STATE OF MICHIGAN

COURT OF APPEALS

TUBELITE, INC., Plaintiff-Appellee,	UNPUBLISHED February 18, 2000
v	No. 215600 Allegan Circuit Court
LAKESHORE GLASS & METALS, INC., Defendant-Appellant.	LC No. 97-020416-CZ

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Defendant Lakeshore Glass & Metals Inc. appeals as of right from the trial court's order granting judgment to plaintiff Tubelite, Inc. in the amount of $23,733.57 pursuant to the Bulk Transfers Act (the "Act"), MCL 440.6101 *et seq.*; MSA 19.6101 *et seq*. We affirm.

I. Basic Facts And Procedural History

A. The Parties

Tubelite is a corporation involved in, among other things, supplying "stock length" aluminum material used to frame glass windows. Gun Lake Glass and Screen, Inc., one of Tubelite's customers, and Michael F. Otis, chief executive officer and a controlling shareholder in Gun Lake Glass and Screen, were defendants in the trial court, but are not parties to this appeal.

In 1996, Otis changed Gun Lake Glass and Screen's named to MFO, Inc. MFO's business involved two divisions. The first, a retail glass division, sold doors, screens, windows and other items from stock and installed these products in residential homes. According to Otis, MFO stocked inventory, such as commercial metal, doors, hardware for doors, door closures, hinges, pushes, pulls, and panic devices and then MFO

> would cut it, drill it, mill it, add hardware to it, assemble it . . . build it into frames, windows, doors, that sort of thing. Then deliver it in a fabricated state to the job site

> where we installed it. We did all that fabrication and assembly work in the shop, brought it out to the job site, installed it and then put glass in it and then it was done.

The second, a commercial glass division, bid for contracts on construction jobs. Once it was awarded a contract, MFO would submit drawings for doors and windows for approval and, when approved, would order these products as needed for the job.

In the summer of 1996, MFO suffered financial difficulties. As a result, MFO sold its retail division to Yankee Auto Glass, Inc.[1] Apparently, however, the financial difficulties persisted and in October 1996, MFO entered into an Asset Purchase Agreement with Lakeshore Glass & Metals, Inc. to sell its remaining assets to Lakeshore. This lawsuit arises out of this second sale of assets.

B. The Asset Purchase Agreement

The Asset Purchase Agreement provided that, at closing, MFO would sell Lakeshore "all of the assets, rights, and interests of every conceivable kind or character whatsoever, whether tangible or intangible, that on the Closing Date are owned by Seller [MFO] or in which Seller has an interest of any kind." At the time the MFO and Lakeshore executed the agreement, MFO's warehouse contained screws, hinge backers, caulk, vinyl, foam tape, sealants, anchors, setting blocks, rubber shims, and other miscellaneous items. In addition, according to Otis, MFO transferred $75,000 to $100,000 in equipment inventory, including ten to twelve vehicles, shop equipment, a cut off saw, hand drills, screw guns, one or two trailers, tables, work benches, table saws, a "backer rod," furniture, computers, copy machines, fax machines, and printers to Lakeshore. Otis estimated that the total value of the inventory MFO transferred to Lakeshore was $200,000 to $300,000, and he had "no doubt" that it was worth at least $100,000. Lakeshore, however, ultimately paid $95,000 for these items

Importantly, the Asset Purchase Agreement specifically referred to Article 6 of the Uniform Commercial Code (the "UCC"), stating:

> 10.25 Bulk Transfer Act. Schedule 10.25 contains a true and complete list of Seller's existing creditors, contains all the information required under Section 6-104 of the UCC, and is being delivered by Seller to Buyer in satisfaction of the requirements of that Section.

Although Otis recalled that the parties had signed the Asset Purchase Agreement on October 31, 1996, several of the required "schedules and attachments" were not prepared even though he had identified a list of MFO's creditors, including Tubelite. Otis attributed the failure to prepare these schedules and attachments to "some urgency to push this transaction through" to finalize the transaction to avoid any problems created by litigation by an MFO to stop the sale. In any event, the parties do not dispute that MFO and Lakeshore did not provide a bulk sales notice to Tubelite, which had an open account balance with MFO in excess of $40,000 at the end of 1996, or other creditors of MFO.

C. The Bench Trial

At the bench trial, Tubelite advanced three theories under which, it contended, the Bulk Transfers Act applied to the transaction between MFO and Lakeshore. First, the Asset Purchase Agreement language for the transaction stated that it was applicable. Second, Tubelite argued that MFO's principal business of MFO was to sell merchandise or inventory, which fell under the broad definition of work in progress in the Act. Finally, it claimed that the applied to any business that manufactured what it sold. In other words, Tubelite contended that the Act applied in this case because it supplied raw materials to MFO, which converted those raw materials into the goods it sold to purchasers through the manufacturing process. Tubelite maintained that, because the Act applied to the circumstances of this case under any one of those theories and that there was "[n]o dispute that the act wasn't complied with," it was entitled to damages.

Lakeshore argued that the Bulk Transfers Act applied solely to businesses that sold merchandise out of stock. The Act, therefore, did not govern its transaction with MFO because MFO only sold materials that were special ordered and its actual inventory was "worthless." Lakeshore also claimed that the assets MFO transferred to it were insufficient to allow Tubelite to recover on its account and that it minimized any potential damage by using its actual notice of the transaction to institute this law suit. Accordingly, in Lakeshore's view, Tubelite did not sustain any damages through Lakeshore's noncompliance with the Act.

D. The Trial Court's Decision

The trial court found that Gun Lake and MFO used materials Tubelite sold to them without paying for those materials. In addition, the trial court found that MFO transferred its assets to Lakeshore in an agreement that referred to the Bulk Transfers Act. Nevertheless, the trial court held that the parties' reference to the Act did not make it apply to the instant case, although it did provide "an indication of what the parties were thinking." The trial court then construed the Act to determine if it applied. Quoting MCL 440.6102(3); MSA 19.6101(3), defining an "enterprise" covered by the Act, MCL 440.6102(1); MSA 19.6102(1) defining a "bulk transfer," and MCL 440.9109(4); MSA 19.9109(4), which describes what constitutes "inventory," the trial court concluded that each of those terms applied to the instant case and, therefore, MFO was subject to the Act. Accordingly, the trial court held that Tubelite was entitled to notice of the transaction between MFO and Lakeshore and, because those businesses failed to provide that notice, Tubelite was entitled to "an attachment of any assets that may still be in existence or a money judgment for those which—to the extent they are not existing."

II. MFO As An Enterprise Covered By The Act

A. Preservation Of The Issue And Standard Of Review

Lakeshore first contends that the trial court erred in concluding that the Bulk Transfers Act applied in this case, an issue it advanced at trial. Therefore, this issue is preserved for our review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

The parties dispute whether this issue involves a factual determination regarding whether MFO engaged in manufacturing or a question of law regarding the meaning of the Bulk Transfers Act. The distinction is significant when deciding which standard of review to apply because we review factual findings of fact for clear error but apply the de novo standard of review to questions of law. *Gumma v D & T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). We conclude that this issue primarily involves a question of law in that the Act fails to define what constitutes manufacturing and we must construe that term to determine if the Act applies here. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Thus we review this issue de novo. *Id*.

B. Statutory Interpretation And "Manufactures"

The Act, as it appeared during the transaction in this case, stated that "[a]n enterprise subject to this article is one whose principal business is the sale of merchandise from stock, including a restaurant, cafe, tavern, hotel, club, school, hospital, other establishment that dispenses food, or any enterprise that manufactures what it sells." MCL 440.6102(3); MSA 19.6102(3). The Act did not define the term "manufactures," otherwise we would simply use that definition in this case. *In re Huisman*, 230 Mich App 372, 379; 584 NW2d 349 (1998). As a result, we must interpret that term, keeping in mind that the

> primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written . . . simply because a phrase is undefined does not render a statute ambiguous. Rather, undefined words are given meaning as understood in common language, taking into consideration the text and subject matter relative to which they are employed. Where a statute does not define one of its terms, it is customary to look to a dictionary for a definition. *Marcelle v Taubman*, 224 Mich App 215, 219; 568 NW2d 393 (1997). [*Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 366-367; 579 NW2d 374 (1998).]

Black's Law Dictionary (7th ed) does not define the verb manufacture, though it defines the noun manufacturer as an "entity engaged in producing or assembling new products." *Random House Webster's College Dictionary* (2d ed), however, concludes that the verb manufacture means " to make up or produce by hand or machinery, " "to work up (material) into form for use," "to fabricate," "to produce in a mechanical way," or "the making of goods by manual labor or machinery."

C. MFO's Business

At trial, Lakeshore's witness, Red Kemple, testified that MFO engaged solely in "fabrication" and merely the "cutting up and screwing together of pieces." This description fits within several of the

above definitions, and clearly is encompassed in the term "to fabricate," which *Random House Webster's College Dictionary* uses to define the verb manufacture.

Moreover, Otis testified that MFO engaged in cutting, drilling, adding hardware, assembling, building material into goods sold, delivering the goods in a fabricated state to the job site for installation, and installing of the goods. Darrin Pritchard similarly stated that the materials Tubelite supplied to MFO required assembling, cutting, glazing, and fabricating before sale to an "end user." The testimony of these two witnesses also supports a conclusion that MFO engaged in the business of manufacturing the goods it sold. Therefore, we conclude that at the time MFO sold its stock to Lakeshore, MFO was an enterprise covered under the Act. MCL 440.6102(3); MSA 19.6102(3).

Lakeshore refers us to several cases from other states holding that entities that received materials on an "as-needed basis" or did not maintain a "substantial inventory" were not covered under their respective states' versions of the Act. Theses cases do not change our minds with regard to whether the Act covered MFO because, even though the UCC has a broad goal of bringing uniformity to commercial transactions, MCL 440.1102(2)(c); MSA. 19.1102(2)(c), these decisions do not bind this Court. Moreover, Michigan's version of the Act differed from the acts reviewed by each of these courts because of this state's 1979 amendment broadening the scope of covered enterprises. Regardless, the facts of the instant matter are plainly distinguishable from the cases Lakeshore cites, which involved the labor- or service-focused industries of printing and automobile repair in contrast to MFO's emphasis on supplying goods that it manufactured to customers. Accordingly, the cases Lakeshore refers to do not dispose of this issue.

Similarly, we reject Lakeshore's argument that the purpose of the Act was only to protect individuals who extend credit to a merchant according to its perceived inventory and should be construed narrowly. The Legislature amended MCL 440.6102(3); MSA 19.6102(3) in 1979 expressly to include schools, hospitals, hotels, and any establishment that provided food as well as manufacturers. These are broad categories of businesses, and it is easy to conceive of a situation in which a creditor to one of these business would extend credit without regard to inventory. Thus, we find no basis on which to rest a narrow construction of that section in order to avoid applying it to MFO in this case. We do not waiver in our conclusion that MFO was an enterprise covered by MCL 440.6102(3); MSA 19.6102(3) at the time of the transaction.

III. Tubelite's Damages

A. Lakeshore's Argument

Lakeshore contends that the trial court erred in concluding that $33,000 assets remained to satisfy a judgment in favor of Tubelite after paying MFO's other secured creditors. In other words, Lakeshore argues that if "no assets" remained, the trial court could not have concluded that Tubelite suffered any damages.

B. Preservation Of The Issue And Standard Of Review

Lakeshore raised this issues in the lower court, preserving it for appeal. *Peterman, supra*.

Again, the parties contest which standard of review applies to the question of damages. Whether and to what extent a party suffers compensable injury is a question for the trier of fact. See generally *Mallory v Conida Warehouses, Inc.*, 134 Mich App 28, 31-32; 350 NW2d 825 (1985); see also *Hadfield v Oakland Co Drain Com'r*, 430 Mich 139, 187 n 26; 422 NW2d 205 (1988). We review a factual determination regarding damages in a bench trial for clear error. MCR 2.613(C); see also *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188, 202; 390 NW2d 227 (1986). A finding of fact is clearly erroneous where, despite some evidence to support it, this Court is left with the definite and firm conviction that a mistake has been committed in light of the entire record. *Gumma, supra* at 210.

C. *Greenberg*

Lakeshore cites only one authority, *Jon Greenberg & Associates, Inc v ABC Appliances, Inc*, 207 Mich App 81, 83; 523 NW2d 823 (1994), for the proposition that a trial court errs if it finds a plaintiff is entitled to an award for damages if the defendant has no assets with which to satisfy a judgment in the plaintiff's favor. In that opinion this Court wrote:

> While *not necessary for resolution of this appeal*, we note that plaintiff has failed to prove that it sustained any damages as a result of defendant's failure to notify plaintiff of the bulk sale. . . . Any claim by plaintiff to the monies or assets made available as a result of Hawthorne's liquidation would have been subject to the interests of the other secured creditors, which far exceeded Hawthorne's assets. Plaintiff would have received nothing. It would be inequitable to allow plaintiff to recover on its unsecured debt from the transferee when plaintiff would not have received any value from the transferor even if notified in time to stop the sale. [*Id.* (emphasis supplied).]

Thus, the *Greenberg* Court suggested that proof that liquidation of the seller's assets would be insufficient to satisfy a plaintiff's claim operated as a "defense" to that plaintiff's bulk transfer claim.

Nevertheless, this Court has also held that "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but obiter dicta and lack the force of adjudication." *Edelberg v Leco Corp*, 236 Mich App 177, 183; 599 NW2d 785 (1999). The language Lakeshore relies on fits within a statement that the *Greenberg* Court conceded was not essential to its determination. Thus, these statements do not have any precedential effect and Lakeshore has failed to support its claim with authority, as case law requires. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

In any event, we perceive a significant distinction between a case in which a defendant claims that the plaintiff did not suffer injury from the conduct underlying the suit and the case in which the defendant simply claims that it cannot pay a judgment in the plaintiff's favor regardless of the factual support for the award. See *Gubin v Lodisev*, 197 Mich App 84, 92; 494 NW2d 782 (1992). Even if ability to satisfy the judgment was relevant in considering an award of damages in this case, there was

testimony that suggests that MFO retained assets or proceeds from its assets after satisfying its debt to its secured creditors with which it could pay some or all of its obligation to Tubelite. For instance, Otis testified that MFO's assets were worth over $200,000 and Brad Zeeff asserted that Lakeshore paid only $95,000 for the assets. Otis and Ken Stienstra also noted that Otis received $25,000 after satisfying United Bank's lien that Yankee Auto Glass owed MFO $8,000. To the extent that Lakeshore and the other defendants in the lower court presented contrary testimony, it was up to the trial court sitting as finder of fact to resolve the conflict, and we give the court's resolution of any conflict in favor of Tubelite "special deference." MCR. 2.613(C); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Consequently, this issue is meritless.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck

[1] It is unclear to us whether the name change from Gun Lake Glass and Screen, Inc. to MFO, Inc. occurred prior to or as a part of the sale the retail division to Yankee Auto Glass, Inc. Otis testified that, in July 1996, Yankee Auto Glass purchased a portion of Gun Lake's assets, including the retail and auto glass divisions as well as the right the use the "Gun Lake" name. The remaining unsold portion of the business, namely the contract and commercial division, was incorporated as MFO, Inc. The exact chronology of the first asset sale to Yankee Auto Glass is not significant with respect to the matter here.