

STATE OF MICHIGAN
COURT OF APPEALS

E. JEANNE DRAPER, WENDY A. HEISIG,
THOMAS A. DRAPER, and JEFFREY C.
DRAPER,

UNPUBLISHED
January 15, 2002

Plaintiffs/Counter-Defendants-
Appellees/Cross-Appellants,

v

No. 222340
Saginaw Circuit Court
LC No. 95-009570-CZ

REED T. DRAPER, ROBERT T. DRAPER,
SAGE DRAPER, and WILLIAM A. BRISBOIS,

Defendants/Counter-Plaintiffs-
Appellees/Cross-Appellees.

Before: Jansen, P.J., and Doctoroff and Owens, JJ.

PER CURIAM.

Defendant Reed T. Draper appeals as of right from an order granting plaintiff E. Jeanne Draper (“plaintiff EJ Draper”) a judgment for \$65,000 against him, without applying a setoff to reflect dividend distributions improperly made to plaintiffs. On cross-appeal, plaintiff EJ Draper challenges the dismissal of her challenge to a sales commission received by defendant Reed T. Draper, as well as the dismissal of her request for exemplary damages against defendant William A. Brisbois. We affirm.

Plaintiffs and defendants were shareholders of Blue Water Realty Company (“Blue Water”), a closely held corporation. In early 1995, Blue Water was sold to Muskegon Development Company (“Muskegon”) for \$2,280,000. Defendants, who were Blue Water’s officers and comprised the Blue Water Board of Directors, approved the payment of a 7% sales commission to defendant Reed T. Draper. Plaintiffs, as minority shareholders, opposed the payment of the sales commission.

Plaintiffs contend that the trial court erred by approving the 7% commission received by defendant Reed T. Draper. Plaintiffs note that, excluding defendant Reed T. Draper, the three other directors and officers were two of defendant Reed T. Draper’s children and his son-in-law. Plaintiffs further note that Blue Water and Muskegon had been conducting business for several years, which made the payment of a sales commission both unnecessary and contrary to the interests of the shareholders. Accordingly, plaintiffs requested that the trial court rule that the

approval of the 7% commission was a breach of defendants' fiduciary duty to the minority shareholders.

Generally, a trial court's factual finding will only be reversed if it is clearly erroneous. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). A finding of fact is clearly erroneous if "an appellate court is left with a firm and definite conviction that a mistake has been made." *Buchanan v City Council of Flint*, 231 Mich App 536, 546; 586 NW2d 573 (1998). In contrast, conclusions of law are reviewed de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Here, although defendant Reed T. Draper did not have to "go far" to locate a buyer for Blue Water, he did negotiate sale terms that were very favorable to all of Blue Water's shareholders. In fact, because the sale was structured as a stock sale, rather than an asset sale, the shareholders saved approximately \$600,000 in taxes. Moreover, the testimony of Muskegon's representative confirmed that Muskegon would not have consented to a stock sale had defendant Reed T. Draper not provided them a personal guarantee. Defendant Reed T. Draper agreed to indemnify Muskegon for liabilities accruing through December 31, 2000. While we note that the shareholders, in turn, agreed to indemnify defendant Reed T. Draper, it was defendant Reed T. Draper who assumed the primary, personal liability.

In addition, the only testimony regarding the reasonableness of the sales commission indicated that a typical fee was 10%. Here, defendants approved a sales commission that was only 7%. While the circumstances justifying a sales commission might be less where there is a closely held, family-owned corporation, defendant Reed T. Draper's personal guarantee actually justifies a higher commission. Moreover, in exchange for receiving the sales commission, defendant Reed T. Draper also agreed to forego \$50,000 in management fees for 1994. Thus, an argument could also be made that his actual sales commission was not \$159,600, but \$109,600. If so, his commission was closer to 5%. In light of all these factors, we do not believe that the trial court erred by upholding the 7% sales commission.

Plaintiff EJ Draper also contends that the trial court erred by dismissing her separate claim for exemplary damages against defendant Brisbois. During the parties' respective motions for directed verdicts, the trial court dismissed plaintiff EJ Draper's exemplary damages request, opining that she failed to sufficiently plead or prove that exemplary damages should be awarded.

In *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000), our Supreme Court explained the standard of review applicable to a directed verdict: "The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted."

In regard to exemplary damages, this Court has explained:

Exemplary damages are a class of compensatory damages that allow for compensation for injury to feelings. In order to justify an award of exemplary damages, the act or conduct complained of must be voluntary and the act must inspire feelings of humiliation, outrage, and indignity. The act or conduct must also be malicious or so wilful [sic] and wanton as to demonstrate a reckless

disregard of plaintiff's rights. The theory is that the reprehensibility of the defendant's conduct both intensifies the injury and justifies the award of exemplary damages as compensation for the harm done the plaintiff's feelings. [*McPeak v McPeak*, 233 Mich App 483, 487-488; 593 NW2d 180 (1999) (citations omitted).]

Here, plaintiff EJ Draper failed to plead that any acts by defendant Brisbois caused her to feel humiliation, outrage, or indignity. Although she testified that she felt a "little bit filled with humility" about the lawsuit, she also testified that it was her husband that made all the relevant financial dealings in the instant matter. Further, there was no finding that defendant Brisbois engaged in any wrongful conduct, much less in any voluntary conduct that was so reprehensible as to justify exemplary damages. As such, we do not believe that plaintiff pleaded or proved a prima facie entitlement to exemplary damages. As a result, the trial court did not err by dismissing plaintiff EJ Draper's claim for exemplary damages against defendant Brisbois.

Finally, defendant Reed T. Draper contends that the trial court erred by refusing to set off dividend payments paid to plaintiffs from the judgment entered against him. Initially, we note that the judgment was entered in plaintiff EJ Draper's favor. Thus, any sums theoretically owed from plaintiffs other than plaintiff EJ Draper to defendant Reed T. Draper could not have been appropriately set off from plaintiff EJ Draper's judgment.

Regardless, having distributed Blue Water's assets in the form of a dividend, defendant Reed T. Draper essentially assumed the risk of the trial court requiring the \$65,000 to be returned to plaintiff EJ Draper. At the very least, defendant Reed T. Draper is a party seeking to overturn a dividend distribution that *he* caused, erroneously or otherwise. Indeed, to whatever extent Blue Water lacked the funds to pay defendant Reed T. Draper's sales commission, it was caused by his acts, and was certainly not caused by plaintiffs. Put another way, defendant Reed T. Draper is essentially requesting relief from plaintiffs based on his mistake.

Moreover, the essence of the trial court's rulings was to have the \$65,000 returned to plaintiff EJ Draper, but not require any further exchanges. In other words, by denying plaintiffs' request to invalidate the 7% commission, the trial court allowed defendant Reed T. Draper to keep that part of his sales commission that he had received. It does not necessarily follow that the trial court had to issue an order providing that defendant Reed T. Draper receive his entire sales commission. In other words, it does not necessarily follow that the trial court's rulings were internally inconsistent. It is certainly plausible that the trial court simply sought a middle-ground solution of only the \$65,000 changing hands. Accordingly, we are not persuaded that the trial court's denial of defendant Reed T. Draper's request for a setoff against plaintiff EJ Draper's judgment was erroneous.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin D. Doctoroff
/s/ Donald S. Owens