STATE OF MICHIGAN

COURT OF APPEALS

ANN ARBOR REHAB CENTERS, INC,

Plaintiff/Counter Defendant-Appellee,

v

ERIC M. SCHUDY,

Defendant-Appellant,

and

ASMAKTA, LTD,

Defendant/ Counter Plaintiff.

UNPUBLISHED
February 27, 2014

No. 312050
Washtenaw Circuit Court
LC No. 09-001449-CZ

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

In this action involving a claim of fraud in the inducement, defendant Eric Schudy appeals as of right the trial court's entry of judgment in favor of plaintiff/counter-defendant Ann Arbor Rehab Center (AARC) in the amount of $188,676.95.[1] We affirm.

On appeal, Schudy first contends that the trial court erred in concluding AARC presented clear and convincing evidence of fraud in the inducement. On an appeal following a bench trial, a trial court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). In making his arguments on appeal, Schudy urges this Court to apply a de novo standard of review to the trial court's findings regarding fraud in the inducement. However, determinations as to whether fraud occurred typically constitute questions of fact. *Traxler v Ford Motor Co*, 227 Mich App 276, 282; 576 NW2d 398 (1998); see also 17B C.J.S. Contracts §

[1] The trial court also found defendant/counter-plaintiff Asmakta, Ltd. (Asmakta) liable for breach of its contract with AARC, and concluded that there was no merit to Asmakta's counterclaim. However, Asmakta later filed for bankruptcy and is not a party to this appeal.

1017 ("Where there is evidence that defendant was induced to sign or to enter into a contract by fraud and imposition, the question is generally treated as one of fact."). Thus, our review is for clear error and we will reverse only if after reviewing the entire record we are "left with the definite and firm conviction that a mistake has been committed." *Walters*, 239 Mich App at 456.

To establish a claim of fraud in the inducement, a plaintiff must establish that:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that is was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 161; 742 NW2d 409 (2007) (citation and quotation omitted).]

A plaintiff bears the burden of establishing the essential elements of this claim. *Hi-Way Motor Co v Intl Harvester Co*, 59 Mich App 366, 371; 229 NW2d 456, 458 (1975). Indeed, fraud is never presumed, but must be proved by clear and convincing evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996).

In this case, based on testimony from Dr. Terry Braciszewski, AARC's owner and director, the trial court concluded that Schudy represented to Braciszewski that he had "personally designed the software that he was selling, and that he had resources at Harvard, and in California and Japan" and that this misrepresentation constituted fraud in the inducement. Schudy disputes the trial court's conclusion, arguing: (1) that the majority of representations at issue were not false, and (2) that among the representations that were false, the representations were not material, and not relied upon by Braciszewski.

Reviewing the record, we first conclude that the trial court did not clearly err in concluding that Schudy did not personally design *Therapy Office*, the software at issue. While Schudy described himself as the "original creator and architect" of *Therapy Office*, he also conceded at trial that *Therapy Office* was created by a "team," that, as the product progressed, he "added programmers, and when the work got to be too much for the individual pieces, [he'd] parcel out the programming." He also readily acknowledged his wife's involvement in developing the user interface design and, at trial, his wife testified that the project was a "joint effort" that included "a staff of ten or eleven people working on the system and building it together and testing it and building other pieces." Based on this evidence, the trial court did not clearly err in concluding that Schudy did not "*personally* design" the program as he had represented to Braciszewski. Regarding Schudy's contacts at Harvard and in California, Schudy admitted at trial that he had no such connections; thus, these representations were undeniably false.

However, in our judgment, AARC failed to present clear and convincing evidence to establish Schudy lacked the aforementioned contacts in Japan. Indeed, we see no indication in the lower court record that AARC presented any evidence on this point. The only evidence on this point relates to testimony from Schudy and his wife, both of whom testified that Schudy had colleagues in Japan. Certainly, the trial court was not required to accept this testimony merely

because it was uncontroverted. See *Yonkus v McKay*, 186 Mich 203, 211; 152 NW 1031 (1915). Nevertheless, we are also mindful that AARC bore the burden of proof on this element and, as such, could not simply rely on disbelief of Schudy's testimony to establish an element of its claim. See *Quinn v Blanck*, 55 Mich 269, 272; 21 NW 307 (1884); *Kohn v Mandell*, 17 Mich App 653, 655; 170 NW2d 261 (1969). Thus, while the trial court did not have to believe Schudy, in the absence of any evidence apart from disbelief of Schudy's testimony, the trial court clearly erred in holding this representation regarding Japan to be false. And, any reliance on that fact was error.

Next, we conclude that, on the facts of this case, the false representations regarding Schudy's design of the program and his contacts at Harvard and in California were material. By definition, something is material where it is "[o]f such a nature that knowledge of the item would affect a person's decision-making." Black's Law Dictionary (9th ed); see also *Rzepka v Farm Estates, Inc*, 83 Mich App 702, 710; 269 NW2d 270 (1978) (recognizing a misrepresentation as material where it bears "upon a fact crucial" to a party's decision). While materiality requires relation to an important fact, it does not, however, require a misrepresentation to "relate to the sole or major reason for the transaction." *Papin v Demski*, 17 Mich App 151, 155; 169 NW2d 351 (1969). In this case, in assessing materiality, it is important to recognize that the parties contracted, not for a completed software program but, for a computer program which everyone agreed needed to be modified to satisfy AARC's needs and which Schudy assured Braciszewski that Asmakta could accomplish. The record supports that fundamental to Braciszewski's decision to contract with Asmakta for these services was his perception of the skills and resources available to Asmakta to accomplish the needed modifications. In this context, whether Schudy "personally designed" the program bore on his ability to speak with authority as to *Therapy Office*'s potential for modification to suit AARC. Further, given that Schudy was Asmakta's CEO, and a self-described "visionary leader," his claimed skills and accomplishments reflected on Asmakta, shaping Braciszewski's impressions of the company. In fact, Braciszewski specifically testified that he chose *Therapy Office*, in part, because he was "impressed" with Schudy. Similarly, claims to connections at Harvard and another university in California—i.e. impressive colleagues Schudy maintained could provide technical assistance—added credence to Schudy's claim that Asmakta could accomplish the necessary modifications.[2] That these concerns were crucial to Braciswesk's decision-making finds support in his testimony, in which he details the important role Schudy's claimed "resources and acumen" played in his decision to select *Therapy Office*.

We are also persuaded that Braciszewski relied on the false representations at issue when selecting *Therapy Office*. This conclusion is born out in Braciszewski's trial testimony, where he

[2] Schudy argues on appeal that these representations cannot be material because he in fact has colleagues at the University of Chicago, a prestigious university in its own right, and no one would reasonably abandon a transaction based on this distinction. However, Schudy bases this claim on his own trial testimony, which the trial court was not required to accept, *Yonkus*, 186 Mich at 211, and in fact described as "not credible." Thus, Schudy's claim to possess colleagues at the University of Chicago does not render the trial court's decision clearly erroneous.

described the role of Schudy's representations regarding his creation of the program, and his claimed resources, at Harvard and in California, in the decision-making process. From this testimony, the trial court did not clearly err in concluding these matters were a "material influence" on Braciszewski's decision. See *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 121; 313 NW2d 77 (1981). That other factors, such as the ability to write on the tablets, might have also influenced Braciszewski does not alter this conclusion because materiality does not require a misrepresentation to be the *sole* influence on a party's decision. *Id.* Rather it is enough when, as in this case, the "misrepresentation exerted a material influence" upon Braciszewski, even if it is ultimately one of several motives acting together. *Id.* Overall, Schudy's arguments are without merit and we see no clear error in the trial court's findings related to fraud in the inducement.

On appeal, Schudy also challenges the consequential damages awarded to AARC by the trial court as compensation for loss of productivity and patient therapy time, arguing specifically that these damages were speculative and not supported by the evidence. Following a bench trial, this Court reviews a trial court's determination of damages for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). Relevant to Schudy's arguments, it is true that a party may not recover damages that are "remote, contingent, or speculative" and must instead prove damages with "reasonable certainty." *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 524-525; 687 NW2d 143 (2004). However, "mathematical precision" is not required and an approximation may suffice provided "a reasonable basis for computation exists." *Id.* at 525. Further, the degree of certainty required depends on the situation, *Bonelli v Volkswagen of Am, Inc*, 166 Mich App 483, 512; 421 NW2d 213 (1988), and "questions of what damages might be reasonably anticipated is a question better left to the factfinder," *Ensink*, 262 Mich App at 525.

In this case, to establish their claim for damages, AARC presented testimony from Braciszewski and AARC's assistant director, Lyn Peyton. Both witnesses detailed the activities and time they, and other employees, wasted in conjunction with Asmatka's efforts to implement *Therapy Office* at AARC. They also testified as to respective salaries to provide a measure to quantify the loss of productivity. AARC supported this testimony with numerous e-mails between AARC and Asmatka, chronicling *Therapy Office*'s numerous failures. Further, AARC relied on a document prepared by Schudy which purported to show the thousands of specific transactions (such as logging on, loading, and saving) by AARC employees on *Therapy Office*. In addition, both Braciszewski and Schudy testified, and the written proposal from Asmatka confirms, that the parties intended for AARC to experience increased efficiency and revenues from the implementation of *Therapy Office*. For example, as Schudy conceded at trial, the proposal he submitted to AARC, relying on an Ernst and Young study, hypothesized a potential increased revenue of $8,000 per week through the use of electronic medical records. From all this evidence, apart from the purchase price, the trial court made the following findings of damages:

> 2. Consequential damages including the reasonable value and measure of the hours of productive work and direct patient contract/therapy time lost by AARC as a consequence of Asmakta's breach of contract. A strict mathematical calculation of this amount, based on the testimony and documents is $140,004.50.

> 3. Consequential damages including the reasonably estimated value of the concrete benefits predicated and documented in the contract and intended by the parties, including operational efficiency and revenue, but not derived as a consequence of Asmakta's breach of contract.
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> 4. Based on the evidence presented, and adjusting for the fact that AARC was required to devote employee time to the project whether successful or not and would not have achieved the software's efficiency benefits immediately, a reasonable and reasonably certain measure of consequential damages (not including the purchase price) under all the facts and circumstances of the case is no less than $150,000.00.

Based on the testimony offered at trial and affording due regard to the trial court's superior ability to evaluate Peyton and Braciszewski's credibility, the trial court's findings in this regard were not clearly erroneous. Time lost when employees are idle has long been held to constitute compensable damages, see, e.g., *Coburn v Muskegon Booming Co*, 72 Mich 134, 148; 40 NW 198 (1888), and where a contract has been breached, damages include the "benefit of the bargain as set forth in the agreement," *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). Time spent on the wasted program is comparable to time lost when employees are idle. While AARC could not provide exact figures to account for its damages, it did not simply speculate. Rather, based on their personal knowledge, Peyton and Braciszewski provided the best approximation they could under the circumstances—indeed, all the testimony indicated the figures were "conservative" estimates. Ultimately, even if not a mathematical certainty, the trial court's decision was based on reasonable approximations establishing damages with a reasonable certainty.

We are not persuaded by Schudy's argument on appeal that "physical evidence," i.e. documentation, was required to support the oral testimony. Such documents might have been helpful, but as Peyton and Braciszewski logically explained, they did not document the time at issue because they were not expecting *Therapy Office* to fail and were not expecting to need such records. Considering this testimony, it appears that the nature of the case is such that exact precision in the amount of hours wasted on *Therapy Office* is simply not possible. See *Bonelli*, 166 Mich App at 512. This does not, however, prevent recovery. *Id.* Moreover, in making his argument, Schudy does not provide citation to any authority for the proposition that "physical evidence" was *required*. On the contrary, MRE 602 permits lay witnesses to testify to matters within their personal knowledge, and a plaintiff's testimony regarding wages and lost time has long been held to provide competent evidence from which the trier of fact could determine the question of damages. See, e.g., *Maxwell v Wanik*, 290 Mich 106, 107; 287 NW 396 (1939). Thus, the trial court did not err in basing its determination of damages on properly admitted testimony to facts within the personal knowledge of Peyton and Braciszewski.

In a related argument, Schudy argues that AARC committed a discovery violation, failing to present documentary evidence of damages before trial and to supplement their discovery as required by MCR 2.302(E). Based on these alleged failures, before trial, Schudy sought to preclude consideration of consequential damages at trial. The trial court denied this request and now, on appeal, Schudy continues to argue that evidence of damages should have been excluded. Schudy's argument lacks merit because he has not shown a discovery violation occurred. The

lower court record shows that AARC timely responded to requests for production and Schudy has not identified any documents which AARC withheld. No order to compel discovery was sought by Schudy, or issued by the trial court against AARC. Indeed, as Schudy emphasizes on appeal, Peyton and Braciszewski indicated that they did not keep records of the amount of time they spent on *Therapy Office*, making it hard to determine what documents Schudy believes were withheld. Most of the testimony at issue was oral testimony from Braciszewski and Peyton, both of whom were included on AARC's witness list and listed, in response to a discovery request, as individuals with knowledge on contested issues. Braciszewski was in fact deposed before trial and, had Schudy wished to depose Peyton, it was his responsibility to do so. See MCR 2.306(B); MCR 2.305(A). Overall, from all appearances, AARC timely complied with the discovery rules. MCR 3.210(C)(2). Thus, there was no basis for sanctions and the trial court did not abuse its discretion in denying Schudy's pretrial request to disallow consequential damages.[3] MCR 3.213(B).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens

[3] Schudy also argues on appeal that MRE 403 should have required exclusion of the evidence at issue. He claims the evidence was unfairly prejudicial because he did not have a chance to examine it before trial. Again, he does not identify any specific evidence and, furthermore, whether prejudice requires exclusion based on a discovery violation is a discovery issue, see MCR 3.213(B), not an evidentiary matter. See generally *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994) (including prejudice within list of factors relevant to determination of appropriate discovery sanction).