STATE OF MICHIGAN

COURT OF APPEALS

QUALITY WATER AND AIR, INC.,

Plaintiff-Appellee,

v

D.A.B. INDUSTRIES, INC., TROY DESIGN & MANUFACTURING CO., WILLIAM ROBERTS, RICHARD J. JANES and BRIAN WERTHMANN,

Defendants-Appellants.

UNPUBLISHED
December 30, 1996

No. 188459
Wayne County
LC No. 93-326026-CK

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM

Defendants appeal as of right from a judgment for plaintiff, Quality Water and Air, Inc., entered on the jury verdict in this breach of contract case. Plaintiff filed a complaint alleging breach of contract by defendants D.A.B. Industries, Inc. ("DAB") and Brian Werthmann, breach of fiduciary duty by Werthmann, intentional interference with a business relationship by defendants Werthmann, Richard Janes, William Roberts, and Troy Design & Manufacturing, Inc. ("TDM") and a civil conspiracy to violate the contract with DAB by all defendants. Plaintiff later added a claim for unpaid commissions under the Michigan Sales Representative Statute ("MSRS"), MCL 600.2961; MSA 27A.2961. After the close of proofs, this complaint was effectively amended to include only breach of contract claims against all defendants and unpaid commission claims against DAB, TDM, and Roberts.[1] All claims against Janes were dismissed. The jury rejected the MSRS claims but found the remaining defendants liable on the breach of contract claims. We affirm but remand solely for determination of the amount of the commission to Werthmann that plaintiff saved as a result of DAB's sale of cam-cut to Ford.

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

Roberts is a co-owner of both DAB and TDM. In 1990 or 1991, TDM developed a rigid foam for use in making prototypes and models. The initial product was a 4" x 18" x 96" board called "cam-cut." DAB, established by Roberts and another TDM owner as a marketing and sales company, contracted for the production of and sold cam-cut. Plaintiff accepted an offer from Roberts to market and distribute cam-cut for DAB. Plaintiff characterized this arrangement as an exclusive distributorship. Plaintiff hired Werthmann to sell cam-cut on a commission basis. Both plaintiff and Werthmann understood that this arrangement precluded Werthmann from selling cam-cut for another company. On November 1, 1992, Roberts terminated the distribution arrangement with plaintiff. However, prior to that date, DAB sold cam-cut boards and milling blocks or bucks made of the same type of rigid foam directly to Ford, one of plaintiff's customers.[2] In addition, during 1992, Werthmann received a $4,000 commission or payment from DAB for sales of cam-cut. Based on these facts, plaintiff filed claims against DAB, TDM, Roberts, Janes, and Werthmann.

Defendants' first argument on appeal is that the trial court erred in denying defendants' motion for a directed verdict with respect to plaintiff's breach of contract claims against TDM, Roberts, and Werthmann. However, when defendants' directed verdict motion was made, the claims against TDM and Roberts were civil conspiracy, intentional interference with a business relationship, and violation of the MSRS. Because the trial court was not asked to direct a verdict after the complaint was, in effect, amended to add breach of contract claims against TDM and Roberts, this issue was not raised at the trial court level and is not preserved for review in this Court. See *Garabedian v Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995).

The trial court did not err in denying defendants' directed verdict motion on the breach of contract claim against Werthmann. Considering the evidence and all reasonable inferences arising from that evidence in the light most favorable to plaintiff, this Court concludes that reasonable minds could differ with respect to whether Werthmann had a contract with plaintiff and whether Werthmann sold cam-cut material to Ford for DAB in violation of that contract. See *Haberkorn v Chrysler Corp*, 210 Mich App 354, 364; 533 NW2d 373 (1995).

Defendants next challenge the trial court's denial of their motion for a directed verdict with respect to damages. Defendants argue that, by law, plaintiff can only recover its net profits for breach of contract and that, because plaintiff only provided evidence related to its gross profits, it failed to create a genuine issue of fact related to damages. However, defendants did not specifically raise this issue in their directed verdict motion. Therefore, this issue was not preserved and this Court will not review the trial court's decision on the directed verdict motion on this basis. See *Garabedian, supra* at 475.

Defendants next challenge the trial court's jury instructions or failure to instruct on damages, contract law, and the individual liability of TDM and Roberts. Although defendants did not specifically request instructions on these issues or object to the instructions as given, this Court may review the jury instructions to prevent manifest injustice notwithstanding MCR 2.516(C). *Hunt v Deming*, 375 Mich

581, 585; 134 NW2d 662 (1965); *Mills v White Castle Systems, Inc*, 199 Mich App 588, 591-592; 502 NW2d 331 (1993). In a breach of contract claim, the plaintiff may only recover net profits. *Om-El v Newcor*, 154 Mich App 471, 478; 398 NW2d 440 (1986). Net profits are defined as gross profits from the fulfillment of the contract less any expenses which the plaintiff did not incur as a result of the breach. *Id*. The trial court did not instruct the jury on the appropriate measure of damages under the breach of contract claim. This Court has previously found manifest injustice where an inappropriate damages instruction or no instruction at all was given because the jury's verdict could have been based on a misunderstanding of the proper measure of damages. See *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 341-342; 425 NW2d 791 (1988); *Getman v Matthews*, 125 Mich App 245, 250; 335 NW2d 671 (1983); *Bluemlein v Szepanski*, 101 Mich App 184, 191; 300 NW2d 493 (1980).

However, because defendants failed to challenge plaintiff's evidence regarding damages by questioning plaintiff about its unincurred expenses or to otherwise raise this issue in any respect at trial, we find with one exception that the correct jury instructions would not have changed the damage award and, therefore, that review is not necessary to prevent manifest injustice. See *Gore v Rains & Block*, 189 Mich App 729, 742; 473 NW2d 813 (1991). The one exception concerns the amount of the commission not required to be paid by plaintiff to Werthmann as a result of DAB's sale of the cam-cut to Ford. We find that sufficient evidence was presented at trial to have warranted an instruction that plaintiff's saved commission should be evaluated in calculating plaintiff's lost net profits.

We also find that there is no manifest injustice in failing to review defendants' challenge to the absence of jury instructions on contract theory or individual liability under a contract. The evidence presented at trial could support the jury's finding that each defendant was a party to the distribution contract with plaintiff, *id*., and defendants have not pointed to any argument or evidence which might have created an improper understanding of a contract or individual liability under a contract, see *Getman, supra* at 250.

Defendants also challenge the trial court's denial of their motion for judgment notwithstanding the verdict with respect to damages or, in the alternative, remittitur. Defendants argue that plaintiff's failure to provide evidence of the proper measure of damages, that is, net profits rather than gross profits, required the trial court to grant these motions. However, considering the evidence in the light most favorable to plaintiffs, this Court finds that reasonable minds could differ with respect to the appropriate amount of damages, with the exception that the amount of the commission to Werthmann saved by plaintiff should have been deducted from the amount of damages awarded plaintiff. Thus, the trial court erred in denying defendants' motion for judgment notwithstanding the verdict on damages with respect to this amount.

Defendants next challenge the trial court's award of mediation sanctions. Mediation sanctions were appropriate in this case because defendants rejected and plaintiff accepted a mediation award and the jury verdict was not more favorable to defendants than that award. See *Keiser v Allstate Ins Co*,

195 Mich App 369, 372; 491 NW2d 581 (1992). While the award of sanctions would be reversed if the judgment were reversed on appeal, *Severn*, *supra* at 417, the trial court did not abuse its discretion in awarding sanctions based on the initial jury verdict, *Dean v Tucker*, 205 Mich App 547, 551; 517 NW2d 835 (1994).

Lastly, defendants challenge the trial court's denial of a directed verdict with respect to plaintiff's MSRS claim. We agree, but find the error to be harmless. Plaintiff purchased cam-cut from DAB and resold the material to its own customers at a higher price, retaining the mark-up as profit. The statute excludes persons who purchase products for resale from the definition of sales representative and, therefore, from coverage under the statute. MCL 600.2961(1)(e); MSA 27A.2961(1)(e). Even considering the evidence in the light most favorable to plaintiff, reasonable minds could not differ with respect to whether plaintiff was a sales representative for purposes of the MSRS. See *Haberkorn*, *supra* at 364. Thus, the trial court erred in denying defendants' motion for a directed verdict on this claim. However, in light of the jury verdict finding that defendants were not liable under the MSRS, this error was harmless. See *Willoughby v Lehrbass*, 150 Mich App 319, 329-330; 388 NW2d 688 (1986).

Defendants argue that this error was not harmless because the jury instructions which were given for plaintiff's MSRS claim confused the jury. However, the instructions were correct statements of the law. See MCL 600.2961(1)(e); MSA 27A.2961(1)(e). Furthermore, defendants do not point to any particular language in the jury instructions which could have confused the jury regarding the remaining claim nor do they provide any case law to support their claim that the necessity of giving jury instructions for a claim which need not have been submitted to the jury could create error requiring reversal. This Court will not search for the authority to sustain or reject a party's position. *American Transmission v Attorney General*, 216 Mich App 119, 121; 548 NW2d 665 (1996). Moreover, defendant specifically requested the trial court to read the definitions of commission and sales representative from the MSRS as part of the jury instructions. Defendants could have framed these instructions to avoid confusing the jury regarding the breach of contract claims, but specifically chose the instructions actually given. A party may not request reversal on an error that the party itself caused. *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993).

This matter is remanded to the circuit court exclusively for a determination of the amount of the commission to Werthmann that plaintiff saved as a result of DAB's sale of cam-cut to Ford. Such amount shall be subtracted from the damages awarded to plaintiff. In all other respects, the trial court is affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo

[1] Plaintiff made no formal motion to amend the complaint to conform to the evidence under MCR 2.118(C). However, plaintiff's initial complaint clearly indicated that DAB and TDM were related entities and that Roberts held positions of authority with both corporations. In its July 12, 1994 trial brief, plaintiff claimed that it had a contractual relationship with the corporate defendants and with Werthmann and that all the defendants had breached their contracts with plaintiff. Most importantly, there was extended discussion regarding the jury instructions and jury verdict form in which the trial court insisted that the jury verdict form separately list breach of contract questions regarding each of the defendants. Defendants did not object to a jury verdict form that clearly required the jury to consider breach of contract claims against DAB, TDM, Roberts, and Werthmann and unpaid commission claims against DAB, TDM, and Roberts. Defendants thereby apparently acquiesced in this effective amendment of plaintiff's complaint. See *Browder v International Fidelity Ins Co*, 413 Mich 603, 608-609; 321 NW2d 668 (1982).

[2] While plaintiff characterized the product sold to Ford as cam-cut, defendants contended that cam-cut referred only to boards of specific dimensions and that products of different dimensions developed from the same type of material could not be properly characterized as cam-cut. However, even among testifying TDM employees, there was dispute over this latter proposition.