STATE OF MICHIGAN

COURT OF APPEALS

DAVID E. TOWNSEND, HEIDI A. TOWNSEND, LINDSAY R. TOWNSEND, HEATHER M. TOWNSEND and DAVID J. TOWNSEND,

Plaintiffs-Appellants/Cross-Appellees,

v

KASLE STEEL CORPORATION,

Defendant/Third-Party Plaintiff-Appellee/Cross-Appellant,

and

KERRY STEEL, INC.,

Third-Party Defendant.

UNPUBLISHED
February 24, 2009

No. 278645
Wayne Circuit Court
LC No. 02-218218-NO

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

In this action seeking recovery for work-related injuries sustained by plaintiff David Townsend, plaintiffs[1] appeal as of right from a circuit court order entering a judgment of no cause of action in favor of defendant Kasle Steel Corporation. We affirm in part, reverse in part, and remand.

[1] Plaintiff Heidi Townsend is David Townsend's wife, and the remaining plaintiffs are their children. Because the claims of Heidi and the children are derivative of David Townsend's claims, this opinion's references to the singular "plaintiff" refer solely to David Townsend.

I. Underlying Facts & Procedure

On March 1, 2000, plaintiff sustained head and back injuries while working as a "slitter helper" on a steel processing line operated by his employer, Kerry Steel, Inc. Kasle Steel Corporation owned the Dearborn facility and equipment Kerry personnel used to process steel. Kasle leased a portion of the facility and its steel processing equipment to Kerry pursuant to an "Industrial Facility Lease."

Plaintiff's injury occurred as he attempted to insert slit steel into a recoiler, the final component of a slitter. A slitter comprises a complex line of machines that uncoils large coils of steel, slits the steel into strips or ribbons, and recoils it. The slitter involved here processed coils of steel as wide as 72 inches. On the day of plaintiff's injury, the shear, a component of the slitter line, was not working. The shear creates smooth, straight 90-degree square ends on the leading edges of the cut steel strips. At the end of the slitting process, two "slitter helpers" manually lift the sheared leading edges of the steel and direct them into slots in the recoiler. This task requires the helpers to hoist the steel over their heads, perfectly position the leading edges in the slots, and to clamp the edges in place before recoiling begins. Because the shear did not work on the day of the accident, plaintiff and Rubin Williams, a coworker, manually cut the edges of the steel with a device called a nibbler. After they "nibbled" the leading edges of the steel, Williams successfully guided one strip of steel into the recoiler slot. As plaintiff picked up the second strip, the first strip came down and hit him on the head, knocking him to the floor. Plaintiffs theorized that the steel fell from the recoiler because its leading edge was not perfectly square, and could not be properly positioned in the slot.

Plaintiffs filed a complaint setting forth two primary counts: "Negligence" and "Breach of Contract." According to the complaint,

> For some time prior to March 1, 2000, the slitter had been malfunctioning. The slitter cuts lengths of steel as the steel is uncoiled. The cut lengths of steel are then rerolled on a recoiling machine. Kerry was experiencing problems with the recoiling machine because the edges of the steel segments could not be clamped into the recoiler.

The complaint further alleged that

> [t]wo or more employees of Kasle were assigned by Kasle to carry out and conduct inspections, testing, repairs, and maintenance of the slitter. Employees of Kasle were also supposed to train and instruct employees of Kerry in the safe and proper method of operating, inspecting, testing, repairing, and maintaining the slitter and other machinery and equipment leased to Kerry by Kasle.

Count I asserted that Kasle employees performing "inspection, maintenance and repair services" on the slitter "failed to act with reasonable care and increased the risk of harm" to plaintiff. Count II, the breach of contract claim, averred that a contract obligated Kasle to provide Kerry's employees with "a reasonably safe place to work," and that plaintiff qualified as a third-party beneficiary of the contract.

In October 2002, the trial court (Judge James Rashid) granted Kasle leave to file a third-party complaint naming Kerry as a third-party defendant. The third-party complaint averred that the industrial facility lease required Kerry to defend and indemnify Kasle regarding the events alleged in plaintiffs' complaint. In 2003, Kasle and Kerry filed motions for summary disposition, and in October 2003 Judge Rashid granted Kerry's motion and dismissed Kerry with prejudice.

In June 2004, Judge Rashid entered an order permitting plaintiffs to file a first amended complaint adding allegations that (1) "Prior to leasing the slitter to Kerry, Kasle made significant modifications and/or repairs to the slitter and its related tooling and equipment," and (2) Kasle's "modifications and repairs to the slitter and its related tooling and equipment … adversely affected the slitter's functioning, configuration, and safe operation, and created an unreasonable risk of harm . . . ." The first amended complaint also pleaded the same negligence and breach of contract count contained in the original complaint.

In March 2005, Judge MacDonald allowed plaintiffs to file a second amended complaint. The second amended complaint alleged that in 1983, Kasle purchased the 72-inch slitter as used equipment, and in 1989 or 1990, Kasle decided to increase the capacity of the slitter. Plaintiffs averred that Kasle "performed and/or furnished the design for a modified 72"-slitter line based upon Kasle's own formulation of a new system," and "specially selected" components supplied by "Braner/Coil-Tech Corporation, a Chicago based manufacturer that also served as the contractor making the improvements to Kasle's 72"-slitter line." The second amended complaint asserted that Kasle incorporated a new "tension stand" and a new "re-coiler" into the modified slitter line, but neglected to incorporate a "'feeder table'—a device allowing the safe and stable passage of the leading edge of the cut steel out from the tension stand and onto the re-coiler . . . ." Plaintiffs averred that the presence of a feeder table would have eliminated the need for a slitter helper to manually lift and position the steel in the recoiler slot.

Count I of the second amended complaint, entitled "Negligence/Gross Negligence by Kasle Steel Corporation in the Design and Formulation of the 72"-steel slitter line," averred that Kasle undertook "to design and to formulate a new system of interrelated equipment," and knew or should have known that the new system "was defective and unreasonably dangerous" because it did not incorporate a "feeder table" or another safety device "so as to allow the safe and stable passage of the leading edge of the cut steel . . . ." This allegation further explained that as configured, the slitter "required slitter workers to position themselves at points of potential energy release, beneath the cut steel coils, in order to perform their job functions."

Count II of the second amended complaint, entitled "Negligence/Gross Negligence by Kasle Steel Corporation in its inspection, maintenance, repair, and training on the 72"-steel slitter line," alleged that Kasle "undertook to assign two or more Kasle employees" to inspect, test, repair and maintain the slitter. Plaintiffs further maintained that pursuant to its lease with Kerry, Kasle provided personnel "to train and instruct employees of Kerry in the safe and proper method of operating, inspecting, testing, repairing, and maintaining" the slitter, and that plaintiff sustained his injuries "while employees of Kasle Steel were present inspecting, maintaining, and/or repairing" the slitter. The second amended complaint asserted that Kasle negligently failed to perform the training, inspection, maintenance and repair functions it had undertaken. Count III, entitled "Nuisance in Fact," alleged that because the slitter line did not incorporate a

feeder table or other guard, it qualified as a nuisance in fact. Count IV repeated the same breach of contract allegations as pleaded in the previous complaints.[2]

In July 2005, Kasle filed a motion for summary disposition, contending that (1) Count I set forth a product liability claim, but Kasle "was not involved in the 'production of a product' as that term is defined in the [product liability] statute"; (2) Kasle bore no duty to repair or maintain the premises, or to train Kerry's personnel; (3) because Kasle had no duty to repair or maintain the slitter, plaintiffs could not demonstrate a nuisance in fact; and (4) plaintiff did not qualify as a third-party beneficiary of the lease. In support of Kasle's motion regarding Count II (negligent inspection, maintenance, repair and training), Kasle provided the trial court with a copy of the lease, and nothing more. Notably, Kasle did not challenge the sufficiency of the evidence supporting any of plaintiffs' negligence claims.

Plaintiffs responded that regardless of the lease provisions, Kasle had undertaken to provide training, repair and maintenance services to Kerry personnel, thereby giving rise to a duty of care. Plaintiffs pointed out that their complaint specifically identified Bruce Davis as the Kasle employee who provided maintenance and training services. Kasle filed a reply brief alleging that no evidence supported that it had maintained or repaired the slitter, and that "[w]ith regard to training, the training provided by Mr. Davis to Kerry Steel employees was verbal instruction only because Kerry was a non-union shop and Defendant's union employee—Bruce Davis—was barred by union rules from operating any machinery or performing any work at Kerry Steel."

At a summary disposition hearing conducted in January 2006, the trial court denied summary disposition regarding Count I (negligent/grossly negligent design or formulation), and granted it as to Counts II (negligent "inspection, maintenance, repair and training"), III (nuisance in fact) and IV (breach of contract). In January 2007, a jury trial occurred concerning Count I, and the jury returned a verdict finding no negligence on the part of Kasle.

II. Analysis of Summary Disposition Rulings

Plaintiffs first challenge the trial court's decision to grant Kasle summary disposition of second amended complaint Count II, which alleged negligent repair and negligent training by Kasle. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Kasle moved for summary disposition pursuant to MCR 2.116(C)(10). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant

[2] After answering the complaint, Kasle filed a notice of nonparty fault, naming Kerry, Braner USA, Edgecomb Corporation, which purchased the slitter as new equipment in 1980, and sold it to Kasle in 1983, and Coil Tech Corporation.

documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, *supra* at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra* at 183.

A. Negligent Training (Count II)

After reviewing the record, we find that the trial court erred by summarily dismissing plaintiffs' negligent training claim. The Kasle-Kerry lease specifically contemplated that Kasle would train Kerry employees. Furthermore, viewed in the light most favorable to plaintiffs, the record evidence demonstrated that (1) Kasle undertook to train Kerry employees, and (2) Bruce Davis, a Kasle employee, trained plaintiff in slitter operation.

The industrial facility lease between Kasle (the landlord) and Kerry (the tenant) commenced on July 1, 1999. Section 3.02 of the lease provided in part,

> Commencing on or about June 1, 1999, *Tenant shall have the right to enter upon the Premises for the purpose of obtaining training of Tenant's employees in the use of the Equipment located in the Premises by Landlord's employees*. … In addition, Tenant acknowledges that such training shall be at Tenant's sole risk and Tenant further agrees to indemnify and hold Landlord harmless from and against any and all claims for loss or damage, including personal injury, which may arise in connection with such training. [Emphasis supplied.]

Bruce Davis testified at his deposition that he worked for Kasle for 17-½ years, and during that time gained familiarity with "each aspect" of Kasle's business. In 1999, Kasle closed its Dearborn slitter operation in contemplation of leasing the steel processing lines to Kerry. According to Davis, "they [Kasle] asked me if I would come over to help Kerry. So I came over to help Kerry during the familiarization of the equipment and the location." When Kasle closed part of its Dearborn facility, Davis was assigned to work as laborer, and "one of the reasons I agreed to come to Kerry [was] to help them get familiar with their equipment because I didn't want to be a laborer." Davis further explained,

> *Q*. You mentioned that you came to Kerry to help them become familiar with their equipment?
>
> *A*. Yes, sir.
>
> *Q*. Does that include the slitter such as the 72?
>
> *A*. Yes, sir.
>
> * * *
>
> *Q*. When you say you worked with Kerry, what was it that you were helping them do?

> *A.* Just if they want to know the location of something, show them how Kasle did it because they had new operators that wasn't familiar with the way that the slitters ran. That's why I don't run number four slitter for Kerry, because I have never been taught how to, you know, where the controls was.[3] Basically all slitters are run the same, but there is certain techniques you have to go by what button to hit first to get everything to run smooth.

Later in the deposition, Davis denied training anyone on the 72-inch slitter, but admitted to conducting training on a 60-inch slitter. Davis described his role as follows:

> All I did was to stand behind the operator. I was not allowed to touch buttons. That was under my ruling from my union. I could not operate. All I could do is voice an opinion on I would do it this way if I was you. And basically all slitters run the same except for one like 72 having a pit is a driven slitter. All the rest is pull-through. They might have different buttons in different locations, but they all basically get loaded the same and ran the same. . . .

Counsel for Kasle questioned Davis as follows:

> *Q.* Isn't it true that all you did was stand by to answer any questions that they may have? By that I mean you stood by out on the shop floor and made yourself available to answer any questions that any of the Kerry employees might have?
>
> *A.* Yes, sir.
>
> *Q.* And that's all you did?
>
> *A.* That's all I did.

Despite defense counsel's attempt to minimize Davis's role, elsewhere in the deposition Davis admitted he trained Kerry's slitter helpers. When asked what he had heard about plaintiff's accident, Davis responded,

> [W]hen you put a cut in the 72, you don't walk underneath steel that's not locked in. You are supposed to exit to the rear of the machine. He did not exit to the rear. He walked under it where you have to bend down at your waist. I don't know how tall this guy is. He looked like he's about close to six foot when I seen him out there, but you've got to go under a place that's about four foot if you're going to go underneath the steel *and all the people I have ever trained to do the helper's job on there, I have showed them you always exit where you could duck underneath the machine and not the material and exit that way where you can stand up where there is nothing that could hit you.* [Emphasis supplied.]

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[3] The 72-inch slitter was number two for Kerry and number seven for Kasle.

Plaintiff testified at his deposition that he had not seen or worked with a steel slitter before he commenced his employment with Kerry in March 1999 as a "slitter helper." Plaintiff initially received some training in slitter operation before Kerry moved to Dearborn. In Dearborn, Davis provided training:

> *Q.* When you got to Dearborn did anyone give you any further training on how to recoil slit steel on a slitter?
>
> *A.* Yes, sir.
>
> *Q.* Who gave you additional training?
>
> *A.* Bruce Davis, I believe, his name was.
>
> *Q.* Who is Bruce Davis?
>
> *A.* He worked for Kasle Steel, I believe.
>
> *Q.* Why do you believe he worked for Kasle?
>
> *A.* Because Kasle employees had come over and trained us how to run their machines.
>
> *Q.* And when did that happen?
>
> *A.* The first couple weeks we came to Dearborn.
>
> *Q.* Did anyone else teach you anything about the operation of any of the slitters other than Bruce Davis when you were at the Dearborn facility?
>
> *A.* Well, Bruce was the one that taught me the most about setting up my operation, always Bruce.

Later in the deposition, plaintiff reemphasized that Davis had trained him on the 72-inch slitter:

> *Q.* So can we conclude that the only person from Kasle that gave you any training on that 72-inch slitter would have been Bruce Davis?
>
> *A.* Yes, sir, I believe so.

James P. Miller, Kerry's plant manager, testified at his deposition that Kasle "made available to us one of their employees for about two months, I think … to train on some of the slitters." Miller identified Davis as the Kasle employee who provided the training, explaining, "Bruce instructed us on a few things on the slitters."[4]

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[4] In Kasle's summary disposition brief regarding its third-party complaint against Kerry, Kasle (continued…)

In granting Kasle summary disposition of plaintiffs' negligent training claim, the trial court observed, "I do not believe that you could call what he [Davis] was doing in that plant training," and ruled from the bench as follows:

> Negligent training, I think the lease is clear and expressly addresses repairs and maintenance as I have already stated. That is the tenant agreed to maintain the premises, including under [lease section] 10.02, expressly providing that improvements or alterations to bring the equipment into compliance with any law, statute, ordinance, including OSHA, are the obligation of Kerry Steel.
>
> Plaintiff's employer had possession and control of the premises and as part of the industrial facility lease, was obligated to repair and maintain the premises.
>
> As far as the training goes, it's, while it's true under this lease that the Defendant undertook to assign two or more Kasle Steel employees to inspect, test, repair and maintain the leased equipment, including the slitter line and to train, instruct employees of Kerry Steel, that obligation ended when they took possession of the property. And the plaintiff has no evidence to support that position. I think Bruce Davis' deposition was as clear as you could get, that he was the person assigned to do it and he said he didn't.

The trial court thus granted summary disposition of plaintiffs' negligent training claim based on its conclusion that Kasle did not provide plaintiff with any training.

But contrary to the trial court's conclusion, that "I think Bruce Davis' deposition was as clear as you could get, that he was the person assigned to do it and he said he didn't," our review of the record reveals evidence that creates a jury question whether Davis trained plaintiff regarding the operation of the 72-inch slitter. Plaintiff's deposition testimony on this subject, standing alone, constitutes sufficient evidence that Davis trained him in slitter operations. In addition to plaintiff's deposition testimony, Davis admitted at his deposition that he "agreed to come to Kerry to help them get familiar with their equipment," and provided advice regarding slitter operation. And the lease specifically contemplated that Kasle employees would train Kerry's employees regarding the equipment: "Tenant shall have the right to enter upon the Premises for the purpose of obtaining training of Tenant's employees in the use of the Equipment located in the Premises by Landlord's employees."

We find that the trial court's determination that, "I do not believe that you could call what he [Davis] was doing in that plant training," constitutes impermissible factfinding. The language of the lease, together with the deposition testimony of plaintiff, Davis and Miller, precluded summary disposition under MCR 2.116(C)(10). Viewed in the light most favorable to plaintiffs, as we must on a summary disposition motion brought under subrule (C)(10), the evidence supports that Davis trained plaintiff on the slitter; specifically that Kasle had undertaken to train

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(…continued)

admitted, "One Kasle employee was made available to train Kerry employees on some of the slitters in the plant. . . ."

Kerry employees and performed the training negligently. Given the existence of this evidence, the trial court erred by summarily dismissing plaintiffs' negligent training claim.

B. Negligent Inspection, Maintenance and Repair (Count II)

Kasle's motion for summary disposition averred that it owed no duty to repair or maintain the 72-inch slitter, based on the following language of the lease:

> 10.01 Tenant agrees at his own expense to keep the premises, including all structural, electrical, mechanical and plumbing systems therein and the equipment at all times in good appearance and repair except for reasonable and normal wear and tear. …
>
> 10.02 Notwithstanding any provision of this lease, from and after the date tenant takes occupancy of the premises any repairs, additions or alteration to the improvements, equipment, or any of its systems (e.g., plumbing, electrical, mechanical) structural or non structural, which are required by any law, statute, ordinance, rule, regulation or governmental authority or insurance carrier, including, without limitation, OSHA and MIOSHA, will be the obligation of tenant.

According to Kasle's summary disposition brief, "Kerry Steel was obligated to repair and maintain the premises," and Kasle owed plaintiff no duty in this regard.

Plaintiffs responded that based on *Ginsberg v Wineman*, 314 Mich 1; 22 NW2d 49 (1946), "the mere evidence of the *terms of the lease* are not dispositive," because plaintiffs contended that Kasle "*nonetheless did undertake to repair and maintain the subject equipment.*" (Emphasis in original). Plaintiffs also mentioned in a footnote that the deposition testimony of several witnesses, including Davis, Miller and plaintiff, established "that Kasle employees, including Bruce Davis, had indeed undertaken to provide maintenance, repair, and training for Kerry after the commencement of the lease." Kasle's reply brief did not cite any law regarding this issue. Rather, Kasle argued, "Plaintiff's argument is lacking only one important ingredient—evidence. There is simply no evidence—and Plaintiffs have not cited this Court to any [in] their Response—that Defendant maintained or repaired the 72 inch slitter after the commencement of the lease."

At the summary disposition hearing, plaintiffs' counsel argued that in its original summary disposition motion and brief, Kasle did not specifically contend that insufficient evidence supported the negligent repair or maintenance claim: "I didn't see anywhere in their brief or motion that the facts were insufficient to support that allegation." The trial court pointed out that Kasle had raised the sufficiency issue "certainly in their reply brief." However, in ruling on this issue, the trial court focused on the law rather than the sufficiency of the evidence:

> Defendant had no duty to repair the slitter at the time of the Plaintiff's injury. In fact, the contract between the parties provided that the lessee, Plaintiff's employer, assume[d] the duty to modify or alter the equipment to make the equipment comply with OSHA or any other applicable standards.

* * *

> Plaintiff's employer had possession and control of the premises and as part of the industrial facility lease, was obligated to repair and maintain the premises.

Plaintiffs' second amended complaint alleged that Kasle "undertook to assign two or more Kasle employees to carry out and conduct inspections, testing, repairs, and/or maintenance of the leased equipment, including the 72"-slitter line." Although the trial court correctly concluded that Kasle bore no duty to repair the equipment under the terms of the lease, the trial court's summary disposition ruling failed to address whether Kasle could face liability for negligent repairs that it voluntarily undertook to perform.

In *Ginsberg*, a landlord undertook to repair a basement step used by the tenant, and completed the repair in a negligent fashion. The plaintiff, an employee of the tenant, fell down the stairs when a stair tread "tipped right off." *Ginsberg*, *supra* at 3-5. The lease did not obligate the defendant to repair and maintain the premises. *Id*. at 6. The Michigan Supreme Court framed the dispositive question as, "If the step was gratuitously repaired by [the defendant's] agent, although he was not legally obligated to do so, and that repair was made in a negligent manner, is [the defendant] liable for injuries sustained by the tenant's employee as a result of the improper repair?" *Id*. The Supreme Court answered this question in the affirmative, and adopted the following rule from the Restatement of Torts:

> The lessor of land, who, by purporting to make repairs thereon while the land is in the possession of his lessee or by the negligent manner in which he has made such repairs has, as the lessee neither knows nor should know, made the land more dangerous for use, is subject to liability for bodily harm caused thereby to the lessee and others upon the land with the consent of the lessee or sub-lessee. [*Id*. at 7, quoting 2 Restatement, Torts, § 362.[5]]

Additional authority also supports the general proposition that a duty may arise when a defendant undertakes an action that it otherwise possesses no obligation to perform. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 205; 544 NW2d 727 (1996), involved the defendant pharmacy's use of a computer system to "monitor its customers' medication profiles for adverse drug interactions." The defendant in *Baker* advertised that its computer system "was designed in part to detect harmful drug interactions." *Id*. Based on these facts, this Court concluded that the defendant pharmacy "voluntarily assumed a duty of care" when it implemented the computer system and advertised its function. *Id*. at 205-206. In *Baker*, this Court drew on well-established case law in concluding that the defendant owed a duty simply because it voluntarily undertook a task:

> Courts have imposed a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume. *Sponkowski v Ingham Co Rd Comm*, 152 Mich App 123, 127; 393 NW2d 579 (1986); *Rhodes v United*

[5] On appeal, Kasle fails to cite or distinguish *Ginsberg* from the facts of this case.

> *Jewish Charities of Detroit*, 184 Mich App 740, 743; 459 NW2d 44 (1990)[, holding ltd in *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993)]; *Terrell v LBJ Electronics*, 188 Mich App 717, 720; 470 NW2d 98 (1991); *Holland v Liedel*, 197 Mich App 60, 64-65; 494 NW2d 772 (1992); *Babula* [*v Robertson*, 212 Mich App 45, 50-51]; 536 NW2d 834 [(1995)]. [*Baker*, *supra* at 205.]

Further examination of Michigan case law lends additional support to plaintiffs' claim that an undertaking by Kasle could create a duty of care. In *Schanz v New Hampshire Ins Co*, 165 Mich App 395, 401-402; 418 NW2d 478 (1988), this Court applied the following principles advanced in the Second Restatement of Torts:

> "Negligent Performing of Undertaking to Render Services
>
> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize is necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking." [*Id*., quoting Restatement, § 323.]

The plaintiffs in *Schanz* owned a building insured by the defendant. *Id*. at 398-399. The defendant retained Commercial Services, Inc., another company, to inspect the building and to estimate its replacement cost. *Id*. at 399. Commercial Services prepared a report containing several serious errors. *Id*. The defendant reviewed the report but failed to detect the errors, and insured the building for an amount well under its actual replacement value. *Id*. at 399-400. After the building burned down, the plaintiffs sued the defendant for the difference, and the jury found in the plaintiffs' favor. *Id*. at 400.

On appeal, the defendant averred that it owed no duty to inspect and appraise the plaintiffs' building. *Schanz*, *supra* at 400. The plaintiffs countered that "once defendant undertook to appraise the building for purposes of informing plaintiffs of the required insurance coverage, defendant assumed a duty to use reasonable care in establishing the replacement cost value of the building." *Id*. This Court explained that "the law does not impose a duty on insurers to inspect the premises of their insureds, although such an obligation may be undertaken." *Id*. at 401. This Court held that the trial court properly determined "that defendant owed a duty to plaintiffs to exercise reasonable care in determining the replacement cost coverage under the policy issued to plaintiffs" because material questions of fact existed with respect to whether the defendant undertook the duty described in § 323 of the Restatement. *Id*. at 401-402, 404-405. See also *Hart v Ludwig*, 347 Mich 559, 564; 79 NW2d 895 (1956) ("The law imposes an obligation upon everyone who attempts to do anything even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken, for nonperformance of which duty an action lies.") (internal quotation omitted).

We conclude that *Ginsberg* and related case law support that Kasle could face liability if it voluntarily undertook to repair the machinery it owned and leased to Kerry. The trial court thus erroneously granted summary disposition of plaintiffs' claim for negligent repair in sole reliance on the terms of the Kasle-Kerry lease. On remand, Kasle may challenge the sufficiency of the evidence supporting plaintiffs' negligent repair and maintenance claim by filing a summary disposition motion that meets the requirements of MCR 2.116(G)(3)(b).

C. Nuisance in Fact (Count III)

Plaintiffs theorized that because the slitter constituted an "unreasonably dangerous condition" of which Kasle had awareness at the time it leased the premises to Kerry, Kasle could face liability for the presence of this nuisance in fact. "[T]he gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992). A private nuisance involves "not only a defect, but threatening or impending danger … to the property rights or health of persons sustaining peculiar relations to the same, and … the doctrine should be confined to such cases." *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910). In *McDowell v Detroit*, 264 Mich App 337, 349; 690 NW2d 513 (2004), rev'd on other grounds 477 Mich 1079 (2007), this Court explained, "To establish the existence of a nuisance in fact, also known as a nuisance under the circumstances, a plaintiff must show '*significant harm* resulting from the defendant's *unreasonable interference* with the use or enjoyment of the property.'" (Emphasis in original).

In *Kilts*, *supra*, the Michigan Supreme Court considered whether a negligently constructed water tower constituted a nuisance in fact. The plaintiff's decedent fell to his death from the tower while working on a covering for the tank. The plaintiff sued the board of supervisors that authorized the tower's construction, the contractors who built it, and the subcontractor who supplied the faulty joists responsible for the accident. *Id*. at 647-648. The trial court directed a verdict for the board of supervisors and the contractors, from which the plaintiff appealed. *Id*. at 648. The plaintiff contended that "the tower was a nuisance, and therefore all the defendants are liable for the injury, upon the theory that all who have to do with creating or maintaining a nuisance are liable for injuries resulting therefrom." *Id*. at 649. The Supreme Court rejected this argument, explaining,

> The defendants in this case owed no duty to the deceased not to erect or maintain this structure. They committed no wrong against him in doing so, for they had no relations with him and he had no right upon the premises up to the time that he was employed to cover the tank. His rights under such employment, such as the right to a safe place to work, and to warning of danger, are to be measured by the ordinary rules of negligence cases, and grow out of his contract of employment, whether the tower was a private nuisance as to other persons or not. In this cause counsel's contention would subject every person who had anything to do with the authorizing, planning, or erecting of this tower and tank to liability for the injury to the intestate. [*Id*. at 653.]

Plaintiffs' argument that *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399; 97 NW2d 90 (1959), controls the outcome of this issue lacks merit. The plaintiff in *Bluemer*, a business invitee, fell through an unmarked trap door at a service station owned by the

defendant Saginaw Oil and leased to Gerald Machul. *Id*. at 402-403. The trial court granted a directed verdict in favor of Saginaw Oil, concluding that Machul had sole possession and control of the station when the plaintiff fell. *Id*. at 404. The Supreme Court determined that because Saginaw Oil lacked possession or control of the premises, it had no duty to keep the premises safe. *Id*. at 408. However, the Supreme Court held that the jury should have been permitted to determine whether the trap door constituted a nuisance in fact. *Id*. at 415-416. The Supreme Court quoted with approval the following language from *Samuelson v Cleveland Iron Mining Co*, 49 Mich 164; 13 NW 499 (1882):

> Every man who expressly or by implication invites others to come upon his premises, assumes to all who accept the invitation the duty to warn them of any danger in coming, which he knows of or ought to know of, and of which they are not aware. This is a very just and very familiar principle. [*Bluemer, supra* at 412-413.]

Bluemer is readily distinguishable from the instant case. *Bluemer* involved an injury sustained by a business invitee, rather than an employee at his workplace. More importantly, the slitter involved here cannot constitute a nuisance because unlike a hidden trap door, its "natural tendency" is not to "create danger" or "inflict injury on person or property." *Id*. at 411. The slitter's mere existence within the leased factory did not interfere with plaintiff's use or enjoyment of the premises, and Kasle owed plaintiff no duty to avoid erecting this machine or leasing it to Kerry. Further, general negligence law principles afford plaintiff with several potential causes of action for pursuing relief. Because the law of nuisance has no reasonable application to these facts, the trial court correctly granted summary disposition of the nuisance claim.

D. Breach of Contract (Count IV)

Plaintiffs reasoned that because the Kasle-Kerry lease specifically provided that Kasle would train Kerry's employees in the use of the equipment on the premises, and because plaintiff fell within the group of Kerry employees, he qualified as a third-party beneficiary of the lease agreement.

In MCL 600.1405, the Legislature defined, in relevant part as follows, who may claim third-party beneficiary status with respect to an agreement entered by other parties:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2) (a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or

> knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.
>
> (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime. . . .

The Michigan Supreme Court has summarized that "the plain language of this statute reflects that not every person incidentally benefited by a contractual promise has a right to sue for breach of that promise, but rather only if the promisor has 'undertaken to give or to do or refrain from doing something *directly* to or for said person." *Brunsell v City of Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002) (emphasis in original). "By using the modifier 'directly,' the Legislature intended 'to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.'" *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003), quoting *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999). This Court recently summarized,

> Only intended, rather than incidental, third-party beneficiaries may sue when a contractual promise in their favor has been breached. More specifically, an incidental beneficiary has no rights under a contract. A third person cannot maintain an action on a simple contract merely because he or she would receive a benefit from its performance or would be injured by its breach. . . . [*Kisiel v Holz*, 272 Mich App 168, 170-171; 725 NW2d 67 (2006)].

In determining whether MCL 600.1405 applies to a purported third-party beneficiary, "a court should look no further than the form and meaning of the contract itself," and should view the contract objectively. *Schmalfeldt, supra* at 428 (internal quotation omitted).

The language of the lease in this case provides no support for plaintiff's contention that he amounts to an intended third-party beneficiary of the Kasle-Kerry lease agreement. The lease nowhere references plaintiff. Kasle's obligations under the lease flowed to Kerry alone. At best, plaintiff qualifies as an incidental beneficiary of the lease. Therefore, the trial court correctly granted summary disposition of plaintiff's breach of contract claim.

III. Discovery Issues

According to plaintiffs, Kasle willfully and repeatedly abused the discovery process by making affirmative misrepresentations, destroying relevant evidence, violating court orders regarding discovery, and failing to produce requested documents. Plaintiffs maintain that the trial court should have granted their motion for a default judgment based on this misconduct, abused its discretion by finding that Kasle had not committed fraud or lied to the court, and further erred by failing to conduct an evidentiary hearing before making unsupported findings of fact.

We review for an abuse of discretion a trial court's decision regarding sanctions for discovery violations. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 450; 540 NW2d 696 (1995). A trial court abuses its discretion when it makes a decision that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). If a party or a party's representative "fails to obey an order to provide or permit discovery … the court in which the action is pending may order such sanctions as are just," including an order "refusing to allow the disobedient party to support or oppose designated claims or defenses . . . ." MCR 2.313(B)(2)(b). "Default is a drastic measure and should be used with caution." *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). A court should employ the default sanction "only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary." *Id*., quoting *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994). Sanctions under MCR 2.313(B) may not be imposed in the absence of a discovery order. *Brenner v Kolk*, 226 Mich App 149, 158-159; 573 NW2d 65 (1997).

In August 2003, plaintiffs requested the production of:

> 18. Each document evidencing the receipt of, the purchase of, and/or payment for, any and all parts, components, spare parts, replacement parts, additional parts, tooling, and/or equipment related to the subject 72"-slitter, and all of its related components and tooling, including, but not limited to, the re-coiler, shear, and any other equipment, parts, components or tooling related thereto, by anyone at any time.
>
> 19. Copies of all repair records, invoices, warranty records, maintenance records, inspection records generated by Defendant or generated by any third-party regarding the subject 72"-slitter and its related tooling and components, including, but not limited to, the re-coiler and shear, from before the subject accident.

In the same request, plaintiffs sought the production of all maintenance logs, repair records and "any other records" regarding the 72-inch slitter.

On September 10, 2003, Lynn Paczesny signed Kasle's responses regarding the repair and maintenance records sought by the August 2003 interrogatories. In answer to interrogatories 18 and 19, Paczesny stated, "No such documents exist." In February 2005, plaintiffs learned that Kasle stored old documents with Leonard Brothers Data Management, Inc., an off-site storage facility. Leonard's records revealed that in December 2003, Kasle had given Leonard written authorization to destroy records regarding the 72-inch slitter. After learning these facts, plaintiffs filed a motion for entry of Kasle's default, alleging that Kasle had destroyed relevant documents that were the subjects of previous discovery orders. Plaintiffs' motion also referenced several other discovery requests that Kasle had incorrectly answered, but later corrected.

The trial court ruled as follows:

> They can't produce documents that they don't have. Down the road if you want some kind of instruction about documents that you think are out there and

> they didn't produce and it should be—the jury should look at it favorably towards you that those document [sic] might contain something that would be favorable to you, I will consider that. I'm not saying you can do it, but I will consider that.
>
> *Traxler* to me was a case where the defendant, they lied, they committed fraud. They lied, and mostly they lied and committed fraud to the Court not to [the] other attorney [sic], even answering motions and so forth. But I do not find that this case rises to the level of *Traxler*. So I will not enter any motion for a default based on discovery abuses. As I've said, if there's some document that you think they might have and they didn't produce it, I'll consider an instruction that the contents would be favorable to you.

The trial court denied plaintiffs' counsel's request for an evidentiary hearing on this subject.

The record reflects that Kasle arguably destroyed documents that it knew or should have known constituted relevant evidence sought by plaintiffs. However, the destruction of these records occurred prior to the entry of a court order regarding discovery of this material. Furthermore, no evidence exists that anyone at Kasle deliberately or intentionally ordered the destruction of the records to impede discovery, and the trial court appropriately instructed the jury as follows:

> The defendant in this case has not produced the files regarding maintenance and repairs to the 72-inch slitter line identified in its file listing reports which is Exhibit 51. You may infer that this evidence would have been adverse to the defendant if you believe the evidence was under the control of the defendant and could have been produced by the defendant and no reasonable excuse for defendant's failure to produce the evidence has been shown.

Plaintiffs have also failed to coherently articulate the manner in which any additional maintenance or repair records would have impacted the trial of this case. We thus conclude that the trial court did not abuse its discretion when it refused to enter Kasle's default or to schedule an evidentiary hearing.[6]

IV. Alleged Evidentiary Errors at Trial

A. Purportedly Improper Lay Witness Testimony

Plaintiffs contend that the testimony of three lay witnesses, Paczesny, Mike Ulewicz, and Jim Miller, violated MRE 701 and 702, and injected "unfair prejudice and surprise" in light of Kasle's failure to supplement its interrogatory answers regarding the anticipated testimony of

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[6] During the hearing on plaintiffs' motion, plaintiffs' counsel stated, "I don't believe there's any basis for an evidentiary hearing . . . the defendant has presented no evidence whatsoever to contest the undisputed, un-rebutted facts set forth in the plaintiff's motion." Plaintiffs requested an evidentiary hearing only after the trial court ruled in Kasle's favor.

these lay witnesses. On June 23, 2005, the trial court entered a "stipulated order regarding discovery" that provided in pertinent part, "It is hereby ordered that . . . [defendant Kasle Steel] [s]hall serve complete, detailed answers to Plaintiffs' Third Set of Interrogatories to Defendant, Kasle Steel Corp., Regarding Kasle Steel Corp.'s Amended Witness List, except those interrogatories related to liability expert witness(es), within 14 days of entry of this Order." The interrogatories requested "a summary of the witness' anticipated testimony at the time of trial."

Kasle answered the interrogatory by stating, "No answer required." At a hearing conducted on January 5, 2006, plaintiffs' counsel argued that this answer qualified as nonresponsive. Kasle's counsel responded that plaintiffs had deposed most of the listed Kasle witnesses, and no further interrogatory answer was required because "[t]hose people are all well known to him," and, "If he wants to interview those people that he's not deposed, he can go interview them. I don't know what they're going to say." The trial court denied plaintiffs' motion and observed, "I don't allow trial by ambush. So if you haven't had an opportunity and somebody on this witness list, surprise them, calling this person, it won't happen in my courtroom." This ruling falls within the range of reasonable and principled outcomes, and does not qualify as an abuse of discretion. *Maldonado*, *supra* at 388.

B. Allegedly Improper Expert Testimony

Several months before trial, plaintiffs filed a motion in limine seeking to exclude expert testimony offered by Kasle's lay witnesses. Kasle's counsel represented that the lay witnesses would not give opinions regarding the "standard of care," but would instead testify regarding their perceptions and experience with feeder tables, "how a feeder table would work, how it wouldn't, what it would require the employer to do, what he wouldn't have to do because now this table is going to raise and lower between this tension stand and recoiler." Plaintiffs' counsel responded, "Now, that steps over the bounds. That's where I draw the line. If I may, Ed Jacinski, who was the Coil Tech Representative, has testified. He was asked by [defense counsel] about the feeder table. And he said I'm not an engineer. I can't comment on that. That goes to the standard of care."

The trial court observed, "I agree. This is something that's going to have to be dealt with in the context of this trial. It's pretty hard in a vacuum. I will tell you this, lay witnesses don't get to give expert opinion." The trial court then declared that it would grant plaintiffs' motion "because it's with an understanding that defense counsel has represented they're not going to give expert opinions. And any kind of further limitations that you wish to have on their testimony will have to be dealt in the context, or at the time of their testimony."

Plaintiffs claim that despite this ruling, the trial court "permitted" Paczesny to offer expert testimony. However, plaintiffs' counsel himself elicited the challenged testimony. Plaintiffs' counsel asked Paczesny whether she had "a general concern about the slitters," and she answered affirmatively. Plaintiffs' counsel then inquired:

> *Q.* And the specific concern did that ever come up, the concern about between the tension stand and the recoiler; did that ever come up at any audit during any audit?
>
> *A.* No, sir.

Q. It would be an appropriate matter for concern, wasn't it?

A. The primary concern I've already stated was the running steel and the recoiler itself as it was returning.

Q. Why was that?

A. Because the area is practically impossible to guard and still have a slitter do what it's supposed to do; cut the slits of steel, gets them off. So one of the most difficult parts of that is the concern someone can always walk in to that area while the recoiler was winding and possibly be wound in. That was the terror of slitters.

Q. Did you bring that up to Mr. Kasle or any of the corporate level people that would have the ability to take care of that problem?

A. I can't ever remember specifically addressing that because slitters are what they are. We knew of the hazard. You apply the controls that you could to make it safe for people in the area.

Q. If that's your control—concern, all you had to do was guard it, right?

A. But you can't guard it and get the slits of steel off.

Q. You could have a—you're not an engineer, right?

A. I'm not an engineer.

Similarly, plaintiffs' counsel himself elicited the following testimony from Ulewicz, Kasle's chief operating officer:

Q. Would you agree Kasle Steel Corporation chose not to put in a feed table in 1990; when it was asking for certain components, it didn't ask for a feed table?

A. It wouldn't be feasible in that line.

Q. I asked you . . . chose not to?

A. There was a reason we chose not to, yes.

Q. I gather from what you want to say is that you didn't think it was feasible.

A. Not [the] way that line of equipment was designed, no.

Q. You're not [i]n engineering, right?

A. No, sir.

Q. And was that something that you discussed with Coil Tech?

A. Not to my knowledge, no.

Q. You didn't even raise it with Coil Tech?

A. Not to my knowledge.

Q. They were going to send you a tension stand, but you didn't suggest to them and it was not discussed with them adding the component of a feeder table at all?

A. That's correct to my knowledge.

Q. You acknowledge you could have done that, though, you could have asked them about it?

A. I suppose we could have.

Q. And if they were designing it, they could . . . design[] in a feeder table as part of that work, correct?

A. I would have to say I don't believe it would have been feasible.

Q. You're not an engineer.

A. I understand how the equipment works. And in order to get the material to go uphill and in to the gripper bar from the horizontals and dimensions it wasn't feasible.

"To oppose on appeal the admission of evidence at trial, a party must timely object at trial and specify the same ground for objection that it asserts on appeal." *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 688; 607 NW2d 123 (1999), citing MRE 103(a)(1) and *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). "A party cannot seek reversal on the basis of an error that the party caused by either plan or negligence." *Detroit v Larned Assoc,* 199 Mich App 36, 38; 501 NW2d 189 (1993). Having asked the questions that resulted in the witnesses' expression of opinions, plaintiffs' counsel cannot now complain of the answers.

Kasle presented the testimony of James Miller, Kerry's plant manager. Kasle's counsel asked Miller whether the feeder table as proposed by plaintiffs' expert would be "practical." Miller responded "Well, first of all, I see no a reason for a feeder table." Plaintiffs' counsel objected on the ground that Miller lacked qualifications to render an opinion. The trial court requested that defense counsel establish "some foundation." Miller described that he had worked with steel slitters for 30 years, and continued,

I've ran slitters. I've set up slitters. I have assisted on slitters. I've loaded and unloaded slitters. I've seen 11 of them in operation. I've worked with three

other ones that did stainless steel at another plant I worked at for a short amount of time.

Plaintiffs' counsel continued to object, arguing that Kasle had represented that it would not call any experts during the trial. The trial court stated, "I think I've already ruled on the issue. The objection is overruled . . . ."

Miller then testified regarding the impracticality of plaintiffs' proposed feeder table:

Q. If a table, like the one depicted in this diagram, was to be added to the 72 inch Brainer between the tension stand and the re-coiler, would it work?

A. No, I don't think so.

Q. Why not?

A. Well, that table there is now, it's down in your area to work. You saw in the video how much room you need to work. It's cut your work down. And the cylinder on the bottom there is protruding out about three four inches. When that table's brought down, you have a pivot point on the top. The table will not go down all the way and clear. So, you won't be able to bring the cart in either.

Q. All right.

A. What the biggest thing that I see with that is, first of all, it's not needed. Number two, if it's there, the man's got less room to work. . . .

The trial court's ruling appears somewhat inconsistent with its statement that "lay witnesses don't get to give expert opinions." Miller plainly expressed an opinion regarding a central issue in the case, the feasibility of plaintiffs' proffered design alternative. However, this testimony satisfied the requirements of MRE 701, because it was "rationally based on the perception of the witness," and "helpful to a clear understanding of the witness' testimony or the determination of a fact at issue." Consequently, the trial court did not err by allowing its introduction. Furthermore, even if Miller's testimony did not fulfill the requirements of MRE 701, its admission amounted to harmless error. MCR 2.613(A).

C. Exclusion of Letter by Defense Counsel

Plaintiffs further assert that the trial court erred by excluding from evidence as hearsay an August 13, 2003 letter sent by Kasle's counsel to Bonnie Crawley of the Chubb Insurance Group.[7] The letter stated in pertinent part,

[7] Defense counsel's office inadvertently sent a copy of the letter to plaintiffs' counsel.

> I will work with Lynn Paczesny with respect to the Kasle employees who are Roger Kasle, Mike Ulewicz and Ms. Paczesny. I am trying to work with Kerry's attorney to make sure that all of the defense witnesses testify in support of our defense to the Plaintiffs' claims. That is, I want to try to make sure all of the witnesses testify that Bruce Davis, a Kasle employee, only worked with the Kerry employees for a couple of months answering the Kerry employees' questions about how to operate the slitter involved in this case. Further, I want all of the witnesses to testify that Mr. Davis had not been assigned to answer any of the questions for the Kerry employees for more than a few months before the incident occurred. In addition, I want all of them to testify that Mr. Davis did not do any service or maintenance on the machine nor did any other Kasle employees provide any service or maintenance to the machine after it was leased to Kerry. This would provide us with a defense to the principal Plaintiff's claims and would also provide us with the basis for a Motion for Summary Disposition seeking a dismissal of the Plaintiffs' Complaint.

Kasle filed a motion in limine seeking to prevent plaintiffs from introducing or using the letter at trial. The trial court ruled that the letter constituted inadmissible hearsay, and did not qualify as an admission.

The letter from defense counsel did not qualify as inadmissible hearsay because plaintiffs did not offer it to prove the truth of the matters asserted within it. MRE 801(c). Plaintiffs offered the letter to show that defense counsel had attempted to manipulate or manufacture the testimony of various witnesses. Moreover, even had the letter been offered to prove the truth of the matters asserted within it, the letter constituted a vicarious admission to a third party, written by Kasle's attorney during the course of and in furtherance of the attorney-client relationship. MRE 801(d)(2)(D). The trial court thus erred by rejecting the introduction of the letter on hearsay grounds. But we conclude that error qualifies as harmless and does not constitute a ground for a new trial or other appellate relief. MCR 2.613(A).

IV. Summary

Because we are remanding for trial regarding Count II (negligent training, repair and maintenance), plaintiffs may again attempt to introduce defense counsel's letter. To introduce the letter or to use it for the impeachment purposes, plaintiffs will need to lay a proper foundation. If they lay a proper foundation, the letter is not objectionable on hearsay grounds. On remand, the trial court should reconsider the admissibility of the letter in light of the purposes for which its admission is sought, and whether a proper foundation has been laid, keeping in mind this Court's determination that the letter does not constitute inadmissible hearsay.

We reverse the trial court's order granting summary disposition of Count II, affirm the trial court's order granting summary disposition of Counts III and IV, and affirm the verdict regarding Count I, but vacate the order granting case evaluation sanctions. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher