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

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

ALFONSO LIEGHIO, ANNA LIEGHIO, JOSEPH LIEGHIO, ENZO LIEGHIO, BRIDGEVIEW INVESTMENTS, INC., MOTEL BEACHFRONT PROPERTIES, INC., TONY'S SUPER BRIDGEVIEW, INC., and TONY'S SUPER BEACHFRONT, INC.,	UNPUBLISHED October 29, 2009
Plaintiffs-Appellees/Cross-Appellants,	
v	No. 285393 Cheboygan Circuit Court LC No. 04-007306-CK
LOVELAND INVESTMENTS and GERALD LOVELAND, JR.,	
Defendants-Appellants/Cross-Appellees,	
and	
GERALD LOVELAND, SR., GAIL DANIELSON, and GARY SMITH,	
Defendants.	

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v	No. 285394 Cheboygan Circuit Court LC No. 04-007306-CK
LOVELAND INVESTMENTS, GERALD LOVELAND, SR., GERALD LOVELAND, JR., and GARY SMITH,	
Defendants,	
and	

GAIL DANIELSON,

Defendant-Appellant/Cross-Appellee.

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

In Docket No. 285393, defendants Gerald Loveland, Jr. and Loveland Investments appeal as of right the trial court's final judgment and order in favor of plaintiffs Alfonso Lieghio, Anna Lieghio, Joseph Lieghio, Enzo Lieghio, Bridgeview Investments, Inc., Motel Beachfront Properties, Inc., Tony's Super Bridgeview, Inc., and Tony's Super Beachfront, Inc. (collectively, "the Lieghios"). In Docket No. 285394, defendant Gail Danielson appeals as of right the trial court's final judgment and order in favor of the Lieghios. The Lieghios cross-appeal in both actions. We reverse the trial court's denial of prejudgment interest, but affirm as to the remainder of the issues in both dockets.

I. Basic Facts And Procedural History

In 2001, Gerald Loveland, Jr. (Loveland)[1] accepted an offer from the Lieghios to purchase the entirety of Loveland's Mackinaw City lodging business, which included four motel properties. Following execution of the purchase agreement, however, the Lieghios decided to purchase only two of the motel properties (the Super 8 Bridgeview Motel and the Super 8 Beachfront Motel). At the closing of the sale, Loveland agreed to sign a covenant not to compete, which provided in pertinent part that Loveland would

> not directly or indirectly own, join in as a partner, control, participate in, become an officer, agent or employee of, or hold stock in or have any financial interest in any business that would be competitive in any respect with the two motels being sold within the geographical area stated below ["a twelve (12) mile radius from the boundaries of the Village of Mackinaw City"] for a period of twenty (20) years from and after the date hereof.

The covenant specifically excepted from its terms Loveland's two other existing motels (the Motel 6 and the Holiday Inn Express): "It is understood that Seller shall continue to own and operate those two motels and they shall be exempt from this covenant as well as any additions or expansions of said motels at their current sites, or on any property adjoining said existing sites." The covenant also provided that "[a]ny breach of the foregoing covenant shall entitle [the

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[1] Gerald Loveland, Jr. was a partner with Gerald Loveland Sr. in a co-partnership named Loveland Investments. However, the issues on appeal pertain solely to Gerald Loveland, Jr.'s conduct. Thus, all references to "Loveland" will refer to Gerald Loveland, Jr., unless otherwise indicated.

Lieghios] to injunctive relief to prevent the same, money damages, and reasonable attorney fees and costs incidental to or required in the enforcement thereof."

In Spring 2004, the Days Inn Lakeview hotel in Mackinaw City became available for sale. Having worked with Loveland in the past, the listing real estate agent, Gary Smith, contacted Loveland to inform him that the Days Inn was for sale. But Loveland's accountant told Smith that Loveland's covenant with the Lieghios prevented him from owning or operating another hotel.

Loveland then told defendant Gail Danielson that the Days Inn was for sale. Danielson had worked for Loveland, managing their motels in Mackinaw City since 1998. Danielson had also developed a personal relationship with Loveland. Danielson considered the Days Inn to be a desirable investment and began exploring options to participate in the purchase and operation of the Days Inn. Danielson drafted a business plan and solicited investors, some of whom she met through Loveland. Danielson and Loveland met with the investors. Danielson informed each investor that the deal was her proposed investment, that Loveland was subject to the covenant not to compete, and that he would not be participating in the venture, including the management, operation, ownership, or financing. However, Loveland assured the investors that the purchase of the motel was a good deal.

Once Danielson obtained commitments from nine investors, she hired an attorney to form the appropriate business entities, obtained capital contributions, and made an offer to purchase the Days Inn "on behalf of an entity to be formed" for the asking price of $3,050,000. Danielson's formal offer to purchase the Days Inn was then accepted by the seller, and the transaction closed in April 2004, with the grantee designated as Tri-City Hotel Group, LLC. Thereafter, Danielson individually formed a limited liability company, Northern Hospitality, to manage the day-to-day operations of the Days Inn. Danielson also resigned her employment with Loveland and began the renovations and property improvement projects required by the Days Inn franchisor.

In May 2004, the Lieghios filed a complaint, alleging that Loveland breached the covenant not to compete by

> having an indirect interest in a competing business[;] exercising control over the acquisition, establishment, and operation of a competing business[;] providing financial assistance for the acquisition of a competing business[;] soliciting investors for that purchase[;] negotiating with the realtor for that purchase[;] and providing advice and other assistance or otherwise participating in a competing business.

Essentially, the Lieghios alleged that Loveland's participation in soliciting the investors was influential and essential to the success of the Days Inn deal. The Lieghios also asserted that Loveland misrepresented to them that the Super 8 Beachfront motel was a three-diamond motel under the American Automobile Association (AAA) rating system. According to the Lieghios, Loveland knew that the motel was scheduled to be downgraded to a two-diamond property. In fact, within 8 days after the closing, AAA re-inspected the motel and downgraded it from a three to a two-diamond rating. The Lieghios also alleged intentional contractual interference against Danielson for her involvement in assisting Loveland's violation of the covenant not to compete. The Lieghios also asserted a claim of civil conspiracy against Loveland and Danielson.

Danielson moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that she was not a proper party to the litigation because she acted at all relevant times as a disclosed agent of Northern Hospitality and/or Tri-City Hotel Group, no evidence was offered to prove that she did anything illegal or unlawful, there was no evidence of damages caused by her allegedly wrongful acts, and her actions were justified by legitimate business purposes. Danielson asserted that the Lieghios' claims against her were frivolous. The trial court granted Danielson's motion, finding insufficient evidence of any wrongdoing or illegal activity on her part to support the claims against her.

Trial then proceeded on the issues of Loveland's alleged violation of the covenant not to compete and his alleged misrepresentations regarding the Super 8 Beachfront motel's AAA rating. Based on the evidence and testimony presented during trial, the trial court found that Loveland violated the covenant not to compete by (1) giving Danielson advice on business matters and providing use of his expertise and reputation for the creation of the business syndicate that eventually purchased the Days Inn and (2) by being the registered owner of the Days Inn website: www.daysinnlakeview.com. But the trial court found that Loveland's activities in providing renovation services, engaging in joint advertising, referring motel guests, and selling supplies to the Days Inn did not violate the terms of the covenant not to compete. The trial court also found that Loveland's leasing of the Days Inn's on-site restaurant did not violate the covenant, explaining that the restaurant was not competitive with the two motels sold to the Lieghios. The trial court further found against the Lieghios on their misrepresentation claims. More specifically, although the trial court agreed that Loveland had misrepresented the AAA rating status, the trial court found that the Lieghios' fraud claim was barred by a merger clause in the purchase agreement.

The trial court rejected Loveland's argument that, without proof of any damage or loss occasioned by the alleged covenant violation, no breach of the covenant could be established. The trial court awarded the Lieghios attorney fees and costs in the amount of $94,290. The trial court further extended the terms of the covenant with respect to Loveland to May 2024, and ordered him to divest himself of any ownership in the Days Inn internet domain name.

Loveland and Danielson now each appeal on separate grounds, and the Lieghios cross-appeal on additional grounds.

II. Docket No. 285393

A. Evidence Of Damages

1. Standard Of Review

Loveland argues that the trial court committed clear error in sustaining the Lieghios' claims for a violation of the covenant not to compete because they failed to present any evidence on the element of damages. We review de novo questions of law.[2] But we review for an abuse

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[2] *Livonia Hotel, LLC v Livonia*, 259 Mich App 116, 123; 673 NW2d 763 (2003).

of discretion a trial court's decision to allow proofs to be reopened after the conclusion of trial.[3] An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.[4]

2. Analysis

Although the trial court acknowledged in its ruling awarding the Lieghios $94,290 in attorney fees and costs that they had failed to prove separate monetary damages, the trial court found it significant that the covenant specifically allowed for injunctive relief and attorney fees as part of the remedy available for breach. As stated previously, the covenant not to compete provided that "[a]ny breach of the foregoing covenant shall entitle [the Lieghios] to injunctive relief to prevent the same, money damages, and reasonable attorney fees and costs incidental to or required in the enforcement thereof." Nevertheless, Loveland contends that *monetary* damages are an essential and requisite element of breach, without which a breach of contract claim must fail.

Loveland is correct that damages are usually a necessary element of a contract breach claim.[5] Indeed, "[t]he party asserting a breach of contract has the burden of proving its damages with reasonable certainty . . . ."[6] However, the Michigan Supreme Court has stated that "[t]he remedy for breach of a covenant is damages *or an injunction*[.]"[7] And, as the Lieghios point out, injunctive relief is usually the proper remedy when money damages are difficult to prove, as they usually are in a case like this.[8] It would be incongruous to require a plaintiff to prove both money damages and entitlement to injunctive relief. Therefore, because the parties here specifically agreed in the covenant not to compete (as they were free to do)[9] that the breaching

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[3] *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959) ("[A] motion to reopen proofs is a matter within the discretion of the court.").

