

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD J. TAPPER,

Plaintiff-Appellant/Cross Appellee,

v

WILLIAM H. THIBODEAU,

Defendant-Appellee/Cross Appellant.

UNPUBLISHED

January 14, 1997

No. 186171

Oakland County

LC No. 91-407447-CK

Before: Saad, P.J., and Griffin, and M.H. Cherry*, JJ.

PER CURIAM.

In this case of alleged misrepresentation and fraud, plaintiff, Richard Tapper, appeals as of right the part of a judgment denying him attorneys' fees against defendant, William Thibodeau. Plaintiff further contends that the trial court erred in submitting defendant's mismanagement claim to the jury. Defendant cross appeals the trial court's order denying his motion for additur, judgment notwithstanding the verdict, or a new trial regarding his counterclaims. We affirm.

I

Defendants Marc, Harvey, and Audrae Thibodeau sold plaintiff their two-thirds interest in the closely held Engineering Services Personal, Inc. ("ESP"). Defendant retained his one-third interest in ESP and continued his position as ESP's president under a six-year employment contract. Six months after the stock sale, plaintiff sold the corporation's assets.

Plaintiff sued all four defendants, asserting several claims of recovery for his allegation that he paid an inflated price for his ESP stock because the Thibodeaus misrepresented ESP's book value. Plaintiff further contends that the alleged misrepresentation led him to agree to have ESP pay defendant a \$100,000 "signing bonus" as part of the stock purchase deal. At trial, a jury awarded plaintiff \$570,000 on his claim that Marc, Harvey, and Audrae Thibodeau breached an express warranty

* Circuit judge, sitting on the Court of Appeals by assignment.

regarding ESP's book value. Defendant countersued, advancing several counts in support of his allegation that plaintiff fraudulently operated and mismanaged ESP. The jury found against plaintiff on all of his claims against defendant and found in favor of defendant on his mismanagement claim, awarding him \$70,000.

II

A

On appeal, plaintiff first contends that the trial court abused its discretion in refusing to award him attorney fees against defendant under the offer of judgment rule, MCR 2.405. We disagree. Pursuant to MCR 2.405(D), a party receiving a verdict larger than the judgment to which he had earlier offered to stipulate may recover "actual costs" from the offeree. Actual costs are the costs and fees taxable in a civil action plus reasonable attorneys fees for services necessitated by the failure to stipulate to the entry of judgment. MCR 2.405(A)(6); *Gudewicz v Matt's Catering, Inc*, 188 Mich App 639, 642; 470 NW2d 654 (1991). Although a court may refuse to award attorney fees in the interest of justice, MCR 2.405(D)(3), the sanction should be routinely enforced absent unusual circumstances. *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275, 278; 505 NW2d 862 (1993).

In the present case, plaintiff offered to stipulate to judgment "in full and complete resolution of all claims and counterclaims . . . in the amount of \$175,000." Although plaintiff prevailed against Marc, Harvey, and Audrae Thibodeau, he did not prevail on any of his claims against defendant. In fact, defendant received a \$70,000 verdict on his mismanagement counterclaim. This \$70,000 verdict in defendant's favor was more favorable to defendant than plaintiff's offer to settle the entire case for \$175,000. Thus, because plaintiff did not receive a favorable verdict against defendant, the trial court did not abuse its discretion in refusing to award attorney fees against defendant.

B

Next, plaintiff claims that defendant's mismanagement claim was equitable in nature and, hence, that the trial court erred in submitting the claim to the jury. However, plaintiff requested a jury trial and did not object to the jury deciding the mismanagement claim until after the close of proofs. Therefore, we consider the issue waived. See *Napier v Jacobs*, 429 Mich 222, 228; 414 NW2d 862 (1987). Nevertheless, defendant was entitled to a jury trial because the mismanagement claim sought money damages. See *ECCO, Ltd v Balimony Mfg Co, Inc*, 179 Mich App 748, 749-751; 446 NW2d 546 (1989); *B&M Die Co v Ford Motor Co*, 167 Mich App 176; 421 NW2d 620 (1988); *Dutka v Siani Hosp*, 143 Mich App 170, 173; 371 NW2d 901 (1985); see also *Mink v Masters*, 204 Mich App 242; 514 NW2d 235 (1994) (a jury demand cannot be withdrawn without the consent of each party).

III

A

In his cross appeal, defendant first contends that the trial court erred in refusing to direct a verdict against plaintiff on his fraudulent and innocent misrepresentation claims. However, the jury rejected the claims defendant contends should have been dismissed. Therefore, the issue is moot. Defendant has cited no authority for, and therefore waived, his proposition that it is error requiring reversal when claims submitted to the jury in a civil trial raise the potential for a “compromise verdict.” A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for a claim. *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 14; 527 NW2d 13 (1994); *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 640; 502 NW2d 368 (1993); cf. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994).

B

Next, defendant contends that the jury’s verdict rejecting several of defendant’s counterclaims contravened the great weight of the evidence. We disagree. In reviewing defendant’s argument that the jury verdict was against the great weight of the evidence, we review the evidence to determine whether the trial court abused its discretion in ruling that the evidence in plaintiff’s favor was not overwhelming. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995); *Rice v ISI Mfg, Inc*, 207 Mich App 634, 637; 525 NW2d 533 (1994). This Court gives substantial deference to a trial court’s conclusion that a verdict was not against the great weight of the evidence. *Severn, supra* at 412.

In the present case, the parties offered conflicting evidence on issues regarding defendant’s counterclaims. Sorting out these claims involved a credibility assessment. Credibility questions are left to the trier of fact and will not be resolved anew by this Court. *People v Premen*, 210 Mich App 211, 221; 532 NW2d 872 (1995). Further, after a thorough review, we conclude that the evidence in defendant’s favor was not overwhelming.

C

Finally, defendant argues that the trial court abused its discretion in denying his motion for additur or, in the alternative, a new trial on the issue of damages. He contends that the \$70,000 verdict on his mismanagement counterclaim is unreasonably low. We disagree. In *McMillan v Auto Club Insurance Assn*, 195 Mich App 463, 467; 491 NW2d 593 (1992), this Court summarized the standard for review on this issue as follows:

An appellate court must accord due deference to the trial court’s decision regarding the grant or denial of additur and should reverse the trial court’s decision only if an abuse of discretion is shown. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989); *Wilson v General Motors Corp*, 183 Mich App 21, 38; 454 NW2d 405 (1990). The proper consideration in granting or denying additur is whether the jury award is supported by the evidence. *Palenkas, supra* at 532. *Wilson, supra* 38. Further, trial courts have discretion in granting new trials, and appellate courts will not interfere absent a palpable abuse of discretion. *Palenkas, supra*.

See also MCR 2.611(A)(1); *Arnold v Darczy*, 208 Mich App 638, 639-640; 528 NW2d 199 (1995).

In the present case, there was conflicting evidence whether plaintiff reimbursed ESP for some of the expenses defendant claims plaintiff still owes the corporation. Also, there is evidence that defendant was compensated when ESP's successor corporation decided not to continue defendant's employment contract. Further, not only was there conflicting evidence on the value of the ESP stock, but plaintiff offers no authority for his unlikely proposition that defendant, as a stockholder, had a vested right to a percentage of ESP's annual profits. Therefore, after a thorough review, we conclude that jury's damage award is supported by the evidence and that the trial court did not abuse its discretion in denying defendant's motion for additur or a new trial.

Affirmed. Defendant may tax costs.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry