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UNPUBLISHED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.

MURPHY, J. (*concurring in part and dissenting in part*).

I agree with the majority that the trial court did not err in dismissing the claim for wrongful termination. However, I disagree with the majority's conclusion that the trial court did not err in denying plaintiff's request for a jury trial. I would hold that plaintiff was entitled to a jury trial on his claim for money damages under MCL 450.1489. I further agree with the majority that the trial court did not err in granting defendants' motion for involuntary dismissal, but only to the extent that the dismissal reached plaintiff's claims for equitable relief, not the request for money damages. Finally, I agree with the majority that the 2006 amendment to MCL 450.1489(3) should not be applied retroactively.[1] Accordingly, I concur in part and dissent in part, and shall address only the jury trial issue.

My analysis requires interpretation of MCL 450.1489. Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id.* at 549. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. *Id.* We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Id*. This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Bageris v Brandon Twp*, 264 Mich App 156, 162; 691 NW2d 459 (2004). "A necessary corollary of these principles is that a court may read nothing

[1] I note that the amendment did not even become effective until after the trial and after the claim of appeal was filed. 2006 PA 68.

into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

MCL 450.1489 provides a statutory basis for shareholders such as plaintiff to bring suit with respect to claims of illegal, fraudulent, or willfully unfair and oppressive acts. The statute provides, in pertinent part, as follows:

> (1) 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.
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> (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. [Emphasis added.]

While some of plaintiff's claims were for equitable relief, e.g., demands for repurchase of his shares and dissolution of the corporation, plaintiff also made a claim for money damages based on defendants' alleged willfully unfair and oppressive conduct.

Contrary to the majority's conclusion, I would find that our Supreme Court's decision in *Anzaldua v Band*, 457 Mich 530; 578 NW2d 306 (1998), dictates that plaintiff here had a statutory right to a jury trial for his money damages claim arising out of MCL 450.1489(1)(f). The *Anzaldua* Court indicated that a statutory cause of action may or may not provide a right to a jury trial depending on the intent of the Legislature as reflected by the words used in the statute.

Anzaldua, supra at 533-548. In *Anzaldua*, the Supreme Court held that the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, and particularly sections 3 and 4 of the act, contains a right to a jury trial. Section 3 provides, in relevant part:

> (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.
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> * * *
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> (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:

> 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 *Anzaldua* Court acknowledged that the WPA does not contain an express provision regarding whether an action brought under the act was to be tried by a judge or jury. *Anzaldua, supra* at 535. The Court also noted that the WPA provides several equitable remedies. *Id.* at 537. MCL 450.1489 also contains several equitable remedies. The *Anzaldua* Court, however, also stated that the WPA expressly provides for actual damages, which the Court found to be significant, and which indicated "that the Legislature intended that the damages issue be tried by a jury, upon request." *Anzaldua, supra* at 539. The Court reasoned:

> Like Congress, when it adopted the Age Discrimination in Employment Act and included "legal remedies," the Michigan Legislature created a cause of action in the WPA and provided for "actual damages." As far back as 1877, the Court has held that a jury is proper where a statute creates a cause of action for actual damages without specifying before whom the action is to be tried. The Legislature is deemed to be aware of the meaning given to the words it uses, including the jury right that accompanies actual damages. Our holding recognizes that the Legislature imported into the WPA the meaning of actual damages . . . . We hold that, by including that term, the Legislature intended that the act contain a right to a trial by jury. [*Anzaldua, supra* at 542-543.]

Here, MCL 450.1489(1)(f) provides for "[a]n award of damages." Therefore, consistent with *Anzaldua*, I would conclude that an action brought under MCL 450.1489 entitles a plaintiff to a trial by jury on any claim for money damages if properly and timely requested.

Footnote 6 in *Anzaldua, supra* at 538, discusses equitable and legal issues and situations in which both legal and equitable relief are requested:

> [W]e note that, under MCR 2.509(D), the court, on motion or its own initiative, may use a jury in an advisory capacity to try equitable issues. The parties may consent to have a jury decide issues that otherwise are not triable to a jury as a matter of right. Also, under subrule B, if a party has a right to a trial by jury but does not demand it, the court has discretionary authority to order a jury trial anyway.
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> Moreover, as explained by the Court of Appeals in *Dutka v Sinai Hosp of Detroit*, 143 Mich App 170, 173-174; 371 NW2d 901 (1985):
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> "The parties have a constitutional right in Michigan to have equity claims heard by a judge sitting as a chancellor in equity. If a plaintiff seeks only equitable relief, he has no right to a trial by jury. *However, in this case, the plaintiff sought both equitable relief in the form of specific performance and legal relief in the form of damages. In this situation the plaintiff had a right to have a jury hear his damage claim.*
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> * * *
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> These cases, which allow a chancellor to award consequential damages along with equitable relief, do not bar plaintiff's demand for a jury where legal remedies are sought along with equitable relief. *The cases defendant relies on only suggest that in some instances a chancellor may also award money damages in fashioning an appropriate remedy. The cases do not bar a jury trial on legal claims when it has been properly demanded.* [Emphasis added.]"
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> See also *B & M Die Co v Ford Motor Co*, 167 Mich App 176; 421 NW2d 620 (1988). [Citations omitted.]

MCL 450.1489 provides for both equitable and legal claims and relief, and plaintiff had a right to a trial by jury with respect to his claim for legal relief, i.e., money damages, while the claims for equitable relief could be decided by the judge.[2] It does not matter whether the determination on underlying factual questions, regarding whether there was illegal, fraudulent, or willfully unfair and oppressive conduct, can serve as the basis for either granting or denying *both* the equitable and the legal claims for relief. Indeed, in *Smith v The Univ of Detroit*, 145 Mich App 468, 479; 378 NW2d 511 (1985), this Court acknowledged that the consequence of accepting a party's right to a jury trial on an issue that may be dependent on facts that are also considered by a judge on an equitable claim may be "the startling possibility of contradictory

[2] MCL 450.1489(1)(f) clearly distinguishes a claim for money damages and even provides a separate statute of limitations specifically for such claims.

findings in the same case on the common issue of fact . . . ." (Emphasis deleted; citations omitted.) The *Smith* panel held:

> Therefore, in a case such as this where both equitable issues and jury submissible issues coexist, the proper procedure is to hold trial before a jury and follow presentation of evidence with two separate factual determinations; court factfinding on the equitable claims and jury factfinding on the claims of damages. [*Id.* at 479.][3]

I would hold that plaintiff was entitled to have a jury render a verdict on his claim for money damages despite the fact that the trial judge would also be examining the factual issues regarding whether there was illegal, fraudulent, or willfully unfair and oppressive conduct when making a ruling on the equitable claims. In light of my view that MCL 450.1489 provided plaintiff with a right to jury trial, it is unnecessary for me to explore any constitutional right to jury trial. See *Anzaldua, supra* at 549.

I respectfully disagree with the majority that language in the WPA distinguishes it from MCL 450.1489 such that the outcome in *Anzaldua* cannot be reached here. As noted above, the WPA 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." MCL 15.364. MCL 450.1489(1) provides that, "[i]f 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 . . . ." Both statutes reference the court ordering relief that the court deems or considers appropriate. Such language did not prevent the Court in *Anzaldua* from finding that a right to jury trial existed. The *Anzaldua* Court did note that the "rendering a judgment" language of the WPA indicated that a judge would be entering an order based on previously decided factual issues and not that the judge would be making a determination on whether to award damages. *Anzaldua, supra* at 536. I do not believe that simply because MCL 450.1489 lacks the "rendering a judgment" language that it is distinguishable.

Anzaldua distinguished the WPA's attorney fee provision, finding that there was no right to jury trial on the issue of attorney fees, where the "WPA provides that the court is to 'award attorney fees.'" *Anzaldua, supra* at 537. The Court had stated that there is a difference between "rendering a judgment" and "awarding damages." *Id.* at 536. MCL 450.1489(1), however, does not directly state that the court is to or may award, among other relief, damages, rather, it provides that a court may "*make an order or grant relief . . .* ***providing for***" an award of damages "[i]f the shareholder establishes grounds for relief[.]" (Emphasis added.) This language suggests that the court can enter an order granting or providing for a damage award on the basis

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[3] See also *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 53; 698 NW2d 900 (2005) (appropriate for jury to determine factual issues relative to damages claim and court to determine factual issues relative to equitable claim in the same case).

of a previous finding that the shareholder established grounds for monetary relief, and not necessarily that the court itself had to render a factual finding on money damages. Further, the trial court's ability to "grant relief" under MCL 450.1489(1) could certainly encompass the rendering of a judgment. I see no reason why the entry of an order under MCL 450.1489 cannot be premised on a jury verdict. Moreover, and importantly, the *Anzaldua* Court noted that attorney fees have traditionally been within the province of a judge and not a jury, and the primary focus and basis of the Supreme Court's ruling that a right to jury trial exists under the WPA was the language providing for a damage award, which is also provided in MCL 450.1489, and which has traditionally been within the province of a jury if demanded. *Anzaldua, supra* at 537-548.

Additionally, the majority's reliance on the history of MCL 450.1489 is unavailing because, as the majority itself concedes, MCL 450.1825, the predecessor of MCL 450.1489, see 1972 PA 284, did not specifically authorize an award of damages.

Finally, my agreement with the majority that the trial court did not err in granting the motion for involuntary dismissal relative to the equitable claims does not negate my position nor mean that a jury could not have found differently on the claim for money damages even though it would have been assessing similar facts and making comparable determinations. See *Smith, supra* at 479. I also disagree with defendants that reversal would be unwarranted because the trial court indicated that it would have granted a directed verdict if a jury trial had been required. First, a motion for a directed verdict requires the court to view the evidence in a light most favorable to the adverse party, and if reasonable persons could reach different conclusions the case is properly left to the jury. *Smith v Jones*, 246 Mich App 270, 273; 632 NW2d 509 (2001). The motion for involuntary dismissal under MCR 2.504(B) required the trial court to act as the trier of fact, weigh the evidence, select between conflicting inferences, and reflect on the credibility of the witnesses. *Marderosian v The Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). The evidence is not viewed in a light most favorable to the plaintiff. *Id.* In my opinion, even though I cannot conclude that the trial court clearly erred in its factfinding with regard to the motion for involuntary dismissal relative to equitable relief, *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995), there was sufficient evidence to allow the claim for money damages to go to a jury under the principles regarding motions for directed verdict. Furthermore, I question whether a harmless error analysis is appropriate in the context of a denial of plaintiff's statutory right to a jury trial.

I would affirm in part, reverse in part, and remand for a jury trial on plaintiff's claim for money damages. Accordingly, I respectfully concur in part and dissent in part.

/s/ William B. Murphy