STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL S. SHERMAN, D.O., PC, doing business as PHYSICIAN EYE CARE ASSOCIATES OF GARDEN CITY, and MICHAEL S. SHERMAN, D.O.,

Plaintiffs/Counterdefendants-Appellees,

v

SHIRLEY T. SHERROD, M.D., PC and SHIRLEY T. SHERROD, M.D.,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

GARDEN CITY HOSPITAL, GARY LEY, MERRILL LYNCH PIERCE FENNER & SMITH, INC., and MERRILL LYNCH TRUST BANK,

Third-Party Defendants.

UNPUBLISHED
December 21, 2021

No. 351634
Wayne Circuit Court
LC No. 08-014212-CK

Before: K. F. KELLY, P.J., and JANSEN and RICK, JJ.

PER CURIAM.

Defendants, Dr. Shirley T. Sherrod and her medical practice, Shirley T. Sherrod, M.D., PC, appeal as of right the trial court's judgment, entered against them and in favor of plaintiffs, Dr.

Michael S. Sherman and his practice, Michael S. Sherman, D.O., PC, in the amount of $1,251,025.66, following a jury trial.[1] We affirm.

I. BASIC FACTS

This case arises from plaintiffs' purchase of defendants' ophthalmology medical practice in May 2008. The case has a lengthy procedural history, including several prior appeals in this Court, resulting in three prior opinions.[2]

In the 13 months leading up to the May 2008 sale, Sherman, in addition to working at his own practice in Garden City, worked for Sherrod and her practice as an independent-employee surgeon. During this time, he performed all of the cataract surgeries for Sherrod's practice and received 25% of the revenue from those surgeries.

Sherrod eventually decided to retire and sell her practice to Sherman. Two key provisions of the purchase agreement are as follows:

> 6. Transfer, Access, and Confidentiality of Patient Records
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> At Closing, as part of the goodwill of the Practice, Seller shall transfer and Purchaser shall accept custody of the patient records, patient charts, patient financial records, patient insurance records, and lists or other compilations of patient data or information, regardless of storage medium and all other materials or documents associated with patients of the Practice. Seller and Purchaser shall communicate with Seller's current patients by a joint letter, the content of which shall be approved by Purchaser, notifying the patients that the Practice has been transferred and encouraging all of the patients to continue to receive eye care from Purchaser. The cost of printing, photocopying and mailing this joint letter shall be shared equally by the parties. Further, said letter shall be finalized and made available for mailing as of the Closing date. *Seller shall use all reasonable efforts to transfer it's [sic] and her goodwill from patients, practice relationships and referral sources to Purchaser and shall support such transfer in every possible way. . . .*

[1] The court awarded $814,943.46 for defendants' breach of contract, including interest, and $436,082.20 for attorney fees, costs, and expert fees under the parties' indemnification agreement.

[2] This Court previously issued opinions in *Michael S Sherman, DO, PC v Shirley T Sherrod, MD, PC*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 2013 (Docket Nos. 299045, 299775, and 308263) (*Sherman I*); *Michael S Sherman, DO, PC v Shirley T Sherrod MD, PC*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2015 (Docket Nos. 320689, 323278, and 324569) (*Sherman II*); and *Michael S Sherman DO, PC v Shirley T Sherrod, MD PC*, unpublished per curiam opinion of the Court of Appeals, issued January 17, 2019 (Docket No. 340408) (*Sherman III*).

* * *

> 15. Indemnification by Seller. Seller shall indemnify and hold Purchaser harmless against any and all loss, injury, liability, claim, damage or expense, including reasonable attorneys' fees, interest, court costs and amounts paid in settlement of claims, suffered by Purchaser which results from any breach by Seller of any representations or warranties made by Seller in this Agreement and the failure by Seller to perform any of its obligations under this Agreement . . . . [Emphasis added.]

Two other agreements were executed contemporaneous with the execution of the purchase agreement. Sherrod entered into an employment agreement with Garden City Hospital (GCH). She agreed to render medical services at the practice she just sold part-time for one year, and in exchange she would receive a base compensation of $50,000.[3] Additionally, Sherman entered into an Administrative Services Agreement with GCH, whereby he agreed to provide, among other things, "administrative management" of Sherrod. Sherman explained that GCH became involved, making it in essence a three-way deal, because he would now perform all of the practice's surgeries at GCH instead of where the surgeries had taken place before, which would financially benefit GCH.

In *Michael S Sherman, DO, PC v Shirley T Sherrod, MD, PC*, unpublished per curiam opinion of the Court of Appeals, issued May 30, 2013 (Docket Nos. 299045, 299775, and 308263) (*Sherman I*), p 3, this Court previously noted:

> Despite these agreements, the relationship between Dr. Sherman and Dr. Sherrod soon deteriorated. According to Sherman, defendant Sherrod refused to inform the staff that plaintiffs now owned the practice, refused to give him the keys to the offices, refused to give up control of the billing process, and insisted that her name and billing numbers be used.

Sherman testified that after months of enduring Sherrod's lack of cooperative treatment, he "drew a line in the sand" and informed the staff on September 25, 2008, that he was the actual owner. Immediately thereafter, Sherrod quit and stopped coming into the office.

> Plaintiffs subsequently filed a complaint against defendants Sherrod alleging numerous causes of action, including breach of contract. Defendants Sherrod filed a counterclaim against plaintiffs for breach of contract and an accounting, and filed a third-party complaint against [GCH] for a violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Plaintiffs moved for summary disposition on their breach of contract claim pursuant to MCR 2.116(C)(10), and on defendants' counterclaims, which the trial court

[3] The agreement provided that Sherrod would be entitled to a bonus if the practice reached certain financial goals.

granted. The trial court also granted summary disposition to [GCH] on the WPA claim pursuant to MCR 2.116(C)(10). [*Id*. at 3.]

On appeal, this Court stated the following with respect to the trial court's grant of summary disposition to plaintiffs on their breach-of-contract claim:

> We agree with plaintiffs that there is no genuine issue of material fact regarding whether defendants first breached the contract, thereby causing plaintiffs damage. Nevertheless, we do find that there is a genuine issue of material fact regarding the amount of damages. The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach. A party's remedy for breach of contract is limited to damages that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made. While damages that are speculative or based on conjecture are not recoverable[,] it is not necessary that damages be determined with mathematical certainty; rather, it is sufficient if a reasonable basis for computation exists.
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> Here, plaintiffs sought to recover for defendants' breach of contract when Sherrod quit her employment. Plaintiffs requested and received $181,048.58, representing the amount of goodwill in the business, as calculated in the business valuation report that defendants Sherrod had prepared in expectation of selling the practice. Yet, damages are generally an issue of fact, and questions of fact are, of course, generally decided by the trier of fact. While plaintiffs claim that the business valuation report represented the amount of goodwill in the business, this report was current as of December 31, 2006, and the purchase agreement was not executed until May 23, 2008. Moreover, even if the loss of goodwill is the appropriate measure of damages, plaintiffs failed to produce any evidence, such as expert testimony, demonstrating that defendants' breach resulted in a loss of any or all of the goodwill in the practice.
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> Because there is a genuine issue of material fact regarding the amount of damages plaintiffs sustained as a direct and natural result from defendants' breach, the trial court erred in holding otherwise.[4] [*Id*. at 6 (cleaned up).]

The events that transpired next are set forth in this Court's opinion in *Michael S Sherman, DO, PC v Shirley T Sherrod MD, PC*, unpublished per curiam opinion of the Court of Appeals, issued December 17, 2015 (Docket Nos. 320689, 323278, and 324569) (*Sherman II*), pp 3-4:

> On remand, the trial court scheduled the matter for a jury trial on the issue of damages. Prior to trial, however, myriad motions were filed. Relevant to the

[4] Although not pertinent to any issues in the current appeal, this Court in S*herman I* affirmed the grant of summary disposition in favor of GCH on the third-party complaint. *Sherman I*, unpub op at 5. This Court also affirmed the grant of summary disposition in favor of plaintiffs on defendants' counterclaims. *Id*. at 7.

> instant matter, plaintiffs filed a motion to bar defendants' efforts to re-litigate causation. Defendants responded that plaintiffs' motion was nothing more than plaintiffs' attempt to seek protection from the fact that they failed to mitigate their damages. According to defendants, the defense of failure to mitigate damages is not a new causation theory and is, instead, a defense that concerns damages such that defendant should be allowed to introduce evidence of this defense at trial. The trial court granted plaintiffs' motion "because, based upon [*Sherman I*], the trial is on damages only."
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> A jury trial concerning damages only took place on January 27, 28, 29, 30 and February 3, 2014. The jury reached a verdict in the amount of $532,356.00 in favor of the Sherman plaintiffs and against defendants.

Thereafter, plaintiffs moved for attorney fees under the parties' indemnification provision in the medical practice purchase agreement. *Id*. at 4. "The trial court denied defendants' request for an evidentiary hearing on this issue and, on March 5, 2014, entered judgment in favor of plaintiffs and against defendants for the attorney fees, expert fees, costs and expenses incurred pursuant to the May 23, 2008 purchase agreement." *Id*.

Defendants appealed and argued that they were entitled to a new trial because the trial court erred by precluding them from litigating the question of the causal relationship between Sherrod's breach of contract and plaintiffs' damages. *Id*. at 4-5. This Court, while noting that *Sherman I* established that plaintiffs "had suffered *some* damages as a result of defendants' breach of the parties' contract," *id*. at 5-6, nonetheless agreed that a new trial was warranted, explaining:

> While damages are an element of a breach of contract action, a party to a contract who is injured by another's breach of the contract is entitled to recover from the latter only damages for such injuries as are the direct, natural, and proximate result of the breach. The type and amount of damages that were the direct, natural, and proximate result of defendants' breach of contract (i.e., those damages that were *caused* by the breach) could only be established through testimony and evidence. To determine the amount of damages plaintiffs were entitled to recover necessarily required proof of a nexus between defendants' breach of contract and the specific damages sought. The only testimony permitted by the trial court, however, was that of certified public accounts [sic: accountants] (CPA's) concerning numerical amounts. While the experts gave some testimony as to how the monetary damages related to the defendants' breach, there is no indication that they were in a position to make such determinations.
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> * * *
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> In sum, this Court, in [*Sherman I*], determined that there was no uncertainty as to the fact of damages concerning defendants' breach of contract. However, the amount of damages attributable to the breach required testimony and evidence to establish that plaintiffs recovered only those damages as could be said to have directly, naturally, and proximately flowed from defendants' breach. The trial court erred in ruling otherwise and in limiting the trial to a presentation of numbers only,

> without allowing testimony and evidence to support or discredit that the numbers were caused by defendants' breach. A new trial is thus ordered. [*Id*. at 6-7 (cleaned up).]

This Court reiterated that *Sherman I* "simply indicated that there was no question as to the fact of damages" and stressed that plaintiffs would only be entitled to those damages that "have directly, naturally, and proximately flowed from defendants' breach . . . ." *Sherman II*, unpub op at 7.

In *Sherman II*, this Court also addressed defendants' argument that the trial court erred by granting plaintiffs' request for attorney fees under the indemnification agreement. Defendants had argued, in pertinent part, that the indemnification provisions only applied to claims brought against the indemnitee by third parties, and not to direct claims between the parties themselves. *Id*. at 8. This Court rejected this argument because it determined that the indemnification language was "all-inclusive" because it required indemnification against "any and all loss . . . suffered by Purchaser . . . ." *Id*. (cleaned up).

On remand, before the new trial commenced, plaintiffs moved to preclude defendants from asserting that plaintiffs had suffered no damages. Relying on *Sherman II*, which provided that plaintiffs had established that they had suffered "some" damages, the trial court granted plaintiffs' motion, but the court also noted that although the amount could not be zero, "it could be a dollar, whatever." When instructing the jury on damages, however, the court never mentioned that it had to award *some* damages. Instead, the court explained that the injured party could only recover damages that naturally arose from the breach itself.

Similar to the previous trial, each side presented expert testimony regarding damages. But unlike the prior trial, both Sherman and Sherrod testified as well. At the conclusion of trial, the jury rendered a verdict in favor of plaintiffs in the amount of $600,000. The trial court entered a judgment that awarded plaintiffs $600,000, consistent with the jury's verdict, and also awarded $214,943.46 for interest under MCL 600.6013(1) and (8). The judgment further required defendants to pay plaintiffs $436,082.20 for attorney fees, costs, and expert fees, under the indemnification agreement.

After entry of the judgment, defendants moved for judgment notwithstanding the verdict (JNOV), arguing that the evidence did not establish any of plaintiffs' damages with reasonable certainty and that the evidence did not show that any damages were the direct, natural, and proximate result of any breach. The trial court disagreed and denied the motion. This appeal followed.

II. ANALYSIS

A. MOTION FOR JNOV

Defendants argue that the trial court erred by denying their motion for JNOV because there was insufficient evidence of a causal connection between defendants' breach and any damages suffered by plaintiffs. We disagree.

This Court reviews a trial court's decision on a motion for JNOV de novo. *Nahshal v Fremont Ins Co*, 324 Mich App 696, 718; 922 NW2d 662 (2018). A motion for JNOV challenges

"the sufficiency of the evidence in support of a jury verdict in a civil case." *Id.* at 719 (cleaned up). A motion for JNOV should only be granted "when, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *Id*.

This trial was to determine plaintiffs' damages as a result of defendants' breach of the 2008 purchase agreement. In *Sherman II*, this Court remanded for a new trial on damages because the trial court had improperly limited the evidence that could be presented at the initial trial. Specifically, the trial court erred by only allowing "a presentation of numbers only, without allowing testimony and evidence to support or discredit that the numbers were caused by defendants' breach." *Sherman II*, unpub op at 7. On remand, the trial court imposed no such evidentiary limitations, and unlike the previous trial, both Sherman and Sherrod testified.

The evidence was sufficient to allow the jury to find that defendants' breach of the purchase agreement caused plaintiffs' damages. In particular, § 6 of the purchase agreement stated, in pertinent part:

> Seller and Purchaser shall communicate with Seller's current patients by a joint letter, the content of which shall be approved by Purchaser, notifying the patients that the Practice has been transferred and encouraging all of the patients to continue to receive eye care from Purchaser. . . . Seller shall use all reasonable efforts to transfer it's [sic] and her goodwill from patients, practice relationships and referral sources to Purchaser and shall support such transfer in every possible way.

At trial, Sherman was asked specifically to address the causal link between defendants' failure to transition the practice and plaintiffs' damages. Sherman stated that Sherrod refused to take any action to introduce him as the new owner to the pertinent stakeholders. When asked of the impact of that failure, he stated:

> Because she's the face of the practice and all the referring doctors have to know that I'm there, all the community leaders where the whole practice was. You know, a lot of referrals from going to various events and community leaders, I was never introduced to them, they had no idea who I was, it's everything in a practice like this.
>
> When the physician who is trusted by the staff and patients takes you around, puts their arm around you, introduces you as someone they trust[,] that's everything.

When asked again about Sherrod's actions, Sherman stated:

> It damaged [the business] in many ways. My reputation, my ability to generate an income, you know, we had to close up a business that was failing.
>
> [T]he goodwill of Dr. Sherrod's name, transferring it over to me was a crucial part in keeping that going, she's been the face of that practice for 30 plus years, patients know her name.

> For her to take me around and put her arm around me in front of the patients on a day and say here's the new guy, here's the new person, here's the new doctor is invaluable, that's everything.

Sherman also was asked why Sherrod was "the key to keeping the business going" and why he would not simply fire her if she was causing issues. Sherman answered:

> She was the face of the business. She had the contacts for the marketing. She had the contacts at the hospital. She had the contacts with the patients. She had the contacts with the staff. She's been there for 30 plus years or however many years.
>
> One of the reasons I bought, I mean a huge reason was for her to stay along with me 'cause I knew that she was the rainmaker[5] and that I wanted to, you know, I would never, no one buys a practice and the senior physician just exit[s] right away . . . .

Defendants, on the other hand, argued that any damages were the result of Sherman's own actions, not Sherrod's. Specifically, defendants primarily contended that the damages were caused by Sherman's failure to properly manage three office locations[6] at the same time, failure to spend enough money on marketing, and his decision to close the Hamtramck office.

Sherman's testimony was sufficient to allow the jury to find that defendants' breach of the purchase agreement caused plaintiffs' damages. Sherman explained why it was important for the practice's success to have a meaningful transition from Sherrod to him. The jury was free to find that this expected transition did not occur because of Sherrod's lack of cooperation, and that the resulting damages were a result of defendants' breach. See *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996) (starting that it is "the factfinder's responsibility to determine the credibility and weight of trial testimony."). Likewise, the jury was free to disregard the evidence and arguments defendants presented. See *id*. Therefore, the trial court did not err by denying defendants' motion for JNOV.

B. MOTION IN LIMINE & JURY INSTRUCTION

Defendants next argue that the trial court erred by granting plaintiffs' motion in limine to preclude defendants from arguing that zero damages should be awarded, and erred by instructing the jury that it could not award nothing. We disagree.

Regarding the jury instructions, defendants have not identified where the trial court instructed the jury that it had to award some amount of damages. Moreover, a review of the jury instructions shows that the jury never was instructed that it had to award some damages. While

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[5] In this context, "rainmaker" means "a person (such as a partner in a law firm) who brings in new business" or "a person whose influence can initiate progress or ensure success." *Merriam-Webster's Collegiate Dictionary* (11th ed).

[6] The three locations were plaintiffs' original practice in Garden City, and the Detroit and Hamtramck locations of the practice that plaintiffs purchased from defendants.

plaintiffs' counsel suggested to the jury during opening statement that the court would be instructing that it had to award some damages and defense counsel reiterated the premise that no damages was not permissible, no such instruction was ever given. Therefore, the record does not support defendants' claim that the jury was erroneously instructed that some damages must be awarded.

And with respect to the motion in limine, the trial court did not abuse its discretion by granting the motion. See *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 63; 836 NW2d 898 (2013) (providing abuse-of-discretion standard for review of grant or denial of motion in limine). The motion sought to preclude defendants from arguing or presenting evidence that zero damages should be awarded. In granting the motion, the trial court relied on the following language in *Sherman II*:

> The plain language of this Court's opinion [in *Sherman I*] makes clear that plaintiffs had established only that they had suffered *some* damages as a result of defendants' breach of the parties' contract. However, the type and amount of damages that plaintiffs had suffered as a result of defendants' breach remained at issue. [*Sherman II*, unpub op at 5-6.]

As *Sherman II* makes clear, plaintiffs had established that they had suffered "*some*" damages, i.e., not zero. Therefore, the trial court did not err by granting plaintiffs' motion in limine. Under the law-of-the-case doctrine, a trial court, on remand, may not take action that is inconsistent with the judgment of this Court. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). "[T]he trial court is bound to strictly comply with the law of the case, as established by the appellate court, according to its true intent and meaning." *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008) (cleaned up). Accordingly, the trial court was compelled to rule that according to the law of the case, plaintiffs were entitled to some positive amount of damages.

C. INDEMNIFICATION—ATTORNEY FEES

Defendants also argue that the trial court erred by awarding plaintiffs $436,082.20 in attorney fees under the indemnification provision in the purchase agreement. We disagree. Whether the law-of-the-case doctrine applies is a question of law subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

Defendants concede that under the law-of-the-case doctrine, this Court is bound to follow this Court's prior decision in *Sherman II* that attorney fees are recoverable under the purchase agreement's indemnification provision. Defendants raise this issue only for the purpose of preserving it for further appellate review in our Supreme Court. "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Id*. As defendants acknowledge, in *Sherman II*, this Court held that the indemnification provision in § 15 of the purchase agreement allows plaintiffs to recover their attorney fees and expenses. *Sherman II*, unpub op at 8-9. Therefore, we affirm the trial court's award of attorney fees and costs.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michelle M. Rick