

STATE OF MICHIGAN
COURT OF APPEALS

MARK GINNARD,

Plaintiff-Appellant,

v

ADVANCED DESIGN AND PROTOTYPE
TECHNOLOGIES, INC., ANNETTE C. SMITH,
and RONALD BRIAN SMITH,

Defendants-Appellees.

UNPUBLISHED
September 27, 2012

No. 303162
Oakland Circuit Court
LC No. 2008-096148-CK

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court opinion and order denying his request for shareholder oppression damages. We reverse.

Following a jury trial, plaintiff was awarded monetary damages for breach of contract and breach of employment agreement against defendants. Plaintiff held a 46.5% shareholder interest in defendant, Advanced Design and Prototype Technologies, Inc (ADAPT). The jury also concluded that the individual defendants committed shareholder oppression, but the presiding trial court, a visiting judge, concluded that he would determine the appropriate remedy.¹ The visiting judge was unsatisfied with the expert testimony submitted by the parties regarding the value of ADAPT shares held by plaintiff and appointed his own independent expert, Timothy Dankoff. However, Dankoff's attempt at valuation was thwarted by the fact that documentation he requested did not exist. Dankoff raised his concerns with the parties and noted that, due to the lack of documentation, he could provide an *estimate* of valuation. Both sides to the litigation indicated that they did not wish to spend additional funds on further evaluation by Dankoff. Consequently, the case was returned from the visiting judge to the assigned judge for an evidentiary hearing at which Dankoff testified. Dankoff testified that he was hesitant to provide an estimate in light of the lack of documentation and his concerns that there may be impropriety with regard to corporate expenditures. However, he did not delineate the party he

¹ The jury's determination regarding shareholder oppression and the trial court's bifurcation of the damage issue are not challenged on appeal.

deemed to be responsible for the alleged improprieties. Dankoff acknowledged that he estimated the valuation of plaintiff's shares in the corporation to be in the range of \$600,000 to \$1,000,000. Despite this testimony and the available remedies set forth in MCL 450.1489, the trial court declined to grant any remedy to plaintiff.

Plaintiff first alleges that the trial court erred by concluding that a valuation of the corporate entity, ADAPT, was too speculative. We agree.

The element of damages must be proved by a preponderance of the evidence, and the plaintiff bears the burden of proof. *Washington v Jones*, 386 Mich 466, 472; 192 NW2d 234 (1971). Stipulations of fact by the parties are binding, but stipulations of law are not binding. *Gates v Gates*, 256 Mich App 420, 426; 664 NW2d 231 (2003). Following a bench trial, a trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195; 761 NW2d 293 (2008). A trial court's damage award in a bench trial is reviewed for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). "A finding is clearly erroneous if panel members are left with a definite and firm conviction that a mistake has been made." *Mettler Walloon, LLC*, 281 Mich App at 195. A damage award is not clearly erroneous where the damage award was within the range of the evidence presented, and the trial court was aware of the issues in the case and appropriately applied the law. *Triple E Produce Corp v Mastronardi Produce*, 209 Mich App 165, 177; 530 NW2d 772 (1995). "[D]amages that are speculative or based on conjecture are not recoverable." *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 255; 792 NW2d 781 (2010). However, it is unnecessary for damages to be determined with mathematical certainty. Rather, an award of damages is sufficient if there is a reasonable basis for computation. *Id.* "Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

A damage award must take into account the facts and circumstances of the individual case. *Om-El Export Co, Inc v Newcor, Inc*, 154 Mich App 471, 485; 398 NW2d 440 (1986). "The valuation of stock in a closely held corporation is often a difficult task." *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). Because of the difficulty in determining the value of stock in a closely held corporation, the trial court is given great latitude in determining the valuation. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). There is no error in the valuation if the determination falls within the range of the evidence presented. *Pelton*, 167 Mich App at 25-26; see also *Diamond v Witherspoon*, 265 Mich App 673, 694; 696 NW2d 770 (2005). Damages are not precluded because of uncertainty in computation particularly when the defendant's conduct creates the lack of certainty:

[W]here injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have. We do not "in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable."

[*Stimac v Wissman*, 342 Mich 20, 28; 69 NW2d 151 (1955).] Particularly is this true where it is defendant's own act or neglect that has caused the imprecision. [*Purcell v Keegan*, 359 Mich 571, 576; 103 NW2d 494 (1960).²]

A defendant cannot "take advantage of his own neglect to defeat the plaintiff's statutory cause of action." *Id.* at 574. Remand is warranted where the trial court's dispositional holding is insufficient for this Court to determine whether the trial court reached the proper result on the basis of its findings of fact. *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 489; 608 NW2d 531 (2000).

Issues involving statutory interpretation present questions of law that are reviewed de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). To determine the legislative intent, the court must first examine the statute's plain language. *Klooster*, 488 Mich at 296. If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Briggs*, 485 Mich at 76.

MCL 450.1489 provides that a shareholder may bring a cause of action for shareholder oppression. If the shareholder establishes grounds for relief, the circuit court may order (1) dissolution and liquidation of the corporation; (2) cancellation or alteration of the documents governing the corporation; (3) prohibition of a corporate act; (4) the purchase at fair value of the shares of the shareholder; or (5) an award of damages to the shareholder. MCL 450.1489(a)-(f). In the present case, plaintiff sought the purchase at fair value of his shares and an award of damages. The facts and circumstances of this case involved a closely held corporation such that valuation to a degree of mathematical certainty would be difficult. *Jansen*, 205 Mich App at 171; *Pelton*, 167 Mich App at 25; *Om-El Export Co, Inc*, 154 Mich App at 485. Additionally, according to the independent expert, documents traditionally prepared in the administration of a corporation were lacking. However, Dankoff did not render an opinion regarding the party responsible for the failure to prepare the appropriate records. Moreover, despite being advised by the expert of this deficiency, the trial court did not inquire regarding the party responsible.

Moreover, we note that expert Dankoff advised the parties that he would have to provide an *estimate of valuation* if he did not have additional documentation. Despite this notice, the

² In *Purcell*, 359 Mich at 573, the plaintiff sought to recover unpaid compensation for overtime work in accordance with the fair labor standards act, 29 USC § 216 (1958). The plaintiff did not keep a detailed accounting of the amount of overtime hours worked. Further, the plaintiff noted that the numbers of hours worked was contingent upon the orders on hand that week. The defendant asserted that the time cards did not indicate that the plaintiff worked overtime and therefore, there was no "definite proof" of the hours worked. The trial court agreed with the defendant, determining that the proof was not definite enough to justify recovery. *Id.* at 573-575. The Supreme Court reversed, noting that the plaintiff was not required to prove his damages with mathematical certainty, particularly where the neglect by the defendant employer caused the imprecision. *Id.* at 576-577.

parties opted not to provide additional documentation or further evaluation.³ Consequently, the trial court determined that it would conduct an evidentiary hearing to address the propriety of the valuation. The trial court did not address whether the parties' decision to allow Dankoff to proceed to an estimate of valuation under those circumstances was a binding stipulation of fact. *Gates*, 256 Mich App at 110. Moreover, irrespective of the determination regarding the valuation, the trial court did not address the other available remedies set forth in MCL 450.1489 regarding plaintiff's shares. Accordingly, a remand is appropriate to address the level of certainty required for determination of damages in a closely held corporation, *Jansen*, 205 Mich App at 171, whether the parties agreed to an estimate of valuation by declining to provide further documentation to Dankoff, *Gates*, 256 Mich App at 426, whether the fault of a party is applicable to the calculation of damages, *Purcell*, 359 Mich at 576, and the propriety of another remedy in accordance with MCL 450.1489. *City of Jackson*, 239 Mich App at 489.⁴

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

³ Defendants' brief on appeal provides that the parties "agreed" that they did not want to spend additional monies toward Dankoff's fees.

⁴ In light of our conclusion that a remand is warranted, we do not address whether the trial court erred in excluding plaintiff's requested evidence. The trial court may conclude that a review of the materials is warranted in light of the remand, and we will not foreclose such review if necessary.