S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

MICHAEL C. WARD, SR., Plaintiff/Counter-Defendant/Appellee/Cross-Appellant, and ROBERT TINUCCI and RRS INC., Plaintiffs/Appellees/Cross-Appellants, v SCOTT IDSINGA, Defendant/Counter-Plaintiff/Cross-Plaintiff/Third-Party-Plaintiff, and RENOVO SERVICES, LLC., and EMERALD VENTURES, INC., Defendants/Cross-Defendants/Appellants/Cross-Appellees, and KEVIN F. FLYNN, Defendant/Third-Party Defendant/Appellant/Cross-Appellee, and TIMOTHY BROCKDORF, DANIEL DUNN, RENAISSANCE RECOVERY SOLUTIONS, and GARY KOSTER, Defendants.	UNPUBLISHED August 15, 2013 No. 302731 Kent Circuit Court LC No. 07-003872-CK

Before: BORELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Renovo Services, L.L.C. ("Renovo"), Emerald Ventures, Inc. ("EVI"), and Kevin F. Flynn ("Flynn") appeal by leave granted the jury trial verdict in favor of Michael C. Ward, Sr. ("Ward"), Robert Tinucci ("Tinucci"), and RRS, Inc. ("RRS") for tortious interference with a business expectancy, tortious interference of RRS's bylaws by Flynn, aiding and abetting a breach of a fiduciary duty by Flynn, and conspiracy. Ward, Tinucci, and RRS (collectively, "plaintiffs") cross-appeal, by leave granted, the trial court's grant of summary disposition in Renovo, EVI and Flynn's (collectively, "defendants") favor on certain claims set forth in plaintiffs' complaint and from other evidentiary and damages issues. We reverse the trial court's denial of defendants' motion for directed verdict with respect to plaintiffs' tortious interference with a business expectancy claim and affirm in all other respects. We thus remand for entry of a judgment consistent with the above.

FACTS

RRS is a repossession order forwarding company which assisted banks, credit unions and other entities with requests for the repossession of vehicles, transportation of said vehicles, skip tracing, liquidation of collateral and the like both in Michigan and throughout the United States. Defendant Scott Idsinga founded RRS in 2002, was its president and CEO, and chaired its Board of Directors. Tinucci first invested in RRS in 2002. He ultimately invested $350,000 in the company over the course of two years, owning 3.07% of the shares of RRS.

Idsinga met Ward in late 2003 and represented that RRS was a profitable company but needed more capital to expand. Idsinga established a close personal friendship with Ward and Ward eventually invested over $2 million in RRS, owning a 26.72% interest in the company. Ward additionally provided personal loans to Idsinga, totaling $530,000. The personal loans were evidenced by a promissory note and were secured by Idsinga's interest in stock in RRS and all his other tangible personal and real property. Idsinga promised to repay the loans by their March 31, 2007, due date and assured Ward that he would achieve a high rate of return on his investment in RRS. Idsinga, however, defaulted on the loans and drained RRS's business accounts for his personal use.

In September 2004, RRS began having cash flow and financial problems. RRS met with EVI, a private investment holding company owned and controlled by Flynn, which suggested reorganization. RRS's Board of Directors approved reorganization and, on September 20, 2005, RRS entered into a reorganization agreement with EVI (which served as the lender for additional capital to RRS) and a new entity founded by Flynn known as Renovo. Renovo is a wholly owned subsidiary and affiliate of EVI engaged in the business of direct repossession of vehicles. Under the agreement, RRS's assets and business were transferred to a new entity, Renaissance Recovery Solutions ("Renaissance"). Though RRS held approximately 83.7% of the issued and outstanding memberships units of Renaissance (EVI and Renovo held the remaining interest in Renaissance) the shareholders of RRS had limited control over the operations and management

of Renaissance due to the delegation of authority to EVI. RRS was prohibited from removing EVI as manager under the agreement.

Flynn, through Renovo, offered to purchase all of RRS's interest in Renaissance on two occasions. In June 2006, Flynn valued Renaissance at $3.2 million and offered to exchange RRS's 83.7% interest in Renaissance for a 10% interest in Renovo, which Flynn valued at $32 million. RRS's shareholders ultimately voted the transaction down primarily because they felt that Renaissance was being undervalued while Renovo was being overvalued. In March 2007, Flynn offered $892,000 for the net equity value of RRS's interest in Renaissance. Three members of the Board of Directors, Idsinga who owned a 49.5%[1] interest in RRS, Koster who owned approximately 3%, and Dunn who owned approximately 8.2%, approved the Renovo offer and provided for approval through written shareholder consents rather than a shareholder meeting. Idsinga, Koster, and Dunn also signed consents in their capacities as shareholders to approve the sale and a check was issued to RRS the same day. Following the March 2007 transaction, Renaissance was a wholly owned subsidiary of Renovo and the two companies were, for all intents and purposes, consolidated.

At the time of the March 2007 transaction, both Ward and Tinucci were away on vacation. They returned to discover that RRS's Board of Directors had approved the sale of all of RRS's membership shares to Renovo. On the same date they each received small checks representing the first of Renovo's two installments of their portions of the purchase price. Neither Ward nor Tinucci signed the shareholder consent, did not sign the checks, and received no notice or explanation from RRS or Idsinga. At trial, Idsinga testified that Flynn, who was a wealthy and powerful businessman, used strong-arm tactics to get the purchase to go through, including telling Idsinga he would have to take the offer or he would never get anything for RRS because Flynn already controlled it, and ensuring that the people on the Board of Directors would vote the way that Flynn desired and had enough shares to push the transaction through whether or not it was in the best interests of RRS.

Ward and Tinucci, individually, and on behalf of RRS filed various claims against the directors of RRS, Flynn, EVI and Renovo. Cross and counter-claims followed. The primary claims asserted by plaintiffs involved breaches of fiduciary duties, breaches of contract, tortious interference, and civil conspiracy with the intent to force the sale of RRS's membership interest to Renovo at an artificially deflated price. Plaintiffs requested a declaratory judgment voiding the sale of RRS to Renovo and the management contract, an order for injunctive relief enjoining Idsinga from encumbering or divesting himself of any assets pending the outcome of the case, and seeking monetary relief. Relevant to the instant matter, Ward obtained a judgment against Idsinga for the $530,000 in loans, plus interest, and was also found to have a perfected security interest in all of Idsinga's tangible personal assets, including but not limited to all of his RRS stock. Also relevant to the instant matter, in an October 14, 2009, order, the trial court granted plaintiffs' motion for summary disposition wherein they requested a declaration that the March

[1] Idsinga acquired 2.5% of this interest by purchasing another shareholder's shares simultaneous with the March 2007 transaction.

2007 sale of RRS's 83.7% membership interest in Renaissance to Renovo was void under the bylaws of RRS.

The vast majority of the claims, cross-claims, and counter-claims were disposed of prior to trial. Jury trial proceeded only with respect to five of plaintiff's claims against defendants. The jury ultimately found that defendants were liable on counts VIII (tortious interference with a business expectancy by all defendants), XI (tortious interference with RRS's bylaws by Flynn), XIII (aiding and abetting a breach of fiduciary duties by Flynn in connection with the March 2007 transaction) and XXI (civil conspiracy by all defendants) of plaintiffs' complaint. The jury found the value of RRS's interest in Renaissance (i.e., interest lost) as $11,120,000 but found that the value should be offset by payments made and debt forgiven in the amount of $4,656,540. The total damages awarded was $7,978,530. On December 17, 2010, a judgment (including interest) was entered in favor of plaintiff RRS against defendant Renovo in the amount of $8,540,090.98, in favor of RRS and against EVI in the amount of $1,026,978.55, and in favor of RRS and against Flynn in the amount of $1,694,475.80. The judgment provided that the maximum amount that RRS was entitled to recover against all defendants collectively was $9,246,447.86.

A. DEFENDANTS' ISSUES ON APPEAL

I. DECLARATION OF THE MARCH 2007 TRANSACTION VOID

On appeal, defendants first contend that the trial court erred in granting plaintiffs' motion for summary disposition with respect to a declaration that the March 2007 transaction was void due to a violation of RRS's bylaws. We disagree.

We review de novo a trial court's decision regarding a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Ernsting v Ave Maria College*, 274 Mich App 506, 509–510; 736 NW2d 574 (2007). All reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). A moving party is entitled to summary disposition under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). We also review a trial court's interpretation of statutory language and corporate bylaws de novo. *Slatterly v Malidol*, 257 Mich App 242, 250–251; 668 NW2d 154 (2003).

Bylaws are a contract between a corporation and its shareholders. *Cole v Southern Michigan Fruit Assn*, 260 Mich 617, 621–622; 245 NW 534 (1932). Bylaws are generally construed in accordance with the same rules used for statutory construction. *Slatterly*, 257 Mich App at 255-256. Thus, we must first look at the specific language of the bylaw. *Id*. If the language is unambiguous, the drafters are presumed to have intended the meaning plainly expressed. However, if the language is ambiguous, it should be interpreted using the "fair and natural import" of the terms in light of the subject matter. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). Also, we must presume that every word has a meaning and should avoid any

construction that would render any part of a bylaw nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992).

RRS's bylaws provide, in Article II, Section 4, that notices of shareholder meetings must be given not less than 10 days before the meeting. Section 4 further provides that the notice will state the general nature of any proposed action to be taken at the meeting "to approve any of the following matters: (i) A transaction in which a director has a financial interest . . . ." Article II, Section 10 of the bylaws provides as follows:

> SHAREHOLDER ACTION BY WRITTEN CONSENT WITHOUT A MEETING. Any action that could be taken at an annual or special meeting of shareholders may be taken without a meeting and without prior notice, if a consent in writing, setting forth the action so taken, is signed by the holders of outstanding shares having not less than the minimum number of votes that would be necessary to authorize or take that action at a meeting at which all shares entitled to vote on that action were present and voted.
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> Unless the consents of all shareholders entitled to vote have been solicited in writing, prompt notice will be given of any corporate action approved by shareholders without a meeting by less than unanimous consent, to those shareholders entitled to vote who have not consented in writing. As to approvals (i) in which a director has a financial interest, (ii) indemnification of corporate agents, and (iii) a corporate reorganization, notice of the approval will be given at least 10 days before the consummation of any action authorized by the approval. Notice will be given in the manner specified herein.

There is no dispute that there was no shareholder meeting held to approve the March 2007 sale of RRS's interest in Renaissance to Renovo. Assuming the initial action in approving the sale could be taken without the necessity of a meeting (on written consent) as provided for in Article II, section 4 of the bylaws, the necessary number of shares voted in favor of the sale. However, where the approval involves a matter in which a director has a financial interest, notice of the approval must be given to those shareholders who did not consent in writing to take the action without the benefit of a meeting. And, such notice must be given at least 10 days prior to consummation of any action authorized by the approval. There is no dispute that no such notice was provided in this matter. Defendants claim, however, that no notice was required because no director had a financial interest in the transaction. We disagree.

The term "financial interest" is not defined in RRS's bylaws. It is also not specifically defined in the applicable Nevada laws, which both parties agree control the interpretation of RRS's bylaws as it is a Nevada corporation. This Court may apply foreign state law to resolve disputes. See, e.g., *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994).

A director who has or is entitled to receive specific financial benefit from the subject transaction, is an interested director. *Shoen v SAC Holding Corp*, 122 Nev 621, 637-38; 137 P3d 1171, 1181-82 (2006). The Delaware courts, long on experience in corporate law, hold that a

director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders. *Rales v Blasband*, 634 A2d 927, 936 (Del 1993). Statues based on the 1988 Model Business Corporation Act define "material financial interest" as "a financial interest in a transaction that would reasonably be expected to impact the objectivity of the director's judgment when participating in action on the authorization of the transaction." Thus, the MBCA standard for assessing materiality in this context is objective, not subjective, inquiring as to the objectivity of the reasonable director under such circumstances. Law of Corp. Offs. & Dirs.: Rts., Duties & Liabs. § 3:20 (2012).

In this matter, the bylaws required 10 days notice before consummation if a director had a financial interest in the transaction (not a *material* financial interest). All of the directors, Idsinga, Dunn, and Koster, testified that they would receive money for the sale of their shares of RRS stock. So, too, would Ward and Tinucci, and all of the other shareholders. At its most basic definition, then, it could be argued that the directors all had a financial interest in the transaction. That could be said of any transaction involving the sale of the corporation's entire stock, however, and does not appear to be within the spirit and meaning of the requirements for notice when a director has a "financial interest." It would be more logical to require such notice only where the financial interest is, as held by the Delaware courts, different than that of the other shareholders. While plaintiffs point out that none of the directors paid for their shares in this case whereas Ward and Tinucci did, this does not mean that the directors would receive a specific financial benefit different from that of or above and above that of the remaining shareholders. The benefit of receiving monetary payment for shares owned remains the same.

It is also true, as pointed out by plaintiffs, that Ward and Tinucci did not actually receive the money for their shares whereas the other shareholders did. But that was because one of RRS's directors, Idsinga, took it upon himself to empty RRS's account before they could cash their checks—not because of any internal operating procedure error or violation of bylaw.

Plaintiffs also assert that one of the directors, Koster, had a financial interest that went beyond simply receiving money for his RRS shares because he had been issued restricted shares in Renovo just a few months prior to the March 2007 transaction. That is a benefit that Koster already had when the March 2007 transaction occurred; he would thus not receive the shares as a personal benefit *from* the transaction. However, because Renovo and Renaissance were to have grown and become more valuable when combined (which they did as a result of the March 2007 transaction) Koster did receive a benefit via his Renovo shares that was different than and above that of the other shareholders from the transaction. While the other shareholders received only the value of their RRS shares in Renaissance and would no longer have ownership in and thus receive no further benefits from Renaissance or Renovo, Koster had a restricted ownership in Renovo whose value had the potential to increase if RRS's interest in Renaissance was sold to Renovo. A director thus having had a financial interest in the transaction, 10 days' notice to the shareholders of the approval was required under RRS's bylaws.

In Nevada, it has been noted, though not necessarily authoritatively held, that a corporation's failure to abide by its bylaw notice requirements invalidates any actions taken after the failure of such notice. See, *Mount Zion Baptist Church v Second Baptist Church of Reno*, 83 Nev 367, 370; 432 P2d 328, 329 (1967). Other jurisdictions have authoritatively held the same. See, e.g., *Stile v Antico*, 272 AD2d 403, 404; 707 NYS2d 227, 229 (2000)(where notice of

shareholder meeting failed to comply with the requirements of bylaw article, the election of new directors at that meeting was invalid); *Nevins v Bryan*, 885 A2d 233, 245 (Del Ch 2005)(Where special meeting to elect directors which required 10 days' notice and description of purpose was held after only two days' notice and notice provided no descriptive purpose, notice was invalid and invalid notice destroyed the validity of director or member meetings and the validity of all corporate actions taken therein). The utter failure of required notice in this instance destroyed the validity of the corporate actions taken after the faulty notice.

It is recognized that there is a difference between actions taken after a faulty notice for a shareholder meeting and the faulty notice of the approval of the March 2007 transaction that was required in this matter. After all, RRS's bylaws only required that the non-voting shareholders be provided *notice* that approval of the transaction took place at least 10 days prior to any action taken to commensurate the approval, not that a shareholder meeting be held. In most circumstances, it could be argued, notice to shareholders that approval of a transaction occurred would have little effect on the transaction itself and would thus be of no moment, particularly if they were non-majority shareholders. However, the notice of approval was particularly significant in this matter due to the fact that Idsinga's majority shares served as collateral for his outstanding loans owed to Ward. The transaction was signed on March 22, 2007, and Idsinga's loans, which he undisputedly could not pay, were due on March 31, 2007. If and when Idsinga defaulted, his shares could become Ward's which would then make Ward the majority shareholder in RRS. He would, in fact, own an approximate 76.2% interest in RRS. The only reason a shareholder vote was not held after director approval in this matter was because the directors held a majority of the shares necessary to vote the transaction through. Primarily, these shares came through Idsinga. It is unclear, but perhaps possible, that Ward may have had the opportunity to take some action with respect to the March 2007 transaction if he had been given the requisite 10 day notice. He may have taken over Idsinga's shares and then become the majority shareholder with enough shares to vote the transaction down.

Defendants argue that neither a shareholder nor RRS can void the transaction because of an alleged bylaw violation when a third party, Renovo, is involved. The fact that a third party was involved in the transaction is, generally, of some consequence. However, it cannot be said that Renovo was an innocent third party in this case. Renovo not only knew about the bylaws but had a copy of them, which they produced during discovery. The jury, in fact, later found in favor of plaintiffs on their claim that Flynn tortiously interfered with RRS's bylaws, thereby finding that Flynn, Renovo's CEO, knew of and purposefully interfered with the bylaws.

Defendants further argue that RRS cannot void a transaction based upon irregularities in its own internal procedures. Defendants direct us to several cases which they argue are directly on point and hold that a corporation cannot do so. Defendants first cite to *McDermott v Bear Film Co*, 219 Cal App 2d 607; 33 Cal Rptr 486 (1963), wherein the 25% owners of a corporation sued the two other 75% owners of the corporation after they sold the corporation's assets to another company without notifying plaintiffs of a shareholders' meeting to authorize the sale, although required to do so by statute. The plaintiffs neither knew of the sale nor consented to it and alleged that the sale was illegal, *ultra vires,* and void. The Court of Appeals affirmed the dismissal of the plaintiffs' complaint, opining that it would follow authorities which held that:

> failure to follow statutory formalities for obtaining shareholders' approval will not vitiate corporate transactions where in fact the requisite number of shareholders have consented; that such statutes are mandatory in requiring shareholders' consent, but only directory in specifying the procedure for obtaining consent; that a stranger dealing with the corporation in good faith is not put to the necessity of confirming the directors' compliance with internal notification procedures. *Id*. at 612.

The *McDermott* court also noted that, "[n]either the original complaint nor its amendment alleged fraud, inadequacy of consideration or collusion between the majority shareholders and [], the transferee of the assets. In their brief on appeal, plaintiffs make no claim of such special circumstances or of need for opportunity to allege them . . . ." *Id*. at 612-613.

Here, in contrast, plaintiffs alleged that the directors and majority shareholders of RRS failed to comply with bylaws in approving the sale, not failed to follow statutory formalities. And, whereas *McDermott* involved a stranger dealing with the corporation in good faith where the plaintiffs did not allege fraud, inadequacy of consideration, or collusion between the majority shareholders and the transferee of assets, none of those factors are present in the instant matter. Flynn and Renovo were not strangers to RRS and were well aware of and had copies of RRS's bylaws, and it was alleged that they did not deal with RRS in good faith, that the consideration for the sale was inadequate, and that there was collusion between the majority shareholders (primarily Idsinga) and the transferee of assets (Renovo, through Flynn). *McDermott* is thus neither directly on point nor particularly helpful to defendants.

Defendants also direct us to *Phillips Petroleum Co v Rock Creek Min Co*, 449 F2d 664, 666 (CA 9 1971). In that case, a corporation had three directors, two of whom, combined, held 69% of the company. Two of the three directors signed an agreement with a company allowing them to lease certain mining claims from the corporation with the option to buy them outright. The third director was unaware of and did not sign the agreement. Thereafter, the corporation began discussions about a merger with another corporation. The owner of the second corporation was aware of the lease option agreement but was confident that the agreement was invalid. He thus bought the corporate shares held by the two directors who signed the agreement, then sent a letter to the mining company telling it that he would not be honoring the purchase option. The mining company initiated suit against the corporation. The court was called upon to determine whether the agreement agreed to by the two former officers and directors of the corporation who were also holders of more than ⅔ of its shares was binding against the corporation inasmuch as no formal meeting of its shareholders was called, and its minority shareholders were not told of the proposal or given an opportunity to voice their opinion or to vote on the matter. *Id*. at 667. The court found that the agreement was binding, noting that because state statutes requiring shareholder ratification for the transfer of assets are designed for the protection of the shareholders, if the shareholders waive formalities or acquiesce to a transfer made without ratification, they cannot later challenge the transfer. *Id*. at 667. Thus, the two directors could not complain about the agreement and neither could their assigns who took with knowledge, i.e., the purchaser of their shares who wrote that he would not honor the option to buy. The trial court also noted, referencing other state statutes, that if the requisite number of shareholders acquiesce in a transfer of corporate assets, the transfer is binding upon the corporation and cannot be set aside by non-consenting minority shareholders. And, since the

applicable Idaho statute was "for the protection of shareholders and not corporations, a corporation has no right under these statutes to challenge corporate transfers authorized by the requisite number of shareholders." *Id*. at 667-668.

Again, the trial court in this case found the sale invalid not because it violated any statute, but because the requisite bylaws were not followed.[2] There is no mention in *Phillips* of bylaw violations—only statutory provisions. Exceptional circumstances were also present in this case that may have substantially affected the ultimate ability of the transaction to go through in the first place. As previously indicated, the directors and majority shareholders, of which Idsinga was the primary, signed the approval on March 22, 2007. Scott's $530,000 in loans from Ward, which were secured by all of his RRS shares, was due on March 31, 2007, and he undisputedly could not repay the loan at that time or thereafter. If the minority shareholders were given the requisite 10 day notice under the bylaws before any action was taken to commensurate the sale, by that time Ward may have had ownership of and control over Idsinga's shares and would have been the majority shareholder in time to change or otherwise affect the sale.

The trial court did not err in holding the March 2007 transaction void.

II. DEFENDANTS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) OR MOTION FOR NEW TRIAL

Defendants next claim that the trial court erred in denying defendants' motions for directed verdict and JNOV or for a new trial on the four tort claims plaintiffs alleged arising out of the sale of RRS's interest in Renaissance. We agree that defendants were entitled to a directed verdict on plaintiffs' claim of tortious interference with a business relationship or expectancy, but the trial court was correct in denying defendants' motions with respect to plaintiffs' remaining three tort claims.

The grant or denial of a motion for a directed verdict is reviewed de novo. *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011). "When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Id.* (quotation marks and citation omitted). "A directed verdict is appropriate where reasonable minds could not differ on a factual question." *Id.* When reviewing a motion for directed verdict, this Court views the evidence up to the time that the motion is made. *Thomas v McGinnis*, 239 Mich App 636, 643–644; 609 NW2d 222 (2000).

We review de novo the trial court's decision on motion for judgment notwithstanding the verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). The trial court should grant a motion for judgment notwithstanding the verdict only if the evidence viewed in the light most favorable to the nonmoving party does not establish a claim as a matter of law. *Id.* When the evidence presented could lead reasonable jurors to

[2] Plaintiffs did claim that the sale also violated Nevada statute, but the trial court did not rule on that issue, finding it unnecessary due to its finding that the transaction violated RRS's bylaws.

disagree, the trial court may not substitute its judgment for that of the jury." *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

The trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). An abuse of discretion occurs when the ruling results in an outcome falling outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Defendants first assert that the jury's view of whether defendants had engaged in tortious conduct was prejudiced by plaintiffs' counsel repeatedly reminding the jury that the March 2007 transaction had been declared void and referring to the trial court's voiding the transaction as "stealing" the individual plaintiff's investments, and by the trial court's reference to Renovo's "conversion" of RRS's interest. However, the fact that the sale had been declared void by the trial court must necessarily have been brought to the jury's attention to explain why the remaining issues were before them and to explain why they had to calculate damages for the "conversion" of RRS's interest in Renaissance. A void contract "is of no legal effect" according to Black's Law Dictionary, 7th Ed., p 326. That being the case, one would generally presume that defendants would simply return RRS's shares in Renaissance, RRS would return the monies they were paid for said shares and the matter of the shares would be resolved. However, the testimony at trial established that after the March 2007 transaction, Renaissance and Renovo were inextricably consolidated such that the shares, as they existed at the time of the March 2007 transaction, were no longer and the shares could not be returned to plaintiffs. In order to fully understand their duties, the jury must have a full picture of the facts and circumstances of the case. Any reference to the court's finding that the transaction was void or that the shares were converted thus did not taint the jury's view of defendants. And, the singular event using the word "stealing" when it came to the shares was unlikely to taint the jury's view of defendants given the remainder of the evidence in this matter.

Defendants also assert that the tort claims were duplicative and confusing. The four tort claims were: aiding and abetting by Flynn; tortious interference with RRS's bylaws by Flynn; tortious interference with a business expectancy by all defendants; and, civil conspiracy by all defendants. In their aiding and abetting claim, plaintiffs asserted that Idsinga was supposed to manage RRS to the mutual advantage of all shareholders, but that he did not and that Flynn helped orchestrate the March 2007 deal to happen quickly so that Idsinga could liquidate as many of his assets as possible before his debt to Ward was due. Plaintiffs alleged that Flynn put the entire March 2007 transaction together and that Idsinga could not have accomplished it without him.

In their tortious interference with RRS's bylaws claim against Flynn, plaintiffs claimed that Flynn intentionally and improperly interfered with the bylaws and personally ensured that the shareholders would be deprived of the protections of their own bylaws. Plaintiffs asserted that Flynn worked to erode the value of RRS and transition its core business competency and value to Renovo and accomplished it by interfering with RRS's bylaws. This claim is not duplicative of the aiding and abetting claim because Flynn could have aided and abetted Idsinga in orchestrating the March 2007 sale at a disadvantage to RRS without also eroding the value of RRS and interfering with RRS's bylaws. He could have simply provided money to Idsinga, for example, and not hurried the sale through.

Plaintiffs claimed in their tortious interference with business expectancy claim against all defendants that they had a reasonable expectation that RRS's relationship with its clients, customers and affiliates would continue to grow and prosper. They claimed that defendants lured RRS into a scheme where they diverted the value of the business wrongfully for defendants' purposes. The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 90; 706 NW2d 843, 849 (2005). This claim is not duplicative of either of the prior two claims because it involves the actions of all defendants and not simply Flynn and, because this claim involves the future relationship that RRS expected with others and claimed was damaged by defendants. It does not require interference with bylaws.

In their conspiracy claim against all defendants, plaintiffs alleged that defendants all conspired to have Renovo obtain the benefits of RRS's primary (only) asset at a price far lower than should have been paid in an arms-length transaction. Plaintiffs asserted that defendants forced the sale at a deflated price and in a manner without sufficient time to let the shareholders object. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003). This claim, too, is different from the other claims because it requires, again, more than action on just Flynn's part, and a concerted effort to accomplish a specific purpose by unlawful means, or an unlawful purpose. This claim is different than plaintiffs' claim that defendants tortiously interfered with their expectancy in RRS's business in the future.

In sum, the claims were not duplicative and the fact that the jury separately awarded damages on the claims serves as evidence that they were not confused.

Defendants next claim that plaintiffs claim of tortious interference with RRS's business expectancy claim fails as matter of law. As previously indicated, tortious interference with a business relationship or expectancy consists of four elements (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. *Health Call of Detroit*, 268 Mich App at 90. One is liable for commission of this tort when one interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another. *Bonelli v Volkswagen of Am, Inc*, 166 Mich App 483, 496; 421 NW2d 213, 219-20 (1988).

As indicated in M CIV JI 126.01, a claim of tortious interference with a business relationship or expectancy contemplates that a defendant intentionally and improperly interfered

with plaintiff's business relationship or expectancy with a *third party*. Indeed the very first element in this instruction states that plaintiff must prove that "a. Plaintiff had a business relationship or expectancy with [name of third party] at the time of the claimed interference." The trial court instructed the jury in this matter consistent with M CIV JI 126.01 stating that in order to establish that defendants' intentionally and improperly interfered with plaintiffs' business expectancy plaintiffs had the burden of proving, "[d]efendants' conduct caused the third party to disrupt or terminate the business expectancy . . . ."

The basis for plaintiffs' tortious interference with a business relationship or expectancy was that RRS had a valid business relationship or expectancy in Renaissance, which defendants knew of, and defendants intentionally and wrongfully interfered with and induced or caused a breach or termination of the relationship or expectancy and caused RRS damages. The fatal flaw in this claim is with the very first element. Plaintiffs claim that the valid business relationship that defendants tortiously interfered with was theirs with Renaissance. But plaintiffs did not have a business relationship or expectation with Renaissance. Instead they owned an interest in Renaissance which consisted of their shares of RRS stock--a tangible personal property asset which was then sold (at an unfair price) to Renovo. They had an investment in Renaissance only, which could be and was an asset sold. There was no relationship or business expectancy that defendants induced Renaissance, a third party, to sever with RRS. Defendants purchased RRS's interest in Renaissance. When one sells an asset, they do so with the understanding that they are giving up any future "business expectancy" the asset may have. There was no evidence or argument that defendants intentionally and improperly interfered with plaintiffs' business expectancy with anyone. Thus, this claim fails as a matter of law and defendants were entitled to a directed verdict on plaintiffs' tortious interference with a business expectancy claim. Remand is therefore necessary for entry of a judgment consistent with this finding.

III. DEFENDANTS' MOTION FOR NEW TRIAL OR REMITTITUR

Defendants next contend that the trial court erred in denying their motion for a new trial or remittitur with respect to the valuation of Renaissance because the valuation date was incorrect, the jury was not properly instructed on the issue of the valuation date, and the trial court abused its discretion in allowing certain valuation evidence to be presented at trial. We disagree.

The trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *Barnett*, 478 Mich at 158. An abuse of discretion occurs when the ruling results in an outcome falling outside the range of principled outcomes. *Maldonado*, 476 Mich at 388.

In determining whether remittitur is appropriate, a trial court must view the evidence in the light most favorable to the nonmoving party and decide whether the evidence supported the jury award. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008); *Diamond v Witherspoon*, 265 Mich App 673, 692-693; 696 NW2d 770 (2005). In reviewing motions for remittitur, courts must be careful not to usurp the jury's authority to decide what amount is necessary to compensate the plaintiff. *Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009). Analysis of this issue thus must necessarily start with the principle that the adequacy of the amount of the damages is generally a matter for the jury to decide. *Kelly v Builders Square, Inc*, 465 Mich 29, 35; 632 NW2d 912 (2001). When reviewing the trial court's

decision, we must also afford due deference to the trial court's ability to evaluate the jury's reaction to the evidence, and only disturb the trial court's decision if there has been an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 532; 443 NW2d 354 (1989).

The decision whether to admit evidence is within a trial court's discretion. This Court reverses only where there has been an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendants contend that the general rule for measuring damages for conversion is to do so based on the value of the property at the time it was converted. Here, that would be March 2007—not the December 2008 valuation date the jury elected to use. The general rule is that the measure of damages for conversion at the time it was converted. *Vos v Child, Hulswit & Co*, 171 Mich 595, 597-98; 137 NW 209 (1912). This general rule, however, has been found inadequate for the losses occasioned by the conversion of stocks and other properties of like character, the values of which are subject to frequent and wide fluctuations. *Id*.

> The general rule gives to the agent, broker, or person in possession of such property that is really valuable frequent opportunity to convert it to his own use, at a time when its market price is far below its actual value, and thus offers a prize for the breach of duty, while it often leaves the injured party remediless. To prevent this injustice, and to throw the chance of this loss upon him who inflicts, rather than upon him who suffers the wrong, an exception has been ingrafted upon this general rule. It is founded upon the proposition that he who deprives another of the possession and control of such property ought to assume the risk of the fluctuations in its market value, until its owner, by purchase or sale, can restore himself to the condition in which he would have been if his property had not been wrongfully taken. It rests upon the proposition that the risk of the market during this time should be assumed by the perpetrator, not by the victim, of the wrong. The exception is that the measure of damages for the failure to sell or to deliver stocks and like speculative property, or for the conversion thereof, is the highest market value which the property attains between the time when the contract required its sale or delivery, or the time of its conversion, and the expiration of a reasonable time, to enable the owner to put himself in status quo, after notice to him of the failure to comply with the contract or of the conversion. *Id*.

In Michigan, then, "the measure of damages in stock conversion cases is the highest market value the stock attains between the date the owner receives notice of the conversion and the expiration of a reasonable period in which to repurchase the stock himself." *Stoddard v Manufacturers Nat Bank of Grand Rapids*, 234 Mich App 140, 146; 593 NW2d 630 (1999). "This reasonable period does not begin to run until the plaintiff knows or has reason to know of the conversion; and it terminates when it becomes clear that the plaintiff, *acting with reasonable promptness and with due allowance made for the necessity of inquiry obtaining legal advice and taking action as well as other relevant factors, would have been able to replace the commodity.* The duration of the period is normally a question for the jury, subject to the control of the court as in the case of other questions of fact." *Id*. at 147-148 (emphasis in original). Although a closely held corporation's stock is not publicly traded, and no established market value exists to assist the courts in valuing a closely held corporation's stock, the courts generally recognize that

a closely held corporation's stock has an ascertainable value and may also be subject to great fluctuations in value. *Butterfield v Metal Flow Corp*, 185 Mich App 630, 641; 462 NW2d 815 (1990).

Here, Ward and Tinucci realized that their stock had been sold or converted without their knowledge or permission within weeks, if not days, of its occurrence. They almost immediately filed suit to which defendants responded that no wrongdoing had occurred. Both sides testified that there was no option or way for plaintiffs to re-purchase the stock, as it was not available on the public market. Testimony was offered to show the varying values of Renaissance over the years and the trial court instructed the jury that they were to calculate RRS's interest in Renaissance by determining the highest market value that the interests received between March 23, 2007 and the expiration of a reasonable period in which to repurchase the interests. It further instructed the jury that it was their duty to determine the reasonable period and may consider factors such as the time to consult with counsel, watch the market, raise funds, employ other brokers, and any special circumstance that would necessitate an extension of time for RRS to repurchase the interest. These instructions were not inconsistent with *Stoddard* and defendants have directed us to no authority suggesting otherwise.

The jury ultimately concluded that the proper valuation date (the reasonable repurchase period expiration date) was in December 2008 and that the value of RRS's stock at that time was $11.2 million. There is and was no limitation on what the jury could determine was a reasonable repurchase period and we find no basis to quarrel with this assigned date.

Defendants also contend that the trial court abused its discretion in allowing plaintiffs to introduce the deposition testimony of defendants' expert, John Bednarski, in their case-in-chief when defendants themselves chose not to call him at trial. According to defendants, this was especially inappropriate where plaintiffs used Bednarski's testimony not because they agreed with it, but to introduce the fact that he had not offered any opinions on a number of issues, and to bolster plaintiffs' own expert's credibility.

Defendants have provided no authority to support their contention that the trial court's admission of Bednarski's deposition testimony during plaintiff's case in chief was in error. Defendants listed Bednarski as their expert witness as to valuation of RRS's interest—a key issue at trial. They provided him for deposition, and did not advise that they would not be calling him as a witness until well into trial. They also provided his calculations in their trial exhibit list. MCR 2.308(A) provides that "depositions or parts thereof shall be admissible at trial or on the hearing of a motion or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence." MRE 803(18) in turn provides that "[t]estimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding" is not hearsay "if the court finds that the deponent is an expert witness and if the deponent is not a party to the proceeding." Bednarski's calculations did not differ greatly from plaintiffs' expert's calculations, true, but defendants have directed us to no prohibition on plaintiffs' use of Bednarski's deposition testimony in any fashion. The trial court did not abuse its discretion in allowing the use of the deposition testimony.

IV. DEFENDANTS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) OR NEW TRIAL CONCERNING DAMAGES AWARDED ON PLAINTIFFS' FOUR TORT CLAIMS

Defendants assert that the trial court erred in denying its motions for directed verdict, JNOV, or new trial with respect to the damages the jury awarded on plaintiffs' tort claims because there was no evidence that RRS suffered any damages over and above the loss of their interest in Renaissance. The grant or denial of a motion for a directed verdict is reviewed de novo. *Chouman*, 293 Mich App at 441. We review de novo the trial court's decision on a motion for judgment notwithstanding the verdict. *Sniecinski*, 469 Mich at 131. The trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *Barnett*, 478 Mich at 158.

As previously indicated, defendants were entitled to a directed verdict on plaintiffs' claim of tortious interference with a business expectancy. Plaintiffs are thus entitled to no damages on that count and that portion of the judgment awarding $383,500.00 on that claim is reversed. With respect to the remaining three tort claims, in accordance with tort law principles, plaintiffs had the burden of proving their actual damage with reasonable certainty. See *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). Remote, contingent, or speculative damages cannot be recovered in Michigan in a tort action. *4041-49 W Maple Condo Ass'n v Countrywide Home Loans, Inc*, 282 Mich App 452, 459-60; 768 NW2d 88 (2009).

The remaining three tort claims are: aiding and abetting Idsinga's breach of fiduciary duty to RRS and its shareholders by Flynn, for which the jury awarded $500,000; Flynn's tortious interference with RRS's bylaws, for which the jury awarded $131,570; and, conspiracy to deprive RRS of its interest in Renaissance by having Renovo obtain the benefits of RRS's primary (only) asset at a price far lower than should have been paid in an arms-length transaction, for which the jury awarded $500,000.

Evidence was presented at trial regarding the values and profits of Renovo, Renaissance and RRS throughout the years. Flynn, notably, testified that after Renovo purchased RRS's interest in Renaissance, Renaissance and Renovo became so intertwined it would be impossible to separate them. Flynn also testified that in March 2009 Renovo gave a PowerPoint presentation to see if they were able to raise the capital to acquire another business. The presentation indicated that Renaissance was the third largest forwarder of repossessions and was estimated to have $30 million in revenue. The evidence established that RRS's interest in Renaissance as of December 2008 was $11,220,000. The evidence also established, then, that even after the December 2008 valuation date, Renaissance continued to grow in value and had increased profits—profits that plaintiffs would have shared in but for the tortious acts of defendants.

Evidence was also presented concerning Flynn's role in getting the March 2007 transaction accomplished, including giving Idsinga the money to buy additional shares of RRS stock to ensure that he had a majority of the stock necessary to vote the transaction through. Flynn admitted to funding the transaction and called obtaining the shares the "belt and suspenders" of the transaction. Idsinga freely testified that the deal was a bad one for RRS and its shareholders and that by engaging in the transaction he breached his fiduciary duty to all. The

jury was also informed that plaintiffs had settled their claims with the directors of RRS for, among other things, their breaches of fiduciary duty, for $690,000.

Based upon the evidence, the jury had sufficient information to award damages on the three remaining tort claims. When a plaintiff proves injury, recovery is not precluded simply because proof of the amount of damages is not mathematically precise and where reasonable minds could differ regarding the level of certainty to which damages have been proved, we are careful not to invade the fact finding of the jury and substitute our own judgment. *Severn v Sperry Corp*, 212 Mich App 406, 415-416; 538 NW2d 50 (1995). Simply because the jury did not specify where it obtained the figures does not mean that they are unreasonable, in light of the evidence presented.

B. PLAINTIFFS' ISSUES ON CROSS-APPEAL

I. TRIAL COURT'S DELEGATION OF ITS FACT-FINDING ROLE TO JURY REGARDING EQUITABLE DEFENSES

Plaintiffs assert on cross-appeal that deductions for setoffs are actions taken by the court, after the verdict, and independent of any factual finding by the jury. According to plaintiffs, the trial court clearly erred in delegating this task to the jury. We disagree.

Plaintiffs rely upon *Szymanski v Brown*, 221 Mich App 423, 434; 562 NW2d 212 (1997), wherein it was stated, "Deductions of setoffs paid from collateral sources . . . are actions taken by the trial court independent of any factual finding by the jury." However, this statement was made in passing while addressing the defendant's argument that offer of judgment sanctions were not appropriate in his trespass case because the jury's base verdict, rather than the trebled damage award should have been used when determining whether the "adjusted verdict" was more favorable to the defendant than the average offer of judgment. *Id*. at 433. In support of its argument, defendant argued that an adjusted verdict does not include deduction of any setoff paid by a joint tortfeasor or a reduction of future damages to present value, citing cases holding the same. It was in rejecting this argument, that this Court made the reference relied upon by plaintiffs, that the deductions for setoffs paid from collateral sources is made independent of any factual finding by the jury, continuing, "[i]n contrast, the trial court trebles actual damages for trespass because the jury has found that the defendant's trespass was intentional." *Id*. at 434. In context, then, the statement was dicta. This case stood for the proposition not that the issue of setoff for collateral damages (or any setoff for that matter) must be decided by the trial court after jury verdict, but that some deductions for purposes of determining an "actual verdict" are made based independent of a jury's factual findings and some are made based upon specific factual findings made by the jury.

Thus, plaintiffs do not provide any relevant authority to support their position that the issue of setoffs *must* be determined by the trial court. Moreover, in *Brewer v Payless Stations, Inc*, 412 Mich 673; 316 NW2d 702, 705 (1982), a policy was announced in Michigan that:

> When there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, the jury shall not be informed of the existence of a settlement or the

> amount paid, unless the parties stipulate otherwise. Following the jury verdict, upon motion of the defendant, the court shall make the necessary calculation and find the amount by which the jury verdict will be reduced. *Id*. at 679.

The converse of the above is also true. And, because this is merely a policy consideration, neither party objected to telling the jury about the settlement, and there was a dispute as to how much of the settlement should be offset, the issue concerning setoff with respect to the settlement properly went to the jury.

The other setoff issues (initial payment on the sale made by Renovo to RRS, debt of RRS extinguished/assumed by Renovo in the March 2007 transaction, and amounts invested by Renovo after the March 2007 transaction) were properly submitted to the jury because they concerned equitable relief. After all, "[u]nless specifically authorized by statute in a particular instance, setoff is a matter in equity based on equitable principles." *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997). Because the jury was asked to determine damages for tort and for the valuation of RRS's interest in Renaissance, they were in the best position to determine whether the proposed setoffs were equitable under the circumstances and with the information provided.

II. JOINT AND SEVERAL LIABILITY

Plaintiffs next assert that the jury's finding that all three defendants were liable for civil conspiracy and their award under that single count renders all three defendants jointly and severally liable for *all* damages. According to plaintiffs, then, the trial court erred in thereafter parsing out the award and allocating responsibility among the defendants in the judgment. Plaintiffs also contend that the value of the membership interest was an element of damages sought in each tort claim, but the trial court, in parsing out the judgment, reflected that the membership interest was only part of the judgment rendered against Renovo. According to plaintiffs, the judgment should be modified so at least the value of the membership interest is included in a singular judgment against all defendants, not just Renovo. We disagree.

Once the jury has reached its verdict, the trial court merely enters a judgment on the verdict that is consistent with the law. *Phillips v Mirac, Inc*, 251 Mich App 586, 594; 651 NW2d 437 (2002). We review the trial court's decision to correct a judgment for an abuse of discretion. *Detroit Free Press, Inc v Dep't of State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999); *McDonald's Corp v Twp of Canton*, 177 Mich App 153, 158; 441 NW2d 37 (1989).

In this case, the jury form listed questions asking the jury to determine the value of RRS's 83.7% interest in Renaissance, which it did at $11,120,000. The jury was also separately asked to specify the damages attributable to each specific tort claim, "not already incorporated in the value set forth above." It found that plaintiffs were entitled to $383,500 "as a result of Defendants' tortious interference with their business expectancy in RRS;" to $131,570 in damages suffered "as a result of Kevin Flynn's tortious interference with the bylaws of RRS;" $500,000 "as a result of Flynn's aiding and abetting a breach of fiduciary duty in connection with the March 2007 transaction;" and $500,000 "as a result of a conspiracy to obtain RRS's interest in [Renaissance]." After determining what offsets should be deducted from the value of RRS, the jury was asked to add all of the amounts together, make the necessary offsets and

determine the damages to be awarded. The final, singular number awarded in the damages section of the verdict form was $7,978,530. The trial court entered a judgment in this matter finding that the jury entered a verdict on claims (including interest) against Renovo in the amount of $7,346,960; against EVI in the amount of $883,500; and against Flynn for $1,515,070.

Plaintiffs are correct that the liability of conspirators to civil damages is joint and several. See, e.g., *Brown*, 338 Mich at 504. However, plaintiffs elected to parse out their tort claims against the defendants, holding all defendants liable for two of the torts, and Flynn solely liable for two. The jury rendered a specific award on the conspiracy count not already incorporated in the value they assigned to RRS's interest in Renaissance, as they were asked to do. Had plaintiffs wanted a singular award for conspiracy that incorporated everything, they could have set the request for damages or the verdict form up in such a way. They did not. Conspiracy was set up as a separate claim with separate damages, the jury awarded it as such, and the judgment accurately reflects the jury verdict on that issue. Thus, the damages awards in the judgment against EVI and Flynn correctly reflect the verdict.

The damages award against Renovo is also correct. Count II of plaintiffs' complaint sought a declaratory judgment that the transaction between RRS and Renovo was void. The trial court made such a declaration, and then advised the jury that Renovo's keeping RRS's interest called for the assessment of conversion damages, which they would be asked to determine. The jury determined these damages by figuring the value of RRS's 83.7% interest in Renaissance, at $11,120,000. Because these damages concerned only the transaction between RRS and Renovo and Renovo's conversion of the shares, (not Flynn's or EVI's), these damages were properly assessed in the judgment only against Renovo.

III. DEFENDANTS' AFFIRMATIVE DEFENSES

Plaintiffs assert that where defendants did not file a counter-claim or raise setoff as an affirmative defense they waived or forfeited the right to raise any claim to setoff and the trial court abused its discretion in allowing defendants to bring the issue of setoff before the court, particularly where it had twice previously denied defendants' efforts to raise the claim of setoff. We disagree.

The interpretation of a court rule involves a question of law subject to de novo review, but the factual findings underlying a trial court's application of a court rule are reviewed for clear error. *McCracken v City of Detroit*, 291 Mich App 522, 524-25; 806 NW2d 337 (2011). A finding is clearly erroneous when the appellate court is left with a definite and firm conviction that a mistake has been made. *Id.* Whether a particular ground is an affirmative defense under MCR 2.111(F) is a question of law that is reviewed de novo on appeal. *Citizens Ins Co of Am v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001).

MCR 2.111(F) governs the pleading of affirmative defenses and states, in relevant part:

> (2) *Defenses Must Be Pleaded; Exceptions.* A party against whom a cause of action has been asserted by complaint, cross-claim, counterclaim, or third-party claim must assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading or by motion as

> provided by these rules is waived, except for the defenses of lack of jurisdiction over the subject matter of the action, and failure to state a claim on which relief can be granted. However,
>
> (a) a party who has asserted a defense by motion filed pursuant to MCR 2.116 before filing a responsive pleading need not again assert that defense in a responsive pleading later filed;
>
> (b) if a pleading states a claim for relief to which a responsive pleading is not required, a defense to that claim may be asserted at the trial unless a pretrial conference summary pursuant to MCR 2.401(C) has limited the issues to be tried.
>
> (3) *Affirmative Defenses.* Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting
>
> (a) an affirmative defense, such as contributory negligence; the existence of an agreement to arbitrate; assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; statute of limitations; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable, or cannot be recovered on by reason of statute or nondelivery;
>
> (b) a defense that by reason of other affirmative matter seeks to avoid the legal effect of or defeat the claim of the opposing party, in whole or in part;
>
> (c) a ground of defense that, if not raised in the pleading, would be likely to take the adverse party by surprise.

"An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000). It is a matter that accepts the plaintiff's allegation as true, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff's pleadings. *Id*.

"Setoff" is a legal or equitable remedy that may occur when two entities that owe money to each other apply their mutual debts against each other. *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997). Setoff does not, as affirmative defenses do, *deny* that plaintiff is entitled to recover. In the affirmative defense of payment or satisfaction for example, one is *denying* that plaintiff is entitled to recover because he has *already* been paid. A setoff, on the other hand does not *deny* that plaintiffs are entitled to be paid or defeat their right to recovery as a matter of law. A setoff simply states that while the plaintiff may be entitled to recover, he also owes the defendant money and the two need to be balanced out so that defendant pays plaintiff what plaintiff is owed, minus the debt that plaintiff owes defendant. Moreover, setoff does not appear as one of the listed affirmative defenses in MCR 2.111(F)(3), although it is understood that the list exhibited therein may not be intended to be exhaustive, but only illustrative. *Campbell v St. John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990).

In any event, the jury awarded four different "setoffs" in this matter: the settlement amount paid to plaintiffs by the directors of RRS; Renovo's initial payment of $446,000 to RRS in the March 2007 transaction; the amount of RRS's debt that Renovo retired/assumed in the March 2007 transaction, and; the amount invested by Renovo after the March 2007 transaction. Notably, all of these "setoffs" came about due to occurrences after the case had progressed for some time, and after the close of discovery. The settlement did not involve and was beyond the control of defendants and was not in existence at the time the lawsuit was filed such that defendants could not have plead an offset for the nonexistent settlement in their responsive pleading. Likewise, defendants always maintained that the March 2007 transaction was valid. It was not until the case was nearing trial, when the trial court declared the transaction void, that offsets for the remaining three amounts became an issue. And, defendants did at one point move to amend their answer to plaintiffs' complaint to add a counter-claim for the amounts they had paid in the transaction in the event the transaction was rescinded but the trial court denied leave to amend at that time.

If setoff were viewed as an affirmative defense, it is questionable whether three of the four amounts were truly setoffs. Again, a setoff is a legal or equitable remedy that may occur when two entities that owe money to each other apply their mutual debts against each other. *Walker*, 226 Mich App at 79. In this matter, the trial court declared the March 2007 transaction wherein Renovo purchased RRS's interest in Renaissance void. The jury was then asked to determine damages based upon Renovo's conversion of the interest. Defendants had, though, *paid* for the interest, albeit at a price that the jury found wholly unfair. The payment was not a debt that RRS owed to Renovo that it breached an obligation to pay and thus the offset was not a circumstance where "two entities that owe money to each other apply their mutual debts against each other." *Walker*, 226 Mich App at 79. The same holds true for the debt that Renovo retired for RRS in the March 2007 transaction and the amounts Renovo invested after the transaction. Moreover, unless specifically authorized by statute in a particular instance, setoff is a matter in equity based on equitable principles. See *Walker*, 226 Mich App 79. Where plaintiffs recovered the entire value of their RRS interest, it would be inequitable to also allow them to retain the benefit of the partial payment already received for RRS's interest, the retirement of RRS's debt, and the investment that was made into RRS.

Finally, while it is unclear why the trial court did not allow defendants to assert these issues in a counter-claim, the fact is that the grant or denial of leave to amend is within the trial court's discretion, *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), as is the trial court's grant or denial of reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). If these claims were indeed found to be affirmative defenses, it is clear to this Court that the trial court constructively granted reconsideration by allowing the issues to be placed before the jury. Because both parties previously were afforded an opportunity for argument concerning this issue, plaintiffs were not surprised by the claims of offsets and we find no prejudice.

IV. INSURANCE PAYMENT SETOFF AND DEBT RETIREMENT SETOFF

Plaintiffs assert that the judgment in this matter should be modified to eliminate a $690,000 set off applied for a payment the individual plaintiffs, Ward and Tinucci, received from an insurance company for claims they brought against the directors of RRS. Plaintiffs argue that

because RRS did not receive the insurance payment and the damages awarded by the jury were for a shareholder derivative action where the award would go only to RRS, the $690,000 payment should not have been set off. Plaintiffs also contend that the jury's offset of plaintiffs' award by $2,896,540 in Renaissance's debt that was allegedly retired by Renovo after the March 2007 transaction was not supported by the evidence at trial.

Plaintiffs did not challenge the award on either of these bases in the trial court, though they did move for reconsideration of the judgment on other grounds. This Court need not review issues raised for the first time on appeal, and we decline to do so in this case. *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 42 (2006). [3]

We reverse the trial court's denial of defendants' motion for directed verdict with respect to plaintiffs' tortious interference with a business expectancy claim and affirm in all other respects. We thus remand for entry of a judgment consistent with the above. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto

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[3] Plaintiffs raised two additional issues on cross-appeal (issues VII and VIII), but acknowledged that said issues need only be addressed in the event that this Court reverses the jury verdict and remands for a new trial. Because we are not remanding for a new trial, we need not address the two additional issues raised by plaintiffs on cross-appeal.