STATE OF MICHIGAN

COURT OF APPEALS

JUDITH A. ZWERK, Plaintiff-Appellant,	UNPUBLISHED May 12, 2011
v	Nos. 294006; 294957 Saginaw Circuit Court
WALTER DON ZEHNDER and ANDREWS HOOPER & PAVLIK PLC, Defendant-Appellees.	LC No. 03-047309-NM

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of dismissal and an order awarding defendants costs in the amount of $7,962. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was married to Michael Zwerk for approximately 30 years. The couple had two children together, and Michael had two children from a previous marriage. Plaintiff asserted that Michael began an extramarital affair and that this caused the marriage to break down. Plaintiff and Michael were divorced in January 2003.[1]

During plaintiff and Michael's marriage, Michael and his brother, Larry Zwerk, ran a family farming business. The farming business consisted of a partnership, Zwerk & Sons Partnership, and a corporation, Arnold Zwerk and Sons, Inc. Michael and Larry each owned 5,000 shares of stock in the corporation individually, and Michael and plaintiff owned 2,365 shares as joint tenants, and Larry and Linda Zwerk also owned 2,365 shares as joint tenants.

Defendant Zehnder (hereinafter "defendant") had a long history of providing accounting services to the partnership and the corporation and to plaintiff and Michael personally.

[1] Michael appealed the judgment of divorce to this Court, and this Court affirmed, in part, and remanded, in part. *Zwerk v Zwerk*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2005 (Docket Nos. 247527; 253660) (2005 Mich. App. LEXIS 273).

Defendant testified that the idea or plan to transfer the corporation to the next generation of Zwerks, or the "succession plan," first arose in 1996. In order to effectuate this plan, on April 25, 2000, defendant or his secretary drew an "x" through the shares of stock that plaintiff and Michael owned as joint tenants, voided them, and combined them into a single share in Michael's name alone. This was done without plaintiff's consent or knowledge. Ultimately, the corporation was sold to the next generation of Zwerks, who included Martin D. Zwerk, David M. Rupprecht and Jeffrey A. Schluckbier.

Plaintiff filed suit against defendants in February 2003, contending generally that defendant engaged in numerous acts of impropriety in drafting and executing the succession plan for the farming business. According to the complaint, defendant planned, created, drafted and organized the succession plan, which was intended to defraud plaintiff of her assets. Plaintiff's complaint contained claims for accounting malpractice, negligence, breach of contract, negligent misrepresentation, fraud, and respondeat superior.[2] The case went to trial primarily on the issues of fraud and breach of contract. The jury decided that plaintiff had a contract with defendant, that defendant did not breach the contract with plaintiff, that defendant failed to disclose a material fact of which he had actual knowledge and that this failure caused plaintiff to have a false impression, that when defendant failed to disclose material facts he did not know that the failure would create a false impression and that the total amount of plaintiff's damages was zero.

The trial court entered a judgment of dismissal on August 26, 2009. On October 22, 2009, the trial court entered an order awarding defendant costs in the amount of $7,962.

II. ANALYSIS

A. DIRECTED VERDICT

Plaintiff argues that the trial court erred in denying her motion for directed verdict of her fraud and breach of contract claims and that the trial court should have granted a directed verdict that there were no non-parties at fault.

This Court reviews de novo the trial court's decision on a motion for directed verdict. *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in favor of that party to determine if a question of fact existed. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). A directed verdict is only appropriate if there is no factual question on which reasonable jurors could differ. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "A motion for directed verdict . . . should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Sniecinski*, 469 Mich at 131. "Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the

[2] Plaintiff also filed a shareholder's derivative lawsuit in 2001 against Michael, Larry and Martin Zwerk, Rupprecht and Schluckbier, but she voluntarily dismissed that complaint.

fact-finder's responsibility to determine the credibility and weight of the testimony." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

