

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

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KERRY STEEL, INC., KLOCKNER STEEL  
TRADE CORPORATION, and MARS STEEL  
CORPORATION,

UNPUBLISHED  
December 21, 2004

Plaintiffs-Appellees,

v

No. 249805  
Oakland Circuit Court  
LC No. 2000-026013-CK

LESLIE FRIEDMAN,

Defendant-Appellant,

and

CAINE STEEL TUBE CORPORATION,

Defendant,

and

MIDWEST STEEL & TUBE, INC.,

Defendant-Not Participating.

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Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant Leslie Friedman appeals as of right from a judgment, following a bench trial, declaring Friedman liable for fraudulent misrepresentation and awarding \$443,927.17 to plaintiff Kerry Steel, Inc. ("Kerry Steel"), \$87,019.86 to plaintiff Klockner Steel Trade Corporation ("Klockner Steel"), and \$195,980.84 to plaintiff Mars Steel Corporation ("Mars Steel"). We affirm.

In 2000, plaintiffs each sold large quantities of steel to defendant Caine Steel Tube Corporation ("CSTC"), on credit, after defendant Friedman, the owner of CSTC, assured plaintiffs that CSTC was profitable and that business was good. Within a few months after the sales, CSTC was not able to pay its debts and filed for bankruptcy. Plaintiffs commenced this action alleging that Friedman ordered the steel at a time when he knew that CSTC was in financial trouble and could not pay for the large quantities of steel ordered, and that Friedman

fraudulently procured the steel shipments on credit by falsely representing CSTC's profitability and financial status. Following a bench trial, the trial court found that Friedman was liable for fraudulent misrepresentation and awarded plaintiffs damages for the value of the steel shipped to CSTC in reliance on Friedman's false representations.

On appeal, we first address Friedman's claim that the trial court erroneously found him liable for silent fraud, a theory that was never alleged in plaintiffs' complaints.

In general, fraud can be committed by either making affirmative false statements or suppressing the truth. The theory of silent fraud is explained in *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000), quoting *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981):

It is generally recognized that "[f]raud may be consummated by suppression of facts and of the truth, as well as by open false assertions," *Fred Macey Co v Macey*, 143 Mich 138, 153; 106 NW 722 (1906), since "a suppression of the truth may amount to a suggestion of falsehood." *Stewart v Wyoming Cattle Ranche Co*, 128 US 383, 388; 9 S Ct 101; 32 L Ed 439 (1888). In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure. See 37 Am Jur 2d, Fraud and Deceit, § 146.

In order to prove silent fraud, there must be some type of misrepresentation, whether by words or action, and a suppression of material facts where the defendant has a legal or equitable duty of disclosure. *M & D, Inc v McConkey*, 231 Mich App 22, 35-36; 585 NW2d 33 (1998). "A legal duty to disclose commonly arises from a circumstance in which the plaintiff inquires regarding something, to which the defendant makes a false or misleading representation by replying incompletely with answers that are truthful but omit material information." *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 500; 686 NW2d 770 (2004). See, also, *Hord*, *supra* at 412.

Although Friedman asserts that plaintiffs did not allege a theory of silent fraud, he does not identify any portion of the trial court's findings of fact or conclusions of law which allegedly demonstrate that the trial court relied on this theory as a basis for liability. It is apparent from our review of the trial court's decision that it did not apply a theory of silent fraud, but rather applied the law for traditional common-law fraud, based on affirmative misstatements. See *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992); *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Traditional common-law fraud differs from silent fraud in that the latter does not require an affirmative false statement.

The trial court found that Friedman made affirmative false statements to all three plaintiffs when he was asked about CSTC's status and financial condition, and that he intended for plaintiffs to rely on those false statements to induce them to ship steel to CSTC on credit. The court never discussed any duty owed by Friedman to disclose the truth about his company. Therefore, we find no basis for concluding that the trial court's decision was improperly based on an unpleaded theory of silent fraud.

Friedman also argues that, to the extent the trial court found him liable for common-law fraud, its findings are clearly erroneous. "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C)." *Alan Custom Homes, Inc, v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* We find no clear error with the trial court's findings.

The elements of fraudulent misrepresentation are:

(1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result. [*Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).]

Fraud must be proven by clear and convincing evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996).

Friedman argues that his statements to plaintiffs' agents were mere honest expressions of opinion or future promises and, therefore, the trial court erred in finding that he made statements of fact sufficient to support an action for fraud. We disagree. Fraudulent misrepresentation must be predicated upon a statement of past or existing fact. *Kamalath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 554; 487 NW2d 499 (1992). Future promises cannot constitute fraud. *Id.* Matters of opinion also do not constitute fraud. *Id.* at 554-555.

The evidence disclosed that before plaintiffs agreed to sell steel to CSTC on credit, Friedman assured them that the business was busy and profitable. He denied that CSTC was experiencing any financial problems. These were statements of past or existing fact relating to CSTC's present economic and financial status and were sufficient to support an action for fraud. The trial court did not clearly err in finding that this element was proven.

Friedman also argues that the trial court erred in finding that Friedman's statements were false. We disagree.

Although plaintiffs were not able to identify each of the specific dates on which Friedman's various representations were made, the evidence established that the representations were made within the same general time frame before plaintiffs began to ship increased amounts of steel to CSTC in approximately mid-2000. The evidence also established that CSTC was not solvent during this time frame. Indeed, a report detailing CSTC's financial status in December 1999 indicated that the company had incurred recurring and substantial losses since 1996, and expressed substantial doubt that the company could continue as a going concern. Further, Friedman sent a letter to CSTC's creditors in August 2000, wherein he indicated that CSTC "has been struggling for the past few years" and in the past two months had been hit with a substantial bad debt and loan reduction, thereby preventing it from paying its suppliers as required. Thus, the trial court did not clearly err in finding that Friedman's representations about CSTC's stable economic status and profitability were false.

Next, Friedman argues that plaintiffs failed to prove by clear and convincing evidence that his representations were made with the intent to deceive plaintiffs, or that plaintiffs actually relied on his representations. We disagree.

The evidence disclosed that each of the plaintiffs inquired about CSTC's economic status before agreeing to supply steel to CSTC on credit. Thus, the evidence established that Friedman was aware that a positive financial picture was necessary in order to secure credit. Further, this was not a case involving sudden, unforeseen financial difficulties that Friedman could not have anticipated. Rather, as previously discussed, the evidence showed that CSTC's financial condition had been precarious for some time. Evidence of Friedman's conduct involving his personal finances also suggested that he was preparing for CSTC to declare bankruptcy. Friedman admitted to transferring joint assets to his wife alone. A loan to CSTC was also repaid to his wife.

Further, the evidence indicated that CSTC began purchasing larger than usual quantities of steel in mid-2000, thus supporting an inference that Friedman was stockpiling material so that CSTC could sell it and thereby allow Friedman to avoid personal liability on a \$1 million guaranty he had given on CSTC's behalf. Friedman argues that his guaranty was never at risk based on CSTC's account balances. But Friedman's figures do not appear to take into account the value of the steel that plaintiffs later supplied. Additionally, although the guaranty had not been enforced as of the time of trial, it was still evidence of Friedman's motive and intent at the time he made the various representations concerning CSTC's economic status and profitability. Friedman also asserts that CSTC's inventory levels were not out of the ordinary in 2000. But even assuming that CSTC's inventory was low in November 2000, when it filed for bankruptcy, that was partly because it had not purchased any new inventory since August, but was nonetheless able to continue operations for two months before filing for bankruptcy because of the inventory it had acquired. The evidence disclosed that during the time CSTC was purchasing steel from plaintiffs, it had its highest inventory since 1998, notwithstanding its dire financial condition.

Friedman argues that Klockner Steel's decision to supply steel to CSTC was not based on anything he said, but on observations that Klockner Steel's controller made when he visited CSTC's facility and observed Friedman's Mercedes and photographs of Friedman's father's steamship line to conclude that CSTC had some wealth. Although Klockner Steel's controller admitted making those observations, he denied that they influenced the decision to extend credit to CSTC. Rather, Klockner Steel extended credit to CSTC based on Friedman's assurances that CSTC was profitable, which occurred before Klockner Steel shipped any steel to CSTC.

For these reasons, we find no clear error in the trial court's determinations that Friedman's representations were made with the intent to deceive plaintiffs, and that plaintiffs actually relied on the representations in deciding to supply steel to CSTC on credit. We similarly conclude that the trial court did not clearly err in finding that plaintiffs' reliance was reasonable.

Friedman also argues that the trial court clearly erred in its determination of damages. "Where a court following a bench trial has determined the issue of damages, we review the award for clear error." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). This Court will not set aside a nonjury award based solely on a difference of opinion.

*Id.* In considering the credibility of witnesses with regard to damages, this Court will defer to the trial court's superior position to observe and evaluate the witnesses' credibility. *Id.*

A plaintiff's burden in proving damages was recently summarized in *Ensink v Mecosta Co General Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004), quoting *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995):

A party asserting a claim has the burden of proving its damages with reasonable certainty. *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 801; 286 NW2d 34 (1979). Although damages based on speculation or conjecture are not recoverable, *Sutton [sic] v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966), damages are not speculative merely because they cannot be ascertained with mathematical precision. *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 368; 137 NW2d 151 (1965). It is sufficient if a reasonable basis for computation exists, although the result be only approximate. *McCullagh v Goodyear Tire & Rubber Co*, 342 Mich 244, 255; 69 NW2d 731 (1955). 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. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988).

The trial court awarded each plaintiff damages in an amount representing the value of the steel shipments that were made after Friedman reasonably knew of CSTC's insolvency and for which plaintiffs never received payment. The court awarded \$443,927.17 to Kerry Steel, \$87,019.86 to Klockner Steel, and \$195,980.84 to Mars Steel. We are satisfied that plaintiffs proved their damages with reasonable certainty and that the trial court's findings on damages are not clearly erroneous.

Friedman argues that Kerry Steel and Mars Steel failed to prove that each steel shipment they made was sent in reliance on a fraudulent statement by Friedman and, therefore, they were not entitled to recover the entire balance owed to them by CSTC. Although plaintiffs' witnesses could not recall the exact dates of each of their conversations with Friedman, their testimony established that they spoke to Friedman to inquire about CSTC's financial status before each transaction in mid-2000, and were assured that there were no financial problems.

Klockner Steel's witnesses similarly established with reasonable certainty that it relied on Friedman's false representations before each shipment of steel. The evidence indicated that Klockner Steel made an initial decision to extend credit after receiving assurances about CSTC's economic and financial situation, and then sent multiple shipments of steel over an approximate period of a month. Although Klockner Steel did not make a new inquiry about CSTC's financial status before each shipment, it was not unreasonable for Klockner Steel to rely on the earlier representations before each shipment during this short time period. In sum, we find no clear error in the trial court's determination of damages.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Karen M. Fort Hood