

Court of Appeals, State of Michigan

ORDER

WHITESELL INTERNATIONAL CORP v WILLIAM WHITAKER

Docket No. 287569

LC No. 05-518716-CZ

William B. Murphy
Chief Judge

Kathleen Jansen

Brian K. Zahra
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's majority opinion issued September 14, 2010, is hereby VACATED. New opinions are attached to this order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 18 2011

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

WHITESELL INTERNATIONAL CORP,

Plaintiff/Counter-
Defendant/Appellant,

v

WILLIAM WHITAKER,

Defendant/Counter-
Plaintiff/Appellee,

and

MRC INDUSTRIAL GROUP INC,

Defendant,

and

PIERCETEK INC,

Defendant/Counter-Plaintiff.

Before: MURPHY, P.J., and JANSEN and ZAHRA, JJ.

PER CURIAM.

Plaintiff/counter-defendant WIC Corp (WIC) appeals as of right a January 30, 2008 judgment in favor of defendant/counter-plaintiff William Whitaker (Whitaker). The judgment reflects the jury's finding in favor of Whitaker against WIC in the amount of \$6 million for tortious interference with business relationship or expectancy, and a \$500,000 award "as a result of [WIC's] flagrant violation of [t]he Michigan Antitrust Reform Act – MCL 445.773 et seq."¹

¹ The jury also found that Whitaker had incurred damages of \$2,971,301 as a result of WIC's antitrust violation but that determination was not referenced in the January 30, 2008 judgment. However, the trial court, in its August 14, 2008 opinion on WIC's motion for reconsideration, (continued...)

The judgment also reflects that the trial court ordered WIC to pay Whitaker \$1,862,671.37 in attorneys' fees, \$205,440.61 in costs, \$36,600 in expert witness costs and \$661,972.88 in prejudgment interest.

On appeal, WIC challenges the above order, as well as a September 5, 2006 order dismissing "Counts I, II, and IV of [WIC]'s complaint," on the basis of res judicata. Count III was abandoned.

I. BRIEF INTRODUCTION

This case is the third lawsuit that WIC or its predecessors have filed against its former employee, Whitaker. WIC's complaint was dismissed on the basis res judicata, but Whitaker continued to pursue his counterclaim against WIC that generally alleges that WIC, through repeated sham litigation to preserve its monopoly, prevented Whitaker from manufacturing interconnected pierce nuts. In this case, WIC had claimed that Whitaker had disclosed a trade secret relating to a process to manufacture interconnected pierce nuts. Whitaker maintained that the process had never been considered secret, and in any event, had been publicly disclosed by a patent filed by the company that sold the process to WIC. Whitaker later added a counterclaim alleging that WIC's sham litigation tortiously interfered with his business relationships and expectancies.

II. BASIC FACTS AND PROCEEDINGS

In general, pierce nuts are a type of fastener that pierce directly into sheet metal and provide a threaded base on which to affix material to the sheet metal. In the 1970's there were three manufacturers of pierce nuts, MacLean-Fogg, Kean Manufacturing (Kean) and Multifastener. At this time, Whitaker was working at Kean learning about pierce nuts and other fasteners. Early on in 1970's, MacLean-Fogg intended to enter the pierce nut market by developing a new process to manufacture pierce nuts and differentiate itself from the competition. According to David Trendler, Whitaker's former supervisor, an engineer of MacLean-Fogg, Bill Grube, invented a method to connect pierce nuts with a piece of wire. Grube "invented the notion of starting from a raw coil of raw material through a straightener, through a press, through a taper wound up on a reel ready to go to the customer, so it wasn't five or ten steps in between to make a final product." Grube obtained United States Patent 3,999,659 in 1973. In 1980, MacLean-Fogg created a subsidiary, Stamptech, and constructed a building in which Stamptech manufactured the interconnected pierce nuts according to the Grube patent. The term "Stamptech Process" was created to market the Grube inline pierce nut process. "What Grube invented was eventually called the Stamptech process."

Whitaker started working for Kean in 1967. He ran a pierce nut press and eventually learned to design, make and set dies ("various devices for cutting or forming material in a press or a stamping or forging machine"). He was eventually promoted to general manager in 1985, and manager of operations in 1990. In 1993, Whitaker left Kean to open a business to

(...continued)

indicated that "the parties stipulated that Whitaker would forego antitrust remedies since his tort award was higher."

manufacture pierce nuts. He and his longtime friend, Dennis Boerger, formed MIOH to make interconnected pierce nuts using the Stamptech process as the patent had expired. Whitaker and Boerger were aware of the Stamptech process from “experience in the pierce nut world.” The parties agree that Kean sued Whitaker alleging disclosure of trade secrets. Whitaker at least prevailed in part and was allowed to manufacture pierce nuts.

In 1993, MacLean-Fogg and MIOH merged. Trendler explained that, “[MacLean-Fogg] had the machinery. Whitaker had 25 or 30 years business experience in the pierce nut business.” MIOH was dissolved in the merger and Whitaker went to work for the subsidiary of MacLean-Fogg that manufactured interconnected pierce nuts, Stamptech. Whitaker owned 21 percent of Stamptech and was president and general manager, but reported to MacLean-Fogg. Stamptech manufactured interconnected pierce nuts from 1993 to 1998 using the same machinery built in 1971. There was no evidence that any Stamptech employee signed a confidentiality agreement.

In the late 1990’s, Whitesell Corporation, a predecessor to WIC, was a large supplier of cold-headed threaded fasteners (screws, bolts, etc) to major-appliance makers, but had no presence in the automotive industry. Its owner, Neil Whitesell, sought entry to the automotive industry and Trendler suggested he purchase Stamptech, as MacLean-Fogg’s owner no longer wanted to compete in the pierce nut business. In 1998, Whitesell Corporation formed Whitesell of Michigan (WOM) and began negotiations to purchase Stamptech.

On August 31, 1998, Whitaker, on behalf of himself, Stamptech and MIOH² executed an “Assignment of Manufacturing Rights” which assigned rights “in any manufacturing processes, designs, products, or systems related to Pierce Nuts, Insert Nuts, Application Tooling and related products previously produced by Stamptech and [that] Whitesell assumes all those rights, title, and interests on their behalf.” The document further assigned “all right and title to all processes in order to encourage Whitesell to purchase Stamptech assets and assume its operation.” The document did not mention intellectual property or trade secrets. Neil Whitesell testified that Whitaker represented to him that the “Stamptech process,” which previously called the Grube process, was confidential. He also testified that Tim Taylor of MacLean-Fogg also represented to him that the Stamptech process was confidential, and a rudimentary drawing of the Stamptech process was attached to the “Assignment of Manufacturing Rights.” The purchase price was \$850,000. Whitaker was retained as general manager at WOM. He executed a confidentially agreement and non-competition agreement.

Whitaker’s tenure at WOM was relatively short. On July 23, 1999 Whitaker either was fired or resigned. Accordingly to WIC, “Whitaker abruptly quit, leading an employee walkout while WOM was trying to fill critical General Motors (GM) orders. The resulting crisis led GM to dispatch . . . a emergency-response specialist, to avoid a supply disruption.” In its brief on appeal, WIC notes that “GM’s only other source of pierce nuts, Fabristeel, was having delivery problems on its own.” Accordingly to Whitaker, Bob Wiese, WOM’s secretary-treasurer fired

² Whitaker signed the agreement on behalf of MIOH, though MIOH was dissolved in 1993.

him following an ongoing dispute over reductions in his and WOM employees promised health care coverage and benefits.

Whitesell Corporation and WOM sued Whitaker in Washtenaw circuit court (Washtenaw action) alleging breach of fiduciary duties, tortious interference with business relationships/expectancies, and conspiracy. The complaint mentioned that Whitaker had signed a confidentiality agreement and alleged Whitaker was “wrongfully retaining possession of company property and information.” Whitaker counterclaimed seeking to null and void his non-competition agreement. The parties accepted a mediation agreement and a \$10,000 judgment was entered against Whitaker in October 2000. Whitaker notes that his mediation summary expressly provided that Whitaker “has now commenced operations making pierce nuts for a company known as the ‘Pierce Nut Company’ [PNC] located in Livonia, Michigan. This company manufactures the same product and sells it to the same customer base as does Stamptech.” Whitaker also notes that counsel for Whitesell Corporation and WOM signed a satisfaction of judgment dated August 23, 2001, that reflected the PNC was a garnishee of Whitaker.

Whitaker and Richard Brodie formed the PNC. The PNC built machines to produce interconnected pierce nuts according the Stamptech process. The PNC manufactured interconnected pierce nuts, but there was testimony that the PNC could not secure enough sales and had quality problems.

In July 2001, WOM filed suit against PNC, Whitaker and Brodie in Alabama state court alleging Whitaker was violating the non-competition agreement at PNC. Whitaker had never worked in Alabama but Whitesell was headquartered there. The case was removed to Alabama federal court and then transferred to the federal court in the eastern district of Michigan (federal action). Whitaker moved to dismiss on the basis of res judicata. Counsel for WOM filed a response that was almost three weeks late. In an October 25, 2001, opinion, the federal district court noted that under Michigan law, “[a] settlement arising from the acceptance of a mediation award disposes of all claims in the action as it subsumes the underlying claims by merging and barring all the included claims and preexisting causes of actions.” The federal court agreed with Whitaker that “Whitaker’s alleged violation of a non-compete agreement could have been raised and resolved in the prior action.” Further, the federal court noted that “the mediation panel report stated that the “[c]ounterclaim is resolved with the main claim.’ One of the Defendant Whitaker’s counterclaims alleged that the non-competition agreement was invalid.” The federal court concluded that “the mediation award encompasses this claim, which means that Plaintiff is barred from asserting it against Defendant Whitaker.” The federal court, however, determined that because “Pierce Nut and Brodie were not parties to the non-competition agreement and were not involved in the lawsuit that resulted in the mediation agreement[,] . . . the doctrine of claim preclusion does not apply to Plaintiff’s action against Defendants Pierce Nut and Brodie.”

Nonetheless, in August 2002, the PNC was declared bankrupt. On August 1, 2003, Fabristeel purchased the assets of the PNC. Until that point, Fabristeel made pierce nuts using a “batch” process, in which the pierce nuts were not interconnected. Pierce nuts made using the “batch” process are later interconnected by essentially crimping wire to the back of the pierce nut, a process known as “kurling.” Although interconnected, the knurled pierce nuts require more steps than the pierce nuts produced by the Stamptech process. Further, interconnected pierce nuts made with the Stamptech process are sharper because there are fewer steps of

production. There was testimony that, before the sale, Fabristeel knew that the PNC had manufactured pierce nuts, but did not know the manner of production. Fabristeel only knew the process was different from their own. There was testimony by an employee of Fabristeel, Jorge Gonzales, that he was not allowed into the PNC building until after the sale. He testified that after the sale he entered the building and the PNC employees appeared busy moving items. Gonzales testified that there were five interconnected pierce nut lines and that he “thought it was a very interesting and unique process.” He testified that Fabristeel was unable to effectively operate the PNC pierce nut machines and offered Whitaker a job. Whitaker declined.

In 2003 Whitaker began negotiations with defendant Michigan Rivet Company (MRC) and eventually signed an employment contract in September 2004. Whitaker executed a confidentiality agreement and non-competition agreement with MRC, and assigned MRC his rights to the pierce nut anchor plate.³ MRC established a subsidiary company defendant Piercetek, to manufacture pierce nuts and invested \$1 million for Whitaker to create an interconnected pierce nuts line. Whitaker began building the machine but production delays and costs slowed the process.

In 2004, the Whitesell Corporation purchased Fabristeel and became WIC. The WOM pierce nut machines were sent to Taylor, Michigan. Gonzales testified that he recognized the WOM pierce nut machines and the PNC pierce nut machines used the same process.

WIC learned that Whitaker was working with MRC and its subsidiary, Piercetek. In June 23, 2005, WIC filed the instant action against Whitaker, MRC and Piercetek. The complaint alleged defendants misappropriated trade secrets, tortiously interfered with WIC’s business relationships/expectancies and misappropriated a patented design for a Pierce Anchor Plate. On July 5, 2005, Piercetek filed a counterclaim seeking relief under the Michigan Antitrust Reform Act (MARA), MCL 445.773. Piercetek alleged that WIC controlled the interconnected pierce nut market and had a monopoly.

WIC obtained an ex parte temporary restraining order (TRO), and sought to turn it into a preliminary injunction against Whitaker, MCR and Piercetek, restraining them from manufacturing pierce nuts, and compelling the withdrawal of Whitaker’s patent application for anchor pierce plates. At the July 6, 2005 hearing, WIC argued that it had purchased intellectual property rights from Whitaker in the sale of Stamptech. However, Robert Weise, treasurer/secretary of WIC, admitted that nowhere in the documents used in the sale of Stamptech “is there a statement, or rep or warranty that Tamp Tech [sic] tells you represents, or warrants that the process has never been disclosed.” Further, Weise admitted that he “did not require [Stamptech] to rep or warrant that the public did not view that this was really a trade secret.” Weise admitted that he did not “review whether any of the Stamp Tech [sic] employees had signed confidential agreements.” He also admitted that did not know whether technical personnel were allowed to view the pierce nut machines. Indeed, he admitted that he had “no idea of what would happen prior to our acquisition.” He admitted that Whitaker’s non-

³ The jury rejected Whitaker’s claims relating to the pierce nut anchor plate, and we need not address it.

competition agreement had long since expired. The trial court concluded that WIC had only established a possibility of prevailing on the merits and not a likelihood of prevailing on the merits, and dissolved the TRO.

WIC then obtained a second ex parte order, and filed a motion for injunction to prevent the sale of the MRC pierce nut machines. The trial court denied WIC's motion for preliminary injunction. The court noted that the Grube patent seems "to describe the very item, the process for making the very item that was handed this Court as an exemplar, if you will." The court also noted the WIC had not produced any confidentiality agreements from Stamptech employees. The court indicated that "the companies that existed before Whitesell[International]; that is Stamptech and MIOH, apparently did not maintain the confidentiality of the Stamptech process; and if that is the case there can be no trade secret." The court, however, specifically indicated that "I am not finding that there was or was not a trade secret."

On November 4, 2005, creditors of MRC filed an involuntary petition for bankruptcy. Piercetec, a wholly owned subsidiary of MRC that manufactured interconnected pierce nuts, was included in the bankruptcy proceedings. There was testimony that NES, a Taiwanese company, had been interested in purchasing the machinery from MRC and Piercetec to manufacture interconnected pierce nuts. Gordon Eng, a transaction attorney, testified that Stephen Ling, a lawyer for NES, asked him to help draft an asset purchase agreement they intended to submit to Steven Engleman, president of MRC, which owned Piercetec. Under the agreement, NES offered 1.3 million for the assets of Piercetec. The agreement also provided that Whitaker would be 20% owner and president of a company that NES would form, Pierce Fastener Products (PFP), along with \$150,000 salary and car allowance. The agreement also provided that Whitaker would receive an incentive if PFP grossed more than \$10 million in yearly sales and that NES would provide Whitaker a \$200,000 litigation loan. Eng testified that Ling raised concerns about the current litigation and indicated that the current litigation prevented the sale, and NES would not buy MRC property that was subject to litigation.

Eng testified that after MRC was in bankruptcy, NES would have to receive approval from a bankruptcy judge before purchasing assets. NES offered 1.1 million for Piercetec assets. The reduced price is attributed to MRC being in bankruptcy and the lack of need to obtain a non-competition agreement. However, Eng testified that an attorney for WIC, Chris Royce, left him a voice mail indicating WIC was claiming "trade secrets in the assets of Piercetec. He noted that they were in litigation, which involved Bill Whitaker and MRC and he threatened to sue NES if NES went forward and purchased the Piercetec assets." There was evidence that MRC's bankruptcy lawyers and lawyers for MRC's debtors felt that WIC was interfering with the bankruptcy proceedings.

After the first failure to purchase Piercetec's assets, Eng continued to negotiate an agreement that would exclude the "trade secret" so that NES and PFP could acquire the Piercetec assets without the threat of a lawsuit. Eng, however, "never got a response that [NES] could put their hands around and say, okay, this is the part or the piece of the process that we can carve out and not have to worry about litigation." Further, Eng offered specific purchase prices, but WIC "wouldn't tell [Eng] if that was enough to keep them from suing us." In addition, a letter from counsel for WIC to Eng indicated that:

Mr. Whitaker has signed an employment agreement with MRC Associates having a two-year non compete provision. Mr. Whitaker has not been released from his obligation. WIC Corporation intends to assert the rights it acquired under the agreement pursuant to its acquisition of the Piercetec assets.

Eng testified “basically they’re saying don’t employ Mr. Whitaker because they have this employment agreement.” Eng testified that NES would not purchase the Piercetec assets without being able to employ Whitaker.

Eng testified that he attempted to purchase portions of MRC, and WIC attempted to condition purchase on NES not hiring Whitaker. NES would not proceed without Whitaker. Eng also testified that WIC was negotiating to purchase the Piercetec asset and sought to elicit statements from MRC for use in the current litigation. Whitaker’s brief on appeal cites the April 12, 2006 “consent judgment” as the primary example of statements WIC elicited from MRC and Piercetec. It states,

Defendant MRC is liable to Plaintiff Whitesell for its misappropriation of trade secrets relating to the automated in-line process for the manufacture of pierce nuts and its tortious interference [sic] Whitesell’s contract and business relationships;

Defendant Piercetec is liable to Plaintiff Whitesell for its misappropriation of trade secrets relating to the automated in-line process for the manufacture of pierce nuts and its tortious interference [sic] Whitesell’s contract and business relationships;

MRC and Piercetec shall assign any and all claims they have, or may have, against third parties, including but not limited to Defendant Bill Whitaker, arising in connection with the transaction and occurrences set forth in Whitesell’s Verified Complaint.

WIC offered \$1,025,000, and the offer included language allowing them to sue Whitaker for any breach of any employment or license agreement with MRC. WIC also provided \$50,000 to Engleman and other individuals not to compete, even though MRC would not likely be able to compete and Engleman did not have knowledge of pierce nuts to compete. There were also provisions assigning WIC the right to sue Whitaker for a violation of his employment agreement with MRC, and making clear that MRC would remain liable to Whitaker for any violation of the employment agreement that had occurred. The bankruptcy trustee approved the sale to Whitesell.

In June 23, 2006, Whitaker filed in the instant litigation a motion for summary disposition against WIC on the basis of res judicata. Whitiaker argued that WIC’s suit raised issues that were or could have been raised in the earlier Washtenaw action or the federal action. At the August 17, 2006 hearing, the trial court granted the motion. The court held that in either the Washtenaw action or the federal action, “simple discovery devices could have revealed not only what Mr. Whitaker’s involvement with [PNC] was, but whether or not he was using the so-called Stamptech Process “

WIC also sought summary disposition based on the *Noerr-Pennington* doctrine and lack of standing. The *Noerr-Pennington* doctrine is derived from two United States Supreme Court cases pertaining to the Petition Clause⁴ and antitrust laws: *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127; 81 S Ct 523; 5 LEd2d 464 (1961), and *United Mine Workers of America v Pennington*, 381 US 657; 85 S Ct 1585; 14 LEd 2d 626 (1965). *J & J Const Co v Bricklayers and Allied Craftsmen, Local 1*, 468 Mich 722, 727 n 5; 664 NW2d 728 (2003), citing *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999). Whitaker responded, seeking summary disposition arguing that WIC's claim was a sham because it knew the Grube patent disclosed the Stamptech process. The trial court denied both motions, finding a factual dispute in regard to whether WIC sued in bad faith. On August 20, 2007, Whitaker amended his counter-claim to add a count of tortious inference with business relationship of expectancy.

There were over 25 days of trial. There was extensive testimony relating to whether the Stamptech process was secret and whether WIC had a monopoly over interconnected pierce nuts. At the end of trial, Whitaker moved for directed verdict, arguing the Stamptech process was not a trade secret. Whitaker argued that testimony at trial revealed that a patent previously filed by attorney Raymond Scott of the law firm that currently represented Whitesell (though not at the time he filed the patent) indicated that "prior patents describe a number of methods" of making interconnected pierce nuts. On cross examination, Harold Woods, Whitesell's vice-president of sales, admitted that, at the time the above patent was filed, 2002, "there were two known methods of putting pierce nuts on wire, Stamptech and batch knurling." From this admission, Whitaker claimed that Scott, a patent attorney for WIC, had represented to the patent office that the Stamptech process had been described in a previous patent. In other words, WIC filed the instant suit with imputed knowledge that the Stamptech process had been described in prior patents. The court accepted the above argument as indicating Woods admitted that the Stamptech process had been publicly disclosed. The court also relied on evidence from Jorge Gonzales, in which he admitted that language in the Grube patent described a characteristic of a product made by the Stamptech process. The court concluded that the Stamptech process was not a trade secret. However, the court made clear that "I am not ruling as to whether or not [WIC]] reasonably believed it to be a trade secret."

The parties presented closing arguments, and written summaries of their respective theories were also presented during the jury instructions. Whitaker's factual theory at trial was that he was a guru of the interconnected pierce nut business. He claimed that WIC by and through its lawyers has systematically and wrongfully used the court system, threats and acquisitions to attempt to monopolize the interconnected pierce nut marketplace. He claimed that Whitesell has been successful in this attempt because it controls a hundred percent of the North American interconnected pierce nut market. Whitaker highlighted the previous litigation

⁴ The petition clause is found in the last line of the First Amendment: "Congress shall make no law. . .abridging the right of the people . . . to petition the Government for redress of grievances." The protections provided by the First Amendment, including the Petition Clause, have been extended to the states by the Fourteenth Amendment. *J & J Const Co*, 468 Mich at 729, citing *Whitehill v Elkins*, 389 US 54, 57; 88 S Ct 184; 19 L Ed.2d 228 (1967).

and argued that Whitesell knew or should have known interconnected pierce nuts were not trade secrets and maintained that the instant lawsuit was solely filed to prevent competition.

Whitesell claimed that that the Stamptech process was a trade secret and the Whitesell did not have a monopoly on the inter-connected pierce nut business. Whitesell maintained in any event that it immunized from suit under the *Noerr-Pennington* doctrine because it had a reasonable belief that there was a chance of prevailing in the instant case to protect its legal rights.

The jury retired and returned its verdict in favor of Whitaker. This appeal ensued.

III. THE NOERR-PENNINGTON DOCTRINE

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a motion under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, draw all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed fact exists. *Id.* A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). Only "the substantively admissible evidence actually proffered" may be considered. *Maiden*, 461 Mich at 121; see also MCR 2.116(G)(6). Summary disposition is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

We review de novo issues of constitutional law. *J & J Const Co*, 468 Mich at 729, citing *McDougall* 461 Mich at 24.

A. ANALYSIS

We conclude that while an argument can be made that the *Noerr-Pennington* doctrine generally immunizes WIC from suit against it as a result of its attempt to protect its alleged trade secret, there is evidence supporting the conclusion that WIC engaged in sham litigation, which is an exception to the *Noerr-Pennington* doctrine. Thus, summary disposition was properly denied.

As mentioned, the *Noerr-Pennington* doctrine is derived from two United States Supreme Court cases pertaining to the Petition Clause and antitrust laws: *Eastern Railroad Presidents Conference*, 365 US 127; *United Mine Workers of America*, 381 US 657; *J & J Const Co*, 468 Mich at 727, n 5.

The *Noerr-Pennington* doctrine is "a principal of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity,

regardless of the underlying cause of action.” *Azzar v Primbank*, FSB, 198 Mich App 512, 517; 499 NW2d 793 (1993). Thus, “parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent.” *Arim v General Motors Corp*, 206 Mich App 178, 190-191; 520 NW2d 695 (1994), citing *Video Int’l Production, Inc v Warner-Amex Cable Communications, Inc*, 858 F2d 1075, 1082 (CA 5, 1988). This Court also agreed with *Potters Medical Center v City Hosp Assn*, 800 F2d 568, 578 (CA 6, 1986), which described the reasons for conferring *Noerr-Pennington* doctrine immunity: “[T]he First Amendment’s protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government.” *Arim*, 206 Mich App at 189. Although the doctrine was initially limited to actions in regard to the Legislative process, that “the protection of the *Noerr-Pennington* doctrine [extends] to efforts to influence administrative agencies and the courts.” *Id.* at 190, quoting *Potters, supra*, 800 F2d at 578, citing *California Motor Transport Co v Trucking Unlimited*, 404 US 508, 510; 92 S Ct 609; 611, 30 L Ed 2d 642 (1972).

The action allegedly protected by the *Noerr-Pennington* doctrine is the instant WIC lawsuit seeking the court’s influence to protect alleged trade secrets. However, even assuming that WIC is generally immunized from being prosecuted under the antitrust laws under the *Noerr-Pennington* doctrine, we conclude that Whitaker established at least one accepted exception to the *Noerr-Pennington* doctrine—the sham exception:

The “sham” exception comes into play when the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience its competitor. Thus, the sham exception is said to apply when one party has begun litigation not to win that litigation, but rather to force its competitor to waste time and money in defending itself. Similarly, a party that “petitions” the government by engaging in administrative processes only to preclude or delay its competitor’s access to those processes may be liable for antitrust damages under the “sham” exception.

Under the sham exception, “[o]nly if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation.” *Professional Real Estate Investors, Inc v Columbia Pictures Industries, Inc*, 508 US 49, 60; 113 S Ct 1920; 123 LEd2d 611 (1993). The sham litigation exception requires that the suit be “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Id.* “[T]he evidentiary burden [is] on the antitrust plaintiff to prove that the action of the defendant comes within the sham exception to *Noerr-Pennington* in this kind of case.” *Id.*; *Gene Cope & Associates, Inc v Aura Promotions, Ltd*, 692 F Supp 724 (ED Mich 1988). The “sham exception” has been narrowly construed by courts. See *Westmac, Inc v Smith*, 797 F 2d 313 (CA 6, 1986); *Razorback Ready Mix Concrete Co v Weaver*, 761 F 2d 484 (CA 8, 1985).

We conclude there was sufficient evidence to support the conclusion that WIC’s instant complaint is “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” The evidence admitted in regard the federal action clearly indicates that the instant case was barred by *res judicata*, discussed, *infra* Section IV. The federal action alleged Whitaker violated his confidentiality agreement by disclosing the Stamptech process. Issues raised by the confidentiality agreement implicate any trade secret that

Whitaker would have disclosed in violation of the confidentiality agreement. Further, the Washtenaw action that had been settled included a counterclaim by Whitaker to null his non-competition agreement. Issues raised in regard to Whitaker's ability to compete against WOM would clearly indicate that Whitaker intended to return to making pierce nuts, interconnected or otherwise. Given Whitaker's previous employment with WIC, there is little question that any trade secret claim could and should have been brought at that time. Thus, we conclude the trial court did not err in denying summary disposition because there is evidence that WIC's instant complaint is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."

Further, the record evidence also supports the jury's conclusion that WIC did not reasonably believe the Stamptech process was a trade secret, and thus WIC filed the instant suit only to harass Whitaker or force him to stop competing. There was evidence that hundreds of people had seen the Stamptech process. There was evidence no company ever associated with the Stamptech process, including Stamptech, MIOH, or MacLean-Fogg, required any employee to sign a confidentiality agreement. There was no evidence of any due diligence to discover whether the Stamptech process had been kept secret before WOM purchased Stamptech. There was evidence presented that the Grube patent described the Stamptech process, which is likely the reason MacLean-Fogg and Stamptech had not considered it confidential. While Neil Whitesell and other executives of WIC maintain that Whitaker had orally assured them that the inline interconnected pierce nut process was confidential, there is no document indicating that it had been kept confidential. Further, there was no evidence of any security of the Stamptech process. We conclude there is evidence from which a jury could conclude that WIC did not reasonably believe that the Stamptech process was a trade secret and merely filed the instant suit to harass Whitaker or prevent him from competing. WIC's motion for summary disposition was properly denied.

IV. RES JUDICATA

A. STANDARD OF REVIEW

This Court reviews the question whether res judicata bars a subsequent action de novo. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004), citing *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

B. ANALYSIS

We conclude the trial court properly determined that both the Washtenaw County action and the federal action are res judicata and bar the instant lawsuit.

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Pierson Sand & Gravel, Inc*, 460 Mich at 380.

Under Michigan law, res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the

second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007); *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006). The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

WIC only challenges the third element in which our Supreme Court “has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Adair*, 470 Mich at 121, citing *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). “Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit” *Id.* at 125 quoting 46 Am Jur 2d, Judgments 533, p 801.

WIC specifically argues that the instant case arises from a different transaction than that underlying the Washtenaw case and the federal case.

In the Washtenaw action, Whitesell Corporation and WOM sued Whitaker for breach of fiduciary duties, tortious interference with business relationships/expectancies, and conspiracy. The complaint mentioned that Whitaker had signed a confidentiality agreement and alleged Whitaker was “wrongfully retaining possession of company property and information.” Whitaker counterclaimed seeking to null and void his non-competition agreement. The parties accepted a mediation agreement and a \$10,000 judgment was entered against Whitaker in October 2000.

We conclude that claims in which Whitaker sought to disclose trade secrets should have been raised in relation to a claim to null and void a non-competition agreement. How Whitaker would attempt to compete with WOM, especially considering his former experience, would clearly form a convenient trial unit. Further, little diligence would need be exercised to discover any potential trade secret disclosure, given pleadings indicating that, Whitaker “has now commenced operations making pierce nuts for a company known as the ‘Pierce Nut Company’ [PNC] located in Livonia, Michigan. This company manufactures the same product and sells it to the same customer base as does Stamptech.”

Further, for the same reasons, the instant case is barred by res judicata because of the resolution of the federal action. In that case, there was no question that Whitaker was competing against WOM and his method of competition would have been highly relevant. The trial court correctly granted Whitaker’s motion for summary disposition.⁵

⁵ The dissent maintains that res judicata was improper because MRC and Piercetec had not yet been formed. However, this position ignores that the federal court essentially held that WOM could no longer assert claims arising from Whitaker’s employment with Whitesell because those claims should have previously been resolved. “Unless it is set aside by a court, a default judgment is absolute and is fully binding, under the doctrines of estoppel and merger of
(continued...)

V. TRADE SECRET

A. STANDARD OF REVIEW

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003); *Silberstein v Pro-Golf of America, Inc.*, 278 Mich App 446, 455; 750 NW2d 615 (2008).

A. ANALYSIS

We need not decide whether the Stamptech process was a trade secret. Even if it was a trade secret, the trial court's conclusion to the contrary would not result in a reversal of the jury's verdict. This is because the theories of the parties and the applicable law were adequately and fairly presented to the jury.

There is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997); *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008). Here, even assuming that the trial court, by directing a verdict that there was no trade secret, improperly suggested to the jury that WIC's interest in the Stamptech process was not a protected trade secret, the jury was nonetheless required to conclude that the WIC's primary objective in bringing the trade secret claim was to hurt Whitaker. This additional finding rendered the court's ruling harmless. See *Dadd v Mount Hope Church*, 486 Mich 857, 780 NW2d 763 (2010) (trial court's failure to instruct the jury on defendant's qualified privilege rendered harmless by the jury's independent finding that defendant acted with reckless disregard).

WIC also notes that the trial court, upon suggestion of Whitaker's counsel, expressly limited the sham litigation instruction to Whitaker's *antitrust* counterclaim. Thus, WIC maintains that court's instruction did not require Whitaker prove that WIC engaged in "sham litigation" to establish its claim of *tortious interference with business relationship/expectation*. We recognize that the jury technically was not instructed that Whitaker must prove "sham litigation" along with the tortious interference with business relationship/expectation. However, the jury definitively found that "WIC Corporation's primary objective in bringing the June 23, 2005 lawsuit [was] to hurt Plaintiff Williams Whitaker by bringing or continuing the lawsuit, and not to obtain the relief sought in the suit." To suggest that the jury would not have similarly concluded that WIC engaged in "sham litigation" for purposes of a tortious interference claim

(...continued)

judgment, and res judicata, as one after appearance and contest." 7 Michigan Pleading and Practice (2d ed), § 44.17. Further, we recognize that the instant case involves overlap between the doctrines of res judicata and collateral estoppel. This is likely the case whenever there are multiple lawsuits filed that are all based on the ending of a single employment relationship. And while the dissent addresses whether collateral estoppel applies to consent judgments (the Washtenaw action), the dissent simply fails to recognize that collateral estoppel applies to default judgments (the federal action). See *Rohe Scientific Corp v National Bank of Detroit*, 133 Mich App 462, 467; 350 NW2d 280 (1984). At the least, we must give some affect to the language contained with the judgment of federal court.

strains credibility. Although this instruction was placed with the antitrust section of the jury verdict form, the language of the instruction was not limited to any particular claim. Thus, although a close question, we cannot conclude that any error arising from the trial court's grant of a directed verdict on the trade secret claim requires reversal of the jury verdict in this case.

VI. WHITAKER'S ANTITRUST AND TORT CLAIMS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Maiden*, 461 Mich at 118. Whether a party has standing to appeal is also a question of law subject to de novo consideration on appeal. *Mich Ed Ass'n v Superintendent of Pub Instruction*, 272 Mich App 1, 4; 724 NW2d 478 (2006).

A. ANALYSIS

We agree with Whitaker that WIC was not primarily liable to Whitaker for a MARA violation. The January 30, 2008 judgment in favor of Whitaker reflects the jury's finding in favor of Whitaker against WIC in the amount of \$6 million for tortious interference with business relationship or expectancy, and a \$500,000 award as a result of WIC's flagrant violation of MARA. Thus, WIC's claim on appeal only relates to a \$500,000 award under MARA. Further, as subsequently addressed in Section VIII, the \$500,000 award under MARA must be vacated pursuant to the parties' stipulation. Accordingly, we need not address any of the arguments raised in this claim of appeal.

VII. VARIOUS EVIDENTIARY RULINGS

A. STANDARD OF REVIEW

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005); *PWaknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). An abuse of discretion exists if the results are outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Id.* Error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

B. ANALYSIS

WIC first argues that the trial court erred in admitting "PX 267," which is a counterclaim from a previous lawsuit in which Fabristeel had sued WOM. WOM's counterclaim stated in part that:

Fabristeel currently enjoys a ninety-five market share in the pierce nut and pierce nut tooling industry. This dominant market share evidences that Fabristeel has a monopoly in the pierce nut and pierce tooling industry in the United States and/or Canada. The former constitutes the relevant market

Whitaker offered the counterclaim into evidence to establish that WOM, after having purchased Fabristeel, controlled 95 percent of the pierce nut industry and had a monopoly. The court admitted the PX 267 as a party admission, MRE 801(d)(2). WIC objected based on relevance, unfair surprise, inadmissible hearsay and undue prejudice.

The trial court's admission of PX 267 does not constitute error requiring reversal. WIC argues that an "admission by an attorney as to a point of law is not binding on a court." WIC's reliance on the above statement is misplaced. Although the court need not accept an admission by an attorney as to a point of law as the point of law may be erroneous, that does not mean a court cannot accept an admission by an attorney as to a point of law if it is true.

In addition, PX 267 does not appear to be a point of law but an assertion of fact. We agree with Whitaker that case law indicates that "[a]dmission of fact appearing in pleading may be used as admissions." *Slocum v Ford Motor Co*, 111 Mich App 127, 132; 314 NW2d 546 (1981). Moreover, WIC's objections based on unfair surprise and inadmissible hearsay are specious. WIC cannot be surprised by its own statement and the statement is specifically not hearsay. MRE 801(d)(2). In regard to prejudice, there was additional testimony at trial that WIC controlled the entire pierce nut market and thus PX 267 was merely cumulative.

WIC next argues that the trial court improperly refused to admit testimony of Katherine White. As Whitaker notes, there is no dispute that WIC's motion to add 17 witnesses, including White, was late. Counsel for WIC informed the trial court that they had waited to file the motion to amend the witness list until after the court decided a motion for summary disposition of the antitrust claim. The court indicated that the claim had been pending for a year and did not wish to further extend discovery. We cannot conclude that the court abused its discretion in denying WIC's motion to add witnesses. See *Edi Holdings LLC v Lear Corp*, 469 Mich 1021, 678 NW2d 440 (2004) ("The Court of Appeals clearly erred in finding that the Oakland Circuit Court abused its discretion when it enforced the summary disposition scheduling order"), citing *MCR 2.401*; *People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999).

Moreover, we conclude that White's testimony, as evidenced by her affidavit, was cumulative to the trial testimony from Woods and Gonzales. Specifically, there was testimony that the Stamptech process differed because it would "punch the holes, blank the nuts, or separate the nuts, then reattach the nuts or the fasteners with two pieces of wire." Woods similarly testified that the Stamptech process "pierced, a hole is pierced for a thread, the nuts are completely severed from the strip and then reattached before it exists [sic] the die." The above testimony is not markedly different from White's affidavit, which states that the Stamptech process differs by "cutting the steel section to form a nut, piercing the nut bores, countersinking top and bottom, threading the nut bore." Further, both Woods and Gonzales laud the flexibility of wire used in the Stamptech process, as does White.

WIC next argues that the trial court improperly admitted evidence of emotional distress. In support, defendant cites *Getman v Matthews*, 125 Mich App 245, 249-250; 335 NW2d 671 (1983). In *Getman*, this Court criticized the lower court "openly invit[ing] the jury to award exemplary damages, such as those for "mental distress, embarrassment, humiliation," and other nonpecuniary damages. This contravened the well-established rule that one who commits the tort of intentionally interfering with another's business relations is subject to liability for

‘pecuniary damages.’” While *Getman* does support WIC’s claim that damages for emotional are not permitted in a commercial case, WIC fails to address *Great Northern Packing, Inc v General Tire and Rubber Co*, 154 Mich App 777, 785; 399 NW2d 408 (1986), which, citing 4 Restatement Torts, 2d, § 774A(1), pp. 54-55, specifically provides that:

the elements of damages for tortious interference are:

“One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for

“(a) the pecuniary loss of the benefits of the contract or the prospective relation;

“(b) consequential losses for which the interference is a legal cause; and

“(c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.”

Further, the only Michigan case relying on *Getman*, 125 Mich App 245, for the proposition advanced by WIC was reversed by our Supreme Court. See *Cadillac Vending Co v Haynes*, 402 NW2d 31; 156 Mich App 423, 428 (1986). The trial court did not commit error allowing evidence of emotional distress.

WIC next argues that the trial court erred in refusing to admit “DX 150,” a bankruptcy contempt ruling. The bankruptcy magistrate held Whitaker in contempt for erasing what he believed was personal information from one of his MRC work computers. Whitaker testified that:

Q. Back when you were working at Piercetek, you had a company computer, correct?

A. Yes.

Q. And when the Piercetek assets were being sold in the Bankruptcy Court, the bankruptcy trustee wanted you to return the computer, correct, your company computer?

A. The computer wasn’t specifically mentioned in assets. I realized one day that I had it. It wasn’t on the asset list when I returned it.

Q. Okay. So you did return it?

A. Yes.

Q. Before returning it, didn’t you wipe files from the computer?

A. Yes, I did.

Q. Tens of thousands of files?

- A. I think that's a great exaggeration, but I erased files, yes, I did.
- Q. And did you encrypt those files?
- A. I don't have any idea of what happened to them. I just simply downloaded a cleaning program off the Internet and let it do its thing. I'm far from being a computer whiz. I have no idea what took place in that computer.
- Q. We share that in common, Mr. Whitaker. Were some of the files that you cleaned, did they contain either Piercetec or MRC business records related to pierce nuts?
- A. I don't believe so. I don't think I had any of those on there. It very well could have, but my intent was to remove my personal information from that computer.
- Q. Were any of the files—I'm going to ask a little more broadly. Were any of the files that you cleaned, Piercetec or MRC business records?
- A. I really don't know. I didn't use those – that computer for MRC business. They assigned me two other computers at their facility and I always used those for those business records. They had an IT person, his name was Ray something, and about once a month I'd take that computer in and he would download it or upgrade it or whatever he did, I'd just tell him here it is. They had all the passwords and everything, so I really don't know what was on there in relation to MRC. I didn't use it very much for that other than e-mails with Steve Engleman.
- Q. Are you saying that you did not destroy MRC or Piercetec business records?
- A. I'm saying I don't know what was taken off that computer in relation to MRC. I had a specific goal to protect my personal information on that computer and since the other stuff existed in other computers, I really didn't care what happened to that stuff, because they had it elsewhere, I don't know.

Counsel for WIC then sought to have a bankruptcy contempt citation admitted to impeach Whitaker. The trial court had earlier indicated that if Whitaker denied having destroyed computer files, the order could be used. However, a review of Whitaker's testimony indicates that Whitaker admitted that he destroyed computer files and stated that he simply did not know which files he had destroyed. In short, Whitaker did not deny that he destroyed computer files and the court did not err in denying WIC's request to impeach Whitaker with a bankruptcy contempt order.

Last, WIC argues that the circuit improperly allowed Whitaker to testify as an expert witness on the size of the relevant market and how much of the market WIC controlled. However, Whitaker was not deemed an expert witness, and the record reflects that the trial court merely allowed Whitaker to testify to personal knowledge. WIC has failed to establish an evidentiary error that would require reversal.

VIII. MARA VIOLATION AWARD

A. STANDARD OF REVIEW

Interpretation of a stipulation is a question of law that this Court reviews de novo. *Oakland Hills Development Corp v Lueders Drainage District*, 212 Mich App 284, 294; 537 NW2d 258 (1995).

B. ANALYSIS

We conclude that the trial court improperly awarded Whitaker \$500,000 for his MARA claim.

A stipulation is an agreement, admission or concession made in a judicial proceeding by the parties. *Eaton County Road Commissioners v Schultz*, 205 Mich App 371; 521 NW2d 847 (1994). Stipulations are a type of contract, and stipulated orders which are accepted by the trial court are generally subject to the rules of contract construction. *In re Nestorovski Estate*, 283 Mich App 177 (2009); *Phillips v Jordan*, 241 Mich App 17; 614 NW2d 183 (2000).

The record indicates that the parties stipulated that Whitaker's award would be limited to either the higher amount of either his tortious interference claim or his MARA claim. The only written record of the stipulation is found on page 6 of the jury verdict form, which provides:

NOTE: PLAINTIFF WILLIAM WHITAKER WILL NOT RECEIVE DAMAGES, IF ANY, FOR BOTH HIS TORTIOUS INTERFERENCE AND HIS ANTITRUST CLAIMS. SHOULD DAMAGES BE AWARDED FOR BOTH CLAIMS, PLAINTIFF WILLIAM WHITAKER WILL RECEIVE THE LARGER OF THE TWO.

The jury verdict reflects under part D.

D. Antitrust/Monopolization/Attempted Monopolization - Interconnected Pierce Nuts - Damages

10. What is the amount of damages, if any, incurred by Plaintiff William Whitaker with respect to interconnected pierce nuts as a result of Defendant WIC Corporation's antitrust violation? If you answered "no" to any of the Questions 6, 7, 8 or 9, then your answer should be "0."

[\$2,971,301]

If your answer is "0", go to Question No. 13

If your answer is anything other than "0", go on to Question No. 11

11. With respect to interconnected pierce nuts, do you find that Defendant WIC Corporation's antitrust violation was flagrant?

[YES]

If your answer is “Yes,” go to Question No. 12

If your answer is “No,” go to Question No. 13

12. You may award any amount of up to three times the amount of damages as shown in response to Question No. 10, above. If you choose to do so, insert the amount

[\$500,000]

Go on to Question No. 13

13. Insert the higher amount, if any, of damages identified in response to Question No. 10 and 12. The number will become your damage award for interconnected pierce nuts. If you did not award in response to Question No. 10, please insert \$0.

[\$2,971,301]

Here, the trial court awarded Whitaker \$500,000 damages for a flagrant MARA violation on the basis that “the stipulation was to the effect that Whitaker could not receive a double recovery of compensatory damages.” However, the stipulation at the end of the jury verdict form only refers to “damages” as does part D of the jury verdict relating to antitrust damages. The stipulation in no way indicates that damages for a flagrant violation of MARA would be separately awarded. Rather, the jury verdict form makes clear that the parties intended that a flagrant violation of MARA would merely allow for the possibility that MARA damages could be tripled. The court’s interpretation of the agreement is at odds with the jury verdict form and stipulation, and the \$500,000 MARA award is vacated.

IX. FLAGRANT AND PERVASIVE COUNSEL MISCONDUCT

A. STANDARD OF REVIEW

Whether to grant or deny a motion for a new trial is entrusted to a trial court’s discretion, which requires appellate review to be for an abuse of that discretion. *Hilgendorf v St. John Hosp. and Medical Center Corp*, 245 Mich App 670, 682; 630 NW2d 356 (2001). An appellate court should defer to the trial court’s judgment, and if the trial court’s decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), cert den 549 US 1206; 127 S Ct 1261; 167 L Ed 2d 76 (2007).

B. ANALYSIS

MCR 2.611(A)(1)(b) permits a trial court to grant a motion for a new trial if the prevailing party committed “misconduct,” affecting the moving party’s substantial rights. The following analysis must be used to determine whether attorney misconduct warrants a new trial:

When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [*Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).]

An attorney's comments during trial warrant reversal where "they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 500-501; 668 NW2d 402 (2003).

WIC first argues that Whitaker's counsel inappropriately referred to WIC's lawyers and the name of their law firm. Normally we would view these references as an attempt to disparage opposing counsel or distract the jury. However, the sham litigation exception required Whitaker prove that WIC's suit was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." Clearly, Whitaker had to present evidence indicating that WIC's lawyers should not have realistically expected to succeed. Thus, comments along the lines of attorneys "being ready to file anything anytime" are not inappropriate. Further, the same law firm represents WIC in patent matters and intellectual property which were implicated in this case. Thus, the actions of WIC's lawyers are relevant to the instant case and mentioning their names and their law firm should not be considered misconduct.

WIC claims that Whitaker's counsel "[c]harged that Taylor (representing the seller) and Wiese and WIC (on behalf of the buyer) had 'cooked up a scheme' in the Stamptech, L.P. transaction, to give the appearance of trade secrecy after Whitaker refused to warrant that in the assignment of manufacturing rights." There was no objection to this line of questioning. Further, when specifically asked, [s]o what you did here, was you and Mr. Weise and Neil Whitesell cooked up a scheme, didn't you?" he replied "[t]here was an agreement." Whitaker's counsel did not commit misconduct in characterizing the agreement as a scheme.

WIC claims that Whitaker's counsel "[a]ccused Engleman of a series of wrongful acts, none of which were supported in the record and all of which appear to have been conjured out of whole cloth." Again, there was no objection to this line of questioning. Further, there was nothing improper about this line of questioning.

WIC also claims that Whitaker's counsel "[r]epeatedly mischaracterized Reese's failure to use accurate market data as nefarious conduct by WIC to withhold information, ignoring that it was their own failure to move to compel that caused their expert to have to guess." Here, Whitaker's counsel questioned Neil Whitesell in regard to his claim that the market had declined,

and asked if he would “give us the financial information tonight so that we can verify exactly what [Woods] said.” The trial court found the question relevant, but sustained the objection because discovery had ended. The line of questioning was not nefarious, and in any event, WIC’s counsel’s objection was sustained.

WIC claims that Whitaker’s counsel “[b]aldly misrepresented to jurors that Jorge Gonzalez said he had “gotten in trouble” with Neil Whitesell over his testimony, when in fact, Gonzalez’s remark during his testimony went to his belief that he had gotten in trouble *with the judge*.” WIC has not cited to Gonzalez’s testimony in this regard in the record, and thus has abandoned the claim. Further, our review indicates that WIC’s counsel clearly was able to respond to Whitaker’s counsel comment and let the jury decide who was right. We agree with Whitaker’s brief on appeal that, “[t]he common experience seems to be that such breaches of good manners are more detrimental to the actor than the accused.” *Firchau v Foster*, 371 Mich 75, 78; 123 NW2d 151 (1963).

WIC claims that Whitaker’s counsel “[i]mproperly used Trendler to mischaracterize the trial judge as having already ruled there was ‘no trade secret’ when she had not, and then made an unduly argumentative response to the ensuing objection, in essence a closing argument accusing WIC of bad faith.” Here, Whitaker’s counsel relied on a circuit court opinion that indicated that if Stamptech and MIOH did not maintain the confidentiality of the trade secret, “there can be no trade secret.” Trendler was of the opinion that Stamptech and MIOH did not maintain the confidentiality of the trade secret, and counsel properly asked whether he believed the Stamptech process was not a trade secret. There was no misconduct.

WIC also claims that Whitaker’s counsel “[e]licited from Whitaker hearsay that Howard & Howard’s bankruptcy lawyer called his lawyer with a veiled threat disguised as an inquiry about whether Whitaker was paying his fees.” The trial court agreed that the remark should not have been brought out, but found it insufficiently prejudicial to warrant a mistrial. *Id.*, at 135-40.” Whitaker’s counsel asked him, “[d]o you have an opinion as to whether they take one position in one court, and a different position in a different court.” Whitaker replied, “[t]hey do more than that. Ms. Gretchko even called two of my attorneys and wanted to know if I was paying my bills. What the heck does that have to do with anything.” There was an immediate objection, which was sustained. Here, Whitaker’s counsel asked a benign question and received a non-sequitor response. Whitaker’s counsel did not engage in misconduct in this instance.

WIC cites in passing several tinged comments by Whitaker’s counsel over the course of a 25-day trial. Not once however does WIC admit that this type of case requires that a plaintiff prove sham litigation. And while this Court has, as requested by WIC, “suffer[ed] through this entire transcript” and found that, at times, Whitaker’s counsel, specifically John Chupa, was overzealous, combative and tended to elicit cumulative testimony, the trial court was in a far better position to assess counsel’s conduct, and given the nature of the case and the protracted proceedings, we cannot conclude that the court erred in denying defendant’s motion for new trial.

X. ATTORNEYS FEES

A. STANDARD OF REVIEW

The findings of fact underlying an award of attorney fees are reviewed for clear error, *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007), while underlying questions of law are reviewed de novo, *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005). The decision whether to award attorney fees and the determination of the reasonableness of the fees are within the trial court's discretion and will be reviewed on appeal for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; ___ NW2d ___ (2009). An abuse of discretion occurred when the decision was outside the range of reasonable and principled outcomes. *Smith*, 481 Mich at 526.

B. ANALYSIS

We conclude that the trial court did not err in awarding attorneys fees, but we remand for a determination of the reasonable rate for attorney John Chupa.

The trial court awarded attorneys fees' on several bases. MCL 445.1905, provides that:

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

Here, we cannot disagree with the trial court's finding that WIC brought its claim, or at the least, maintained its claim, in bad faith. As defined by a legal dictionary, "bad faith" means "[d]ishonesty of belief or purpose[.]" Black's Law Dictionary (8th ed). The jury specifically found that WIC's "lawsuit was so objectively baseless that no reasonable litigant could realistically be expected to win." The jury also found that "Defendant WIC Corporation's primary objective in bringing the June 23, 2005 lawsuit [was] to hurt Plaintiff Williams Whitaker by bringing or continuing the lawsuit and not to obtain relief sought in the suit." Given these findings, the court did not clearly err in finding that WIC's claim of misappropriation was made in bad faith, and did not abuse its discretion in awarding attorneys fees' pursuant to MCL 445.1905.

Further, given that this conclusion is supported by evidence and consistent with the jury verdict, the trial court did not err in relying on MCR 2.114 (the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation) and MCL 600.2591 (devoid of arguable legal merit) as additional basis to award attorneys fees'.

WCI also argues that trial court "abdicated its responsibilities" by not holding an evidentiary hearing to determine the amount of attorneys' fees.

Generally, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed. *Kernen v Homestead Development Co*, 252 Mich App. 689, 691; 653 NW2d 634 (2002), citing *Miller v Meijer, Inc*, 219 Mich App 476, 479; 556 NW2d 890 (1996). However, if the parties created a sufficient record to review the issue, an

evidentiary hearing is not required. *Id.* citing *See Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999); *Giannetti Bros Constr Co, Inc v City of Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989). A trial court's decision that an evidentiary hearing is not warranted is reviewed for an abuse of discretion. *Id.*

Here, Whitaker submitted in his January 10, 2008 motion to enter order of judgment voluminous detailed billing statements for attorneys and costs. At a January 25, 2008 hearing on the motion, counsel for Whitaker iterated the hourly attorneys fees' rate for each attorney that had worked on the case, all of which were separately delineated. Counsel for WCI stated "your Honor, we're primarily going to rely primarily what is already contained in our response brief, which the Court just indicated the Court has thoroughly read." Thus, the record does not reflect a request for hearing. Counsel for WIC did however comment on the rate requested by Whitaker's primary trial counsel, John Chupa, which was \$475 an hour. Counsel for WIC indicated that,

Whitesell argued . . . that the case law being relied on by Mr. Whitaker for a \$475 . . . an hour fee for Mr. Chupa is based on patent infringement cases. This was not a patent infringement case. Mr. Chupa knows they are completely separate animals. This was not a patent infringement case even if it potentially involved patent. Therefore, the request for \$475 an hour, for this particular reason, and other reasons stated in our response brief, is highly excessive.

Mr. Chupa, however, noted that "[w]e talked about abandonment, continuation practice, patent disclosure practice, all sorts of basic patent issues that required a patent lawyer on both sides, not just a patent lawyer on Mr. Whitaker's sides, but a patent lawyer on Howard and Howard's side."

In regard to Mr. Chupa's hourly rate, the trial court stated:

Mr. Chupa has been practicing for over 20 years, is not just a patent attorney, and I don't say that to desperate (sic) him, I mean he's not only a patent lawyer, but I think had both a Bachelor's and Master's degree in Engineering, and has brought both skills to bear in representing Mr. Whitaker in this matter. And given the length of his experience, his skill set and the kind of case and issues involved in this case, I think \$475 is entirely reasonable. If you look at the amount involved, there were millions of dollars involved in this lawsuit, the results obtained were substantial, millions of dollars, because of the length of this litigation – the pre-trial litigation and the amount of time this case took to try, which was some eight weeks, if we look at the – whether the acceptance of the particular employment would preclude other employment by a lawyer, I think that's fairly easily answered. A lot of time has been devoted to Mr. Whitaker in this case, probably to the exclusion of at least some other matters that Mr. Chupa and Mr. Nine and others would have ordinarily been involved in

However, in *Smith*, 481 Mich at 530-531, our Supreme Court held that,

a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In

determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under Wood). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee.

Smith does not differentiate between types of lawyers but focuses on “fee customarily charged in the locality for similar legal services.” Here, to support Mr. Chupa’s rates, Whitaker provided articles from the Wall Street Journal, the Intellectual Property Conference, and Genetic Engineering & Biotechnology News. These articles do not reflect a “fee customarily charged in the locality for similar legal services.” Further, we also question whether these articles can be considered “reliable surveys or other credible evidence of the legal market.” Accordingly, we agree with WIC that Whitaker must provide some reliable documentation to determine fees consistent with *Smith*, 481 Mich 519. Thus, we remand the cause to determine the fee customarily charged in the locality for the services that Mr. Chupa provided.

XI. UNSUPPORTED AND EXCESSIVE DAMAGE AWARD

A. STANDARD OF REVIEW

“[T]he adequacy of the amount of damages awarded is ordinarily within the province of the jury,” including “awards for pain and suffering.” *Taylor v Mobley*, 279 Mich App 309, 311; 760 NW2d 234 (2008), citing *Kelly v Builders Square, Inc.*, 465 Mich 29, 35; 632 NW2d 912 (2001); *Bosak v Hutchinson*, 422 Mich 712, 736; 375 NW2d 333 (1985). “[D]espite this significant deference we must pay to the jury’s determinations, there is room for limited appellate review.” *Id.*, citing MCR 2.611(A).

B. ANALYSIS

WIC argues that there was no evidentiary support for the jury’s \$6 million verdict. WIC specifically argues that, “there is insufficient evidence to show that [Whitaker] ever would have made that much in the fastener industry.” Clearly, this assertion begs the question of how much Whitaker could have earned had WIC not interfered with business relationships and expectancies. Here, Whitaker presented a so-called damages expert, James Reese, to calculate the amount of money Whitaker could have expected had he “been allowed to complete or negotiate an agreement for his livelihood,” with potential contracts. Reese indicated that he only calculated damages on this legal theory from 2005 forward. Reese created a theoretical pierce nut company and developed projections of that company’s income. He assumed that the company would have to be sold in 2 years according to the tortious interference with business relationship/expectation theory. At the end of year he projected \$5.4 million in total income. He also testified that the “sale price at four times earnings would be \$21.6 million.”

In regard to emotional-distress damages, WIC contends that “Whitaker’s testimony that he gained weight from eating cheaply was insufficient to support a \$6 million award.” The emotional distress damages were not based on Whitaker’s eating habits. First, not only did Whitaker present evidence of emotional distress, but several witnesses testified that WIC’s had actually harmed his reputation. For instance, Derek Cushman testified that,

Yes, there's a concern about his ability to basically make everything happen without getting sued. The fact that – they're scared of the facts that they don't want to have material commitments and so forth. I mean you're talking expensive material that they want to make sure that the material is supplied and gets paid for. And so yeah, they're concerned.

Further, Cushman concluded that WIC's actions "lessen[ed] their willingness to do business with [Whitaker]."

Eugene Oldford similarly testified that

basically it brings about credibility and whether or not [Whitaker] is going to be able to make the product and produce it, same thing, and in turn, deliver the product, and they get nervous thinking that all of a sudden he's being shutdown again and then they would be back to having to retreat to wherever they had been purchasing from before.

There was also testimony from witnesses that WIC actions took an emotional toll on Whitaker. Oldford also testified that: "I've known [Whitaker] for, as you know, twelve years and I think it's been very taxing on both his health and his mental attitude because of the distraction." Cushman presented similar testimony.

In our view, the best explanation of the amount of damages awarded to Whitaker under the tortious interference with business relationship/expectation theory is that he could have had a company that made \$5.4 million profit in the relevant time period. Further, the jury could have awarded the remaining \$600,000 as either harm to his reputation or emotional harm. Given the significant deference this Court must pay to the jury's determinations, the jury determination of damages is not clearly erroneous.

We affirm in part and reverse in part. We remand for further proceedings consistent with this opinion. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Brian K. Zahra