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

[5] *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63, 69; 761 NW2d 832 (2008) ("Damages are an element of a breach of contract action.").

[6] *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

[7] *Cramer v Metropolitan Savings & Loan Ass'n*, 401 Mich 252, 261; 258 NW2d 20 (1977) (emphasis added).

[8] See *Roland v Kenzie*, 11 Mich App 604, 611; 162 NW2d 97 (1968), quoting *Jaquith v Hudson*, 5 Mich 123, 140 (1858):

> "The damages to arise from the breach of this covenant, from the nature of the case, must be not only uncertain in their nature, but impossible to be exhibited in proof, with any reasonable degree of accuracy, by any evidence which could possibly be adduced. It is easy to see that while the damages might be very heavy, it would be very difficult clearly to prove any."

[9] *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996) ("The parties to a contract may include a provision that the breaching party will be required to pay the other side's attorney fees and such provisions are judicially enforceable.").

party would be responsible for attorney fees, the trial court properly considered those attorney fees as damages for Loveland's breach.[10]

Further, although "[a] party claiming the right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a prima facie case and to avoid a directed verdict[,]"[11] we agree with the trial court that Loveland was not prejudiced by the trial court's decision to reopen the proofs and hold a separate evidentiary hearing on the issue of reasonable attorney fees.[12]

In sum, we conclude that the trial court did not abuse its discretion by reopening the proofs to allow the Lieghios to present proof of reasonable attorney fees in a post-trial motion when attorney fees were specifically provided for as a remedy in the covenant not to compete.

B. Anti-Trust Violation

1. Standard Of Review

Loveland argues that the trial court committed clear error in not holding the covenant not to compete as void, against public policy, and in violation of state and federal anti-trust laws. More specifically, Loveland argues that the parties' covenant not to compete was an illegal horizontal market allocation agreement to restrict competition. We review de novo questions of law.[13]

2. Analysis

Competitors run afoul of anti-trust laws when they agree to divide a market in order to minimize competition.[14] "'Any bargain or contract which purports to limit in any way the right of either party to work or to do business, whether as to the character of the work or business, its place, the manner in which it shall be done, or the price which shall be demanded for it, may be called a bargain or contract in restraint of trade.'"[15] However, Michigan law recognizes an exception in the case of a business sale.[16]

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[10] *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984) ("Attorney fees awarded under contractual provisions are considered damages, not costs.").

[11] *Zeeland*, *supra* at 196.

[12] See *Bonner*, *supra* at 541; *In re Estate of Howarth*, 108 Mich App 8, 13; 310 NW2d 255 (1981);

[13] *Livonia Hotel, LLC*, *supra* at 123.

[14] *McDill v McDonald Cooperative Dairy Co*, 91 Mich App 611, 618; 283 NW2d 819 (1979).

[15] *Stoia v Miskinis*, 298 Mich 105, 117-118; 298 NW 469 (1941), quoting 5 Williston on Contracts (Rev Ed), p 4576, § 1633. See also MCL 445.772 ("A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.")

[16] *Brillhart v Danneffel*, 36 Mich App 359, 363-364; 194 NW2d 63 (1971).

In *Brillhart v Danneffel*, the plaintiff bought a restaurant from the defendants, and as part of the agreement, the defendants signed a covenant not to compete, agreeing not to have any interest in a restaurant located in the city limits or within 10 miles of the city limits for a period of five years.[17] However, before the five years had passed, the defendants violated the agreement by purchasing a restaurant within the restricted area.[18] In upholding the trial court's decision that the covenant was valid and enforceable, this Court noted that in a business purchase transaction, the "covenant not to compete is valid if reasonable."[19] In other words, "when a vendor sells his business to another person with the stipulation that he will not re-engage in the same business nor compete with the vendee, the agreement will be enforced if the restraint is not unreasonable."[20] This Court then concluded that the covenant at issue was reasonable because the defendants understood that they were agreeing to a 5-year, 10-mile limitation; their agent wrote the agreement; and they voluntarily signed the contract. This Court distinguished *Brillhart* from a case in which a covenant was held invalid because the covenant unreasonably provided that the seller would "never" re-engage in that business.[21]

This Court has also held, however, that "[s]ome business practices create such a great probability of injury to free competition that the rule of reason need not be applied on a case by case basis."[22] And, as Loveland points out,

> "One of the classic examples of a *per se* violation * * * is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contradistinction to combinations of persons at different levels of the market structure, *e.g.*, manufacturers and distributors, which are termed 'vertical' restraints. This Court has reiterated time and time again that '[horizontal] territorial limitations * * * are naked restraints of trade with no purpose except stifling of competition.'"[23]

But the present case is distinguishable from per se illegal horizontal restraint agreements. Such violations are usually found where business owners agree to allocate the market, for example, by agreeing not to solicit business from each other's clients.[24] There is no evidence here that the parties were acting in agreement to benefit each other to the detriment of the

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[17] *Id*. at 361.

[18] *Id*. at 362.

[19] *Id*. at 363-364.

[20] *Id*. at 365, citing *Hubbard v Miller*, 27 Mich 15 (1873).

[21] *Id*. at 364, citing *Wolverine Sign Works v Powers*, 248 Mich 371; 227 NW 669 (1929).

[22] *McDill*, *supra* at 617-618.

[23] *Id*. at 618, quoting *United States v Topco Associates, Inc*, 405 US 596, 608; 92 S Ct 1126; 31 L Ed 2d 515 (1972).

[24] See *United States v Cooperative Theatres of Ohio, Inc*, 845 F2d 1367 (CA 6, 1988).

competitiveness of the market generally, and there was no agreement to allocate the market for their mutual benefit.

Here, the parties' agreement is similar to those upheld in a long line of cases, like *Brillhart*, that have sanctioned covenants not to compete where they are merely a reasonable restraint on a seller's competitive efforts in order to promote the buyer's realization of goodwill in the purchased business. For example, in *Hubbard v Miller*, the Michigan Supreme Court stated that although contracts for the restraint of trade were generally invalid, such restraints "would be fair, reasonable and valid, and would be enforced like any other valid, contract" when

> considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public . . . —as every other person except the vendor is still at liberty to engage in the same business within the same limits[.][25]

Additionally, in *Roland v Kenzie*, this Court stated that "[a] bargain made between professional men providing for a reasonable restraint on competition in order to realize the good will of a practice will be sustained."[26]

Accordingly, because the covenant not to compete in this case was not unreasonable, we hold that the trial court did not err in concluding that the covenant not to compete was valid and enforceable.

C. Violation Of The Covenant Not To Compete

1. Standard Of Review

If a contract's language is clear, its construction is a question of law for the court that is subject to our de novo review.[27] We may not set aside a trial court's findings of fact unless they are clearly erroneous.[28] A trial court's findings of fact are clearly erroneous only if "on review of the entire record, [we are] left with the definite and firm conviction that a mistake has been made."[29]

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[25] *Hubbard*, *supra* at 19, 21.

[26] *Roland*, *supra* at 608. See also *United States v Addyston Pipe & Steel Co*, 85 F 271, 281 (CA 6, 1898) (stating that "covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold[.]").

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

[28] MCR 2.613(C).

[29] *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

2. Analysis

As stated previously, the covenant not to compete provided in pertinent part that Loveland would not directly or indirectly: (1) own; (2) join in as a partner; (3) control; (4) participate in; (5) become an officer, agent or employee of, or hold stock in; or (6) have any financial interest in any business that would be competitive in any respect with the two motels sold to the Lieghios.

(a) Loveland's Appeal

In its opinion and order, the trial court found, in pertinent part, as follows:

> [T]he covenant not to compete was violated when Mr. Loveland assisted Ms. Danielson in the acquisition of the Days Inn Lakeview. The Days Inn Lakeview is a business which competes with the two motels that were sold to the Leighios [sic] and the degree of assistance provided by Mr. Loveland to Ms. Danielson result [sic] in Mr. Loveland directly or indirectly, participating in any business that is competitive with the two motels purchased by the Leighios [sic].
>
> The purpose of the agreement is to exclude Mr. Loveland from using his expertise in the motel business to generate competition for the Leighio [sic] motels. . . .
>
> [T]he proofs establish that Mr. Loveland did give Ms. Danielson advise [sic] on business matters and provided use of his expertise and reputation for the creation of the business syndicate that now owns and operates the Days Inn Lakeview. This activity was prohibited by the covenant not to compete . . . .

Loveland argues that the trial court clearly erred in finding that he violated the covenant not to compete by encouraging and cooperating in Danielson's formation of the investment group to buy the competing hotel, rendering his opinion regarding the viability of the proposed purchase, and recommending Danielson. Notably, Loveland does not provide supporting authority on appeal for his contention that the trial court erred in its above ruling.[30] However, the Lieghios provide two cases that they contend are instructive in addressing breach of covenant claims.

In *C H Barrett Co v Ainsworth*,[31] the defendant sold his grain elevator business and signed a covenant not to compete that prohibited him from engaging in or becoming "interested in" the grain elevator business or any similar business within the city or within 20 miles of the city for 20 years. However, he later helped his son establish a grain elevator business by

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[30] See MCR 7.212(C)(7); *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984) (stating that the appellant may not give issues cursory treatment with little or no citation of supporting authority); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003) ("Argument must be supported by citation to appropriate authority or policy.").

[31] *C H Barrett Co v Ainsworth*, 156 Mich 351, 352-353; 120 NW 797 (1909).

providing capital for the business, helping his son obtain credit, providing advice on how to run the business, and acting as purchasing agent by buying grain for the business.[32] The Michigan Supreme Court held that the defendant violated the covenant not to compete.[33]

In *Buckingham Tool Corp v Evans*,[34] the defendant was subject to a covenant not to compete that prohibited him from directly or indirectly, in any capacity, engaging in or having a financial interest in any business that was competitive to his former tool and die business. However, the defendant later loaned money and rented a building to his son to help him start his own new tool and die business.[35] Moreover, the employees of the new business were, for the most part, former employees of the defendant's old business.[36] The employees testified that they had left the old business because of their friendship with the defendant, but that the defendant did not solicit them.[37] On appeal from the trial court's finding that the defendant's actions did not constitute a breach, this Court explained that "[i]t is well settled that a noncompetition agreement is violated where one sets up a competing business in the name of another as a guise to do business for himself."[38] However, "it is not normally a violation of such agreement to merely lend money, extend credit, or the like to a person about to engage in a competing business."[39] According to this Court, the salient question was "whether the actions of [the defendant] amounted to engaging in a competing business through his son, or whether they were merely a fatherly attempt to help his son get started in a new business."[40] This Court then held that the defendant's actions did not violate the covenant because he did not participate in the running of the business, have any financial interest in it, or counsel his son in business matters.[41] To summarize, this Court stated, "In light of these facts, we do not feel that the evidence presented by the plaintiff justifies the conclusion that [the defendant] was indirectly competing in the tool and die business."[42]

The language in the covenant at issue here is broader than the language in the covenants in *Buckingham* or *Barrett*. While the covenant in *Barrett* prohibited the defendant from engaging in or becoming interested in the competing business, and the covenant in *Buckingham* prohibited the defendant from directly or indirectly engaging in or having a financial interest in the competing business, the covenant here prohibited Loveland from directly or indirectly

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[32] *Id*. at 353-358.

[33] *Id*. at 358-359.

[34] *Buckingham Tool Corp v Evans*, 35 Mich App 74, 75; 192 NW2d 362 (1971).

[35] *Id*. at 76.

[36] *Id*. at 76-77.

[37] *Id*. at 77.

[38] *Id*. at 77-78.

[39] *Id*. at 78.

[40] *Id*.

[41] *Id*.

[42] *Id*.

participating in a competing business. Moreover, it is significant that even under their more narrow terms, both *Buckingham* and *Barrett* indicated that a violation of a covenant not to compete can occur when the bound party provides advice to or counsels a competitor, which is clearly what Loveland did here.

The evidence supported that Loveland made phone calls and attended meetings with Danielson to present the purchase opportunity to potential investors, who were friends of Loveland's, including Loveland's insurance agent, Joe Breed, and Roderick Baltzer, who had known Loveland for nearly 20 years. Loveland told the investors that the Days Inn purchase was a good deal. And Loveland admitted that the investors relied on his opinion because of his experience in the motel property market. Indeed, Baltzer testified that Loveland's support was important enough that he probably would not have entertained the investment had only Danielson approached him. Another investor, Patricia Malloy, who learned about the Days Inn deal from her son, testified that it was her belief that Loveland had approached her son about needing investors for the deal.

Further, according to Malloy, she, her son, and Loveland had a phone conversation in March 2004, during which Loveland provided her with financial information about the Days Inn's past performance and told her that Danielson was going to be managing the Days Inn. Malloy testified that she did not know that Danielson was one of the other investors before closing but that she relied on Loveland vouching for Danielson as manager. Loveland also testified that he helped Danielson create the prospectus that was given to the potential investors. Loveland provided financial information from another motel that he owned as a comparison for the prospectus. He also obtained financial information from the former owner of the Days Inn to include in the prospectus.

Despite the above conduct, Loveland relies on dictionary definitions to support that the trial court erred in concluding that he "participated in" the Day Inn deal because, according to Loveland, "participation" inherently equates to having some sort of ownership interest, which he indisputably did not possess. However, while participation can mean "to have a share," as in "to participate in profits," participation can also mean simply "to take part," as in "to participate in a conversation."[43] Here, the covenant not to compete precluded six separate items: Loveland could not directly or indirectly (1) own; (2) join in as a partner; (3) control; (4) participate in; (5) become an officer, agent or employee of, or hold stock in; or (6) have any financial interest in the Days Inn. If participation merely equated to having an ownership interest, as Loveland suggests, then its inclusion in the litany of prohibited conduct would be superfluous.[44] Therefore, we conclude that the trial court did not clearly err in finding that Loveland violated the covenant by participating in, that is, taking part in, Danielson's deal to purchase the Days Inn by advising and counseling her and providing her the benefit of his reputation and expertise to engage in a

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[43] *Random House Webster's College Dictionary* (1997), 950.

[44] *Laevin v St Vincent De Paul Society*, 323 Mich 607, 609-610; 36 NW2d 163 (1949) ("Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument.").

competing business. Indeed, to conclude otherwise would allow Loveland to circumvent the covenant's purpose of promoting the buyer's realization of goodwill in the purchased business.[45]

Loveland also argues that the trial court clearly erred in finding that Loveland's ownership of the internet domain address—www.daysinnlakeview.com—violated the covenant not to compete. We disagree.

The evidence submitted at trial established that Loveland undisputedly controlled and owned the internet domain name for the Days Inn—www.daysinnlakeview.com. And in its opinion and order, the trial court found as follows:

> Plaintiffs are . . . entitled to injunctive relief prohibiting any further involvement by Mr. Loveland in connection with the operation of the Days Inn Lakeview website domain, www.daysinnlakeview.com. This website is owned by Loveland and is operated to generate business for Leghios [sic] competitor. This activity violates the covenant.

Loveland attempts to deflect the significance of his ownership of the domain name by stating that he was simply branching out his business interests into the electronic advertising field. However, under the totality of the circumstances, we cannot conclude that that trial court clearly erred in finding that his ownership of this particular domain name was a violation of the covenant. As concluded above, Loveland was clearly enmeshed in the Days Inn motel deal and his ownership of this domain name was just one more example of his indirect participation in a competing business. Accordingly, we conclude that the trial court did not clearly err in finding that Loveland violated the covenant not to compete by owning and controlling the domain name for the Days Inn.

(b) The Lieghios' Cross-Appeal

During trial, it was established that, after the closing on the Days Inn purchase, Loveland's development company completed renovations on the motel and Loveland attended a meeting of the owners to discuss the status of the motel's development. Loveland also provided various supplies, like cleaning supplies, pool chemicals, and linens to the Days Inn; since he owned two other motel properties, he could order such supplies in bulk quantities and then sell them to the Days Inn at a marked up price. Loveland also engaged in advertising activities related to the Days Inn. Loveland maintained a website—www.mackinawcity-mi.com—that advertised his hotels and the Days Inn. Loveland also engaged in joint print advertising with his hotels and the Days Inn in the AAA guidebook. Additionally, a company that Loveland owned leased a restaurant located on the Days Inn premises for the 2004, 2005, and 2006 seasons. The restaurant provided an amenity directly to the Days Inn by providing its guests with free continental breakfast, which Loveland admitted made the Days Inn more competitive.

On cross-appeal, the Lieghios argue that the trial court clearly erred in finding that Loveland's conduct in acting as a purchasing agent for the Days Inn, engaging in joint

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[45] See *Roland*, *supra* at 608.

advertising with the Days Inn, providing redevelopment services, and leasing the on-premises restaurant at the Days Inn did not violate the covenant not to compete. However, we conclude that the trial court did not clearly err in its findings because the covenant not to compete did not prohibit Loveland from selling goods and services, from participating in joint advertising, or from leasing and operating a restaurant.

More specifically, nothing in the covenant prohibited Loveland from having his construction company perform renovations on local hotels. Owning a construction company that is hired to perform work for a competitive business is too tangential to be precluded by the terms of the covenant not to compete.

Loveland's practice of buying supplies and then selling them to the Days Inn is a closer call. The Lieghios point out that Loveland admitted that this activity helped make the Days Inn more competitive by cutting its costs. However, we find it significant that Loveland actually sold the supplies to the Days Inn at a markup, thereby generating additional revenue for himself. Therefore, we are persuaded by Loveland's argument that he was merely acting in his best interest to operate the two motels that he retained. Notably, we might have reached a different conclusion if Loveland was selling the supplies to the Days Inn at his cost or at a further discount. The Lieghios attempt to analogize this case to *Barrett*, in which the defendant was found to have violated a covenant not to compete by buying grain for his son's business.[46] However, we find that case distinguishable because in that case the defendant was directly acting as an agent for his son's business: "There was a good deal of testimony that defendant had been on the street buying grain for the competing business."[47]

We further conclude that the trial court correctly found that Loveland did not violate the covenant by referring overflow customers to the Days Inn because such referrals are a normal part of operating the two motels that he retained, which were specifically exempted from the covenant not to compete. Indeed, Loveland's franchise agreement with Days Inn required him to refer guests to other Days Inn establishments.

We also conclude that the trial court correctly found that Loveland did not violate the covenant by allowing the Days Inn to advertise for a fee on www.mackinawcity-mi.com, which he owned, or by jointly advertising with the Days Inn in the AAA guidebook. As the trial court found, such advertising is common and was merely done to reduce costs for Loveland's two remaining hotels.

Finally, we believe that the trial court correctly found that Loveland did not violate the covenant by operating the freestanding restaurant located on the Days Inn property. Similar to the analysis of his interest in the construction company, the covenant not to compete did not preclude Loveland from having an interest in a restaurant business. Neither of the Lieghios' motels had restaurants; therefore, Loveland's operation of the restaurant did not compete with those motels.

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[46] *Barrett*, *supra* at 353-358.

[47] *Id.* at 358.

Accordingly, we conclude that the trial court did not clearly err in its findings because the covenant not to compete did not prohibit Loveland from selling goods and services, from participating in joint advertising, or from leasing and operating a restaurant.

D. Burden Of Proof

1. Standard Of Review

Loveland argues that the trial court clearly erred in holding that it was his burden to prove that Danielson could have formed her group of investors without him. We review de novo questions regarding which party bears the burden of proof.[48]

2. Analysis

In its opinion and order, the trial court stated as follows:

> Mr. Loveland accompanied Ms. Danielson to various meetings with potential investors and many of these investors knew and relied on Mr. Loveland's expertise and endorsement of this business transaction when they decided to back Ms. Danielson's enterprise. It was not established that Ms. Danielson could have obtained the investors without the assistance and endorsement of Mr. Loveland.

Loveland takes issue with the last sentence in the above passage, claiming that it evidences the trial court's improper burden shifting. We find no merit to this contention. When read in context, the trial court's statement was merely part of its explanation of its factual findings and summary of the evidence. The more reasonable reading of the trial court's comment was that it was simply trying to say, based on the evidence that the investors relied on Loveland's endorsements and assistance, that the evidence demonstrated that Danielson could not have obtained the investors without his endorsements and assistance. There was no other indication in the record that the trial court shifted or misunderstood the burden of proof.[49]

III. Docket No. 285394

A. Standard Of Review

In Docket No. 285394, Danielson argues that the trial court erred in denying her motion for sanctions because the Lieghios' complaint against Danielson was frivolous. We review for clear error a trial court's decision whether a claim is frivolous within the meaning of MCR 2.114 and MCL 600.2591.[50] "A decision is clearly erroneous where, although there is evidence to

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[48] *Pickering v Pickering*, 253 Mich App 694, 697; 659 NW2d 649 (2002).

[49] See *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

[50] *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

support it, the reviewing court is left with a definite and firm conviction that a mistake has been made."[51]

B. Analysis

Danielson moved for mediation sanctions and costs, arguing that she was entitled to sanctions under MCR 2.114 and MCL 600.2591 for having to defend against the Lieghios' frivolous claims. The trial court denied Danielson's request for sanctions, finding that the Lieghios' complaint raised "enough red flags, enough indicia that maybe Ms. Danielson was involved in this activity to find that, I guess, the initial complaint is not frivolous in my mind when I consider all those facts, the information that the Lieghios had before them at the time the suit was filed."

"The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted."[52] "The statutory scheme is designed to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual basis of a claim or defense . . . . The ultimate outcome of the case does not necessarily determine the issue of frivolousness."[53]

The elements of a tortious interference with a contract claim are: "(1) a contract, (2) a breach, and (3) instigation of the breach without justification by the defendant."[54] "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means."[55]

We cannot conclude that the trial court clearly erred in its finding that the Lieghios' claims were not frivolous. There was absolutely no evidence to support that the Lieghios' primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure Danielson.[56] And, based on the circumstances at the time their claims were asserted, there was no basis to find that their claims were devoid of arguable legal merit or that they had no reasonable basis to believe that the facts underlying their legal positions were in fact true.[57] To the contrary, at the time of filing their complaint, the Lieghios' theory was that Danielson, a former employee and girlfriend of Loveland, was merely acting as Loveland's agent in an effort to circumvent the covenant not to compete and acquire an interest in the Days Inn. The fact that the trial court, upon review of discovery, determined the claims to be without sustainable merit is

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[51] *Id*. at 661-662.

[52] *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003).

[53] *Louya v William Beaumont Hosp*, 190 Mich App 151, 163-164; 475 NW2d 434 (1991); see MCR 2.114 and MCL 600.2591.

[54] *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 312; 486 NW2d 351 (1992).

[55] *Id*. at 313.

[56] MCL 600.2591(3)(a)(i).

[57] MCL 600.2591(3)(a)(ii) and (iii).

not determinative on the issue of frivolousness.[58] Accordingly, we conclude that the trial court did not clearly err in finding that the Lieghios' claims against Danielson were not frivolous.

IV. Merger Clause

A. Standard Of Review

On cross-appeal, the Lieghios argue that the trial court correctly found that Loveland made a misrepresentation of fact when he told the Lieghios that the Super 8 Beachfront Motel had a three-diamond AAA rating when he knew that the motel was scheduled to be downgraded to a two-diamond rating. However, the Lieghios contend that the trial court erred in holding that the presence of a merger clause in the purchase agreement barred any recovery on the fraud claim. We review de novo questions of law.[59]

B. Analysis

The purchase agreement between the parties stated, in pertinent part:

> 12. Seller's Representations and Warranties. Buyer has agreed to purchase "as is", "where is" but is relying on the following representations and warranties:
>
> A. Seller's holds marketable title to the assets and has the right and authority to sell the assets hereunder.
>
> B. There are no condemnation or imminent domain proceedings either pending or threatened against the properties.
>
> C. The current zoning classification allows the properties to be used as motels and complies with all applicable zoning laws and rules.
>
> D. That to the best of Seller's knowledge there are no hazardous waste, toxic materials or substances deposited in or upon the properties and the improvements are free of asbestos material and chemicals commonly known as PCBs or formaldehyde insulation.
>
> E. There is no claims, counterclaims, suits, or demands against the assets, which are now in existence arising out of Seller's ownership or operation of the motels.
>
> F. To the best of Seller's knowledge, the assets comply with applicable federal, state and local laws, rules, regulations and ordinances.

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[58] *Louya*, *supra* at 163-164.

[59] *Livonia Hotel, LLC*, *supra* at 123.

G. That all documents, including financial documents, delivered by the parties to each other are true and correct copies and accurate as to the facts and statements contained herein.

H. That the representations and warranties contained therein shall survive closing.

I. To the best of Seller's knowledge, the Sellers are unaware of any structural or engineering faults or functional obsolescence with regard to the motels, plans or equipment.

* * *

28. Miscellaneous

a. This agreement contains the entire agreement by and between the parties with respect to the subjects covered herein and supersedes all prior agreement, [sic] written or oral, with respect thereto. Furthermore, this provision of this agreement shall survive the closing of this transaction.

Under Michigan law, fraud in the inducement is recognized when "'a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon.'"[60] To establish fraud in the inducement, a party must show that

> "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) *the plaintiff acted in reliance upon it*; and (6) the plaintiff suffered damage."[61]

Thus, reliance is an essential element of a misrepresentation claim.

In their argument, the Lieghios focus on the specific language of the merger clause, arguing that it only served to supersede all prior *agreements*, not *representations* like that made by Loveland. However, this argument misses the mark. The Lieghios agreed to purchase the motel "as is," with only certain explicit exceptions, none of which would cover the rating representation. Therefore, the Lieghios' misrepresentation claim fails for lack of proof on the essential element of reliance. In other words, despite that Loveland misrepresented that the

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[60] *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 242-243; 733 NW2d 102 (2006), quoting *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

[61] *Id*. at 243 (internal quotations and citations omitted; emphasis added).

motel had a three-diamond AAA rating and that the rating was not likely to change, even though he had been told that the motel was going to be downgraded to a two-diamond rating, the "as is" clause in the purchase agreement negates the Lieghios' reliance on that misrepresentation. If Loveland's representation of the rating was a critical factor in their decision to purchase, then that should have been included in the list of specifically excepted and relied-upon representations. Accordingly, we conclude that there was no merit to Lieghios' fraud claim because the express language contained in the contract defeated their reliance on Loveland's misrepresentation regarding the AAA rating.

V. Prejudgment Interest

A. Standard Of Review

On cross-appeal, the Lieghios argues that the trial court correctly awarded reasonable attorney fees pursuant to the contract, but that the trial court erred in refusing to allow interest to run from the date of the filing of the complaint. We review de novo a trial court's grant of prejudgment interest.[62]

B. Analysis

MCL 600.6013(8) provides as follows:

> [I]nterest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint . . . . Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

"The prejudgment interest statute is remedial and to be construed liberally in favor of the plaintiff. The purpose of prejudgment interest is to compensate the prevailing party for expenses incurred in bringing actions for money damages and for any delay in receiving such damages."[63]

If the language of a statute is clear and unambiguous, judicial construction is not permitted and the statute must be enforced as written.[64] Where the language of the statute is unambiguous, the court presumes that the Legislature intended the meaning expressed.[65] In construing a statute, a court may not read anything into the clear statutory language that is not within the manifest intent of the Legislature as derived from the words of the statute.[66]

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[62] *Phinney v Perlmutter*, 222 Mich App 513, 540; 564 NW2d 532 (1997).

[63] *B & B Investment Group v Gitler*, 229 Mich App 1, 13; 581 NW2d 17 (1998) (internal citation omitted).

[64] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

[65] *Id.*

[66] *Id.*

The Michigan Supreme Court has established that MCL 600.6013(8) is clear and unambiguous and concluded that the statute does not exclude any attorney fees or costs from the interest calculation.[67] Absent some circumstance excepting the award of fees and costs from the statutory provision for prejudgment interest, the denial of prejudgment interest on the entire amount of the money judgment, including attorney fees and other costs, is improper. Therefore, in this case, where attorney fees were awarded as damages pursuant the specific terms of the contract, MCL 600.6013(8) governs and mandates that interest be calculated from the date of filing the complaint.[68] Accordingly, we conclude that the trial court erred in refusing to allow interest to run from the date of the filing of the complaint, and we reverse and remand for entry of amended judgment reflecting prejudgment interest pursuant to MCL 600.6013(8).

We reverse the trial court's denial of prejudgment interest and remand for entry of amended judgment reflecting prejudgment interest pursuant to MCL 600.6013(8). We affirm on the remainder of the issues in both Docket No. 285393 and Docket No. 285394. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

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[67] *Ayar v Foodland Distributors*, 472 Mich 713, 716-717; 698 NW2d 875 (2005).

[68] See *Central Transport*, *supra* at 548 ("Contractual provisions for payment of reasonable attorney fees are judicially enforceable. Attorney fees awarded under contractual provisions are considered damages, not costs.") (internal citations omitted).