

STATE OF MICHIGAN
COURT OF APPEALS

JOHN H. FLIEHMAN, d/b/a J.H. FLIEHMAN
SALES COMPANY,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 169559

LC No. 91-011162-CK

PLASTECH MANUFACTURING
CORPORATION,

Defendant-Appellant.

Before: Jansen, P.J., and Taylor and J.P. Noecker,* JJ.

JANSEN, P.J. (dissenting in part).

I respectfully dissent from the majority's decision to reverse the award of \$60,723 in plaintiff's favor on the basis that defendant prevented new sales by not securing an acceptable paint source. I would affirm the trial court's judgment in all respects, and concur in the affirmance of the armature award of \$14,899.18.

This action stems from a contract dispute surrounding the payment of commissions to plaintiff for automotive parts on which he secured contracts for defendant. The trial court, in its written opinion, specifically found that defendant breached the condition of the contract that it had to secure an acceptable paint source, and that such a breach was substantial. In its opinion, the trial court carefully noted the differing positions of the parties on this issue and of the evidence presented by each party.

As noted by the trial court, it was defendant's position that an acceptable paint source had always been available because it could secure the services of another paint shop, and that an acceptable paint source did not necessarily have to be an in-house paint source. It was plaintiff's position that the paint source would be secured either by an in-house paint line or by securing an outside facility that had the capability of producing a base coat/clear coat paint. The trial court found that if defendant had secured an acceptable paint source with base coat/clear coat capabilities, then plaintiff would have had

* Circuit judge, sitting on the Court of Appeals by assignment.

little or no difficulty in securing additional orders from ITT Thompson or its successor, Thompson, International. However, no additional orders were secured by defendant, thus, the trial court concluded that defendant had not secured an acceptable paint source.

The trial court's factual findings in this regard are not to be set aside unless clearly erroneous. MCR 2.613(C). A finding is clearly erroneous if the appellate court, on all the evidence, is left with a definite and firm conviction that a mistake has been made. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). This standard does not authorize a reviewing court to substitute its judgment for that of the trial court. If the trial court's view of the evidence is plausible, the reviewing court may not reverse. *Id.* In other words, an appellate court is not to substitute its own judgment for that of the trial court unless the facts clearly preponderate in the opposite direction. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 410; 531 NW2d 168 (1995).

Further, with respect to reviewing the credibility of witnesses, appellate courts should give special deference to the trial court's findings when they are based on the witnesses' credibility. *Id.* "[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

I cannot conclude that the trial court's factual finding that defendant did not secure an acceptable paint source was clearly erroneous. The trial court noted each party's position, the evidence presented by each party on this issue, and found that defendant had not secured any additional orders from ITT Thompson, thus, it had not secured an acceptable paint source. The trial court's factual finding is supported by the evidence. The majority, in accepting defendant's evidence as being true, has merely set aside the trial court's factual findings, made a credibility determination, and substituted its judgment for that of the trial court.

I would affirm.

/s/ Kathleen Jansen
/s/ Clifford W. Taylor
/s/ James P. Noecker