STATE OF MICHIGAN

COURT OF APPEALS

J&W TRANSPORTATION, LLC, HOWARD MILLER and JEAN MILLER, Plaintiffs-Appellees, v WAYNE L. FRAZIER, and WL FRAZIER TRUCKING, LLC, Defendants-Appellants.	UNPUBLISHED June 1, 2010 No. 289711 Isabella Circuit Court LC No. 07-005987-CB

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

This litigation arose following a dispute among plaintiffs Jean Miller and Howard Miller and defendant Wayne Frazier[1] regarding monies the Millers alleged Wayne owed to them and to plaintiff J&W Transportation, LLC, (J&W) a trucking company the three of them had formed. Defendants appeal as of right the trial court's denial of its motion for new trial. We affirm.

I. BACKGROUND

J&W, a trucking company, was formed around July 2001. The members were Jean, Howard, and Wayne. Jean met Wayne while they were both working for Bestway Systems.[2] At some point after they met, they decided to start a company along with Howard that would haul freight. Howard was to be a "silent partner."

The articles of organization for J&W were filed with the Michigan Department of Commerce on August 24, 2001, at which time its assets consisted of two trucks contributed by Wayne and $20,000, $10,000 each from Jean and Howard, resulting in Wayne having a 50 percent interest and Howard and Jean each with a 25 percent interest. When J&W started, it

[1] Throughout this opinion, defendant Wayne Frazier will be referred to as Wayne and defendant WL Frazier Trucking, LLC will be referred to as Frazier Trucking.

[2] For simplicity, all references to this company will be to Bestway, although the company at some point changed its name to Total.

leased its equipment to Bestway. Both Jean and Wayne continued to work for Bestway after the formation of J&W; Jean was an employee while Wayne was a contractor.

Because of Jean's employment with Bestway, it was determined that she should not sign the payroll checks to drivers working for J&W. Although Jean originally signed some of the checks, Wayne acquired a stamp of his signature at some point for Jean to use in this regard. Wayne was aware that the stamp was used for things other than payroll and testified that there were specific instances where Jean would request to use the stamp and he would give permission.

J&W had no line of credit with a bank; when credit was needed, Jean and Howard acquired it because it was easier for them to obtain. Around July or August 2001, J&W acquired three additional trucks with money loaned from Jean and Howard by tapping their home equity line of credit from Standard Federal. The cost of three trucks purchased with the Standard Federal line of credit money totaled $82,653 all of which was paid by J&W with cash received from Jean and Howard's Standard Federal home equity line of credit. Money was also taken from the credit line to put operating capital into J&W, with an initial amount of $10,000.

In 2003, when Jean and Howard sold the home that had the attached equity credit line, Standard Federal paid off the credit line by taking proceeds from the sale of the home, collecting $95,464.08. Jean discussed with Wayne that J&W did not have the money to pay off the loan and suggested J&W carry a loan to Jean and Howard for seven years at seven or seven and a half percent interest at a payment of $1,440 per month. This discussion resulted in a loan originating in August 2003, which J&W began to pay in September 2003. About a year later, Jean drafted a promissory note between J&W and Howard and Jean reflecting that the $95,464 would be paid at seven percent interest for 84 months. The interest rate was discussed with Wayne and Jean testified that it "made it at a manageable amount of payment so that J&W could afford to make that payment." Jean signed her name and testified that she stamped Wayne's name with his permission, both on behalf of J&W as the borrower. Wayne testified that he never gave Jean permission to stamp his name to the note. The debt was reflected on J&W's tax returns. Jean was uncertain of when she told Wayne about the promissory note, but she knew she had made him aware of it. Although Wayne denied knowledge that J&W was making payments to Standard Federal on the equity line of credit, he had earlier admitted that he was aware payments were being made on the note since 2006 because Jean told him J&W was paying on the note.

When additional credit was needed, Jean and Howard would use their low interest credit cards. Business expenses such as license plates (which averaged $2,000 to $2,500 per truck per year) and cash advances for money to put into J&W's accounts were put onto the cards. According to Jean, no personal expenses were ever put on these credit cards. J&W made monthly payments on the cards, generally through online bill payment.

At some point, Jean, Howard and Wayne decided to seek minority status for J&W based on Wayne's Mexican heritage. Howard testified that the purpose of seeking minority status was to "benefit by better distributions, better profit, better business for J&W." In order to do so, the interests in J&W were changed to make Wayne a 51 percent owner and Jean and Howard each 24.5 percent owners, although there was no change in actual contributions and neither Jean nor Howard received anything in exchange for giving up the percentage point to Wayne. Jean and Howard each executed assignments of interest that gave Wayne an additional 1 percent interest.

Wayne's signature on these documents was stamped. Wayne testified that he had received the one percent interest, making his percentage 51 percent, but denied giving permission to have his name stamped on the assignments. He believed the assignments were valid without his signature.

At the same time J&W was seeking minority status, the parties contemplated Wayne's company, Frazier Trucking, for which he was the sole owner, also receiving minority status.[3] The parties contemplated both companies having minority status and that Howard and Jean and J&W would all benefit from Frazier Trucking also having minority status because "that would create more business and then with more business the trucks would be able to move . . . more loads which would create more revenue."

In January 2006, Wayne applied for minority status for Frazier Trucking. During this time, J&W paid expenses for Frazier Trucking, including start-up costs, insurance, and paying Frazier Trucking's employees. J&W ultimately advanced Frazier Trucking $22,296 in expenses. Jean had agreed to make these disbursements "[b]ecause previous to this we had discussions about the roles of if W.L. Frazier [Trucking] got in his minority status, how it would benefit J&W and would it benefit Howard and I [sic]." Wayne testified that there were never any discussions about developing J&W and increasing its business through an association with Frazier Trucking; rather the discussions were that J&W could grow by procuring minority status. Although Frazier Trucking received minority status, J&W was denied minority status in early 2006 because Jean had financial control of J&W. J&W lost its appeal of the ruling.

In August 2006, Jean resigned from Bestway. At the time, she was working as a dispatcher or freight coordinator, who is the person who selects the owner/operators and the loads they receive. Although Wayne contended that Bestway fired Jean for the conflict of interest created between her dispatch work and her ownership interest in J&W, the vice president of Bestway in 2006 testified that he was satisfied with Jean's work and that she was not fired; rather, Jean had elected to quit to work with Wayne.

Bestway had been having problems with Wayne. J&W had 12 or 13 trucks leased to Bestway and Wayne kept threatening to pull the trucks and go into business for himself. Bestway ultimately terminated J&W's contract. Jean resigned the same day the contracts were terminated. Although she gave two weeks' notice, Bestway accepted her resignation that day. Jean did not complain regarding Bestway canceling the lease because there were other companies to which J&W could lease its trucks. In fact, Jean believed that J&W had two trucks working with Dallas Mavis, another trucking company similar to Bestway, at the time Bestway cancelled the leases.

Jean testified that she left Bestway along with Wayne in order to take the J&W trucks and "try and start a business on our own to grow the company." She was going to work for "J&W

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[3] There is no question that the operating agreement permitted Wayne to create a competing company and that plaintiffs were aware that Wayne was creating Frazier Trucking and did not consider the creation of Frazier Trucking a breach of Wayne's fiduciary duties.

along with W.L. Frazier [Trucking]." Howard testified that his understanding was that "Wayne and Jean were going to move forward with J&W Transportation and W.L. Frazier together and that it would all benefit J&W."

Jean began work with Wayne in September 2006. Jean believed she was working for J&W at the time, but Wayne testified that Jean was simply an employee of Frazier Trucking. By October 2006, all of J&W's trucks were being run through Dallas Mavis under Frazier Trucking. Because Frazier Trucking leased the trucks to Dallas Mavis, Dallas Mavis paid Frazier Trucking. Thus, the trucks did not benefit J&W; all of the income they produced went to Frazier Trucking and none of the Dallas Mavis or Mason Dixon[4] checks received by Frazier Trucking were ever deposited into any J&W accounts. Jean testified that she wanted the accounts to be separated between J&W and Frazier Trucking, but that Wayne said that because he had already set up the agreement with Dallas Mavis, and because they could get certain things with all the trucks under his name, it was better that it was all done through Frazier Trucking. No leases were ever created to formalize the relationship between J&W and Frazier Trucking although Jean requested them; the trucks remained titled to J&W.

Jean testified that there had been multiple discussions regarding her and Howard having an interest in Frazier Trucking. Although they could not be part owners because it would cost Frazier Trucking its minority status, they were supposed to have a side deal that the profits of Frazier Trucking would benefit J&W. According to Jean, the parties had a verbal agreement and there was supposed to be something put in writing, but "it never did get handled." From her perspective, Frazier Trucking could not exist without J&W because Frazier Trucking only had one truck; the other 12 it used belonged to J&W. Jean would not have allowed Frazier Trucking to use J&W's trucks or paid Frazier Trucking bills if she had not believed that J&W would receive compensation for their use. To support her belief that she was more than an employee at Frazier Trucking, she noted that she had been an employee at Bestway and never used her own credit to pay Bestway expenses the way she did for Frazier Trucking. Howard also testified that, although Jean was working for Frazier Trucking as an employee, there was a verbal agreement that Howard and Jean were going to benefit from Frazier Trucking. Wayne denied ever promising Jean an equity interest in Frazier Trucking and testified that he never, at any time, had any intention of providing Jean or Howard an ownership interest in or a share of the profits from Frazier Trucking.

Around November 2006, Howard made an additional $50,000 loan to Frazier Trucking at Jean's request because Frazier Trucking was having cash flow problems. Wayne personally executed[5] a promissory note, evidencing the $50,000 loan and requiring payments of $1,232.42 on the 16th of every month beginning in December 16, 2006 until paid off, but with a balloon payment provision indicating that the entire unpaid balance would become "payable in full on December 16, 2009." When Howard made the loan, he expected the revenue from J&W trucks

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[4] Mason Dixon was another trucking company, similar to Dallas Mavis, that Frazier Trucking provided J&W trucks to.

[5] This one did not utilize the signature stamp and was notarized.

to go into J&W accounts and he testified that he would not have made the loan if he had known that J&W was not going to benefit and Frazier Trucking was going to run the trucks and keep all the money.

While Jean worked for Frazier Trucking, Wayne had paid her a wage he decided on, but was never actually agreed to by the parties. She had believed she would be paid in a similar manner to how she was paid at J&W, i.e. as a share of the profits. Instead, she was paid as an employee, although Wayne apparently wrote her a check as a draw and did not take any taxes out. Howard testified that although he received draws or compensation from J&W prior to Frazier Trucking using J&W's trucks, once Frazier Trucking began to use the trucks he received no draws or compensation from J&W.

Jean stopped working for Frazier Trucking in late 2006; she testified she quit, while Wayne testified she was terminated. When Jean left, she was given her severance pay as well as money she was owned for credit card debts. According to Jean, Wayne was difficult to work with and was not putting any money into J&W, making it difficult to pay J&W's bills. Wayne was avoiding phone calls and the person taking care of the bills could not pay any bills without Wayne's permission. Jean testified that Wayne acknowledged responsibility and that J&W was receiving disbursements from Frazier Trucking, but the dispute was that Jean did not believe Wayne was acknowledging enough responsibility for the debts of J&W. By the end, the only thing Frazier Trucking was paying for was the truck payments and Howard and Jean were absorbing all of the remaining J&W's expenses by paying them with their personal credit cards. J&W received no compensation for the use of the trucks after May 2007. When Wayne stopped paying anything, plaintiffs decided to sue.

Plaintiffs initially had their counsel send a certified letter to Wayne on May 25, 2007, indicating that he either needed to make a weekly payment to lease the trucks or stop using them. Wayne agreed that the letter required lease payments or return of the trucks, but the trucks were not returned and no payments were made. Although lease negotiations occurred, no agreement was ever reached. According to Jean, Wayne refused to pay anything. Wayne believed he could use the trucks during the lease negotiations and that Jean and Howard were being unreasonable with their lease terms. He believed they had arbitrarily rejected his proposed leases.

On July 26, 2007, the trial court entered a restraining order and order for hearing, which required that defendants "shall absolutely desist and refrain from damaging, destroying, concealing, disposing of *or using* the truck tractors identified in the attached Exhibit A so as to substantially impair their value until further order of this Court (emphasis added)." Additional orders were entered, but not complied with. In October 2007, 10 of J&W's 12 trucks were sold for $8,000 each. The money from the sale was placed into escrow with plaintiffs' attorneys.

In May 2008, plaintiffs filed a motion for order to show cause alleging that Frazier Trucking was utilizing J&W trucks contrary to court order. Plaintiffs attached to their petition various settlement statements from Dallas Mavis and Mason Dixon, evidencing multiple trips by one of J&W's trucks to places in Virginia, Indiana, Ohio, Kentucky, Florida, New Jersey, Maine, Illinois, Delaware, Missouri, Texas, Arizona, and Georgia as well as multiple locations within Michigan, with payments made to Frazier Trucking. Jean testified that this particular truck, 4234, had not been sold based on Wayne's representations that it was no longer operable. However, Wayne testified that he never advised Jean that truck 4234 was inoperable. He

testified that he believed it was not part of the sale because the two unsold trucks were supposed to become the possession of Frazier Trucking. Although they "never followed through with the whole sale" from J&W, "it was my understanding once again that these were now—no longer an issue." Both unsold trucks had been seen at Frazier Trucking three months prior to trial.

Wayne testified that he was aware of the court orders related to the use of the truck. Although he testified that truck 4234 was operable but not currently licensed, another witness testified that truck 4234 was licensed with current Indiana plates. Wayne testified that truck 4234 was not operable for anything other than local usage because it was an older tractor and "under powered." He believed truck 4234 was only used within Michigan. He reviewed an independent contractor agreement with Mason Dixon signed by him, and agreed that it included truck 4234, which was listed as "active" for interstate usage, but indicated that he had not intended to make that unit available for interstate carrier business. He admitted that he signed the independent contract agreement including truck 4234 only 14 days after he testified at his deposition that truck 4234 could only be used for local use, but denied that the independent contractor agreement committed truck 4234 to interstate transportation of goods.

The contractor agreement included a statement of an existing lease agreement that provided that J&W leased truck 4234 to Frazier Trucking. Wayne testified that he entered into the lease agreement between J&W and Frazier Trucking on his own authority based on a de facto agreement between J&W and Frazier Trucking that J&W was moving all the trucks to Frazier Trucking because J&W had nowhere else to put them. He conceded that the contractor agreement also included an inspection report for truck 4234 that indicated every mechanical component to the truck was functional. He also acknowledged responsibility for actions taken by Frazier Trucking.

Wayne disagreed with the written statements provided by Dallas Mavis and Mason Dixon evidencing out of state trips by truck 4234 because they could have been inaccurate, but provided no proof that they were, in fact, inaccurate.

By the time of trial, J&W's assets consisted of two trucks (4234 and one that was disabled) and the $61,000 in escrow from the sale of the other trucks. J&W's bills had not been paid, and Jean and Howard were still making monthly credit card payments on J&W debts. They estimated J&W's liabilities at roughly $80,000.

At trial, plaintiffs sought roughly five categories of damages under various theories of liability: $39,011 for unpaid J&W expenses on the Millers personal credit cards; $43,147 remaining unpaid on the promissory note reflecting the debt from the home equity line of credit; $41,490 remaining unpaid, including late fees, on the promissory note between Howard and Frazier Trucking; $22,296 in unpaid Frazier Trucking expenses advanced by J&W; and $57,737 in lost profits for Frazier Trucking's use of J&W trucks from November 2006 until October 11, 2007.

Wayne's position was that he had paid J&W $216,924.17, which he believed more than repaid his debts, and presented the trial court with a document he prepared that he claimed evidenced all money paid by Frazier Trucking to Howard, Jean, J&W, various credit card companies, and Graff Financial and Volvo for the trucks. Wayne also asserted various claims

against Jean, alleging that she had embezzled various amounts from J&W and Frazier Trucking and had overpaid the promissory note on the home equity line by $31,564.

The trial court issued a written opinion on October 23, 2008. It found "specifically that the credibility of Mrs. Miller far exceeds that of Mr. Frazier." It also found defendants in criminal contempt for violation of multiple court orders and ordered defendants to pay plaintiffs $7,500. It held that plaintiffs were entitled to $39,011 from defendants for credit card debt and $41,490 under Howard's promissory note based on fraud and misrepresentation. It concluded that the fraudulent misrepresentations constituted a breach of fiduciary duty and ordered J&W dissolved and its assets liquidated, including the $61,000 held in trust from the sale of the trucks. It held that defendants were unjustly enriched by using J&W property, namely the trucks, to generate income for Frazier Trucking without compensation for J&W, and awarded plaintiffs $57,737 in lost profits and $43,147 remaining due under the home equity note and awarded J&W $22,296 for funds loans to Frazier Trucking that had not been repaid. The trial court also found that defendants had committed both common law and statutory conversion and awarded J&W costs and attorneys fees for having to bring the lawsuit. Although the trial court concluded that Wayne breached his contract with Howard on the $50,000 promissory note, it concluded that the claim was satisfied because it had already awarded the remainder due under the fraud and misrepresentation claim.

The trial court also addressed Wayne's counterclaims and found no valid claim for breach of fiduciary duty and no evidence of conversion. Regarding Wayne's allegation of payment, the trial court held:

> Defendants argue that WL Frazier loaned J&W $216,924.17 to make these payments. The Millers admit to receiving some payments toward the debts that are owed. Mrs. Miller testified at trial how each of these checks were allocated and demonstrated to the court that the payments were not included in the damages being requested. Plaintiffs satisfactorily demonstrated to the court that they did not convert money from Defendants for their own personal use. All of the funds in which checks were cut were used to pay off debts owned by Plaintiff LLC or Defendants.

On November 13, 2008, defendants filed a motion for new trial or amendment of judgment, alleging all of the claims now raised on appeal. The trial court held a hearing after which it issued its ruling from the bench. The trial court concluded that it had erred in awarding plaintiffs the $7,500 for contempt damages because those were owed to the court. Although it expanded or clarified its rulings on the other issues, it affirmed all of its prior rulings. Defendants now appeal.

II. STANDARD OF REVIEW

When reviewing a trial court's decision after a bench trial, we review its findings of fact for clear error and review de novo its conclusions of law. *City of Flint v Chrisdom Props, Ltd*, 283 Mich App 494, 498; 770 NW2d 888 (2009). Where a trial court has granted equitable relief, we set aside factual findings only where they are clearly erroneous, but review de novo whether equitable relief is proper under the facts. *Id.* at 498-499.

III. HOME EQUITY PROMISSORY NOTE

We reject defendants' claim that the trial court erred in awarding plaintiffs $43,147 for the home equity promissory note on a theory of unjust enrichment.

A claim for unjust enrichment is equitable in nature and requires a showing of "(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). Under such a claim, the law implies a contract to prevent the unjust enrichment. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). An implied contract will only exist where there is no express contract governing the same subject between the same parties. *Morris Pumps*, 273 Mich App at 194-195.

In the present case, a promissory note existed between J&W and plaintiffs. Plaintiffs sought unjust enrichment against defendants, neither of whom were parties to the promissory note. Accordingly, there is no express contract covering the same subject between the same parties, and a contract may be implied to avoid unjust enrichment. *Id.*

In finding for plaintiffs on this claim, the trial court held:

> Plaintiffs also argue that Defendants were unjustly enriched when the Millers were not reimbursed $43,147.00 remaining due on their home equity loan. When J&W was formed, three vehicles were purchased and operating expenses were paid using credit from the Miller's home equity line. In 2003, the Millers sold their home and the equity line was paid off. This was done pursuant to the agreement that the profits from J&W and WL Frazier would be used to repay the line of credit. At that time, $95,464.00 was due on the equity line. Mrs. Miller would write checks from J&W to repay the loan. A promissory note was stamped with Mr. Frazier's name indicating that the debt would be repaid, payments would be made every month, and eight percent interest would accrue monthly. Mr. Frazier argues that Mrs. Miller used his signature stamp on the note without his knowledge and consent. This Court finds that based on the testimony, the evidence indicating that this note was claimed as a debt on J&W's tax returns, and that Mr. Frazier made payments on this note after Mrs. Miller left WL Frazier, Mr. Frazier was aware of the debt and acknowledged its terms. The Millers acknowledge receiving some payments on the loan, however $43,147.00 remains due. The Plaintiffs Millers are entitled to repayment of this amount.

At defendants' hearing on a motion for new trial, the trial court further elaborated:

> The evidence presented demonstrated that Mr. Frazier agreed to repay the money taken out of the Millers' home equity line and make monthly payments. Mr. Frazier admits to making payments on the note from funds from W.L. Frazier. Mr. Frazier received a benefit from the Millers by being allowed to use the trucks purchased from the funds of the equity line and an inequity resulted because J&W was not able to use those trucks to generate income and the Millers were not repaid on the loan.

Because there was more than sufficient evidence to support the trial court's holdings, we find no error.

Defendants allege that they more than paid for the amount originally loaned from the home line of credit. There is no question that defendants made payments on the promissory note prior to the 2003 sale of plaintiffs' home which required paying off the home equity line. Defendants argue that because the initial loan was for roughly $95,000 and payments were made on the loan, there was no way for the promissory note to have had a beginning balance of $95,464.08. What defendants' argument ignores is the testimony that additional draws and loans were made from the credit line subsequent to the initial purchase of three trucks and $10,000 operating cash to J&W. Plaintiffs also testified that the line of credit was only used for J&W business purposes and provided evidence that the amount due on the line of credit was $95,464.08, which Standard Federal deducted from the sale of the home. Finally, plaintiffs provided copies of checks reflecting all the payments received on the promissory note and the loan amortization from which the amount due could be calculated. Considered in conjunction with the promissory note provision that permits a late charge of $200 for each month a payment is more than 10 days late, the record contains more than sufficient evidence to support the trial court's award of $43,147, and the trial court provided factual support for its legal conclusion that unjust enrichment was appropriate.

IV. FRAUD CLAIMS

Defendants next allege that the trial court erred in finding that they committed fraud.[6] We disagree.

To establish actionable fraud, a plaintiff must show that (1) the defendant made a material representation; (2) the representation was false; (3) the defendant knew the representation was false or recklessly made the representation without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff suffered injury. *Johnson v Wausau Ins Co*, 283 Mich App 636, 643; 769 NW2d 755 (2009).

As to the first element, there was evidence that defendant made a material representation—that J&W and Frazier Trucking would be run together for their mutual benefit and that plaintiffs would have an interest in Frazier Trucking. Although defendants assert that these statements were never made, this was a credibility determination to be made by the trial court, which held, "The court specifically finds that the credibility of Mrs. Miller far exceeds that of Mr. Frazier." Accordingly, we give special regard to the trial court's determination that Wayne lacked credibility, MCR 2.613(C), and conclude that Wayne did, in fact, make these representations.

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[6] At oral argument, defendants agreed that the trial court could have properly assessed these amounts under a different theory. Thus, the dispute is not as to amounts awarded, but as to legal theory.

There is also evidence of the second element, that the representation was false, because the companies were never run together for their mutual benefit and Wayne testified that he never intended plaintiffs to have an interest in Frazier Trucking. Given defendants' actions, the evidence permits an inference that Wayne made these statements knowing that they were not true, thereby meeting the third element. Defendants clearly intended plaintiffs to act based on the representations, as Frazier Trucking was in need of start-up capital and operating expenses and needed plaintiffs to continue to float J&W expenses, thereby evidencing the fourth element. Plaintiffs did, in fact, rely on the representation, as the Millers both testified, by loaning money to Frazier Trucking and paying J&W debts with their own personal funds in the belief that Frazier Trucking would be run in a manner beneficial to J&W, and ultimately suffered financial injury when defendants failed to repay the promissory note to Howard and refused to make payments toward the J&W debt accrued on the Millers' personal credit cards. Thus, all six elements of actionable fraud were met.

Defendants assert that these were simply mere promises, which cannot form the basis of a fraud claim. Although the trial court used language indicating promises were made, it also used language indicating that guarantees and assertions of fact were made. Thus, Wayne did not simply make a promise to plaintiffs. Rather, he stated, as a positive assertion, that Frazier Trucking profits would benefit J&W and that by running the two companies together, everyone would benefit from his minority status. Furthermore, the past or existing fact on which the promise was made was that J&W trucks were being used to create Frazier Trucking profits. Thus, Wayne's representation that the Frazier Trucking profits would benefit J&W was based on a past or existing fact and was sufficient to support a fraud claim. See *Michaels v Amway Corp*, 206 Mich App 644, 652; 522 NW2d 703 (1994). We find no error.

V. CONTEMPT

Defendants next contend that the trial court committed reversible error in finding them guilty of criminal contempt. We disagree.

We review a trial court's issuance of a contempt order for an abuse of discretion. *Porter v Porter*, 285 Mich App 450, 454; 776 NW2d 377 (2009). "[R]eversal is warranted only when the trial court's decision is outside the range of principled outcomes." *Id.* at 455. "Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply. By contrast, the purpose of criminal sanctions is to punish past disobedient conduct by imposing an unconditional and definite sentence." *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007) (citations omitted).

The trial court found defendants guilty of criminal contempt, holding:

> On June 28, 2008, a Show Cause Hearing was held regarding Defendants' violation of the court's order to return truck 4234 to Plaintiffs. The court ordered that Plaintiffs were entitled to possession of the truck at their expense and Defendants were ordered once again not to use the truck. The issue of costs for the contempt was reserved for trial. MCR 3.606(A) stated that when contempt is committed outside the presence of the court, the court is allowed to either order the accused person to show cause why the[] person should not be punished for the

> alleged misconduct, or issue a bench warrant for the arrest of the person. The difference between civil and criminal contempt is that civil contempt seeks to change the contemnor's conduct by threatening him with a penalty if he does not change his actions while criminal contempt seeks to punish the contemnor for past misdoings. *State Bar v Cramer*, 399 Mich 116, 127; 249 NW2d 1 (1976).
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> At trial, Mr. Frazier admitted to being aware of the Orders prohibiting use of the trucks. Although, he stated that he believed truck 4234 was exempt from the Orders. He further stated that he only used the truck for interstate shipping. Plaintiffs provided copies of work orders indicating that truck 4234 was making out of state trips as late as April of 2008. This Court finds that Defendants violated the court's Orders and are subject to penalties for contempt.

The trial court then awarded plaintiffs $7,500 as a contempt sanction against defendants.

At the hearing on the motion for new trial, defendants made the same claims they now assert on appeal. The trial court reiterated its finding of contempt, but noted it had made a few errors which it addressed, holding in part:

> This Court did not state the burden of proof in its opinion, but did state that it found that both Defendants, through the action of Mr. Frazier, were in willful violation of the orders restraining them from using the referenced trucks. The Court will take the time to elaborate on this issue raised by Defendants but still finds them to be in contempt. The contempt assessment does not go directly to the Plaintiffs. It is paid to the court.

The trial court further stated that although Wayne stated he believed truck 4234 was exempt from the orders, "he had no reason to have such a belief. The orders listed truck 4234 as a truck that could not be used." Based on these statements at the motion for new trial, it is clear that the trial court found that defendants, through Wayne's actions, willfully disregarded its orders. Accordingly, the only real issue is whether defendants received due process.

"Whether a party has been afforded due process is a question of law, subject to review de novo." *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009). "A criminal contempt proceeding requires *some* of the safeguards of an ordinary criminal trial." *Id.* at 669 (emphasis added). A defendant must be informed whether the proceedings are criminal or civil, is entitled to be informed of the charge, must be given the opportunity to prepare a defense and secure the assistance of counsel, is entitled to the presumption of innocence and has the right against self-incrimination. *Id.*

The trial court recognized that it did not provide a burden of proof in its opinion, but correctly stated the burden of proof—beyond a reasonable doubt—at the hearing on the motion for new trial, and concluded that "Plaintiff presented evidence demonstrating beyond a reasonable doubt that Defendants, through Mr. Frazier's actions, had a willful disregard or disobedience of the Court's multiple orders restraining the use of the truck." Accordingly, the trial court applied the appropriate burden of proof. Furthermore, having reviewed the evidence, we agree that plaintiffs proved beyond a reasonable doubt that defendants knowingly and willfully violated multiple court orders restraining use of J&W's trucks.

On July 26, 2007, the trial court entered a restraining order and order for hearing, which required that defendants "shall absolutely desist and refrain from damaging, destroying, concealing, disposing of *or using* the truck tractors identified in the attached Exhibit A so as to substantially impair their value until further order of this Court (emphasis added)." On September 7, 2007, the trial court entered a stipulated order for possession pending judgment which provided that defendants "shall deliver possession" of 11 operable trucks, listed by vehicle identification number, to a temporary storage location by September 10, 2007, and to "an alternative final storage location" as designated by plaintiffs, no later than 5:00 p.m. September 17, 2007. The trucks were never moved and defendants failed to cease using the vehicles. Rather, Frazier Trucking continued to use the trucks for out of state trips, some as recently as April 2008, as evidenced by the multitude of Dallas Mavis and Mason Dixon settlement sheets. Furthermore, Wayne even testified that he continued to use one of the trucks for in-state trips after the court's orders were entered. Accordingly, there was proof beyond a reasonable doubt that defendants knowingly violated multiple orders of the trial court.

Defendants also received all of the other rights to which they were entitled. The trial court issued an order on June 30, 2008, providing: "IT IS FURTHER ORDERED AND ADJUDGED that the Court will entertain proofs with regard to Plaintiffs' Show Cause Motion to hold Defendants in contempt of Court during the trial of his matter." Thus, defendants were well aware that the proofs for the contempt issue were going to be presented at trial. Furthermore, there is no question that defendants were present at trial when the proofs of contempt were presented, that Wayne testified in this regard, and that defendants were represented by counsel and had adequate opportunity to prepare a defense.

The last issue, then, is whether defendants had notice that the contempt charges were criminal rather than civil. The trial court noted that plaintiffs' show cause order did not specifically address whether civil or criminal contempt was alleged, but concluded that defendants were on notice that criminal contempt was sought based on the difference between the two types of contempt. As the trial court noted, it "was punishing Defendants for their past conduct of using the trucks in violation of more than one of this Court's orders; and I stress more than one. By definition alone, civil contempt sanctions could not be assessed."

Plaintiffs' motion attached documentary evidence of the alleged violations and specifically asserted that defendants were willfully violating the court's orders that the trucks were not to be used and were to be provided to a location of plaintiffs' election by September 17, 2007. The motion also requested the court adjudicate defendants "in contempt of this Court for violation of the July 26, 2007, September 7, 2007, and October 15, 2007 orders." Furthermore, the trial court delayed proofs on the matter from the show cause hearing to the trial, giving both plaintiffs and defendants additional time, which would make sense given that the burden of proof was beyond a reasonable doubt. Here, where all of the proper procedures for criminal contempt were followed, the contempt motion was supported with documentary evidence and specifically alleged defendants' failure to comply with the trial court's order, and the inherent nature of civil contempt made it inapplicable, this was "sufficient to warn defendants that plaintiff was potentially seeking a finding of criminal contempt." *Droomers v Parnell*, unpublished opinion

per curiam of the Court of Appeals, issued June 30, 2005 (Docket No. 253455).[7] In light of defendants' egregious violations of multiple court orders and the fact that they received their due process rights, we affirm the trial court's determination of contempt.

VI. LOST PROFITS

We also reject defendants' claim that the trial court improperly awarded plaintiffs $57,737 in lost profits.

Defendants are correct that loss of profits must be shown with a reasonable degree of certainty. *Body Rustproofing, Inc v Mich Bell Tel Co*, 149 Mich App 385, 390-391; 385 NW2d 797 (1986). However, mathematical precision is not required. *Id.* Plaintiffs provided evidence that J&W trucks produced approximately $635,760 in revenues while in Frazier Trucking's possession and leased out through Frazier Trucking. There was evidence that many expenses had already been deducted prior to the $635,760, making it closer to a net profit figure. Plaintiffs provided evidence, based on J&W's tax returns and financial statements that indicated a historical profit ratio of 10.97% averaged over the preceding five years. Plaintiffs then calculated the lost profits by multiplying the $635,760 by the 10.97 percent profit, resulting in $69,743, which they divided by 2 (reflecting that they were only entitled to their 50 percent interest), giving a figure of $34,871. To that, they added 100 percent of the gross receipts from the use of the single truck, 4234, which occurred after entry of the court order ($19,744 and $3,122) for a total of $57,737.

Although defendants allege that expert testimony was required, they provided no legal support for their position and, thereby, can be deemed to have abandoned it. As the trial court noted at the hearing on the motion for new trial, defendants produced no evidence to contradict plaintiffs' evidence or to show that the tax reports on which they were based were unreliable, other than the accusation that Jean did not have them prepared correctly. Although Wayne testified that there were possible reasons that the settlement statements *could* have been inaccurate, he failed to provide any proof that they were, in fact, inaccurate, testifying that he was "simply saying that the possibility exists." Furthermore, Wayne admitted that he relied on the J&W tax returns for information needed to file his own personal returns and that, at least at that time, he believed the returns were sufficiently accurate. Under the circumstances, we conclude that the lost profits were shown with a reasonable degree of certainty and were not merely speculative.

Moreover, the calculations show that defendants' argument that the trial court failed to take into consideration his interest in J&W lacks merit as to the $34,871. The division of the $69,743 figure properly reflected the reduction of the lost profits to only plaintiffs' half interest. At best, it could be argued that it should not have been a 50/50 split, but a 51/49 split. Although the operating agreement provides that profits, losses, income, deductions and credits "shall be allocated among the Members in accordance with their Membership Interests," in light of the

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[7] We find *Droomers* particularly persuasive because it involved criminal sanctions of jail time, whereas the present case only involves a fine.

fact that Wayne only received the extra percentage share to take advantage of a minority status that was never received, and Jean and Howard received nothing in exchange for the transferred percentage point, we see no reason why the profit calculation should not be enforced as 50/50.

The only remaining question, then, is whether the trial court erred in failing to permit Wayne any interest in the $19,744 and $3,122 amounts, which were defendants' profits obtained from their use of truck 4234 in violation of the trial court's orders. Defendants have provided no authority to indicate why this award was improper or why the trial court was without authority to consider defendants' misconduct when determining that Wayne should receive no interest in the profits generated from his violation of a court order. Accordingly, we conclude that the trial court's award was proper.

VII. CONVERSION

Defendants allege that the trial court erred in finding they committed both common law and statutory conversion. We disagree.

Common law conversion "is any distinct act of dominion wrongfully exerted over another person's personal property." *Pamar Enterprises Inc v Huntington Banks of Mich*, 228 Mich App 727, 734; 580 NW2d 11 (1998). Even temporary deprivation of personal property is sufficient. *Id.* Conversion occurs when a party uses personal property in their possession without the authority to do so, as well as when a party refuses to surrender personal property after demand has been made. *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960). Under MCL 600.2919a, plaintiffs may recover damages for statutory conversion if defendants stole, embezzled, or converted plaintiffs' property to their own use. MCL 600.2919a(1)(a).[8]

In the present case, there is no dispute that the trucks were owned by J&W, but were in defendants' possession. The May 25, 2007 certified letter sent by plaintiff's counsel to defendants provided:

> As you know, the Millers are becoming increasingly concerned about the fact that your company, WL Frazier Trucking, LLC, is using the twelve trucks belonging to J&W without making payments on a regular or sufficient basis. . . .
>
> At this point, one of two things must happen. Either your company enters

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[8] Defendants quote *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999) for the premise that statutory conversion requires "knowingly 'buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property.'" However, *Head* was decided before the 2005 amendment to MCL 600.2919a, which added a section permitting recovery against "[a]nother person's stealing or embezzling or converting property to the other person's own use." Accordingly, statutory conversion is now much broader, and the line of cases, including *Campbell v Sullins*, 257 Mich App 179, 191-192; 667 NW2d 887 (2003), which hold that statutory conversion only applies to those who aid and abet conversion and not those who actually convert, have been statutorily overruled.

> into a written, binding lease with J&W providing for weekly payments, or your company must return the trucks to J&W so they can be leased to parties who will pay fair rental. *If you want to continue having your company use the trucks, you must sign and return a copy of the enclosed lease to my office. If you do not sign the lease, then the trucks must be returned to the control of the Millers* so that they can lease them to others for the benefit of J&W. *Whichever alternative you choose, you must act by the close of business on Friday, June 8.* If you fail to meet the headline, suit will be filed in Circuit Court seeking the return of the trucks, an accounting, and an award of damages against your company and you personally. [Emphasis added.]

The language in the demand letter could not be clearer. Defendants were required to sign the lease provided or return the trucks by June 8. There was no provision to continue to use the trucks while engaging in lease negotiations.

Accordingly, the evidence showed that defendants failed to return plaintiffs' property after demand had been made and used property in their possession without the authority to do so. Therefore, the trial court properly found defendants committed common law conversion. *Thoma*, 360 Mich at 438. Having concluded that defendants converted the trucks, the trial court then properly concluded that plaintiffs were entitled to damages under MCL 600.2919a(1)(a) because defendants had converted plaintiffs' property to their own use. There is no error.

VIII. FRAZIER TRUCKING EXPENSES ADVANCED BY J&W

Defendants allege that the trial court erred in awarding $22,296 to plaintiffs for unpaid Frazier Trucking expenses advanced by J&W. Because defendants do not contest the actual elements of the unjust enrichment, but only the evidence in support of the amount, we have limited our analysis to a review of the record evidence in support of this claim.

Jean initially testified that J&W ultimately advanced Frazier Trucking $22,296 in expenses. Defendants questioned Jean at trial, disputing that J&W was owed the $22,296 it fronted Frazier Trucking in expenses. Jean was shown check no. 1220 for $21,826.44, which was a payment from Frazier Trucking to Jean for reimbursements on credit cards. Jean agreed she had not deposited this check into J&W, but indicated that check no. 1220 represented reimbursement for Frazier Trucking bills that she paid with her credit card so that she had personally advanced them to Frazier Trucking, as opposed to the $22,296, which had been fronted by J&W. Jean noted that Amanda Gillespie, the person who took over Frazier Trucking's bookkeeping after Jean left, had signed the check. She also supplied the back-up to specify what the check was paying for, which broke down all the credit card charges that were for Frazier Trucking expenses. She again testified that these charges were different than the $22,296 on credit cards for J&W and that these damages did not include any of the $21,826.44 that had been paid by check no. 1220.

Under the circumstances, there was more than sufficient evidence in the record to support the trial court's findings that the payment of $21,826.44 to Jean was for a separate obligation than the $22,296, which was being sought by J&W for reimbursement of expenses to Frazier Trucking. Defendants' assertion that the only evidence to support the trial court's award was Jean's testimony is without merit. Trial Exhibit 25 was copies of checks paid out of J&W's

accounts on behalf of Frazier Trucking to support the claim for $22,296, while Trial Exhibit 40 itemized the credit card payments totaling $21,826.44 made by Jean on behalf of Frazier Trucking for which she was reimbursed by check no. 1220. Indeed, there is no evidence in the record to support that any of the $22,296 advanced by J&W to Frazier Trucking was ever paid. Furthermore, Wayne testified that he had "no idea what exactly" the credit card payments reflected in the $21,826.44 check were for. Accordingly, there was no clear error in the trial court's findings of fact. *City of Flint*, 283 Mich App at 498.

IX. DEFENDANTS' CLAIMS AGAINST PLAINTIFFS

Defendants final claim on appeal is that the trial court erred when it "failed to account for the converted funds" by the Millers. We hold that the trial court properly concluded that there was no evidence of conversion.

Defendants assert on appeal that there is uncontrovered evidence in support of their claim. However, as the trial court noted at the hearing on the motion for new trial, "[d]efendant does not state what this uncontroverted evidence is that supports this claim." We agree.

As previously discussed, there is no evidence of overpayment on either the Standard Federal home equity line or the promissory note executed to reflect the debt when the home equity line was paid off during the home sale. There is also no evidence of embezzlement regarding the gift cards. Jean testified that the payments in QuickBooks to Bay Area Catholic Schools were not payments for tuition, but purchases of gift cards that were used business purposes. Even though the purchase of the gift cards resulted in a benefit to Jean in the form of credit for her children's tuition, there is no evidence of embezzlement. J&W paid fair value for the gift cards and received exactly what it paid for. The gift cards were subsequently used for business expenses such as holiday meals and gifts to employees, as well as paying Jean's personal fuel costs. Given the testimony that Wayne was reimbursed from J&W for his personal fuel costs as a business expense, there is no evidence to support that Jean's use of company-purchased gift cards to "reimburse" her personal fuel costs constituted embezzlement.

Defendants also failed to show embezzlement of $3,604.30. Jean testified that check no. 1022 written to Jean from Frazier Trucking for $3,604.30 was a payment for the charge incurred by Premium, a payroll processing company. She testified that she paid for the charge by Premium and the check was to reimburse her for that and denied it was embezzlement. She provided exhibits evidencing a wire transfer leaving J&W's accounts for $3,589.30[9] to Premium and a deposit to J&W's account for $8,604.30. Jean believed the deposit reflected the $3,604.30 check being deposited into J&W's accounts along with an additional $5,000 given that the deposit was made the same day as the check was dated and the matching final digits of $604.30.

Jean was questioned regarding whether the check showed that it was deposited into her personal bank. She agreed that it showed it was her personal bank, but also testified that "there's

[9] The difference between this amount and the $3,604.30 is $15 and reflects compensation for a $15 a wire transfer fee that was assessed at a later date.

an account in there for J&W that I deposited that money into the account." She admitted that it was "possible then that I wrote a check from my account. All I know is there is an account—money deposited into J&W's account for the amount in J&W's account." Upon further questioning, she referenced the documentation showing the money being deposited into J&W's account and reiterated that she had no recollection of depositing the funds into her own account.

Given that the $8,604.30 deposit occurred on the same day the $3,604.30 check was written, there was sufficient evidence that those funds were contained within that deposit and that no embezzlement occurred. At best, the evidence and testimony could indicate that Jean deposited the funds into her own account. However, the deposit into J&W accounts on the same day would indicate that the funds were not converted.

Finally, defendants complain regarding a $300 check made out to Jean from Frazier Trucking. Jean testified that she "vaguely" remembered the check and that the ledger indicated it was for a "draw." She further testified that she was "shocked" that Wayne gave her a draw. Jean again testified later that the check was a draw. This is the sum total of the evidence relating to the $300 check. We conclude that this testimony is insufficient to hold that Jean embezzled these funds.

Accordingly, there was no error in the trial court's determination that there was no conversation by Jean. *City of Flint*, 283 Mich App at 498.

X. CONCLUSION

Having found no clearly erroneous findings of fact and no errors of law, we affirm the trial court's denial of defendants' motion for new trial.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio