

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

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DORA STOTZ,

Plaintiff-Counterdefendant-  
Appellee,

v

RONALD T. BARROWS, Individually and d/b/a  
CAPITAL TRUST,

Defendant-Counterplaintiff-  
Appellant.

UNPUBLISHED

May 1, 2007

No. 265154

Wayne Circuit Court

LC No. 02-222766-CZ

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Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant Ronald T. Barrows (defendant), individually and doing business as The Capital Trust, appeals as of right from a judgment, following a jury trial, in favor of plaintiff Dora Stotz. We affirm in part, reverse in part and remand.

This action arises out of a failed investment scheme, in which plaintiff Dora Stotz invested and lost \$100,000, purportedly with a third-party, Donald Callen (Callen), the managing director of Chaparral Trust (Chaparral). The following is undisputed. Defendant introduced plaintiff to the investment opportunity presented by Callen, and to Callen himself. Defendant also used his own irrevocable trust, The Capital Trust (Capital), and his client trust account as a vehicle to facilitate plaintiff's investment with Callen/Chaparral by accepting funds from plaintiff and purportedly transmitting them electronically to an attorney for Callen/Chaparral named Herbert Bernstein.

On July 2, 1999, after a conference call defendant set up between plaintiff, Callen, plaintiff's then-fiancé Phil Howell,<sup>1</sup> and defendant to discuss the investment opportunity at issue, plaintiff wrote a check to defendant's client trust account. Almost two weeks later, on or about July 14, 1999, plaintiff signed a document titled "Understanding of Engagement

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<sup>1</sup> Howell is not a party to this action. Therefore, he will be discussed only as pertinent to the issues raised on appeal.

Disclosure/Disclaimer,”<sup>2</sup> in which she acknowledged: that defendant introduced her to Callen; that defendant was “acting simply as a finder to introduce, locate and refer [her] to Callen and vice [sic] versa”; that she “had the opportunity to discuss this matter with Callen and elected to accept his invitation to participate in his program.” The Engagement Disclosure expressly provided that defendant was “not acting as an attorney, real estate broker or in any other licensed or professional capacity” and that plaintiff “understand[s], acknowledge[s] and agree[s] that [defendant] is not acting as either an attorney or broker on [her] behalf.” Plaintiff further acknowledged that she was

acting solely and on [her] own accord, freely and voluntarily entering into this transaction with Don Callen and Chaparral Trust. [Defendant] has no involvement other than as conduit in an effort to help [plaintiff] facilitate this transaction. [Plaintiff] has directed [defendant] to place the money in his attorney-client trust account from which the money will thereafter be electronically transferred to the client trust account of the attorneys for Chaparral Trust to perform this transaction. [I] enter into this transaction at [my] own risk with full knowledge that [I] may have had this transaction reviewed by a separate and independent attorney or counselor of [my] choosing.

The Engagement Disclosure specified that plaintiff was to “receive fifteen (15%) percent per month on the monies invested over a term of approximately 120 days” and that defendant was to receive a \$2,500 finder’s fee from the proceeds of the first installment paid to plaintiff, “which shall occur in approximately 1 month after the funds are placed into the program.”

Plaintiff also entered into a joint venture agreement with Capital, acting through defendant. The JVA, signed on July 12, 1999, identified “The Capital Trust Ronald T. Barrows, Managing Director” as “CT” and explained the situation underlying the parties’ agreement relating to the investment as follows:

WHEREAS CT because of its relationship with [Chaparral], was informed of a joint venture opportunity which CT believed might benefit [plaintiff] and which she might be interested; and

WHEREAS, CT arranged a conference telephone call between [Chaparral], [plaintiff], her advisor, Phil Howell and itself during which the joint venture program was discussed in detail and [plaintiff] and Phil Howell were able to and did ask and receive answers to all of their questions; and

WHEREAS, prior to [plaintiff] contributing her funds, a second conference call was arranged between the above parties and new questions and concerns addressed and resolved; and

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<sup>2</sup> Howell also signed this document.

WHEREAS, CT at [plaintiff's] request and at [Chaparral's] insistence, has entered into a Joint Venture Agreement with Chaparral . . . in a form substantially the same as this for the direct benefit of [plaintiff]; and

WHEREAS, [Chaparral], CT and [plaintiff] will merge certain of their respective assets, funds, efforts and contacts to facilitate Private Placement opportunities and funding of certain Financial Instruments and Programs for the benefit of [plaintiff] and its respective Funders/Clients/Trusts approved by this Joint Venture on an Individual Program basis.

With that introduction, the JVA then provided that Chaparral and plaintiff agreed that plaintiff would contribute an initial amount of \$100,000 and that she would receive, through CT, fifteen percent per month for the term of the contract. The JVA specifically provided that:

CT makes no representations or warranties concerning this transaction, nor has it had any direct involvement in completing this transaction, other than for forwarding [plaintiff's] funds according to [Chaparral's] instructions and [plaintiff's] directions, and as a disbursing agent of the proceeds to [plaintiff]. An "Understanding of Engagement-Disclosure/Disclaimer Agreement" between [defendant] and [plaintiff] is attached hereto and incorporated herein by reference as Exhibit A. [JVA, 1.3.]

The JVA also provided for arbitration of any dispute between the parties arising there from. And it included a merger, modification and waiver clause, providing in part, that it "constitutes the entire Agreement between the [p]arties pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the [p]arties, whether oral or written, are hereby superseded and merged herein." Originally, the JVA further provided that defendant would be paid outstanding legal fees owed by Howell for other matters out of plaintiff's disbursements from this investment. However, plaintiff struck that language from the JVA because the outstanding fees were unrelated to this investment and plaintiff felt it inappropriate to address that issue in the JVA.

Capital entered into a similar joint venture agreement with Chaparral (JVA 2), in which it was explained that: Chaparral invited Capital to participate with Chaparral in "a 'by invitation only' high return bank debenture trading program"; Capital lacked the funds to accept the invitation but indicated that plaintiff might be interested; Chaparral only contracts with trusts; plaintiff did not have a trust; Chaparral agreed to allow plaintiff to use Capital as a "contracted for trust vehicle conduit to convey and receive money to and from" Chaparral; Chaparral agreed to recognize Capital as plaintiff's "appointed pass-through vehicle for that investment purpose only and [Capital] agrees to act in that pass-through capacity only"; and that "[a]ll liability for the transaction, other than forwarding the funds to, and receiving and distributing funds from [Chaparral] when sent, will be upon [plaintiff]." Pursuant to the JVA 2, Capital was to submit plaintiff's \$100,000 to a "Bank Attorney/Client Escrow account" which was to be "fully bonded for the dollar value of the deposit and all funds so deposited will remain in said Attorney/Client Escrow account for the duration of any program."

As noted above, approximately ten days before she signed the JVA and twelve days before she signed the Engagement Disclosure, plaintiff issued a check for \$100,000 to

defendant's client trust account for purposes of making the investment. However, plaintiff never received any return on her investment or the return of her money. Defendant deposited the check into his client trust account. The money was never held by Capital. Plaintiff asserts that defendant was a participant in a scheme to defraud her of her investment funds. Defendant asserts that he merely introduced plaintiff to the investment opportunity, that he transferred her money to Chaparral's attorney as directed by the pertinent agreements between the parties receiving nothing in return, and that he too, was a victim of this "con."

In her complaint, plaintiff alleged claims sounding in fraud, unjust enrichment, conversion and negligent misrepresentation. More specifically, plaintiff alleged that defendant fraudulently induced her to enter into the investment with Chaparral by knowingly or recklessly making material misrepresentations to her, by failing to disclose material facts known to him under circumstances where his silence constituted false representations of fact, and by continuing to make false representations after receiving money from plaintiff to conceal his own wrongdoing. Plaintiff also asserted that defendant owed her a duty to use reasonable care when disseminating information about Chaparral and Capital, which he breached by making the false statements and false representations by omission noted above, causing plaintiff both economic and non-economic harm.

On August 13, 2002, defendant filed a pleading titled "Answer to Complaint, Reliance Upon Jury Demand and Affirmative and Special Defenses." Defendant's answer to plaintiff's complaint spans pages 1 to 7 of this pleading, the reliance on plaintiff's jury demand appears on page 7, and the affirmative and special defenses are listed on pages 8 through 10. Defendant also filed a counterclaim, which although being separately captioned, begins on page 11. This counterclaim alleged claims of breach of contract, intentional infliction of emotional distress, malicious prosecution and abuse of process.

On September 24, 2002, plaintiff having failed to answer, defendant filed an application for entry of default against plaintiff on the counterclaim. On December 12, 2002, defendant filed a motion for entry of default judgment on the counterclaim. After the trial court denied that motion, on May 28, 2003, plaintiff filed a motion to set aside the default. The trial court granted this motion, reasoning that,

In our case, it is tempting to attribute the reasons for [plaintiff's] attorney's failure to respond entirely to attorney neglect and proceed no further other than to deny the motion. However, a careful examination of how the Counterclaim was served on [plaintiff's] attorney convinces the [c]ourt that [defendant] substantially contributed to [plaintiff's] attorney's failure to respond, and indeed the manner in which the Counterclaim was served further leads the [c]ourt to find that the default was premised on a substantial defect that excused, if not entirely obviated, [plaintiff's] attorney's duty otherwise to file an answer to the Counterclaim. Notably, the Counterclaim was literally buried within a pleading, that on its face only reflected that an answer and affirmative defenses, along with voluminous exhibits and discovery requests, were being served on [plaintiff's] attorney. While it may be that when [defendant] filed his pleadings with the Court Clerk he carefully identified for the Court Clerk the existence of the Counterclaim and had the Court Clerk stamp it, this does not demonstrate how he submitted it to [plaintiff's] attorney. It is significant to the [c]ourt that later,

when the Court Clerk went to enter the filing that [defendant] had made into the [c]ourt's computer system, the Court Clerk evidently erroneously failed to notice that along with the Answer there was also the Counterclaim. Of course, given that the Counterclaim followed numerous exhibits would additionally cause it not to be immediately discovered unless expressly called to [plaintiff's] attorney's attention. Needless to say, the method by which [defendant] chose to serve [plaintiff's] attorney with the Counterclaim was calculated not to draw attention to it or did not clearly alert [plaintiff's] attorney that a counterclaim was being filed.

The trial court noted that, pursuant to MCR 2.110(C), a counterclaim may be combined with an answer, but "must clearly be designated as such" and that failure to meet this requirement eliminates the need to file a responsive pleading. The trial court found that defendant "failed to clearly identify that he had served on [plaintiff's] attorney a counterclaim. Hence, [plaintiff's] attorney was not required to respond to the Counterclaim." It thus concluded that "[i]t follows that [plaintiff's] attorney has satisfactorily demonstrated that the default rests on a substantial irregularity, and thus has established good cause to set aside the default."

Regarding establishment of a meritorious defense, the trial court observed that plaintiff's defenses to the breach of contract and malicious prosecution were legal and not factual in nature, and thus need not be supported by an affidavit of facts, and further, that plaintiff's affidavit set forth sufficient facts to establish a meritorious defense to the claims for intentional infliction of emotional distress and abuse of process.

The trial court also determined that "[u]nder the very unusual circumstances of this case, including the finding that the default was ultimately improperly filed due to the failure of [defendant] to clearly identify his assertion of a counterclaim, . . . [defendant] could not have any taxable costs 'in reliance on the default' . . . [and] that an award of attorney fees . . . would not be presently warranted." The trial court ordered plaintiff to answer or otherwise defend against the counterclaim within 21 days of the order.

Prior to trial, defendant also a filed motion for summary disposition. Defendant asserted that by identifying defendant's limited role in the transaction, by expressly stating that defendant made no representations or warranties concerning the transaction, and by providing that plaintiff bore "[a]ll liability for the transaction, other than for forwarding the funds to and receiving and distributing funds from" Chaparral, the Engagement Disclosure, the JVA and the JVA 2, read together, served to release defendant and to implicitly indemnify and hold him harmless from any liability or loss arising from the transaction entered into between plaintiff and Callen/Chaparral. Relying on the unanswered requests for admissions, defendant further asserted that plaintiff admitted that she read, understood and executed the Engagement Disclosure and the JVA.

In her opposition, plaintiff argued that defendant's motion was based almost entirely on an assertion that defendant's unresponded-to requests for admission should be deemed admitted and once admitted, they presented sufficient basis for summary disposition. Plaintiff attached her answers and asked the court to accept them while recognizing that "[a]ll but the initial week or so of the delay was generated by [defendant's] filing of a specious default." Plaintiff further asserted that neither the release nor the arbitration clause contained in the parties' agreement

warranted summary disposition because they are set forth in the documents that plaintiff was induced to sign by defendant's tortious conduct. Plaintiff also asserted that defendant had an attorney-client relationship with plaintiff that prohibited him from "fashioning release documents which prospectively limits his exposure to [plaintiff] for malpractice."

The trial court denied defendant's motion. The court first noted that MCR 2.312(B)(1) provides that "[e]ach matter as to which a request is made is deemed admitted unless, within 28 days after service of the request or within a shorter or longer time as the court may allow," a written response is filed. It then determined, pursuant to *Janczyk v Davis*, 125 Mich App 683, 691-692 (1983), that allowing plaintiff's late answers would aid in the presentation of the action, that defendant was not prejudiced in his ability to prove his case at trial by the late answers and that the amount of the delay attributable to plaintiff was inconsequential when compared to the "overwhelming amount" of the delay resulting from defendant's "unjustified reliance on the defectively filed default." It also determined that the alleged release in the parties' agreement did not warrant summary disposition because even assuming that the language cited by defendant was clear and unambiguous, the allegations in the complaint asserted that plaintiff was "induced to enter into these transactions, and thus these agreements" by defendant's fraudulent misrepresentations. The trial court reasoned that defendant did not address how "these allegations would not be sufficient, if proven, to constitute a basis for setting aside these agreements." The Court concluded that

At this point, the [c]ourt is satisfied that the Complaint fairly sets forth sufficient factual allegations, which accepted as true, that would be cause for finding the alleged releases in these various documents invalid. Accordingly, the [c]ourt further declines to grant [defendant's] motion for summary disposition based on a purposed release.

The parties proceeded to trial. At the close of proofs, the trial court *sua sponte* dismissed plaintiff's claim for unjust enrichment and statutory conversion, leaving fraud, conversion and negligent misrepresentation for the jury. The jury concluded that defendant was not liable for fraud or conversion but was liable to plaintiff in the amount of \$50,000 for negligent misrepresentation.

Thereafter, defendant moved for judgment notwithstanding the verdict, or alternatively, for a new trial, arguing that there was insufficient evidence presented at trial that defendant made any material misrepresentations about the investment so as to support a verdict in plaintiff's favor on her negligent misrepresentation claim. Plaintiff moved for sanctions against defendant and his counsel, asserting that defendant's counterclaim was frivolous and without arguable legal merit. The trial court denied defendant's motion for JNOV or a new trial. The trial court determined that defendant's claims for malicious prosecution and abuse of process were "utterly devoid of legal merit" and thus, frivolous, and granted plaintiff sanctions for the filing of those two counts. The trial court denied sanctions in connections with defendant's claims for breach of contract and intentional infliction of emotional distress. The parties agreed to \$7,000 as the appropriate amount of costs and fees attributable to the two frivolous counts.

We first note that plaintiff, quite belatedly, has challenged our jurisdiction over this appeal on the basis that it was not timely filed. We agree that defendant's filing of his appeal of right was untimely because it failed to comply with the timing requirements set forth in MCR

7.204. However, as this Court noted in *Waati & Sons Electric Co v Dehko*, 230 Mich App 582, 585; 584 NW2d 372 (1998), in such cases, “we may, in our discretion, accept the pleadings as an application for leave to appeal, grant the appeal, and resolve the appealed issue on the merits.” Here as in *Waati*, we choose to do so, given the circumstances before us, including the substantial amount of time that this Court and the parties have invested in this matter and because the trial court erred in denying defendant’s motion for JNOV, and thus it would be unfair to allow the jury verdict against defendant to stand based on a mere procedural error. *Id.*

We now turn to the substance of this appeal. In a number of related arguments, defendant contends that the trial court erred in declining to enforce release language in the documents signed by plaintiff. Further, defendant argues that, even if the trial court properly denied defendant’s motion for summary disposition on this basis, defendant was entitled to JNOV<sup>3</sup> because plaintiff presented no evidence whatsoever at trial that she was fraudulently induced to enter into the documents or that she justifiably relied on alleged misrepresentations made by defendant. We agree, in part, with defendant’s arguments.

The issues whether defendant was entitled to summary disposition based on release and whether defendant was entitled to a JNOV were raised before and decided by the trial court. Therefore, those issues are properly preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). This Court reviews a trial court’s decision on a motion for summary disposition de novo, considering the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmovant. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004); *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). This Court also reviews a trial court’s decision on a motion for judgment notwithstanding the verdict de novo, viewing the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). Only if the evidence viewed in this light failed to establish a claim as a matter of law is JNOV appropriate. *Id.* If, however, reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

In its motions for summary disposition, defendant argued that language in the Engagement Disclosure, the JVA and the JVA 2 released him from any liability to plaintiff arising out of her investment with Callen/Chaparral. Pursuant to MCR 2.116(C)(7), a claim may be barred because of a release. *Rinke v Auto Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997). As this Court explained in *Rinke*, “The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties’ intentions must be ascertained from the plain, ordinary meaning of the language of the release.” *Id.* Here, however, the documents signed by plaintiff do not contain any language whereby plaintiff explicitly agreed to release defendant from liability arising from the

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<sup>3</sup> Defendant also argues that he was entitled to a directed verdict on the same grounds but no such motion was made to the trial court.

transaction. Those documents define defendant's role in the transaction as acting as a mere "finder" or "conduit," but nowhere do they specifically provide that plaintiff released defendant from liability. Defendant does not point to any specific language in the Engagement Disclosure or JVA signed by plaintiff as constituting a release but, rather, argued that by setting forth his limited role in the transaction, they "serve to release" him from any liability arising from the transaction and "impliedly indemnify and hold [him] harmless" from any loss plaintiff may suffer. Thus, the trial court did not err in failing to enforce the documents against plaintiff as a release.

Judgment notwithstanding the verdict should be granted only when there was insufficient evidence presented to create an issue for the jury. *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Id.* at 123-124. If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

As this Court explained in *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006) (quoting *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 482, 502; 686 NW2d 770 (2004)), "[a] claim for negligent misrepresentation 'requires plaintiff to prove 'that [she] justifiably relied to [her] detriment on information prepared without reasonable care by one who owed [her] a duty of care.'"

Assuming for purposes of this discussion that defendant owed a duty to plaintiff,<sup>4</sup> plaintiff cannot establish that she justifiably relied on any alleged misrepresentations made by defendant relating to the investment. First, the documents signed by plaintiff specifically state: that defendant was "acting simply as a finder to introduce, locate and refer" her to Callen and was not "acting as an attorney, real estate broker or in any other licensed or profession [sic] capacity"; that she understood, acknowledged and agreed that defendant was "not acting as either an attorney or broker" on her behalf and that he had "no involvement other than as a conduit in an effort to help [plaintiff] facilitate this transaction"; that she was acting "solely and on [her]

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<sup>4</sup> "In determining whether a duty exists, courts examine a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk." *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993). "Most importantly, for a duty to arise there must exist a sufficient relationship between the plaintiff and defendant." *Id.* A court could conclude that defendant owed plaintiff a duty arising from the parties relationship as attorney-client in the time leading up to, if not including, the instant transaction, especially as defendant was aware that plaintiff had funds available to make the investment as a result of that relationship and as plaintiff gave defendant a check to deposit into his client trust account for purposes of making this investment before she was presented with the Engagement Disclosure and JVA. However, a court could also conclude that given defendant's limited role in this transaction, as set forth in the Engagement Disclosure and JVA, there was no duty pertaining to the instant investment.

own accord, freely and voluntarily entering into this transaction” at her “own risk with full knowledge that [she] may have had this transaction reviewed by a separate and independent attorney or counselor” of her choosing that defendant “makes no representations or warranties concerning this transaction nor has it had any direct involvement in completing the transaction” other than as a disbursing agent for funds between Chaparral and plaintiff; and that “all prior and contemporaneous agreements, representations, negotiations and understandings of the [p]arties whether oral or written” were superseded and merged into the JVA. The documents signed by plaintiff explicitly disclaim that defendant made any representations whatsoever about the investment, and thus, as acknowledged by plaintiff in writing, he could not have made any *misrepresentations* – negligent or otherwise - about that investment. Plaintiff’s disclaimer of any representations by defendant is consistent with the testimony of both defendant and Callen.

Even if this Court were to assume that, notwithstanding plaintiff’s written concession in this regard, a fact finder could reasonably conclude on the basis of plaintiff’s testimony that defendant had made misrepresentations, plaintiff’s concession necessarily belies any claim she might make that she “justifiably relied” on those misrepresentations. As this Court explained in *Fejedelem, supra* at 503,

Whether a person *justifiably* relies on a [representation] is indistinguishable from whether the person *reasonably* relies on it. Indeed, courts sometimes treat the two words essentially as synonyms. . . . Thus, the test in Michigan is identical to the test set forth in 3 Restatement Torts, 2d § 552A, p 140, which states that “[t]he recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying.”

Applying that test, the *Fejedelem* Court concluded that plaintiff was negligent in relying on unaudited financial information provided by defendant, because “the parties actually discussed the financial statements and plaintiff was thus aware that the financial statements were not only unaudited but also estimated” and because plaintiff sought and was denied access to additional records on the advice of an independent CPA consultant. *Id.* at 503-504. Similarly, in *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999), this Court determined that plaintiff could not reasonably rely on alleged representations that an at-will provision in the contract did not apply to him and that he would be allowed to sell insurance for companies other than defendant in light of express contractual statements otherwise.

Similarly here, we conclude that plaintiff could not have *reasonably* relied on any alleged representations by defendant about the nature of the investment because the agreements plaintiff signed clearly defined defendant’s limited role as a “finder” or “conduit” with “no involvement” in the transaction, specifically disclaimed that defendant made any representations or warranties, stated that any prior representations were superseded and merged into the JVA, and provided her with the right and opportunity to have the investment reviewed by an attorney or counselor of her choosing. In other words, even if defendant made misrepresentations, plaintiff’s reliance on

them was unreasonable. The record is clear that plaintiff had ample opportunity (as she acknowledged in writing) to seek review of the investment from more qualified advisors.

Plaintiff admitted that she read the Engagement Disclosure and the JVA before she signed them and that she understood the pertinent portions of the agreements.<sup>5</sup> Plaintiff did not assert below that the contract language in this regard was unambiguous or unclear. It is well established that unambiguous language “will be enforced as it is written unless doing so would violate public policy.” *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). As this Court recently explained, in *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (issued March 6, 2007), slip op at p 2, quoting a prior decision by a panel of this Court in an earlier appeal, “when a contract contains a valid merger clause, the only fraud that can invalidate the contract is where ‘one party induces the other to suppose that the antecedent agreement is included in the writing,’ or where one party induces the other ‘to forget that agreement and to execute an incomplete writing, while describing it as complete.’” See also, *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 493-495; 579 NW2d 411(1998).

Plaintiff does not allege that either of these circumstances applies here. Rather, plaintiff argued below that the agreements were of no effect because defendant committed fraud to induce her to enter into the transaction and thus, the agreements. However, while evidence of defendant’s alleged misrepresentations was admissible, in contradiction of the agreement, to establish fraud so as to set aside the agreements, *Id.* at 494-495, the jury found against plaintiff on her fraud claim. Therefore, in the absence of fraud warranting setting aside the agreements, there is no basis for disregarding plaintiff’s acknowledgment in writing that defendant’s role in the transaction was limited and that she had the right to review the investment with more qualified advisors. Plaintiff testified at trial that she disagreed with certain representations in the JVA and Engagement Disclosure, but acknowledged she knowingly and voluntarily signed these documents. The record is clear that plaintiff understood that she could strike language from these documents that did not meet with her approval, as she did with the reference in the JVA to payment of unrelated legal fees to defendant from the proceeds of the investment. She did not take issue with, strike or attempt to change any portion of the agreement pertinent here. Consequently, there being no evidence suggesting a finding of reasonable reliance, we reverse the trial court’s order denying defendant judgment notwithstanding the verdict on plaintiff’s claim for negligent misrepresentation.<sup>6</sup>

Defendant further argues that the trial court abused its discretion in setting aside the default entered against plaintiff on the counterclaim because there was absolutely no showing of good cause for the failure to answer. We disagree.

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<sup>5</sup> Plaintiff testified that she did not understand certain portions of the agreements, but did not express any confusion over the portions relevant to this analysis.

<sup>6</sup> In light of this determination, we need not consider defendant’s argument regarding jury instructions.

This issue was raised before and decided by the trial court. Therefore, it is properly preserved for appeal. *Fast Air, supra* at 549. This Court reviews a trial court's decision whether to set aside a default or a judgment of default for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). An abuse of discretion will be found only where the trial court's decision results in an outcome outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 372 (2006).

MCR 2.603(D)(1) provides that a motion to set aside a default or default judgment, on grounds other than a lack of jurisdiction, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. The decision whether to grant a motion to set aside default is entrusted to the discretion of the trial court and therefore, this Court's review of that decision is "sharply limited" such that it will not be reversed unless it constitutes a clear abuse of discretion. *Alken-Ziegler, supra* at 227. An abuse of discretion "involves far more than a difference in judicial opinion." *Id.* Rather, the abuse of discretion standard acknowledges that there are circumstances in which there is no one correct outcome. *Maldonado, supra* at 388 (quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231, (2003)). Thus, this Court will find that a trial court has abused its discretion only where the trial court's decision results in an outcome outside the range of principled outcomes. *Id.*

Although the law favors the determination of a claim on its merits, "it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, supra* at 229. Our Supreme Court explained in *Alken-Ziegler*, that good cause warranting the setting aside of a default can be shown by: (1) a procedural defect or irregularity or (2) a reasonable excuse for the failure to comply with the requirements that created the default. *Id.* at 233. In addition, the trial court must also consider whether its failure to set aside the default will result in manifest injustice. *Id.* Manifest injustice is "the result that would occur if a default were allowed to stand after a party has demonstrated good cause and a meritorious defense." *Id.* Thus,

[w]hen a party puts forth a meritorious defense and attempts to satisfy "good cause" by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the "good cause" showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be required than if the defense were weaker, in order to prevent a manifest injustice. [*Id.* at 233-234.]

Additionally, this Court has explained that the existence of attorney negligence does not preclude a finding of good cause if circumstances otherwise support such a finding. *Huggins v MIC General Ins Corp*, 228 Mich App 84, 87; 578 NW2d 326 (1998); *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989).

The trial court concluded that the manner in which defendant filed and served its counterclaim was a procedural irregularity so as to constitute good cause for the failure to respond. On appeal, defendant argues that the trial court's actions constituted an abuse of discretion because its counterclaim complied with applicable court rules and therefore, the manner in which it was filed did not establish good cause to warrant setting aside the default. Defendant asserts that, "[a]lthough the Counterclaim was part of the Answer," it fully complied

with MCR 2.110(C), requiring that a counterclaim combined with an answer must be clearly designated as such, because it was separately captioned. Defendant cites nothing, other than the court rule, in support of his assertion that the manner in which the pleading was filed did not constitute good cause for setting aside the default.

MCR 2.110(C) provides that a counterclaim may be combined with an answer, but “must be clearly designated as such.” Defendant filed a pleading titled “Answer, Affirmative Defenses and Reliance on Jury Demand.” The question presented then, is whether placing a separate caption on the first page of the counterclaim, which was page 11 of the answer, but not including “counterclaim” in the title of the pleading, is sufficient to “clearly designate” the counterclaim as a counterclaim when combined with the answer. This Court has not previously ruled on this question. However, given the circumstances of this case, and the strength of plaintiff’s defense that the counterclaim failed to state a claim upon which relief could be granted, we conclude that the trial court did not abuse its discretion in setting aside the default based on a finding that the manner in which defendant filed the counterclaim was an irregularity in the proceedings constituting good cause. *Alken-Ziegler, supra* at 233-234.

Further, even if the trial court abused its discretion in setting aside the entry of default, defendant was not entitled to a judgment thereon, and therefore, was in no way prejudiced by the trial court’s decision. The entry of a default provides the basis for the entry of a default judgment, by the clerk in limited circumstances, or by the court, as provided in MCR 2.603(B). *ISB Sales Co v Dave’s Cakes*, 258 Mich App 520, 530; 672 NW2d 181 (2003). However, “entry of a default does not operate as an admission that the complaint states a cause of action. If the complaint fails to state a cause of action, it will not support a judgment.” *State ex rel Saginaw Prosecuting Attorney v Bobenal Investments, Inc*, 111 Mich App 16, 22; 314 NW2d 512 (1981), citing *Hofweber v Detroit Trust Co*, 295 Mich 96; 294 NW 108 (1940). That is, where the complaint, or in this case, the counterclaim, fails to state a claim upon which relief can be granted it will not support entry of a judgment obtained by a default. *Hunley v Phillips*, 164 Mich App 517, 523; 417 NW2d 485 (1987).

Here, the trial court ultimately determined that the counterclaim failed to state a claim upon which relief could be granted. Defendant does not challenge that determination on appeal. Therefore, regardless whether the trial court improperly set aside the default, defendant was not entitled to judgment on his counterclaim.

Finally, defendant argues that the trial court abused its discretion in denying defendant sanctions for “having to deal with [p]laintiff’s astonishingly dilatory behavior” in responding to the counterclaim and in awarding plaintiff \$7,000 for fees “supposedly incurred in responding to two of the counts of the very same pleading.” Again, we disagree.

This issue was raised before and decided by the trial court. Therefore, it is properly preserved for appeal. *Fast Air, supra* at 549. This Court reviews a trial court's determination whether to impose sanctions under MCR 2.114 for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

This Court reviews a trial court's decision to award attorney fees for an abuse of discretion. *Farmers Ins Exchange v Kurzman*, 257 Mich App 412, 422; 668 NW2d 199 (2003). This Court reviews a trial court's findings of fact underlying such an award for clear error, *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000), and any questions of law affecting the determination whether to award sanctions de novo. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005).

In his counterclaim, defendant explicitly acknowledged that his claim for malicious prosecution was not yet ripe, there having been no prior action that concluded in his favor. Thus, there admittedly was no legal basis for him to assert that claim. And his claim for abuse of process was premised solely on the fact that plaintiff filed the instant action. Defendant offered nothing to establish that she did so with any improper purpose. Defendant argues on appeal, without more, that while "those counts of [the] counterclaim are not terribly strong" the trial court should not have deemed them frivolous, especially given plaintiff's conduct. Of course, whether plaintiff's counsel properly responded to defendant's counterclaim (discussed below) is not relevant to whether that counterclaim, or portions thereof, were frivolous. The trial court evaluated each count of defendant's counterclaim on its own merit, determining that the claims for breach of contract and intentional infliction of emotional distress were at least of some arguable merit. Defendant offers no rationale contrary to the trial court's considered conclusion that the malicious prosecution and abuse of process counts fail to meet this threshold. Further, the amount awarded, \$7,000, was agreed on between the parties. Therefore, there is no basis for defendant to challenge that amount on appeal.

Defendant also claims that the trial court abused its discretion in failing to award him any sanctions for having to deal with [p]laintiff's astonishingly dilatory behavior" in responding to the counterclaim, which required defendants to appear three times on the motion for entry of default judgment, "twice because [p]laintiff never bothered" to file a response to the motion. The abuse of discretion standard is deferential and acknowledges that there is no single correct outcome; rather, there are multiple reasonable and principled outcomes. When a trial court chooses one of these principled outcomes, it does not abuse its discretion. *Maldonado, supra* at 388. Given the manner in which defendant's counterclaim was filed, that the first hearing on defendant's motion for default judgment was improperly noticed, and the trial court's finding that defendant could not have any taxable costs in reliance on that default, we do not conclude that the trial court's decision that sanctions were not warranted was an abuse of discretion.

We reverse the trial court's order denying defendant's motion for judgment notwithstanding the verdict, affirm the trial court's order awarding plaintiff \$7,000 in sanctions, and affirm the trial court's order denying defendant's motions for sanctions. We remand for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra  
/s/ Richard A. Bandstra  
/s/ Donald S. Owens