

STATE OF MICHIGAN
COURT OF APPEALS

FREDERICK GIORDANO,

Plaintiff-Appellant/Cross-Appellee,

v

ALAN MARKOVITZ and ALMARK OF
MICHIGAN, INC., f/k/a ALMARK, INC.,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

January 15, 2002

No. 223420

Wayne Circuit Court

LC No. 90-020419-CK

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

This case returns to this Court for a second time. This Court remanded the case to the circuit court for a calculation of damages and the parties subsequently agreed to submit to binding arbitration on the amount of damages. Plaintiff now appeals by right, and defendants cross-appeal, an order which granted in part plaintiff's motion to confirm the arbitration award. We affirm in part, reverse in part and remand for further proceedings.

This case involves the parties' agreement for ownership in a topless bar. The background facts may be found in this Court's previous opinion, *Giordano v Markovitz*, 209 Mich App 676; 531 NW2d 815 (1995), wherein this Court remanded for damages. During the arbitration that followed, the arbitrators decided that the stock should be valued as of April 4, 1995, the date of this Court's earlier opinion, to ensure plaintiff received the benefit of the bargain. However, the circuit court ruled that the proper valuation date was November 30, 1990, the date the contract was breached. Using that date, plus a reasonable time thereafter, the arbitrators determined the amount of damages. That award included the reimbursement of \$139,914.83 for a "loan" paid by plaintiff. The arbitrators then calculated prejudgment interest at a flat rate of ten percent. Upon plaintiff's motion to confirm the arbitration award, the circuit court determined that the \$139,914.83 was a capital contribution, not a loan, and modified the award accordingly. The court otherwise affirmed the award.

Plaintiff first argues that the circuit court erred in reversing the arbitrators' opinion regarding the applicable valuation date. Arbitration awards are reviewable for legal error that

substantially impacts the outcome of the case and is discernable from the face of the award. *DAIIE v Gavin*, 416 Mich 407, 445 331 NW2d 418 (1982); *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001). The valuation of stock is a legal issue which we review de novo. *Kocher v Dep't of Treasury*, 241 Mich App 378, 380; 615 NW2d 767 (2000).

A party to a contract is generally entitled to the benefit-of-the-bargain damages. *Davidson v General Motors Corp*, 119 Mich App 730, 733; 326 NW2d 625 (1982), modified on reh 136 Mich App 203 (1984). However, cases involving stock are not evaluated under the general valuation rule. Instead, “the measure of damages in stock conversion cases is the highest market value the stock attains between the date the owner receives notice of the conversion and the expiration of a reasonable period in which to repurchase the stock himself.” *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 146; 593 NW2d 630 (1999). The purpose of this rule is to place the risk of the stock's market fluctuations on the wrongdoer. *Vos v Child, Hulswit & Co*, 171 Mich 595, 597-598; 137 NW 209 (1912). Moreover, the rule is applicable to stock in closely held corporations. *Butterfield v Metal Flow Corp*, 185 Mich App 630, 641; 462 NW2d 815 (1990). Because the damages in this case involved stock conversion, the circuit court properly directed the arbitrators to value the stock as of the date of the breach, with damages to extend for a reasonable time thereafter. We therefore reject plaintiff's argument that this case is bound by the method of valuating damages in *Davidson*, *supra*, because that case did not involve stock conversion.

Next, plaintiff asserts that the circuit court erred in modifying the arbitrators' award by classifying plaintiff's \$139,914.83 as a capital contribution rather than as a loan. In our initial opinion, *Giordano*, *supra*, this Court determined that plaintiff had partially performed the “ownership agreement” by paying \$139,914.83 into the project. This determination necessitates the conclusion that that amount was a capital contribution and not a loan. The law of the case doctrine provides that a question of law decided by an appellate court is binding and will not be decided differently on remand or in a subsequent appeal. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Thus, the law of the case doctrine precludes reconsideration of this issue because a decision that the \$139,914.83 was a loan would destroy the legal basis for this Court's prior holding.

On cross-appeal, defendants claim that the arbitrators exceeded their power by awarding a flat rate for prejudgment interest, contrary to statute. We agree. Our Supreme Court, in *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 511; 475 NW2d 704 (1991), declared that the fluctuating statutory interest rate of MCL 600.6013 applied to “the award of interest from the date the complaint is filed until the date judgment is satisfied.”¹ Moreover, contrary to

¹ Specifically, MCL 600.6013(6) provides:

Except as otherwise provided in subsection (5) and subject to subsection (11), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action *shall* be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state

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plaintiff's assertion, this case is factually distinct from *Wiselogle v Michigan Mut Ins Co*, 212 Mich App 612; 538 NW2d 98 (1995), vacated 453 Mich 978 (1996), where the trial court awarded interest in light of the arbitrators' failure to do so. The Supreme Court vacated the opinion because they stated that the decision to award interest was for the arbitrator to decide and not the court. *Id.* at 978. In this case the arbitrators made the decision to award interest, but failed to apply the proper statutory rate. We further find that the arbitrators' decision substantially changed the outcome of the case because it increased the judgment against defendants. Thus, the portion of the circuit court's order affirming the arbitrators' award of interest is reversed. We remand this issue to the circuit court to vacate the arbitrator's flat rate interest award and provide for the proper statutory interest rate.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper

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treasurer, and compounded annually, pursuant to this section. Interest under this subsection shall be calculated on the entire amount of the money judgment, including attorney fees and other costs. However, the amount of interest attributable to that part of the money judgment from which attorney fees are paid shall be retained by the plaintiff, and not paid to the plaintiff's attorney. [Emphasis added.]