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

RAAD AYAR and VINCENT, INC.,

Plaintiff-Appellees/Cross-Appellees,

and

JOLIET, INC. and R & D WHOLESALE, INC.,

Plaintiffs,

v

FOODLAND DISTRIBUTORS and LIVONIA HOLDING CO., INC.,

Defendants-Appellants,

and

KROGER CO.,

Defendant-Cross-Appellant.

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UNPUBLISHED
November 21, 2000

No. 214293
Wayne Circuit Court
LC No. 93-328590-CK

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

PER CURIAM.

Defendants Foodland Distributors (Foodland) and Livonia Holding Company, Inc. (Livonia) appeal as of right and defendant Kroger Company (Kroger) cross-appeals as of right in this commercial case concerning grocery stores in metropolitan Detroit. We reverse the jury's verdict and award on plaintiff Vincent's silent fraud claim against Foodland and remand for a bench trial solely on that claim between Vincent and Foodland. We affirm in all other respects.

I. Overview

A. The Parties

At the heart of the controversy underlying this case are two separate agreements pertaining to retail grocery stores in the Detroit area. Each agreement spawned a separate lawsuit. The instant case is a third lawsuit that incorporates facts related to the two previous suits while raising new claims. Thus, it is important to understand the parties' identities and relationships before addressing their substantive arguments.

Raad Ayar is a businessman and a member of the Chaldean community in metropolitan Detroit. Ayar owns Vincent, which in turn owned and operated a grocery store in the Tel-Ford shopping plaza at the corner of Telegraph and Ford Roads in Dearborn Heights until it was evicted from that location. The parties refer to this as the "Tel-Ford store" and the eviction proceedings as the "Tel-Ford case," one of the two previous lawsuits mentioned above. In addition to other business holdings, Ayar also has an ownership interest in Joliet, a corporation that owned grocery store Harper Foods, and R & D, a food wholesaler.

On the defendants' side, Kroger owns and operates a chain of retail grocery stores. Kroger apparently owns a corporate subsidiary, which is a partner in Foodland, a food distributor that subleased the Tel-Ford store to Vincent and conducted business with Ayar's other grocery stores. Livonia is Foodland's second partner. Evidently, two corporations named Wetterau and SuperValu each had an ownership interest in Livonia at some point in time, if not concurrently.

B. The RFR Agreement

The first agreement connecting some of these parties is a written right of first refusal (RFR) agreement, which Ayar and his partner/brother-in-law, Mike Dallo, entered into with Kroger and executed on January 16, 1987. The RFR agreement required Kroger to sublease four specified grocery stores located in Warren, Grosse Pointe, and Royal Oak to Ayar and Dallo at a favorable rate if Kroger ever decided to sell, assign, or sublease any of those four stores. The RFR agreement was in effect so long as Ayar and Dallo used Foodland as its distributor in the three grocery stores they owned at the time they executed the RFR agreement and any grocery stores they subsequently acquired, excluding any store they subsequently sold. The parties dispute Ayar and Dallo's consideration for the RFR agreement. Ayar contended that he had to encourage other Chaldeans to do business with Foodland, while Kroger argued that Ayar and Dallo only had to pay the $1 mentioned in the written RFR agreement, which they did not do.

C. The Commercial Sublease And The Tel-Ford Case

After Kroger, Ayar, and Dallo entered into the RFR agreement, Ayar formed Vincent, leading to the second agreement at issue in this case: a commercial sublease. Simply put, Foodland agreed to sublease the Tel-Ford store to Vincent, which would then operate a grocery store there under the name Harvest Foods. However, this sublease agreement between Foodland

and Vincent became the subject of *Tel-Ford Associates Ltd Partnership v The Vons Companies*.[1] The *Tel-Ford* opinion, after noting the numerous corporate tenants and their multiple name changes, summarized the facts relevant to the dispute:

> On August 29, 1990, Meadowdale [a Tel-Ford lessee] notified plaintiff [the Tel-Ford landlord] that it was assigning the lease to Kroger effective August 31, 1990. Kroger notified plaintiff of the assignment by letter dated August 31, 1990, and also informed plaintiff that it planned to close the store after operating it for approximately one week to sell down the inventory.
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> [Richard] Griffin[, Tel-Ford's principal,] received the letter on September 5, 1990, and immediately wrote to Kroger and requested a copy of the assignment. After meeting with a representative of Kroger and unsuccessfully contacting [sic] representatives of Meadowdale, Griffin wrote to Meadowdale on September 20, 1990, and expressed a belief that, because Kroger did not intend to operate a food supermarket in the store, Meadowdale had breached Article XXXI of the lease by failing to give plaintiff fifteen days written notice of the assignment.[2] A copy of the letter was sent to Kroger. In a letter to Kroger dated October 1, 1990, Griffin reiterated the contention that the lease was breached and demanded that Kroger immediately relinquish possession so that plaintiff could mitigate damages, presumably by leasing to a tenant who intended to operate a supermarket. A copy was sent to Meadowdale.
>
> Kroger refused to surrender the store. Plaintiff retained an attorney who, by letter dated November 8, 1990, sent a formal notice of default and termination to Kroger, Meadowdale, and The Vons Companies [a former Tel-Ford lessee].
>
> Kroger responded by letter dated November 28, 1990. Kroger denied that any breach occurred, and contended that it had not at any time intended to use the leased premises for other than a food supermarket. The letter implied that Kroger might operate a food supermarket at the location in the future or find a successor that would do so. To this end, the letter informed plaintiff that Kroger intended to assign the lease to Foodland Distributors, which would operate the store as a food supermarket through a franchisee. Kroger also contended that any breach was waived by plaintiff's acceptance of September and October rents.
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> By letter dated December 3, 1990, counsel for plaintiff sent notice to Kroger of plaintiff's contention that Kroger was in violation of Article VI of the Lease, which requires the tenant to operate the business as a "food supermarket substantially similar to the food supermarket operated by tenant in the Detroit,

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[1] *Tel-Ford Associates Ltd Partnership v The Vons Companies*, unpublished per curiam opinion of the Court of Appeals (Docket Nos. 162205 & 162393, rel'd October 20, 1995), lv den 453 Mich 930 (1996).

[2] The lease did not permit the lessor to cure a breach or default under Article XXXI.

Michigan metropolitan area." The letter gave Kroger notice that the lease would automatically terminate within forty-five days unless Kroger commenced operating a supermarket within that period.[3]

Meanwhile, Kroger assigned the lease to Foodland, a wholesale supplier of groceries to Kroger that is half-owned by Kroger. Foodland then subleased the store to Vincent on December 6, 1990. Vincent reopened the store and has been operating a supermarket on the premises since January 13, 1991.

Vincent's principal, Raad Ayar, testified that he was misled regarding the nature of the dispute between plaintiff and Kroger. He testified that he was led to believe, both by Kroger and by Griffin, that the dispute involved Article VI of the lease requiring the operation of a supermarket on the premises. Ayar testified that he reasonably believed that opening his store would cure any breach of Article VI. Griffin, however, testified that when he met Ayar in December 1990, after Vincent took possession, he did not say anything to lead Ayar to believe that the occupancy was acceptable to plaintiff. Plaintiff introduced as evidence the December 6, 1990, sublease between Foodland and Vincent which, in the section immediately preceding Ayar's signature, contains an acknowledgment by Vincent that plaintiff was contesting the assignment of the lease to Kroger and would likely contest the assignment of the lease from Kroger to Foodland. The provision notes the likelihood that plaintiff would institute litigation against Kroger, Foodland, and Vincent to terminate the lease and sublease.

On December 10, 1990, plaintiff filed a complaint in district court seeking possession under the summary proceedings act, MCL 600.5701 *et. seq*.; MSA 27A.5701 *et. seq.* By order dated April 5, 1991, the district court granted plaintiff's motion to file an amended complaint to delete the claim for possession under the summary proceedings act and substitute a count seeking possession pursuant to the legal and equitable powers of the circuit court. The district court also granted plaintiff's request to remove the action to circuit court.

The action proceeded in circuit court solely on plaintiff's theory that Meadowdale violated Article XXXI of the lease when it failed to give plaintiff fifteen days prior notice of the assignment to Kroger because Kroger did not intend to operate a supermarket in the ordinary sense of the word at the time of the assignment. Plaintiff requested damages representing the rent it would have received for the premises had it terminated the lease in August 1990 and found a new tenant willing to pay a fair market rental, which exceeded the rental called for by the lease. Plaintiff also claimed attorney fees as an element of damages pursuant to Article XV(b).

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[3] A lessee could cure a breach or default under Article VI merely by operating a conforming grocery store at the Tel-Ford property within a specified period of time.

A jury trial was held in November 1992. The jury returned a unanimous verdict in favor of plaintiff and awarded plaintiff $216,297.57 for loss of income and $156,811.94 for attorney fees and costs. The jury specifically found that Article XXXI of the lease was breached, that the breach was not cured by defendants, and that the breach was not waived by plaintiff.

Plaintiff moved for entry of judgment on the verdict. By order dated January 7, 1993, the trial court gave Vincent until April 3, 1993, to surrender the premises and ordered Vincent to pay plaintiff during that period the fair market rental used by the jury in calculating plaintiff's damages.

D. The Second Lawsuit

Meanwhile, around October 1991, Kroger began negotiating with Consolidated Stores, Inc., to sublease the Warren store identified in the RFR agreement so that Consolidated could operate a Big Lots store at that location. Ayar did not learn about the negotiations between Kroger and Consolidated until July 1992, at which time Ayar claimed that Kroger breached the RFR agreement by failing to give him notice of its intent to sublease to Consolidated. In response, Kroger offered in writing to sublease the store to Ayar at a rental rate within the terms established in the RFR agreement, but for more than the rental price it initially offered Consolidated. Kroger also noted that it had removed the fixtures and equipment in the Warren store. Ayar ultimately refused to accept the sublease on the Warren store.

Ayar then sued Kroger and Esam "Charlie" Asker,[4] asserting five tort claims arising out of this decision to sublease to Consolidated. This was the second of the three lawsuits involving the parties to the instant case. The trial court in the case involving Asker dismissed the claims with prejudice following summary disposition, but specifically exempted Ayar's claim that Kroger breached the RFR agreement and diminished its value.

E. The Instant Case

Ayar and the other plaintiffs in this third case filed the original complaint and jury demand on October 7, 1993, alleging thirteen different claims against all defendants except Livonia. The parties stipulated to dismiss Wetterau and SuperValu as defendants and to add Livonia as a new defendant. As a result, the eleven claims[5] in the amended complaint form the

[4] Evidently, Asker claimed that he had acquired Ayar and Dallo's interest in the RFR by purchasing at least one of the three stores that Ayar and Dallo owned that conducted business with Foodland pursuant to the RFR agreement.

[5] Negligence (Count I), breach of an implied covenant of good faith and fair dealing (Count II), interference with prospective advantage (Count III), fraudulent misrepresentation, fraudulent inducement, and fraudulent nondisclosure (Count IV), fraudulent misrepresentation (Count V), innocent misrepresentation (Count VI), negligent misrepresentation (Count VII), breach of contract (Count VIII), unjust enrichment (Count IX), business defamation (Count X), and injurious falsehood (Count XI).

basis for this appeal. Generally, plaintiffs' theory of liability was that defendants misrepresented and mishandled the dispute over the Tel-Ford store, including problems with a worker's union that ultimately picketed Vincent's Harvest Foods store in the Tel-Ford plaza, leading to Vincent's eviction and causing economic harm to all the plaintiffs. According to plaintiffs' theory, that economic harm was intended to put them out of business and to prevent Ayar from enforcing the RFR agreement. Further, plaintiffs alleged that Joliet suffered harm when Ayar was not able to devote time to its development because of his involvement in the other disputes and R & D suffered harm from alleged defamatory statements Foodland's representatives made to food manufacturers with which R & D intended to do business. Plaintiffs asked that all defendants be held jointly and severally liable, but that Kroger not be held liable individually on the tort claim regarding the RFR "except as to when Kroger is held responsible as a partner of Foodland on breach of contract."

The trial court partially granted Foodland and Livonia's motion for summary disposition, dismissing "all claims [against Foodland and Livonia Holding] contained within the First Amended Complaint for damages arising from or relating to the December 6, 1990 sublease entered into between Vincent, Inc. and Foodland for the Harvest Food Store as located in the Tel-Ford Shopping Center." The trial court denied summary disposition without prejudice for Counts III, IX, X, and XI and flatly denied summary disposition for all remaining Counts. In a later order, the trial court summarily dismissed the claims against Kroger "in connection with Ayar's claims for anticipatory repudiation of the Right of First Refusal with respect to the three Kroger stores that remain open . . . ." However, the trial court permitted plaintiffs to "seek recovery for the diminution in value, if any, of the Right of First Refusal itself as a result of any breach of the Right of First Refusal by The Kroger Co."

At trial, at the close of plaintiffs' proofs, the trial court partially granted defendants' motions for directed verdict, dismissing all claims by Joliet, all claims against Livonia, and most of the claims against Foodland and Kroger. The trial court, however, denied a directed verdict on the silent fraud claims, the RFR agreement breach and diminished value claims, and R & D's defamation claim. The jury found Foodland, Livonia, and Kroger jointly and severally liable to plaintiffs Raad Ayar and Vincent, Inc. for $9,270,686 for intentional misrepresentation (silent fraud) as alleged in Count V. The jury found Kroger individually liable to Ayar for $14,506,781 for breaching the RFR agreement and diminishing its remaining value. The jury found Kroger liable to Ayar for unjust enrichment, but did not award any damages for that claim. After denying defendants' motions for a new trial, judgment notwithstanding the verdict, and remittitur, the trial court entered judgment in the amount of $20,481,434 against Kroger and $9,441,801 against Foodland and Livonia.

II. Jury Demand

A. Standard Of Review

Foodland and Livonia argue that the trial court erred when the trial court denied their renewed motion to strike plaintiffs' jury demand. Whether any or all plaintiffs waived the right to a jury trial in a contract presents a question of law, reviewed de novo.[6]

B. The Motions To Strike The Jury Demand

Foodland and Livonia filed the motion to strike the jury demand on February 28, 1997, forty-one months after plaintiffs filed the first complaint. Following a hearing, the trial court denied the motion, which the parties subsequently stipulated was without prejudice. Foodland and Livonia moved to strike the jury demand a second time on July 25, 1997. They contended that all the plaintiffs waived their right to demand a jury trial because the Tel-Ford sublease included a jury waiver provision that covered all the claims in the case. The Tel-Ford sublease, section 25.21, states:

> <u>WAIVER OF JURY TRIAL AND COUNTERCLAIM</u>. The *parties hereto* shall and they hereby do waive trial by jury in any action, proceeding or counterclaim brought by either of the parties hereto against the other *on any matters whatsoever arising out of or in any way connected with this sublease*, the relationship of landlord and tenant, tenant's use or occupancy of the leased premises, and/or claim of injury or damage. In the event landlord commences any proceedings for nonpayment of rent or any other amounts or charges payable hereunder, tenant shall not interpose any counterclaim of whatever nature or description in any such proceeding. This shall not, however, be construed as a waiver of tenant's right to assert such claims in any separate action brought by tenant.[7]

The trial court denied this renewed motion to strike the jury demand, reasoning that the action did not "arise out of the lease" and was not "based on the lease itself but other activities which the . . . plaintiffs claim are torts." Further, the trial court noted, if the case did involve "damages from the lease," the case would be tried to the court and not a jury.

On appeal, Foodland and Livonia argue that the jury waiver provision in the sublease covered the silent fraud claim. They do not attempt to dispute the trial court's decision to submit the questions of fact on the other claims to the jury, which would likely be harmless error because of the jury's findings of no liability or damages on those claims. Thus, the limited question here is whether the trial court should have struck the jury demand regarding the silent fraud claim against Foodland and Livonia and, instead, held a bench trial on that issue.

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[6] See *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

[7] Capitalization altered and emphasis added.

C. Contract Construction

This issue is largely a question of contract interpretation. "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties."[8] To do this, courts apply the plain meaning of the words the parties used in a written agreement.[9] By its plain language, the jury waiver provision only bars the "parties" from having a jury trial on issues related to the sublease. Even a cursory examination of the sublease reveals an important detail: the sublease was solely between Vincent and Foodland. Although the proceedings in the lower court tended to blur the distinctions between the various corporations involved in this lawsuit, Livonia, Ayar, Joliet, and R & D were *not* parties to the sublease. Therefore, the sublease did not affect Ayar, Joliet, and R & D's rights to demand a jury trial pursuant to MCR 2.508 and Const 1963, art 1, § 14 against any of the defendants in this case, including Foodland, no matter the claims. Nor did the sublease offer Livonia any protection from a jury trial. Thus, the trial court did not err when it refused to strike the jury demand for Ayar, Joliet, and R & D's claims against Foodland and for all plaintiffs' claims against Livonia.

Whether the trial court properly declined to strike the jury demand for Vincent's silent fraud claim against Foodland in Count V is a closer question with a different answer. In our view, and contrary to the trial court's reasoning, the contractual language Vincent and Foodland used is so broad it contemplates applying the jury waiver provision to contract and tort claims that are related to the sublease in any manner. The allegations in Count V, the silent fraud count, all relate to the problems Vincent experienced after it signed the sublease with Foodland and became embroiled in the Tel-Ford litigation. Even the allegation in Count V that refers to the Kroger store in Warren is "connected" to the sublease because it placed Kroger's wrongful relationship with Foodland in the overall context of the problems with the Tel-Ford store. It is hard to imagine a jury waiver provision any more encompassing than the one used here. As a result, the injury alleged in Count V fits within this jury waiver provision under the tort language when it is viewed as "connected" in "any way whatsoever" to the sublease.

D. Delay In Asserting The Waiver

Ayar and Vincent still contend that the trial court was within its rights to proceed with a jury trial because Foodland waived its right to assert the jury waiver provision in the sublease by waiting more than 3½ years to move to strike the jury demand. If this were an issue entrusted to the trial court's discretion, and had it exercised its discretion to deny the motion on the grounds of waiver or improper delay, this Court could affirm the trial court because the record does not explain Foodland's delay in raising this issue and we see the possibility that waiting to assert this right to a bench trial was prejudicial to plaintiffs. Yet, the court rules do not entrust this decision to grant a motion to strike a jury demand to a trial court's discretion.

There are a few cases in which Michigan courts have viewed consent to try a case to a jury as roughly analogous to waiving the right to demand a bench trial. For instance, in *McPeak*

[8] *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28; 517 NW2d 19 (1994).

[9] *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 166; 550 NW2d 846 (1996).

v McPeak,[10] the plaintiffs sought a constructive trust on the proceeds of an insurance policy. While the Supreme Court assumed for the sake of argument that this was an equitable action and should have been decided by the trial court, it nevertheless determined that MCR 2.509(D) permitted the parties to consent to try the case to the jury and that the parties had in fact consented to do so.[11] Among the factors the Supreme Court identified as signifying consent were the timely jury demand, the absence of a motion to strike the jury demand, pretrial orders noting that the case was scheduled to be tried to a jury, full participation in jury selection, draft jury instructions, a jury verdict form from both the plaintiffs and defendant, as well as the defendant's failure to raise the issue on appeal.[12] Thus, the Supreme Court concluded, no new trial was necessary despite the trial court's error in submitting the case to a jury.[13]

This case, however, lacks the hallmarks of consent identified in *McPeak*. Although there was a considerable period of silence in which Foodland never challenged the jury demand, it formally moved to strike the demand twice in the seven months preceding trial. While Foodland could have registered further objections to the form of the proceedings on the record, doing so would have been futile and the issue was already preserved for appeal, having been raised and decided.[14] Also, unlike *McPeak*, Foodland raised this issue on appeal, leaving no technical grounds to avoid what has become a somewhat messy legal problem.[15]

This case is more like *Zurcher v Herveat*,[16] in which two of the three members of the panel concluded that the parties had not consented to trying their equitable claims concerning property to the jury. As evidence of lack of consent, the lead opinion in *Zurcher* pointed to the trial court and the parties' ongoing references to having the court, not the jury, decide the equitable issues in the litigation.[17] Under those circumstances, this Court reversed and remanded for a new bench trial on those equitable claims.[18] While Foodland's objections to a jury trial may not have been as pervasive as the parties' efforts to obtain a bench trial in *Zurcher*, they nevertheless indicate a lack of consent to a jury trial in a sufficiently strong manner. Furthermore, although the trial court here did mention the possibility of trying certain issues itself, it indicated that none of those issues remained to be tried in this case. As a result, unlike in *Zurcher*, the trial court in this case did not fail to follow through with an initial intent to hold a

[10] *McPeak v McPeak*, 457 Mich 311, 314-315; 577 NW2d 670 (1998).

[11] *Id*. at 315-316.

[12] *Id*. at 316.

[13] *Id*.

[14] MCR 2.517(A)(7); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

[15] Plaintiffs cite *Anderson v Harry's Army Surplus, Inc*, 117 Mich App 601; 324 NW2d 96 (1982) and *State Hwy Comm v Wright*, 42 Mich App 660; 202 NW2d 724 (1972) to support their waiver argument. However, both cases were resolved on issue preservation grounds and this issue is fully preserved for appeal.

[16] *Zurcher v Herveat*, 238 Mich App 267, 303-307; 605 NW2d 329 (1999).

[17] *Id*.

[18] *Id*. at 307.

bench trial; instead, the trial court here proceeded in accordance with its express intent to submit the case to the jury.

The jury waiver question in *Fera v Village Plaza, Inc*[19] is much closer to this case than *McPeak* or *Zurcher*. In *Fera*, the plaintiff secured a lease in a shopping plaza under construction for a "book and bottle" store.[20] The landlord encountered numerous problems before completing the plaza about three years behind schedule.[21] During this protracted delay, one of the defendants discovered an unexecuted copy of a lease and, when the plaintiffs claimed that their lease included the space identified in the unexecuted lease, the defendant demanded that they produce a copy of their executed lease.[22] The plaintiffs could not do so because they had given their copy of the lease to one of the other defendants for some changes.[23] Whether the plaintiffs knew when they filed suit that the lease included a jury waiver provision is unclear from the opinion. However, the defendants never objected to the jury demand during the ensuing three years of discovery and other pretrial proceedings.[24] On the first day of trial, the defendants finally produced the lease that the plaintiffs had signed and moved to strike the jury demand, relying on the jury waiver provision in the executed lease.[25] The trial court denied the motion, finding that the defendants had waived a bench trial by failing to object to holding a jury trial at an earlier time.[26]

On appeal, this Court concluded that the trial court in *Fera* had not erred in denying the motion to strike the jury demand.[27] Rather than framing the issue on appeal as a matter of construing the jury waiver provision in the lease, the Court addressed whether the trial court abused its discretion by denying the defendants' motion to modify the pretrial summary.[28] In other words, the Court looked at the jury trial question from the perspective of the trial court's discretion to amend the pretrial scheduling order that slated the case for a jury trial. Having defined the issue on appeal, the Court initially examined GCR 1963, 301.3, which provided in part that "[t]he summary of results[, i.e., the pretrial scheduling order,] controls the subsequent

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[19] *Fera v Village Plaza, Inc*, 52 Mich App 532; 218 NW2d 155 (1974), rev'd on other grounds 396 Mich 639 (1976).

[20] *Id*. at 535.

[21] *Id*.

[22] *Id*. at 536.

[23] *Id*.

[24] *Id*. at 537.

[25] *Id*.

[26] *Id*.

[27] *Id*. at 537.

[28] *Id*. at 538.

course of the action unless modified at or before trial to prevent manifest injustice."[29] The Court then explained:

> The modification of the pretrial summary rests within the trial court's sound discretion. *Reinhardt v Bennett*, 45 Mich App 18; 205 NW2d 847 (1973). Different from *Reinhardt*, *supra*, where a disputed issue had been sufficiently raised in the pleadings to avoid unfair surprise, the nonjury trial provision here presumably caught plaintiffs unaware. While the waiver clause appeared in small print in plaintiffs' unexecuted lease copy, knowledge of that provision is more properly chargeable to defendants who used a variety of standard shopping center leases, some incorporating a waiver of jury trial provision. Even assuming plaintiffs were aware of that provision, *defendants had the burden of timely assertion*. Defendants' inaction permitted plaintiffs to assume defendants were satisfied with a jury trial. Assertion of the waiver provision could therefore have caused unfair surprise, even assuming some prior knowledge of that provision. The court rule requires a showing of manifest injustice. We find none.[30]

The reasoning in *Fera*, that a defendant with a contractual right to a bench trial must assert that right in a timely manner or it will be considered waived, is quite appealing. However, it does not fit well in this case. First, MCR 2.401 now controls pretrial scheduling orders. This new court rule does not make a pretrial scheduling order mandatory, nor does it include language even vaguely similar to the statement in GCR 1963, 301.3 that a pretrial scheduling order "controls" the action unless modified. Rather, MCR 2.401 now grants the trial court broad discretion to control all varieties of pretrial and trial matters without requiring any particular order to be final. Thus, the substantive basis for this Court's decision in *Fera* no longer exists.

Second, although plaintiffs filed a jury demand with the complaint in October 1993, the trial court evidently did not enter any order in the next twenty-eight months that specified whether a judge or jury would be trying the case. Also, nothing in the February 1996 scheduling order, the first such order we could find in the record, attempts to bind the parties to the jury trial to the same degree that GCR 1963, 301.3 made the steps outlined in a pretrial "summary of results" binding on the parties unless altered by the trial court. Equally pertinent is the fact that plaintiffs' counsel prepared the February 1996 scheduling order without Foodland's approval. This indicates that the order did not bind the parties by their mutual asset to it. The failure to object to a binding scheduling order that designated the case for jury trial operated as a significant factor for the appellate decisions in *McPeak* and *Fera*. Thus, because the scheduling orders in this case do not establish an early commitment to a jury trial by the parties or the trial court, these orders do not resolve this issue.

The third factor that works against applying a "delay equals waiver" reasoning is that the delay in this case is not as outrageous as in *Fera*. While the record does not explain why Foodland waited almost 3 ½ years to challenge the jury demand, Foodland lacks the sort of

[29] *Id*.

[30] *Id*. (emphasis added).

suspicious motivation for waiting to move to strike the jury demand that the defendants in *Fera* had. Nor was the delay in this case as egregious as in *Fera*. Foodland did not wait until the day of trial to move to strike the jury demand; it brought the first motion to strike a comfortable seven months before trial, when there would have been less prejudice to Vincent's plans for presenting its case to the jury. Moreover, Vincent entered into a stipulation more than five months before trial agreeing that the trial court's order denying the first motion to strike was without prejudice. As a result, Vincent should have expected that it would be opposing the same motion to strike the jury demand at a later time and that the possibility of a bench trial existed until the trial court denied the renewed motion to strike in August 1997.

Even if delay and prejudice were appropriate reasons to deny the motion to strike in this case, those were not the reasons the trial court articulated for its ruling. Rather, the trial court attempted to construe the contract, but did so erroneously. Accordingly, we conclude that the trial court erred when it denied the motion to strike Vincent's silent fraud claim against Foodland. The trial court should have allowed the other claims to go to the jury and then decided Vincent's silent fraud claim against Foodland in a bench trial pursuant to MCR 2.509(C).

E. The Scope Of Remand

Although necessary, reversing on this ground is troubling. Remanding for a new trial would involve a considerable expenditure of resources if the voluminous trial court record we have reviewed is any indicator of the parties' ability to prolong litigation. Nor is a new trial obviously necessary, given that the trial court heard all the evidence. As Justice Coleman said in her dissent in *Socha v Passino*,[31] "[u]seless trials are a luxury neither the judicial system nor the individual parties can afford." Accordingly, our disposition of this issue is purposefully narrow.

We reverse the jury's verdict finding Foodland liable to Vincent for silent fraud. We do not reverse the jury's verdict holding Foodland liable to Ayar. We vacate only the portion of the damages the jury awarded to Vincent and remand Vincent's silent fraud claim to the trial court. The trial court may hold an evidentiary hearing and receive any additional evidence necessary for it to render findings of fact and conclusions of law on Vincent's silent fraud claim, including the question of damages, while also considering the evidence adduced at trial. The trial court may not make any additional findings of fact or conclusions of law concerning Foodland's *liability* to Ayar. However, the trial court may ask the parties to brief, argue, and present evidence that will assist it in determining which portion of the jury award was for Ayar's *damages* in order not to disturb that award on remand.

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[31] *Socha v Passino*, 405 Mich 458, 472; 275 NW2d 243 (1979).

III. Collateral Estoppel

A. Standard Of Review

Foodland and Livonia argue that collateral estoppel barred Ayar and Vincent from litigating the reasonable reliance issue that is an element of silent fraud. Whether collateral estoppel precludes litigating an issue is a question of law this Court reviews de novo.[32]

B. The Concept of Collateral Estoppel

As this Court explained in *Porter v Royal Oak*,[33] the doctrine of collateral estoppel prevents "relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." This doctrine is strictly applied in that "[t]he issues [in both cases] must be identical, and not merely similar . . . ."[34] The previous litigation must have presented a "full and fair" opportunity for the plaintiffs to litigate the issue presented in the subsequent case.[35] Furthermore, collateral estoppel includes an element of mutuality, requiring the previous litigation of the issue to have had a preclusive effect on the party asserting collateral estoppel as a defense.[36]

C. Mutuality Of Estoppel

The easiest way to resolve this issue is to focus on mutuality of estoppel. Viewed simply, *Porter*, *supra*, describes mutuality in terms of having the "same" parties litigate the issue "between" themselves more than once. Neither Ayar nor Livonia were parties in the Tel-Ford case. Assuming that Livonia is Foodland's privy, it is entitled to assert collateral estoppel as a defense.[37] However, even though Ayar may be Vincent's owner, officer, and agent, whom defendants in this case allegedly misled, he was not a party to the Tel-Ford case, which did not involve his individual interests, including the RFR agreement. Moreover, corporations typically have legal identities that are independent from their owners' identities.[38] Consequently, Ayar, as an individual, is not estopped from litigating the reliance issue in this case.

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[32] *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 835 (1999).

[33] *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995).

[34] *Eaton Co Bd of Co Road Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

[35] *Arim v General Motors Corp*, 206 Mich App 178, 194-195; 520 NW2d 695 (1994).

[36] *Lichon v American Universal Ins Co*, 435 Mich 408, 427-428; 459 NW2d 288 (1990).

[37] See *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 42; 191 NW2d 313 (1971), quoting *Bernhard v Bank of America Nat'l Trust & Savings*, Ass'n, 19 Cal2d 807, 811; 122 P2d 892 (1942); *Williams v Logan*, 184 Mich App 472, 478; 459 NW2d 62 (1990).

[38] *Bitar v Wakim*, 456 Mich 428, 431; 572 NW2d 191 (1998).

Still, whether Foodland, Kroger, and Livonia may now argue that Vincent, a named party to the Tel-Ford case, is estopped from litigating the reliance issue is a separate question. We again turn to mutuality of estoppel. At a more complex level,

> mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must also have been a party, or a privy to a party, in the previous action. In other words, "'[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.'" See *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971). Although there is a trend in modern law to abolish the requirement of mutuality, this Court reaffirmed its commitment to that doctrine in 1971 in *Howell*.[39]

The key consideration, then, is whether Foodland and its privy, Livonia, as well as Kroger would have been "bound" by the determination of the reliance issue in the earlier eviction action if the jury had found that Vincent reasonably relied on their alleged misrepresentations.

Critically, the outcome for Foodland and Kroger in the Tel-Ford case did not depend to any degree on how the jury resolved the reasonable reliance issue. Had the jury found that Ayar reasonably relied on Kroger and Griffin's representations, meaning that the finding had "gone against" Foodland and Kroger, Vincent would not have been evicted from the Tel-Ford store.[40] However, that finding would not have affected Foodland and Kroger's liability to Tel-Ford for breaching the lease. Vincent was only a party to the Tel-Ford litigation because it was occupying the Tel-Ford store at the time and Tel-Ford wanted to repossess the store as a remedy for the breach by Foodland and Kroger of the prime lease. Vincent neither pressed any claims against Foodland or Kroger because of their alleged fraudulent misrepresentations nor litigated this issue with them in any way; the issue was solely between the Tel-Ford plaintiff and Vincent. Tel-Ford's claims against Foodland and Kroger did not depend on whether Vincent's defense had merit; the jury's opportunity to deliberate on the reasonable reliance issue in the Tel-Ford case would not have "bound" Foodland and Kroger no matter what it ultimately determined.

Furthermore, as far as it is possible to tell without the trial court record in the Tel-Ford case, the alleged misrepresentations in this case go far beyond the misrepresentations Vincent used as a defense in that lawsuit. This Court's *Tel-Ford* opinion, which is the only evidence of the reliance issue litigated in that case, does not suggest that it involved the wider group of misrepresentations identified in Count V. If there was evidence in the Tel-Ford trial court record that would indicate that the reliance issue was identical in these two cases, defendants should have submitted any such evidence to the trial court in this case at the time it made its motion to preclude relitigating this issue. They did not do so. Although there is some factual overlap between the two cases, the Tel-Ford case simply cannot be construed as litigation "between"

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[39] *Lichon, supra*.

[40] We assume solely for the sake of analysis that had Vincent's defense on this ground been successful, it would have been allowed to stay in the Tel-Ford store.

Vincent, Foodland, and Kroger concerning the exact same reasonable reliance issue raised in this case. Therefore, the trial court did not err in allowing Ayar and Vincent to litigate the reliance issue in this case and Foodland will not escape relitigating this issue on remand.

IV. The Tel-Ford Opinion

Foodland and Livonia argue that the trial court erred when it refused to permit them to submit the *Tel-Ford* opinion to the jury as evidence because it was relevant to prove that Ayar and Vincent did not rely on any of their alleged misrepresentations. However, the trial court, despite its initial ruling, actually admitted the *Tel-Ford* opinion into evidence on October 9, 1997. There are cryptic remarks in the record concerning the intent of the trial court or the parties to redact the opinion. However, the record does not indicate that the opinion was ever redacted. Defendants also referred to the results in that previous litigation in front of the jury a number of times, essentially conveying the substance of the opinion, i.e., that Vincent's defense in that case had failed. Therefore the trial court's ruling, even if erroneous, was harmless.

V. Evidence Of Silent Fraud

A. Standard Of Review

Foodland and Livonia argue that the evidence at trial was insufficient to support the jury's verdict in plaintiffs' favor on the silent fraud claim by challenging the trial court's decisions to deny the motions for a directed verdict, judgment notwithstanding the verdict (JNOV), and a new trial. We review this issue de novo.[41]

B. Legal Standards

In *Meagher v Wayne State University*,[42] this Court articulated the legal standard courts must apply to decide whether to grant a motion for a directed verdict.

> When evaluating a motion for a directed verdict, a court must consider the evidence in the 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 question exists upon which reasonable minds may differ. *Brisboy v Fibreboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988).

Courts apply the same standard when deciding a motion for JNOV.[43]

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[41] This sufficiency of the evidence argument best fits a challenge to the trial court's decision on the motions for directed verdict and JNOV, which are subject to de novo review. See generally *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999). Thus, we do not use the abuse of discretion standard applied when reviewing a decision on a motion for a new trial. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

[42] *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

According to *M & D, Inc v WB McConkey,*[44] to prove fraud, a plaintiff must demonstrate:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.

Additionally, *Novak v Nationwide Mut Ins Co,*[45] modifies this fifth element, requiring the reliance to be reasonable.

Plaintiffs claimed that the fraud in this case was silent, meaning that it rested on withholding important information rather than simply making a false statement.[46] They had to demonstrate that defendants did not reveal a material fact that they had a legal or equitable duty to disclose and that the silence was "intended" to be misleading.[47] Silence is not enough; there must be words or conduct that create a "misimpression."[48]

Although *M & D* does not say so expressly, the factors that are relevant to prove silent fraud appear to modify, not supplant, the general test for fraud. Accordingly, plaintiffs had to prove: (1) defendants failed to disclose a material fact that they had the legal or equitable duty to disclose; (2) nondisclosure was misleading because of defendants' words or conduct; (3) defendants knew that nondisclosure would be misleading; (4) defendants acted in this misleading manner with the intention that plaintiffs would act on their misimpression; (5) plaintiffs reasonably relied on the misimpression defendants created; and (6) plaintiffs suffered damage as a result. Of these six elements, Foodland and Livonia only challenge whether there was sufficient evidence of a misimpression and whether plaintiffs reasonably relied on that misimpression.

C. Misrepresentation

The evidence of misleading conduct in this case was definitely sufficient when all doubts are resolved in plaintiffs' favor. Plaintiffs introduced evidence that Foodland had received a notice of default in November 1990 mentioning both the curable and incurable defaults and that the Tel-Ford had refused to accept rent. An Allied Supermarket employee testified that he had

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(…continued)

[43] *Anton v State Farm Mut Ins Co*, 238 Mich App 673, 683; 607 NW2d 123 (1999).

[44] *M & D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), adopting elements from previously vacated opinion 226 Mich App 801, 806; 573 NW2d 281 (1998) (Young, J.).

[45] *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689-691; 599 NW2d 546 (1999).

[46] See *M & D, supra* at 32-33.

[47] *Id*. at 33-34.

[48] *Id*. at 33-34, 36.

warned a Foodland officer that plans to use the building for a nongrocery entity would lead to an incurable default under the prime lease. Ayar testified that he did not know about the default notice or the returned rent when he signed the sublease on December 6, 1990 and that he had been told that moving into the store by early January 1991 would cure any problems with the default. Larry Osiecki, Foodland's former director of store development, confirmed that he told Ayar that moving into the store on time would cure any default. While Ayar clearly knew about the curable breach, there is was no evidence that anyone personally told Ayar that there had been an incurable breach.

Foodland and Livonia nevertheless contend that Ayar learned of the incurable breach through a copy of a document called "the narrative," which Foodland sent to his attorney. The narrative states in pertinent part:

> The lease requires the Landlord's consent to assign the lease for a use other than a food store; if the consent is not given, he can terminate the lease. The lease also requires if it is not operated as a food store for a period of 90 days, that after a 45 day grace period, the Landlord may terminate the lease. The Landlord has given Kroger notice of default on the lease. The 90 day period ends December 6, 1990 and the 45 day period ends January 21, 1991.

The narrative does not indicate that the first default mentioned is incurable. Nor does the narrative state which type of default occurred. By describing the grace period in concrete terms, the narrative suggests that the problems with prime lease were curable no matter their nature.

Foodland and Livonia rest a significant portion of their argument that there was no misrepresentation on paragraph 25.26 in the sublease, which states:

> Tenant acknowledges that Prime Lessor is contesting the assignment of the Prime Lease to Kroger, and will likely contest the assignment of the Prime Lease from Kroger to Landlord; and it is also likely that Prime Lessor will institute litigation and/or take other action against any or all of Kroger, Landlord and Tenant to terminate the Prime Lease and/or this Sublease. Kroger and Landlord have agreed that Landlord will defend both Landlord and Kroger in the event of any litigation or threatened litigation or other action by Prime Lessor concerning the termination of the Prime Lease or this Sublease. . . .

Like the narrative, this does not reveal the nature of the default under the prime lease or whether that default could be cured. Additionally, while Foodland and Livonia correctly note that Ayar's attorney, Konrad Stauch, provided extensive revisions and comments for the sublease before Ayar signed it, nothing in his letters suggest that Stauch was aware of the incurable default.

There was also extensive trial testimony concerning Foodland's confidence that the default could be cured simply by having Vincent open the store in the Tel-Ford plaza by early January 1991. This testimony combined with the ambiguity in the lease concerning the nature of the default allowed the jury to conclude that Ayar was only aware of the curable default when he signed the lease on Vincent's behalf on December 6, 1990 and that Foodland had not revealed the incurable default despite its documented knowledge of that second problem. By having

Foodland's employees reveal the curable default to Ayar without ever mentioning the incurable default, there was both action and silence creating a misimpression. Indeed, the jury could conclude that Foodland mentioned the curable default to avoid revealing the incurable default so that if there were ever any problems between the parties it could rely on its ambiguous revelations about the curable default to excuse its failure to reveal the incurable default.

The only evidence that anyone ever mentioned the incurable default to Ayar or his agent was the disputed evidence that one of Foodland's attorneys, Robert Biederman, had mentioned this default to Stauch. Stauch, however, testified that Biederman had misrepresented the nature of the default. The jury was in the best position to assess Biederman and Stauch's credibility and conclude, as was its province, that Stauch was more believable.[49] Thus, the jury could conclude based on the evidence that, up to the time Ayar signed the sublease, he had no idea that there was this second, incurable default and Foodland had a duty to disclose this incurable default because Ayar had evidently inquired about defaults prompting Foodland to send the narrative.[50] As a whole, these representations concerning the default were the sort of half-truths that the Supreme Court defines as silent fraud.[51]

The evidence of a silent misrepresentation only becomes greater in light of the equipment lease, which mentioned only the *possibility* of the Tel-Ford landlord suing to reclaim the property. Ayar signed the equipment sublease for Vincent on December 18, 1990, eight days *after* the Tel-Ford landlord sued Foodland. This clearly was a misrepresentation because the lawsuit was a certainty, not a possibility. Although Foodland argues that a local newspaper article published after Ayar signed the sublease but before he signed the equipment sublease gave sufficient warning of the incurable default despite the language concerning the "possibility" of a lawsuit, Foodland failed to prove that Ayar had seen the article. Ayar testified that he did not generally read newspapers, that he did not see this particular article, and that he did not live in the community where the newspaper was circulated, all suggesting that the article did not actually give him notice of the incurable default. It makes little sense to reason that Ayar must have seen this article, despite testimony to the contrary, when Foodland's attorney involved in the Tel-Ford negotiations testified that even he had not seen the article before Ayar signed the equipment lease. The net effect is that the representation in the equipment lease concerning the possibility of a lawsuit was incorrect and likely had the effect of being misleading. Whether that misrepresentation was intentional is not clear, but Foodland and Livonia do not dispute whether there was evidence of their intent on appeal. In sum, there was sufficient evidence of the sort of misimpression that constitutes silent fraud.

D. Reasonable Reliance

Unlike the situation in the Tel-Ford eviction case, the reasonable reliance question in this case does not revolve around whether Ayar was aware of *any* possibility of a lawsuit on the

[49] See *People v Lemmon*, 456 Mich. 625, 636, n 13; 576 NW2d 129 (1998).

[50] See *Hord v Environmental Research Institute of Michigan*, __ Mich __; __ NW2d __ (Docket No. 115369, dec'd October 10, 2000), slip op at 14.

[51] *Id*.

sublease. Clearly, the sublease and the equipment lease were capable of warning him of some legal action concerning the store, making any claim that he was totally unaware of any possibility of a lawsuit incredible and any reliance on contrary representations unreasonable. Rather, this case concerns whether Ayar knew of the incurable default and that the Tel-Ford landlord had already instituted an action. Given the parties' past dealings and the fact that Foodland had revealed that there was a problem with the prime lease, there is no reason to believe that Ayar and Vincent's reliance on the multiple representations by Foodland's employees that the default could be cured was anything but reasonable and genuine when all doubts are resolved in their favor. After all, there seems very little likelihood that Ayar and Vincent would have commenced a business at the Tel-Ford plaza had they known that there was no way to cure the default and that the Tel-Ford landlord had already decided to take legal action. Furthermore, none of the documentary evidence admitted at trial mentioned that the default was incurable; this was not a case of a party simply turning a blind eye to the obvious truth or making an unwarranted inference from the information Foodland and Livonia actually conveyed concerning the defaults.[52] The evidence circumstantially established that Ayar's reliance on the misrepresentation was reasonable and the jury was entitled to reach this conclusion.

VI. Great Weight Of The Evidence

Foodland and Livonia argue that the jury's verdict was against the great weight of the evidence. However, as in the trial court, Foodland failed to make any substantive argument on this ground at all in its appellate brief. Rather, Foodland merely mentions the great weight of the evidence in the issue presented and in the last sentence of its argument on the sufficiency of the evidence. Foodland and Livonia waived this issue by failing to develop some argument based on specific references to the record.[53]

VII. Remittitur

A. Standard Of Review

Foodland and Livonia contend that the trial court erroneously denied their motion for remittitur because the jury's award was "excessive." This Court reviews a trial court's decision to deny a motion for remittitur for an abuse of discretion.[54]

B. The Trial Court's Ruling

The trial court denied the motion for remittitur, reasoning that the jury reasonably chose to believe and adopt plaintiffs' expert testimony concerning damages in light of defendants' failure to present competing evidence on the correct measurement of damages. The trial court acknowledged that there were some errors in plaintiffs' expert's testimony, which he corrected

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[52] See *id*. at 8.

[53] See MCR 7.212(C)(7); *Alford v Pollution Control Industries of America*, 222 Mich App 693, 699; 565 NW2d 9 (1997).

[54] See *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997).

while testifying. Overall, the trial court concluded, the expert's testimony supported the jury's determination of damages, making remittitur inappropriate.

Foodland and Livonia now challenge the award for damages on several grounds in support of their argument that the trial court should have granted remittitur. First, they claim that paragraph 25.26 in the sublease is a liquidated damages agreement that applies to this silent fraud claim. Second, they challenge numerous portions of the expert's testimony, assumptions, calculations, and conclusions concerning damages. Finally, they argue the damages the jury awarded are inappropriate because they exceed Ayar and Vincent's investment in the store and the expenses they incurred when evicted while including the attorney fees in the eviction case.

C. Legal Standard For Remittitur

Determining damages is not an exact science. In *Hoffman v Auto Club Ins Ass'n*,[55] this Court explained:

> A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages.[56]

The "'law does not require impossibilities' and does not require a higher degree of certainty than the nature of the case permits."[57] Accordingly, "when the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount."[58] Furthermore, when damages concern the loss of future financial gain, this Court entrusts the calculation of damages to the "sound judgment of the trier of fact . . . ."[59] Yet, if the jury returned an "excessive award" that was "influenced by passion or prejudice," a trial court has the discretion to grant a motion for a new trial.[60] An improper award does not always require a new trial. Rather, "[i]f the court finds that the only error in the trial is the . . . excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party

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[55] *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

[56] Citations omitted.

[57] *Body Rustproofing, Inc v Michigan Bell Telephone Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986), quoting *Allison v Chandler*, 11 Mich 542, 554 (1863).

[58] *Body Rustproofing, Inc, supra*.

[59] *Henry v City of Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999), citing *Vink v House*, 336 Mich 292, 297; 57 NW2d 887 (1953).

[60] MRE 2.611(A)(1)(c).

consent in writing to the entry of judgment in an amount found by the court to be the . . . highest (if the verdict was excessive) amount the evidence will support."[61]

D. Liquidated Damages

Defendants' argument that the sublease included a liquidated damages clause that applies in this case lacks merit. We cannot find a place in the lower court record where they raised this argument and consider it unpreserved.[62] Regardless, paragraph 25.26 states in pertinent part:

> In the event that any litigation results in either the Prime Lease being terminated and/or this Sublease being terminated, then Foodland will reimburse Tenant for all reasonable costs and expenses incurred by Tenant to return the Leased Premises to Landlord (and to Prime Lessor) in the condition required under the terms of this Sublease (and under the terms of the Prime Lease).

Again, because only Vincent and Foodland were parties to this contract, it did not limit Ayar's damages even if the clause applied to the tort of silent fraud. Even assuming that this is a liquidated damages clause, it only applies to litigation to terminate the prime lease or the sublease. This clause does not contemplating fixing damages in a suit unrelated to terminating the prime lease or sublease, such as this case.

E. The Plaintiffs' Expert's Testimony

The trial court correctly determined that the jury was aware of the flaws in the plaintiffs' expert's damages calculations through Foodland's lengthy cross-examination. The expert conceded some of these errors and corrected them while testifying. He also fully explained how he arrived at his calculations, allowing the jury to reject his ideas if it chose to do so. Some portions of his testimony that Foodland and Livonia now claim were flawed merely reflect a difference of opinion over what constitutes a relevant factor for determining damages. Certainly, the merit of one position over the other can be debated at length. However, that there is a debate simply means that the jury had a proper role in deciding damages. That the jury ultimately decided to believe the plaintiffs' expert is not surprising in light of Foodland's decision not to call an expert witness to testify to what it considered the proper measure of damages in this case. Further, even if the award did improperly incorporate the $290,000 Ayar spent defending Vincent in the eviction lawsuit, any error was likely harmless because the expert testified that he used figures that he estimated were $300,000 below the actual damages Vincent and Ayar sustained.

This was an extremely complicated commercial case. Proving damages, including future damages, was a real challenge because they tend to be particularly difficult to determine. The jury would have had a much easier time if the parties agreed on the measure of damages and how to calculate them. Yet, the trial court properly exercised its discretion when it denied the motion for remittitur because it recognized that the jury relied on the evidence to determine damages.

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[61] MRE 2.611(E)(1).

[62] See *Kryzsiak v Hinton*, 104 Mich App 134, 139; 304 NW2d 823 (1981).

VIII. Parol Evidence

Kroger contends that the trial court erred when it failed, *sua sponte*, to strike Ayar's testimony concerning the "flavor" of the RFR agreement, i.e., the unwritten terms he thought the RFR agreement encompassed. Regardless of whether Kroger had to object to this testimony to preserve this issue for appeal, we consider this issue waived because the record reveals that Kroger's attorney actually solicited the bulk of the testimony it now finds objectionable. A party may not "assign error on appeal to something which his own counsel deemed proper at trial."[63]

IX. Anticipatory Breach Of A Right Of First Refusal

A. Standard Of Review

Kroger contends that Ayar's theory that the jury could award damages for the diminution in the value of the RFR agreement concerning the three remaining Kroger stores was an impermissible claim for anticipatory breach of contract. Kroger also claims that the trial court erred when it ruled that the jury could determine damages because Ayar could not assign his rights under the RFR agreement.[64] These issues require us to interpret and apply the terms of the RFR agreement and to examine pure legal questions, all of which requires review de novo.[65]

B. Liability Versus Damages

One of Ayar's primary theories in this case is that, when Kroger breached the RFR agreement concerning the Warren store, Kroger diminished the value of his right of first refusal for the three other Kroger stores listed in the RFR agreement. In essence, by breaching the RFR agreement, Kroger demonstrated that there was a real likelihood that it would fail to perform its contractual obligations in the future, destroying Ayar's confidence in the agreement and eliminating any chance he had to sell his rights under the agreement.

Kroger, however, contends that Ayar's theory is tantamount to a *claim* for anticipatory breach of the RFR agreement and that Michigan law does not permit such a cause of action pursuant to *Brauer v Hobbs*.[66] Although Kroger is correct that *Brauer* bars a "cause of action"

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[63] *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

[64] Kroger also contends that the doctrine of judicial estoppel precludes Ayar from denying his testimony in the previous action against Asker in which he testified that the RFR agreement was "personal" to him and Dallo. Even assuming that the doctrine applies in this instance, Ayar's lay testimony describing how he understood the contract does not trump our de novo review of the contract itself because here we address a question of law, not a question of fact. Furthermore, we cannot find a place in the record where Kroger raised this issue in the trial court and, therefore, consider it unpreserved for appeal. See *Fast Air*, *supra* at 549.

[65] See *Henderson*, *supra* at 353; see generally *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

[66] *Brauer v Hobbs*, 151 Mich App 769; 391 NW2d 482 (1986).

for anticipatory breach of a right of first refusal because such an agreement lacks mutuality of obligation at the time of performance,[67] Count VIII of the amended complaint clearly identifies the diminished value issue as a question of damages flowing from Kroger's act of breaching the RFR agreement for the Warren store. This was not a cause of action or claim[68] and, having proved that Kroger breached the RFR agreement, Ayar was entitled to the full panoply of remedies available at law or in equity.[69] True, Ayar shouldered the burden of proving a causal connection between Kroger's present breach and the damages he alleged, including the diminished value of the RFR agreement.[70] However, nothing barred him from sustaining his burden and receiving an award that compensated him for those damages.

Further, we conclude that the jury was not forced to award damages for anticipatory breach, even unintentionally. The trial court did not instruct the jury in this case to decide whether, by words or actions, Kroger manifested an intent not to perform its contractual obligations in the future, thereby permitting Ayar to sue now.[71] Rather, the trial court instructed the jury on the elements Ayar had to prove to support his claim of breach of contract mentioning that the jury had to find that Ayar's damages, if any, were the "result" of Kroger's breach.

As a practical matter, the jury had to determine whether Ayar proved, primarily through his expert's testimony, that the contract would be worth less if he sold it because of Kroger's breach regarding the Warren store.[72] Alternatively, the jury could have considered whether the expert's testimony proved that Kroger's breach made the RFR agreement literally worthless, eliminating any possibility of a sale. These factual questions necessarily relied on an assumption that there were duties Kroger could still perform under the RFR agreement, meaning that the RFR agreement for the remaining stores was still in effect and had not been breached. Had the jury been charged with considering whether Kroger committed an anticipatory breach, then it would not have considered whether Kroger's conduct had *lessened* the value of the RFR agreement. Instead, the jury would have determined the full benefit of the bargain Kroger had

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[67] Although supported by consideration that required Ayar to act to Kroger's benefit, Ayar had no obligation to engage in or abstain from any act whatsoever at the time Kroger was obligated to allow him to exercise his right of first refusal. Ayar could choose to respond to the notice from Kroger, he could attempt to negotiate a sublease, or he could ignore the opportunity to exercise his preemptive right completely. Thus, only Kroger had an obligation to perform specific acts under the contract and the obligations were not mutual.

[68] See *Brauer, supra* at 775-776.

[69] See 3 Corbin on Contracts (revised) § 11.3, pp 471-472.

[70] See *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 678; 591 NW2d 438 (1998).

[71] See generally *Carpenter v Smith*, 147 Mich App 560, 564-565; 383 NW2d 248 (1985).

[72] Although Kroger disputes whether Ayar could ever sell his rights to the RFR agreement, it does not argue that a sale price is an otherwise inappropriate way of determining value.

denied Ayar by breaching the RFR agreement for the other stores in advance of its obligation to give Ayar an opportunity to preempt a third party's offer.[73]

That the jury decided to award damages for a 100 percent decrease in value does not, alone, indicate that award was for anticipatory breach rather than a dramatic injury from the present breach. There was complete agreement by all witnesses who were questioned about the matter that the RFR agreement with Kroger was very valuable. Not only does Kroger operate numerous stores, it has a significant presence in the metropolitan Detroit food retail business. Moreover, not one of the witnesses at trial, including the officers from Kroger who testified, could recall any other contractual arrangement like the RFR agreement. As a result, although there was disagreement over the amount of damages, if any, that Ayar sustained, there was consensus that the RFR was a valuable contract. Consequently, when the jury weighed the evidence and decided that plaintiffs' expert provided the more compelling damages testimony, it should come as no surprise that the award was substantial even though it was not for an alleged anticipatory breach.

C. Assignment

Kroger also challenges whether Ayar's expert could measure damages in this case at all because the contract at issue here is a personal services contract and cannot be assigned. In other words, if Kroger is correct, because the contract cannot be assigned, the expert's decision to assume that Ayar could sell his rights under the RFR agreement in order to figure what those rights would be worth was completely erroneous. However, we conclude that this was not a personal services contract; Ayar's services were consideration for, not the object of, the contract.

In *UAW-GM Human Resource Center v KSL Recreation Corp*,[74] this Court looked at an agreement that stated that the contract "shall be binding on and for the benefit of the parties *and their successors*" and concluded that the language indicated that the contract was not for personal services. The Court reasoned that "[s]uch language 'tends to indicate that the promised performance is not personal.'"[75] Paragraph five of the RFR agreement uses virtually identical language, saying, "This Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors." Not only does this language indicate that the RFR agreement is not a contract for personal services, it also suggests that the parties contemplated being able to assign their rights under the agreement to others. Kroger's offer to allow Asker to exercise Ayar's preemptive right for the Warren store reinforces the conclusion that the RFR agreement was assignable and that Kroger would not object to such an assignment. Because Ayar's expert's method of calculating damages was legally feasible, the trial court did not err in submitting this question of diminished value to the jury.

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[73] See *Stanton v Dachille*, 186 Mich App 247, 252; 463 NW2d 479 (1990).

[74] *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 511; 579 NW2d 411 (1998).

[75] *Id*., quoting Restatement Contracts, 2d, § 323, p 35, comment b.

X. Mitigation

A. Standard Of Review

Kroger argues that Ayar failed to mitigate his damages as a matter of law when he refused to accept the lease for the Warren store that Kroger offered in July 1992 despite his claims that he was ready, willing, and able to do so. This is a question of law, which we review de novo.[76]

B. The Mitigation Doctrine

According to the Supreme Court in *Morris v Clawson Tank Co*,[77] "Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing." An injured plaintiff need not take every measure available to avoid further injury, but must only take any reasonable steps under the circumstances of the case to lessen damages; these steps need not be successful if they are reasonable.[78] Additionally, the defendant shoulders the burden of proving that the plaintiff failed to take reasonable steps to lessen damages.[79]

C. Rights Of First Refusal

To understand whether Ayar failed to mitigate his damages as a matter of law once Kroger breached the RFR agreement requires understanding the nature of a right of first refusal and its distinction from an option contract. Corbin on Contracts explains:[80]

> These transactions (which this treatise uses under the generic term "right of first refusal") are closely related to the purposes of an option contract and yet are very dissimilar in the legal relations of the parties who make them. To include them under the heading "Option Contracts," as if they were merely a special variety thereof, is not only confusing to courts and anyone who contracts but also is logically inaccurate. *They are not offers and create no power of acceptance.* These transactions create a right, a contractual right to "preempt" another. . . .
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> * * *
>
> Some guiding generalities . . . and some examples may assist in clarifying and distinguishing these "preemptive" rights from option-contract rights. Like an

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[76] See *Cardinal Mooney*, *supra*.

[77] *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998). Although *Morris* concerned mitigation of damages in the context of employment discrimination, its thoughtful explanation that a plaintiff need not go to extremes to lessen damages because the plaintiff is the injured party and the defendant the wrongdoer applies equally well in this case.

[78] See *M & V Barocas v THC, Inc*, 216 Mich App 447, 449; 549 NW2d 86 (1996).

[79] *Id*. at 449-450.

[80] 3 Corbin on Contracts (revised), § 11.3, at 468-472; see also *Brauer*, *supra* at 776, n 3 (using Corbin to distinguish between a right of first refusal and an option contract).

> option contract, a right of first refusal must be supported by consideration or its equivalent. However, the holder of an option, say on a piece of land, has the power to make a contract solely by calling upon the owner to perform and accepting the owner's title. *The holder of a right of first refusal on a piece of land only has the right to receive an offer to buy the land.* Generally, it is a contractual right to preempt another because the right is conditional on the owner's decision that an offer from a third party is acceptable. More specifically, the right is subject to an agreed condition precedent, typically the owner's receipt of an offer from a third party and the owner's good-faith decision to accept it. *Only then can the holder of the right decide whether or not to create a contract on the same terms that the owner is willing to accept from the third party*. More precisely, the occurrence of these events (owner's receipt of an offer and the good-faith decision to accept it) satisfies the condition precedent, which "triggers" the right of first refusal that "ripens" into an option. The option then can be exercised like any other option contract. *The owner must notify the right-holder of the owner's receipt of the third-party offer and of the decision to accept it. Failure to do so entitles the holder to legal and equitable remedies (as in the case of an option contract) such as damages or specific performance. Even though a right of first refusal is less advantageous to the holder than is an option contract, it is preferable to mere negotiation with the owner because of the preemptive nature of the right if a willing and able third-party buyer should appear*. Whether a party has given a right of first refusal as well as the scope of the right is primarily a matter of interpretation . . . .[81]

Just as Corbin described, the RFR agreement required Kroger to give Ayar notice when it received certain offers. Thus, Kroger had breached this contract when it failed to notify Ayar of Consolidated Store's offer for the Warren store. Because this was a right of first refusal, not an option contract, neither Kroger nor Ayar had agreed to the material terms of a sublease for the Warren store. Although they had set a cap on the amount of rent Kroger could charge Ayar and also agreed that Ayar would be entitled to "the same terms and conditions" offered to the third party, Ayar was never required to accept Kroger's offer to sublease the store, even in the absence of a breach. The evidence introduced at trial also revealed that, in fact, the sublease Kroger offered to Ayar did not include the "same terms and conditions" it offered Consolidated. While the parties dispute whether the rent structure Kroger offered Ayar was better or worse in the long-run, there was no dispute that the rent Consolidated would have paid was less than what Ayar would have paid under the sublease Kroger offered, at least in the short-term. Although the parties continued to negotiate the terms of the sublease before Ayar instituted this action, they never settled on any material terms.

Kroger's argument that Ayar had to accept the sublease is, in fact, quite a radical position. Forcing Ayar to accept the sublease in order to mitigate his damages would effectively deliver a windfall to Kroger even though it was the wrongdoer. If accepting a sublease was the only way Ayar could mitigate his damages, a party in Kroger's position would have a significant advantage

[81] Emphasis added and footnotes omitted.

if it breached the right of first refusal because it could dictate the terms of the sublease unilaterally. The party holding the preemptive right simply could not refuse the sublease offered without forfeiting the right to recover other damages for "failure to mitigate."

There is also a flaw in Kroger's argument in that it attempts to define, as a matter of law, what would constitute mitigation rather than treating the issue as a factual question. Ordinarily, a jury determines whether a plaintiff acted reasonably in mitigating his damages because mitigation revolves around factual matters.[82] The jury in this case heard Ayar's testimony that he did what he thought was reasonable and necessary following Kroger's breach to minimize his losses, including efforts to negotiate an acceptable sublease with Kroger. Even Corbin notes that the primary purpose of a right of first refusal is to minimize the amount of *negotiation* necessary to secure a mutually agreeable contract, not to bind a party to a contract involuntarily. This negotiation, if done in good faith as Ayar claims, was likely a sufficient effort to mitigate his damages. That the effort ultimately failed did not bar his recovery.[83] At the same time, the jury also heard Kroger's argument that Ayar's conduct was not reasonable because the sublease, though different from the one offered to Consolidated, was somewhat similar and sufficiently attractive. With this conflicting evidence on the issue of mitigation, the jury properly functioned as a factfinder in determining that Ayar's post-breach acts were reasonable efforts to lessen his damages. If Ayar found the terms of the sublease Kroger offered satisfactory, he could have accepted that sublease, lowering the damages he sustained. But requiring him to accept an unsatisfactory sublease that did not conform to the terms he expected to receive pursuant to the RFR agreement was not reasonable under the circumstances.

XI. Special Verdict Form

A. Standard Of Review

Kroger claims that the trial court erred when it omitted questions on the special verdict form that asked the jury to determine whether Ayar took reasonable steps to mitigate his damages and to deduct any portion of his damages that he did not mitigate from the amount of the award. Whether to use a special verdict form is an issue entrusted to the trial court's discretion.[84] This suggests that, the trial court had the discretion to choose which questions to include on the special verdict form so long as the form did not contain any errors of law or otherwise improper comments or instructions. Our review is therefore for abuse of discretion.

B. Mitigation

The special verdict form in this case asked the jury (1) whether there was a contract that gave Ayar a right of first refusal, (2) whether Kroger breached that right of first refusal, (3) whether Ayar suffered damages, and (4) what the actual damages were. When Kroger raised this issue concerning mitigation of damages at trial, the trial court stated that the verbal

[82] See generally *Snell v UACC Midwest, Inc*, 194 Mich App 511, 517; 487 NW2d 772 (1992).

[83] *Morris*, *supra* at 264.

[84] See *Wengel v Herfert*, 189 Mich App 427, 435; 473 NW2d 741 (1991); see also MCR 2.514.

instructions it had issued to the jury adequately covered the mitigation issue. Indeed, after the trial court instructed the jury on the elements of the claims, it instructed the jury on mitigation, saying:

> A person has a duty to use reasonable means to minimize his damages after he has been damages. It is for you to decide whether the plaintiffs have failed to use such reasonable means, and if so whether any damage resulted from such failure.
>
> You must not compensate the plaintiffs for any portion of their damages which resulted from their failure to use such means.

The trial court also informed the jury that it was providing the special verdict form in order to assist the jury in following the instructions it had already read.[85] These remarks made it clear that the jury was to follow the instructions that the trial court read and that the special verdict form did not, in any way, modify those instructions.

When the instructions and the special verdict form are viewed together, it is apparent that the jury knew that when the special verdict form referred to damages, that amount excluded any amount that would compensate Ayar for damages he suffered as a result of his own failure to mitigate damages. This instruction accurately stated the law and this Court ordinarily presumes that juries follow the instructions they are given.[86] Even if technically erroneous, omitting the additional questions concerning mitigation from the special verdict form was harmless.

XII. Kroger's Damages

Like Foodland, Kroger disputes the way plaintiffs' expert calculated Ayar's lost future profits had he acquired the sublease to the Warren store. Again, the problem with this argument is that the jury heard the extensive cross-examination that exposed the flaws in the expert's methodology. Additionally, Kroger had its own expert testify how he would calculate damages. To a certain point, Kroger is correct that the testimony of plaintiffs' expert concerning future profits and the diminished value of the RFR agreement was speculative. However, any expert's estimation of future damages and the value of an intangible contract right is somewhat speculative. The testimony in this case was no more speculative than in any other case because plaintiffs' expert relied on industry data as well as figures based on Ayar's personal success in business and the experience other independent grocers have had in the business. In the end, the jury simply chose to believe plaintiffs' expert, which was proper.

Kroger's arguments also revolve around whether plaintiffs' expert was competent to offer an expert opinion on future damages. Plaintiffs' expert is a certified public accountant with a

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[85] Technically, the trial court stated that it thought the special verdict form would "assist you [the jury] in following that verdict form." However, the context of the remark suggests that the court was referring to the long instructions it had just read to the jury.

[86] See generally *People v Bradford*, 69 Mich App 583, 589-590; 245 NW2d 137 (1976).

master's degree in taxation. At the time of trial he had nineteen years' experience, he was a partner in an accounting firm, approximately ten to twenty-five percent of his business involved grocery stores, including independent grocery stores, and he had determined the value of between five and ten independent grocery stores. These are sufficient qualifications for him to render an opinion on damages. More importantly, Kroger did not object to his qualifications in the trial court. Thus, whether he was qualified to testify as an expert is not preserved for appeal.

XIII. Discount Rate

A. Standard Of Review

Kroger argues that the trial court should have applied a twenty-five percent discount rate rather than a five percent discount rate when reducing the jury's award to present value. We review the trial court's factual findings related to this issue for clear error and its interpretation and application of relevant case law de novo.[87]

B. The Trial Court's Ruling

Following the jury's verdict, Ayar[88] moved for entry of judgment arguing that he was entitled to damages in the amount of $22,887,958 for Kroger's breach of the RFR agreement when that award was reduced to present value, adjusted for inflation, and included interest that had accrued through December 12, 1997. According to Ayar, the $10,381,326 awarded for Kroger's breach of the RFR agreement should be adjusted for inflation and reduced to present value so that it equaled $10,152,584. To arrive at this figure, Ayar used the five percent discount rate described in SJI2d 53.03 and MCL 600.6306(1)(e); MSA 27A.6306(1)(e).

Kroger claimed that the trial court should use a twenty-five percent discount rate when calculating the present value of the award adjusted for inflation because this higher discount rate was more appropriate for a risky venture like a grocery store. Because this issue is complex, the trial court conducted an evidentiary hearing. At the hearing, plaintiffs' expert explained that he chose to apply a five percent discount rate in this case because

> the Financial Accounting Standard Board and its predecessor in the field of accounting have issued opinions, also announcements on interest rates to be used when determining values reduced to present value, how you determine that interest rate. And one of the factors that they look at is current rates for debentures with substantially identical terms and risks that are traded in the open market. The way I look at this verdict is Mr. Ayar and other plaintiff's verdicts if

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[87] MCR 2.613(C); see, generally, *People v Sexton*, 458 Mich 43, 53; 580 NW2d 404 (1998) (applying de novo review when determining whether case law applied to the case at hand).

[88] Ayar and Vincent actually brought the motion jointly. However, Foodland and Livonia do not dispute the discount or interest rates applied to the award. Therefore, this issue and the next one only address the measure of damages for the RFR, and not the silent fraud claim.

> they went to the open market today what interest rate would they expect with ability to get to the money in a reasonable basis. You could look at that, you could look at the regular pass book [sic] savings accounts you could look at CD rates. CD rates right now are approximately five percent. Coincidental with that is the statutory rate of five percent for determining present value and five percent I felt was [a] reasonable number to us to reduce that verdict to present value.

In response to a question concerning why he used a twenty-five percent rate when determining the return when Ayar sold the store, plaintiffs' expert explained that there was no reason to apply the same discount rate to determine the value of the business at the time it is sold and the present value of the jury's award. In his opinion, a grocery store owner would want to be able to recoup the investment in a store within four years, which is why he used the twenty-five percent discount rate to determine the value of the business. Although he agreed with defense counsel that a five percent discount rate represented a very low-risk venture, he disagreed that it was inappropriate to apply in this case or would yield a windfall for Ayar.

Kroger's financial expert, testified that reducing a sum to present value must factor in some level of risk. Kroger's expert said that he had not determined a specific discount rate for the Warren store's sale, but that a fifty percent discount rate would be conservative. He thought it inappropriate to use a five percent discount rate when determining present value when plaintiffs' expert testified at trial that twenty-five percent was appropriate. Kroger's expert conceded that he did not have experience working with grocery stores and was familiar with some cases in which the five percent discount rate was used to determine present value. Foodland's expert, testified that the discount rate in this case would have to be at least twenty-five percent because using the five percent discount rate "would serve to provide a significant windfall to the plaintiff and significant penalty to the defendants." He did not believe that the financial accounting standards board's opinions were at all relevant to determining this discount rate.

The trial court rejected the testimony of defendants' experts because they relied on the testimony of plaintiff's expert concerning the discount rate applied to determine the sale price of a business. The trial court distinguished this case from *Pontiac School Dist v Miller, Canfield, Paddock & Stone*,[89] noting that this case did not involve fixed debt that had a definite present value and that the jury's award was vulnerable to inflation. The trial court concluded that the five percent discount rate applied and that it incorporated uncertainties like inflation, so the trial court did not adjust the award for inflation. Further, the trial court concluded that the sum awarded for RFR agreement's diminished value was not subject to reduction because "the sum was fixed in 1991."

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[89] *Pontiac, supra*.

C. The Five Percent Discount Rate

Kroger's argument that the discount rate was too low ignores the case law that applies this five percent discount rate to a wide variety of actions.[90] In *Nation v WDE Elec Co*,[91] the Supreme Court even stated that SJI2d 53.03 still applies to cases that MCL 600.6306(1); MSA 27A.6306(1), which governs how to determine present value in personal injury cases, does not control. Kroger also fails to acknowledge the conflicting testimony of plaintiffs' expert *supporting* the five percent discount rate regardless of the rate established in the standard jury instructions. Further, Kroger persists in arguing that the grocery retail business is highly risky. Yet its argument is really meant to suggest that the jury's award was inflated and does not reveal what, if any, risks would affect the present value of the jury's award. Overall, although Kroger criticized plaintiffs' method of reducing the award to present value, it did not provide any substantial evidence demonstrating that that methodology was incorrect.

More importantly, Kroger fails to address the trial court's legal reasoning. In truth, the trial court properly distinguished *Pontiac* from this case on relevant grounds. *Pontiac* involved municipal bonds issued at a fixed rate, making them impervious to inflation and other risk factors.[92] The plaintiff's expert in *Pontiac* believed that he was legally obligated to apply the five percent discount rate, as did the trial court, despite other expert testimony that seven percent was a more appropriate discount rate.[93] This Court reasoned that SJI2d 53.03 created a presumption in favor of the five percent discount rate.[94] The Court concluded that the defendant had rebutted that presumption successfully *because* the case involved "fixed-debt obligations that were susceptible of a sum certain determination unaffected by inflation" and the defendant "presented undisputed evidence that the present value of [the] plaintiff's future damages was determined by using actual market rates that are compounded."[95]

Although the experts in this case may have disagreed about the extent to which inflation would affect future damages, there was no disagreement that inflation would play some role in present value as the trial court noted. Further, the trial court properly noted that the defense experts arrived at their much higher discount value by looking at an unrelated figure, the rate used to calculate the sale price of the Warren store, which plaintiffs' expert hotly contested. Kroger's expert did not determine a proper discount rate and Foodland's expert did not explain how he determined that twenty-five percent or more was proper a proper discount rate. Thus, unlike *Pontiac* and contrary to the implication in Kroger's brief, the discount rate *was* controverted and Kroger failed to rebut the presumption in favor of the five percent discount rate.

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[90] *Id*. at 635 and cases cited therein.

[91] *Nation v WDE Elec Co*, 454 Mich 489, 493; 563 NW2d 233 (1997).

[92] *Pontiac*, *supra* at 636.

[93] *Id*. at 631-634.

[94] *Id*. at 636.

[95] *Id*.

The trial court's factual conclusions were not clearly erroneous, nor did it err when it interpreted and applied *Pontiac*.

XIV. Interest Rate

A. Standard Of Review

Kroger argues that the trial court erred when it applied the twelve percent statutory interest rate to the judgment. This is a question of law reviewed de novo.[96]

B. Statutory Provisions

This issue solely concerns which of two statutory provisions prescribes the appropriate interest rate for the trial court to apply to the portion of the judgment concerning the RFR agreement from the date Ayar filed the complaint until the date Kroger satisfies the judgment. MCL 600.6013; MSA 27A.6013 provides in pertinent part:

> (5) For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.
>
> (6) Except as otherwise provided in subsection (5) and subject to subsection (11), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section. 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.

The trial court applied the twelve percent interest rate under subsection 5 to the successful claims against Kroger but the floating rate under subsection 6 to the silent fraud claim against Foodland and Livonia. On appeal, Kroger contends that the RFR agreement is not within the meaning of a "written instrument" as that term is used in subsection 5, so the trial court should have applied subsection 6 to the award for the RFR claim.

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[96] *Alex v Wildfong*, 460 Mich 10, 21; 594 NW2d 469 (1999).

In support of its argument, Kroger cites federal case law for the proposition that "not all written contracts are written instruments for [the] purposes" of this statute.[97] However, that statement is really the *defendant's* argument in *Jones*, not the *court's* pronouncement on the subject. The *Jones* Court in fact rejected the defendant's argument, stating, "Where, as here, the judgment rendered has the effect of enforcing a written promise to pay a sum certain, judgment must be deemed to have been rendered on a written instrument."[98] A more recent federal case, *Holland v Earl Graves Publishing Co, Inc*,[99] specifically noted that "[t]he term 'written instrument' encompasses written contracts" under subsection 5.

Holland is more relevant in this case than *Jones* because it relied on the Michigan Supreme Court's decision in *Yaldo v North Pointe Ins Co.*[100] In *Yaldo*, the Supreme Court construed the term "written instrument" in subsection 5, explaining that it was "clear and unambiguous" and plainly encompassed a written insurance contract.[101] In reaching this conclusion, the Supreme Court rejected the defendant's argument that by using the word "instrument," the Legislature intended for subsection 5 to apply only to negotiable instruments or other written documents that include specified interest rates.[102] While the Supreme Court bolstered its reasoning by citing a number of cases that used "written instrument," "written contract," and "insurance contract" interchangeably, the Court did not limit its holding to insurance contracts as Kroger contends.[103] The Court clearly applied the statute as written and, there being no dispute that the insurance contract was in writing, found that it fell within the statutory interest rate described in subsection 5.[104]

Opinions interpreting and applying *Yaldo* make clear that the Supreme Court's broad understanding of what constitutes a "written instrument" under subsection 5 goes beyond the insurance context. For instance, this Court in *Auto Club Ins Ass'n v State Farm Ins Cos*[105] used *Yaldo* to create an operational definition of a "written instrument" as "an agreement or understanding reduced to writing as a means of giving formal expression to an act or contract, which includes an insurance policy." By mentioning that the definition "includes" insurance policies, the Court in *Auto Club* specified that insurance policies are only a subset of a large group of written contract and agreements that fall under subsection 5.[106]

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[97] *Jones v Jackson Nat'l Life*, 819 F Supp 1382, 1384 (WD Mich, 1993).

[98] *Id*.

[99] *Holland v Earl Graves Publishing Co, Inc*, 33 F Supp 2d 581, 583 (1998).

[100] *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998).

[101] *Id*. at 346.

[102] *Id*.

[103] *Id*. at 346-347.

[104] *Id*. at 346.

[105] *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 169; 561 NW2d 445 (1997).

[106] See also *Everett v Nikola*, 234 Mich App 632, 638; 599 NW2d 732 (1999).

The RFR agreement in this case is indisputably "an agreement or understanding reduced to writing as a means of giving formal expression" to the parties' agreement concerning Ayar's preemptive right to negotiate contracts to operate a grocery store in four different locations. Although Kroger contends that the judgment on the award for diminution in the value of the RFR agreement does not constitute a judgment on a written instrument, the diminution in value flows from that breach of the written RFR agreement. Therefore, the judgment the trial court entered encompassing the award was a judgment "on a written instrument" and the trial court did not err in applying the interest rate in subsection 5.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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