

Court of Appeals, State of Michigan

ORDER

Kallas Company v Tom's Oyster Bar-Management, Inc.

Docket Nos. 305780 & 305801

LC No. 09-026700-CK

Kurtis T. Wilder
Presiding Judge

Cynthia Diane Stephens

Amy Ronayne Krause
Judges

The Court orders that the May 21, 2013 unpublished per curiam opinion is AMENDED in two places. First, the last sentence of the first paragraph on page 2 now reads: "For the reasons set forth below, we affirm." Second, the last paragraph of the opinion (page 12) now reads: "Affirmed."

In all other respects, the May 21, 2013 opinion remains unchanged.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JUN 04 2013

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

KALLAS COMPANY,

Plaintiff/Counter-Defendant-
Appellee,

v

TOM'S OYSTER BAR-MANAGEMENT, INC.,
TOM'S OYSTER BAR-DOWNTOWN, INC.,
TOM'S OYSTER BAR, LTD., TOM'S OYSTER
BAR-NAUTICAL MILE, INC., TOM'S OYSTER
BAR-ROYAL OAK, INC., and THOMAS J.
BRANDEL,

Defendants/Counter-Plaintiffs,

and

HOWARD & HOWARD ATTORNEYS,
P.L.L.C.,

Non-Party-Appellant.

UNPUBLISHED
May 21, 2013

No. 305780¹
Wayne Circuit Court
LC No. 09-026700-CK

KALLAS COMPANY,

Plaintiff/Counter-Defendant-
Appellee,

v

No. 305801
Wayne Circuit Court
LC No. 09-026700-CK

¹ Docket Nos. 305780 and 305801 were consolidated by order of this Court. *Kallas Co v Tom's Oyster Bar-Mgt, Inc*, unpublished order of the Court of Appeals, entered August 31, 2011 (Docket Nos. 305780 and 305801).

TOM'S OYSTER BAR-MANAGEMENT, INC.,
TOM'S OYSTER BAR, LTD., and TOM'S
OYSTER BAR-NAUTICAL MILE, INC.,

Defendants/Counter-Plaintiffs,

and

THOMAS J. BRANDEL, TOM'S OYSTER BAR-
DOWNTOWN, INC., and TOM'S OYSTER
BAR-ROYAL OAK, INC.,

Defendants/Counter-Plaintiffs-
Appellants.

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

In Docket No. 305780, Howard & Howard Attorneys, P.L.L.C. (“the Attorneys”) appeal by right the trial court’s opinion and order granting a judgment in favor of plaintiff, Kallas Company (“Kallas”), in this breach of contract action. Specifically, the Attorneys challenge an earlier order granting summary disposition in favor of plaintiff and granting in part and denying in part plaintiff’s motion against it and defendants² for sanctions and awarding attorney fees and costs. In Docket No. 305801, defendants³ appeal by right the same opinion and order granting a judgment in favor of plaintiff following a bench trial. Defendants also challenge the trial court’s orders granting plaintiff’s motion for summary disposition on defendants’ counterclaim of accounting malpractice and the grant of attorney fees and costs as sanctions for a frivolous counterclaim. For the reasons set forth below, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I. STANDARDS OF REVIEW

The Attorneys and defendants assert the trial court erred in granting summary disposition in favor of plaintiff, finding that defendants’ counterclaim of accounting malpractice was frivolous, and determining the award of attorney fees and costs as sanctions. This Court reviews

² Defendants are identified as Tom’s Oyster Bar-Management, Inc., Tom’s Oyster Bar-Downtown, Inc., Tom’s Oyster Bar, Ltd., Tom’s Oyster Bar-Nautical Mile, Inc., Tom’s Oyster Bar-Royal Oak, Inc., and Thomas J. Brandel.

³ For purposes of the appeal filed in Docket No. 305801, while the named defendants are the same as identified in Docket No. 305780, only Thomas J. Brandel, Tom’s Oyster Bar-Downtown, Inc., and Tom’s Oyster Bar-Royal Oak, Inc. are listed as appellants.

de novo a trial court's decision to grant or deny summary disposition. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

When ruling on a motion brought under MCR 2.116(C)(10), the court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. [*The Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009).]

We review a trial court's decision to impose sanctions for the filing of a frivolous action for an abuse of discretion. A trial court's factual finding that a litigant's position was frivolous is reviewed for clear error. MCR 2.613(C); *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Attorney General v Harkins*, 257 Mich App 564, 575; 669 NW2d 296 (2003). "[T]he determination of the reasonableness of [attorney] fees . . . is within the discretion of the trial court." *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). Accordingly, this Court reviews the award of attorney fees and costs for an abuse of discretion. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 286; 761 NW2d 761 (2008); *Lavene v Winnebago Indus*, 266 Mich App 470, 473; 702 NW2d 652 (2005). Findings of fact are reviewed for clear error and questions of law are reviewed de novo. *Ypsilanti Charter Twp*, 281 Mich App at 286. "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id.*

II. ACCOUNTING MALPRACTICE

Initially, defendants challenge the trial court's grant of summary disposition in favor of plaintiff. Defendants specifically assert that the trial court erred in ignoring the affidavits submitted by defendant Thomas J. Brandel and Professor Alan Reinstein, which served to create a genuine issue of material fact precluding summary disposition. We disagree.

A negligence claim is comprised of the following elements: "(1) duty, (2) general standard of care, (3) specific standard of care, (4) cause in fact, (5) legal or proximate cause, and (6) damage." *Malik v William Beaumont Hosp*, 168 Mich App 159, 168; 423 NW2d 920 (1988). "The term 'malpractice' denotes a breach of the duty owed by one rendering professional services to a person who has contracted for such services." *Id.* A professional malpractice action constitutes a tort claim that is "predicated on the failure to exercise the requisite" level of professional skill. *Stewart v Rudner*, 349 Mich 459, 468; 84 NW2d 816 (1957). Thus, defendants bear the burden of establishing: (1) the existence of a professional relationship; (2) evidence of negligence in the performance of services rendered by plaintiff to defendants;

(3) that the negligent acts were a proximate cause of an injury; and (4) the existence and extent of the injury that is alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

In this instance, the parties do not dispute the existence of a professional relationship, as evidenced by the contractual agreements, between plaintiff and defendants. Similarly, there is no dispute that defendants have incurred substantial penalties and interest for the failure to pay various taxes in a timely manner. Instead, defendants focus their argument on allegations that plaintiff's negligence in failing to fulfill its professional obligation to inform defendants of its termination of payments to the Internal Revenue Service (IRS) and the consequences inherent in not timely paying the taxes due. Defendants therefore argue that there exists a genuine issue of material fact that precluded the grant of summary disposition. By contrast, plaintiff argues that regardless of any alleged negligence, the grant of summary disposition was inevitable because defendants are unable to establish that plaintiff's alleged negligence was a proximate cause of defendants' injury because the evidence demonstrated that defendants' failure to pay the taxes was attributable to a lack of funds, not a lack of knowledge.

Defendants contend that the affidavits submitted by Brandel and Reinstein created a genuine issue of material fact, that the trial court ignored the affidavits and thus improperly granted summary disposition in favor of plaintiff. In his affidavit, Brandel averred that plaintiff "never notified me that it was not paying payroll taxes owed . . . and I only learned that these payroll taxes were not being paid months later." Brandel further attested that plaintiff failed to inform him of the possible costs and penalties that could be incurred and that he was unaware "of the costs and penalties associated with failure to timely pay these past due taxes until several months later after enormous penalties and interest had already accrued." Yet, at his deposition, Brandel acknowledged receiving "monthly statements" from plaintiff, which he reviewed, that detailed the amount of unpaid taxes. Although Brandel could not recall what action he took when he received these statements, he acknowledged, "Maybe I didn't do anything. Maybe I was hoping that business would pick up and we could pay these."

Similarly, when deposed, defendants' bookkeeper, Mary Beth Calandro, acknowledged that defendants routinely had insufficient funds to pay both the payroll and the associated taxes. Calandro indicated that she was aware immediately when plaintiff did not remit the payroll taxes, that plaintiff's employees would contact her to inform her of insufficient funds in the bank account, and that she forwarded copies of notices received from the IRS to both plaintiff and Brandel. "[T]he 'general rule is that knowledge of an agent on a material matter, acquired within the scope of the agency, is imputed to the principal.'" *Briggs Tax Servs, LLC v Detroit Pub Sch*, 485 Mich 69, 80; 780 NW2d 753 (2010) (citation omitted).

This evidence serves to dispute defendants' claim of negligence on the part of plaintiff in fulfilling its professional obligations and the ability to demonstrate causation. Although defendants assert plaintiff was duty-bound to inform them of plaintiff's discontinuation of the direct payment of tax obligations, Calandro's deposition testimony indicates that defendants were placed on immediate notice. Calandro asserted that plaintiff's employees would contact her when insufficient funds were available to remit tax payments. Calandro and Brandel acknowledged receiving monthly statements from plaintiff detailing the amount of unpaid taxes. In addition, Calandro asserted that, upon receiving late notices from the IRS, she copied and provided them to plaintiff and Brandel. Although this evidence does not address defendants'

contention that plaintiff breached its duty as an accountant in failing to inform them directly of the consequences inherent in the failure to timely pay the taxes, the evidence does serve to contradict Brandel's assertion in his affidavit that plaintiff "never notified me that it was not paying payroll taxes owed . . . and I only learned that these payroll taxes were not being paid months later."

Reinstein's affidavit asserts that plaintiff breached the applicable standard of care for an accountant: (a) in failing to notify defendants when plaintiff stopped remitting tax payments, and (b) not notifying defendants of the substantial penalties and interest to be incurred for failing to timely remit the tax payments. To the extent that the evidence demonstrated that plaintiff did inform defendants of the discontinuation of tax payments, the allegation by Reinstein pertaining to plaintiff's failure to notify of the termination of service is without support. The remainder of Reinstein's affidavit articulates standards to be applied to an accountant but does not interpret these standards in terms of direct allegations or examples of how plaintiff's behavior was deficient or fell short of the standards. Contrary to defendants' contention, Reinstein's affidavit failed to sufficiently rebut the inference that summary disposition was appropriate in the circumstances. Reinstein primarily offered only general allegations and references to the standard of care. In accordance with MCR 2.116(G)(6), affidavits submitted to support or oppose a motion brought under MCR 2.116(C)(10) "shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." "Summary disposition is not precluded simply because a party has produced an expert to support its position. The opinion must be admissible." *Amorello v Monsanto Corp*, 186 Mich App 324, 331; 463 NW2d 487 (1990). An affidavit "must set forth with particularity such facts as would be admissible as evidence," not merely an opinion. *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). As such, the "conclusionary language [of Reinstein's affidavit] and its failure to be supported by underlying facts renders it insufficient for purposes of MCR 2.116(C)(10)." *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 207; 413 NW2d 705 (1987). Conclusory statements that a duty was breached are insufficient to create a genuine issue of material fact. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 470; 646 NW2d 455 (2002).

Further, the mere existence of some failure or negligence on the part of plaintiff is insufficient to sustain defendants' counterclaim of accounting malpractice. Integral to establishing the claim is the ability to prove a causal connection between plaintiff's alleged omission and the harm suffered. Based on the testimony proffered, defendants cannot demonstrate this causal link. Calandro repeatedly acknowledged that defendants' failure to pay taxes was not based on a lack of knowledge that those taxes were due but because of the lack of funds available to remit the payments. Similarly, in his deposition, Brandel admitted to an awareness of the overdue taxes and his failure to respond "hoping that business would pick up and we could pay. . . ." Although Brandel contended that if he had been informed by plaintiff he would have used personal funds to meet the overdue tax obligations, the evidence demonstrates that Brandel was aware of the overdue taxes, yet consistently failed to take any action.

Defendants are correct that a trial court, in deciding a motion for summary disposition, is not to make factual findings or weigh credibility. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). However, a party or a witness may not create a factual dispute by submitting an affidavit that contradicts his own prior conduct. *Palazzola v Karmazin Prod*

Corp, 223 Mich App 141, 155; 565 NW2d 868 (1997). Indeed, as this Court has recognized, a witness or party is bound by his or her deposition testimony and cannot contradict that testimony by submission of an affidavit in an effort to overcome a motion for summary disposition. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993). Any contradictory assertions contained in the affidavits submitted by defendants were insufficient to successfully create a genuine issue of material fact and oppose the summary disposition motion. Based on the undisputed evidence proffered by plaintiff from defendants' employees and witnesses that a proximate cause of defendants' injury was the insufficiency of funds to pay the taxes as they became due, the trial court did not err in the award of summary disposition.

III. FRIVOLOUS COUNTERCLAIM

Defendants next contend that the trial court erred in its determination that the counterclaim for accounting malpractice was frivolous and the imposition of sanctions against defendants and the Attorneys. Again, we disagree.

"Awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Keinz*, 290 Mich App at 141 (citation omitted). In accordance with MCR 2.114, "an attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). MCR 2.114(E) mandates the imposition of costs when the filing of a pleading violates MCR 2.114(D), which requires the pleading to be well grounded in fact after reasonable inquiry and that it not be "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D)(2), (3). "The frivolous claims provisions impose an affirmative duty on each attorney to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *Harkins*, 257 Mich App at 576. "The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." *Jerico Const, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

Brandel's deposition testimony, in conjunction with that of Calandro, demonstrated that defendants were aware that taxes were not being timely paid, that interest and penalties were being incurred, and that defendants lacked the monetary resources to pay the taxes owed. The trial court did not ignore the submitted affidavits or make improper credibility determinations in granting summary disposition, dismissing the counterclaim and imposing sanctions. It merely recognized that any liability incurred by defendants derived from their inability to pay the taxes, not the lack of information provided by plaintiff.

Plaintiff's complaint was filed on October 29, 2009. Defendants' counterclaim was not filed until June 11, 2010. At that time, defendants' counsel, at the very least, had available Brandel's deposition testimony, which is contrary to and not supportive of the content of his affidavit. It is not permissible for a "plaintiff to create a genuine issue of material fact by submitting an affidavit that contradicts [his] sworn deposition testimony." *Cunningham v Dearborn Bd of Ed*, 246 Mich App 621, 635; 633 NW2d 481 (2001). Consequently, Brandel's affidavit was insufficient to support defendants' counterclaim because it did not establish the causation element necessary for a claim of accounting malpractice, thus justifying the trial court's dismissal of the counterclaim as frivolous premised on a determination that the

counterclaim was not well grounded in fact, MCR 2.114(D)(2). Similarly, defendants' reliance on the Reinstein's affidavit is unavailing as it primarily contains only bare allegations pertaining to the standard of care and does not rebut plaintiff's evidence that a proximate cause of defendants' injury was the lack of financial resources to pay the taxes when due and not a lack of knowledge that the taxes were outstanding and the resultant consequences of non-payment. By the time plaintiff filed its motion seeking permission to submit a motion for summary disposition on January 13, 2011, defendants and the Attorneys "had ample reason to believe that the [counterclaim] lacked legal merit and evidentiary support" premised on the inability to demonstrate a causal connection between the alleged malpractice and the injury. *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 170; 712 NW2d 731 (2006). At this juncture, defendants had obtained Calandro's deposition testimony, which specifically asserted that defendants lacked the financial resources to pay the taxes incurred and had knowledge that the taxes were not being routinely paid. The submission of the affidavits of Brandel and Reinstein also fails to demonstrate that defendants conducted a reasonable inquiry into the factual and legal viability of the claims as the affidavits were filed approximately one year after the counterclaim was filed. It was reasonable, therefore, for the trial court to infer that defendants violated MCR 2.114 by submitting a counterclaim that was frivolous and vexatious. *BJ's & Sons Const Co, Inc v Van Sickle*, 266 Mich App 400, 413; 700 NW2d 432 (2005).

MCR 2.114 states, in relevant part:

(E) **Sanctions for Violation.** If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, *shall impose* upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

(F) **Sanctions for Frivolous Claims and Defenses.** In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages. [Emphasis added.]

"[T]he term 'shall' is clearly mandatory." *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Consequently, the trial court did not clearly err when it ordered the imposition of sanctions, which are mandatory.

IV. ATTORNEY FEES

Defendants also contest the reasonableness of the attorney fees awarded. We disagree

Notably, the Attorneys do not contest the authority of the trial court to impose joint and several liability for the sanctions imposed. Rather, the Attorneys contend that the imposition of sanctions was contraindicated based on having undertaken a reasonable inquiry of the factual and legal basis for the counterclaim before its signing and submission. As discussed above, this claim lacks merit. Before filing of the counterclaim, the Attorneys had available Brandel's deposition testimony acknowledging defendants' lack of funds to timely pay taxes when due and

his knowledge that the taxes were not being paid by plaintiff. In soliciting Brandel's subsequent affidavit, which was contrary to his deposition testimony, the Attorneys' contention regarding the adequacy of their investigation of the factual and legal basis for the counterclaim is questionable, as well as their motivation.

However, defendants and the Attorneys also dispute the trial court's calculation of what constituted a reasonable attorney fee in the award of sanctions.⁴ In awarding attorney fees, the trial court relied on the Supreme Court's decision in *Wood v Detroit Auto Inter-Ins Exchange*, 413 Mich 573; 321 NW2d 653 (1982), mod *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008). The *Wood* Court explained "that there is no precise formula for computing the reasonableness of an attorney's fee" but identified "the factors to be considered" to include:

(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood*, 413 Mich at 588 (quotation marks and citations omitted).]

In *Smith*, the Court further recognized the factors contained in MRPC 1.5(a) as overlapping the considerations delineated in *Wood* in the determination of what constitutes a reasonable attorney fee. *Smith*, 481 Mich at 530. In addition, when "determining the fee customarily charged in the locality for similar legal services, the trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan. The above factors have not been exclusive, and the trial courts could consider any additional relevant factors." *Id.* (citations omitted).

We conclude that the fee assessed was reasonable under *Wood* and *Smith*. First, plaintiff established, and the trial court accepted, that attorney Neilson's baseline fee was \$250 per hour. Specifically, plaintiff submitted the results of an economic survey by the State of Michigan which indicated that the median hourly rate for an attorney similarly situated to Neilson, an equity partner at a law firm of between 21-50 lawyers practicing in the field of professional liability with 30 years of practice experience, and an LLM in tax law, was between \$230 - \$270 per hour. See *Smith*, 481 Mich at 530-531; *Wood*, 413 Mich at 588. Next, plaintiff argued that \$300 per hour was the appropriate fee for Neilson specifically. Plaintiff established, via two affidavits, that Neilson himself customarily charged \$300 per hour for his work; the affidavits submitted by plaintiffs established that based on Neilson's "professional standing and experience," *Id.*, a \$300 fee for Neilson's work was appropriate. The trial court agreed with plaintiff, concluding that \$300 per hour for Neilson's work was a reasonable fee. In short, because the trial court conducted its analysis following the framework set forth in *Wood* and *Smith*, we cannot conclude that it abused its discretion when it determined that a \$300 attorney fee was appropriate.

⁴ The number of hours expended and the costs awarded are not challenged.

V. PROMISSORY NOTES

Next, defendants contend the trial court erred in finding that the security agreements and promissory notes executed between defendants and plaintiff were valid and enforceable. We disagree.

This Court reviews a trial court's factual findings in a bench trial for clear error and its conclusions of law de novo. *Chelsea Inv Group, LLC v Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made. The trial court's findings are given great deference because it is in a better position to examine the facts." *Id.* at 251 (citations omitted). The interpretation of a contract comprises a question of law, which this Court reviews de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). Whether contract language is ambiguous, necessitating resolution by the trier of fact, is a question of law that this Court reviews de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

Defendants argue that the promissory notes are invalid because they are contrary to the original agreements between the parties regarding the charges that could be incurred for accounting services, because they lacked consideration and because they were procured through duress.

The primary goal of interpreting a contract is to honor the intent of the parties. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). Courts are required to discern the parties' intent from the words used in the contract and must enforce an unambiguous contract in accordance with its plain terms. *Id.* at 656-657. In other words, "when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent." *Burkhardt*, 260 Mich App at 656 (citations omitted).

A promissory note is a contract. *Collateral Liquidation v Renshaw*, 301 Mich 437, 443; 3 NW2d 834 (1942). "A promissory note must be certain as to the sum to be paid, and the time of payment." *First Nat'l Bank v Carson*, 60 Mich 432, 436; 27 NW 589 (1886). Specifically:

[Our Supreme Court] has defined a promissory note as "a *written unconditional promise* by one person to pay to another person therein named . . . a fixed sum of money. . . ." *Parker v Baldwin*, 216 Mich 472, 474; 185 NW 746 (1921) (emphasis added). Further, "[n]o contract or agreement is a promissory note which does not provide for the payment of money, *absolutely and unconditionally.*" *Id.* (emphasis added). Thus, a promissory note is more than a contract to repay a loan: it is a *written instrument* that embodies a formal promise to repay. See MCL 440.9102(1)(uu) and (mmm); MCL 440.3104. [*Jackson v Estate of Green*, 484 Mich 209, 243; 771 NW2d 675 (2009).]

On January 23, 2008, Brandel signed five separate promissory notes on behalf of: (a) Tom's Oyster Bar – Downtown, in the amount of \$9,508; (b) Tom's Oyster Bar, Ltd., in the amount of \$925; (c) Tom's Oyster Bar – Nautical Mile, in the amount of \$4,860; (d) Tom's Oyster Bar – Royal Oak, in the amount of \$7,339; and (e) Tom's Oyster Bar – Management,

Inc., in the amount of \$10,705. The language of all five promissory notes was consistent. The only variation within the documents is the amount alleged to be owed and the business identified as the entity for which Brandel was signing "as personal guarantor." Specifically, each note included the following language:

For consideration as follows: Professional accounting and/or tax and/or payroll services previously rendered, the undersigned does hereby promise to pay to the order of Kallas Company, the sum of _____.

Payable as follows:

On demand.

It is understood that any current or future fees billed through May 31, 2008 will be added to the above balance after which the undersigned will be on a pay-as-you-go basis, meaning that the undersigned pay each new fee as it is billed. And that any billings subsequent to May 31, 2008 not paid within 30 days from the date billed will constitute a default under this agreement.

* * *

Interest shall run at the rate of 18% per annum on the entire principle balance. Every person at any time liable for the payment of the debt evidenced hereby, waives presentment for payment, demand and notice of non-payment of this note, and shall be liable for all costs and attorney fees incurred as a result of collection hereof.

"In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Our Supreme Court has explained that "[t]o have consideration there must be a bargained-for exchange. There must be a benefit on one side, or a detriment suffered, or a service done on the other." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002) (citations and quotation marks omitted). Nothing within the four corners of the subject documents renders them internally unenforceable. Defendants' contention that the promissory notes were an inaccurate reflection of monies owed premised on the underlying contractual agreements between the parties is irrelevant. The sum of each promissory note is stated. Brandel is indicated as the person responsible for the indebtedness, consistent with his signature "as personal guarantor." "A finding of personal liability may be particularly appropriate where the note in question reads 'we promise to pay' the amount in question." *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 289-290; 369 NW2d 487 (1985). In these promissory notes, the language specifies "the undersigned does hereby promise to pay." Plaintiff is designated as the entity owed the indebtedness. The percentage rate is specified in addition to the terms of enforcement. All of the material and required elements of a contract are present.

Defendants challenge the enforceability of the promissory notes based on a lack of consideration. Specifically, defendants argue that a prior debt does not constitute adequate

consideration. Contrary to defendants' assertion, in *Ann Arbor Constr Co v Glime Constr Co*, 369 Mich 669, 674; 120 NW2d 747 (1963), our Supreme Court affirmed a prior ruling "that a note given in payment of a pre-existing debt is supported by valuable consideration." Further, "any person to whom a negotiable instrument has been pledged as collateral security for a pre-existing debt is a holder for value to the extent of the amount due him." *Id.* According to the Court:

The question of consideration necessary to support accommodation paper has not been subject to dispute since the adoption of the negotiable instruments law.

'An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, *without receiving value therefor*, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.' (Emphasis supplied.)

In an action against accommodation indorsers on a note, it is not necessary to show any consideration moving to them.

The prevailing view as to what is necessary to support the signature of an accommodation party is best expressed [by the following]:

'No consideration moving to one who becomes a party merely for accommodation is necessary to support his contract. To fasten liability upon an accommodation indorser, it is not necessary that any consideration should move directly to him. *The contract of such indorsement is supported by the consideration moving to the payee from the person to whom he negotiates the instrument.*' (Emphasis supplied.) [Id. at 674-675.]

Regardless, the various entities comprising defendants owed preexisting debts to plaintiff. These preexisting debts are sufficient consideration in exchange for the continuation of services by plaintiff. Consideration is defined as a bargained-for-exchange resulting in "a benefit on one side, or a detriment suffered, or service done on the other." *Gen Motors Corp*, 466 Mich at 238-239. "Courts do not generally inquire into the sufficiency of consideration." *Id.* at 239. In executing the promissory notes, defendants procured plaintiff's forbearance on the debt owed and a continuation of a working relationship at a time, which the evidence suggests, was financially difficult for defendants. Consequently, this comprised a detriment to plaintiff and a benefit to defendants. As noted above, case law has further suggested that no consideration is required to secure an antecedent corporate debt. See *Enzymes of America, Inc v Deloitte, Haskins & Sells*, 207 Mich App 28, 36; 523 NW2d 810 (1994), rev'd on other grounds 450 Mich 889 (1995). "The adequacy of the consideration is irrelevant to the enforceability of the note and guaranty." *Id.*

Finally, defendants further contend that the promissory notes are invalid because they were procured through duress. We disagree.

Defendants argue that plaintiff refused to release W-2s completed for employees. Because defendants required these documents, it is argued that the threat to withhold the documents was used as a means to coerce Brandel to sign the promissory notes.

Initially, we note that MCL 339.733 states:

(1) Statements, records, schedules, working papers, or memoranda made by a licensee or by an employee of a licensee shall remain the property of the licensee unless there is an agreement to the contrary. This subsection does not apply to a report submitted by a licensee to a client or a document constituting the original books or records of a client's business.

Consequently, the W-2s constituted plaintiff's work product and were not improperly withheld.

Contracts may be voided premised on the existence of duress. *Clement v Buckley Mercantile Co*, 172 Mich 243, 253; 137 NW 657 (1912). "To succeed with respect to a claim of duress, [defendants] must establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations or fortunes." *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 681-682; 591 NW2d 438 (1998) (citations and quotations marks omitted). Defendants are unable to demonstrate the coercion necessary for a claim of duress as plaintiff's withholding of the W-2s was not an illegal act. The "[f]ear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully." *Id.*

Finally, plaintiff contends that Tom's Oyster Bar – Royal Oak is not a proper party, asserting that on November 2, 2011, this defendant "satisfied in whole" the portion of the August 1, 2011, judgment entered against it. In support of its argument, plaintiff attaches a document entitled Satisfaction of Judgment As To Defendant, Tom's Oyster Bar – Royal Oak, Inc. only to its appellate brief. The document provided by plaintiff is not time stamped and does not evidence any designation verifying its filing with the lower court. A review of the lower court file and register of actions does not reveal the existence of this document. As discussed by this Court in *Amorello*, 186 Mich App at 330:

Plaintiffs' argument on appeal ignores the general rule that this Court's review is limited to the record presented in the trial court or administrative tribunal. Enlargement of the record on appeal is generally not permitted. Thus, plaintiffs' references to documents which were not presented to the trial court cannot be considered by this Court. [Citations omitted.]

Accordingly, the document constitutes an improper expansion of the record by plaintiff and we decline to consider it. MCR 7.210(A)(1); 7.212(C)(6), (D)(1).

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause