

STATE OF MICHIGAN
COURT OF APPEALS

YACOUB E. CHAHINE,

Plaintiff/Counterdefendant-
Appellant,

v

NATIONWIDE MARKET, INC., and JALIL
SAAD,

Defendants/Counterplaintiffs-
Appellees.

UNPUBLISHED

January 20, 2004

No. 244254

Wayne Circuit Court

LC No. 00-013048-CK

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals as of right from a judgment, following a bench trial, awarding defendants \$47,014.78 on their counterclaim. Plaintiff's motion for a new trial was denied. We affirm in part, vacate in part, and remand for recalculation of damages consistent with this opinion.

Plaintiff first argues that the trial court erred in not permitting his attorney to withdraw during mid-trial. We disagree. We review a trial court's decision on a motion to withdraw as counsel for an abuse of discretion. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999).

A party has a constitutional right to represent him or herself, even in civil cases. See Const 1963, art 1, § 13; see also *Hempel v Bay Circuit Judge*, 222 Mich 553, 559; 193 NW 281 (1923). Before trial begins, this right is nearly unqualified if unequivocally asserted. See *People v Payne*, 27 Mich App 133, 135-136; 183 NW2d 371 (1970). However, even if unequivocally asserted, "the right to discharge counsel after commencement of the trial is but a qualified right." See *People v Armstrong*, 28 Mich App 387, 389-390; 184 NW2d 531 (1970); see also *People v Henley*, 382 Mich 143, 146-149; 169 NW2d 299 (1969) (trial court did not err in refusing to allow a disruptive defendant to fire his attorney "after trial was well under way"). As explained in both *Armstrong*, *supra* at 390, and *Payne*, *supra* at 136, each quoting *United States ex rel Maldonado v Denno*, 348 F2d 12, 15 (CA 2, 1965):

Once the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is

sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.

After reviewing the record, we conclude that plaintiff has failed to show that he was prejudiced by not being allowed to discharge his attorney in mid-trial and represent himself, let alone that any "prejudice to the legitimate interests . . . overbalances the potential disruption of proceedings already in progress." See *Maldonado, supra* at 15. In particular, plaintiff's request was made shortly before the conclusion of trial, he failed to explain what additional evidence he wished to present or how it might change the outcome, nor did he explain why he should be allowed to introduce it despite the earlier cutoff date set by the trial court. The trial court did not abuse its discretion in denying plaintiff's motion to withdraw.

Next, plaintiff argues that he is entitled to a new trial because his right to a trial by jury was waived without his consent. We disagree.

The right to trial by jury "shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Const 1963, art 1, § 14. MCR 2.508(B)(1) provides that a party may demand a trial by jury by filing a written demand for a jury trial and paying the required jury fee. A party that fails to file a written demand or pay the required fee "waives trial by jury." MCR 2.508(D)(1). Here, it is undisputed that plaintiff never filed a written demand for a jury trial or paid the required jury fee. Thus, plaintiff's right to trial by jury was clearly waived by counsel's failure to file a jury demand. Although a trial court has discretion to order a trial by jury in the absence of a demand, MCR 2.509(B); see also *Adamski v Cole*, 197 Mich App 124, 130; 494 NW2d 794 (1992), plaintiff does not argue that the court abused its discretion in failing to sua sponte order a jury trial. Accordingly, we find no error in this regard.

Next, plaintiff argues that the trial court clearly erred when it assessed a \$41,116 expense amount against defendant company.¹ We agree.

Plaintiff raised this issue in his motion for a new trial, which was denied. A new trial may be granted for "[a] verdict clearly or grossly inadequate or excessive," "[a] verdict or decision against the great weight of the evidence or contrary to law," and an "[e]rror of law occurring in the proceedings, or mistake of fact by the court." MCR 2.611(A)(1)(d), (e), (g).

A trial court's findings of fact are reviewed for clear error. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). Regard is to be given to the trial court's

¹ At trial, the parties stipulated to the company's income. Thus, to the extent that plaintiff is arguing that the corporation's income should have been higher, the issue has been waived and, therefore, is not susceptible to review on appeal. See *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); see also *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000). A party may not seek redress on appeal by taking a position contrary to that argued in the trial court. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

special opportunity to evaluate the credibility of witnesses who appeared before it. *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made. *Arco Inds Corp v American Motorists Ins Co*, 448 Mich 395, 410-411; 531 NW2d 168 (1995), overruled in part on other grounds in *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 116-117, n 8; 595 NW2d 832 (1999). A trial court's decision granting or denying a motion for a new trial will not be reversed absent a palpable abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997).

At trial, the parties agreed that Chtaura Foods, LLC, a New York company, ordered ninety drums of olive oil from defendant company, and that defendant Saad arranged for the oil to be shipped directly from Syria to Van Rex Gourmet Foods, Inc., Chtaura Foods' facility in Long Beach, California. The product was never in Detroit and was never bottled, packaged or handled by defendant company. Defendant Saad paid \$23,940 for the shipment and received \$41,116 from Chtaura Foods. The parties agreed below that the documents pertaining to this shipment to California appeared in two places in the parties' exhibit book, Joint Trial Exhibit A, to wit: pages 00171-00175, and pages 00201-00211.²

Before trial, the parties filed a joint trial brief reflecting a disputed olive oil expense in the amount of \$23,940, as shown in invoice number 0153929-2. They did not indicate that a \$41,116 expense amount was in dispute. When the attorneys prepared their joint verdict form, approximately three months after trial, they properly used the trial brief's original disputed expense entry as the basis for ¶ 2(p)(iii)(c), which relates to pages 00171-00183 (\$23,940). However, they apparently overlooked that pages 00201-00211 referred to the same shipment and *added* a disputed expense entry, ¶ 2(p)(iii)(d), in the amount of \$41,116—the amount paid by the buyer. The trial court apparently relied on this erroneous form as the basis for its verdict, and a judgment was accordingly prepared, erroneously assessing both amounts as expenses, \$23,940 and \$41,116. This resulted in the company being assessed substantially higher expenses than those actually incurred. We therefore conclude that the trial court clearly erred in assessing the \$41,116 amount as an expense. Accordingly, we vacate the judgment in part to delete this expense amount and remand for recalculation of damages.

Next, plaintiff argues that the trial court clearly erred in failing to credit him with the cost or fair market value of inventory and equipment remaining in the company's possession on the date of his discharge. We disagree.

There was no evidence concerning the amount or value of the inventory and equipment remaining in defendants' possession, or whether it was sound accounting practice to consider all or part of its cost, or its fair market value, in determining defendant company's profits or losses during the relevant time period. Therefore, there was no evidentiary basis for the computation requested by plaintiff. Moreover, under the terms of the contract between the parties, plaintiff

² It is undisputed that page 00206 pertains to an unrelated shipment of empty glass bottles.

was not an owner of the business and was only entitled to a percentage of the profits, or was responsible for a percentage of any loss, not a percentage of the value of the business. Consequently, plaintiff has no claim against the equipment and inventory retained by the business. Thus, we reject plaintiff's argument that the trial court clearly erred in its determination of damages in this regard.

Lastly, plaintiff argues that the trial court abused its discretion by allowing legal fees incurred by defendant company after the date of plaintiff's discharge to be deducted as an expense. We agree. A trial court's decision to award attorney fees is ordinarily reviewed for an abuse of discretion, but pertinent questions of law are reviewed de novo. *HA Smith Lumber & Hardware Co v Decina*, 258 Mich App 419, 429; 670 NW2d 729 (2003).

"[A]ttorney fees generally are not recoverable in this jurisdiction in the absence of a statute or a court rule that expressly authorizes such an award." *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999); see also *HA Smith, supra* at 429. In this case, defendants do not identify any statute or court rule authorizing an award of attorney fees as an element of damages in an ordinary breach of contract action. Additionally defendants fail to explain why attorney fees incurred after plaintiff's December 10, 1999, discharge should be considered in light of the trial court's earlier ruling that only earnings and expenses incurred by the company up to the date of plaintiff's discharge would be considered at trial.

Accordingly, we conclude that the trial court erred in deducting as an expense the \$18,121.75 in legal fees that defendants incurred after the date of plaintiff's discharge. We therefore vacate the judgment in part to also delete this expense amount and remand for recalculation of damages.

Affirmed in part, vacated in part, and remanded for recalculation of damages. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage