STATE OF MICHIGAN

COURT OF APPEALS

KATHI WILSON, D.D.S., and GRAND DENTAL CARE OF GRAND RAPIDS, P.C.,	UNPUBLISHED May 18, 2010
Plaintiffs-Appellees,	
v	No. 289009 Kent Circuit Court
RONALD RIEBSCHLEGER,	LC No. 06-004434-CK
Defendant-Appellant.	

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by right the judgment entered for plaintiff following a jury trial in this contract dispute over defendant's sale of his Grand Rapids dental practice to plaintiff.[1] Defendant also appeals the trial court's October 31, 2008, opinion and order denying defendant's motions for judgment notwithstanding the verdict (JNOV), new trial, or additur and remittitur, and also granting plaintiff's motion for case evaluation sanctions. We affirm.

I. FACTUAL BACKGROUND

In 2003, plaintiff was just beginning her career as a dentist while defendant had an established dental practice with offices in Rockford and Grand Rapids. On June 5, 2003, the parties signed a contract for plaintiff to buy and defendant to sell Grand Dental Care of Grand Rapids, P.C. The sale price was $330,000 with an initial payment of $110,000 required on execution of the agreement, followed by additional payments of $110,000 one and two years after the first payment. Plaintiff would own one third of the practice on the first payment, two-thirds on the second payment, and the entire practice after the final $110,000 payment. The parties agreed to share profits of the practice during the purchase period on the basis of their respective ownership interests. The signature page of the contract contains the handwritten definition of profits as "all monies left over after expenses paid." The contract provided that an accountant using generally accepted accounting principles would determine profits.

[1] We use the singular "plaintiff" to refer to Kathi Wilson because the other nominal plaintiff is the subject of the buy-sell contract between Wilson and Ronald Riebschleger.

The agreement provided that during the first year, plaintiff would receive a draw of $70,000 as an advance of her share of that fiscal year's profits. The contract also provided that plaintiff "will not be held liable for any lab expenses" unless her "$70,000 draw is not met with her 33% share of profits at the end of the twelve-month period commencing at the time [plaintiff] begins actively rending [sic] dental services." The parties further agreed they would not compete within seven miles of each other for a period of two years beyond the end of the agreement. Finally, the contract contained an integration clause and also provided that any amendment to the agreement be in writing signed by both parties.

The dental practice operated on a fiscal year of July 1 through June 30. Over the first two years of the parties' agreement, defendant's long-time accountant, Mike Tawney, prepared financial statements for the dental practice. Tawney testified at trial that defendant instructed him to use the accrual basis of accounting on a fiscal year (July 1 through June 30) in preparing the financial statements, and that he had not been provided, nor did he review, a copy of the parties' agreement. It was not until after July 7, 2004 that Tawney prepared financial reports for the first fiscal year ending June 30, 2004. He did not prepare the financial reports for the second fiscal year ending June 30, 2005 until after August 11, 2005. Plaintiff paid her first installment of $110,000 on June 17, 2003, her second installment of $110,000 in August 2004, and paid the final installment of $110,000 on October 25, 2005. Defendant signed a receipt after the third payment that certified plaintiff had paid "the full purchase price of $330,000 for the purchase of Grand Dental Care . . . in three installments of $110,000 each."[2] Part of the dispute at trial involved the contract provision that allowed plaintiff at her option to delay paying the second and third installments if she paid a penalty calculated as a percentage of profits or nine percent interest from the date of the agreement. Plaintiff contended her payments were late, in part, because Tawney failed to timely prepare the dental practice's financial statements, which were necessary for her to obtain financing from her bank. Plaintiff also testified that she kept defendant informed regarding the delay and that defendant assured her that the delay in paying the second and third installments was not a problem.

In August 2005, plaintiff and defendant met with Tawney, who provided financial statements and an accounting of profits for the second fiscal year of the agreement. According to plaintiff, she believed that Tawney's accounting might have overstated the practice's profits. Plaintiff hired accountant Joel Baker to review both the parties' agreement and Tawney's financial statements. Baker concluded that the definition of "profits" in the contract required accounting for them on a cash, not the accrual, basis that Tawney had used. Consequently, Baker believed that Tawney had overstated profits that were due defendant under the agreement. Baker also concluded that Tawney's accounting overstated profits by not including depreciation. Later in 2005, the parties and their accountants met. Tawney agreed that Baker's claim regarding depreciation was legitimate. In December 2005, Tawney prepared new accounts that asserted for the first time defendant's claims for additional profits for the time period from the end of each fiscal year until when plaintiff actually paid the second and third installment payments, and also asserted claims for penalty assessments for the late payments. Tawney

[2] Defendant also received $128,000 as his share of profits under the agreement.

acknowledged at trial that in submitting the revised accounting claiming additional profits and penalties, he was acting as an advocate for defendant. Tawney acknowledged that the definition of "profits" in the contract, "all monies left over after your expenses paid," describes cash basis accounting. Defendant's other accounting expert at trial also conceded that profits calculated on a cash basis are "monies left over after expenses are paid."

In the first part of 2006, defendant, who owned the building in Grand Rapids where Grand Dental was located, would not enter into a lease agreement with plaintiff while his claim for additional profits and purchase price penalty was unresolved. Plaintiff feared that defendant might lock her out of the building, so, in April 2006, she moved her dental practice. Plaintiff notified defendant of her move and also posted signs to notify her patients of the new office location. Within days, plaintiff noticed that the signs had been removed and replaced by signs advising patients to contact defendant at his Rockford office. Also, in the process of moving, plaintiff learned that because defendant had transferred the license to his office in Rockford she could not use the dental office management software (Dentrix), which had been included in the purchase of the Grand Rapids practice.

On May 3, 2006, plaintiff initiated this lawsuit by filing a complaint alleging that defendant was in violation of the parties' covenant not to compete and that defendant was tortiously interfering with plaintiff's business relationship with her patients. Plaintiff sought and obtained a temporary restraining order. On May 22, 2006, the parties stipulated to the entry of an order continuing the temporary order, but also permitting defendant to place signs on the building regarding its availability for lease and permitting defendant to lease the building to another dentist provided defendant held no interest in the practice and the name "Grand Dental" was not used.

On June 22, 2006, defendant filed an answer and affirmative defenses to plaintiff's original complaint and a counter-complaint for breach of contract. Defendant alleged that plaintiff owed additional money under the contract as a penalty for paying the second and third installments late, that plaintiff owed defendant an additional share of profits, and that plaintiff had not properly accounted to defendant for the collection of presale accounts receivable that defendant had retained under the buy-sell agreement. Defendant also alleged that plaintiff was in violation of the parties' covenant not to complete by moving her dental practice to within seven miles of its original location. Plaintiff answered defendant's counter-complaint, denying its allegations. Plaintiff also asserted affirmative defenses of, among others, estoppel, waiver, and set off, and that defendant's claims were barred by his own breach of the parties' contract.

Although not specifically pleaded in her affirmative defenses, plaintiff's monetary claims against defendant included one for $17,042 to replace the Dentrix software with another dental practice software, Eaglesoft. In addition to the basic dispute whether profits were to be determined on a cash or accrual basis of accounting, plaintiff also contended that she should not have been responsible for any dental lab expenses during the first year of the agreement because her share of profits did not exceed her first-year draw of $70,000. Plaintiff also claimed she was improperly assessed a share of court costs necessary to collect presale accounts receivable that defendant had retained as his sole property.

After discovery, a case evaluation hearing occurred on September 20, 2007. The case evaluation panel awarded $0 for plaintiff and $20,000 for defendant against plaintiff. Plaintiff

accepted the case evaluation award and defendant rejected it. The trial court held a settlement conference on March 26, 2008, which resulted in scheduling the case for trial on July 14, 2008.

A week before the trial, on July 7, 2008, defense counsel filed with the trial court defendant's trial brief, proposed jury instructions, and a motion in limine to preclude plaintiff from arguing to the jury her entitlement to setoff regarding plaintiff's expense to replace the Dentrix software. Defendant argued the merits of this claim and that plaintiff did not present a claim for damages in her complaint related to the software license.[3]

On July 8, 2008, plaintiff filed her trial brief with the court. Plaintiff disputed defendant's claims for additional profits on the grounds of cash basis accounting over the first two fiscal years of the agreement. Plaintiff also asserted that defendant acknowledged full payment of the purchase price on receipt of the third installment payment of $110,000, and that defendant had waived enforcement of the contract's penalty provisions for late payments. Further, plaintiff asserted defendant owed plaintiff $17,000 to replace the dental software.

On the first day of trial, before beginning the process of empanelling a jury, the court heard arguments of counsel regarding defendant's motion in limine. Defense counsel noted that plaintiff's claims had been litigated for two years as setoffs to defendant's claims for damages, not as affirmative claims for damages, and that plaintiff had never sought leave to amend her pleadings. Plaintiff's counsel asserted that plaintiff's claim for the expense of replacing the Dentrix software arose after she filed her complaint was no surprise to defendant as it had been the subject of counsel's communication, discovery and case evaluation. Plaintiff's counsel acknowledged his failure to seek amendment earlier, and orally moved to amend plaintiff's complaint to permit her to seek damages as affirmative relief for breach of contract. Counsel asserted that the court rules provided that leave to amend should be freely granted where defendant could not establish prejudice. Defense conceded the issue was litigated at case evaluation, but only as a setoff to defendant's claims. Plaintiff's counsel disagreed, but the trial court did not accept his offer to review plaintiff's case evaluation brief. Plaintiff's counsel further noted that part of plaintiff's affirmative claim for damages included her contention that she had actually overpaid defendant his share of the dental practice's profits.

The trial court granted plaintiff's motion to amend, reasoning that the substance of plaintiff's claims had been litigated and defendant was prepared to defend them on the merits whether the claim was submitted as one for affirmative relief or only as a setoff. The court relied on MCR 2.118(A)(2), providing that leave to amend should be freely granted where justice so requires. Consequently, the trial court denied defendant's motion in limine.

On the eighth day of trial, after counsels' closing arguments and the trial court's instructions, the jury returned its verdict that plaintiff had not breached the parties' contract but that defendant had, awarding plaintiff damages against defendant in the amount of $25,030. On

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[3] Although plaintiff sought injunctive relief in her complaint, her prayer for relief also requested judgment for "any and all damages suffered as a result of Defendant's actions and any other relief [that the court] deems appropriate . . . ."

August 12, 2008 in accordance with the jury's verdict, the trial court entered judgment of $25,030 in favor of plaintiff and no cause of action on defendant's claims. By opinion and order issued October 31, 2008, the trial court denied all defendant's post-trial motions for relief, and also granted plaintiff's motion for case evaluation sanctions of $1130 in taxable costs and $51,982 as a reasonable attorney under MCR 2.402(O). Defendant now appeals by right.

II. CASE EVALUATION SANCTIONS

Defendant argues that case evaluation sanctions do not apply in this case; that plaintiff's counsel did not establish plaintiff was actually billed the fees claimed as sanctions; that plaintiff was not entitled to attorney fees related to her post-judgment motion for sanctions; and that the trial court erred by awarding prejudgment interest on the case evaluation award. We agree with plaintiff that to the extent these arguments have been preserved for appeal, they lack merit.

In general, a party that rejects a case evaluation award is subject to sanctions if the party fails to improve its position by proceeding to verdict. MCR 2.403(O)(1); *Rohl v Leone*, 258 Mich App 72, 75; 669 NW2d 579, 581 (2003). If applicable to the circumstances, the imposition of case evaluation sanctions is mandatory. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997). "We review de novo a trial court's decision to impose sanctions." *Rohl*, 258 Mich App at 75. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). To the extent defendant's claims involve the interpretation and application of the court rules or a statute, our review is de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001).

Defendant first argues case evaluation sanctions do not apply because MCR 2.403(K)(2) provides there must be a separate award "as to the plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action," and because in determining the favorably of a verdict, MCR 2.403(O)(4)(a) requires a comparison "of the evaluation and verdict as to the particular pair of parties . . . ." Defendant contends the evaluators did not contemplate an award regarding plaintiff Grand Dental and that plaintiff's claims were not pleaded as affirmative claims for damages until after case evaluation. Therefore, defendant argues, comparison of "pairs of parties" was not possible. See *Kusmierz v Schmitt*, 477 Mich 934; 723 NW2d 833 (2006); see also *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 626; 550 NW2d 580 (1996) (MCR 2.403(O) assumes the same claims were submitted at case evaluation as were presented at trial). Defendant did not preserve this argument for appeal. Moreover, it also lacks merit.

Although defendant asserted the posture of the parties' claims at case evaluation was a reason for not granting plaintiff's pretrial motion to amend her complaint, defendant did not assert this argument as a basis for avoiding case evaluation sanctions. Further, when plaintiff moved to amend her complaint, the parties disputed whether plaintiff's claims were argued at case evaluation as affirmative ones for damages or only as setoffs to defendant's claims. The trial court did not rule on the parties' claims regarding case evaluation. So, this argument is not preserved. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

In addition, this argument lacks merit. Defendant's claims *were* submitted to case evaluation. Defendant rejected the case evaluation award as to his claims against plaintiff in the

amount of $20,000, and plaintiff accepted this award. Defendant did not improve his position at trial when the jury, in essence, returned a verdict of no cause of action regarding defendant's claims. A party who rejects an evaluation is subject to sanctions if he fails to improve his position at trial. MCR 2.403(O)(1); *Rohl*, 258 Mich App at 75.

Defendant next argues that the trial court erred in awarding an attorney fee for services necessitated by the rejection of the case evaluation because plaintiff's counsel charged a discounted hourly fee less than what the trial court determined, based on the evidence submitted, was a reasonable hourly rate customarily charged in the locality for similar legal services. MCR 2.403(O)(6)(b); *Smith*, 481 Mich at 530. This argument fails because defendant has not established a factual basis for it in the record and because it lacks merit on the facts of this case.

Defendant relies for this argument on *McAuley v General Motors Corp*, 457 Mich 513, 520; 578 NW2d 282, 284 (1998), overruled in part *Rafferty v Markovitz*, 461 Mich 265; 602 NW2d 367 (1999). In each of these cases the Court held a prevailing party could not recover an attorney fee under the case evaluation court rule where the party had already been fully compensated for a reasonable attorney fee under an applicable statutory provision. See *McAuley*, 457 Mich at 515-517, 520 (the plaintiff awarded a reasonable attorney fee under the Handicappers' Civil Rights Act), and *Rafferty*, 461 Mich at 266, 272 (the prevailing party fully compensated for her reasonable attorney fees under the Civil Rights Act). While these cases note that a party must incur attorney fees to permit recovery of a reasonable attorney as a case evaluation sanction, *McAuley*, 457 Mich at 520; *Rafferty*, 461 Mich at 271, it is the recovery of a full reasonable attorney fee, not the actual billings of counsel, that sets the upper limits of a reasonable attorney fee awarded as a case evaluation sanction. Thus, the Court observed in *Rafferty*, 461 Mich at 271, where a statute provides for an award of an attorney fee, "[a]n additional award may be appropriate only if the applicable statute limits the recovery of attorney fees to something less than a reasonable attorney fee." What constitutes a reasonable attorney fee may differ from the actual fee counsel charged the client or the highest hourly rate the attorney might otherwise been able to assess. *Smith*, 481 Mich at 530; see also *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002) ("Reasonable fees are not equivalent to actual fees charged."). Consequently, this argument fails.

Next, defendant argues that the trial court erred by including 20 hours of post-judgment legal services, including counsel's preparation and filing a motion for case evaluation sanctions, in calculating "a reasonable attorney fee . . . for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(b). We disagree. "Taxable costs can include fees incurred posttrial." *Zdrojewski*, 254 Mich App at 72. As this Court has explained, "MCR 2.403 does not limit an award to attorney fees for services performed only at the trial. Rather, the rule states that attorney fees may be awarded for all services necessitated by the rejection of the mediation award." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 179; 568 NW2d 365 (1997). Had defendant accepted the case evaluation award as did plaintiff, it would not have been necessary for plaintiff's counsel to prepare for and attend both the trial and post-trial motions. This argument fails.

Last, with respect to case evaluation sanctions, defendant argues that the trial court erred in awarding prejudgment interest on the amount of case evaluation sanctions. This argument is frivolous. MCL 600.6013(8) provides, in pertinent part, that "interest on a money judgment recovered in a civil action is calculated . . . from the date of filing the complaint" and "is

calculated on the entire amount of the money judgment, including attorney fees and other costs." The trial court did not err by applying the plain and unambiguous statutory language. "[U]nder MCL 600.6013(8), judgment interest is applied to attorney fees and costs ordered as [case evaluation] sanctions under MCR 2.403(O) from the filing of the complaint against the liable defendant." *Ayar v Foodland Distributers*, 472 Mich 713, 717-718; 698 NW2d 875 (2005).

III. AMENDMENT OF PLAINTIFF'S COMPLAINT

Defendant argues that the trial court abused its discretion by granting plaintiff's pretrial oral motion to amend her complaint to assert her claims to setoff as affirmative claims for damages for breach of contract. We disagree.

We review a trial court's decision on a motion to amend pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *In re Kostin Est*, 278 Mich App 47, 51; 748 NW2d 583 (2008).

We conclude the trial court properly relied on MCR 2.118(A)(2) in granting plaintiff's motion. That rule permits a party to amend its pleadings by leave of the court, which "shall be freely given when justice so requires." Amendment of pleadings is generally a matter of right rather than grace. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973). "[A] motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Prejudice that will justify denial of leave to amend is not that the amendment might affect the outcome of the trial but rather that the amendment would prevent the objecting party from having a fair trial. *Fyke & Sons*, 390 Mich at 657-658; *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 344; 568 NW2d 847 (1997). Delay alone will not justify denying a motion to amend pleadings unless it would impair a party's ability to contest the amended allegations so as to render the trial unfair. *Weymers*, 454 Mich at 659.

Defendant argues that MCR 2.118(C) is the proper rule by which to judge the trial court's decision. We disagree. Generally, wider latitude is accorded parties seeking to amend pleadings before trial under MCR 2.118(A)(2) than during trial under MCR 2.118(C)(1). *Weymers*, 454 Mich at 660 n 26. MCR 2.118(C)(1) permits amendments to conform to the evidence "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties." Further, MCR 2.118(C)(2) provides: "If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits." By its plain terms, MCR 2.118(C)(1) requires that evidence be presented at a trial, so that the "amendment of the pleadings conform[s] to the evidence." A jury trial consists of empanelling and swearing a jury, counsel's presentations of opening statements, evidence, and closing arguments, the trial court's application of the law and instructions to the jury, and the jury's fact finding and verdict. Here, none of these components of a jury trial had occurred when the trial court heard and granted plaintiff's motion to amend her pleadings.

Because the trial court heard and decided plaintiff's motion to amend *before* trial, defendant's reliance on *Grzesick v Cepela*, 237 Mich App 554; 603 NW2d 809 (1999), is misplaced. In *Grzesick*, the issue was whether the defendant had waived an affirmative defense by not pleading it in an amended answer and whether she could revive it by moving to amend her pleadings "to conform with the proofs at trial." *Id*. at 558. Further, the defendant's motion to amend was not decided until during trial. *Id*. at 557 n1.

Defendant's reliance on MCR 2.118(C)(2) is also misplaced because that rule requires an objection be raised to evidence. *Zdrojewski*, 254 Mich App at 61. In opposing plaintiff's motion, defendant did not object to the admission of evidence but rather to plaintiff's arguing that the evidence would entitle her to affirmative relief in the form of damages for breach of contract.

Regardless of the applicable court rule, the bottom line here is that the trial court did not clearly err by finding that defendant failed to show the amendment denied him a fair trial. *Weymers*, 454 Mich at 659; *Traver Lakes*, 224 Mich App at 344. The amendment did not change the nature of plaintiff's claims; it merely changed the relief she sought. That a party might lose on the merits is not a basis for finding prejudice necessary to deny a motion to amend. *Fyke & Sons*, 390 Mich at 658. In its October 31, 2008, opinion and order addressing this issue as a basis for defendant's motion for new trial, the trial court opined:

> This case has always been about breach of the parties' agreement. Defendant had notice that the issue of the replacement software would be litigated at trial where the witness lists for both sides indicated that witnesses from Dentrix and Eaglesoft would be called. Moreover, one of the central issues throughout this case was the determination of profits and the parties' respective shares thereof. Defendant's counterclaim alleged, in relevant part, that plaintiff had breached the parties' agreement by failing to make a proper distribution of the practice's profits pursuant to the agreement. Much of trial was a battle of the accounting experts concerning the determination and share of these profits. The financial numbers concerning the lab expenses and courts costs were contained in the practice's accounting. Accordingly, this Court concludes that the amendments allowed with respect to the replacement software, court costs, and lab expenses did not prejudice defendant and were required by justice.

We find the court's reasoning on this issue sound and its decision to grant plaintiff's motion to amend within the range of reasonable and principled outcomes. *In re Kostin Est*, 278 Mich App at 51.

IV. PLAINTIFF'S DEFENSE OF WAIVER OR ESTOPPEL

At the close of plaintiff's proofs at trial, defendant moved for directed verdict regarding plaintiff's affirmative defenses to defendant's claims for additional purchase price and profits as a result of plaintiff's late payment of the second and third installment payments. Defendant argued below and argues on appeal that plaintiff failed to produce clear and convincing evidence to support her theory that defendant waived or the parties mutually modified the contract's penalty provisions regarding late payments. Similarly, defendant argued that plaintiff's evidence

was insufficient to support her theory of equitable estoppel. Defendant now asserts the trial court erred by denying his motion for directed verdict. We disagree.

This Court reviews de novo a trial court's decision on a motion for directed verdict. *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008). We must view the evidence presented up to the point of the motion and all legitimate inferences from the evidence in the light most favorable to the nonmoving party. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Roberts*, 280 Mich App at 401.

A waiver consists of the intentional relinquishment or abandonment of a known right. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 471; 761 NW2d 846 (2008). Pertinent to this case, "contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). Thus, the "parties to a contract are free to *mutually* waive or modify their contract notwithstanding a written modification or anti-waiver clause because of the freedom to contract." *Id*. at 364 (emphasis in original). The "mutuality requirement is satisfied where a waiver or modification is established through *clear and convincing* evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract." *Id*. at 364-365 (emphasis in added).

We agree with the trial court's analysis and conclusion that plaintiff presented sufficient evidence from which the jury could find the clear and convincing standard of proof regarding waiver or modification of the parties' contract had been satisfied. When addressing this issue in its October 31, 2008, opinion and order, the trial court opined:

> The clear and convincing evidentiary standard is typically thought to be the highest, most demanding, level of proof in civil cases. *In Re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Clear and convincing evidence is defined as evidence that produces in a factfinder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000). It is evidence so clear, direct, weighty, and convincing that the factfinder is able to come to a clear conviction, without hesitating, of the truth of the precise facts at issue. *Id*. Evidence may be uncontroverted and yet not be clear and convincing. *Id*. Conversely, evidence may be clear and convincing even though it is controverted. *Id.*
>
> In this case, plaintiffs evidence indicated that defendant assured plaintiff that defendant accepted plaintiff's delayed second and third installment payments as timely under the parties' agreement and that the parties intended that the profit allocation be on a year-to-year basis from July 1 to June 30 of the following year. Although controverted, this evidence was sufficiently direct, weighty, and convincing to permit the jury to come to a clear conviction that the parties modified or waived the terms of the agreement relating to the delayed purchase option, increased purchase price, and distribution of profits. Viewing this evidence in a light most favorable to plaintiff, a question of fact existed concerning this defense. Thus, the denial of defendant's motion for a directed

> verdict on this defense and submission of this defense to the jury did not constitute an error of law. [Citations omitted.]

In addition to the foregoing, the jury could have drawn inferences in favor of plaintiff's theory from evidence that although defendant's long-time accountant prepared the yearly accountings at defendant's direction, defendant did not assert a claim for penalty purchase price or additional profits until December 2005. This was after plaintiff, following review by her own accountant, questioned accounting for profits on the accrual basis of accounting. Moreover, the jury could have drawn inferences in favor of plaintiff's theory from the written receipt defendant signed in October 2005, which provided:

> This is to certify that the full purchase price of $330,000 for the purchase of Grand Dental Care Grand Rapids has been paid to Ron Riebschleger by Kathi Wilson in three increments of $110,000 each. This purchase coincides with that outlined in the contract. Kathi Wilson is now 100% owner of the dental practice while Ron Riebschleger remains owner of the building at 894 Fuller NE.
>
> /s/ Kathi Wilson
>
> /s/ Ron Riebschleger 10/25/05

Although the meaning of the evidence was contested, factual questions remained for the jury to decide whether plaintiff had established waiver or modification of the parties' contract by clear and convincing evidence. *Quality Products & Concepts Co*, 469 Mich at 364-365; *In Re Martin*, 450 Mich at 227. Consequently, the trial court did not err in denying defendant's motion for directed verdict on this affirmative defense. *Roberts*, 280 Mich App at 401.

Similarly, plaintiff produced sufficient to warrant submitting her equitable estoppel theory to the jury. The defense of estoppel may arise when (1) one party by representation, admissions, or silence intentionally or negligently induces another party to believe certain facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of those alleged facts. *Tenneco Inc*, 281 Mich App at 446. "Silence or inaction alone is insufficient to invoke estoppel absent a legal or equitable duty to disclose." *Id.*

Here, the jury could well have found that defendant misled plaintiff by directing and accepting accounting for profits on a fiscal year basis, by not asserting any claim for penalty price until December 2005, and by orally assuring plaintiff that the late payments were not a problem. This evidences more than mere silence or inaction. Further, the jury could have found that plaintiff justifiably relied on defendant's assurances and was prejudiced by not earlier retaining her own accountant. A more timely independent review of the contract and the dental practice's financial statements might have expedited plaintiff's ability to finance her second and third installment payments. Drawing all legitimate inferences from the evidence in the light most favorable to plaintiff, we conclude that the trial court properly denied defendant's motion for a directed verdict on plaintiff's equitable estoppel theory because factual questions existed upon which reasonable minds could differ. *Lewis*, 258 Mich App at 192-193.

V. DEFENDANT'S POST-TRIAL MOTIONS

Defendant raises several arguments regarding the trial court's rulings on his post-trial motions for JNOV or new trial. We find that the trial court thoroughly addressed all of defendant's arguments in its October 31, 2008, opinion and order and did not err or abuse its discretion in denying defendant's motions.

This Court reviews de novo a trial court's decision on a motion for JNOV. *Foreman v Foreman*, 266 Mich App 132, 135; 701 NW2d 167 (2005). In reviewing the decision, this Court must view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper. *Foreman*, 266 Mich App at 136.

We review the trial court's decision on a motion for new trial for an abuse of discretion. *Barnett v Hildago*, 478 Mich 151, 158; 732 NW2d 472 (2007). When the trial court's decision is outside the range of principled outcomes, it has abused its discretion. *Id*. This Court will accord substantial deference to the trial court's conclusion that a verdict was not against the great weight of the evidence. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). We review de novo any underlying questions of law. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008).

Defendant first argues that the jury's determination that the parties' contract did not require accounting for profits on the accrual basis of accounting was against the great weight of the evidence and must be reversed. We disagree. Although it might be inferred that the jury accepted plaintiff's theory that the parties' contract required calculation of profits on a cash accounting basis, the jury actually determined that plaintiff did not breach the contract but that defendant did. We defer to the trial court's determination, which in turned deferred to the fact-finding ability of the jury. Because the evidence was such that reasonable people could differ, the trial court properly denied defendant's motion for JNOV. *Foreman*, 266 Mich App at 136.

For the same reason, defendant's argument that the trial court erred by not granting his motion for JNOV regarding his claim to additional profits on the basis of plaintiff's late installment payments must fail. As discussed in Part IV, the trial court properly submitted plaintiff's theory of waiver or modification, and estoppel, to the jury. Because the evidence and all legitimate inferences in the light most favorable to plaintiff supported her affirmative defenses to defendant's claim to additional profits, the trial court properly denied defendant's motion for JNOV. *Sniecinski*, 469 Mich at 131; *Phinney*, 222 Mich App 524-525.

The trial court addressed defendant's claims regarding presale accounts receivable in its October 31, 2008, opinion and order, as follows:

> . . . Defendant contends that the evidence established, and that plaintiff admitted, that plaintiff underpaid defendant $15,667 in presale accounts receivable but overpaid defendant approximately $4,537 in presale accounts receivable, leaving a net presale accounts receivable balance of $11,130 owed by plaintiff to defendant. Defendant contends that the jury verdict of no cause of action was thus without legal basis and against the great weight of the evidence.

> However, plaintiff's evidence indicated that the $15,667 underpaid presale accounts receivable was included in practice income, that defendant received $10,497 of this amount as his profit share, thus reducing the underpaid presale accounts receivable to approximately $5,170, and that netting this amount against the overpaid presale accounts receivable left a balance of only $633. Plaintiff's theory was that $633 did not constitute a breach where plaintiff had already paid defendant hundreds of thousands of dollars pursuant to the agreement. The jury specifically found that plaintiff did not breach the contract.
>
> Because reasonable jurors could honestly have reached different conclusions, the issue of breach was for the jury and the grant of a motion JNOV is not warranted.

We conclude the trial court correctly addressed defendant's claims regarding presale accounts receivable and adopt that part of its October 31, 2008, opinion and order.

Finally, defendant argues that the trial court erred by not granting his motion for JNOV or new trial with respect to the damages that the jury awarded plaintiff. We disagree.

This issue relates to plaintiff's claims to damages under the theories that: defendant was responsible for lab expenses during the first year of the agreement because plaintiff's share of profits did not cover her first year draw; the full expense of court cost to collect presale accounts receivable was not deducted from defendant's share of practice profits; and the expense plaintiff incurred to replace dental practice software. With respect to these claims, we agree with the trial court that evidence viewed in the light most favorable to plaintiff was sufficient to support the jury's assessment of damages against defendant in the amount of $25,030. Only if the evidence with respect to plaintiff's claims of damages viewed in the light most favorable to plaintiff failed establish her claims as a matter of law would it be appropriate to grant defendant's motion for JNOV. *Sniecinski*, 469 Mich at 131; *Phinney*, 222 Mich App 524-525. Consequently, the trial court did not err in denying defendant's motion for JNOV, or abuse its discretion in denying his motion for new trial. The trial court's decision was well reasoned and within the range of principled outcomes. *Barnett*, 478 Mich at 158.

VI. CONCLUSION

For all of the reasons discussed above, we affirm the judgment entered August 12, 2008, and the trial court's October 31, 2008, opinion and order denying defendant's post-trial motions for relief and granting plaintiff's motion for case evaluation sanctions. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher