STATE OF MICHIGAN

COURT OF APPEALS

BENSON ASSOCIATES, INC.,

Plaintiff-Appellee,

v

BODYTECHNIQUES, INC. and B.H. VANDERBEKE,

Defendants-Appellants.

UNPUBLISHED
June 11, 2002

No. 228852;235835
Oakland Circuit Court
LC No. 95-496134-CK

Before: Cavanagh, P.J., and Gage and Murray, JJ.

PER CURIAM.

Following a jury trial, defendants Bodytechniques[1] and B.H. Vanderbeke appeal as of right from the trial court's entry of judgment for plaintiff. The jury returned a special verdict finding for plaintiff with respect to its breach of contract claim against Bodytechniques and its tortious interference with a contract count against Vanderbeke. We affirm.

I

This case involves plaintiff's claim of entitlement to a real estate commission on a lease of commercial property located in Rochester Hills, Michigan. A limited partnership called Classic Investments owned the commercial property. William W. Benson, a Michigan-licensed commercial real estate broker, Vanderbeke and a third individual formed Classic Investments. Since 1992, the partnership consisted of only Vanderbeke, the general partner, and Benson, a limited partner. Because of financial difficulties, the partnership filed for bankruptcy protection in early 1994.

Benson also had incorporated and was the sole shareholder in plaintiff, which possessed a Michigan real estate broker's license. Benson testified that when he had held the general partner position before Vanderbeke, he had orally appointed plaintiff to act as the partnership's agent for leasing the commercial property. Benson further testified that after assuming the general partnership position, Vanderbeke had knowledge that Benson, through plaintiff, made efforts to locate potential tenants for the property and that Vanderbeke made no objection to Benson's

[1] The parties stipulated at trial that the entity's appropriate name was Bodytechniques Fitness Center, L.L.C., d/b/a Bodytechniques Fitness Center.

efforts on behalf of the partnership. Vanderbeke testified to the contrary that neither Benson nor plaintiff had any authority, in writing or otherwise, to act as the partnership's leasing agent.

Around the same time that Classic Investments filed for bankruptcy in early 1994, Benson met Michael Lathers, president of Bodytechniques, a health club. After ascertaining Lathers' serious interest in leasing a portion of the commercial property, Benson recalled that in March 1994 he advised Vanderbeke and Timothy Fusco, the partnership's bankruptcy attorney, of the interest of a potential tenant. According to Benson, Vanderbeke expressly approved Benson's continuation of negotiations with Lathers, and Fusco advised Benson to stall Lathers to avoid creating a partnership asset, i.e., a lease, the value of which could be distributed to creditors in the partnership's bankruptcy proceedings.

Much trial testimony from Benson and Lathers recounted their negotiations, which continued from early 1994 through December 1994. Benson testified that he advised Lathers that he was a partner in the bankrupt entity that owned the commercial property and that he was acting as a real estate broker representing the partnership. Benson averred that he maintained Lathers' interest while attempting to stall him for as long as possible, until the fall of 1994 when negotiations began in earnest. Benson and Lathers then negotiated alterations to a draft lease through early December. Benson testified that he kept Vanderbeke apprised of the ongoing negotiations, including the identities of Lathers and Bodytechniques and Benson's intent to seek a commission on any lease ultimately entered, and introduced letters to and from Vanderbeke and Fusco as well as Fusco's billing records, which reflected Vanderbeke's knowledge of and Fusco's involvement in the lease negotiations with Lathers. Neither Vanderbeke nor Fusco could recall with specificity what they had learned regarding the potential tenant or exactly when they had learned it.

According to Lathers, the negotiations proceeded slowly throughout 1994, despite that in the summertime he advised Benson of his strong desire to occupy the property by the beginning of the health club busy season in September. Lathers recalled Benson's representations that he was the person with whom Lathers should be dealing regarding the lease, and Benson's repeated assurances that the lease would be finalized.

On December 9, 1994, Lathers signed an agreement pursuant to which plaintiff would receive a commission for its efforts in securing a lease for Bodytechniques. Lathers testified that he signed the agreement only after Benson threatened to "queer the deal" regarding the lease if Lathers did not sign. On the same date, Benson, Lathers and Vanderbeke met briefly together for the first time. While Vanderbeke testified that he simply wished to meet the potential tenant, Lathers averred that Benson had promised him that Vanderbeke would sign a lease that day. When the parties did not sign a lease, Lathers felt that Benson had lied to him throughout the negotiations regarding his authority to enter a lease on the partnership's behalf and the readiness of a lease, and consequently ceased further negotiations with Benson.

The parties and their attorneys, including Benson and his lawyer Robert Nix, successfully finalized a lease over the course of the next week. The lease was signed on December 16, 1994. The final draft of the lease had replaced a previously present provision that had reflected plaintiff's entitlement to a commission consistent with the December 9 agreement. The new provision in the lease's final draft instead directed Bodytechniques to pay a monthly commission

to Classic Investments. The altered lease provision also indemnified Bodytechniques against any legal action that might be instituted against it involving a commission on the lease.

Lathers made the first three monthly commission installment payments to plaintiff pursuant to the December 9, 1994 agreement between Bodytechniques and plaintiff, but ceased making any further payments to plaintiff after Vanderbeke directed him to stop and to pay the partnership instead. Shortly thereafter, plaintiff instituted this action.

II

Defendants first contend that the trial court erred in denying their motion for a directed verdict. This Court reviews de novo the trial court's decision regarding defendants' motion for directed verdict. *Derbabian v Mariner's Pointe Associates Ltd Partnership*, ___ Mich App ___; ___ NW2d ___ (Docket No. 216024, issued February 12, 2002), slip op. at 3. In reviewing the directed verdict ruling, an appellate court examines the testimony and all legitimate inferences that may be drawn in the light most favorable to the nonmoving party. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). The appellate court recognizes the jury's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony, *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996), and will not substitute its judgment for that of the jury if reasonable jurors honestly could have reached different conclusions regarding the evidence. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

A

Defendants argue that they were entitled to judgment as a matter of law because no consideration existed to support the enforceability of the December 9, 1994 commission agreement between plaintiff and Bodytechniques. The commission agreement stated in relevant part that "*[i]n consideration of [Benson's/plaintiff's] services in negotiating the Lease Agreement* dated _____, 1994 between Bodytechniques, Inc. . . . and Classic Investments" involving a portion of 1460 North Rochester Road, Bodytechniques would pay plaintiff $141,223.86 plus interest. [Emphasis added.] Benson testified that he negotiated with Lathers regarding the lease for at least several months leading up to the December 9 meeting with Vanderbeke. Although the parties did not sign a lease on December 9, the testimony of at least four trial witnesses (Benson, Nix, Lathers and Fusco) and documentary evidence in the form of Fusco's billing invoices and several written communications between the parties all reflected that Benson and Nix made efforts to secure a Bodytechniques-Classic Investments lease from at least October 1994 through December 14 or 15, 1994, one or two days before Bodytechniques and Classic Investments undisputedly entered a lease agreement regarding 1460 North Rochester Road.

Viewing the abundant evidence of Benson's lease negotiations in the light most favorable to plaintiff, we find that the evidence amply supported the jury's reasonable conclusion that consideration existed to support the enforceability of the December 9 commission agreement. *Hunt, supra*.

B

Defendants also proclaim their entitlement to a directed verdict with respect to plaintiff's breach of contract claim on the basis of fraud, citing (1) Vanderbeke's testimony that neither Benson nor plaintiff had authority to negotiate a lease on behalf of the partnership, and (2) Lathers' testimony that Benson lied in representing himself as the partner who possessed authority to bind the partnership to a lease with Bodytechniques and in repeatedly promising that a lease would be signed by December 9, 1994.

With respect to Benson's or plaintiff's authority to negotiate a lease on the partnership's behalf, Benson explained at trial that before Vanderbeke became the general partner in November 1992, Benson himself verbally and properly appointed plaintiff as the partnership's leasing agent. Benson further testified that Vanderbeke had knowledge of Benson's ongoing efforts to find a tenant who would lease the partnership property, that Vanderbeke expressly approved of his negotiations with potential tenants, and that in March 1994 Vanderbeke and Fusco directed Benson to conduct negotiations by stalling any interested tenants until the partnership's bankruptcy neared resolution. The testimony of Benson and Vanderbeke agreed that Vanderbeke made no effort to revoke any authority of Benson or plaintiff to negotiate a lease on behalf of the partnership until January 1995 when Vanderbeke did so in writing.

Viewing this evidence in the light most favorable to plaintiff, we conclude that the jury reasonably could have determined from the evidence that plaintiff had authority to conduct lease negotiations on behalf of Classic Investments. While Vanderbeke denied that either Benson or plaintiff ever possessed authority to act on the partnership's behalf, this Court will not revisit the jury's apparent finding of Benson's testimony as more credible than Vanderbeke's. *Hunt, supra*.

Regarding Lathers' allegations that Benson misled him during the lease negotiations, Benson testified to the contrary that on meeting Lathers he (1) gave Lathers a business card that reflected Benson's status as a real estate broker, (2) informed Lathers that he was a broker representing the Classic Investments partnership that owned the property, (3) advised Lathers that he held a partnership interest in Classic Investments, thus giving him a partial ownership interest in the property, and (4) explained to Lathers that he had authority to deal with the rental property, but did not have authority to act on the partnership's behalf. Benson's and Lathers' testimony agreed that Benson did not inform Lathers specifically that he was either the general partner or a limited partner in Classic Investments.

Regarding Benson's discussions with Lathers concerning the status of the lease negotiations, Benson testified that he informed Lathers that Classic Investments was involved in bankruptcy proceedings, and that the bankruptcy court would have to approve any proposed lease of the property. Benson denied that at any time he ever informed Lathers that a lease had been prepared and was ready to be signed, or that he otherwise gave Lathers the impression that the lease would be finalized by December 9. Benson explained that the parties continued to negotiate changes to the draft lease through that date and that Lathers' attorney had not yet expressed his approval of all proposed changes. Benson further denied ever threatening that if Lathers did not sign the December 9 commission agreement he would terminate the lease negotiations.

We find that Benson's testimony sufficiently supported the jury's reasonable finding that Benson did not fraudulently induce Lathers' signature of the December 9 commission

agreement. To the extent that the jury apparently accepted Benson's testimony, we reiterate that we will not second guess the jury's credibility determination.[2] *Hunt*, *supra*.

Accordingly, we conclude that the trial court correctly denied defendants' motion for a directed verdict.

III

Defendants next argue that the trial court improperly permitted plaintiff to introduce two settlement-related letters authored by attorney Fusco in violation of MRE 408. This Court reviews for an abuse of discretion a trial court's decision to admit evidence. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 688; 630 NW2d 356 (2001).

The first letter at issue, a November 7, 1994 missive from Fusco to Nix, addressed "a number of pending and unresolved issues relating to [Classic Investments'] Plan of Reorganization," among which were the status of Benson's negotiations with Lathers, Benson's intent to claim a commission on the lease, and the possibility, ultimately unrealized, that Benson might enter a consulting agreement with Lathers. The letter expressed that Vanderbeke had "concerns that would not be present if Mr. Benson were acting solely for the [partnership]," and Vanderbeke's position that "the partnership should receive all benefits from the lease and Mr. Benson paid [sic] a commission as envisioned by the Partnership Agreement."

The second letter by Fusco, dated December 13, 1994 and addressed to Lathers' attorney with copies directed to Nix, Vanderbeke and Benson, summarized ten "unresolved issues relating to the proposed lease . . . between the [partnership] and your client [Bodytechniques]." One unresolved issue involved Benson's claim for a real estate commission. The letter expressed Fusco's understanding that "the real estate commission to be paid to Benson is in addition to the rent payments and is in the amount of six (6%) of the rent payments for the initial term, . . . to be paid in monthly installments over the ten (10) years of the Lease," and the partnership's position that "these payments be considered additional rent under the Lease."

We conclude that MRE 408 did not preclude the admissibility of either letter. MRE 408 provides as follows:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise

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[2] To the extent that defendants set forth the alternative argument that plaintiff "is not entitled to recover on this matter due . . . to its violation of its fiduciary duties to Bodytechniques," we note that this claim also lacks merit. While the trial court permitted defendants to call an expert real estate broker witness who believed that the December 9 agreement indicated that plaintiff represented Bodytechniques, Benson's and Lathers' testimony agreed that neither Benson nor plaintiff acted as an agent of Bodytechniques during the lease negotiations.

> negotiations is likewise not admissible. *This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose*, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Emphasis added.]

We first observe that neither letter consists of "statements made in compromise negotiations" of a claim "disputed as to either validity or amount." The November 7 letter, which mentions Vanderbeke's position that Benson should receive a commission on the lease as provided in the partnership agreement, addresses the issue of *lease negotiations* and expresses no position with respect to the subsequently entered December 9 commission agreement between Bodytechniques and plaintiff. See *Dunlop v Twin Beach Park Ass'n, Inc*, 111 Mich App 261, 264; 314 NW2d 578 (1981) (finding admissible a party's offer to purchase property involved in a quiet title action when the offer to purchase occurred before the dispute regarding property ownership arose). The December 13 letter took no position whatsoever with respect to the amount of the commission plaintiff or Benson should receive, the claim in dispute in this case.

Moreover, plaintiff did not introduce either letter "to prove liability for . . . the claim [for a commission] or its amount," MRE 408, but to undermine defendants' theory that Benson hid his negotiations with Lathers from Vanderbeke in an attempt to usurp a partnership opportunity by collecting for himself a quarter million dollar commission on the deal. Plaintiff introduced the letters to demonstrate that contrary to defendants' assertions, Vanderbeke and Fusco had knowledge regarding Benson's progress in the lease negotiations with Lathers.

We conclude that the trial court did not abuse its discretion in admitting the letters because plaintiff offered the letters to show Vanderbeke's knowledge, not to prove either defendant's liability with respect to the instant breach of contract and tortious interference claims. *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 638; 329 NW2d 760 (1982).

IV

Defendants also assert that the trial court admitted irrelevant and prejudicial evidence of other acts by Vanderbeke in violation of MRE 401, 403 and 404. Defendants have not properly presented this issue for appeal, however, because their discussion of the issue neglects to provide either specific examples of allegedly improper evidence of Vanderbeke's other acts or any citation to the trial court record where we might locate such evidence. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Moreover, our review of the record reveals that defendants' claim lacks any merit.[3]

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[3] Defendants presumably intend to refer to trial testimony regarding Vanderbeke's initiation of a partnership cash call and his loan to the partnership of approximately one million dollars to pay off the partnership's mortgagee. With respect to Benson's testimony regarding the cash call, we find that the trial court properly admitted this testimony, which addressed Vanderbeke's actions during the closely related partnership bankruptcy proceedings, because it tended to make more

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V

Defendants further contend that the trial court erred in allowing plaintiff to introduce into evidence statements made by Fusco at a January 1995 bankruptcy hearing regarding the partnership's reorganization plan, and dicta statements by the bankruptcy court at the same hearing concerning Benson's entitlement to a commission on the Bodytechniques-Classic Investments lease. We review for an abuse of discretion the trial court's decision to admit evidence. *Hilgendorf, supra*.

A

Plaintiff introduced statements by Fusco at the January 1995 bankruptcy hearing to the effect that the partnership was "willing to pay [Benson] a commission consistent with the terms of the partnership agreement," but that Benson's claim of right to a commission on the Bodytechniques-Classic Investments lease agreement, according to the December 9, 1994 commission agreement, should not preclude the bankruptcy court's approval of the lease. At trial, plaintiff argued, and the trial court apparently accepted, that Fusco's statements were admissions by an agent of a party pursuant to MRE 801.

Fusco's statements, which expressed the position of the general partner of Classic Investments, were attributable to Vanderbeke, a party to this case. MRE 801(d)(2)(C) and (D). However, the trial court erred to the extent that it found that Fusco's statements were admissions binding on Vanderbeke. This Court has distinguished that statements of fact by a party's counsel in a pleading or other document filed with the court qualify as party admissions under MRE 801(d)(2)(C), while statements by counsel regarding the law cannot be treated as a party admission or be binding on the court. Compare *People v Von Everett*, 156 Mich App 615, 624; 402 NW2d 773 (1986) (affirming the trial court's finding that the defendant's counsel's statement in a notice of alibi regarding the defendant's whereabouts at the time of the charged robbery constituted an admission of the defendant under MRE 801(d)(2)(C)), with *Sarin v Samaritan Health Ctr*, 176 Mich App 790, 796; 440 NW2d 80 (1989) (finding in dicta that statements by the plaintiff's counsel before Sixth Circuit Court of Appeals did not bar the plaintiff's action), and *Michigan Health Care, Inc v Flagg Industries, Inc*, 67 Mich App 125, 129-130; 240 NW2d 295 (1976) (explaining that "[a]lthough statements of fact in other pleadings are inconclusively admissible . . . . the statement in question was not a statement of

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probable a jury finding that Vanderbeke acted purposefully in interfering with plaintiff's commission agreement, a material element of plaintiff's claim. MRE 401; *Wood v Herndon & Herndon Investigations, Inc*, 186 Mich App 495, 499-500; 465 NW2d 5 (1990). Furthermore, MRE 404(b)(1) explicitly contemplates the employment of other acts evidence to prove intent or motive, and no danger of unfair prejudice substantially outweighed the significant probative value of the evidence in proving Vanderbeke's motive for interfering with the commission agreement. MRE 403. With respect to the substantial trial testimony regarding Vanderbeke's loan to the partnership to pay off its mortgage on the rental property, we conclude that defendants have waived any challenge to this evidence, which was elicited only when defense counsel questioned Benson on the subject at some length during cross examination. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998).

fact but a conclusion of law and an admission by an attorney as to a point of law is not binding on a court").

Because Fusco's statements regarding Benson's entitlement to a commission according to the partnership agreement involved legal conclusions that could not bind Vanderbeke as party admissions, we conclude that the trial court abused its discretion in admitting Fusco's statements pursuant to MRE 801(d)(2).

B

The trial court also permitted plaintiff to introduce the bankruptcy court's statement at the close of the January 1995 hearing, after approving both the lease agreement and the partnership's plan of reorganization, that while "[t]he record should be clear that the Court is not resolving at this time any . . . claim that Mr. Benson may have on his lease commission[,] I think it's fairly clear that Mr. Benson is entitled to be paid a lease commission" either in accordance with the commission agreement or the partnership agreement. The trial court apparently accepted plaintiff's suggestion that the bankruptcy court's observation fell within the catch all hearsay exception embodied within MRE 803(24).

We find, however, that plaintiff failed to establish the requirements for admissibility of the bankruptcy court's statement pursuant to MRE 803(24). Even assuming as plaintiff argues that the statement had "circumstantial guarantees of trustworthiness," MRE 803(24), and that plaintiff offered the statement to prove a material fact, MRE 803(24)(A), the court's statement is not "more probative on the point for which it is offered than any other evidence." MRE 803(24)(B).[4]

C

After reviewing the improperly admitted statements within the context of the other evidence produced at trial, we conclude that the erroneous admission of the statements was harmless. Plaintiff allegedly offered the bankruptcy hearing statements to show Vanderbeke's position at the hearing that plaintiff should obtain a commission according to the partnership agreement and Vanderbeke's subsequent knowing, intentional interference with plaintiff's efforts to collect its commission. Abundant evidence at trial, including letters by the parties and their attorneys and trial testimony by Benson, Nix and Fusco, showed that (1) Vanderbeke had full awareness of Benson's lease negotiations with Lathers and Benson's intent to claim a commission for plaintiff when a lease was entered, (2) Vanderbeke's position during negotiations that plaintiff should rely on the partnership agreement for any commission it

[4] Plaintiff explained in its brief on appeal that it offered Fusco's and the bankruptcy court's statements to demonstrate that Vanderbeke "embarked on a course of action which tortiously interfered with [plaintiff's] right to a commission" despite previously having acknowledged plaintiff's entitlement to a commission pursuant to the partnership agreement. The court's statement at the bankruptcy hearing was not more probative than any other evidence because plaintiff introduced at trial other testimony and documentary evidence that reflected or implied Vanderbeke's position that plaintiff should receive a commission as contemplated by the partnership agreement.

intended to claim, and (3) Vanderbeke's subsequent interference with the commission agreement by ordering that Lathers cease payments to plaintiff.

In light of the other, properly admitted evidence, we conclude that our refusal to disturb the judgment on the basis of the admission of the bankruptcy hearing statements was not inconsistent with substantial justice. MCR 2.613(A).

VI

Defendants also challenge the jury instructions read by the trial court. This Court generally reviews de novo claims of instructional error. Jury instructions, which an appellate court reviews in their entirety, should include all the elements of the plaintiff's claims and should not omit material issues, defenses or theories if the evidence supports them. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A

Defendants first argue that the trial court erred in declining to instruct the jury according to a set of five supplemental instructions proffered by defendants. The proffered instructions described situations in which a limited partner, who otherwise would bear no responsibility for acts of the partnership, could assume control over partnership activities and thereby assume a fiduciary duty to the partnership and the other partners. A trial court must read supplemental jury instructions proposed by a party when the standard jury instructions do not adequately cover a subject, the supplemental instructions properly inform the jury of the applicable law, and the evidence presented at trial supports the supplemental instructions. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001). This Court reviews for an abuse of discretion the specific determination by the trial court whether the evidence supported the proffered instruction. *Hilgendorf, supra* 694-695. This Court will not reverse a trial court's decision regarding supplemental instructions unless a failure to vacate the verdict would be inconsistent with substantial justice. *Bouverette, supra* at 402.

We conclude that the trial court did not abuse its discretion in determining that the evidence presented at trial did not support defendants' proffered special instructions. While the first proposed special instruction expressed that a limited partner could become liable for partnership obligations if he actively engaged in the partnership's business operations, the instant case did not involve any question of plaintiff or Benson's liability for an obligation of the limited partnership.[5] Furthermore, no evidence presented during trial showed that Benson participated in controlling the partnership business at any time after Vanderbeke assumed the general partnership in 1992. Proposed instruction number two was totally inapplicable to the instant case because this case involved neither an issue of a general partner's liability to third parties nor a "partnership without limited partners." Likewise, no evidence supported proposed instructions

[5] The central trial issues involved plaintiff's efforts to establish that Bodytechniques breached the December 9 commission agreement and that Vanderbeke tortiously interfered with the December 9 agreement, and defendants' attempts to show that the December 9 agreement was unenforceable due to a lack of consideration and fraudulent misrepresentations by Benson to Lathers regarding the readiness of a lease on December 9.

numbered three through five, which acknowledged that a limited partner, who otherwise would not owe a fiduciary duty to his partners, might establish such a fiduciary duty to the other partners "by . . . assuming the responsibilities of the general partner and so acting," or by misappropriating confidential partnership information. The trial testimony undisputedly established Benson's status as a limited partner in Classic Investments, and that Vanderbeke was the general partner who managed the partnership. While Lathers testified to his perception that Benson "was the person to deal with," "[t]he partner in charge of the building," the undisputed testimony of Benson and Lathers agreed that Benson at no time specifically held himself out to Lathers as a *general partner* of Classic Investments. Furthermore, defendants presented absolutely no evidence tending to establish that Benson utilized his status as a limited partner "to obtain and use confidential information," as addressed in proposed instructions four and five, and presented only California and Illinois case law in support of proffered instructions three through five.

B

Defendants also assert that the trial court erred in overruling their objection to plaintiff's requested instruction regarding exemplary damages. The trial court noted that its decision with respect to the instruction "[wa]s a close call" due to plaintiff's identity as a one-man corporation and a lack of overwhelming testimony that plaintiff suffered humiliation, outrage or indignity, but ultimately agreed to read the instruction.

We find no error in the trial court's agreement to read an exemplary damages instruction because evidence existed at trial that supported the jury's award of exemplary damages.

> Exemplary . . . damages are *compensation for injury to feelings. They are awardable where the defendant commits a voluntary act which inspires feelings of humiliation, outrage, and indignity.* The conduct must be malicious or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights. The purpose of exemplary damages is not to punish the defendant, but to render the plaintiff whole. [*Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 341; 425 NW2d 791 (1988) (emphasis added).]

Contrary to defendants' suggestion, plaintiff's corporate status does not preclude it from receiving exemplary damages. *Id.*; *Joba Constr Co, supra* at 643.

In this case, ample evidence at trial supported a finding by the jury that Vanderbeke purposefully committed the malicious or willful and wanton act of interfering with the commission agreement between plaintiff and Bodytechniques.[6] Defendants argue that the jury's

[6] The trial testimony of Fusco established that Vanderbeke ordered the alteration of lease paragraph forty-two, which had provided that Bodytechniques should pay a commission to Benson consistent with the December 9 commission agreement, shortly before Vanderbeke signed the lease. The change orchestrated by Vanderbeke required that Bodytechniques instead should pay the commission to Classic Investments and indemnified Bodytechniques from any commission-related suit plaintiff might initiate pursuant to the December 9 agreement. Although Lathers had made three commission payments to Benson pursuant to the December 9 commission agreement, Lathers explained that he ceased making further payments to Benson
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award of compensatory damages for the breach of contract made plaintiff whole and thus precluded an award of exemplary damages. See *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 187; 364 NW2d 609 (1984). Defendants ignore, however, that Benson's testimony supported a finding by the jury that, in addition to sustaining compensatory damages arising directly from the breach, Benson had experienced feelings of humiliation, outrage and indignity arising from Vanderbeke's *tortious interference* with the contract. *Jackson Printing Co*, *supra*. According to Benson's testimony, Vanderbeke's last minute deletion of his entitlement to a commission from the final draft of the Bodytechniques-Classic Investments lease, and Vanderbeke's indemnification of Lathers against any potential lawsuit by Benson seeking to recover his commission, inspired in Benson feelings of shock, dismay and anger that still existed at the time of trial.[7]

In light of the evidence that Vanderbeke's tortious conduct occasioned injury to plaintiff's feelings[8] beyond the compensatory damages arising from the breach of contract itself, we cannot conclude that the trial court abused its discretion in finding that an exemplary damages instruction was applicable in this case. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).[9]

VII

Defendants next aver that the trial court failed to reduce the amount of plaintiff's judgment to its present value. Defendants suggest that because plaintiff received a breach of contract award that took into account future payments and interest, the trial court's further imposition of prejudgment interest on the jury's award resulted in a double award of interest on plaintiff's judgment. Defendants' argument that the trial court improperly applied MCL 600.6013 raises an issue of law that we review de novo. *Saginaw Co v John Sexton Corp of Michigan*, 232 Mich App 202, 214; 591 NW2d 52 (1998).

We first address defendants' suggestion that the trial court should not have permitted the jury to award plaintiff any commission agreement payments beyond those due and owing at the

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after Vanderbeke ordered him to do so.

[7] We note that the jury might also have considered in awarding exemplary damages the evidence of Vanderbeke's other conduct of the partnership's business. For example, Benson testified regarding Vanderbeke's unwarranted partnership cash call at a difficult financial time for Benson, and that Vanderbeke had loaned the partnership approximately one million dollars at a high rate of interest and subsequently directed all partnership income to himself and his wife in repayment of the loan.

[8] We note Vanderbeke's testimony that he treated Benson and plaintiff as one and the same.

[9] While the trial court ultimately neglected to read the instruction regarding exemplary damages to the jury, we will not investigate this issue because the parties neither objected to the trial court's omission at the time of trial nor raised on appeal any argument regarding the trial court's omission. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (noting that an issue not raised in and decided by the trial court is not preserved for appeal); *Joerger*, *supra* (explaining that this Court will not "discover and rationalize the basis for [a] claim").

time of the 1999 trial.[10] Evidence presented at trial supported the jury's apparent determination that Lathers repudiated or committed an anticipatory breach of the December 9 commission agreement: Lathers ceased paying plaintiff its commission after having made only the first three payments required by the December 9 agreement, and by the time of trial had made no commission payments to plaintiff for a four-year period; Lathers entered a lease agreement with Vanderbeke that instead provided that he should pay Classic Investments the monthly commission and likewise provided, at Lathers' insistence, for the partnership's indemnification of Lathers in the event plaintiff initiated legal action to recover its commission; at Vanderbeke's insistence, Lathers began making commission payments to the partnership in early 1995. See *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999) (explaining that if, before the time of performance, a party to a contract unequivocally conveys the intent not to perform the innocent party may either sue immediately for the breach or await the time for performance, and that whether a repudiation occurred depends on the party's intention manifested by acts and words).

The anticipatory breach of the December 9 commission agreement vested in plaintiff an immediate right of action to recover the entirety of the breaching party's outstanding contractual obligation. "Damages for an anticipatory repudiation are to represent *full compensation* for the loss caused by depriving the plaintiff of the benefit of the bargain." *Stanton v Dachille*, 186 Mich App 247, 252; 463 NW2d 479 (1990) (emphasis added). Consequently, the jury properly awarded plaintiff the total amount of Bodytechniques' obligation under the December 9 agreement, $243,138 (representing 120 installment payments of the $141,223.86 commission plus 12% interest per annum), minus the three payments Lathers made, $6078.45.

Defendants' further contention that the trial court erred in imposing 12% prejudgment interest on the breach of contract award pursuant to MCL 600.6013 lacks merit. The prejudgment interest statute provides in relevant part as follows:

> (1) *Interest shall be allowed on a money judgment recovered in a civil action,* as provided in this section. However, for complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "future damages" means that term as defined in section 6301.
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> * * *
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> (5) For complaints filed on or after January 1, 1987, *if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year* compounded annually, unless the instrument has a higher rate of interest. . . . [MCL 600.6013 (emphasis added).]

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[10] The December 9, 1994 commission agreement between plaintiff and Bodytechniques provided for a commission of $141, 223.86 plus 12% interest, payable in 120 monthly installments of $2026.15.

An award of prejudgment interest is mandatory in all cases to which section 6013 applies. *Everett v Nickola*, 234 Mich App 632, 639; 599 NW2d 732 (1999).

The prejudgment interest statute clearly applies to the breach of contract judgment in this case. By its plain terms, MCL 600.6013(5) mandates that the trial court impose 12% prejudgment interest on a judgment "rendered on a written instrument." The commission agreement undisputedly qualifies as a written instrument. The only exception to the 12% interest requirement envisioned by MCL 600.6013 is the category of future damages defined within MCL 600.6301, which defines "future damages" as "damages *arising from personal injury* which the trier of fact finds will accrue after the damage findings are made." MCL 600.6301(a) (emphasis added). Interpreting MCL 600.6013(1) and 600.6301, this Court has explained that "except for future damages resulting from a personal bodily injury, a *plaintiff is entitled to prejudgment interest on the entire money judgment, including future damages*, from the date of the filing of the complaint." *H J Tucker & Assoc's, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 561-562; 595 NW2d 176 (1999) (emphasis added) (rejecting the defendant's claim that prejudgment interest should not apply to commissions that had not become due and owing until after the plaintiff filed his complaint).

Because the amounts of future commission payments do not fall within the definition of "future damages" excluded from interest calculation pursuant to MCL 600.6013 and 600.6301, we conclude that the trial court correctly awarded 12% interest on the entire amount of the breach of contract award, including those amounts payable in the future.[11]

VIII

Defendants further assert that the trial court erred in awarding plaintiff mediation sanctions because, although defendants would have liked to accept the mediation evaluation in this case, plaintiff's conduct in related litigation effectively precluded them from doing so. This Court reviews de novo the trial court's decision whether to grant mediation sanctions because the decision involves a question of law. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997).

The parties do not dispute that the September 1996 mediation evaluation of this case constituted $70,000, that plaintiff accepted the evaluation, that defendants rejected the evaluation, or that defendants failed to obtain a jury verdict more than ten percent below the evaluation. Under these circumstances, plaintiff is entitled to mediation sanctions, pursuant to MCR 2.403(O)(1) and (3), as a matter of law. *Great Lakes Gas Transmission Ltd Partnership*, *supra* at 130.[12]

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[11] We note that defendants provide no authority supporting their suggestion that the trial court should have reduced the amounts of the award and interest.

[12] Defendants' characterization of their rejection of the mediation evaluation as coerced by plaintiff's gamesmanship is unsupported by the law or the available facts of record. Defense counsel acknowledged at the May 31, 2000 hearing regarding mediation sanctions that "admittedly there's no court rule to specifically support our position that mediation sanctions should not be awarded in a case where such dilatory tactics are utilized that absolutely prevents

(continued…)

Accordingly, we conclude that the trial court properly granted plaintiff mediation sanctions.[13]

IX

Defendants also claim that the trial court erred in awarding plaintiff attorney's fees as an element of damages for Vanderbeke's tortious interference with the commission agreement. This Court reviews for clear error a trial court's decision to award attorney fees, but reviews for an abuse of discretion the award itself. *Michigan Educational Employees Mut Ins Co v Turow*, 242 Mich App 112, 118; 617 NW2d 725 (2000).

"The common-law tradition in Michigan follows what is sometimes called the 'American Rule' regarding attorney fees. Under this rule, attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides to the contrary." *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994). Exceptions to the prevailing doctrine that attorney fees are not recoverable must be narrowly construed. *Brooks v Rose*, 191 Mich App 565, 575; 478 NW2d 731 (1991).

According to one established common law exception, a party may recover as damages the costs, including attorney's fees, expended in a prior lawsuit he was forced to defend or prosecute because of a third party's wrongdoing. The wrongdoer must have committed some malicious, fraudulent or similar wrongful conduct beyond mere negligence.[14] *Mieras v DeBona*, 204 Mich App 703, 709; 516 NW2d 154 (1994), rev'd on other grounds 452 Mich 278; 550 NW2d 202 (1996). Recovery also has been allowed in limited situations where a party has incurred legal expenses as a result of another party's fraudulent or unlawful conduct. *Brooks, supra*.

(…continued)

[sic] a party from accepting a mediation award." Furthermore, the record does not substantiate defendants' alleged fear that their acceptance of mediation with respect to plaintiff's instant claims would have subjected them to liability in another lawsuit in which plaintiff alleged the same claims. Defense counsel acknowledged at the May 31 hearing that, within the applicable 28-day time limit that defendants had to decide whether to accept or reject the mediation in the instant case, plaintiff had agreed to dismiss the counts of its complaint in the related litigation to the extent that those claims duplicated claims raised in the present case.

[13] We note that defendants raise no challenges to the amounts or reasonableness of the attorney's fees awarded as mediation sanctions.

[14] The parties spend much time arguing whether the prior litigation exception should apply to this case. According to plaintiff, *Dassance v Nienhuis*, 57 Mich App 422; 225 NW2d 789 (1975), established that the prior litigation exception could apply where, as here, a plaintiff simultaneously proceeded against both a defendant who breached a contract with the plaintiff and a second defendant who tortiously interfered with the contract. Defendants rely on *G & D Co v Durand Milling Co, Inc*, 67 Mich App 253; 240 NW2d 765 (1976), in which another panel of this Court criticized *Dassance* and explained that the prior litigation exception did not apply where only one cause of action existed against multiple defendants. Pursuant to MCR 7.215(I)(1), we must follow this Court's opinion in *In re Thomas Estate*, 211 Mich App 594, 602; 536 NW2d 579 (1995), which observed that the prior litigation exception did not apply in situations involving only one litigation. Accordingly, the prior litigation exception does not apply in this case, which involves only one litigation.

In this case the jury found that Vanderbeke purposefully induced Lathers to breach the commission agreement between plaintiff and Bodytechniques. Vanderbeke's tortious conduct[15] in persuading Lathers, who otherwise had begun to make payments to plaintiff in accordance with the commission agreement, to breach the commission agreement plainly necessitated plaintiff's institution of the breach of contract action against Bodytechniques. Because Vanderbeke's wrongful acts forced plaintiff to expend money to bring the instant breach of contract action, we conclude that the trial court properly awarded plaintiff attorney's fees as an element of its damages with respect to the tortious interference judgment against Vanderbeke.[16] *Brooks*, *supra*; *Scott v Hurd-Corrigan Moving & Storage Co, Inc*, 103 Mich App 322, 347-348; 302 NW2d 867 (1981); *Oppenhuizen v Wennersten*, 2 Mich App 288, 298-300; 139 NW2d 765 (1966).

X

Defendants next contend that the trial court erred in amending the judgment against Vanderbeke to incorporate prejudgment interest on the attorney's fees that the court awarded as an element of damages for Vanderbeke's tortious interference with the commission agreement. This argument of defendants raises another legal question regarding the interpretation and application of the prejudgment interest statute, which we review de novo. *Saginaw Co*, *supra*. A court's primary task in construing a statute is to discern and give effect to the intent of the Legislature. This task begins by examining the language of the statute itself. If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

The calculation of interest with respect to the judgment against Vanderbeke for tortious interference is governed by MCL 600.6013(6), which provides as follows:

> Except as otherwise provided in subsection (5) and subject to subsection (11), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section. *Interest under this subsection shall be calculated on the entire amount of the money judgment, including attorney fees and other costs.* However, the amount of interest attributable to that part of the money judgment from which attorney fees are paid

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[15] A claim of tortious interference requires a showing that the defendant engaged in "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law." *CMI Int'l, Inc v Intermet Int'l Corp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 225585, issued April 30, 2002), slip op. at p. 3.

[16] We note that once again, defendants do not challenge the reasonableness of the amount of attorney's fees awarded by the trial court.

> shall be retained by the plaintiff, and not paid to the plaintiff's attorney. [Emphasis added.]

As this Court has observed regarding MCL 600.6013(6), "[t]here is nothing ambiguous about the statute's mandate that interest be awarded on [the] plaintiff's money judgment, including costs and attorney fees." *Grow v W A Thomas Co*, 236 Mich App 696, 720; 601 NW2d 426 (1999). We conclude that the trial court properly awarded interest on the portion of the tortious interference judgment against Vanderbeke that represented attorney's fees.

XI

Defendants lastly argue that the trial court erred in amending the first paragraph of the judgment, a joint and several award against both defendants, to incorporate 12% prejudgment interest pursuant to MCL 600.6013(5). Paragraph one of the amended judgment provided in relevant part as follows:

> Judgment be and it hereby is entered in favor of Plaintiff and against Defendants . . . B.H. Vanderbeke and Bodytechniques, L.L.C., jointly and severally, in accordance with the jury's verdict in the amount of $237,059.55 together with statutory interest accrued on the Judgment pursuant to MCL 600.6013 as of February 7, 2001, in the amount of $224,293.32, for a total amount . . . of $461.352.87.

Defendants suggest that to the extent that paragraph 1 applies to Vanderbeke, the trial court erroneously calculated interest at the 12% rate applicable to "a judgment . . . rendered on a written instrument," MCL 600.6013(5), because the judgment against Vanderbeke was premised on his tort liability, not any written instrument.

According to the special verdict form, if the jury found Vanderbeke liable for tortious interference with the commission agreement, "Defendant Vanderbeke [wa]s liable, *jointly and severally* with Bodytechniques, for the amount of damages" arising from the breach of the commission agreement. [Emphasis added.] The jury found Bodytechniques liable for approximately $237,000 arising from its breach of contract. As we discussed above in section VII of this opinion, MCL 600.6013(5) mandated the trial court's imposition of 12% interest on the breach of contract portion of the judgment. *Everett, supra*. The existence of joint and several liability within the special verdict, the propriety of which the parties did not dispute before the trial court and which defendants do not challenge on appeal, requires that Vanderbeke bear responsibility for the breach of contract portion of the judgment, including mandatory 12% interest. See Black's Law Dictionary (7th ed), p. 926, explaining that in a situation involving "joint and several liability," "each liable party is individually responsible for the entire obligation."

Because MCL 600.6013(5) and the existence of joint and several liability together require that Vanderbeke have responsibility for the amount of the breach of contract judgment plus 12%

interest, we need not consider whether in other circumstances a tortious interference judgment could fall within the scope of a judgment "rendered on a written instrument."[17]

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Christopher M. Murray

[17] We further observe that according to the indemnification provision with the Bodytechniques-Classic Investments lease, under which the partnership agreed to indemnify Bodytechniques "from any and all claims by parties for real estate commissions arising from this transaction," the partnership would appear to be liable for the amount of the breach of contract judgment against Bodytechniques. As we mentioned above, this judgment includes 12% interest, MCL 600.6013(5), as a matter of law.