

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHAEL P. GARRITY,

Plaintiff-Appellee,

and

TOM BAGNASCO,

Plaintiff,

v

MAC VALVES, INC.,

Defendant-Appellant.

UNPUBLISHED

May 8, 2003

No. 231170

Oakland Circuit Court

LC No. 98-009461-CZ

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Before: Whitbeck, C.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant Mac Valves, Inc., appeals as of right the trial court's orders denying summary disposition, directed verdict, and judgment notwithstanding the verdict (JNOV) respecting plaintiff Michael P. Garrity's claims that arose from his sellback of company stock.<sup>1</sup> Mac Valves also appeals the trial court's award of expert witness fees and mediation sanctions. We affirm in part, reverse in part, and remand for a new trial limited to the issue of damages.

I. Basic Facts And Procedural History

This case arose when Garrity, a twenty-year Mac Valves employee, alleged that Martha Welch, Mac Valves' vice president and treasurer, led him to believe he was required to sell a significant portion of his shares in Mac Valves shortly before their value substantially increased. Mac Valves is a closely held corporation operated by the Neff family. The company was founded by chairman James Neff; his son Robert Neff is the president, and his daughter Martha Welch is the vice president and treasurer. Once a year, Mac Valves would offer some of its employees the opportunity to purchase shares in the company. These shares were not publicly traded.

In 1985, Robert Neff offered Garrity the opportunity to buy one hundred shares of Mac Valves stock for one hundred dollars per share. Garrity did so in December of 1986, borrowing

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<sup>1</sup> Plaintiff Tom Bagnasco reached a settlement with Mac Valves during the trial, and he is not a party to this appeal.

the money from James Neff and repaying it over the next four years. The stock purchase agreement provided that if Garrity's employment were terminated, whether voluntarily, involuntarily, or by death, Mac Valves would pay him or his estate the book value of the shares as determined at the end of the preceding fiscal year. Under the agreement, Garrity could not sell, transfer, or otherwise dispose of the shares without first offering the shares to Mac Valves, although the shares were not openly traded and there was no outside market for them.

After purchasing his shares, Garrity began attending Mac Valves' annual stockholders' meetings, which were held every February after Mac Valves received its annual financial review from the accounting firm Plante and Moran. John Bebes, a Plante and Moran accountant, explained that Mac Valves used the final net income and equity figures from the annual reviews to calculate the yearly stock dividend paid to Mac Valves' shareholders. Rather than paying cash dividends or adjusting the value of the stock, Mac Valves would issue more shares to keep the book value steady at one hundred dollars.

At the February 1996 stockholders' meeting, two major upcoming transactions were discussed, although it is unclear how many details were made available. First, it was disclosed that Mac Valves would be selling some of its stock in a company called SMC. The SMC stock was carried on Mac Valves' books at its purchase price rather than its fair market value, which was significantly higher. Although Garrity attended this meeting, he did not recall any discussion of a company sale of SMC stock.

Second, at a June 1996 board of directors meeting, James Neff announced that he would be retiring, and wished to sell all but one thousand shares of his stock back to the company. In consideration of the large sum of money this purchase would require, Neff volunteered to sell his stock to the company at a twenty-five percent discount, or seventy-five dollars a share. Although Neff's imminent retirement had been discussed at the February 1996 stockholders meeting, there had been no discussion of the terms of his stock sale, and Garrity did not recall any discussion of a possible company purchase of James Neff's stock.

In October 1996, Welch called Garrity into her office. According to Garrity, Welch told him that the company was going to buy back 1,140 shares of his stock. Garrity said he told Welch that he did not want to sell his stock, to which she allegedly replied, "Bob [Neff] and I have to sell and you have to sell too." When Garrity responded that he did not think this was right or fair, Welch reportedly told him, "that's the way it is." Welch explained that the sellback was necessary because "some things had happened" during the year, although she did not specify what these things were. Welch then showed him a document listing his options as to how he would receive payment for his stock. Feeling that he had no choice in the matter, Garrity agreed to sell the 1,140 shares, leaving him with 750 shares. Garrity acknowledged that Welch never directly or indirectly threatened his job in connection with the sale; however, Garrity said he "knew if I made too big a stink, I could get fired tomorrow," in which case his shares would automatically revert to the company under the terms of his stock purchase agreement.

Garrity opted to receive payment in one lump sum of approximately \$113,000. Garrity received no written documentation relating to the sale, nor did Welch advise him to seek professional advice or provide him with any of the company's financial information. Garrity did not believe he was able to access the company's financial information, in part because it was Mac Valves' policy to disclose this information only at the annual stockholders' meetings, after

it had received its reports from Plante and Moran. Garrity testified that when he met with Welch, he was unaware that James Neff had sold 152,000 of his company shares, and was also unaware of the 1996 SMC stock sale. Garrity testified that he had no desire to sell his stock in October 1996, and that he planned to hold it and let it grow until he retired.

Until the October 1996 meeting with Welch, Garrity had planned to stay with Mac Valves until he completed a teaching degree he had been working toward part time; however, he “drastically” reevaluated this choice after the meeting because he no longer trusted the company with his retirement money. Garrity also acknowledged that he was dissatisfied with his job at Mac Valves for other reasons. Garrity waited to resign until January 1997 in order to realize the gain on his remaining shares that would accrue on the first of the year.

The following month, Garrity learned that the value of Mac Valves’ stock had risen eighty-nine percent. Although Garrity knew that the stock “had a good track record,” he stated that if he had known it would rise even as much as fifty to sixty percent, it might have made a difference in how he handled the sale. Had Garrity retained the shares that he sold until January 1, 1997, he would have gained \$101,460.

Garrity filed suit on October 1, 1998. The first amended complaint alleges that Mac Valves coerced Garrity to sell his shares by threatening adverse employment consequences, falsely represented that the \$100 sales price constituted fair value for the shares, breached their fiduciary duty by dealing unfairly with Garrity and intentionally withholding material facts respecting the James Neff stock purchase and the SMC stock sale, and that Mac Valves’ actions in this transaction were fraudulent, willfully unfair, and oppressive to Garrity as a minority shareholder. Garrity sought money damages or, alternatively, rescission. The case was mediated;<sup>2</sup> however, Mac Valves rejected the \$30,000 mediation evaluation.

Mac Valves moved for summary disposition, arguing that Garrity’s apparent cause of action for coercion must be dismissed under MCR 2.116(C)(8) because no such cause of action exists, and that the remainder of the case should be dismissed because there were no genuine issues of material fact regarding fraud or the existence and breach of any duties. In a December 28, 1999 opinion and order, the trial court dismissed the coercion claim but otherwise denied the motion, finding that the alleged statement that plaintiffs were required to sell their stock presented factual questions respecting fraudulent misrepresentation and breach of fiduciary duty. The trial court further found that there was evidence indicating that Mac Valves might have breached its fiduciary duty by misrepresenting the value of plaintiffs’ stock and not disclosing the Neff stock purchase and SMC stock sale. This Court and the Supreme Court denied Mac Valves’ interlocutory applications for leave to appeal this order on February 7, 2000 and April 25, 2000, respectively.

At trial, Martha Welch testified that she told Garrity that the company “was proposing to purchase a certain number of shares” from him. Welch denied telling anyone that they had to sell their shares of stock. Welch named two employees who were offered a stock purchase at the

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<sup>2</sup> Because this occurred before MCR 2.403 was amended to refer to “mediation” as “case evaluation,” this opinion will use the former term throughout.

same time as Garrity, turned it down, and suffered no negative job repercussions. Welch also pointed out that she, her brother, and her niece's trust fund had also sold some shares back to the company at the same time. Welch explained that although the SMC stock was carried on the company's books at its purchase price rather than its fair market value, the actual value would have been reflected in Mac Valves' annual reports that were distributed to all the shareholders, including Garrity.

At the close of evidence, Mac Valves moved for a directed verdict; however, the trial court denied the motion. The trial court submitted three claims to the jury: fraudulent misrepresentation, fraudulent failure to disclose material facts or "silent fraud," and breach of fiduciary duty. The jury held Mac Valves liable for fraudulent misrepresentation and breach of fiduciary duty, but rejected the claim that Mac Valves fraudulently failed to disclose material facts. The jury awarded Garrity \$101,460 in damages.

Mac Valves moved for judgment notwithstanding the verdict (JNOV) on the grounds that Garrity's reliance on Welch's statement that he had to sell was not reasonable, and that Mac Valves had no duty to disclose information that Garrity could have discovered in the company's financial books and records. Mac Valves also challenged the damage award, arguing that the proper measure of damages was the difference between what was paid and the value of the stock at the time of the sale. Noting that it had already rejected the same arguments in ruling on Mac Valves' motions for summary disposition and directed verdict, the trial court denied the motion for JNOV. The trial court also upheld the jury's damage award, stating that the damages were properly calculated based on the stock's value on the date Garrity would have sold in the absence of fraud.

## II. Fraudulent Misrepresentation

### A. Standard Of Review

We review de novo the trial court's denial of a motion for summary disposition,<sup>3</sup> directed verdict,<sup>4</sup> and JNOV.<sup>5</sup>

### B. Elements Of Fraudulent Misrepresentation

To prove his fraudulent misrepresentation claim, Garrity was required to show that:

- (1) the defendant made a material representation;
- (2) the representation was false;
- (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion;
- (4) the defendant made the representation with the intention that the plaintiff

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<sup>3</sup> *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

<sup>4</sup> *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 4011 (1997); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 703; 568 NW2d 64 (1997).

<sup>5</sup> *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000).

would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.<sup>[6]</sup>

### C. Reliance

Mac Valves argues that Garrity failed to establish that he relied on Welch's statement in making his decision to sell because his stated reason for selling was that he feared losing his job. However, this argument is directly undermined by Garrity's deposition testimony, as the following exchange indicates:

*Q.* Can you tell me why you sold the stock back if you didn't think it was fair, you didn't want to do it, and nobody said anything bad was going to happen to you if you didn't do it?

*A.* Because I was told that I had to sell it back.

Although Garrity's trial testimony was less direct, it also indicated that Welch's statement induced him to sell. After Garrity told Welch he did not wish to sell, Welch "said 'that's the way it is.' So I said okay, you know. Like what am I going to do?"

Apart from being factually unsupported, this rather disingenuous argument suggests that Garrity's fear of losing his job if he refused to sell was wholly unrelated to Welch's demand that he sell. However, it is apparent that the only reason Garrity would have feared for his job if he refused to sell was because of Welch's alleged statement that he had no other option.

### D. Material Influence

Moreover, even if Welch's alleged demand that Garrity sell could have logically been divorced from Garrity's fear of losing his job for refusing to do so, Garrity was only required to show that Welch's alleged statements were a "material influence" on his decision to sell, and need not have been the sole reason:

It is well settled in Michigan that the test for determining the existence of reliance is not whether the misrepresentation was the sole influence upon the complaining party in deciding to sign the agreement but rather is "whether the . . . misrepresentation exerted a *material* influence upon the minds of [the complainants], although it might be only 1 of several motives, acting together, which produced the result."<sup>[7]</sup>

When deciding a motion for summary disposition, directed verdict, or JNOV, the trial court must consider the evidence in the light most favorable to the nonmoving party to determine

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<sup>6</sup> *M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

<sup>7</sup> *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 121; 313 NW2d 77 (1981), quoting and adding emphasis to *Callihan v Talkowski*, 372 Mich 1, 6; 124 NW2d 788 (1963).

whether a genuine issue of any material fact exists to warrant a trial.<sup>8</sup> Because Garrity testified that he would not have sold but for Welch's alleged demand that he do so, we conclude that the trial court did not err by refusing to dismiss Garrity's fraudulent misrepresentation claim for lack of reliance.

#### E. Reasonable Reliance

To recover on the misrepresentation claim, Garrity must not only have relied on Welch's demand that he sell, but that reliance must also have been reasonable.<sup>9</sup> Mac Valves argues that Garrity knew he was the owner of the stock, and was aware that the stock purchase agreement only required him to sell if he left Mac Valves or if he died. Accordingly, Mac Valves argues it could no more demand that Garrity sell his stock than that he sell his car, and his belief to the contrary was unreasonable.

Again, however, this argument is somewhat disingenuous. First, the comparison to car ownership is clearly inapt. Unlike a car, Mac Valves stock is not a commodity that any person can freely buy or sell on the open market. Rather, ownership of Mac Valves stock can be accomplished only with Mac Valves' permission, and on its terms. Therefore, it would not be facially unreasonable for Garrity to believe that, although he owned the stock, he was not entirely free to control when or to whom he sold it.

Second, although it is true that the stock purchase agreement required Garrity to sell his stock if his employment was terminated for any reason, contrary to Mac Valves' argument, nothing in the agreement indicated that this was the only circumstance under which Mac Valves could purchase or demand Garrity's stock. Indeed, the agreement contained a provision that expressly allowed Mac Valves to make other agreements relating to the stock:

This agreement shall not limit the Company in any way from making any other agreement which it, in its sole discretion, elects to make with any shareholder of the Company respecting the same or other subject matter; or from refraining from making any agreement with any other shareholder of the Company respecting the same or other subject matter.

Therefore, Mac Valves' assertion that Garrity should have known that the agreement protected him from a forced sale is unsupported.

Finally, even if the stock purchase agreement had made clear that Garrity could not be forced to sell, Garrity was well aware that his at-will status allowed Mac Valves simply to terminate his employment, in which case his stock would automatically revert to Mac Valves under the terms of the agreement. Because this evidence presented a genuine issue of material fact respecting whether Garrity's reliance on Welch's alleged demand to sell was reasonable, we

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<sup>8</sup> *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Meagher, supra* at 708; see also MCR 2.116(G)(5).

<sup>9</sup> *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999).

conclude that the trial court did not err by refusing to dismiss Garrity's fraudulent misrepresentation claim for lack of reasonable reliance.<sup>10</sup>

### III. Breach Of Fiduciary Duty/Silent Fraud

#### A. Standard Of Review

As noted, we review de novo the trial court's denial of a motion for summary disposition,<sup>11</sup> directed verdict,<sup>12</sup> and JNOV.<sup>13</sup>

#### B. Reliance

Garrity's claim of breach of fiduciary duty through failure to disclose information is also known as "silent fraud." A claim of silent fraud requires proof that the defendant intended to induce the plaintiff to rely on the defendant's nondisclosure of a material fact that the defendant had an affirmative duty to disclose.<sup>14</sup>

In this case, viewing the facts as Garrity has presented them, there is simply no indication that Mac Valves intended to induce Garrity to rely on its nondisclosure of facts relating to the imminent increase in the value of his stock to induce him to sell. Rather, as Garrity's testimony makes clear, Mac Valves relied on its representation that Garrity had no choice but to sell his stock on demand. Because there was no proof that Mac Valves intended to induce Garrity to rely on its nondisclosure of facts relating to the stock's value to persuade him to sell, which is an essential element of a silent fraud claim, the trial court erred in refusing to dismiss the claim.

#### C. Duty

Moreover, even if Garrity had established this element of his claim, we find that Mac Valves had no duty to disclose information about the two transactions when seeking to purchase Garrity's stock.<sup>15</sup> Although a duty arises when there are "special facts" relating to the stock's value that are known only to the corporation and not to the minority shareholder,<sup>16</sup> Garrity's

<sup>10</sup> *Ritchie-Gamester*, *supra* at 76; *Meagher*, *supra* at 708; *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); see also MCR 2.116(G)(5).

<sup>11</sup> *Maiden*, *supra* at 118.

<sup>12</sup> *Meagher*, *supra* at 708; *Town*, *supra* at 703.

<sup>13</sup> *Morinelli*, *supra* at 260.

<sup>14</sup> *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995), citing *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 517; 309 NW2d 645 (1981) and *Lowery v Dep't of Corrections*, 146 Mich App 342, 356-360; 380 NW2d 99 (1985).

<sup>15</sup> See *Walsh v Goulden*, 130 Mich 531, 539-540; 90 NW 406 (1902).

<sup>16</sup> See *Bollstrom v Duplex Power Car Co*, 208 Mich 15, 32-33; 175 NW 492 (1919), citing *Strong v Repide*, 213 US 419, 431-434; 29 S Ct 521; 53 L Ed 853 (1909). See also *Lightner v W H Hill Co*, 258 Mich 50, 63-64; 242 NW 218 (1932); *Backus v Kirsch*, 264 Mich 339, 342-343; 249 NW 872 (1933).

expert testified that there was enough information in Mac Valves' records for an accountant to determine the actual value of the stock when Welch approached Garrity to sell. Therefore, regardless whether Garrity knew about the SMC sale and Neff purchase in advance, he would have discovered these transactions had he inspected Mac Valves' records in October of 1996. It is undisputed that Garrity neither requested to examine the company's financial records before acceding to Welch's demand to sell, which he had a common-law as well as a statutory right to do,<sup>17</sup> nor sought financial advice regarding the transaction. Accordingly, the trial court erred in failing to dismiss the silent fraud claim on this basis as well.

#### IV. Inconsistent Verdicts

##### A. Standard Of Review

We will set aside a jury's verdicts only if they are too logically and legally inconsistent to be reconciled.<sup>18</sup>

##### B. Reconciling The Verdicts

Mac Valves argues that it was logically and legally inconsistent for the jury to find Mac Valves liable for breach of fiduciary duty, but not for silent fraud. Our conclusion that the trial court erred in failing to dismiss the silent fraud claim ends this argument moot.

#### V. Damages

##### A. Standard Of Review

Because determination of the proper measure of damages presents a question of law, we review this issue de novo.<sup>19</sup>

##### B. Time Of Sale

During closing arguments, Garrity's attorney suggested to the jury that a proper award would be the number of shares Mac Valves purchased – i.e., 1,140 – times eighty-nine dollars, which is the amount the shares would have been worth after January 1, 1997. The trial court instructed the jury: "If you decide the plaintiff is entitled to damages, it's your duty to determine the amount of money which reasonably, fairly and adequately compensates him." The jury accepted this argument and awarded \$101,460, which is 1,140 times 89.

After a hearing, the trial court denied Mac Valves' motion for JNOV, stating:

The evidence presented by the plaintiff in this case was that he had no desire or intention to sell his stock in October of 1996.

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<sup>17</sup> See *Walsh, supra*; MCL 450.1487(2), (3).

<sup>18</sup> *Clark v Seagrave Fire Inc*, 170 Mich App 147, 153; 427 NW2d 913 (1988), quoting *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987).

<sup>19</sup> *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 662-663; 593 NW2d 534 (1999).

The jury found plaintiff would not have sold his stock until 1997 or later, except for the fraud and breach of fiduciary duty of the defendant.

Based on these circumstances, plaintiff's damages are based not on the date of the sale of the stock was unlawfully sold back to the defendant [sic], but the date he would have sold the stock had no fraud occurred.

This award restores plaintiff to the position he would have occupied had the breach or [sic] fiduciary duty not occurred.

Mac Valves argues that Garrity's damages should have been based on the value of his stock at the time he sold it in 1996 as calculated by Garrity's expert rather than their value when he left the company in 1997. We agree.

Initially, we note that there is no evidence that Garrity would have sold his stock on January 1, 1997 had no fraud occurred. On the contrary, Garrity testified that he would not have sold the stock until he retired at some undetermined time in the future. Thus, the notion that calculating Garrity's damages from January 1, 1997 would restore him to the position he would have occupied but for the fraud is factually unsupported.

Furthermore, this is not the method of calculation the Michigan Supreme Court has employed under similar circumstances. In *Bollstrom v Duplex Power Car Co.*,<sup>20</sup> for example, the director of a corporation fraudulently induced the plaintiff to sell some of his shares in the corporation at an unfair price, then resold the shares at a profit two days later.<sup>21</sup> The Court held that the plaintiff was entitled to recover the difference in price between what he had paid and the amount for which they were resold.<sup>22</sup> As in the case here, there was no indication that the plaintiff in *Bollstrom* would have sold his shares at that time but for the director's fraudulent inducement to do so.<sup>23</sup>

Similarly, in *Backus v Kirsch*,<sup>24</sup> the defendant, a company president, fraudulently induced the plaintiff to sell his company stock.<sup>25</sup> In deciding the question of how to assess damages, the Court stated:

The stock was not listed. It had no market value. There was no dealing in the stock. . . . The plaintiffs' expert witness, Martin, estimated the value to be about \$35, but as he seems to have been influenced in part by market quotations of the new Kirsch Company stock six months after the sale, we are not inclined to accept his estimate as the correct value. The defendant himself placed a cash

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<sup>20</sup> *Bollstrom, supra.*

<sup>21</sup> *Id.* at 17, 23, 30-32.

<sup>22</sup> *Id.* at 33.

<sup>23</sup> See *id.* at 30-31.

<sup>24</sup> *Backus, supra.*

<sup>25</sup> *Id.* at 340, 343-344.

value of \$30 a share on the stock at the time he transferred it to the new corporation. That was the price he expected to get on the reorganization of the company. He had offered that price to some other stockholders. Considering the book value of the stock, the prosperous condition of the business, its volume of sales and net earnings, we are of the opinion that \$30 a share was a *fair value at the time of the sale* by the plaintiffs.<sup>[26]</sup>

In other words, despite the fact that the plaintiff was fraudulently solicited to sell his stock and it subsequently increased in value, the Court nonetheless rejected as a measure of damages the stock's increased value, using instead the amount the stock was actually worth at the time of the sale.<sup>27</sup>

Thus, according to these controlling cases, Garrity's damages should have been determined from the stock's value on the date he sold it. This calculation was not performed at trial. As Mac Valves' expert testified, the parties agreed that the stock's value had increased by eighty-nine dollars a share by the end of the 1996 calendar year. This figure was based on a fifty-five dollar increase from the two special transactions and a thirty-four dollar increase from Mac Valves' general operating profits. However, the expert testified that he had not calculated how much of the general operating profits had been earned by October of 1996, and that it was not reasonable simply to prorate the annual amount to make this determination.

Although new trials limited to damages are disfavored,<sup>28</sup> they are permitted in cases when, as here, liability is clear.<sup>29</sup> Accordingly, because the factual record is inadequate to determine what Garrity's stock was worth on the day he sold it, we remand for a new trial that is limited to this determination. In so doing, we recognize the possibility that the resulting award could require a reversal of the award of mediation sanctions.<sup>30</sup> Should this issue arise on remand, we leave it to the trial court to determine whether the mediation sanctions must be vacated.

## VI. Expert Witness Fees

### A. Standard Of Review

We review the trial court's determination of the amount of attorney fees<sup>31</sup> and expert witness fees<sup>32</sup> for an abuse of discretion.

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<sup>26</sup> *Id.* at 346 (emphasis added).

<sup>27</sup> *Id.*

<sup>28</sup> See *Garrigan v LaSalle Coca-Cola Bottling Co*, 373 Mich 485, 489; 129 NW2d 897 (1961).

<sup>29</sup> See *Bias v Ausbury*, 369 Mich 378, 383; 120 NW2d 233 (1963).

<sup>30</sup> See MCR 2.403(O).

<sup>31</sup> *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995).

<sup>32</sup> *Haberkorn v Chrysler Corp*, 210 Mich App 354, 380; 533 NW2d 373 (1995).

## B. MCL 600.2164

Expert witness fees are governed by MCL 600.2164, which provides:

No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case.

Although a trial court has the discretion under MCL 600.2164 to authorize expert witness fees for court time as well as for the time spent preparing to testify,<sup>33</sup> “an expert is not automatically entitled to compensation for all services rendered.”<sup>34</sup> Specifically, this Court has rejected the idea that “conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party’s position” are compensable as expert witness fees.<sup>35</sup>

In this case, the trial court awarded \$4,907.50 in expert witness fees based on the expert’s bill. Mac Valves objects to \$2,252.50 of this amount, which it contends was not spent in trial preparation, but rather for organizing and preparing reports. However, the trial court evidently determined that the preparation of reports, at least one of which was used extensively at trial, was more properly categorized as trial preparation than as the type of activity for which fees may not be awarded, such as conferring with counsel.<sup>36</sup> Because this determination was not so “palpably and grossly violative of fact and logic” that it evidenced a perversity of will, a defiance of judgment or the exercise of passion or bias,<sup>37</sup> Mac Valves has not demonstrated that reversal is warranted on this ground.

## VII. Evidentiary Hearing

### A. Standard Of Review

We review the trial court’s determination that an evidentiary hearing on fees is unnecessary for an abuse of discretion.<sup>38</sup>

### B. Avoiding Forfeiture

Mac Valves argues that the trial court erred in arbitrarily reducing the amount of the mediation award to account for the fact that co-plaintiff Bagnasco’s claim was settled before the

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<sup>33</sup> *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989).

<sup>34</sup> *Hartland Twp v Kucykowicz*, 189 Mich App 591, 599; 474 NW2d 306 (1991).

<sup>35</sup> *Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987).

<sup>36</sup> *Id.*

<sup>37</sup> *Dep’t of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000) (internal quotations omitted).

<sup>38</sup> *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002).

end of trial rather than holding an evidentiary hearing to determine how to apportion the costs between the plaintiffs. Because Mac Valves did not request an evidentiary hearing, however, this issue was forfeited.<sup>39</sup> To avoid forfeiture under the plain error rule, Mac Valves must establish that: 1) an error occurred; 2) the error was clear or obvious; and 3) the error affected substantial rights.<sup>40</sup>

As a general matter, when a party challenges the reasonableness of the fees requested, the trial court should “inquire into the services actually rendered prior to approving the bills of costs.”<sup>41</sup> “Although a full-blown trial is not necessary” to this inquiry, “an evidentiary hearing regarding the reasonableness of the fee request is.”<sup>42</sup> However, if the record is sufficient to review the issue, an evidentiary hearing is not required.<sup>43</sup>

In this case, the trial court found that “except for maybe some personal meetings which might be attributable to Mr. Bagnasco that had nothing to do” with Garrity’s claims, “I think there would be very little that would be work [sic] on behalf of both. Since the issues were the same.” Relying on *Michigan Basic Property Ins Ass’n v Hackert Furniture Distributing Co, Inc*,<sup>44</sup> which upheld a partial award of mediation sanctions in a multiple-party case, the trial court decided to “give a slight discount, because there was some, I’m going to give a discount of five thousand dollars for individual issues off the attorney fees.”

Although “there is no exact science” for determining which costs are attributable to which parties,<sup>45</sup> the trial court in this case appeared to use no method whatsoever to make its determination which costs were incurred solely as a result of Bagnasco’s claims. The record does not indicate which costs or issues the trial court considered to be “individual” to Bagnasco’s claim, and the \$5,000 amount appears to have been arrived at arbitrarily. However, Mac Valves did not object to the amount at the hearing, and does not argue on appeal that the amount at which the trial court arrived was incorrect. Indeed, Mac Valves presents no evidence that *any* of the costs assessed as sanctions arose solely from Bagnasco’s claims. Accordingly, although the trial court may have erred in arbitrarily determining the amount by which to reduce the award of sanctions, Mac Valves has not established that this error affected its substantial rights. Therefore, no error requiring reversal occurred.

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<sup>39</sup> *Id.* at 692, citing *People v Collins*, 239 Mich App 125, 133 n 5; 607 NW2d 760 (1999).

<sup>40</sup> *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

<sup>41</sup> *B & B Inv Group v Gitler*, 229 Mich App 1; 581 NW2d 17 (1998), quoting *Wilson v General Motors Corp*, 183 Mich App 21, 42; 454 NW2d 405 (1990).

<sup>42</sup> *Id.* at 42-43.

<sup>43</sup> *Id.*, citing *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999); *Giannetti Bros Const Co, Inc v City of Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989).

<sup>44</sup> *Michigan Basic Property Ins Ass’n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230; 486 NW2d 68 (1992).

<sup>45</sup> *Id.* at 236.

## VIII. Conclusion

To summarize, we reverse with respect to the silent fraud claim and the damage award, affirm with respect to the fraudulent misrepresentation claim as well as the trial court's decisions regarding mediation sanctions, and remand for a new trial limited to determining Garrity's damages as calculated by the date he sold his stock.

Affirmed in part, reversed in part, and remanded for a determination of damages consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra