STATE OF MICHIGAN

COURT OF APPEALS

VENTURA SYSTEMS, INC.,

Plaintiff-Appellee,

v

JENZANO CORP,

Defendant-Appellant.

UNPUBLISHED
September 17, 2002

No. 229979
Oakland Circuit Court
LC No. 99-011646-CK

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Defendant Jenzano Corporation appeals by leave granted the trial court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm and remand for further proceedings.

I. Basic Facts And Procedural History

Ventura Systems, Inc., is a certified minority-owned corporation that repairs electronics used in automobile manufacturing. In 1998, Ventura's only other local, minority-owned competitor for business through the DaimlerChrysler Corporation's Special Supplier Program was Industrial Control Repair (ICR). At the beginning of the year, ICR was receiving repair work from DaimlerChrysler. Though ICR complained to DaimlerChrysler about the work it was also channeling to Ventura, DaimlerChrysler reduced the work it was giving to ICR. At about the same time, DaimlerChrysler gave Ventura a blanket repair order for various electronic equipment, including the pertron circuit boards that control automated welders used in the automobile manufacturing process.

Ventura, which did not have its own repair facility at the time, identified two other businesses that conducted the sort of electronics repairs that DaimlerChrysler was seeking for its pertron boards. One of these companies, Atlantic, was located in Maryland. Ventura sent part of its business from DaimlerChrysler to Atlantic in early spring 1998. Florida corporation Jenzano was the other business that Ventura located. Ventura's sales manager, George Tipton, spoke with Tim Jennetten, the Jenzano employee who worked with pertron boards. Jennetten described Jenzano's in-house work on pertron boards and support services for the companies with the pertron problems. Tipton felt assured by Jennetten's representations of Jenzano's in-house capabilities. Still, Tipton allegedly told Jennetten that if Jenzano "could not repair the boards that [Ventura] did have another vendor . . . to send them so, so [Ventura] didn't want them to

outsource" the work. While Tipton did not inform Jennetten that the pertron boards were from DaimlerChrysler or specify the number of pertron boards Ventura would be sending to Jenzano, he told Jennetten that Ventura had a "pretty substantial order" for Jenzano. Tipton also reportedly told Jennetten that whether Jenzano received more pertron boards to repair after giving an estimate depended on Jenzano's pricing and turnaround time. Ventura then sent Jenzano two boards for repair and a cost estimate.

Evidently pleased with Jenzano's initial work and estimates, Ventura sent many more pertron boards to Jenzano. However, Jenzano evidently could not fulfill such a large order and immediately started subcontracting the work to other another company with which it already had a business relationship, but did not inform Ventura about this new arrangement. As Jennetten put it, Jenzano's "common practice" was not to "tell our customers how we do our business." When Jenzano returned the repaired pertron equipment to Ventura, some of it months later than originally arranged, Ventura discovered an ICR sticker on each piece of equipment. In short, Jenzano had arranged for ICR – Ventura's primary competitor – to perform the repairs. At around the same time, Steve Taddei of ICR informed DaimlerChrysler that it was performing the work for Ventura's order. Though Ventura had paid Jenzano for the first shipment of pertron boards, it did not pay for the last order of pertron boards after discovering what Mark Hasse, Ventura's vice president, referred to as ICR's "conspiracy." In July 1998, Ventura employed its first repair technician and secured certification indicating that it was a minority-owned business that performed certain repairs. However, on August 11, 1998, DaimlerChrysler ceased sending Ventura pertron boards to repair, transferring that work to ICR and canceling Ventura's blanket order.

After Ventura lost its pertron work from DaimlerChrysler, Debra Hasse, Ventura's owner and president, went to the DaimlerChrysler Sterling Heights Stamping Plant to inquire about obtaining more business. She spoke with two DaimlerChrysler representatives, Dennis O'Brien and Bill Stacey, who reportedly asked her whether Ventura was "still outsourcing to Florida." Though she replied that Ventura had not outsourced work on anything since shipping the pertron boards to Jenzano in the spring and summer of 1998, DaimlerChrysler had no work for Ventura. Hasse did not ask Stacey and O'Brien why they were interested in this information about outsourcing. Rather, she thought "in the context of the conversation it was pretty clear that they were not going to send [Ventura] any business at that time." She said to the two men, "[S]o I guess you've talked to ICR regarding the Pertron boards." They replied, "Yes." Eventually, Ventura received more work from DaimlerChrysler's Sterling Heights Stamping Plant, but never any additional pertron board work.

Ventura then sued Jenzano under two legal theories. First, Ventura claimed, Jenzano breached its oral agreement not to subcontract the repair work. Second, Ventura alleged, Jenzano committed fraud or misrepresentation (intentional, constructive, negligent, or innocent) when it induced Ventura to enter into the repair agreement by representing that it would not have other businesses conduct the repairs when, in fact, that was exactly what Jenzano intended to do. As became clear from Ventura's subsequent arguments, it was not seeking damages for losing the blanket order from DaimlerChrysler. Rather, it was seeking compensation primarily for future profits lost from the pertron business DaimlerChrysler had discontinued with Ventura. According to Mark Hasse, in evaluating damages, he felt "reasonably" sure that Ventura would remain in business for six years. Using the amount of pertron board orders Ventura received

from DaimlerChrysler in the first four months of March 1998 ($96,341.28) and the costs associated with the repairs ($44,143.00), Mark Hasse arrived at $52,198.28 as the profit Ventura realized from arranging pertron board repairs through outsourcing. Mark Hasse then projected that Ventura would lose $313,189.68 over those six years by not having the business from repairing pertron boards, which was a simple multiplication of the $52,198.28 figure by six. He did not attempt to estimate the profits in excess of the cost of having Ventura perform the repairs themselves. Additionally, as Debra Hasse later explained, Ventura was asking for $100,000 to compensate it for damage to its reputation.

After considerable preliminary wrangling concerning discovery and other matters, Jenzano moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). According to Jenzano, it had not agreed to perform all the work on the pertron boards, pointing to the absence of evidence documenting this agreement. Even if there were an enforceable oral contract, Jenzano contended that the fact that it outsourced the work to ICR did not proximately cause Ventura to sustain any damages. Further, if Jenzano did cause Ventura to sustain damages, Ventura's claim for and calculation of damages was purely speculative, and, therefore, insufficient to support recovery. Finally, Jenzano argued that Michigan law barred Ventura from bringing the tort claim for fraud because it stemmed solely from a breach of contract.

The trial court issued an opinion and order discussing the issues in the case and giving a brief overview of the evidence in the record. In the trial court's opinion, a disputed question of material fact existed concerning whether Jenzano promised Ventura that it would perform all the repairs to the pertron boards rather than sending the boards to another company for the repairs. Similarly, noting that Ventura had provided estimates of lost future profits, the trial court concluded that it was a jury's job to determine whether this evidence merited an award. Therefore, the trial court denied the motion for summary disposition with respect to the breach of contract claim. Additionally, the trial court denied the motion for summary disposition concerning the fraud claim, holding that the deposition testimony concerning Tim Jennetten's promises was sufficient to create a question of material fact concerning the fraud claim. In the end, though clearly ruling on the motion under MCR 2.116(C)(10) and summarizing each party's arguments, the trial court did not explicitly address Ventura's arguments regarding causation for the contract claim or whether this suit impermissibly used the conduct underlying the breach of contract claim to support the fraud claim.

On appeal, Jenzano raises six issues, but does not challenge Ventura's claim that George Tipton's conversation with Jennetten resulted in an oral contract. Instead, in its first two arguments, Jenzano claims that there was inadequate evidence that, by subcontracting the repair work to ICR, it caused Ventura's alleged damages. In the following three issues, Jenzano contests Ventura's evidence and calculation of damages, claiming that the number of years of future business and the amount of profit projected during those years was speculative. In its final argument, Jenzano argues that there was insufficient evidence that it had any duty to Ventura that was distinct from the contract to support a separate fraud or misrepresentation claim. We discuss the issues and the supporting evidence in the record in more detail in the following sections.

II. Standard Of Review

Case law requires that we review de novo orders granting or denying summary disposition.[1]

III. Legal Standard

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim.[2] When deciding a motion for summary disposition under MCR 2.116(C)(10), "the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial.[3] The nonmoving party cannot simply rest on allegations or denials, but must present evidence showing that a material issue of fact is in dispute requiring resolution at trial.[4] In the end analysis, summary disposition is appropriate if the documentary evidence establishes "that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law."[5]

IV. Contract Claim: Causation

In Michigan, aside from the limits imposed by the statute of frauds,[6] oral contracts have long been enforceable.[7] The rule governing the consequences of a breach of contract is simple and well known: "A party to a contract who is injured by another's breach of the contract is entitled to recover from the latter damages for only such injuries as are the direct, natural, and proximate result of the breach."[8]

Jenzano first claims that Ventura does not have the necessary evidence of this causation because Ventura actually lost DaimlerChrysler business as a result of not having its own repair facility. In support of this argument, Jenzano points to deposition testimony from Anna Jean Wheaton, the DaimlerChrysler representative who worked with the Special Supplier Program. When asked whether it was "fair to say that" Ventura was going to "lose its blanket" order from DaimlerChrysler if Wheaton had not heard from ICR president Taddei in summer 1998

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[1] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[2] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[3] *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); see also MCR 2.116(G)(5).

[4] *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999), citing MCR 2.116(G)(4).

[5] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[6] See, e.g., MCL 566.132.

[7] See, generally, *Adolph v Cookware Co of America*, 283 Mich 561; 278 NW2d 687 (1938).

[8] *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 679; 591 NW2d 438 (1998).

regarding Ventura's outsourcing to Jenzano, Wheaton simply replied "Yes." From Wheaton's perspective the "major" factor that led to the DaimlerChrysler decision to discontinue the blanket order with Ventura was that Ventura "had no on-site facilities of their own." According Jenzano, this portion of Wheaton's deposition testimony demonstrated that it could not have caused Ventura future damages because DaimlerChrysler had already planned to eliminate the blanket order it had with Ventura.

Wheaton's testimony was also consistent with an internal DaimlerChrysler document that Jenzano produced, which referred to "'pass-through' suppliers," and stated:

> The Special Supplier Program is regarded as an economic program to benefit the financial success of the minority community, as well as Chrysler Corporation. As such, minority suppliers are evaluated based on the level of value they add to the process. Sourcing business to minority suppliers who act as "pass-through" suppliers (i.e., middlemen for non-minority suppliers) is not a practice that is compatible with the mission of the Program.
>
> During our review of minority suppliers engaged by Chrysler, we noted one instance of a minority supplier which appeared to act as a distributor of nonproductive material sourced solely from an established non-minority, first-tier, strategic supplier. The minority supplier purchased materials from the first-tier supplier for resale to Chrysler.[9]
>
> To ensure the creditability of the Special Supplier Program and safeguard against the risk that the Program is perceived as non-value added, the use of pass-through minority suppliers should be prohibited.

Under the headline "corrective action," the document indicated that DaimlerChrysler "will continue to monitor and review the commodities and services received from our minority suppliers and make regular site visits to ensure that pass-through suppliers are not being utilized." Similarly, in an internal memorandum Wheaton prepared regarding Ventura, she noted that DaimlerChrysler's policy was "typically" to cancel orders placed with pass-through suppliers and then to discontinue business with the supplier. Additionally, Wheaton indicated that DaimlerChrysler had set a schedule of business goals related to performing its own repairs for Ventura to complete by August 1, 1998. Ventura had obtained certification as a repair facility, but Wheaton did not believe that Ventura accomplished the goals set for it. In any event, as even Hasse recognized, DaimlerChrysler did not have a legal duty to continue to conduct business with Ventura.

At the same time, however, Wheaton resisted saying that outsourcing was the "dispositive" reason why DaimlerChrysler eliminated the blanket order. Though acknowledging DaimlerChrysler's written policy regarding pass-through businesses, Wheaton did not believe that the internal document stating DaimlerChrysler's policy against pass-through suppliers had been distributed to suppliers. Nor was she certain whether anyone from Ventura would have

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[9] There is no suggestion in the record that this reference is to Ventura.

ever had an opportunity to learn of the policy. Wheaton agreed that DaimlerChrysler did not have a "hard and fast rule" that required it to stop doing business with suppliers that worked in a pass-through capacity. Asked essentially the same question in another way, Wheaton agreed that DaimlerChrysler did not "have a policy against doing repair work by a third party." Wheaton added that Ventura's decision to send the pertron boards to Jenzano "was a factor" or "may have been a factor" in the decision to eliminate the blanket order.

Wheaton's deposition testimony clearly contains contradictory information. On one hand she pinpointed Ventura's failure to have its own repair facilities by August 1, 1998, as the primary reason why DaimlerChrysler canceled the blanket order. On the other hand, however, she acknowledged that learning about Ventura's subcontract with Jenzano was a factor or may have been a factor[10] in the decision to cancel its order, that Ventura had made progress in terms of the goals DaimlerChrysler had set for it, and that the policy against pass-through suppliers did not necessarily require canceling a supplier's order from DaimlerChrysler. Debra Hasse's deposition testimony, in which she recounted the spontaneous inquiries from O'Brien and Stacey regarding whether Ventura was still outsourcing to "Florida," meaning Jenzano, only underscores the connection between Jenzano's alleged breach of the contract and Ventura's alleged losses. There was also relatively close timing between Jenzano's decision to subcontract to ICR and DaimlerChrysler's decision to cancel the order. As Ventura points out, DaimlerChrysler knew that it did not have its own repair facilities around March 1998, but only decided to eliminate the blanket order *after* Jenzano sent the pertron boards to ICR, prompting Taddei to contact DaimlerChrysler. Thus, Jenzano's argument that there is no dispute concerning Ventura's lack of repair facilities as the cause for its losses fails.

Jenzano also claims that it could not be expected to foresee that subcontracting the pertron repair work to ICR would cause any harm to Ventura. Jenzano might not have known that the pertron boards belonged to DaimlerChrysler. However, it is reasonable to assume that Jenzano, as a business related to automobile manufacturing, was aware of the fierce competition within the industry. Hasse stated at her deposition that she did not tell Jenzano that it would be repairing DaimlerChrysler's pertron boards because that information was considered a trade secret. Jennetten gave a strikingly similar answer when asked why he never informed Ventura that Jenzano had sent the pertron boards to ICR, stating, "[I]t's common practice. We don't tell our customers how we do our business." There can be no doubt that surreptitiously bringing a third-party into a business transaction presents the real potential that the important secrets kept in the course of business between the original parties will be disclosed. That risk of alerting one of Ventura's competitors was even more strikingly obvious considering that the state of Michigan is widely associated with automobile manufacturers, Ventura is a Michigan company, and Jenzano sent the pertron boards to ICR – another Michigan company.

Moreover, Tipton reportedly insisted that Jenzano perform all the work on the pertron boards. This was enough to alert Jenzano that there was some risk of harm to Ventura from further subcontracting the work on the boards. By outsourcing the work to ICR without ever informing Ventura, Jenzano suggested by its action that it was willing to take the risk of breaching the agreement not to outsource, perhaps on the theory that Ventura would not discover

[10] Wheaton's exact words were, "It may have been a factor, but not a major factor."

the arrangement. If willing to avoid the terms of the agreement, Jenzano must also be willing to acknowledge that there is a dispute regarding the causal connection its actions have to Ventura's alleged injuries when that plan failed.

Finally, Jenzano flatly argues that all of Ventura's evidence is inadmissible hearsay barred by MRE 810(c). Consequently, Jenzano contends, the evidence on the record was not sufficient to oppose its motion for summary disposition. However, Jenzano fails to identify which statements are allegedly hearsay, to apply this rule of evidence to any particular statement, or to brief this argument at all. Instead, Jenzano leaves to us the task of examining each piece of evidence in the record against MRE 810(c). Under these circumstances, Jenzano has abandoned this argument.[11]

In sum, a question of disputed fact exists regarding causation that the parties must submit to the jury. This is not to say that we would view Ventura's evidence as particularly convincing if we were sitting as factfinders. However, the legal standard we apply to this issue requires us to view the evidence in the light most favorable to Ventura, while barring us from weighing the evidence Ventura provided against the evidence Jenzano submitted in support of the motion.[12] As a result, even though the trial court did not explicitly address this issue in its ruling, it did not commit error requiring reversal because the causation issue does not entitle Jenzano to summary disposition.[13]

V. Contract Claim: Damages

Jenzano argues that Ventura failed to provide any competent evidence that it had incurred damages and of the amount of those alleged damages. Setting aside the question of causation, the first part of this argument is fairly easy to resolve. Contrary to Jenzano's contention, both Debra and Mark Hasse provided deposition testimony that, first, they ceased to receive any additional pertron board repair work from DaimlerChrysler following Jenzano's alleged breach leading Taddei to call DaimlerChrysler and that, second, they had expected to receive more orders.

How to measure these damages is, as in most cases, a much more difficult problem to solve. In *Hoffman v Auto Club Ins Ass'n*,[14] this Court explained:

> A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be

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[11] See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

[12] See *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993).

[13] See *Detroit v Presti*, 240 Mich App 208, 214; 610 NW2d 261 (2000).

[14] *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55; 535 NW2d 529 (1995).

> ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate.[15]

The "'law does not require impossibilities' and does not require a higher degree of certainty than the nature of the case permits."[16] Accordingly, "when the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount."[17] Similarly, when damages concern the loss of future financial gain, this Court entrusts the calculation of damages to the "sound judgment of the trier of fact . . . ."[18] MCR 2.116(C)(10) itself acknowledges the fact-sensitive nature of determining damages, exempting "the amount of damages" from the issues for which there must be a dispute of material fact in order for a claim to be tried.

Jenzano's chief complaint about Ventura's evidence of the amount of its damages centers on Ventura's ability to project that it would continue to exist six years into the future. According to Jenzano, Ventura was a new company and had no reliable basis on which to conclude that it would remain in business, much less that it would receive pertron board orders from DaimlerChrysler. However, Debra Hasse testified at her deposition that Ventura was established as an ongoing business concern designed to remain in operation despite changeovers in personnel, ownership, or other events. Though DaimlerChrysler had not promised Ventura future orders, Debra Hasse recalled that at the beginning of 1998, O'Brien had informed her that she would be happy to learn of the large pertron board orders going to Ventura. At the time of the alleged breach in this case, Ventura had also been in business and working with DaimlerChrysler for about three years. That Ventura remained in business two years later, when the parties took the depositions in this case, only underscores that Ventura's projection that it would remain in business for six years was reasonably accurate.

Mark Hasse also explained how he arrived at both conservative and optimistic projections of the future profits Ventura would lose. He used real numbers culled from the orders DaimlerChrysler had placed with Ventura in 1998 to estimate future income and expenses. While there is likely to be variation in any business's profits over time, the jury is the proper body to determine whether Mark Hasse's estimates were accurate, or whether to award Ventura another sum, if any money at all. Consequently, the trial court did not err in denying the motion for summary disposition.

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[15] *Id*. at 108 (citations omitted).

[16] *Body Rustproofing, Inc v Michigan Bell Telephone Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986), quoting *Allison v Chandler*, 11 Mich 542, 554 (1863).

[17] *Body Rustproofing*, *supra*.

[18] *Henry v City of Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999), citing *Vink v House*, 336 Mich 292, 297; 57 NW2d 887 (1953).

VI. Fraud Claim

A. Restating A Claim

Jenzano argues that Ventura's claim for fraud or misrepresentation solely involves its alleged breach of contract, and is therefore merely a restatement of it contract claim. Jenzano claims that, without evidence that Jenzano had a separate duty that it breached by outsourcing the pertron board repairs to ICR, Ventura cannot press this separate tort claim. In its complaint, Ventura included a count for misrepresentation or fraud. Ventura asserted that Jenzano made material representations, including false statements to induce Ventura to enter into the contract to repair equipment; that Jenzano made statements to Ventura that they would not ship the equipment to a third party for repairs; that this misrepresentation was material; that this misrepresentation was false; and that when this representation was made, Jenzano knew it was false or made it recklessly without knowledge of its truth or falsity and in a business and professional capacity. In our view, these assertions are at least somewhat different from Ventura's breach of conflict claim. This difference was sufficient to establish the misrepresentation or fraud claim as a separate and independent cause of action. According to Tipton, Jennetten promised that Jenzano would perform all the repairs to the pertron boards itself, it had the capabilities to do so, and was actually in the business of performing those repairs. Tipton also claimed to have explained in no uncertain terms to Jennetten that Jenzano had to perform the repairs, or Ventura would send its work elsewhere. While Jennetten denies making any promises to Tipton, this simply underscores that there was a dispute of fact concerning whether Jenzano promised to do this work in order to receive Ventura's order without intending to perform the work itself.

B. An Actionable Tort

That Ventura made a separate and distinguishable tort claim does not, in of itself, automatically mean that this claim was actionable. In Michigan, there are essentially three theories to establish fraud: (1) traditional common-law fraud, (2) innocent misrepresentation, and (3) silent fraud.[19] In its brief, Ventura does not refer to traditional common-law fraud or innocent fraud, but does refer to silent fraud. We assume that it is proceeding on this theory. Silent fraud is "fraud by nondisclosure or fraudulent concealment" and "is a commonly asserted, but frequently misunderstood doctrine."[20] "Michigan courts have recognized that silence cannot constitute actionable fraud *unless* it occurred under circumstances where there was a legal duty of disclosure."[21] "Accordingly, the touchstone of liability for misdirection or 'silent fraud' is that *some* form of representation has been made and that it was or proved to be false."[22] United States "Supreme Court precedent clearly indicates that, in order to prove a claim of silent fraud, a

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[19] See *M&D, Inc v McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998), (*MD II*) citing with approval then-Judge Young's discussion of fraud in *M&D, Inc v McConkey*, 226 Mich App 801, 806-809; 573 NW2d 281 (1997).

[20] *MD II, supra* at 28.

[21] *Id*. at 29.

[22] *Id.* at 30.

plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure."[23] There are thus two prongs to a silent fraud claim: first, a showing of some type of representation that was false or misleading and, second, a legal or equitable duty of disclosure.

Here, Ventura asserted that Jenzano made statements to it that Jenzano would not ship the equipment to a third party for repairs, that this misrepresentation was false, and that Jenzano knew it was false. Rather clearly, this assertion, at the summary disposition stage,[24] satisfies the first prong of the two-pronged silent fraud doctrine. Whether it satisfies the second prong is a closer question but, again, we note that Tipton claimed to have explained to Jennetten that Jenzano had to perform the repairs, or Ventura would send its work elsewhere. Under such circumstances, we think it at least arguable that this explanation triggered a legal or equitable duty by Jenzano to disclose that it would, in fact, send the work elsewhere.

Jenzano, however, argues that future promises do not constitute actionable fraudulent conduct. There is case law holding that "[f]uture promises are contractual and do not constitute fraud."[25] There is, however, a "bad faith" exception to the general rule.[26] This exception holds, generally, that "a fraudulent misrepresentation may by based upon a promise made in bad faith without intention of performance."[27] The evidence of fraudulent intent, to come within this exception "must relate to conduct of the actor 'at the very time of making the representations, or almost immediately thereafter.'"[28] As Ventura notes, Jenzano, within days after receiving its first shipment of pertron boards, shipped them to ICR to do the actual work. To the extent, therefore, that Ventura asserted a misrepresentation about a future event, we conclude that this assertion falls within the bad faith exception to the general rule that future promises are contractual and do not constitute fraud.

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

/s/ William C. Whitbeck
/s/ Patrick M. Meter

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[23] *Id.* at 31, citing *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 125, 127; 313 NW2d 77 (1981).

[24] Obviously, we express no opinion concerning whether Ventura can prove this claim at trial.

[25] *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

[26] *Id.* at 337, citing *Crowley v Langdon*, 127 Mich 51, 58-59; 86 NW 391 (1901).

[27] *Hi-Way Motor, supra* at 337-338.

[28] *Id.* at 338-339, quoting *Danto v Charles C Robbins, Inc*, 250 Mich 419, 425; 230 NW 188 (1930).