STATE OF MICHIGAN

COURT OF APPEALS

SOUTHERN MICHIGAN BEEF COMPANY and DECATURLAND INVESTMENTS, INC.,	UNPUBLISHED November 28, 2000
Plaintiffs-Appellees,	
v	No. 216486 Van Buren Circuit Court
DEAN FOODS VEGETABLE COMPANY,	LC No. 97-042482-CK
Defendant-Appellant.	

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant Dean Foods Vegetable Company appeals as of right, following a jury trial, from a judgment awarding plaintiff Southern Michigan Beef Company (hereinafter "plaintiff") $2,500,000 plus statutory interest. We affirm.

In 1990, a manager for defendant's Hartford plant,[1] met with farmers to discuss the benefits of silage, the by-product resulting from the processing of sweet corn. Silage is composed of husks, butts, cobs, and some corn kernels. It must be removed from the plant on a continuous basis or the plant cannot operate. Defendant needed an individual to haul the silage, and Bernard Sherburn, a farmer who later formed plaintiff, expressed an interest. The parties agreed to a one-year contract with the opportunity for a five-year extension. In 1990, the total silage was between five and six thousand tons. Sherburn learned that second-year production was estimated at fifteen thousand tons. This amount would require additional trucks and storage space and was more silage than could be fed to Sherburn's own animals. Sherburn was encouraged to haul silage not only for his own personal use, but to sell silage to third parties. Consequently, Sherburn requested a contract ensuring a long-time guaranteed feed source. Eventually, Sherburn requested that a fee per ton be charged because of the facilities, trucks, and resources required to handle the increasing amount of silage and maintain a profit. Despite the fact that Sherburn negotiated a price per ton for hauling of silage and a duration until the year 2006, defendant closed the plant and terminated the contract. Defendant's representatives

[1] The initial contract was executed by Bellingham Frozen Foods. Bellingham Frozen Foods was acquired by defendant.

testified that various business decisions were considered, and it was cost effective to close the facility. Defendant's representatives testified that plaintiff's contract was a minor percentage of the cost of operation of the plant and was not a consideration. However, one of defendant's representatives never forwarded plaintiff's contract to the central office while defendant explored its cost cutting options. Defendant asserted that the arrangement between the parties constituted an outputs contract and production could be reduced to zero as long as the decision was made in good faith. Defendant's theory was presented at trial. That is, defendant's representatives testified that the closure decision was made in good faith, although evidence was presented to the contrary.[2] The jury found in plaintiff's favor and awarded $2,500,000.

Defendant first argues that the trial court erred in failing to grant a directed verdict or judgment notwithstanding the verdict (JNOV) when the evidence failed to establish that defendant's decision to reduce its outputs was made in bad faith. We disagree. When evaluating a motion for directed verdict or JNOV, we view the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999). Either motion should be granted only when there are no issues of material fact with regard to which reasonable minds could differ. *Id*. The question of bad faith presents a question of fact. *Alyas v Gillard*, 180 Mich App 154, 162; 446 NW2d 610 (1989). In the present case, contradictory evidence was presented regarding the considerations involved and, in turn, the appropriate action taken. The contradictory evidence presented questions of credibility that were properly resolved by the trier of fact. *Anton v State Farm Mutual Auto Ins Co*, 238 Mich App 673, 689; 607 NW2d 123 (1999). We do not resolve credibility questions anew. *Thames v Thames*, 191 Mich App 299, 311; 477 NW2d 496 (1991).

Defendant next argues that the trial court erred in instructing the jury on allocation of business risk. We disagree. Jury instructions are reviewed in their entirety. *Stoddard v Manufacturers National Bank*, 234 Mich App 140, 163; 593 NW2d 63 (1999). Error requiring reversal does not occur if, on balance, the parties' theories and the applicable law were adequately and fairly presented to the jury. *Id*. In the present case, the instructions adequately and fairly presented the theories and applicable law to the jury. The trial court's inclusion of the term "unduly" was not improper. See *Empire Gas Corp v American Bakeries Co*, 840 F2d 1333, 1340 (CA 7, 1988).

Defendant next argues that the trial court abused its discretion by allowing evidence of contract negotiations prior to the 1995 contract. We disagree. The decision to admit evidence is within the sound discretion of the trial court and that decision will not be disturbed absent an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). The parol evidence rule excludes evidence of prior contemporaneous agreements, oral or written, that contradict, vary, or modify an unambiguous writing intended as a final and complete expression of the agreement. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998). In the present case, the evidence did not vary or modify the writing in question. Rather, the evidence was properly admitted to demonstrate the

[2] Contrary to the provisions of MCR 7.212(C)(6), defendant's brief does not contain a concise statement of material facts, both favorable and unfavorable.

circumstances surrounding the inducement to enter into the contract. *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 98; 380 NW2d 60 (1985), quoting *Stimac v Wissman*, 342 Mich 20, 25-26; 69 NW2d 151 (1955).

Defendant next argues that the trial court erred in applying the interest rate set forth in MCL 600.6013(5); MSA 27A.6013. We disagree. The interest rate applied was proper because the subject matter of the dispute involved a written instrument. MCL 600.6013(5); MSA 27A.6013; *Yaldo v North Pointe Ins Co*, 457 Mich 341, 345; 578 NW2d 274 (1998).[3]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ Gary R. McDonald

[3] We have addressed the issues as raised by the parties on appeal. We note, however, that while the parties characterized the contractual agreement as governed by output and requirements contracts, MCL 440.2306; MSA 19.2306, it would appear that the Uniform Commercial Code does not apply to this transaction. MCL 440.2102; MSA 19.2102 provides that this article applies to the sale of goods. Plaintiff did not engage in the purchase of a good, but rather, performed the *service* of picking up silage from defendant's facility and hauling it away. When defendant sought to have Sherburn handle extensive quantities of silage, Sherburn was encouraged to change his occupation and silage use. That is, he was encouraged to engage in the *subsequent* sale of silage to third parties in order to handle the quantities that needed to be hauled from defendant's facility. To make the investment to handle the quantities produced by defendant, Sherburn essentially changed his occupation from farming, and invested accordingly. To protect his expenditures and investment in this hauling business, Sherburn negotiated a ten-year contract. The agreement estimated that the quantity of silage to be hauled from the facility was twenty-five thousand tons. However, defendant did not include an escape clause from this agreement to allow for a change in the market or business decisions. Accordingly, even applying contract principles to this transaction, defendant breached the agreement since it failed to include a contingency for cost beneficial closing of this plant.