# STATE OF MICHIGAN

# COURT OF APPEALS

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POLY-AMERICA, INC.,

Plaintiff-Appellee/Cross-Appellant,

v

SHRINK WRAP INTERNATIONAL,

Defendant-Appellant/Cross-Appellee.

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UNPUBLISHED
October 10, 2000

No. 212951
Wayne Circuit Court
LC No. 96-619840-CZ

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

PER CURIAM.

Plaintiff, Poly-America, Inc., is a Texas manufacturer of polymer films. In October and November 1994, plaintiff sold film to Shrink Wrap Systems ("Systems"). When Systems failed to pay for the film, plaintiff obtained a default judgment against Systems in Texas. Because collection efforts against Systems were unsuccessful, plaintiff brought an action in Wayne Circuit Court against Shrink Wrap International ("International") on the theories of successor liability and fraudulent conveyance. The trial court directed a verdict on the fraudulent conveyance claim. The jury returned a unanimous verdict in the amount of $65,000 on the successor liability claim. During post-judgment proceedings, the trial court awarded plaintiff interest on the judgment pursuant to MCL 600.6013(6); MSA 27A.6013(6), and also awarded pre-filing interest pursuant to MCL 438.7; MSA 19.4. The court also awarded plaintiff mediation sanctions, but refused to allow interest on the mediation sanctions. Defendant appeals from the judgment and post-judgment orders as a matter of right. Plaintiff cross-appeals, arguing that the trial court erred in dismissing the fraudulent conveyance claim, that the court erred in refusing to award post-judgment interest on the mediation sanction award, and that the court erred in granting pre-judgment interest pursuant to §6013(6) instead of MCL 600.6013(5); MSA 27A.6013(5). We affirm in part and reverse in part.

## FACTS

In 1983, Gloria Horne commenced employment with American Boat Top ("ABT"), a manufacturer of custom canvas tops for boats, and became a twenty percent owner of the company with a $20,000 investment. ABT was owned by Othell "Red" Bickerstaff. In 1987, Bickerstaff formed Systems, a supplier of shrink wrap film and related equipment used in winterizing boats. In

1989, Horne became Bickerstaff's partner in Systems, receiving a fifty percent interest in the business without any investment.

In 1992, Horne and Bickerstaff had a "falling out" over the handling of finances and Horne left Systems. Bickerstaff executed a note in the amount of $200,000 to pay Horne for her share of Systems in November 1992. However, Bickerstaff never made any payments on the note.

In 1993, Systems' business operations relocated to a warehouse owned by Horne. In March 1993, Horne went back to work for Systems because she was not being paid on the note. She returned to her previous position involving sales and orders. She was earning a weekly salary of $1,000. At that time, Systems' core employees were Ruth Ann Eliason, Debbie Beringer, Harold Franton, Michael Thanasiu, Masako Yuhas, and "Mr. Bronson."

In late 1994, Horne realized that Systems was "going down." At that time, Systems was late in paying rent, late in paying wages, on COD status with most suppliers, and on pre-pay terms with others. Horne indicated that "she knew the money was coming in, but did not know where it was going."

In September 1994, Horne began to form International while she was still employed at Systems. International's business is identical to that of Systems. Both Horne and Bickerstaff's daughter, Ruth Ann Eliason, were forty-nine percent shareholders in International. Bickerstaff was a two percent shareholder. Initially, Horne testified that her sole investment in International was $20,000 in November of 1994. Later, however, Horne testified that she may have also invested $50,000 in September of 1994. Neither Bickerstaff nor Eliason made any capital contributions to International.

Horne established a banking relationship for International with Franklin Bank in October 1994 and contracted for courier service in November 1994. In December 1994, Bickerstaff told Horne that he had business in California and did not know when he was returning. Systems ceased operating in December 1994. According to Horne, International did not begin official operations until January 1995.

During November and December 1994, in addition to the $61,000 of goods purchased from plaintiff, Systems purchased $326,261 of goods from its principal supplier, Crayex. This constituted approximately 400,000 pounds of film during a time in which Systems was ceasing operations. Nonetheless, Horne insisted that there was no appreciable inventory left when she opened International for business in January 1995.

When International opened for business in January 1995, it had all of Systems' inventory, furniture, phones, computers, and records. International retained all six of Systems' telephone numbers, and paid Systems' past electrical bill and retained service in Systems' name. International also paid Systems' past gas bill and retained gas service in Systems' name. International paid Systems' pager service bill and retained the pagers. International paid Systems' bills to the extent necessary to keep the business operating, and contracted in Systems' name. When International opened, the employees were the same core employees that operated Systems. Horne testified that she never gave any supplier or customer a written notice that Systems was out of business and that International had replaced it. She stated that she informed employees to answer the phone "Shrink Wrap International," and to tell

customers that International could fill Systems' orders. She did not know whether employees answered the phone as instructed.

After International began operations, it began to collect Systems' receivables and deposit them in International's bank account. Among the payments received were: $3,196.64 from Crest Liner, $4,800 from Santarosa Sales, $482 from CF Sales, $2,700 from Dart Trucking, $563.70 from Leader Ind., $1,661 and $138 from North Point, Inc., $103.65 from MacPac, $854 and $579 from Granite Packing, $4,228.95 from Demmitt & Owens, and others. International also cashed checks from FPM made payable to Systems in March and April 1995 in the amounts of $4,000 and $5,000. Horne was a twenty-five percent owner of FPM.

Cathy Knight, a sales representative with plaintiff, testified that she spoke with either Horne or Bickerstaff once a week from October 1994 through June 1995. During May and June 1995 she spoke with them daily. Throughout that time, the phone numbers she called for Systems were always answered "Shrink Wrap." Knight spoke to both Horne and Bickerstaff about Systems' outstanding debt to plaintiff. At no time did anyone at International tell her that Systems had ceased operating.

From January through May 1995, International paid plaintiff $39,000 on Systems' outstanding debt. These payments came in the form of wire transfers from International's bank (Franklin Bank) and from checks written by Horne on International's account. On May 8, 1995, Bickerstaff, using Systems' letterhead, promised to pay $7,000 every other week on the arrearage and purchased $7,200 of new inventory from plaintiff in Systems' name. Horne testified that the money used to pay the debt was "loaned" to Bickerstaff and secured by promissory notes. However, Horne presented no documentary evidence or testimony to support her assertion.

In April 1995, International contracted with AT&T for telephone service in Systems' name and confirmed the purchase using Systems' fax cover sheet. Horne identified herself in this transaction as "president" of a company called "Shrink Wrap." Bickerstaff contracted with UPS in Systems' name in January 1995 for a shipping label machine. International contracted with Systems' computer software company for work in July 1995 and October 1996 using Systems' name.

After the close of plaintiff's proofs, the trial court granted International's motion for a directed verdict on the claim of fraudulent conveyance but denied the motion for a directed verdict on the claim of successor liability. The jury returned a unanimous verdict, finding that Shrink Wrap International was a successor of Shrink Wrap Systems and was liable for Systems' debts.

On June 12, 1998, Judge Tertzag heard a motion for entry of judgment. The dispute between the parties involved the inclusion of pre-filing interest in the judgment pursuant to MCL 438.7; MSA 19.4. Defendant argued that pre-filing interest was an element of plaintiff's proofs to the jury and that the jury's verdict included all pre-filing interest. Plaintiff asserted that the jury verdict included only the amount owing by defendant and could not have included statutory pre-filing interest. The court awarded pre-filing interest in the amount of $4,630.14 pursuant to MCL 438.7; MSA 19.4 for the time period between the date of the Texas judgment and the date the complaint was filed in the present

action. The court also awarded post-judgment interest in the amount of $10,413.57 pursuant to MCL 600.6013(6); MSA 27A.6013(6) from the date the complaint was filed.

On August 7, 1998, Judge Tertzag heard a motion for mediation sanctions. International filed no written objection to the motion and relied only on a verbal objection at the hearing. Defendant objected to plaintiff's hourly rate of $140, claiming it should be $100 per hour because defendant's attorney charged that rate. The court suggested that the parties try to compromise on the issue of mediation sanctions. The parties agreed to a total figure, including costs and fees, of $25,316.95. The court denied interest on the mediation sanctions.

I

International claims that the trial court should have directed a verdict in favor of International on the claim of successor liability because plaintiff failed to prove that Systems had ceased its ordinary business operations, liquidated, and dissolved. We disagree.

When evaluating a motion for directed verdict, this Court must consider the evidence in a light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). Directed verdicts are appropriate only when no factual dispute exists upon which reasonable minds could differ. *Brisboy v Fibreboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988).

Generally, when one corporation sells its assets to another, the purchaser is not responsible for the debts and liabilities of the selling corporation. *Antiphon, Inc v LEP Transport, Inc*, 183 Mich App 377, 382; 454 NW2d 222 (1990). However, there are exceptions to the general rule:

> The law is well settled in regard to liability of the consolidated or purchasing corporation for the debts and liabilities of the consolidating or selling corporation. Such obligations are assumed (1) when two or more corporations consolidate and form a new corporation, making no provision for the payment of the obligations of the old; (2) when by agreement, express or implied, a purchasing corporation promises to pay the debts of the selling corporation; (3) when the new corporation is a mere continuance of the old; (4) when the sale is fraudulent, and the property of the old corporation, liable for its debts, can be followed into the hands of the purchaser. [*Id.* at 382-383, citing *Chase v Michigan Tel Co*, 121 Mich 631, 634; 80 NW 717 (1899).].

Here, a review of the record reveals that plaintiff's cause of action for successor liability was based on the third exception: that the new corporation is a mere continuance of the old.

The parties apparently believed below that, to succeed on the claim of successor liability, plaintiff had to establish that there was a "continuity of enterprise" between the corporations. See *Turner v Bituminous Casualty Co*, 397 Mich 406; 244 NW2d 873 (1976), where the Court noted the exceptions to the general rule regarding successor liability, but

> "rejected the narrow strictures of traditional corporate successor nonliability as

> inapplicable to a products liability case. The *Turner* Court reasoned that the traditional corporate law approach was neither legally nor logically related to the policy considerations underlying the evolving law of products liability. Therefore, in its stead, the *Turner* Court adopted the rule of "continuity of enterprise" for products liability cases which arise subsequent to corporate transfers. [*Pelc v Bendix Machine Tool Corp,* 111 Mich App 343, 352; 314 NW2d 614 (1981).]

*Turner's* "continuity of enterprise" has been applied only in products liability cases. *Turner* has not been interpreted by any case law as requiring proof of all four elements to establish a prima facie case of successor liability in a case where the issue is whether a successor corporation can be held liable for the debts incurred by the selling corporation. Hence, we believe that analysis of this issue under the rubric of *Antiphon* is appropriate.

International argues that plaintiff failed to prove that International is merely a continuance of Systems because Systems is still operating. However, viewed in a light most favorable to plaintiff, the evidence revealed that Systems ceased operating in early December 1994. Horne testified that Systems and International never operated at the same time and that International commenced operations in January 1995. She also testified that she directed her staff to tell callers that Systems was out of business. Absolutely no evidence was presented to support a finding that Systems was operating during the relevant time period. Further, abundant evidence was presented that International merely continued Systems' business operation. Hence, the trial court properly denied the motion for directed verdict of the claim of successor liability.

II

International asserts that the trial court erred by refusing to give a supplemental jury instruction. The determination whether supplemental jury instructions are applicable and accurate is within the trial court's discretion. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). There is no reversible error if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

Horne testified that Systems began operating again in 1997. In light of this statement, International asked the court to instruct the jury that:

> [I]f you find that Shrink Wrap Systems is still in business, then you cannot find that Shrink Wrap International is a successor corporation and you must find no cause of action against Poly-America regarding their claim that Shrink Wrap International is a successor corporation of Shrink Wrap Systems.

The trial court refused to read the instruction, instead instructing the jury in accordance with the four-prong test established in *Turner, supra*. The court reasoned that if the predecessor corporation closed,

and then reopened, the reopening should not vitiate the successor liability that accrued through its dormancy.[1]

The instruction requested by International did not adequately state the law. The *Turner* test required plaintiff to prove that "the selling corporation ceased its ordinary business operation, liquidated and dissolved as soon as legally and practically possible." Plaintiff was not required to prove that Systems did not resume doing business in the future. The instructions as given by the trial court adequately stated the applicable law.

III

International argues that the jury's finding that there was a "continuity of management, personnel, physical location, assets, and general business operations of the selling corporation" was against the great weight of the evidence. An objection going to the great weight of the evidence can be raised only by a motion for new trial before the trial court. *Hyde v University of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997). International did not bring a motion for new trial.[2] Failure to raise the issue by the appropriate motion waives the issue on appeal, *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997), unless failure to consider the issue would result in a miscarriage of justice. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). Because the evidence was sufficient to support the jury's verdict, a miscarriage of justice will not result from our failure to review this issue.

IV

International contends that the trial court erred by admitting the Texas default judgment and the Michigan civil judgment into evidence because the probative value of the evidence was outweighed by the danger of unfair prejudice. MRE 403. International did not raise an objection substantially on this ground at trial.[3] To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 637; 601 NW2d 160 (1999). Absent an objection, appellate review is limited to whether admission of the evidence resulted in manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Here, the judgments were admitted to confirm the amount of the debt owing from Systems to plaintiff. Plaintiff's account representative independently verified, from corporate records, that the two judgments reflected the amount owing to plaintiff from Systems. Indeed, it is uncontroverted that Systems owed plaintiff at

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[1] We note that Horne presented no documentary or testimonial evidence to support the claim that Systems reopened.

[2] Rather, International brought a motion for judgment notwithstanding the verdict.

[3] At trial, International's objection came in the form of a challenge to foundation. International questioned whether the proffered document (the Texas judgment) was kept in the ordinary course of plaintiff's business. International lodged no objection to the admission of the Michigan judgment.

least $65,000. The dispute at trial was whether International could be held liable for the debt. Thus, admission of the evidence did not result in manifest injustice.

V

International maintains, without objection below and without citation to supporting authority, that all post-judgment motions should be set aside because the trial judge did not preside over the motions. This issue is not properly preserved because it was not raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Further, an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 580 (1998). Consequently, we decline to address this issue.

VI

International argues that the court erred by awarding statutory interest because the jury verdict already included interest. A review of the lower court record reveals that International's argument is factually flawed. At trial, the jury was asked only to determine whether International was liable for Systems' debts and, if so, the amount of the debt. Evidence was presented regarding the amount of the unpaid invoices for merchandise received by Systems. The issue of interest was never presented to the jury.

VII

International argues that the trial court erred by awarding pre-judgment interest for the period of time between the date of the Texas judgment and the filing of the present complaint.[4] The award of pre-judgment interest is a matter within the trial court's discretion. *Holland v Earl G. Graves Pub Co, Inc*, 33 F Supp 2d 581, 583 (ED Mich, 1998); *Cataldo v Winshall, Inc*, 3 Mich App 290, 295-296; 142 NW2d 28 (1966).

In *Holland, supra* at 583, the court stated:

> With respect to interest potentially accruing *before* the filing of the complaint . . . "generally, Michigan courts have included interest as an element of damages as a matter of right where the amount claimed is liquidated." *Jones v Jackson Nat'l Life Ins Co*, 819 F Supp 1382, 1383 (WD Mich, 1993) (citing *Banish v City of Hamtramck*, 9 Mich App 381, 385; 157 NW2d 445 (1968)). A claim for damages is defined as being "liquidated" where, as in the case at bar, "the amount thereof is fixed,

[4] International relies on MCL 600.6013(6); MSA 27A.6013(6) in support of its argument. However, pre-judgment interest is governed by MCL 438.7; MSA 19.4.

> has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law." . . . . As the *Jones* court stated, in cases where the amount claimed is liquidated, "interest generally has been allowed from the date when the claim accrued or in other words, 'from the date compensation would have been due had it been paid voluntarily.'" [*Jones, supra* at 1383 (quoting *Currie v Fiting*, 375 Mich App 440, 454; 134 NW2d 611 (1965)).].

MCL 438.7; MSA 19.4 provides that:

> In all actions founded on contracts, express or implied, whenever in the execution thereof any amount in money shall be liquidated or ascertained in favor of either party, by verdict, report of referees, award of arbitrators, or by assessment made by the clerk of the court, or by any other mode of assessment according to law, it shall be lawful . . . to allow and receive interest upon such amount. . . .

The court may, in its discretion, award plaintiff pre-judgment interest. Here, plaintiff's claim was liquidated because Systems shipped the goods to Systems together with an invoice for payment. Hence, plaintiff is entitled to receive interest "from the date compensation would have been due had it been paid voluntarily." *Currie, supra* at 454. Here, the trial court used the date of the Texas judgment as the date from which plaintiff would have been entitled to receive interest.[5] The trial court did not abuse its discretion in awarding plaintiff pre-judgment interest as an element of damages.

VIII

International asserts that the trial court erred by awarding mediation sanctions without a hearing regarding attorney fees or hours. Whether a party is entitled to sanctions, and the amount of actual costs and attorney fees, are within the trial court's discretion. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 625-626; 550 NW2d 580 (1996).

International argues that the $140 hourly fee charged by plaintiff's attorney was unreasonable. In calculating reasonable attorney fees, the trial court may take into consideration the fees generally charged by attorneys in that circuit. See, e.g., *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co*, 194 Mich App 230, 234, 236; 486 NW2d 68 (1992). The record reveals that the trial court determined that the hourly rate charged by plaintiff's counsel was lower than the fees charged by attorneys in Wayne County. The fee charged to International by their counsel is not necessarily determinative of a reasonable attorney fee.

In addition, International argues that the trial court should have held an evidentiary hearing regarding the necessity of the services provided by plaintiff's counsel as a result of International's rejection of the mediation evaluation. However, International did not request an evidentiary hearing, and

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[5] Arguably, plaintiff would have been entitled to pre-judgment interest from the date on which payment on the invoice was due.

consented to the entry of the order for mediation sanctions. The amount of the sanctions entered on the order was negotiated between the parties, not the trial court. Consequently, International has waived this argument.

IX

On cross-appeal,[6] plaintiff argues that the trial court erred in refusing to award post-judgment interest on the mediation sanction award. We agree. Pursuant to MCL 600.6013(6); MSA 27A.6013(6):

> Interest under this subsection *shall* be calculated on the entire amount of the money judgment, including attorney fees and other costs. However, the amount of interest attributable to that part of the money judgment from which attorney fees are paid shall be retained by the plaintiff, and not paid to the plaintiff's attorney.

Accordingly, attorney fees awarded as mediation sanctions are subject to interest. *Pinto v Buckeye Union Ins Co*, 193 Mich App 304, 312; 484 NW2d 9 (1992).

Plaintiff also argues on cross-appeal that the trial court erred in granting pre-judgment interest pursuant to §6013(6). Plaintiff suggests that interest should have been granted pursuant to MCL 600.6013(5); MSA 27A.6013(5), because the action was based on a written instrument.

The term "written instrument" is not defined in § 6013. However, in *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998), the court found the term to be clear and unambiguous in determining that an insurance policy is a written contract. The Court noted that:

> The Legislature's choice to impose a higher rate of interest on defendants who enter into written contracts is not arbitrary. First, there is a distinction between contract claims and tort claims. Tort claimants often do not have a preexisting relationship with their tortfeasors. On the other hand, there is a preexisting relationship between two parties who have signed a written contract. Greater expectations regarding performance and payments are likely to exist when the parties have established their rights and responsibilities before a controversy arises.
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> While so great a distinction is not found between written contracts and oral contracts, there is nevertheless a greater degree of certainty when a written contract is involved. It would be logical for the Legislature to impose a higher interest rate for written instruments. [*Id*. at 350.]

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[6] Plaintiff argues in the cross-appeal that the trial court erred in dismissing the fraudulent conveyance claim. However, plaintiff states that it has raised this argument "only in the unlikely event that defendant/appellant is granted relief on appeal . . . . [T]his argument is moot if the defendant's appeal is denied" (because the remedies for the two claims overlap). Thus, in light of our decision to affirm the jury's verdict, we need not address this issue.

International contends that "the purchase orders and invoices combine to form a contract, a written agreement." We disagree. No evidence was presented regarding how the business relationship between Systems and plaintiff operated. At most, evidence was presented that plaintiff shipped merchandise to International and then sent an invoice for the merchandise. No evidence was presented to support a factual finding that a *written* contract existed between plaintiff and Systems with regard to the shipment of merchandise that would constitute a "written contract" as that term is used in the statute and interpreted in *Yaldo*. Hence, we conclude that interest was properly awarded pursuant to § 6013(6).[7]

We reverse the trial court's denial of plaintiff's motion for interest on the mediation sanctions and costs and remand for further proceedings consistent with this opinion. In all other respects the judgment is affirmed. Jurisdiction is not retained.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[7] Plaintiff's alternative argument regarding the statutory rate of interest on the Texas judgment is moot because the present action is independent of the Texas action. Further, judgment was set aside because Systems was not properly served with the summons and complaint.