S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

GERALD L. POLLACK & ASSOCIATES, INC., Plaintiff/Counter-Defendant-Appellee, v LOREN POLLACK, Defendant/Counter-Plaintiff-Appellant, and RONALD M. BARRON, ALEX KOCOVES, and BARRON, ROSENBERG, MAYORAS, & MAYORAS, PC, Counter-Defendants/Third-Party Defendants-Appellees.	UNPUBLISHED January 27, 2015 No. 319180 Oakland Circuit Court LC No. 2010-108947-CK

GERALD L. POLLACK & ASSOCIATES, INC., Plaintiff/Counter-Defendant-Appellee, v LOREN L. POLLACK, Defendant/Counter-Plaintiff-Appellant, and RONALD M. BARRON, ALEX KOCOVES, and BARRON, ROSENBERG, MAYORAS, & MAYORAS, PC,	No. 320917 Oakland Circuit Court LC No. 2010-108947-CK

Counter-Defendants/Third-Party Defendants.

GERALD L. POLLACK & ASSOCIATES, INC.,

Plaintiff/Counter-Defendant,

v

LOREN L. POLLACK,

Defendant/Counter-Plaintiff-Appellant,

and

RONALD M. BARRON and BARRON, ROSENBERG, MAYORAS, & MAYORAS, PC,

Counter-Defendants/Third-Party Defendants,

and

ALEX KOCOVES,

Counter-Defendant/Third-Party Defendant-Appellee.

No. 320918
Oakland Circuit Court
LC No. 2010-108947-CK

GERALD L. POLLACK & ASSOCIATES, INC.,

Plaintiff/Counter-Defendant,

v

LOREN L. POLLACK,

Defendant/Counter-Plaintiff-Appellant,

and

No. 320919
Oakland Circuit Court
LC No. 2010-108947-CK

RONALD M. BARRON and BARRON, ROSENBERG, MAYORAS & MAYORAS, PC,

Counter-Defendants/Third-Party Defendants-Appellees,

and

ALEX KOCOVES,

Counter-Defendant/Third-Party Defendant.

Before: FORT HOOD, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

In Docket No. 319180, defendant/counter-plaintiff, Loren Pollack ("Loren"), appeals as of right an amended order granting a permanent injunction. In Docket No. 320917, Loren appeals as of right a judgment awarding attorney fees to plaintiff/counter-defendant, Gerald L. Pollack & Associates, Inc. ("GLP"). In Docket No. 320918, Loren appeals as of right a judgment awarding attorney fees to counter-defendant/third-party defendant Alex Kocoves ("Kocoves"). In Docket No. 320919, Loren appeals as of right a judgment awarding attorney fees to counter-defendant/third-party defendant Ronald M. Barron ("Barron"). The appeals were consolidated to advance the efficient administration of the appellate process.[1] In Docket Nos. 319180, 320918, and 320919, we affirm. In Docket No. 320917, we affirm in part, vacate in part, and remand for entry of an amended judgment to reflect a deduction of $10,870 that GLP agreed to remove from its attorney fee claim.

I. DOCKET NO. 319180

Loren first argues that the trial court erred in determining that Loren owned less than 20% of the shares of GLP and in concluding that GLP was not contractually obligated to pay for Loren's purchases of his shares of GLP. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the

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[1] *Gerald L Pollack & Assoc, Inc v Pollack*, unpublished order of the Court of Appeals, entered August 19, 2014 (Docket Nos. 319180, 320917, 320918, 320919).

nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The proper interpretation of a contract is a question of law that is reviewed de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

> In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law. However, if the contractual language is ambiguous, extrinsic evidence can be presented to determine the intent of the parties. [*In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008) (citations omitted).]

Loren argues that, at relevant times in this case, he owned 20% of the shares of GLP stock, thereby preventing the other shareholders from taking certain actions without his consent according to the terms of a 2006 shareholders agreement. We disagree with Loren's argument that he owned 20% of the shares of GLP. In a 2006 stock purchase agreement between Loren's now-deceased father, Gerald Pollack ("Gerald"), as "the Seller," and Kocoves and Loren, as "the Buyers," Gerald, Kocoves, and Loren agreed, in relevant part:

> **WHEREAS,** the Seller owns all of the outstanding and issued shares of common stock (the "Stock") of Gerald L. Pollack & Associates, Inc., a Michigan corporation (the "Corporation");
>
> **WHEREAS,** the Seller desires to sell 20% of the Stock to Alex Kocoves and an additional 20% of the Stock to Loren Pollack, on the terms and conditions set forth herein.
>
> **NOW THEREFORE,** in consideration of the mutual covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Seller and the Buyer agree as follows:
>
> 1. Sale of the Shares. The Seller shall sell to the Buyers, and the Buyers shall each buy from the Seller 20%, each, of the Stock.
>
> 2. Transfer of the Shares. The Seller shall deliver to each of the Buyers a stock certificate representing the appropriate number of Shares of the Stock, on an annual basis. *Upon each yearly principal payment by each Buyer, as set forth below, the Seller shall deliver 2% of the Stock to each Buyer, provided that each Buyer is current on all interest payments due as described below in Section 3.*

> *After ten years (commencing December 31, 2005), each Buyer shall own 20% of the Stock.*
>
> 3. Payment of the Purchase Price. The total purchase price for the Stock shall be $2,000,000, plus interest. Each of the Buyers shall pay $100,000.00 per year to the Seller, for ten years, for a total of $2,000,000.00. The first payment was made by each Buyer as of December 31, 2005, and each additional payment shall be due by December 31th [sic] of each respective year, until paid in full. The Buyers will guarantee, or already have guaranteed, certain Promissory Notes between the Seller and JP Morgan Chase Bank, in the combined principal sum of $2,000,000 (hereinafter the "Notes"). As additional consideration, the Buyers shall also be responsible, and indemnify the Seller and the Corporation, for any interest charged, accrued or due on the Notes, now or in the future, and will pay such interest directly to JP Morgan Chase Bank pursuant to the terms of the Notes. The Buyers shall each be responsible for payment of the interest on the Notes jointly and severally. Each Buyer has contribution rights against the other Buyer for his respective one-half share of the interest. [Emphasis added.]

The stock purchase agreement unambiguously provides that Gerald would deliver 2% of the stock to Loren and 2% of the stock to Kocoves on an annual basis, beginning on December 31, 2005, so that after 10 years, Loren and Kocoves would each own 20% of the stock. This language unambiguously reflects that, contrary to Loren's argument, he did not acquire 20% of the shares of GLP when the stock purchase agreement was executed. Rather, he was to acquire 2% each year until, after 10 years, he had acquired 20% of the shares. Loren's argument is therefore rejected because it is contrary to the plain language of the stock purchase agreement.

Loren makes a new argument on appeal that the percentage of stock he owned was somehow tied to the status of Gerald's promissory note to J.P. Morgan Chase Bank ("JPMC"). But the stock purchase agreement does not say that Loren would own 20% of the shares of GLP once Gerald or GLP had paid off the promissory note to JPMC. Rather, the unambiguous language of the stock purchase agreement provides that Loren acquires 2% of the stock each year beginning on December 31, 2005, so that *after 10 years* he would own 20% of the stock. Loren is obligated to pay $100,000 a year to Gerald in order to acquire his 2% share for that year. Loren's focus on the status of Gerald's note to JPMC is a distraction from the dispositive language of the stock purchase agreement.

Next, Loren notes that a Subchapter S Election form submitted to the IRS on behalf of GLP in October of 2009 contained an attestation by Barron, Kocoves, and Loren that Kocoves and Loren each acquired 20% stock ownership as of January 1, 2006. This IRS form was not attached as an exhibit to Loren's response to Kocoves's motion for summary disposition, although it was attached to Loren's response to Barron's motion for partial summary disposition on other grounds and Barron's joinder in Kocoves's motion. Even assuming that the IRS form was properly made a part of the record for the purpose of Kocoves's summary disposition motion, it is improper to consider this document because the stock purchase agreement unambiguously states that Loren and Kocoves would acquire 2% each year upon payment of $100,000 for that year, beginning on December 31, 2005, so that Loren and Kocoves would each own 20% of the stock *after 10 years*. Because the contractual language is unambiguous, there is

no need to resort to extrinsic evidence regarding the contracting parties' intent. *In re Smith Trust*, 480 Mich at 24.[2]

Loren further argues that the representations on the IRS form warrant application of the doctrine of estoppel to prevent GLP, Kocoves, and Barron from disputing that Loren owned 20% of the stock at the relevant times. Loren did not assert below that the doctrine of estoppel applies, so this aspect of his argument is unpreserved. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). The argument lacks merit in any event. As GLP notes, its actual income tax return for 2010 showed that Loren owned only 12% of GLP shares. Loren does not explain why GLP should be bound by an erroneous representation in a Subchapter S Election form as opposed to its actual income tax returns.[3] Further, equitable estoppel is not an independent cause of action but merely a defense that applies when a party justifiably relies and acts on a belief that misrepresented facts are true. *AFSCME Int'l Union v Bank One, NA*, 267 Mich App 281, 292 n 3; 705 NW2d 355 (2005). The doctrine applies when "(1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Id.* at 293 (quotation marks and citations omitted). Here, there is no evidence that Loren justifiably acted and relied on the belief that he owned 20% of the shares of GLP. Thus, Loren has not established that the doctrine of equitable estoppel applies.

Next, Loren attempts to analogize his purchase of the stock to the purchase of a house that is mortgaged; Loren suggests that like a mortgagor who becomes owner of a house even though it is mortgaged, Loren acquired 20% of the stock all at once even though it was to be paid off over 10 years. This analogy is inapt given that unlike a house, stock is divisible and may be acquired incrementally. Further, as discussed, the stock purchase agreement does not provide for Loren to purchase the entire 20% of GLP shares at one time to be paid in installments; rather, the agreement provides for Loren to acquire 2% of the stock each year for 10 years.

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[2] GLP notes that its actual 2010 tax return properly reflected that Loren owned 12% of GLP stock by the end of 2010. GLP and Kocoves also reference Loren's December 1, 2011 deposition testimony stating that he currently owned 12% of the stock, although this testimony was not submitted until GLP responded to Loren's later motion to vacate the circuit court order that the Gerald L. Pollack Trust controlled 76% of the shares of GLP. Again, it is not necessary to consider this extrinsic evidence in light of the unambiguous language of the stock purchase agreement. Further, it is questionable whether this portion of Loren's deposition testimony could properly be considered given that it was not submitted in connection with the summary disposition motion at issue. See *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009) ("When reviewing a decision on a motion for summary disposition, this Court will not consider evidence that had not been submitted to the lower court at the time the motion was decided.").

[3] There is no indication that GLP benefited in any way from the incorrect information on the Subchapter S Election form.

Loren relies on a May 30, 2006 letter from Gerald to Barron and David Clark of JPMC, in which Gerald stated: "In the event this writer agrees to sell Alex Kocoves and Loren Pollack will be treated as if they had the full 20% stock less the corporation's outstanding obligation based upon vesting schedule." Again, it is improper to consider extrinsic evidence given the unambiguous language in the stock purchase agreement. *In re Smith Trust*, 480 Mich at 24. In any event, the May 30, 2006 letter does not state that Loren and Kocoves actually own 20% of the stock; it says only that they would be treated as if they owned the full 20% of the stock if Gerald was to sell his shares. The reference to a "vesting schedule" is consistent with the acquisition of 2% of the stock each year in accordance with the stock purchase agreement. This letter also states that Kocoves and Loren were each awarded 20% of the stock "in accordance with" the stock purchase agreement and the shareholders agreement. The stock purchase agreement is therefore deemed the manner in which the 20% of stock is to be acquired. If anything, then, the letter *confirms* that Loren and Kocoves did not acquire the full 20% when the stock purchase agreement was executed; Loren and Kocoves were merely to be treated as if they did own such a percentage in the event that Gerald sold his shares.

Loren also references a purported August 11, 2005 unsigned letter on GLP letterhead, allegedly written by Kocoves on Loren's behalf to a mortgage lender, stating that Loren "has acquired a twenty percent interest in GLP & Associates, Inc. pursuant to a certain restricted stock agreement with GLP & Associates, Inc. and said stock has a current value above two (2) million dollars." Loren asserts that Kocoves and GLP are bound by this representation. This letter may not be considered because it was not submitted when the motion for summary disposition was decided and is not in the record. See *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009) ("When reviewing a decision on a motion for summary disposition, this Court will not consider evidence that had not been submitted to the lower court at the time the motion was decided."). A party may not expand the record on appeal. *Id*. The letter therefore fails to create a genuine issue of material fact concerning whether Loren owned 20% of the shares of GLP.

Loren next argues that GLP was required to pay any balance due for Loren's shares. In particular, Loren relies on two letters purportedly written by Gerald in 2004 and 2006 that allegedly obligate GLP to fund Loren's purchases of his shares. In the December 7, 2004 letter from Gerald to Kocoves and Loren, written on GLP letterhead, Gerald stated that "your stock purchase of 20% will be the responsibility of this company in its entirety." The letter also referenced the $2 million loan and stated that "[e]ach of you in good faith by way of GLP & Associates will receive the required capital to pay each individual loan in totality." In the May 30, 2006 letter from Gerald to Barron and Clark and copied to Loren and Kocoves, written on GLP letterhead, Gerald stated that the "loans will be the sole responsibility of G.L.P. and Associates, Inc, while this writer is alive, or in the event should I have a quick departure please dole my request on their behalf." This letter further stated that "two payments have already been made on behalf of Alex Kocoves and Loren Pollack, and these payments will continue unconditionally without question, they have been earned and will be granted." We conclude that the trial court properly held that neither the 2004 letter nor the 2006 letter establishes that GLP is contractually obligated to fund Loren's purchases of his stock shares.

With respect to the 2004 letter, no consideration exists for Gerald's promise to fund the stock purchases. Consideration is "a bargained exchange involving a benefit on one side, or a detriment suffered, or service done on the other. Consideration is required for a valid contract."

Prentis Family Foundation, Inc v Karmanos Cancer Institute, 266 Mich App 39, 58; 698 NW2d 900 (2005) (quotation marks and citations omitted). The 2004 letter does not reflect a bargained exchange involving a benefit on one side or a detriment suffered or service done on the other. The letter purports to require GLP to fund Loren's stock purchases but does not impose any obligations on Loren, such as to use his own funds for some of the stock purchases. On appeal, Loren has abandoned his argument advanced in the trial court that he agreed to continually work for GLP in exchange for the stock payments. Instead, Loren maintains that his earlier work for GLP provided the consideration necessary to establish a contract. However, as Loren acknowledges, past consideration does not constitute legal consideration for a subsequent agreement. See *Easley v Mortensen*, 370 Mich 115, 120; 121 NW2d 420 (1963); *Prentis Family Foundation, Inc*, 266 Mich App at 58 n 7.

Loren cites 4 Williston, Contracts (4th ed), § 8.13, p 303 for the principle that "a subsequent promise that is given and accepted in satisfaction of a previous unliquidated liability that arose from an implied obligation to pay for requested services is deemed to be supported by sufficient consideration" and that such an agreement "is in the nature of an accord and satisfaction and compromise[.]" Loren also cites *Bagaeff v Prokopik*, 212 Mich 265, 267-268; 180 NW 427 (1920), for the proposition that a moral obligation to pay may constitute the consideration necessary to support a contract in some cases. Loren maintains that he provided services to GLP for many years and received no salary, instead receiving only his earned commissions on sales. Therefore, Loren contends, GLP's promise to fund the stock purchases was supported by GLP's moral obligation to pay Loren for his services.

We find Loren's argument unpersuasive. Loren does not dispute that he received his full commissions on sales. There is no evidence that Loren did not receive earnings to which he was entitled as a sales agent. Further, Loren was not yet an officer or a director of GLP at the time of the 2004 letter. The 2004 letter states that the shareholders agreement and stock purchase agreement were still being worked on and that Loren and Kocoves "will be officially nominated as officers, directors once these agreements are formalized and executed." GLP thus had no moral obligation to pay Loren for past services as a director or officer at the time of the 2004 letter. Nor does the 2004 letter indicate that GLP was indebted to Loren for past services or that GLP's promise to fund Loren's stock purchases was based on an implied obligation to pay him for past services. An accord and satisfaction requires proof of a good faith dispute over an unliquidated claim. *Faith Reformed Church of Traverse City, Mich v Thompson*, 248 Mich App 487, 492; 639 NW2d 831 (2001). There is no evidence of a dispute between Loren and Gerald or GLP regarding an unliquidated claim related to Loren's past services at the time of the 2004 letter. The trial court properly held that the promise to fund the stock purchases in the 2004 letter was not supported by consideration.

Further, the stock purchase agreement contained an integration clause:

> 11. <u>Entire Agreement</u>. This Agreement constitutes the complete and final agreement of the parties concerning the sale of the Stock and supersedes all prior agreements or understandings concerning the sale of the Stock. This Agreement may not be modified or amended except in writing, signed by all the parties effected [sic] by such amendment.

This contractual language unambiguously provides that the stock purchase agreement supersedes all prior agreements or understandings concerning the sale of the stock. Therefore, any agreements or understandings reflected in Gerald's 2004 letter concerning the sale of the stock, including that GLP would fund the purchases, were superseded by the stock purchase agreement. "Where the parties have included an express integration or merger clause within the agreement, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete 'on its face' and, therefore, parol evidence is necessary for the 'filling of gaps.' " *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 169; 721 NW2d 233 (2006). There is no evidence of fraud that invalidates the integration clause, and the agreement is not obviously incomplete on its face; thus, parol evidence may not be considered.

Loren further contends that a course of dealing existed that requires GLP to continue to fund Loren's stock purchases because GLP paid for the stock purchases until Gerald died. "However, a contract cannot be implied in law while an express contract covering the same subject matter is in force between the parties." *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999); see also *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003) ("a contract will be implied only if there is no express contract covering the same subject matter"). "A prior course of performance cannot alter the clear and unambiguous language of the contract. Where the provisions of a contract are clear and unambiguous, the contract language is to be construed according to its plain sense meaning." *Ditzik v Schaffer Lumber Co*, 139 Mich App 81, 89; 360 NW2d 876 (1984).

> Generally, extrinsic evidence is not admissible where a contract is clear and unambiguous. And, while generally a course of performance is highly persuasive evidence of proper contract interpretation when introduced against the party so performing, the law also recognizes that a party may undertake a wrong interpretation of the words of a contract and the other party should never be permitted to profit by such mistake in the absence of an estoppel arising from a prejudicial change of position in good-faith reliance on such performance. [*Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 191-192; 565 NW2d 887 (1997) (citations omitted).]

"In the absence of ambiguity, rules of construction such as reliance on a course of performance are unnecessary to this Court's task and accordingly we regard such evidence as reflective of no more than a mistake on [the performing party's] part and thus as ultimately irrelevant." *Id*. at 193. Here, the stock purchase agreement is an express contract covering the same subject matter; it unambiguously requires Loren to pay for his own stock purchases. Extrinsic evidence of the parties' course of dealing in paying for the stock purchases cannot alter the unambiguous contractual language. There is no evidence that Loren suffered a prejudicial change of position in good-faith reliance on GLP's funding of the stock purchases before Gerald's death.

Finally, the purported letter of May 30, 2006 does not establish the contracting parties' intent or modify the terms of the stock purchase agreement. Because the stock purchase agreement unambiguously states that Loren is to pay for his own shares, extrinsic evidence in the form of the 2006 letter stating that GLP would pay for the shares may not be admitted. *In re*

Smith Trust, 480 Mich at 24. Further, the stock purchase agreement was not validly amended to require GLP to pay for the shares. The integration clause of the stock purchase agreement states, in relevant part: "This Agreement may not be modified or amended except in writing, signed by all the parties effected [sic] by such amendment."

> A contract, including a written contract, may be modified orally or in writing. The modification must be by mutual consent. The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract. [*Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 454-455; 733 NW2d 766 (2006) (quotation marks and citations omitted).]

The parties to the stock purchase agreement were Gerald, Loren, and Kocoves. There is no evidence that Kocoves consented to a modification of the stock purchase agreement to require GLP to pay for the stock purchases. Therefore, the record does not establish a mutual agreement of the contracting parties to modify the stock purchase agreement.

Loren's next series of arguments on appeal concern various challenges to the corporate governance of GLP. In particular, Loren argues that the trial court erred at a bench trial in finding that Barron and Michael McEvilly were validly appointed to GLP's board of directors and in denying Loren's request for specific performance of a check-signing provision in the shareholders agreement. He also challenges the grant of summary disposition to Kocoves regarding the approval of his employment contract and presents additional arguments concerning challenges to other decisions of the GLP shareholders or board of directors. For the reasons discussed below, we conclude that all of Loren's arguments lack merit.

A trial court's findings of fact in a bench trial are reviewed for clear error, while its conclusions of law are reviewed de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). In applying the clearly erroneous standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

"Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013). A trial court's decision whether to grant specific performance is also reviewed for an abuse of discretion. *Zurcher v Herveat*, 238 Mich App 267, 300; 605 NW2d 329 (1999). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Statutory interpretation presents a question of law that is reviewed de novo. *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999). "If the language in a statute is clear and unambiguous, this Court assumes that the Legislature intended its plain meaning, and the statute must be enforced as written. This Court may read nothing into an unambiguous

statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Bay City v Bay Co Treasurer*, 292 Mich App 156, 166-167; 807 NW2d 892 (2011) (quotation marks and citations omitted).

The construction and interpretation of the language used in a trust is reviewed de novo. *In re Stillwell Trust*, 299 Mich App 289, 294; 829 NW2d 353 (2012). "When construing a trust, a court's sole objective is to ascertain and give effect to the intent of the settlor. Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust." *Id*. (quotation marks and citation omitted).

Loren seeks declaratory relief concerning the proper composition of GLP's board of directors. "The purpose of a declaratory judgment is to definitively declare the parties' rights and duties, to guide their future conduct and relations, and to preserve their legal rights." *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014). Loren contends that Barron and McEvilly were not validly appointed or elected to the GLP board of directors. Loren relies on ¶ 5a of the shareholders agreement, which states, in relevant part:

> The Shareholders agree that until the termination of this Agreement, they will vote all Stock owned or controlled by them so that the Company's Board shall consist of three individuals, G. Pollack, Kocoves, and L. Pollack. No director of the Company who has been nominated by a Shareholder pursuant to this Section may be removed from the Board of Directors with or without cause, except upon the prior authorization or request, by vote or written consent, of the Shareholder who nominated the director. . . . *Any vacancy created by the resignation, death or Disability of G. Pollack shall be filled by a person selected by G. Pollack, either at the time of resignation, or as set forth in any estate planning documents of his, prior to the time of his death or Disability*. For any other director, the remaining Shareholders shall vote to fill the vacancy, which shall be considered a Fundamental Issue. [Emphasis added.]

In addition, ¶ 5c of the shareholders agreement provides that following Gerald's death, no action may be taken on a "fundamental issue" without the vote or written consent of shareholders holding at least 81% of the issued and outstanding stock. Paragraph 10h(*xxiii*) of the shareholders agreement defines "fundamental issue" to include, *inter alia*, the appointment of a director pursuant to ¶ 5a.

It is undisputed that Gerald died while still a director. Section 6C(2)(a)(*x*) of Gerald's Trust Agreement grants to the successor co-trustees the following authority:

> To have all the power and authority to act as an entity owner with respect to any entity (including, without limitation, managing or participating in the management of the entity; *appointing one or more Trustees as a director*, officer, managing partner, or managing member of the entity; and receiving director's fees, officer's salaries, compensation as managing partner, or compensation as managing member) . . . . [Emphasis added.]

Further, § 6C(2)(a)(*xi*) of the Trust Agreement authorizes the co-trustees "to vote in person or by proxy any and all stock and other business interests and securities on any question, or subject matter, or for any other purpose[.]"

Loren contends that Gerald never selected a person to succeed him on the board of directors in accordance with the shareholders agreement and that Gerald could not delegate his authority to select his successor to the co-trustees. Therefore, Loren argues, Gerald's seat on the board of directors must remain forever vacant unless Kocoves and Loren jointly agree to fill it, and the appointments of Barron and later McEvilly to the board were invalid.

We disagree with Loren's argument. Paragraph 5a of the shareholders agreement granted to Gerald the right to select his successor on the board of directors "either at the time of resignation, or as set forth in any estate planning documents of his, prior to the time of his death or Disability." Gerald's estate planning document, the Trust Agreement, authorized the co-trustees to act as an entity owner, including by "appointing one or more Trustees as a director[.]" It is undisputed that Gerald selected Barron and JPMC as the successor co-trustees of the Trust. Gerald thereby authorized the selection of Barron as a director in accordance with the shareholders agreement by providing in the Trust Agreement that a co-trustee could be appointed as a director. The fact that the Trust Agreement did not identify Barron by name as Gerald's choice to serve as a director does not alter the fact that Gerald chose Barron as a co-trustee, provided for the appointment of a co-trustee to the board of directors, and thereby authorized Barron's appointment to the board of directors.

To the extent that Barron was not "selected" by Gerald, we conclude that Gerald delegated his right to choose his successor on the board to the co-trustees by explicitly authorizing the co-trustees to appoint a co-trustee as a director. "Under general contract law, rights can be assigned unless the assignment is clearly restricted. An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt v Bailey*, 260 Mich App 636, 652; 680 NW2d 453 (2004) (citation omitted). There is no restriction on assignments in the shareholders agreement. Paragraph 12e of the shareholders agreement provides that "[t]he terms and conditions of this Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties hereto . . . ." We find unconvincing Loren's contention that Gerald's contractual right to select his successor was the type of right that could not be assigned, as described in *Detroit Postage Stamp Serv Co v Schermack*, 179 Mich 266, 275-276; 146 NW 144 (1914) (holding that a contractual obligation is not assignable if it involved a relation of personal confidence requiring that the rights be exercised and the obligations performed by the contracting party alone). There is no indication that Gerald's contractual right to select his successor on the board of directors was a matter with respect to which the other contracting parties reposed such personal confidence in Gerald that the right could not be assigned. Barron's appointment to the board of directors was therefore valid.

Loren fails to present a developed argument explaining why he believes the appointment of McEvilly to replace Barron on the board was improper. "A party abandons a claim when it fails to make a meaningful argument in support of its position." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). In any event, once Barron resigned as a director, the shareholders were entitled to elect McEvilly as Barron's successor. Paragraph 5a of the shareholders agreement provides that the shareholders may vote to fill a vacancy of any director

other than Gerald. Kocoves and the Trust, who together held more than 81% of the shares, approved McEvilly's appointment to the board of directors. The trial court did not err in rejecting Loren's challenge to the composition of the board and in denying Loren's request for declaratory relief on this issue.

Next, Loren argues that the board of directors at its May 4, 2010 meeting did not validly approve Kocoves's employment contract or validly adopt the corporate bylaws. Loren also challenges the votes at the same meeting to elect Kocoves as president, secretary, and treasurer, and to adopt a proposal to create a new corporate stock ledger showing that the Trust owned 80% of the stock and that Kocoves and Loren each owned 10%. Loren's argument is premised on his view that Barron was not validly appointed as a director to replace Gerald and the fact that the challenged actions all involved Barron's affirmative vote. Loren contends that the vote of qualified directors, i.e., Kocoves and Loren, was therefore one to one on all these matters, except that it was zero to one on the approval of Kocoves's employment contract because, Loren argues, Kocoves could not vote on his own employment contract given his interest in the matter.

We conclude that Loren's argument is devoid of merit. Kocoves's employment contract and the approval of the bylaws presented "fundamental issues" requiring the approval of holders of 81% of the shares of GLP. Paragraphs 10h(*i*), (*x*), and (*xii*) of the shareholders agreement defines a "fundamental issue" to include, respectively, "amendment of the Articles of Incorporation or Bylaws of the Company," "any change in the title, duties, salary, or other compensation of an officer," and "hiring, firing, duties, and compensation of any employees earning in excess of $50,000.00 annually[.]" Pursuant to ¶ 5c of the shareholders agreement, after Gerald's death, no action may be taken on a fundamental issue without the vote or written consent of shareholders holding 81% or more of the issued and outstanding shares. A shareholder resolution dated March 1, 2010, and signed by Kocoves and the co-trustees, Barron and the JPMC representative, adopted the corporate bylaws and approved Kocoves's employment contract. As discussed earlier, Loren did not own 20% of the shares as he claims but acquired 2% a year beginning on December 31, 2005. At the time of the March 1, 2010 shareholder resolution, the Trust and Kocoves collectively held 90% of the outstanding stock. Therefore, shareholders holding 81% or more of the outstanding shares approved the corporate bylaws and Kocoves's employment contract, as required by the shareholders agreement. Further, as discussed, Barron was properly appointed to the board of directors to succeed Gerald. Therefore, the board's vote at the May 4, 2010 meeting to approve Kocoves's employment contract and the corporate bylaws was supported by a majority of the three-person board of directors, given that Kocoves and Barron voted in favor.

Loren does not explicate why he believes the approval of the new stock ledger and the election of Kocoves as president, secretary, and treasurer were improper, other than to assert that these actions involved the affirmative vote of Barron, who Loren claims was not validly elected or appointed to the board of directors. This argument is devoid of merit for the reasons discussed, i.e., Barron was validly appointed to the board. Other than making this assertion, Loren develops no argument to support his challenge to these actions and his contention is therefore deemed abandoned as inadequately presented. *Berger*, 277 Mich App at 712.

Loren further argues, however, that Kocoves's vote in favor of his employment contract should be deemed invalid given his interest in the matter. The shareholders agreement does not

limit votes on fundamental issues to *disinterested* shareholders. Rather, such issues must receive the vote or written consent of shareholders holding at least 81% of the issued and outstanding stock. As discussed, the Trust and Kocoves together held 90% of the shares when they approved Kocoves's employment contract. Loren relies, however, on a provision of the Business Corporation Act (BCA), MCL 450.1545a, to argue that approval by a majority of the disinterested directors is required where a director has an interest in the matter. MCL 450.1545a provides, in relevant part:

> (1) A transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes *any* of the following:
>
> (a) The transaction was fair to the corporation at the time entered into.
>
> (b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and the board, committee, or independent director or directors authorized, approved, or ratified the transaction.
>
> (c) *The material facts of the transaction and the director's or officer's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction*.
>
> (2) For purposes of subsection (1)(b), a transaction is authorized, approved, or ratified if it received the affirmative vote of the majority of the directors on the board or the committee who had no interest in the transaction, though less than a quorum, or all independent directors who had no interest in the transaction. The presence of, or a vote cast by, a director with an interest in the transaction does not affect the validity of the action taken under subsection (1)(b).
>
> (3) For purposes of subsection (1)(c), *a transaction is authorized, approved, or ratified if it received the majority of votes cast by the holders of shares who did not have an interest in the transaction*. A majority of the shares held by shareholders who did not have an interest in the transaction constitutes a quorum for the purpose of taking action under subsection (1)(c). [Emphasis added.]

Under MCL 450.1545a(1)(c) and (3), an interested transaction is insulated from challenge if the material facts and the director's interest were known to the shareholders and the transaction was authorized by the majority of disinterested shareholders. If Kocoves's interested shares are set aside, the Trust controlled approximately 88% of the disinterested shares and Loren controlled approximately 12%. Therefore, because the material facts and Kocoves's interest were known to the shareholders and the Trust approved Kocoves's contract, the transaction is not subject to challenge on the basis of Kocoves's interest under MCL 450.1545a.

Loren contends that shareholders lacked the right to elect officers and that the board of directors must instead do so, but MCL 450.1488(1)(c) allows shareholders to agree to establish

the manner of selecting or removing directors or officers.[4] The shareholders agreement provides that a change in the title, duties, or compensation of an officer is a fundamental issue that requires approval by holders of 81% of the shares. Loren further contends that approval by *both* the board of directors *and* the shareholders was required under the shareholders agreement and that a majority of disinterested directors did not support Kocoves's employment contract. Loren notes that Kocoves's employment contract did not receive the support of a majority of *disinterested directors*, given that Loren opposed the employment contract, Barron supported it, and Kocoves supported it but was interested in the transaction. But the shareholders agreement does not require that a director be disinterested in order to vote. Further, MCL 450.1545a insulates an interested transaction from challenge if *any* of the three alternative conditions are satisfied. As discussed, the condition in MCL 450.1545a(1)(c) and (3) is met here because the material facts and Kocoves's interest were known and the Trust held 88% of the disinterested shares and authorized the transaction. Accordingly, Kocoves's employment contract was properly approved.

Loren next argues that GLP did not validly initiate this lawsuit, the replacement of the corporate accountant was invalid, and salary increases or hiring of GLP employees with salaries above $50,000 were invalid. Loren notes that the definition of a "fundamental issue" in the shareholders agreement includes the initiation of litigation involving the company, appointing or removing accountants, and hiring, firing, or setting of compensation for employees earning in excess of $50,000. Therefore, Loren contends that because action on these issues required the support of the shareholders holding 81% of the issued and outstanding shares, and because he owned 20% of the stock, none of these actions could be taken without his consent. Loren's argument is devoid of merit because it is premised on his incorrect view that he held 20% of the stock when the challenged actions were taken; rather, as discussed, he acquired only 2% a year under the stock purchase agreement and would not have owned 20% until December 31, 2014. Accordingly, Loren's argument on these matters is rejected.

Next, Loren argues that GLP must submit any checks over $5,000 to Loren for approval under ¶ 5d of the shareholders agreement, which provides:

> All checks, investments, incurrence of debt, and/or other items of withdrawal, from any deposit account containing money or securities belonging to

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[4] MCL 450.1488(1)(c) states:

> (1) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with this act in 1 or more of the following ways:
>
> * * *
>
> (c) It establishes who shall be directors or officers of the corporation, or the terms of office or manner of selection or removal of directors or officers of the corporation.

> the Company, in excess of $2,000.00 (either individually or in the aggregate with other checks, investments, or other items of withdrawal related to the same transaction) must be signed by G. Pollack, if he is alive and not Disabled. If he is no longer alive or is Disabled, then the signature of Kocoves or L. Pollack shall be required for any checks, investments, etc. in excess of $2,000.00 but not less than $5,000.00, and *both signatures shall be required for any check, investments, etc., in excess of $5,000.00*. [Emphasis added.]

Loren notes that this provision does not depend on Loren or Kocoves owning 20% or more of the stock, and that it requires both of their signatures on any check in excess of $5,000.

The trial court did not abuse its discretion in denying Loren's request for specific performance of the check-signing provision. The trial court correctly concluded that the contracting parties abandoned the check-signing provision. An abandonment of a contract may be inferred from the parties' conduct and the attendant circumstances. *Dault v Schulte*, 31 Mich App 698, 701; 187 NW2d 914 (1971). A contract is deemed abandoned when one party acts in a manner inconsistent with the contractual terms and the other party acquiesces. *Id*. A contractual provision that has been abandoned is not subject to specific enforcement. *Higbie v Higbie*, 306 Mich 577, 599; 11 NW2d 248 (1943).

The final pretrial order reflects that the parties stipulated that: Loren has never been a signatory on any bank account belonging to GLP; Loren has never signed a check drawn on a GLP bank account; Loren has known for years that Kocoves is and has been signing checks on behalf of GLP; Kocoves has been an authorized signatory on GLP's bank account since July 15, 2008, when Gerald added Kocoves to the account; Kocoves has been the only authorized signatory on GLP's bank account since Gerald's death; and Loren has accepted numerous checks in excess of $5,000 drawn on a GLP bank account that were signed only by Kocoves. On cross-examination at trial, Loren acknowledged knowing before Gerald's death that Kocoves was signing checks on behalf of GLP. Loren never signed checks on behalf of GLP. Loren acknowledged accepting and negotiating GLP checks payable to him or his corporation for amounts over $5,000 that were signed only by Kocoves. Kocoves testified that the check-signing provision of the shareholders agreement did not become an issue until after this lawsuit was filed. Loren told Kocoves numerous times that he had no interest in coming in everyday and signing checks and that he did not care about signing checks. According to Kocoves, Loren was lying when he testified that he requested the right to sign checks. Loren saw Kocoves signing checks and never made any comment about it. Loren never complained about not wanting to cash GLP checks that did not bear his signature. Barron likewise testified that Loren was aware for a substantial period of time that Kocoves was acting as the sole check-signer as appointed by Gerald; in 2008, Gerald signed a card that was submitted to the bank, authorizing only Kocoves to sign checks. During Gerald's final illness, Kocoves was basically running the company with Gerald's permission, and Kocoves was signing many of the checks with Gerald's blessing when Gerald was not around. Barron first became aware that Loren wanted to sign checks after this lawsuit was filed. Loren did not raise the issue when Gerald went into the hospital and was unable to sign checks.

Although Loren claimed at trial that he told Barron, Kocoves, and others that he wished for the check-signing provision of the shareholders agreement to be enforced, the trial court did

not credit this testimony. The court found that Loren was aware that Kocoves was added as a signatory on GLP bank accounts and never objected to that practice before this litigation. This Court affords deference "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). Overall, the facts establish that the contracting parties acted in a manner inconsistent with the provision requiring that Loren and Kocoves both sign checks over $5,000, and Loren acquiesced in this practice by accepting numerous checks over $5,000 signed only by Kocoves. The record supports the trial court's finding of abandonment.

In addition, the above facts reflect that Loren has waived his right to enforcement of the check-signing provision. "[A] waiver is a voluntary and intentional abandonment of a known right." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). "A party always has the option to waive a condition or stipulation made in his own favor . . . ." *Cobbs v Fire Ass'n of Philadelphia*, 68 Mich 463, 464; 36 NW 222 (1888). Whether the facts of a case establish a waiver presents a question of fact. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). Clear and convincing evidence of a waiver or modification is required. *Quality Prod & Concepts Co*, 469 Mich at 364-365. As discussed, it is uncontested that Loren knew for years that Kocoves alone was signing GLP checks over $5,000, and that Loren accepted numerous checks over $5,000 that were drawn on a GLP account and signed only by Kocoves. Loren was not merely silent; he affirmatively acquiesced in the practice by accepting and negotiating checks signed only by Kocoves, and by rarely coming to the office even though checks must be signed daily. These facts support the finding that Loren voluntarily and intentionally abandoned his known right to sign checks over $5,000. Cf. *id.* at 377-378 (finding mere silence insufficient to establish a waiver). Loren notes that the shareholders agreement contained a provision requiring any modification to be in writing, but Loren fails to acknowledge that such a provision does not preclude a finding of waiver. "[I]t is well established in our law that contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses." *Id*. at 372. The trial court's findings were sufficient to establish a waiver.

Further, the trial court did not abuse its discretion in concluding that it would be inequitable to grant specific performance of the check-signing provision. Specific performance is an equitable remedy. *Rowry v Univ of Mich*, 441 Mich 1, 10; 490 NW2d 305 (1992). "The remedy of specific performance is an extraordinary one granted only in unusual cases to prevent irreparable harm." *Barbers Local 552 v Sealy*, 368 Mich 585, 588; 118 NW2d 837 (1962). The trial court correctly noted that Loren has failed to present evidence of any improper expenditure by GLP and there is no indication that Loren will suffer irreparable harm by denying specific enforcement of his right to sign checks over $5,000. The trial court found that GLP would suffer irreparable harm if this contractual provision was enforced. Testimony at trial established that Loren was rarely in the GLP office. GLP issues numerous checks on a daily basis given the nature of its business; indeed, Loren acknowledged that "hundreds of thousands of dollars flow[] through GLP weekly." There are payroll checks, agent commission checks, and checks related to school district remitter funds that flow through GLP. Numerous checks have to be signed on a daily basis or it could have a serious negative effect on GLP's business. Kocoves testified that Loren comes to the office 10 to 20 times a year. Everyday Kocoves signs 20 to 50 checks over $5,000; the checks must be issued daily because clients' deposits have to go into their investment accounts quickly. Kocoves stated that GLP would go out of business if it held clients' money for

more than 24 to 48 hours. Given Loren's past threatening and disruptive conduct, the trial court found credible the fear that Loren would hold the check-writing process "hostage," which could pose a serious threat to GLP's survival. The trial court also noted the uncontested fact that Loren owes a substantial amount of debt to the IRS and to his former attorneys in this case, despite his lucrative earnings as a commissioned salesperson. The trial court concluded it would not be in GLP's best interest to entrust Loren with the financial responsibility of signing checks. The trial court's findings were not clearly erroneous and its decision that the extraordinary remedy of specific performance was not warranted on these facts fell within the range of reasonable and principled outcomes.

Loren next argues that the trial court erred in striking Loren's demand for a jury trial. We conclude that Loren has waived review of this issue.

"A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co v Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009). A waiver is a voluntary and intentional abandonment of a known right. *Quality Prod & Concepts Co*, 469 Mich at 374. " 'The usual manner of waiving a right is by acts which indicate an intention to relinquish it, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive.' " *The Cadle Co*, 285 Mich App at 254-255, quoting *Book Furniture Co v Chance*, 352 Mich 521, 526-527; 90 NW2d 651 (1958). "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Mich/Wis, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006). " 'A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute.' " *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). See also *In re FAI-75 Expressway in Detroit*, 6 Mich App 605, 608-609; 149 NW2d 903 (1967) (holding that the right to a jury trial in a condemnation proceeding may be waived). Further, MCR 2.509(A) provides:

> **(A) By Jury.** If a jury has been demanded as provided in MCR 2.508, the action or appeal must be designated in the court records as a jury action. The trial of all issues so demanded must be by jury unless
>
> (1) the parties agree otherwise by stipulation in writing or on the record, or
>
> (2) the court on motion or on its own initiative finds that there is no right to trial by jury of some or all of those issues.

In this case, GLP moved to strike Loren's jury demand, noting that as a result of dispositive motions that had been granted, the only claims remaining to be tried were GLP's complaint for injunctive relief and incidental damages, and three counts of the counter-complaint. GLP waived its right to seek monetary damages from Loren under its complaint, leaving only an equitable claim for injunctive relief to be tried with respect to GLP's complaint. Given the trial court's prior dispositive rulings, Loren had no monetary claims remaining, except for a claim of indemnification, which could not be tried until GLP's complaint is tried. Loren's remaining counterclaims sought only equitable relief and could not be tried by a jury. GLP

therefore asked that the court strike Loren's jury demand, schedule the remaining claims for a bench trial, and defer the trial of Loren's indemnification claim until after the trial of GLP's complaint.

On August 8, 2012, a hearing was held on GLP's motion to strike Loren's jury demand. GLP's counsel noted that he had not received a response to the motion from Loren's counsel. Loren's counsel then stated:

> We did not file a response, your Honor, because we believed that the statements in the brief are pretty accurate and we, at this time, unless the Probate Court determines that the shares are to be reversed and the claims should be revived in some way, to make it a legal claim, at this time as it stands they are all equitable.

GLP's counsel then stated, "I guess that solves that problem, your Honor." The trial court responded, "I guess so. I will be the stuckee (ph)."

On August 13, 2012, the trial court entered an order, stating in relevant part:

> IT IS FURTHER ORDERED THAT the Motion to Strike was unopposed and is granted; trial shall proceed on the date scheduled and shall be a non-jury trial on the following claims, all of which are equitable in nature and which are the only remaining claims in the case at this time: (1) GLP's claim for an injunction against Loren Pollack, as pled in the Complaint, (2) Loren Pollack's claim for specific performance of the Shareholder's [sic] Agreement as to the issues of his right to sign checks and limiting directors to only Loren Pollack and Alex Kocoves, as pled in Count I of the Second Amended Counterclaim, and (3) Loren Pollack's claim for declaratory relief, as pled in Count XV of the Second Amended Counterclaim, other than the portions of the claim set forth in sub-paragraphs 127.c., g. and h., which were already dismissed.
>
> IT IS FURTHER ORDERED THAT if Loren Pollack prevails in his defense of the claim by GLP for an injunction, then he will be able to proceed on his claim for monetary damages for indemnification under Count XVI of the Second Amended Counterclaim, to the extent consistent with this Court's prior ruling as to that claim, and if that happens, that claim can then proceed to a jury trial, which would occur after the non-jury trial.

The above facts establish that Loren waived his right to a jury trial. Loren's counsel expressly stated on the record that the statements in the brief supporting GLP's motion to strike the jury demand were "pretty accurate" and agreed that, barring a later determination by the probate court that would somehow revive dismissed claims, "at this time as it stands they are all equitable." The trial court then entered an order, to which the parties stipulated with respect to form, stating that the motion to strike the jury demand was unopposed and was granted, leaving only the indemnification claim to be tried to a jury if Loren prevailed in his defense of GLP's claim for an injunction. Given Loren's counsel's expression on the record of agreement with the statements in GLP's motion to strike the jury demand, and counsel's express recognition of the

equitable nature of the remaining claims, Loren cannot now take a contrary position on appeal. *Grant*, 272 Mich App at 148. Allowing Loren to assign error to the decision to strike the jury demand would be to permit Loren to harbor error as an appellate parachute. *Marshall Lasser, PC*, 252 Mich App at 109. Because Loren's counsel waived this issue, the waiver eliminated any error and appellate review is precluded. *The Cadle Co*, 285 Mich App at 255.

Loren next argues that the trial court abused its discretion by granting injunctive relief to GLP prohibiting Loren from competing with GLP or soliciting GLP's employees, agents, or clients. We disagree. This Court reviews a trial court's decision whether to grant an injunction for an abuse of discretion. *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

Paragraph 7 of the shareholders agreement contained the following covenants:

> **7. Covenants.**
>
> **a.** Non-Competition. Kocoves, L. Pollack, and any Future Shareholders each agree that, while they are employed by or remain as Shareholders, Officers or Directors of the Company and for a period of two (2) years thereafter (the "Restricted Period"), he shall not engage in any Competitive Activity without the prior written consent of the Company, either as shareholder, principal, investor, partner, consultant, advisor, agent, sole proprietor, independent contractor or employee within the State of Michigan.
>
> **b.** Non-Solicitation. Each Shareholder, other than G. Pollack, agrees that during the Restricted Period, he shall not compete with the Company in any way including, but not limited to any of the following, directly or indirectly: (i) recruit or solicit any employee or sales agent of the Company to discontinue his or her employment or engagement; seek to employ or retain any employee or agent of the Company; or cause any business, person, firm or company which competes directly or indirectly with the Company to seek or solicit the employment or retention of any employee or agent; or (ii) solicit or encourage any business, person, firm or company which has a business relationship with [the] Company to seek to discontinue the relationship.
>
> **c**. Reasonable Restriction. Each Shareholder agrees that the duration, activities restricted and geographic scope of the provisions set forth in this Section are reasonable, and are reasonably necessary to protect the business and good will of the Company. If any court determines that the duration, activities restricted or geographic scope, or any combination thereof, are unreasonable and that any of these provisions is to that extent unenforceable, each Shareholder agrees that the provision shall remain in full force and effect for the greatest time period, with respect to the broadest type of activities described, and in the greatest geographic area that would not render it unenforceable.

In its May 10, 2013 opinion and order following the bench trial, the trial court stated that GLP's position was that Loren had engaged in a course of conduct that breached his fiduciary duties to GLP and his obligations under the shareholders agreement. GLP was claiming that Loren circulated defamatory and disparaging communications to employees and third parties about GLP and its management, including threats to disclose confidential information to competitors of GLP and school districts in the market targeted by GLP. The trial court found that Loren engaged in a course of conduct that was "most detrimental" to GLP's operations. The court noted that as a director and officer of GLP, Loren owes a fiduciary duty to the corporation, including a duty to discharge his duties in good faith in and in the best interest of the corporation. The court found ample evidence that Loren acted in direct contravention of these duties, putting GLP in real and imminent danger as a result of certain communications.

In particular, the court found that Loren sent a series of emails that were threatening, defamatory, and involved sensitive information. For example, a February 27, 2010 email from Loren to Kocoves, the co-trustees, and Loren's attorneys contained "a diatribe of alleged wrongdoing on the part of Kocoves and others and echoes that of a conspiracy theory. In this email, Loren threatened to publicize his complaints by alerting the media." These emails continued for months, even after this action was commenced. The court found the emails contained threats of harm that were imminent and caused legitimate concern for the corporation. Loren threatened to disclose his alleged mistreatment and his dissatisfaction with Kocoves's employment contract to GLP's agents, clients, and the media. He also threatened to picket or protest in front of school district buildings, Barron's law firm office, and the offices of JPMC and to post information on social media. In a meeting with Kocoves, Loren threatened the operations of GLP by claiming to be "ten times worse" than his brother, Leslie Pollack ("Leslie"), and stating that he would "rather have it all burn down" unless he "gets [his]." The court also referenced an anonymously authored letter known as the "knowledge is power" letter that was disparaging of GLP, contained inside information that could only be known to Loren, and was similar in tone to Loren's email communications. Further, Loren interfered with GLP's potential business relationship with LSW, a national insurance company, to GLP's detriment by sending to LSW's president an email suggesting fraudulent activity and advising LSW's president to cease discussions with Barron and Kocoves concerning the proposed business relationship. LSW then ceased negotiations with GLP. Even after Loren stipulated to the entry of an injunction prohibiting disparaging or defamatory communications about GLP, Loren emailed GLP's accountant to accuse him of malpractice and sent additional emails complaining of how he and others were treated at GLP, including threatening to report GLP to a regulatory authority and making disparaging comments about Kocoves and GLP operations. The court also referenced testimony about Loren's disrespectful comments during a presentation at an agents meeting and his unauthorized removal of a file from outside of McEvilly's office. The court found this conduct inconsistent with the interests of GLP and that it could harm the corporation if unrestrained. The court found that an injunction was appropriate.

The court subsequently entered an order granting a permanent injunction, Loren moved for reconsideration, and the court denied the motion for reconsideration but agreed to modify the injunctive order:

> [Loren] is correct in stating that the Court's May 10, 2013 Opinion and Order offered no specific discussion about the subject of competitive activity;

> however, the Opinion and Order is replete with factual findings relative to [Loren's] conduct in contravention of his duties under the Shareholder's Agreement by which he is bound as well as his fiduciary duties as an officer and director of GLP. The injunction is consistent with [Loren's] rights and duties under the law as well as the Shareholder's Agreement – to which [Loren] agreed. The Court does find however the proposed amended injunction is more appropriately tailored to better serve the needs and rights of the parties in fulfilling their duties to GLP. Upon receipt of this Order, GLP shall present the amended injunction for entry. The balance of [Loren's] request is denied as he has not made arguments sufficient to demonstrate palpable error by which the Court and the parties have been misled or shown that a different disposition of the motion must result from correction of the error pursuant to MCR 2.119(F)(3). [Loren's] motion is therefore **DENIED**.

On November 6, 2013, the trial court entered an amended order granting a permanent injunction, which stated, as relevant to this issue, in ¶ 4:

> 4. Loren Pollack is enjoined from directly or indirectly soliciting and/or hiring employees or agents of GLP, soliciting clients of GLP, or competing with GLP in any way so long as Loren Pollack is a shareholder, officer or director of GLP.

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992). Loren briefly asserts, without citing authority, that there are no supporting findings of fact to establish a breach of the restrictive covenants in the shareholders agreement. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) (citations omitted). In any event, Loren's assertion lacks merit. In denying Loren's motion for reconsideration, the trial court explained:

> [Loren] is correct in stating that the Court's May 10, 2013 Opinion and Order offered no specific discussion about the subject of competitive activity; however, the Opinion and Order is replete with factual findings relative to [Loren's] conduct in contravention of his duties under the Shareholder's Agreement by which he is bound as well as his fiduciary duties as an officer and director of GLP. The injunction is consistent with [Loren's] rights and duties under the law as well as the Shareholder's Agreement – to which [Loren] agreed.

As summarized above, the trial court's May 10, 2013 opinion and order contains detailed factual findings concerning Loren's conduct that the court found breached his fiduciary duties under MCL 450.1541a. Further, as discussed below, the injunction was consistent with Loren's obligations under the restrictive covenants of the shareholders agreement and Loren's fiduciary duties as a director and officer of GLP. Overall, we do not find convincing Loren's cursory

assertion that the trial court failed to make the requisite factual findings to support its injunctive order.

Next, Loren maintains that the injunction exceeds the scope of the restrictive covenants contained in the shareholders agreement. Loren relies on MCL 445.774a(1), which states:

> An 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. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

Loren cites case law for the proposition that a restraint on competition is enforceable only to the extent that it is reasonable. See, e.g., *Stoia v Miskinis*, 298 Mich 105, 118; 298 NW 469 (1941); *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 495; 650 NW2d 670 (2002). According to Loren, the injunction is geographically overbroad because it is not limited to the state of Michigan and is overbroad in scope because it prohibits Loren from directly or indirectly competing with GLP in any way. We disagree with Loren's arguments.

Regarding the claim that the injunction is geographically overbroad, Loren notes that ¶ 7a prohibits Loren from engaging in "any Competitive Activity . . . within the State of Michigan" whereas this geographical limitation is not contained in the injunction, which bars Loren from "competing with GLP in any way so long as Loren Pollack is a shareholder, officer or director of GLP." According to Loren, the injunction prohibits Loren from engaging in competitive activity not only in Michigan, "but throughout the Universe." Loren says that the injunction should go no further than the contractual covenant.

Loren's argument focuses on MCL 445.774a, which applies to employment relationships, and on the language of the shareholders agreement. However, the trial court's decision was also based on Loren's fiduciary duties to GLP as an officer and director of the corporation. "[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another." *Teadt v Lutheran Church Mo Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999). MCL 450.1541a(1) 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.

"It is beyond dispute that in Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve." *Prod Finishing Corp v Shields*, 158 Mich App 479, 486; 405 NW2d 171 (1987). As explained in *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 306-307; 600 NW2d 664 (1999) (citations, quotation marks, and emphasis omitted):

> [T]he directors of a corporation owe fiduciary duties to stockholders and are bound to act in good faith for the benefit of the corporation. A fiduciary duty is a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person.

See also *Thomas v Satfield Co*, 363 Mich 111, 119; 108 NW2d 907 (1961) ("[W]e entrust a corporation's directors with the management of its affairs and impose upon them fiduciary duties requiring the utmost good faith whenever they deal with the corporation they serve."); *Wagner Electric Corp v Hydraulic Brake Co*, 269 Mich 560, 564; 257 NW 884 (1934) ("Under the law of this state and elsewhere, the directors of a private corporation stand in a fiduciary relation to its stockholders, and are bound to act in good faith for the benefit of the corporation.").

As an officer and director of GLP, Loren was not merely bound by the shareholders agreement but also owed a fiduciary duty to act in good faith for the benefit of the corporation and to subordinate his personal interests to those of the corporation. The injunction effectuates this fiduciary duty by barring Loren from engaging in competition with GLP. The fact that the injunction is not limited to the state of Michigan does not render it invalid. It is true that the shareholders agreement bars competition within the state of Michigan, but Loren cites no authority suggesting that a director's or officer's fiduciary obligations to a corporation end at the border of a state. Loren has the option of stepping down as a director and officer of GLP if he wishes to be free from the injunction; the injunction expressly states that it applies "so long as Loren Pollack is a shareholder, officer or director of GLP."[5] Thus, we conclude that Loren's challenge to the geographical breadth of the injunction lacks merit.

Loren also contends that the scope of the injunction is overbroad in prohibiting him from directly or indirectly competing with GLP in any way. Loren acknowledges that the restrictive covenant in the shareholders agreement says that he shall not compete with GLP "in any way," but he asserts that this language should be read in conjunction with a 1992 agents agreement and should be limited to barring attempts to take away present or past clients of GLP or engaging in the same or similar business as GLP. Loren contends that the language of the injunction is ambiguous and leaves him to guess whether a particular activity is competitive at the risk of being held in contempt of court. Because GLP sells fixed annuities, Loren thinks he should be

[5] GLP acknowledges that the injunction would terminate in this circumstance, noting that the injunction is less restrictive in this respect than the covenants in the shareholders agreement, which would continue for two years after Loren sells his stock.

free to sell variable annuities, mutual funds, stocks, and bonds to anyone, and that he is free to deal with Michigan clients or customers of GLP as long as he does not solicit or take away those clients from GLP on the fixed asset side. In response, GLP asserts that the language of the injunction is sufficiently clear as it tracks the language of the restrictive covenant in the shareholders agreement, and that if Loren is not certain whether a particular activity comprises competition, then he is free to seek declaratory relief to avoid subjecting himself to sanctions under the injunction. GLP notes that Loren is free to sell his stock and resign his positions as officer and director of GLP if he wishes to be free from the injunction. GLP disputes Loren's view that he is free to sell variable annuities while he continues to own stock and serve as a director and officer of GLP, stating that Loren's sales of such products would likely cause GLP customers to move money out of GLP fixed asset products or not to purchase such products.

We agree with GLP that the injunction is sufficiently clear to apprise Loren of what he is prohibited from doing. The shareholders agreement that Loren entered in 2006 bars him from competing with GLP "in any way . . . ." Likewise, the injunction says that Loren may not compete with GLP "in any way" so long as he is a shareholder, officer, or director of GLP. That is, the injunction is very similar to the language that Loren himself agreed to in the shareholders agreement. To the extent that Loren is uncertain whether a particular activity constitutes competition with GLP, and to the extent that GLP is unwilling to waive any objection to that activity, Loren is free to seek declaratory relief in lieu of risking sanctions for violating the injunction.

Loren and GLP attempt to litigate in this Court whether certain specific activities constitute competition with GLP and are therefore barred by the injunction. The parties are particularly interested in whether Loren may sell variable annuities given that GLP sells fixed annuities. However, any argument concerning whether Loren may engage in such specific activities is not preserved because it has not been addressed and decided by the trial court. *Hines*, 265 Mich App at 443. Further, any such claim is not ripe for review at this point. "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). "The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Huntington Woods v Detroit*, 279 Mich App 603, 615; 761 NW2d 127 (2008) (quotation marks and citation omitted). The record does not establish that Loren has sold or is attempting to sell the specific financial products that he claims are not covered by the injunction and that GLP contends are covered. Because the parties' arguments concern contingent future events that may not occur as anticipated or at all, any claim concerning whether the injunction bars the sales of these specific types of products is not ripe. The parties are free to seek declaratory relief on this matter if they wish to do so.

Loren next challenges the portion of the injunction prohibiting him from disseminating defamatory or disparaging communications. Constitutional issues are reviewed de novo. *Madugula v Taub*, 496 Mich 685, 695; 853 NW2d 75 (2014). "When addressing defamation claims implicating First Amendment freedoms, appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine

whether the statements are subject to First Amendment protection." *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995).

The trial court's November 6, 2013 amended order granting a permanent injunction referenced the court's May 10, 2013 opinion and order finding that: Loren owes a fiduciary duty to GLP as a director and officer of GLP; Loren engaged in defamatory communications; and Loren had previously stipulated to a June 23, 2011 preliminary injunction that remained in effect. As relevant to this issue, the November 6, 2013 amended order then set forth in ¶¶ 1-3 the following injunctions:

> 1. Loren Pollack and those persons in active concert or participation with him who receive actual notice of this Final Order by personal service or otherwise, are enjoined from disseminating, either directly or indirectly, confidential, proprietary, defamatory and/or disparaging communications, information or trade secrets, relating in any way to GLP, its related entities, its operations, officers, directors, shareholders, employees and/or agents, or any Trustee of the Gerald L. Pollack Trust, including but not limited to Alex Kocoves, Ronald Barron, Walter Marsh or JPMorgan Chase ("Prohibited Communications"), by any method, including but not limited to emails and letters to GLP's employees, agents, clients, potential clients, competitors, potential competitors, vendors (including but not limited to ING and LSW and individuals affiliated with them), school districts and/or potential purchasers or vendors.
>
> 2. The Prohibited Communications shall include, but not be limited to, statements and/or communications (whether verbal, written or electronic) which:
>
> > a. Undermine, or attempt to undermine, the authority of any members of GLP management, such as statements that Loren Pollack is in control of GLP, may fire or hire any individuals at GLP, may enter into or discontinue any agreements or contracts on behalf of GLP, or may cause GLP to do business or refrain from doing business with any individuals or entities, and/or;
> >
> > b. Directly or indirectly suggest that any members of GLP management, officers, directors or shareholders lack, and/or call into question any of the following as to those individuals: integrity, capability, responsibility, or authority.
>
> 3. Loren Pollack is enjoined from threatening, harassing, or bullying GLP's employees and/or agents.

As explained in *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005):

> The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.

"A plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 262; 833 NW2d 331 (2013). Loren asserts on appeal that GLP failed to plead with the requisite specificity allegations of defamation. This argument is not preserved because it was not raised, addressed, and decided below. *Hines*, 265 Mich App at 443. Moreover, the argument is inadequately briefed on appeal; Loren merely asserts in a cursory fashion that the allegations of defamation are general and insufficiently exact. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Johnson*, 256 Mich App at 339-340. In any event, as discussed below, the injunction was issued not only on the basis of defamation but also premised on Loren's fiduciary duties as a director and officer of GLP.

Next, Loren argues that the trial court failed to make findings of fact identifying any specific statement that constituted defamation of GLP or a specific threat made by Loren. Loren further contends that even if defamation occurred, the trial court's injunction violates the First Amendment because it is a prior restraint and because it is not carefully tailored to the scope of the wrongful conduct proved at trial.

In response, GLP argues that Loren consented to ¶ 1 of the permanent injunction concerning the dissemination of communications because he stipulated to the entry of a preliminary injunction containing similar language that was incorporated into the permanent injunction. GLP further contends that Loren waived his arguments with respect to ¶ 1 of the injunction comprising an unconstitutional prior restraint because he testified at trial that he would not engage in various actions, including: disparaging GLP; defaming Kocoves, Barron, or McEvilly; sending disparaging or defamatory communications to GLP's clients or competitors; or threatening or intimidating GLP's employees or agents. We disagree with GLP's contention that either the stipulation to the preliminary injunction or Loren's testimony at trial waived his appellate contention that the permanent injunction constitutes a prior restraint in violation of the First Amendment. A waiver is a voluntary and intentional abandonment of a known right. *Quality Prod & Concepts Co*, 469 Mich at 374. Although Loren consented to a *preliminary* injunction and testified that he would not engage in the conduct at issue, he did not acquiesce in the issuance of a *permanent* injunction subjecting him to sanctions for engaging in the conduct. Loren's stipulation to a *preliminary* injunction and his testimony that he would not engage in this conduct did not amount to a voluntary and intentional abandonment of his right to challenge the issuance of a *permanent* injunction as an unconstitutional prior restraint.

Turning to the merits, we disagree with Loren's contention that the injunction amounts to an unlawful prior restraint of speech. Loren's argument disregards the fact that the injunction was issued not only on the basis of defamatory statements but also on the basis of Loren's breaches of his fiduciary duties as an officer and director of GLP.

If the injunction had been issued solely on the basis of Loren's defamatory statements, we would agree with Loren that the injunction as framed was an unconstitutional prior restraint. "The term 'prior restraint' is used to describe an administrative or judicial order that forbids certain communications in advance of the time that the communications are to occur. Temporary

restraining orders and permanent injunctions, which actually forbid speech activities, are classic examples of prior restraints." *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 622-623; 673 NW2d 111 (2003) (citation omitted). "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Org for a Better Austin v Keefe*, 402 US 415, 419; 91 S Ct 1575; 29 L Ed 2d 1 (1971).

In *McFadden v Detroit Bar Ass'n*, 4 Mich App 554, 558; 145 NW2d 285 (1966) (citation omitted), this Court stated that an injunction prohibiting further distribution of an allegedly defamatory report was not warranted:

> [I]t is a familiar and well settled rule of American jurisprudence that equity will not enjoin a defamation, absent a showing of an independent economic injury – which does not appear in the instant case. The primary reason is an abhorrence of previous restraints on freedom of speech. Additional reasons for the denial of injunctive relief are that there is an adequate remedy at law, i.e., an action for damages, and that the defendant in a defamation action has the right to a jury trial which would be precluded by granting of an injunction.

McFadden was decided before November 1, 1990, and it therefore is not binding on this Court. MCR 7.215(J)(1); *In re Stillwell Trust*, 299 Mich App at 299 n 1. Since *McFadden*, neither this Court nor our Supreme Court has addressed whether a party may be enjoined from making statements that a fact-finder has determined to be false. Although not binding on this Court, case law from other jurisdictions may be considered persuasive. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007).

The Kentucky Supreme Court's decision in *Hill v Petrotech Resources Corp*, 325 SW3d 302 (Ky, 2010), is instructive. The Kentucky Supreme Court in *Hill* found that in light of the recognition that defamatory speech was not protected by the First Amendment, a modern rule had developed that, once a trial court or a jury has finally determined that speech is defamatory, that speech may be enjoined. *Id*. at 308. The *Hill* Court noted that this rule was stated in 42 Am Jur 2d, Injunctions, § 97, as follows:

> [T]he prohibition [against enjoining defamation] is not absolute, as there are exceptional cases in which a prior restraint is acceptable. For instance, an injunction would issue to prohibit a defendant from reiterating statements which had been found in current and prior proceedings to be false and libelous to prevent future injury to the libel plaintiff's personal reputation and business relations. An injunction restraining the publication of matter defaming a plaintiff personally [is] proper where there [is] no adequate remedy at law because of the recurrent nature of the defendant's invasions of the plaintiffs [sic] rights, the need for a multiplicity of actions to assert the plaintiffs [sic] rights, the imminent threat of continued emotional and physical trauma, and the difficulty of evaluating the injuries in monetary terms. [*Hill*, 325 SW3d at 308.]

The Kentucky Supreme Court in *Hill* adopted the modern rule, holding that defamatory speech may be enjoined after a final determination that the speech at issue was false if the injunction is narrowly tailored to limit the prohibited speech to that which has been determined to be false.

Id. at 309. We agree with the Kentucky Supreme Court's reasoning in *Hill* for adopting the modern rule and hold that defamatory speech may be enjoined after a determination that the speech was false. Because defamatory speech is not protected by the First Amendment, such an injunction does not violate the First Amendment right of free speech. See also *Karhani v Meijer*, 270 F Supp 2d 926, 930 n 4 (ED Mich, 2003) (stating that although "equity will not enjoin a libel" absent extraordinary circumstances, the United States Court of Appeals for the Sixth Circuit has permitted a permanent injunction for statements found by the trier of fact to be libelous).

In the present case, the trial court did not make findings explaining precisely which statements Loren made that were false and defamatory, nor did the trial court limit its injunction to prohibiting Loren from republishing statements that the court had determined were false. The court found that Loren engaged in a course of conduct that was detrimental to GLP's operations. The court made a general finding that Loren sent a series of email communications that were threatening, defamatory, and involved sensitive information. The court referenced a February 27, 2010 email to Kocoves, the co-trustees of the Trust, and Loren's attorneys, that contained "a diatribe of alleged wrongdoing on the part of Kocoves and others and echoes that of a conspiracy theory" and that threatened to publicize complaints by alerting the media. But the court did not identify with specificity the allegedly false statements that were contained in the email.

The court also found that Loren continued sending emails for months, making threats of harm that were imminent and that caused legitimate concerns for GLP. The court stated that Loren had threatened to disclose his alleged mistreatment and dissatisfaction with Kocoves's employment contract to GLP's agents and clients and to the media. The court noted that Loren had threatened to picket or protest in front of school districts, Barron's law firm office, and JPMC offices, and to post information on social media outlets. The court noted Kocoves's testimony that Loren had made statements threatening GLP operations by being "ten times worse" than Leslie and that Loren would "rather have it all burn down" unless he "gets [his]." The court referenced the anonymous "knowledge is power" letter that contained disparaging inside information, including information that Kocoves indicated was known only to Loren, and that was written in a tone similar to Loren's emails. The court took note of evidence that Loren interfered with GLP's potential business relationship with LSW by emailing LSW's president to suggest fraudulent activity and advising LSW's president to cease discussions with Barron and Kocoves concerning the proposed relationship, after which the negotiations ceased. The court also noted that after the entry of the preliminary injunction barring disparaging and defamatory communications, Loren sent additional emails accusing GLP's certified public accountant of malpractice, complaining of how Loren and others were being treated at GLP, threatening to report GLP to a regulatory authority, and making disparaging remarks about Kocoves and GLP operations in general. The court noted that Loren engaged in disrespectful behavior at an agents meeting, yelling from the back of the room during a presentation regarding a LSW product, "That's illegal, you can't do that." The court noted evidence that Loren had removed a file containing proprietary and confidential information from outside of McEvilly's office. The court observed that employees complained to Kocoves about feeling bullied by Loren and that Loren was involved in a physical altercation with Leslie in GLP's office. The court found that Loren's conduct was "inconsistent with the interests of GLP and can only harm the corporation if unrestrained." The court noted Kocoves's testimony that negative communications to one school

district could travel to other school districts, creating a "domino effect" that would negatively affect GLP's success.

The court found that a permanent injunction was warranted. The court rejected Loren's contention that the injunction comprised an unconstitutional prior restraint, noting that Loren had already agreed to a similar injunction and testified that he would not engage in such conduct. The court noted that the interest of the public and third parties was paramount. The court found that GLP employees have suffered harm from Loren's conduct and that "those who have invested their retirement funds with GLP have an interest in preserving the stability of their investments."

Overall, the court's findings reflect that Loren engaged in a series of communications that amounted to complaints about the way he was being treated and threats to take his dissatisfaction to GLP's agents and clients and to the media. The court referenced Loren's threatening statements to Kocoves about being "ten times worse than" Leslie and preferring to have it "all burn down" unless Loren "gets [his]," as well as Loren's allegation of fraud in his email to LSW's president. The trial court did not, however, specifically identify which statements that Loren made were false and defamatory. Although the court made a general finding that Loren made defamatory statements, the court did not make sufficiently particularized findings concerning *which* statements were false and defamatory.

Moreover, the court's injunction was not limited to prohibiting Loren from republishing the statements that had been adjudicated to be false. Instead, the injunction is framed more broadly to prohibit Loren from disseminating "confidential, proprietary, defamatory and/or disparaging communications, information or trade secrets, relating in any way to GLP, its related entities, its operations, officers, directors, shareholders, employees and/or agents, or any Trustee of the Gerald. L. Pollack Trust, including but not limited to" Kocoves, Barron, Marsh, or JPMC. The injunction further bars communications that undermine or attempt to undermine the authority of members of GLP management or that suggest that members of GLP management, officers, directors, or shareholders lack integrity, capability, responsibility, or authority. Loren was also barred from threatening, harassing, or bullying GLP's employees or agents. The injunction therefore does not fall within the modern rule permitting an injunction as described in *Hill* because it is not limited to prohibiting the republication of statements that the court had determined were false.

Nonetheless, we are not persuaded that the injunction is an unconstitutional prior restraint. Loren fails to acknowledge that the injunction was issued not merely on the basis of his defamatory comments but also on the basis of his fiduciary obligations as a director and officer of GLP. The court referenced these fiduciary obligations numerous times when deciding to issue the injunction. In its May 10, 2013 opinion and order, the court, after noting that Loren engaged in a course of conduct that was "most detrimental to the operations of GLP[,]" stated:

> In his capacity as a director and officer of GLP, Loren owes a fiduciary duty to the corporation. Specifically, Loren is obligated to discharge his duties in good faith and in the best interest of the corporation. MCL 450.1541a. There is ample evidence before the Court to suggest Loren has acted in direct contravention of

> these duties and this "real and imminent danger" to GLP exists as a result of certain communications.

The court then addressed Loren's numerous disparaging and threatening communications and actions summarized above. Later in this opinion and order, the court stated: "The prohibited conduct is already of the type and character precluded under Loren's fiduciary duties." Also, in the court's November 6, 2013 amended order granting a permanent injunction, the court emphasized at the outset that the court had "found that [Loren] owes a fiduciary duty to [GLP] in his capacity as a director and officer of [GLP]" as a basis for issuing the injunction.

"Use of trade secrets in violation of a confidentiality agreement or in breach of a fiduciary duty is not protected by the First Amendment." *Ford Motor Co v Lane*, 67 F Supp 2d 745, 750 n 6 (ED Mich, 1999). Thus, "an injunction may issue against one who plans to reveal a trade secret in violation of an employment contract or in breach of a fiduciary duty." *Id*. Likewise, in *Cherne Indus, Inc v Grounds & Assoc, Inc*, 278 NW2d 81, 94 (Minn, 1979) (citation omitted; emphasis added), the court stated:

> Conduct that infringes upon a copyright has been found not to be entitled to First Amendment protection. By analogy, *a former employee's use of confidential information or trade secrets of his employer in violation of a contractual or fiduciary duty is not protected by the First Amendment*. Given the public interest in preserving the ability of parties freely to enter contracts and to seek judicial enforcement of such contracts and in providing judicial remedies for breaches of fiduciary duties imposed by law, any infringement by the injunction on defendants' First Amendment rights is tolerable and justified.

As discussed earlier, Loren owes fiduciary duties to GLP because he is an officer and director of the corporation. See, e.g., MCL 450.1541a; *Wallad*, 236 Mich App at 306-307; *Prod Finishing Corp*, 158 Mich App at 486. The trial court found that Loren acted in direct contravention of his fiduciary duties and placed GLP in real and imminent danger as a result of his numerous communications summarized above. The trial court also expressly stated that the communications prohibited by the injunction were of the type and character already precluded by Loren's fiduciary duties as a director and officer of GLP. Loren presents no argument to dispute the trial court's conclusion on this point or otherwise to challenge the determination that the injunction was warranted on the basis of Loren's fiduciary duties and his actions in breach of those duties. Nor does Loren address the case law discussed above pertaining to the lack of First Amendment protection for communications that violate one's fiduciary duties. Loren offers no reason to dispute the finding that his numerous threatening and disparaging communications concerning GLP and its officers, directors, and shareholders violated his fiduciary duties to act in good faith and in the best interest of the corporation. "When an appellant fails to dispute the basis of the trial court's ruling, this Court need not even consider granting [the appellant] the relief [he] seek[s]." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (quotation marks, brackets, and ellipsis omitted). Loren's speculative assertion that the injunction will prohibit him from engaging in hypothetical innocuous conduct such as reporting an officer's embezzlement or commenting on a possible physical incapacity of an officer is devoid of merit, given the court's express statement that the communications prohibited by the injunction are of the type and character already precluded by Loren's fiduciary duties.

Loren presents a new appellate argument that the trial court erred in failing to presume that a handwritten note that accompanied the "knowledge is power" letter would have revealed that Loren was not the author. Loren asserts that Kocoves's testimony that he crumpled up and discarded the handwritten note comprises an admission of spoliation of evidence, which gives rise to an adverse presumption. This argument is not preserved because it was not raised, addressed, and decided below. *Hines*, 265 Mich App at 443. "It is well settled that missing evidence gives rise to an adverse presumption only when the complaining party can establish intentional conduct indicating fraud and a desire to destroy evidence and thereby suppress the truth." *Ward v Consol Rail Corp*, 472 Mich 77, 84; 693 NW2d 366 (2005) (quotation marks and brackets omitted). When asked what happened to a handwritten note that accompanied the copy of the "knowledge is power" letter that was delivered to him, Kocoves said that it was "[p]robably crumpled up and threw it in the garbage, I don't know. I don't recall." Loren has not established that Kocoves's actions indicate fraud and a desire to suppress the truth of who authored the "knowledge is power" letter. Therefore, we are not convinced that Loren was entitled to an adverse presumption.

II. DOCKET NOS. 320917, 320918, 320919

Loren first argues that if the underlying judgment is vacated in Docket No. 319180, then the award of case evaluations sanctions against him must also be vacated. Because we have concluded that Loren's arguments in Docket No. 319180 are devoid of merit, the underlying judgment has not been vacated and, therefore, we need not address this issue.

Next, Loren argues that the trial court erred in failing to deduct $10,870 from the attorney fee award in favor of GLP because GLP agreed to reduce its request for costs by that amount. We agree. Loren argues that the trial court erred in including in the case evaluation sanctions award to GLP $10,870 in attorney fees that GLP agreed at the December 11, 2013 evidentiary hearing to deduct from its claim. GLP agrees with Loren that this amount should have been deducted from the award and that the trial court failed to do so. GLP's counsel agreed at the December 11, 2013 evidentiary hearing to reduce its requested attorney fee award by $10,870 in light of Loren's objections to various time entries of GLP's attorneys as being duplicative. The parties agree that the trial court failed to reduce the fee award by that amount. Accordingly, the fee award to GLP is vacated in part and the case is remanded to the trial court for entry of an amended judgment reflecting this agreed-upon reduction.

Next, Loren argues that the trial court erred in allowing GLP, Kocoves, and Barron to recover attorney fees for the time period from June 22, 2012 to August 15, 2012, because, according to Loren, this period preceded Loren's rejection of the case evaluation. Because Loren failed to raise this issue below, it is not preserved. We will nonetheless review the issue because it presents a question of law and the facts necessary for its resolution have been presented. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010). "The proper interpretation and application of a court rule is a question of law, which we review de novo. This court uses the principles of statutory construction when interpreting a Michigan court rule. We begin by considering the plain language of the court rule in order to ascertain its meaning." *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009) (citations omitted).

Loren argues that the trial court erred in awarding attorney fees to GLP, Kocoves, and Barron for the period from June 22, 2012 to August 15, 2012. According to Loren, the rejection of the case evaluation did not occur until August 16, 2012, when the rejection was posted on the lower court register of actions. We disagree. Actual costs that may be awarded as case evaluation sanctions include "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(b). Disclosure of a party's acceptance or rejection of the case evaluation may occur after the expiration of the 28-day period following service of the panel's evaluation, "at which time the ADR clerk shall send a notice indicating each party's acceptance or rejection of the panel's evaluation." MCR 2.403(L)(2). The day after the expiration of the 28-day period for accepting or rejecting the evaluation "serves as the starting point for measuring those attorney fees subject to reimbursement as a [case evaluation] sanction." *Taylor v Anesthesia Assoc of Muskegon, PC*, 179 Mich App 384, 387 n 1; 445 NW2d 525 (1989). The record reflects that the notice of Loren's rejection of case evaluation was sent to the parties on June 21, 2012, which was 28 days after the case evaluation. Therefore, it was proper for the trial court to award attorney fees for the period of June 22, 2012 to August 15, 2012, that Loren challenges on appeal.

We note that Loren cites no authority establishing that the date of entry in the register of actions is dispositive in determining when a case evaluation was rejected. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Loren further asserts that GLP, Kocoves, and Barron should have moved to correct the record if the date of rejection in the register of actions was incorrect, but the June 21, 2012 notice of rejection was attached to GLP's motion for case evaluation sanctions and is therefore part of the record.

Loren next argues that Kocoves and Barron are precluded from recovering attorney fees as case evaluation sanctions because their fees were paid by GLP. This issue is not preserved because Loren did not raise it below. *Hines*, 265 Mich App at 443. Moreover, this issue does not present a question of law for which all the necessary facts have been presented, *Gen Motors Corp*, 290 Mich App at 387, because the record is not developed regarding who paid the attorney fees for Kocoves and Barron, and Kocoves and Barron lacked an opportunity to present testimony on this point below given Loren's failure to raise the issue.

In any event, Loren's argument lacks merit. With respect to Kocoves, Loren identifies no evidence that GLP actually paid Kocoves's legal fees that were incurred after Loren's rejection of the case evaluation on June 21, 2012. Instead, Loren references a May 11, 2011 ruling of the trial court denying Loren's motion to prohibit GLP from paying the attorney fees of Kocoves and Barron. Loren contends that absent proof that Kocoves actually paid his attorney fees, Kocoves should not have been awarded anything. In response, Kocoves observes that this issue was not raised below, and that if it had been, Kocoves could have explained that the corporate bylaws required GLP to indemnify him for his fees after he incurred the fees, that the law firm invoices were directed to Kocoves rather than to GLP, and that any fees that Kocoves recovers will be passed back to GLP. Kocoves further notes that Loren cites only cases that address the

possibility of a double recovery, and that Loren cites no cases prohibiting a recovery of attorney fees on the ground that an indemnitor has paid those fees.

Loren makes a similar unpreserved argument with respect to Barron's attorney fees. In response, Barron notes that Loren failed to raise the issue below, but that if he had done so, Barron would have presented testimony that none of his fees requested as sanctions were paid by GLP. According to Barron, although his fees were paid by GLP earlier in the litigation under an indemnification provision in the corporate bylaws, Loren's counsel made clear before case evaluation occurred that Loren's claims against Barron were in Barron's capacity as a co-trustee of the Trust. Therefore, Barron's subsequent attorney fees were paid entirely by the Trust. Barron says that any fees and costs recovered from Loren will be remitted back to the Trust.

Again, the record is not developed concerning the above facts because Loren failed to raise this issue below. In any event, assuming that the facts as presented by the parties are true, i.e., that GLP indemnified Kocoves for his attorney fees and that the Trust paid Barron's attorney fees, Loren's argument is devoid of merit. Loren fails to cite authority establishing that a party may not recover attorney fees under MCR 2.403(O) merely because that party has been indemnified by a third party for the payment of those fees. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Magee*, 218 Mich App at 161. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Peterson Novelties, Inc*, 259 Mich App at 14. Loren cites cases holding that a double recovery of attorney fees under both a court rule and a statute is prohibited because attorney fee awards are meant to be compensatory rather than punitive. See, e.g., *Rafferty v Markovitz*, 461 Mich 265, 269-273; 602 NW2d 367 (1999), citing *McAuley v Gen Motors Corp*, 457 Mich 513; 578 NW2d 282 (1998). The present case does not involve an effort to obtain a double recovery of attorney fees from Loren. Rather, Kocoves and Barron each seek only a single recovery from Loren. The fact that Kocoves was indemnified for his fees by GLP and that Barron's fees were paid by the Trust does not alter the conclusion that Kocoves and Barron are each seeking only a single recovery from Loren.

As discussed, MCR 2.403(O)(1) requires a party who has rejected an evaluation to pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. "Costs" include "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(b). There is nothing in the court rule that precludes the recovery of a reasonable attorney fee where a third party has indemnified the fee applicant for the attorney fee. Recently, in addressing an attorney fee award under MCR 2.403(O) to a party that was a law firm represented by its own attorneys, this Court stated, in relevant part:

> MCR 2.403(O)(1) provides that the party who rejects a case evaluation and subsequently fails to receive a more favorable verdict "must pay the opposing party's actual costs . . . ." MCR 2.403(O)(6)(b) provides that "actual costs" include "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." Unlike MCL 600.2591, which is incorporated by reference in MCR 2.114(F), MCR 2.403(O)(6)(b) does not restrict the trial court's authority to award a prevailing party only "the costs and fees incurred." Instead, MCR

> 2.403(O)(6)(b) requires the trial court to award "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(b) does not require that the attorney fee be "incurred," it requires only that the trial court determine a "reasonable" attorney-fee amount according to a prescribed method, namely, by determining the "hourly or daily rate . . . for services necessitated by the rejection of the case evaluation." Accordingly, an award of case evaluation sanctions must include an award of attorney fees to be determined by this method. [*Fraser Trebilcock Davis & Dunlap, PC v Boyce Trust 2350*, 304 Mich App 174, 215-216; 850 NW2d 537 (2014).]

Kocoves represents that his attorneys' invoices were directed to him, he incurred the fees, and he was then indemnified by GLP. Barron represents that his fees were paid by the Trust. Kocoves states that he will remit any fee recovery to GLP, and Barron says that he will remit any recovery to the Trust. We find no basis in the court rules or case law to suggest that indemnification by a third party precludes a recovery of attorney fees under MCR 2.403(O).

Loren's reply briefs assert there is no evidence in the record that Kocoves is obligated to remit any fees recovered to GLP or that Barron is required to remit any recovered fees to the Trust. But the record was not developed on this point because Loren failed to raise this issue below. In any event, the remission of any recovered fees is a matter between GLP and Kocoves, and between the Trust and Barron, respectively. Any arrangements between the fee applicants and their respective third-party indemnitors does not alter the fact that Loren is required to pay only a single attorney fee award to each fee applicant.

Loren next argues that the trial court erred in awarding attorney fees for the time spent pursuing case evaluation sanctions. We disagree. This issue is not preserved because Loren did not raise it below. *Hines*, 265 Mich App at 443. The trial court's decision to award case evaluation sanctions for services associated with post-trial motions is reviewed for an abuse of discretion. *Troyanowski v Village of Kent City*, 175 Mich App 217, 226-227; 437 NW2d 266 (1988). Also, "[t]his issue involves the interpretation and application of a court rule, which is reviewed de novo by this Court." *Fraser Trebilcock*, 304 Mich App at 216. Unpreserved issues are reviewed for plain error. *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271, 273; 824 NW2d 573 (2012). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

In *Troyanowski*, 175 Mich App at 226, the plaintiffs argued that the trial court erred in including in an award under MCR 2.403(O) "defense fees incurred due to the posttrial evidentiary hearing on plaintiffs' witness obstruction claim and plaintiffs' posttrial motions." This Court rejected the plaintiffs' argument:

> Under the circumstances of this case, we believe the court's award was justified. MCR 2.403 does not limit an award to attorney fees for services performed at the trial itself. Rather, the rule states that attorney fees may be awarded for *all* services necessitated by the rejection of the mediation award.

> Here, plaintiffs made posttrial accusations that required a full-scale evidentiary hearing, which never would have arisen had they accepted the mediation award. At the end of the hearing, in which defendants were required to participate, the trial court found no basis for the accusations. Likewise, plaintiffs' postjudgment motions were necessitated by their decision to go to trial. [*Id*. at 226-227.]

In *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 178-179; 568 NW2d 365 (1997), this Court held that an award of sanctions under MCR 2.403(O) was justified where the award included fees incurred for a post-trial motion. This Court explained: "MCR 2.403 does not limit an award to attorney fees for services performed only at the trial. Rather, the rule states that attorney fees may be awarded for all services necessitated by the rejection of the mediation award." *Id*. at 179, citing *Troyanowski*, 175 Mich App at 226-227.

In *Haliw v Sterling Hts*, 471 Mich 700, 711; 691 NW2d 753 (2005), our Supreme Court held "that appellate attorney fees and costs are not recoverable as case evaluation sanctions under MCR 2.403(O)." This Court concluded that MCR 2.403(O) is "trial-oriented." *Id*. The Court explained:

> Moreover, in support of our conclusion that MCR 2.403(O) is trial-oriented, we note that a request for case evaluation sanctions must be made within twenty-eight days after entry of the judgment, MCR 2.403(O)(8), generally a time before the bulk of appellate fees and costs have been incurred. In addition, MCR 2.403(O)(6)(b) allows recovery of attorney fees "necessitated by" the rejection of the case evaluation. While a causal nexus plainly exists between rejection and trial fees and costs, the same cannot be said with respect to rejection and the decision to bring an appeal. Rather, appellate attorney fees and costs are arguably "necessitated by" a perceived erroneous trial court ruling.
>
> We are cognizant of prior decisions of the Court of Appeals that have construed the phrase "necessitated by the rejection" as a mere temporal demarcation. See, e.g., *Mich[] Basic Prop Ins Ass'n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 235; 486 NW2d 68 (1992). On the basis of the language of MCR 2.403(O), however, we believe the better-reasoned approach goes beyond a temporal demarcation and requires a causal nexus between rejection and incurred expenses. [*Haliw*, 471 Mich at 711 n 8.]

In *Young v Nandi*, 490 Mich 889, 890 (2011) (*Young III*), our Supreme Court reversed this Court's "judgment finding that the plaintiff is entitled to attorney fees and costs for posttrial work that occurred in the Oakland Circuit Court following the appellate process" and reinstated the trial court's ruling. The Supreme Court explained: "There is not a sufficient causal nexus between the postappeal proceedings and the defendants' rejection of the case evaluation." *Id*., citing MCR 2.403(O)(6)(b) and *Haliw*, 471 Mich at 711 n 8.

In *Fraser Trebilcock*, 304 Mich App at 216, the defendants argued that the trial court erred by awarding the plaintiff case evaluation sanctions for post-judgment activities and by awarding attorney fees for time spent in obtaining case evaluation sanctions. After discussing *Troyanowski*, *Haliw*, and *Young III*, this Court stated: "We infer from these authorities that

actual costs arising from postjudgment proceedings that occur more than 28 days after the judgment may be awarded as case-evaluation sanctions if the proceedings are causally connected to the party's rejection of the case evaluation." *Fraser Trebilcock*, 304 Mich App at 219. This Court then reasoned as follows:

> Here, the trial court awarded plaintiff sanctions related both to its opposition to defendants' motion for a new trial and to its pursuit of case-evaluation sanctions. Regarding the former category, plaintiff's legal work opposing defendants' motion for a new trial was necessitated by defendants' rejection of the case evaluation. Defendants' motion for a new trial was a second attempt to obtain a favorable verdict after their first attempt resulted in a verdict higher than the case evaluation. This "second-bite-of-the-apple" would not have been necessary if defendants had accepted the case evaluation in the first instance.
>
> However, the proceedings to obtain the award of case-evaluation sanctions were not necessitated by defendants' rejection of the case evaluation. The case-evaluation proceedings were complicated by defendants' assertion that plaintiff, a law firm represented by its own members, was not entitled to receive attorney fees and by defendants' objections to the amount of attorney fees sought by plaintiff. As previously discussed, the legal issue of plaintiff's entitlement to attorney fees for services rendered by its own attorneys was a close issue, not clearly settled by Michigan caselaw. Plaintiff requested $115,202 in attorney fees, but the trial court awarded only $80,434, reducing plaintiff's claim by approximately 30%. Under these circumstances, we find that there is insufficient causal nexus between defendants' rejection of the case evaluation and the resources plaintiff expended claiming attorney fees. . . . [*Id.* at 219-220.]

In this case, Loren presents an unpreserved argument that GLP, Kocoves, and Barron are not entitled to recover attorney fees for time spent pursuing case evaluation sanctions. Loren argues that GLP's attorneys billed $12,517.50 in May 2013 and that most of this amount was for the preparation of GLP's motion for sanctions. GLP notes that it did not seek to recover attorney fees for time spent on the motion hearing, the evidentiary hearing, or any supplemental submissions; rather, GLP sought only to recover attorney fees for time spent on preparing the motion for sanctions itself. Loren argues that Kocoves's attorneys billed $1,781.25 for work on sanctions in January 2013. As Kocoves observes, this work in January 2013 did not pertain to case evaluation sanctions, given that the court's judgment was not entered until May 2013. Rather, the January 2013 work related to a different sanction awarded against Loren for filing a meritless motion to vacate a circuit court order, and the trial court directed Kocoves to submit a bill of particulars; Kocoves did not seek or obtain attorney fees for pursuing case evaluation sanctions. Kocoves notes that this point could have been addressed on the record if Loren had raised this issue below. Loren challenges Barron's recovery of $2,007.50 in attorney fees for work on sanctions.

Loren's argument that the trial court erred in awarding attorney fees for time spent in pursuing case evaluation sanctions is devoid of merit. Loren makes only a broad assertion that time spent on pursuing case evaluations is not necessitated by the rejection of case evaluation. But this Court observed in *Fraser Trebilcock*, 304 Mich App at 219, "that actual costs arising

from postjudgment proceedings that occur more than 28 days after the judgment may be awarded as case-evaluation sanctions if the proceedings are causally connected to the party's rejection of the case evaluation." This Court then held that the proceedings to obtain an award of case evaluation sanctions *in that case* were not necessitated by the rejection of case evaluation *for reasons specific to that case*. *Id*. at 219-220. In particular, the case-evaluation proceedings in *Fraser Trebilcock* were complicated by the legal issue of the plaintiff-law firm's entitlement to attorney fees for services rendered by its own members and by the defendants' objections to the amount of attorney fees sought by the plaintiff, and the trial court awarded only 30% of the fees requested. *Id*. In those circumstances, this Court found an insufficient causal nexus between the rejection of the case evaluation and the resources expended in seeking attorney fees. *Id*. at 220.

By contrast, Loren fails to articulate on appeal a reason why he thinks the attorney fees sought in pursuing case evaluation sanctions were not causally connected to the rejection of case evaluation *in this case*. Loren makes a broad assertion that no causal connection exists because it is the choice of a prevailing party whether to seek case-evaluation sanctions. Loren's generalized argument would preclude *in every case* the recovery of attorney fees for pursuing case evaluation sanctions. His argument contravenes the reasoning in *Fraser Trebilcock* that attorney fees may be awarded for post-judgment motions if the requisite causal connection to the rejection of case evaluation exists. Unlike in *Fraser Trebilcock*, Loren has failed to identify a fact-specific reason to conclude that the attorney fees associated with pursuing case evaluation sanctions were not causally related to the rejection of case evaluation.

Nor is such a fact-specific reason clear or obvious from the record. As discussed, GLP sought attorney fees only for the preparation of the motion for case evaluation sanctions and not for the motion hearing, evidentiary hearing, or any supplemental submissions. Kocoves did not seek any attorney fees for pursuing case evaluation sanctions, only in connection with an earlier, unrelated sanction issue that arose in January 2013, before the trial court's judgment was entered. The attorney fees of $2,007.50 sought by Barron that Loren identifies in his reply brief relate partially to the January 2013 sanctions issue and partially to the case evaluation sanctions. Loren fails to identify a specific reason why Barron's requested fees are not causally related to the rejection of case evaluation, and Loren's counsel did not challenge Barron's requested fees or cross-examine Barron's attorney at the evidentiary hearing. Accordingly, Loren has not established with respect to this issue that a clear or obvious error affected the outcome of the lower court proceedings. *Duray Dev, LLC*, 288 Mich App at 150.

Loren next argues that the trial court improperly awarded attorney fees to Barron associated with Barron's counsel's gratuitous offering of services to the attorneys for GLP and Kocoves. We disagree. Because Loren failed to preserve this issue, our review is limited to outcome-determinative plain error. *Richard*, 297 Mich App at 273; *Duray Dev, LLC*, 288 Mich App at 150.

Loren asserts that Barron's counsel "seems to have offered to lend his assistance to GLP and Kocoves" by "involv[ing] himself on multiple occasions with issues concerning the injunction or other matters purely internal to GLP[.]" Therefore, Loren asserts, "[a]nother $5,417.50 (or more) must be excised from Barron's sanctions award." In support of his contentions, Loren refers to the dates of multiple entries in Barron's counsel's invoice. However, Loren fails to explain specifically *how* or *why* the entries on each of the referenced

dates pertain only to the injunction or matters purely internal to GLP. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Johnson*, 256 Mich App at 339-340 (citations omitted).

We have reviewed the entries cited by Loren, and it is not clear or obvious that the entries cited by Loren pertain to matters that concern only GLP. Moreover, as Barron's counsel testified at the evidentiary hearing, Loren was pursuing claims against Barron in Barron's capacity as a co-trustee. The Trust's largest asset was its ownership of shares of GLP. Loren attempted throughout the litigation to establish that he owned 20% of the shares of GLP, a position that would have reduced the percentage of shares owned by the Trust. Barron's counsel testified that the fees he sought to recover were associated with efforts to protect the Trust from Loren's efforts to obtain control of GLP. Loren fails to present an adequate appellate argument explaining why Barron's counsel could not coordinate with the attorneys for GLP and Kocoves on issues that affected the Trust's largest asset. Loren also fails to explain exactly how he calculated the figure of "$5,417.50 (or more)" that he claims must be deducted from Barron's attorney fee award. Overall, Loren's argument on this issue fails to establish a clear or obvious error in the award of attorney fees to Barron.

Loren next argues that the trial court abused its discretion in determining the hourly rates for the attorneys for GLP, Kocoves, and Barron. We disagree. As explained in *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (citations omitted):

> A trial court's decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo. We review for an abuse of discretion a trial court's award of attorney fees and costs. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes.

"The determination of a reasonable hourly rate for an attorney fee to include in a sanction is within the trial court's discretion." *Heaton v Benton Constr Co*, 286 Mich App 528, 542; 780 NW2d 618 (2009).

In *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982), our Supreme Court listed six factors relevant to computing a reasonable attorney fee:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [Internal quotation marks and citation omitted.]

In *Smith*, our Supreme Court noted that the eight factors listed in MRPC 1.5(a), which overlap the *Wood* factors, have also been utilized to determine reasonable attorney fees:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. [*Smith*, 481 Mich at 530, quoting MRPC 1.5(a).]
>
> The *Smith* Court held that some fine-tuning of the multifactor approach was needed:
>
> We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [*Smith*, 481 Mich at 530-531 (footnote omitted).]

"In determining the fee customarily charged in the locality for similar legal services, the trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan." *Id*. at 530 (internal quotation marks omitted). The fee customarily charged in the locality for similar legal services "is reflected by the market rate for the attorney's work. The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." *Id*. at 531 (internal quotation marks and citation omitted). The fee applicant must present evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id*. (internal quotation marks and citation omitted). "[R]easonable fees are different from the fees paid to the top lawyers by the most well-to-do clients." *Id*. at 533.

> The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than

> anecdotal statements to establish the customary fee in the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. [*Id*. at 531-532.]

In approving GLP's attorney fee request, the trial court noted that this case was "more complex and litigious than most, if not all, of the matters in which this Court has awarded case evaluation sanctions." The court noted that two of GLP's attorneys, Joel Serlin and Barry Rosenbaum, were highly regarded and employed by a well-respected law firm, that they were well-prepared at all stages of the litigation, and that they were not responsible for the protracted nature of the case. The court observed that Serlin and Rosenbaum have nearly a combined 80 years of experience in complex civil litigation. The court noted that Loren's conduct during the proceedings, including multiple attorney substitutions, contributed to the length of the litigation, and that Loren did not prevail in any part of the case.

With respect to GLP's attorney fee claim, Loren argues that the trial court erred in allowing fees at the hourly rates of $400 for Serlin and $300 for Rosenbaum. Loren notes that, according to the 2010 State Bar of Michigan Economics of Law Practice Survey, the median hourly rate for attorneys with the status of equity partners was $250 and the median for all practitioners was $215. For an associate such as Gregory Krause, the median rate was $195 an hour. Loren contends that GLP's attorneys offered only the type of anecdotal evidence deemed inadequate in *Smith*. Loren disputes GLP's claim that the case was complex and accuses GLP's attorneys of engaging in "self-aggrandizing puffery as to their professional standing[.]" Loren advocates reducing the hourly rates for Serlin and Rosenbaum to $250 or $215 and Krause's rate to $195.

We do not find Loren's argument convincing. Loren suggests that the rates for Serlin and Rosenbaum should be either $215, which is the median rate for all practitioners, or $250, which is the median rate for attorneys with the status of equity partners. But *Smith* states that the fee customarily charged in the locality is determined by the market rate, which is the rate that lawyers of *similar ability and experience in the community* normally charge their clients for the type of work in question. *Id*. at 531. The fee applicant must present evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers *of reasonably comparable skill, experience and reputation*." *Id*. (internal quotation marks and citation omitted; emphasis added). Loren essentially urges that the trial court must *ignore* the skill, experience, and reputation of GLP's attorneys and instead award them the median rate for all practitioners or for all equity partners. This is plainly contrary to the analysis in *Smith*, which requires consideration of the attorney's skill, experience, and reputation. Loren's contention that the median rates must be used in this case is without merit.

Serlin testified that he has practiced law for 45 years, with virtually his entire career focused on commercial litigation and business disputes. He has tried hundreds of cases, has been appointed by judges as a facilitative mediator, and has lectured for a 10-year span at bench-bar conferences on various aspects of commercial litigation. Serlin's normal hourly rate is $450, but he charged $400 an hour in this case. Serlin testified that Rosenbaum's normal hourly rate is $350, but he charged $300 an hour in this case. Rosenbaum has practiced law with Serlin since 1976. Krause's rate was $250 an hour, and he has been practicing law for 14 years. Rosenbaum testified that he has been an attorney since 1976, and that he specializes in commercial litigation.

Rosenbaum viewed this case as constituting complex litigation because of the number of issues that were presented, the number of exhibits, and the number of potential witnesses.

The trial court reasonably concluded that this case was one of the most complex cases for which it had awarded case evaluation sanctions. It is therefore within the range of principled outcomes to conclude that a complex civil case of this nature would customarily be handled by attorneys whose skills, reputation, and experience are above average. Cf. *Heaton*, 286 Mich App at 543 (the trial court did not abuse its discretion in rejecting a requested hourly rate in the 75th percentile of the bar survey because the trial court determined that the "case was not overly complex" and that a rate closer to the median hourly rate was reasonable). Taking into account the complexity of the case and their experience and abilities, Serlin and Rosenbaum may reasonably be viewed as warranting rates in the 75th to 95th percentiles for equity partners in their geographic area, such that an hourly rate of $300 to $425 applied under the bar survey. Rosenbaum's hourly rate of $300 and Serlin's hourly rate of $400 fell within this range. Further, the National Law Journal Survey submitted by GLP supported a conclusion that the fees requested in this case are considerably less than those charged by the highest paid attorneys in the most respected Detroit-area law firms. Overall, Loren has failed to establish that the trial court's fee award to GLP fell outside the range of reasonable and principled outcomes.

In approving Kocoves's attorney fee claim, the trial court noted that Stuart Teger's hourly rate was $465 in 2012 and $475 in 2013, and that Roger Meyers's 2012 hourly rate was $270 and his 2013 rate was $310. The court utilized the same reasoning as it did with respect to GLP's fee request, noting the complexity of the case, the fact that the attorneys were highly regarded and employed by a well-respected firm, Honigman Miller Schwartz and Cohn, LLP ("Honigman"), and the fact that Loren's conduct including his multiple attorney substitutions contributed to the protracted nature of this case. The court observed that "Kocoves has provided several examples of different judges and courts awarding Honigman its rates – many of which are in excess of the fees requested in this case. This Court is not bound by the determinations of other circuit judges or federal district court opinions, but these examples further emphasize such fees are not unheard of."

In challenging Kocoves's attorney fee award, Loren again asserts that the median hourly rate for equity partners is $250, the median hourly rate for all practitioners is $215, and that for associates such as Meyers the median hourly rate is $195. Loren again argues that the median rates are controlling. Loren contends that the testimony of Honigman's chief value partner, Carl Herstein, comprised the type of anecdotal evidence rejected by *Smith*. Loren again disputes that this case was complex and accuses Kocoves's attorneys of "self-aggrandizing puffery as to their professional standing[.]"

Loren's argument concerning Kocoves's attorney fee award lacks merit for many of the same reasons discussed in connection with Loren's challenge to GLP's attorney fee award. Again, *Smith* does not mandate use of the median rate but requires determination of the fee customarily charged in the locality as reflected in the market rate for the attorney's work, which is the rate that lawyers of similar ability and experience in the community normally charge. *Smith*, 481 Mich at 531. Loren's argument would make an attorney's ability and experience irrelevant in determining the customary fee, contrary to the analysis in *Smith*. The trial court correctly took note of the complexity of this case. The trial court is not limited to the state bar

survey but may consider other testimony in determining the customary fee for the locality. *Id.* at 531-532.

Honigman's chief value partner, Herstein, testified that for 19 years he has engaged in an extensive data-gathering effort by examining all publicly available rate information, including rate data from bankruptcy filings, rate database subscription services, information from clients and from other firms, and information in the trade press such as Michigan Lawyer's Weekly and the National Law Journal. Herstein also takes into account the state bar survey. Herstein testified that at firms similar to Honigman with respect to the high degree of skill and professionalism in dealing with complicated legal issues, the typical hourly rates for partners range from the low $300s to the $600s and even the $700s. For associates at such firms, the hourly rates range from the mid-$200s to the $300 level. Herstein testified that Teger's hourly rate, which was $465 for 2012 and $475 for 2013, was within the range of what was reasonable for someone of Teger's skill and experience. Meyers's rates of $270 and $310 were within the range of reasonable associate rates. In a post-hearing submission in response to Loren's post-hearing brief, Kocoves presented evidence of other cases in which Honigman's rates were approved, including for amounts greater than those charged here.

Meyers testified that he graduated from the University of Michigan Law School in 2009, near the top of his class with a 3.98 grade point average. He clerked for one year for a federal appellate judge before going to work for Honigman. He works in the firm's general litigation department in the corporate and securities litigation practice group; since his second year, he has served as "first chair" in most of his own cases. Teger's experience is set forth in his professional biography attached to Kocoves's case evaluation sanctions motion; Teger has practiced law with Honigman for more than 32 years, has significant trial experience in Michigan and other states, has been recognized for his litigation expertise in various publications, and has published articles and spoken on legal issues.

In light of the above evidence, the trial court's determination of the customary fee for Kocoves's attorneys fell within the range of reasonable and principled outcomes. The trial court properly took into account the complexity of the case and the ability and experience of Kocoves's attorneys. Herstein's testimony did not comprise mere anecdotal evidence but was based on an extensive data-gathering effort that took into account the state bar survey and other publicly available information concerning rates charged by law firms offering the types of legal services provided by Honigman. The trial court did not abuse its discretion in determining the hourly rate for Kocoves's attorneys.

Finally, the trial court stated as follows concerning Barron's hourly rate:

> Regarding Barron's motion, Loren does not challenge the fees requested by Barron's counsel – Andrew Mayoras. Mr. Mayoras billed at the discounted rate of $275 per hour and is requesting a total of $38,851.24. This request is more than reasonable. Mr. Mayoras has 17 years of experience in probate litigation. Loren did not challenge Barron's fee request either at the hearing or in his supplemental briefs. The Court will therefore grant Barron's request for fees.

Loren argues that Mayoras should have been limited to the median hourly rate for all practitioners of $215. Loren suggests that Mayoras's probate expertise was not relevant to this litigation.

Loren's argument is devoid of merit. As discussed, *Smith* does not support Loren's contention that Mayoras may only recover the median rate for all practitioners. Rather, the customary fee is based on the market rate, which is the rate that lawyers of similar ability and experience in the community normally charge. *Id.* at 531. Loren did not challenge Mayoras's fees or hourly rate during the evidentiary hearing or in post-hearing submissions. Mayoras testified that he took the lead on the board of directors issue and probate-related issues in this case. Loren disputes the relevance of Mayoras's probate litigation experience; however, the issue concerning the composition of the board of directors turned in part on the language of the Trust Agreement, as discussed earlier, and Loren himself made the probate issues part of the case, including by calling as a witness at trial the estate planning attorney who drafted the Trust Agreement.

Regarding his background, Mayoras testified that he is an equity partner at Barron Rosenberg Mayoras & Mayoras in Troy, that he graduated from the University of Michigan Law School in 1995, and that he has practiced for 18 years with expertise in probate litigation. Mayoras and his wife co-authored a book on celebrity estate cases and co-hosted a television special based on their book that aired on PBS stations around the country; Mayoras has also appeared as an expert on national television shows. He and his wife have regularly contributed articles to Forbes.com. He normally charges $300 an hour but for this case he charged $275 an hour. Mayoras testified that in light of his standing in the community and his unique background, he thought the hourly rate charged was reasonable.

Given the complexity of the case, Mayoras's ability and experience, and Loren's failure to challenge Mayoras's fee at the evidentiary hearing or in post-hearing submissions, we conclude that the trial court's determination of the hourly rate for Mayoras fell within the range of reasonable and principled outcomes. The trial court did not abuse its discretion in determining the customary fee.

Next, Loren argues that with respect to the attorney fee claims of GLP and Kocoves, the trial court improperly awarded fees based on duplicative tasks performed by multiple attorneys for each fee claimant. We disagree. Loren failed to preserve this issue with respect to Kocoves's attorney fee claim, so our review of that aspect of Loren's argument is limited to outcome-determinative plain error. *Richard*, 297 Mich App at 273; *Duray Dev, LLC*, 288 Mich App at 150.

Loren fails to identify each of the specific billing entries for GLP's and Kocoves's respective attorneys by date and type of service that Loren claims are duplicative and to explain precisely how or why those specific billing entries are duplicative of other billing entries. This Court will not search the record for factual support for a party's claims. *Derderian*, 263 Mich App at 388; see also MCR 7.212(C)(7) ("Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court."). An appellant may not merely announce his position and leave it to this Court to discover and

rationalize the basis for his claims. *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008).

Moreover, a trial court may reasonably award attorney fees that include time for work performed by several attorneys from one law firm on a single case. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 328-330; 602 NW2d 633 (1999). As the trial court observed, this was a highly complex and litigious case with multiple issues that was tried over seven days. It was reasonable for GLP and Kocoves to utilize more than one attorney from the same law firm to divide their work on specific tasks in litigating this matter. Loren's attempt to minimize or belittle the contributions of some of the attorneys in this case, including by stating that they were performing tasks "that could have been handled by a trained monkey, or a secretary," is both unconvincing and inappropriate. The trial court aptly noted that the fee claimants' attorneys were well-prepared throughout this litigation and were not responsible for the protracted nature of this case. Although not dispositive, it is notable that Loren himself utilized more than one attorney at trial. Overall, we conclude that the award of attorney fees to GLP and Kocoves for more than one attorney fell within the range of reasonable and principled outcomes.

Loren next argues that the trial court abused its discretion in awarding attorney fees for the hours claimed. In particular, he contends that the time records were insufficiently detailed and that the attorneys falsified or padded their time records. We disagree. Loren failed to raise below his argument that the attorneys falsified or padded their time records, so that aspect of the issue is unpreserved.

In *Young v Nandi*, 276 Mich App 67, 87; 740 NW2d 508 (2007) (*Young I*), vacated in part on other grounds 482 Mich 1007 (2008) (*Young II*), this Court rejected a challenge to the purported lack of specificity in the time records of an attorney fee claimant, including entries labeled only as "trial prep" or "trial prep and trial." This Court explained, in relevant part:

> Although plaintiff's counsel did not list exactly what she was doing with regard to her "trial" and "trial prep" submissions, which made up the bulk of her 372 requested hours, lawyers generally know what other lawyers do during "trial" and "trial prep"—review the pleadings, review discovery responses, read depositions, prepare experts, prepare lay witnesses, prepare for cross-examinations, prepare opening and closing arguments, prepare exhibits, attend the trial, and so forth. The list is quite extensive but well known, i.e., there are no surprises. Therefore, an evidentiary hearing was properly denied as unnecessary. It would be unreasonable to force lawyers, who do not even know if they will be entitled to case evaluation sanctions at the time they are preparing for and attending the trial, to record exactly what they were doing at every "billable" moment. And, it is unnecessary. The trial court can certainly consider the type of case, the length of the trial, the difficulty of the case, the numbers and types of witnesses, as well as other relevant factors, and determine what services were necessitated by the rejection of the case evaluation. We refuse to require an exhaustive and detailed list of the precise service provided at every moment. [*Young I*, 276 Mich App at 89 (citation omitted).]

In *Young II*, 482 Mich at 1007, our Supreme Court vacated only the portion of the *Young I* opinion holding that the trial court properly denied the request for an evidentiary hearing, remanded the case to the trial court for an evidentiary hearing, and denied leave to appeal in all other respects. In *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 102; 795 NW2d 205 (2010), this Court held that an attorney's billing records were sufficient and quoted with approval the above quoted language from *Young I* except for the language stating that an evidentiary hearing was properly denied as unnecessary.

Loren argues that *Young I* was implicitly overruled by *Smith* and that *McNeel* failed to refer to *Smith*. Loren suggests that to the extent this Court is obligated to follow *McNeel*, a conflict should be declared under MCR 7.215(J). We disagree. MCR 7.215(J)(1) requires this Court to "follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." *Smith* did not overrule or modify *Young I*; *McNeel*, which approved the relevant portion of *Young I*, was issued after *Smith*. We find nothing in the relevant portions of *Young I* or *McNeel* that is inconsistent with *Smith*. In *Smith*, 481 Mich at 532 (footnote omitted), our Supreme Court explained:

> In considering the time and labor involved (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*) the court must determine the reasonable number of hours expended by each attorney. The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence.

The relevant holding in *Young I* that was followed in *McNeel* merely indicates that lawyers generally know what other lawyers do during "trial prep" and "trial" and that an exhaustive list of what an attorney does at every moment is not required. Loren identifies no reason why a time record that uses those terms may not be deemed sufficiently detailed to satisfy the requirements of *Smith*. Therefore, we decline the request to express disagreement with *Young I* and *McNeel* or to propose invocation of the conflict resolution procedures of MCR 7.215(J).

With respect to GLP's fee claim, Loren argues that the trial court failed to address Loren's "specific objections to dozens of billings" and failed to consider whether the claimed hours of trial preparation were reasonable. Loren contends that trial preparation after case evaluation was somewhat duplicative of prior efforts because depositions were reviewed and summarized in preparing the case evaluation summaries. Loren further asserts that Serlin and Rosenbaum could not identify what exactly was done or why on a particular day anything took as much time as claimed.

Loren does not explain the exact nature of his "specific objections to dozens of billings" that the trial court allegedly failed to address. This Court will not search the record for factual support for a party's claims. *Derderian*, 263 Mich App at 388; see also MCR 7.212(C)(7) ("Facts stated must be supported by specific page references to the transcript, the pleadings, or

other document or paper filed with the trial court."). An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *VanderWerp*, 278 Mich App at 633. The trial court properly relied on *Young I* for the proposition that lawyers generally know what constitutes trial preparation, and the court found that the fee request was reasonable. Loren cites no authority for his assertion that the preparation of a case evaluation summary makes an attorney's trial preparation somewhat duplicative or unnecessary. Again, "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Johnson*, 256 Mich App at 339-340 (citations omitted). Overall, Loren has failed to establish that the trial court's attorney fee award to GLP for the hours claimed fell outside the range of reasonable and principled outcomes.

Concerning Kocoves's attorney fee claim, Loren again asserts that the trial court failed to address Loren's "specific objections to [Honigman] billings which are purely generic and utterly uninformative." Loren complains of entries for "trial preparation," "prepare for trial," and "pretrial work." Loren also disputes Teger's billing for several telephone conversations with Kocoves and for the preparation for questioning of two witnesses, one of whom Teger ultimately did not question and the other of whom did not testify at trial. Loren again disputes the need for trial preparation when a case evaluation summary was prepared.

Loren's objections to entries for "trial preparation" or "pretrial work" are devoid of merit in light of *Young I* and *McNeel*. Loren's contention that it was unreasonable for Teger to confer by telephone with Kocoves is unavailing; it is reasonable for an attorney to confer with his client during the litigation process. The fact that Teger prepared to question two witnesses, one of whom he did not question at trial and the other of whom ultimately did not testify, is hardly unusual; it is commonly understood that attorneys must be prepared for many contingencies at trial despite the lack of certainty ahead of time concerning which witnesses will ultimately testify or need to be questioned. Loren cites no authority establishing that trial preparation is less necessary if a case evaluation summary was prepared.

With respect to Barron's attorney fee request, Loren says that the trial court "falsely posit[ed]" that Loren had not challenged Mayoras's hours and that the trial court did not address any of Loren's "specific objections to Mayoras'[s] billings, many of which are so tenebrously undefined as to be meaningless." Loren complains that Mayoras had entries for consulting with attorneys for GLP and Kocoves regarding a "status" but did not explain the subject of the discussion and that Mayoras billed for reviewing other parties' proposed findings of fact after the verdict was in.

Loren's contentions lack merit. In his initial response to the case evaluation sanctions motions, Loren asserted generally that many of Mayoras's entries were duplicative or unnecessary and requested an evidentiary hearing so that he could, *inter alia*, cross-examine Mayoras regarding the billings. The court held an evidentiary hearing, but Loren's counsel did not challenge any of Mayoras's billings at the hearing; indeed, when offered the opportunity to cross-examine Mayoras, Loren's counsel expressly declined to do so. Loren's post-hearing supplemental brief also failed to challenge Barron's fee request. Therefore, the trial court

reasonably concluded that Loren failed to challenge Barron's fee request. Loren's contention that Mayoras failed to specify what certain billings meant is unconvincing; Loren's counsel could have cross-examined Mayoras at the evidentiary hearing but expressly declined to do so.

Loren further asserts that the attorneys for GLP, Kocoves, and Barron "falsified and padded their time entries." To support this assertion, Loren compares the hours billed for trial work each day to the hours that the trial was in session that day as reflected in the trial transcripts. This argument is devoid of merit. Loren cites no authority establishing that an attorney's time records must match the number of hours reflected in a trial transcript for a given day. This argument is inadequately supported and briefed. *Johnson*, 256 Mich App at 339-340. As Loren concedes in his reply briefs, his calculation of the hours for one of the trial dates failed to take into account the hours reflected in an additional transcript for part of the day, such that Loren undercounted the recorded trial hours for that day. More generally, Loren's argument ignores the practical realities of trial litigation. It is commonly understood that attorneys do not start and stop working with each bang of the trial judge's gavel. Attorneys often arrive early to set up exhibits, confer with other counsel, or discuss strategy with a client. It is not uncommon for attorneys to work on a case during breaks and lunch. They often stay after the trial session ends on a particular day to collect exhibits, documents, or books, confer with opposing counsel, and review the day's proceedings with their clients. Loren says there is nothing in the record to establish that the attorneys engaged in these off-the-record activities. But Loren failed to raise this aspect of his argument in the trial court, thereby depriving the fee claimants of the opportunity to present evidence addressing Loren's new allegation of fraudulent billing. The fee claimants' hours were adequately supported by their time records and the attorneys' testimony at the hearing.

Loren next argues that the clean hands doctrine or the wrongful conduct rule should be applied to preclude an award of attorney fees in light of the allegedly fraudulent billing discussed above. Although this issue was not raised below, it may be considered for the first time on appeal. See *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975) ("Since the clean hands maxim is designed to preserve the integrity of the judiciary, courts may apply it on their own motion even though it has not been raised by the parties or the courts below."). This Court reviews de novo actions in equity, including the application of the clean hands doctrine. *Id*. at 383.

In *Cummings v Wayne Co*, 210 Mich App 249, 252; 533 NW2d 13 (1995) (citations omitted), this Court explained:

> The authority to dismiss a lawsuit for litigant misconduct is a creature of the "clean hands doctrine" and, despite its origins, is applicable to both equitable and legal damages claims. The authority is rooted in a court's fundamental interest in protecting its own integrity and that of the judicial process. While this Court has recognized that substantive distinctions between law and equity survived the procedural merger of law and equity, we do not believe that the distinction prevents a court of law from invoking the "clean hands doctrine" when litigant misconduct constitutes an abuse of the judicial process itself and not just a matter of inequity between the parties. The "clean hands doctrine" applies not only for the protection of the parties but also for the protection of the court.

See also *Orzel v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995) (holding that under the wrongful conduct rule, a plaintiff's claim is barred if it is based entirely or partially on his own illegal conduct). Loren argues that the fee claimants' attorneys have unclean hands because they attempted to commit a fraud on the court by padding their hours when moving for sanctions. As discussed earlier, however, Loren's contention of fraudulent billing lacks merit. There is no evidence that the fee claimants' attorneys padded their hours or falsified their time records; they did not commit misconduct or illegal conduct. Accordingly, there is no basis to invoke the clean hands or wrongful conduct doctrines to bar recovery of the requested fees.

GLP argues that because of the allegations of fraudulent billing in Loren's appellate brief, this Court should discipline Loren and his appellate counsel pursuant to MCR 7.216(C)(1)(b), which states:

> **(C) Vexatious Proceedings**
>
> (1) The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8), assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
>
> * * *
>
> (b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.

GLP's request for sanctions must be made in a motion filed within 21 days after the date of this Court's opinion disposing of the appeals; a sanctions request in an appellate brief is not a motion under the court rule. See *Barrow*, 305 Mich App at 684, citing MCR 7.211(C)(8). Accordingly, we deny the request for appellate sanctions without prejudice. *Id*.

Loren next challenges the awards of fees for two paralegals: John Schwantes, the paralegal for GLP's attorneys, and Karen Gooze, the paralegal for Kocoves's attorneys. This issue is unpreserved. Loren did not raise most of his challenges to the paralegal fees until *after* the evidentiary hearing was completed. Even then, he did not challenge whether Gooze satisfied the training criteria in a state bar bylaw and did not argue that Schwantes and Gooze performed tasks that duplicated the time and effort of the respective attorneys of GLP and Kocoves, arguments Loren now advances on appeal. Even though the supplemental briefs did challenge the paralegals' hourly rates and challenged whether Schwantes met the training criteria, Loren's failure to raise most of these matters until after the evidentiary hearing deprived the fee claimants of an opportunity to meet those objections with evidence at the hearing. Indeed, Loren himself argues on appeal that the trial court did not authorize the submission of evidence in the post-hearing supplemental briefs. Overall, Loren's failure to raise this issue timely leads to the conclusion that the issue is unpreserved.

Further, this issue does not present a question of law with respect to which all of the necessary facts have been presented. *Gen Motors Corp*, 290 Mich App at 387. A review of an

attorney fee award is for an abuse of discretion, *Smith*, 481 Mich at 526; hence, this issue does not present a question of law. Further, all of the necessary facts have not been presented. Because Loren failed to raise most aspects of this issue in advance of the evidentiary hearing, the fee claimants were not afforded an opportunity to present evidence at the hearing to address Loren's challenges. The necessary facts were not presented as evidence at the hearing and made part of the record.

Even were we to consider this issue under the existing record, Loren's challenges to the paralegal fees lack merit. MCR 2.626 provides:

> An award of attorney fees may include an award for the time and labor of any legal assistant who contributed nonclerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan.

Art 1, § 6 of the Bylaws of the State Bar of Michigan provides:

> **Section 6 -** Any person currently employed or retained by a lawyer, law office, governmental agency or other entity engaged in the practice of law, in a capacity or function which involves the performance under the direction and supervision of an attorney of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts such that, absent that legal assistant, the attorney would perform the task, and which work is not primarily clerical or secretarial in nature, and:
>
> (a) who has graduated from an ABA approved program of study for legal assistance and has a baccalaureate degree; or
>
> (b) has received a baccalaureate degree in any field, plus not less than two years of in-house training as a legal assistant; or
>
> (c) who has received an associate degree in the legal assistant field, plus not less than two years of in-house training as a legal assistant; or
>
> (d) who has received an associate degree in any field and who has graduated from an ABA approved program of study for legal assistants, plus not less than two years of in-house training as a legal assistant; or
>
> (e) who has a minimum of four (4) years of in-house training as a legal assistant;
>
> may upon submitting proof thereof at the time of application and annually thereafter become a Legal Assistant Affiliate Member of the State Bar of Michigan. [http://www.michbar.org/generalinfo/bylaws.cfm (accessed December 5, 2014).]

Loren contends that Schwantes was not shown to have satisfied the requirements of the state bar bylaw. Although the issue was not well developed below given Loren's failure to timely challenge Schwantes's credentials, there is sufficient evidence in the record to establish

that Schwantes satisfied the requisite criteria. At the evidentiary hearing, Serlin testified that Schwantes "has been a paralegal for about 23 or 24 years and has a degree from Rutgers as a paralegal." In its appellate brief, GLP relies on statements in its post-hearing supplemental brief indicating that Schwantes "has graduated from an ABA-approved program of study for legal assistants and has a baccalaureate degree from Rutgers University. He also has 18 years in-house training as a legal assistant." The statements of GLP's attorneys in the supplemental brief did not constitute evidence. See *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 364; 503 NW2d 915 (1993) ("Counsel's arguments are not evidence."). GLP's failure to present evidence on this point is largely attributable to Loren's failure to timely challenge Schwantes's credentials below. Nonetheless, Serlin's testimony at the evidentiary hearing indicated that Schwantes had been a paralegal for 23 or 24 years and had a degree from Rutgers as a paralegal. Without citing evidence on the point, Loren asserts that Rutgers has no paralegal degree program but merely an online certification program that is not the equivalent of a baccalaureate degree. GLP's appellate brief states that the legal assistant program was not provided by Rutgers. In any event, assuming that the record fails to establish that Schwantes graduated from an ABA-approved legal assistance program or the exact nature of his degree from Rutgers, it is evident from Serlin's testimony that Schwantes has been a paralegal for many years, and the trial court could reasonably infer from Serlin's testimony that Schwantes had a minimum of four years of in-house training as a legal assistant given the number of years he had been a paralegal. Overall, the record supports the conclusion that Schwantes satisfied the requirements of the state bar bylaw.

Loren likewise claims that Gooze did not satisfy the requirements of the state bar bylaw. Kocoves notes that his motion for case evaluation sanctions stated that Gooze was a paralegal with more than 30 years' experience with Honigman, that she received a bachelor of science degree in English and elementary education from Eastern Michigan University in 1977 and a post-baccalaureate degree in paralegal studies from Madonna University in 1982, and that Madonna University's paralegal program is approved by the ABA. Statements by the attorneys in the motion did not comprise evidence. *Zantop Int'l Airlines, Inc*, 200 Mich App at 364. Again, Loren did not challenge Gooze's satisfaction of the state bar bylaw criteria at any point in the lower court proceedings, so the issue was not developed at the evidentiary hearing. In any event, Herstein, Honigman's chief value partner, testified that Gooze was at the higher end of the hourly rate range for legal assistants because "she's a very experienced, very well-regarded legal assistant, who's been doing that work for a very long time." Considering the record as a whole, including the testimony regarding her experience and length of service, it was reasonable for the trial court to infer that Gooze had at least four years of in-house training as a legal assistant and therefore satisfied the state bar bylaw criteria.

Next, Loren argues that Schwantes and Gooze were duplicating the time and effort of the attorneys for whom they worked. Loren contends that the fee claimants offered no details of their respective paralegals' work to demonstrate that without the paralegal, the attorneys would have performed the tasks. Loren did not raise any such objections below, so the issue was not developed at the evidentiary hearing. On appeal, Loren does not identify with specificity any particular time entries in which he contends the paralegals performed work that duplicated the time and effort of attorneys. This Court will not search the record for factual support for a party's claims. *Derderian*, 263 Mich App at 388. Loren has failed to establish that the trial court abused its discretion in awarding fees for the paralegal hours claimed.

Loren challenges the hourly rates of Schwantes ($175) and Gooze ($215), which he characterizes as "attorney rates" or "senior attorney rates." Loren cites no pertinent authority to establish that those rates were unreasonable or that a highly experienced paralegal must charge an hourly rate less than an attorney's rate. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Johnson*, 256 Mich App at 339-340 (citations omitted). As discussed, there was evidence that both paralegals were highly experienced. Loren has not established that the trial court's determination of the hourly rates fell outside the range of reasonable and principled outcomes.

Loren next contends that the trial court abused its discretion in denying his post-judgment motion to compel GLP to release Loren's shareholder distributions, which were being held in escrow. This Court lacks jurisdiction to decide this issue. This issue is raised in Docket No. 320917, which is an appeal from a post-judgment order granting costs and attorney fees. This Court has jurisdiction over the order awarding costs and attorney fees under MCR 7.202(6)(a)(iv) and MCR 7.203(A)(1). However, Loren may not challenge in this appeal the order denying the motion to compel release of shareholder distributions. Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other prior orders in the case. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). But where the appeal is brought from a post-judgment attorney fees or costs order under MCR 7.202(6)(a)(iv), the appeal "is limited to the portion of the order with respect to which there is an appeal of right." MCR 7.203(A)(1). Therefore, this appeal is limited to the costs and attorney fees order. We lack jurisdiction to review the issue concerning the withholding of shareholder distributions.

The cases cited in Loren's reply brief to argue that this Court has jurisdiction are inapt. Loren cites *West Mich Mech, Inc v West Mich Mech Servs, LLC*, 480 Mich 916 (2007), which held:

> Because the February 12, 2007 order of the Ottawa Circuit Court is a postjudgment order awarding attorney fees and costs, it is a final order under MCR 7.202(6)(a)(iv) that is appealable as a matter of right under MCR 7.203(A)(1). We note that there is nothing in the language of MCR 7.202(6)(a)(iv) that distinguishes between postjudgment orders awarding attorney fees incurred prior to a final judgment and such orders awarding attorney fees incurred after final judgment has entered. Moreover, the phrase "other law or court rule" cannot be read as limiting the scope of the rule to orders involving attorney fees incurred prior to entry of a final judgment. Had this Court intended the rule to limit appeals of right from postjudgment orders awarding attorney fees to those involving attorney fees incurred after a final judgment, it would have included language to that effect in the court rule.

It is not clear why Loren thinks the above analysis is relevant to the jurisdictional issue in this case. The analysis in *West Mich Mech, Inc* simply indicated there was no distinction in the court rule between post-judgment orders awarding attorney fees incurred before a final judgment and such orders awarding attorney fees incurred after the entry of a final judgment. No such

distinction is at issue here. The holding in *West Mich Mech, Inc* is of no relevance to the jurisdictional issue presented here.

Loren also cites *Hunter v Sisco*, 300 Mich App 229, 234 n 1; 832 NW2d 753 (2013), rev'd on other grounds ___ Mich ___ (2014), for the proposition that, according to Loren's phrasing, "an appeal of right from an order defined as final in MCR 7.202(6)(a)(iii)-(v) encompasses all rulings the 'effect' of which is to impact in any fashion the order from which appeal has properly been claimed." The analysis in *Hunter* does not support Loren's argument. The *Hunter* Court concluded that both of the issues raised by the defendant related to whether the defendant was entitled to governmental immunity, such that this Court had jurisdiction to review both issues under MCR 7.203(A) and MCR 7.202(6)(a)(v). *Hunter*, 300 Mich App at 234 n 1. The *Hunter* Court relied on prior case law stating that a trial court's ruling on a summary disposition motion comprises an order denying governmental immunity whenever the effect of the court's decision is to deny a defendant's claim of immunity. *Id*. In this case, the order denying Loren's motion to compel the release of shareholder distributions is not an order awarding or denying attorney fees and costs, nor is the effect of the trial court's ruling on that issue to award or deny attorney fees and costs. The effect of the order is merely to continue the escrowing of funds; it does not grant or deny an award of attorney fees and costs. Loren's reliance on *Hunter* is misplaced.

Finally, Loren presents an unpreserved argument that the case should be reassigned to a different trial judge on remand. Because we are remanding only for the ministerial task of entering an amended judgment, we need not consider this unpreserved argument.

In Docket Nos. 319180, 320918, and 320919, we affirm. In Docket No. 320917, we affirm in part, vacate in part, and remand for entry of an amended judgment to reflect a deduction of $10,870 from GLP's attorney fee award. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Joel P. Hoekstra