STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY EHLERT and LEANNE EHLERT,

Plaintiffs-Appellees,

v

EARL WISER and ROBERTA L WISER,

Defendants-Appellants.

UNPUBLISHED
December 11, 2003

No. 239777
Montcalm Circuit Court
LC No. 00-000463-CK

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

In this action arising out of plaintiffs' purchase of defendants' business, defendants appeal as of right the trial court's judgment awarding plaintiffs $84,520.55. We affirm.

On November 4, 1998, plaintiffs and defendants entered into a buy/sell agreement in which plaintiffs agreed to purchase defendants' excavation business for $175,000. Both plaintiffs and defendant Earl Wiser signed the buy/sell agreement, but defendant Roberta Wiser did not, the reason for which is unclear. The buy/sell agreement contained an integration clause and a non-compete clause. In addition to the non-compete clause in the buy/sell agreement, the parties also executed a separate non-compete agreement, which both defendants signed. On July 6, 2000, plaintiffs filed a complaint against defendants alleging that defendants breached the non-compete agreement, intentionally misrepresented material facts, and negligently misrepresented the condition of the business value and asset conditions. Plaintiffs sought a permanent injunction to stop defendants from violating the non-compete agreement and requested monetary damages.

Following a bench trial, the trial court entered a judgment for plaintiffs and awarded plaintiffs damages in the amount of $84,520.55. Specifically, the trial court awarded plaintiffs $25,023.60 for damages arising out of the condition of equipment that was conveyed to plaintiffs as part of the business, $24,510 for damages arising out of defendants' breach of the non-compete agreement, $24,000 in exemplary damages, and $750 for accounts receivable. The remainder of the damage award was for interest, costs, and attorney fees. The trial court entered the judgment against both defendants.

Defendants first argue that the trial court erred in relying on financial documents prepared by defendant Roberta Wiser in finding that defendants' conduct was fraudulent.

According to defendants, the trial court's reliance on an income projection document and an estimated annual expense document should have been precluded by the parol evidence rule because the parties' buy/sell agreement had an integration clause that merged "all contemporaneous or prior negotiations" into the buy/sell agreement. Therefore, defendants contend, any prior representations made regarding business income or expenses should have been precluded by the integration clause. The legal effect of a contractual clause is a question of law that this Court reviews de novo. *Quality Products* & *Concepts Co v Nagel Precision, lnc*, 469 Mich 362, 369; 666 NW2d 251 (2003).

The parol evidence rule is summarized as follows:

> The parol evidence rule provides that, when two parties have made a contract and have expressed it in a writing which they both have agreed to as being a complete and accurate integration of that contract, extrinsic evidence of antecedent and contemporaneous understandings and negotiations is inadmissible for the purpose of varying or contradicting the writing. [*Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 97-98; 380 NW2d 60 (1985).]

The parties' buy/sell agreement included an integration clause, which provided as follows:

> 21. Entire Agreement. This Agreement contains the entire agreement of the parties with respect to its subject matter; provided, however, that the terms and conditions of any related real estate Buy and Sell Agreement of even date are incorporated by reference, and any default under either this Agreement or that Buy and Sell Agreement shall constitute a default under both Agreements. All contemporaneous or prior negotiations have been merged into this Agreement, and this Agreement may be modified or amended only by written instrument signed by the parties to this Agreement. This Agreement shall be governed by and construed in accordance with the laws of the State of Michigan.

When interpreting a contract, this Court first looks to the plain language of the contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 61; 664 NW2d 776 (2003). The goal in the construction or interpretation of any contract is to honor the intent of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). "' "his Court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning."'" *Id.*, quoting *Sheldon-Seatz, Inc v Coles*, 319 Mich 401, 406-407; 29 NW2d 832 (1947), quoting *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941). Furthermore, courts are not to create ambiguity where none exists. *Id.* Contractual language must be construed according to its plain and ordinary meaning, and this Court must avoid technical or constrained constructions. *Id*. at 491-492.

The integration clause in the buy/sell agreement provides, in relevant part, that "[a]ll contemporaneous or prior negotiations have been merged into this Agreement." In drafting the integration clause, the parties elected to restrict the integration clause to include all prior negotiations but not prior representations. If the parties had intended the integration clause to

preclude consideration of prior representations, they should have drafted the integration clause to read as follows: "All contemporaneous or prior negotiations *and representations* have been merged into this Agreement." The parties did not draft the integration clause so broadly. This Court does not have the authority to redraft contracts for parties when the words used by them are clear, unambiguous, and have a definite meaning. *UAW-GM, supra* at 491. Thus, we accept the clause as written and refuse to interpret it to include prior representations.

Defendants next argue that the trial court erred in finding that defendants committed fraud regarding the condition of the equipment. According to defendants, there can be no fraud when plaintiffs had the opportunity and ability to inspect the equipment and discover its condition before they purchased it.

When reviewing a judgment following a bench trial, the trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. MCR 2.613(C); *Lamp v Reynolds,* 249 Mich App 591, 595; 645 NW2d 311 (2002). Defendants rely on *Schuler v American Motors Sales Corp,* 39 Mich App 276; 197 NW2d 493 (1972), to support their contention that there can be no fraud in this case because plaintiffs had the opportunity and ability to discover the condition of the equipment. In *Schuler, supra,* the plaintiff claimed that the defendant made material misrepresentations with respect to the new car inventory and the parts and accessories inventory of the business in which he purchased stock. The evidence showed, however, that all the representations made by the defendants were contained in financial statements and supporting schedules. Although the plaintiff had not read all the supporting schedules, he had been given the schedules to read and had signed each one. This Court rejected the plaintiff's argument that the defendants defrauded him, stating, "Plaintiff cannot show a misrepresentation by ignoring a part of the information supplied him, and then later claim he was defrauded because he was not told of the facts which he chose to ignore." *Id.* at 279. According to this Court, "there is no fraud where means of knowledge are open to the plaintiff and the degree of their utilization is circumscribed in no respect by defendant." *Id.* at 280.

We find that defendant's reliance on *Schuler* misplaced. *Schuler* is factually distinguishable from the instant case. In the matter before us, the buy/sell agreement warranted that the equipment would be in good working condition. Conversely, in *Schuler,* the information was supplied to the plaintiff in a written document, and the plaintiff chose to ignore it. Here, defendants did not provide plaintiffs with any written information regarding the poor condition of the equipment, and there is no indication that plaintiffs ignored information that was available to them regarding the condition of the equipment. Finally, in *Schuler,* the plaintiff could have easily discovered the fraud simply by reading the schedule. In contrast, in the instant case, it would have been much more difficult for plaintiff to discover the fraud. The equipment appraisal reveals that there were forty-five separate pieces of equipment. According to plaintiff Jeffrey Ehlert's testimony, while some of the problems with the equipment were visually observable, generally, the problems could not have been discovered without actually operating the equipment. Furthermore, when Mr. Ehlert examined the equipment with the appraiser, the weather was extremely cold, so some of the equipment could not be started without plugging it in or pre-heating it. Because of these factual distinctions, we reject defendants reliance on *Schuler*.

In *Hayes Construction Co v Silverthorn,* 343 Mich 421, 426-427; 72 NW2d 190 (1955),

the Supreme Court stated that when the seller has special knowledge on which the buyer would naturally rely, the parties do not stand on equal terms, and the buyer can rely on the seller's representations. In this case, defendants, as owners of the equipment, had special knowledge of the condition of the equipment. Given defendants' warranty in the buy/sell agreement regarding the condition of the equipment and the large number of equipment items, it was reasonable for plaintiff to visually inspect the equipment and rely on defendants' representations that the equipment was in good working condition or that it would be fixed. *Id.* Unlike the plaintiff in *Schuler,* who could have discovered any fraud simply by reading a schedule, plaintiff in the instant case did not have the ability to easily discover the fraud. We therefore conclude that our holding in *Schuler* does not preclude the trial court's finding of fraud. Because defendants had special knowledge of the condition of the property and because it would have been very difficult for plaintiffs to ascertain the working condition of each of the 45 pieces of equipment, the parties did not stand on equal terms, and plaintiffs had the right to rely upon defendants' representations regarding the condition of the equipment.

Defendants next argue that the trial court erred in awarding plaintiffs exemplary damages in the amount of $25,000. This Court reviews a challenge to damages in a bench trial for clear error. MCR 2.613(C); *Peterson v Dep't of Transportation,* 154 Mich App 790, 799; 399 NW2d 414 (1986). However, to the extent that the proper measure of damages revolves around a question of law, this Court's review is de novo. See *Cardinal Mooney High School v Mich High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991).

Exemplary damages are a class of compensatory damages that allow for compensation for injury to feelings. *McPeak v McPeak (On Remand),* 233 Mich App 483, 487; 593 NW2d 180 (1999). The purpose of exemplary damages in Michigan is not to punish the defendant, but to render the plaintiff whole. *Hayes-Albion Corp v Kuberski,* 421 Mich 170, 187; 364 NW2d 609 (1984). When compensatory damages can make the injured party whole, exemplary damages should not be awarded. *Id.* In cases involving only a breach of contract, the general rule is that exemplary damages are not recoverable. *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401, 419-420; 295 NW2d 50 (1980). However, exemplary damages may be recoverable in a contract action if there is "tortious conduct existing independent of the breach." *Id.* at 420. 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. *McPeak, supra* at 487. The act or conduct must be so malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff's feelings. *Id.* at 490. Further, the injury to the plaintiff's feelings and mental suffering must be a natural and proximate result of the nature of the defendant's conduct. *Id.*

Here, defendants' contend that the trial court erroneously awarded $25,000 in what it characterized as exemplary damages. We find that the trial court's characterization of the award as exemplary damages was erroneous. The Court predicated its award by stating, in relevant part:

> Last, I am awarding damages for fraud, for the intentional misrepresentation by . . . . Defendants toward Plaintiffs. As I have already indicated here, I find that Defendants did make intentional, material misrepresentations. As I've already indicated, the misrepresentations by which,

> but for that, Plaintiffs never would have bought this property. The bank never would have loaned the money that they did to allow Plaintiffs to buy this property. And but for these material misrepresentations, plaintiffs would not be where they are now with equipment that they had to pay to get fixed, mortgage that they have to pay and business that they have lost . . . . Many of those things can never be restored or returned back to the Plaintiffs and as such, I believe that they are entitled to damages for that intentional misrepresentation. . . . Again, that being the income projections. Those were deliberate, they were prepared by Ms. Wiser, they were used for the Plaintiffs to rely on by Defendants and as we have found out, they were completely wrong.

It appears that the trial judge did not award exemplary damages but rather compensated plaintiffs for damages resulting from defendants' intentional misrepresentations. Pursuant to MCR 7.216(7), this Court is empowered to "enter any judgment or order or grant further or different relief as the case may require." Thus, the damage award is proper if not construed as exemplary damages.

It would be a gross injustice to disallow the award of $25,000 simply because the trial court mislabeled the award as "exemplary damages." It is clear from the record that the trial court awarded this sum because of defendants' gross misrepresentations of many matters, foremost of which were the income projections. Roberta Wiser prepared an annual income of $210,000 for the business, but later plaintiff Jeffrey Ehlert saw that defendants' tax return reflected a gross annual income of $80,000. The trial court awarded plaintiffs $25,023.60 for equipment repairs. Even if this Court upholds the trial court's award of $25,000 for intentional misrepresentation, plaintiffs are still behind at least $8,000 from income defendants' projections, when we add the totality of the trial court's award and actual income plaintiffs earned. We therefore find that the trial court merely mislabeled the award of $25,000 as exemplary damages, but properly awarded plaintiffs $25,000 as compensation for the intentional misrepresentations of defendants.

Defendants also argue that the trial court erred in entering the judgment against defendant Roberta Wiser and in failing to differentiate the damages awarded against each defendant. Additionally, defendants argue that plaintiffs failed to sustain their burden of proving with a reasonable degree of certainty the damages they suffered as a result of defendants' breach of the non-compete agreement.

We find that the trial court did not err in entering the judgment against defendant Roberta Wiser. The evidence supports the trial court's entering the judgment against her with respect to each damage award. Regarding the $25,023.60 in damages awarded for the condition of the equipment, the evidence showed that defendant Roberta Wiser made representations regarding the condition of the equipment. While she did not sign the buy/sell agreement, she was present when that agreement was signed, and she signed all the other documents relating to the purchase of the business, including the property transfer affidavit, the warranty deed, the non-compete agreement, and the bill of sale for the equipment. Moreover, there was evidence that defendant Roberta Wiser helped run the business and was very active in consummating the sale of the business. Therefore, the trial court properly assessed the damages based on the condition of the equipment against defendant Roberta Wiser. For the same reasons, the trial court also properly

assessed $750 in damages for accounts receivable against defendant Roberta Wiser.

The trial court also properly held defendant Roberta Wiser liable for $24,510 in damages resulting from defendants' breach of the non-compete agreement. The evidence showed that defendant Roberta Wiser signed the non-compete agreement. Within one month after she signed the agreement, defendant Roberta Wiser approached plaintiffs with a proposal to amend the non-compete agreement, saying that defendant Earl Wiser needed to work. In addition, defendant Earl Wiser violated the non-compete agreement, in part, by helping a former employee start up an excavating business on land owned by both defendants. Accordingly, defendant Roberta Wiser was liable for damages for breaching the non-compete agreement.

We decline to address defendants' argument that the trial court erred in failing to differentiate the damages awarded against each defendant. Because defendant failed to raise the issue of apportionment of damages between defendants at trial, this issue is waived. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 301-302; 616 NW2d 175 (2000).

Finally, we reject defendants' argument that plaintiffs failed to sustain their burden of proving the damages from defendants' breach of the non-compete agreement with reasonable certainty. Defendants are correct that a party asserting a claim has the burden of proving its damages with reasonable certainty. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). Damages based on speculation or conjecture are not recoverable. *Id.* However, when a plaintiff proves injury, recovery is not precluded simply because proof of the amount of damages is not mathematically precise. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995). Further, where reasonable minds could differ regarding the level of certainty to which damages have been proved, this Court is careful not to invade the fact finding of the jury and substitute its own judgment. *Id.* At the outset, we note that before they breached the non-compete agreement, defendants acknowledged that it would be difficult to determine damages resulting from a breach of the agreement. The non-compete agreement, which both defendants signed, specifically states, "The parties hereto acknowledge that upon a breach of this AGREEMENT by WISER, EHLERT'S damages may be irreparable or impossible to measure." At trial, plaintiff husband testified regarding the damages the business suffered as a result of defendant Earl Wiser working for Shook Asphalt. While plaintiff could not articulate a specific dollar amount, he stated that his business suffered damages because Shook Asphalt was doing jobs that his business could have been doing. Plaintiff asserted that, on average, 20% of his business was asphalt work and that defendant Earl Wiser told him that the business normally earned $35,000 to $45,000 annually doing asphalt work.

Ultimately, the trial court awarded plaintiffs $24,510 in damages for defendant's violation of the non-compete agreement. The trial court arrived at this damage figure by adding $144,740 (the appraised value of the equipment), $5,000 (the value of the land), and $750 (accounts receivable), and subtracting that total ($150,490) from $175,000, the purchase price for the business. We believe that the damage award for the breach of the non-compete agreement was appropriate in light of evidence that twenty percent of plaintiffs' business involved asphalt work and, according to defendants' income projections, the business earned $210,000 annually. Plaintiffs proved that they suffered damages, and, contrary to defendants' argument on appeal, they did not have to prove the amount of their damages with mathematical precision.

Affirmed

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello