STATE OF MICHIGAN

COURT OF APPEALS

123.NET, INC.,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

DOMINIC SERRA, METRO WIRELESS INTERNATIONAL, INC., GENERAL TOWER SYSTEMS, INC., and DOMINIC SERRA & ASSOCIATES, INC.,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellees/Cross-Appellants,

and

DANIEL IRVIN,

Third-Party Defendant,

and

VB DATACOM, LLC

Defendant/Counterplaintiff/Third-Party Plaintiff/Cross-Appellant,

and

REESE SERRA,

Defendant/Counterplaintiff/Third-Party Plaintiff.

UNPUBLISHED
December 2, 2021

No. 353075
Oakland Circuit Court
LC No. 2016-154850-CB

Before: CAVANAGH, P.J., and O'BRIEN and REDFORD, JJ.

PER CURIAM.

Plaintiff, 123.net, Inc., appeals as of right the January 15, 2020 order denying its request for attorney fees in the form of case-evaluation sanctions. Defendants Dominic Serra, Metro Wireless International, Inc., General Tower Systems, Inc., Dominic Serra & Associates, Inc. (DSA), and VB Datacom, LLC, filed a cross-appeal as of right, challenging other, previously issued orders of the trial court. For the reasons provided below, we affirm in part, reverse in part, and remand for further proceedings.

This case arises out of the parties' past business relationships. Third-party defendant, Daniel Irvin, is the chief executive officer of plaintiff, which is a company that provides telecommunication services to businesses throughout Michigan. In 2009, plaintiff and Zing Networks, Inc., entered into an agreement in which plaintiff would acquire Zing in exchange for shares of Zing to be delivered within 30 days. When Zing did not timely produce the shares, plaintiff withdrew from the agreement. Despite this event, plaintiff retained defendant Dominic Serra,[1] though his company DSA, to act as the director of plaintiff's wireless services division. Serra reported directly to Irvin, and had broad responsibilities, including hiring and supervising vendors and sales agents, approving invoices, executing leases, supervising personnel, marketing, and making sales.

After the termination of the Zing agreement, plaintiff and Serra exchanged several drafts of a "profit sharing arrangement for the sale of wireless internet services . . . to [plaintiff's] current and future customers." The document was titled the "Wireless Internet Partnership Agreement" (WIPA). Drafts of the WIPA contemplated that Serra would receive 1/3 of the proceeds after the proceeds reached a gross amount of $500,000 in annual sales. However, the WIPA was never executed by the parties.

In February 2012, plaintiff and VB Datacom entered into an Agent Agreement, in which plaintiff agreed to pay commissions for every customer secured by VB Datacom. The Agent Agreement also provided, in pertinent part, that plaintiff may terminate the agreement for cause for several reasons, including that VB Datacom "engage[d] in any fraudulent or criminal activities." Unbeknownst to plaintiff, VB Datacom and DSA entered into a partnership agreement, in which they would split the profits, including any sales commissions VB Datacom received from plaintiff. In November 2017, plaintiff terminated the Agent Agreement with VB Datacom, relying on VB Datacom's failure to disclose its relationship with Serra and citing the fraudulent-activities clause of the agreement.

In May 2012, Serra and plaintiff executed a Warrant Agreement. This agreement provided that in consideration for Serra's "efforts to create, maintain, and advance the wireless network of

[1] Serra was a founder and chief operation officer of Zing.

[plaintiff], both past, present, and future," Serra would receive, upon the sale of the company's "Wireless Assets,"[2] the lower of:

> A. Thirty (30%) Percent of the Gross Revenue received by the Corporation upon the sale of the Wireless Assets, or
>
> B. Thirty (30%) Percent of the appraised value as contained in Article III, occurring at the time of the triggering event contained in Article III.

Article III of the Warrant Agreement provided that upon certain events, including Serra's termination from the company, the value of Serra's 30% share was to be appraised by Irvin or his successor. And if Serra did not agree with the appraisal, the services of "a reputable and disinterested third-party appraisal company" could be selected to perform the appraisal. The agreement also contained a merger clause: "This Agreement, including the schedules, contains the entire agreement between the Parties with respect to the matters described herein and is a complete and exclusive statement of the terms thereof and supersedes all previous Agreements."

After Serra and plaintiff separated, plaintiff sent Serra a letter advising him that Irvin had performed the evaluation as described in the Warrant Agreement and determined that Serra's 30% share was valued at $794,651.28 at the time of the separation. Given some of Irvin's past comments to Serra, Serra thought this was very low.

Plaintiff brought suit in August 2016. In November 2017, plaintiff filed its first amended complaint alleging misappropriation of trade secrets (Count I), tortious interference with business relationships (Count II), breach of fiduciary duty (Count III), fraudulent inducement (Count IV), breach of the Warrant Agreement (Count V), civil conspiracy (Count VI), silent fraud (Count VII), fraud (Count VIII), conversion (Count IX), and aiding or abetting (Count X).

In October 2016, Serra, Metro Wireless, General Tower, and DSA (collectively, "the Serra Defendants") filed a counterclaim against plaintiff and a third-party complaint against Irvin. The pleading included counts of breach of fiduciary duty (Count I), breach of fiduciary duty among partners (Count II), breach of contract (Count III), fraud in the inducement (Count IV), tortious interference with a business relationship (Count V), promissory estoppel (Count VI), business defamation (Count VII), civil conspiracy (Count VIII), unjust enrichment (Count IX), and accounting (Count X).

In 2017, the parties moved for summary disposition. Plaintiff and Irvin moved for summary disposition under MCR 2.116(C)(8) on all the counts raised in the counterclaim and

[2] The agreement defined what Wireless Assets were, but its definition is not pertinent for the issues on appeal. The parties do not disagree that there was no sale of Wireless Assets under the terms of the Warrant Agreement.

third-party complaint. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10) on all of plaintiff's counts.[3]

The trial court issued an opinion addressing both motions. The court dismissed plaintiff's claim for breach of fiduciary duty because it ruled that the count was an attempt to assert a trade-secrets claim, which was preempted by the Michigan Uniform Trade Secrets Act, MCL 445.901 *et seq*. The court denied defendants' motion regarding the other counts in plaintiff's complaint. Regarding plaintiff and Irvin's motion, the trial court dismissed defendants' claim for breach of the Warrant Agreement because it was not ripe, given that the sale of plaintiff's assets was the event that triggered payment to Serra and that had not occurred. The court dismissed the unjust-enrichment claim because an express agreement covered the same subject matter. Given the merger clause in the Warrant Agreement, the court dismissed defendants' claims for promissory estoppel and fraud in the inducement. The court ruled that defendants' claims for business defamation and civil conspiracy could not survive summary disposition based on the asserted facts. Finally, the court denied an accounting to defendants in light of the fact that the Warrant Agreement had a specific procedure for valuation. Thus, the only claims by defendants that survived were Count I (breach of fiduciary duty), Count II (breach of fiduciary duty among partners), and Count V (tortious interference with a business relationship).[4]

While defendants' motion for reconsideration was pending, the parties went to case evaluation. Despite the trial court having dismissed seven of defendants' counterclaims, they still argued to the case-evaluation panel that their claims, in particular the claim for breach of the Warrant Agreement, would be reinstated through their motion for reconsideration.[5]

On January 8, 2018, defendants filed an amended counterclaim and third-party complaint. Although the amended pleading added a few new general allegations, it presented the same 10 counts that were alleged in their original counterclaim and third-party complaint. VB Datacom also asserted its own counterclaim against plaintiff, alleging, in pertinent part, that plaintiff had breached the Agent Agreement by terminating it.[6]

In September 2018, plaintiff moved for summary disposition under MCR 2.116(C)(10) on the Serra Defendants' three remaining counts, which included two counts of breach of fiduciary duty. The trial court granted the motion. The court ruled that defendants' two claims of breach of

[3] Although defendants asserted they were seeking summary disposition on all of plaintiff's counts, in their brief in the trial court, they never addressed plaintiffs' Count V, breach of the Warrant Agreement.

[4] Defendants moved for reconsideration, which included a request to amend the pleadings, but the trial court denied that motion "in its entirety."

[5] The specific facts related to case evaluation are discussed later in Part I of this opinion.

[6] The other counts raised by VB Datacom—violation of the Michigan Sales Representatives Act and tortious interference with a business relationship—were dismissed by stipulation before trial.

fiduciary duty necessarily failed because plaintiff and Irvin did not owe a fiduciary duty to any of the Serra Defendants.

The case proceeded to trial. As a result of the trial court's various decisions during the pendency of the case, for some surviving claims, the jury merely had to determine damages because liability had already been established by the trial court. The jury returned the following verdicts:

- It awarded plaintiff $0 for its misappropriation-of-trade-secrets claim against the Serra Defendants.
- It awarded plaintiff $39,694.21 for its claims of breach of fiduciary duty pertaining to VB Datacom against Serra and DSA.
- Serra and DSA breached their fiduciary duty to plaintiff related to General Tower, causing $1 in damages.
- It awarded plaintiff $1 for its silent-fraud claim against Serra and DSA.
- VB Datacom committed silent fraud against plaintiff, causing $1 in damages.
- The Serra Defendants did not commit fraud against plaintiff.
- It awarded plaintiff $1 on its claim of civil conspiracy, related to VB Datacom, against Serra and DSA.
- VB Datacom was liable for conspiracy against plaintiff, causing $9,917.05 in damages.
- Although Serra and Metro Wireless were not liable for committing civil conspiracy regarding General Tower and/or Metro Wireless, DSA and General Tower were liable, resulting in $1 in damages.
- VB Datacom aided or abetted Serra and DSA's silent fraud and breaches of fiduciary duty, causing $1 in damages.
- Plaintiff breached the Agent Agreement with VB Datacom, and awarded VB Datacom $63,178.50 in damages.

Plaintiff thereafter filed a motion and an amended motion for partial judgment notwithstanding the verdict (JNOV). Plaintiff argued that because there was no dispute that it had terminated the Agent Agreement between it and VB Datacom, the only question for the jury was whether that termination was justified, i.e., whether VB Datacom engaged in fraudulent activities. Plaintiff also noted that VB Datacom had conceded before trial that VB Datacom's breach-of-contract claim "either succeeds or fails on the strength of [plaintiff's] silent-fraud claims against VB Datacom." With the jury finding that VB Datacom had committed silent fraud, plaintiff

maintained that the verdict that plaintiff breached the Agent Agreement was contrary to law and must be reversed. The court noted that fraud was an issue for the jury to decide, and concluded that because the jury decided that VB Datacom had engaged in fraud, VB Datacom could not prevail on its breach-of-contract claim. Accordingly, the court granted plaintiff's motion. The trial court entered an amended judgment, reflecting a judgment of no cause of action regarding VB Datacom's claim for breach of contract against plaintiff.

I. PLAINTIFF'S APPEAL

Plaintiff argues that the trial court erred as a matter of law when it sua sponte vacated the case-evaluation award. We agree. Whether the trial court had the authority to vacate the case-evaluation award is a question of law, which we review de novo. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 374; 689 NW2d 145 (2004). The construction of court rules and statues is reviewed de novo as well. *Id*.

Plaintiff filed the instant complaint in August 2016. In December 2016, the trial court ordered the parties to submit their dispute to case evaluation in July 2017, with trial expected to take place in December 2017. In May 2017, the parties stipulated to an amended scheduling order, which moved case evaluation to October 2017 and trial to March 2018.

In the month before case evaluation, the trial court granted summary disposition in favor of plaintiff on seven of defendants' counterclaims. The case-evaluation panel issued a unanimous decision awarding plaintiff $100,000 for its claims and awarded defendants $1.1 million for their counterclaims, for a net award of $1 million in favor of defendants.[7] Defendants submitted a response, where they attempted to accept one portion of the award and reject the other:

> 1. Dominic Serra (DO5), Metro Wireless International Inc. (DO6) and General Tower Systems, Inc. (DO7) hereby reject the award given in favor of 123.net (PO1) against them in the amount of $100,000.
>
> 2. Dominic Serra (DO5), Metro Wireless International Inc. (DO6) and General Tower Systems, Inc. (DO7) hereby accept the award given in their favor and against 123.Net (PO1) and Daniel Irvin (DO8) in the amount of $1,100,000. The award of $1,100,000.000 [sic] as to the counterclaim in favor of DO5 and against PO1 and DO8 is joint and several.

[7] Aside from the entry of the awards in table form on the document, the case-evaluation panel specified in the comments section, "PO1 [plaintiff] receives an award of $100,000 on its claims against DO5 [Serra]; however, DO5 receives an award of $1,100,000 on its counterclaim against PO1. In other words, DO5 receives a net award of $1,000,000 against PO1. The award in favor [of] DO5 will be joint and several with DO6 [Metro Wireless], DO7 [General Tower,] and DO8 [Irvin]."

Regardless of defendants' intent, the case-evaluation office recorded their response as "R" for "rejection."

After case evaluation, plaintiff filed its first amended complaint. Thereafter, defendants filed their amended counterclaim and third-party complaint. The case ultimately proceeded to trial on limited issues,[8] resulting in a net verdict of (1) $39,697.21 in favor of plaintiff against Serra and DSA, and (2) $1.00 in favor of plaintiff against Serra, DSA, General Tower, and Metro Wireless.[9]

Plaintiff argued below that it should be entitled to case-evaluation sanctions because defendants, who rejected the case-evaluation award, did not improve on their net $1,000,000 case-evaluation award. Coincidentally, the Serra Defendants also moved for case-evaluation sanctions, arguing that plaintiff did not improve on the $100,000 award that plaintiff rejected. The trial court ruled:

> Having looked at everything, and trust me, there was a lot to look at in this case, I would have to venture that it's been quite a muddled mess from the get-go. However, my concern is that at the time that this case evaluation came down[,] there were a lot of things that were in flux that probably should have been taken care of before you went to case evaluation.
>
> Now, I know you [defense counsel] had filed your motion for reconsideration but you didn't ask for an extension of the case evaluation because of that and that would have been the prudent thing, to see exactly what issues were still alive at that point in time. Compound that with the way the case evaluation panel handled the awards, in this court's estimation, basically negates the award, period, so I'm vacating the case evaluation award because I don't believe it has any bearing as to what should have been done, what could have been done if everything was properly presented to a case evaluation panel.

When plaintiff inquired on what authority or basis the court was vacating the case evaluation, the court responded:

> Well, I believe the basis is what I indicated, which is that there were issues that were presented to this case evaluation panel that should not have been presented[;] therefore, there is no basis for the award that was given and I'm vacating the award because of that.

Consequently, the trial court denied both plaintiff's and defendants' motions for case-evaluation sanctions.

---

[8] As discussed later, many of the claims and counterclaims had been dismissed via summary disposition.

[9] Plaintiff's claims against VB Datacom and VB Datacom's counterclaim are not pertinent to the case-evaluation issue.

We note at the outset that the trial court (and no party) has identified anything in the court rules, common law, or statute that expressly allows a trial court to vacate a case-evaluation award. Indeed, defendants on appeal take no position on whether the trial court possessed such authority. Nevertheless, it appears that the general court rule allowing for relief from a judgment or order, MCR 2.612(C), could arguably be utilized. We conclude so because, in a somewhat analogous situation, this Court has held that a party can set aside its rejection or acceptance of a case-evaluation award under MCR 2.612(C) if failure to set the acceptance or rejection aside would result in "substantial injustice." *State Farm Mut Auto Ins Co v Galen*, 199 Mich App 274, 277-278; 500 NW2d 769 (1993), citing MCR 2.612(C)(1); *Great American Ins Co v Old Republic Ins Co*, 180 Mich App 508, 510; 448 NW2d 493 (1989), citing MCR 2.612(C)(1)(a); *Reno v Gale*, 165 Mich App 86, 92-93; 418 NW2d 434 (1987), citing MCR 2.612(C)(1). That was the case even though there is nothing in the court rules that specifically permits a trial court to set aside a party's rejection or acceptance of a case-evaluation award. Arguably, then, MCR 2.612(C) could likewise be invoked for setting aside or vacating a case-evaluation award.

MCR 2.612(C) provides, in pertinent part:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.
>
> (2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. . . .

However, there are two significant impediments to invoking MCR 2.612(C) in the present circumstance. First, relief under this court rule is only available *upon a party's motion*. See MCR 2.612(C)(1) ("On motion and just terms . . . ."); MCR 2.612(C)(2) ("The motion must be made within a reasonable time . . . ."). In this case, no party moved to have the award vacated. Indeed, plaintiff and defendants both embraced the award and sought to recover case-evaluation sanctions. Instead, the trial court on its own initiative vacated the case-evaluation award. Second, even assuming defendants' position at the trial court somehow could be viewed as a request to vacate

the award, the request was not done within a reasonable time. The parties submitted their case to the case-evaluation panel on October 11, 2017. As of November 9, 2017, defendants were put on notice that their attempt to accept the award with respect to the $1.1 million in their favor and reject the award with respect to the $100,000 award in favor of plaintiff was unsuccessful. Defendants filed their motion for case-evaluation sanctions more than two years later on January 8, 2020, a month after trial had concluded. It was patently unreasonable for defendants to wait that long to potentially challenge their designation as having rejected the entire case-evaluation award.[10] Accordingly, MCR 2.612(C) could not have been utilized to vacate the award. Thus, with no other court rule or statute permitting the trial court to vacate a case-evaluation award, the trial court erred as a matter of law when it vacated the award.[11] We therefore reverse the vacation of the case-evaluation award and remand for further proceedings.[12]

---

[10] Moreover, such a request to set aside the case evaluation would have been based on "mistake" because defendants contend that the award was in violation of the MCR 2.403(K)(2) by failing to create separate awards as to plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim. But when a "mistake" is the ground for relief, the motion for relief must be filed "within one year after the judgment, order, or proceeding was entered or taken." MCR 2.612(C)(2). In this instance, defendants did not move for relief within a year after the case-evaluation award or within a year after learning that their response to case evaluation was deemed a rejection. We offer no opinion whether a timely motion would have been successful.

[11] Although defendants take no position on whether the trial court possessed the authority to vacate the case-evaluation award, they nonetheless suggest that MCR 2.604(A) could have afforded that authority. We disagree. MCR 2.604(A) states, in relevant part:

> Except as provided in subrule (B), an order or other form of decision *adjudicating* fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment adjudicating all the claims and the rights and liabilities of all the parties. [Emphasis added.]

In *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007), we stated that this court rule allows a trial court "to revisit an order while proceedings are still pending." See also *Hill v City of Warren*, 480 Mich 1195, 1198 (2008) (CORRIGAN, J., concurring). In our view, the rule is inapplicable for vacating case-evaluation awards. First, such an award, without acceptance on both sides, is not an "adjudication" of any claims and therefore does not fall under the ambit of the rule. See *Magdich & Assoc, PC v Novi Dev Assoc, LLC*, 305 Mich App 272, 276-277; 851 NW2d 585 (2014). Second, the rule only pertains to prior orders of the court. The case-evaluation award is not an order, per se, and was not issued by the court; therefore, when modifying it or vacating it, the court is not "revisit[ing]" one of "its prior rulings." *Hill*, 480 Mich at 1198 (CORRIGAN, J., concurring). This is distinguishable from MCR 2.612(C)(1), which allows a party to seek relief from any "final judgment, order, or *proceeding*." (Emphasis added.)

[12] We note, the remand for further proceedings is in conjunction with other aspects of this opinion; including § II (C) *infra*¸ which reverses the judgment notwithstanding the verdict and remands for

II. DEFENDANTS' CROSS-APPEAL

Preliminary, it is necessary to determine whether this Court has jurisdiction to review defendants' issues on cross-appeal, which all do not relate to the denial of case-evaluation sanctions.[13] "Whether a court has subject-matter jurisdiction is a question of law subject to review de novo." *Usitalo v Landon*, 299 Mich App 222, 228; 829 NW2d 359 (2012). Plaintiff argues that this Court lacks jurisdiction to hear defendants' issues on cross-appeal because any cross-appeal is limited to the trial court's order denying case-evaluation sanctions. Because binding precedent suggests a contrary outcome, we disagree.

---

a new trial on VB Datacom's claim of breach of contract and plaintiff's claim of silent fraud. As such, this reversal of the trial court sua sponte vacating the case evaluation award is not to be interpreted as a finding by this Court that the trial court must under all the circumstances which may exist at some later date, impose case evaluation sanctions against one or both parties. Should the trial court be called upon to consider and decide a future motion by a party or parties to impose case evaluation sanctions, issues the trial court may consider in deciding such motion or motions may include but are not limited to:

1. Was the original case evaluation award premised on multiple claims that had already been dismissed by the trial court but for which a party had a pending motion for reconsideration, which was itself eventually denied?
2. Did the parties draft and present to the court and agree to a special verdict form that allowed for inconsistent verdicts necessitating a retrial?
3. Did the original case evaluation award separately identify the party or parties granted a case evaluation award and specify the claim for which the panel granted the award; and if not, did the parties take action so that their case evaluation award was set forth in compliance with MCR 2.403(K)(2) to enable the possibility of evaluating the propriety of awarding sanctions under MCR 2.403(O)?
4. What is the result of the matter tried on remand?
5. And any other matters the trial court determines are appropriate to consider under the facts and law of the case and the court rules and caselaw of this state.

[13] No steps need to be taken to preserve a challenge to subject-matter jurisdiction. See *Forest Hills Coop v City of Ann Arbor*, 305 Mich App 572, 615; 854 NW2d 172 (2014). Indeed, the issue need not even be raised by a party because "a court is continually obliged to question sua sponte its own jurisdiction over . . . the subject matter of an action." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 399; 651 NW2d 756 (2002). Regardless, plaintiff has challenged this Court's jurisdiction to hear defendants' cross-appeal. Plaintiff originally raised this issue in a motion to dismiss defendants' cross-appeal. This Court denied the motion, but ordered the parties "to address the jurisdictional issue presented in the motion to dismiss in the cross-appellants' and cross-appellee's briefs." *123.net v Serra*, unpublished order of the Court of Appeals, entered August 6, 2020 (Docket No. 353075).

As background, we present this timeline of events after the conclusion of the jury trial, leading up to the filing of the appeal and cross-appeal:

December 20, 2019:	Trial court enters judgment consistent with jury's verdict[14]
January 8, 2020:	Plaintiff filed amended motion for partial JNOV as to VB Datacom
January 8, 2020:	Plaintiff files motion for case-evaluation sanctions
January 8, 2020:	Defendants file motion for case-evaluation sanctions
January 15, 2020:	Trial court denies both motions for case-evaluation sanctions and vacates the case-evaluation award
January 15, 2020:	Trial court grants plaintiff's motion for partial JNOV as to VB Datacom
January 23, 2020:	Trial court enters amended judgment, reflecting grant of JNOV
February 5, 2020:	Plaintiff files motion for reconsideration of the trial court's vacation of the case-evaluation award
February 26, 2020:	Trial court denies plaintiff's motion for reconsideration
March 11, 2020:	Plaintiff files its claim of appeal in this Court, appealing as of right the trial court's denial of case-evaluation sanctions
April 1, 2020:	Defendants file a claim of cross-appeal, challenging prior orders of the trial court

This Court has jurisdiction to hear appeals as of right from "final" orders or judgments. MCR 7.203(A)(1). MCR 7.202(6)(a), in turn, defines a "final judgment" or "final order" in a civil case, in pertinent part, as follows:

[14] Despite the judgment stating that it was not a final order, it was a final order under the court rules because it was the first order or judgment that resolved the remaining claims between the parties. See MCR 7.202(6)(a)(i). Notably, this Court is not bound by the trial court's characterization of the order in determining whether the order qualifies as a final order. See *McCarthy & Assoc, Inc v Washburn*, 194 Mich App 676, 678-681; 488 NW2d 785 (1992).

(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order;

* * *

(iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule[.]

Thus, the trial court's order denying plaintiff's request for case-evaluation sanctions in the form of attorney fees is a final order because it is "a postjudgment order . . . denying attorney fees and costs under MCR 2.403."[15] MCR 7.202(6)(a)(iv). Normally, a party has 21 days to file a claim of appeal of a "final order" in a civil action. MCR 7.204(A)(1)(a). But if the party moved for reconsideration of that final order within the 21-day period for filing an appeal of right, the party may nonetheless file an appeal by right if the appeal is filed within 21 days after the trial court renders a decision on the motion for reconsideration. MCR 7.204(A)(1)(b).

In this case, plaintiff appealed as of right the trial court's January 15, 2020 order denying its request for case-evaluation sanctions. Plaintiff filed the claim of appeal on March 11, 2020. Although this was not within the 21-day period after entry of the January 15, 2020 order, plaintiff's motion for reconsideration of that order was filed within that 21-day period, and its claim of appeal was timely filed within 21 days after the trial court's denial of the motion for reconsideration. Accordingly, plaintiff's appeal as of right of the order denying attorney fees was timely. When appealing as of right, a party normally "is free to raise issues on appeal related to prior orders." *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009); see also *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). But because the final order in this instance was a postjudgment order denying attorney fees, see 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). Thus, plaintiff's appeal by right was limited to issues related to the denial of its motion for attorney fees.

Defendants had 21 days from the date of plaintiff's claim of appeal to file a cross-appeal. MCR 7.207(B)(1). Defendants met that deadline. However, at issue here is the scope of that cross-appeal.

Notably, MCR 7.207,[16] which addresses cross-appeals, does not specifically address the types of orders from which an appellee may file a cross-appeal. Instead, MCR 7.207 primarily addresses the temporal requirements for filing such an appeal.

---

[15] As discussed in Part I of this opinion, MCR 2.403 governs case evaluation.

[16] MCR 7.207 states:

(A) Right of Cross Appeal.

In *Bancorp Group, Inc v Meister*, unpublished per curiam opinion of the Court of Appeals, issued January 20, 1998 (Docket No. 174566), p 1, after a judgment was entered in favor of the

---

(1) When an appeal of right is filed or the court grants leave to appeal any appellee may file a cross appeal.

(2) If there is more than 1 party plaintiff or defendant in a civil action and 1 party appeals, any other party, whether on the same or opposite side as the party first appealing, may file a cross appeal against all or any of the other parties to the case as well as against the party who first appealed. If the cross appeal operates against a party not affected by the first appeal or in a manner different from the first appeal, that party may file a further cross appeal as if the cross appeal affecting that party had been the first appeal.

(B) Manner of Filing. To file a cross appeal, the cross appellant shall file with the clerk a claim of cross appeal in the form required by MCR 7.204(D) and the entry fee

(1) within 21 days after the claim of appeal is filed with the Court of Appeals or served on the cross appellant, whichever is later, if the first appeal was of right; or

(2) within 21 days after the clerk certifies the order granting leave to appeal, if the appeal was initiated by application for leave to appeal.

The cross appellant shall file proof that a copy of the claim of cross appeal was served on the cross appellee and any other party in the case. A copy of the judgment or order from which the cross appeal is taken must be filed with the claim.

(C) Additional Requirements. The cross appellant shall perform the steps required by MCR 7.204(E) and (F), except that the cross appellant is not required to order a transcript or file a court reporter's or recorder's certificate unless the initial appeal is abandoned or dismissed. Otherwise the cross appeal proceeds in the same manner as an ordinary appeal.

(D) Abandonment or Dismissal of Appeal. If the appellant abandons the initial appeal or the court dismisses it, the cross appeal may nevertheless be prosecuted to its conclusion. Within 21 days after the clerk certifies the order dismissing the initial appeal, if there is a record to be transcribed, the cross appellant shall file a certificate of the court reporter or recorder that a transcript has been ordered and payment for it made or secured and will be filed as soon as possible or has already been filed.

(E) Delayed Cross Appeal. A party seeking leave to take a delayed cross appeal shall proceed under MCR 7.205.

plaintiff after a jury trial, the defendants moved to set aside the judgment and the trial court granted the motion in part and ordered a new trial on certain issues. The plaintiff filed a delayed application for leave to appeal, which this Court granted. *Id*. The defendants thereafter filed a cross-appeal, challenging "trial and pretrial matters." *Id*. at 6. This Court held that it lacked jurisdiction to hear the cross-appeal because it opined that the cross-appeal was limited to the order initially appealed, "i.e., the trial court's decision to grant a new trial."[17] *Id*. Our Supreme Court reversed on this issue, stating that "[t]here is no basis for the Court of Appeals conclusion that it lacked jurisdiction to consider the issues raised on the cross-appeal." *Bancorp Group, Inc v Meister*, 459 Mich 944 (1999).

In *Costa v Community Emergency Med Servs, Inc*, 263 Mich App 572; 689 NW2d 712 (2004), there were two separate appeals that were consolidated. In the first appeal, one of the defendants appealed as of right the trial court's denial of her motion for summary disposition premised on governmental-immunity grounds. *Id*. at 575. In the second appeal, other defendants appealed by leave granted the same order, which denied their motion for summary disposition on the issue of emergency-medical-service-provider immunity. *Id*. at 576. The plaintiffs filed a cross-appeal in each appeal. *Id*. at 575-576. In the second appeal, the defendants argued that this Court lacked jurisdiction to consider the plaintiffs' cross-appeal because the initial order appealed was not a final order. *Id*. at 581. This Court went on to "address the ability to cross-appeal from orders defined by MCR 7.202(6)(a)(iii)-(v), i.e., orders that are nonfinal except by definition of that rule." *Id*. at 582. This Court recognized that

> MCR 7.203(A)(1) explicitly prescribes the scope of an appellant's appeal as of right from a final order under MCR 7.202(6)(a)(iii)-(v) . . . and limits an appellant's right to appeal under these circumstances "to the portion of the order with respect to which there is an appeal as of right." [*Id*. at 583.]

Citing MCR 7.207(A)(1), the Court noted that "the court rules do not similarly restrict the scope of cross-appeals." *Id*. The Court concluded that because MCR 7.207 contained no language of limitation, a cross-appellant was free to challenge "whatever legal rulings or other perceived improprieties [that] occurred during the trial court proceedings," regardless of whether the initial appeal was an appeal as of right or by leave granted.[18] *Id*. at 583-584.

---

[17] The Court stressed that the order appealed from was the order granting a new trial, not the final judgment. *Bancorp Group*, unpub op at 6, citing MCR 7.203(B). The Court relied on MCR 7.203(B)(1), which states that this Court may grant leave to appeal from "a judgment or order of the circuit court and court of claims that is not a final judgment appealable of right." Although unstated, it appears the Court likely relied on its prior order that initially granted the plaintiff's delayed application for leave to appeal, which limited the appeal to "issues raised in the application and supporting brief." *Bancorp Group, Inc v Meister*, unpublished order of the Court of Appeals, entered June 8, 1994 (Docket No. 174566).

[18] Indeed, although not mentioned by this Court in *Costa*, it rendered its holding even though, similar to the situation in *Bancorp Group*, the order granting the defendants' application for leave to appeal expressly "limited [the appeal] to the issues raised in the application." *Costa v*

In *Mossing v Demlow Prods, Inc*, 287 Mich App 87, 89; 782 NW2d 780 (2010), the plaintiff's claims and the defendants' counterclaims were dismissed via summary disposition. The plaintiff appealed as of right, and the defendants filed a cross-appeal. After those filings, the trial court entered a postjudgment order denying the defendants' request for attorney fees. In their cross-appeal, the defendants challenged the trial court's decision to deny their request for attorney fees. *Id*. This Court noted that "the broad language in *Costa* might support the proposition that a postjudgment order denying fees and costs can be challenged as part of the appeal from the final judgment itself because it is part of 'whatever legal rulings or other perceived improprieties occurred during the trial court proceedings.' " *Id*. at 93, quoting *Costa*, 263 Mich App at 584. But the Court declined to extend *Costa*'s holding to situations where a party attempts to invoke this Court's jurisdiction through a cross-appeal "to challenge an order that was entered *after* the claim of cross-appeal was filed in this Court." *Mossing*, 287 Mich App at 93 (emphasis added).[19]

Considering the foregoing authority, we are bound to conclude that this Court has jurisdiction to hear defendants' challenges to matters falling outside the scope of the final order appealed, i.e., the order denying plaintiff's request for attorney fees. *Costa* makes it clear that a cross-appellant can raise any issues outside the particular order from which the initial appeal was sought. *Costa*, 263 Mich App at 583-584. Importantly, this allowing of a cross-appellant to challenge "whatever legal rulings or other perceived improprieties occurred during the trial court proceedings" applies to appeals from final orders as defined by MCR 7.202(6)(a)(iii)-(v), which is the circumstance in the present case, where an appellant's scope of appeal is limited by MCR 7.203(A)(1). *Id*. Likewise, *Bancorp Group* stands for the principle that a cross-appellant is not limited to confining the issues on cross-appeal to the initial order appealed, even if the initial appeal is limited in scope, such as being by leave granted and limited to the particular issues raised in the application.

In this instance, the order appealed is a final order as defined by MCR 7.202(6)(a)(iv). The only distinguishing fact from this case and *Costa* is that the "final" order appealed here also is a postjudgment order. But this difference is not significant in our view, and therefore, we are compelled to follow *Costa*.[20] Consequently, while plaintiff, as the appellant, was limited to raising

---

Community Emergency Med Servs, Inc, unpublished order of the Court of Appeals, entered August 14, 2003 (Docket No. 248104). Thus, despite the scope of the appellant's appeal in the first appeal being limited by court rule and the scope of the appellants' appeal in the second appeal being limited by this Court's order granting leave to appeal, the cross-appellants had no limitations to the issues they could raise in either appeal.

[19] The Court expressly declined to address whether a postjudgment order granting or denying an award of attorney fees and costs (a final order under the court rules) that is entered *before* a claim of cross-appeal is filed requires a separate appeal. *Mossing*, 287 Mich App at 93-94.

[20] Further, while *Mossing* limited the scope of *Costa*'s holding, the limitation is not applicable in this case because it only precludes a cross-appellant from challenging orders that were entered *after* the filing of the cross-appeal. The challenged orders on cross-appeal were entered well before the filing of the cross-appeal.

issues related to the order denying its request for attorney fees, MCR 7.203(A)(1), defendants, as cross-appellants, were not, MCR 7.207(A)(1).

A. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

Defendants argue that the trial court erred by dismissing their claim for breach of contract when it granted plaintiff's motion for summary disposition. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW23d 201 (1998). "A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

In their counterclaim, defendants alleged one count of breach of contract. Despite there being only one listed count, defendants alleged multiple breaches:

> Irvin and 123.net breached both the Warrant Agreement as well as the Joint Venture Agreement by the following acts and/or omissions which include, but are not limited to:
>
> a. failing to properly value the interest of Serra in 123.net or to provide backup information with respect to the conduct of business of the company;
>
> b. failing to pay profit sharing to Serra in accordance with the agreements of the parties;
>
> c. anticipatorily breaching the employment relationship between Serra and 123.net because Irvin "didn't like him" thereby impairing his ability to grow his interest in the company and to continue to receive compensation and profit sharing;
>
> d. selling parts of the company off on a piecemeal basis so as to impair the value of Serra's interest as defined in the Warrant Agreement.

In moving for summary disposition, plaintiff and Irvin argued that defendants' breach-of-contract claim should be dismissed because any claim under the Warrant Agreement was not ripe, given that any right to payment was conditioned on plaintiff's sale of its assets and that event had not yet occurred. Plaintiff and Irvin also argued that Serra's claim for profit sharing could not survive because there is no such promise in the Warrant Agreement, which contains a merger clause. Lastly, plaintiff and Irvin argued that defendants had not pleaded sufficient facts to show an anticipatory breach because the termination of Serra was not anticipatory and it was not a breach

of any kind.[21] In response, defendants focused on plaintiff's assertion that it was impossible to conduct an appraisal. Defendants contended that this statement demonstrated that "the prior valuation . . . was performed in bad faith and in breach of the agreement." There was virtually no other argument related to the breach-of-contract claim. The trial court concluded that, although the valuation had occurred, it did not trigger a right to payment to Serra. Accordingly, the trial court ruled that the breach-of-contract claim was not "ripe" and dismissed the claim.

To prevail on a claim for breach of contract, a plaintiff must establish that "(1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming the breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). Plaintiff, in arguing for summary disposition, primarily was relying on the absence of allegations contained in the counterclaim to support the first and last elements.

On appeal, defendants assert that they properly pleaded a breach-of-contract claim because they had alleged breaches other than the failure to pay Serra. While this is true, it does not help the count survive. In their complaint, defendants alleged that plaintiff and Irvin failed to properly value Serra's interest at the time of his termination. But Serra was to be paid this interest[22] only after plaintiff's wireless assets were sold. Thus, assuming there was any breach by failing to properly value Serra's interest, with no sale of the wireless assets, the obligation to pay Serra had not been triggered, which means that Serra had yet to suffer any damages. Indeed, any claim based on the Warrant Agreement necessarily failed because it was impossible for any alleged breach, absent any trigger to the right to payment, to have caused any damages. This is what plaintiff and the trial court meant when they stated that the claim was not "ripe,"[23] and we agree.

On appeal, defendants also argue that some of their breach-of-contract claims were not based on the Warrant Agreement. However, in responding to plaintiff's motion for summary disposition, defendants never raised this argument. Therefore, this argument is not preserved, and we decline to address it. See *Autodie, LLC v City of Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014).

---

[21] Irvin also argued that the claim should be dismissed against him specifically because any contract was between Serra and plaintiff, not Irvin individually, but that argument is not relevant to the issues on appeal.

[22] Upon Serra's separation from plaintiff, Irvin was to appraise the value of the company at the time of the separation. Serra would then be entitled to 30% of that amount or 30% of the gross revenue received by plaintiff upon the sale of the wireless assets, whichever was less.

[23] Defendants also alleged that plaintiff and Irvin failed "to provide backup information regarding the conduct of business of the company" to Serra. In addition to failing because there could be no resulting damages from this breach, this particular claim also fails for the simple reason that the Warrant Agreement does not impose an obligation on plaintiff's part to supply "backup information." Likewise, there is nothing in the Warrant Agreement preventing plaintiff from selling small portions, i.e., "piecemeal," of its assets. In fact, the agreement seems to contemplate this because it specifically exempts a sale of less than 50% of the outstanding shares of the company as an event that would be considered a sale of wireless assets.

Defendants finally argue that evidence uncovered after the motion was decided shows that they had valid claims. Defendants' argument is not supported by law. What evidence defendants discovered after the motion was decided is not relevant to whether the motion was properly granted at the time. First and foremost, a motion for summary disposition based on MCR 2.116(C)(8) is decided by the pleadings alone, making "evidence" not pertinent. *Beaudrie*, 465 Mich at 129. Second, defendants cite no authority for the proposition that a trial court's decision on a motion, though correct at the time, can later be deemed incorrect simply because of later-discovered information the court did not possess at the time. Indeed, the appropriateness of a trial court's decision on a motion for summary disposition is determined by "reviewing the record as it existed at the time of the trial court's ruling." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 319; 900 NW2d 680 (2017).

Therefore, although the trial court did not specifically address each and every aspect of defendants' breach-of-contract claim that defendants raise on appeal, we affirm the grant of summary disposition in favor of plaintiff and Irvin because the trial court nevertheless reached the correct result. See *Washburn v Michailoff*, 240 Mich App 669, 678 n 6; 613 NW2d 405 (2000).

B. SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Defendants also argue that the trial court erred by granting summary disposition in favor of plaintiff and Irvin on defendants' two counts of breach of fiduciary duty. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek*, 456 Mich at 337. "A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim." *Hall v Hackley Hosp*, 210 Mich App 48, 53; 532 NW2d 893 (1995). The motion is properly granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). Also, whether a fiduciary duty exists is a question of law that this Court reviews de novo. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005).

A claim of breach of fiduciary duty sounds in tort. *Highfield Beach at Lake Mich v Sanderson*, 331 Mich App 636, 666; 954 NW2d 231 (2020).

> This Court has explained that a fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another. A breach of fiduciary duty arises when a person holding a position of influence and confidence abuses the influence and betrays the confidence. A person in a fiduciary relation to another is under a duty to act for the benefit of the other with regard to matters within the scope of the relation. [*Id*. at 666 n 13 (quotation marks and citations omitted).]

"To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages caused by the breach of duty." *Id*. at 666. In their complaint, defendants alleged two counts of breach of fiduciary duty: one with a fiduciary duty arising because of plaintiff's "control" over Serra and the other with a fiduciary duty arising because of an alleged partnership between Serra and plaintiff and Irvin. Although not

clear from defendants' amended counterclaim and third-party complaint, defendants later made clear that the alleged breaches were the failure to properly evaluate Serra's interest upon his separation from plaintiff, and the failure to pay profit sharing.

Plaintiff and Irvin moved for summary disposition under MCR 2.116(C)(10), arguing that there was no evidence to support any of the elements: duty, breach of duty, and damages. The trial court granted the motion, ruling that plaintiff and Irvin owed no fiduciary duty to Serra, who was an employee. The court noted that to the extent that the Zing agreement created any fiduciary duty, any duty was extinguished when the agreement was terminated in 2010.[24]

The trial court did not err. Regarding the profit-sharing aspect of defendants' claims, neither plaintiff nor Irvin had a fiduciary duty to pay Serra profit sharing.

First, there was no evidence that Serra was in a partnership with plaintiff or Irvin. Defendants relied on the 2009 Zing agreement and the 2010 WIPA as evidence that there was a partnership relationship. But there is no dispute that the Zing agreement was terminated shortly after it was executed and that the WIPA, which provided that Serra would receive "proceeds obtained from the sale of wireless internet services," was never executed. Thus, there is no basis for defendants to rely on contractual relationships that had either been terminated or had never been consummated in the first place.

Instead, the evidence showed that from 2009 until 2014, plaintiff paid Serra, in an annual salary payable in monthly installments, to act as its director of wireless operations. Serra testified that he was the most senior manager in the wireless division and reported directly to Irvin. No reasonable juror could conclude that the existing relationship was anything other than that of employer-employee. As such, neither plaintiff nor Irvin owed any fiduciary duty to Serra, despite that they, as Serra's employer, necessarily maintained a certain amount of "control" over him. See *Bradley v Gleason Works*, 175 Mich App 459, 463; 438 NW2d 330 (1989).

Second, assuming some type of fiduciary duty existed between them, there is no fiduciary duty to pay Serra profit sharing. Indeed, from defendants' own admissions, it is clear that such a specific "duty" arose because of alleged promises plaintiff and Irvin previously made to Serra. Accordingly, any claim related to the failure of plaintiff and Irvin to pay profit sharing to Serra clearly sounds in contract, not tort. Therefore, this aspect of defendants' claim fails as a matter of law, and the trial court did not err by dismissing it. See *Crews v Gen Motors Corp*, 400 Mich 208, 226; 253 NW2d 617 (1977) ("[A] tort action will not lie when based solely on nonperformance of a contractual duty."); *Urbain v Beierling*, 301 Mich App 114, 132; 835 NW2d 455 (2013) (holding that claims sounding in contract are not actionable in tort); *Nelson v Northwestern S&L Ass'n*, 146 Mich App 505, 509; 381 NW2d 757 (1985) ("For an action in tort to exist . . . , there must be a breach of a duty separate and distinct from the duties imposed by the contract.").

Likewise, the other aspect of defendants' claim fails for a similar reason. Irvin's duty to provide a valuation of Serra's interest in the company upon Serra's separation from the company

[24] The court also mentioned that defendants' reliance on alleged past promises of profit sharing "falls on deaf ears" because of the existence of the merger clause in the Warrant Agreement.

is derived solely from the Warrant Agreement. The Warrant Agreement states that upon "the termination or resignation of [Serra] from [plaintiff]," Serra's share "shall be appraised by Daniel Irvin, or his successor." Clearly, any allegation pertaining to Irvin's failure to properly carry out his duties under the Warrant Agreement sound in contract, not tort. Accordingly, plaintiff was entitled to summary disposition on this aspect of defendants' claim as well. See *Crews*, 400 Mich at 226; *Urbain*, 301 Mich App at 132; *Nelson*, 146 Mich App at 509.

Because plaintiff was entitled to summary disposition on all of defendants' breach-of-fiduciary-duty claims, the trial court did not err by granting plaintiff's motion.

C. JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants argue that the trial court erred by granting plaintiff's motion for partial JNOV. We agree, but for reasons different than proffered by defendants. 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).

The Agent Agreement between plaintiff and VB Datacom allowed for plaintiff to terminate the agreement for cause for several reasons, including that VB Datacom "engage[d] in any fraudulent or criminal activities." In November 2017, plaintiff terminated the Agent Agreement, citing the fraudulent-activities clause of the agreement and VB Datacom's failure to disclose its relationship with Serra.

The jury found VB Datacom liable on plaintiff's claims of silent fraud, conspiracy, and aiding or abetting. The jury also found that plaintiff had breached the Agent Agreement. After the jury trial concluded, plaintiff moved for JNOV on VB Datacom's breach-of-contract claim, arguing that because the jury found that VB Datacom had engaged in silent fraud, plaintiff's termination of the agreement was justified as a matter of law. Plaintiff noted that defense counsel had conceded that VB Datacom's breach-of-contract claim could not survive if plaintiff prevailed on its claim for silent fraud.

At the motion hearing, counsel for VB Datacom agreed that the jury verdicts were "contradictory," but nonetheless suggested that the verdicts should stand because it was impossible to ascertain which one was "correct." In other words, VB Datacom suggested that with the jury finding that VB Datacom succeeded on its breach-of-contract claim, the jury necessarily found that VB Datacom had not engaged in fraud. Thus, it could argue that the jury's verdict finding VB Datacom liable for silent fraud should be overturned. The trial court was not persuaded and instead agreed with plaintiff and granted the motion. The court noted that fraud was an issue for the jury to decide, and having found that VB Datacom had engaged in fraud, VB Datacom could not prevail on its breach-of-contract claim.

A motion for JNOV challenges the sufficiency of the evidence in support of a jury verdict. *Nahshal*, 324 Mich App at 719. 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*.; see also *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor, & Merrill, Inc*, 267 Mich App 625, 642-643; 705 NW2d 549 (2005).

Plaintiff's motion was premised on an alleged inconsistent verdict—not an evidentiary deficiency. In such a situation, JNOV is not the proper remedy; the proper remedy is to either reinstruct the jury or order a new trial. *Beasley v Washington*, 169 Mich App 650, 658-659; 427 NW2d 177 (1988); *Farm Bureau Mut Ins Co v Sears, Roebuck & Co*, 99 Mich App 763, 767; 298 NW2d 634 (1980); see also *Payton v Detroit*, 211 Mich App 375, 397; 536 NW2d 233 (1995). Accordingly, because the basis for plaintiff's motion was an inconsistent verdict, of which counsel for VB Datacom agreed was inconsistent, the trial court committed an error of law when it granted the motion for JNOV.

We note that VB Datacom conceded below that silent fraud would indeed qualify as engaging in fraudulent activities under the terms of the contract. Counsel for VB Datacom took the following positions in the trial court:

> "123.Net's defense to the breach of contract claim either succeeds or fails on the strength of its silent fraud claims against VB Datacom."
>
> "Assuming, arguendo, that 123.Net's claim for fraud fails, so too does its defense to the breach of contact [sic] action."
>
> "The undersigned takes no issue with 123.Net's position that if it is able to establish fraud that the parties' contract provides that post termination commissions and residuals would not be payable."

Thus, it is perhaps somewhat understandable why plaintiff moved for JNOV instead of a new trial after the conclusion of trial. Plaintiff had already gotten VB Datacom to agree that if the jury found in plaintiff's favor for silent fraud, then VB Datacom legally could not prevail on its claim for breach of contract. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Living Alternatives for Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994); see also *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 537; 847 NW2d 657 (2014) ("Judicial estoppel precludes a party from adopting a legal position in conflict with a position taken earlier in the same or related litigation.") (quotation marks and citation omitted). Therefore, VB Datacom cannot now argue on appeal (or while opposing plaintiff's motion for JNOV) that silent fraud on VB Datacom's behalf would not permit plaintiff to terminate the Agent Agreement for cause.

MCR 7.216(A)(8) permits this Court, "if a judgment notwithstanding the verdict is set aside on appeal, grant a new trial or other relief as necessary." Given that JNOV is not the proper vehicle for addressing inconsistent verdicts and given VB Datacom's concession at the trial court that the verdicts were inconsistent, pursuant to MCR 7.216(A)(8), we reverse the grant of JNOV and remand for a new trial on VB Datacom's claim of breach of contract and plaintiff's claim of silent fraud.

D. MOTION TO STRIKE

Defendants argue that the trial court erred when it granted in part plaintiff's motion to strike. We disagree. This Court reviews a trial court's decision on a motion to strike for an abuse of discretion. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). A

court abuses its discretion when it selects an outcome falling outside the range of reasonable and principled outcomes. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

Plaintiff moved to strike defendants' amended counterclaim and third-party complaint because defendants later had taken the position that this amended filing resurrected the seven claims that the trial court previously dismissed under MCR 2.116(C)(8).

MCR 2.115(B) governs motions to strike and states:

> On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules.

The trial court granted in part the motion. Although the trial court did not strike the entirety of the amended counterclaim and third-party complaint, the court struck the seven listed counts that previously had been dismissed on summary disposition. The court first noted that regardless of whether plaintiff had agreed to extend the date for filing the amended pleading, defendants never sought the court's permission. The court also noted that there was nothing of substance in the amended pleading that differed in substance from the original pleading. Accordingly, the court struck those seven counts from the amended pleading.

The trial court did not abuse its discretion. First, there is nothing to show that defendants sought leave to file the amended pleading. Instead, defendants apparently solely relied on plaintiff's agreement to allow five extra days for them to "file their formal answer" to plaintiff's first amended complaint. The court's ruling was correct. At the time, the scheduling order in effect set a deadline of November 28, 2017, to file amended pleadings. Thereafter, the trial court entered an order adopting a discovery master recommendation that extended some dates, "with all other dates to remain as currently in effect." Notably, the order allowed defendants to file "responsive pleadings" to plaintiff's first amended complaint by January 3, 2018, and allowed amended pleadings to be filed by that same day, "subject to the Court's ruling as to the pending Motion for Reconsideration or until further order of the Court."[25]

As such, defendants' January 8, 2018 filing was untimely under the then-existing court orders. Defendants cite no authority that would permit them to disregard a court order merely because plaintiff may have agreed to the action.[26] Clearly, with the court-imposed deadline not

[25] The pending motion for reconsideration was defendants' motion that challenged the trial court's dismissal of seven of their counts through summary disposition, and alternatively, sought permission to amend the counterclaim. The trial court ultimately denied that motion "in its entirety" on February 15, 2018.

[26] Although the trial court did not address whether plaintiff had actually given defendants permission to file an amended pleading, it is clear that plaintiff did not. In the e-mail correspondences between defense counsel and plaintiff's counsel, defendant had asked, "I am respectfully reaching out to see if you would be willing to give us a very short extension (under a week) until 1/8 for our *answers*." (Emphasis added, underline omitted.) When asked whether the

met, defendants were obligated to seek the permission of the trial court for their late filing, and they never did.[27] Consequently, the trial court reasonably concluded that, with the court-imposed January 3, 2018 deadline passing and no leave having been requested or granted by the court, the seven counts listed in the amended counterclaim and third-party complaint that previously had been dismissed on summary disposition were not "revived" simply by virtue of their untimely filing. And because these counts were not successfully revived, the trial court did not abuse its discretion by striking them from the amended pleading because MCR 2.115(B) allows for the striking of parts of a pleading if they are "immaterial" or "impertinent."

III. CONCLUSION

We conclude that this Court has jurisdiction to hear defendants' cross-appeal.

Regarding the issues raised by the parties, we affirm in part, reverse in part, and remand for further proceedings. Specifically, we affirm the trial court's grant of plaintiff's motions for summary disposition related to defendants' counterclaims and the trial court's partial grant of plaintiff's motion to strike defendants' amended counterclaim and third-party complaint. But we reverse the trial court's vacation of the case-evaluation award, reverse the grant of plaintiff's motion for JNOV as to VB Datacom's breach-of-contract claim, and remand for further proceedings, including a new trial related to the claims that produced inconsistent verdicts (plaintiff's silent-fraud claim against VB Datacom and VB Datacom's breach-of-contract claim against plaintiff and Irvin).

---

response would be "an answer or a motion," defense counsel replied, "It will be a formal answer. No motion." Plaintiff ultimately agreed to allow defendants until January 8, 2018 "to file their formal answer to the amended complaint." Clearly, the discussion pertained solely to answers and not amended counterclaims or third-party complaints. Defendants' reliance on the fact that amended counterclaims may be included in an answer under MCR 2.110(C) is misplaced. Counterclaims and third-party complaints are distinct pleadings from answers and when combined with an answer, must still be designated as such. See MCR 2.110(A)(3)-(5); MCR 2.110(C). Thus, just because the rules allow for a counterclaim to be combined with an answer, it does not follow that permission given to file an answer extends to the filing of these other, distinct pleadings.

[27] Defendants' reliance on a later-issued January 24, 2018 scheduling order, which allowed for the amendment of pleadings until May 11, 2018, is misplaced. This order is not given retroactive effect and therefore does not change the fact that at the time of defendants' January 8, 2018 filing, they were not compliant with the then-existing court orders. Orders that the court made after the fact are irrelevant unless they expressly noted they were to be given retroactive effect.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Colleen A. O'Brien
/s/ James Robert Redford