STATE OF MICHIGAN

COURT OF APPEALS

ROBERT N. LANGRILL,

Plaintiff-Appellant,

v

DIVERSIFIED FABRICATORS, INC., DONALD J. LANDUYT, and ROBERT D. LANDUYT,

Defendants-Appellees.

UNPUBLISHED
June 25, 2002

No. 225001
Macomb Circuit Court
LC No. 95-004419-CB

DIVERSIFIED FABRICATORS, INC.,

Plaintiff-Appellee,

v

ROBERT N. LANGRILL,

Defendant-Appellant,

and

RICHARD SCHOENRATH and TDS MANUFACTURING, INC.,[1]

Defendants.

No. 225002
Macomb Circuit Court
LC No. 95-004451-CK

Before: Whitbeck, C.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In these consolidated cases involving a shareholder dispute in a closely-held corporation, plaintiff Langrill in docket no. 225001 appeals by right the trial court's order granting summary

[1] It appears that defendants Schoenrath and TDS have entered into settlement agreements with Diversified Fabricators, Inc. and have been dismissed from this action.

disposition in favor of defendants Diversified Fabricators, Inc. (DFI), Donald Landuyt, and Robert Landuyt and dismissing Langrill's complaint that alleged minority shareholder oppression, breach of fiduciary duties, and tortious interference with a contract/business relations.[2] In docket no. 225002, Langrill appeals by right the trial court's order awarding DFI $300,000 in damages for breach of fiduciary duties and breach of contract and ordering specific performance of a 1981 Stock Retirement Agreement requiring Langrill to sell his 10,000 shares of stock back to DFI at $9.60 per share. We affirm.

Langrill first argues that the trial court erred in granting summary disposition in favor of DFI and the Landuyts on his claims of shareholder oppression, breach of fiduciary duty, and tortious interference with a business relationship. We disagree. A trial court's grant or denial of summary disposition will be reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In this case, the trial court granted defendants' summary disposition motion with respect to Langrill's shareholder oppression and breach of fiduciary duty claims pursuant to MCR 2.116(C)(7) (statute of limitations), stating that all claims that arose before September 22, 1992 (i.e., three years before Langrill filed his complaint) were barred under MCL 450.1541a(4). The court stated that even if some of the oppression and breach of fiduciary duty claims had not been time-barred, these claims along with those not affected by the statute of limitations would be subject to dismissal under MCR 2.116(C)(10) (no genuine issue of material fact) because Langrill testified during his deposition that he had consented to the 1988 stock transfer between the Landuyts and that he had not been forced to sign the agreement. The court dismissed Langrill's tortious interference claim pursuant to MCR 2.116(C)(10), stating that no employment contract existed and that the Landuyts as corporate officers were not third parties to the contract even if one existed.

With respect to Langrill's shareholder oppression and breach of fiduciary duty claims, we conclude that the trial court properly granted defendants summary disposition because no genuine issue of material fact existed. In his appellate brief, Langrill raises several allegations to support his claims, including that the 1988 stock transfer between the Landuyts was invalid, the compensation payments to the Landuyts were excessive, and the 1995 agreement was unfair and led to his "firing" or "force-out." Langrill's allegations regarding the breach of fiduciary duty claim are substantially the same as those alleged regarding the shareholder oppression claim.

After reviewing the evidence in this matter, it is clear that Langrill consented in writing to the 1988 stock transfer, consented in writing to the Landuyts' yearly compensation, and had decided not to execute the 1995 proposed stock agreement. Generally, "a shareholder who assents to a corporate transaction may not later challenge the validity of the transaction in court." *Camden v Kaufman*, 240 Mich App 389, 392; 613 NW2d 335 (2000). Langrill failed to present evidence that he was forced to sign the compensation and stock transfer documents or that the Landuyts fired or forced him out of the company. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Moreover, Langrill explicitly testified that he was not forced to sign the stock transfer agreement. The fact that Langrill refused to sign the 1995

[2] Langrill does not appeal the trial court's dismissal of his wrongful discharge claim.