The trial court did not err in denying plaintiff's motion for directed verdict of her fraud claim. Plaintiff's theory at trial was that defendant committed fraud based on silence. Silent fraud is also known as fraud by nondisclosure or fraudulent concealment and requires the plaintiff asserting the claim to set forth a complex set of proofs. *M&D, Inc v McConkey*, 231 Mich App 22, 28; 585 NW2d 33 (1998). "[I]n order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure." *Id.* at 31. "Suppression of facts and truths can constitute silent fraud where the circumstances are such that there exists a legal or equitable duty to disclose." *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 500; 686 NW2d 770 (2004). There must also be intent to defraud. *M&D, Inc*, 231 Mich App at 28; *Lorenzo v Noel*, 206 Mich App 682, 684; 522 NW2d 724 (1994). With any fraud claim, a plaintiff must show reasonable reliance on the defendant's misrepresentation. *Foreman v Foreman*, 266 Mich App 132, 141-142; 701 NW2d 167 (2005).

At trial, defendant admitted that he should have gotten plaintiff's express consent to void her corporate stock and that Michael never told him that plaintiff was in agreement regarding voiding her stock. However, defendant also testified that Michael and Larry ran the corporation, that Michael and Larry dealt with all the financial issues involving the corporation and that plaintiff was never involved with the farming operations or bookkeeping. Defendant further testified that he relied on Michael and Larry for information throughout the years he worked for the farming business and that he thought that plaintiff was aware of the sale of the business and that he thought he had her consent. Defendant's belief that plaintiff was aware of the sale of the business and that he had plaintiff's consent to void and transfer the jointly held stock, whether reasonable or not, negates intent to defraud. Viewing defendant's testimony in the light most favorable to defendant, as the nonmoving party, defendant did not have an intent to defraud plaintiff. *M&D, Inc*, 231 Mich App at 28.

Furthermore, plaintiff has not established that she relied on any alleged silent misrepresentation on the part of defendant. Defendant testified that Michael and Larry were running the business, and they were defendant's contact people. Plaintiff admitted that she did not assist in managing the business and that before September 2000, Michael took care of matters with defendant. Plaintiff also testified at trial that she never had a discussion with defendant regarding the shares of stock she owned jointly with Michael and that from January 1, 2000, until she filed the lawsuit against defendant, defendant did not ever contact her to have a conversation. According to plaintiff, defendant never called her or sent her a letter with a misrepresentation. Viewing the evidence in a light most favorable to defendant, the trial court properly denied plaintiff's motion for directed verdict because plaintiff could not show reliance on any alleged silent misrepresentation and she could not establish that defendant intended to defraud her.

Plaintiff next argues that the trial court erred in denying her motion for directed verdict of her breach of contract claim. Plaintiff has waived this issue on appeal by failing to adequately address the merits of her argument in her appellate brief. It is not enough for a party to simply assert an error and then leave it up to this Court to discover and rationalize the basis for their

claims, elaborate and unravel their arguments for them, and then search for authority to sustain or reject their position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). We decline to address this unpreserved error.

Plaintiff also argues that she was a third-party beneficiary to the succession plan. Whether plaintiff is a third-party beneficiary is governed by MCL 600.1405, which provides:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

A contract is presumed to have been made for the benefit of the parties to it, and a party asserting third-party beneficiary status has the burden of proving that she is an intended beneficiary. *Oja v Kin*, 229 Mich App 184, 193; 581 NW2d 739 (1998). An objective standard is used to determine whether a plaintiff is a third-party beneficiary of a contract. *Krass v Tri-Co Security, Inc*, 233 Mich App 661, 665-666; 593 NW2d 578 (1999). The contract itself reveals the parties' intentions. *Id.* at 666. If a contract is primarily for the benefit of the parties, that a third person is incidentally benefited does not give rise to a third party beneficiary contract. *Oja*, 229 Mich App at 193.

Plaintiff's third-party beneficiary argument presumes, without elaboration, that the succession plan is a contract. Plaintiff had the burden of establishing that she was an intended beneficiary, but her appellate brief is silent regarding whether she was an intended beneficiary of the succession plan. As stated above, a party may not simply assert an error and then leave it up to this Court to discover and rationalize the basis for their claims, elaborate and unravel their arguments for them, and then search for authority to sustain or reject their position. *Yee*, 251 Mich App at 406. Plaintiff's third-party beneficiary argument is not preserved for review.

Plaintiff finally argues that the trial court erred in failing to direct a verdict that there were no non-parties at fault. In rendering its verdict, the jury did not find that there were any non-parties at fault. Thus, any error in the trial court's failure to direct a verdict regarding this issue was harmless. MCL 769.26; MCR 2.613(A).

B. SUFFICIENCY OF COMPLAINT AND MOTION TO AMEND COMPLAINT

Plaintiff argues that she sufficiently pleaded claims for bailment, conversion and breach of fiduciary duty, and that if she did not sufficiently plead those claims, the trial court abused its discretion in denying her motion to amend her complaint to conform to the evidence.

This Court reviews a trial court's decision on a party's motion to amend a pleading for an abuse of discretion. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.*

"[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993). A complaint must contain "specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]" MCR 2.111(B)(1).

MCR 2.118(C) governs the amendment of a pleading to conform to the evidence and provides:

> (1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.
>
> (2) If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

Plaintiff's complaint did not contain explicit claims for bailment, conversion or breach of fiduciary duty. However, such specificity is not required, as long as the pleading is sufficient to provide defendant with sufficient notice to defend claims of bailment, conversion and breach of fiduciary duty. *Stanke*, 200 Mich App at 317. In an opinion and order dated May 24, 2007, the trial court ruled that plaintiff's complaint did not sufficiently put defendant on notice of bailment and conversion claims:

> In the portion of her Brief arguing the Count V—fraud issues, [plaintiff] argues the law of bailment and conversion. [Plaintiff], however, never alleged a bailee relationship in her Complaint, nor did she plead a cause of action for conversion. Discovery is closed in this matter, and [plaintiff] nowhere asks the Court for leave to amend her Complaint. *See, Gordin v William Beaumont Hospital*, 180 Mich App 488, 494 (1989) (no abuse of discretion in denying motion to amend complaint where case was listed for trial, where discovery had been completed, much of which would probably have to be redone if new claims were added by allowing amendment). This case will go to trial on the causes of action of which Defendants have been properly placed on notice by the Complaint, and no others.

Even if the trial court's conclusion regarding the lack of specificity in plaintiff's complaint was incorrect, plaintiff did not seek leave to amend her complaint to add claims of bailment, conversion and breach of fiduciary duty at any time before trial. If plaintiff had so moved, it would have been difficult for the trial court to deny such a motion because under MCR 2.118(A)(2), leave to amend a pleading "shall be freely given when justice so requires[,]" and motions to amend should be denied only for specific reasons, such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility. *Franchino v Franchino*,

263 Mich App 172, 189-190; 687 NW2d 620 (2004). Even in the face of the trial court's specific statement that her complaint did not sufficiently plead bailment and conversion, however, plaintiff did not move to amend her complaint to assert those claims until the fifth day of trial, on August 25, 2009, after the conclusion of proofs and more than two years after the trial court ruled that plaintiff's complaint did not sufficiently plead bailment and conversion. Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 323-324; 553 NW2d 377 (1996).

Moreover, the trial court did not err in denying plaintiff's motion to amend her complaint to conform to the proofs. Because plaintiff moved to amend her complaint during trial, MCR 2.118(C)(1) applies. Generally, wider latitude is accorded to parties seeking to amend pleadings before trial under MCR 2.118(A)(2) than during trial under MCR 2.118(C)(1). See *Weymers v Khera*, 454 Mich 639, 660 n 26; 563 NW2d 647 (1997). An amendment to conform to the proofs made during trial shall not be granted unless the party seeking to amend establishes that the amendment and the admission of the evidence would not prejudice the objecting party. MCR 2.118(C)(2); *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 136; 523 NW2d 849 (1994).

The trial court did not abuse its discretion in denying plaintiff's motion to amend her complaint under MCR 2.118(C) because claims for bailment, conversion and breach of fiduciary duty were not tried by express or implied consent of the parties. MCR 2.118(C)(1). Plaintiff's claims were not clear at trial, and the trial court attempted to clarify them on more than one occasion. When the trial court specifically asked plaintiff what claims were left at trial, plaintiff's counsel seemed unclear of the precise claims himself, saying he needed to check with co-counsel. Plaintiff's co-counsel subsequently stated that plaintiff's principal claims included fraud and breach of contract. Significantly, when asked to clarify plaintiff's claims, at no point did plaintiff ever state that she was pursuing claims for bailment, conversion or breach of fiduciary duty.

Defense counsel's comments when the trial court was attempting to clarify plaintiff's claims clearly indicate that defendant did not consent, expressly or impliedly, to trying claims for bailment, conversion or breach of fiduciary duty. When plaintiff withdrew her accounting malpractice claim, defense counsel said: "there are three claims left in this case; accounting malpractice, breach of contract and fraud. *That's it*." (Emphasis added.) Regarding the claims that were being tried, defense counsel also stated: "we tried to clean this up, Judge, and the Court has issued an order saying what claims are in and what claims are not in. . . . And there were three claims as of the time we picked a jury, three." Based on defense counsel's comments, defendant clearly did not consent to trying claims for bailment, conversion or breach of fiduciary duty. Because claims for bailment, conversion and breach of fiduciary duty were not tried by the parties' express or implied consent, allowing the amendment would have prejudiced defendant. Thus, the trial court did not abuse its discretion in denying plaintiff's motion to amend her complaint.

Plaintiff also argues that the trial court erred in denying her motion for directed verdict because defendant was strictly liable under the bailment theory. Plaintiff did not include this issue in the statement of questions presented; thus, it is not properly presented for appeal. MCR

7.212(C)(5); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

C. SUMMARY DISPOSITION

Plaintiff argues that "[t]he trial court denied Plaintiff's Motion for Partial Summary Disposition that the farm was discounted without Plaintiff's consent, and that the durable power of attorney gave no authority . . . to transfer [plaintiff's] shares to either Michael Zwerk or the Defendant."

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

Contrary to plaintiff's argument, the trial court appears to have granted plaintiff's motion, at least with respect to plaintiff's durable power of attorney argument:

> The Court will grant the motion that there was no written authority from [plaintiff]—written or verbal directly from [plaintiff] and that the durable power of attorney gave no direct authority to [defendant]. Now, that still leaves some room, and I'm going to have to see how that develops at trial, and I suspect that there could be some objections, but that's the Court's ruling today.

On December 5, 2006, the trial court entered an order granting plaintiff's motion:

> **IT IS HEREBY ORDERED** that Plaintiff's Motion for Partial Summary Disposition is Granted as follows:

a. There was no written or verbal authority directly from Plaintiff Judith Zwerk to Defendant Walter Don Zehnder allowing him to void and/or transfer Plaintiff Judith Zwerk's Stock Certificates.

b. The Durable Power of Attorney executed by Judith Zwerk naming Michael Zwerk as her attorney in fact gave no direct authority to Defendant Walter Don Zehnder to void and/or transfer Plaintiff Judith Zwerk's Stock Certificates.

The trial court granted plaintiff's motion, at least with respect to plaintiff's argument that defendant did not have authority, under the durable power of attorney or otherwise, to void or transfer plaintiff's shares of stock. Although plaintiff did raise the issue of the farm being discounted in her motion for summary disposition, she did not orally argue it on the record at the hearing on the motion, and the trial court's ruling does not address plaintiff's argument about the farm being discounted. An issue not addressed by the trial court is not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Furthermore, plaintiff has failed to preserve the farm issue by failing to brief the merits of her allegation of error regarding the value of the farm. It is not enough for a party to simply assert an error and then leave it up to this Court to discover and rationalize the basis for their claims, elaborate and unravel their arguments for them, and then search for authority to sustain or reject their position. *Yee*, 251 Mich App at 406.

D. RES JUDICATA AND COLLATERAL ESTOPPEL

Plaintiff argues that res judicata or collateral estoppel applies to factual findings made in the divorce action between plaintiff and Michael Zwerk because defendant testified as an expert for Michael in the divorce action and he was therefore a party, or in privity to a party, in the underlying action.

"The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Res judicata precludes "a subsequent action between the same parties when the evidence or essential facts are identical." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair*, 470 Mich at 121. Michigan courts have applied the doctrine broadly as barring not only claims that have already been litigated, "but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.*

Plaintiff's argument that the trial court's factual findings in the divorce action are binding in the present case based on the doctrine of res judicata is without merit because all of the criteria for the doctrine to apply are not satisfied. Contrary to plaintiff's contention, the divorce action and the present action did not involve the same parties or their privies. The fact that defendant testified for Michael Zwerk did not render him a privy. "Privity" requires both a substantial identity of interests and a working or functional relationship in which the interests of the non-party are presented and protected by the party in the litigation. *Phinisee v Rogers*, 229 Mich App

547, 553-554; 582 NW2d 852 (1998). Privity signifies that the relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon the other, although the other was not a party to the lawsuit. *Id.* at 553. In this case, it simply cannot be said that defendant's interests in protecting himself from liability for fraud and breach of contract claims were protected by Michael's defense of the divorce action brought by plaintiff. Thus, defendant was not in privity to Michael in the underlying divorce action. Moreover, the claims in plaintiff's divorce action against Michael were not the same as plaintiff's fraud and breach of contract claims against defendant.

Collateral estoppel is also a preclusion doctrine, but it involves issue preclusion rather than claim preclusion. *People v Gates*, 434 Mich 146, 154 n 7; 452 NW2d 627 (1990). "[C]ollateral estoppel must be applied so as to strike a balance between the need to eliminate repetitious and needless litigation and the interest in affording litigants a full and fair adjudication of the issues involved in their claims." *Storey v Meijer, Inc*, 431 Mich 368, 372; 429 NW2d 169 (1988). "Collateral estoppel . . . precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). Collateral estoppel also requires mutuality of estoppel; estoppel is mutual if the party taking advantage of the earlier adjudication would have been bound by it, had it gone against him. *Monat v State Farm Ins Co*, 469 Mich 679, 684-685; 677 NW2d 843 (2004).

The issues of defendant's liability for fraud and breach of contract were not actually and necessarily determined in the divorce case between plaintiff and Michael. Moreover, for the reasons stated above, defendant was not in privity with Michael. The doctrine of collateral estoppel, like res judicata, is inapplicable.

E. TRIAL COURT'S RULINGS REGARDING DAMAGES

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition of plaintiff's claim for damages against defendant arising out of the sale of the farm and that the trial court abused its discretion in ruling that evidence regarding the value of the partnership, the corporation and real property owned by the business was inadmissible at trial.

Defendant moved for partial summary disposition under MCR 2.116(C)(10), arguing, in part, that plaintiff could not establish any damages arising out of the sale of the partnership because she never had an interest in the partnership. In its May 24, 2007, opinion and order, the trial court granted defendant's motion for summary disposition that plaintiff could not claim any damages against defendant regarding the sale of the partnership, stating:

> The Court will **GRANT** this branch of Defendants' Motion because of the total absence of any case law supporting Plaintiff's position that she has a damages remedy outside the Divorce Court against a third party who she claims, in essence, plotted with her then-spouse to reduce the perceived value of the marital estate. It appears that Plaintiff already sought and obtained her remedy <u>in the divorce case</u>: she was successful in convincing this Court, presiding over the divorce case, to ignore fictitious or artificial values attributed to marital property,

> and to make its property award based upon real values. Thus, Plaintiff simply did not "receive a reduced share of the marital estate", as she claims in her Brief . . . .

Plaintiff argues that the trial court abused its discretion in refusing to permit the admission of evidence regarding the value of the partnership, the value of the corporation and the value of real estate owned by the corporation. In sustaining defendant's objection to the introduction of evidence regarding the value of the partnership, the trial court relied on the May 24, 2007, opinion and order, which concluded that plaintiff already obtained her damages remedy in the divorce case, as well as MRE 403. The trial court also relied on the May 24, 2007, opinion and order in ruling that evidence regarding the value of the corporation and the value of real estate owned by the corporation was inadmissible.

We hold that we need not determine whether the trial court erred in ruling that plaintiff already received her damages remedy in the divorce action against Michael because plaintiff argues that the precluded evidence was relevant to her recovery of exemplary damages and damages for mental distress;[3] however, such damages are not warranted in this case.

Regarding plaintiff's breach of contract claim, the jury found that defendant did not breach a contract with plaintiff. Thus, the jury would not have awarded plaintiff damages for breach of contract even if the trial court had allowed plaintiff's proffered evidence to be admitted at trial. Any error in the trial court's preclusion of the valuation evidence plaintiff sought to admit for its relevance to her recovery of exemplary damages and damages for mental distress for breach of contract is therefore harmless. MCL 769.26; MCR 2.613(A).

The gist of plaintiff's fraud claim is that defendant drew an "x" through and voided the shares of stock owned by plaintiff and Michael as joint tenants without her consent or knowledge and drafted and executed the succession plan with the intent to drastically reduce her share of the marital estate. Even if the values of the partnership, corporation, and land owned by those two legal entities would be relevant to whether defendant intended to defraud plaintiff and reduce her share of the marital estate, exemplary damages and damages for mental distress are not warranted in this case. Thus, any error in the preclusion of the evidence would be harmless. MCL 769.26; MCR 2.613(A).

Damages for mental distress and/or exemplary damages are recoverable in fraud cases if such damages are the natural consequence of the wrongful act and reasonably could have been anticipated. *Phinney*, 222 Mich App at 532. Damages for mental anguish include damages for mental pain and anxiety which naturally flow from the injury, such as shame, mortification and humiliation. *Meiras v DeBona*, 204 Mich App 703, 710; 516 NW2d 154 (1994), rev'd on other grounds 452 Mich 278 (1996). Exemplary damages are recoverable only for intangible injuries or injuries to feelings, which are not quantifiable in monetary terms. *Unibar Maintenance*

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[3] Plaintiff asserts that the values of the corporation and partnership were also relevant to a determination regarding the value of the voided shares of stock, the reduction of the marital estate, the loss of inheritance to the four children, but we only address plaintiff's argument with respect to damages because that is the issue raised in plaintiff's question presented.

Services, Inc v Saigh, 283 Mich App 609, 630; 769 NW2d 911 (2009). Such an award is warranted to compensate a plaintiff for the humiliation, sense of outrage and indignity resulting from injuries maliciously, willfully and wantonly inflicted by the defendant. *Id.* Where a grievance created is purely pecuniary in nature, and is susceptible of a full and definite monetary compensation, exemplary damages are not permitted because the party may be made whole through monetary compensation. *Id.*

The facts of this case do not merit the imposition of damages for mental distress or exemplary damages. As noted above, plaintiff alleges that defendant drew an "x" through and voided the shares of stock owned by plaintiff and Michael as joint tenants without her consent or knowledge and drafted and executed the succession plan with the intent to drastically reduce her share of the marital estate. Such conduct is not so willful, wanton and outrageous that injury to feelings and mental suffering are the natural result of such conduct. Even if defendant did act in such a way to defraud plaintiff and reduce her marital assets, the conduct alleged by plaintiff would not inspire feelings of humiliation, outrage and indignity, and plaintiff could be made whole through monetary compensation. For this reason, plaintiff would not have been entitled to exemplary damages or damages for mental distress. Thus, any error in the preclusion of evidence bearing on such damages was harmless. MCL 769.26; MCR 2.613(A).

Plaintiff argues that the trial court erred in not giving jury instructions on consequential damages and exemplary damages. Plaintiff did not include this issue in the statement of questions presented; we therefore deem this issue abandoned. MCR 7.212(C)(5); *Mettler Walloon, LLC*, 281 Mich App at 221.

F. DEFENDANT'S TESTIMONY

Plaintiff argues that the trial court abused its discretion in admitting defendant's testimony that he thought or believed that plaintiff knew about the sale of the corporation.

At trial, defendant testified that he "thought" that plaintiff was aware of the issue, i.e. that he thought plaintiff was aware of the sale of the corporation and what he was doing with her stock certificates. Testimony that constitutes hearsay is generally inadmissible at trial. MRE 802. Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(b). In this case, defendant's testimony concerned his thought or belief regarding plaintiff's awareness of what was going on with the sale of the corporation and her stock certificates. Defendant's thoughts or beliefs regarding plaintiff's awareness were relevant to whether defendant intended to defraud plaintiff. *M&D*, 231 Mich App at 28; *Lorenzo*, 206 Mich App at 684. A statement offered into evidence to demonstrate a person's state of mind is not hearsay. *People v Breeding*, 284 Mich App 471, 488; 772 NW2d 810 (2009). Because defendant's testimony concerned his state of mind regarding plaintiff's awareness of the sale of the corporation and what was happening to her stock certificates, it was not hearsay, and it was properly admitted.

In allowing the evidence, the trial court relied on *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492; 679 NW2d 106 (2004) and *People v Flaherty*, 165 Mich App 113; 418

NW2d 695 (1987), rev'd in part 487 Mich 568 (2010). In *Shuler*, this Court stated that statements that are offered to show their effect on a witness are not offered for their truth and are admissible. *Shuler*, 260 Mich at 516. In *Flaherty*, 165 Mich App at 122, this Court held that evidence of a statement made out of court is not hearsay where it is offered to show the effect of the statement on the person who heard it. These cases are inapplicable to the facts of this case because the testimony at issue, that defendant thought that plaintiff was aware of the sale of the corporation and what was happening to her stock certificates, was not offered to show the effect on a listener. However, because the trial court properly allowed the evidence, albeit for the wrong reason, we affirm the trial court's admission of the evidence. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) (this Court will not disturb a ruling of the trial court if that court reached the right result for the wrong reason).

Plaintiff also asserts that defendant's testimony should have been excluded because defendant did not have personal knowledge that plaintiff knew about the sale of the business. However, defendant conceded that he did not talk to plaintiff about her awareness and that he relied on Michael and Larry in assuming that plaintiff was aware, and plaintiff effectively cross-examined defendant regarding the reasonableness of his belief in this regard. Defendant's admitted lack of personal knowledge regarding plaintiff's awareness goes to the weight of the evidence, not its admissibility and is a matter for the trier of fact to determine. See *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999).

G. EVIDENCE REGARDING PLAINTIFF'S PRIOR COMPLAINT

Plaintiff argues that the trial court abused its discretion in admitting into evidence a prior complaint filed by plaintiff in Tuscola County concerning the sale of the corporation.

In October 2001, plaintiff brought a shareholder's derivative action against Michael and Larry Zwerk, as well as the individuals who received ownership of the farm through the succession plan: Martin Zwerk, David Rupprecht and Jeffrey Schluckbier. The complaint contained claims of violation of corporate bylaws, commission of willful and oppressive acts, commission of illegal acts, commission of fraudulent acts and failure to report financial condition and pay dividends. Plaintiff sought access to the corporate books and records and a declaratory judgment. The parties ultimately stipulated to dismiss the action.

As stated above, plaintiff made a relevancy objection to the admission of the complaint, and the trial court reserved its ruling on the issue and ultimately ruled that the complaint was relevant and admissible. On appeal, plaintiff argues that admission of the complaint was unfairly prejudicial. An objection to evidence based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *Genna v Jackson*, 286 Mich App 413, 423; 781 NW2d 124 (2009). In a civil case, this Court has no obligation to consider a claim of error that was not properly preserved by an objection before the trial court. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (observing that Michigan follows a raise or waive rule for appellate review in civil cases). However, "[t]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010).

Plaintiff's argument is undeveloped and unclear, but plaintiff relies on this Court's opinion in *Slocum v Ford Motor Co*, 111 Mich App 127; 314 NW2d 546 (1981), and asserts that the allegations and facts pleaded in the previous complaint are not admissible as admissions against plaintiff. In *Slocum*, this Court held that allegations made by a party in a third-party complaint that were inconsistent with the pleader's defense in the principal action could not be used as admissions in the principal action and were inadmissible under MRE 403. *Id.* at 131-134. Although plaintiff discusses this court's holding in *Slocum*, she does not assert how it applies to the present case and she does not assert precisely what allegations or facts in the Tuscola complaint constitute admissions and are prejudicial. It is not enough for a party to simply assert an error and then leave it up to this Court to discover and rationalize the basis for their claims, elaborate and unravel their arguments for them, and then search for authority to sustain or reject their position. *Yee*, 251 Mich App at 406. Moreover, because plaintiff failed to properly preserve her objection to the evidence, this Court has no obligation to consider the issue. *Walters*, 481 Mich at 387-388. In any event, had plaintiff objected to the admission of the complaint on MRE 403 grounds, any potential prejudice could have been avoided by a curative instruction from the trial court. See *Badiee v Brighton Area Schools*, 265 Mich App 343, 374; 695 NW2d 521 (2005).

H. COSTS

Plaintiff argues that the trial court abused its discretion in awarding costs in the amount of $2,920 for costs incurred by defendant from Jeff Bagalis, a CPA who assisted accountant Rodney Crawford in preparing to testify as an expert at trial. According to plaintiff, MCR 2.625 and MCL 600.2164 do not contemplate awarding costs for the time and labor of assistants.

Costs are only recoverable when they are permitted by statutory authority or court rule. *Guerrero v Smith*, 280 Mich App 647, 670-671; 761 NW2d 723 (2008); *Mieras*, 204 Mich App at 709. In this case, the applicable authority includes MCL 600.2164 and MCR 2.625. MCL 600.2164(1) provides, in relevant part: "No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case." MCR 2.625 provides, in relevant part:

> **(A) Right to Costs.**
>
> (1) *In General*. Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

Plaintiff's argument that MCR 2.625 and MCL 600.2164 do not permit recovery of costs for experts' assistants appears to be based on this Court's unpublished opinion in *Wolverine Commerce v Pittsfield Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 2010 (Docket No. 282532) (2010 Mich. App. LEXIS 362), although plaintiff does not specifically cite the case. In *Wolverine Commerce*, this Court stated:

> Nowhere in MCR 2.625 or MCL 600.2164 is there any explicit indication whether the work of an expert's assistant may be taxed as a cost. In direct contrast, MCR 2.626 explicitly permits an award of *attorney* fees to include the "time and labor" of certain legal assistants. Again, no similar provision exists in MCR 2.625 or MCL 600.2164. This suggests that the time and labor of assistants is *not* compensable under MCR 2.625 or MCL 600.2164. However, an expert is entitled to compensation for his or her preparations for testifying. *Mackie v Rowe*, 372 Mich 341, 342-343; 126 NW2d 702 (1964). If an expert witness's preparations for testimony requires the work of assistants, those assistants' labors necessarily constitute taxable "preparation." Nevertheless, only the preparation of *opinion* testimony is taxable. MCL 600.2164(3). Therefore, we agree with the principle impliedly laid out in *Verma v Giancarlo*, unpublished opinion per curiam of the Court of Appeals, Docket No. 208534 (2000), where a panel of this Court suggested that costs could be taxed for expert's assistants hours spent preparing to express an opinion, but not hours spent assembling data. [*Wolverine Commerce*, slip op pp 5-6.]

At the hearing on defendant's motion for costs, defense counsel stated that Bagalis assisted Crawford in preparing to testify at trial. As this Court stated in *Wolverine Commerce*, "[i]f an expert witness's preparations for testimony requires the work of assistants, those assistants' labors necessarily constitute taxable "preparation" if such assistance is spent preparing the witness to express an opinion." *Wolverine Commerce*, slip op p 6. Because Bagalis assisted Crawford in preparing for his anticipated expert opinion testimony at trial, Bagalis's labors constitute taxable "preparation." Therefore, the trial court did not abuse its discretion in including costs for Bagalis's assistance to Crawford in its order awarding costs to defendant.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Jane M. Beckering