e agreed to a commission reduction over a year ago to help you restore profitability to the company." This letter also states that M.C.L. § had been in arrears since that time, and at the time of the letter was seven months behind, and that plaintiff would "like it understood" that "in the event of a restructuring or sale" plaintiff expected "to get paid in strict accordance with the terms of our existing contract." Under these circumstances, there were genuine issues regarding the agreed-upon commission rate, and, while the court correctly denied plaintiff's motion for summary disposition, defendant's motion should have been denied as well.<sup>11</sup>

## VI

Plaintiff also argues that the circuit court erred in refusing to apply M.C.L. § 600.2961; MSA 27A.2961 retroactively. Plaintiff filed a motion to amend its complaint to add a claim under this statute, which the circuit court denied on the basis that an amendment would be futile because the statute creates a new substantive right and is punitive and thus may not be applied retroactively. A retroactive application would have allowed plaintiff to obtain actual damages and an amount equal to two times the amount of commissions, if defendant, as principal, is found to have intentionally failed to pay plaintiff the sales representatives' commission when due. MCL 600.2961(5)(a-b).

Statutes are presumed to operate prospectively unless a contrary intent is clearly manifested. *Franklin v. Ford Motor Co.*, 197 Mich.App 367; 369 495 NW2d 802 (1992). The recognized and often employed exception to this general rule is that where a statute is remedial or procedural in nature, it applies retroactively. *Id.* However, statutes having a punitive intent will not be given retroactive effect. *Herring v. Golden State Insurance Co.*, 114 Mich.App 148, 157-159; 318 NW2d 641 (1982).

\*12 We conclude that M.C.L. § 600.2961; MSA 27A.2961 is punitive in nature, as it allows, in addition to the recovery of actual damages, recovery in the amount of two times the commissions due for a principal's intentional failure to pay commissions when due. See Black's Law Dictionary, 3d edition (defining exemplary or punitive damages, in pertinent part: "Unlike compensatory or actual damages, punitive or exemplary damages are based upon an entirely different public policy consideration—that of punishing the defendant or of setting an example for similar wrongdoers .... In cases in which it is proved that a defendant has acted willfully, maliciously, or fraudulently, a plaintiff may be awarded exemplary damages in addition to compensatory or actual damages."); see also *Stevens v. Creek*, 121 Mich.App 503, 508-509; 328 NW2d 672 (1982) (holding that the treble damages provided in M.C.L. § 600.2919; MSA 27A.2919 for willful and voluntary removal of timber from another's lands are punitive in nature.) Thus, we conclude the circuit court correctly denied plaintiff leave to amend its complaint to seek damages under M.C.L. § 600.2961; MSA 27A.2961.

We affirm the circuit court's grant of immediate judgment to plaintiff in the amount of \$115,101 and remand for proceedings consistent with this opinion. We reject plaintiff's argument that the case should be reassigned to a different judge on remand. Plaintiff has in no respect overcome the presumption of judicial impartiality. *In Re Forfeiture of \$1,159,420*, 194 Mich.App 134, 151; 486 NW 2d 326 (1992).

### Footnotes

- 1 This effective date was a handwritten change from the typed January 1, 1982 date and was initialed by the signatories.
- 2 The copy in the record is difficult to read, apparently sections had been highlighted. Our transcription may therefore have minor errors.
- 3 Defendants had earlier unsuccessfully sought leave to amend their answer to include different defenses—the affirmative defense of statute of frauds and to invoke an arbitration provision. The circuit court denied the motion as untimely. In that motion to amend, defendants denied that there ever was an agreement between the parties as set forth in plaintiff's complaint.
- 4 We are confused by plaintiff's argument that failure to provide notice of termination resulted in the extension of the contract until July 31, 1992, rather than July 31, 1991. It would appear that the contract called for consecutive automatic two-year extensions of

the contract, to become effective one year before the expiration date. Thus, the initial contract expiration date was July 31, 1987. However, on July 31, 1986, the contract was automatically extended for two years, from July 31, 1987 to July 31, 1989, as stated in the 1983 amendment. The contract term would thus fluctuate between one and three years, as also stated in the amendment. Immediately before July 31, 1986, the contract had one year remaining; immediately after, there were three years remaining. Extending this construction, the contract would again be automatically renewed on July 31, 1988, and the term would be extended from July 31, 1989 to July 31, 1991.

5 See note 4.

6 See note 4.

7 See note 4.

8 In supplemental brief, plaintiff cites two cases, *Soderborg v. Detroit Bank and Trust Co*, 126 Mich.App 474; 337 NW2d 364 (1983), and *Taylor v. City of Detroit*, 182 Mich.App 583; 452 NW2d 826 (1989), in support of its related argument that the circuit court erroneously believed that because the Agreement existed the court was compelled to rule that it governed. We do not believe that the circuit court's determination was based on the mere existence of the Agreement, but was more likely based on the entire record, including the final joint pre-trial order.

9 Equitable estoppel is a doctrine which operates to bar a person from denying the truth of a fact which has in the view of the law become settled by acts of the party, express or implied. 9 Michigan Civil Jurisprudence, Estoppel, §§ 2, 3, pp 105-106.

10 *Davis v Kramer Bros Freight Lines, Inc*, 361 Mich. 371; 105 NW2d 29 (1960), was a contract dispute. The plaintiffs alleged that the parties had an oral agreement by which they were entitled to 65% of gross revenues for freight transportation, that they'd performed the work, and that deductions had improperly been made from their earnings. The plaintiffs further alleged that from time to time lease contracts in furtherance of the oral agreement had been entered into, one of which stated specifically how compensation should be computed, but that unauthorized deductions had been made from sums due them.

Defendant moved to dismiss on the basis that the items for which plaintiffs claimed reimbursement were clearly excluded by the written instruments and there was thus no issue of fact for the court. The circuit court granted the defendant's motion to dismiss on the basis that the plaintiff was attempting to change the terms of the lease or to interpret it differently than it had been applied during the years of operation thereunder.

The Supreme Court reversed, noting that the first step the court should have taken was to determine the terms of the contract. The Court then addressed the defendant's argument that the parties had acquiesced for many years in interpretations of the contract at variance with those now asserted by the plaintiffs, and in this discussion stated the proposition the circuit court in the instant case relied on: There is no doubt that evidence of practical interpretation by the parties is admissible as an aid in the determination of the meaning to be given legal effect. But the key word in this sentence is in the plural, "parties." A one-sided, self-serving interpretation by one party is of no help in interpretation. Acquiescence by the other party is required to establish a practical construction by the parties and this is precisely the thrust of appellants' claim of error. 'The plaintiff and other brokers ...,' states the affidavit in opposition to the motion to dismiss, 'complained continuously of their treatment and the construction attempted to be placed upon said leases, and never acquiesced in the defendant's construction of the contract.'

Upon the motion to dismiss for failure to state a cause of action, all facts well pleaded must be taken as true for the purposes of the motion. Here the declaration properly alleged the making of a contract, its breach, and damages flowing therefrom. If the facts were as plaintiffs alleged (and for the purposes of this motion we must assume that they are), plaintiffs clearly have a cause of action. [361 Mich. at 375-76.]

*Gaydos v. White Motor Corp*, 54 Mich.App 143; 220 NW2d 697 (1974), is also distinguishable, as it involved the interpretation of a severance policy held to be clear and unambiguous and a unilateral contract. As such, parol evidence was not admitted.

The plaintiffs were former employees of defendant corporation, which was acquired by AM General Corp in 1971. On July 1, 1971, the date of the sale, a memo was sent to employees stating that effective that date, AM had acquired defendant and that as a result they would be employed by AM, who would continue operations under the same general terms then in effect. The plaintiffs were taken off the defendant's payroll.

In 1966, the defendant by memo had adopted a policy and procedure on severance pay which stated that severance pay is given to certain employees terminated at the Company's request, with several exceptions inapplicable to the plaintiffs.

The plaintiffs brought suit based on contract to recover severance pay. The defendant argued that the severance pay contract was partially oral and that parol evidence should be admitted to supplement and facilitate interpretation of the written memo. The trial court held that the contract was clear and unambiguous and refused to admit parol evidence.

This Court affirmed, concluding that the defendant's adoption of the severance policy constituted an offer, and that the employees having continued to work thereafter constituted consideration for a unilateral contract, upon which the plaintiffs had a right to rely.

This Court noted:

Thus, the focus of the case was interpretation of a unilateral contract. Only in cases of ambiguity in the terms of a written contract will courts resort to the use of extraneous evidence. When the contract is clear and unambiguous, the conduct of the parties cannot be used to prove that the contract means something other than what appears on its face.

'While the construction placed on a contract by one of the parties may have bearing on the meaning to be accorded to the agreement, and a party's construction of his own language in a contract is the highest evidence of his own intention, the meaning of the contract cannot be established by the construction placed on it by one of the parties, or by only some of the parties, unless such interpretation has been made to and relied on by the other party or parties ....'

Where parol seeks to change the clear scope, effect, and obligation of the written contract, it should be rejected. A onesided, self-serving interpretation is of no assistance in interpretation. [54 Mich.App at 149.]

11 Defendants argue that Smith's writings agreed to the 2.5% rate and, further, that all contracts can be orally modified, including those which require that modifications be in writing. However, defendants do not address or explain, assuming the Agreement was modified to decrease the commission rate to 2.5%, why such a modification would not also include increases in the commission rate and an extension of the term of the Agreement until either July 1991 or the end of 1991, as reflected in Smith's letter of December 29, 1987, and MCL's response of March 16, 1988.

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

2006 WL 2000132

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Randy IRISH, Plaintiff-Appellant,

v.

NATURAL GAS COMPRESSION SYSTEMS, INC., Craig Anderson, William Jenkins, Tracy Larsen, Ian Phair, Mark Ritola, James Sanor, Richard Sheteron, James Stricker, A.J. Yuncker, and Colleen Yuncker, Defendants-Appellees.

Docket No. 266021. | July 18, 2006.

Synopsis

Background: Former shareholder brought action against company and its directors alleging shareholder oppression and breach of contract following a "squeeze-out" merger. Company moved for summary disposition asserting a statute of limitations defense and alleging failure to state a claim. The Circuit Court, Grand Traverse County, granted the motion. Shareholder appealed.

Holdings: The Court of Appeals held that:

[1] former shareholder did not have standing to bring action alleging shareholder oppression;

[2] appraisal was the exclusive remedy available to former shareholder; and

[3] limitations period for claims seeking damages applied.

Affirmed.

West Headnotes (3)

[1] Corporations and Business Organizations  
⇒ Persons entitled to sue; standing

Former shareholder of company did not have standing to bring action alleging shareholder oppression against company and its directors following a merger designed to eliminate the former shareholder's shares, where former shareholder did not have shareholder status at the time of the action, as required by statute governing such actions. M.C.L.A. § 450.1489.

[2] Corporations and Business Organizations  
⇒ Exclusive remedy

The exclusive remedy available to former shareholder alleging shareholder oppression against company and its directors following a merger designed to eliminate the former shareholder's shares was to request appraisal as a dissenting shareholder in order to address his claim that he received less than the fair market value for his stock; even though company did not mail shareholder notice of annual meeting concerning the merger vote, the merger was not unlawful or fraudulent as might allow for an alternative remedy. M.C.L.A. § 450.1762(1)(a), (3).

1 Cases that cite this headnote

[3] Corporations and Business Organizations  
⇒ Estoppel, waiver, limitations, and laches

Limitation of Actions  
⇒ Securities; corporations

Three-year limitation period from accrual, or two-year limitation period from discovery, of claims seeking damages for shareholder oppression, rather than six-year limitation period applicable to claims seeking equitable relief, applied to former shareholder's action against company, even though shareholder ostensibly requested equitable relief, where shareholder sought to have company compelled to purchase his shares at fair value, which amounted to a claim for damages. M.C.L.A. §§ 450.1489(1)(f), 600.5813.

2 Cases that cite this headnote

Grand Traverse Circuit Court; LC No. 05-024788-CK.

Before: NEFF, P.J., and BANDSTRA and ZAHRA, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

\*1 Plaintiff appeals by right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) (statute of limitations) and (8) (failure to state a claim). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a founding director and stockholder in Natural Gas Compression Systems, Inc. (Natural Gas Compression) and owned 13.2 percent of its stock. In September 2002, a change in the capital structure of Natural Gas Compression was proposed that involved eliminating plaintiff as a shareholder by means of a "cash out" merger and merging NGCS, Inc., an independent corporation, into Natural Gas Compression. The merger provided that investors who had been terminated as directors or employees, of whom plaintiff appears to be the only one, were ineligible to receive stock in the surviving company and would receive \$0.39 for each of their existing shares. This price was calculated as the average of the stock's (1) equity value of \$0 per share, (2) price to book value of \$1.59 per share, and (3) price to earnings value of \$0.22. Non-terminated founding member shareholders received shares in the new corporation. The per-share liquidation preference for the stock in the new company was \$14.63, which is the original subscription price paid by outside investors whose shares were converted into priority stock in the resulting corporation.

At the Natural Gas Compression's annual shareholder meeting on September 5, 2002, 84.7 percent of the eligible shares were voted in favor of the merger. Plaintiff claims that he did not receive notice of the meeting until after it occurred so that he was unable to vote his stock against the merger. However, plaintiff's 13.2 percent of the stock would not have altered the approval of the merger because the merger required only a 71 percent affirmative vote.

Under the terms of the merger documents, plaintiff's shares were canceled. On October 21, 2002, Natural Gas Compression mailed a check to plaintiff for his canceled

shares based on the per share value of \$0.39. On October 29, 2002, plaintiff returned the check, stating that he believed the company's actions were illegal and oppressive, and he intended to find legal representation to protect his rights. Natural Gas Compression sent the check back to plaintiff. Plaintiff's attorney then sent letters to Natural Gas Compression demanding that plaintiff be paid \$14.63 per share for his canceled stock.

Natural Gas Compression's financial position improved after plaintiff was "squeezed out". Net profits before taxes for the year ending July 31, 2002, were \$24,937. Net profits before taxes for the year ending July 31, 2005, were \$3,471,761.

Plaintiff did not contact Natural Gas Compression again until he filed his complaint on August 24, 2005, which was two years and ten months after he rejected the check from Natural Gas Compression and retained counsel. In his complaint, plaintiff alleged a count of shareholder oppression under MCL 450.1489 and a count of breach of contract.

\*2 Defendants moved for summary disposition under MCR 2.116(C)(7) (statute of limitations) and MCR 2.116(C)(8) (failure to state a claim of shareholder oppression under MCL 450.1489). At the hearing on defendants' motion, the trial court found that a "squeeze-out" merger is lawful in Michigan, that plaintiff did not show that the merger violated any contractual relations, and that plaintiff's votes were effectively voted against the merger because the merger documents required only affirmative votes to pass. The court concluded that plaintiff had no standing to assert a claim for shareholder oppression under MCL 450.1489 because he was not a current shareholder and that after the merger plaintiff failed to exercise his exclusive appraisal remedy as a dissenting shareholder under MCL 450.1762 and MCL 450.1772. The trial court also concluded that plaintiff's claim was barred by the two-year limitation period under the discovery rule in MCL 450.1489(1)(f) because plaintiff did not sue defendants until August 24, 2005, two years and ten months after he knew, when he returned the check on October 29, 2002, that he had a claim against Natural Gas Compression.

Plaintiff appeals by right claiming that he timely and properly brought his claim under MCL 450.1489. We disagree.

[1] This Court reviews de novo an appeal from an order granting summary disposition. *Bryant v. Oakpointe Villa*

*Nursing Ctr, Inc.*, 471 Mich. 411, 419, 684 N.W.2d 864 (2004). The trial court did not err in concluding that plaintiff did not state a claim under MCL 450.1489 because plaintiff is not a shareholder and has no standing under MCL 450.1489 and because plaintiff's exclusive remedy is an appraisal action under MCL 450.1762(3) and MCL 450.1772.

MCL 450.1489(1) provides that "[a] shareholder may bring an action in the circuit court ... to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." Under MCL 450.1109(1), a "shareholder" is a "person holding units of proprietary interest in a corporation." "Holding" is a present active participle, modifying shareholder and, accordingly, means a current shareholder, i.e., holding the shares in the present. Further, in *Estes v. Idea Engineering & Fabricating, Inc.*, 250 Mich.App. 270, 282, 649 N.W.2d 84 (2002), this Court stated that "plaintiffs in a § 489 suit may only be current shareholders." Because plaintiff's shares were canceled incident to the September 5, 2005 merger, plaintiff ceased being a shareholder and was not a current shareholder when he sued defendants on August 24, 2005. Therefore, plaintiff did not have standing to sue under MCL 450.1489.

[2] Further, plaintiff was limited to an exclusive appraisal remedy for his claim that he received less than fair market value for his stock. Plaintiff had the right to dissent from the corporate merger. MCL 450.1762(1)(a). However, a shareholder's remedy for such a corporate action is limited to dissent and an appraisal. A shareholder may not actually challenge the corporate action, unless the action is unlawful or fraudulent with respect to the shareholder or the corporation. MCL 450.1762(3).

\*3 Plaintiff did not show that the merger was unlawful or fraudulent with respect to either the corporation or himself. In support of his claim, plaintiff primarily claims that Natural Gas Compression did not mail him a notice of the annual meeting so that he did not attend and did not vote his shares against the merger. However, even if plaintiff had received

notice of the meeting and had voted all of his shares, it would have made no difference because 84 percent of the eligible shares voted for the merger and only 71 percent of the eligible votes were needed for the merger to pass.

[3] Plaintiff also maintains that the trial court erred in finding that he did not timely file his claim because the limitation period in MCL 450.1489(1)(f) applies only to claims for damages, it does not apply to claims for equitable relief requested under MCL 450.1489(a)-(e). We disagree.

Under *Estes, supra* at 272, 286, 649 N.W.2d 84, this Court held that the residual catch-all, six year limitation period in MCL 600.5813 applies to claims under MCL 450.1489. However, in 2001 PA 57, the Legislature added MCL 450.1489(1)(f) that provides a three-year limitation period from accrual and a two-year limitation period from discovery for claims requesting damages. But, as plaintiff argues, the amendment did not specifically address the limitation period for claims seeking equitable relief. Accordingly, the residual six-year limitation period in MCL 600.5813 presumably applies to plaintiff's claim insofar as he requests equitable relief instead of damages. But this does not assist plaintiff.

Plaintiff ostensibly requests equitable relief in his complaint, including the unwinding of the merger and the "uncanceling" of his shares. However, plaintiff actually requests damages because he seeks equitable relief only to compel Natural Gas Compression to purchase his shares at "fair value." Thus, the two-year limitation period under the discovery rule applies. As noted above, plaintiff acknowledged that he had a potential cause of action on October 29, 2002, when he informed Natural Gas Compression that he would retain an attorney. However, plaintiff did not file his complaint until two years and ten months later. Therefore, plaintiff's complaint was untimely, even assuming that plaintiff had standing under MCL 450.1489.

Affirmed.

2006 WL 143289

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

KENT TILLMAN, LLC, and Kent Companies, Inc., Plaintiffs/Counter-Defendants-Appellees,

v.

TILLMAN CONSTRUCTION CO., Defendant/Third-Party Plaintiff/Counter-Plaintiff-Appellant,

and

Roosevelt TILLMAN, Defendant-Appellant,

and

FIDELITY & DEPOSIT CO OF MARYLAND and Allen J. Vanderlaan, Third-Party Defendants-Appellees.

No. 263232. | Jan. 19, 2006.

Before: WHITBECK, C.J., and BANDSTRA and MARKEY, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

\*I Defendants appeal as of right the trial court order granting summary disposition in favor of plaintiffs and from a money judgment entered in favor of plaintiffs. We affirm.

Kent Companies (Kent) and Tillman Construction (Tillman) formed Kent-Tillman, LLC (the LLC), for the purpose of bidding on a construction project. Ownership interests in the LLC were 85 percent and 15 percent, respectively. Kent, the majority member, managed the LLC. The LLC submitted a bid for cement work to Erhardt/Hunt, the manager of the construction project, and Erhardt/Hunt awarded a contract to the LLC.

Plaintiffs initiated this action against defendants after the president of Tillman, Roosevelt Tillman, withdrew over \$145,000 from the LLC's bank account without management approval. Defendants filed a counterclaim alleging that a subcontract existed between the LLC and Tillman under

which Tillman was entitled to receive, as compensation for furnishing labor for the construction project, a fixed sum of 15 percent of the full contract price as set out in the contract between the LLC and Erhardt/Hunt. Tillman also alleged that the president of Kent distributed a disproportionate amount of money to Kent, in violation of the LLC operating agreement, and that Kent violated the Michigan Limited Liability Company Act ("LLCA"), MCL 450.4101 *et seq.*, by controlling the LLC in a manner that was fraudulent, willfully unfair, and oppressive to Tillman. Plaintiffs moved for summary disposition, which was granted with a money judgment against defendants, jointly.

We review *de novo* a trial court's decision on a motion for summary disposition. *Hess v. Cannon Twp*, 265 Mich.App 582, 589; 696 NW2d 742 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* When deciding a motion for summary disposition under this subrule, we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* Additionally, we review *de novo* the construction and interpretation of a contract. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich. 504, 511; 620 NW2d 531 (2001).

Defendants first contend that there was sufficient evidence from which a fact-finder could conclude that a subcontract existed between the LLC and Tillman under which Tillman was to receive, as compensation, a fixed sum of 15 percent of the price of the contract between Erhardt/Hunt and the LLC. Defendants assert that the subcontract is evidenced by the proposal letter, letter of intent, and certain documents in the record that refer to Tillman as a "subcontractor." We disagree.

The LLC operating agreement, which contained an integration clause, provided that any profit or loss would be allocated according to each member's ownership interest in the LLC, as would distributions of cash. Further, members were not to be paid any salary or compensation for services rendered to the LLC. Contract language should be given its ordinary and plain meaning. *Lawsuit Financial, LLC v. Curry*, 261 Mich.App 579, 590; 683 NW2d 233 (2004). By the plain language of the operating agreement, the 85/15 percent split referred to losses, profits, and cash disbursements, not to the full contract price. "Parol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms

of a contract which is clear and unambiguous." *UAW-GM Human Resource Ctr v. KSL Recreation Corp.*, 228 Mich.App 486, 492; 579 NW2d 411 (1998), quoting *Schnude Oil Co v. Omar Operating Co.*, 184 Mich.App 574, 580; 458 NW2d 659 (1990). Defendants cannot rely on the proposal letter, letter of intent, or other documents to vary the terms of the operating agreement.

\*2 Defendants contend that, even in the absence of a written subcontract, they are entitled to recover under the theory of promissory estoppel because plaintiffs promised to pay defendants 15 percent of the contract price and defendants relied on that promise in forming the LLC with Kent. We disagree. "The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v. Nationwide Mut Ins Co.*, 235 Mich.App 675, 686-687; 599 NW2d 546 (1999). Promissory estoppel should be applied cautiously and is appropriate only where the promise is clear and definite. *Marrero v McDonnell Douglas Capital Corp.*, 200 Mich.App 438, 442; 505 NW2d 275 (1993). Defendants failed to present evidence of a clear and definite promise. Moreover, the alleged representations made by Kent contradict the express terms of the operating agreement by which both parties are bound. Therefore, defendants' promissory estoppel claim must fail. See *Novak*, *supra* at 687.

Defendants next contend that the trial court erred when it granted summary disposition in favor of plaintiffs on defendants' fraudulent misrepresentation claim. We disagree. As one element of a claim of fraudulent misrepresentation, defendants were required to prove that their reliance on plaintiffs' representation was reasonable. *Foreman v. Foreman*, 266 Mich.App 132, 141-142; 701 NW2d 167 (2005). Because the written contract between the parties contained a merger clause, defendants' alleged reliance on representations not contained in the written contract was unreasonable. See *UAW-GM*, *supra* at 504.

Defendants next contend that Kent was not entitled to reimbursement for labor or equipment costs as out-of-pocket expenses and that, therefore, in the trial court's money judgment, Kent received compensation in excess of that which was allowed under the LLC operating agreement. We disagree. We review for clear error an award of damages.

*Triple E Produce Corp v. Mastronardi Produce, Ltd.*, 209 Mich.App 165, 177; 530 NW2d 772 (1995). Clear error exists only where, although there is evidence to support the trial court's finding, we are left with a definite and firm conviction that a mistake has been made. *Id.* at 171. "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *UAW-GM*, *supra* at 491, quoting *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 127 n 28; 517 NW2d 19 (1994). "[W]hen the parties include an integration clause in their written contract, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete 'on its face' and, therefore, parol evidence is necessary for the 'filling of gaps.'" *UAW-GM*, *supra* at 502, quoting 3 Corbin, *Contracts*, § 578, p 411.

\*3 Although, as discussed earlier, the operating agreement was complete and unambiguous regarding the allocation of profits and losses, the operating agreement was obviously incomplete regarding cost of reimbursements that each member was entitled to receive for labor and equipment expenses. The proposal letter and letter of intent, which preceded the operating agreement, provided that the members would receive reimbursement for labor at a designated rate and that the members would receive reimbursement for equipment leased to the LLC. Further, there was evidence that both the members received reimbursements in that fashion before the controversy underlying this litigation. See *The Cooke Contracting Co v. Dep't of State Highways*, 52 Mich.App 402, 409-410; 217 NW2d 435 (1974) (parties' conduct may be used to interpret contract). The trial court did not clearly err in concluding that, under the parties' agreement, Kent was entitled to receive reimbursement for labor as well as for equipment leased to the LLC.

Defendants next contend that the trial court erred in failing to allocate the Contractor Controlled Insurance Program credit ("CCIP credit") based on the members' respective ownership interests in the LLC. We disagree. In exchange for providing insurance for the employees of Kent and Tillman, Erhardt/Hunt received a CCIP credit, which reduced the gross contract price and, in turn, the amount owing the LLC. The trial court allocated the CCIP credit to the companies based on the amount each company would have had to pay to procure its own insurance, rather than in accordance with each company's ownership interest in the LLC. We conclude that this allocation was not clear error. First, the LLC had no employees and there is no evidence that the LLC would

have had to provide insurance for the members' employees if Erhardt/Hunt had not contracted to provide the insurance. Therefore, the CCIP credit represented a benefit conferred upon the individual members, not upon the LLC itself. Second, although paragraph 5(d) of the operating agreement provides that "[a]ll items of income, gain, loss, deduction, or credit shall take into account the varying interests of the Members in the Company during such year," the CCIP credit is not a "credit" as contemplated by the operating agreement because it was Erhardt/Hunt, not the LLC, who received the credit. Therefore, the CCIP credit is not within the scope of paragraph 5(d) of the operating agreement.

Defendants also contend that the trial court erred when it ordered defendants to pay 15 percent of the LLC's legal expenses. We disagree. The trial court reasoned that paragraph 7(h) of the operating agreement, which purports to govern indemnification for attorney fees, "[did] not contemplate or include a lawsuit filed by one member versus the other or, more particularly, by the LLC versus a member." Thus, the trial court concluded that neither party was entitled to recover attorney fees from the opposing party under that paragraph. The trial court further held that defendants were liable for 15 percent of the legal expenses incurred by the LLC. We agree that, under paragraph 7(h) of the operating agreement, neither member was entitled to indemnification or attorney fees. However, we also agree with the trial court's conclusion that, under other provisions of the operating agreement, Tillman was liable for 15 percent of the LLC's (rather than Kent's) legal expenses, just as Tillman is liable for 15 percent of any other LLC expense. The trial court's decision to award legal expenses did not amount to clear error.

\*4 Defendants also contend that Kent violated the LLCA by controlling the LLC in a manner that was illegal, fraudulent, or willfully unfair and oppressive conduct toward Tillman. We disagree.

Section 515 of the LLCA provides:

(1) A member of a limited liability company may bring an action ... to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and

oppressive conduct toward the limited liability company or the member.

(2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member. The term does not include conduct or actions that are permitted by the articles of organization, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure. [MCL 450.4515.]

Defendants' expert witness testified that neither Kent nor Tillman did anything in violation of the LLC operating agreement. Further, he testified that although Tillman was not treated fairly by Kent, that treatment was not inconsistent with the provisions of the operating agreement. Defendants failed to set forth specific facts showing that a genuine issue of material fact existed that Kent violated section 515 of the LLCA.

Finally, defendants contend that there is no legal basis for making Roosevelt Tillman personally liable on the money judgment because it has no relation to the claims asserted against Roosevelt Tillman in his individual capacity. We disagree. "It is a familiar principle that the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort." *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich.App 545, 549; 701 NW2d 749 (2005), quoting *Warren Tool Co v Stephenson*, 11 Mich.App 274, 300; 161 NW2d 133 (1968). Because Roosevelt Tillman, by personally withdrawing funds from the LLC's bank account without management approval, actively participated in the tort of conversion, the trial court did not err in holding that Roosevelt Tillman was personally liable. Further, even though the money judgment was for less than the amount of the converted funds, there is no evidence to support defendants' contention that the money judgment was wholly unrelated to the conversion.

We affirm.

2003 WL 1919531

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Ray KOUZA and Duraid Daoud,  
Plaintiffs-Appellants/Cross-Appellees,

v.

Akram NAMOU, Akram Namou,  
CPA, PC, and Romulus Nights, Inc.,  
Defendants-Appellants/Cross-Appellees.

No. 231470. | April 22, 2003.

Before: GRIFFIN, P.J., and NEFF and GAGE, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

\*1 Plaintiffs appeal as of right from entry of a judgment in favor of defendants following a jury verdict of no cause of action with respect to plaintiffs' claims against defendants for an alleged lost opportunity to purchase the former Clarion Hotel in Romulus. We affirm.

I

This case stems from plaintiffs' alleged lost opportunity in late 1993 and early 1994 to purchase a Clarion Hotel in Romulus, which plaintiffs claim defendant<sup>1</sup> Akram Namou, a CPA and hotel owner, usurped for his own benefit after plaintiffs sought his professional financial advice concerning the hotel's profitability. Plaintiffs filed this action for damages, alleging three claims: professional malpractice and breach of fiduciary duty against Akram and Akram Namou C.P.A., P.C., and tortious interference with a business relationship or expectancy against all three defendants.

Plaintiffs' theory of the case was that defendant betrayed plaintiffs' trust for his own personal gain, falsely advising them that the Clarion was a losing proposition with no long term prospects for improvement, thereby causing their

partnership to dissolve. Defendant's theory was that plaintiffs aborted their purchase and attempted to blame their own lack of funds, experience and courage on defendant, and brought this contingency case without any evidence because they had nothing to lose. Further, plaintiffs earlier bailed out of a signed letter of intent on another hotel; they had significant money problems, could not complete the Clarion purchase, and asked defendant to be a partner because they needed his money. They passed up offers to purchase the Clarion and now want the hotel risk-free. The jury found in favor of defendant on all counts.

II

Plaintiffs first argue that they were denied their right to a fair trial on the basis of misconduct by defense counsel on four alleged grounds: 1) improper accusations of misconduct and criminality, 2) violation of the trial court's ruling on mitigation argument, 3) advising the jury of the court's rulings outside the presence of the jury, and 4) improper testimony by defendant concerning the lack of any previous malpractice lawsuits against him. We find no error requiring reversal.

A

This Court reviews alleged misconduct of counsel to first determine whether the attorney's action was error and then whether the error requires reversal. *Craig v. Oakwood Hospital*, 249 Mich.App 534, 539, 555; 643 NW2d 580 (2002) (Cooper, J, concurring). An attorney's remarks will not generally be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* Reversal is required if prejudicial statements by counsel reflect a studied attempt to inflame the jury or deflect its attention from the issues involved. *Id.*

Where an issue of alleged misconduct by counsel is unreserved, this Court must determine if a new trial is required because the error denied the party a fair trial, i.e., what occurred may have caused the result or played too large a part such that the verdict is tainted. *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich.App 278, 290; 602 NW2d 854 (1999). Unreserved claims of error are forfeited absent a showing of plain error that affected the claimant's substantial rights, i.e., plaintiffs must show a clear or obvious error that affected the outcome of the case. *Shinholster Estate v. Annapolis Hosp.*, \_\_\_ Mich.App \_\_\_;

\_\_\_ NW2d \_\_\_ (Docket No. 225710, issued 2/14/03) slip op p 7; *Kern v. Blethen-Cohmi*, 240 Mich.App 333, 336; 612 NW2d 838 (2000).

B

\*2 Plaintiffs argue that defense counsel used unfounded accusations of misconduct and criminality toward plaintiffs to obtain a verdict. The alleged misconduct does not indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Craig, supra* at 555. Generally, defense counsel's remarks were based on the evidence or the circumstances presented, and were not "unfounded." Further, counsel's comments were limited to the context that warranted them. Plaintiffs have shown no error requiring reversal.

Plaintiffs failed to object to remarks made during counsel's opening statement. Defendant's remarks did not plainly violate the court's ruling precluding use of the word fraud in reference to plaintiffs' activities. Moreover, counsel's remarks properly characterized, and responded to, plaintiffs' counsel's remarks in his opening statement concerning defendant stealing plaintiffs' business deal. Counsel's remarks concerning plaintiff Kouza's misrepresentations, even if objectionable, unlikely influenced the trial outcome, given Kouza's own admissions of untruthfulness and plaintiffs' evidence to the contrary. The remaining instances of misconduct are baseless.

2

Plaintiffs complain that defendant violated the court's pretrial ruling prohibiting defendant from arguing that plaintiffs were required to mitigate their damages by accepting defendant's offer to assign his rights to purchase the Clarion. Even if this comment was improper, plaintiffs did not object, and it is unlikely to have influenced the result. The court instructed the jury, and defense counsel reiterated, that the court would instruct the jury on the law and that the statements of the attorneys were merely their opinions. There was no instruction on mitigation. The jury is presumed to follow the instructions. *Id.* at 561.

Moreover, counsel's remark, by its own limitation, applied only if the jury found liability. The jury found no liability, thus never reached the issue of damages, and therefore the error would not have played a part in the result.

3

Plaintiffs complain that defense counsel advised the jury of rulings made outside its presence. Again, plaintiffs did not object to the alleged misconduct, and there is no indication that these isolated incidents over a nine-day trial tainted the result.

Plaintiffs themselves placed the matter of former plaintiff Salem's withdrawal at issue, referring to Salem in their opening statement. A party waives review of the admission of evidence that he introduced or made relevant by his own placement of a matter in issue. *City of Troy v. McMaster*, 154 Mich.App 564, 570-571; 398 NW2d 469 (1986).

Counsel's lost profits reference, by his express limitation, only related to damages. As noted above, the jury did not reach the issue of damages; thus, it is unlikely that the verdict was tainted by counsel's remark. Likewise, we find no error in counsel's remark in closing argument referencing relevant expert testimony concerning malpractice. The expert's testimony on financing was relevant with respect to the facts underlying the alleged malpractice, i.e., whether defendant's financial analysis was accurate and his advice to plaintiffs proper.

\*3 Regarding counsel's reference to the malpractice ruling, the trial court had stated during discussion on defendant's motion for a directed verdict that plaintiffs could not claim malpractice beyond mid-January and could not make a claim to the contrary in the jury instructions or in argument to the jury. Further, the court ultimately instructed the jury that nothing that took place after the middle of January 1994 could be considered as malpractice. Defendant's reference to the ruling could not have affected the outcome beyond any effect from the actual instruction.

4

Finally, plaintiffs did not object to defendant's testimony that he had no previous malpractice lawsuits, and may not now complain of error. As defendant points out, the alleged

misconduct involves defendant's testimony during cross-examination in response to the question whether he testified earlier that he was a "good accountant." Defendant's response pertained to a matter raised by plaintiffs. A party waives review of the admission of evidence that he introduced, or that was made relevant by his own placement of a matter in issue. *Id.* at 570-571.

### III

Plaintiffs argue that the trial court committed error requiring reversal in instructing the jury on the elements of professional malpractice and breach of fiduciary duty. We disagree.

#### A

Claims of instructional error are generally reviewed de novo, *Cox v Flint Bd of Hospital Managers*, 467 Mich. 1, 8; 651 NW2d 356 (2002), although a trial court's determination whether supplemental instructions are applicable and accurate is reviewed for abuse of discretion. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich.App 140, 162; 593 NW2d 630 (1999). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *Clark v. Kmart Corp (On Remand)*, 249 Mich.App 141, 151; 640 NW2d 892 (2002).

Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Case v. Consumers Power Co*, 463 Mich. 1, 6; 615 NW2d 17 (2000); *Bachman v. Swan Harbour Ass'n*, 252 Mich.App 400, 424; 653 NW2d 415 (2002). Reversal is not required unless the failure to reverse would be inconsistent with substantial justice. MCR 2.613(A), *Case, supra*. There is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v. Higgins*, 454 Mich. 46, 60; 559 NW2d 639 (1997); *In re Flury Estate*, 249 Mich.App 222, 226; 641 NW2d 863 (2002).

#### B

We find no error requiring reversal based on instructional error; the failure to vacate the verdict would not be inconsistent with substantial justice. The theories of the

parties and the applicable law were adequately and fairly presented to the jury. *Id.* at 226.

#### 1

\*4 Plaintiffs claim error requiring reversal on the basis that the court failed to inform them of the malpractice claim cut-off instruction before closing argument in violation of MCR 2.516(A)(4). Plaintiffs did not raise their objection before the trial court. A trial court's failure to inform counsel of its proposed action on requested instructions does not constitute reversible error in the absence of timely objection. *Hanna v. Ivory*, 61 Mich.App 225, 228; 232 NW2d 366 (1975).

Further, from the record, it appears that defense counsel's closing argument reference to the court's malpractice ruling has its genesis in the court's ruling on defendant's motion for a directed verdict. The instruction arose essentially as a curative instruction, requested by defendant following plaintiffs' rebuttal closing argument. Pursuant to MCR 2.516(B)(2), at any point during trial, the court may "instruct the jury on a point of law if the instruction will materially aid the jury to understand the proceedings and arrive at a just verdict."

Plaintiffs also claim that the substantive instruction on malpractice took from the jury the ability to credit testimony of plaintiffs' expert. We disagree. Contrary to plaintiffs' assertion, questions regarding duty are generally for the court to decide as a matter of law, *Harts v. Farmers Ins Exchange*, 461 Mich. 1, 6; 597 NW2d 47 (1999), and are subject to de novo review, *Benejam v. Detroit Tigers, Inc.* 246 Mich.App 645, 648; 635 NW2d 219 (2001). The trial court's ruling and subsequent instruction was based on the facts, the testimony, and plaintiffs' particular claims. The ruling did not improperly preclude the jury from crediting the testimony of plaintiffs' expert concerning a continuing duty or effectively instruct the jury that it was obliged to believe defendant's expert.

Plaintiffs also argue that the court's instruction that no events after mid-January could be considered with respect to malpractice was wrong and it eviscerated plaintiffs' malpractice case, making it impossible for the jury to return a verdict in favor of plaintiffs. The determination whether the supplemental instructions are applicable and accurate is within the trial court's discretion. *Stoddard, supra* at 162. This discretion is to be exercised in the context of the particular case, with due regard for the adversaries' theories of the case and counsels' legitimate desires to structure argument to the

jury around anticipated instructions. *Jones v. Porretta*, 428 Mich. 132, 146; 405 NW2d 863 (1987); *Wengel v. Herfert*, 189 Mich.App 427, 431; 473 NW2d 741 (1991). Although the trial court's instruction may have been broader than necessary, we find no abuse of discretion in light of plaintiffs' theory and the evidence.

The essence of plaintiffs' malpractice claim was that defendant committed malpractice in advising plaintiffs that the hotel was a bad project. In the final instructions, the court quoted plaintiffs' theory, which stated that defendant betrayed the trust of his clients, plaintiffs, for his own personal gain, that he failed to reveal his conflicts of interest, and that he falsely convinced plaintiffs that the hotel was a losing proposition with no long term prospects for improvement. The jury was not precluded from so finding. There is no error requiring reversal with regard to jury instruction, if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock*, *supra* at 60; *In re Flury Estate*, *supra* at 225-226.

2

\*5 Similarly, plaintiffs' claims of error in the fiduciary duty instructions are without merit. Plaintiffs' challenges rest primarily on law, including case law from other states, that is specific to other types of relationships, such as joint venturers, partners, agents, and attorneys, and other factual circumstances. Even if the instructions were somewhat imperfect, we find no error requiring reversal because the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Id.*

Plaintiffs claim error in the court's instruction regarding termination of fiduciary duty, which stated: "Once the fiduciary relationship is over, however, a fiduciary is free to pursue his or her own interest." Arguably, plaintiffs waived objection to this instruction given their opportunity to further develop the instruction on the definition of "fiduciary relationship." Likewise, plaintiffs failed to object to the trial court's decision to exclude the duty of disclosure. Failure to timely and specifically object to a jury instruction precludes appellate review absent manifest injustice. *Bouverette v Westinghouse Electric Corp*, 245 Mich.App 391, 403; 628 NW2d 86 (2001). Manifest injustice results if the defect is of such a magnitude as to constitute plain error requiring a new trial or if it pertains to a basic and controlling issue. *Shinholster Estate*, *supra* at slip op p 7; *Mina v. Gen Star*

*Indemnity Co*, 218 Mich.App 678, 680-681; 555 NW2d 1 (1996), rev'd in part on other grds 455 Mich. 866 (1997). We find no manifest injustice.

The court instructed the jury that a fiduciary owes a client "the duty of honesty and continuing good faith and loyalty and restraint from self-interest." Plaintiffs' theory was that defendant knowingly gave plaintiffs false advice to scare them away from the Clarion deal. The instructions did not preclude a finding of liability for breach of fiduciary duty had the jury accepted plaintiffs' theory. Even if the affirmative statement that a fiduciary is free to pursue his or her own interest is subject to challenge, we find no error when the instructions are considered in their entirety. Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions *Case, supra* at 6; *Bachman, supra* at 424.

Plaintiffs also allege error in the court's failure to instruct the jury that a fiduciary owes the "utmost" fidelity, asserting that the court initially agreed to use the word "utmost" and then inexplicably later changed its mind and refused to do so. Contrary to plaintiffs' assertion, plaintiffs themselves essentially reraised the issue of use of the word utmost and should not now be heard to complain that the court omitted the word. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich.App 662, 684; 591 NW2d 438 (1998).

In any event, the trial court did not "water down" the standard of fiduciary duty by omitting the word utmost. Although certain decided cases, particularly those involving agency or corporate director relationships, have used the word utmost, many cases addressing fiduciary duty in general do not. A requested nonstandard jury instruction must be modeled as nearly as practicable after the style of the standard jury instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative. *Beadle v. Allis*, 165 Mich.App 516, 527; 418 NW2d 906 (1987). Thus, a trial court is not required to give an instruction merely because it is an accurate statement of the law, even where the instruction is taken verbatim from a decided case. *Id.* at 526-529; see also 2 Lang, Neilson, Young & Holsinger, Michigan Civil Procedure, Jury Instructions & Special Verdicts, § 19.8, pp 19-8-19-11.

\*6 Cases that have addressed the nature of the fiduciary relationship state generally, that a fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another,

and that relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed. *Vincencio v. Jaime Ramirez, MD, PC*, 211 Mich.App 501, 508; 536 NW2d 280 (1995); *Smith v. Saginaw S & L Ass'n*, 94 Mich.App 263, 274-275; 288 NW2d 613 (1979). Further, "[a] person in a fiduciary relation to another is under a duty to act for the benefit of the other with regard to matters within the scope of the relation." *Teadt v Lutheran Church Missouri Synod*, 237 Mich.App 567, 581; 603 NW2d 816 (1999). A fiduciary is one in whom another has reposed trust and confidence and the fiduciary must exercise a corresponding degree of fairness and good

faith. *Portage Aluminum Co v. Kentwood Nat'l Bank*, 106 Mich.App 290, 294; 307 NW2d 761 (1981). The trial court's instructions properly informed the jury of the applicable law.

IV

In light of the above disposition, this Court need not address the issues presented in defendant's cross-appeal.

Affirmed.

Footnotes

- 1 Although there are three named defendants, both defendant corporations are wholly owned by defendant Akram Namou. One corporate defendant is Namou's accounting firm and the other is the corporate owner of the Clarion Hotel (now a Best Western). For clarity, this opinion refers to defendant in the singular.

---

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

2006 WL 287406

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Joseph LOZOWSKI, Plaintiff-Appellant,

v.

Elise M. BENEDICT and William  
Gray, Defendants-Appellees.

No. 257219. | Feb. 7, 2006.

Before: DAVIS, P.J., and FITZGERALD and COOPER, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

\*1 Plaintiffs and defendants formerly held all shares of a now-dissolved closely held corporation. Plaintiff brought this action against defendants, alleging claims for minority shareholder oppression, breach of fiduciary duty and breach of contract, and requesting monetary damages, an accounting and injunctive relief. Plaintiff appeals as of right from the circuit court's order granting defendants summary disposition pursuant to MCR 2.116(C)(5), (7) and (8). We affirm in part, reverse in part and remand.

The circuit court granted summary disposition in part under MCR 2.116(C)(5), on the basis of its determination that plaintiff's claims were derivative to those of the corporation and should have been brought as a shareholder derivative action, rather than by plaintiff in his individual capacity. Plaintiff insists that he lacked standing to file a shareholder derivative action because the corporation had dissolved before he filed suit.

Whether a party has standing to sue constitutes a legal question subject to de novo review. *Crawford v. Dep't of Civil Service*, 466 Mich. 250, 255; 645 NW2d 6 (2002). We also consider de novo the circuit court's summary disposition ruling. *Allen v. Keating*, 205 Mich.App 560, 562; 517 NW2d 830 (1994). "In reviewing a grant of a motion for summary disposition pursuant to MCR 2.116(C)(5), we must consider

the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Rohde v. Ann Arbor Pub Schools*, 265 Mich.App 702, 705; 698 NW2d 402 (2005).

According to MCL 450.1492a, to commence or maintain a shareholder derivative action, a shareholder must have been a shareholder "at the time of the act or omission complained of," subsection 492a(a), and must remain a shareholder "until the time of judgment." Subsection 492a(c). Although plaintiff maintains that he could not have brought this suit as a shareholder derivative action because the corporation had dissolved in April 2003, MCL 450.1834 contemplates that "a dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred." Subsection 834(e) also allows a dissolved corporation to "sue and be sued in its corporate name ... in the same manner as if dissolution had not occurred."

We strive to read these potentially conflicting provisions harmoniously and, if unambiguous, apply the statutes as written.<sup>1</sup> *Nowell v. Titan Ins Co.*, 466 Mich. 478, 482; 648 NW2d 157 (2002). Having carefully considered the clear and unambiguous language of § 492a and § 834, we find that they do not conflict. While § 492a governs shareholder derivative suits in general, § 834 provides specific and complementary rules applicable to dissolved corporations. Specifically, while § 492a imposes the requirement that a plaintiff in a shareholder derivative action be a shareholder at the time of the action's filing and judgment, § 834 explicitly contemplates that a shareholder of a dissolved corporation should continue to function with respect to the corporation as if no dissolution had taken place. Together, § 492a and § 834 anticipate that a shareholder in a dissolved corporation has standing to pursue a derivative action on the corporation's behalf "as if dissolution had not occurred." Adopting plaintiff's interpretation would vitiate parts of § 834 and effectively preclude a shareholder derivative suit from ever being maintained on behalf of a dissolved corporation. We conclude that the circuit court correctly rejected plaintiff's argument that he lacked standing to bring a shareholder derivative action on behalf of the dissolved corporation.<sup>2</sup>

\*2 Plaintiff next argues, with respect to the circuit court's invocation of MCR 2.116(C)(8), that the court erred by finding that he stated claims derivative to claims of the corporation, rather than claims alleging an individualized injury. A motion under subrule (C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Maiden v.*

*Rozwood*, 461 Mich. 109, 119-120; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. The motion "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v. Dep't of Corrections*, 439 Mich. 158, 163; 483 NW2d 26 (1992).

"The doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation, and not that of a stockholder, officer, or employee." *Belle Isle Grill Corp v. Detroit*, 256 Mich.App 463, 474; 666 NW2d 271 (2003). Two related exceptions exist, under which circumstances a stockholder or employee may bring suit on his own behalf. " 'A stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally.' " *Christmer v. Anderson, Nietzke & Co, PC*, 433 Mich. 1, 9; 444 NW2d 779 (1989), quoting 19 Am Jur 2d. Corporations, § 2245, p 1-17.<sup>3</sup> An officer or stockholder also may file suit individually if he "can show a violation of a duty owed directly to [him] that is independent of the corporation." *Belle Isle Grill Corp, supra*, citing *Michigan Nat'l Bank v. Mudgett*, 178 Mich.App 677, 679; 444 NW2d 534 (1989). The second exception allowing a shareholder to sue individually "does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally." *Michigan Nat'l Bank, supra* at 679-680. "Thus, where the alleged injury to the individual results only from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action against the third party." *Id.* at 680.

In this case, plaintiff alleged in his breach of fiduciary duty and breach of contract counts that defendants funneled corporate funds to other corporations in which they held interests, which conduct breached (1) their fiduciary duties to the corporation, and (2) their contractual duties to conduct corporate business "in a financially sound manner," and to conduct corporate business activities fairly and equitably for the benefit of all shareholders.<sup>4</sup> Plaintiff maintains that because he and defendants were the only three shareholders and defendants stood to benefit from their own

alleged misconduct, he suffered an injury that the remaining shareholders did not.

\*3 But regardless of whether plaintiff suffered an injury, each of the complaint's allegations refers to breaches and injuries to the corporation or all shareholders. In the complaint, plaintiff simply offers no basis for his alleged injuries independent of the alleged harm to the corporate entity; the complaint asserts neither that defendants owed him a personal duty independent of what they owed to the corporation as shareholders, nor that he suffered some individualized injury distinct from the harm that defendants allegedly inflicted on the corporation. Because the exceptions allowing individual shareholders to sue individually do not apply when the acts complained of result in damage both to the corporation and to the individual, *Michigan Nat'l Bank, supra* at 679-680, we conclude that the circuit court correctly found that plaintiff's breach of contract and breach of fiduciary duty claims failed to state an actionable individual injury.

Lastly, plaintiff argues that the circuit court erred in dismissing his minority shareholder oppression claim under MCR 2.116(C)(7) (*res judicata*) and (C)(8). Whether the doctrine of *res judicata* applies involves a legal question that we review *de novo*. *Pierson Sand & Gravel, Inc v. Keeler Brass Co*, 460 Mich. 372, 379; 596 NW2d 153 (1999). When reviewing a motion under subrule (C)(7), this Court accepts all well pleaded complaint allegations as true, unless contradicted by documentary evidence that establishes a genuine issue of material fact. MCR 2.116(G)(5); *Maiden, supra* at 119; *Guerra v. Garratt*, 222 Mich.App 285, 289; 564 NW2d 121 (1997). If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then whether the plaintiff's claim is barred constitutes a question for the court as a matter of law. *Maiden, supra* at 122; *Guerra, supra*.

Plaintiff's shareholder oppression claim derives from MCL 450.1489(1), which allows a shareholder to bring an action "to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." Subsection 489(3) defines "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder."

Contrary to defendants' argument, the plain statutory language does not require that the plaintiff be a minority shareholder, or show that each defendant individually is a majority shareholder. Rather, subsection 489(1) requires only a showing that the defendants are "in control of the corporation." Here, plaintiff sufficiently alleged under subsection 489(1) that defendants collectively owned 60 percent of the corporation's shares and comprised two-thirds of the board of directors, and thus had control over corporate affairs.

Plaintiff further alleged that defendants misused their collective power over corporate affairs to enrich themselves at the expense of the corporation and plaintiff, the minority shareholder, by funneling corporate funds to two other corporations that defendants controlled. Viewing these allegations as true and construing them in plaintiff's favor, we find that plaintiff sufficiently alleged that defendants took "a significant action or series of actions that substantially interfere[d] with the interests of the shareholder as a shareholder." MCL 450.1489(3). Consequently, we conclude that the circuit court erred to the extent that it granted summary disposition of plaintiff's minority shareholder oppression claim under MCR 2.116(C)(8).<sup>5</sup>

\*4 Defendants correctly argue that res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action.<sup>6</sup> *Ozark v. Kais*, 184 Mich.App 302, 307; 457 NW2d 145 (1990). The doctrine requires a showing that: (1) the prior action was decided on the merits in a final decision, (2) the issue disputed in the second case was or could have been resolved in the prior action, and (3) both actions involve the same parties or their privies. *Kosiel v. Arrow Liquors*

*Corp.*, 446 Mich. 374, 379; 521 NW2d 531 (1994); *Ozark, supra* at 307-308.

"In most instances, the denial of a motion to amend will not be a decision on the merits." *Martin v Michigan Consolidated Gas Co.*, 114 Mich.App 380, 383; 319 NW2d 352 (1982). "However, when ... the denial is made on the basis of the futility of the amendment, it is in effect a determination that the added claims are substantively without merit." *Id.* at 384. "Such a determination is entitled to res judicata impact." *Id.*

Plaintiff previously filed a 2002 shareholder derivative action that the circuit court dismissed without prejudice. The parties do not dispute that the circuit court also denied plaintiff's motion to amend his 2002 complaint to add a shareholder oppression claim. The instant record, however, contains no indication that the denial of plaintiff's motion to amend amounted to a decision on the merits, i.e., that the circuit court previously found that plaintiff's proposed amendment qualified as futile. *Martin, supra*. The order denying plaintiff's motion to amend that defendants submitted in this case states only that "Plaintiff's Motion to Amend is DENIED" "[f]or the reasons stated on the record." The transcript of the motion hearing in the prior action does not appear as part of the record in this case. Thus, defendants have failed to show that the circuit court previously dismissed plaintiff's motion to amend on the merits. Accordingly, we conclude that the circuit court in this case erred by dismissing plaintiff's shareholder oppression claim on the basis of res judicata.

Affirmed in part, reversed in part and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

#### Footnotes

- 1 This Court considers de novo questions of statutory interpretation. *Diamond v. Witherspoon*, 265 Mich.App 673, 682; 696 NW2d 770 (2005). When construing statutes, we consider the specific statutory language at issue and, if the language is clear and unambiguous, we must apply it as written, and may not engage in judicial construction. *Id.* at 684.
- 2 Because plaintiff concedes that he did not file a shareholder derivative action, we need not address whether a derivative action ever may be pursued without making the required demand on the corporation's board of directors. See MCL 450.1493a(a); MCR 3.502(A).
- 3 In *Christner, supra*, the Supreme Court agreed that because the plaintiff was the only one of ten shareholders who did not receive a distribution of corporate assets upon liquidation, he suffered an individual injury that entitled him to sue on his own behalf.
- 4 According to the complaint, by the same alleged misconduct, defendants violated their duty to abide by an implied covenant of good faith and fair dealing.
- 5 Contrary to their representations on appeal, defendants did not move for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). Additionally, the circuit court clearly granted summary disposition to defendants solely under MCR 2.116(C)(5), (7) and (8). Thus, while plaintiff may not have countered defendants' allegation that the transactions at issue were duly approved, he had no burden to do so given the grounds alleged in defendants' motion. See *Maiden, supra* at 119 (unlike a motion under (C)

(10), a party requesting summary disposition under MCR 2.116(C)(7) need not file supportive material and the opposing party need not reply with supportive material).

- 6 Although the circuit court addressed the propriety of summary disposition on res judicata grounds, defendants correctly observe that on appeal, plaintiff fails to argue that res judicata does not preclude its shareholder oppression claim. "Ordinarily, we do not address issues not raised below or on appeal, or issues that were not decided by the trial court. However, this Court possesses the discretion to review a legal issue not raised by the parties." *Tingley v. Kortz*, 262 Mich.App 583, 588; 688 NW2d 291 (2004). "To the extent this issue was not properly raised on appeal, we have held that we may choose to 'address any issue that, in the court's opinion, justice requires be considered and resolved.'" *LME v. ARS*, 261 Mich.App 273, 287; 680 NW2d 902 (2004), quoting *Paxlike v Retool Industries (On Rehearing)*, 198 Mich.App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich. 502; 519 NW2d 441 (1994). Because, as discussed *infra*, the record does not support the circuit court's reliance on res judicata, we find that justice requires our consideration and resolution of the res judicata question.

---

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

2003 WL 23104222

Only the Westlaw citation is currently available.

**UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.**

Court of Appeals of Michigan.

James M. REINHART, Plaintiff-Appellee/Cross-Appellant,

v.

CENDROWSKI SELECKY, P.C., f/k/a Cendrowski Selecky & Reinhart, P.C., Defendant-Appellee, and

Harry T. CENDROWSKI and John R. Selecky, Defendants-Appellants/Cross-Appellees.

James M. REINHART, Plaintiff-Appellee/Cross-Appellant,

v.

CENDROWSKI SELECKY, P.C., f/k/a Cendrowski Selecky & Reinhart, P.C., Defendant-Appellant/Cross-Appellee, and

Harry T. CENDROWSKI and John R. Selecky, Defendants-Appellees.

No. 239540, 239584. | Dec. 30, 2003.

Before: BANDSTRA, P.J., and HOEKSTRA and BORRELLO, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

\*1 In these consolidated cases, defendants Cendrowski Selecky, P.C., Harry T. Cendrowski, and John R. Selecky appeal as of right from a judgment entered following a bifurcated jury/bench trial. Plaintiff James M. Reinhart cross-appeals from this same order. We affirm.

**I. Basic Facts and Procedural History**

This case arises from the end of a business and employment relationship that spanned more than fifteen years. Plaintiff, a

former shareholder and employee of defendant Cendrowski & Selecky, P.C. (CSPC), filed suit against the corporation and its majority shareholders and officers, defendants Harry Cendrowski and James Selecky ("the individual defendants"), after being terminated from the company's employ in December 1998. The suit filed by plaintiff was premised upon his failure to receive a portion of what the parties have dubbed "the Taubman fee," which plaintiff alleged was owed to him under the terms of his employment agreement. Plaintiff also alleged that he was denied his share of corporate profits to which he was entitled under a stock restriction and purchase agreement (SRPA) with the corporation. In seeking to recover these monies, plaintiff alleged breach of contract, conversion, unjust enrichment, promissory estoppel, and breach of fiduciary duty/shareholder oppression in violation of MCL 450.1541a and MCL 450.1489.<sup>1</sup> Plaintiff further sought declaratory relief, seeking to invalidate a provision of his employment agreement that required him to pay to the corporation, for the period of three years, a portion of any fees received by plaintiff from corporate clients for whom plaintiff performed work following his termination. CSPC filed a counterclaim under this provision, seeking the return of more than \$30,000 received by plaintiff from its corporate clients since having left CSPC. The defendant corporation also filed a counterclaim seeking specific enforcement of the SRPA, which required that plaintiff tender his shares back to the corporation upon termination.

Before trial, the lower court dismissed plaintiff's claims for breach of contract, unjust enrichment, and promissory estoppel, as asserted against the individual defendants, on the ground that neither of the individual defendants were a party to the written agreements at issue and because plaintiff failed to expressly defend those claims, as concerned the individual defendants, against a joint motion for summary disposition brought by the corporate and individual defendants.

The lower court also bifurcated several of the remaining claims, ordering that the breach of fiduciary duty/shareholder oppression claim be tried before the bench, along with the defendant corporation's counterclaim for specific performance of the SRPA, following a separate jury trial. Consequently, at the time the jury trial commenced, only plaintiff's claims for breach of contract, unjust enrichment, and promissory estoppel, as asserted against the corporate defendant, and his claim for conversion against the individual defendants, were to be presented for consideration by the jury. However, plaintiff's claim for conversion was

ultimately dismissed on the individual defendants' motion for a directed verdict, made following the conclusion of plaintiff's case. Consequently, the jury was asked to decide only plaintiff's claims for breach of contract, unjust enrichment, and promissory estoppel, as asserted against the corporate defendant, and defendant corporation's counterclaim for recovery under the termination provisions of the employment agreement.

\*2 The jury found that although no valid contract awarding plaintiff any portion of the Taubman fee existed, the corporation had in fact promised plaintiff a twenty-five percent interest in the Taubman fee. Accordingly, the jury awarded plaintiff \$936,159 on his promissory estoppel claim. However, the jury rejected plaintiff's assertions that he had been improperly terminated and that the corporation had been unjustly enriched at his expense, and found that plaintiff breached the non-compete provisions of his employment agreement with the corporation. Accordingly, the jury awarded defendant CSPC \$32,960 on its counterclaim.

At the close of plaintiff's proofs at the subsequent bench trial, the trial court directed a verdict in defendants' favor after concluding that plaintiff had failed to prove that defendants "took any action that was not permitted by the [various] agreements" between the parties, as required under MCL 450.1489. The trial court also ordered that plaintiff tender his stock back to the corporation at the price determined to be the value of his shares under the SRPA.

Thereafter, plaintiff and defendant CSPC both moved for judgment notwithstanding the verdict (JNOV); plaintiff challenging the jury's verdict on his breach of contract claim, and CSPC challenging the jury's verdict on plaintiff's claim for promissory estoppel. Defendants Cendrowski and Selecky also moved for costs and sanctions under MCR 2.403(O), which requires imposition of "actual costs" against a party who rejects an award at case evaluation and does not improve his position at trial, and MCR 2.114(F) and 2.625(A)(2), which require an award of costs upon a finding that an action was frivolous. The trial court, however, denied each of the parties' motions.

Each party now appeals from the final judgment below. In Docket No. 239540, defendants Cendrowski and Selecky appeal as of right the trial court's ruling on its motion for costs and attorney fees. In Docket No. 239584, defendant CSPC appeals as of right, arguing that the trial court erred in denying its motion for JNOV or a new trial as to plaintiff's promissory

estoppel claim. Plaintiff has filed a cross-appeal in both actions, arguing that the trial court erred in directing verdicts on its claims for conversion and breach of fiduciary duty/ shareholder oppression, and in denying plaintiff's motion for JNOV on its claim for breach of contract.

Docket No. 239540

#### A. Case Evaluation Sanctions

Defendants Cendrowski and Selecky argue that the trial court erred in denying their request, pursuant to MCR 2.403(O), for case evaluation sanctions against plaintiff. We disagree.

MCR 2.403(O)(1) provides that "[i]f a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." Here, it is not disputed that, before trial, a case evaluation panel determined that plaintiff should receive nothing on its claims against the individual defendants. It is further not disputed that plaintiff rejected the panel's determination then failed to obtain a more favorable verdict against the individual defendants, each of his claims against those parties having subsequently been dismissed either on motion for summary disposition or directed verdict. See MCR 2.403(O)(2)(c). The dispute here arises from plaintiff's rejection of the panel's contemporaneous determination that he should receive \$200,000 on his claims against defendant CSPC, the subsequent jury verdict on those claims awarding plaintiff \$936,159, and the following language found in MCR 2.403(O)(4):

\*3 In cases involving multiple parties, the following rules apply:

- (a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable

to the plaintiff than the aggregate evaluation.

In applying this subrule, the trial court focused on the final sentence of MCR 2.403(O)(4)(a) and determined that, because the "aggregate verdict" obtained by plaintiff, i.e., \$936,159, was greater than the aggregate evaluation of \$200,000, the individual defendants were not entitled to case evaluation sanctions. On appeal, the individual defendants argue that the trial court erred in this determination because it was limited under MCR 2.403(O)(4)(a) to evaluating only the evaluation awards and verdicts between themselves and plaintiff. Thus, defendants argue, the lower court should not have aggregated the award from plaintiff's claims against the defendant corporation when determining whether plaintiff obtained a more favorable verdict at trial or case evaluation. We do not agree.

This Court reviews a trial court's decision whether to grant case evaluation sanctions de novo because it involves a question of law, not a discretionary matter. See *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich.App 127, 129; 573 NW2d 61 (1997). The issue at hand also involves interpretation of a court rule, which, like matters of statutory interpretation, is a question of law that is reviewed de novo. *Marketos v. American Employers Ins Co*, 465 Mich. 407, 412; 633 NW2d 371 (2001).

In *Marketos*, supra, our Supreme Court set forth the proper method for interpreting court rules:

"When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. Similarly, common words must be understood to have their everyday, plain meaning." [*Id.* at 413, quoting *Grievance Administrator v. Underwood*, 462 Mich. 188, 193-194; 612 NW2d 116 (2000).]

Defendants are correct that, under the plain language found in the first sentence of MCR 2.403(O)(4)(a), the trial court was limited, when determining whether plaintiff had achieved a more favorable verdict than evaluation, to consideration of "only the amount of the evaluation and verdict as to the particular pair of parties [i.e., plaintiff and the individual defendants], rather than the aggregate evaluation or verdict

as to all parties." Defendants are also correct that when properly applied this language requires a conclusion that plaintiff failed to achieve a "more favorable" result as defined in MCR 2.403(O)(3).<sup>2</sup> However, this conclusion does not end the assessment under MCR 2.403(O)(4)(a). As the trial court correctly recognized, the rule goes on to prohibit the imposition of costs "on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation." While defendants argue that this language permits aggregation of only those verdicts and evaluations on claims between the particular pair of parties at issue, to read the rule in such a manner would render the final sentence of MCR 2.403(O)(4)(a) mere surplusage, as it would stand to merely reiterate the concept found in the first sentence of the rule, i.e., that in determining whether imposition of sanctions is proper in cases involving multiple defendants, only those verdicts and evaluations on claims between the particular parties at issue may be considered. Such a result is not permitted under the rules of interpretation to be applied by this Court in construing the language of MCR 2.403(O)(4)(a). See *Yudashkin v. Holden*, 247 Mich.App 642, 652; 637 NW2d 257 (2001) (courts "must avoid constructions that render any part of a court rule surplusage or nugatory").

\*4 Moreover, the final sentence of MCR 2.403(O)(4)(a) begins with the word "[h]owever," which has been defined to mean "nevertheless," or "in spite of that." Random House Webster's College Dictionary (1992). When considered in the context of these commonly accepted meanings, the plain import of the final sentence of MCR 2.403(O)(4)(a) is that it was intended to create an exception to the concept set forth in the first sentence of the subrule, i.e., regardless of whether a verdict between a particular pair of parties is more or less favorable, case evaluation sanctions may not be imposed where the plaintiff achieves an overall verdict greater than the overall evaluation.

Contrary to defendants' assertion, such an interpretation of MCR 2.403(O)(4)(a) does not "produce an illogical and unfair result" by providing immunity from case evaluation sanctions to a plaintiff who files a legally or factually baseless claim. The rule, as interpreted above, permits imposition of case evaluation sanctions under appropriate circumstances. For instance, where a plaintiff fails to both improve his position against an individual defendant and obtain an aggregate verdict greater than the aggregate evaluation as to all parties, the imposition of sanctions in favor of the individual defendant would be required. This is consistent with the purpose of providing case evaluation sanctions,

which is to place the burden of litigation costs on a party who demands a trial by rejecting the case evaluation award, yet fails to improve his position at trial. *Dessart v. Burak*, 252 Mich.App 490, 498; 652 NW2d 669 (2002). The rule, as interpreted by the trial court, merely prohibits placing this burden on a plaintiff who, despite having failed to achieve a more favorable verdict as to any individual defendant, achieves a better overall position at trial. Moreover, sanctions for the filing of legally or factually baseless claims are provided for elsewhere in the statutes and court rules. See MCR 2.625(A)(2) and MCL 600.2591. Accordingly, a party who has been forced to defend against such a claim, but finds recovery of costs under MCR 2.403 unavailable, is not without recourse. Therefore, we do not conclude that the trial court erred in denying the individual defendants' request for case evaluation sanctions against plaintiff.

#### B. Sanctions for Frivolous Claims

Defendants Cendrowski and Selecky also argue that the trial court erred in denying their motion for costs and attorney fees pursuant to MCR 2.114(F) and MCR 2.625(A)(2), which require the imposition of such sanctions against a party who has asserted a frivolous claim or defense. Defendants argue, as they did below, that each of the claims asserted against them by plaintiff were without legal or factual merit, as evidenced by dismissal of those claims either on motion for summary disposition before trial, or by directed verdict following the close of plaintiff's proofs. In deciding defendants' motion, the trial court found simply that there is "no basis for finding that the claims brought by the Plaintiff were frivolous." We find no error in the trial court's decision.

\*5 MCL 600.2591(3)(a)<sup>3</sup> provides that a claim or defense is frivolous if at least one of the following conditions is met:

- (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
- (iii) The party's legal position was devoid of arguable legal merit.

A trial court's determination whether a claim or defense is frivolous is reviewed for clear error. *Kitchen v. Kitchen*, 465

Mich. 654, 661; 641 NW2d 245 (2002). A determination is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* at 661-662.

Whether a claim or defense is frivolous within the meaning of MCL 600.2591 depends on the facts of each case, *id.* at 662, and must be determined on the basis of the circumstances existing at the time the claim was asserted, *In re Costs and Attorney Fees*, 250 Mich.App 89, 94; 645 NW2d 697 (2002). Thus, contrary to defendants' assertion, plaintiff's inability to defeat a motion for summary disposition or to prove his claims at trial does not itself merit a finding that his claims were frivolous. See *Jerico Constr, Inc v. Quadrants, Inc*, 257 Mich.App 22, 36; 666 NW2d 310 (2003). Moreover, "[n]ot every error in legal analysis constitutes a frivolous position" warranting the imposition of sanctions. *Kitchen, supra* at 663.

Here, the trial court did not clearly err in concluding that there was "no basis" for finding that the claims brought by plaintiff against the individual defendants were frivolous. As explained below, while these claims were not successful, they were not completely groundless or devoid of arguable legal merit at the time the complaint was filed. MCL 600.2591(3); *In re Costs and Attorney Fees, supra*.

#### 1. Breach of Contract and Promissory Estoppel

Defendants Cendrowski and Selecky argue that because they were not parties to the employment agreement at issue here, and made no personal promises regarding payment to plaintiff of a portion of the Taubman fee, the trial court clearly erred in failing to find that plaintiff's claims for breach of contract and promissory estoppel, as asserted against them individually, were both legally and factually frivolous. However, considering plaintiff's reliance on not only the employment agreement, but also on the October 12, 1993 letter agreement indicating that a portion of the Taubman fee was to be paid directly "to the principals" of CSPC, as well as the fact that plaintiff dealt exclusively with Cendrowski and Selecky in their capacity as majority shareholders when negotiating a right to an increased percentage of the Taubman fee, we cannot deem plaintiff's attempt to hold the individual defendants personally liable for promises or agreements allegedly made during those negotiations to be factually baseless or devoid of arguable legal merit. MCL 600.2591(3) (a)(ii) and (iii). Accordingly, we do not conclude that the

trial court clearly erred in failing to find these claims to be frivolous. *Kitchen*, *supra* at 661.

## 2. Conversion

\*6 In his complaint, plaintiff asserted that defendants Cendrowski and Selecky converted his "property by taking for themselves" his respective portion of the Taubman fee. As defendants correctly note, to support an action for conversion of money there must be an obligation on the part of the defendant to return specific monies entrusted to his care. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich.App 94, 111; 593 NW2d 595 (1999). Defendants argue that because (1) there was no evidence presented at trial that plaintiff entrusted any specific monies to their care, and (2) plaintiff acknowledged at trial that Taubman paid the fee at issue by means of a check made payable to CSPC and not the individual defendants, plaintiff's claim for conversion of the fee was both legally and factually baseless, so as to require imposition of sanctions under MCR 2.114(F) and MCR 2.625(A)(2). However, as noted above, whether a claim or defense is frivolous within the meaning of MCL 600.2591 must be determined on the basis of the circumstances existing at the time the claim was asserted. *In re Costs and Attorney Fees*, *supra*. Moreover, this Court has held that "[a]n action for conversion lies where an individual cashes a check and retains the full amount of the check when he is entitled to only a portion of that amount." *Citizens Ins Co v. Delcamp Truck Center, Inc*, 178 Mich.App 570, 576; 444 NW2d 210 (1989), citing *Hogue v. Wells*, 180 Mich. 19, 24; 146 NW 369 (1914). Here, despite plaintiff's concessions at trial, there is no evidence that at the time the complaint was filed in June 1999 plaintiff knew that the fee had been paid to CSPC, rather than the individual defendants. To the contrary, plaintiff alleged from the start that the fee was always intended to be paid to the principals of CSPC, an allegation arguably supported by the express language of the October 1993 engagement letter.<sup>4</sup> Moreover, when viewed in this manner the October 1993 letter supports the assertion that plaintiff was entitled to a portion of the money received from Taubman, and that the individual defendants were obligated to remit that portion of the fee to plaintiff upon demand. *Citizens*, *supra*; see also *Globe & Rutgers Fire Ins Co of New York v Fisher*, 234 Mich. 258, 260-261; 207 NW 884 (1926) (contract entitling an individual to specific monies will support an action for conversion). That this theory of individual liability was ultimately proven to be factually unsustainable does not render the claim baseless at the time it was asserted. *Jerico*,

*supra*. Accordingly, the trial court correctly concluded that plaintiff's claim for conversion was not frivolous within the meaning of MCL 600.2591(3)(a).

## 3. Unjust Enrichment

Unjust enrichment is an equitable theory of restitution under which "one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss." Restatement Restitution, General Scope Note (1937), p 1. Michigan courts have "long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another." *Michigan Educational Employees Mutual Ins Co v Morris*, 460 Mich. 180, 198; 596 NW2d 142 (1999). In seeking relief on this ground plaintiff alleged that after agreeing to afford him a percentage of the Taubman fee in 1997, the individual defendants "embarked upon a plan and scheme to usurp for themselves" his share of both the fee and corporate profits. Plaintiff further alleged that as part of this plan the individual defendants intentionally deferred billing clients in order to reduce distributable profits until he could be terminated, at which time they negotiated payment of the Taubman fee, which they kept for themselves. It was on the basis of these allegations, which find arguable support in the record; that plaintiff asserted a right to recover his portion of the fee and corporate profits under the theory of unjust enrichment.

\*7 While defendants argue that they received no benefit from payment of the termination fee—the fee having been paid to the corporation and not themselves—and that, therefore, plaintiff's claim for unjust enrichment was factually flawed, there is, as previously noted, no evidence that plaintiff was aware that the fee had not been paid directly to defendants at the time he filed his complaint. Moreover, there is record evidence suggesting that although the fee was paid to CSPC, the individual defendants both benefited greatly shortly thereafter, each having received a distribution or other payment from CSPC in excess of one million dollars. Given these facts and circumstances, it cannot be said that plaintiff's claim for unjust enrichment was frivolous within the meaning of MCL 600.2591(3)(a).

## 4. Breach of Fiduciary Duty/Shareholder Oppression

Plaintiff alleged in his complaint that the individual defendants' termination of his employment in order to force

a sale of his stock under the SRPA and permit them to appropriate the entirety of the Taubman fee, as well as corporate profits, constituted violations of MCL 450.1541a and MCL 450.1489, which provide causes of action for breach of the fiduciary duties of a corporate officer or director, and to "establish that the acts of the directors or those in control of the corporation are ... willfully unfair and oppressive to the corporation or to the shareholder." MCL 450.1489(1). MCL 450.1489(3) defines "willfully unfair and oppressive" conduct as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interest of the shareholder as a shareholder." However, that section further provides that this "term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied or written corporate policy or procedure." MCL 450.1489(3) (Emphasis added).

MCL 450.1489(1) provides that if a shareholder establishes grounds for relief, the trial court may "grant relief as it considers appropriate," including the purchase of the aggrieved shareholders stock at "fair value." MCL 450.1489(1)(e). However, as previously noted, following a bench trial on these claims the trial court directed a verdict in favor of the individual defendants after concluding that plaintiff was unable to establish a right to recovery under these statutes. Specifically, the trial court found:

On review of the extensive record presented, this court is satisfied that there is insufficient evidence to establish that Defendants breached any fiduciary duty to either the corporation or to Plaintiff as a minority shareholder, and thus, Plaintiff is not entitled to any of the remedies set forth in section 1489. Plaintiff has failed to prove that Defendants took any action that was not permitted by the agreements. Thus, the Individual Defendants' Motion for Directed Verdict as to Count V of the Complaint alleging Shareholder oppression is granted.

\*8 The trial court's ruling in this regard was apparently premised on the fact that, as argued by defendants below, the defendants' termination of plaintiff and subsequent tender offer for the purchase of his stock at a price determined

under the formula found in the SRPA were consistent with the provisions of both the SRPA and the employment agreement entered into by the parties in 1988. On appeal, defendants argue that the trial court's ruling in this regard makes clear that plaintiff's claims for breach of fiduciary duty and shareholder oppression were without merit "as a matter of law," the challenged conduct having been "permitted by an agreement," and that, therefore, they are entitled to reasonable costs and attorney fees under MCR 2.114(F) and MCL 600.2591. However, in making this argument defendants fail to recognize that the statutory language on which the trial court relied in directing a verdict in their favor, i.e., that conduct "permitted by an agreement" does not constitute willfully unfair or oppressive conduct within the meaning of MCL 450.1489(1), was not added to the statutory scheme until more than two years after plaintiff filed his complaint in this matter. See 2001 PA 57. As noted by plaintiff, prior to the enactment of 2001 PA 57, which added the entirety of MCL 450.1489(3), the statute failed to even define willfully unfair and oppressive conduct, let alone except certain conduct from the definition of that term. Consequently, it cannot be reasonably argued that, on the basis of this language, plaintiff's claims for breach of fiduciary duty and shareholder oppression were frivolous at the time they were first asserted. *In re Costs and Attorney Fees, supra*. Accordingly, the trial court did not clearly err in refusing to award defendants' reasonable costs and attorney fees in connection with plaintiff's assertion of these claims.

#### 5. Declaratory Relief

Defendants Cendrowski and Selecky also argue that they were entitled to reasonable costs and attorney fees incurred in connection with plaintiff's request for declaratory relief, which sought to invalidate the non-compete provision of his employment agreement with defendant CSPC. However, although named as parties in the suit, review of the complaint makes clear that the individual defendants were not called upon or required to defend against this count, their having not been parties to the employment agreement challenged by plaintiff. Accordingly, defendants are entitled to no relief under MCR 2.114(F) or MCL 600.2591.

#### C. Costs as Prevailing Party

Defendants Cendrowski and Selecky also argue that the trial court abused its discretion in denying their motion for costs

under MCR 2.625(A)(1) because they were the prevailing parties. Again, we disagree.

MCR 2.625(A)(1) provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." Consequently, the taxation of costs under MCR 2.625(A) is within the trial court's discretion, even when the party prevailed in the action. See *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp.*, 221 Mich.App 301, 308; 561 NW2d 488 (1997). Here, the trial court denied defendants' costs under MCR 2.625(A)(1) on the record at a hearing on defendants' motion held January 23, 2002. In doing so, the trial court stated simply that it "would note that many of [the requested costs] are not appropriate, including, for example, lunch meetings, parking, computer time, depositions, transcripts not read into evidence and court reporter fees." Defendants do not, however, challenge the trial court's decisions in this regard as a discretionary abuse, but rather argue that because the trial court did not place these reasons in writing, as required by MCR 2.625(A)(1), this Court should reverse the trial court's decision and itself award them costs. We note, however, that while a separate writing detailing the basis for the trial court's decision was not issued, the trial court incorporated its statements at the January 23, 2002 hearing in its written order denying defendants' motion, a practice not uncommon in our judicial system, and which was sufficient to meet the "in writing and filed" requirement of MCR 2.625(A)(1). Accordingly, given the nature of defendants' challenge on appeal, and considering that this Court will generally defer to the trial court's decision on a discretionary ruling so long as the result is not "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias," *Spalding v. Spalding*, 355 Mich. 382, 384-385; 94 NW2d 810 (1959), we affirm the trial court's decision denying the individual defendants' costs under MCR 2.625(A)(1).

Docket No. 239584

#### A. Motion for Judgment Notwithstanding the Verdict

\*9 Defendant CSPC first argues that the trial court erred in denying its motion for JNOV as to the promissory estoppel claim successfully asserted by plaintiff at the jury trial. We disagree.

Defendant's argument is premised, as it was below, on the well-settled rule that quasi-contractual remedies such as promissory estoppel are inapplicable where the parties have made an express contract covering the same subject matter. See *Cascade Electric Co v. Rice*, 70 Mich.App 420, 426; 245 NW2d 774 (1976). Relying on this rule, defendant asserts that because the terms of the compensation plaintiff was to receive were covered in the fully-integrated employment agreement executed by the parties in 1988, plaintiff could not advance promissory estoppel as a theory for recovery of additional "compensation," i.e., his claimed share of the Taubman fee. Plaintiff does not dispute the validity of the rule cited by defendant, on which the jury was arguably instructed at trial.<sup>5</sup> Plaintiff asserts, however, that the rule is inapplicable here, as the 1988 agreement between the parties did not contemplate any later agreements concerning his compensation. In denying defendant's motion, the trial court agreed with this argument, stating:

On review of the arguments of the parties, this Court is satisfied that that the employment agreement did not address any post 1988 compensation issues, such as the 1996 promise for [plaintiff] to receive 25 percent of the Taubman fee as compensation. And, thus, the subject matter of plaintiff's promissory claim is not the same subject matter in the employment agreement. A trial court's decision on a motion for JNOV is reviewed by this Court de novo, *Bouverette v. Westinghouse Electric Corp*, 245 Mich.App 391, 395; 628 NW2d 86 (2001), to determine whether the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law, *Orzel v. Scott Drug Co*, 449 Mich. 550, 557-558; 537 NW2d 208 (1995). If reasonable jurors honestly could have reached different conclusions based upon the evidence, neither the trial court nor this Court may substitute its judgment for that of the jury. *Hamann v. Ridge Tool Co*, 213 Mich.App 252, 254; 539 NW2d 753 (1995).

As previously noted, the jury was instructed on the law at issue here and, apparently, concluded that the compensation provisions of the employment agreement did not serve to address the additional compensation alleged by plaintiff to have been promised him. Because the evidence at trial when viewed in the light most favorable to plaintiff supports this conclusion, the trial court did not err in denying defendant's motion for JNOV.

As plaintiff correctly notes, the compensation provisions of his employment agreement relating to salary, bonuses, and fringe benefits indicate that these matters were not static, but would be reviewed and adjusted "from time to time," thereby suggesting that the issue of compensation was, as a general matter, a fluid concept not wholly resolved by the agreement. Moreover, while defendant is correct that the written employment agreement contained an integration clause stating that the 1988 agreement "contains the entire agreement of the parties relating to the subject matter hereof and supercedes all prior understandings and agreements," this language does not foreclose later agreements concerning matters covered in the written agreement. More importantly, however, we note that the employment agreement at issue here was executed more than five years before the October 1993 letter agreement that obligated Taubman to pay the termination fee should its relationship with CSPC cease. The extraordinary ramifications to CSPC and its principals represented by payment of this fee, as well as the broad time period between execution of the two agreements, provides a sufficient basis, when viewed in the light most favorable to plaintiff, from which to conclude that the specific subject matter of plaintiff's compensation if and when the fee was ever paid was not covered by the more general provisions of the 1988 agreement. The trial court did not err in denying defendant's motion for JNOV on the ground that plaintiff was precluded from advancing promissory estoppel as a theory of recovery.

\*10 Defendant also argues that, even if promissory estoppel was applicable under the facts of this case, the trial court nonetheless erred in declining to grant JNOV because plaintiff failed to present a prima facie case under that theory. Again, we disagree.

In *Stewart v. Rudner*, 349 Mich. 459; 84 NW2d 816 (1957), our Supreme Court set forth the following definition of a prima facie case: "'a prima facie case means, and means no more than, evidence sufficient to justify, but not to compel, an inference of liability, if the jury so finds.'" *Id.* at 474, quoting *McDaniel v Atlantic Coast Line Railway*, 190 NC 474, 475; 130 SE 208 (1925). To establish a claim based on promissory estoppel, there must be:

- (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature;

and (4) circumstances such that the promise must be enforced if injustice is to be avoided. [*Booker v. Detroit*, 251 Mich.App 167, 174; 650 NW2d 680 (2002), rev'd in part on other grounds, 469 Mich. 887 (2003).]

" [A] promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way which would justify a promisee in understanding that a commitment had been made." ' *Id.* , quoting *Schmidt v. Bretzlaff*, 208 Mich.App 376, 379; 528 NW2d 760 (1995) To determine whether a promise existed, a court must examine objectively the words, actions and circumstances surrounding the situation, as well as the nature of the relationship between the parties. *Novak v. Nationwide Mutual Ins Co*, 235 Mich.App 675, 687; 599 NW2d 546 (1999). Moreover, the promise must be definite and clear, *Schmidt, supra*, and reliance on the promise is reasonable only if that reliance is induced by an actual promise. *Ypsilanti Twp v. General Motors Corp*, 201 Mich.App 128, 134; 506 NW2d 556 (1993).

In challenging the evidence to support a prima facie case of estoppel, defendant first argues that plaintiff failed to show that the promise at issue here was "definite and clear." *Schmidt, supra*. However, we find that when objectively viewed, "the words, actions and circumstances surrounding the situation" at issue here are sufficient to justify a jury in concluding that the promise met both these requirements. *Novak, supra; Stewart, supra*. Neither of the individual defendants denied that negotiations concerning providing plaintiff a twenty-five percent share of the Taubman fee, as compensation for services rendered, took place. Moreover, Cendrowski expressly acknowledged that following these negotiations he requested and received from the corporation's attorney a draft amendment to plaintiff's employment agreement providing for just that. Both Cendrowski and Selecky also acknowledged signing, as members of the board of directors, a consent resolution approving the amendment and directing the corporate officers to "take any and all action necessary to effectuate" the resolution, "including ... execution and delivery" of the amendment. Cendrowski further acknowledged that it was he who approved the form of the consent resolution and presented it to the remaining board members for their signature. Although no final draft of the amendment was ever signed, the evidence was nonetheless sufficient to "justify" a conclusion that the promise at issue here, i.e., that a twenty-five percent share of

the Taubman termination fee would be provided to plaintiff as "compensation for services rendered," was sufficiently definite and clear for purposes of presenting a prima facie case. *Stewart, supra*.

\*11 Defendant also argues the evidence was insufficient to show that plaintiff relied to his detriment on the promise to provide him a twenty-five percent share of the Taubman termination fee. Defendant acknowledges plaintiff's testimony that, in anticipation of receiving the fee, he failed to pursue an "open invitation" for a position as a tax partner at the accounting firm of Deloitte & Touche, which was then paying its partners more than he was receiving as an employee at CSPC. Defendant argues, however, that because plaintiff never expressly rejected a formal offer of employment from that firm, and failed to provide more specific facts concerning the details of any such employment, the evidence to support this element of his claim was insufficient to establish a prima facie case. In support of this argument, defendant cites *Marrero v McDonnell Douglas Capital Corp*, 200 Mich.App 438; 505 NW2d 275 (1993) and *Barber v. SMH (US), Inc*, 202 Mich.App 366; 509 NW2d 791 (1993), for the proposition that it is not enough for a plaintiff to simply assert that he gave up "other opportunities" in reliance on a promise. Here, however, in contrast to the cited cases, plaintiff asserted more than that he gave up "other opportunities." As noted above, plaintiff expressly testified that in reliance on the promise at issue here he chose not to pursue a specific position at a specific firm, which was then paying a greater salary than he receiving from CSPC. This testimony was sufficient to establish a prima facie case with respect to detrimental reliance. *Stewart, supra*.

As a corollary to this argument, defendant also asserts that plaintiff was limited to recovery of reliance damages only, and therefore could recover only the difference between his salary at CSPC and that which he would have received had he accepted employment at Deloitte & Touche, a measure of damages not proven at trial. However, 1 Restatement Contracts 2d specifically states that the remedy for a breach of contract based on promissory estoppel should be "flexible," and makes clear that while it is proper in a given case to award only reliance damages, "full-scale enforcement by normal [contract] remedies is often appropriate." Restatement, § 90, comments b and d. Accordingly, enforcement of the promise at issue here to award plaintiff the promised benefit was appropriate.

Defendant CSPC also argues that it was entitled to JNOV because plaintiff failed to present evidence that his reliance on the promise to provide him twenty-five percent of the Taubman fee was reasonable. *Booker, supra*. Defendant's claim in this regard is premised on its assertion that the promise, not having been reduced to a signed writing, contradicts the express requirements of the 1988 employment agreement, which requires that, to be binding, all modifications to that agreement be contained in a signed writing. Citing *Novak, supra*, for the proposition that it is unreasonable to rely on an oral promise that contradicts an express written agreement, defendant argues that plaintiff's knowledge of this requirement made any reliance on an alleged oral promise that was never reduced to a signed writing unreasonable. However, unlike the circumstances in *Novak, supra* at 686-687, where the plaintiff asserted oral assurances that the at-will provision of his written employment contract would not apply to him, there is nothing in the contract at issue here expressly contradictory to the alleged promise. Although the employment agreement entered into by the parties required that modifications to the agreement be reduced to a signed writing in order "to be valid," this requirement does not, as did the at-will provision as issue in *Novak*, directly conflict with the promise at issue here, i.e.; that plaintiff would be entitled to receive a share of the Taubman fee. Moreover, plaintiff testified at trial that he attempted several times to have the draft amendment to his employment agreement setting forth the terms of this promise finalized and signed, and was each time reassured that it would eventually be done. These assurances, when viewed in connection with the signed board resolution purporting to approve the amendment to his employment agreement, were sufficient to justify a conclusion that his reliance on the promise at issue was reasonable.

#### B. Motion for a New Trial

\*12 In the alternative, defendant CSPC argues that the jury's verdict was against the great weight of the evidence and that the trial court, therefore, should have granted its motion for a new trial on this ground. In making this argument, defendant relies upon its challenge to the sufficiency of the evidence at trial to establish a prima facie case, arguing simply that "[f]or the reasons already discussed, plaintiff failed to present sufficient evidence of the elements of promissory estoppel to justify the jury's verdict in his favor of \$936,159." However, it is well settled that a jury's verdict should not be set aside if there was competent evidence to support it. *Ellsworth v.*

*Hotel Corp of America*, 236 Mich.App 185, 194; 600 NW2d 129 (1999). Thus, when a party claims that a jury's verdict was against the great weight of the evidence, this Court may overturn that verdict "only when it was manifestly against the clear weight of the evidence." *Id.* As discussed above, plaintiff presented sufficient documentary and testimonial evidence at trial to both support its claim for promissory estoppel and "justify" the jury's verdict in his favor on that claim. *Stewart, supra.* Although defendant, through the testimony of its officers, denied the existence of the promise underlying that claim, it is not this Court's role to assess the weight of the evidence or the credibility of the witnesses who testified at trial. See *Kalamazoo Co Rd Comm'rs v. Bera*, 373 Mich. 310, 314; 129 NW2d 427 (1964). Accordingly, the trial court did not err in refusing to grant defendant a new trial on this ground. *Ellsworth, supra.*

Defendant also argues that a new trial is required because the trial court failed to properly instruct the jury regarding the law of promissory estoppel. Again, we disagree.

Claims of instructional error are reviewed de novo on appeal. *Cox v Flint Bd of Hospital Managers*, 467 Mich. 1, 8; 651 NW2d 356 (2002). However, a trial court's determination whether a requested instruction was applicable and accurate is reviewed for an abuse of discretion. *Jackson v. Nelson*, 252 Mich.App 643, 647; 654 NW2d 604 (2002). An abuse of discretion exists only if an unprejudiced person considering the facts on which the trial court acted would conclude that there was no justification or excuse for the ruling made. *Clark v. Kmart Corp (On Remand)*, 249 Mich.App 141, 151; 640 NW2d 892 (2002). Moreover, reversal is not required unless the failure to do so would be inconsistent with substantial justice. *Case v. Consumers Power Co*, 463 Mich. 1, 6; 615 NW2d 17 (2000).

At trial, defendant requested that the trial court instruct the jury that "[t]he plaintiff is not entitled to any recovery for promissory estoppel if there is an express contract in force between the same parties regarding the subject matter," and that any reliance on the promise alleged by plaintiff "must be reasonable and to the plaintiff's detriment." Defendant also requested that the jury be instructed that:

\*13 Promissory estoppel should apply only where you have no question about any of the facts alleged by the plaintiff and where you have no doubt that the plaintiff gave up a job that was formally offered to him in

reasonable reliance upon a clear and definite promise.

However, the trial court declined to so instruct the jury, choosing instead to provide instruction only on the elements of a claim for promissory estoppel, as contained in the standard civil jury instructions. See SJI2d 130.01.<sup>6</sup> On appeal, defendant asserts that this limited instruction failed to accurately and fairly instruct the jury on the applicable law, and that the trial court's refusal to grant its requests for instruction, therefore, requires a new trial. We do not agree.

Although the trial court did not expressly instruct the jury that plaintiff was not entitled to any recovery for "promissory estoppel" if there was an express contract between the parties regarding the subject matter of the alleged promise, the court did instruct that:

[a] contract can be implied only if there is not express contract covering the same subject matter. There cannot be an express and implied contract covering the same subject matter at the same time.

Moreover, counsel for defendant argued during his closing statement to the jury that promissory estoppel could not be used as a substitute for the express terms of the employment contract. That the jury rejected this argument and found in favor of plaintiff on his claim for promissory estoppel does not warrant overturning its verdict. *Case, supra.* Moreover, as previously discussed, there was ample evidence from which to conclude that the subject matter of the promise at issue was not covered by the written employment agreement. As such, reversal on this ground is not required. *Id.*; see also MCR 2.613(A).

That the trial court declined defendant's request to instruct the jury that plaintiff's reliance on the alleged promise "must be reasonable and to the plaintiff's detriment" is similarly not grounds for reversal. In giving the standard civil jury instruction on promissory estoppel, the trial court instructed the jury that in order to succeed on this claim plaintiff was required to show that he took "some action in reasonable reliance" on the alleged promise, and that he was "damaged as a result" of that reliance. Such instruction clearly informed the jury of the proposition sought by the requested instruction.

We similarly reject defendant's assertion that the trial court's failure to honor its request to instruct the jury that it could find in favor of plaintiff on a theory of promissory estoppel only if it had "no question about any of the facts alleged by the plaintiff" and "no doubt that the plaintiff gave up a job that was formally offered to him in reasonable reliance upon a clear and definite promise," requires a new trial. Although there is arguable legal support for the proposition that application of the theory of promissory estoppel is generally limited to circumstances where the facts are "unquestionable," see *Novak, supra* at 687, there is no similar basis to support instruction that a formal offer of employment was required to support a verdict in favor of plaintiff on this claim. Accordingly, because the instruction as a whole was not appropriate, we find no abuse of discretion in the trial court's refusal to read the instruction at trial. *Clark, supra*.

\*14 Finally, defendant argues that the trial court erroneously instructed the jury that "[i]f the fact of damages has been established, the wrongdoer bears the risk of uncertainty about the amount of damages." Defendant argues that this instruction erroneously placed upon it the burden of the risk of uncertainty with respect to plaintiff's damages. However, even assuming that this instruction was erroneous, the damages sought and awarded here, i.e., twenty-five percent of the Taubman termination fee, were not uncertain. Accordingly, we do not conclude that a failure to reverse on the basis of this alleged error would be inconsistent with substantial justice. *Case, supra*.

#### Cross-Appeal in Docket Nos. 239540 and 239584

##### A. Directed Verdict: Conversion

Plaintiff argues that the trial court erred in granting a directed verdict on his claim for conversion in favor of the individual defendants. We disagree.

A trial court's decision on a motion for a directed verdict is reviewed de novo. *Derbabian v. S & C Snowplowing, Inc.*, 249 Mich.App 695, 701; 644 NW2d 779 (2002). The appellate court reviews all the evidence presented up to the time of the motion to determine whether a question of fact existed. *Kubczak v. Chemical Bank & Trust Co.*, 456 Mich. 653, 663; 575 NW2d 745 (1998). In doing so, the appellate court views the evidence in the light most favorable to the nonmoving

party and grants him every reasonable inference and resolves any conflict in the evidence in his favor. *Id.*

As previously noted, in order to establish a claim for conversion of money there must be an obligation on the part of the defendant to return specific money entrusted to his care. *Head, supra*. At trial, plaintiff acknowledged during his testimony that the draft amendment to his employment agreement, on which he relied to assert a claim of right to a portion of the Taubman fee, purported to grant him only "a sum equal to twenty-five percent" of the fee, rather than a portion of the fee itself. Plaintiff further acknowledged that, given this language, the draft amendment did not afford him a claim against any specific check or fund, but rather only an amount equal to a percentage of the fee. In seeking a directed verdict at trial the individual defendants argued, among other things, that plaintiff had failed to present evidence establishing a right to the specific monies received from Taubman and that, therefore, they were obligated to him, if at all, under a contractual rather than tort theory. The trial court apparently agreed, directing a verdict in favor of the individual defendants after finding that plaintiff's claim was for "breach of contract, whether it be an express or implied contract, and not conversion." We find no error in this decision.

Conversion has been defined as "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Citizens, supra* at 575. By the time of trial it was not disputed that the termination fee at issue was paid by Taubman through a check made payable to CSPC, and that CSPC cashed this check by placing it in its general corporate checking account. Plaintiff acknowledged at trial that the agreement on which he relied to assert a claim of right to a portion of the money represented by this check afforded him no personal right to the specific monies received from Taubman, but only a sum equal to a percentage of that money. In doing so, plaintiff essentially acknowledged that the individual defendants, wrongfully or otherwise, asserted no dominion over property to which plaintiff claimed a right, and that, as the trial court found, his claim against that money sounded in contract rather than tort. Accordingly, a directed verdict on this claim in favor of the individual defendants was appropriate.

##### B. Involuntary Dismissal: Breach of Fiduciary Duty/Shareholder Oppression

\*15 Plaintiff next argues that the trial court erred in granting a directed verdict on his claim for breach of fiduciary duty/shareholder oppression. We disagree.

As previously noted, plaintiff alleged in his complaint that the individual defendants' termination of his employment in order to force a sale of his stock under the SRPA and permit them to appropriate the entirety of the Taubman fee, as well as corporate profits, constituted violations of MCL 450.1541a and MCL 450.1489. As also previously noted, the trial court dismissed this claim after finding the evidence presented at the bifurcated trials to be insufficient to establish that the individual defendants breached their fiduciary duties or took any other actions inconsistent with the SRPA or the employment agreement entered into by plaintiff. On appeal, plaintiff challenges the trial court's conclusions in this regard, arguing that there was substantial evidence to show that the individual defendants breached both their fiduciary duties and the relevant agreements by failing to execute the amendment to his employment agreement as ordered by the board of directors, terminating his employment without the requisite "board action," and intentionally deferring realization of profits until after plaintiff had been terminated.

This Court treats a motion for a directed verdict in a civil bench trial as a motion for involuntary dismissal brought pursuant to MCR 2.504(B)(2). *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich.App 636, 639; 534 NW2d 217 (1995). Pursuant to this rule, the trial court may dismiss the plaintiff's action after the close of the plaintiff's case if the court determines that the plaintiff has not shown a right to recovery under the facts or law. MCR 2.504(B)(2). In ruling on such a motion, the trial court does not view the evidence in a light most favorable to the nonmoving party, as it would when addressing a motion for a directed verdict. *Warren v June's Mobile Home Village & Sales, Inc*, 66 Mich.App 386, 389; 239 NW2d 380 (1976). Instead, it acts as a trier of fact, judges credibility, weighs the evidence, and decides the case on the merits. *Id.*: A trial court's decision to grant or deny a motion for involuntary dismissal will, therefore, be reversed only where the findings of fact in support of the determination were clearly erroneous. *Id.*; *Begola, supra*. This standard does not authorize the substitution of the reviewing court's judgment for that of the trial court. "[I]f the trial court's view of the evidence is plausible, the reviewing court may not reverse." *Beason v. Beason*, 435 Mich. 791, 805; 460 NW2d 207 (1990).

With respect to the individual defendants' failure to execute an amendment to plaintiff's employment agreement despite the signed consent resolution directing that such action be taken, Selecky testified at trial that the resolution's pronouncement was a "nullity" because no such amendment had in fact been presented to the board or personally agreed to by him. Consistent with this testimony, Cendrowski similarly testified that despite the pronouncement in the January 1, 1997 consent resolution, no finalized version of plaintiff's proposed compensation amendment was ever agreed upon or presented to the board of directors. Despite plaintiff's testimony to the contrary, when this testimony is considered in conjunction with the fact that no evidence of a finalized agreement to amend plaintiff's employment agreement was produced at trial, it cannot be said the trial court, sitting as the trier of fact, clearly erred in determining that the individual defendants breached no fiduciary duty by failing to execute a written amendment to that agreement. *Warren, supra*; *Beason, supra*.

\*16 Because the evidence presented at trial also supports a finding that plaintiff was terminated in a manner consistent with his employment agreement, we similarly reject plaintiff's claim that the trial court erred in concluding that the individual defendants breached neither a fiduciary duty nor the terms of his employment agreement when terminating his employment with CSPC. Plaintiff acknowledged at trial that under the terms of his employment agreement he was, in essence, an "at-will" employee of CSPC and could therefore be terminated for any reason, so long as such termination was by action of the board following thirty days written notice. Although plaintiff now argues on appeal that the required "board action" was not taken because Cendrowski "acted alone" in terminating plaintiff, this argument is not supported by the record. At trial, plaintiff acknowledged meeting with both Cendrowski and Selecky on November 10, 1998, and receiving at that time a set of written talking points, which including as topics the thirty day notice and severance provisions of his employment agreement. Plaintiff also acknowledged that the November 17, 1998 termination letter he received stated that the "written discussion points" given to him on November 10, 1998 were intended to constitute the written notice required by his employment agreement, and that he left CSPC thirty days later without ever having disputed that the discussion points were sufficient notice under that agreement. Plaintiff also acknowledged that Selecky and Cendrowski were the only CSPC board members at that time, and that there was no dispute that the two agreed on the matter of his termination as board

directors. Plaintiff further acknowledged that CSPC generally did not hold formal board meetings, but rather conducted those meetings informally, and that he had no knowledge of what Selecky and Cendrowski may have done as board members with respect to his termination. Plaintiff's testimony at trial, which is consistent with that offered by the individual defendants on this matter, belies his argument on appeal and supports the trial court's conclusion that the individual defendants took no action constituting a fiduciary breach, or otherwise inconsistent with the employment agreement, when terminating plaintiff.

Evidence to support the trial court's rejection of plaintiff's claim that the individual defendants, in particular Harry Cendrowski, intentionally deferred realization of profits until after plaintiff had been terminated and asked to tender his stock back to CSPC was also presented at trial. Although acknowledging that he was in fact late in billing his hours on a number of occasions in 1998, Cendrowski expressly

denied intentionally withholding his hours and attributed the delays to the demands on his time created by the Taubman restructuring. In support of this claim, Cendrowski noted that his billable hours for Taubman increased nearly four hundred hours over that of the previous year. Moreover, plaintiff himself acknowledged at trial that others in the firm, including himself, had contributed to the billing problems that existed throughout the relevant time period by delaying billing for as long as three months. Although plaintiff offered evidence to support a conclusion contrary to that reached by the trial court, it is not this Court's function to weigh conflicting evidence. *Kalamazoo Co, supra*. Rather, as noted above, so long as the trial court's view of the evidence is "plausible," this Court may not reverse. *Beason, supra*. Accordingly, we find no error in the trial court's dismissal of this claim.<sup>7</sup>

\*17 We affirm.

#### Footnotes

- 1 Plaintiff's claims for conversion and breach of fiduciary duty/shareholder oppression were asserted against only the individual defendants. The remainder of his claims were asserted against both the corporate and individual defendants.
- 2 Under MCR 2.403(0)(3), a verdict is considered to be "more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation." MCR 2.403(0)(3) further provides that "[i]f the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant."
- 3 Pursuant to MCR 2.114(F), a party who files a frivolous claim or defense is subject to assessment of costs under MCR 2.625(A)(2), which provides that if the court finds that an action or defense is frivolous, it must award costs as provided by MCL 600.2591. Under this statute, costs include "all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees." MCL 600.2591(2).
- 4 This letter agreement expressly provided that in the event the agreement was ever terminated, Taubman would "be obligated to pay to CS & R ... a termination payment to the principals of CS & R...."
- 5 Whether the jury was sufficiently informed of the tenets of this rule is discussed *infra*.
- 6 The trial court also instructed the jury that "[a] subjective belief that a promise was made when the promise is not explicit is not sufficient to support a claim of promissory estoppel."
- 7 Because we have concluded that plaintiff's claim for promissory estoppel should be affirmed, we do not address plaintiff's alternative argument that the trial court erred in failing to grant his motion for JNOV with respect to his claim for breach of contract.

2005 WL 991577

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Arthur ROMENCE, Robert Niemiec,  
Martin McEnroe, Douglas Bart, Larry  
Sharp, Hans Borlinghaus, Mary Fredricks,  
John Furton, and Dianna Luman,  
Plaintiffs-Appellants/Cross-Appellees,

v.

John CARRIER, James Summers,  
David Savage, and David Collins,  
Defendants-Appellees/Cross-Appellants.

No. 253713. | April 28, 2005.

Before: NEFF, P.J., and WHITE and TALBOT, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

\*1 Plaintiffs appeal as of right, and defendants cross-appeal, from an order granting summary disposition in plaintiffs' favor in this shareholder dispute concerning a stock sale in a privately-owned corporation. Plaintiffs seek to change the remedy ordered by the trial court from rescission to specific performance, permitting them to purchase their proportionate share of the stock. Defendants seek reinstatement of the stock sale. We affirm.

I

Plaintiffs and defendants are shareholders in Excellence Manufacturing, Inc. ("Excellence"). Plaintiffs owned thirty percent of the shares of stock of Excellence, and defendants owned nineteen percent of the shares. Karol Ervins-Houtman, who is not a party to this lawsuit, owned the remaining fifty-one percent of the shares of stock.

On May 30, 2003, defendants, who comprised the board of directors of Excellence, entered into an agreement with

Ervins-Houtman to purchase her shares of stock. Although the shareholder agreement and the corporate bylaws of Excellence in effect at the time required that any stock first be offered for sale to the corporation, and then to all shareholders in their proportionate shares, defendants individually purchased Ervins-Houtman's majority share without the requisite offer to all shareholders.

Plaintiffs filed this action to enforce their rights under the bylaws,<sup>1</sup> arguing that they were entitled to purchase their proportionate shares of Ervins-Houtman's stock.<sup>2</sup> Plaintiffs requested that the court impose a constructive trust on the shares of stock purchased by defendants.

Defendants filed a motion for summary disposition, claiming that the bylaws were amended on May 30, 2003 to remove the sale restrictions. Defendants argued that Article X of the bylaws provided that the bylaws may be amended by a majority vote of the board of directors, and the board had unanimously agreed to remove the transfer restrictions. Defendants' purchases therefore did not violate the bylaws. In response, plaintiffs requested that a cross-motion for summary disposition be granted in their favor.

The trial court found that, contrary to defendants' argument, the amendment to the bylaws was not effected until the summer of 2003, after the purported purchase of Ervins-Houtman's stock and after plaintiffs' action was filed. Accordingly, the sale was a nullity. The court granted summary disposition in favor of plaintiffs, invalidating the sale and returning the parties to their stock ownership status of as May 29, 2003.

II

Plaintiffs contend that the trial court abused its discretion in merely vacating the sale to defendants and returning the parties to the status quo ante rather than imposing a constructive trust on the disputed stock shares and transferring those shares to plaintiffs upon payment. We disagree.

A trial court has discretion in awarding damages, including the remedy of specific performance in the purchase of stock. *Livingston v. Crown Chemical Mfg. Inc.*, 50 Mich.App 153, 156-157; 212 NW2d 775 (1973), aff'd 394 Mich. 144; 229 NW2d 793 (1975). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly

violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v. Randolph*, 461 Mich. 757, 768; 610 NW2d 893 (2000). A trial court's grant or denial of summary disposition is reviewed de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich.App 315, 324; 675 NW2d 271 (2003).

\*2 Plaintiffs argue that under Article VII, § 4, of the bylaws, which governs the sale of stock, the right of first refusal became an option contract because the condition precedent-defendants' receipt of an offer from Ervins-Houtman was met, and thus the trial court lacked the discretion to forego ordering specific performance. Plaintiffs' argument is unpersuasive.

We find the cases cited by plaintiffs inapposite because they do not involve similar facts and equitable considerations. Here, unlike in other cases that have ordered specific performance of a right of first refusal, neither the sale of the stock nor the sale restrictions are inevitable occurrences. Under the right of first refusal in this case, Ervins-Houtman could elect to retain her shares and never sell to anyone. See *DeVries v. Westgren*, 446 Pa 205, 208-209; 287 A.2d 437 (1971) (stock purchase agreement technically not an option, but rather a right of first refusal because agreement did not create an irrevocable offer; however, unlike a right of first refusal, whereby shareholder could retain shares and not sell to anyone, agreement required the employee to offer his shares to remaining shareholders upon termination of his employment). Further, it was undisputed that the bylaws could be amended by a majority vote of the board of directors and, as the trial court noted, defendants could and did amend the bylaws to remove the sale restrictions; however, the amendment was ineffectual with regard to the sale at issue because the amendment postdated the sale. Plaintiffs were not entitled to an order for specific performance.

### III

On cross-appeal, defendants argue that the court erred in denying their motion for summary disposition. Defendants contend that the trial court should have confirmed the validity of the sale of Ervins-Houtman's stock to defendants on the basis of defendants' actions to amend the bylaws and effect a valid sale by ratification or a corrective transfer of the stock. We disagree.

It is undisputed that defendants did not act to remove the stock transfer restrictions of Article VII, § 4, of the bylaws until long after the May 30, 2003 sale. The sale of Ervins-Houtman's stock to defendants on May 30, 2003 therefore violated the bylaws provisions for a right of first refusal. Defendants rely on various theories to rehabilitate the initial invalid sale of the stock and avoid a return to the status quo preceding the sale. However, given the facts and equitable considerations before us, we concur with the trial court that the proper remedy is invalidation of the sale.

We find the trial court's reasons for rejecting defendants' arguments sound. Defendants' expressed general intent on May 30, 2003, that "the substance of the contemplated Stock Purchase Agreement was in the best interests of Excellence Manufacturing" and that they "should take whatever action was necessary to effectuate and implement the Stock Purchase Agreement" with Ervins-Houtman, did not overcome the express provisions of the bylaws. Likewise, the ratification consent pursuant to MCL 450.1525 was merely "a confirmation of prior acts," and encompassed no action amending the bylaws. Defendants' subsequent attempt sometime after July 3, 2003, after this litigation commenced, to retroactively amend the bylaws by "unanimous written consent" did not remedy the invalidity of the May 30, 2003 sale, which was effected under the former bylaws that provided for a right of first refusal.

\*3 We are equally unpersuaded that defendants' further actions on December 8, 2003, following the trial court's ruling from the bench, entitled defendants to summary disposition. On December 8, 2003, the trial court ruled that the sale was invalid and the parties should be returned to the status quo. That same evening, defendants again sought to cure the invalid sale by obtaining Ervins-Houtman's signature on an amendment to the bylaws, as well as a corrective transfer of the stock. Even disregarding the factual issues raised by defendants' actions in executing these documents,<sup>3</sup> we conclude that the documents do not warrant altering the trial court's resolution of this dispute.

Defendants' last minute actions, in the interim between the court's bench ruling and the entry of the judgment, were more preemptive than curative—an attempt to avoid the effect of the pending judgment that would restore the parties to the status quo. The trial court's ruling on December 8, 2003, and its subsequent written order entered January 16, 2004 expressly determined that the parties were returned to the status quo preceding the sale, as of May 29, 2003. Despite defendants'

technical arguments attempting to validate the December 2003 sale, the documents do not now entitle defendants to a different decision than that issued by the trial court. Affirmed.

Footnotes

- 1 The Shareholder Agreement provided that a shareholder could dispose of stock, without restriction, with the prior written consent of fifty-one percent of the shares entitled to vote. Ervins-Houtman executed the necessary written consent, and therefore plaintiffs' claim was limited to the bylaws restriction.
- 2 Plaintiffs also claimed that defendants violated their fiduciary duty and that defendant's action constituted shareholder oppression. These claims are not an issue on appeal.
- 3 Plaintiffs obtained an affidavit from Ervins-Houtman in which she stated that defendant Carrier misrepresented the necessity of her signatures on the documents executed and had she known of the trial court's ruling, she would not have signed the documents presented by defendants on December 8, 2003.

---

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

2009 WL 3049723

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.

H. John SCHIMKE, Plaintiff/  
Counter-DefendantAppellee,

v.

LIQUID DUSTLAYER, INC.,

Wendy Steel, Trustee of the Richard C. Rademaker Trust, and Tina L. Rademaker, Defendants/Counter-PlaintiffsAppellants.

Docket No. 282421. | Sept. 24, 2009.

Manistee Circuit Court; LC No. 01-010606-CK.

Before: METER, P.J., and MURRAY and BECKERING, JJ.

Opinion

PER CURIAM.

\*1 Defendants Liquid Dustlayer, Inc., Wendy Steel, as Trustee of the Richard Rademaker Trust,<sup>1</sup> and Tina L. Rademaker (Tina) appeal as of right from a judgment, following a bench trial, awarding plaintiff \$769,600 for the value of his minority interest in Liquid Dustlayer. We affirm.

Plaintiff, a minority shareholder of Liquid Dustlayer, a closely held corporation, brought this action for willfully unfair and oppressive conduct, contrary to § 489 of the Michigan Business Corporation Act, MCL 450.1489, in connection with a proposed plan by Richard Rademaker (Rademaker), the sole director of Liquid Dustlayer, to have Liquid Dustlayer redeem his stock on terms not made available to plaintiff.

**I. Pretrial Motion for Summary Disposition and Injunction**

Defendants first argue that the trial court erred in denying their motion for summary disposition and in enjoining the proposed redemption of Rademaker's shares. We disagree.

**A. Summary Disposition**

A trial court's decision on a motion for summary disposition is reviewed de novo. *Madden v. Rozwood*, 461 Mich. 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ with regard to the conclusions to be drawn from the evidence. See *Glittenberg v. Doughboy Recreational Industries (On Rehearing)*, 441 Mich. 379, 398-399; 491 NW2d 208 (1992); see also *Quinto, supra* at 367, 371-372. Questions of statutory interpretation are also reviewed de novo. *Heinz v. Chicago Rd. Investment Co.*, 216 Mich.App 289, 295; 549 NW2d 47 (1996).

At all relevant times, § 489 provided:

(1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:

- (a) The dissolution and liquidation of the assets and business of the corporation.
- (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
- (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
- (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.

\*2 (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the

officers, directors, or other shareholders responsible for the wrongful acts.

(f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

(2) No action under this section shall be brought by a shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association.

(3) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

Although there are four published decisions addressing this statute, *Franchino v. Franchino*, 263 Mich.App 172; 687 NW2d 620 (2004), *Estes v. Idea Engineering & Fabricating, Inc.*, 250 Mich.App 270; 649 NW2d 84 (2002) (*Estes II*), *Estes v. Idea Engineering & Fabricating, Inc.*, 245 Mich.App 328, 338-346; 631 NW2d 89 (2001) (*Estes I*), vacated in part 245 Mich.App 801 (2001), and *Baks v. Moroun*, 227 Mich.App 472; 576 NW2d 413 (1998), overruled in part by *Estes II*, only *Franchino* and *Estes II* remain good law with regard to § 489.

In *Estes II*, *supra* at 271-272, a special panel of this Court was convened under MCR 7.215(J)<sup>2</sup> to resolve a conflict between *Estes I* and *Baks* with respect to whether § 489 creates a cause of action. This Court resolved the conflict in favor of *Estes I* and against *Baks* by holding that § 489 creates a cause of action, rather than simply being a venue provision. *Estes II*, *supra* at 278-279. In *Franchino*, *supra* at 173-174, this Court held that § 489 only protects a shareholder's interest as a shareholder, not as a member of a board of directors or as an employee of a corporation.<sup>3</sup>

Defendants argue that plaintiff failed to demonstrate that there were questions of material fact for trial and, therefore,

the trial court should have granted defendants' motion for summary disposition. We note, however, that in his response to defendants' motion, plaintiff did not claim that there existed issues of material fact for trial, but rather argued that he, not defendants, was entitled to judgment as a matter of law. Defendants now argue that they were entitled to judgment as a matter of law for various reasons. We disagree.

Defendants argue that plaintiff failed to establish a violation of § 489 because he failed to show a *pattern* of "willfully unfair and oppressive conduct." However, § 489(3) defines "willfully unfair and oppressive conduct" as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder" (emphasis added). Thus, "willfully unfair and oppressive conduct" may be established by proof of either (1) a continuing course of conduct, (2) a significant action, or (3) a series of actions. Accordingly, a single significant action that substantially interferes with a shareholder's interests as a shareholder is sufficient to support a cause of action under § 489.

\*3 Defendants also argue that they were entitled to summary disposition because the proposed redemption never took place. However, § 489 does not require that an act be completed before a court may intervene. Indeed, § 489(1)(c) allows a court to issue an "injunction against a resolution or other act of the corporation." Similarly, § 489(1)(d) allows a court to "prohibit [ ] ... an act of the corporation or of shareholders, directors, officers, or other persons party to the action." Therefore, the fact that the contemplated redemption had not yet occurred did not entitle defendants to judgment as a matter of law.

Defendants also argue that plaintiff failed to show that the proposed redemption would diminish the value of his stock. However, § 489 does not require a showing that oppressive conduct diminished the value of the shareholder's stock. Rather, § 489(3) requires a showing that the misconduct "substantially interferes with the interests of the shareholder as a shareholder." In this case, the plan to redeem Rademaker's stock did not include plaintiff. To the extent that defendants were willing to consider redeeming plaintiff's stock, it was at a much lower price. This discrepancy affected the value of plaintiff's shareholder interest in Liquid Dustlayer and was sufficiently indicative of a substantial interference with plaintiff's rights as a shareholder.

For these reasons, the trial court did not err in denying defendants' motion for summary disposition.

### B. Temporary Restraining Order (TRO)

Defendants argue that the trial court erred in sua sponte enjoining the proposed stock redemption, without a showing of imminent or irreparable harm.

MCR 3.310(B)(1)(a) requires a showing of immediate and irreparable harm before a TRO may be issued without advance notice to the other party. In this case, the trial court sua sponte issued a TRO, without prior notice to defendants and without discussing the requirements of MCR 3.310(B)(1)(a). However,

an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

[MCR 2.613(A)]

At trial, Rademaker testified that he had voluntarily refrained from implementing the redemption pending the outcome of this lawsuit. He also took the position that the redemption was merely a hope or a dream that had not been finalized, not a real plan. Once the trial court decided the matter on the merits and ascertained the value of plaintiff's stock, it lifted the injunction and allowed Liquid Dustlayer to redeem Rademaker's shares on the same terms as plaintiff's. Under the circumstances, any error in issuing the TRO was harmless. Failure to grant appellate relief would not be inconsistent with substantial justice.

## II. Finding of Willful and Oppressive Conduct

\*4 Defendants argue that the trial court erred in concluding that the proposed redemption plan was sufficient to establish willful and oppressive conduct under § 489. We disagree.

A trial court's findings of fact at a bench trial are reviewed for clear error. *Sands Appliance Service, Inc. v. Wilson*, 463 Mich. 231, 238; 615 NW2d 241 (2000). Regard is given to

the trial court's special opportunity to evaluate the credibility of witnesses who appeared before it. See *Morris v. Clawson Tank Co.*, 459 Mich. 256, 271; 587 NW2d 253 (1998). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made. *Arco Inds. Corp. v. American Motorists' Ins. Co.*, 448 Mich. 395, 410; 531 NW2d 168 (1995), overruled in part on other grounds *Frankeumuth Mut. Ins. Co. v. Masters*, 460 Mich. 105, 116-117 n. 8; 595 NW2d 832 (1999). Questions of law are reviewed de novo. See *Sands*, supra at 238.

Defendants argue that the proposed redemption plan was merely an inchoate dream and, therefore, was not actionable under § 489. We disagree. The evidence presented at trial showed that Rademaker repeatedly indicated that he wanted Liquid Dustlayer to redeem his stock and that he was not willing to redeem plaintiff's shares immediately, or at the same price. Even after transferring some of his stock to his daughter Tina, Rademaker controlled a majority of the shares. Rademaker had his attorney draft closing documents for the company-financed redemption of his remaining stock, at \$15,000 a share. Rademaker also proposed scheduling a shareholders' meeting on the issue, but stated that the meeting could be held on the same day as the closing, thus suggesting that whatever happened at the meeting was unlikely to affect Rademaker's plans. In light of the evidence on the entire record, the trial court did not clearly err in finding that Rademaker had a well-formed imminent plan to cause Liquid Dustlayer to redeem his remaining shares of stock, but not plaintiff's shares, for \$15,000 a share. As discussed previously, §§ 489(1)(c) and (d) contemplate that oppressive conduct that has not yet been completed is actionable under the statute.

Defendants argue that the redemption plan was mere speculation and could not support an award of damages or the trial court's decision to interfere with the officers' discretion. However, § 489 contemplates that in a closely held corporation, directors may sometimes exercise their discretion in a willful and oppressive manner, to the disadvantage of minority shareholders. As indicated, § 489 allows a court to intervene before an action is finalized. Further, § 489(1)(e) specifically authorizes a court to order a corporation to purchase a plaintiff's shares of stock.

Defendants next observe that MCL 450.1261(i) and (m) authorize a corporation to buy and sell shares, but we note

that plaintiff here never claimed that the proposed redemption plan was ultra vires.

\*5 Defendants also argue that plaintiff failed to prove a continuing pattern of oppressive conduct, but, as explained previously, a single "significant action" is sufficient to show willful and oppressive conduct under § 489(3).

Defendants argue that a violation of § 489 was not established because the evidence showed that plaintiff's retirement interests were being considered. They contend that Rademaker did not intend to divert so much money that he would hurt Liquid Dustlayer, and thereby his daughter or plaintiff, and that the proposed price of \$15,000 a share was simply a "talking point." They also assert that Rademaker intended to obtain an appraisal of Liquid Dustlayer and that no witness analyzed the proposed terms or the effect of the inchoate redemption plan. Thus, defendants argue, plaintiff failed to prove that he had a "right" to unlock the value of his stock or that he would have been hurt if Liquid Dustlayer redeemed Rademaker's stock.

As previously explained, the evidence at trial showed that the proposed redemption was imminent. While defendants claim that plaintiff's retirement interests would be protected, the evidence showed that Rademaker offered plaintiff approximately one third of what Rademaker was demanding for his shares, and Rademaker had voting control of Liquid Dustlayer. In the meantime, Rademaker and Tina remained steadfast in refusing to pay dividends, despite Liquid Dustlayer's substantial cash reserves, essentially preventing plaintiff from receiving any benefit whatsoever from his nearly one-third ownership of Liquid Dustlayer. The trial court did not clearly err in finding that defendants engaged in "willfully unfair and oppressive conduct," entitling plaintiff to relief under § 489.

### III. Remedy of Redemption

Defendants next argue that the trial court erred in ordering Liquid Dustlayer to redeem plaintiff's stock. We again disagree.

"An inquiry into the nature, scope, and elements of a remedy is a question of law that is reviewed de novo." *Auto-Owners Ins. Co. v. Amoco Production Co.*, 468 Mich. 53, 57; 658 NW2d 460 (2003). However, a trial court's choice among available remedies is reviewed for an abuse of discretion. See,

generally, *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 122; 517 NW2d 19 (1994).

Section 489(1) provides that "[i]f the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following...." Thus, § 489 grants a court broad discretion to fashion a remedy it "considers appropriate."

In *Estes II, supra* at 280, this Court recognized that in a closely held corporation, such as this one, "a shareholder ... is unable to escape an oppressive situation by dispensing of his shares of ownership in the public arena" (internal citation, quotation marks, and emphasis omitted). The Court also recognized that "the relationship among those in control of a closely held corporation requires a higher standard of fiduciary responsibility, a standard more akin to partnership law." *Id.* at 281 (internal citation and quotation marks omitted). Accordingly, § 489(1)(c) specifically authorizes a court to order the purchase of a plaintiff's shares. Section 489(1)(a) also allows a court to order "[t]he dissolution and liquidation of the assets and business of the corporation."

\*6 In the present case, the continuing injunction prevented Liquid Dustlayer from redeeming Rademaker's shares. However, the evidence showed that Rademaker continued drawing a salary from Liquid Dustlayer, as well as substantial bonuses. Tina was similarly paid a generous salary and bonuses. Liquid Dustlayer had never paid dividends to its shareholders, and Rademaker and Tina opposed the idea of doing so. Plaintiff held nearly a one-third interest in Liquid Dustlayer, but received no dividends (and no salary), and he had no voting influence. Thus, Rademaker and Tina continued receiving a benefit from their stock ownership, while plaintiff received nothing. Extending the injunction, without ordering the purchase of plaintiff's stock, would merely have perpetuated this inequitable status quo. Under the circumstances, the trial court did not abuse its discretion in ordering Liquid Dustlayer to redeem plaintiff's stock.

### IV. Valuation of Plaintiff's Stock

Defendants next argue that the trial court erred by failing to discount the value of plaintiff's minority shares. We disagree.

An award of damages following an evidentiary hearing is reviewed for clear error. *Woodman v. Miesel Sysco Food*

*Service Co.*, 254 Mich.App 159, 190; 657 NW2d 122 (2002); *Jansen v. Jansen*, 205 Mich.App 169, 170-171; 517 NW2d 275 (1994). "A trial court has great latitude in determining the value of stock in closely held corporations," and no clear error will be found where the court's valuation is "within the range established by the proofs." *Id.* at 171.

Section 489(1)(e) authorizes a court to order "[t]he purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts" (emphasis added). The trial court's order for the parties to obtain a normalized valuation of plaintiff's stock must be viewed in the context of the statute. Defendants received the report of David Richards, a certified business evaluator, in January 2007, and failed to produce any contrary evidence at the valuation hearing.

As defendants observe, MCL 450.1761(d) states that

"[f]air value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

Michigan has not adopted the requirement that fair value be ascertained without a discount for lack of marketability or minority status. Conversely, the definition contained in § 761 does not require a court to discount the value of minority shares. The trial court correctly recognized this principle.

In the present case, Rademaker owned 37.78 percent of Liquid Dustlayer, Tina owned 33.33 percent of Liquid Dustlayer, and plaintiff owned 28.89 percent. Thus, the parties held similar ownership interests.<sup>4</sup> Richards testified that "the ownership percentages were so close together that I just-a huge discount ... would not be appropriate." Richards later testified that it was appropriate to take into account no discount in this case. Under the circumstances, the trial court did not err in declining to discount the value of plaintiff's shares; its decision was supported by the proofs.

#### V. Interest

\*7 Defendants lastly argue that the trial court erred in awarding plaintiff prejudgment interest on the purchase price of his stock.

Generally, a decision whether to award prejudgment interest is reviewed de novo. *Griswold Properties, LLC v. Lexington Ins Co.*, 275 Mich.App 543, 569; 740 NW2d 659 (2007), superceded in part on other grounds 276 Mich.App 551 (2007). However, "[t]his Court reviews an award of interest in equity for an abuse of discretion." *Olson v. Olson*, 273 Mich.App 347, 349; 729 NW2d 908 (2006).

Under MCL 600.6013(8), a plaintiff is entitled to prejudgment interest accruing from the date a complaint is filed through the date the judgment is satisfied. In this case, however, the trial court did not award interest from the filing of the complaint, nor did it cite § 6013 as authority for its award of interest. Further, an order directing the purchase of minority stock is an equitable remedy, not a money judgment. See, generally, *Olson, supra* at 354, n. 6; see also *Moore v. Carney*, 84 Mich.App 399, 404-406; 269 NW2d 614 (1978). Therefore, § 6013 does not apply.

However, an award of interest on an equitable remedy "may be appropriate pursuant to the trial court's discretion under its equitable powers." *Olson, supra* at 354. "An equitable award of interest ... is not intended to serve the purpose of compensating a party for the lost use of funds." *Id.* at 354-355 (internal citation and quotation marks omitted). Rather, it "prevents the delinquent party from realizing a windfall and assures prompt compliance with court orders." *Id.* at 355 (internal citation and quotation marks omitted); see also *In re Forfeiture of \$176,598*, 465 Mich. 382, 388 n. 12; 633 NW2d 367 (2001).

In the present case, the evidentiary hearing to determine damages was held in July 2007, 18 months after the case was initially decided, and the judgment was not entered until November 20, 2007. In the meantime, defendants continued to operate Liquid Dustlayer and had full use of its assets, while plaintiff received no dividends or other benefit from his ownership interest. If equitable interest had not been ordered, defendants would have received a windfall from the delay. Therefore, the trial court did not abuse its discretion in ordering defendants to pay equitable interest on the judgment.

Affirmed.

Footnotes

- 1 Richard Rademaker was originally named as a defendant, but died during the pendency of this action. The trust was thereafter substituted in his place.
- 2 The rule applicable in *Estes II* was at that time found in MCR 7.215(I).
- 3 Section 489(3) was amended by 2006 PA 68, effective March 20, 2006, to add that "[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." Thus, it appears that this portion of *Franchino* has been legislatively overruled.
- 4 As noted by the trial court, during his employment, plaintiff contributed greatly to the success and profitability of Liquid Dustlayer.

---

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

2011 WL 2423884

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.

Daniel J. TRAPP, Plaintiff–Appellant,

v.

Terry L. VOLLMER, Defendant–Appellee.

Docket No. 297116. | June 16, 2011.

Kent Circuit Court; LC No. 08–011944–CK.

Before: SHAPIRO, P.J., and O’CONNELL and OWENS, JJ.

Opinion

PER CURIAM.

\*1 Plaintiff Daniel Trapp appeals by right the trial court’s order granting defendant Terry Vollmer summary disposition and dismissing plaintiff’s complaint. We affirm.

Plaintiff was employed by Electro Chemical Finishing Company (ECF), which defendant founded. In 1998, the parties entered into an agreement, ¶ 3 of which is the subject of this litigation. It read:

Vollmer and Trapp will develop a succession plan whereby they will either sell their stock to an employee stock option plan (ESOP) or exchange their stock through a merger or acquisition. This succession plan is to be in effect by March 1, 2005. Any changes or alternative resolutions must be mutually agreed upon by both parties.

No succession plan or alternative solution was ever implemented.

On appeal, plaintiff argues that the trial court erred in granting defendant’s motion for summary disposition on his breach of contract and shareholder oppression claims. We review de novo a trial court’s decision on a motion for summary disposition. *Latham v. Barton Malow Co.*, 480 Mich. 105,

111; 746 NW2d 868 (2008). We also review de novo a trial court’s interpretation of a contract. *Alpha Capital Mgt., Inc. v. Rentenbach*, 287 Mich.App 589, 611; 792 NW2d 344 (2010). Similarly, we review de novo questions of statutory interpretation. *Detroit v. Ambassador Bridge Co.*, 481 Mich. 29, 35; 748 NW2d 221 (2008).

A motion for summary disposition under MCR 2.116(C) (10) tests the factual sufficiency of the complaint. *Corley v. Detroit Bd. of Ed.*, 470 Mich. 274, 278; 681 NW2d 342 (2004). “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Id.* When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.*

With regard to plaintiff’s breach of contract claim, the issue is whether ¶ 3 fails for lack of material terms. Michigan law recognizes that parties may enter into an enforceable contract that requires them to execute another contract at a later date. *Opdyke Investment Co. v. Norris Grain Co.*, 413 Mich. 354, 359; 320 NW2d 836 (1982); *Prof. Facilities Corp. v. Marks*, 373 Mich. 673, 679; 131 NW2d 60 (1964); *Hansen v. Catsman*, 371 Mich. 79, 82; 123 NW2d 265 (1963). However, to be valid, a contract to contract must contain all the essential elements that are to be incorporated into the final contract. *Opdyke*, 413 Mich. at 359, citing *Socomy–Vacuum Oil Co. v. Waldo*, 289 Mich. 316, 323; 286 NW 630 (1939). If the agreement leaves open any material term to be decided in the future, no contract is made. *Hansen*, 371 Mich. at 82.

Plaintiff argues that, at minimum, a question of fact exists regarding whether ¶ 3 constitutes an enforceable agreement to agree. We disagree. In *Opdyke*, 413 Mich. 79, our Supreme Court stated that “certain matters” are expressly left to be negotiated in the future is some evidence that the parties did not intend to be bound by the agreement. *Opdyke*, 413 Mich. at 359–360. Thus, while essential terms are required to make a valid agreement to agree, the lack of non-essential terms does not automatically invalidate the agreement.

\*2 In this case, ¶ 3 identifies the parties (Vollmer and Trapp), the subject matter (the succession plan), and the implementation date (March 1, 2005). It also provides through the use of the word “their” that the succession plan would include both parties either selling or exchanging their stock—“Vollmer and Trapp ... will either sell their stock ...

or exchange their stock....” It further identifies who will be responsible for the succession plan’s development, both parties—“Vollmer and Trapp will develop a succession plan....” However, it contains no specifics regarding the succession plan such as a mechanism for determining the stock purchase price and the plan’s components. On its face, ¶ 3 appears to be an agreement to, in good faith, develop a succession plan and to agree on the plan’s details in the future, presumably when the parties committed to a purchaser. Such an interpretation is bolstered by plaintiff’s contention that defendant breached the agreement when he allegedly refused to sell ECF, i.e., he did not pursue in good faith the implementation of a succession plan.

However, in Michigan, agreements to negotiate have been held unenforceable for lack of material terms. *Prof. Facilities*, 373 Mich. at 678–679. As stated in 1 Corbin on Contracts § 4.1, p 531:

When the evidence clearly shows, either by reason of definite language or otherwise, that the only (and the complete) subject matter that is under consideration is left for further negotiation and agreement, there is no contract, not for vagueness or indefiniteness of terms but for lack of any terms. The parties may use words constituting an “agreement to agree” or an “agreement to negotiate”, with the result that they feel a sense of “obligation”. This is merely an obligation to discuss terms ... not an obligation ... to render any other future performance.

Here, ¶ 3 contains no particulars with regard to its subject matter: the succession plan. As such, it is merely an unenforceable agreement to negotiate, rather than an enforceable agreement to agree, because it failed to outline any of the succession plan terms. Accordingly, the trial court did not err in granting defendant summary disposition on plaintiff’s breach of contract claim.<sup>1</sup>

Next, we address plaintiff’s argument that the trial court erred in dismissing his shareholder oppression claim.<sup>2</sup> MCL 450.1489(1) allows a shareholder to sue for “acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the

corporation or to the shareholder.” “Willfully unfair and oppressive conduct” is defined in part as “a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder.” MCL 450.1489(3).

In *Franchino v. Franchino*, 263 Mich.App 172; 687 NW2d 620 (2004), the Court stated that “willfully unfair and oppressive conduct” refers to conduct that substantially interferes only with rights that automatically accrue to a shareholder by virtue of being a shareholder. Here, the affected interests plaintiff alleged pertained to defendant’s compliance with ¶ 3. Implementation of a succession agreement is not an interest that accrued to plaintiff by virtue of being a shareholder. Thus, plaintiff could not maintain his shareholder oppression claim.

\*3 Plaintiff further argues that the 2006 amendment to MCL 450.1489(3) negated the portion of the *Franchino* decision that rejected the “reasonable expectations test.” The *Franchino* Court rejected the “plaintiff’s invitation to define the term ‘oppression’ to include ‘conduct that defeats the reasonable expectations of a minority shareholder.’” *Franchino*, 263 Mich.App at 186. It reasoned that a “reasonable expectations approach” that places the focus on the rights or interests of a shareholder would be inconsistent with a statute that places the focus on the actions of the majority like MCL 450.1489 does. *Id.* at 187–188. Applying such a test, plaintiff reasons that his shareholder oppression claim survives summary disposition. In an apparent reaction to the *Franchino* decision, the Legislature amended MCL 450.1489(3). It added: “[w]illfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder.”

Plaintiff cites to the Legislature’s addition of employment termination, without further explanation, and its specific reference to the “affected shareholder” as evidence of a change of focus to the impact on minority shareholders. We believe that the amendment’s language evinces no such intent. The Legislature simply expressly defined the circumstances under which two types of majority conduct could be considered “willfully unfair and oppressive conduct.” In doing so, it expanded with restrictions the type of shareholder interests that could properly be the subject of “willfully unfair and oppressive conduct” beyond those defined in *Franchino*. The focus remained on the majority’s conduct

in the context of terminating employment or limiting employment benefits, not on the reasonable expectations of a minority shareholder. Therefore, the 2006 amendment to MCL 450.1489(3) neither expressly adopted a reasonable expectations test in determining oppressive conduct nor provided a basis for us to disregard the *Franchino* decision thereby opening the door to adoption of the test. Accordingly,

we conclude that the trial court did not err in granting summary disposition on plaintiff's shareholder oppression claim.<sup>3</sup>

Affirmed.

Footnotes

- 1 Based on our decision, we need not address plaintiff's issues pertaining to breach of the contract.
- 2 Plaintiff's argument that the trial court's decision was premature because defendant did not raise the issue or comply with MCR 2.116(G)(3) and (4) is without merit. Defendant's summary disposition motion as to whether plaintiff could maintain his shareholder oppression claim was brought pursuant to MCR 2.116(C)(8) because he relied solely on plaintiff's complaint. *Feyz v. Mercy Mem. Hosp.*, 475 Mich. 663, 672; 719 NW2d 1 (2006).
- 3 Based on our decision, we need not address whether plaintiff's claim is barred by the statute of limitations and whether the parties mutually agreed to extend the succession plan's implementation date.

---

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.