S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

KNIGHT ENTERPRISES, INC., Plaintiff-Appellee, v FAIRLANE CAR WASH, INC., PJJ ENTERPRISES, L.L.C., JOHN MASOURAS, and JAMES MASOURAS, Defendants-Appellants.	UNPUBLISHED April 8, 2008 No. 276838 Wayne Circuit Court LC No. 05-515075-CK

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

In this breach of contract action, defendants Fairlane Car Wash, Inc., PJJ Enterprises, L.L.C., John Masouras, and James Masouras (collectively, Fairlane) appeal as of right the trial court's order of judgment in favor of plaintiff Knight Enterprises, Inc. Fairlane also appeals the trial court's orders granting Knight Enterprises summary disposition. We affirm.

I. Basic Facts And Procedural History

Fairlane owns and operates a car wash and gas station business in the city of Dearborn. Knight Enterprises is a wholesale distributor of petroleum products. In June 2003, the parties executed a Motor Fuel Franchise Agreement (Franchise Agreement) in which Knight Enterprises agreed to brand Fairlane's gas station with the Citgo name and Fairlane agreed to sell Citgo brand gasoline supplied by Knight Enterprises. Knight Enterprises provided Fairlane with the equipment necessary to enable Fairlane to accept credit card payments at the gas station, and the parties also executed a Credit Card Program Participating Agreement (Credit Card Agreement), which provided, in part, as follows:

> 12. The dealer [Fairlane] will be billed on a monthly basis per month for the epos terminal plus all credit card fees.

In May 2005, Knight Enterprises filed a complaint against Fairlane, alleging that Fairlane breached the Credit Card Agreement by failing to comply with the agreement's payment terms. Shortly thereafter, Knight Enterprises moved for summary disposition under MCR 2.116(C)(10), arguing that it had paid for all the electronic point of sale (epos) terminal and credit card fees incurred by Fairlane, but had not yet been reimbursed by Fairlane. Knight Enterprises admitted that a dispute between the parties arose because Knight Enterprises initially neglected to send out the monthly bills for over a year but then, when the error was noticed, billed Fairlane for all the unbilled months at once. Fairlane then refused to pay the fees. Knight Enterprises argued that regardless of the late billing, Fairlane was nevertheless obligated to reimburse Knight Enterprises the fees pursuant to paragraph 12 of the Credit Card Agreement for all credit card transactions, including mini-mart products, that is, car washes, sodas, snacks, etc., as well as gasoline sales. Anticipating Fairlane's response, Knight Enterprises argued that, by claiming it was not required to reimburse Knight Enterprises for the fees associated with gasoline sales, Fairlane was seeking to avoid the contract language requiring it to pay the fees associated with *all* credit card transactions.

Fairlane responded, arguing that the course of conduct between the parties demonstrated that the Credit Card Agreement was never performed and never became operative. Fairlane noted that under paragraph 25 of the Franchise Agreement there were two options for the motor fuel price structure: a "Posted Rack Deal" and a "Five Cent (5) Margin Deal."[1] Under the Posted Rack Deal, Fairlane would agree to pay a "rack posting" price[2] plus $0.0225 a gallon and then receive a rebate of $0.0125 a gallon on all gasoline purchases that exceeded 100,000 gallons per month. Under the Five Cent Margin Deal, Knight Enterprises would pay Fairlane a fee of $0.05 a gallon on all petroleum products dispensed and metered by the pumps.

Fairlane explained that the difference between the two price structures was that, under the Posted Rack Deal, Fairlane would have to pay up front for all of the gasoline delivered, Fairlane then could set the price at which to sell the gasoline to the public, and when a customer purchased gasoline using a credit card, that amount would be credited to Fairlane. If a customer paid with cash, then Fairlane could just keep it. But under the Five Cent Margin Deal, Knight Enterprises retained ownership of the gasoline even after it was placed in Fairlane's underground storage tanks, Knight Enterprises determined the sales price, and Knight Enterprises received the

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[1] Specifically, paragraph 25 of the Franchise Agreement states as follows:

> DEALER and KNIGHT each has the option once (1) to change the Motor Fuel Price Structure to the <u>"Five Cent (5) Margin Deal"</u> or the <u>"Posted Rack Deal"</u> during the entire term of this contract.
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> (1.) <u>"Posted Rack Deal"</u>—DEALER will pay the Detroit Area Branded Jobber Rack posting plus $0.0225 per gallon. DEALER will receive a rebate of $0.0125 per gallon on all gasoline purchases that exceed One Hundred Thousand (100,000) gallons per month. The duration of the rebate period will coincide with the original term of this agreement specified in Section 2 with no extensions. If volume amount is minimum of Seventy Five Thousand (75,000), the rate is ¾ of a cent on the CITGO program.
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> (2.) <u>"Five Cent (5) Margin Deal"</u>—KNIGHT will pay Dealer a fee of Five Cents (5) per gallon on all petroleum products dispensed and metered by the Fuel dispenser pumps. KNIGHT will maintain all petroleum product inventories in the underground storage tanks. <u>No Rebate to Dealer</u>.
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> This Agreement will commence with the "Five Cent Margin Deal" for pricing.

[2] According to Fairlane, the rack posting price is the amount charged per gallon by the refiner, in this case Citgo, to all distributors (a.k.a., "jobbers") like Knight Enterprises.

money from the credit card company when a customer purchased gasoline. If a customer paid with cash, then Fairlane was required to deposit it in Knight Enterprises' bank account. Fairlane explained that in the latter deal structure, Fairlane was actually performing a service for Knight Enterprises by letting it use Fairlane's facility to sell its gasoline, thus justifying Knight Enterprises' payment of the $0.05 fee to Fairlane.

According to Fairlane, the only course of conduct between the parties was under the Five Cent Margin Deal, therefore, "making the Credit Card Agreement irrelevant." Essentially, Fairlane argued that, although executed by the parties, the Credit Card Agreement was only intended to be operative if the parties switched to the Posted Rack Deal in which Fairlane would be receiving a benefit from use of the credit card equipment. In other words, Fairlane argued, because it received no direct benefit from credit card sales under the Five Cent Margin Deal, there was no reason for it to pay the fees associated with those sales.

Fairlane contended that the fact that Knight Enterprises did not bill Fairlane under the Credit Card Agreement for so long showed that it was not applicable to the parties' transactions. Indeed, according to Fairlane, the Credit Card Agreement was never an issue until Knight Enterprises began asking Fairlane to change the pricing structure to the Posted Rack Deal. Under the Franchise Agreement, each party was entitled to change from one structure to the other once during the contract period. Fairlane asserted that Knight Enterprises wanted Fairlane to be the first one to exercise that right so that Knight Enterprises could reserve the right to change it back at its convenience. When Fairlane refused to change the terms, Knight Enterprises' owner allegedly became upset and sent the accumulated billing, which amounted to approximately $15,500. Fairlane argued alternatively that Knight Enterprises' course of conduct in not billing Fairlane for a whole year constituted a modification of the contract and a waiver of the payment provision. Fairlane requested that the trial court instead grant summary disposition in Fairlane's favor pursuant to MCR 2.116(I)(2).

After hearing oral arguments on the motion, the trial court issued its ruling on the record. The trial court first noted several provisions of the parties' agreement, including paragraph 25 of the Franchise Agreement and paragraph 12 of the Credit Card Agreement, as well as paragraph 22 of the Franchise Agreement, which required that any modifications to the contract be in writing;[3] paragraph 11, which required that any waivers of breach of performance be in writing;[4]

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[3] Paragraph 22 of the Franchise Agreement states as follows:

> No alterations, changes or modifications of this Agreement shall be effective unless made in writing and executed in the same manner as this Agreement and no oral changes are effective.

[4] Paragraph 11 of the Franchise Agreement states, in pertinent part, as follows:

> Any waiver by either party of any breach of any provision of this Agreement shall not be deemed to be a waiver of subsequent breaches of the same or other provisions. The failure by KNIGHT to seek redress for the breach of, or to insist upon the strict performance of this Agreement shall not constitute a waiver of such breach of performance, unless such waiver shall be given in writing and signed by an officer of KNIGHT.

and paragraph 20, which expressly stated that Fairlane was bound to all the requirements of any related underlying agreements, including any credit card agreements.[5] The trial court then noted that in his affidavit, Peter Masouras, Vice President and Director of Fairlane, averred that it was his understanding that the Credit Card Agreement would only become operative if either party changed the price structure to the Posted Rack Deal. However, the trial court pointed out that none of the written agreements were consistent with Peter Masouras' understanding and further stated that, since he did not sign the written agreements, Masouras' understanding was irrelevant. The trial court then concluded as follows:

> I didn't see any documentation in the evidence that was submitted for consideration, along with the Motion for Summary Disposition that would indicated [sic] that the affiant was in a position to opine or form an understanding of the rights and duties of the parties at the time that the contract agreements were made.
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> So I don't see how the affidavit creates a genuine issue of material fact. And the motion is granted as to liability.

Accordingly, the trial court entered an order granting Knight Enterprises' motion as to liability only and scheduled trial on the remaining issue of damages.

Knight Enterprises then moved for summary disposition as to damages, arguing that the amount of damages owed was a sum certain in that Fairlane was contractually liable to pay for "*all* credit card fees" incurred. In support of its contention, Knight Enterprises attached as an appendix an affidavit and accounting for all of the credit card fees paid by Knight Enterprises, which totaled $69,969.15. And Knight Enterprises contended that Fairlane simply had no competent evidence to contradict the fees, thereby justifying a grant of summary disposition in Knight Enterprises' favor. Knight Enterprises argued alternatively that even if the court allowed the matter to proceed to trial, then the court should require a bond for security in the amount of $100,000, or enter an order in limine barring Fairlane from introducing evidence at trial that it owed anything less than all of the credit card fees.

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[5] Paragraph 20 of the Franchise Agreement states as follows:

> It is understood that if there is any other Agreement related to this property between KNIGHT and KNIGHT'S Supplier's [sic] (i.e. Branded supply agreement), KNIGHT is in no way attempting to nor are they able to convey to the DEALER, rights in excess of those available to KNIGHT to be conveyed to DEALER. *Further, DEALER understands that he is bound at a minimum by all requirements or provisions of any underlying product agreements, sign agreements, credit card agreements, etc.* DEALER acknowledges having been advised of any related product, sign, credit card agreements, etc., laying out the terms and conditions associated with this property. DEALER hereby agrees to execute any and all other documents required by KNIGHT or its current or, at KNIGHT'S option future replacement supplier, to implement this Agreement. [Emphasis added.]

Fairlane responded, arguing that Knight Enterprises was merely attempting to get a second bite at the apple on the issue of damages, which the court had already ruled would proceed to trial. Fairlane also pointed out that under MCR 2.116(C)(10), summary disposition may not be granted on the issue of damages.[6] Further, Fairlane argued, because the court rule did not differentiate between sum certain damages and other types of damages, Knight Enterprises' motion on the issue should be denied as not being within the purview of that motion for summary disposition. Fairlane further argued that, regardless, the amount of damages was still in dispute because, pursuant to the terms of paragraph 8 of the Credit Card Agreement[7] and paragraph 2 of the Machine Agreement,[8] Knight was required to prove that the fees were both "incurred" and "submitted" by Fairlane. Accordingly, Fairlane argued that it was only responsible for the convenience store credit card fees incurred and submitted by Fairlane, not the gasoline credit card fees incurred by Knight Enterprises. Fairlane also argued that posting a security bond was not necessary.

The trial court heard oral arguments on the motion and then issued a ruling on the record as follows:

> Well, I agree with [Knight Enterprises] in this instance, because that would mean that the two integrated contracts—the one that cross-referenced the credit card sales requirement would somehow have to differentiate.
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> And since it did use the term "all," don't [sic] believe I can accept your except.

Fairlane interjected, emphasizing that there was an ambiguity between the language requiring the charges to be incurred by Fairlane and the language requiring Fairlane to pay for all the charges and that, therefore, the ambiguity should be construed against Knight Enterprises as the contract drafter. However, the trial court dismissed this contention, stating:

> Contract matters are decided by the Court.

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[6] MCR 2.116(C)(10) states as follows:

> *Except as to the amount of damages*, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [Emphasis added.]

[7] Paragraph 8 of the Credit Card Agreement states as follows:

> You [Fairlane] agree to pay service charges assessed by CITGO/KNIGHT on credit care sales tickets *you submit*, or for special handling fees that may be imposed as a result of improper ticket submission. [Emphasis added.]

[8] A Credit Card Machine Agreement ("the Machine Agreement") executed by the parties, states, in pertinent part:

> I/We [Fairlane] further agree to pay Knight Enterprises, Inc. or CITGO for any and all credit card chargeback *incurred by us*. [Emphasis added.]

> That's not something that would even go to the fact finder. That would be for me to interpret.

Accordingly, the trial court entered an order granting Knight Enterprises' motion as to damages.

Knight Enterprises then moved for entry of formal judgment in the amount of $69,969.15, plus costs, interest, and attorney fees. Knight Enterprises also filed a separate motion for taxation of costs, interest, and case evaluation sanctions.

Fairlane responded, conceding to the amounts requested by Knight Enterprises with respect to damages and interest. But Fairlane objected to Knight Enterprises' calculation of the ordinary bill of costs and its request for case evaluation sanctions. Fairlane argued that Knight Enterprises' ordinary bill of costs was incorrect because neither statute nor court rule made the $75 case evaluation fee a taxable cost; therefore, Fairlane argued that the correct amount should be $230, not $305. Fairlane also argued that because case evaluation sanctions were not mandatory in a case disposed of by summary disposition, the trial court should have exercised its discretion to not grant them given that Fairlane's arguments were not frivolous. Fairlane also argued that Knight Enterprises should itself bear the costs associated with pursuing a case that arose as the result of Knight Enterprises' own neglect in billing. But even if the trial court chose to grant such sanctions, Fairlane argued that approximately 16 hours of Knight Enterprises' claimed attorney fees were not "necessitated by the rejection of the case evaluation" and therefore should not be included in the award. Fairlane did not dispute that the claimed attorney fees were reasonable, but after subtracting the allegedly unnecessary fees, Fairlane argued that Knight Enterprises should be awarded no more than $11,225.

In February 2007, the trial court entered its order of judgment in favor of Knight Enterprises, awarding it $69,969.15 in base damages, $230 in taxable costs, $4,405.14 in prejudgment interest pursuant to MCL 600.6013, and $11,225 in attorney fees pursuant to MCR 2.403, for a total judgment of $85,829.29.

Fairlane now appeals.

II. Summary Disposition

A. Standard Of Review

Fairlane argues that the trial court erred in granting Knight Enterprises summary disposition on its claim for breach of contract because the credit card agreement never became operative when the parties only intended it to be implemented if they switched over to the Posted Rack Deal. Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[9] The trial court

[9] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

must consider all the documentary evidence in the light most favorable to the nonmoving party.[10] We review de novo the trial court's ruling on a motion for summary disposition.[11]

If a contract's language is clear, its construction is a question of law that is subject to this de novo review.[12] Whether contract language is ambiguous is also a question of law subject to de novo review.[13] But interpretation of an ambiguous contract is a question of fact that must be decided by a jury.[14]

B. Ambiguity

It is a cardinal rule of contract interpretation that

> "a contract is to be construed as a whole; that all its parts are to be harmonized so far as reasonably possible; that every word in it is to be given effect, if possible; and that no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable."
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> * * *
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> "Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument."[15]

Absent ambiguity, a contract must be construed to adhere to its plain and ordinary meaning.[16] Technical and constrained constructions are to be avoided.[17] A contract is ambiguous if the words may reasonably be understood in different ways or the provisions irreconcilably conflict with each other.[18]

We cannot accept Fairlane's contention that the agreements contained any ambiguity about its obligation to pay for *all* credit card fees. Fairlane points to an alleged extrinsic intent based on the price structure utilized by the parties, but nothing in the plain language of either the

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[10] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

[11] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[12] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

[13] *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

[14] *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447, on remand 259 Mich App 467 (2003).

[15] *Laevin v St Vincent De Paul Society*, 323 Mich 607, 609-610; 36 NW2d 163 (1949) (internal citations omitted).

[16] *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998).

[17] *Id*.

[18] *Klapp*, *supra* at 467; *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001).

Franchise Agreement or the Credit Card Agreement supports such an interpretation. There is nothing in the Franchise Agreement that differentiated between the types of sales, i.e., gasoline or non-gasoline convenience store sales, for which Fairlane was responsible or entitled to receive compensation. And the Credit Card Agreement similarly makes no distinction, but rather plainly states that Fairlane was responsible to reimburse Knight Enterprises for all credit card fees. In fact, the Credit Card Agreement also expressly states that "[p]artial participation in the CITGO/KNIGHT Credit Card Program is not permitted," thereby indicating that Fairlane was not permitted to distinguish between the types of sales for which it was responsible. Absent any ambiguity, there was no reason for the court to consider Peter Masouras' affidavit, which improperly purported to create an intent not evidenced by the plain language of the agreements.[19] Therefore, we conclude that the trial court did not err in granting Knight Enterprises summary disposition in this ground.

C. Modification And Waiver

Fairlane alternatively argues that Knight Enterprises' conduct of not billing Fairlane raised a genuine issue of material fact regarding whether the parties modified the original agreement and waived enforcement of the provision in question. However, even while making this argument, Fairlane does not dispute that it was responsible for the non-gasoline sales. Therefore, this argument is again based on an asserted ambiguity leading to a conclusion that there was a distinction between such sales and the gasoline sales. Since Fairlane conceded that it was responsible for some of the credit card fees, under the terms of the contract, it is responsible for *all* of the credit card fees. Moreover, there was no indication that the parties mutually assented to the purported modification.[20] Therefore, we conclude that Fairlane's modification and waiver argument is without merit.

D. Damages

Fairlane argues that even assuming that it was liable for breach of contract, there existed a genuine issue of material fact as to the amount of damages to which Knight Enterprises was entitled because Fairlane only "incurred" the fees for the non-gasoline sales. Although Fairlane submitted the affidavit of John Masouras in support of its response to Knight Enterprises' motion on the issue of damages, Fairlane failed to submit a specific contradictory accounting of the fees for which it claimed it was responsible. Thus, we cannot conclude that the trial court erred in granting summary disposition on this ground.

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[19] *Klapp, supra* at 470, quoting *Edoff v Hecht*, 270 Mich 689, 695-696; 260 NW 93 (1935) ("'The parol evidence rule does not preclude the admission of parol or extrinsic evidence for the purpose of aiding in the interpretation or construction of a written instrument, where the language of the instrument itself taken alone is such that it does not clearly express the intention of the parties or the subject of the agreement.'").

[20] *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-373; 666 NW2d 251 (2003) ("[A] party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract.").

III. Case Evaluation Sanctions

A. Standard Of Review

Fairlane argues that even if the trial court did not err in granting Knight Enterprises summary disposition, it nevertheless abused its discretion in awarding Knight Enterprises case evaluation sanctions. We review for an abuse of discretion a trial court's decision whether to award costs in the "interest of justice" pursuant to MCR 2.403(O)(11).[21] "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes."[22]

B. Interest Of Justice

Following summary disposition on the issue of damages, the trial court awarded Knight Enterprises $69,969.15 in damages. "[A] judgment entered as a result of a ruling on a motion after rejection of the case evaluation" is a "verdict" for case evaluation purposes.[23] In this case, Knight Enterprises claimed case evaluation sanctions on the ground that the "verdict" was not more favorable to Fairlane than the case evaluation award.[24] In such cases, the trial court may award "actual costs," including "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation."[25] However, if the "verdict" is the result of a ruling on a motion after rejection of the case evaluation, the trial court may, "in the interest of justice, refuse to award actual costs."[26]

Here, Fairlane argues that the trial court abused its discretion by not refusing to award case evaluation sanctions in the interest of justice. However, Fairlane failed to offer any compelling authority or evidence in support of its contentions. Therefore, we cannot conclude that the trial court abused its discretion in not refusing to award case evaluation sanctions.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering

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[21] *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003).

[22] *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

[23] MCR 2.403(O)(2)(c).

[24] MCR 2.403(O)(3).

[25] MCR 2.403(O)(6)(b).

[26] MCR 2.403(O)(11).