

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

LEGACY CAPITAL PARTNERS, LLC,

Plaintiff,

vs.

JOHN A. KAILUNAS, II; and REGAL  
INVESTMENT ADVISORS, LLC,

Defendants.

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Case No. 13-09947-CKB

HON. CHRISTOPHER P. YATES

ORDER DENYING DEFENDANT KAILUNAS'S  
MOTION FOR A NEW TRIAL OR REMITTITUR

Few endeavors seem more futile than trying to persuade a Court to grant a new trial after the Court has conducted a bench trial and rendered comprehensive findings of fact and conclusions of law. In essence, the moving party must convince the Court that its verdict was so incorrect that “the overwhelming weight of the evidence favors the losing party.”<sup>1</sup> Guerrero v Smith, 280 Mich App 647, 666 (2008). Presumably, only an irrational Court would rule against a party in the face of such overwhelming evidence. Nevertheless, Defendant John Kailunas – assisted by a new attorney – has chosen to try to climb that steep hill by moving for a new trial under MCR 2.611(A) or, alternatively, for remittitur under MCR 2.611(E). Unsurprisingly, the Court finds no basis to grant Kailunas any of the relief that he has requested.

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<sup>1</sup> The Court has searched in vain for definitive authority as to whether that standard applies to a verdict after a bench trial as well as a verdict from a jury trial. The best the Court can find is a footnote from Justice James Brickley in his plurality opinion in Hadfield v Oakland County Drain Commissioner, 430 Mich 139, 187 n26 (1988), which was subsequently overruled by our Supreme Court. Pohutski v City of Allen Park, 465 Mich 675, 679 (2002). Thus, the Court shall apply the general principles applicable to new-trial motions challenging jury verdicts.

Defendant Kailunas started the bench trial in a difficult position based upon a default entered by the clerk that conclusively established his liability. See Kalamazoo Oil Co v Boerman, 242 Mich App 75, 79 (2000). His only option was to defend against the plaintiff's request for damages. Much to the Court's surprise, Kailunas did not offer his own theory of damages at trial, other than to argue that the Court ought not award any damages. As a result, the Court had only the plaintiff's evidence on damages to consider in determining an appropriate verdict. When the Court rendered its findings of fact, conclusions of law, and verdict in a nine-page written opinion issued on December 15, 2015, the Court chose the most modest theory of damages proposed by the plaintiff, which yielded the sum of \$1,140,595.90. Although Kailunas faults the Court for arriving at the figure, the Court notes that Kailunas provided the Court with no alternative amount of damages.

The Court's calculation of damages flowed from the testimony of Ralph Allen, who plainly had a financial stake in the outcome of the trial. Defendant Kailunas challenges the Court's reliance upon Allen's testimony, but nothing in Michigan law precludes a party from testifying on damages, even if the witness acts as an expert. Beyond that, Kailunas has provided an affidavit from Eric A. Adamy that presents a valuation analysis that did not come up at the trial. See John A. Kailunas II's Motion for New Trial or Remittitur, Exhibit 1. That testimony would have given the Court food for thought in considering an appropriate award of damages, but Kailunas cannot use a new-trial motion to furnish evidence that "with reasonable diligence [could] have been discovered and produced at trial." See MCR 2.611(A)(1)(f). Although MCR 2.611(D)(1) permits a party seeking a new trial to file supporting affidavits "[i]f the facts stated in the motion for a new trial . . . do not appear on the record of the action," Mr. Adamy's affidavit provides facts and analysis that could have been offered at trial. The time to hear from Mr. Adamy was at trial, not in the trial's aftermath.

In moving for a new trial, Defendant Kailunas has taken aim with a blunderbuss, as opposed to a rifle. He has cited MCR 2.611(A)(1)(a), (b), (c), (d), (e), and (g),<sup>2</sup> but his arguments boil down to an attack upon the testimony of Ralph Allen and the Court's reliance upon that evidence. Based upon a careful review, however, the Court finds no reason to reject, out of hand, Allen's testimony. And if the Court accepts Allen's testimony, Kailunas has no basis for a new trial. Like it or not, the Court must recognize that Allen's testimony provides ample support for the Court's verdict. While the Court concedes that Mr. Adamy's testimony might have moved the needle in favor of Kailunas on the issue of damages, Kailunas has no right to augment the record with evidence he readily could have presented at trial. See MCR 2.611(A)(1)(f). If the Court were to allow Kailunas to do so, the case might well turn into a series of trials and subsequent motions for new trials resulting from each side plugging holes in its evidence after the completion of each trial in the sequence. That is not how trial proceedings should work. Instead, the Court must recognize that Kailunas had his opportunity to present evidence at trial, that he chose a course that led to defeat, and that he now must live with that outcome despite his best efforts to gin up additional evidence in the wake of his loss. Therefore, the Court must deny Kailunas's motion for a new trial.

The same can be said about Defendant Kailunas's motion for remittitur under MCR 2.611(E). "In determining whether remittitur is appropriate, a trial court must decide whether the [damages] award was supported by the evidence." Silberstein v Pro-Golf of America, Inc., 278 Mich App 446, 462 (2008). Here, as the Court has already explained, the testimony of Ralph Allen provides ample support for the verdict rendered. "The power of remittitur should be exercised with restraint." Id.

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<sup>2</sup> Curiously, Defendant Kailunas has omitted MCR 2.611(A)(1)(f), which enables a party to rely upon newly discovered evidence, even though he has provided the Court with an affidavit of Mr. Adamy that contains a wealth of new evidence in the form of expert testimony.

The Court already showed restraint in selecting the most conservative calculation of damages offered during Allen's testimony. Now, the Court must again exercise restraint in considering whether the damages should be reduced because of the "excessiveness of the verdict[.]" See MCR 2.611(E)(1). In the Court's view, the record clearly supports the verdict. Kailunas complains that the Court erred in looking to the buyout price of an interest in Durand Capital Partners, LLC ("Durand") as a useful measure of the damages to Plaintiff Legacy Capital Partners, LLC ("Legacy"). The Court went to great lengths in its conclusions of law to explain why "Durand provides a nearly perfect model for setting the value of Legacy." See Findings of Fact, Conclusions of Law, and Verdict (as Revised) at 8. The Court need not restate the reasons for that conclusion. Instead, the Court simply must deny Kailunas's request for remittitur based upon the Court's explanation for its calculation of damages set forth on pages eight and nine of the findings of fact, conclusions of law, and verdict.

IT IS SO ORDERED.

Dated: April 26, 2016

  
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HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge