STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH M. LANE,

Plaintiff-Appellee,

v

MAGNUM CORPORATION,

Defendant-Appellant.

UNPUBLISHED
May 15, 2008

No. 275939
Oakland Circuit Court
LC No. 2004-061919-CK

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

In this breach of contract action, defendant Magnum Corporation appeals as of right the trial court's denial of its motion for summary disposition, as well as the trial court's denial of its motions for judgment notwithstanding the verdict (JNOV), directed verdict, and new trial. We affirm.

I. FACTS

Plaintiff, Joseph Lane, is an engineer, patent attorney, and businessman. He earned his law degree in 1957, and after practicing briefly in the Detroit area, moved to Washington D.C. and concentrated his practice in patent law. Through his patent work, Lane met and befriended Martin ("Marty") Abel. In 1978, Lane and Abel founded defendant Magnum Corporation (Magnum) to serve as a holding company for the purchase of a company called Caltherm. Lane drafted the legal documents associated with the formation of Magnum. Magnum went on to acquire other subsidiary companies, including Vernet S.A. in France. Lane was Chairman and CEO of Magnum and Abel was President. The two men owned all of the company stock until 1992, when Robert Frank of Vernet joined as a third owner. At the time of trial, Lane was 78 years old and Abel was 86 years old.

Magnum was a closely held business, managed rather informally by Lane and Abel. The two men did not report to the board of directors or seek oversight from the board. Magnum did not hold shareholder meetings or board meetings between 1978 and 2004. Frank testified that corporate formalities were "very limited" and he deferred entirely to Lane and Abel's discretion to set their own salaries. Although Lane presented evidence that several significant company expenses were undertaken without formal written or board approval, Magnum presented evidence that many big-ticket items were memorialized in writing and ratified by the board. Agreements not formalized in writing were usually ratified by the board in after-the-fact consent

resolutions, characterized by Lane's son, John, as "rubber stamps" and "the minimum formalities that we had in place to keep the business certified as a corporation."

Sometime in 1992, Frank asked Lane and Abel about purchasing a supplemental pension plan. This, according to Lane, prompted Lane and Abel to think about retirement benefits for themselves. In lieu of a formal funded pension plan, which would place a heavy financial burden on Magnum, Lane says that he entered into an "oral agreement with my long-term friend and partner for a salary for life." The agreement had no specific terms, such as length of further employment required before retirement and receipt of the salary for life. In addition, the agreement was never memorialized in any writing, was never taken in front of the board for approval, and was never discussed with Robert Frank or Marty's son, Bruce Abel. Corporate counsel Roger Cook testified that he had a discussion with both Lane and Abel in 1999 in which they explored the possibility of formalizing their salary-for-life arrangement into a pension or retirement plan, but decided to "continue the existing non-qualified plan arrangement . . . [they] were supposed to continue receiving for their lifetimes, a certain amount of payments per year." Lane's son, John, testified that he was also aware of the agreement and had witnessed Abel confirming its existence.

In conjunction with this informal salary-for-life plan, Lane and Abel also made an arrangement to provide their wives with a survivor benefit in the event of either man's death. This written agreement was taken to and ratified by the board of directors in November 1994. Lane testified that he and Abel took this particular agreement before the board for written approval because they feared that, without formalized approval, it would not be binding and their wives would be unprotected upon the husbands' deaths.

In 2003, Lane and Abel resigned their board positions and all offices and titles with Magnum. Both men continued to be paid their full $235,000 salary. In February 2004, Bruce Abel became president of Magnum. At a shareholder's meeting in August 2004, Lane was formally terminated from Magnum; Bruce Abel said this was because Lane was not doing any work for the company. Magnum stopped paying Lane's salary at this time. Marty Abel continued to be paid his full salary. Abel still works on projects for Magnum and receives a reduced salary.

Lane tried to collect on his salary-for-life agreement, but the company declined to continue paying him. Lane filed this suit in October 2004, alleging breach of contract, breach of implied contract, and promissory estoppel. In January 2006, Magnum filed a motion for summary disposition, arguing that Lane's state-law contract claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), a federal statute. The trial court denied this motion, finding that the agreement was not the type of benefit plan governed by ERISA. At trial, the jury found Magnum liable for breach of contract. Magnum filed motions for JNOV and new trial, both of which were denied. Magnum now appeals.

II. SUMMARY DISPOSITION

Magnum first argues that the trial court erred in denying its motion for summary disposition. We disagree.

A. Standard of Review

Denial of a motion for summary disposition is reviewed de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). "Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are also reviewed de novo." *Id.* Review is limited to the evidence presented to the trial court at the time the motion was decided. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

B. Analysis

Magnum contends that the trial court erred in denying its motion for summary disposition, because Lane's claims were preempted by ERISA. However, we conclude that the agreement was not a "top hat" plan under ERISA; therefore, any state-law claims were not preempted by federal ERISA claims.

A top-hat plan is a special category of ERISA plan in that it is "unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 USC §§ 1051(2), 1081(3), 1101(a)(1). These plans are exempt from ERISA's substantive provisions, regarding things like participation, vesting, funding, and fiduciary responsibilities, and are only subject to ERISA's enforcement procedures, such as those concerning reporting, disclosure, administration, and enforcement. *Garratt v Knowles*, 245 F3d 941, 946 n 4 (CA 7, 2001); *Demery v Extebank Deferred Compensation Plan (B)*, 216 F3d 283, 286-287 (CA 2, 2000).

Not every agreement to provide retirement income constitutes an ERISA-governed plan. "The existence of an ERISA plan is a question of fact, to be answered in light of all the surrounding circumstances and facts from the point of view of a reasonable person." *Thompson v American Home Assurance Co*, 95 F3d 429, 434 (CA 6, 1996). An ERISA-governed plan is said to exist when a reasonable person can ascertain "(1) the intended benefits, (2) the class of beneficiaries, (3) a source of funding, and (4) the procedures for receiving benefits." *Petersen v E F Johnson Co*, 366 F3d 676, 678 (CA 8, 2004).

The trial court denied Magnum's motion for summary disposition because it found that the alleged agreement for lifetime compensation did not constitute a top-hat agreement under ERISA. Since the agreement was not a top-hat agreement, the trial court found that ERISA provided neither a presumption nor an exemption for enforcement.

We agree with the trial court's ruling. Here, there was no "plan" to speak of, no administrative scheme, no procedure to determine a class of beneficiaries, no appeal procedure, and no discretion involved in the payment of any compensation to plaintiff. See *Diak v Dwyer, Costello & Knox, PC*, 33 F3d 809, 810 (CA 7, 1994) (pension payments made in ad hoc arrangement with small group of retired employees were "individual contract[s] executed upon each person's retirement"). Again, this is a question of fact to be answered in light of all surrounding circumstances and facts from the point of view of a reasonable person, and we find it unlikely that a reasonable person would determine that there was enough evidence here to establish the existence of an ERISA-governed plan.

III. JNOV

Next, Magnum argues that the trial court erred in denying its motion for JNOV. Again, we disagree.

A. Standard of Review

Denial of a motion for JNOV is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). A motion for JNOV should be granted only if the evidence, viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Id.* If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

B. Analysis

Magnum raises four main arguments as to why the trial court erred in denying its motion for JNOV: (1) there was insufficient evidence presented at trial to establish a binding contract for lifetime salary; (2) the testimony of Roger Cook was improperly admitted at trial; (2) the letter defining the terms of the "Widow's Agreement" was improperly admitted at trial; and (4) there was insufficient evidence to establish that Magnum agreed to be bound by the alleged agreement under Delaware law.

1. Existence of a Contract

We reject Magnum's argument that there was insufficient evidence presented at trial to establish a binding contract for lifetime salary.

A valid contract requires a meeting of the minds on all material facts. "'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.'" *Stanton v Dachille*, 186 Mich App 247, 256; 463 NW2d 479 (1990), quoting *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812, 818; 428 NW2d 784 (1988). When the promises and performances to be rendered by each party are set forth with reasonable certainty, the agreement does not fail for indefiniteness. *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941). Avoidance of a contract due to indefiniteness is not favored under Michigan law. *Id.* "The enforceability of a contract depends on consideration." *Hisaw v Hayes*, 133 Mich App 639, 643; 350 NW2d 302 (1984). Valid consideration requires a bargained-for exchange. *Higgins v Monroe Evening News*, 404 Mich 1, 20; 272 NW2d 537 (1978). Consideration can be a benefit to one side or a detriment suffered, or services done, by the other. The benefit need not be to the promisor, but can also be to a third party. *Plastray Corp v Cole*, 324 Mich 433, 440; 37 NW2d 162 (1949). "[A] promise to pay is not binding if made without consideration." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991).

Magnum first argues that the evidence produced at trial was too indefinite to allow the jury to determine that a contract existed in this case. More specifically, defendant contends that because the contract was not in writing and there was no testimony as to its essential terms, the contract must fail for indefiniteness. We disagree.

Although Lane fell short on providing express terms that established the agreement between himself and Abel, this may well be a function of his age (78 at the time of trial) and the length of time elapsed between the conversation and trial (14 years). Further, meeting of the minds is not judged solely on the existence of express terms; the parties' visible actions are also a factor. Roger Cook testified that he had discussions with both men together regarding their plans for the future. He testified "there was an existing arrangement that they had under which both [men] were receiving life time payments" and that "[t]hey intended that these payments would continue to be made to them for their lives once they agreed to the contract." Cook also indicated that Abel was present and participated in these discussions. Although Cook was not present to witness the actual creation of the agreement, he was present to witness what appeared to be a mutual understanding between the President and CEO of Magnum that they would each receive salaries for life. It is also relevant that Magnum continued to pay both plaintiff and Abel their full salaries after they "semi-retired" and resigned their titles and board positions; this is a strong indicator of partial performance and thus an assent to the material terms of the agreement.

Further, the oral nature of the agreement has no effect on whether it is binding. *Pangburn v Sifford*, 216 Mich 153, 154; 184 NW 512 (1921). When an offer has been made by one party and accepted by the other, and there has been a meeting of the minds, there is a valid contract and unless required by law, it need not be reduced to writing in order to be binding. *Id.*

Magnum also argues that the agreement in this case fails for lack of consideration. However, Lane testified that he and Abel decided to continue salaries for life in lieu of a formal, funded pension plan. Part of the reason this decision was made was to spare Magnum the heavy financial burden of a formal plan; therefore, Magnum benefited by being spared this additional burden. And since the two directors each received the same benefit of retirement security via salaries for life, each also indirectly incurred the detriment of Magnum's promise to the other. Therefore, we conclude that there was sufficient consideration for this agreement.

2. Admission of Roger Cook's Testimony

The trial court did not err reversibly in admitting the testimony of attorney Roger Cook. This is so for three reasons: Cook's statements regarding the matter were not covered under the attorney-client privilege; the statements were not hearsay, but were admissions of a party-opponent or allowable under a hearsay exception; and his testimony was based on personal knowledge of the conversations he witnessed (and participated in) between Lane and Abel.

The scope of the attorney-client privilege is narrow and attaches only to confidential communications by the client to his adviser that are made for the purpose of obtaining legal advice. *In re Costs & Attorney Fees*, 250 Mich App 89, 99; 645 NW2d 697 (2002). No privilege exists with respect to statements made to an attorney who is acting on behalf of both sides of the same transaction or to communications made in the presence of a person in an adversarial position. See *Harwood v Randolph Harwood, Inc*, 124 Mich App 137, 141; 333 NW2d 609 (1983); *Frank v Morley's Estate*, 106 Mich 635, 639-640; 64 NW 577 (1895).

The trial court allowed Cook to testify as to conversations he had with both Lane and Abel present because if they were all present, it constituted a waiver of the attorney-client privilege. Cook's representation covered both sides of the transaction at issue; he testified that

he advised both Lane and Abel regarding establishment of a qualified pension plan through their positions at Magnum. He thus served as counsel simultaneously to plaintiff and defendant while they were in an adverse position as to the agreement. Since communications made to an attorney also representing an adverse party are not privileged as to the adverse party, Magnum cannot claim the attorney-client privilege here.

In addition, the trial court ruled that statements made by Abel regarding the existence of the agreement would constitute admissions against interest under MRE 801(d)(2), or statements of intent under the "state of mind" hearsay exception of MRE 803(3). The state of mind exception applies to statements of "the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent . . .)." MRE 803(3). Cook testified about Lane's and Abel's intentions to continue the lifetime salary payments, not their beliefs as to whether an agreement existed. See *Harwood*, *supra* at 140.

Finally, Cook testified about conversations he participated in and witnessed between Lane and Marty Abel around the year 2000. He was not there to testify about any 1992 conversations regarding the creation of the agreement; he was there to testify about the intent of the two men to continue their arrangement of salary for life. Thus, it cannot be said that Cook lacked personal knowledge of these statements or conversations under MRE 602. In terms of relevance and prejudice, there is no doubt that Cook's testimony was highly relevant—indeed, he was the only truly disinterested third party to witness a discussion of the agreement, so his testimony would absolutely make the existence of the agreement more probable than without the evidence. MRE 401. As such, this relevant and probative testimony would also be prejudicial, since it would help corroborate Lane's version of events. This degree of prejudice, however, is not so great as to warrant exclusion of the evidence under MRE 403, since the prejudice is not unfair and would not be confusing to the jury. Therefore, we find it was not error for the trial court to allow this evidence in under MRE 401, 403, or 602.

3. Admission of the Letter Defining the Terms of the "Widow's Agreement"

We find that the admission of the letter defining the terms of the "Widow's Agreement" into evidence was erroneous because it was not relevant. This error, however, is not harmful enough to warrant JNOV or reversal.

Under MRE 401, "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Magnum argues that the letter is hearsay and that the admission of the letter prejudices Magnum because it serves as the only written "corroboration" of the oral agreement at issue here. Lane argues that the letter was not hearsay and that the court did not abuse its discretion because it set forth Magnum's obligation to Lane's and Abel's wives; it was drafted and signed by Magnum's President, Abel; it was signed by Magnum's CEO Lane; and it appeared on Magnum's letterhead.

Although we agree with the above points raised by Lane, these facts do not necessarily make the letter relevant. On its face, the letter appears to prove *only* that Lane and Abel memorialized a written agreement to take care of their wives in the event of their deaths, and that is not the agreement in dispute here.

Magnum also argues that the letter was erroneously admitted as an admission of a party-opponent under MRE 801(d)(2) and that the letter was hearsay because: (1) there was no evidence that Magnum had authorized Abel to write the letter on its behalf; (2) at the time the letter was written, Abel was no longer a shareholder in Magnum, stripping him of any authority he may have previously had to authorize such agreements; and (3) there was no evidence that Abel was the "authorized agent" of Magnum concerning that specific transaction. However, we conclude that these arguments over the letter and agency authorization for the transaction is over a completely different agreement—the Widow's Agreement—and thus irrelevant to whether there was an oral agreement between plaintiff and defendant for salary for life.

Therefore, we find that the letter was erroneously admitted into evidence because it does not corroborate the existence of an oral agreement for salary for life. An error is not harmless if it was prejudicial, and an error in the admission or exclusion of evidence is ground for granting a new trial if refusal to take this action is inconsistent with justice. *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998). Since the court properly allowed corroborating testimony from attorney Roger Cook, as well as Lane's son, John, this error was not fatal to Magnum's case, was not so prejudicial as to be an insult to justice, and does not warrant reversal or a new trial.

4. Agency

Finally, we conclude that there was sufficient evidence to establish that Magnum agreed to be bound by the alleged agreement under Delaware law. Magnum is a Delaware corporation; as such, Delaware law governs whether Magnum is bound by the agreement in dispute. We believe Lane and Abel were in a position such that their actions, both as agents of Magnum and as two-thirds shareholders of Magnum, were binding upon Magnum.

Delaware law holds that

> when, in the usual course of the business of a corporation, an officer or agent has been allowed to manage certain of its affairs, and when this is known to the other party to the contract, the authority of the officer to act for the corporation is implied from the past conduct never challenged by the corporate officials. [*Hessler, Inc v Farrell*, 226 A2d 708, 711-712 (Del, 1967).]

Lane and Abel had a great deal of autonomy in managing their affairs at Magnum; for instance, they set their own salaries and never had a written employment contract. Under agency principles and Delaware law, then, this ongoing conduct would imply that they had continued authority to manage their affairs when it came to employment compensation matters—including agreeing to pay each other salary for life in lieu of a formal pension plan.

Magnum argues that, at the time of the formation of the contract, Marty Abel had already gifted his shares to his son Bruce, and therefore had no authority to enter into agreements without board authority or consent. This allegation, however, is not factually sound. Magnum stresses that Abel was no longer a shareholder on November 2, 1992, when he transferred the last of his shares in Magnum to his son. Lane testified that the salary-for-life agreement was formed "weeks or months" before that date; this means that Lane and Marty Abel were still two-thirds

shareholders in Magnum. As CEO and President, their positions allowed them to make business decisions for the corporation; as controlling stockholders, they had the ability to ratify and bind those decisions without further formal board action.

Under 8 Del C § 144(a), no contract or transaction between a corporation and one or more of its directors or officers shall be void or voidable solely for this reason. The statute can neither "'sanction unfairness' [nor] can it invalidate fairness if, upon judicial review, the transaction withstands close scrutiny of its intrinsic elements." *Marciano v Nakash*, 535 A2d 400, 405 (Del, 1987). This statute does not, however, provide the exclusive enumerated means for validating interested director contracts. *Robert A Wachsler, Inc v Florafax Int'l*, 778 F2d 547, 551 (CA 10, 1985). Delaware courts have not held that a formal shareholder vote is the only way to ratify voidable corporate acts; some cases (in dictum) appear to have endorsed ratification by mere shareholder acquiescence in the face of full knowledge of material facts. *Id.* at 552. Magnum argues that this action cannot have been ratified by a majority of the stockholders, because "[o]ne cannot ratify that which he does not know[,]" see *Cahall v Lofland*, 114 A 299, 319 (Del Ch, 1921), and Robert Frank, John Lane, and Bruce Abel had no knowledge of this agreement by the time the board met to sign consent resolutions. But at the time the agreement was *formed*, it was formed by and acknowledged by two-thirds of the company's stockholders, and did not need any further ratification.

Lane and Abel were majority stockholders in Magnum at the time the alleged agreement was formed. According to testimony from both Lane and Roger Cook, the two directors/shareholders considered formalizing their salary-for-life agreement into a funded pension plan but made the decision not to do so, because it would be too great of a financial burden on the corporation. Thus, in keeping the agreement informal, Lane and Abel made a business decision they felt was fair and in the best interests of the corporation, fulfilling their corporate duties of care and loyalty. See *Marciano*, *supra* at 403-405 (loans made to corporation by its half owners with bona fide intention of assisting the corporation are valid and enforceable debts notwithstanding origin in self-dealing). And "it cannot be said that contracts fairly entered into, and honestly executed, where no one is defrauded or overreached, are invalid." *Ten Eyck v Pontiac, O & PAR Co*, 74 Mich 226, 233; 41 NW 905 (1889).

Therefore, we conclude that the legal relationship between Lane, Abel, and Magnum was such that at the time of the formation of the contract, Lane and Abel were in a corporate position to not only enter into binding agreements on behalf of the corporation, but to ratify those agreements immediately, requiring no further formal action.

IV. DIRECTED VERDICT

Magnum further argues that, for the same reasons the trial court erred in denying its motion for JNOV, it also erred in denying its motion for directed verdict. We disagree.

A. Standard of Review

Denial of a motion for directed verdict is reviewed de novo. *Sniecinski*, *supra* at 131. A motion for directed verdict should be granted only if the evidence, viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Id.* "When the

evidence could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury." *Tobin v Providence Hosp*, 244 Mich App 626, 652; 624 NW2d 548 (2001). If no factual question exists, however, the trial court may grant a directed verdict. *Michigan Mut Ins Co v CNA Ins Cos*, 181 Mich App 376, 380; 448 NW2d 854 (1989).

B. Analysis

For the same reasons the trial court did not err in denying defendants' motion for JNOV, it did not err in denying defendant's motion for directed verdict.

The nonmoving party has the right to ask a jury to believe the case presented to it, however improbable it might seem. *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975). Whenever a factual question exists, upon which reasonable persons may differ, a trial judge may not direct a verdict. *Id.* This action presented a classic case of "He said, he said," which revolved around a crucial question of fact—whether an oral agreement existed for salary for life. Given Magnum's closely-held corporation status, the informal way the company was run, and the apparent inconsistency of observed corporate formalities, it is certainly *possible* that two men, good friends for years and colleagues with innate trust in one another, *could* make an oral agreement to continue salaries for life without considering the consequences down the road of failing to write anything down. Lane presented sufficient evidence to raise an issue of fact regarding the existence of oral agreement for salary for life. As such, the trial court was not at liberty to step in and render a directed verdict.

V. NEW TRIAL

Finally, we reject Magnum's argument that the trial court erred in denying its motion for new trial.

A. Standard of Review

A trial court's decision to grant a new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). An abuse of discretion occurs when the decision results in an outcome that falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A new trial should be granted only when "'the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.'" *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (citation omitted).

B. Analysis

The trial court did not abuse its discretion in denying defendant's motion for new trial.

Absent exceptional circumstances, the court may not substitute its viewpoint for that of the jury. Magnum argues that this case fits within the exceptional circumstances, in particular "where a witness's testimony is material and so inherently implausible that it could not be believed by a reasonable juror . . . or where the witness's testimony has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies.'" *Lemmon*, *supra* at 643-644 (citations omitted). We disagree.

Our Supreme Court has explained:

> This does not mean that "[a] judge's disagreement with the jury's verdict," . . . or a "trial judge's rejection of all or part of the testimony of a witness or witnesses," entitles a defendant to a new trial. . . . Rather, a trial judge must determine if one of the tests applies so that it would seriously undermine the credibility of a witness' testimony and, if so, is there "a real concern that an innocent person may have been convicted" or that "it would be a manifest injustice" to allow the guilty verdict to stand. . . . If the "evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions," the judge may not disturb the jury findings although his judgment might incline him the other way. [*Id* (internal citations omitted).]

The credibility of plaintiff's evidence was not stellar—he was trapped in some inconsistencies on cross-examination, he had no written evidence of the existence of the alleged agreement, nor could he pinpoint much about the contract beyond that it would be "salary for life" and that it was formed sometime before November 1992. Still, a lay juror might reasonably see an informal promise made between two good friends and business partners. And although it is certainly a disappointment for Magnum to continue to pay Lane's salary for the rest of his life, it can hardly be declared a "manifest injustice." This Court must not usurp the jury's function and declare a new trial.

The trial court also did not err in refusing to give Magnum's proposed jury instruction No. 47. A thorough review of the trial record, both before the jury was given instructions, and during the time the jury was being instructed, reveals no evidence that Magnum objected at any time on the record to the court's refusal to give the jury instruction. Under MCR 2.516(C), a party may assign as error the failing to give an instruction only if the party objects on the record before the jury retires to consider the verdict. Since there is no indication in the record that Magnum made any objection to the court's refusal to give instruction No. 47, this issue is waived on appeal. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000).

Further, it is inaccurate for Magnum to assert that a new trial is deserved because the evidence weighs so heavily against the verdict and a serious miscarriage of justice will result if the verdict stands. Lane had testimony from three witnesses (himself, Roger Cook, and John Lane), which established or corroborated the existence of the agreement. This was enough for the jury to find that an agreement existed and that Magnum was bound by it. This verdict, though disappointing for Magnum, can hardly be termed as "against the great weight of the evidence" and "contrary to law."

In light of the evidence presented, the arguments made, and the jury's decision, the trial court did not abuse its discretion in refusing to grant a new trial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette