

STATE OF MICHIGAN
COURT OF APPEALS

ABC BARREL & DRUM SITES, ETHONE OMI,
INC., FORD MOTOR COMPANY, GENERAL
MOTORS COMPANY, HENKEL
CORPORATION, PVS NOLWOOD
CHEMICALS, INC., and VAN WATERS &
ROGERS, INC.,

UNPUBLISHED
February 19, 2002

Plaintiff/Counterdefendants-
Appellees/Cross-Appellants,

v

DETREX CORPORATION,

Defendant/Counterplaintiff-
Appellant/Cross-Appellee.

No. 220784
Oakland Circuit Court
LC No. 96-526357 CK

Before: Bandstra, C.J., and Doctoroff and White, JJ.

WHITE, J. (*concurring*).

The issues of the nature of Kohl's representations to Gleason and Currie, and whether such representations were breached, were fully litigated at trial. The jury heard extensive evidence regarding the alleged representations and was instructed that it could consider Kohl's representations in interpreting the agreement if it concluded that the representations were consistent with or explained the agreement. Two of the asserted representations - - that there were strong defenses available that would be vigorously litigated, and that third-party PRPs would be vigorously pursued - - were consistent with the terms of the written agreement. By its verdict, the jury determined that no promises were made in this regard that were breached. The third asserted representation - - that Detrex' liability would not exceed \$100,000 - - could be viewed as consistent with or inconsistent with the contract. It is clear that if this promise was made, it was breached. Thus, the jury either concluded that it was not made or that, if made, it was inconsistent with the terms of the agreement. If the jury concluded it was not made, defendant suffered no prejudice by the dismissal of its fraudulent inducement claim. If the jury concluded it was made but was inconsistent with the agreement, the propriety of the court's dismissal of the fraudulent inducement claim regarding this alleged representation is implicated.

The circuit court focused on the requirement that the misrepresentation regarding future conduct be reasonably expected to be relied on, and appears to have concluded that in the face of the actual terms of the agreement, representations regarding a \$100,000 limitation on defendant's

exposure under the agreement could not reasonably be expected to be relied on as a matter of law. I agree. The representation was made to two attorneys. It was made in the face of a contract that mentioned the possibility of settlement, provided for a procedure that permitted one participant to be bound to a settlement notwithstanding its disagreement, provided no escape mechanism, and allocated a set percentage (27.78%) of any settlement to Detrex. Further, Detrex was aware that, although Detrex had only committed \$100,000 to the effort, the group had already offered to settle with the EPA for \$1.5 million. Additionally, another attorney at Kohl's firm, who had been representing Detrex directly, had recently sent Detrex a memo discussing the agreement and outlining Detrex' exposure, mentioning a range of \$550,600 to \$1.25 million. Under the circumstances, any representations regarding Detrex' exposure under the agreement could only be understood as a possible scenario, and could not reasonably be expected to be relied on as a promise that notwithstanding the terms of the agreement, in no event would Detrex be expected to contribute more than \$100,000.

I find no error requiring reversal.

/s/ Helene N. White