# STATE OF MICHIGAN

# COURT OF APPEALS

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| TBD EXCAVATING, L.L.C.,<br><br>Plaintiff/Counter-Defendant-Appellant, | UNPUBLISHED<br>July 27, 2010 |
| v | No. 289391<br>Wayne Circuit Court |
| JACKIE'S TRANSPORT, INC.,<br><br>Defendant/Counter-Plaintiff-Appellee. | LC No. 06-633417-CB |

Before: M.J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Plaintiff, TBD Excavating, L.L.C., appeals by delayed leave granted a $3,628.49 net judgment in its favor, arguing that the award should have been higher. The judgment is a result of business disputes between plaintiff and defendant, Jackie's Transport, Inc., related to a variety of business dealings. We affirm in part, reverse in part, and remand.

## A. ADMISSION OF EVIDENCE

Plaintiff argues that the trial court erred when it excluded the admission of plaintiff's Exhibit 8, which detailed the social security numbers for its workers for the year 2006. We disagree.

To preserve an evidentiary issue for appeal, the party must object at trial and specify the same ground for objection that is asserted on appeal. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). At trial, defendant objected to the admission of plaintiff's Exhibit 8 because of a lack of foundation. Plaintiff countered that the exhibit was admissible as an exception to hearsay under the business record exception under MRE 803(6). Therefore, the issue is preserved with respect to the argument that the exhibit falls under the business record exception to hearsay. However, on appeal, plaintiff also argues that the exhibit was admissible under MRE 803(7), to show the absence of an entry on a record. Since this particular argument was not presented to the trial court, it is not preserved.

We note that the great weight of evidence standard cited by both plaintiff and defendant as the applicable standard of review, is not the correct standard of review. Rather, a trial court's decision to admit evidence normally is reviewed for an abuse of discretion. *Campbell v Dept of*

*Human Services*, 286 Mich App 230, 235; 780 NW2d 586 (2009). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). However, unpreserved issues are reviewed for plain error affecting substantial rights. *Wolford v Duncan*, 279 Mich App 631, 641; 760 NW2d 253 (2008). Under the plain error rule, the objecting party has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

As we previously mentioned, plaintiff argued at trial that the exhibit was admissible as a hearsay exception under MRE 803(6). The proponent of such a record must establish that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of such business activity to make that record. MRE 803(6); *Price v Long Realty, Inc*, 199 Mich App 461, 467-468; 502 NW2d 337 (1993). However, the lower court record establishes, and plaintiff concedes, that the exhibit in question was not prepared in the normal course of business activity. Rather, Robert Pasek, plaintiff's owner, testified that he created the exhibit on the second day of trial, with the clear implication that it was created for trial purposes. Accordingly, the trial court did not abuse its discretion when it excluded the admission of the evidence under MRE 803(6).

Plaintiff, on appeal, argues for the first time that the exhibit alternatively was admissible under MRE 803(7),[1] which involves the absence of an entry in records kept in accordance with regularly conducted business activities. As a prerequisite, the record in question must be a business record that meets the requirements established in MRE 803(6). Because plaintiff failed to meet this foundational requirement, the trial court committed no error, and plaintiff's argument fails.

B. AWARD FOR EQUIPMENT RENTAL

Plaintiff next argues that the trial court erred when it concluded that, because defendant claimed to only have used the 320 backhoe for two weeks and the 963 loader for 2 days, plaintiff was only entitled to damages for those specified time frames. We agree. This Court reviews a trial court's determination of damages for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id*. at 512.

First, the lower court erred when it applied the doctrine of promissory estoppel to the facts of this case. As the trial court acknowledged, promissory estoppel requires (1) a promise,

[1] MRE 803(7): "Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of [MRE 803(6)], to prove the nonoccurrence or nonexistence of the matter, if the matter was of the kind of which a business memorandum, report, record, or data compilation was regularly made and preserved . . . ."

(2) which the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008). In order to invoke the doctrine, there must be an actual, clear, and definite promise. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 381; 689 NW2d 145 (2004). Under the facts of this case, the doctrine of promissory estoppel is not implicated because the trial court found that there was not any clear and definite promise on defendant's behalf regarding the equipment rental. The trial court noted the following:

> The promises related to the trucking by parties, the fuel charges, and the rentals satisfy the requirements for the application of the doctrine of promissory estoppel in this case. However, there are difficulties associated with determining the amount due the parties for the services they performed. While this court is satisfied that work was performed by the parties and that equipment rentals were made, it appears that some of the claims for charges were exaggerated.
>
> There are major disagreements regarding the terms and conditions of the equipment rental agreements. *There are no clear indications regarding the costs, the period of the rentals or the responsibility for transporting the equipment.* Both parties acknowledge that the defendant did use the plaintiff's equipment. The plaintiff is therefore entitled to reasonable compensation for the use of his equipment. Correspondingly, the defendant is entitled to compensation for fuel supplied the plaintiff and each party is entitled to compensation for hauling. [Emphasis added.]

Because the trial court found there had been no clear and definite promise concerning the use of the equipment, the trial court erred as a matter of law when it applied the doctrine of promissory estoppel.

However, the doctrine of quantum meruit would properly apply to the facts as found by the trial court. Quantum meruit, like promissory estoppel, is based on equity. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 199; 729 NW2d 898 (2006). Quantum meruit merely requires that a plaintiff establish (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. *Id.* at 195. Since the trial court found that defendant received the benefit of possessing and using plaintiff's equipment and that plaintiff should be compensated for the benefit conferred, quantum meruit is an applicable remedy.

Applying the doctrine of quantum meruit to the facts herein, the trial court clearly erred by awarding damages for only two weeks of defendant's use of the 360 backhoe because the evidence established that defendant possessed the backhoe for two months. Under quantum meruit, a plaintiff is entitled to the value of the services *provided*. *Morris Pumps*, 273 Mich App at 199; *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 551; 487 NW2d 499 (1992). Despite defendant's contention that he only used the backhoe for two weeks, the evidence was clear and undisputed that defendant had *possession* of the 320 backhoe for two months. Thus, plaintiff provided services to defendant, the availability of the 320 backhoe for two months, and is entitled to charges for the service provided. At trial, plaintiff offered

evidence that the going rate for a one-month rental of a 320 backhoe was $7,000. Defendant, on the other hand, claimed that the going rental rate for a 320 backhoe was approximately $5,200 per month. The trial court's award of two weeks rental appeared to accept as more credible the $5,200 per month rate asserted by defendant.[2] When a lower court makes a finding of fact based on the credibility of the testimony this Court affords special deference to the lower court's findings. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Accordingly, we conclude that plaintiff should have been awarded $10,080 for defendant's rental of the 320 backhoe.

The trial court also clearly erred in its calculation of damages resulting from defendant's rental of the 963 loader. Despite defendant's claim that he only used the 963 loader for one day, there was unrefuted evidence that defendant had possession of the 963 loader for a month. Since the record established that the weekly rental rate for the 963 loader was $3,670, plaintiff should have been awarded $14,680 for the one-month rental of the 963 loader.

The net result, with respect to the equipment rental issue, is that plaintiff is entitled to quantum merit damages in the amount of $24,760.

C. FUEL COST AWARD

Plaintiff next argues that the trial court's finding that it owed $22,700 in fuel costs to defendant was clearly erroneous. We disagree.

Plaintiff first claims that the trial court failed to apply credit that it was due to offset the total balance owing. We disagree. Plaintiff relies on several credit memos that were admitted into evidence at trial, totaling $23,201.81. However, there was evidence that at least some of these credits were issued to cancel incorrect bills, and that a new, corrected bill was subsequently issued.[3] In addition, plaintiff acknowledged that it did not maintain thorough records regarding how much fuel it obtained from defendant, and both parties testified that plaintiff never paid anything with regard to the fuel debt. Therefore, the court's finding that defendant was entitled to the entire amount it was seeking was not clearly erroneous.

Plaintiff next claims, without any reference to the record, that it only received 5,291 gallons of fuel in total, and that the price of that fuel was $3.23 per gallon. Plaintiff's presentation of this issue is inadequate to allow this Court to review it. *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). "A party may not leave it to this Court to search for the factual basis to sustain or reject its position, but must support its position with specific references to the record." *Id.*; see also MCR 7.212(C)(7). A party's failure to properly

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[2] The trial court found the value of two weeks' rental of the 320 backhoe to be $2,520 (or approximately $5,040 for one month).

[3] For example, on one occasion, defendant billed plaintiff $5,749.16 for fuel, but when it was discovered that there were errors in the bill, defendant issued plaintiff a credit for $5,749.16, and reissued a revised bill showing the correct charges. Plaintiff's argument on appeal fails to adequately account for the issuance of the revised bill.

address an argument constitutes its abandonment. *Begin*, 284 Mich App at 590. Accordingly, with this particular argument being abandoned and plaintiff's credit-memo argument having no merit, plaintiff's claim fails. In any event, we find nothing in the record supports plaintiff's assertion that the parties agreed that fuel would be purchased at the cost of $3.23 per gallon, and there is nothing in the record to support plaintiff's claim that it used only 5,291 gallons of fuel.

We affirm in part, reverse in part, and remand to the circuit court for modification of the judgment consistent with this opinion. We do not retain jurisdiction.

No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder