STATE OF MICHIGAN

COURT OF APPEALS

BANDIT INDUSTRIES, INC.,

Plaintiff-Appellee,

v

WILLIAM H. BAYLES,

Defendant-Appellant,

and

HOBBS INTERNATIONAL, INC., d/b/a HOBBS EQUIPMENT COMPANY,

Defendant.

UNPUBLISHED
November 30, 1999

No. 201781
Isabella Circuit Court
LC No. 95-008746 CK

ON REMAND

Before: Hood, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. Defendant, William H. Bayles (hereinafter "defendant"), appealed as of right from a judgment of $87,500 in favor of plaintiff which entered following a bench trial. On appeal to this Court, defendant argued that a facsimile memorandum could not be construed as a personal guaranty, defendant did not possess the requisite intent for creation of a guaranty, personal liability could not be imposed on defendant as a result of the facsimile, and the trial court erred in denying defendant's motion for summary disposition. This Court affirmed the judgment for plaintiff. We concluded that the terms of the facsimile and the circumstances surrounding its execution evidenced defendant's personal guaranty to plaintiff. *Bandit Industries, Inc v Bayles*, unpublished opinion per curiam of the Court of Appeals, issued June 9, 1998 (Docket No. 201781).

Defendant sought leave to appeal our decision in the Supreme Court. On September 14, 1999, the Supreme Court issued the following order:

> On order of the Court, the application for leave to appeal is considered, and pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this

> case to the Court of Appeals for reconsideration of arguments made by the defendant-appellant which the Court of Appeals did not address. The defendant-appellant claimed that the circuit court erred as a matter of law in refusing to enter summary disposition or a directed verdict in his favor. Specifically, the panel did not address the defendant-appellant's arguments that he was entitled to judgment as a matter of law because the use of the term "assurance" in the October 8, 1993 facsimile did not create a guaranty contract given that the definition of the critical term "assurance" as used in the Uniform Commercial Code, UCC § 2-609, MCL 440.2609; MSA 19.2609 and in the United States Bankruptcy Code, 11 USC § 365(b)(1)(C), contemplates something less than a "guaranty."

Consequently, we issue this opinion in accordance with the Supreme Court's order, and we affirm the judgment for plaintiff.

As an initial matter, we note that the arguments raised by defendant are not preserved for appellate review. In moving for summary disposition, defendant argued that an assurance and a guaranty of payment were distinct events. However, defendant failed to argue in the trial court that the term "assurance" as set forth in MCL 440.2609; MSA 19.2609 and 11 USC § 365(b)(1)(C) applied to the parties' transaction and precluded the trial court from concluding that defendant had provided a personal guaranty to plaintiff.[1] Issues undecided by a trial court are not preserved for appeal. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 562; 475 NW2d 304 (1991). When an issue was not preserved for appeal, "it should not have been reached by the Court of Appeals, nor is it appropriately decided on appeal in this [the Michigan Supreme] Court." *Radtke v Everett*, 442 Mich 368, 397-398; 501 NW2d 155 (1993). The issue of the application of the Uniform Commercial Code (hereinafter "UCC") and the Bankruptcy Code to the term "assurance" was not raised in defendant's brief on appeal filed with this Court.[2] However, where an issue presents a question of law for which all necessary facts are present before this Court, we will briefly address it. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Because the nature of the parties' transaction was set forth in the trial court, we are able to address defendant's claim regarding the UCC.

Defendant argued in its application for leave to appeal to the Supreme Court that defendant was required to give an "assurance" as set forth in MCL 440.2609; MSA 19.2609 upon plaintiff's request, and this "assurance" did not rise to the level of posting a guaranty. We disagree. Questions of law receive de novo review. *B & B Investment Group v Gitler*, 229 Mich App 1, 15; 581 NW2d 17 (1998). Defendant concluded that Article 2 of the UCC governs the parties' transaction. However, Article 2 of the UCC governs the relationship between parties involved in "transactions in goods." *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 519; 486 NW2d 612 (1992). In the present case, the corporate defendant[3] did not purchase goods for its own personal use. Rather, the corporate defendant acted as a "dealer" on behalf of plaintiff. That is, the corporate defendant was charged with selling plaintiff's products to specific regions. The ultimate purchaser of the goods manufactured by plaintiff was not the corporate defendant, but rather, a client. The difference between the contract price paid by the corporate defendant's client and the price of the product charged by

plaintiff constituted the fee earned for acting as "dealer." Our Supreme Court adopted the following test for determining whether contracts involving mixed goods and services are governed by the UCC:

> The test for inclusion or exclusion is not whether they are mixed, but granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction for sale, with labor incidentally involved . . . . [*Id.* at 534.]

Review of the dealer agreement executed between the parties reveals that the corporate defendant was to provide the service of selling plaintiff's products in specific New York and Connecticut counties with goods incidentally involved. Accordingly, the UCC does not apply to this transaction, and the term "assurance" as set forth in MCL 440.2609; MSA 19.2609 has no bearing on the parties' transaction.

Defendant also argued in its application to the Supreme Court that 11 USC § 365(b)(1)(C) differentiates between an "assurance" and a guaranty. As previously noted, an unpreserved issue which presents a question of law for which all necessary facts are presented may be addressed by this Court. *Miller, supra.* Additionally, a party may not merely announce a claim with cursory briefing and leave it up to the appellate courts to unravel and elaborate on his claims. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Alston v Northville Regional Psychiatric Hospital*, 189 Mich App 257, 261; 472 NW2d 69 (1991). While the lower court record adequately addressed the nature of the parties relationship such that we could review the UCC issue, it fails to set forth any information concerning the bankruptcy proceeding involving defendant. Accordingly, we decline to address this issue. *Goolsby, supra*.[4] We again affirm the judgment in favor of plaintiff.

Affirmed.

/s/ Harold Hood
/s/ Peter D. O'Connell
/s/ Michael J. Talbot

[1] Defendant filed his initial motion for summary disposition in lieu of an answer to plaintiff's complaint. This brief did not cite to the Uniform Commercial Code or the Bankruptcy Code. Defendant renewed his motion for summary disposition shortly before trial. A new brief was filed in support of summary disposition. This brief also did not reference the relevant statutory authority now cited in defendant's application for leave to appeal to the Supreme Court. Finally, review of the trial transcript reveals that defendant did not raise these statutory arguments at the time of the motion for directed verdict or at any other time during the trial.

[2] Specifically, defendant's brief on appeal at page eight took issue with the trial court's application of dictionary definitions to the terms "assurance" and "assure." However, there was no mention of the above cited statutes in defendant's brief on appeal filed with this Court.

[3] The corporate defendant Hobbs International, Inc., d/b/a Hobbs Equipment Co., was defaulted and is not a party to this appeal.

[4] We will note, however, that we question the propriety of application of 11 USC § 365(b)(1)(C) to the parties' transaction. This section applies to executory contracts and unexpired leases. "An executory contract is one in which a party binds himself to do or not to do a particular thing in the future." 17 CJS, Contracts, § 7, p 576. Plaintiff contracted to supply five chippers to the State of Connecticut in response to a transaction arranged by the corporate defendant. Plaintiff satisfied its contractual obligations. The corporate defendant was obligated to pay plaintiff for the chippers once it received payment from the State of Connecticut. Despite receiving payment, the corporate defendant failed to, in turn, pay plaintiff. Accordingly, the contract is no longer executory because the corporate defendant failed to satisfy its future obligation once the time for payment arrived, and the corporate defendant breached its obligations. Therefore, we cannot conclude that it would be appropriate to apply 11 USC § 365(b)(1)(C) to this transaction, and defendant has failed to provide any guidance regarding the propriety of applying this section in its application for leave to the Supreme Court.