STATE OF MICHIGAN

COURT OF APPEALS

QUALITY MANUFACTURING, INC.,

Plaintiff-Appellee/Cross Appellant,

v

BRIAN D. MANN, BRIAN D. MANN, JR., and QUALITY WAY PRODUCTS, LLC,

Defendants-Appellants/Cross Appellees,

and

BRIAN D. MANN,

Counter Plaintiff-Appellant/Cross Appellee,

v

QUALITY MANUFACTURING, INC.,

Counter Defendant-Appellee/Cross Appellant,

and

BRIAN D. MANN,

Third Party Plaintiff-Appellant,

v

JAMES E. KIRBY,

Third Party Defendant-Appellee.

UNPUBLISHED
December 15, 2009

No. 286491
Genesee Circuit Court
LC No. 04-079512-CZ

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendants Brian D. Mann, Brian D. Mann Jr., and Quality Way Products, LLC appeal by right a judgment entered in favor of plaintiff Quality Manufacturing, Inc., who cross appeals, following a twelve-day bench trial in this case involving a failed business relationship. We reverse in part, affirm in part, and remand for further proceedings.

Defendants raise several arguments on appeal, but we begin with their last issue which challenged as erroneous the trial court's conclusions of law that defendants breached fiduciary duties, conspired to breach fiduciary duties, and tortiously interfered with Quality Manufacturing's employees and customer relationships. After review of the trial court's findings of fact for clear error and de novo review of its conclusions of law, we agree with defendants. See *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Although Quality Manufacturing argues that this issue was not preserved for appellate review, a party is not required to take exception to a trial court's findings or decisions when a bench trial is held. See MCR 2.517(A)(7); *Morris v Clawson Tank Co*, 459 Mich 256, 275 n 13; 587 NW2d 253 (1998).

Mann was vice president of Quality Manufacturing from about May of 1994, when it was incorporated, until July 2, 2004, when he notified Kirby, its president and sole shareholder, that he resigned. According to Mann, he resigned because Kirby failed to honor his repeated promise that Mann was a 50 percent owner of the company and legal documents reflecting that interest would be forthcoming. Mann then incorporated a business, called Quality Way, which directly competed with Quality Manufacturing. Employees from Quality Manufacturing voluntarily chose to become employees of Quality Way. Many former customers of Quality Manufacturing became customers of Quality Way. Quality Manufacturing sued, alleging that Mann breached his fiduciary duties as vice president and that Mann Jr. conspired with him to do so. These claims are without legal merit.

MCL 450.1541a(1) of the business corporation act provides:

> (1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:
>
> (a) In good faith.
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.

And, with regard to an officer's duties, MCL 450.1531(4) provides: "An officer, as between himself and other officers and the corporation, has such authority and shall perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board not inconsistent with the bylaws." It does not appear from the record

evidence in this case that Mann's duties as vice president were set forth in bylaws.[1] Clearly, the statutory duties imposed on Mann as vice president related to the management of Quality Manufacturing.

Quality Manufacturing has never claimed that Mann breached his fiduciary duties with regard to the actual operational management of Quality Manufacturing; rather, the claims were that he breached his duties by planning for his competing business while employed at Quality Manufacturing, resigning unexpectedly, opening a competing business, and "taking" its employees and customers with him. The trial court, citing MCL 450.1541(a), held that Mann was required, at least, to give notice of his intentions with regard to Quality Manufacturing:

> In essence, Brian Mann Sr., vice president of Quality Manufacturing, orchestrated a sneak attack on Quality Manufacturing which was planned while he was an officer of that corporation. His actions cannot be determined to be conducted in "a manner he reasonably believed to be in the best interests of the corporation." At the very least, Quality Manufacturing was entitled to notice of what was a foot [sic]. I find under the circumstances of this case that Mann as vice president of the company had an obligation to give notice of his intention to leave, give notice of his intention to form a competitive company and give notice of his intention to raid Quality Manufacturing's employees. Not doing so was wrongful and a breach of his duties as an officer of that corporation. His conduct put Quality Manufacturing at a competitive disadvantage.

We disagree with the trial court's conclusions as unsupported by the facts and the law.

First, Quality Manufacturing failed to set forth any legal authority in support of its claim that Mann was required to give any specific notice of his intention to resign as vice president and terminate his employment. Under MCL 450.1535(1), an officer can be removed with or without cause and there is no indication that notice is required. By the same token, MCL 450.1535(3) provides that an officer "may resign by written notice to the corporation." The statutory language is permissive, not mandatory; there is no indication that any particular notice of resignation, written or otherwise, is required by statute.

