

STATE OF MICHIGAN
COURT OF APPEALS

BIT BY BIT COMPUTING, INC.,

Plaintiff/Counterdefendant-
Appellant,

v

GRAND BLANC PRINTING INC,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

January 24, 2003

No. 227017

Genesee Circuit Court

LC No. 96-048430-CK

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, the trial court entered a judgment of no cause of action on plaintiff Bit by Bit Computing's complaint against defendant Grand Blanc Printing and awarded defendant \$6,242.50 on its counter-complaint against plaintiff. The trial court later denied plaintiff's motion for a judgment notwithstanding the verdict (JNOV) or a new trial. Plaintiff appeals as of right, and we affirm.

Plaintiff first argues that the trial court erred in denying its motion for separate trials with regard to its complaint and defendant's counter-complaint. We review this issue for an abuse of discretion. *LeGendre v Monroe Co*, 234 Mich App 708, 719; 600 NW2d 78 (1999).

MCR 2.505(B) allows a trial court to sever claims and conduct separate trials "[f]or convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy" This Court has held that "the decision to sever trials should be ordered only upon the most persuasive showing that the convenience of all parties and the court requires it." *LeGendre, supra* at 719. Here, plaintiff did not make a "persuasive showing" that severance was required to avoid prejudice. Plaintiff argues that severance was necessary to avoid prejudicing it and confusing the jury but does not specify how prejudice and confusion would arise from the joinder of claims. The record does not show a probability of prejudice and confusion. The allegations and testimony with regard to both plaintiff's claim and defendant's counterclaim were straightforward and uncomplicated, so there was no danger that the jury would be confused by having to decide two different claims. Plaintiff was free to argue that it did not owe any money as alleged in the counter-complaint because another entity contracted for the sale. Because plaintiff has not presented evidence that it was prejudiced by the decision not to

bifurcate the claims, the trial court did not abuse its discretion in denying the motion. *Hodgins v Times Herald Co*, 169 Mich App 245, 261; 425 NW2d 522 (1988).

Next, plaintiff argues that the trial court erred by allowing defendant to call two witnesses – Michael Kilbreath and Dale Hampshire – who were not named on defendant’s witness list.

Contrary to plaintiff’s statement in its appellate brief, plaintiff did not timely object to Kilbreath’s testimony, so plaintiff failed to preserve this issue with respect to Kilbreath. See, generally, *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997); see also MRE 103(a)(1). This Court reviews unpreserved evidentiary issues to determine whether a plain error occurred that affected a party’s substantial rights. *Hilgendorf v St John Hosp and Medical Center Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

No plain error occurred with respect to Kilbreath. Defendant’s witness list stated that defendant could call all witnesses listed on plaintiff’s witness list. Because plaintiff’s list named Kilbreath as a potential witness, defendant adequately satisfied the trial court’s scheduling order and MCR 2.401(I)(1). Plaintiff had sufficient notice that Kilbreath might testify. Because Kilbreath’s testimony did not create a “trial by surprise,” the trial court did not err in allowing his testimony.¹ *Grubor Enterprises v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993), quoting *Stepp v Dep’t of Natural Resources*, 157 Mich App 774, 779; 404 NW2d 665 (1987).

Plaintiff preserved the issue regarding Hampshire’s testimony with a timely objection at trial. We therefore review this issue for an abuse of discretion. See, generally, *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998), *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90; 618 NW2d 66 (2000), and *Jernigan v General Motors Corp*, 180 Mich App 575, 584; 447 NW2d 822 (1989). “An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias.” *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). Moreover, an error in the admission or exclusion of evidence does not require reversal unless a substantial right of the party is affected. MCR 2.613(A); *Ellsworth v Hotel Corporation of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999).

Here, while defendant did not name Hampshire on its initial witness list, it did list him as a witness on a pretrial conference questionnaire dated March 21, 1999, four months before trial. The trial court noted that this “certainly would put the Plaintiffs on notice that they [i.e., defendant] intended to call this gentleman.” Moreover, Hampshire was a former employee of defendant, and defendant listed “all . . . former employees . . . of [the] parties” on its initial witness list.² Finally, the trial court gave plaintiff an opportunity to interview Hampshire before defendant called him to testify. Under these circumstances, we simply cannot say that the trial

¹ We note that our conclusion in this regard would be the same even if plaintiff *had* timely objected to Kilbreath’s testimony.

² We acknowledge that the trial court did not rely on this specific fact in allowing Hampshire to testify. Nonetheless, the wording of defendant’s initial witness list does lend credence to the trial court’s ultimate decision to allow Hampshire to testify.

court *abused its discretion* in allowing Hampshire to testify. Plaintiff was not faced with a trial by surprise. *Grubor, supra* at 628.

Next, plaintiff argues that the trial court should have granted its motion for a JNOV or a new trial with respect to the allegations in its complaint. When reviewing a trial court's denial of a motion for a JNOV, this Court examines the evidence and all legitimate inferences arising from the evidence in the light most favorable to the non-moving party. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). A trial court should grant a motion for a JNOV only if there was insufficient evidence presented to create a jury-triable issue. *Id.* This Court reviews a trial court's decision with regard to a motion for a new trial for an abuse of discretion. *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). The trial court's function when reviewing a motion for a new trial is to determine whether the overwhelming weight of the evidence favors the losing party. *Id.* This Court gives substantial deference to the trial court's conclusion that the verdict was not against the great weight of the evidence. *Id.*

Because this dispute arises from the sale or attempted sale of goods, we look to Article 2 of the Uniform Commercial Code (UCC), MCL 440.2101 *et seq.* See MCL 440.2102 and 440.2105(1). Plaintiff maintains that the parties entered into an oral contract for the sale of the Display Maker for either \$28,888 or \$33,367.74, depending on when defendant paid for the item. Section 2-201 of the UCC requires that contracts for the sale of goods for a price of \$500 or more be in writing to be enforceable. MCL 440.2201(1). However, if defendant accepted the goods it would be liable for payment notwithstanding the absence of a written contract. MCL 440.2201(3)(c); *West Cent Packing, Inc v AF Murch Co*, 109 Mich App 493, 500-503; 311 NW2d 404 (1981). Acceptance is governed by § 2-606, which provides:

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of section 2606), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit. [MCL 440.2606.]

Rejection is governed by § 2-602, which provides, in part:

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the 2 following sections on rejected goods (sections 2603 and 2604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this article (subsection (3) of section 2711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected. [MCL 440.2602.]

Thus, plaintiff could prevail on its claim by convincing the jury that defendant orally contracted for the sale of the unit and then accepted it pursuant to § 2-606. Plaintiff's witnesses' testimony did support this version of events.

Defendant, however, presented evidence to the contrary. Defendant claimed that there was no oral agreement to purchase the Display Maker and that plaintiff agreed to deliver the unit merely for a trial period. Defendant's version of the transaction constitutes a "sale on approval" under § 2-326 of the UCC, MCL 440.2326(1)(a). Section 2-327 provides, in pertinent part:

(1) Under a sale on approval unless otherwise agreed

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions. [MCL 440.2327(1).]

Defendant's witnesses supported that the parties agreed only to a sale on approval and that defendant properly exercised its election to return the goods.

The jury, acting within its province as trier of fact, determined that defendant's version of events was more credible. Because defendant's account of the transaction was legally viable and supported by the evidence, the trial court did not err in denying plaintiff's motion for a JNOV. Further, the great weight of the evidence was not against defendant, so the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Plaintiff additionally argues that the trial court should have granted its motion for a JNOV or a new trial with regard to the counter-complaint. Once again, we disagree. Indeed,

defendant presented sufficient evidence that plaintiff was the proper entity to be billed for the printing services dealt with in the counter-complaint, and the great weight of the evidence did not favor plaintiff on this point.

Finally, plaintiff argues that it was entitled to recovery on an unjust enrichment theory. However, plaintiff's third-party complaint did not state a claim for unjust enrichment, and plaintiff did not raise this theory until it filed its motion for a JNOV. Consequently, this issue is not properly before this Court. *Pro-Staffers, Inc v Premier Manufacturing Support Services, Inc*, 252 Mich App 318, 328-329; 651 NW2d 811 (2002). Moreover, plaintiff cites no law in support of its unjust enrichment argument, thereby abandoning the issue for purposes of appeal. See, generally, *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998).³

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

³ In any event, defendant's evidence sufficiently rebutted a claim for unjust enrichment. The elements of an unjust enrichment claim are "(1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1994). Defendant's evidence showed that it did not receive a benefit from plaintiff. Defendant's president testified that defendant was not able to find a profitable use for the Display Maker. Defendant's conduct did not cause any inequity to plaintiff; if plaintiff had to bear the cost of the Display Maker, it was because plaintiff assumed the risk of incurring that obligation to Laser Master. Accordingly, plaintiff would not have been entitled to a JNOV or a new trial on this theory even if plaintiff had properly pleaded the claim and properly raised the issue on appeal.