

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN D. FORSBERG,

Plaintiff-Appellant,

v

FORSBERG FLOWERS, INC, LOU ANN
BALDING, and MARK H. FORSBERG,

Defendants-Appellees.

UNPUBLISHED
December 5, 2006

No. 263762
Marquette Circuit Court
LC No. 02-039529-NZ

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants on his wrongful termination claim, an order denying his request for a jury trial, and an order granting defendants involuntary dismissal on his remaining claims arising under MCL 450.1489. We affirm.

Defendant Forsberg Flowers, Inc. (defendant corporation) is a Michigan close corporation. Plaintiff is a minority shareholder of the business. Defendants Mark Forsberg (defendant Forsberg) and Lou Ann Balding (defendant Balding) (collectively “defendants”) are also shareholders. The three are siblings. Though plaintiff’s business relationship with defendants has generally been marked by disagreement and discord, this dispute arises most directly out of a shareholders’ meeting in which plaintiff was removed from his employment with defendant corporation by defendants.

I

Plaintiff first argues the circuit court erred in dismissing his claim for wrongful termination. We disagree. We review summary disposition rulings de novo. *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005). Review of a motion for summary disposition under MCR 2.116(C)(8) assumes the “factual allegations in the nonmoving party’s pleadings are true and . . . [assesses whether] there is a legally sufficient basis for the claim.” *Salinas v Genesys Health Sys*, 263 Mich App 315, 317; 688 NW2d 112 (2004). Our review is limited to the pleadings. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

“Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party.” *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579

NW2d 906 (1998) (opinion of Weaver, J.). This presumption may be overcome, *Rood v Gen Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993), and a plaintiff alleging wrongful discharge may prove the same through one of the following:

(1) proof of “a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause”; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a “legitimate expectation” of job security in the employee. [*Lytle, supra* at 164 (citations omitted).]

A two-step inquiry is utilized to evaluate a “legitimate expectation” claim: “The first step is to decide ‘what, if anything, the employer has promised,’ and the second requires a determination of whether that promise is ‘reasonably capable of instilling a legitimate expectation of just-cause employment’” *Id.* at 164-165 (citation omitted and alteration in original).

Upon review of his complaint, we conclude that plaintiff has failed to state a claim for wrongful termination cognizable at law. *Salinas, supra* at 317. Plaintiff does not allege either “a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause” or “an express agreement, either written or oral, regarding job security that is clear and unequivocal.” *Lytle, supra* at 164. The only reference to any such agreement is plaintiff's claim that he was terminated “in breach of . . . [his] employment contract.” This allegation, however, does not purport to establish a “just cause” or “definite term” provision, nor does it allege a “clear and unequivocal” agreement. *Id.* Indeed, this statement is nothing more than a conclusory allegation that an employment contract existed, with no reference to its specific terms. And it is well-established that “[c]onclusory statements, unsupported by factual allegations, are insufficient to state a cause of action.” *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003), citing *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994); see also *NuVision, Inc v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1987).

Plaintiff's wrongful termination claim may be best characterized as a “legitimate expectation” claim because, plaintiff argues on appeal, his status as a shareholder, officer and director of the business afforded him such an expectation. But plaintiff does not allege “‘what, if anything, . . . [defendant corporation] has promised,’” nor whether and how any such promises reasonably instilled in him “‘a legitimate expectation of just-cause employment.’” *Lytle, supra* at 164-165. Moreover, plaintiff's status as a shareholder and officer could not, in and of itself, legitimately create such an expectation. See *Franchino v Franchino*, 263 Mich App 172, 184; 687 NW2d 620 (2004) (noting that “employment and board membership are not considered shareholder rights”); MCL 450.1535(1) (“An officer elected or appointed by the board may be removed by the board with or without cause. An officer elected by the shareholders may be removed with or without cause, only by a vote of the shareholders”). Plaintiff thus did not enjoy a legitimate expectation of employment for a definite term or absent just cause.

II

Plaintiff next argues that the circuit court erred in denying his request for a jury trial. We disagree. We review questions of statutory interpretation de novo. *Ayar v Foodland*

Distributors, 472 Mich 713, 715; 698 NW2d 875 (2005). And whether a party is entitled to a jury trial is a constitutional question we review de novo. *Anzaldúa v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998).

A statutory cause of action may or may not grant the right to a jury trial, depending on legislative design. See *id.* at 533-550. We must therefore evaluate whether MCL 450.1489 afforded plaintiff a jury trial right.

MCL 450.1489(1) provides as follows:

A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:

- (a) The dissolution and liquidation of the assets and business of the corporation.
- (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
- (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
- (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
- (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.
- (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). This intent is best discerned from the statutory language. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). “Clear and unambiguous statutory language is given its plain meaning, and is enforced as written.” *Ayar, supra* at 716.

In *Anzaldua, supra*, our Supreme Court addressed whether a right to a jury trial was guaranteed under sections 3 and 4 of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.* *Anzaldua, supra* at 534. Section 3 provides that

(1) A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his or her principal place of business.

(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney fees. [MCL 15.363.]

Section 4 provides that,

A court, in rendering a judgment in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate. [MCL 15.364.]

The Court observed that the WPA did not expressly indicate whether actions under its provisions were to be tried by a judge or jury. *Anzaldua, supra* at 535. In evaluating the relevant provisions, the Court reasoned as follows:

Defendants argue that the Legislature's use of "court" rather than "court or jury" is determinative. We disagree. What is important in understanding the Legislature's intent is not that it used the word "court" instead of "jury," but, rather, what it provided that the "court" should do. The Legislature described the court's role in WPA actions in terms of "rendering a judgment," *not* in terms of "awarding damages." The expressions are not interchangeable; "awarding damages" and "rendering a judgment" have different meanings.

When a court renders a judgment, it is entering an order based on previously decided issues of fact. "Rendering judgment" does not mean the judge is making a determination of the entitlement of a party to an award of actual damages. Instead, it is the procedural step the judge takes after the factfinder has made that determination.

The difference in the terms is made clear by the statute itself. The WPA provides that the court is to "award attorney fees." Deciding the entitlement to an award of attorney fees has traditionally been the job of a judge, not a jury. Because the act provides that the court should award attorney fees, it is clear that

the Legislature intended that a judge should decide whether a party is entitled to fees, and in what amount. [*Id.* at 536-537 (emphasis in original).]

By its unambiguous language, we conclude MCL 450.1489 does not provide for a right to a jury trial. It does not direct before whom an action is to be tried. However, it expressly indicates that, when a party establishes grounds for relief, “the circuit court may make an order or grant relief as it considers appropriate.” MCL 450.1489(1). This is a directive as to what the court “should do.” *Anzaldúa, supra* at 536. It does not presume, in contrast to the WPA, that in doing so the court “is entering an order based on previously decided issues of fact.” *Id.* Moreover, five of the six enumerated remedies in MCL 450.1489 are equitable in nature. See MCL 450.1489(1)(a)-(e); cf. *Anzaldúa, supra* at 541 (discussing legal remedy of money damages). While the court is likewise authorized to award damages, MCL 450.1489(1)(f), “the mere fact that damages are sought is not determinative of the legal or equitable nature of the action, because damages may be recovered in purely equitable proceedings.” *Anzaldúa v Band*, 216 Mich App 561, 576 n 4; 550 NW2d 544 (1996), *aff’d* 457 Mich 530 (1998) [hereinafter “*Anzaldúa II*”]. Because MCL 450.1489 contemplates that the circuit court fashion an order or grant relief it deems appropriate, a jury trial right is not embodied in the statute.

Although the inclusion of a potential award of damages under MCL 450.1489 could be deemed legal in nature, and thus within the province of a jury, see *Anzaldúa, supra* at 541, such a conclusion is not consistent with the history of this statute. As originally enacted, MCL 450.1489 contained the remedies enumerated in its current form, including language expressly authorizing an award of damages. See 1989 PA 121, § 489. The predecessor to MCL 450.1489 was MCL 450.1825. See 1972 PA 284, § 825; see also *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 284; 649 NW2d 84 (2002). MCL 450.1825 granted circuit courts the power to take the same actions currently stated under MCL 450.1489, except that the courts were not specifically authorized to award damages. Both statutes empowered circuit courts to “make orders” or “grant relief” as appropriate. However, the actions embodied in MCL 450.1825 were traditionally considered to be equitable in nature. See, e.g., *Barnett v International Tennis Corp*, 80 Mich App 396, 403-404, 416-417; 263 NW2d 908 (1978). The addition of authority to award damages did not change the character of these actions, given that the other provisions remained substantially the same. Further, nothing surrounding the enactment of MCL 450.1489 suggests that the Legislature intended this authorization to alter the equitable nature of the action.

Having concluded that MCL 450.1489 does not provide for a jury trial right, we must still evaluate whether a jury trial is nonetheless constitutionally required. The Michigan Constitution guarantees that “[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law.” Const 1963, art 1, § 14. This right exists as it has previously become known to the jurisprudence of Michigan. *Phillips v Mirac, Inc*, 470 Mich 415, 425; 685 NW2d 174 (2004). That is, to the extent MCL 450.1489 embodies a legal cause of action cognizable at common law, the right of a jury trial is preserved for an action under its terms. And this remains despite the absence of an express grant of a jury trial right under its provisions.

In *Anzaldúa II, supra*, this Court addressed this constitutional requirement in the context of the WPA. We held that “the appropriate test for determining whether a right to a jury trial ‘remains’ is to examine the nature of the action.” *Anzaldúa II, supra* at 584. This inquiry involves evaluating “whether the cause of action would have been denominated as legal at the

time that the 1963 constitution was adopted and, therefore, whether a party bringing the action would have been accorded a right to a jury trial.” *Id.* at 565.

Michigan has long recognized “that a court of equity has inherent power to decree the dissolution of a corporation when a case for equitable relief is made out upon traditional equitable principles.” *Levant v Kowal*, 350 Mich 232, 241; 86 NW2d 336 (1957). Similarly, a court of equity,

has ample power in other ways [than dissolution] to give relief for substantially all corporate ills. It may require an accounting for misappropriation of funds, secret profits, and the like. It may restrain or compel the corporation and its officers to lawful conduct, and, ordinarily, protect the stockholders in all their rights without dissolution. [*Stott Realty Co v Orloff*, 262 Mich 375, 381; 247 NW 698 (1933) (citation omitted).]

See also *Burch v Norton Hotel Co*, 261 Mich 311, 314-315; 246 NW 131 (1933). In such circumstances, courts of equity operated as fact-finders, independent of a jury. See *Holden v Lashley-Cox Land Co*, 316 Mich 478; 25 NW2d 590 (1947); *Turner v Calumet & Hecla Mining Co*, 187 Mich 238, 251; 153 NW 718 (1915); *Miner v Belle Isle Ice Co*, 93 Mich 97; 53 NW 218 (1892).

Although MCL 450.1489 did not exist as a cause of action prior to 1963, its “nature” is similar to a traditional equitable action. It authorizes an action for fraudulent or oppressive conduct visited upon minority shareholders, cf. *Turner, supra* at 240-247; *Miner, supra* at 98-108, and authorizes various equitable remedies in the event of such conduct, Cf. *Turner, supra* at 250; *Miner, supra* at 117-118; see also *Stott Realty Co, supra* at 381. Indeed, we recently recognized that MCL 450.1489 was

“added to the Michigan statutes to give a statutory cause of action to shareholders who are abused by controlling persons. The claim under section 489 is direct, not derivative. The statutory cause of action is, of course, similar to the common law shareholder equitable action for dissolution, but is independent of that traditionally limited and uncertain cause of action.” [*Estes, supra* at 284 (citation omitted).]

Given these similarities, we conclude that an action under MCL 450.1489 “would have been denominated as” equitable when “the 1963 constitution was adopted.” *Anzaldúa II, supra* at 565. Hence, the right to a jury trial does not “remain” under the Michigan Constitution for this action. Const 1963, art 1, § 14. Therefore, the trial court did not err when it concluded that plaintiff had no right to a jury trial.

III

Plaintiff next argues that a 2006 amendment to MCL 450.1489(3), see 2006 PA 68, § 489, should be applied retroactively. We disagree.

Whether a statutory amendment should be applied retroactively is a question of statutory construction that this Court reviews de novo. *Frank W Lynch & Co v Flex Technologies, Inc.*,

463 Mich 578, 583 ; 624 NW2d 180 (2001). In determining whether a statute should be applied retroactively or prospectively, the primary rule is that legislative intent governs. *Id.* “Amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent.” *Tobin v Providence Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001). However, “statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested.” *Lynch, supra* at 584, quoting *Franks v White Pine Copper Division*, 422 Mich 636, 672; 375 NW2d 715 (1985).

At the time of the bench trial, MCL 450.1489(3) defined “willfully unfair and oppressive conduct” to mean “a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder.” In *Franchino, supra* at 184-186, this Court construed this definition and determined that, because employment and membership on the board of directors were not traditionally considered shareholder rights, termination of a shareholder’s employment or membership on the board could not constitute conduct that substantially interfered with the interests of the shareholder as a shareholder. In granting defendants’ motion for involuntary dismissal, the trial court relied on *Franchino* for the proposition that plaintiff’s termination from employment could not support his claim of shareholder oppression. However, after the June 2005 involuntary dismissal of plaintiff’s case, the Legislature amended MCL 450.1489(3) to include the following sentence: “Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder.” 2006 PA 68, § 489.

There is no language in 2006 PA 68 that indicates a clear legislative intent to have the act apply retroactively. Hence, there is a presumption that the act operates prospectively only. *Tobin, supra* at 661. Further, because the amendment affects defendants’ substantive rights by enlarging the scope of the conduct that constitutes willfully unfair and oppressive conduct, it cannot be applied retroactively as a remedial amendment. *Lynch, supra* at 584-586. Therefore, it only applies prospectively.

IV

Finally, plaintiff argues that the circuit court erred in granting defendants’ motion for involuntary dismissal. We disagree. In a bench trial, a defendant may move for involuntary dismissal at the close of the plaintiff’s proofs “on the ground that on the facts and the law the plaintiff has shown no right to relief.” MCR 2.504(B)(2). “[A] motion for involuntary dismissal calls upon the trial judge to exercise his function as a trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between conflicting inferences.” *Marderosian v The Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). The evidence is not viewed in the light most favorable to the plaintiff. *Id.* Our review of an involuntary dismissal is de novo, but the court’s findings of fact are reviewed for clear error. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

MCL 450.1489(1) allows a shareholder to “bring an action . . . to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.” As it existed during the circumstances of

this dispute, MCL 450.1489(3) defined “willfully unfair and oppressive conduct” as “a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder.” See 2001 PA 57, § 489. We conclude that the trial court did not err in concluding that plaintiff failed to establish the requisite misconduct.

Plaintiff presented no evidence that defendants’ actions were illegal or fraudulent. The court found, and the record supports, that defendant Forsberg’s use of corporate resources did not amount to embezzlement, as various family members enjoyed similar benefits, including plaintiff. At best, plaintiff’s evidence related to his claim that defendants’ conduct was “willfully unfair and oppressive.” Yet the evidence failed to support such a claim.

Plaintiff was required to demonstrate “a continuing course of conduct or a significant action or series of actions that substantially interfere[d] with” his interests as a shareholder. MCL 450.1489(3). As the trial court found, defendant’s actions did not rise to this level. Both defendant Forsberg and plaintiff reaped personal benefits incident to their ownership of defendant corporation, including insurance benefits, corporate vehicles, gasoline, and various other personal expenses. The court found that defendant Forsberg enjoyed more personal benefits, but that this was offset by his financial contributions to defendant corporation. This conclusion is supported by the record, namely that defendant Forsberg loaned thousands of dollars to defendant corporation as circumstances warranted, when “cash flow” problems arose, and then personally assumed the costs associated with these loans. The court determined that the personal benefits enjoyed by the parties and their family were a common occurrence in the operation of defendant corporation, and the record supports this. There is accordingly little reason to suggest that plaintiff’s evidence demonstrated willfully unfair and oppressive conduct because defendants’ conduct effectively constituted consistently applied corporate policies. Cf. MCL 450.1489(3). Defendants’ conduct was not willfully unfair and oppressive toward plaintiff as a shareholder, particularly given that plaintiff enjoyed benefits incident to the conduct he claims was willfully unfair and oppressive.

Though the record supports the court’s finding that plaintiff worked longer hours and took fewer vacations than defendant Forsberg, as the court also found, this does not illustrate conduct that substantially interfered with plaintiff’s status as a shareholder. MCL 450.1489(3). As an owner of defendant corporation, plaintiff was free to work hours he chose, and he was not at liberty to compel another owner to do the same. The court found that plaintiff was the cause behind defendants’ action to suspend his employment. That plaintiff was argumentative, hostile, and volatile in the work environment is evidenced in the record, and the court’s determination was not erroneous. Furthermore, despite that it was the genesis of this dispute, plaintiff’s removal from his employment was not grounds upon which the court could find he was oppressed as a shareholder. *Franchino, supra* at 186.

Plaintiff presented no evidence that his interests “as a shareholder” were substantially

interfered with. *Id.* On the facts and the law, plaintiff was not entitled to relief. MCR 2.504(B)(2). The court's dismissal was proper.

Affirmed.

/s/ William C. Whitbeck

/s/ Michael R. Smolenski