

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS M. SHOAFF,

Plaintiff-Appellee,

v

GARY D. BALDWIN, former Personal Representative of the Estate of Duane V. Baldwin; MARY JO BALDWIN, former Co-Trustee of the Duane V. Baldwin Trust, JACOBS MANAGEMENT, L.L.C., FFM CO., INC., DGM CORP., AGRICON, INC., STOCKBRIDGE LIMITED PARTNERSHIP #1; STOCKBRIDGE LIMITED PARTNERSHIP #2; STOCKBRIDGE LIMITED PARTNERSHIP #3; STOCKBRIDGE LIMITED PARTNERSHIP #4; STOCKBRIDGE LIMITED PARTNERSHIP #5,

Defendants-Cross Plaintiffs-
Counter Plaintiffs,

and

THOMAS E. WOODS, as successor Personal Representative of the Estate of Duane V. Baldwin and as successor Trustee of the Duane V. Baldwin Trust,

Defendants-Appellants,

and

BALDWIN SOD FARMS and
MARK BALDWIN,

Cross-Defendants.

UNPUBLISHED

February 3, 2005

No. 248606

Ingham Circuit Court

LC No. 99-090282-CZ

THOMAS M. SHOAFF,

Plaintiff-Counter Defendant-
Appellee,

v

No. 248609
Ingham Circuit Court
LC No. 99-90282-CZ

GARY D. BALDWIN, former Personal
Representative of the Estate of Duane V. Baldwin;
MARY JO BALDWIN, former Co-Trustee of the
Duane V. Baldwin Trust, JACOBS
MANAGEMENT, L.L.C., FFM CO., INC., DGM
CORP., AGRICON, INC., STOCKBRIDGE
LIMITED PARTNERSHIP #1; STOCKBRIDGE
LIMITED PARTNERSHIP #2; STOCKBRIDGE
LIMITED PARTNERSHIP #3; STOCKBRIDGE
LIMITED PARTNERSHIP #4; and
STOCKBRIDGE LIMITED PARTNERSHIP #5,

Defendants-Counter Plaintiffs-
Cross Plaintiffs-Appellants,

and

THOMAS E. WOODS, Successor Personal
Representative of the Estate of Duane V. Baldwin,
and THOMAS E. WOODS, as Successor Trustee
of the Duane V. Baldwin Trust,

Defendants,

and

BALDWIN SOD FARMS and MARK
BALDWIN,

Cross-Defendants.

THOMAS M. SHOAFF,

Plaintiff-Counter Defendant-
Appellee,

v

No. 255460
Ingham Circuit Court
LC No. 99-90282-CZ

GARY D. BALDWIN, former Personal Representative of the Estate of Duane V. Baldwin; MARY JO BALDWIN, former Co-Trustee of the Duane V. Baldwin Trust, JACOBS MANAGEMENT, L.L.C., FFM CO., INC., DGM CORP., AGRICON, INC., STOCKBRIDGE LIMITED PARTNERSHIP #1; STOCKBRIDGE LIMITED PARTNERSHIP #2; STOCKBRIDGE LIMITED PARTNERSHIP #3; STOCKBRIDGE LIMITED PARTNERSHIP #4; and STOCKBRIDGE LIMITED PARTNERSHIP #5,

Defendants-Counter Plaintiffs-
Cross Plaintiffs-Appellants,

and

THOMAS E. WOODS, Successor Personal Representative of the Estate of DUANE V. BALDWIN, and THOMAS E. WOODS, as Successor Trustee of the Duane V. Baldwin Trust,

Defendants-Appellants,

and

BALDWIN SOD FARMS and MARK BALDWIN,

Cross-Defendants.

Before: Griffin, P.J., and Saad and O’Connell, JJ.

PER CURIAM.

In these consolidated cases stemming from a failed business venture, defendants¹ appeal by right from a final judgment entered by the circuit court in favor of plaintiff Thomas M. Shoaff

¹ As used in this opinion, the term “defendants” collectively refers to all “primary” and “secondary” defendants. The “primary defendants” are Thomas E. Woods, Successor Personal
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following a bench trial, and by leave granted from the court's order denying certain post-judgment motions filed by defendants. We affirm.

FACTUAL BACKGROUND

This case arises out of a business agreement (the Agreement) dated February 3, 1996, between plaintiff Thomas Shoaff and the late Duane V. Baldwin and Mark Baldwin. The parties agreed to form and become shareholders in a corporation to be known as Baldwin Farms, Inc. The Agreement specifically stated that Duane and Mark Baldwin would be responsible for the management and operation of Baldwin Farms, which would grow and sell sod in Florida. Plaintiff, for his part, was to guarantee the financing in the form of a \$400,000.00 loan from a financial institution in Indiana. The Agreement provided that, in guaranteeing the loan, plaintiff was relying entirely on the projections, representations, and abilities of Duane Baldwin to make the farm a viable enterprise. In return, Duane Baldwin agreed to indemnify plaintiff and hold him harmless if Baldwin Farms failed to repay the \$400,000.00 loan.

Concurrent with the Agreement, the parties executed a separate indemnity/hold harmless agreement, which reiterated that plaintiff would guarantee a \$400,000.00 loan to Baldwin Farms based on Duane Baldwin's financial projections and on his alleged expertise, knowledge, management abilities, and supervision of the venture. The indemnity agreement provided that the indemnitor, Duane Baldwin, agreed to indemnify and hold harmless plaintiff in the event of any failure by the corporation to meet its obligations with respect to the guaranteed loan. The indemnity agreement further expressly stated that if plaintiff was required to take any action to enforce the terms of the Agreement, plaintiff would be entitled to recover all costs and expenses associated therewith, including legal fees incurred in enforcing the Agreement. As security for

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Representative of the Estate of Duane V. Baldwin, and Thomas E. Woods, as Successor Trustee of the Duane V. Baldwin Trust. The term "secondary defendants" collectively refers to Gary D. Baldwin, as former Personal Representative of the Estate of Duane V. Baldwin; Mary Jo Baldwin, as former Co-Trustee of the Duane V. Baldwin Trust; Jacobs Management, LLC; FFM Co., Inc.; DGM Corp; Agricon, Inc.; and Stockbridge Limited Partnerships #1-5.

DGM Corporation is an operating company that works in conjunction with a marketing company, Agricon (a company formed in 1974). DGM was formed in 1986 by Duane and Mary Lou Baldwin, Mark Baldwin, and Gary and Linda Baldwin. Duane Baldwin served as president of DGM until about 1990, at which time Gary Baldwin then became president. The assets of DGM include farmland and specialized equipment that it uses in active and ongoing farming operations harvesting sod, processing peeled onions for the Campbell Soup Company, general farming equipment, and storage and office buildings. Agricon is a now defunct Michigan corporation originally used by DGM as a marketing company. Agricon ceased active operations in the mid-1990's. Agricon still owns an interest in a parcel of land in dispute in this case, a Jackson county property sold in August 2003. Five limited partnerships, Stockbridge Limited Partnerships #1-5 created by Duane and Mary Lou Baldwin, own farm lands which were leased to DGM. FFM, LLC, and Jacobs Management, LLC, are two limited liability companies that were created to function as general partners of limited partnerships #2-5, in which Duane, Gary, and Mary Jo Baldwin took memberships in exchange for limited partnership interests.

the obligation, Duane Baldwin pledged 2,000 shares of stock in American Paytel Corporation, which were represented to have a value of \$200.00 per share, in support of his obligation.

By virtue of two amendments to the indemnity agreement in 1996, the amount of the loan was increased to over \$700,000.00. In these first and second amended indemnity agreements, the parties reaffirmed the terms of the existing indemnity and extended its coverage to the restructured loan. Mark Baldwin was added as an additional “joint and several” indemnitor, and, in addition, the parties agreed that additional assets would provide collateral for the indemnity in the event that the PayTel stock should prove to be deficient.

According to plaintiff, Duane Baldwin claimed he had more than enough assets, in the form of real estate holdings and securities, to cover the obligation. However, unbeknownst to plaintiff, in October 1991, five years before the agreement with plaintiff was signed, Duane Baldwin had transferred his residence, real estate holdings, mutual fund accounts, bonds, insurance policies, and certificates of deposit into five newly-created limited partnerships, in which his children were given ownership interests, but Baldwin retained the largest percentage of interest.² In July 1998, Duane Baldwin conveyed the remainder of his assets to the Duane V. Baldwin Trust, a revocable living trust.

Due to adverse weather conditions, the sod farm business was a failure, and Baldwin Farms never made any of the payments on the loans. At the same time, the value of American Paytel stock plummeted. In February 1998, Baldwin Farms was unable to meet its payments of principal and interest coming due to the bank. In September 1998, Duane Baldwin died unexpectedly from a heart attack.³ His estate was valued at less than \$15,000.00. There is no dispute in this case that the assets of the estate and trust were inadequate to cover Baldwin’s debt to plaintiff.

Plaintiff paid off the loans in September 1999 pursuant to his loan guarantee, shortly after filing the instant suit in June 1999.⁴ In March 2001, the parties stipulated to allow plaintiff to file a second amended complaint, in which plaintiff alleged eight causes of action against the primary and secondary defendants: breach of contract (Count I); fraud (Count II); tortious conversion (Count III); fraudulent conveyances pertaining to the 1991 and 1998 transfers (Count IV); recovery of property from the estate (Count V); accounting of assets held by defendants

² These limited partnerships, Stockbridge Limited Partnerships #1-5, are named defendants in this action because plaintiff claims that these transfers left Baldwin insolvent.

³ His wife, Mary Lou Baldwin, predeceased her husband and her interest in the real property, trust, and partnerships passed to her husband in 1994, before the indemnity agreements were made to plaintiff.

⁴ Plaintiff filed suit in the circuit court after Duane Baldwin died but before an estate was opened. Once the estate was opened and a personal representative appointed, plaintiff filed his first amended complaint against the personal representative and trustee of Duane Baldwin’s estate and trust, and eventually added as defendants Jacobs Management, LLC; FFM, Co., LLC; DGM Corporation; Agricon, Inc.; and Stockbridge Limited Partnerships #1-5.

(Count VI); violation of the Michigan Securities Act (Count VII); and injunctive relief (Count VIII). Plaintiff sought indemnification pursuant to the terms of the Agreement. The payments and interest totaled in excess of \$729,000.00. Plaintiff claims to have first learned of the 1991 conveyances through discovery in this litigation. Plaintiff claimed that assets owned by Duane Baldwin were used to induce him to enter into personal guarantees for the commercial loans used to support Baldwin Sod Farms. Plaintiff further alleged that both Duane Baldwin and Mark Baldwin presented financial statements that misrepresented the success of the venture and represented that additional assets would be available to indemnify him, if necessary.

On April 23, 2001, the primary defendants agreed to the entry of a consent judgment in the amount of \$701,462.76, plus statutory interest as provided by MCL 600.6013, and admitted liability pursuant to the indemnification agreements (Count I of the second amended complaint). Defendants then filed motions for summary disposition, pursuant to MCR 2.116(C)(7), (8), and (10), pertaining to all eight counts of the second amended complaint. In a written opinion and order dated September 12, 2001, the trial court granted summary disposition on Count VII, but denied defendants' motions as to all remaining counts. Counts I, II, and III were subsequently dismissed with prejudice by stipulation of the parties.

A five-day bench trial was held on the remaining equitable claims. At trial, plaintiff attacked the validity of Duane Baldwin's 1991 transfers of real and personal property to the secondary defendants on the theory that they were made with the intent to hinder, delay, or defraud present and future creditors contrary to the Uniform Fraudulent Conveyance Act (UFCA), MCL 566.11 *et seq.*, and that the defendant partnerships and corporations were sham entities created and used for improper purposes, i.e., to hinder and delay payment on a lawful judgment to avoid creditors. At the conclusion of trial, the circuit court rendered a written opinion and order of judgment in favor of plaintiff, concluding that plaintiff had proven his case by "overwhelming evidence." In its amended judgment, the circuit court found "by clear and convincing evidence that the transfers of property to the Entity [secondary] Defendants were fraudulent as to Plaintiff herein" under the UFCA and, further, "that the Entity [secondary] Defendants were the alter ego of Duane V. Baldwin and had no legitimate existence apart from him and were sham entities created or maintained to avoid his obligations to creditors." The court's judgment provided that "all transfers of property, real, personal or mixed, to the Entity [secondary] Defendants are hereby set aside to the extent necessary to satisfy Plaintiff's claim under this Judgment and Plaintiff's Partial Consent Judgment" against the primary defendants. The court separately tried the issue of attorney fees and costs to which plaintiff was entitled pursuant to the terms of the indemnity agreements. Following the presentation of proofs on the issue of costs and fees, the court awarded plaintiff a total of \$446,824.49 in attorney fees and costs. A final judgment in the amount of \$1,352,936.82 was entered on December 17, 2002. The circuit court denied defendants' post-judgment motions for credit against the judgment.

In these consolidated appeals, defendants now raise issues concerning the pre-trial summary disposition motions, the trial court's findings of fact and conclusions of law rendered after the bench trial, and post-judgment proceedings.⁵ In Docket No. 248609, the secondary

⁵ The partial consent judgment entered on April 23, 2001, is not being appealed by any of the
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defendants appeal as of right from the amended judgment entered in favor of plaintiff following the bench trial. In Docket No. 248606, the primary defendants filed a separate appeal by right, which raises essentially the same arguments and issues as those set forth in Docket No. 248609. Accordingly, these two appeals will be jointly addressed in this opinion. In Docket No. 255460, all defendants appeal by leave granted from the circuit court's post-judgment order denying their motion for a credit against the judgment.

Docket Nos. 248609 and 248606

I

Defendants first argue that the trial court erred in permitting plaintiff to pursue his fraudulent conveyance claim more than six years after the challenged conveyances transpired. Defendants note that, with regard to the November 1991 transfers of real and personal property to the Stockbridge limited partnerships, this lawsuit was not commenced until 1999, and the fraudulent conveyance claim was not asserted until the filing of the first amended complaint in May 2000. Defendants contend that the applicable six-year limitations period provided by MCL 600.5813 expired at least two years before this lawsuit was filed because, for purposes of the UFCA, the six-year limitations period runs from the date of the transfers. Defendants further argue that plaintiff had actual notice, as a matter of law, that these transfers had occurred because each 1991 transfer of land to the limited partnerships was promptly recorded with the county register of deeds, and, in due course, the transfers were also recorded with the township and the Michigan Department of Treasury.

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiff's favor. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). Where there are no factual disputes and reasonable minds cannot differ on the legal effects of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law which is also reviewed de novo. *Id.*

The interpretation and application of a statute of limitations presents a question of law which is likewise reviewed de novo on appeal. If the language of the statute is clear, no further analysis is necessary or allowed. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). In the absence of disputed facts, the question whether a cause of action is barred by the statute of limitations is also a question of law. *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993).

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defendants. Further, because no party has sought review of the circuit court's grant of summary disposition with regard to Count VII, the Michigan Securities Act violation, that cause of action is not at issue in this appeal.

Here, the parties do not contest that the applicable statute of limitations is MCL 600.5813, which provides that, “All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.” MCL 600.5827 further provides:

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Recently, in *Boyle v General Motors Corp*, 468 Mich 226, 227; 661 NW2d 557 (2003), our Supreme Court held that the discovery rule does not apply to cases alleging fraud; rather, an action for fraud accrues under MCL 600.5827 at the time the wrong was done, not when it was discovered or should have been discovered. Citing *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995), the *Boyle* Court further noted that, “The wrong is done *when the plaintiff is harmed*, rather than when the defendant acted.” *Id.* at 231 n 5 (emphasis added).

A cause of action does not “accrue” until all the necessary elements of the claim have occurred and can be alleged in the complaint. *Moll, supra* at 15-16. In the instant case, when Duane Baldwin conveyed his real and personal property to the Stockbridge partnerships in 1991, the UFCA was still in effect.⁶ The UFCA prohibited conveyances that were fraudulent as to “present and future creditors.” See MCL 566.16; MCL 566.17.⁷ As the trial court correctly noted, plaintiff’s claims of fraudulent conveyance did not “accrue” within the meaning of MCL 600.5813 and MCL 600.5827 until Baldwin entered into the agreements with plaintiff and plaintiff was, as a result, harmed. *Boyle, supra*. Thus, because Duane Baldwin entered into the agreement with plaintiff in February 1996, the June 1999 complaint, and the May 2000 amended complaint, were filed well within the six-year period of limitation.

⁶ The UFCA has since been repealed and replaced in 1998 by the Uniform Fraudulent Transfers Act (UFTA), MCL 566.31 *et seq.*, which similarly provides that “A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, *whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred.* . . .” [MCL 566.34(1); emphasis added.]

⁷ MCL 566.16 provided: “Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.”

MCL 566.17 provided: “Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

Under defendants' erroneous interpretation of Michigan law, plaintiff would have less than one year from the time he met Baldwin in 1996 to bring suit because the wrong purportedly was done when the assets were conveyed in 1991. This approach is without logic. For example, if plaintiff was not introduced to Baldwin until 1998, then the six-year statute of limitations would have run before any relationship was even developed. Under defendants' flawed reasoning, the Michigan Supreme Court has recognized that "a plaintiff's cause of action could be barred before the injury took place." *Stephens, supra* at 535.

Finally, when a person makes false representations about the title to real property, he is not relieved of liability for fraud merely because the person he defrauded could have detected the fraud by examining the public records. *In re People v Jory*, 443 Mich 403, 417-418 n 10; 505 NW2d 228 (1993); *Cole Lakes, Inc v Linder*, 99 Mich App 496, 506; 297 NW2d 918 (1980). Therefore, the trial court properly held that defendants' statute of limitations defense was without merit.

II

Secondary defendants next argue that the circuit court lacked jurisdiction to hear plaintiff's claims alleging fraudulent conveyance and for an accounting or for attorney fees and costs. Defendants maintain that, under Michigan's Estate and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, the only proper party to bring such a claim, and thereby vest jurisdiction in the circuit court, is the personal representative of the estate suing on behalf of beneficiaries and/or creditors. MCL 700.3710.⁸ Defendants contend that plaintiff cannot seek to directly void transfers made by the decedent because his claim to the assets, if any, is only derivative. We disagree.

Questions regarding statutory interpretation and application are issues of law determined *de novo* on appeal. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 344; 578 NW2d 274 (1998).

As the trial court noted when addressing this issue in its opinion and order dated September 12, 2001, defendants did not raise this issue until almost a year after the case had been pending in circuit court. The trial court properly concluded, as plaintiff argued, that this case is, in essence, a breach of contract action, and, as such, the probate court has concurrent, not exclusive, jurisdiction over this matter under the EPIC, which provides in pertinent part:

(1) In addition to the jurisdiction conferred by section 1302 and other laws, the [probate] court has *concurrent* legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust:

⁸ MCL 700.3710 provides: "The property liable for the payment of unsecured debts of a decedent includes all property transferred by the decedent by any means that is in law void or voidable as against the decedent's creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of the decedent's unsecured debts, is exclusively in the personal representative."

* * *

(i) Hear and decide a contract proceeding or action by or against an estate, trust, or ward. [MCL 700.1303; emphasis added.]⁹

Because the underlying complaint in this matter is clearly a breach of contract action involving three indemnity agreements and plaintiff's allegation that fraud was committed in order to get plaintiff to personally guarantee commercial loans to Baldwin Sod Farms, the trial court did not err in concluding that it had subject-matter jurisdiction to hear this cause of action.

III

Defendants next argue that the trial court erred by entering a money judgment on an unpleaded "sham entity" theory. Defendants maintain that, before a "piercing the veil" theory may be considered, it must first be pleaded by setting forth facts sufficient to show that the entity form was used to perpetrate a fraud on the plaintiff. Defendants argue that, here, there are no allegations regarding "sham entities" that would justify piercing the corporate veil, such as a claim that Duane Baldwin treated the assets of the corporations/partnerships as his own. Moreover, defendants contend that not only was the "sham entity" theory never pleaded, it was also not supported by competent evidence, particularly with regard to defendants DGM and Agricon. Defendants maintain that each corporation was formed according to law, and no evidence showed that either corporation was used as an "alter ego" by Baldwin.

This Court reviews a trial court's findings of fact in a bench trial for clear error and reviews de novo its conclusions of law. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Id.* at 652. "An appellate court will give deference to 'the trial court's superior ability to judge the credibility of the witnesses who appeared before it.'" *Id.*, quoting *Rellinger v Bremmeyr*, 180 Mich App 661, 665; 448 NW2d 49 (1989).

A trial court's decision whether to pierce the corporate veil is reviewed de novo because of the equitable nature of the inquiry. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). However, the trial court's decision "will not be reversed unless the factual findings are clearly erroneous or the reviewing court is convinced that it would have reached a different result had it occupied the trial court's position." *Law Office of Lawrence J. Stockler, PC v Rose*, 174 Mich App 14, 43-44; 436 NW2d 70 (1989).

⁹ When plaintiff filed this action, the Revised Probate Code was in effect. The Revised Probate Code was repealed effective April 1, 2000, and was superseded by the EPIC. The EPIC applies to court proceedings pending on April 1, 2000, except to the extent, in the opinion of the court, the Revised Probate Code should be made applicable in the interest of justice or because of the infeasibility of applying EPIC's procedures. See MCL 700.8101.

Initially, as plaintiff correctly notes, “piercing the corporate veil” is not in and of itself a cause of action, but rather a doctrine which fastens liability on the individual who uses a corporation merely as an instrumentality to conduct his or her own personal business, and liability arises from fraud or injustice perpetrated not on the corporation but on third parties dealing with the corporation. See *In re RCS Engineered Products Co, Inc*, 102 F3d 223, 226 (CA 6, 1996); *Aioi Seiki, Inc v JIT Automation, Inc*, 11 F Supp 2d 950, 953-954 (ED Mich, 1998).

There is no single rule delineating when the corporate entity may be disregarded. *Foodland, supra* at 456. A court may find that one entity is the alter ego of another and pierce the corporate veil upon proof of three elements: first, the corporate entity must be an instrumentality of another; second, the corporate entity must be used to commit a fraud or wrong; and, third, there must have been an unjust loss or injury to the plaintiff. *Acton Plumbing & Heating Co v Jared Builders, Inc*, 368 Mich 626; 118 NW2d 956 (1962); *In re RCS Engineered Products, Inc, supra* at 226; *Nogueras v Maisel & Assoc of Michigan*, 142 Mich App 71, 86; 369 NW2d 492 (1985).

In the instant case, the material allegations of Count IV of plaintiff’s second amended complaint adequately set forth a claim to recover property transferred in fraud of the creditor, thus providing a basis for the trial court to pierce the corporate veil. First, plaintiff alleged in paragraphs 53-56 that the limited partnership and corporation defendants were created solely to avoid creditors. Second, plaintiff alleged in paragraph 59 of the amended complaint that these entities were used to commit wrongs against creditors. Finally, plaintiff claimed he suffered an unjust loss in paragraphs 31-32. “The only requirements for stating a cause of action is a presentation of factual allegations that would reasonably inform defendants of the ‘nature of the claims’ against which defendants are called upon to defend.” *Smith v Stolberg*, 231 Mich App 256, 260-261; 586 NW2d 103 (1998); MCR 2.111(B)(1).

Defendants’ argument that the “sham entity” theory was not supported by competent and material evidence is likewise without merit. Plaintiff presented ample evidence at trial that defendant entities were sham entities that merely served as Duane Baldwin’s alter ego. The evidence showed that family members who had partnership and corporate interests never provided consideration for those purported interests and never shared in the profits or losses of the entities. The evidence overwhelmingly established Duane Baldwin’s abuse of partnership and corporate arrangements by using them as devices from which he paid his personal expenses, while insulating himself from payment of his personal debts.

Plaintiff’s expert, Allan Claypool, testified that Duane Baldwin failed to comply with state and federal tax laws and nearly all of the requisite partnership formalities required by the partnership agreements. For example, Duane Baldwin’s children were not paid their respective shares of partnership profits or losses; no partnership records were ever maintained; annual statements were not delivered to each partner; no annual meetings ever took place; except for Stockbridge Limited Partnership #5, no bank accounts were established or operated; no salary was paid to the general partner; provisions applicable to the transfer of limited partnership interests were not followed; no state or federal income tax returns were ever filed for Stockbridge Limited Partnerships #1-4; only some of the required income tax returns were filed for Stockbridge Limited Partnership #5; and no balance sheets or financial statements were ever prepared or maintained for the partnerships.

There was additional evidence that Duane Baldwin retained total control of the entities' assets for his exclusive individual benefit. For example, he personally filed Michigan farmland preservation tax credit claims with his personal income tax returns. Duane Baldwin represented in those documents that he was the owner of, and entitled to, 100 percent of the property tax credits attributable to the farmland, which was actually titled in the partnerships. Duane Baldwin also represented in a handwritten 1996 financial statement that the Michigan farmland, valued at \$600,000.00, was owned by him personally. Furthermore, Duane Baldwin's own home was titled in the name of one of the partnerships. According to Claypool, the establishment of defendant entities served no legitimate business purpose. Furthermore, DGM acted as a conduit, and, based on the testimony of Gary Baldwin, the business and personal assets were so intertwined with all of the entities that he did not know who owned the interests.

We conclude that the trial court did not clearly err in piercing the veil of these partnership and corporate entities and finding that they were, indeed, sham entities used by Duane Baldwin for his sole benefit. In so concluding, the trial court noted in its written opinion and order that "It is noteworthy that Duane Baldwin was not a stranger to the courts and was sued numerous times in relation to his business enterprises." Under the circumstances, and in light of the evidence of record, the trial court properly held that the resultant transfers were accordingly voidable.

IV

The secondary defendants next argue that the circuit court erroneously found that transfers of property owned by Duane and Mary Lou Baldwin made in 1991 to Stockbridge Limited Partnerships #1-5 were a "fraudulent conveyance" in 1991 under the UFCA, MCL 566.17, to a then-existing creditor. Defendants contend that plaintiff did not become a creditor under MCL 566.17 until he had a claim of indemnity against Duane Baldwin in February 1998; consequently, the lack of a creditor relationship between plaintiff and Baldwin at the time of the transfers bars plaintiff's claim, and the court's finding to the contrary is clearly erroneous.

Defendants further maintain there was no proof of "fraudulent intent" of the kind necessary to set aside voluntary conveyances as to existing (or later) creditors. *Cole v Brown*, 114 Mich 396, 399; 72 NW 247 (1897). Defendants contend that the alleged failures by the limited partnerships or corporations to which Duane Baldwin transferred assets to file annual reports, pay annual fees, or to keep minutes, is unrelated to the gratuitous transfers of entireties property in the form of limited partnership interests or limited corporation shares to family members in 1991 and 1993. Defendants argue that the trial court's findings that the transfers were made to avoid Duane Baldwin's debt to plaintiff are contrary to law and fact, particularly where the debt arose in 1998 when plaintiff paid the bank loan, more than seven years after the date of the creation of the limited partnerships. We disagree.

Both the UFCA, in effect in 1991, and the current act, the UFTA, specifically prohibit transactions made with the intent to hinder, delay, or defraud future creditors. The overwhelming evidence clearly supports the trial court's conclusion that the 1991 and 1998 transfers violated the UFCA. The record indicates that, in 1991, Duane Baldwin and his attorney formed a firm to develop and market a "scheme" to shield assets from future creditors, at about the same time that Baldwin transferred most, if not all, of his assets to five limited partnerships. The scheme was to be marketed to farmers, individuals, and lawyers, and promoted the concept of farmers transferring all of their property to several limited partnerships and corporations to

avoid future creditors. Also in 1991, Baldwin transferred most of his assets to defendants Stockbridge Limited Partnerships #1-5. In exchange for the property, Baldwin issued partnership interests to himself and other family members for no consideration. Baldwin did not file a gift tax return for the interests transferred to family members. Baldwin repeatedly represented to plaintiff in 1996 and 1997, during the series of business transactions involving Baldwin Farms, that he held enough property to indemnify plaintiff for any losses incurred by that business venture. Consistent with these representations was Baldwin's handwritten personal financial statement, dated December 1996, showing his net worth to be \$1,700,000. No mention was made of the five limited partnerships holding Baldwin's real estate. According to plaintiff's expert's testimony and written opinion, Duane Baldwin did not avail himself of typical and legitimate estate planning techniques.

Moreover, contrary to defendants' assertion, the evidence shows that Duane Baldwin was rendered insolvent as a result of his fraudulent transactions. When he died, his estate was probated as a small estate of less than \$15,000.00, which clearly was not enough to cover his debts. The petition filed with the probate court makes no mention of any stock in American Paytel, which is consistent with the evidence showing that Duane Baldwin never really owned any stock in American Paytel. In any event, under the UFCA and UFTA, it is not necessary for plaintiff to show that Baldwin was in fact insolvent. See MCL 566.17; MCL 566.34(1); *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 658-659; 513 NW2d 441 (1994). An intent to delay or hinder creditors, standing alone, is sufficient to constitute a fraudulent conveyance under MCL 566.17.

As the trial court concluded in its written opinion, the evidence that the transfers were made by Duane Baldwin in 1991 with the intent to defraud present and future creditors was "overwhelming." The court further aptly noted that the testimony of one witness alone – Janet Bollinger (Duane Baldwin's girlfriend) – which the court deemed credible, was sufficient on this point. She testified that Duane Baldwin told her on several occasions that the transfers were made to defraud creditors and were part of a plan that he and his attorney had researched. Baldwin also told her that he did not intend to pay plaintiff. Defendants' argument in this regard is therefore without merit.

V

Defendants next argue that the circuit court erred in holding DGM Corporation and Agricon, Inc. liable for the individual debts of Duane Baldwin as sham entities. Defendants complain that the circuit court erred when it made no distinction between the separate legal existence of the Stockbridge limited partnerships, on the one hand, and DGM and Agricon, on the other hand; instead, the trial court purportedly lumped all of the entities together and improperly treated the assets of DGM and Agricon as accessible by plaintiff pursuant to the judgment. We disagree.

The trial court's finding that DGM and Agricon were sham entities used to frustrate Duane Baldwin's creditors, evade lawful execution processes, and deceive governmental entities is substantiated by the record. According to the testimony of Gary Baldwin, DGM paid the obligations of Stockbridge Limited Partnerships #1-4, and those partnerships were sham entities having had no legitimate business purpose, income, or expenses. Defendants failed to produce any credible records concerning the ownership or operation of DGM; plaintiffs' unrefuted

records indicated that Duane Baldwin held a fifty-three percent interest, and Gary Baldwin held a forty-seven percent interest. It is undisputed that Agricon, Inc. is a dissolved Michigan corporation that owns an interest in ninety-eight acres in Jackson County. Duane Baldwin owned part or all of Agricon, Inc. Gary Baldwin claimed at trial to be the president of Agricon and testified that the company “lapsed” because of a lack of meetings and failure to maintain its corporate existence. However, Gary Baldwin failed to produce any definitive ownership records regarding Agricon. Further, the evidence showed that Duane Baldwin’s trust and estate were the beneficial owners of all of Agricon’s interest in the real property. In light of the evidence produced at trial, particularly the testimony of plaintiff’s expert witness, Allan Claypool, the trial court did not clearly err in finding that Agricon and DGM were sham entities utilized by Duane Baldwin to frustrate his creditors, evade lawful execution processes, and deceive governmental entities.

VI

Next, defendants maintain that the language of the indemnity agreements limited recoverable fees and costs to enforcement and did not extend to the costs of collection. We disagree.

Duane Baldwin signed a broad indemnity that included reimbursement for any litigation or related expenses incurred by plaintiff, as the documents of record so reflect. The original indemnity agreement and each subsequent amendment provided that “[I]n the event [plaintiff] is required to take any action to enforce the terms of this Agreement, he shall be entitled to recover all costs and expenses associated therewith, including, but not limited to, legal fees.” The parties’ final “Letter of Agreement” also provided that “if any [party] is required to pursue legal action or incur expenses, including legal expenses, to enforce our rights under such agreements, then such party shall be entitled to recover such expenses associated with successfully enforcing the terms of these agreements.”

The term “enforce” is not employed in some hypertechnical sense, but rather is used in the same sense that it is used in ordinary parlance. It means simply to cause the agreements to have their intended effect, and, if any legal action is required to achieve that result, it is covered. Consistent with this use, Black’s Law Dictionary (8th ed) defines “enforce” as: “to give force or effect to . . . ; to compel a person to pay damages for not complying with (a contract).”

Because all of plaintiff’s actions were reasonably calculated to protect his interests and proved successful, the trial court did not err in holding that the award of attorney fees and costs was recoverable under the indemnity contract and was not limited to fees or costs incurred after entry of the consent judgment. Defendants’ argument is unmeritorious.

VII

Defendants next argue that the trial court erred in denying defendants a jury trial on the issue of attorney fees and costs, in granting an award based on material allegedly not admitted into evidence, in making no or inadequate findings of fact on the issue of costs and fees, and in concluding that plaintiff’s attorney fees claims were reasonable and within the scope of the indemnity. We disagree.

The parties to this action signed a written stipulation, dated May 29, 2002, in which they agreed, in pertinent part, that:

7. Plaintiff's claim for attorney fees under the Indemnity Agreement shall be disposed of after the bench trial on Count IV (Fraudulent Conveyance) by summary disposition, stipulation of Plaintiff and the primary Defendants, or *trial by the Court* if the Motion for Summary Disposition is denied or Plaintiff and the Primary Defendants cannot stipulate to a resolution of the claim. [Emphasis added.]

Defendants now claim that the phrase "trial by the Court" actually means trial by jury, and that the trial court erred in denying defendants a jury trial on all issues of fact related to plaintiff's attorney fee and cost claims.

Stipulations, like contracts, are agreements reached by and between the parties. *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). Stipulations are thus construed under the same rules of construction as contracts, and the court must, if possible, ascertain and give effect to the intent of the parties. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 394; 573 NW2d 336 (1997); *Kline v Kline*, 92 Mich App 62, 72-73; 284 NW2d 488 (1979). To determine if a stipulation is ambiguous, the language used is given its ordinary and plain meaning to see if its words may reasonably be understood in different ways. *Rossow v Brentwood Farms Development, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

"The right to a jury trial in a civil action is permissive, not absolute." *Marshall Lasser, PC v George*, 252 Mich App 104, 106; 651 NW2d 158 (2002). "[T]he subsequent waiver of a properly demanded jury trial can be inferred from the conduct of the parties under a 'totality of the circumstances' test." *Id.* at 108. When a party acquiesces to a bench trial, it cannot later complain about the lack of a jury trial when, by its own conduct, it waived that right. *Id.* at 109.

In this case, the language of the stipulation was the subject of negotiations among the counsel of record, including defendants' counsel. The apparent goal of the stipulation was to streamline the case by having the case tried by the court, as opposed to a jury. Plaintiff notes that, in paragraph 3 of the stipulation, he agreed to the dismissal with prejudice of his wrongful conversion and fraud claims, legal claims that were triable by a jury, with the stated purpose of pursuing only his equitable claims so as to avoid the time and expense of a jury trial. Plaintiff logically contends that all of the parties' counsel were aware of these circumstances when they signed the stipulation. Thus, viewed in the totality of the circumstances, the trial court did not err in concluding that "trial by the Court" was an alternative expression connoting a bench trial. If defendants wanted a jury trial on the attorney fee issue, they should have insisted on specific language requiring a jury trial. By entering into the stipulation, defendants effectively waived their right to a trial by jury.

With regard to defendants' argument that they were denied the opportunity to present evidence or closing arguments on the attorney fee and cost issues, the record belies defendants' contention and shows that, following plaintiff's presentation of proofs on the question of the reasonableness of attorney fees and costs, defendants were given the opportunity to further argue the issue but did not.

Defendants also protest the amount of the attorney fees that were awarded to plaintiff. This Court generally reviews reasonable attorney fee determinations under an abuse of discretion standard. *46th Circuit Trial Court v Crawford County*, 261 Mich App 477, 493; 682 NW2d 519 (2004). Attorney fees are to be reviewed using the six guidelines set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973): (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Id.* at 495-496. See also *Michigan Tax Management Services Co v Warren*, 437 Mich 506, 509-510; 473 NW2d 263 (1991). Reasonable fees are not equivalent to actual fees charged. *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002).

Here, at the hearing on the matter of fees and costs, plaintiff called attorney Ted Stroud as his expert witness to review the statements for services rendered by the attorneys in this case. Defendants did not call any witnesses. Following the hearing, the trial court, in its written opinion dated December 13, 2002, stated in pertinent part:

Plaintiff who prevailed at trial on this matter has requested attorney fees, costs, and miscellaneous expenses pursuant to the indemnification agreement in the amount of \$465,325.93. The Court held a hearing at which Plaintiff presented expert testimony regarding the reasonableness of the requested fees. Plaintiff's expert reviewed the file and applied the factors found in *Crawley v Schick*, 48 Mich App 728; 211 NW2d 217 (1973). The witness, Ted Stroud, Esq., concluded that the fees were reasonable with the exception of those described only as "working on the file." Those entries approximated 5% of the amount charged. Defendants' proofs were limited to the cross-examination of Plaintiff's expert. The Court is well familiar with Msrs. Bender, Murphy and Wellman, all of whom worked on the file at one time or another, and finds, as did Mr. Stroud, that the hourly rates of \$175.00 to \$200.00 are reasonable. The Court finds that it is reasonable to discount the Murphy, Brenton & Spagnuolo bill by 5% to reflect the unsupported entries testified to by Mr. Stroud.

Defendants contest the costs associated with retaining expert witnesses in this matter. This objection ignores that the battle of experts was one commenced by the Defendants and not by the Plaintiff. Such a cost was reasonable, and the Court found the testimony of Mr. Claypool and Mr. Bos (Defendant's expert) informative.

Defendants' objections to the payment of Attorney Fees for Counsel retained in Indiana is not well made. The responsibility for the payment of attorney fees and costs stems from the contractual indemnity provision not by statute or court rule. Plaintiff is from Indiana and the banks involved are from Indiana. The contractual provision requires the Defendants to pay for all costs associated with enforcement of the indemnity agreement. Thus, it was foreseeable that Indiana counsel may be required.

The trial court thereafter awarded attorney fees in the amount of \$368,233.35, and costs in the amount of \$78,591.14, for a total of \$446,824.49 in costs and attorney fees. Under the circumstances where, as plaintiff notes, the file is voluminous because defendants defended the case with an onslaught of largely unsuccessful motions and claims, and the case spanned almost four years, the trial court did not abuse its discretion in its determination of the reasonableness of attorney fees collectible pursuant to the indemnity agreements.

VIII

Defendants next contend that the circuit court erred in allegedly granting a double award of statutory interest, i.e., the court not only levied a money judgment against the secondary defendants, including the \$701,462.76 on which there was already a consent judgment as to Count I against the primary defendants only, but also granted interest from a date prior to entry of the consent judgment. Defendants argue that the consent judgment included interest to the date of entry; thereafter, statutory interest accrues pursuant to MCL 600.6013(6). Defendants maintain that by adding statutory interest from an earlier date, the trial court granted plaintiff a prohibited and erroneous double recovery.

Questions regarding the interpretation and application of the prejudgment interest statute, MCL 600.6013, are reviewed de novo as a question of law. *Yaldo, supra* at 344.

As previously noted, a partial consent judgment was entered in April 2001 against the primary defendants “in the amount of \$701,462.76 plus interest as provided by MCLA 600.6013” The final amended judgment entered by the court in December 2002 set aside, as fraudulent, all transfers of property to the entity defendants, “to the extent necessary to satisfy Plaintiff’s claim under this Judgment and Plaintiff’s Partial Consent Judgment against Defendants Estate . . . and Trust.” The trial court’s computation of the “total judgment, including attorney fees, costs, and interest . . . together with interest calculated to MCL 600.6013(8) in the amount of \$1,352,936.82,” against “all defendants,” does not reflect a redundant judgment, i.e., penalize defendants doubly by awarding damages on top of those already awarded pursuant to the consent judgment, but rather incorporates the consent judgment into the final sum, with no double award of statutory interest. The final amended judgment merely increased the partial consent judgment for costs of collection, as provided for in the indemnity agreements, and statutory interest. Defendants’ argument is therefore without merit.

IX

Defendants next argue that, assuming the propriety of the court’s findings of fact regarding sham entities, the trial court erred in failing to unravel the transactions involving these entities. Defendants contend that the trial court improperly stripped Baldwin family members of their assets in the family enterprises, and failed to limit plaintiff’s rights to acquire interests in the limited partnerships legitimately given by Mary Lou Baldwin to her children at the time of her death.

This issue was not raised at trial and therefore is not properly preserved for appellate review by this Court. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). In any event, defendant’s argument is without merit. Defendants provide no legal

authority to support their contention that plaintiff cannot recover against Stockbridge Limited Partnerships #1-4 because the real estate that was conveyed into those limited partnerships was property owned by Duane and Mary Lou Baldwin as tenants by the entireties. Once the property was conveyed to the limited partnerships, any entireties property ceased to be entireties property and became available to existing and future creditors. Pursuant to the final judgment, plaintiff may now execute against the property held by the entity defendants, deemed alter egos of Duane Baldwin, to the extent necessary to satisfy his claim. Any recorded liens or taxes will have to be satisfied first according to law and, then, to the extent that any of the property, i.e., sham entity, is liable for any debts of the debtor, such property shall be included in his assets and is not exempt from liability for his debts. MCL 566.11; MCL 566.131. The trial court did not clearly err in rendering its factual findings regarding the sham entities and in setting aside the conveyances to the Baldwin children and to the trust as sham entities.

In conclusion, in Docket Nos. 248609 and 248606, we affirm the judgment and order entered by the circuit court in favor of plaintiff.

Docket No. 255460

In this case, defendants appeal by leave granted the trial court's denial of their post-judgment motion for a credit against the judgment. Defendants' appeal stems from the following circumstances.

As previously noted, as security for his obligation pursuant to the Agreement, Duane Baldwin pledged 2,000 shares of stock in American Paytel Corporation, which were represented to have a value of \$200.00 per share. Through amendments to the Agreement in 1996, the size of the loan was increased. The second indemnification agreement acknowledged that plaintiff had possession of the stock certificates "with appropriate stock powers and related authorizations." The second indemnification agreement also provided that plaintiff "had the right, but not the obligation, to set off that number of shares of American Paytel Corp. as he elects to compensate TMS [Thomas M. Shoaff] in whole or in part for the payments by TMS to the Lender."

In March 2003, following the entry of judgment in favor of plaintiff and after their motions for new trial were denied, defendants filed a post-judgment motion for a credit against the judgment. The trial court did not conduct a hearing on the motion until April 21, 2004. At that hearing, defendants argued that, because plaintiff had retained the pledged stock throughout the litigation and afterward, they were entitled to a partial satisfaction of the judgment in the amount of \$496,329.79, the total when the proportionate amount of interest was also deducted. Plaintiff's attorney argued that it had been established at trial that Baldwin had sold some of the stock after he pledged it to Shoaff. Evidence was also introduced at trial that Baldwin never paid for the stock subscription and so never obtained ownership of the issued shares. Following oral argument, the trial court denied defendants' motion because it was filed more than two years after entry of the partial consent judgment and because the issue had been litigated at trial.

We conclude that the trial court did not err when it denied defendants' motion for credit and held that such a claim was foreclosed because it was filed more than two years after entry of

the partial consent judgment. As previously noted, the partial consent judgment settled the primary defendants' liability pursuant to the indemnity agreements, the terms of which included the contested stock pledge provision. Defendants are now bound by the partial consent judgment which, once entered, has the full force and effect of a litigated judgment, *Trendell v Solomon*, 178 Mich App 365, 368; 443 NW2d 509 (1989), and may not be set aside or modified unless there is a mutual mistake or fraud. *Id.*; MCR 2.612(C)(1)(a) and (c).

Moreover, the stock pledge provision is unambiguous and clearly does not require plaintiff to use the APC stock as a setoff against Duane Baldwin's obligation to plaintiff. "An indemnity contract is construed in the same manner as other contracts." *Daimler Chrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 185; 678 NW2d 647 (2003). "Thus, an unambiguous written indemnity contract must be enforced according to the plain and ordinary meaning of the words used in the instrument." *Id.* Here, the indemnity terms simply and plainly do not obligate plaintiff to execute on the pledged APC stock: plaintiff had "the right, *but not the obligation*," to execute on the stock. The trial court's order denying defendants' post-judgment motion for credit against the judgment is therefore affirmed.

/s/ Richard Allen Griffin
/s/ Henry William Saad
/s/ Peter D. O'Connell