# STATE OF MICHIGAN

# COURT OF APPEALS

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QUALITY PRODUCTS AND CONCEPTS COMPANY,

Plaintiff-Appellant,

v

NAGEL PRECISION, INC.,

Defendant-Appellee.

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UNPUBLISHED
March 21, 2000

No. 207538
Wayne Circuit Court
LC No. 96-612160 CK

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this contract dispute. We reverse.

I

Plaintiff corporation is a former sales representative of defendant corporation, a manufacturer of large industrial machinery. Plaintiff argues that a question of fact remained whether defendant's silent acquiescence in plaintiff's procurement of business from Giddings & Lewis and Ex-Cell-O[1] and the existence of written documents related thereto constituted a "quantum meruit/procuring cause claim, an implied contract, a waiver, a modification and/or a subsequent agreement entitling plaintiff to commissions." We agree that plaintiff presented sufficient evidence to survive a motion for summary disposition.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and is reviewed de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmovant. *Id.* at 454, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). The movant has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence; the burden then shifts to the nonmovant to establish that a genuine issue of disputed fact exists. *Id.* at 455. If the nonmovant fails to present documentary evidence establishing the existence of a material

factual dispute, the motion is properly granted. *Id.* We review the circuit court's determination to deny plaintiff's motion for reconsideration for abuse of discretion. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609; 450 NW2d 6 (1989).

II

The facts viewed in a light most favorable to plaintiff are that the parties orally agreed in 1990 that plaintiff would provide sales representation for defendant and receive a commission on sales within its assigned area. On August 1, 1993, the parties entered into a written sales representative agreement, which stated that plaintiff "hereby accepts such appointment subject to the terms and conditions set forth herein and expressly acknowledges that its Territory is both limited and nonexclusive." The agreement provided that either party could terminate the agreement for any or no reason with ninety days written notice. An exhibit incorporated into the written agreement stated that plaintiff's territory comprised "all engine, axle, brake and drum plants in the State of Michigan," and additionally named a number of companies located outside of Michigan. The agreement excluded from plaintiff's territory "all House Accounts and: All Transmission plants and other machine tool suppliers (turn key operations)." The agreement also stated:

> Nagel reserves the right during the term of this Agreement to identify certain accounts within the Territory as "House Accounts." House Accounts include, but are not limited to, customers with whom Nagel has or is developing a direct selling relationship.
>
> There are no House Accounts at the present time.

In 1994, with the knowledge of Rolf Bochsler, defendant's vice-president and chief operating officer,[2] Kenneth Barton, plaintiff's principal, began to work with Chrysler Corporation to procure business from Giddings & Lewis and Ex-Cell-O. Pursuant to the written agreement, plaintiff submitted written status reports to Bochsler in 1994 and the first few months of 1995. Plaintiff appended to its response to defendant's motion for summary disposition copies of several such reports that indicated that Ex-Cell-O and Giddings & Lewis had been quoted prices and/or were ordering parts from defendant. These reports included "P.O. Status Reports" in chart form, which were dated June 1, 1994, October 1, 1994, and December 1, 1994, and in which plaintiff listed Giddings & Lewis 3.3 and 3.9 liter machines, and stated pertinent to the Giddings & Lewis orders a commission percentage figure and expected commission of $63,000 for each machine. Plaintiff also submitted below purchase orders Giddings & Lewis sent directly to defendant dated from May 19, 1994 to December 5, 1994, all of which stated "confirming to Ken Barton," and specified delivery dates on the 3.3 liter machine of February 28, 1995 and of March 31, 1995 on the 3.9 liter machine.[3] Plaintiff also submitted below a copy of a handwritten note from Barton to Bochsler dated July 18, 1994, in which Barton stated that QPAC's accountant was requesting an updated commission report, and listed the orders plaintiff's records showed, which included Giddings & Lewis orders for one 3.3 liter and one 3.9 liter honing machine.

In early 1995, defendant proposed modifying the parties' written agreement. Barton testified at deposition that in February of that year Bochsler advised him for the first time[4] that defendant would not

pay commissions on the Giddings & Lewis and Ex-Cell-O business. Bochsler testified at deposition that he tried to modify the parties' agreement in 1995 not because he was dissatisfied with plaintiff's services, but because plaintiff's workload was too large to handle. Barton then requested an accounting of orders for which he had allegedly earned a commission.

By letter dated March 8, 1995, Bochsler terminated plaintiff's contract effective June 6, 1995. Defendant provided plaintiff an accounting in October 1995, stating that no commission was due on the Giddings & Lewis business because it was a turnkey operation and a machine tool supplier, and excluded from plaintiff's territory under the written agreement.

Plaintiff filed its three-count complaint in March 1996, alleging breach of contract, "Oral contract, implied/express contract/modification quantum meruit-unjust enrichment," and requesting declaratory relief.

The circuit court's opinion granting defendant's motion for summary disposition stated in pertinent part:

> . . . . For purposes of this motion the court must look at the facts in a light most favorable to plaintiff. Therefore, the court will accept as true that defendant knew about plaintiff's efforts to procure sales with the machine tool suppliers and that defendant never objected to plaintiff's efforts.
>
> Plaintiff seeks quantum meruit relief, alleging that defendant impliedly consented to modify the written agreement and/or waived the requirement that modifications be in writing by failing to object to plaintiff's actions or notify plaintiff that there would be no commission. Plaintiff relies on the case of *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334, 339-340 (1918), where the court held that defendant impliedly waived the requirement that a modification be in writing when he was benefitted [sic] by plaintiff's services and was aware of and **authorized** changes or deviations to the written contract. (Emphasis added).
>
> The facts of the case at bar are distinguishable from the facts in *Klas*. When asked to put the request for extra work in writing as required by the written contract, the defendant in *Klas* replied that "there was no necessity of going back to the contract on that point, that they were not children, they were willing to pay for any work they would order." *Id* at 336.
>
> In the case at bar, there is no evidence that defendant did anything to encourage or authorize plaintiff to seek sales outside of the express territory found in the written contract. Plaintiff unilaterally attempted to modify the written sales agreement by soliciting sales from suppliers outside of the territory expressly defined in the agreement. Plaintiff alleges that defendant encouraged them to continue seeking the Giddings & Lewis and Ex-Cell-O sales, however, plaintiff has presented no evidence to support this allegation. While there is evidence that defendant had knowledge of plaintiff's efforts,

> there is no evidence that defendant encouraged plaintiff or mutually consented to extend the sales agreement to machine tool suppliers. The mere fact that defendant knew of plaintiff's activities and did not object to them is not enough to constitute a waiver of the written modification requirement. The court finds no question of fact for the jury to decide. Therefore, defendant's motion for summary disposition is hereby GRANTED.

Plaintiff's motion for reconsideration argued that the circuit court's opinion overlooked that a question of fact remained whether defendant's silent acquiescence and/or silent encouragement of plaintiff's procurement of the Giddings & Lewis and Ex-Cell-O business gave rise to an implied contract. Plaintiff also argued that waiver could be shown by circumstance or by a course of acts and conduct, that waiver is a mixed question of law and fact and that it was for the jury to determine whether the facts of the case constituted waiver as defined by the court. The circuit court denied plaintiff's motion for reconsideration. This appeal ensued.

III

Plaintiff does not dispute that the written agreement expressly excluded machine tool suppliers or that Giddings & Lewis and Ex-Cell-O were machine tool suppliers. Further, there is no evidence in the record that the parties *expressly* agreed orally or in writing to modify the written agreement. Nevertheless, we conclude there were genuine issues remaining on the issues of waiver and contract implied in law.

A

A written contract may be varied by a subsequent parol agreement unless forbidden by the statute of frauds, even though the original contract provides that it is not to be changed except by written agreement. *Morley Bros v Construction Co*, 266 Mich 52, 55; 253 NW 213 (1934); see also 17A Am Jur 2d, Contracts, § 524, p 540, which states in pertinent part:

> Although a simple contract completely reduced to writing cannot be contradicted, changed, or modified by parol evidence of what was said and done by the parties at the time it was made, nevertheless, by the rules of the common law, it is competent for the parties to a simple contract in writing, before any breach of its provisions, altogether to waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus to make it a new one. The reason for this is that simple contracts, whether written or otherwise, are, in the absence of a statute changing the rule, of the same dignity in contemplation of law, and therefore the written contract may be changed, modified, or waived in whole or in part by a subsequent one, express, written, oral, or implied. Accordingly, extrinsic evidence may be relied on to establish that the parties had modified their agreement after its execution.

* * *

> . . . . It is also competent for the parties to a contract to vary its terms by a subsequent course of dealing.

Regarding waiver, in *Klas v Hardware & Furniture Co,* 202 Mich 334, 339-340; 168 NW 425 (1918), the Supreme Court addressed the question whether the defendant had expressly or impliedly waived a condition in the parties' written contract providing that written permission was required to do extra work, and whether waiver was a question for the jury:

> The law has been stated as follows:
>
> "Waiver is a matter of fact to be shown by the evidence. It may be shown by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; **or it may be shown by a course of acts and conduct, and in some cases will be implied therefrom. It may also be shown by so neglecting and failing to act as to induce a belief that there is an intention or purpose to waive.** Proof of express words is not necessary, but the waiver may be shown by circumstances or by a course of acts and conduct which amounts to an estoppel." 40 Cyc. p. 267.
>
> "Waiver is a mixed question of law and fact. It is the duty of the court to charge and define the law applicable to waiver, but it is the province of the jury to say whether the facts of the particular case constitute waiver as defined by the court." 40 Cyc. p. 270.
>
> "A provision in the contract that all extra work shall be ordered by the architect in writing may be waived by the parties, the question whether there has been such a waiver usually being one of fact, depending on the facts and the circumstances of the particular case. **Thus such waiver may be implied where the order and the extra work are known to the owner,** or where the extra work is orally ordered by the owner or called for by the agent in the plans and specifications; or the owner by his conduct may be estopped from setting up such provision as a defense." 9 Corpus Juris, p. 846.

See also, 17A Am Jur 2d, *supra,* § 656, stating in pertinent part:

> . . . . An implied waiver exists when there is either an unexpressed intention to waive, which may be clearly inferred from the circumstances, **or no such intention in fact to waive, but conduct which misleads one of the parties into a reasonable belief that a provision of the contract has been waived.**

We conclude that plaintiff presented sufficient evidence below to raise a genuine issue of fact whether defendant's alleged silence in the face of Barton's activity and reporting constituted a waiver. The circuit court's interpretation of *Klas* was unduly restrictive; plaintiff did not need to show that defendant expressly encouraged or authorized sales outside plaintiff's territory.

B

The circuit court did not address the contract implied in law theory, which plaintiff had briefed below. Regarding implied contracts, 5A Michigan Civil Jurisprudence, Contracts, § 273, p 368, states in pertinent part:

> There are two kinds of implied contracts; one implied in fact, and the other implied in law. **The first does not exist unless the minds of the parties meet**, by reason of words or conduct. **The second is quasi or constructive**, and does **not**[5] require a meeting of minds, but is imposed by fiction of law, to enable justice to be accomplished, even if no contract was intended. In order to afford the remedy demanded by exact justice and adjust that remedy to a cause of action, the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received. . . . [See also *Auburn v Brown*, 60 Mich App 258, 263; 230 NW2d 385 (1975); *Detroit v Highland Park*, 326 Mich 78, 100; 39 NW2d 325 (1949); 42 CJS §§ 3, 4, Implied and Constructive Contracts, pp 5-7.[6]]

"The process of imposing a 'contract-in-law' to prevent unjust enrichment is an activity which should be approached with some caution." *In re McCallum Estate*, 153 Mich App 328, 335; 395 NW2d 258 (1986). Such a claim has as essential elements:

> . . . (1) receipt of a benefit by the defendant from the plaintiff and (2) which benefit it is inequitable that the defendant retain. Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. [*Barber v SMH (US) Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). See also *In re Lewis Estate*, 168 Mich App 70, 74; 423 NW2d 600 (1988).]

Plaintiff argued and defendant did not dispute that it usually takes a substantial amount of time, i.e., years, for a manufacturer's representative to develop sales of the types of products defendant-supplier manufactures, and that once a customer accepts a quote, the supplier is virtually assured of eventually obtaining the order and having the opportunity to continue to supply the customer. Plaintiff presented evidence below that throughout 1994 and early 1995 it submitted to defendant ongoing status reports reflecting purchase orders it had procured, including from Giddings & Lewis and Ex-Cell-O, and that defendant had received from Giddings & Lewis a number of written purchase orders for business procured by Barton that stated "confirming to Ken Barton". Defendant does not dispute that it had knowledge in 1994 that plaintiff was calling on these businesses and procured their business, nor does defendant dispute that plaintiff's ongoing written status reports set forth a commission percentage figure and sum plaintiff anticipated being paid for commission on the honing machine orders. Barton testified that Boschler did not inform him that defendant did not intend to pay the commissions until February 1995. This evidence is sufficient to raise a genuine issue of fact whether a contract implied in law arose, i.e., whether plaintiff's procurement of business from Giddings & Lewis and Ex-Cell-O benefited defendant, and whether it is unjust that defendant retain the benefit without compensating plaintiff.[7]

Although an implied in law contract cannot be enforced while there is an express contract covering the same subject matter in force between the parties. *Scholz v Montgomey Ward & Co, Inc*, 437 Mich 83, 93; 468 NW2d 845 (1991), the express contract here is clearly confined to the parties' duties and obligations with respect to a particular territory[8] The contract does not purport to set forth the duties and obligations of the parties with respect to the sales at issue.

To the extent the circuit court's order dismissed claims based on waiver and a contract implied in law, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Harold Hood
/s/ Kathleen Jansen

[1] Plaintiff's response to defendant's motion for summary disposition stated that, with the exceptions of Giddings & Lewis and Ex-Cell-O, plaintiff stipulated to dismiss its claim for commissions on all orders defendant had not accepted prior to June 6, 1995, the effective date of termination of the parties' written agreement, provided that an accounting was made to verify the commissions due and that the orders were in fact and in good faith legitimately accepted substantially subsequent to June 6, 1995. Plaintiff noted that its stipulation had "no effect on Plaintiff's entitlement to commissions on orders Defendant previously agreed to pay pursuant to its correspondence dated October 6, 1995 and February 22, 1996."

[2] In support of its response to defendant's motion, plaintiff attached excerpts of deposition testimony of Rolf Bochsler, defendant's vice president and chief operating officer, in which Bochsler stated that between the effective date of the parties' written agreement, and the date he terminated the agreement, he was aware that plaintiff was calling on Giddings & Lewis and Ex-Cell-O, and that during that time frame, he and Barton had a number of discussions regarding engine machines that Giddings & Lewis and Ex-Cell-O were going to build for Chrysler. Bochsler further testified at deposition that Barton periodically provided him with various documents concerning the status of orders, including "P.O. Status Reports," "Quotation Status Reports," and "R & D Status Reports." Bochsler claims that during this period he told Barton that commissions would not be paid on the Giddings & Lewis business. Barton claims that Bochsler first informed him that commssions w

[3] The purchase orders and supplemental purchase orders were for a Nagel honing machine for the 3.9 liter Chrysler Corporation V-6 cylinder block, and honing machine for the 3.3 liter. Also attached to plaintiff's response to defendant's motion was a letter from Giddings & Lewis to defendant which stated "Attn: Ken Barton." Giddings & Lewis' letter also stated that it was placing the purchase order for the 3.9 liter honing machines on hold (P.O. FF021823). The Giddings & Lewis order for the 3.3 liter honing machine was the subject of supplemental purchase orders dated November 23 and December 5, 1994 (FF021814) which stated: "NOTE: 23 Nov 94 addition of $72,700.00 new total $2,031,920.00 due to following changes . . . "

[4] Bochsler asserts, however, that he consistently told Barton that he would not be paid commissions on the Giddings & Lewis and Ex-Cell-O business.

[5] Plaintiff's memorandum of law in support of its response to defendant's motion for summary disposition quoted this provision but excluded the word "not."

[6] The law as stated in Michigan Civil Jurisprudence, *supra*, is in accord with the analysis of implied contract theories set forth at 42 CJS §§ 3, 4, Implied and Constructive Contracts, pp 5-7:

> A "contract implied in fact," or an implied contract in the proper sense, arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract.
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> The implication of a mutual agreement must be a reasonable deduction from all the circumstances and relations of the parties, a contract cannot be implied in fact where the facts are inconsistent with its existence, and a contract or agreement may not be implied contrary to the intention or understandings of the parties.
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> A contract implied in fact does not describe a legal relationship different from that created by an express contract, and it has been said that an implied-in-fact requires the same elements as an express contract, i.e., mutual assent, offer, acceptance, and consideration, differing from an express contract only insofar as it is proved by circumstantial evidence rather than by express written or oral terms.
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> The elements of an implied in fact agreement call for a factual determination and can be adjudicated only on an ad hoc basis, by taking into consideration the peculiar facts presented by the individual case.
>
> § 4. **Constructive or Quasi Contracts**
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> * * *
>
> Contracts implied in law or quasi contracts, also called constructive contracts, are inferred by law as a matter of reason and justice from the acts and conduct of the parties and circumstances surrounding the transactions, and are imposed for the purpose of bringing about justice without reference to the intentions of the parties.
>
> A contract implied in law is an equitable principle that is totally unrelated to traditional concepts of contract law. It is, rather a remedy imposed by the court, and has been said to be nothing more than a legal fiction, an equitable vehicle for obtaining a just result.

> A quasi contract is not a contractual obligation in the true sense because there is no agreement; it is an obligation that does not require privity, and that will be imposed by law even though it is clear that no promise was ever made or intended. Indeed, such an obligation is sometimes even imposed against a clear expression of intent, and one may become an obligor without ever consenting to the creation of the obligation.
>
> Generally, the creation of a quasi contract requires a lawful act, a benefit conferred on defendant by plaintiff, an appreciation by defendant of the benefit, and the acceptance and retention by defendant of the benefit under circumstances such that it would be inequitable for him to retain the benefit without payment for its value. An obligation is imposed by law to promote justice and to prevent fraud or wrongdoing. A quasi contract is implied by law in order to remedy the wrongful enrichment of one party at the expense of another, and is designed to restore the aggrieved party to his former position by the return of the thing delivered or the money expended.
>
> * * *
>
> On the other hand, the court properly resorts to quasi contract only in the absence of an express contract or a contract implied in fact. Additionally, there is no general rule that a recipient of a benefit must pay for the benefit irrespective of circumstances. To recover under the theory of implied contract, plaintiff is usually required to establish that defendant impliedly or expressly requested the benefits conferred. . .
>
> Relief will be denied if plaintiff did not contemplate a fee in consideration of the benefit or if defendant could not reasonably believe plaintiff expected a fee. . . .
>
> Although a quasi contract is different from an implied in fact or express contract, it is enforceable by an action ex contractu.

[7] Plaintiff also argued below that the sales representatives' commissions act (SRCA), MCL 600.2961 *et seq.*; MSA 27A.2961 *et seq.* applied, but does not make that argument on appeal.

[8] The agreement recites that Nagler, in need of the services of a representative in the territory, and QPAC, being willing and able to provide the services, agree that QPAC is appointed the authorized sales representative in the territory, and accepts the appointment subject to the terms and conditions of the contract. QPAC agrees to use its best efforts within the territory, and Nagel agrees to pay as payment in full for QPAC's services *under the contract* certain commissions for orders procured and delivered within the territory. The agreement purports to provide the entire agreement of the parties "*relative to the subject matter hereof.*"