And, according to the record evidence, Mann was not a party to an employment contract with Quality Manufacturing that obligated him to tender any particular notice of resignation. Under Michigan law, then, Mann's employment with Quality Manufacturing is presumed to have been at-will employment. See *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993); *Franzel v Kerr Mfg Co*, 234 Mich App 600, 612; 600 NW2d 66 (1999). Thus, the employment relationship was terminable by Quality Manufacturing or Mann at any time, for any or no reason whatsoever. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982); *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572; 753 NW2d 265 (2008). Therefore, the trial court's legal conclusion that Mann breached a fiduciary duty owed to Quality Manufacturing by failing to provide notice of his intention to terminate the employment relationship is erroneous and is reversed.

[1] We note that the trial exhibits were not provided to this Court. See MCR 7.210.

Second, Quality Manufacturing failed to set forth apposite legal support for its claims that it was entitled to notice of Mann's intention to form a competitive company or that Mann could not plan for his own competing business while an officer employed by Quality Manufacturing. Instead, in support of these claims, Quality Manufacturing relies, as it did in its trial brief, solely on the case of *Production Finishing Corp v Shields*, 158 Mich App 479; 405 NW2d 171 (1987), a case that is clearly factually distinguishable. In that case, the defendant officer was actively pursuing a "longstanding objective" of the plaintiff which was to secure a particular business opportunity with a particular potential client for the plaintiff. *Id*. at 483. When that potential client indicated that it did not want to do business with the plaintiff, the defendant officer asked if they would consider becoming his personal client. *Id*. Thereafter, the defendant officer submitted a proposal to the prospective client and met with them several times in pursuit of this business opportunity for himself, not for his employer. *Id*. at 484. He then purchased equipment and established a corporation to perform those services for that particular client in July of 1981, while he remained an officer of the plaintiff's company. The defendant officer did not inform the plaintiff of these events until after he resigned in August of 1981. This Court held that the defendant officer breached his fiduciary duties by "diverting a corporate opportunity for his own personal gain." *Id*. at 485. It is clear that, but for the defendant officer's actions on behalf of and at the behest of the plaintiff, he would never have secured that business opportunity for himself. Thus, the well-reasoned rule that "a person who undertakes to act for another shall not, in the same matter, act for himself . . . [and] all profits made and advantage gained by the agent in the execution of the agency belong to the principal" applied. *Id*. at 486-487.

But Quality Manufacturing has never alleged usurpation of a corporate opportunity against Mann or claimed that Mann competed unfairly against Quality Manufacturing by using information gained through his employment. In fact, the evidence of record would not support such a claim. To the contrary, the evidence of record reveals that Kirby, the sole shareholder of Quality Manufacturing, had no experience in the basement column industry and had no experience with the machinery used to fabricate the columns. Mann, on the other hand, had worked at AFCO Manufacturing, which made basement columns, for 22 years, had seen a column machine built, and actually ran the column machine. Mann had also been president of AFCO Manufacturing for a couple of years. Mann knew the customers, suppliers, and subcontractors within the basement column industry. This was the valuable knowledge that he brought to Quality Manufacturing; it was not acquired while he worked at Quality Manufacturing. Kirby had no experience in, or knowledge of, the basement column industry. At the time Mann left Quality Manufacturing, he had worked with basement column customers for about 32 years, only ten of which was while employed at Quality Manufacturing.

Not only was there no employment agreement between Quality Manufacturing and Mann, but there also was no anticompetitive covenant. MCL 445.774a(1) provides that "[a]n employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business." Here, Quality Manufacturing is attempting to secure by judicial intervention what it did not secure by fair contractual bargaining supported by consideration. That is, by virtue of the trial court's judgment, Quality Manufacturing received the benefit of a bargain that was never negotiated or agreed upon.

Quality Manufacturing has also failed to cite any legal support for its claim that Mann was prohibited from planning for a basement column business while an officer of Quality Manufacturing—a claim that defies the well-known general prohibition against restraints of trade in the absence of a valid legal agreement. See *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006); *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 485-497; 650 NW2d 670 (2002). Several legal treatises have extensive commentary on the issue, including 3 Fletcher Cyclopedia of the Law of Corporations, §856, which discusses the well-established principle that former officers or directors of a corporation, unless prohibited by contract, may compete against a former employer in the same business and that they "do not violate their duty of loyalty when they merely organize a corporation during their employment to carry on a rival business after the expiration of employment." Likewise, Law of Corporate Officers and Directors: Indemnification and Insurance, § 3:11, provides:

> Unless restricted by contract, corporate officers and directors may resign and form a competing enterprise. This may be done with complete immunity because freedom of employment and encouragement of competition generally dictate that such persons can leave their corporation at any time and go into a competing business. Before actually terminating his or her relationship with the corporation, a corporate officer or director is generally free to make arrangements or preparations for the competing business, provided no wrongful or unfair acts are committed.

This principle is also set forth in Restatement 2d Agency, § 393, comment e, p 218:

> *e. Preparation for competition after termination of agency*. After the termination of his agency, in the absence of a restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed. See §396. Even before the termination of the agency, he is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete.

And, again, in Am Jur 2d, Corporations § 1482, p 473-474:

> The fact that one was once a director or officer of a corporation does not preclude such person from engaging in a business similar to that conducted by the company. Generally, in the absence of a contractual provision to the contrary, corporation fiduciaries, such as directors or officers, are free to resign and form an enterprise that competes with the corporation after they sever their connection with it. Further, in the absence of a contract provision to the contrary, former corporate fiduciaries may solicit the customers of their former corporation for business unless the customer list is itself confidential.

And in 2 Callmann on Unfair Competition, Trademarks and Monopolies, § 16:26 (4th edition):

> A partner, employee, agent or independent contractor, who today are business associates, may tomorrow become competitors. Without a restrictive agreement,

> at the termination of his or her employment an employee can go to work for a competitor or form a competing business. Indeed, even prior to terminating the current employment relationship, the employee has a right to seek and prepare for alternative employment, and has no obligation to disclose to the current employer any intent to become a competitor.

Clearly, in the absence of any specific claim of wrongdoing, Mann did not breach any fiduciary duty owed to Quality Manufacturing when he planned for his business while employed by Quality Manufacturing. There is no allegation that Mann competed with Quality Manufacturing contemporaneously while its vice president as the defendant officer did in *Production Finishing Corp*, *supra*. And Quality Way was not, in fact, formed until after Mann tendered his resignation to Kirby.

The evidence of record reveals that Mann was dissatisfied with his employment situation. He began planning, and even secured funding for, a new venture in case he could not negotiate an agreeable resolution to his grievance with Quality Manufacturing. That is, Mann thoughtfully prepared for his future in the only business in which he had ever worked—the basement column industry. Mann established a line of credit and his son secured a potential location for the new business, a location that Mann Jr. would also use to house his flagpole business. Mann did not purchase any inventory for his new venture and did not legally form his new company until after he had resigned from Quality Manufacturing. He did nothing to sabotage the future success of Quality Manufacturing before he left. In fact, the last week he worked there, he had sales totaling $134,732 and the last day he worked, his sales totaled $42,000. No evidence was presented that, while employed by Quality Manufacturing, Mann used his agency to benefit himself rather than Quality Manufacturing. Further Mann was not required to give notice to Quality Manufacturing of his intention to form a competing company and he was not prohibited from forming a competing company. Therefore, the trial court's legal conclusions to the contrary are erroneous and are reversed.

Third, the trial court concluded that Mann breached his fiduciary duty to Quality Manufacturing when Mann failed to provide it notice that he intended to "raid Quality Manufacturing's employees." Again, we disagree with the trial court's imposition of a notice requirement as unsupported by legal authority. Similarly, when many employees from AFCO Manufacturing left that employment to work for Quality Manufacturing, Quality Manufacturing found no legal impediment to such action. But, more importantly, the evidence of record does not support the conclusion that Mann "raided" Quality Manufacturing's employees.

Not one employee of Quality Manufacturing had an employment contract with Quality Manufacturing; they were all at-will employees. Accordingly, they were entitled to terminate their employment at any time. See *Kimmelman*, *supra* at 572. The evidence was consistent that the employees left Quality Manufacturing because they did not want to work for Kirby. They did not leave Quality Manufacturing because they were enticed to do so by any actions of Mann; rather, they left simply because they wanted to work for Mann after Mann resigned from Quality Manufacturing. In fact, the employees of Quality Way actually received less favorable benefits than they did working for Quality Manufacturing. Quality Manufacturing has wholly failed to present any legal authority to support its claim that Mann breached fiduciary duties he owed to it merely because, after he resigned, all of Quality Manufacturing's employees freely chose to terminate their employment and seek employment with Quality Way. Therefore, the trial court's

legal conclusion that Mann breached a fiduciary duty owed to Quality Manufacturing by failing to provide notice of his intention to "raid" Quality Manufacturing's employees is erroneous and is reversed.

In summary, while vice president of Quality Manufacturing Mann was required to discharge his duties in good faith, with the care of an ordinarily prudent person in that position, and in a manner reasonably believed in the best interests of the corporation. MCL 450.1541a. There is no evidence that Mann breached these duties. Quality Manufacturing flourished while Mann was in charge of its operations. But Mann was not legally obligated to continue to work for Quality Manufacturing. He also was not legally obligated to refrain from working for or forming a competing company. Although he began planning for his future while he remained vice president of Quality Manufacturing, Mann did nothing that negatively impacted Quality Manufacturing while he was its vice president. That is, while vice president, he managed "the affairs of the corporation solely in the interest of the corporation." *L A Young Spring & Wire Corp v Falls*, 307 Mich 69, 101; 11 NW2d 329 (1943). After he resigned from Quality Manufacturing, there is no legal reason he could not pursue the same customers or that former employees from Quality Manufacturing could not work for Mann. Therefore, the trial court should have dismissed all of the breach of fiduciary duty claims against Mann. And the conspiracy to commit a breach of fiduciary duty claim against Mann Jr. premised on these same allegations should also have been dismissed by the trial court.

Next, we turn to the trial court's conclusion that Mann tortiously interfered with a business relationship or expectancy of Quality Manufacturing. Again, we disagree. One of the elements of this claim is "an intentional inducing or causing a breach or termination of the relationship or expectancy." *Lakeshore Comm Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995); see, also, *AOPP v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003). That is, there must be "[a]n unjustified instigation of the breach by the defendant." *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). In its brief on appeal, just as in its trial brief, Quality Manufacturing only argues that Mann "intentionally set up a competing business with his son and stole QMI's customers." This allegation is insufficient to establish improper instigation or that Mann wrongfully induced customers to terminate their relationship with Quality Manufacturing. After Mann left Quality Manufacturing and established his own business, he was merely competing for the same customers of basement columns—customers that did not have contracts with Quality Manufacturing. Most of the customers knew and did business with Mann, who had been in the basement column business for about 32 years, only ten of which was with Quality Manufacturing. The customers had no contact or history with Kirby. Further, the sales figures belie the claim. The month after Mann resigned, Quality Manufacturing had record sales totaling $556,247.25. In light of the lack of evidence in support of this claim, it should have been dismissed by the trial court.

The trial court also concluded that Mann tortiously interfered with employment contracts that Quality Manufacturing had with its employees. There is no evidence to support this holding and Quality Manufacturing has failed to cite to even a single case in support of its claim. The fact is, Quality Manufacturing did not have employment contracts with any employee, including Mann. As discussed above, all of the employees at Quality Manufacturing were at-will employees. They could terminate their employment, and be terminated from their employment, at any time for any or no reason. And, again, the evidence was consistent—the employees left

Quality Manufacturing after Mann resigned because they did not want to work for Kirby, not because they were enticed to do so by any "intentional inducing" or "unjustified instigation" by Mann. Thus, this claim also should have been dismissed.

In summary, the trial court erroneously concluded that Mann breached his fiduciary duties to Quality Manufacturing and that Mann Jr. conspired with him to do the same. With regard to the interference claims, the trial court also erroneously concluded that (1) Mann tortiously interfered with employment contracts Quality Manufacturing had with its employees, (2) Mann tortiously interfered with a business relationship or expectancy of Quality Manufacturing, (3) Mann Jr. assisted Mann with these endeavors, and (4) Quality Way was liable for such intentional interferences. None of these claims were meritorious and they were the only surviving claims from Quality Manufacturing's complaint. Accordingly, the trial court should have entered a judgment of no cause of action with regard to Quality Manufacturing's entire action. We reverse the judgment in favor of Quality Manufacturing and remand for entry of a judgment of no cause of action against Mann, Mann Jr., and Quality Way. The trial court is also directed to enter a judgment in the amount of $1,120,689 in favor of Mann and against Quality Manufacturing and Kirby consistent with its holding on Mann's promissory estoppel claim.

In light of our conclusion, we need not address several other issues defendants raised on appeal. First, we need not address defendants' argument that the trial court erred when it offset Quality Manufacturing's damages by Mann's damages awarded on his individual claims against Quality Manufacturing and its owner, Kirby. Mann, alone, is entitled to damages with regard to his promissory estoppel claim set forth in his complaints against Quality Manufacturing and Kirby. The trial court determined those damages to be $1,120,689 and Quality Manufacturing has not appealed this award by the trial court. Second, we need not address defendants' argument that the trial court erred in awarding case evaluation sanctions in the amount of $78,000 against Mann without first determining the several liability of all defendants pursuant to MCL 600.2957. Quality Manufacturing is not entitled to case evaluation sanctions. Third, we need not address defendants' argument that the trial court erred in failing to allocate a percentage of fault to Quality Manufacturing and Kirby, as required under MCL 600.2957 and MCL 600.6304, with regard to Quality Manufacturing's damages. Quality Manufacturing is not entitled to an award of damages. Fourth, we need not address defendants' argument that the trial court erred when it failed to reduce the future damages awarded to Quality Manufacturing to net present value. Quality Manufacturing is not entitled to damages.

Defendants also argue that the trial court erred when it reached the conclusion of law that Kirby did not breach fiduciary duties as president of Quality Manufacturing. We disagree with defendants' characterization of the trial court's holding.

In a bench trial, the trial court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *Chapdelaine, supra* at 169. A finding of fact is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Count III of Mann's counterclaim against Quality Manufacturing was a breach of fiduciary duty claim, and included the following allegations:

> 18. Plaintiff's President falsely represented that the corporation would honor the commitment to provide 50% of the value of the business to Defendant/Counter-Plaintiff Brian D. Mann.
>
> 19. Defendant Counter-Plaintiff Brian D. Mann placed special trust and confidence in the President as agent of the corporation and relied on him to exercise his judgment in acting for the interests of Defendant Counter-Plaintiff Brian D. Mann in causing the corporation to provide him with an equal interest in the Plaintiff.
>
> 20. As agent for Plaintiff, the President violated his fiduciary duty; violated his duty to act in good faith; failed to act in a timely and reasonable manner; and failed to disclose information as to the refusal to comply with this commitment.

The trial court dismissed this claim holding: "Count three alleges that Kirby breached a fiduciary duty to Brian Mann. No such duty has been identified during the trial. This count is dismissed." We agree with the dismissal of this claim.

It appears from the complaint that Mann was alleging that Quality Manufacturing, through Kirby, breached fiduciary duties owed to Mann personally but, as the trial court held, such a claim was not established. In their brief on appeal, defendants seem to argue that Kirby breached fiduciary duties owed to Quality Manufacturing and, apparently, thereby breached fiduciary duties owed to Mann. Although inartfully worded, that does not seem to be the allegation in the counterclaim. Nevertheless, defendants have no standing to pursue an action against Kirby on behalf of Quality Manufacturing. See, e.g., *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003). Further defendants fail to explain or support their claim that Kirby owed a fiduciary duty to Mann, a mere employee and not a stockholder of Quality Manufacturing. Therefore, this issue is without merit. The trial court properly dismissed Count III of Mann's counterclaim.

Next, defendants argue that the trial court erroneously dismissed Mann's allegations of estoppel and fraud in light of its conclusion that Quality Manufacturing and Kirby were jointly liable for a breach of promise to make Mann an owner of Quality Manufacturing. We disagree.

Mann's counterclaim against Quality Manufacturing and third-party complaint against Kirby included claims of (1) equitable estoppel premised on Mann's purported reliance on Kirby's representations that Mann was a 50 percent owner and would be provided with the necessary document to reflect that interest, (2) fraud and misrepresentation premised on verbal representations purportedly made by Kirby to Mann and others that Mann was a 50 percent owner of Quality Manufacturing and that they were equal partners, (3) silent fraud based on Kirby's failure to disclose that Mann was not a 50 percent owner of Quality Manufacturing and would not become a 50 percent owner of the company, (4) fraud based upon bad faith promise grounded on Kirby's purported promise that Mann was a 50 percent owner of Quality Manufacturing and would be provided the necessary documents reflecting that interest, and (5) innocent misrepresentation premised again on the purported representation by Kirby that Mann

was a 50 percent owner of Quality Manufacturing.[2] On appeal, however, Mann only challenges the trial court's rejection of the first three claims; thus, we turn to those claims.

To establish actionable fraud and misrepresentation, a plaintiff must prove that (1) the defendant made a material misrepresentation, (2) that was false, (3) when the defendant made it, he knew it was false or made it recklessly, (4) the defendant made the representation with the intention that the plaintiff would act upon it, (5) the plaintiff did in fact act in reliance on it, and (6) the plaintiff suffered damages. See *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *M & D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Here, the trial court noted in its findings of fact that the evidence supported a conclusion that Mann was promised an ownership interest in Quality Manufacturing. However, the trial court also held that Mann failed to establish his claim that Kirby promised him 50 percent ownership; Mann's ownership interest was never to exceed 49 percent. Credibility determinations are for the finder of fact. *In re Miller*, *supra* at 337; *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). Nevertheless, the fraud claim failed because Mann did not present evidence establishing that when Kirby promised Mann an ownership interest in Quality Manufacturing, the promise was false or that Kirby knew the promise was false. We agree with the trial court's conclusion. Mann failed to establish that, at the time the promise of an ownership interest was made, the promise was false and Kirby knew that he would not honor the promise. Fraud claims must be proved by clear and convincing evidence. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008) (citations omitted).

The elements of silent fraud are the same as those of fraudulent misrepresentation except that the misrepresentation supporting a claim of silent fraud is based on the defendant's suppression of a material fact that he was legally bound to disclose, rather than on an affirmative representation. *McConkey*, *supra* at 28-29; *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988). The trial court rejected this claim, holding that to establish it, Mann would have had to prove that Kirby failed to disclose the fact that he had no intention of making Mann a partner and that Kirby knew he was not going to make Mann a partner or owner. But, the trial court reasoned, it already concluded that the promise to make Mann an owner was real and Kirby believed it to be true when he made it. We agree with that conclusion. Mann failed to prove that, at the time the promise of an ownership interest was made, Kirby knew that he would not honor the promise but did disclose that intention to Mann.

Mann argues in his appeal brief that "[t]he court views the claims of fraud in a vacuum, and incorrectly limits the time frame to the original promise. Representations of Mann's ownership were made throughout the 10 years Mann built this business, as were the representations that the stock would be issued." But the "original promise" is what induced Mann to leave his long-time employment with AFCO Manufacturing, as Mann alleged in his counterclaim and third-party complaints. As Mann claimed throughout the trial, but for Kirby's promise of an ownership interest in Quality Manufacturing, Mann would not have left AFCO Manufacturing and the ownership opportunity that he had at that company. Thus, Kirby's

[2] Mann also raised a fraudulent concealment claim in both his counterclaim and third-party complaint, but those claims were summarily dismissed with prejudice by order dated June 20, 2007.

original promise, and Mann's reliance on that promise, is what gave rise to Mann's purported damages. That Kirby made representations to potential employees and customers that Mann was an owner of Quality Manufacturing is of no legal consequence to Mann.

And, in his brief on appeal Mann agrees that his equitable estoppel claim was properly dismissed by the trial court because it is a doctrine, not a cause of action, but Mann argues that Kirby should be equitably estopped from profiting from his breached promise. See *Hoye v Westfield Ins Co*, 194 Mich App 696, 704; 487 NW2d 838 (1992). In light of our conclusion that Quality Manufacturing is not entitled to damages, we need not address this issue.

On cross appeal, Quality Manufacturing argues that the trial court erred when it utilized a 12 percent profit margin to calculate its damages. This issue is rendered moot by our conclusion that Quality Manufacturing was not entitled to damages.

Quality Manufacturing also argues on cross appeal that the case evaluation sanctions awarded to it by the trial court were unfairly low. This issue too is rendered moot by our conclusion that Quality Manufacturing did not prevail on any of its claims.

In conclusion, the judgment in favor of Quality Manufacturing is vacated and the trial court is directed to enter a judgment of no cause of action with regard to Quality Manufacturing's entire case against Mann, Mann Jr., and Quality Way. The trial court's order for case evaluation sanctions in favor of Quality Manufacturing is also vacated. The trial court is further directed to enter a judgment in the amount of $1,120,689 in favor of Mann and against Quality Manufacturing and Kirby.

Reversed in part, affirmed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens