S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

TOOLING MANUFACTURING & TECHNOLOGIES ASSOCIATION and TMTA INSURANCE AGENCY L.L.C.,

Plaintiffs-Appellees,

v

MARK TYLER, TEAM MARKETING GROUP, INC., d/b/a TYLER CONSTRUCTION, INC., d/b/a TEAM BENEFITS GROUP, INC., d/b/a ALLIED RISK, INC., and MARK TYLER & ASSOCIATES, INC.,

Defendants-Appellants.

UNPUBLISHED
December 28, 2010

No. 293987
Oakland Circuit Court
LC No. 2007-081120-CZ

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

In this employment dispute, defendants Mark Tyler, Team Marketing Group, Inc. (Team Marketing), which did business under various names, and Mark Tyler & Associates, Inc. (Tyler & Associates) appeal as of right the trial court's judgment in favor of plaintiffs Tooling Manufacturing & Technologies Association (the Association) and TMTA Insurance Agency, L.L.C. (the Agency) after a bench trial. On appeal, Tyler argues that the trial court committed several legal errors that warrant reversal of the judgment in favor of the Association and the Agency. He also argues that the trial court erred when it failed to enter judgment in his favor on his counterclaims for breach of contract and conversion. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Richard Steinhelper testified that he worked for the Association from 1972 to his resignation in 2002. During that time it was known as the Michigan Tooling Association. From 1990 to 2002, he was the Association's managing director and was responsible for implementing the programs established by the Association's board of directors. Steinhelper stated that the Association previously had a contractual relationship with an insurance agent, Richard Moore, who was responsible for marketing and selling group insurance programs to the Association's member companies. Moore was not a salaried employee; he received compensation in the form of commissions from the insurers.

Steinhelper said that, after it learned that Moore was going to retire in 2000, the Association's board of directors decided to establish the Agency to "capture [the] commissions" from its insurance programs and use them "to support the functions of the Association." The board also decided to hire a licensed insurance agent "for the purpose of running and managing the subsidiary." Gary Theuerkorn, who was a member of the board at the time of Tyler's hire, testified that the board wanted to replace Moore with an employee because it did not want "to be held hostage by someone who could quit and take his business elsewhere, the customers, and we wanted to capture some of the money that was coming to that individual and we wanted to have more control over the whole process."

Steinhelper said that he heard about Tyler through word-of-mouth and called him to see if he was interested in running the Agency. He eventually hired Tyler.

Tyler testified that he had worked in insurance for some time and that he incorporated his own agency in 1993. In 1995, he changed the name of this business to Team Marketing. He was Team Marketing's only shareholder.

Tyler said that Steinhelper called him about a possible job opportunity with the Association. After several discussions, Tyler accepted employment with the Association in September 2000. According to a revised offer of employment, Steinhelper agreed to pay Tyler a base salary of $8,500 per month. In addition, to the base salary and some other benefits, Steinhelper agreed to pay Tyler bonuses equal to 30% of the commissions from new insurance sales and 25% of the commissions from renewals to the end of the year. He agreed that, beginning in 2001, the bonus on commissions would increase to 50% of new sales and to 35% of renewals. Steinhelper stated that it was his intent that the commissions would flow to the Agency and that Tyler would receive a base salary and then a bonus based on the total commissions: "the mechanism was for the money to flow into the agency and then . . . be distributed to him as an employee . . . ."

Tyler testified that he did not bring clients of his own to the Association; rather, he worked and tried to expand the existing book of business with the Association's members and was responsible for seeing that the Agency got the commissions from those sales. Tyler was the only insurance agent at the Agency and was solely responsible for negotiating with the insurers on behalf of the Agency. Tyler also attended the Association's board member meetings and was responsible for informing the board about the Agency's insurance business.

The Agency used Blue Cross Blue Shield of Michigan (Blue Cross) as its insurer for health insurance policies. The Association had also agreed that it would exclusively endorse Blue Cross in exchange for an annual fee. Tyler stated that it was his belief that the exclusive endorsement agreement with Blue Cross prevented the Agency from offering health insurance from any other provider. For that reason, he had the commissions that were earned on a health policy from another insurer assigned to him. He explained that, had he brought those commissions into the Agency, the Association would have placed its annual endorsement fee in jeopardy.

In April 2001, Tyler moved the Agency's book of dental business to Assurant.[1] He moved the Agency's book of life and disability insurance to Assurant in July of that same year. Tyler knew the sales manager at Assurant, Dave Brass, from before he began working for the Association.

Tyler said the Association did not increase his bonus payments to 50% of the commissions on new business and 35% on renewal business, as it agreed to do beginning in 2001. He said that Steinhelper told him that the Association could not afford the increase, but assured him he would make it up to him. Steinhelper admitted that it was communicated to Tyler that the Association could not afford to pay the increased payments on the commissions for 2001.

Jerry Morrow testified that he began to work for the Association in 2002 and served as the Association's controller. The controller was responsible for the Association's financial documents. Morrow stated that Tyler initially performed the calculations for his own bonuses. Morrow began to calculate Tyler's bonuses in January 2004 from the commissions sent to the Agency. However, he relied on Tyler to know what constituted new or renewal business. Tyler told him that new business was any new account or old account that had been modified or renewed. Morrow said that this system did not make sense to him: "I just didn't understand how a company that was . . . a participating company within the insurance program prior to Mr. Tyler's employment would be converted to new business just simply by a modification of an insurance policy or renewal, but I'm not an insurance person . . . ." As a result, Tyler took a 30% bonus on the majority of the commissions paid to the Agency.

Tyler denied that he ever calculated his own bonuses. Tyler admitted that he told the controller whether the account was new or renewal business and stated that it was his understanding that new business was any new account or old account that had a significant change in coverage. And new business did not become renewal business through the passage of time. As such, the majority of his accounts were permanently deemed new business.

Steinhelper testified that he understood that new business referred to new business brought to the Agency and renewal business to be from renewals of previously sold business. He said that he did not remember discussing any other definition with Tyler. The Association continued to pay Tyler a bonus calculated as 30% of the majority of the commissions received by the Agency throughout Tyler's employment. Based on this commission rate and including his base salary, the Association paid Tyler more than $250,000 per year from 2002 to 2006.

Stella Kurpansky testified that she worked for the Association and was responsible for collecting the insurance premiums from the Association's members and paying the insurers. She also handled the additions, deletions, and other changes for the policies other than those with Blue Cross. She stated that she recorded the commission payments in a spreadsheet and took

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[1] At the time, Assurant was called Fortis. However, for ease of reference we shall refer to this insurer as Assurant throughout this opinion.

them to the bank. The spreadsheet with the commission payment information was available to anyone on the network drive and she gave a summary to Tyler monthly.

In June 2002, Tyler executed a group producer contract with Assurant. However, he did not enter into the contract on behalf of the Agency; instead, he established Team Marketing as the group producer for the Agency's book of business with Assurant. Although the Agency received a producer bonus from Assurant in 2001, after Tyler executed the group producer contract, Team Marketing received the producer's bonuses from the Agency's book of business. From 2002 to 2007, Assurant paid Team Marketing more than $568,000 in producer bonuses.

Tyler testified that the contract was—notwithstanding its label—really a general agency agreement. Accordingly, the producer bonuses were really general agent commissions. He also stated that the general agent commissions were for extra work performed by the general agent and that the commissions did not reduce the commission paid to the writing agent, which was the Agency.

Molly Browne testified that she was the sales manager who replaced Brass at Assurant in 2005. She stated that she was familiar with Assurant's business and specifically with the Agency's book of business. Browne stated that Assurant did not have a general agency relationship with Team Marketing. The bonuses that Assurant paid out on the Agency's book of business were actually producer bonuses—not general agent commissions; and they were paid as a reward for maintaining a certain levels of business and for reaching certain benchmarks for new business. Moore said it would be unusual for the same person to be both a writing agent and a general agent. She also thought that the Agency should have and could have received all the compensation including the producer bonuses.

Tyler also testified that the Association knew from memos and discussions that he provided general agent services through Team Marketing on the Agency's book of business. However, Steinhelper stated that he did not have a discussion with Tyler about Tyler taking commissions of his own on the Agency's book of business. Steinhelper said that Tyler told him that he had his own agency, but that he only used it to provide life insurance to family and friends. Steinhelper said he would not have agreed to hire Tyler had he disclosed that he would be selling insurance services on his own. Steinhelper clarified that he did not hire Tyler's agency—he hired Tyler as an employee to run the Agency.

Kurpansky also testified that she was not aware that Tyler was receiving commissions on the Agency's business through Team Marketing. Had she known of this, she would have informed the controller. Kurpansky related that on one occasion she noticed that a communication from an insurer showed that Team Marketing had received a carbon copy of the communication. She said she asked Tyler about it and he stated that "it didn't mean anything" and asked her to black it out. Similarly, Morrow testified that he was not aware that Tyler was receiving commissions on the Agency's book of business through Team Marketing.

In 2002, Steinhelper retired. Robert Dumont testified that he became the Association's managing director in March 2003. Dumont stated that it was his belief that Tyler owed 100% of his time and efforts to the Association. He also was not aware that Tyler was receiving commissions on the Agency's book of business through Team Marketing. He understood that

Tyler provided some policies to family and friends, but he expected that all commercial work would go through the Agency.

Tyler testified that he eventually proposed purchasing the Agency from the Association in exchange for the payment of future commissions. He stated that he wanted to take the Agency outside the Association in order to get around the Association's exclusive endorsement agreement with Blue Cross. He believed that his proposal would be beneficial to all parties because it would guarantee income to the Association while allowing the Agency to expand.

In a proposal dated February 2005, Tyler offered to take over the Agency in exchange for remitting 17% of the commissions back to the Association. Tyler justified the rate by noting that the Association incurs considerable expenses in running the Agency—most of which were related to compensating or reimbursing Tyler—and he would assume those expenses when he took over. In later documents, Tyler increased the percentage of the commissions that he proposed to send back to the Association from 17% to 30%. In a letter dated December 2005, Tyler noted that the new agency would be called Mark Tyler & Associates. Tyler testified that the board rejected all his proposals and Theuerkorn even referred to his proposal as an attempt "to steal our agency."

In January 2006, Tyler filled out applications for standard commissions and for a producer program with Reliance Standard Life Insurance Company (Reliance) on behalf of Team Marketing. He moved the life insurance and disability business from Assurant to Reliance in the middle of 2006. Reliance paid a total of more than $100,000 in commissions to Team Marketing for 2006 and 2007 based on policies sold to the Association's members.

Browne testified that soon after Brass left Assurant for Reliance, Tyler asked for a copy of the demographics underlying the persons insured with the Agency. She was concerned about the request because such requests usually precede a move to another insurer. Browne said she had contacted Tyler and informed him that, because of changes to the demographics, the Association's members were overpaying for their coverage. She said she could have lowered the pricing by 25% and still maintained profitability on the group of business, but Tyler told her not to re-rate the group. She said that Tyler moved the group to Reliance in July 2006. Browne believed that Tyler was rewarding his friendship with Brass by moving the business and that it had nothing to do with Assurant's handling of the account.

Tyler testified that, in February 2006, an acquaintance told him that someone was interviewing to replace him at the Agency. After having his proposals to purchase the Agency from the Association rejected, Tyler decided to move on. He said he secured office space and equipment for his new business. He incorporated Tyler & Associates in September 2006.

In January 2007, Tyler filed a commission payment designation that instructed Blue Cross that his commissions should be paid to Tyler & Associates. In that same month, he sent a letter on the Agency's letterhead to Blue Cross wherein he stated that the Agency "releases all commissions to the current agent of record on all groups that have been assigned to [the Agency]." He signed the letter as the Agency's general manager. Tyler sent a similar letter, dated February 8, 2007, to Reliance. In that letter, he stated that the letter served as "official notification of all commissions and the commission assignment on all of the business written with [Reliance]" and directed that the current agent of record, who was Tyler, will remain the same. He indicated that the change in commission payments was effective March 1, 2007.

Tyler also informed various members of the Association that they needed to confirm that he was going to continue as their agent of record for Blue Cross. In January 2007, many of the Association's member companies sent letters to Blue Cross confirming that their agent of record, Tyler, "will continue to service our business." Tyler indicated that he received a call from someone at Blue Cross who told him that he needed to have the members send these confirmations as a result of the Association's name change at the end of 2006. The Association's expert on insurance testified that these letters of confirmation were not necessary and effectively transferred the right to receive commissions from the Agency to Tyler as an individual.

Tyler admitted that Blue Cross' general agents began to pay Tyler & Associates some of the straight commissions on the Agency's book of business in February 2008, but he did not recall if Tyler & Associates received all the commission checks. Documentary evidence showed that Blue Cross paid Tyler & Associates more than $24,000 in commissions in February. Tyler admitted that he was not entitled to the commissions earned prior to his resignation. He further stated that he intended to give them back, but was precluded from doing so by the Association's decision to sue him. Nevertheless, Tyler maintained that he was entitled to all the commissions after his resignation because he was the agent of record on the policies until the individual members designated a new agent of record.

Dumont testified that Tyler came to his office on February 22 or 23 and informed him that he intended to quit and take all his business with him. Dumont said he replied, "we'll just see about that." On that same day, the carpet cleaners needed access to the Agency's offices and Dumont let them in. There he saw that the Agency's files had been packed into boxes that were stacked on the floor. Dumont went and asked Morrow to help him move the boxes to a secure location. Morrow testified that, when Tyler returned and saw that the boxes had been moved, he was visibly upset. Tyler testified that he removed the files from the filing cabinets because the cabinets belonged to him and he was moving them out of the office, but that he did not intend to take the Agency's insurance files.

On February 27, 2007, the Association sued Tyler for misappropriating trade secrets, unfair competition, injunctive relief related to allegedly missing computer files, tortious interference with business relationships, unjust enrichment, and breach of fiduciary duty. Tyler filed counterclaims against the Association for breaching its contract to pay a bonus based on the higher percentage of the commissions after 2001, for converting a commission check, unjust enrichment, and tortious interference. After discovery, the Association amended its complaint to add Team Marketing, the aliases under which Team Marketing did business, and Tyler &

Associates as defendants. The Association also amended the complaint to include the Agency as a plaintiff and added a claim of conversion based on Tyler's actions in diverting commissions to his entities. The parties' claims proceeded to trial in December 2008.

At the conclusion of the proofs, the trial court dismissed the Association and Agency's claims for misappropriation of trade secrets, unfair competition, and injunctive relief. Thus, the Association and Agency's remaining claims were: conversion, unjust enrichment, fraud, breach of fiduciary duty, and tortious interference. Tyler's claims that the Association breached its contract by failing to pay him a bonus based on the higher percentages, breached its contract by failing to pay him his final paycheck and vacation pay, converted a commission check that was payable to Team Marketing, and that the Agency and Association were unjustly enriched by accepting the payment of commissions due to Tyler after he ceased working for the Association, also remained at the close of proofs.

In a written opinion and order, the trial court found that the Association and Agency had proved each of its remaining claims; namely, the court found that Tyler, acting individually and through his businesses, had wrongfully taken $738,441.65 in commissions that were due to the Agency over the period at issue. The trial court also rejected the majority of Tyler's counterclaims, but did find that the Association had breached its employment contract with Tyler by failing to pay him his final paycheck and vacation pay. The trial court found that Tyler was entitled to $23,000 for his breach of contract claim. After offsetting the $23,000, the trial court entered a judgment for the Association and Agency against defendants for $715,441.65 in damages.

This appeal followed.

II. BENCH TRIAL

A. STANDARDS OF REVIEW

On appeal, Tyler raises several claims of error regarding the trial court's findings of fact and its application of the law to those facts. These errors, he maintains, warrants reversal of the judgment against him and entry of judgment in his favor. This Court reviews de novo, as a question of law, the proper scope and application of a legal doctrine. See *Ghaffari v Turner Constr Co*, 473 Mich 16, 19; 699 NW2d 687 (2005). This Court reviews a trial court's factual findings after a bench trial for clear error. *Lignon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

B. BREACH OF CONTRACT

We shall first address Tyler's claim that the trial court erred when it concluded that Tyler was not entitled to recover the bonuses promised by the Association at the higher percentage rates because of his misconduct or because he acquiesced to the lower rate through his course of conduct.

At trial, it was undisputed that the Association originally agreed to pay Tyler a bonus based on a higher percentage rate for new and renewal business beginning in 2001 and that it did not pay the higher rate. Tyler also presented evidence that, under the higher percentage rates, he should have been paid more than $577,000 in additional compensation. Despite this evidence, the trial court concluded that Tyler was not entitled to the additional compensation. The trial court reasoned that Tyler forfeited his right to the extra compensation through his misconduct in "directing commission payments to his companies." In the alternative, the trial court concluded that Tyler "waived his right to the additional commissions by accepting the lower amount."

On appeal, Tyler argues that the trial court essentially applied the doctrine of unclean hands to preclude him from recovering the unpaid commissions. He maintains that the trial court erred in applying this equitable doctrine to preclude his contract claim, because the contract claim is legal, not equitable. He further argues that misconduct will only bar a legal claim, such as his breach of contract claim, where the contract is against public policy.

Michigan courts have long recognized that an agent may forfeit his or her right to compensation under a contract for services when the agent engages in misconduct or grossly mismanages his principal's affairs. See *Rippey v Wilson*, 280 Mich 233, 245; 273 NW 552 (1937) (noting that an attorney may forfeit his or her right to collect fees through unprofessional conduct or abandonment of his or her client's case); *Sweeney & Moore, Inc v Chapman*, 295 Mich 360, 363; 294 NW 711 (1940) (stating that it is the general rule that a "broker may forfeit his right to compensation by misconduct, breach of duty, or wilful disregard, in a material respect, of an obligation imposed upon him by the law of agency."); *Toy ex rel Ketchum v Lapeer Farmers Mut Fire Ins Ass'n*, 297 Mich 188, 192-193; 297 NW 230 (1941) (stating that an officer, as an agent of a corporation, may forfeit all right to compensation through fraud, misconduct, or gross mismanagement); *Burnham v Kelley*, 299 Mich 452, 464-465; 300 NW 127 (1941) (holding that an executor of an estate forfeited his right to compensation through his mismanagement of the estate); *Greater Bloomfield Real Estate Co v Braun*, 64 Mich App 128, 136-137; 235 NW2d 168 (1975) (recognizing that a real estate broker may forfeit his or her right to compensation from the principal by engaging in misconduct). This rule is often referred to as the faithless agent or faithless servant rule. See *GK Alan Assoc, Inc v Lazzari*, 44 AD 3d 95, 100-105; 840 NYS 2d 378 (NY App Div, 2007) (discussing application of the faithless agent rule to a case where the agent had two related principals); Anno: *Application of "Faithless Servant Doctrine"*, 24 ALR 6th 399. The faithless agent rule recognizes that—by being disloyal to his or her principal—the agent has not properly performed under his or her agreement with the principal and, for that reason, has no right to the compensation contemplated under the agreement. See *Lydia E Pinkham Medicine Co v Gove*, 303 Mass 1, 4; 20 NE 2d 482 (1939); see also *Sweeney & Moore*, 295 Mich at 364 (noting that the purpose of the rule is to ensure fidelity and undivided allegiance and it is the breach of this faith that bars recovery). Under the faithless agent rule, an agent who engages in misconduct will forfeit the compensation related to the service that was improperly performed. See, e.g., *Harris v Specialties Distributing Co*, 305 Mich 373, 379; 9 NW2d 645 (1943) (noting that the agent should derive no profit from the improperly conducted sales and his claim against the defendant should be reduced by the amount of fees or gratuities that he received); *Rippey*, 280 Mich 245-246 (noting that where the services are severable, misconduct as to one phase will not result in the forfeiture of the fees for another phase). However, an agent who engages in willful misconduct may forfeit *all* his or her right to compensation:

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned. [2 Restatement Agency, 2d, § 469, p 399; see also *Toy*, 297 Mich at 192 (stating that it is the general rule that a fiduciary may forfeit all right to compensation for fraud, misconduct or gross neglect).]

In this case, the trial court found that Tyler engaged in serious misconduct by diverting commissions that belonged to the Agency. Indeed, the trial court found that the diversion of the commissions amounted to a breach of his fiduciary duties, conversion of his principal's property, fraudulent misrepresentation, and tortious interference with his principal's business relationships. Further, the evidence showed that this misconduct occurred throughout the period in which Tyler claimed he was under paid. Given the trial court's findings and evidence, we cannot conclude that it misapplied the law when it determined that Tyler forfeited his right to any compensation beyond that which he already received. See, e.g., *Toy*, 297 Mich at 193 (refusing to allow the agent's claim for salary because the "evidence is overwhelming that there was gross neglect of duty in the management of the affairs of the insurance company; and that Mr. Ivory was largely responsible for such mismanagement."); *Burnham*, 299 Mich at 464-465 (noting that the executor used his experience to manipulate the estate and that, under such circumstances, he was not entitled to any compensation for his services). The trial court did not err when it barred Tyler's claim for additional compensation on the basis of his misconduct.

Tyler also argues that the trial court erred to the extent that it concluded that he waived his right to the higher payments through his course of conduct. Specifically, he argues that there was no evidence to support the trial court's finding in this regard. As already noted, the trial court properly determined that Tyler forfeited his right to any compensation at the higher percentage rates through his misconduct. Because the trial court properly dismissed Tyler's claim for additional compensation on this basis, we need not address this claim of error. Even if there had been no misconduct warranting the forfeiture of the compensation sought under this claim, we would nevertheless conclude that the trial court did not clearly err when it found that Tyler and the Association had modified the terms of the compensation agreement through their course of conduct.

The parties to a contract are free to modify the terms of their contract. *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). However, a modification may not be unilateral; the party claiming the modification must establish that it was the mutual intent of the parties to modify the original contract. *Id.* The party advancing the amendment has the burden of proving by clear and convincing evidence that the parties agreed to modify the contract through a written agreement, oral agreement, or through affirmative conduct establishing a mutual agreement to waive the original terms. *Id.* Here, there was clear and convincing evidence to support the finding that both Tyler and the Association agreed to a modified system for calculating Tyler's bonus.

There was evidence that Steinhelper told Tyler that the Association could not afford to pay him the higher bonus that was to take effect beginning in 2001 and that Tyler acquiesced to that arrangement. Although Tyler claimed that he only went along with that arrangement because Steinhelper told him that he would make it up to him, Steinhelper did not testify to that effect and the trial court was free to find that Tyler was not credible in this regard. MCR 2.613(C); see also *Tuttle v Dep't of State Highways*, 397 Mich 44, 46 n 3; 243 NW2d 244 (1976) (noting that appellate courts will normally defer to the trial court's credibility determinations at a bench trial). Moreover, Dumont testified that Tyler never asked him to change the rate. Indeed, the evidence—if believed—established that Tyler was responsible for calculating his own bonuses through 2004. Despite this, there was evidence that he did not indirectly assert his right to payment of a bonus at the higher percentage by submitting a bonus summary that used the higher rate and did not directly assert his right to the higher percentage in a communication to Steinhelper or later to Dumont.

In addition to the evidence that Tyler did not directly or indirectly assert his right to the higher commissions during the term of his employment, Morrow testified that he thought Tyler's system for classifying business as new or renewal was peculiar and Steinhelper testified that Tyler's classification method was not in accord with the parties' agreement. Thus, there was evidence that Tyler altered the agreement by using an expansive definition for new business that resulted in him receiving a bonus based on 30% of the commissions for almost all the Agency's book of business. And Dumont testified that, after he became the Association's managing director, he learned that Tyler had classified virtually all the business as new business. However, he did not object because he thought that it had gone on for so long that "we had established a, a practice within . . . the agency on how Mr. Tyler was going to be compensated . . . ." Moreover, when Tyler mentioned to Dumont that Steinhelper had promised him a higher rate, Dumont said he responded by telling Tyler that he probably "waived whatever was in that letter", but that if he felt strongly about it, he should seek "expert help" and "take whatever steps are necessary to get it corrected." Taken as a whole, this evidence supports a finding that Dumont and Tyler, even if reluctantly, agreed to modify his compensation scheme to maintain the status quo. That is, Dumont agreed to accept Tyler's peculiar classification system and Tyler agreed that his bonus would not be set under the terms stated in the original offer of employment. Accordingly, there was clear and convincing evidence that the parties mutually agreed to modify the terms of their agreement and that the modification was adequately supported by consideration. *Quality Products and Concepts Co,* 469 Mich at 372.

The trial court did not clearly err when it found that Tyler engaged in misconduct and did not err when it concluded that, as a matter of law, Tyler was barred from seeking the unpaid additional compensation; Tyler forfeited his right to the additional compensation through his misconduct. The trial court also did not clearly err when it found that there was clear and convincing evidence that the parties modified Tyler's compensation agreement through their course of conduct.

C. CONVERSION

Tyler next argues that the trial court erred when it found that Tyler, Team Marketing, and Tyler & Associates converted the Agency and the Association's property.

In its opinion, the trial court found that Tyler used his entities to convert commissions that were properly payable to the Agency:

> The Court finds that [the Agency and the Association] met their burden of demonstrating [that] Tyler wrongfully exerted control over commissions and bonus payments that should have been paid to the Agency. The evidence establishes that Tyler sent documents to insurance carriers resulting in commission and bonus payments from insurance sales to [the Association's] members being paid to his companies. [The Association and Agency] also presented evidence that, had Tyler not submitted those documents to the insurers, the commissions and bonuses would have been paid to [the Agency]. Thus, Tyler is liable for converting [the Agency's] commission and bonus payments.

On appeal, Tyler argues that the trial court erred in finding that Tyler converted the commissions because the insurance companies paid the commissions in the form of checks to Tyler's businesses and they could not, as a matter of law, convert checks that were written to them. He also argues that there was no evidence that he or his businesses were obligated to deliver specific funds to the Agency. We do not agree that Tyler's use of a separate entity to receive the funds that he diverted from the Agency insulated him or his businesses from liability for converting the Agency's funds.

Common law conversion "consists of any 'distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Agricultural Dep't v Appletree Mktg*, 485 Mich 1, 13-14; 779 NW2d 237 (2010), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). A person may sue for the conversion of identifiable money or checks that the defendant had an obligation to deliver to the plaintiff. *Garras v Bekiares*, 315 Mich 141, 146-149; 23 NW2d 239 (1946) (holding that, because the operator of a consignment shop had not agreed to remit the specific moneys or checks used by customers to pay for the merchandise placed on consignment, the consignor could not establish a conversion). Similarly, one can sue for the conversion of funds that were delivered to the defendant for a specified purpose, but that the defendant diverted to his or her own use. See *Hogue v Wells*, 180 Mich 19, 24; 146 NW 369 (1914); *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968) (stating that the payee of a check had no right to the check because it had been pledged to a third party and, when the defendants diverted it to their own ends, they could be liable for conversion).

The evidence presented at trial showed that the Agency had a book of business with various insurers who had agreed to pay compensation to the Agency in the form of commissions and bonuses. The Agency had an immediate right to possess the funds allocated for the payment of the commissions and bonuses on the Agency's book of business at the time the insurers allocated funds for that purpose. Further, it was undisputed that Tyler had the sole responsibility for negotiating with the insurers on the Agency's behalf and had the apparent authority to instruct the insurers as to how the compensation for the Agency's book of business would be distributed. Tyler also had a duty to act in the Agency's best interests, which included ensuring that the Agency received the compensation paid by the insurers on the Agency's book of business. See *Burton v Burton*, 332 Mich 326, 337-338; 51 NW2d 297 (1952) (noting that, where an agent acquires a pecuniary advantage from third parties by means of his fiduciary character, the agent is accountable to his employer as a trustee for the profit); *Central Cartage Co v Fewless*, 232 Mich App 517, 524-525; 591 NW2d 422 (1988) ("A fiduciary owes a duty of good faith to his principal and is not permitted to act for himself at his principal's expense during the course of the agency."); see also 2 Restatement Agency, 2d, § 388. Despite his duty to direct that those funds be remitted to the Agency, Tyler directed the insurers to pay his own businesses. It was this act—not the cashing of the checks by Team Marketing and Tyler & Associates—that constituted conversion. See *Warren Tool*, 11 Mich App at 298-300 (holding that, where funds are specifically allocated for a particular purpose, the diversion of those funds to a third party can constitute conversion). The insurers allocated specific and identifiable funds for the payment of compensation on the Agency's book of business and Tyler had a duty to cause that compensation to be remitted to the Agency. By ignoring his duty to cause the insurers to remit the payments to the Agency and instead willfully causing the funds to be remitted to third parties, Tyler deprived the Agency of possession of these funds. That is, he exercised dominion over identifiable and specific funds in a manner that was inconsistent with the Agency's interests and, for that reason, could properly be liable for converting those funds. *Appletree Mktg*, 485 Mich at 13-14.

Team Marketing and Tyler & Associates, acting through Tyler, can also properly be held liable for their participation in Tyler's conversion by accepting the wrongfully diverted funds and then distributing them to Tyler. See *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 276; 761 NW2d 694 (2008) (noting that a person may be liable for conversion by aiding or abetting or assisting another in a conversion, even when acting innocently); see also, e.g., *Trail Clinic, PC v Bloch*, 114 Mich App 700, 709; 319 NW2d 638 (1982) (stating that a doctor who did not have any direct contact with the converted checks could nevertheless be liable for conversion because he actively assisted with the conversion by sending a letter causing an insurer to send payments to a different address). For that reason, Tyler's reliance on authorities that stand for the proposition that the payee of a check generally cannot be liable for converting the check is misplaced. Tyler exercised wrongful dominion over the funds by directing the insurers to pay the funds to his businesses and the fact that the insurers did so with checks that were made payable to his businesses did not relieve those businesses of liability for participating in Tyler's wrongful acts.

Under the facts found by the trial court, Tyler, Team Marketing, and Tyler & Associates could properly be held liable for converting the funds that Tyler caused the insurers to pay to Team Marketing and Tyler & Associates.

D. CONVERSION OF THE TYLER & ASSOCIATES CHECK

Tyler also argues that the trial court erred to the extent that it determined that he was not entitled to judgment against the Association for cashing a check for $10,948 that was made payable to Tyler & Associates. In its opinion, the trial court found that Tyler failed to establish that the Association's act in cashing the check was wrongful as between the parties because "the evidence demonstrates that the commissions . . . should have been paid to the Agency." Stated another way, the trial court found that the check at issue was improperly issued to Tyler & Associates and, for that reason, the funds represented by the check were not actually Tyler & Associates property. To the extent that this conversion claim was properly before the trial court,[2] Tyler & Associates had the burden to prove that it had an interest in the check and that the Association or Agency's actions were wrongful as between the parties. See *Thomas v Watt*, 104 Mich 201, 207; 62 NW 345 (1895) ("To entitle the plaintiff to recover two points were essential to be proved: (1) Property in herself, and a right of possession at the time of the conversion[;] (2) A conversion of the property by the defendant to his own use."); *Rohe Scientific Corp v National Bank of Detroit*, 133 Mich App 462, 468; 350 NW2d 280 (1984) ("Liability for conversion does not arise if the actor is privileged to dispossess another of the chattel. . . . If defendant's right to possession was greater than that of plaintiff's, plaintiff could not maintain an action for conversion."), reversed on other grounds on rehearing, 135 Mich App 777 (1984). On this record, we cannot conclude that the trial court clearly erred when it found that Tyler & Associates failed to prove that the check rightfully belonged to it or that the Association or Agency's action in cashing the check was not wrongful as between the parties. MCR 2.613(C).

E. SILENT FRAUD AND FIDUCIARY DUTY

Tyler next argues that, even though he actually disclosed that Team Marketing would be receiving commissions, he had no duty to do so. Thus, he maintains, the trial court erred to the extent that it found that Tyler committed silent fraud by failing to disclose that Team Marketing was receiving commissions. Tyler also argues that, because he disclosed the existence of Team Marketing and that it would act as a general agent, his relationship with the Association did not give rise to a fiduciary duty in that regard.

As our Supreme Court has explained, in determining whether there is an agency relationship, "we consider 'the relations of the parties as they in fact exist under their agreements or acts' and note that in its broadest sense agency 'includes every relation in which one person acts for or represents another by his authority.'" *St Clair School Dist v Intermediate Educ Ass'n/Mich Educ Ass'n*, 458 Mich 540, 557; 581 NW2d 707 (1998), quoting *Saums v Parfet*, 270 Mich 165, 170-171; 258 NW 235 (1935). The primary characteristic of an agent is that he or she is the principal's business representative; his or her function is to "'bring about, modify, affect, accept performance of, or terminate contractual obligations between his [or her] principal and third persons.'" *Id.*, quoting *Saums*, 270 Mich at 172. It is also fundamental to the existence of an agency relationship that the principal has the right to control the conduct of the agent with respect to the matters entrusted to the agent. *Id.* at 557-558.

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[2] The Association and Agency argue that the trial court did not have the authority to decide this claim because only Tyler filed counterclaims and then only against the Association. The check at issue was made payable to Tyler & associates, not Tyler, and was apparently inadvertently cashed by the Agency, not the Association. In any event, given the trial court's findings, we decline to address this issue.

Here, the Association hired Tyler to run its wholly-owned subsidiary, the Agency. The Association gave Tyler the authority to run the Agency as he saw fit; he had the authority to negotiate with the insurers on the Agency's behalf and even had the power to move the Agency's book of business form one insurer to another. He also directly interacted with the Association's member companies on behalf of both the Association and the Agency with regard to insurance matters and reported directly to the Association's board of directors. In light of this overwhelming and undisputed evidence, it is beyond reasonable dispute that Tyler had an agency relationship with both the Association and the Agency. As a result, Tyler had a duty of loyalty to the Association and Agency, which included a duty to refrain from acquiring a benefit from the Association's transactions and a duty to disclose all the material facts and circumstances concerning those transactions. See *Hovarth v Langel*, 276 Mich 381, 385; 267 NW 865 (1936) (holding that an agent stands in a fiduciary relationship with his principal and is duty bound to exercise honesty and good faith and to make a full and fair disclosure of all the material facts and circumstances in relation to the transactions in which he purports to represent them); *Sweeney & Moore*, 295 Mich at 363; see also 2 Restatement Agency, 3d, § 8.02, p 280 ("An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position."); 2 Restatement Agency, 3d, § 8.11, p 369 (stating an agent's duty to provide his or her principal with information). Consequently, Tyler had a duty to disclose to the Association that he had directed the Agency's insurers to make commission and producer bonus payments to his business entities and the breach of that duty could serve as the basis for a claim of silent fraud. See *Clement-Rowe v Mich Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995) (noting that fraud may be committed by failing to disclose a fact or facts that one has a duty to disclose with the intent to induce another to rely on the nondisclosure).

Further, we do not agree with Tyler's contention that the evidence showed that he disclosed that his businesses were receiving payments on the Agency's book of business. Tyler did testify that he told various persons at the Association about Team Marketing's role as a general agent and he submitted documents that could be understood to state the same thing. However, the Association presented testimony that no one at the Association knew that Team Marketing was receiving payments on the Agency's book of business. Further, Steinhelper testified that it was his understanding that Tyler had a small agency that he used to sell policies to his friends and family and he stated that he told Tyler that he did not have a problem with that. But he also testified that he would not have hired Tyler had he known that Tyler intended to sell on his own. Further, there was testimony that suggested that Tyler's documentary evidence was never actually submitted to the Association. Accordingly, there was a clear factual dispute as to whether Tyler fully informed the Association about his businesses and the revenues that they received on the Agency's book of business. In its opinion and judgment, the trial court recognized the disputed nature of the evidence and resolved that dispute in the Association and Agency's favor; it found the Association and Agency's testimony and evidence to be more credible and found that Tyler did not disclose that his companies were receiving commissions and producer bonuses from the insurers. This Court will defer to the trial court's resolution of a factual dispute, especially where the dispute hinges on credibility determinations. MCR 2.613(C); *Tuttle*, 397 Mich at 46 n 3.

The trial court did not err when it determined that Tyler had an agency relationship with the Association and Agency that gave rise to a duty to disclose that his businesses were receiving payments on the Agency's book of business. The trial court also did not clearly err when it found that Tyler did not properly disclose that his businesses were receiving commissions and bonuses on the Agency's book of business. And the trial court did not err when it determined that Tyler could be liable under a claim for silent fraud for his failure to make the disclosure.

F. TORTIOUS INTERFERENCE

Tyler next argues that the trial court erred in finding that he tortiously interfered with the Association or Agency's business relationships with the Association's members. But the trial court did not find that Tyler tortiously interfered with the relationship between the Association, Agency, and the Association's members. Rather, it found that "Tyler interfered with [the Association and Agency's] expected commissions from insurance sales to [the Association's] members by misdirecting the commissions to his companies." That is, the trial court found that Tyler tortiously interfered with the Association and Agency's relationship with its *insurers*. Because Tyler has not challenged the trial court's application of the law to its actual findings, there is no error for this Court to review.

III. IMPROPER JUDGMENT

A. STANDARDS OF REVIEW

Finally, Tyler argues that the trial court erred when entered a judgment in favor of the Association and Agency against Tyler, Team Marketing, and Tyler & Associates without allocating fault and damages among the parties. This Court reviews de novo the proper interpretation and application of statutes. *Granger Land Dev Co v Dep't of Treasury*, 286 Mich 601, 608; 780 NW2d 611 (2009).

B. ANALYSIS

As a preliminary matter, we note that Tyler did not properly raise this issue before the trial court. Michigan generally follows a "raise or waive" rule of appellate review for civil matters. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). However, this Court has the discretion to overlook preservation requirements under certain circumstances. See *Smith v Foerster-Bolser Constr*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

After discussing the individual claims, the trial court found that, "as a result of Defendants' conversion, misrepresentation, tortious interference, breach of fiduciary duty, and unjust enrichment, Plaintiffs were damaged in the amount of $738,441.65." The trial court entered "judgment for Plaintiffs and against Defendants in the amount of $715,441.65", which included a setoff in favor of Tyler for his unpaid salary and benefits. Thus, on its face, the trial court's judgment provided that the Association and Agency were entitled to the full amount of the judgment from Tyler, Team Marketing, and Tyler & Associates.

Our Legislature has generally abolished joint and several liability for actions "based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death . . . ." MCL 600.2956. In such cases, the finder-of-fact must allocate liability for the damages on the basis of fault. See MCL 600.6304(1). However, the Legislature did not abolish "an employer's vicarious liability for an act or omission of the employer's employee." MCL 600.2956. Traditionally, an employer is vicariously liable for the acts and omissions of its employee that are committed in the scope of the employee's employment. See *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 221; 716 NW2d 220 (2006). In such a case, the employer is responsible without regard to its participation, either by act or omission; rather, the employer is held liable as a matter of public policy. *Theophelis v Lansing Gen Hosp,* 430 Mich 473, 483; 424 NW2d 478 (1988) (opinion by GRIFFIN, J.). Nevertheless, the employee remains fully liable for his or her acts along with the employer. *Trail Clinic*, 114 Mich App at 709; see also 2 Restatement Agency, 3d, § 7.01, p 115. Further, the tort-reform statutes do not apply to vicarious-liability cases because a vicariously liable tortfeasor is not at fault within the meaning of the statutes. See *Kaiser v Allen*, 480 Mich 31, 37; 746 NW2d 92 (2008). Therefore, where an employer is vicariously liable for the acts of its employee, it will not normally be subject to apportionment of fault. *Id.* at 38-39.

In this case, the trial court found that Tyler diverted the commissions and bonuses at issue to Team Marketing and Tyler & Associates. It was undisputed that Tyler was the sole shareholder and agent for both Team Marketing and Tyler & Associates. Hence, every action taken by those entities was an action taken through Tyler. As such, to the extent that Tyler's tortious actions were within the scope of his employment, Team Marketing and Tyler & Associates were vicariously liable for those torts. *Zsigo*, 475 Mich at 221. And they could not be assigned fault. *Kaiser*, 480 Mich at 38-39. And, to the extent that the trial court could assign fault to Team Marketing or Tyler & Associates based on their own actions—fault that was independent of the fault caused by Tyler in his individual capacity—Tyler would still be individually liable for those damages because he was the sole acting agent for both entities. *Trail Clinic*, 114 Mich App at 709. Accordingly, there is no scenario where the allocation of fault to Team Marketing and Tyler & Associates would result in a reduction in Tyler's liability.

Similarly, the separate existence of the Association and the Agency does not materially alter the parties' situations. It is undisputed that the Agency is wholly owned by the Association. Thus, the judgment in this case will ultimately benefit the Association even if paid to the Agency. There is also no danger that Tyler will have to pay twice; payment to either the Association or Agency will satisfy the judgment. Given these facts, we decline to exercise our discretion to review this claim of error.

There were no errors warranting relief.

Affirmed. As the prevailing parties, the Association and Agency may tax costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello