# STATE OF MICHIGAN

# COURT OF APPEALS

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MELVIN KUHENS and LINDA KUHENS,

Plaintiffs/Counterdefendants-Appellees,

v

B & R OIL COMPANY, INC.

Defendant/Counterplaintiff-Appellant.

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UNPUBLISHED
November 30, 1999

No. 209871
Berrien Circuit Court
LC No. 96-000222 NZ

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's denial of its motion for directed verdict, motion for judgment notwithstanding the verdict (JNOV) or for a new trial, and the trial court's order awarding plaintiffs fees and costs of $21,352.55. We affirm and remand for consideration of plaintiffs' appellate attorney fees.

Defendant and plaintiffs entered into a petroleum marketing and consignment agreement under which defendant supplied the petroleum, equipment, and maintenance for the sale of gasoline and other petroleum, which plaintiffs sold at their convenience store. The agreement required plaintiffs to deposit the proceeds from their daily petroleum sales into defendant's bank account. Under the parties' contract, defendant was required to supply petroleum and maintain the equipment. Mark Dobson ("Dobson"), defendant's director of operations, testified that it was defendant's fault that the pumps were shut down in October 1995 by the government because he failed to notice the deadline for compliance. Plaintiffs subsequently sent defendant an invoice for $212 as compensation for losses suffered as a result of the shut down. Plaintiff Mel Kuhens ("Kuhens") testified that his statements to Dobson in a December 14, 1995 telephone conversation, i.e., that he would not make daily proceeds deposits, was in response to defendant's actions of deducting losses from plaintiffs' commission checks and of reneging on reimbursing plaintiffs for their losses when the pumps were shut down in October. Defendant subsequently closed down the pumps and removed its petroleum on December 16, 1995 (Tr 339). Plaintiffs filed a complaint for damages and injunctive relief. Defendant answered and filed a counterclaim. After trial, the jury reached a verdict in favor of plaintiffs in the amount of $54,000.

Defendant first claims that the trial court erred in denying defendant's motions for directed verdict, judgment notwithstanding the verdict (JNOV), or for a new trial because plaintiffs breached the parties' contract by repudiating the contract obligations before their performance was due. Specifically, defendant claims that plaintiffs unequivocally declared their intent not to perform under the contract when Kuhens stated in the December 14 telephone conversation that he would not make the daily proceeds deposits, and that this declaration constituted an anticipatory breach of the parties' contract. "Under the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance." *Stoddard v Manufacturers National Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999). In determining whether a repudiation occurred, it is the party's intention manifested by acts and words that controls, rather than any secret intention that may be held. *Id.* To constitute an anticipatory breach of contract, a statement must be a "definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives." 4 Corbin, Corbin on Contracts, § 973, p 905. For an oral repudiation, "a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform." *Paul v Bogle*, 193 Mich App 479, 494; 484 NW2d 728 (1992), quoting 2 Restatement Contracts, 2d, § 250, pp 273-274.

Because the standard of review varies depending on the motion at issue, we address defendant's motions separately. We review de novo the trial court's denial of defendant's motion for directed verdict. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). A directed verdict is appropriate only when no factual question exists upon which reasonable minds may differ. *Id.* In reviewing a motion for directed verdict, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995). Here, the trial court concluded that whether Kuhens unequivocally declared his intent not to perform the contract was a question of fact for the jury and that it was within the province of the jury to decide if either side breached, who breached first, and whether it was a material breach, justifying action by the other side. We agree.

According to Kuhens testimony, it was defendant's practice to deduct uncollectible credit card charges from plaintiffs' commissions, without splitting the loss. Kuhens testified that defendant's practice prompted his comments in the December 14 telephone conversation:

> *Q.* So how did that [i.e., defendant's practice of deducting losses] play into the conversation with Mark Dobson?
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> *A.* Well, because I said, "You promised to pay us something for being down that [i.e., the October shut down]." And he said, "Mel, $212 is a little bit ridiculous." I said, "Well, Mark, I asked you what was fair, what did you feel like would be a fair invoice." I said, "I wanted to be fair with you." And he said, "This here is a little bit unfair." I said, "Well, take 50 bucks off of it." He said, "That's still ridiculous." And I

> said, "Well, then I'll tell you what, just change the bill to whatever you think is fair and send me a check." I said, "I think it's worth something what we went through." And he said, "Just forget it. We ain't going to pay it." I said, "Well, then I'll tell you what, I'll take it off of your deposit." He said, "You want to play them games, I'll take it off of your commission check." And I said, "Well, then how about me just not making the deposit?" And he said, "Well, we'll come up here and shut you down." I said, "Well, whatever trips your trigger", and I hung up the phone.

Dobson testified to a slightly different version of the conversation, stating that Kuhens said: "And if you won't pay me the $212, I'm not going to deposit your moneys."

About two hours after the phone conversation, defendant disabled the pumps at plaintiffs' store, preventing further petroleum sales. However, Kuhens testified that he had already made the deposit for the day and that he would have made the deposit as always. Thus, the issue of breach hinged on the disputed testimony regarding the December 14 telephone conversation. Viewing the evidence in the light most favorable to plaintiffs, there was a question of fact as to whether Kuhens' statement was unequivocal or sufficiently positive to be reasonably interpreted as a repudiation of the contract, and further, whether this partial repudiation justified defendant's refusal to perform. The trial court properly denied defendant's motion for directed verdict.

Next, with regard to defendant's motion for JNOV, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate. *Id.* "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998), quoting *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). Here, reasonable minds could differ regarding whether Kuhens' statement was a definite and unequivocal repudiation of the parties' contract. Further, reasonable minds could differ regarding the question whether the statement, even if found to be a partial repudiation, justified defendant's breach, i.e., locking up the petroleum equipment. Because reasonable minds could differ on the issue of breach of contract and whether any breach justified the other party's failure to perform, the verdict must stand. The trial court did not err in denying defendant's motion for JNOV.

Regarding defendant's motion for a new trial, this Court reviews a motion for new trial for an abuse of discretion. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). The trial court must determine whether the overwhelming weight of the evidence favors the losing party. *Severn*, *supra* at 412. This Court gives substantial deference to the trial court's determination that a verdict was not against the great weight of the evidence. *Id*.

The trial court found that the jury verdict was in "accordance with a permissible view of the evidence." Further, it was up to the jury to determine who breached first, and the jury could have

concluded that the "initiating breach" was defendant's action in October 1995, of failing to maintain its equipment, causing plaintiffs' pumps to be shut down by the government. The record supports the trial court's reasoning. Under the parties' contract, defendant was required to supply petroleum and maintain the equipment. Dobson testified that it was defendant's fault that the pumps were shut down in October 1995 by the government because he failed to correct a violation with the pumps at plaintiffs' store in a timely manner. Kuhens testified that his statements in the December 14 conversation responded to defendant's actions of deducting losses from plaintiffs' commission checks and of reneging on reimbursing plaintiffs for their losses when the pumps were shut down in October. There was a question of fact regarding whether Kuhens' comment about not making the deposit was a definite and unequivocal repudiation of the parties' contract, and if so, whether that repudiation justified defendant's action of disabling the pumps. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next claims that the trial court erred in denying defendant's motion for JNOV or for a new trial on the ground that the verdict was the result of passion, prejudice, sympathy and bias. Specifically, defendant contends that plaintiffs spent a considerable time at trial establishing that defendant was a large corporation as opposed to plaintiffs' "mom and pop" store, and that plaintiffs elicited testimony implying that defendant was an environmental polluter. Defendant further contends that neither subject was relevant to the issues involved in the case and that plaintiffs raised the subjects to excite the passions and prejudices of the jury. We disagree with that contention. The trial court noted that the jury awarded plaintiffs less than the amount of damages sought, so the jury verdict was not based on passion or prejudice in terms of the damages award. With regard to defendant's claim that the verdict resulted from passion and prejudice because plaintiffs portrayed this case as a big corporation against a "mom and pop" store, the court also disagreed. First, the court noted that defendant did not object to the evidence at trial. Second, this evidence was rebutted by defendant, which also characterized itself as a family business, operated by father and sons. Further, there was no basis from anything the jury said or did to indicate that the jury was improperly influenced.

A trial court's determination that a verdict was not against the great weight of the evidence will be given substantial deference by this Court. *Severn*, *supra* at 412. A verdict may be vacated only where there is no reasonable support for the verdict in the evidence and it is more likely to have resulted from extraneous influences, passion, prejudice, or sympathy. *Nagi v Detroit United Railway*, 231 Mich 452, 457; 204 NW 126 (1925); *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998).

The award of damages was within the range of the evidence; plaintiffs claimed losses of $73,000 and the jury awarded only $54,000. If a jury verdict is within the range of the evidence, a new trial is not warranted on a claim that the verdict was excessive absent a showing that that it was secured by improper methods, sympathy, or prejudice. *Means v Jowa Security Services*, 176 Mich App 466, 477; 440 NW2d 23 (1989). There has been no such showing in this case.

Although defendant contends on appeal that the "big corporation versus mom and pop operation" theme was pursued throughout the trial and was improper, defendant failed to object to plaintiffs' evidence and argument, and likewise used this theme itself. With regard to the evidence of

environmental pollution, this evidence was relevant to the issue of plaintiffs' mitigation of damages and whether Kuhens could use another supplier. It was also relevant to plaintiffs' reasons for not accepting defendant's offer to sell him the equipment. Defendant did not object, in general, to the expert witness' testimony on environmental contamination and, in fact, conducted extensive cross-examination on this issue. Regardless, Mark and Ralph Dobson, president of B & R Oil company, testified on direct examination that defendant paid for the extensive costs of the environmental cleanup out-of-pocket, without reimbursement from government funds or insurance, which portrayed defendant in a positive light. Thus, the environmental contamination evidence most likely did not garner sympathy for plaintiffs any more than for defendant, who used the issue to its favor. We also reject defendant's contention that plaintiffs' counsel's statements during closing argument that Dobson could not attend the last day of trial because of a family trip to Disney World and that the amount of damages sought by plaintiffs would not be sufficient to send them on a similar trip, inappropriately gained the jury's natural sympathy in favor of the "underdog" plaintiffs. Defendant initially raised the issue of Dobson's absence from the trial on the redirect examination of Ralph Dobson. Given that defendant presented testimony on this issue, we find that plaintiffs' counsel's fleeting reference to the trip during closing argument was not inappropriate.

Further, we find no evidence that the verdict resulted from improper influences on the jury. During jury instruction, the court instructed the jury that its decision must not be influenced by sympathy or prejudice. Moreover, defendant either failed to object to most of the now complained-of evidence or itself introduced the evidence or placed the matter in issue. Error warranting reversal must be that of the trial court and not one to which an aggrieved party contributed by planned or neglectful omission of action on his part. *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993).

Finally, defendant claims that the trial court abused its discretion in the award of attorney and expert witness fees. In this regard, defendant raises three separate sub-issues. In its first sub-issue, defendant contends that the attorney fee provisions in the parties' agreement was permissive rather than mandatory, and did not grant plaintiff any right to recover attorney fees not otherwise available under Michigan law. We disagree with this contention. This Court reviews a trial court's decision whether to award attorney fees for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). Page eight of the parties' contract contains the following attorney fee provision:

> In the event that an event of a default is not cured immediately, then the remedies of the parties shall be as follows:
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> * * *
>
> (d) The non-defaulting party may, in any event, be entitled to recover attorney fees from the defaulting party if litigation ensues as a result of a breach of contract.

Contractual provisions for the payment of reasonable attorney fees as damages are enforceable, including fees incurred on appeal. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548-549; 362 NW2d 823 (1984). Here, the language of the contract expressly states that the non-defaulting party *may* be entitled to attorney fees. The word "may" designates discretion. *Mollett v Taylor*, 197 Mich App 328, 339; 494 NW2d 832 (1992). The only fair reading of this language is that

it is a contractual agreement to allow attorney fees associated with litigation. Otherwise, the provision would be meaningless; the contract would not require such permissive language for a party to recover fees under a statute or court rule. "No word in a contract should be rejected as surplusage if it serves some reasonable purpose." *Geerdes v St Paul Fire & Marine Ins Co*, 128 Mich App 730, 734; 341 NW2d 195 (1983). Accordingly, we conclude that the trial court did not abuse its discretion in awarding attorney fees based upon the attorney fees provision in the parties' contract.

In its second sub-issue, defendant contends that the trial court's award of attorney fees was excessive. We disagree. In determining a reasonable attorney fee, the trial court should consider the factors set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973):

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expense incurred; and (6) the nature and length of the professional relationship with the client.

However, the court is not limited by these six factors, and may adjust an attorney's fee in light of the results of the proceedings. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 114; 593 NW2d 595 (1999).

Defendant objects to the $150 hourly rate charged by plaintiffs' counsel, contending that a rate of $125 per hour is more reasonable. According to the record, counsel had more than seventeen years' experience. Counsel emphasized that the case, although not a high profile case, was a high stress case given what was at stake for his clients and the level of effort required on his part for a three-day jury trial, and for that reason, he charged a $150 hourly rate rather than his usual hourly rate of $130, which was about the same as if he had taken the case on a contingency fee basis. Although defendant argues that a rate of $125 an hour is more reasonable than the $150 hourly rate approved by the trial court, that is not the issue before this Court. A trial court's determination of the reasonableness of the attorney fees will be upheld absent an abuse of discretion. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). Based upon the record in this case, we cannot say that the trial court abused its discretion in approving an hourly rate of $150.

Defendant also contends that counsel's statement for services includes reimbursement for fees associated with defendant's motion to compel answers to its discovery requests, on May 20, June 15 and 17, 1996, and states in its brief that "[p]laintiffs should not be reimbursed for their failure to comply with the Court Rules." According to the record, the trial court agreed with defendant's assertion and deducted two and one-half hours of attorney time for those activities, which is the deduction that defendant's attorney requested at the hearing on plaintiffs' motion for attorney fees. Under these circumstances, we find defendant's contention on appeal to be entirely devoid of merit and borders on an attempt to mislead this court.

In its third sub-issue, defendant contends that the trial court erred in awarding costs related to services performed by plaintiff's expert witness, Mr. Larry Schoene. However, defendant fails to cite any authority to support its position, but merely asserts that the trial court abused its discretion in

awarding the expert witness fees. By failing to cite any supporting legal authority, defendant has effectively abandoned this issue. *Head, supra* at 115-116.

Finally, plaintiffs request an award of their actual attorney fees incurred in connection with this appeal in the amount of $4,500. A contractual provision for reasonable attorney fees in enforcing provisions of a contract may include allowance for services provided upon appeal. *Central Transport, supra* at 549. However, the trial judge made no findings as to whether the parties' contract encompassed appellate attorney fees. Accordingly, we remand to the trial court for a determination of whether the attorney fee provision encompassed appellate fees, and if so, the court should determine the reasonable value of plaintiffs' counsel's services on appeal.

Affirmed, but remanded for consideration of appellate attorney fees consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski