STATE OF MICHIGAN

COURT OF APPEALS

BERO MOTORS, INC.,

Plaintiff-Appellee,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

UNPUBLISHED
August 10, 2006

No. 257675
Delta Circuit Court
LC No. 98-014256-CK

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment awarding plaintiff damages of $3,126,934 for breach of contract in accordance with a jury's verdict. We affirm.

Plaintiff, an automobile dealership holding franchises to sell defendant's Pontiac and Buick brands, hoped to acquire a franchise to sell defendant's GMC truck brand. Plaintiff's desire meshed with defendant's "GM Plan 2000," which aimed to realign dealerships so that the Pontiac, Buick, and GMC truck franchises would be grouped together, as would the Chevrolet, Cadillac, and Oldsmobile franchises. Plaintiff wanted to accomplish this goal by purchasing a Town & Country dealership, which held Cadillac, Oldsmobile, and GMC truck franchises and also a Toyota franchise. If plaintiff were successful in acquiring Town & Country, it intended to sell the Cadillac, Oldsmobile, and Toyota franchises. Plaintiff's owners and Town & Country's owner, Lyle Berro, attempted to negotiate a sale in 1996 but could not agree on a purchase price.

Defendant's representatives met with plaintiff's owners in October 1996 to discuss defendant's Plan 2000. Plaintiff's owners allege that defendant's representatives agreed to help plaintiff acquire a GMC truck franchise. According to plaintiff, defendant promised to assign plaintiff its right of first refusal to purchase Town & Country in the event of a sale, thus giving plaintiff precedence over other potential buyers. In exchange, plaintiff allegedly promised to help implement Plan 2000 by offering to sell the Cadillac and Oldsmobile franchises to a local Chevrolet dealership and by using a separate showroom to sell other manufacturers' vehicles. This alleged agreement was never reduced to writing.

In November 1997, Lyle Berro sold Town & Country to another entity for $1,150,000. The purchase price included the sale of real estate that Lyle Berro and his wife owned and leased to the dealership. Plaintiff had previously been willing to pay $1,200,000 for the dealership if Berro included the real estate. Plaintiff brought this action for breach of contract against

defendant, claiming that defendant breached its promise to assign plaintiff the right of first refusal.

The jury found that defendant was liable for breach of contract and awarded plaintiff damages of $3,126,934. This amount represented the profits plaintiff would have allegedly earned from 1998 to 2010 if it had purchased Town & Country for $1,150,000, kept the GMC truck franchise, and sold the remaining franchises and the real estate for $800,000. Defendant's post-trial motions for judgment notwithstanding the verdict (JNOV), a new trial, or remittitur were all denied.

On appeal, defendant argues that the alleged oral contract in which defendant agreed to assign plaintiff its right of first refusal to purchase the Town & Country dealership was unenforceable under the statute of frauds, MCL 566.106, because it involved an interest in real estate. We disagree.

Whether the statute of frauds bars the enforcement of a purported contract is a question of law that this Court reviews de novo. *Kelly-Stehney & Associates, Inc v MacDonald's Indus Products, Inc*, 265 Mich App 105, 110; 693 NW2d 394 (2005). MCL 566.106 provides:

> No estate or interest in lands, other than leases for a term not exceeding one [1] year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

The trial court determined that the statute of frauds did not apply, because Town & Country did not own its real estate, and, therefore, the right of first refusal did not encompass an interest in real property. The court further concluded that even if the agreement did encompass a right to buy the land, the statute of frauds was still not applicable because it does not apply to option contracts or rights of first refusal.

The trial court correctly held that the statute of frauds does not apply to a right of first refusal. Initially, we note that the trial court treated the right of first refusal as an option to buy real estate, though they are not the same. "An option is a mere offer that may ripen into a binding bilateral contract upon a seasonable acceptance of the terms recited therein." *Bowkus v Lange*, 196 Mich App 455, 460, 494 NW2d 461 (1992), rev'd on other grounds 441 Mich 930 (1993); see also *Le Baron Homes, Inc v Pontiac Housing Fund, Inc*, 319 Mich 310, 315; 29 NW2d 704 (1947). By contrast, a right of first refusal is a conditional option; it is conditioned on the owner's willingness to sell. See *Czapp v* Cox, 179 Mich App 216, 223; 445 NW2d 218 (1989). A right of first refusal, unlike an option, is not an offer to sell; it does not create the power of acceptance. *Brauer v Hobbs*, 151 Mich App 769, 775-776; 391 NW2d 482 (1986). In *Brauer*, this Court distinguished a right of first refusal from an option contract. *Id.* The Court held that the property owners' promise that they would not sell their lot to anyone until they had made an offer to sell it to the plaintiff was a right of first refusal, although the Court noted that Michigan courts had previously labeled such agreements as option contracts rather than first

refusal agreements. *Id.* at 775-776, 776 n 3; see also *Glocksine v Malleck*, 372 Mich 115, 118; 125 NW2d 298 (1963), and *Bennett v Eisen*, 64 Mich App 241; 235 NW2d 749 (1975).

In the alleged agreement here, defendant promised to assign plaintiff its right to purchase Town & Country ahead of all other potential buyers in the event it was put up for sale. Thus, the agreement is properly characterized as one assigning a right of first refusal.

In *Marina Bay Condominiums, Inc v Schlegel*, 167 Mich App 602, 607; 423 NW2d 284 (1988), this Court held that the statute of frauds does not apply to an option to buy real estate. The Court explained:

> An option is a preliminary contract for the privilege of purchase and not itself a contract of purchase. It is a contract collateral to the offer to sell whereby the offer is irrevocable for a specified period. It involves the privilege of buying property at a fixed price within a specified period of time. An option contract does not create an interest in land. Therefore, it is not subject to the statute of frauds. [*Id.* (citations omitted).]

Similarly, in *Hague v DeLong*, 282 Mich 330, 333; 276 NW 467 (1937), our Supreme Court stated that "[a]n option to purchase realty . . . is not a sale of interest in realty within the statute of frauds."

Although *Marina Bay* involved an option contract rather than a right of first refusal, its rationale is equally applicable to rights of first refusal. A right of first refusal, like an option contract, is not a contract to purchase land but instead involves the privilege to buy property ahead of another potential buyer. Indeed, a right of first refusal gives the promisee *less* rights than an option contract. The promisee in an option contract holds the power to purchase the property at will for the specified price during the specified period, but the promisee in a right of first refusal agreement cannot exercise any right to purchase property unless the seller decides to sell to a different buyer. Because the right of first refusal gives the holder fewer rights than an option, we conclude that if the statute of frauds does not apply to the latter, it also does not apply to the former.

Defendant also asserts that its dealership agreement with plaintiff precludes enforcement of an oral contract. As defendant acknowledges, however, this Court previously rejected this argument in plaintiff's prior appeal in this matter. See *Bero Motors, Inc v General Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2001 (Docket No. 224190). Defendant correctly concedes that the law of the case doctrine precludes reconsideration of this argument in the present appeal. *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 91; 662 NW2d 387 (2003). Indeed, defendant asserts that it is raising this argument only to preserve it for possible future review by our Supreme Court.

Defendant also argues that it was entitled to JNOV because plaintiff did not present sufficient evidence of a binding contract between the parties. This Court reviews de novo a trial court's decision regarding a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). "A motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury." *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997).

Defendant contends that plaintiff did not give any consideration in exchange for defendant's alleged promise. A binding contract requires consideration, i.e., a bargained-for exchange. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 238; 644 NW2d 734 (2002). "There must be a 'benefit on one side, or a detriment suffered, or service done on the other.'" *Id.* at 238-239, quoting *Plastray Corp v Cole*, 324 Mich 433, 440; 37 NW2d 162 (1949). "Courts do not generally inquire into the sufficiency of consideration . . . ." *Id.* at 239.

A binding contract can be formed by mutual promises. *Garlock v Motz Tire & Rubber Co*, 192 Mich 665, 672; 159 NW 344 (1916). The term "promise" has been defined as "'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993), quoting 1 Restatement Contracts, 2d, § 2, p 8. Promises and performances to be rendered are sufficiently definite if they are set forth with reasonable certainty. *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941). In *Higgins v Monroe Evening News*, 404 Mich 1, 20-21; 272 NW2d 537 (1978), our Supreme Court stated:

> Valid consideration for a contract cannot be presumed merely because two parties receive benefit from each other. Rather, a bargained for exchange is required. The essence of consideration, therefore, is legal detriment that has been bargained for and exchanged for the promise. Calamari, Contracts (1st ed), § 53, p 105. The two parties must have agreed and intended that the benefits each derived be the consideration for a contract.

Here, plaintiff promised to comply with defendant's Plan 2000 by selling the Cadillac and Oldsmobile franchises to another local dealership if it acquired Town & Country and by displaying defendant's products in a separate showroom, apart from plaintiff's Jeeps. Defendant argues that the former promise was too indefinite because there was no agreement between plaintiff and the other local dealership regarding price or time of performance, no assurance that the sale could be consummated, and no contingency plan if it were not. Defendant contends that the promise was illusory, because if plaintiff failed to sell the franchises to the other dealership, defendant could not enforce the promise by forcing a sale to take place. However, plaintiff only promised to *offer* the franchises to the other dealership; it did not guarantee that the other dealership would accept.

In *General Motors*, *supra*, the plaintiff's sales agreement promised customers that, in response to a customer complaint about a vehicle defect, the plaintiff would consider paying for replacement parts not covered by warranty. *Id.* at 234, 238. The Supreme Court addressed whether the plaintiff's promise to *consider* paying for replacement parts pursuant to its sales agreement was "consideration flowing to customers when they purchased a GM vehicle or merely an illusory promise." *Id*. at 238. The Court held that the promise was adequate consideration because the plaintiff promised to hear and address customer complaints. *Id.* at 238-239. The Court explained that although the plaintiff's promise to consider paying for the parts was discretionary with respect to whether the plaintiff would provide the parts, it was "not discretionary regarding the plaintiff's obligation to act reasonably and in good faith in response to a customer complaint." *Id.* at 240. The Court concluded that the goodwill adjustment policy was "part of the consideration flowing to GM customers when they purchase a GM vehicle that is taxed pursuant to the [General Sales Tax Act] at retail sale." *Id.* at 242-243.

General Motors supports plaintiff's position in this case. Plaintiff's commitment to offer the other dealership the opportunity to buy the Cadillac and Oldsmobile franchises is analogous to the commitment to negotiate customer complaints in good faith. Although plaintiff did not expressly promise to negotiate with the other dealership in good faith, the law recognizes an implied covenant of good faith and fair dealing in all contracts that neither party will do anything that adversely affects the other party's right to receive the fruits of the contract. *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992). This implied covenant limits the parties' conduct when the contract leaves the manner of performance to a party's discretion. *Ferrell v Vic Tanny Int'l, Inc,* 137 Mich App 238, 243; 357 NW2d 669 (1984); *Burkhardt v City National Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975). Plaintiff's promise regarding the other dealership was not illusory, because it obligated plaintiff to make a good-faith offer to the other dealership if it ever exercised defendant's assignment of the right of first refusal.

Defendant also argues that plaintiff's promise to comply with Plan 2000 was not induced by defendant's promise because plaintiff had already indicated it was willing to comply with the plan. However, there is no evidence that plaintiff intended to terminate its Jeep franchise voluntarily or use a separate showroom unless it acquired the GMC truck franchise. Defendant admitted that it could not force any dealer to comply with Plan 2000, and plaintiff did not commit itself to the plan by merely stating that it would comply. Plaintiff's promise to separate its Jeeps *if* it acquired a GMC truck franchise was a detriment, because it obligated plaintiff to do something it was not otherwise required to do. Moreover, although plaintiff did not specify a time for removing the Jeeps, a contract is not void for indefiniteness merely because it does not specify a time for performance; in such cases, the contract is deemed to require performance within a reasonable time. See *Soloman v Western Hills Development Co*, 88 Mich App 254, 257; 276 NW2d 577 (1979) (Michigan does not favor the destruction of contracts due to indefiniteness, and performance may be required to be rendered within a reasonable time if the time of performance is indefinite).

Although plaintiff's promise to offer the Cadillac and Oldsmobile franchises to another dealership if it purchased Town & Country fit with the plans Robert Bero, an employee of plaintiff, made when he first negotiated with Lyle Berro, plaintiff's *commitment* to make the offer was induced by defendant's promise. Accordingly, plaintiff's promises to help defendant fulfill the goals of Plan 2000 were bargained for in exchange for defendant's promise.

Thus, plaintiff presented sufficient evidence of an enforceable contract between itself and defendant. Defendant promised to assign its right of first refusal so that plaintiff would have the opportunity to take precedence over other purchasers offering to buy Town & Country. In exchange for this commitment, plaintiff would comply with defendant's Plan 2000 by using separate showrooms for its Jeeps and offering the Cadillac and Oldsmobile franchises to another local dealership. These promises were valuable consideration for defendant, which otherwise lacked the means to force dealers to align franchises in accordance with its Plan 2000, and the promises were bargained for in exchange for defendant's promises.

In light of our decision that plaintiff presented sufficient evidence to establish an enforceable contract with defendant, and in light of the jury's determination that defendant breached that contract, we need not address defendant's promissory estoppel issue.

Next, defendant argues that the trial court erred by denying its request for a new trial based on plaintiff's counsel's allegedly inflammatory remarks to the jury. We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004).

In *Gilbert*, the trial court awarded the plaintiff $21,000,000 in damages for workplace sexual harassment. *Id.* at 753. The defendant moved for a new trial on the ground that the award was excessive and partly attributable to the plaintiff's counsel's extremely inflammatory, prejudicial, and misleading argument. *Id.* at 753-754, 770. In his argument, the plaintiff's counsel equated the defendant with Nazi Germany, grossly distorted evidence by suggesting that the plaintiff was subjected to extreme physical abuse, and portrayed the defendant as a cruel, indifferent corporation abusing a helpless, low-ranking employee. *Id.* at 773-777. The Supreme Court concluded that the overall intent and purpose of the argument was to subvert the jurors' factfinding role and persuade them to punish the defendant. See *id.* at 776.

We do not agree that plaintiff's counsel's closing argument in this case approached the level of egregiousness found in *Gilbert*. Although plaintiff's argument invoked stereotypes of honest, small-town businessmen up against a large, urban, impersonal corporation, it did not include the same degree of inflammatory rhetoric that the plaintiff's counsel resorted to in *Gilbert*. In *Gilbert*, counsel compared the defendant to a genocidal, totalitarian regime, emphasized the shared ethnicity between the defendant and the Nazis, falsely portrayed the plaintiff as a victim of intensive physical abuse, and urged the jurors to punish the defendant. *Id.* at 773-775. Moreover, whereas *Gilbert* involved the emotionally charged situation of a plaintiff claiming that sexual harassment was literally killing her by aggravating her substance abuse problem, see *id.* at 759-760, the instant case involved a comparatively prosaic business disappointment. Under all the circumstances, we cannot conclude that the trial court abused its discretion in denying defendant a new trial in the present case.

Finally, defendant argues that plaintiff's evidence with regard to lost profits was insufficient to support the jury's verdict and that defendant was entitled to remittitur or a new trial. Defendant also argues that the trial court erred in admitting Bruce Hutler's and Craig Nelson's expert testimony with regard to lost profits. Both of these arguments rest on the premise that Hutler and Nelson impermissibly relied on data that was too speculative to support the lost-profits award with reasonable certainty.

Like a trial court's decision with regard to a motion for a new trial, a decision concerning a motion for remittitur is also reviewed for an abuse of discretion. *Gilbert, supra* at 761-762; *Diamond v Witherspoon*, 265 Mich App 673, 692-693; 696 NW2d 770 (2005). A trial court is in the best position to make an informed decision with regard to the alleged excessiveness of a verdict because it hears all the testimony and evidence and has the unique opportunity to evaluate the jury's reaction to the proofs and to the individual witnesses. *Diamond, supra* at 692-693. Accordingly, this Court must review the evidence in the light most favorable to the nonmoving party and should reverse only if an abuse of discretion occurred. *Diamond, supra* at 693. Remittitur is appropriate if the verdict exceeds the highest amount supported by the evidence. MCR 2.611(E)(1); *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989).

The essence of defendant's argument is that plaintiff's economic-loss experts improperly used unreliable, speculative, and irrelevant data that rendered their testimony inadmissible under MRE 702. The admissibility of an expert's testimony is reviewed for an abuse of discretion. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999).

"In order to recover prospective profits, a plaintiff must establish proof of lost profits with a reasonable degree of certainty." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997). Lost profits can be recovered when proved, but "[t]he jury should not be permitted to speculate or guess [with regard to] the amount of lost profits." *Id.* at 175-176 (internal citations and quotation marks omitted). "[W]here lost profits are shown, and there is ample proof on this point, they should not be denied merely because they are hard to prove." *Fera v Village Plaza, Inc*, 396 Mich 639, 647; 242 NW2d 372 (1976). If there is non-speculative, non-conjectural evidence of lost profits, but the evidence is disputed, it is the jury's prerogative to determine which party's evidence is credible. *Id.*

Additionally,

> MRE 702 governs the admissibility of expert testimony. Under this rule, evidence is admissible if it complies with a three-part test. First, the expert must be qualified. Second, the evidence must provide the trier of fact a better understanding of the evidence or assist in determining a fact in issue. Finally, the evidence must be from a recognized discipline. [*In re Wentworth*, 251 Mich App 560, 563; 651 NW2d 773 (2002) (citation omitted).]

Moreover, to be admissible, expert testimony, including the data underlying the expert's theories and the methodology by which the expert draws his conclusions, must be reliable. *Gilbert, supra* at 779. "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert" may testify to the knowledge by opinion or otherwise, if the testimony is based on sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. MRE 702; see also *In re Noecker*, 472 Mich 1, 11; 691 NW2d 440 (2005). An expert opinion is generally admissible as long as the basic methodology and principles employed to reach the conclusion are sound. *Anton v State Farm Mutual Automobile Ins*, 238 Mich App 673, 678; 607 NW2d 123 (1999).

Defendant challenges several aspects of plaintiff's experts' testimony. However, we conclude that defendant's arguments attack the probative weight and credibility of the experts' underlying data, rather than the reliability of the data itself. Defendant does not suggest that the experts used false data, but rather that they used data that was irrelevant (e.g., reliance on Wisconsin dealerships that were not sufficiently similar for comparative purposes), incredible (e.g., plaintiff's projection of workforce increase), or uncertain (e.g., increase of revenue from ancillary sales associated with truck sales). These alleged deficiencies in plaintiff's proof of lost profits simply do not render the evidence inadmissible or insufficient. Michigan law with regard to lost profits recognizes the inherent difficulty of measuring lost profits and requires that they be proved with reasonable certainty, not mathematical precision. *Fera, supra* at 644; *Joerger, supra* at 175. If the evidence is not speculative, disputes over the weight and credibility of the

evidence are left to the jury. *Fera, supra* at 647; see also *McLean v 988011 Ontario, Ltd*, 224 F3d 797, 800-801 (CA 6, 2000) ("mere weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility") (internal citation omitted and quotation marks omitted).

In the instant case, the evidence in question was not unacceptably speculative. The experts did not speculate regarding any of the data on sales, operating expenses, etc. They used information from other dealerships or other markets and relied on information provided by plaintiff's owners, who have substantial experience in running a dealership. Defendant had the opportunity to cross-examine the experts and attempt to undermine the credibility and persuasiveness of the information provided. The trial court did not err in concluding that the experts' testimony was admissible and that the evidence relating to lost profits was sufficient to support the jury's verdict.

Defendant also argues that plaintiff's lost damages were not foreseeable at the time it allegedly promised to assign the right of first refusal to plaintiff. Ever since *Hadley v Baxendale*, 9 Exch 341; 156 Eng Rep 145 (1854), the rule has been that "the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co,* 409 Mich 401, 414; 295 NW2d 50 (1980). Defendant argues that damages of $3.1 million were not foreseeable because defendant could not have predicted that its agent's statement to Robert Bero would be construed as a binding contract and because the damage analysis was "little more than rank speculation." These arguments reiterate issues already raised and addressed in this appeal. Moreover, the jury could find that lost profits naturally arose from the breach of contract because the ostensible purpose of the contract was to enable plaintiff to enhance its profits by entering into the successful GMC truck market.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Patrick M. Meter