

STATE OF MICHIGAN
COURT OF APPEALS

CLAYTON H. MILLER,

Plaintiff-Appellee/Cross Appellant,

v

VILLAGE HILL DEVELOPMENT
CORPORATION, DAVID D. PHIPPS, and
KALLID A. JABARA,

Defendants-Appellants/Cross
Appellees.

UNPUBLISHED

July 3, 2001

No. 220297

Wayne Circuit Court

LC No. 96-620603-CK

Before: Cavanagh, P.J., and Cooper and K. F. Kelly, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's denial of their motions for partial summary disposition, directed verdict, judgment notwithstanding the verdict (JNOV), new trial, and remittitur in this action alleging, in pertinent part, breach of contract and breach of fiduciary duty claims. Plaintiff cross-appeals as of right the trial court's denial of his motion for mediation sanctions. We affirm.

In approximately 1985, plaintiff and defendants, David D. Phipps and Kallid A. Jabara (defendants), began their association when plaintiff decided to build a condominium complex called Meadow Hill located in Plymouth Township. Toward that end, defendants agreed to finance the project and plaintiff agreed to provide the labor and supervision related to its construction. After its successful completion, plaintiff and defendants decided to pursue another condominium development on Plymouth Road in Plymouth Township with the same division of responsibility. An S corporation was formed called Village Hill Development Corporation (VHDC). They purchased an option on property for the proposed site of construction, however, the township would only approve a sixty unit luxury apartment development. After a second option on the property was purchased and prior to its expiration, the township approved the parties' proposed sixty unit luxury apartment development. Thereafter, a land contract on the optioned property was entered into by plaintiff, defendants, and plaintiff's wife. However, about twenty months later and after Phipps commissioned a market/feasibility study on the property and their proposed plans, defendants abandoned the project, the land contract was forfeited, and the property was deeded back to the owners. Plaintiff's loss on the project totaled approximately

\$34,900 and the loss on the entire project totaled approximately \$251,520, which was allocated to VHDC.

In approximately 1992, plaintiff and defendants decided to pursue another condominium project, called Meadow Creek in Canton Township, with the same division of responsibility. During the construction of the project, in approximately 1995, there was a breakdown in the relationship between plaintiff and defendants causing Phipps to assume control over the project and plaintiff to be excluded from the project as well as VHDC. Thereafter, plaintiff initiated the instant action alleging, in pertinent part, breach of contract regarding the Plymouth Road development and breach of fiduciary duty and conversion claims regarding defendants' withdrawal of VHDC funds in the amount of \$543,000 for alleged personal use and permitted rent-free use by Phipps' daughter of an apartment unit owned by VHDC. Plaintiff also pleaded a shareholder's derivative claim for conversion and waste. Following a jury trial, a verdict was rendered in plaintiff's favor regarding these claims.

On appeal, defendants argue that the trial court erred in denying their motion for partial summary disposition regarding plaintiff's breach of contract claim involving the Plymouth Road project. Although defendants raise several issues on appeal, the only issue raised in the trial court was whether the statute of frauds barred plaintiff's breach of contract claim because the oral agreement allegedly involved an interest in land. This Court is obligated to review only issues that are properly preserved. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Issues not raised and addressed in the trial court are not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Consequently, the application of the statute of frauds to the oral agreement is the only issue that will be addressed by this Court with regard to the breach of contract claim.

Defendants argue that the statute of frauds barred plaintiff's claim because "the land development agreement as Miller alleges it requires a conveyance of land in order to create a duty to take steps to create a profit." We disagree. It is undisputed that the parties entered into an oral agreement to develop a parcel of land. It is also uncontested that the agreement included that defendants would finance the project, including the acquisition of the necessary land to be developed, and plaintiff would provide the labor involved in developing the project and property for its proposed use. The agreement simply detailed plaintiff's and defendants' responsibilities and obligations with respect to the proposed project. Plaintiff's breach of contract claim arose out of defendants' failure to perform an obligation that they assumed by the agreement – to provide the financing for the project. The statute of frauds only applies to contracts and conveyances of interests in land. MCL 566.106; *Board of Control of Eastern Michigan Univ v Burgess*, 45 Mich App 183, 187; 206 NW2d 256 (1973). It is not an alleged interest in land that gave rise to plaintiff's breach of contract action. The subject of the breach of contract action was defendants' failure to finance the project. Therefore, the agreement was not within the contemplation of the statute of frauds. Consequently, although the trial court reached the right result, it did so for the wrong reason. See *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 640; 534 NW2d 217 (1995).

Next, defendants argue that the trial court erred in denying their motions for directed verdict and JNOV regarding plaintiff's breach of fiduciary duty claims. We disagree. A trial

court's ruling on motions for directed verdict and JNOV are reviewed de novo on appeal. *Thomas v McGinnis*, 239 Mich App 636, 643; 609 NW2d 222 (2000); *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999). A directed verdict is appropriate only when no factual questions exist on which reasonable minds could differ. *Thomas, supra* at 644. A jury verdict may not be disturbed if reasonable jurors could have honestly reached different conclusions. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998), quoting *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

The Business Corporation Act, particularly MCL 450.1541a(1), provides that directors and officers of a corporation must discharge their duties in good faith, with the care an ordinary prudent person in a similar situation would exercise, and in a manner reasonably believed to be in the best interests of the corporation. Further, directors, officers, and majority shareholders are fiduciaries who owe a strict duty of good faith to both the corporation and the minority shareholders. See *Salvadore v Connor*, 87 Mich App 664, 675; 276 NW2d 458 (1978).

Review of the record reveals disputed issues of fact upon which reasonable minds could differ and that plaintiff presented sufficient evidence in support of his breach of fiduciary duty claims. Viewing the evidence in a light most favorable to plaintiff, during the Meadow Creek project and without plaintiff's consent or notice, defendants (1) hampered construction efforts by failing to release necessary funds causing delay, the appearance of financial problems, and decreased marketability, (2) reduced prices on the units by \$10,000 resulting in a loss of \$87,100, (3) removed plaintiff as project manager of the Meadow Creek development and as president of VHDC without notification or a corporate meeting, (4) repeatedly refused to communicate with plaintiff or plaintiff's counsel regarding the Meadow Creek project or VHDC, (5) allowed Phipps' daughter to live rent-free for twenty-three months in a Meadow Creek unit with a fair rental value of \$1,400 a month and a sale value of \$145,000, and (6) removed \$543,000 from VHDC while this action was pending.

Further, there were disputed issues of fact regarding (1) whether the losses incurred on the Plymouth Township project, totaling \$251,520, were properly charged to VHDC or whether the losses were individual losses, and (2) whether the agreement between the parties was to recoup losses on the Plymouth Township project from the total profits of the Meadow Creek project, as defendants contended, or whether the agreement was that each party would recoup his losses from his individual profits (60/40 split) on the Meadow Creek project, as plaintiff contended. Although defendants deny most, if not all, of plaintiff's allegations, disputed issues of fact and credibility assessments of witnesses are properly within the province of the jury to determine. *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 689; 607 NW2d 123 (1999); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Consequently, the trial court properly denied defendants' motions.

Next, defendants argue that the trial court erred in denying their motion for remittitur or new trial because the jury award was not supported by sufficient evidence. A trial court's decision regarding remittitur is reviewed on appeal for an abuse of discretion. *Anton, supra* at 683. When deciding a motion for remittitur, the trial court must determine whether the jury verdict was for an amount greater than the evidence supported. *Id.*; MCR 2.611(E). Defendants argue that the trial court did not properly consider the evidence when it denied their motion.

However, it is clear from the record that the trial court specifically found that the evidence presented by plaintiff, if believed by the jury, supported the verdict. Upon review of the record and affording due deference to the trial court's superior position to view the evidence, evaluate the jury's reaction to the evidence, and evaluate the credibility of the witnesses, we conclude that the trial court did not abuse its discretion in holding that the jury verdict was sufficiently supported by the evidence.

Next, defendants argue that the trial court erred in denying their motion for a new trial as a consequence of plaintiff's counsel's improper closing argument. We disagree. Asserted claims of counsel misconduct, on the basis of improper comments, are reviewed by first determining whether the attorney's action was error and, if it was, whether reversal is required. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). The comments will not usually be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* After reviewing the contested comments in this unpreserved claim, we conclude that such comments did not cause the result, play too large a part, or deny defendants a fair trial. See *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 192; 600 NW2d 129 (1999).

On cross-appeal plaintiff argues that the trial court erred in denying plaintiff's request for mediation sanctions. We disagree. A trial court's decision whether to grant mediation sanctions is a question of law subject to de novo review on appeal. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129-130; 573 NW2d 61 (1997). Plaintiff argues that he filed his motion for leave to amend his complaint to add breach of fiduciary duty and conversion claims on the same day that the case was mediated and that he argued the merits of these claims at the mediation hearing. Consequently, plaintiff argues, all of his claims were subjected to mediation, were included in the mediation evaluation, and defendants' rejection of the evaluation coupled with plaintiff's success at trial entitles him to mediation sanctions pursuant to MCR 2.403(O)(1).

However, MCR 2.403(A)(1) provides, in pertinent part, that "[a] court may submit to mediation any civil action in which the relief sought is primarily money damages or division of property." MCR 2.101(B) provides that "[a] civil action is commenced by filing a complaint with the court." Interpretation of a court rule is subject to the same basic principles that govern statutory interpretation, including that a court rule is construed in accordance with the ordinary and approved usage of the language and in light of the purpose to be accomplished by its operation. *Saint George Greek Orthodox Church of Southgate v Laupmanis Associates, P C*, 204 Mich App 278, 282; 514 NW2d 516 (1994). A well-established rule of statutory construction is that statutes that relate to the same subject or share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another or were enacted on different dates. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998), quoting *Detroit v Michigan Bell Telephone Co*, 374 Mich 543, 558; 132 NW2d 660 (1965). Consequently, claims alleged and pleaded in a complaint form a civil action and only those claims, pursuant to MCR 2.403(A)(1), are permitted to be submitted to mediation for evaluation. Although the parties may discuss a myriad of issues during the mediation hearing, the evaluation rendered must be confined to the claims actually pleaded in the action.

Further, MCR 2.403(J)(4) provides that “[s]tatements by the attorneys and the briefs or summaries are not admissible in any court or evidentiary hearing.” A trial court is not required, nor permitted, to speculate or read through the parties mediation summaries to determine whether claims raised in a complaint that was amended subsequent to the evaluation were subjected to a meaningful evaluation. A trial court relies on the evaluation as a benchmark of reasonableness because it provides “an apparently meaningful understanding of both the merits and potential value of [a] claim.” *Nostrant v Chez Ami, Inc*, 207 Mich App 334, 340; 525 NW2d 470 (1994), quoting *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 364-365, 466 NW2d 404 (1991). Consequently, if a party’s position substantially changes after the mediation, it is incumbent on the party to move for the evaluation to be set aside and request an order granting a second, more meaningful, evaluation.

In this case, the claims that resulted in a verdict in plaintiff’s favor that would meet the requirements of MCR 2.403 – the breach of fiduciary duty and conversion claims and shareholder’s derivative action – were counts included in plaintiff’s amended complaint. Plaintiff’s motion for leave to amend was not granted until after the mediation; therefore, the claims were not properly submitted to mediation and mediation sanctions are not appropriate. See *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 626; 550 NW2d 580 (1996); *McCarthy v Auto Club Ins Ass’n*, 208 Mich App 97, 102; 527 NW2d 524 (1994). In addition, plaintiff’s reliance on the relation-back doctrine in support of his position is misplaced. The purpose of the relation-back doctrine is simply not implicated here. See *Smith v Henry Ford Hosp*, 219 Mich App 555, 558-559; 557 NW2d 154 (1996).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly