

STATE OF MICHIGAN
COURT OF APPEALS

TED NUGENT and AMBOY DUKES, INC.,

Plaintiffs-Appellants/Cross-
Appellees,

and

DOUGLAS BANKER,

Plaintiff,

v

MUSKEGON SUMMER CELEBRATION, INC.,
d/b/a MUSKEGON SUMMER CELEBRATION,

Defendant-Appellee/Cross-
Appellant,

and

MMCS, INCORPORATED, d/b/a MERIDIAN
ENTERTAINMENT GROUP, TIM
ACHTERHOFF and JOE AUSTIN,

Defendants.

UNPUBLISHED

October 18, 2007

No. 266445

Muskegon Circuit Court

LC No. 04-043318-CK

TED NUGENT and AMBOY DUKES, INC.,

Plaintiff-Appellants/Cross-
Appellees,

and

DOUGLAS BANKER,

Plaintiff,

v

No. 269804

MUSKEGON SUMMER CELEBRATION, INC.,
d/b/a MUSKEGON SUMMER CELEBRATION,

Muskegon Circuit Court
LC No. 04-043318-CK

Defendant-Appellee/Cross-
Appellant,

and

MMCS, INCORPORATED, d/b/a MERIDIAN
ENTERTAINMENT GROUP, TIM
ACHTERHOFF and JOE AUSTIN,

Defendants.

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal, and defendant cross-appeals, a jury trial verdict on plaintiffs' breach of contract claim, the trial court's grant of defendant's motion for summary disposition and motion for directed verdict, as well as the trial court's rulings on various post-trial motions. For the reasons set forth below, we affirm.

I. Facts and Procedural History

This litigation arose after defendant, Muskegon Summer Celebration (MSC), cancelled a performance by plaintiff Ted Nugent, during the summer of 2003 due to a controversy that arose out of an interview Mr. Nugent gave on a radio program. A few weeks before the scheduled performance, Mr. Nugent participated in a radio program in Denver, Colorado, and some of the defendants' agents and some in the media opined that Mr. Nugent used racial slurs in reference to African-Americans and Asians. Indeed, the Muskegon Chronicle published a story about the interview and, according to MSC's executive director, Joe Austin, some members of the Muskegon community were upset about Mr. Nugent's comments and complained about his anticipated performance at the festival. Thereafter, the MSC issued a press release that stated:

After discussion with a wide range of community leaders, the Summer Celebration Board of Trustees decided it was in the best interest of the community to replace previously scheduled Ted Nugent for the June 30th show. "Any use of potentially offensive racial terms such as those attributed recently to Ted Nugent do not reflect the spirit of Muskegon nor the Summer Celebration," Summer Celebration Chairperson Tim Achterhoff commented. "The Board was forced to make a difficult decision, but together we feel it is the right decision for the community."

Plaintiffs filed this action and asserted allegations of libel and slander, breach of contract, detrimental reliance, unfair competition and unjust enrichment. The trial court granted MSC's motions for summary disposition on the libel and slander and detrimental reliance claims and granted a directed verdict to MSC on the unfair competition and unjust enrichment claims. The jury returned a verdict in favor of plaintiffs on the breach of contract claim, and awarded \$80,000 in damages for the breach of contract, and \$20,000 in lost merchandise sales. Thereafter, the trial court reduced the breach of contract award by \$20,000 because it ruled that, had Mr. Nugent played the concert, he would have had to pay his agent and manager 25 percent of the contract amount. The trial court also declined to award Mr. Nugent costs for his travel to court, trial transcripts, and depositions.

II. Analysis

A. Libel and Slander

Plaintiffs maintain that the trial court prematurely granted summary disposition to MSC on their libel and slander claim and that plaintiffs did not have sufficient time to discover what defamatory statements defendants may have made.¹ Michigan law provides that defamation claims must be pleaded with specificity. *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 52; 495 NW2d 392 (1992). Accordingly, plaintiffs were required to set forth “the very words of the libel” in their pleadings—the “materially false” statements allegedly made by MSC representatives and in what way the statements were made with malice or a reckless disregard for the truth. *Id.* at 51-53. Because plaintiffs were required but failed to include this information in the pleadings, we reject plaintiffs’ claim that summary disposition was premature.² Had plaintiffs presented statements in which defendants called Mr. Nugent a racist, then this matter would present a different case. However, as it stands, based on the record before us, the only allegation regarding defamation concerns defendants’ comment about Mr. Nugent’s comments.

In the pleadings and at the time of the motion hearing, the only example of the “materially false statements” plaintiffs could produce was the press release in which Mr. Achterhoff is quoted as saying, “Any use of potentially offensive racial terms such as those attributed recently to Ted Nugent do not reflect the spirit of Muskegon nor the Summer Celebration.”³ Plaintiffs do not challenge the trial court’s ruling that this statement was neither

¹ We review motions for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999).

² If further discovery were required, plaintiffs should have submitted an affidavit to the trial court stating the nature of probable testimony of witnesses who were not yet deposed and the reasons plaintiffs believed they would testify to those facts. *Coblentz v City of Novi*, 475 Mich 558, 570; 719 NW2d 73 (2006). Not only did plaintiffs fail to do so below, even on appeal they fail to disclose any actionable defamatory statements other than those already rejected by the trial court.

³ Plaintiffs cited another phrase that was allegedly defamatory in response to MSC’s motion: “Nugent scratched for racial remarks.” However, this quote is not attributed to MSC or its representatives. Rather, it is a headline from a newspaper article and no evidence suggests that

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materially false nor defamatory. Accordingly, the trial court correctly granted summary disposition to MSC on this issue.

B. Breach of Contract

MSC claims that the trial court should have granted summary disposition on plaintiffs' breach of contract claim because MSC withdrew its "offer" for Mr. Nugent to perform before a contract was finalized. It is undisputed that the various contract documents sent by both MSC's representative, Kevin Meyer, and Mr. Nugent's agent, Adam Kornfeld, required signatures and that the documents were never signed. However, evidence established that the parties nonetheless formed a binding oral agreement.

A valid contract requires the following: 1) parties competent to contract, 2) a proper subject matter, 3) legal consideration, 4) mutuality of agreement, and 5) mutuality of assent. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). Evidence established that Mr. Meyer called Mr. Kornfeld to make an offer for Mr. Nugent to play on June 30, 2003 for \$75,000. After some negotiation, Mr. Meyer told Mr. Kornfeld that the festival would pay Mr. Nugent \$80,000, with a 50 percent deposit. According to Mr. Kornfeld, he and Mr. Meyer agreed on those essential terms, Mr. Kornfeld received approval from Mr. Nugent's manager, and Mr. Nugent was prepared to play on June 30, 2003. Further, after this conversation occurred, MSC began to advertise that Mr. Nugent would be performing at the festival and it began to sell individual tickets for Mr. Nugent's concert.

Further evidence established that it is common for buyers and booking agents to reach oral agreements for artists to perform, without signed, formal contracts. Mr. Kornfeld confirmed that this occurred in his own business, entertainment lawyer Michael Novak testified that oral contracts are "the norm" in the music business, and Mr. Nugent's own manager testified that, though it is his job to sign Mr. Nugent's contracts, he rarely does so because signed contracts are generally not used. Moreover, Mr. Meyer admitted that a percentage of his contracts for the Summer Celebration are not signed and that he would have expected Mr. Nugent to perform irrespective of an executed agreement. Thus, plaintiffs presented sufficient evidence for the jury to decide whether Mr. Nugent and MSC reached a binding, oral agreement and the trial court correctly denied MSC's motion for summary disposition.

III. Unfair Competition and Unjust Enrichment Claims

Plaintiffs argue that the trial court erred by granting a directed verdict to MSC on plaintiffs' unfair competition and unjust enrichment claims.⁴ The crux of plaintiffs' allegation is that MSC failed to remove a press release about Mr. Nugent's appearance on its website and this confused customers into thinking Mr. Nugent would perform even after the concert was cancelled. According to plaintiffs, MSC profited from this confusion without paying Mr. Nugent for the use of his image. Notwithstanding other legal frailties, as to both the unfair competition

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the words were offered or used by defendants.

⁴ "This Court reviews de novo a trial court's decision regarding a party's motion for a directed verdict." *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

and unjust enrichment claims, plaintiffs failed to present evidence that MSC actually sold tickets to customers who believed that Mr. Nugent was affiliated with the concert after his performance was cancelled. Plaintiffs failed to present any evidence that any tickets were sold because of any continuing use of Mr. Nugent's name, and this was the basis for the trial court's ruling. Indeed, plaintiffs ignore this point on appeal and fail to explain why it would not be speculative for the jury to decide that plaintiffs lost money or MSC made money because of the single press release on the MSC website.⁵

IV. Exclusion of Evidence

Plaintiffs assert that the trial court unfairly excluded evidence at trial that Mr. Nugent lost future touring profits as a result of MSC's cancellation of his performance.⁶

In a motion to compel the production of documents, MSC asserted that Mr. Nugent engaged in numerous business activities through his five companies in 2004, but plaintiffs failed to turn over complete copies of Mr. Nugent's tax returns, documentation of his business revenues, or the tax returns of Amboy Dukes. MSC argued that the documents would show that Mr. Nugent had touring income, and that he participated in numerous other business ventures, including an MTV reality show, that may have prevented him from touring as extensively in 2004 as he did in prior years. Plaintiffs sought \$1.8 million in lost touring income for 2004, but argued that the documents sought by MSC are irrelevant and may be "oppressive, unduly burdensome, embarrassing and annoying to" Mr. Nugent. The trial court ruled that the information is relevant and that plaintiffs must turn over all records showing income generated during the relevant periods before the pre-trial conference.

By the start of trial, plaintiffs had failed to turn over the evidence as ordered and continued to argue that it was irrelevant to plaintiffs' lost future profits claim. The trial court again agreed with MSC that it would be impossible for MSC to evaluate or respond to a future damage claim without access to information about Mr. Nugent's business activities and income. The court also noted that plaintiffs had a duty to mitigate damages and "coalescing of those income streams is vital to figuring all that out." Though plaintiffs presented some summaries,

⁵ Moreover, evidence showed that Nugent himself continued to advertise his participation in the festival well after his show was cancelled. Thus, if plaintiffs could show some link between the continued use of Nugent's name and the ticket sales, jurors would have to further speculate about whether any tickets were sold because of Nugent's own website promotion.

⁶ This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 269; 730 NW2d 523 (2006). "A trial court abuses its discretion in admitting or excluding evidence if its determination falls beyond the principled range of outcomes." *Id.* When a trial court sanctions a party, "a trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Bloemendaal v Town & Country Sports Center, Inc.*, 255 Mich App 207, 212; 659 NW2d 684 (2002). Generally, an appropriate sanction is to exclude evidence that unfairly prejudices the other party. *Id.*

they failed to submit full or sworn evidence, as ordered. Accordingly, the trial court barred plaintiffs from presenting evidence of lost future profits to the jury.⁷

If a party violates the discovery rules, a court may “order such sanctions as are just.” MCR 2.313(B)(2). However, “[t]he record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.” *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). As this Court explained in *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990):

Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful or accidental, (2) the party’s history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court’s order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive.

MSC is correct that, throughout the litigation, plaintiffs repeatedly failed to answer interrogatories and produce documents, even after the trial court ordered them to do so. Further, the order at issue here required plaintiffs to produce all of the requested documents before the pre-trial conference. Though plaintiffs turned over some documents by that time, they failed to turn over many others until after trial had commenced.

We hold that the trial court did not abuse its discretion when it prevented plaintiffs from presenting evidence of lost profits damages. Plaintiffs repeatedly refused to turn over the evidence, they had a history of noncompliance with MSC’s discovery requests and the trial court’s orders and, when given a last chance to comply, they failed to do so until after the deadline and after trial had begun. Plaintiffs’ conduct also prevented MSC from analyzing the

⁷ On appeal, plaintiffs erroneously contend that the trial court’s ruling was unexpected and that plaintiffs had no opportunity to respond. Not only had the parties briefed and argued the issue extensively before trial, the matter was raised repeatedly during trial and the trial court talked to the parties at length in chambers about it. As discussed, the trial court ordered plaintiffs to produce the evidence and, instead, plaintiffs continued to argue that the evidence was irrelevant. Plaintiffs will not be heard to argue that they were taken by surprise by the trial court’s ruling.

Plaintiffs also contend, for the first time, that, because MSC filed its document request on January 3, 2005 instead of January 2, 2005, MSC was not entitled to the requested evidence. However, MSC had requested personal and corporate tax returns with accompanying documentation in its request for production of documents in prior discovery requests. Further, plaintiffs did not raise this issue below and, instead, chose to challenge MSC’s document request on relevancy grounds. Accordingly, we reject plaintiffs’ argument.

financial material and from obtaining an expert witness to rebut plaintiffs' damage claim. Under these circumstances, the trial court's decision to exclude the evidence was correct and a lesser sanction would have been inappropriate. Accordingly, we affirm the trial court's ruling.

V. Contract Damages Award

Plaintiffs complain that the trial court erroneously reduced the contract damages award by 25 percent. After trial, the court subtracted \$20,000 from the award because evidence showed that, if Mr. Nugent had performed at the festival, he would have had to pay his agent and manager 25 percent of the contract price. Our courts have held that, in commercial transactions, damages are generally limited to net loss, rather than gross profits. *Lawton v Gorman Furniture Corp*, 90 Mich App 258, 267; 282 NW2d 797 (1979). Accordingly, the proper measure of damages is what plaintiffs would have earned under the contract after expenses are deducted. Plaintiffs do not dispute this legal principle, but claim that the trial court's decision was "against the great weight of the evidence." And, according to plaintiffs, evidence showed that Mr. Nugent must pay his agent and manager a percentage of the judgment, and thus by subtracting this amount the court deprived plaintiffs of the damages due under the contract.

Trial testimony does not support plaintiffs' argument that Mr. Nugent must pay 25 percent of the judgment to his agent and manager. Rather, the testimony reveals that Mr. Nugent would have paid his agent and manager if he had "performed" at the festival, but obviously Mr. Nugent did not give a performance. Therefore, had the contract been fulfilled, the net to Mr. Nugent would have been \$60,000, not \$80,000. We are not persuaded by plaintiffs' argument that Mr. Nugent's agent and manager must be paid on the judgment because they are compensated for any "music-related activity."

VI. Costs

Plaintiffs contend that the trial court erred when it refused to tax costs for Mr. Nugent's travel expenses, witness depositions, and court reporter fees.⁸

With regard to Mr. Nugent's travel expenses, pursuant to MCL 600.2405, a prevailing party may recover "[a]ny of the fees of . . . witnesses . . . mentioned in this chapter or in chapter 25, unless a contrary intention is stated." MCL 600.2552(1) provides that, "a witness shall be reimbursed . . . for his or her traveling expenses in coming to the place of attendance and returning from the place of attendance, to be estimated from the residence of the witness, if his or her residence is within this state, or from the boundary line of this state that the witness passed in

⁸ Pursuant to MCR 2.625(A)(1), "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." "This Court reviews a trial court's ruling on a motion for costs under MCR 2.625 for an abuse of discretion." *Fansler v Richardson*, 266 Mich App 123, 126; 698 NW2d 916 (2005). Permitted costs are set forth in MCL 600.2401 *et seq.* and 600.2501 *et seq.*

coming into this state, if his or her residence is out of this state.”⁹ MCL 600.2552 says nothing about whether a party may claim travel expenses for appearing at trial. However, MCR 2.625(G)(3) provides:

If witness fees are claimed, an affidavit in support of the bill of costs must state the distance traveled and the days actually attended. If fees are claimed for a party as a witness, the affidavit must state that the party actually testified as a witness on the days listed.

We read this court rule to support the trial court’s decision. Though Mr. Nugent testified at trial, he was already in town for the rest of the trial on the days before and after his testimony. Accordingly, the trial court did not abuse its discretion.

Plaintiffs further assert that the trial court abused its discretion when it declined to award costs for trial transcripts. MCL 600.2543(2) provides that, “Only if the transcript is desired for the purpose of moving for a new trial or preparing a record for appeal shall the amount of reporters’ or recorders’ fees paid for the transcript be recovered as a part of the taxable costs of the prevailing party in the motion, in the court of appeals or the supreme court.” Though plaintiffs argued that the parties both relied on the trial transcripts during trial and during post-trial motions, plaintiffs did not file a motion for new trial and plaintiffs presented no affidavit or other evidence to establish whether and to what extent either party used the transcripts for other purposes. Further, the reason transcript costs are recoverable on appeal is because an appellant must order them to establish his claims and, if he prevails, such costs were both necessary and justified. There is no such rationale for the recovery of costs in the trial court generally or under the circumstances in this case. Accordingly, the trial court properly denied plaintiff’s request for the transcript costs.

Plaintiffs also complain that they are entitled to costs for deposition transcripts. MCL 600.2549 provides that “[r]easonable and actual fees paid for depositions of witnesses filed in any clerk’s office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.” The record reflects that the disputed transcripts were not “read into evidence” at trial and, therefore, the trial court correctly denied plaintiffs’ request.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

⁹ As MSC points out, though plaintiffs sought to recover the total cost for Nugent to travel from his home in Texas to Muskegon, the statute permits recovery only for travel costs from the state line.