STATE OF MICHIGAN

COURT OF APPEALS

THOMAS C. LEDUC and MARIA LEDUC, Plaintiffs/Counter Defendants-Appellants, v DEAN ROTAR, Defendant/Counter Plaintiff-Appellee.	UNPUBLISHED February 17, 2004 Nos. 244037 Wayne Circuit Court LC No. 00-013941-CK
THOMAS C. LEDUC and MARIA LEDUC, Plaintiffs/Counter Defendants-Appellants, v DEAN ROTAR, Defendant/Counter Plaintiff-Appellee.	No. 244567 Wayne Circuit Court LC No. 00-013941-CK

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging a jury verdict of no cause of action in defendant's favor, as well as the trial court's "judgment" awarding defendant case evaluation sanctions pursuant to MCR 2.403(O). We affirm in part, reverse in part, and remand for further proceedings.

I. Facts and Proceedings

Plaintiffs hired defendant, a longtime friend of plaintiff Thomas Leduc, to help with certain aspects of a major home expansion and renovation project. Defendant was to perform shingling and siding work on the addition, help plaintiffs convert the original first-floor space to a master bedroom and bathroom, and install two furnaces and air conditioners. Plaintiffs planned

to pay defendant for his shingling, siding, and heating and cooling work, but the parties understood that defendant would help with the other work without remuneration. Plaintiffs and defendant agreed that plaintiffs would pay defendant $3,000 for each furnace/air conditioner package, and $1,500 for installation of each package, for a total of $9,000.

Defendant abandoned his work on the project before it was completed. At the time he left, he had not completed the shingling and siding, the first-floor conversions were incomplete, and only one furnace had been partially installed. Plaintiffs brought this action, asserting claims for fraudulent misrepresentation, innocent misrepresentation, conversion, breach of contract, negligence, and violations of the Michigan Consumer Protection Act ("MCPA"), MCL 445.901 *et seq*. The jury returned a verdict of no cause of action in defendant's favor.

II. Docket No 244567

A. Jury Instructions

Plaintiffs contend that the trial court erred in refusing to instruct the jury on their innocent misrepresentation, conversion, and MCPA claims, and in declining the jury's request for re-instruction on fraud, contract, and negligence. We find merit in this argument with respect to some of the MCPA claims.

We review claims of instructional error de novo, examining the court's instructions as a whole to determine whether it committed error requiring reversal. *Burnett v Bruner*, 247 Mich App 365, 375; 636 NW2d 773 (2001). The jury instructions should include all elements of the plaintiff's claim, and should not omit material issues, defenses or theories supported by the evidence. *Case v Consumers Power Co*, 463 Mich 1, 10-11; 615 NW2d 17 (2000). However, it is error to instruct a jury on a matter not sustained by the evidence or the pleadings. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997); *Novi v Woodson*, 251 Mich App 614, 631; 651 NW2d 448 (2002). Reversal is warranted only where failure to reverse would be inconsistent with substantial justice. MCR 2.613(A); *Burnett*, *supra*.

1. Innocent Misrepresentation

The trial court did not err in refusing to instruct on innocent misrepresentation and conversion because plaintiffs failed to present evidence in support of these theories.

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). The innocent misrepresentation rule differs from fraudulent misrepresentation in that there is no requirement that the defendant act with a fraudulent purpose or intent for the plaintiff to act upon the misrepresentation, but there are additional requirements that the unintentionally false representation be made in connection with the making of a contract and that the plaintiff's resulting injury inure to the benefit of the party making the misrepresentation. *Id*. Thus, the party alleging innocent misrepresentation need not prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. *Id*. at 117. As with mutual mistake and intentional fraud, the

misrepresentation must relate to a past or existing fact and not be promissory in nature. *Alibri v Detroit/Wayne Co Stadium Authority*, 254 Mich App 545, 564; 658 NW2d 167 (2002).

In their appellate brief, plaintiffs do not identify what representations defendant allegedly made that could constitute innocent misrepresentations and fail to make any other argument in support of an innocent misrepresentation instruction. Because a party "may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim," this issue is waived. See *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000). To the extent plaintiffs suggest in their brief that defendant made representations that he would perform certain work which he never completed, such statements are clearly promissory in nature and, therefore, cannot satisfy the requirement that the alleged misrepresentation relate to a past or existing fact "and not be promissory in nature." See *Alibri, supra*. The trial court did not err in failing to instruct on this theory.

2. Conversion

Plaintiffs argue that they were entitled to a conversion instruction under MCL 600.2919a, because the jury could have found that defendant acquired a furnace with their money and then converted it. We disagree. There was no evidence that defendant acquired a furnace. Plaintiffs admitted that they did not know if he did, and defendant denied it. Defendant wrote plaintiffs a receipt showing that he accepted money for a second furnace, but there was no evidence that he ever purchased a furnace with the money. The trial court did not err in failing to instruct on conversion.

3. Consumer Protection Act

The trial court apparently denied plaintiffs' requested MCPA instructions based on defendant's argument that he was not in "trade or commerce" as required by the statute. We disagree. The term "trade or commerce" is defined in MCL 445.902(d):

> "Trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity. "Trade or commerce" does not include the purchase or sale of a franchise but does include pyramid and chain promotions . . . .

In *Forton v Laszar*, 239 Mich App 711, 714; 609 NW2d 850 (2000), this Court considered whether a licensed residential builder was subject to liability under the MCPA. This Court noted that the MCPA's broad definition of "trade or commerce" neither expressly includes nor excludes residential builders, and commented that the MCPA is "a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." *Id*. at 715. The Court reasoned:

> In construing a statute, the courts must look to the object of the statute and the harm it is designed to remedy and then apply a reasonable construction that best accomplishes the purpose of the statute. *Marquis v Hartford Accident &*

> *Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994). Given that the clear legislative intent of the MCPA is to protect consumers in the purchase of goods and services, we conclude that the definition of "trade or commerce" includes residential builders who construct and sell homes for personal family use. Thus, residential builders are subject to claims of unfair or deceptive trade practices under the MCPA. [*Id*.]

Applying this analysis to the facts of this case, we conclude that defendant was subject to the MCPA. Contrary to defendant's argument below, that he was not in trade because he was just "a friend of theirs who happened to have a business card because he was doing some side jobs," the evidence was sufficient to establish that defendant conducted a business of providing a service for personal, family or household purposes. The evidence showed that defendant had conducted a side business known as All-Purpose Construction for four or five years. He had a business card which stated that he did "siding, roofing, doors, windows, finished basements, rough and finished construction." A jury could reasonably infer that because defendant used a business card to present himself as a builder for hire, and because he admitted running the business for five years, he was not merely a friend who agreed to help plaintiffs for compensation, but a person who solicited jobs for profit. Although All-Purpose Construction was not defendant's primary occupation, there is nothing in the statute that excludes from the "trade or commerce" definition persons who run consumer-oriented businesses in addition to working another regular full-time job. In light of the Court's broad reading of the MCPA in *Forton*, we conclude that the trial court erred in deciding that defendant was outside the scope of the statute.[1] We also reject defendant's argument that plaintiffs were not consumers in this case, but rather general contractors subcontracting out jobs. However similar their role was to that of a general contractor, plaintiffs were indisputably buying defendant's services for their own family and household purposes.

We conclude that the trial court's error was harmless, however, with respect to plaintiffs' MCPA claims under subsections (s), (bb) and (cc) of MCL 445.903(1), because the evidence did not support those claims. Those subsections all pertain to misrepresentations or nondisclosures of fact that deceive or mislead the consumer. Defendant's representation that he would buy a furnace, when he did not, is not a misrepresentation of *fact*, but failure to fulfill a promise of future performance. His alleged representation that he was properly constructing the cathedral ceiling was an expression of opinion as to construction standards. Although plaintiffs' expert witness, Bryan Ritter, testified that the ceiling was constructed poorly, this establishes only that defendant's work was shoddy by Ritter's standards. Plaintiffs did not offer evidence that defendant's work was so inherently inadequate that he misrepresented a fact when he claimed he

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[1] Our conclusion is not inconsistent with this Court's decision in *Campbell v Sullins*, 257 Mich App 179, 193-194; 667 NW2d 887 (2003), wherein it was held that the defendant "backyard mechanic" who sporadically worked on the plaintiff's cars for nominal payment was not running an automobile repair "place of business" for purposes of the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq*. Unlike defendant in the instant case, who admitted having an unlicensed construction business for four or five years, the defendant in *Campbell* merely did occasional work on the plaintiff's cars, without soliciting business. *Campbell*, *supra* at 189-190.

was doing it properly. Similarly, apart from the furnace agreement, subsection (y) (failure to provide promised benefits) was not satisfied because there was no testimony that defendant ever promised any particular degree of quality in his work.

However, the trial court's error was not harmless as to subsections (u) (failure to return payment after agreement is terminated) and (y) (failure to provide promised benefits as they relate to the furnace agreement) of MCL 445.903(1). Defendant admitted that he never acquired or installed the second furnace or either air conditioner, and that he failed to return plaintiffs' furnace payment after the relationship ended. These facts are sufficient to establish illegal practices under the MCPA. Accordingly, we reverse the judgment of no cause of action and remand for further proceedings on plaintiffs' MCPA claims under subsections MCL 445.903(1)(u) and (y).

4. Jury's Request for Supplemental Instructions

A trial court has the discretion to repeat certain instructions on request of the jury. MCR 2.516(B)(4); *VanBelkum v Ford*, 183 Mich App 272, 274; 454 NW2d 119 (1989). Here, the trial court did not abuse its discretion in declining the jury's request. The general nature of the jury's request suggested that there was no confusion over any particular aspect of the instructions, but merely a general interest in reviewing the information already received.

B. Great Weight of the Evidence

Plaintiffs maintain that the trial court erred in denying their motion for a new trial on the ground that the jury's verdict of no cause of action was against the great weight of the evidence. A new trial may be granted on all or some of the issues when the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). When a party claims that a jury verdict is against the great weight of the evidence, this Court may overturn the verdict only when it is manifestly against the clear weight of the evidence. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). The jury's verdict should not be set aside if there is competent evidence to support it. *Id*. A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *Id*. This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. *Campbell v Sullins*, 257 Mich App 179, 193-194; 667 NW2d 887 (2003).

1. Negligence

Plaintiffs argue that the great weight of the evidence favored their negligence claim because they offered undisputed expert testimony that defendant improperly installed siding, failed to complete siding, constructed improper framing, and failed to ventilate the roof in violation of the building code. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Plaintiffs' evidence of unsatisfactory performance does not conclusively establish negligence. Defendant testified that he did the best he could with the inadequate materials plaintiffs provided. A jury could have found that defendant did not breach a duty, or that his performance was not the cause of the unsatisfactory result.

2. Fraudulent Misrepresentation

To establish a prima facie claim of fraudulent misrepresentation, a plaintiff must prove that (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth or falsity, and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage. *Campbell*, *supra* at 195. An action for fraudulent misrepresentation must be predicated upon a statement of past or existing fact. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993), mod in part by *Patterson v Kleiman*, 447 Mich 429, 433-434 (1994). A mere broken promise does not constitute fraud, nor is it evidence of fraud. *Id*.

Defendant's failure to acquire and install the air conditioners and second furnace, and his failure to complete other tasks, cannot constitute fraud because they involve broken promises, not misrepresentation of past or existing fact. See *Marrero*, *supra*. With respect to defendant's alleged representations that he could perform certain tasks, there is no evidence that defendant represented any particular level of skill or experience. Plaintiffs testified that they believed defendant was capable of performing the work, but they never testified to any statements or representations that defendant made concerning his ability. Consequently, the jury's verdict was not against the great weight of the evidence.

3. Breach of Contract

Plaintiffs argue that the jury's verdict was contrary to the great weight of the evidence because they offered undisputed evidence that defendant failed to perform or complete several tasks that he agreed to do. A necessary threshold issue, however, is whether defendant was contractually bound to perform these tasks.

Contracts are created by parties and require mutual assent on all essential terms. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-373; 666 NW2d 251 (2003); *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). Mutuality of agreement, or a meeting of the minds, means that "[t]here must be a meeting of the minds on all the material facts in order to form a valid agreement, and whether such a meeting of the minds occurred is judged by an objective standard, looking to the express words of the parties and their visible acts." *Sanchez v Eagle Alloy, Inc*, 254 Mich App 651, 665-666; 658 NW2d 510 (2003), quoting *Groulx v Carlson*, 176 Mich App 484, 491; 440 NW2d 644 (1989). A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 317, 575 NW2d 324 (1998), mod on other grounds by *Harts v Farmers Ins Exchange*, 461 Mich 1, 10-11 (1999).

We find no definitive objective evidence that the parties mutually agreed to bind themselves to defendant's July 1997 writing. Although plaintiffs contended that they agreed to pay defendant $7,000 if he completed the tasks listed in the writing, defendant contended that the writing was just a summary showing work already done, payments already received, work yet to be completed, and anticipated future costs. Plaintiff Thomas Leduc also described the writing as a "summary." Accordingly, the jury could have found that the writing was just a plan for future

work, and not a mutual agreement in which the parties bound themselves to the terms of the writing.

One aspect of the jury's verdict is, however, against the great weight of the evidence. There was undisputed evidence that the parties did enter into a contract that defendant would install both furnaces and both air conditioners, at a cost of $3,000 for each furnace/air conditioner package, and $1,500 for installation of each package. Defendant admitted that he agreed to these terms. There was also undisputed evidence that plaintiffs paid the entire materials and labor cost for the first set of units (minus $100 for Thomas' installation of pipes), before the furnace installation was completed and before the air conditioner was purchased. And, there was undisputed evidence that defendant accepted $3,000 in March 1997 for the purchase of the second furnace and air conditioner, but never obtained any materials or did any work on the second installation, and refused plaintiffs' request for a refund. Plaintiffs also submitted undisputed evidence that they paid another contractor $8,400 to complete the heating and cooling work. Consequently, the trial court abused its discretion in denying a new trial on the breach of contract claim in relation to the furnace and air conditioner contract. Accordingly, we remand for a new trial with respect to this issue.

III. Conclusion

We conclude that plaintiffs presented undisputed evidence that defendant failed to acquire and install the second furnace and both air conditioners after plaintiffs paid for all the units and paid defendant the entire installation cost of the first package. In light of this undisputed evidence, the trial court erred in refusing to give appropriate MCPA instructions under MCL 445.903(1)(u) and (y), and the jury's verdict of no cause of action on this portion of plaintiffs' breach of contract claim is also against the great weight of the evidence. We therefore reverse the trial court's judgment in part as it pertains to these claims, and remand for further proceedings consistent with this opinion.

IV. Docket No. 244037

In light of our decision to remand for a new trial on some of plaintiffs' claims, defendant is no longer entitled to case evaluation sanctions under MCR 2.403(O). Therefore, it is unnecessary to consider plaintiffs' issue challenging the trial court's decision to award defendant case evaluation sanctions in the form of a judgment.

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

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra