STATE OF MICHIGAN

COURT OF APPEALS

JAMES D. ELDER, JR.,

Plaintiff/Counter-Defendant-Appellant,

v

MIKE DORIAN FORD, INC.,

Defendant/Counter-Plaintiff-Appellee,

and

MICHAEL V. DORIAN, SR. and MICHAEL V. DORIAN, JR.,

Defendants-Appellees.

UNPUBLISHED
November 16, 2004

No. 244530
Oakland Circuit Court
LC No. 01-030534-CK

JAMES D. ELDER, JR.,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v

MIKE DORIAN FORD, INC.,

Defendant/Counter-Plaintiff-Appellant/Cross-Appellee,

and

MICHAEL DORIAN, SR., and MICHAEL DORIAN, JR.,

Defendants.

No. 244798
Oakland Circuit Court
LC No. 01-030534-CK

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

The parties[1] appeal as of right from a final judgment for plaintiff entered after a jury trial. Plaintiff James D. Elder, Jr., alleged in a lawsuit against defendants Mike Dorian Ford, Inc. (Dorian Ford), Michael V. Dorian, Sr. (Dorian Sr.), and Michael V. Dorian, Jr. (Dorian Jr.), that defendants unlawfully breached an employment contract by firing him without just cause. Plaintiff sought post-termination damages as well as damages for certain acts or omissions by defendants that took place before the termination. Ultimately, plaintiff obtained over $8,000,000 in damages, of which $7,742,755 represented the jury's determination of plaintiff's lost future earnings. Defendants contest the jury verdict and challenge certain rulings made by the trial court. In his cross-appeal and in a separately filed appeal, plaintiff similarly challenges certain rulings made by the trial court. We affirm.

Plaintiff began working as the general manager for Dorian Ford, an automobile dealership, in 1984. He and Dorian Sr., the dealership's president, signed an employment agreement providing that plaintiff would be paid, among other things, twenty-five percent of the dealership's gross operating profits. The agreement stated that it would continue from year to year and would be automatically renewed. It stated that it could be terminated (1) by the mutual consent of the parties or (2) if, in any one year, the gross profits of the dealership fell below $150,000. During the course of plaintiff's employment with Dorian Ford, the gross profits began to far exceed $150,000. As noted by defendants in their appellate brief, "[o]ver the next seventeen years [following plaintiff's hiring date], Dorian Ford's annual profits increased to average more than $4 million."

Problems with regard to plaintiff's employment began to develop in 2000. Defendants contend that plaintiff began to take too many vacation days and began ignoring his duties, while plaintiff contends that defendants began trying to "push him out" so that Dorian Jr. could become the new general manager of Dorian Ford. In 2001, plaintiff filed a lawsuit alleging, inter alia, that defendants had been exaggerating the operating expenses of Dorian Ford in order to diminish its reported gross profits and thus the amount of money plaintiff would receive under the employment agreement. Subsequently, on April 23, 2001, defendants terminated plaintiff's employment, and plaintiff eventually amended his complaint to allege a breach of the employment agreement.

Before trial began, the trial court granted summary disposition to plaintiff with respect to some of his claims, awarding him $148,569.05. The case then proceeded to a two-part trial (a liability phase and a damages phase), and plaintiff was awarded $7,742,755 by the jury for lost

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[1] While defendants Michael V. Dorian, Sr., and Michael V. Dorian, Jr., are not listed as appellants in Docket No. 244798, they were parties during the relevant proceedings and rulings below and are listed as appellees in Docket No. 244530. For consistency, in this opinion we will refer to defendant Mike Dorian Ford, Inc., and to the two individual defendants as "defendants," collectively.

future earnings. Plaintiff also received $433,928 for certain pre-termination damages; the parties stipulated, after the liability phase of the trial, that this amount represented the money owed with respect to the jury's conclusion that defendants had committed certain pre-termination wrongs.

On appeal, defendants first argue that the trial court should have granted their motion for summary disposition, their motion for a directed verdict, or their motion for a judgment notwithstanding the verdict (JNOV) because the employment agreement provided for at-will employment at a matter of law. Defendants contend that, at the very least, the jury should have been allowed to decide whether the employment agreement provided for at-will employment. The trial court's decision with regard to each of the forgoing motions is reviewed de novo. *Graves v Warner Bros*, 253 Mich App 486, 491-492; 656 NW2d 195 (2002).

We conclude that defendants are not entitled to appellate relief because they essentially waived the argument concerning at-will employment.

In their motion for partial summary disposition with regard to plaintiff's breach of contract claim, defendants discussed the issue of at-will employment in general terms, but they never made the argument that plaintiff was an at-will employee. Indeed, after discussing the at-will issues, defendants made the concluding statement that "a termination of Elder's employment for just cause does not constitute a breach of the Agreement."

At the motion hearing, defendants' attorney stated that "Mr. Elder was an at will employee . . . ." He then admitted, when prompted by the court, that defendants had not made this argument in their summary disposition brief. In its ruling, the court stated:

> At oral argument, Defendants argued that Plaintiff was an at will employee. This argument was contradictory to Defendants' initial argument that there was no genuine issue of material fact that Plaintiff was discharged based on just cause, as set forth in Defendants' motion and attached documents. Accordingly, the Court declines to rule on Defendant's [sic] latest and untimely argument. The Court will address Defendant's argument regarding just cause employment only.

The court then stated that "there are genuine issues of material fact as to whether Plaintiff's employment was terminated for just cause."

At trial, after plaintiff finished presenting his evidence, defendants moved for a directed verdict, stating, in part, that the court should "rule as a matter of law that this was a terminable at will contract[.]" In ruling on the motion, the court stated, in part:

> Viewing the evidence in a light most favorable to the plaintiff, he engaged in pre-employment negotiations regarding job security and drafted an agreement to that effect, which the parties signed. Moreover, he was never given any material either at the time of hiring or subsequently, indicating that his employment was at will. Reasonable jurors could find that the plaintiff overcomes the presumption of employment at will . . . .

> Even if the plaintiff's evidence does not overcome the presumption of employment at will, the Court finds that the plaintiff has established a just cause contract on the public policy-based legitimate expectation theory . . . .

Then, during his closing argument, defendants' attorney stated:

> . . . in your absence the Court has ruled the contract does not give him lifetime employment, it merely gives him what is known as a just cause employment relationship. Which means that his employer, Dorian Ford, could terminate him for just, good or just cause.

Subsequently, after reading the jury instructions to the jury, the court had the parties examine and initial the verdict form. The court then stated, "The record should note both parties approved the verdict form, subject to otherwise stated - - ," at which point plaintiff's attorney interjected, "Subject to what's already stated." Defendants' attorneys said nothing at this point. The verdict form was submitted to the jury, and the first question asked, "Did Dorian Ford breach its contract with Plaintiff, James Elder, by terminating his employment without good or just cause for which Plaintiff has suffered damages?"

After trial, in ruling on defendants' argument regarding at-will employment made in their motion for a JNOV, the trial court ruled that "[r]easonable jurors could find that Plaintiff's evidence overcomes the presumption of employment at will" and that "the facts presented preclude judgment for Defendant as a matter of law."

Viewing the facts as a whole, we conclude that defendants did not sufficiently pursue their claim concerning at-will employment. First, they failed to make the pertinent argument in their written motion for summary disposition or in their accompanying brief. Therefore, the court essentially concluded that defendants waived the argument, and defendants do not appeal this ruling by the court. Subsequently, the court did consider the at-will argument, in conjunction with defendants' directed verdict motion. Its ruling with respect to the directed verdict motion was ambiguous, however, because it found that "plaintiff has established a just cause contract on the public policy-based legitimate expectations theory" while at the same time finding that "[r]easonable jurors could find that the plaintiff overcomes the presumption of employment at will." It simply was not clear whether the court had ruled (1) that the issue of at-will employment would be determined by the jury or (2) that plaintiff had established a just-cause employment contract *as a matter of law*.[2] Despite this ambiguity, defendants' attorney

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[2] We note that plaintiff's attorney stated the following immediately before closing arguments:

> I should probably indicate for the record that we do object that the [c]ourt found as a matter of law that it's a just cause contract. We think that . . . the case should be submitted to the jury on the grounds that there are only two bases for the termination under the agreement or left to the jury --

(continued…)

stated during closing arguments that "the Court has ruled the contract . . . gives him what is known as a just cause employment relationship." Moreover, and significantly, defendants failed to object to the verdict form, which did not include a separate question concerning at-will employment but instead *assumed* the existence of a just-cause employment relationship.

In response to plaintiff's argument that defendants acquiesced in the verdict form by not objecting to it, defendants refer to the proposed jury instructions it submitted to the court; these instructions included an instruction concerning whether an employment contact provides for just-cause or at-will employment. We cannot conclude that the submission of a requested instruction concerning the at-will versus just-cause issue was equivalent to raising an explicit objection to the verdict form.

Finally, we note that plaintiff argued, in a motion for summary disposition, that the employment agreement provided for lifetime employment, regardless of his job performance, as long as the yearly gross profits of Dorian Ford stayed above $150,000. In response to this motion, Dorian Sr. submitted an affidavit in which he stated that "I never agreed that [plaintiff] would only be terminated by our mutual consent or if gross profits fell below $150,000. Rather, I always understood that I had the right to terminate Elder if he was not doing his job or was otherwise not acting in the best interests of the dealership." The trial court agreed with Dorian Sr. and denied plaintiff's motion for summary disposition. Accordingly, defendants successfully made the argument, in essence, that the employment agreement provided for just-cause termination. As noted in *Opland v Kiesgan,* 234 Mich App 352, 362; 594 NW2d 505 (1999), a party who successfully and unequivocally asserts a position during judicial proceedings cannot later assert an inconsistent position. While we do not rest our decision solely on this judicial estoppel doctrine, it nonetheless lends support to the notion that defendants did not properly pursue their claim concerning at-will employment.

We conclude that defendants' actions throughout the proceedings as a whole, and particularly their failure to object to the verdict form, amounted to a waiver of the issue concerning at-will versus just-cause employment. We therefore find no basis for reversal.

Defendants contend that if the employment agreement provided for just-cause termination, then "the Agreement must be construed to have a definite duration of one year, as contracts of indefinite [duration] are presumed, at law, to be at will." This contention is without merit. While it is true that employment contracts for an indefinite duration are presumptively terminable at the will of either party, see *Lytle v Malady,* 458 Mich 153, 163-164; 628 NW2d

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The attorney continued, "It should have been left to the jury as to whether they could find an oral modification to that." The court responded by stating that "[w]e have gone over this" and that the issue was on the record "[a]d nauseum." We conclude that these statements by plaintiff's attorney and the brief and unenlightening comments of the trial court did not indicate that the issue of just-cause versus at-will employment was removed from the jury. Instead, it merely reinforced the court's conclusion that it was rejecting *plaintiff's* interpretation of the contract (i.e., that the contract allowed for plaintiff's discharge *only* if one of the two specified conditions were met).

515 (1998), defendants, as discussed earlier, *waived* the issue regarding whether the instant contract provided for at-will employment. Therefore, the contract is to be construed as providing for just-cause employment, even if it lacked a definite term. As stated in *Bracco v Michigan Technological University*, 231 Mich App 578, 589; 588 NW2d 467 (1998), "a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term, i.e., although the term is 'indefinite.'" The contract stated that it would "continue from year to year and will be automatically renewed but may be terminated upon" certain conditions. There is simply no authority, and defendants cite none, for concluding that the contract should be limited to a duration of one year in the absence of one of the specified conditions (i.e., mutual consent of the parties or a year in which gross profits are less than $150,000). Reversal is unwarranted.

Defendants next argue that the trial court erred in failing to conclude, as a matter of law, that plaintiff breached his duty to mitigate his damages. Although defendants do not specify the specific rulings with which it takes issue, we conclude from context that defendants are challenging the court's rulings with respect to defendants' motions for summary disposition, for a directed verdict, and for a JNOV. Accordingly, our review is de novo. *Graves, supra* at 491-492. We find no basis for reversal.

As noted in *Morris v Clawson Tank Co*, 459 Mich 256, 264-265; 587 NW2d 253 (1998):

> In the context of a breach of an employment contract, . . . mitigation of damages obligates the victim of the wrongdoing to make reasonable efforts to find employment after discharge. The plaintiff's back-pay award, if he succeeds at trial, is then reduced by the amount that he earned in mitigation. Such a plaintiff may not purposefully remain unemployed or underemployed in order to maximize recoverable damages in the form of lost wages.
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> * * *
>
> The mitigation rule also obliges the plaintiff to accept, if offered, employment that is substantially similar to that from which the plaintiff was fired. [Citations omitted.]

Moreover, the defendant bears the burden of establishing that the plaintiff failed to take reasonable measures to mitigate his damages. *Id.* at 266.

The *Morris* Court held that SJI2d 105.41 properly states the law concerning mitigation of damages:

> "Whether the plaintiff was reasonable in not seeking or accepting particular employment is a question for you to decide. However, the plaintiff is obligated to accept an offer of employment which is of 'a like nature.' In determining whether employment is of 'a like nature,' you may consider, for example, the type of work, the hours worked, the compensation, the job security, working conditions, and other conditions of employment." [*Morris, supra* at 266 n 5, quoting SJI2d 105.41.]

Defendants claim that plaintiff failed to take reasonable measures to find a job similar to the position he had had at Dorian Ford. They further argue that plaintiff unreasonably turned down a position as a manager of operations at another automobile dealership, Jerome Duncan Ford.

During his deposition, plaintiff testified that he sought a position as a general manager with McDonald Ford. Plaintiff testified that he rejected the general manager position because the pay would have been too low, considering that the company's profits were "negative." He did accept a position as a consultant for $10,000 a month; this position was expected to last for three or four months.

Plaintiff additionally testified that he was contacted by a person at Jerome Duncan Ford about a general manager position. He stated that he declined their initial offer, which was for $90,000 a year in salary and eleven percent of the dealership's profits. Plaintiff described the profits at Jerome Duncan Ford as "nothing." He explained that "I understood they couldn't afford what I was making and I wanted to get something similar," so he offered to work for free for five years in exchange for twenty-five percent of the selling price of the dealership after that term of employment. Jerome Duncan Ford did not accept this counteroffer. Plaintiff additionally testified that he was limiting his job search to Ford dealerships within the metropolitan Detroit area because his maximum commuting time was around an hour and because all his knowledge was about Ford products. Plaintiff also testified that he sought employment with the Suburban Collection, a collection of dealerships.

Plaintiff's deposition testimony was sufficient to raise a question of fact regarding whether plaintiff made reasonable efforts to mitigate his damages. Indeed, plaintiff testified that he *did* in fact seek different employment and that the offer from Jerome Duncan Ford would not have provided compensation comparable to the compensation he had received at Dorian Ford. The trial court did not err in denying defendants' motion for summary disposition with regard to the mitigation issue, especially because "the question whether an employee was reasonable in not seeking or accepting particular employment is one to be decided by the trier of fact." *Morris, supra* at 266 (internal citations and quotations omitted).

The evidence at trial similarly demonstrated a question of fact regarding whether plaintiff reasonably sought to mitigate his damages and reasonably turned down the offer from Jerome Duncan Ford. Therefore, the court did not err in denying defendants' motions for a directed verdict and a JNOV.

Defendants additionally argue that the trial court erred by failing to instruct the jury with respect to the "lowered sights" doctrine,[3] under which "a wrongfully discharged employee, who, after a reasonable period of time, is unable to locate work of the kind to which he or she is accustomed is required to 'lower his or her sights' and consider accepting other available

[3] Our review of instructional error is de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

employment even if the pay rate is lower." See *Harper Woods Federation of Teachers v Harper Woods Bd of Ed*, 103 Mich App 649, 654 n 7; 302 NW2d 857 (1981). However, defendants cite no Michigan cases mandating the use of this doctrine, and the court in *Harper* specifically noted that this doctrine has not been adopted in Michigan. See *id.* at 654-656. Moreover, as noted earlier, defendants failed to object to the jury instructions as given. The court properly instructed the jury with regard to plaintiff's duty to mitigate his damages, and no error occurred with respect to the court's failure to give the an instruction concerning the "lowered sights" doctrine.

Next, defendants argue that the trial court erred by admitting the testimony of Mauricio Kohn, one of plaintiff's expert witnesses, because his opinions regarding Dorian Ford's future profits and plaintiff's lost future income were not the product of any special expertise but could have been made by any lay witness. In general, "[t]he qualification of a witness as an expert and the admission of the expert's testimony are within the trial court's discretion." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997). However, defendants did not raise a timely objection at trial based on the argument they advance on appeal. In fact, after a lengthy voir dire of Kohn in which defendants' attorney questioned Kohn about his conclusions regarding damages and about his deposition testimony, the attorney stated that he was "not objecting to the gentleman's qualifications[.]" Nor did the attorney object to the admission of Kohn's exhibits. Instead, the attorney objected to Kohn's testimony because Kohn was going to offer widely differing valuations of plaintiff's damages, because another expert on damages had already testified for plaintiff, and because "[i]t is not helpful for the jury to be given a smorgasbord of opinions from Plaintiff's experts." Because defendants admitted, after considering Kohn's proposed testimony, that Kohn was qualified to testify as an expert, they have waived their current appellate argument.

Defendants also mention on appeal the objection they raised at trial, i.e., that Kohn gave the jury too many possible choices from which to determine damages. Defendants cite no authority in support of this additional argument, however. An issue that has been given cursory treatment with little or no citation to relevant supporting authority is not properly presented for review. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001); see also *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998).

Next, defendants argue that the trial court should have granted their motion for a JNOV because the jury's verdict awarding post-termination damages was unsupported at trial. This argument by defendants merely represents a rehashing of their argument concerning plaintiff's alleged failure to mitigate his damages, and we reject it for the reasons stated earlier.

Next, defendants argue that the trial court should have granted their motion for a directed verdict with respect to whether defendants were liable to plaintiff in connection with money given to Dorian Sr.'s children. We disagree. Plaintiff testified that three $433,000 checks from the dealership were written to each of Dorian Sr.'s three children, who endorsed the checks back to the dealership, as loans, on the same day. Interest was then paid to the children on a monthly basis. Plaintiff testified that the interest was paid by the dealership and that the dealership did not need to borrow any money from the children. He stated that he arrived at the total valuation for the interest payments at issue by looking at the general ledger for the dealership. Dorian Sr. testified that he employed the loan procedure as an estate-planning tool. He further testified that

the interest payments to the children did not reduce plaintiff's bonus because it came out of his personal retained earnings.

While it is true that Dorian Sr.'s testimony supported a verdict for defendants on the instant issue, it is also true that plaintiff's testimony supported a verdict for plaintiff. Indeed, plaintiff testified that *the dealership* paid the interest and that it did not need to borrow the money. The jury reasonably could have concluded that the interest payments to the children served to reduce plaintiff's bonus under the employment agreement. The court properly denied defendants' motion for a directed verdict with respect to this issue.

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition concerning whether plaintiff was entitled to a one-half interest in Dorian Ford. Plaintiff had alleged in an affidavit that Dorian Sr. orally "promised and agreed that I would have the right to purchase 50% of Dorian Ford upon [his] death." The trial court concluded that plaintiff's claim to enforce this alleged promise was untenable because it was barred by a statute in effect at the time of the alleged agreement, MCL 440.8319, which stated that, absent certain exceptions, a contract for the sale of securities must be in writing. See MCL 440.8319(a). The court also concluded that plaintiff's claim was barred by MCL 450.1305(1), which states that "[a] subscription for shares made before or after organization of a corporation is not enforceable unless in writing and signed by the subscriber."

Plaintiff contends that former MCL 440.8319 does not apply to this case because plaintiff filed his lawsuit after the statute was repealed. We disagree. Indeed, the repeal of a statute does not operate to extinguish rights that accrued or vested under the statute. *Hurt v Michael's Food Center*, 249 Mich App 687, 692; 644 NW2d 387 (2002). The statute was in effect at the time of the alleged oral agreement, and defendants retained their right to assert a statute of frauds defense despite the later repeal of the statute. Plaintiff additionally contends that former MCL 440.8319 does not apply to this case because the transfer of stock was to occur in connection with an employment agreement. See, generally, *Baldassarre v Singer*, 444 Pa 100, 103; 282 A2d 262 (1971). This argument is without merit. Indeed, the employment agreement was signed before the alleged promise to sell plaintiff one-half of Dorian Ford and was separate from that alleged promise. As noted by the trial court, "[t]he oral agreement cannot be considered 'part and parcel' of the parties' employment agreement."

Plaintiff additionally contends that former MCL 440.8319 does not apply here because some courts have held that shares of stock in a closely held entity, such as Dorian Ford, are not "securities" for purposes of a statute of frauds contained in the Uniform Commercial Code.[4]

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[4] We review issues of statutory interpretation de novo. *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002). The rules of statutory construction require the courts to give effect to the Legislature's intent. *Institute in Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996). "This Court should first look to the specific statutory language to determine the intent of the Legislature," which is "presumed to intend the meaning that the statute plainly expresses." *Id.* If the language is clear and unambiguous, "the plain meaning of the statute reflects the legislative intent, and judicial

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Again, we reject plaintiff's argument. The plain language of former MCL 440.8319 provided no exception for closely held entities, and we decline to rely on the out-of-state case law cited by plaintiff,[5] especially given that the majority of states reach the opposite conclusion, i.e., that statutes of fraud do apply to the sale of stock in a closely held entity. See, e.g., *Wakefield v Crawley,* 6 SW3d 442, 449-450 (Tenn, 1999).

Plaintiff contends that if former MCL 440.8319 is deemed to apply to this case, then he nevertheless raised a question of fact concerning whether he satisfied the exception under former MCL 440.8319(b), which provided that a contract for the sale of securities was enforceable to the extent that payment had been made. We disagree. Plaintiff argues that his "payment" consisted of dramatically raising the profits of Dorian Ford and foregoing other business opportunities. These activities were tied to the previous employment agreement, however, and therefore did not evidence the clear elements or the clear execution of the sale agreement. See *McDonald v Schifler,* 323 Mich 117, 125-126; 34 NW2d 573 (1948) (a contract should not be enforced based on part performance unless the parties have agreed on every material matter and the subjects of the alleged contract are clearly identifiable and defined). Moreover, the activities were part of a preexisting duty under the employment agreement. See *Yerkovich v American Auto Ass'n,* 461 Mich 732, 740-741; 610 NW2d 542 (2000) ("doing what one is legally bound to do is not consideration for a new promise").[6] Plaintiff also alleges that part of his "payment" consisted of selling certain of his own stock in a van conversion company, d'Elegant, Inc. (d'Elegant) to Dorian Jr. and tolerating certain questionable expenses at the dealership that served to decrease his income under the employment agreement. Again, however, there was simply insufficient evidence that these actions were meant to satisfy the execution of the sale agreement, especially (in the case of the d'Elegant stock transfer) because Dorian Jr. was not a party to the alleged original agreement to sell part of Dorian Ford to plaintiff. See, generally, *McDonald, supra* at 125-126.

Plaintiff additionally contends that a question of fact existed regarding whether the sale agreement was enforceable under former MCL 440.8319(d), which provided that an agreement for the sale of securities was enforceable if "the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price." In support of his argument

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construction is not permitted." *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135; 545 NW2d 642 (1996). If reasonable minds could differ regarding the meaning of a statute, judicial construction is warranted. *Yaldo v North Pointe Ins Co,* 457 Mich 341, 346; 578 NW2d 274 (1998). A court must not read into a statute anything "that is not within the manifest intent of the Legislature as gathered from the act itself." *In re S R,* 229 Mich App 310, 314; 581 NW2d 291 (1998).

[5] We similarly decline to rely on the unpublished case cited by plaintiff.

[6] Plaintiff contends that the "preexisting duty" rule does not apply here because the employment agreement was with Dorian Ford whereas the alleged sale agreement was with Dorian Sr. Given Dorian Sr.'s status as president of the company, his signature on the employment agreement, and plaintiff's admission that Dorian Sr. was the sole owner of Dorian Ford, plaintiff's argument is disingenuous.

that defendants admitted the existence of the contract, plaintiff cites hearsay statements by two individuals who claimed in affidavits to have heard defendants admit to the existence of the contract. This was wholly insufficient to raise a question of fact concerning whether defendants admitted the existence of the contract in their "pleading, testimony or otherwise in court."

Plaintiff contends that a question of fact existed concerning whether he "partially performed" the contract such that it was enforceable despite former MCL 440.8319. This argument is merely a rehash of plaintiff's "partial payment" argument, and we reject it for the reasons stated earlier.

We also reject plaintiff's argument that he raised a question of fact concerning whether he was entitled to enforce the sale of Dorian Ford by virtue of the doctrine of promissory estoppel. A party may enforce a promise that does not meet contractual requirements if the promise is one on which the promisor would reasonably expect the promisee to act or forgo acting and on which the promisee does act or forgo acting. *State Bank of Standish v Curry,* 442 Mich 76, 83 (1993). Promissory estoppel did not apply here because the terms of the alleged oral agreement were not clearly specified or apparent. *Id.* at 86, 89. It is simply not clear what consideration plaintiff was supposed to have given for the sale of part of Dorian Ford to him, and it is not clear that he acted or forewent acting as a result of the alleged promise to sell. The trial court correctly rejected plaintiff's promissory estoppel argument.[7]

Next, plaintiff argues that the trial court improperly granted summary disposition to defendants with regard to plaintiff's claim under MCL 600.2961, which provides that a sales representative may obtain treble damages from his employer in certain circumstances if the employer fails to pay commissions in a timely manner. The statute defines "sales representative," in pertinent part, as "a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission." MCL 600.2961(1)(e). It defines "commission" as "compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a percentage of the dollar amount of profits." MCL 600.2961(1)(a). Clearly, plaintiff was paid in part by commission as defined by the statute, because part of his compensation under the employment agreement was a percentage of Dorian Ford's profits.

The pertinent question is whether plaintiff was a "sales representative" under the statute. The trial court, in concluding that plaintiff did not meet the definition of a "sales representative," held that "Plaintiff . . . did not sell cars as a sales employee" but instead "ran the business[.]" Plaintiff has failed to persuade us that the trial court erred in reaching this conclusion. Indeed, in his brief, plaintiff simply makes bald assertions and fails to set forth any analogous or persuasive case law that might aid us in evaluating the trial court's conclusion. As noted in *Palo Group, supra* at 152, an appellant may not leave it up to this Court to search for authority to sustain or reject his position.

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[7] Given our conclusion regarding former MCL 440.8319, we need not address the trial court's conclusion that MCL 450.1305(1) barred plaintiff's claim.

Moreover, the trial court's decision makes sense in light of the clear language of the employment agreement. The employment agreement stated that plaintiff was employed "as General Manager of all of [Dorian Ford's] operations at its dealership[.]" He was not under contract or employed to solicit orders or sell goods but rather to serve as a general manager for Dorian Ford. While part of plaintiff's role may have involved the solicitation of orders and the selling of goods (given the nature of an automobile dealership), his position was more analogous to that of "service" employee, i.e., he lent his skill and expertise to Dorian Ford to facilitate the overall business. See, generally, *Mahnick v Bell Co*, 256 Mich App 154, 162-163; 662 NW2d 830 (2003) (discussing service employees in the context of MCL 600.2961). Reversal is unwarranted.[8]

Finally, plaintiff claims that the trial court erred by granting summary disposition to defendants with respect to plaintiff's claim concerning the transfer of d'Elegant stock to Dorian Jr. Plaintiff had alleged that he sold half his stock in d'Elegant to Dorian Jr. only because of the alleged oral promise from Dorian Sr. that plaintiff would someday own part of Dorian Ford. After the trial court concluded that the alleged contract to sell part of Dorian Ford to plaintiff was unenforceable, plaintiff sued Dorian Jr. for rescission, or, alternatively, for unjust enrichment in connection with the d'Elegant sale. The trial court rejected plaintiff's claims, and we agree with this decision. Indeed, there was no fraud, mistake of fact, or misrepresentation, see *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995), and *Garb-Ko, Inc v Lansing-Lewis Services, Inc*, 167 Mich App 779, 782; 423 NW2d 355 (1988), alleged to have been perpetrated or caused by *Dorian Jr.*, the subject of the d'Elegant sale. Moreover, the alleged promise by Dorian Sr. cannot form the basis of a misrepresentation claim because it related to a future action and not a past or present fact. See *Hi-Way Motor Co v International Harvester Co*, 59 Mich App 366, 372-373; 229 NW2d 456 (1975). Further, plaintiff's unjust enrichment claim was untenable because such a claim involves those situations in which no express contract exists. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992). Here, an express agreement existed for plaintiff to sell the d'Elegant stock. Moreover, given that Dorian Jr. paid for the stock in question, he was not unjustly enriched. Reversal is unwarranted.[9]

Both cases are affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter

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[8] We reject plaintiff's brief argument that the trial court granted summary disposition prematurely with respect to the claim under MCL 600.2961. First, no further factual development was necessary to resolve the motion. Moreover, plaintiff does not specify which additional, pertinent facts would have been elicited after further discovery.

[9] We note that plaintiff has conceded to withdraw the additional issues raised in his brief in light of our rejection of defendants' appeal.