

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

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MERRILL LYNCH PIERCE FENNER & SMITH,  
INC.,

UNPUBLISHED  
March 11, 2004

Plaintiff/Counter-Defendant-  
Appellee/Cross-Appellant,

v

No. 242109  
Saginaw Circuit Court  
LC No. 99-027865-CZ

MICHAEL H. FAKIH, M.D.,

Defendant-Cross-Appellee,

and

MAHA FAKIH,

Defendant/Counter-Plaintiff-  
Appellant.

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Before: Fitzgerald, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Following a bench trial, defendant/counter-plaintiff Maha Fakh appeals as of right the trial court's order entering a money judgment in favor of plaintiff/counter-defendant Merrill Lynch Pierce Fenner & Smith, Inc. (Merrill Lynch), and dismissing for no cause of action her counterclaims. Merrill Lynch cross-appeals the trial court's dismissal for no cause of action its claims against defendant Dr. Michael Fakh. We affirm.

On April 16, 1999, Merrill Lynch, a licensed securities broker/dealer, brought suit against Dr. and Mrs. Fakh for collection of a debit balance in a securities account opened by Mrs. Fakh and in which her husband made trading decisions. The complaint alleges breach of contract, dishonored checks, promissory estoppel, and innocent misrepresentation, and was later amended to include a claim for indemnification. On December 6, 1999, Mrs. Fakh filed a counterclaim, alleging breach of contract and misrepresentation. She later filed an amended counterclaim, adding a claim for breach of fiduciary duty.

At trial, Merrill Lynch maintained that Mrs. Fakh opened a cash management account through her broker, Baljinder "Betu" Gill, a Merrill Lynch account executive with whom Mrs. Fakh's husband had maintained a Merrill Lynch account. Merrill Lynch claimed that Dr. Fakh

had asked Gill to open an account in Mrs. Fakh's name with Dr. Fakh having trading authority in that account. Gill testified that he explained this arrangement to Mrs. Fakh and told her that she would have to sign something allowing this to take place. Mrs. Fakh signed the cash management account agreement and executed a limited power of attorney, appointing her husband as her agent and attorney-in-fact with respect to managing her account. Because there were margin calls on the account<sup>1</sup> that remained unpaid, and two checks from Dr. Fakh bounced, Merrill Lynch liquidated Mrs. Fakh's account, leaving a negative balance of \$81,048.07 for which Merrill Lynch maintains that Mrs. Fakh is responsible.

The Fakhis maintained that Gill, who had generated commissions through Dr. Fakh's account, concocted a scheme to allow Dr. Fakh to trade again after Merrill Lynch had withdrawn trading privileges in, and closed his account. According to the Fakhis, Gill had Mrs. Fakh, without her knowledge, sign a document to assign her husband power of attorney on the account that she had opened through Gill for safe, conservative investments by including the document with and representing it as one of the documents necessary to open an account. The Fakhis claimed that Dr. Fakh made many trades and Gill, on his own initiative and without instruction or approval from the Fakhis, made an unauthorized stock purchase for the account. That purchase led to immediate losses that increased over time and led Dr. Fakh to purchase more of that stock while it was "on the way down" in an effort to offset the losses. The Fakhis asserted that this precipitous loss led to a margin call and ultimately to Merrill Lynch's liquidation of the account, leaving a negative balance.

On November 27, 2001, having heard the evidence and having received from the parties trial briefs and post-trial briefs, the trial court issued its opinion and order. In relevant part, the trial court stated the following findings of fact:

Defendant Dr. Fakh was a high volume, aggressive investor. Because of prior problems with his account, Dr. Fakh was not allowed to trade by [p]laintiff Merrill Lynch. To get around this situation, Dr. Fakh and an agent of [p]laintiff, Betu Gill, arranged to have an account opened for [d]efendant-[c]ounter [p]laintiff Maha Fakh, possibly assuming Merrill Lynch's home office would not pick up on this account because of the difference in Social Security numbers. On the same day this account was set up, Maha Fakh executed a document giving her husband power of attorney to make investment decisions in this account.

Dr. Fakh actively traded in this account for some period of time. All investment decisions in this account were made by Dr. Fakh through Mr. Gill.

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<sup>1</sup> At trial, Gill explained that buying stocks on margin is borrowing money to buy them. Essentially, a broker lends the difference between the cash that an investor pays for the securities and the amount that is purchased on margin. Gill explained that "[a] margin call is when the market value of your securities drops below minimum maintenance requirements. There is a call issued to bring in funds to get the account value up back to the certain ratio."

In April 1998, a crisis arose in the account as a result of the purchase of 20,000 shares of Cybershop. The value per share of this stock steadily declined, despite additional purchases by Dr. Fakh, until in late August 1998, there was a series of margin calls.

At this time, before leaving the country on a business trip, Dr. Fakh gave Mr. Gill two checks in the total amount of \$64,000.00. The checks, when presented, were dishonored. Even if the checks were honored, they would not have brought the account up to meet the margin call. Mr. Gill's supervisor then ordered the account liquidated. The account, after liquidation, had a debit balance of \$81,048.00.

Thereafter, the trial court reviewed the claims of the parties. With regard to Merrill Lynch's claims, the trial court found Mrs. Fakh liable under the contract for \$81,048; found no cause of action concerning the dishonored checks; and found that Merrill Lynch failed to establish the necessary elements of promissory estoppel and innocent misrepresentation by a preponderance of the evidence. The trial court also found that half of Merrill Lynch's legal efforts involved their action against Dr. Fakh, and awarded \$11,640 in legal fees. With respect to Mrs. Fakh's counterclaims, which were premised on the assertion that Mrs. Fakh was unaware of the relationship between her husband and Gill and thus did not understand the significance of the document that she had signed, the trial court rejected this premise and found that Mrs. Fakh had failed to prove her counterclaims.

In sum, as reflected in its May 30, 2002 final judgment, the trial court found in favor of Merrill Lynch and against Mrs. Fakh in the total amount of \$92,688 (\$81,048 in damages and \$11,640 in attorneys' fees), plus statutory interest, but found no cause of action with regard to Merrill Lynch's claims against Dr. Fakh and with regard to Mrs. Fakh's counterclaims against Merrill Lynch.

On appeal, Mrs. Fakh first argues that the trial court erred in finding her liable on Merrill Lynch's breach of contract claim. Specifically, Mrs. Fakh contends that in light of the trial court's finding that Dr. Fakh and Gill arranged to have an account opened for Mrs. Fakh in an attempt to circumvent Merrill Lynch's disallowing Dr. Fakh to trade on his account and in light of the overwhelming evidence that she did not know about the power of attorney document that she signed as part of the paperwork to open her account, "it makes no sense to conclude that Mrs. Fakh knowingly granted her husband authority to trade in her name," i.e., knowingly signed the power of attorney document.

We review a trial court's findings of fact in a bench trial for clear error, MCR 2.613(C); *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003); however, the trial court's legal conclusions are reviewed de novo. *Id.*; *The Detroit News, Inc v Policemen & Firemen Retirement Sys of Detroit*, 252 Mich App 59, 67; 651 NW2d 127 (2002). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Ambs, supra* at 652. This Court will not second-guess the trial court's credibility determinations. MCR 2.613(C) ("[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.").

At trial, the parties presented conflicting evidence concerning the creation of Mrs. Fakh's account and the intentions of the parties in doing so. Mrs. Fakh admitted to signing the cash management agreement with Merrill Lynch that provided that she would cover any debit balance in her account. She also admitted that she signed the power of attorney document, but maintained that she was not aware that she had been asked to sign it and did not know that the document existed until after the lawsuit was filed. Mrs. Fakh testified that she never discussed with Gill the prospects of her husband making the trading decisions in her account or having a power of attorney regarding her account. According to Mrs. Fakh, she opened the account for conservative investment because she was not comfortable with her husband's trading methods. She also testified that she never looked at the mailings she received from Merrill Lynch. Dr. Fakh testified that Gill presented the idea to open an account in Mrs. Fakh's name and have her execute a power of attorney so Dr. Fakh, who is an aggressive trader, could resume trading. Dr. Fakh stated that his wife did not know he was trading in her account and he did not tell her. In contrast to the Fakh's testimony, Gill testified that he explained to Mrs. Fakh that her husband wanted to open an account in her name and that something was needed in writing if Dr. Fakh was going to give orders concerning how to handle her account. Gill testified that Mrs. Fakh had no problem with that arrangement. Gill stated that he filled in the power of attorney form and Mrs. Fakh signed it and the cash management agreement in his presence. Given the evidence at trial, whether Mrs. Fakh should be bound by the power of attorney document, and therefore liable under the agreement, turns on a credibility judgment. The trial court rejected the premise that Mrs. Fakh was unaware of the relationship between her husband and Gill and thus did not understand the significance of the document that she had signed. Giving due regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it, we find no clear error in the trial court's findings.

To the extent that Mrs. Fakh further argues that the trial court erred in finding Mrs. Fakh liable for breach of contract because Gill made an unauthorized purchase of Cybershop stock that caused the debit balance, her argument is without merit. At trial, the parties presented conflicting evidence concerning whether Dr. Fakh authorized the purchase of 20,000 shares of Cybershop stock. Mrs. Fakh testified that she had trusted Gill to make the decisions in her account. Dr. Fakh testified that he did not authorize that Cybershop stock purchase. Gill testified that all the security transactions in Mrs. Fakh's account were initiated by Dr. Fakh and that he was authorized to make the complained of Cybershop stock purchase. The trial court found that all investment decisions in Mrs. Fakh's account "were made by Dr. Fakh through Mr. Gill." From the evidence presented at trial, we are not left with a definite and firm conviction that this finding was erroneous.

Next, Mrs. Fakh argues that the trial court erred in rejecting her claim that Merrill Lynch failed to mitigate its damages and in failing to address mitigation of damages in its opinion and order. We disagree.

"Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing." *Morris v Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998).

"Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The

person wronged cannot recover for any item of damage which could thus have been avoided.” *Id.* at 263-264, quoting *Shiffer v Gibraltar School Dist Bd of Ed*, 393 Mich 190, 197; 224 NW2d 255 (1974) (quoting McCormick, Damages, § 33, p. 127).]

A plaintiff has a duty to mitigate his or her loss, and it is the defendant's burden to prove the plaintiff's failure to mitigate. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 15; 516 NW2d 43 (1994).

Here, Mrs. Fakih claims that the evidence shows that had Merrill Lynch liquidated her account more expeditiously, it would have received a higher amount for each Cybershop share. Mrs. Fakih also claims that had Merrill Lynch not sold the 40,000-plus shares of Cybershop at one time, which depressed its price, it would have brought in additional money. Thus, she contends that her debit balance would have been reduced had Merrill Lynch attempted to mitigate its damages in these ways. However, mitigation of damages seeks to minimize the economic harm arising from legal wrongdoing, *Morris, supra*, and in this case the alleged legal wrongdoing is Mrs. Fakih's breach of contract, i.e., her failing to pay the debit balance on her account. Mrs. Fakih's argument would require Merrill Lynch to undertake mitigation prior to the alleged wrongdoing, and thus her argument is inapposite. The trial court did not clearly err in failing to find that Merrill Lynch failed to mitigate its damages, *Amb's, supra*, and we find no merit in the argument that the trial court's findings were insufficient for appellate review of this issue. See MCR 2.517(A)(2); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995) (“Findings of fact regarding matters contested at a bench trial are sufficient if they are ‘[b]rief, definite, and pertinent,’ and it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation.”).

Mrs. Fakih also argues that the trial court erred in awarding attorney fees to Merrill Lynch. Specifically, she contends that there was no evidence to support the award of attorney fees and that the trial court failed to make findings concerning the reasonableness of the attorney fees awarded. We disagree. Because Merrill Lynch sought the award of attorney fees as an item of damages provided for both in the cash management agreement in the event of a breach of the contract and under the indemnification clause of the power of attorney document, we review for clear error the trial court's finding that Merrill Lynch is entitled to attorney fees. MCR 2.613(C); *Amb's, supra*.

A contractual provision requiring the breaching party to pay the other side's attorney fees is judicially enforceable. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). But recovery is limited to reasonable attorney fees. *Id.* at 195-196; *In re Howarth Estate*, 108 Mich App 8, 12; 310 NW2d 255 (1981). A party asserting a breach of contract claim resulting in attorney fees as damages bears the burden of introducing evidence and proving his or her damages with reasonable certainty. *In re Howarth Estate, supra*.

Here, Merrill Lynch presented evidence concerning the attorney fees. Merrill Lynch's counsel presented an exhibit containing a summary of bills and itemized billing statements and testified that the work billed was performed and “reasonably done.” He further testified that he and an associate worked on the matter to keep the charges as reasonable as possible and he believed that their rate, \$137 per hour, is reasonable and consistent with his experience as an

attorney. On cross-examination, Merrill Lynch's counsel testified that the claim for attorney fees is against Mrs. Fakih and that there is no breakdown or allocation attributing a portion to the claims against Mrs. Fakih and a portion to the claims against Dr. Fakih, or concerning the amounts attributable only to the defense of Mrs. Fakih's counterclaim.

The trial court determined that "fully one-half of Merrill Lynch's legal efforts involved their actions against ... Dr. Fakih" and proceeded to award to Merrill Lynch legal fees in an amount approximately one-half of the amount requested. Having reviewed the evidence presented, including the itemized billing statements and counsel's testimony, we find without merit Mrs. Fakih's assertion that the trial court "made an attorney fee award without any evidence to sustain it." Further, where there was evidence presented at trial indicating that the fees requested were reasonable, where the bills were itemized, and where the claims arose from the same circumstances and were interrelated, and thus a large portion of the attorney time spent was incapable of apportionment between the claims, see *Bien v Venticinque*, 151 Mich App 229, 232; 390 NW2d 702 (1986), we are not persuaded that the trial court erred in awarding a portion of the total attorney fees billed for the matter or abused its discretion in accepting the charged amount per hour as reasonable. See *Wood v DAIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

Finally, Mrs. Fakih argues that the trial court erred in finding no cause of action on her counterclaims against Merrill Lynch. We disagree.

In her brief on appeal, Mrs. Fakih sets out the separate elements of each counterclaim, i.e., breach of contract, misrepresentation, and breach of fiduciary duty, and she argues that the evidence presented supports a finding in her favor on each counterclaim. In arguing the evidence, Mrs. Fakih disregards the trial court's findings of fact and makes her own credibility decisions concerning the evidence presented at trial.

We decline to second-guess the trial court's credibility determinations. MCR 2.613(C). Here, the trial court found with regard to Mrs. Fakih's counterclaims that "they are premised on the assertion that [Mrs.] Fakih was unaware of the relationship between Mr. Gill and her husband, Dr. Fakih, and therefore did not understand the significance of the document she signed. Based on the totality of the evidence, the [c]ourt rejects this premise[]." With respect to this finding, we have reviewed the entire record and we are not left with the definite and firm conviction that a mistake has been made. *Amb's, supra*. In particular, we note that the testimony of Gill directly contradicted Mrs. Fakih's claims, thus creating a credibility question for the trial court, as finder of fact, to resolve. Applying the trial court's findings of fact to the law, the trial court did not err in concluding that there was no cause for action on Mrs. Fakih's counterclaims.

On cross-appeal, Merrill Lynch argues that the trial court erred in concluding that Dr. Fakih was not obligated to pay Merrill Lynch the draft amounts of his two dishonored checks. Merrill Lynch claims that Dr. Fakih is liable to Merrill Lynch for the two check amounts, totaling \$64,000, under a provision of the Uniform Commercial Code (UCC), MCL 440.3414(2). We disagree.

To the extent that this issue challenges the trial court's findings of fact, our review is for clear error. *Amb's, supra*. However, to the extent that resolution of this issue involves questions of law, such as statutory construction, our review is de novo. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 529; 660 NW2d 384 (2003).

Merrill Lynch's claim against Dr. Fakhri arises from the following circumstances. On August 28, 1998, Dr. Fakhri delivered a check to Merrill Lynch in the amount of \$25,000. On September 1, 1998, Dr. Fakhri delivered a check to Merrill Lynch in the amount of \$39,000. According to Dr. Fakhri, the checks were not intended to be cashed, but were to be shown to Gill's superiors "as proof there was money that was coming in so the account wouldn't be liquidated." Merrill Lynch maintains that these checks were delivered to apply toward a margin call on Mrs. Fakhri's account. Payment on both checks, which were drawn from separate bank accounts, was refused due to non-sufficient funds. The trial court, in finding no cause of action on Merrill Lynch's claim regarding dishonored checks, found that "Dr. Fakhri was an agent of [Mrs.] Fakhri and any loss suffered was suffered not by [Merrill Lynch] but by [Mrs.] Fakhri."

With limited analysis, Merrill Lynch maintains, as it did in the trial court, that it is entitled to recover the check amounts under MCL 440.3414(2), which provides in total:

If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in sections 3115 and 3407. The obligation is owed to a person entitled to enforce the draft or to an endorser who paid the draft under section 3415.

However, under the circumstances in the present case, we believe that Merrill Lynch is entitled to no further relief. Arguably, Merrill Lynch has abandoned this issue by providing only cursory treatment with little citation to supporting authority despite the complexity of the UCC. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001); *Yamaha Motor Corp, USA v Tri-City Motors & Sports, Inc*, 171 Mich App 260, 270; 429 NW2d 871 (1988) ("The UCC is a highly integrated body of statutes whose provisions must be carefully read as such. Fair and just application of the UCC rarely involves reference to only one or a few of its provisions in isolation."). Moreover, Merrill Lynch addresses this issue as solely a question of law; however, there were factual questions surrounding the making, delivery, and purpose of the checks that required the trial court to make factual determinations. Again, it is the trial court's role to determine credibility, MCR 2.613(C), and the factual circumstances, in this instance, cannot be severed from the application of the law. Further, Dr. Fakhri did not owe the check amounts to Merrill Lynch and he received nothing in exchange for the checks. It was Mrs. Fakhri that was responsible to pay on the margin calls on her account. If the checks were payments on a margin call, as Merrill Lynch contends, they would have been deposited in Mrs. Fakhri's account, and thus were not payments to Merrill Lynch. Moreover, even if Merrill Lynch were entitled to recover damages, Merrill Lynch liquidated Mrs. Fakhri's account after nonpayment of the checks on the basis of nonsufficient funds, thereby mitigating its damages, and the remaining damages were recovered in its breach of contract claim against Mrs. Fakhri. Merrill Lynch is entitled to no relief on this claim.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Michael J. Cavanagh  
/s/ Joel P. Hoekstra