agreement[3] and in fact did not sign the agreement refutes any suggestion that he was forced into signing the other documents. Langrill now cannot complain in this matter because the evidence clearly shows that he approved and ratified documents such as the compensation agreements and the stock transfer agreement and refused to approve documents (e.g., the 1995 agreement) when he desired to do so. MCL 450.1545a(1)(c); *Lorren v Baroda Manuf Co, Inc*, 334 Mich 405, 409; 54 NW2d 702 (1952); *Camden, supra* at 393-396, 398-400; see, generally, *Port Huron Area School Dist v Port Huron Education Assoc*, 426 Mich 143, 151; 393 NW2d 811 (1986) (parties consenting to written agreements consent to the terms and conditions of such agreements). Our conclusion that Langrill's willful consent to the agreements disposes of his oppression claims is further supported by the Legislature's recent amendment to MCL 450.1489 that defines the term "willfully unfair and oppressive conduct." MCL 450.1489(3) states that "willfully unfair and oppressive conduct . . . does not include conduct or actions that are permitted by an agreement . . . ." 57 PA 2001, immediately effective July 23, 2001.

Further, with respect to Langrill's reliance on *Barnett v International Tennis Corp*, 80 Mich App 396; 263 NW2d 908 (1978), in arguing that the Landuyts had not shown that additional duties had been assumed in order to justify the increases in their salaries, we find that Langrill's reliance on *Barnett* is misplaced. Unlike the present case, the plaintiff shareholder in *Barnett* refused to consent to an increase in two of the other shareholders' salaries and almost immediately filed a lawsuit seeking restoration to the corporation of a part of the salaries paid to the two shareholders.

Even if we did not agree with the trial court that Langrill's oppression and fiduciary-related claims are without merit because of his willful consent, some of the oppression claims would still be barred under the statute of limitations applicable to an action brought pursuant to MCL 450.1489. Since the trial court decided this matter, this Court held in *Estes v IDEA Engineering & Fabricating, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 211845, issued March 5, 2002), that a shareholder oppression action brought pursuant to MCL 450.1489 is governed by the six-year statute of limitations set forth in MCL 600.5813. The trial court in this case applied the shorter limitations period set forth in MCL 450.1541a(4). Langrill filed his complaint on September 22, 1995; consequently, any oppression cause of action that accrued more than six years before September 22, 1989, is time-barred. Thus, Langrill's oppression claims regarding the 1988 stock transfer and the 1988 compensation agreements are barred under the six-year limitations period. In addition, as the trial court properly stated, Langrill's breach of fiduciary duty claims were barred by the shorter time period in MCL 450.1541a(4); therefore, any fiduciary-related claims that accrued before September 22, 1992 are time-barred. Because of Langrill's willful consent in this matter, we reject and need not address Langrill's continuing wrongful acts argument that his claims are not time-barred because the 1988 stock transaction was the beginning of a series of wrongful acts that occurred over the next seven years. However, we note that the continuing wrongful acts doctrine must be established by continual tortious acts, *Horvath v Delida*, 213 Mich App 620, 627; 540 NW2d 760 (1995), and we do not find tortious or wrongful acts in this matter.

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[3] Regarding the 1995 proposed agreement, we also note that Langrill testified that the Landuyts told him to take the proposal to an attorney for review, which he did.

We reject Langrill's claim that the trial court erred in dismissing his claim of tortious interference. The trial court first found that no employment contract existed. The court then stated that even if a contract had existed, defendants, as corporate officers, could not be considered third parties to the contract. The trial court relied upon this Court's decision in *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986), which states:

> To maintain a cause of action for tortious interference with a contract, a plaintiff must establish a breach of contract caused by the defendant, and that the defendant was a "third party" to the contract or business relationship. . . . First, since plaintiff's employment contract was terminable at will, there could be no breach arising from its termination. . . . Second, . . . Smith [as the director, president, and controlling shareholder of the defendant Michigan Oil Company, and director and chief executive officer of the defendant Michigan Oil Company's parent corporation] was not a third party to plaintiff's employment relationship with [the defendant Michigan Oil Company]. [Citations omitted.]

In *Dzierwa, supra*, this Court held that the individual defendant who was a director, officer, and controlling shareholder was not a third party for purposes of a claim for tortious interference. More recently, this Court stated that the elements of tortious interference are "(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant." *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). Langrill does not appeal the trial court's finding that he was an at-will employee, but rather relies upon the case of *Feaheny v Caldwell*, 175 Mich App 291, 304; 437 NW2d 358 (1989), to assert that a plaintiff may maintain an action for tortious interference with an at-will employment contract. Even assuming as Langrill argues that tortious interference with an at-will contract is actionable, he has failed to overcome the "very difficult obstacle" of showing that the Landuyts were third parties to the contract or business relationship. *Feaheny, supra* at 305; see, also, *Dzierwa, supra* at 287. In *Feaheny, supra*, this Court stated:

> [S]ince all five defendants were corporate officers, plaintiff faced the very difficult obstacle of showing that each defendant stood as a third party to the employment contract at the time he allegedly performed the acts. This is so, because, as corporate officers, the defendants served as agents whose acts were privileged when acting for and on behalf of the corporation, rather than acting to further strictly personal motives.

Moreover, even if the Landuyts were third parties to the business relationship, Langrill has failed to establish wrongful interference, i.e., evidence that the Landuyts "did per se wrongful acts or did lawful acts with malice and without justification." *Feaheny, supra*.

Langrill next argues that the trial court erred in striking two of his affirmatives defenses: first, that DFI's claim was barred by its own inequitable conduct and unclean hands, and, second, that the stock retirement agreement violated public policy. We disagree. An order striking affirmative defenses is reviewed for an abuse of discretion. *Maurer v McManus,* 161 Mich App 38, 54; 409 NW2d 747 (1987). An abuse of discretion occurs "only if an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made," *Ellsworth v Hotel Corp of America,* 236 Mich App 185, 188; 600 NW2d 129 (1999), or "the result is so palpably and grossly violative of fact and logic that it evidences a

perversity of will, a defiance of judgment, or the exercise of passion or bias," *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

In its motion to strike Langrill's affirmative defenses pursuant to MCR 2.115(B), DFI asserted that the affirmative defenses were identical to Langrill's complaint that had already been dismissed by the court and therefore the defenses should be considered as immaterial and impertinent. DFI also argued that the law of the case doctrine applied because the trial court had previously ruled on Langrill's claims that were now being offered as affirmative defenses, and the trial court was constrained from reaching inconsistent rulings merely because the same claims were now labeled as defenses. The court granted DFI's motion to strike the affirmative defenses.

MCR 2.115(B) provides in relevant part:

> **(B) Motion to Strike.** On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules.

After reviewing the affirmative defenses at issue in this matter, Langrill's claims that the trial court dismissed, and the language of MCR 2.115(B), we are not convinced that the trial court abused its discretion in striking the affirmative defenses, i.e, that there was no justification for the ruling, *Ellsworth, supra,* or that the ruling was so palpably and grossly violative of fact and logic, *Barrett, supra*. As Langrill essentially recognizes in his appellate brief, his original claims that were dismissed are the same or similar to his affirmative defenses. Thus, the trial court properly struck the redundant or impertinent portions of Langrill's pleading pursuant to MCR 2.115(B). Moreover, our review of the lower court transcripts in this matter indicate that despite the trial court's order striking Langrill's defenses, the court did allow Langrill to present evidence supporting at least some of his defenses at trial. For example, the Langrill's claims as to the inequities of the proposed 1995 agreement were presented into evidence, and although DFI's attorney objected on the basis that Langrill's affirmative defenses had been dismissed, the court allowed testimony regarding the Landuyts' and Langrill's compensation and bonus payments. Because of our conclusion that the trial court did not abuse its discretion in striking the affirmative defenses pursuant to MCR 2.115(B), we need not address the issue regarding whether the law of the case doctrine applies only to appellate courts and not trial courts.

Langrill argues that the trial court erred in admitting evidence regarding the five mile restriction contained in the parties' agreement and in admitting testimony on an alleged violation of the preliminary injunction. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc,* 457 Mich 593, 614; 580 NW2d 817 (1998).

Langrill first argues that the issue to be determined at trial was whether Langrill had solicited DFI's customers, and the erroneous admission of irrelevant evidence regarding the five mile restriction "allowed the trial court and DFI to substitute the simplistic fact of location for required proof of solicitation." Langrill asserts that the five mile provision contained in the parties' agreement applied only to the physical work location of Langrill and was totally irrelevant to the location of DFI customers.

At trial, defendant Donald Landuyt was allowed to testify that certain customers that Langrill visited during the two years the restrictive covenant was active were within a five mile radius of DFI. After Langrill objected to the testimony, the court appears to have allowed the testimony because it demonstrated to the trial court where the customers were located. We conclude that even if the admission of the evidence were improper, any error was harmless because in addition to finding that the five mile radius restrictive covenant was violated, the court also found that Langrill was liable because he violated at least one other restrictive covenant contained in the 1981 Stock Retirement Agreement. The agreement in this matter provides in pertinent part:

> In the event selling STOCKHOLDER also leaves or ceases to be in the employ of CORPORATION for any reason, he covenants not to for a period of two (2) years:
>
> (a) Solicit any present or past customer of the CORPORATION.
>
> * * *
>
> (c) Directly or indirectly request or advise any past or present customer of the business to withdraw, curtail or cancel their business with the CORPORATION.
>
> * * *
>
> (e) Directly or indirectly engage in the sale of any product or service which is being handled by the CORPORATION at the time of termination of employment within a five (5) mile radius from the location of any office or branch of the CORPORATION, either as an employee, proprietor, partner or stockholder.

Although Langrill is correct that the trial court found that his improper conduct had occurred within a five mile radius of DFI's premises, the trial had already found that Langrill had violated the restrictive covenant by "directly or indirectly attempting to induce [DFI's] customers into turning their business over to TDS." This finding, which is independent of the five mile radius restrictive covenant, shows that the trial court relied on section (c), and possibly section (a), to find Langrill liable.

In addition, other evidence offered to show a violation of the five mile radius covenant demonstrated that Langrill solicited DFI customers in violation of the other restrictive provisions contained in the 1981 Stock Retirement Agreement. For example, Dave Deponio testified that soon after Langrill left DFI, Deponio observed Langrill on the premises of two of DFI's customers. Deponio saw Langrill distributing his new TDS business cards to one of the customers. With respect to the other DFI customer, Deponio testified that Langrill was attempting to line up a project with that customer by acquiring information to quote jobs. Deponio also testified that just before Langrill left his employment with DFI, he asked Deponio to print a master list of all the vendors that DFI was using and a list of all DFI customers that were in the computer data base. Thus, any error was harmless in light of the other evidence presented.

Langrill next argues that the trial court abused its discretion in allowing a witness to testify regarding an alleged solicitation of a DFI customer in violation of the preliminary injunction because the special master that the court had appointed had already decided the issue, and the trial court had adopted the special master's findings. We reject Langrill's argument. Although Langrill objected to the testimony, the trial court judge allowed it because he was the trier of fact and could easily ignore the testimony if he had already ruled on the matter. The court opined that it would abide by any previous ruling, but that the testimony may relate to the issue of credibility. After reviewing the lower court record in this matter, we are not convinced that the trial judge considered the testimony in question in reaching its verdict. Contrary to Langrill's assertion, the trial court did not "effectively grant reconsideration of the issue." Further, as previously stated, other evidence was presented to show that Langrill violated the restrictive covenants contained in the 1981 agreement.

Langrill asserts that the trial court erred in ordering specific performance of the parties' 1981 agreement that required Langrill to sell his 10,000 shares of stock to defendants for $9.60 per share. We disagree. This Court reviews equitable actions under a de novo standard of review. *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997). Specific performance of a contract is an equitable remedy. *Rowry v Univ of Michigan*, 441 Mich 1, 9; 490 NW2d 305 (1992).

Regarding this issue, the trial court stated that the 1981 agreement clearly and unambiguously required Langrill to sell his stock back to DFI upon his termination or withdrawal from his employment with DFI. The court opined:

> It does not matter whether Langrill had been fired or had voluntarily quit his position since the contractual requirement had been triggered by the fact that Langrill left his position, rather than by the circumstances surrounding his departure. Pursuant to Paragraph 3(b), the Court is satisfied that the stock price was redetermined to be $9.60 per share. Accordingly, Langrill shall sell his 10,000 shares of stock back to Diversified at such price pursuant to the payment terms delineated under Paragraph 5(A).

Section 1(A) of the 1981 Stock Retirement Agreement provides:

> If any STOCKHOLDER should desire to in any manner dispose of all or any portion of his stock in the CORPORATION during his lifetime, or if his employment has been terminated with the CORPORATION, or if he withdraws from the CORPORATION, he shall first offer in writing to sell the number of shares of stock in the CORPORATION that he desires to dispose of to the CORPORATION (or in the event of his termination of employment or of his withdrawal, as above, he must within thirty (30) days of such termination or withdrawal offer to sell all his shares), based on a price to be determined in accordance with the provision of Paragraph 3(b)[4] hereof.

[4] There is no dispute that the amount stated in paragraph 3(b) of the 1981 Stock Retirement Agreement was modified to $9.60 per share.

We agree with the trial court that the 1981 agreement clearly required Langrill to sell his stock back to DFI upon his termination or withdrawal from his employment with DFI regardless of the circumstances surrounding Langrill's departure. When the language of a contract is clear, the contract should be enforced as written. *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997). Although Langrill argues that the trial court erred in awarding specific performance because there was evidence that the Landuyts had unclean hands and forced him out of DFI, we conclude after reviewing the record that the trial court listened to the trial testimony regarding the Landuyts' alleged bad conduct and despite that testimony, the court determined that the 1981 agreement should be enforced as written. Langrill's argument raises an issue of credibility assessment. When the lower court's findings are based on the credibility of the witnesses, special deference will be given to the findings of the trier of fact given its superior ability to judge the credibility of the witnesses. MCR 2.613(C); *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). We find no error on this issue.

Langrill argues that the trial court erred in ordering him to pay defendants $300,000 in damages. We disagree. The clearly erroneous standard of review is applicable to a damage award rendered in a bench trial. *Scott v Allen Bradley Co*, 139 Mich App 665, 672; 362 NW2d 734 (1984). A trial court's findings of fact in a bench trial are also reviewed for clear error. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous where, although there is evidence to support it, upon review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Walters, supra*.

The trial court awarded damages of $300,000 after finding that Langrill had (1) violated his fiduciary duties to DFI pursuant to MCL 450.1541a by conducting a meeting in his basement with TDS owners and two DFI employees for the purpose of trying to induce the two DFI employees to leave DFI and join TDS while Langrill was still employed at DFI and (2) breached the restrictive covenants contained in the 1981 Stock Retirement Agreement by directly or indirectly trying to induce DFI customers to turn their business over to TDS. These factual findings were based on credibility grounds, and we find no error. MCR 2.613(C); *Walters, supra; Sparling Plastic, supra*.

We reject Langrill's arguments on this issue. First, Langrill argues that the court should not have ordered him to pay damages because he did not realize any profits from the customers who did business with TDS instead of DFI. As stated by DFI, this argument does not make sense. Further, this issue is waived because Langrill has failed to cite any authority to support his argument. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997).

In addition, contrary to Langrill's argument, he did not raise the issue regarding the legality of the non-compete covenant in his affirmative defenses. Generally, an issue is not properly preserved if it was not raised and addressed by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We will not review issues raised for the first time on appeal unless manifest injustice will result. *Herald Co v City of Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998). After reviewing the record, we conclude that no manifest injustice will result from our failure to address this unpreserved issue.

Further, we reject Langrill's argument that damages were improperly ordered because DFI was working at full capacity in its Design and Build Department and therefore could not have performed work for the customers lost to TDS. As the trial court determined, Langrill persuaded other key employees to leave DFI and induced DFI customers to do business with TDS instead of DFI. Langrill's actions resulted in DFI being unable to perform the work. We will not allow Langrill to benefit from a situation that he created.

Finally, Langrill argues that even if he did solicit DFI customers, DFI failed to prove any damages resulting from his conduct. We disagree. The ultimate goal of damages is to compensate for the harm or damage done. *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993). "Thus, whatever method is most appropriate to compensate a plaintiff for the loss may be used." *Id*. Lost profits are recoverable, but "they must be proven with a reasonable degree of certainty as opposed to being based on mere conjecture or speculation." *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 549; 481 NW2d 762 (1992); see, also, *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988). Mathematical certainty is not required, and lost profits are still allowed even where they are difficult to calculate and are speculative to some degree. *Bonelli, supra*.

In this case, evidence was presented that DFI had lost well over $300,000 in net profits during the time period from August 1995 through December 31, 1996. *Getman v Mathews*, 125 Mich App 245, 250; 335 NW2d 671 (1983) (damages for lost profits must be based on net profit losses). The net profit losses were based on the records of both DFI and TDS as it related to specific customers that had never done business with TDS before Langrill joined TDS. These customers were long-time customers of DFI that ceased doing business with DFI during the time they conducted business with TDS. Having reviewed the entire record, we conclude that the lost profits were proven with a reasonable degree of certainty and were not too speculative. *Poirier, supra; Bonelli, supra.* We not left with a definite and firm conviction that the trial court made a mistake. *Walters, supra*.

We affirm.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey