STATE OF MICHIGAN

COURT OF APPEALS

FRANK W. LYNCH & CO.,

Plaintiff–Appellant,

v

FLEX TECHNOLOGIES, INC., a foreign corporation, FLEX TECHNOLOGIES, LTD., a foreign or alien corporation, and 828965 ONTARIO, INC., a foreign or alien corporation, jointly and severally,

Defendants–Appellees.

UNPUBLISHED
October 22, 1996

No. 169747
LC No. 90-393782-CK

Before: White, P.J. and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

Plaintiff appeals the circuit court's orders granting defendants summary disposition and plaintiff partial summary disposition, entering judgment in plaintiff's favor in the amount of $115,101, and denying plaintiff's motion to amend its complaint to seek certain statutory damages. We affirm the denial of the motion to amend and the entry of immediate judgment for plaintiff, but reverse the grant of summary disposition to defendant, and remand for further proceedings.

I

Plaintiff entered into a Manufacturer's Representative Agreement (Agreement) with Drut Industries effective July 1, 1982, pursuant to which the parties agreed on terms specified therein "unless otherwise agreed upon in writing by supplemental agreement signed by both parties." Drut agreed to pay plaintiff a five percent commission on net sales to certain customers. The agreement was signed by Harry Kearney, Drut's president, and G. Peter Smith, plaintiff's president. Sometime later, Drut Industries was renamed Mechanical Cables, Ltd. (MCL). In April 1989, MCL was acquired by defendants.

Paragraphs eleven and twelve of the original agreement state:

> 11. The effective date of this agreement is July 1, 1982.[1] This agreement may be terminated by either party by written sixty (60) day notice to the other at the above addresses by Certified Mail return receipt requested.
>
> 12. Upon termination of this agreement Drut Industries, Ltd. **shall continue to pay commissions** (as defined herein) to Frank W. Lynch & Co. for all sales of the type of products sold by Frank W. Lynch & Co. hereunder to the customers set forth on Exhibit "A" **for one year after said termination**. [Emphasis added.]

The original agreement also specified that the agreement "may not be modified unless in writing signed by both parties."

Two amendments were made to the agreement. The first amendment was proposed by letter dated September 10, 1982, from Smith to Kearney. The following sentence was added to ¶ 12:

> In the event shipments against orders by Frank W. Lynch & Co. do not start until after termination, **the commissions will be paid on the first year of shipments against said orders.**

The letter bears Kearney's signature below the words "acknowledged and approved."

The second amendment (1983 amendment), the effect of which is at issue in this case, is stated in a letter dated October 17, 1983, from Smith to Kearney, acknowledged and approved by Kearney's signature:

> In accordance with our recent conversation, in view of our mutual interest in continuing our successful and profitable association, I would suggest we amend our Manufacturers Representation Agreement of July 31, 1982, **to establish a term for said agreement**, as follows:
>
> "**The initial term of this Agreement shall be until July 31, 1987. On July 31, 1986 this Agreement shall be automatically extended until July 31, 1989 and will continue to be automatically extended every two years, so the term of the contract will float in between one year and three years.**" [Emphasis added.]

More than four years later, on December 29, 1987, Smith sent Kearney a letter referring to an earlier conversation:

> Per our conversation in Barrie, it is regretable [sic] the company is in bad financial shape. We are certain, through your efforts and Gus's, that this will be a temporary situation. **We are agreeable to a commission reduction in the interest of helping the borrowing capability of the company to achieve long term growth beneficial to all of us.** We would like to suggest **in consideration for the temporary reduction you suggested to 2.5% our current contract be extended now to July**

> **1, 1991 and the automatic renewable feature referred to in my letter amendment dated 10/17/83 be continued so that the contract term floats between 1 and 3 years. Commission rate to be 2.5% in 1988, 3.0% in 1989 and 4% in 1990.** [Emphasis added.]

This letter was not signed by Kearney. However, on March 16, 1988, E.J. Robillard, vice president and general manager of MCL, wrote plaintiff a letter, which was carbon copied to Kearney:[2]

> Thank you for your letter of Dec 29 **in response to our request for an alternative commission structure**. I appreciate the position you've outlined in reference to the commission but would like to suggest changes which would be beneficial both to you and M.C.L. **over the longterm**:
>
> The plan I would suggest would be as follows:
>
> Jan 1/88 through March 31/89 - 2.5% commissions on all parts.
>
> April 1/89 through Mar 31/90 - 3% on all <u>new</u> business for first year of shipments and 3% on retained business.
>
> April 1990 forward 5% on all <u>new</u> business for first year of shipments & 2.5% on all retained business.
>
> This plan would help stimulate the effort for new business while reflecting the reality of declining margins on retained business.
>
> **If this plan is agreeable the contract would be extended through 1991 and we would add Ford to your account list**. [Underlined emphasis in original, other emphasis added.]

The above letter contained no signature line for, and was not signed by, plaintiff. An inter-office memorandum dated a little over a year later, April 5, 1989, from Smith to Kearney, and signed by Smith, states:

> I realize you and the company are going through some very trying times, and I certainly hope your negotiations will work out for the best for both.
>
> I do feel it necessary to remind you again that you are substantially in arrears on commissions. **We agreed to a commission reduction over a year ago to help you restore profitability to the company.** Despite the fact you have been in arrears since then, which has now reached 7 months owing, we have continued to devote our time and money to representing Mechanical Cables in good faith.
>
> We would like to suggest you commence regular payments to us immediately. **Also, in the event of a restructuring or sale of the company, we would like it understood**

> **we expect to get paid in strict accordance with the terms of our existing contract.**
>
> We look forward to your comments. [Emphasis added.]

On April 28, 1989, defendants purchased MCL's assets.

By letter to Smith dated October 27, 1989, Duane Herchler, vice president of marketing for Flex Technologies, Inc., gave notice of termination of plaintiff's services effective January 1, 1990:

> This letter is to confirm our phone conversation of 10-24-89. We are planning on going direct with our CPS and Truck & Bus Cable representation. Effective January 1st, 1990 we would like to have all sales coverage transfered [sic] to us. This is necessary due to the position we are still in at Flex Canada.
>
> As I mentioned, **we will be paying all of your past due commissions plus current commissions earned thru [sic] December 31st, 1989**.
>
> I will be in touch with you to work out the details. [Emphasis added.]

The next communication in the record is a letter from Herchler to Smith, dated December 1, 1989, stating in pertinent part:

> Re: Termination
>
> > We are in receipt of your letter dated November 28, 1989 and are not aware of any continuing obligations on MCL's or Flex Technologies part. The only agreement we have made (verbally) was to pay the prior past due commissions that MCL had accumulated prior to taking over. Therefore all commission payments will be discontinued after December 31, 1989 when your representation stops.

Smith's November 28, 1989, letter is not before us.

II

Plaintiff brought suit against defendants in July 1990, asserting, alternatively, breach of express contract and quantum meruit/unjust enrichment. Plaintiff's complaint alleged that defendants were required to retain plaintiff until July 31, 1992, and to pay post-termination commissions at a rate of five per cent. Plaintiff attached to its complaint a copy of the Agreement.

For approximately thirty months, throughout discovery and at a special mediation in January 1993, defendants maintained they were not bound by the Agreement, and that they were unaware of the existence of the Agreement.

In early February 1993, defendants filed a motion in limine. Plaintiff filed a cross-motion in limine in March 1993. In their motion, defendants argued for the first time that they were bound by the written Agreement, and sought to exclude evidence of damages beyond one year from the contract termination date. Defendants argued that the Agreement, as amended, established a floating contract term of one to three years, subject to termination on sixty days' notice by either party. Defendants admitted liability only for post-termination commissions accruing between December 31, 1989 and December 31, 1990 at a rate of 2 ½%, or $115,101. Defendants did not move to amend their answer.[3]

Plaintiff's motion in limine sought to prevent defendants from availing themselves of their new position that the Agreement bound them, and requested that the case go forward on certain facts set forth in defendants' mediation summary, throughout which defendants maintained the Agreement did not bind them. Plaintiff attached to its motion copies of the October 27, 1989 and December 1, 1989 correspondence summarized above, and the first twenty-two pages of defendants' mediation summary, which frequently cited Smith's deposition testimony.

Before the June 9, 1993 hearing on the cross-motions in limine, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the sole question raised by plaintiff's complaint was the amount of post-termination commissions plaintiff was entitled to, and no genuine issue of fact remained on that question. Defendants argued that the written Agreement applied, the sixty-day termination notice provision survived the 1983 amendment, and defendants' termination of plaintiff with sixty days' notice was permitted. Defendants requested partial summary disposition as to all plaintiff's claims except its claim for 1990 commissions under the Agreement.

Following the filing of the cross-motions in limine, the parties filed a Final Joint Pre-Trial Order on March 25, 1993. Trial was at that time set to start on March 29, 1993. Defendants stated under the section entitled "Defendants' Claims," that "[a]lthough Flex was unaware of the FWL&Co [plaintiff]/MCL Representative Agreement, Flex will not contest that the Agreement controls." Flex stated under "Defendants' Claims" that, pursuant to paragraph 12, Flex owes plaintiff $115,101 in post-termination commissions for 1990 shipments, representing a commission rate of 2 ½%. Under "Uncontested Facts" the pre-trial order states in pertinent part:

> a. From 1988 until its termination in 1989 FWL&Co. [plaintiff] was paid a commission rate of 2-1/2% by MC and then Flex.
>
> b. On October 27, 1989, Flex sent FWL&Co. written notice of its termination effective December 31, 1989.
>
> c. The MC/FWL&Co. July 31, 1982 Representative Agreement as amended provides for one year of post-termination commissions.
>
> d. 1990 sales on which commissions are owed amount to $4,604,043.
>
> e. Two and one-half percent of $4,604,043 is $115,101.

Under "Plaintiff's Statement of Issues" the pre-trial order states:

> a. Whether a 5% commission rate may be used to calculate damages when that rate was modified downward to 2 ½% by agreement and never thereafter raised to 5% although negotiations had been conducted with MC and Flex and FWL&Co.'s acquiescence in the 2 1/2% rate with Flex was conditioned on a long-term relationship which Flex refused by its actions to maintain?
>
> b. Whether the procuring cause doctrine applies where the existence of a written contract between FWL&Co. and MC, Flex's predecessor, has been repudiated because Flex did not know of its existence and there was no "meeting of the minds" and Flex operated under the belief that only a "handshake deal" existed, and Flex continued at all times to operate under a "handshake deal"?
>
> c. Whether the terms of the written agreement are applicable where there has been no "meeting of the minds" because the Defendants were unaware of the existence of the agreement and in fact were told that no written agreement existed and were operating on the basis of what it believed to be a "handshake deal" and consistently repudiated any express written agreement?
>
> d. If the Court determines the written contract is applicable, whether the Court should interpret the October 17, 1983 amendment as replacing the sixty-days' notice provision; or read it as a [sic] requiring the notice to be given prior to the end of a term (i.e. [sic] 60-day notice before July 31, 1988 or by July 31, 1988 where the term ends July 31, 1989 or by July 31, 1988 where the term ends July 31, 1989 so as to make it rolling between one and three years, through 7-31-92); or reading it as requiring the notice to be given sixty days prior to the July 31, 1989 termination which would then renew the term until July 31, 1992.
>
> e. Whether the denial of knowledge of the written contract and the admitted understanding of Flex that MC had a "handshake deal" with FWL&Co. and that Flex would continue with such an arrangement entitles FWL&Co. to proceed on the doctrine enunciated in Reed and other applicable law?

"Defendant's Statement of Issues" states as follows:

> a. Whether a 5 percent commission rate may be used to calculate contract damages when that rate was modified downward to 2 ½% by agreement and never thereafter raised to 5%?
>
> b. Whether the Court should ignore the provision in the Agreement providing for sixty days' notice for termination when that is the only means of terminating the Agreement?

c. Whether the Court should ignore the provision in the Agreement providing for sixty days' notice for termination when that provision is not, as a matter of law, inconsistent with the contract modification that set automatically renewing terms?

d. Whether the procuring cause doctrine applies in the face of an express contractual provision governing post-termination commissions?

e. Whether the Agreement is an exclusive contract when there is no provision identifying it as such?

At the June 9, 1993 hearing on the motions in limine, plaintiff's counsel referred to Smith's deposition testimony on pertinent points and referred a number of times to what Smith would testify to, if necessary, regarding the intent of the Agreement. After hearing arguments from both counsel, the circuit court did not rule, but, rather, suggested that the matters were more amenable to resolution by motions for summary disposition.

Following the hearing on the cross-motions in limine, plaintiff filed a motion for partial summary disposition, noting that it continued to contest defendants' newly asserted reliance on the Agreement. Plaintiff argued that assuming the Agreement applied, it was entitled to judgment as a matter of law for, at minimum, $115,101, a figure agreed to by defendants in the final pre-trial order. Plaintiff argued that the court must interpret the Agreement, giving effect to the parties' intent and the surrounding circumstances, and that the parties to the contract at the time of its making are best able to give definition to the contract where an ambiguity may exist. Plaintiff further argued that the parties intended to establish a term for their relationship with an automatic renewal and provide for a one year notice of termination—the initial term was until July 31, 1987, and if notice was not given by July 31, 1986, the contract renewed itself and extended to July 31, 1989. Notice of termination was therefore required by July 31, 1988, or the contract would automatically renew until July 31, 1992.[4] Plaintiff argued that since defendants did not give notice of termination by July 31, 1988, the contract extended until July 31, 1992,[5] and plaintiff was thus entitled to post-termination commissions until July 31, 1993.[6] Plaintiff argued that paragraph 11 of the Agreement did not survive the 1983 amendment, because the purpose of the amendment would be nullified if defendants could prematurely cancel it, without penalty, on sixty days' notice. Alternatively, plaintiff argued that if paragraph 11 is deemed to survive, it creates an ambiguity and, in that situation, the parties to the agreement at the time, i.e., Smith and Kearney, are best able to give definition and construction to the terms of a contract and parol evidence is needed to ascertain their intent. Plaintiff argued that under these circumstances, summary disposition is inappropriate. As another alternative, plaintiff argued that, should the court conclude paragraph 11 survived the amendment, notice nevertheless had to be tendered sixty days prior to the expiration of the contract, i.e., by May 31, 1989. Plaintiff argued that no such notice was received and that, therefore, under either interpretation of the applicable termination notice provision, the agreement extended to July 31, 1992.[7]

Finally, plaintiff argued that defendants' literal interpretation of the Agreement obligated them to pay plaintiff the five percent commission rate on sales stated in the Agreement. Plaintiff urged that

paragraph four of the Agreement was not amended in a writing signed by both parties, and the reduction of the commission rate to 2 ⅛% was temporary and on an interim basis to help defendants' predecessor, MCL, with its borrowing capability. Plaintiff sought immediate judgment in the amount of $115,101 plus interest, costs, and attorney fees, including sanctions, and asked that the court determine that plaintiff is entitled to post-termination commissions through July 31, 1993 at a 5% commission rate on all parts sold from 1/1/90 through at least 7/31/93.

No oral argument was heard on the summary disposition motions. The circuit court's opinion and order states that "the parties assert that there are no facts in dispute in this matter, and that the issue of law to be resolved is whether paragraphs 11 and 12 survive the Amendment." The circuit court concluded that the 1983 amendment rendered the contract ambiguous because it could be interpreted either to abrogate or co-exist with the sixty-day notice of termination provision. The court resolved the ambiguity against plaintiff, the drafting party of the October 1983 amendment:

> This Court finds that the [1983] Amendment renders the contract ambiguous. A contract is ambiguous when either the general language or particular words or phrases used are doubtful as to meaning, or, in the light of other facts, reasonably capable of having more than one meaning. Reading those paragraphs together, the Amendment could replace paragraph 11 or coexist with it.
>
> Read as if the Amendment replaces paragraph 11, the contract indicates that Flex must give Lynch notice of cancellation at least one year before the end of the contract term, otherwise the contract is automatically renewed for another two years beyond the end of the contract term.
>
> Alternatively, the Amendment could coexist with paragraph 11. Flex can terminate the agreement at any time as long as it gives Lynch sixty days' notice. To renew the contract, the parties either draw up a new agreement, or, one year before the term expires, the current agreement is extended for an additional two years from the expiration date.
>
> Extrinsic evidence, including parol evidence, is admissible to clarify the meaning of an ambiguous contract. Lynch proposes to offer the testimony of G. Peter Smith, Lynch's President and drafter of the Amendment to resolve any ambiguity surrounding the Amendment. But a one-sided self-serving interpretation by one party is of no assistance in interpretation. Davis v Kramer Brothers Freight Lines, Inc., 361 Mich 371, 376; 105 NW2d 29, 31-32 (1960); Gaydos v White Motor Corp., 54 Mich App 143, 149-50; 220 NW2d 697 (1974).
>
> Moreover, any imperfection or ambiguity in a contract must be construed against the drafter. In this case, because Lynch was the drafter of the Amendment, any ambiguity would have to be resolved in favor of Flex, the nondrafting party.

> Resolving the ambiguity in favor of the nondrafting party means that paragraph 11 would survive the Amendment. Under this interpretation, Flex was required to give Lynch sixty days' notice (per paragraph 11), and then pay Lynch one year of post termination commissions (per paragraph 12). Therefore, Lynch's argument that it is due post-termination commissions through at least July 31, 1993 fails.
>
> Lynch also argues that paragraph 4 of the Agreement obligates Flex to pay Lynch the 5% commission rate on sales of all General Motors Divisions as stated in the Agreement. Lynch admits that the parties reduced the commission rate to 2.5%, and this rate continued from 1988 until Flex's termination of Lynch became effective on December 31, 1989 (Final Pretrial Order, March 22, 1993, uncontested fact (a) at 4). However, Lynch asserts that this arrangement was only temporary.
>
> Although several modifications of the commission rate were proposed, neither party has provided an amended commission rate agreement in a writing that is signed by both parties as required per paragraphs 4 and 16 of the original Agreement. Therefore neither party has established any other terms or the duration of a reduced commission rate arrangement. The only term presented to this Court is the 2.5% paid from 1988 through December 31, 1989. Therefore, Flex does not owe Lynch a 5% commission. [Several citations omitted.]

The circuit court granted plaintiff's motion for immediate judgment, requiring defendants to pay $115,101 plus statutory interest, and granted defendants' motion for summary disposition as to all other claims pursuant to MCR 2.116(C)(10). Plaintiff's request for costs, attorney fees and sanctions was denied.

III

Plaintiff argues that the circuit court erred in permitting defendants to rely on the Agreement, which they had previously repudiated and by which they denied being bound. Plaintiff argues that defendants cannot accept and reject the same instrument, or having availed themselves as to part, defeat its provisions in any other part. Further, plaintiff argues that defendants waived the defense under MCR 2.111(A)(2), for failure to assert it. Plaintiff also argues that defendants were estopped from relying on any of the Agreement's provisions, and that defendants' protracted defense on the basis they were not bound by the Agreement prejudiced plaintiff.

Defendants argue that they did not simultaneously advance conflicting positions, but abandoned their defense that there was no binding contract, and conceded partial liability under the Agreement. Defendants argue that they were not required to move to amend their answer to add this defense because it is one involving interpretation of the contract.

MCR 2.111(F)(2) requires that defenses be asserted in a responsive pleading, and provides that a defense not asserted in the responsive pleading or by motion is waived, except for the defenses of lack of jurisdiction over the subject matter and failure to state a claim on which relief can be granted.

Defendants' answer denied liability to plaintiff under the Agreement, and that position was adhered to for approximately thirty months. Defendants never moved to amend their answer to assert the defense that damages were limited by the contract. Further, regardless of whether defendants were required to plead this defense, it is uncontested that defendants asserted a different defense and denied the applicability of the Agreement for thirty months.

At the hearing on the motions in limine, when plaintiff's counsel argued that defendants should not be permitted at that late date to avail themselves of the Agreement, the court asked plaintiff's counsel whether he was asking the court not to allow defendants to amend their answer:

> [Plaintiff's counsel]: . . . I think this Court has the authority to get to the position that we are asking it to get to with regard to saying, okay, because you have denied [the Agreement's] existence and because we've gone to these lengths, we—you now at this late, at this late date—
>
> THE COURT: You can't amend your answer.
>
> [Plaintiff's counsel]: --you can't—
>
> THE COURT: Is what you're asking me to do is to not allow them to amend their answer?
>
> [Plaintiff's counsel]: Oh, I think that's right, Judge. Exactly it. Because that's exactly what this turns into. It turns into an absolute amendment of their answer which, if the Court goes back and looks up the answer and we've cited it—
>
> THE COURT: So what you're saying is that you want me to—
>
> [Plaintiff's counsel]: It's an admission.
>
> THE COURT: --to exercise my discretionary powers to refuse to allow them—
>
> [Plaintiff's counsel]: Yes.
>
> THE COURT: --to amend their answer?
>
> [Plaintiff's counsel]: Yes, Your Honor. Because, in fact--
>
> THE COURT: We took about a half hour to—that what you're saying is—and if they can't amend their answer, then the proofs that you will present at trial, you will not present these, and they can't come back and present it because they can't amend their answer.

[Plaintiff's counsel]: Yes. And, Judge, you know, from our perspective, I think that the Court, with that understanding, can understand our position with regard to the lengths that we've gone to bring a case before this Court--

THE COURT: Trust me. If I appointed Judge Thorburn as the discovery master, you know that I understood that there were problems.

* * *

THE COURT: All right. I see the cases, but I don't see the interpretation of the cases. The doctrine is, of course, that one, you know, that, in essence, that a person cannot accept or reject the same instrument [and] having availed themselves of a part of that instrument, turn around and defeat it.

But in the two recent Michigan cases that you've cited, one you're talking about wills and people who have taken under the provisions of the wills and what the Courts have said is that if you have taken under the provisions, you can't deny its existence, and therefore, it exits [sic]. It doesn't mean that if they say it doesn't exist and you produce a document that I can then as a Judge say, "Excuse me, but it doesn't exist because—because you came too late."

The only thing that I can think of again is what I said earlier is that what you would like me to do is to refuse to allow them to amend their pleadings, but that would not in essence, and I don't really want to talk about it in terms of equity, it wouldn't be factually, it wouldn't be logical for me to indicate that they couldn't when I have the document in front of me.

So if they were to say it didn't exist and you were to come forward and say, "Look, they benefited under this contract X, Y and Z." Then that doctrine would apply and I would say, "Yes, it does exist." And you're estopped from denying its existence, but the cases that have been cited are more in the doctrine of estoppel that they are denied, they are estopped from denying the existence. Not that I can say in the face of a written document you're estopped from asserting that there is a document. I don't think that it goes that way and I don't think that it can be reversed that way.

The circuit court in effect permitted defendants to amend by granting defendant's motion for summary disposition. We review a circuit court's determination regarding leave to amend an answer for abuse of discretion. *Horn v Dept of Corrections*, 216 Mich App 58, 65; 548 NW2d 660 (1996). We cannot conclude that the court's determination to permit defendants to assert that the Agreement applied and limited damages was an abuse of discretion.[8]

Further, we reject plaintiff's estoppel argument.[9] Equitable estoppel arises where a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe certain facts; the second party not only must have relied justifiably on this belief, but also must be

subject to prejudice if the first party is permitted to deny the facts upon which the second party relied. *Penny v ABA Pharmaceutical Co*, 203 Mich App 178; 511 NW2d 896 (1993). There is no indication that plaintiff was induced by defendants to believe that the Agreement was not binding. Further, although plaintiff does not invoke the doctrine of judicial estoppel specifically, we note that it is inapplicable here because it pertains to a party who asserts a position in a prior proceeding and an inconsistent position in a subsequent proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994). There was only one proceeding here.

Nevertheless, we observe that the only conclusion supported by the record is that defendants repeatedly asserted that they were unaware of, and were not bound by, the Agreement, and did not admit to the Agreement's applicability until March, 1993. The record is devoid of any reasonable explanation for defendants' failure to admit the Agreement's applicability and assert their defenses based on the contract until the eve of a scheduled trial. Under these circumstances, the circuit court's decision to allow defendants to raise the belated defense that the Agreement limited damages to $115,101 should have been counterbalanced by conditioning the "amendment" on defendants' reimbursing plaintiff for the additional expenses, including attorney fees, that would have been unnecessary had a request for amendment been filed earlier. MCR 2.118(A)(3); *Stanke v State Farm Mutual*, 200 Mich App 307, 321; 503 NW2d 758 (1993); see also, e.g., *Weymers v Khera*, 210 Mich App 231, 242, n 7. Moreover, while we conclude that the court's analysis in the "Costs, Attorney Fees, and Sanctions" section of its written opinion does not constitute an abuse of discretion, the analysis focuses on defendants' pleading, and does not address the additional papers and documents filed by defendants during the course of the proceedings. MCR 2.114(A). We remand with directions that the circuit court again address the issue of sanctions.

IV

Plaintiff next argues that the circuit court did not consider the parties' intent in interpreting the Agreement, which was to establish a multi-year term for their relationship, with an automatic extension, absent a one-year notice of termination. Plaintiff further argues that after the 1983 amendment, plaintiff and Flex's predecessor continued a course of performance consistent with this interpretation. Plaintiff argues that although an ambiguity is to be construed against the drafter, that rule of construction is subordinate to the rule of practical contract interpretation, which is to ascertain and give effect to the parties' intent. We agree.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *St Paul Fire & Marine Ins Co v Quintana*, 165 Mich App 719, 722; 419 NW2d 60 (1988). The circuit court must consider the pleadings, affidavits, depositions, and other documentary evidence. The test is whether the kind of record which might be developed, giving the benefit of any reasonable doubt to the non-movant, would leave open an issue upon which reasonable minds might differ. *Linebaugh v Berdish*, 144 Mich App 750, 754; 376 NW2d 400 (1985).

The construction of an unambiguous and unequivocal contract is a question of law for the court. *Skotak v Vic Tanny, Int'l*, 203 Mich App 616, 619; 513 NW2d 428 (1994). However, where an

ambiguity exists, a court must construe the contract so as to effectuate the intent of the parties, if ascertainable. *Fox v Detroit Trust Co*, 285 Mich 669, 675-677; 281 NW 399 (1938). A contract must be construed and given effect with reference to the intention of the parties as it existed at the time of entering into the contract. 17A CJS, Contracts, § 295, p 63. The intention of the parties may be gathered from all the pertinent facts and circumstances. *Id*. at 46. Extrinsic evidence is admissible to clarify the meaning of an ambiguous contract. *Sturgis Savings & Loan Ass'n v Italian Village, Inc*, 81 Mich App 577, 580; 265 NW2d 755 (1978).

We agree with plaintiff that the rule of construing ambiguities against the drafter is subordinate to the rule of practical contract interpretation. 17A CJS, Contracts, § 295, p 45, 56-57 ("The fundamental, basic, primary, ultimate, or paramount question to be determined in the legal construction of all contracts is what the real intention of the parties was," and "[i]t is the duty, function, or obligation of the court to apply this rule; and it is the one which should first be applied." Emphasis added.)

The circuit court's opinion makes no mention of an attempt to ascertain the intent of the parties to the Agreement -- Smith and Kearney -- at the time of the 1983 amendment. While the filing of the cross-motions for summary disposition does imply that "the parties assert no facts are in dispute," plaintiff's brief clearly argued that if the court rejected its interpretation of the contract and concluded that the contract was ambiguous, parol evidence would be necessary and summary disposition would be inappropriate. Further, at the hearing on the cross-motions in limine, plaintiff argued Smith's position as to the 1983 amendment's effect on the original agreement and stated that if necessary Smith would so testify. The circuit court's determination that Smith's testimony would be one-sided and self-serving disregarded that Smith was a party to the original Agreement and to the 1983 amendment, while defendants, who acquired MCL in 1989 and disclaimed knowledge of the existence of the Agreement until 1993, were not. The two cases cited by the circuit court do not support the court's decision to preclude Smith's testimony in the instant case. [10]

We therefore remand to allow presentation of evidence regarding the intent of the parties in entering into the Agreement, and the 1983 amendment's effect on the Agreement, particularly, but not solely, as to the continued viability and effect of the sixty-day notice of termination provision. In this regard, we further note that the circuit court did not address plaintiff's argument that, assuming the sixty-day notice provision survived the 1983 amendment, defendants failed to give notice sixty days prior to the expiration date stated in the Agreement.

V

While we reject plaintiff's argument that the court erred in not applying the original written Agreement's provision for a 5% commission on sales of parts to all General Motors divisions, we conclude a genuine issue of fact remained as to what percentage rate of commissions should apply. Under the Agreement, the commission rate was five percent. The December 29, 1987 letter from Smith to Kearney states "we would like to suggest in consideration for the temporary reduction you suggested to 2.5% . . .," and included a proposal that the commission rate increase to 3% in 1989 and 4% in 1990. MCL responded to this letter, suggesting that the 2.5% commission rate continue through

March 31, 1989, and then increase to 3% on April 1, 1989, and to 5% on all new business from April 1990 forward, with a 2.5% rate on retained business. While neither letter was signed by the other party, the commission rate was in fact reduced, and an April 5, 1989 letter from Smith to Kearney states "[w]e agreed to a commission reduction over a year ago to help you restore profitability to the company." This letter also states that MCL had been in arrears since that time, and at the time of the letter was seven months behind, and that plaintiff would "like it understood" that "in the event of a restructuring or sale" plaintiff expected "to get paid in strict accordance with the terms of our existing contract." Under these circumstances, there were genuine issues regarding the agreed-upon commission rate, and, while the court correctly denied plaintiff's motion for summary disposition, defendant's motion should have been denied as well.[11]

VI

Plaintiff also argues that the circuit court erred in refusing to apply MCL 600.2961; MSA 27A.2961 retroactively. Plaintiff filed a motion to amend its complaint to add a claim under this statute, which the circuit court denied on the basis that an amendment would be futile because the statute creates a new substantive right and is punitive and thus may not be applied retroactively. A retroactive application would have allowed plaintiff to obtain actual damages and an amount equal to two times the amount of commissions, if defendant, as principal, is found to have intentionally failed to pay plaintiff the sales representatives' commission when due. MCL 600.2961(5)(a-b).

Statutes are presumed to operate prospectively unless a contrary intent is clearly manifested. *Franklin v Ford Motor Co*, 197 Mich App 367; 369 495 NW2d 802 (1992). The recognized and often employed exception to this general rule is that where a statute is remedial or procedural in nature, it applies retroactively. *Id.* However, statutes having a punitive intent will not be given retroactive effect. *Herring v Golden State Insurance Co,* 114 Mich App 148, 157-159; 318 NW2d 641 (1982).

We conclude that MCL 600.2961; MSA 27A.2961 is punitive in nature, as it allows, in addition to the recovery of actual damages, recovery in the amount of two times the commissions due for a principal's intentional failure to pay commissions when due. See Black's Law Dictionary, 3d edition (defining exemplary or punitive damages, in pertinent part: "Unlike compensatory or actual damages, punitive or exemplary damages are based upon an entirely different public policy consideration—that of punishing the defendant or of setting an example for similar wrongdoers . . .. In cases in which it is proved that a defendant has acted willfully, maliciously, or fraudulently, a plaintiff may be awarded exemplary damages in addition to compensatory or actual damages."); see also *Stevens v Creek*, 121 Mich App 503, 508-509; 328 NW2d 672 (1982)(holding that the treble damages provided in MCL 600.2919; MSA 27A.2919 for willful and voluntary removal of timber from another's lands are punitive in nature.) Thus, we conclude the circuit court correctly denied plaintiff leave to amend its complaint to seek damages under MCL 600.2961; MSA 27A.2961.

We affirm the circuit court's grant of immediate judgment to plaintiff in the amount of $115,101 and remand for proceedings consistent with this opinion. We reject plaintiff's argument that the case

should be reassigned to a different judge on remand. Plaintiff has in no respect overcome the presumption of judicial impartiality. *In Re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW 2d 326 (1992).

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard Ryan Lamb

[1] This effective date was a handwritten change from the typed January 1, 1982 date and was initialed by the signatories.

[2] The copy in the record is difficult to read, apparently sections had been highlighted. Our transcription may therefore have minor errors.

[3] Defendants had earlier unsuccessfully sought leave to amend their answer to include different defenses--the affirmative defense of statute of frauds and to invoke an arbitration provision. The circuit court denied the motion as untimely. In that motion to amend, defendants denied that there ever was an agreement between the parties as set forth in plaintiff's complaint.

[4] We are confused by plaintiff's argument that failure to provide notice of termination resulted in the extension of the contract until July 31, 1992, rather than July 31, 1991. It would appear that the contract called for consecutive automatic two-year extensions of the contract, to become effective one year before the expiration date. Thus, the initial contract expiration date was July 31, 1987. However, on July 31, 1986, the contract was automatically extended for two years, from July 31, 1987 to July 31, 1989, as stated in the 1983 amendment. The contract term would thus fluctuate between one and three years, as also stated in the amendment. Immediately before July 31, 1986, the contract had one year remaining; immediately after, there were three years remaining. Extending this construction, the contract would again be automatically renewed on July 31, 1988, and the term would be extended from July 31, 1989 to July 31, 1991.

[5] See note 4.

[6] See note 4.

[7] See note 4.

[8] In supplemental brief, plaintiff cites two cases, *Soderberg v Detroit Bank and Trust Co*, 126 Mich App 474; 337 NW2d 364 (1983), and *Taylor v City of Detroit*, 182 Mich App 583; 452 NW2d 826 (1989), in support of its related argument that the circuit court erroneously believed that because the Agreement existed the court was compelled to rule that it governed. We do not believe that the circuit court's determination was based on the mere existence of the Agreement, but was more likely based on the entire record, including the final joint pre-trial order.

[9] Equitable estoppel is a doctrine which operates to bar a person from denying the truth of a fact which has in the view of the law become settled by acts of the party, express or implied. 9 Michigan Civil Jurisprudence, Estoppel, §§ 2, 3, pp 105-106.

[10] *Davis v Kramer Bros Freight Lines, Inc*, 361 Mich 371; 105 NW2d 29 (1960), was a contract dispute. The plaintiffs alleged that the parties had an oral agreement by which they were entitled to 65% of gross revenues for freight transportation, that they'd performed the work, and that deductions had improperly been made from their earnings. The plaintiffs further alleged that from time to time lease contracts in furtherance of the oral agreement had been entered into, one of which stated specifically how compensation should be computed, but that unauthorized deductions had been made from sums due them.

Defendant moved to dismiss on the basis that the items for which plaintiffs claimed reimbursement were clearly excluded by the written instruments and there was thus no issue of fact for the court. The circuit court granted the defendant's motion to dismiss on the basis that the plaintiff was attempting to change the terms of the lease or to interpret it differently than it had been applied during the years of operation thereunder.

The Supreme Court reversed, noting that the first step the court should have taken was to determine the terms of the contract. The Court then addressed the defendant's argument that the parties had acquiesced for many years in interpretations of the contract at variance with those now asserted by the plaintiffs, and in this discussion stated the proposition the circuit court in the instant case relied on:

> There is no doubt that evidence of practical interpretation by the parties is admissible as an aid in the determination of the meaning to be given legal effect. But the key word in this sentence is in the plural, "parties." A one-sided, self-serving interpretation by one party is of no help in interpretation. Acquiescence by the other party is required to establish a practical construction by the parties and this is precisely the thrust of appellants' claim of error. 'The plaintiff and other brokers . . .,' states the affidavit in opposition to the motion to dismiss, 'complained continuously of their treatment and the construction attempted to be placed upon said leases, and never acquiesced in the defendant's construction of the contract.'
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> * * *
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> Upon the motion to dismiss for failure to state a cause of action, all facts well pleaded must be taken as true for the purposes of the motion. Here the declaration properly alleged the making of a contract, its breach, and damages flowing therefrom. If the facts were as plaintiffs alleged (and for the purposes of this motion we must assume that they are), plaintiffs clearly have a cause of action. [361 Mich at 375-76.]

Gaydos v White Motor Corp, 54 Mich App 143; 220 NW2d 697 (1974), is also distinguishable, as it involved the interpretation of a severance policy held to be clear and unambiguous and a unilateral contract. As such, parol evidence was not admitted.

The plaintiffs were former employees of defendant corporation, which was acquired by AM General Corp in 1971. On July 1, 1971, the date of the sale, a memo was sent to employees stating that effective that date, AM had acquired defendant and that as a result they would be employed by AM, who would continue operations under the same general terms then in effect. The plaintiffs were taken off the defendant's payroll.

In 1966, the defendant by memo had adopted a policy and procedure on severance pay which stated that severance pay is given to certain employees terminated at the Company's request, with several exceptions inapplicable to the plaintiffs.

The plaintiffs brought suit based on contract to recover severance pay. The defendant argued that the severance pay contract was partially oral and that parol evidence should be admitted to supplement and facilitate interpretation of the written memo. The trial court held that the contract was clear and unambiguous and refused to admit parol evidence.

This Court affirmed, concluding that the defendant's adoption of the severance policy constituted an offer, and that the employees having continued to work thereafter constituted consideration for a unilateral contract, upon which the plaintiffs had a right to rely. This Court noted:

> Thus, the focus of the case was interpretation of a unilateral contract. Only in cases of ambiguity in the terms of a written contract will courts resort to the use of extraneous evidence. When the contract is clear and unambiguous, the conduct of the parties cannot be used to prove that the contract means something other than what appears on its face.
>
> > 'While the construction placed on a contract by one of the parties may have bearing on the meaning to be accorded to the agreement, and a party's construction of his own language in a contract is the highest evidence of his own intention, the meaning of the contract cannot be established by the construction placed on it by one of the parties, or by only some of the parties, unless such interpretation has been made to and relied on by the other party or parties . . . .'
>
> Where parol seeks to change the clear scope, effect, and obligation of the written contract, it should be rejected. A onesided, self-serving interpretation is of no assistance in interpretation. [54 Mich App at 149.]

[11] Defendants argue that Smith's writings agreed to the 2.5% rate and, further, that all contracts can be orally modified, including those which require that modifications be in writing. However, defendants do not address or explain, assuming the Agreement was modified to decrease the commission rate to 2.5%, why such a modification would not also include increases in the commission rate and an extension of the term of the Agreement until either July 1991 or the end of 1991, as reflected in Smith's letter of December 29, 1987, and MCL's response of March 16, 1988.