UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2498

September Term, 2005

NORA ZIETZ, ET AL.

v.

STRATEGIC MANAGEMENT PARTNERS, INC.

Eyler, Deborah S.,
Krauser,
Wenner, William W. (Ret'd,
Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: January 26, 2007

02C030087419

In the Circuit Court for Anne Arundel County, Strategic Management Partners, Inc. ("SMP"), brought suit against Network Technologies Group, Inc. ("NTG"), Nora Zietz, Robert McE. Stewart, Gwendolyn Smith Iloani, Maritza Alvarez, and The Abell Foundation ("Abell"), for claims related to the demise of NTG, a defunct "telecommunications infrastructure contractor." SMP alleged that Zietz, Stewart, Iloani, and Alvarez were directors of NTG. Abell is a non-profit foundation that invested $2.25 million in NTG and was its largest shareholder.

SMP sued NTG for breach of contract; the individuals for negligent misrepresentation; Abell for breach of a guarantee agreement; and Zietz for breach of the same guarantee agreement. Zietz and Stewart filed cross-claims for contribution against Iloani and Alvarez.

NTG did not file an answer, and ultimately a default order was entered against it. Before trial, SMP settled its negligent misrepresentation claims against Iloani and Alvarez.

The case was tried to the court for nine days, from September 29, 2004, to October 12, 2004. On July 19, 2006, the court issued a detailed memorandum opinion and order ruling in favor of SMP on its negligent misrepresentation claims against Zietz and Stewart; and against SMP and in favor of Abell and Zietz on its breach of guaranty claims. The court awarded SMP damages of $59,500. The court ruled against Zietz and Stewart on their cross-claim for contribution.

Zietz and Stewart noted an appeal, and SMP noted a cross-appeal. We shall set forth their questions presented after a review of the pertinent facts.

FACTS AND PROCEEDINGS

NTG was founded in 1998 as a business to provide telecommunications infrastructure and construction services. The company collapsed in July 2002.

NTG's operating expenses were largely provided by Mercantile Safe and Trust Company ("Mercantile"), its first secured creditor, with whom it maintained a revolving line of credit.

Zietz and Stewart were outside directors in the company, beginning in January 1999, and May 2000, respectively. They served as members of the Board of Directors ("Board") as representatives of their employers. Zietz represented Abell, which, as mentioned above, was the largest investor in NTG. Stewart represented Spring Capital Partners ("Spring Capital"), an entity that had extended $3.5 million in financing to NTG.

Iloani served on NTG's Board briefly, from March 2002 to July 2002. She was president of Smith Whiley & Company ("Smith"), an investment management company that managed the Bon Secours Community Investment Fund, L.P. ("Bon Secours"). Bon Secours invested $1 million dollars in NTG in March 2002. Iloani served as Bon Secours's representative on NTG's Board. Alvarez never served on the NTG Board. She was the Smith representative who performed

due diligence for Bon Secours. She attended some of the NTG Board meetings.

John M. Collard is the President of SMP and its sole shareholder. SMP specializes in providing "turn around and crisis management services" to other companies. These services range from basic consulting to "assumption of upper management positions on an interim basis."

In May 2002, Michelle Tobin, NTG's Chief Executive Officer ("CEO"), informed the company's Board that she was leaving her position because she had been diagnosed with breast cancer.[1] The Board decided to hire an interim CEO to replace Tobin before searching for a permanent replacement. In early June 2002, members of the Board began interviewing candidates for that position.

On June 6, 2002, Stewart met with Collard about employing SMP's services as interim CEO. They discussed the status of NTG and the responsibilities the interim CEO would be undertaking. According to Collard, the two had a detailed discussion about NTG's financial status, and he was provided a number of financial documents about NTG. According to Stewart, that did not happen.

Zietz then met with Collard on June 17, 2002. She gave him several financial documents and they talked about NTG's financial position and her expectations of what duties the interim CEO would

[1]In fact, it would later come to light that Tobin had not been diagnosed with breast cancer or any other disease. SMP does not allege that either Zietz or Stewart was aware of Tobin's deceit.

undertake. Zietz did not give Collard any information about pending or current lawsuits or loans made to NTG by officers of the company.

On June 25, 2002, Collard met with Zietz and Alvarez. During that meeting, Zietz told Collard that the Board had agreed to hire Collard as the interim CEO, and asked him to prepare a contract.

Collard prepared a draft "Interim Management Agreement" ("IMA"), and sent it to Zietz the next day (June 26). He and Zietz discussed the language of the proposed IMA. At Zietz and Iloani's request, some changes were made to the language, including the description of the reasons for Tobin's departure.

The following day, June 27, Collard met with Zietz and with Victor Giordani, a co-founder of NTG and its Chief Operating Officer, and a member of the Board. At that meeting, the IMA was executed by Collard on behalf of SMP and by Zietz on behalf of NTG and the Board.

The IMA provided that Collard's contemplated term of service would last "up to six months" with a minimum term of one month. At the end of one month, the IMA could be terminated by either party on "one weeks notice[.]" Collard would be compensated under the IMA in the amount of $10,000 per week and was required to submit invoices weekly to the Board. Lastly, the IMA stated that the Board would meet "on oar about August 1st" TO reassess.

The Board met the next day, June 28, and voted to install Collard as interim CEO and a member of the Board.[2]

On July 1, 2002, Collard began working in the position of interim CEO. In his first two days in that role, Collard discovered serious accounting irregularities that jeopardized the company, and upon further investigation, discovered that the company's senior management, including Tobin, had fraudulently manipulated its financial statements to overstate accounts receivable and understate expenses. He realized that NTG was in dire financial straits. Collard immediately notified Mercantile of what he had found, and was told that NTG's account was overdrawn and Mercantile would not be honoring any more checks issued on that account. On July 5, Mercantile issued a notice of default on its loan to NTG and warned that it would "call the loan" unless additional funds were invested in the company.

Meanwhile, it had become clear to Collard that NTG would not be able to meet its financial obligations to him under the IMA. On or about July 3, 2002, he spoke to Zietz and sought a guaranty of his payments under the IMA. Zietz verbally agreed, on behalf of Abell, to such a guaranty. On July 9, Collard hand-delivered Zietz a letter to memorialize the guaranty agreement. The letter stated:

> This letter will confirm our conversations wherein [Abell] has agreed to guarantee all professional fees and

[2]The minutes of the Board meeting stated that the IMA was for a term of one month with an option to renew. The language of the IMA stated that it renewed automatically absent notice of termination by either party to the contract.

> the contract between [NTG] and [SMP] dated June 26, 2002, including in the event that a preference or avoidance action is brought against [SMP] or me with regard to fees received from [NTG] in this matter in the future.

Zietz signed the letter on behalf of Abell on an "Agreed:" line.

On July 11, the Board met and Collard advised the members of Mercantile's position.[3] Zietz, Stewart, and Iloani responded that they would not invest any more money in NTG. The Board then voted to authorize Collard to close the company. That same day,[4] Collard drafted and signed an Amendment to the IMA ("Agreement") on behalf of SMP and NTG. The Amendment changed the nature of the services from consulting to closing down and liquidating; changed the term of the IMA, by extending it for the purpose of liquidating the company; stated that "the time originally anticipated is now changed substantially and increased based upon the desperate situation at the Company"; and changed SMP's fees from $10,000 per week to $250 per hour, with no maximum. The Amendment also provided that NTG would be liable for all amounts not approved by Mercantile under a "Forbearance Budget" that had been approved. In fact, a Forbearance Agreement eventually was reached between Mercantile and NTG, but not until July 17.

On July 12, 2002, NTG ceased operations and its employees all were terminated. Collard then went about liquidating NTG's assets

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[3]There was some dispute as to whether this was a valid Board meeting. Zietz did not believe that proper notice was given to all of the Board members.

[4]There was testimony from Collard that, while the Amendment was dated July 11, it was neither drafted nor signed until a week later.

pursuant to the Forbearance Agreement. On or about October 13, Mercantile instructed Collard that it considered the winding down and liquidation of NTG completed.

Mercantile authorized payments to SMP in connection with Collard's work at NTG totaling $117,892. For reasons we shall discuss in detail, *infra*, Collard took the position that, under the Amendment to the IMA, SMP was owed an additional $357,375 in fees for services it provided beyond those authorized by Mercantile for the withdrawal and liquidation of NTG. On March 3, 2003, SMP filed suit in the case at bar. The trial court rendered its decision as we have recited above.

Zietz and Stewart noted this appeal, presenting two questions, which we have rephrased:

> I. Did the trial court err in determining that they should be held personally liable for a portion of SMP's fees under a theory of negligent misrepresentation?
>
> II. Did the trial court err in determining that Alvarez and Iloani were not liable to them for contribution?

SMP noted a cross-appeal, asking:

> III. Did the trial court err by limiting its damages award for negligent misrepresentation to $59,500?
>
> IV. Did the trial court err in ruling in favor of Abell on the breach of guaranty claim?

For the following reason, we shall affirm the judgments of the circuit court. We shall set forth additional facts as necessary to our discussion of the issues.

DISCUSSION

Our standard of review in a case that has been tried to the court is governed by Rule 8-131(c), which provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Thus, we give deference to the factual findings of the trial judge and only reverse if the findings are clearly erroneous. *Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc.*, 149 Md. App. 336, 354-55 (2003); *Knapp v. Smethhurst*, 139 Md. App. 676, 695 (2001). A factual finding is only clearly erroneous if there is no competent and material evidence in the record to support it. *Yivo Inst. for Jewish Research v. Zaleski*, 386 Md. 654, 663 (2005). The legal conclusions reached by the circuit court, however, are reviewed *de novo*. *L.W. Wolfe Enters., Inc. v. Maryland Nat'l Golf, L.P.*, 165 Md. App. 339, 344 (2005).

I.

Negligent Misrepresentation - Liability

SMP's negligent misrepresentation claim arose out of the pre-employment meetings, on June 6, 17, and 25, 2002, between Collard, Zietz, Stewart, and Alvarez, on behalf of Iloani. As noted, SMP settled its claims against Iloani and Alvarez prior to trial. At trial, it sought to prove that Zietz and Stewart negligently made

material false representations in the course of the negotiations in those meetings.

Law of Negligent Misrepresentation

For over sixty years, Maryland has recognized the tort of negligent misrepresentation as separate and distinct from the tort of fraud or deceit. *Virginia Dare Stores, Inc. v. Schuman,* 175 Md. 287 (1938). In describing the tort, this Court has explained:

> The action lies for negligent words, recovery being permitted where one relies on statements of another, negligently volunteering an erroneous opinion, intending that it be acted upon, and knowing that loss or injury are likely to follow if it is acted upon.

Cooper v. Berkshire Life Ins. Co., 148 Md. App. 41, 57 (2002)(internal citations omitted). A plaintiff must prove five elements to sustain a claim of negligent misrepresentation:

> (1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
> (2) the defendant intends that his statement will be acted upon by the plaintiff;
> (3) the defendant has the knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
> (4) the plaintiff, justifiably, takes action in reliance on the statement; and
> (5) the plaintiff suffers damage proximately caused by the defendant's negligence.

Martens Chevrolet v. Seney, 292 Md. 328, 337 (1982). While the elements are similar to fraud or deceit, negligent misrepresentation does not require a showing of "scienter on the part of the defendant [or] intent to deceive the other party." *Id.* at 333.

In the case at bar, Zietz and Stewart challenge the trial judge's findings as to the first element, in that they argue no duty of care existed, no false statements were asserted, and they were not negligent. Furthermore, assuming *arguendo* that they did in fact negligently assert false statements, they argue that Collard was not justified in relying upon the misrepresentations and any injury he suffered was not the proximate result of the misrepresentations. We shall address each of these contentions in turn.

Duty of Care

The trial court found that Zietz and Stewart owed SMP a duty of care to avoid negligently asserting false statements. It acknowledged that their mere status as members of the Board did not give rise to such a duty of care. It concluded, however, that on the facts adduced at trial, there was an "intimate nexus between the parties," that is satisfied by "contractual privity or its equivalent," citing *Jacques v. First National Bank*, 307 Md. 527 (1986), because Zietz and Stewart personally negotiated on behalf of NTG during the meetings in question, and therefore undertook a duty not to negligently provide misinformation about NTG that was relevant to the proposed employment agreement.

SMP seeks only economic damages. In such cases, the Court of Appeals has opined:

> As a general rule, when the failure to exercise due care creates a risk of economic loss only, and not the risk of

> personal injury, we have required an "intimate nexus" between the parties as a condition to the imposition of tort liability. That "intimate nexus" may be satisfied by contractual privity,. . ., or its equivalent. One "equivalent" is stated in § 552 of the Restatement (Second) of Torts (1965), which, in relevant part, provides that (1) a person who, in the course of its business, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance on that information, if the person fails to exercise reasonable care or competence in obtaining or communicating the information[.]. . . Those principles have been adopted by this Court and are a part of the Maryland law.

Swinson v. Lords Landing Village Condominium, 360 Md. 462, 477-78 (2000)(internal citations omitted).

An "intimate nexus" may be found from pre-contractual negotiations for employment. *Weisman v. Connors*, 312 Md. 428, 448 (1988). In *Weisman*, a 56-year-old vice president at Ford entered into employment negotiations with the defendant, the owner of a much smaller holding company. During the course of the negotiations, the defendant made numerous representations to the plaintiff about the plaintiff's compensation package and the plaintiff's future role at the holding company. When the facts represented did not come to pass, the plaintiff brought suit under a theory of negligent misrepresentation. The Court of Appeals held that an "intimate nexus" could exist under these circumstances and, moreover, that the existence of the "intimate nexus" was a question of fact properly submitted to the jury. *Id.* at 448-51.

Zietz and Stewart argue that *Weisman* is inapposite because, in that case, the person making the misrepresentations owned the business and was thereafter a party to the employment contract; whereas, in the case at bar, NTG was the contracting party and Zietz and Stewart merely acted as its agents. In support, they rely upon this Court's decision in *Lopata v. Miller*, 122 Md. App. 76, 92 (1998), holding that real estate agents who falsely represented the acreage of a parcel of real property owed no duty to the purchasers of the property to independently investigate the representation of the acreage in the MLS report. Zietz and Stewart suggest that they similarly owed no duty to investigate representations set forth in the financial documents prepared by NTG management or the oral representations made by NTG's management concerning NTG's financial status.

Lopata, however, is distinguishable from the instant case. In *Lopata*, the Court noted that the real estate agents had "no particular expertise in acreage determination[s]" and "were not capable of determining the true acreage of the property without resort to other authorities." *Id.* at 91. In the case at bar, Zietz and Stewart both were sophisticated business people with access to information about and knowledge of the business operations of NTG. Furthermore, unlike the real estate agents in *Lopata*, who relied upon the MLS accurately to reflect the acreage

of the property, Zietz and Stewart had independent knowledge about the misrepresented information.

The facts, viewed in a light most favorable to the prevailing party, showed that Collard met with Stewart on one occasion and Zietz on two occasions prior to accepting the position of interim CEO of NTG. During the meetings, both Stewart and Zietz furnished Collard with financial documents and made oral representations about the current and future economic condition of NTG. As Board representatives of entities heavily invested in NTG, Zietz and Stewart were personally interested in finding a replacement CEO for the company. Thus, the meetings served dual purposes: to assess Collard's qualifications and to sell him on the position. Under these circumstances, like the defendant in *Weisman*, Zietz and Stewart "had to realize that negligence on [their] part in conveying [] information could result in considerable economic harm" to Collard. *Weisman, supra*, 312 Md. at 449.

"The law imposes [] a duty to reasonably assure the accuracy of what [is] represent[ed]" where the party making the representations occupies a "superior position to obtain the needed knowledge." 37 *Corpus Juris Secundum*, Fraud § 59 at 245 (1997). The trial judge did not err, legally or factually, in concluding that Zietz and Stewart owed Collard a duty of care not to make negligent, material misrepresentations about NTG during the course of the pre-contractual negotiations for employment.

Negligently Asserted False Statements

The trial court found that Zietz and Stewart made several negligently asserted false and material statements during the interviews. First, they told Collard that NTG was not aware that it was a party to any litigation, even though they knew of a $883,428 claim pending against NTG by Nationwide Trenching, Inc. ("NTI"). Second, they gave Collard financial documents that they knew or should have known were incomplete or inaccurate.[5] Third, they negligently failed to give Collard complete information about the reason why Tobin was leaving the company. Fourth, they negligently failed to disclose to Collard information about NTG's dire financial straits that they knew as members of the Board; specifically, that the company was "in danger of collapse" due to actions by Tobin that the Board thought had "permanently and irreparably damaged" the company. And fifth, that they failed to disclose to Collard the existence of employee loans materially affecting the company's financial situation, and that they knew about.

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[5]The trial judge found that Stewart provided Collard with the following documents at their June 6, 2002 meeting: 1) the PPM Executive Summary (drafted in early 2002); 2)"Sales by Customer Summary" for 1999; 3) "Revenue by Customer" (year-to-date totals as of December 31, 2000); 4) "Revenue by Customer" (year-to-date totals as of June 30, 2001); and 5) "Anticipated Collection of Unpaid Invoices" (by customer) as of February 7, 2002.

The trial judge found that Zietz provided Collard with all of the above documents, as well as the following additional documents: 1) "[NTG] Financial Statements, December 31, 2000 and 1999"; 2) "[NTG] Financial Statements, December 31, 2001 and 2000"; 3) NTG's 2001 financial statements; 4) NTG's preliminary financials as of April 30, 2002; and 5) NTG's preliminary financials as of March 31, 2002.

Zietz and Stewart contend that they did not make false statements to Collard during the pre-contractual negotiations because all of the information they provided was based upon their honest understanding of the facts at that time. Further, they maintain that they did not act negligently because any misrepresentations were communicated innocently based on information they received from NTG's management -- information upon which they had a right to rely. Lastly, they assert that the information SMP claims they should have disclosed relates to "three trivial matters" "that were not material to [...] NTG's overall financial condition."

We note at the outset that the question of whether Zietz and Stewart negligently made false statements to Collard during the pre-contractual negotiations is one of fact. Thus, absent a showing that the trial judge was clearly erroneous, these findings will not be reversed on appeal. *See* Md. Rule 8-131(c). Furthermore, as discussed, *supra*, Zietz and Stewart need not have *known* that the statements they made were false or have intended to make misrepresentations to Collard. "Negligent misrepresentation . . . only requires conduct which falls below the standard of care the maker of the statement owes to the person to whom it is made." *Gross, supra*, 332 Md. at 260.

To be sure, there was conflicting testimony about each of trial judge's findings and the extent of Zietz and Stewart's

knowledge about the five misrepresented matters.[6] In a bench trial, however, it is the province of the trial judge to weigh the evidence, assess the credibility of the witnesses, and make findings of fact. *See Liberty Mut. Ins. Co. v. Md. Auto. Ins. Fund*, 154 Md. App. 604, 609 (2004) (noting that we do "not sit as a second trial court"); *Shafer v. Stuart Hack Co.*, 124 Md. App. 516, 527 (1999) (observing that, "if 'competent material evidence' supports the trial court's findings, [the appellate court] must uphold them and cannot set them aside as 'clearly erroneous'"). There was ample competent and material evidence in the record to support the trial court's findings.

The trial judge heard testimony from Collard that he asked both Stewart and Zietz whether there were any lawsuits pending against NTG and that both replied in the negative. Furthermore, the trial judge found that both Zietz and Stewart provided Collard with an Executive Summary from a year old Private Placement Memorandum ("PPM") that included the following statement: "[NTG] is not aware that it is a party to any litigation." There was also testimony from Collard that he learned of the NTI litigation upon reviewing the "[NTG] Preliminary Balance Sheet as of April 30, 2002[,]" a document provided to him by Zietz at the June 17, 2002 meeting. On the document, Zietz's handwritten notes indicated that

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[6]For example, Stewart testified that he did not give Collard any documents at their meeting on June 6, 2002. Collard testified that Stewart gave him eleven financial documents. The trial judge found that Stewart gave Collard five documents.

NTI had filed a lawsuit against NTG and that the claim was for "$200,000 over what actual invoices show." Shortly thereafter, Collard called Zietz to discuss this note and Zietz told him that the lawsuit was being settled. Collard discovered after he became interim CEO that the actual amount in controversy was $883,428. Even though Zietz and Stewart may not have known the full extent of the NTI claim, both knew of its existence. From this evidence, the trial judge reasonably could infer that Zietz and Stewart failed to exercise due care by responding to Collard's inquiries and in providing him with the PPM without disclaiming the portion relating to pending litigation.

The trial judge also found that Zietz and Stewart provided Collard with certain financial documents at their meetings that were outdated and did not give an accurate picture of NTG's financial status. According to Collard, he reviewed the documents and found that they confirmed most of the oral representations made by Zietz and Stewart as to the financial condition of the company. Insofar as the trial judge found that Zietz and Stewart knew, or should have known, that the company was in serious financial trouble, he did not err in concluding that they were negligent in providing these financial documents to Collard.

There was also considerable testimony and evidence introduced concerning Tobin's resignation from NTG. The evidence showed that on May 14, 2002, Tobin informed Zietz and Stewart that she planned

to resign because she had cancer. After NTG began in earnest the search for a new CEO, Tobin made numerous financial demands as a condition of her resignation. On June 20, 2002, Zietz wrote a letter to Tobin on behalf of the Board threatening to terminate her for cause if she did not resign voluntarily prior to June 24, 2002 (the date of the next Board meeting). The letter stated, in pertinent part, that NTG's financial performance had "fallen dramatically"; that "[t]he lateness of the [2001 audit] has placed NTG out of covenant with Mercantile"; that NTG was in default on interest payments to Spring Capital; that both Mercantile and Spring Capital could call their loans; and that NTG "appears in danger of collapse." There was testimony from Zietz that Stewart either saw this letter or discussed its contents before it was sent. While Zietz did inform Collard that she was negotiating Tobin's separation agreement and that the Board was prepared to fire Tobin for cause if necessary, she did not express her apparent belief that the company was faltering under Tobin's watch. Stewart also represented to Collard that Tobin was resigning solely for health reasons. This evidence was sufficient to support the trial judge's finding that Zietz and Stewart negligently represented the reason for Tobin's resignation.

Collard testified that both Stewart and Zietz told him that NTG was essentially a "$30 million company, breakeven, small loss," but that it was currently "cash-tight" and having difficulty

collecting accounts receivables. Further, Collard was informed that NTG was in need of new capital both in the form of equity capital and in the form of a lending agreement with a new bank. Collard was not informed that NTG was in default on its loan to Spring Capital.[7] Further, Collard was not informed that NTG was overdrawn on its loan with Mercantile.[8] The trial judge could find from these facts that Zietz and Stewart negligently misrepresented NTG's financial condition.

Lastly, both Zietz and Stewart became aware that Tobin alleged she made loans to NTG in the amount of $200,000 during the course of the separation agreement negotiations in mid-June. There was also evidence that both Zietz and Stewart received a financial document evidencing the claimed existence of employee loans in the amount of $232,689 in the days prior to the Board meeting on June 26, 2002. Apparently, this was the first time NTG management included any reference to employee loans in its financial documents. None of the documents Collard was given revealed the existence of claimed employee loans. The trial judge was not clearly erroneous in finding that Zietz and Stewart were negligent in failing to disclose the existence of the claimed loans.

Justifiable Reliance

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[7]Collard was informed that the Sprint Capital loan might go into default, but not that it was in default.

[8]Collard was informed that NTG had exhausted its line of credit with Mercantile, but not that it was overdrawn.

The trial court found that Zietz and Stewart intentionally provided Collard with information about NTG's financial condition that they knew was false or misleadingly incomplete, with the intention that he would act upon it, to his detriment; and that Collard indeed justifiably relied upon the information.

Zietz and Stewart argue that, as a matter of law, Collard could not have justifiably relied upon the misrepresentations because they were "trivial" and were neither "relevant or material to SMP's engagement." Given that Collard knew that NTG was a financially troubled company in a "state of decline,"[9] they maintain, he could not have justifiably acted in reliance on Zietz and Stewart's representations about these matters in making the decision to accept the position of interim CEO.

Statements that are "vague and indefinite" or "merely [] loose[,] conjectural or exaggerated" do not justify reliance by the hearer, *Goldstein v. Miles*, 159 Md. App. 403, 436 (2004) (quoting *Buschman v. Codd*, 52 Md. 202, 207 (1879)), because they ought to "put the hearer upon inquiry." *Fowler v. Benton*, 229 Md. 571, 579 (1962). In contrast, statements of present or past facts may justify reliance. *See Weisman, supra*, 312 Md. at 457.

Zietz and Stewart's representations to Collard were all about the past and present financial condition of NTG, the present status of legal claims against NTG, and the present reasons for Tobin's

[9]The IMA, which was drafted by Collard, uses this language.

resignation. As such, the statements were of the type a hearer reasonably could rely upon.

Zietz and Stewart are correct that Collard learned other information about the troubled financial state of NTG before he accepted the interim CEO position. However, to prove reliance, a plaintiff need not prove that, absent the misrepresentation, he would not have acted. Rather, "it is sufficient that the misrepresentation substantially induced the plaintiff to act." *Sass v. Andrew*, 152 Md. App. 406, 441 (2003) (quoting *Nails v. S&R, Inc.*, 334 Md. 398, 416-17 (1994)). Furthermore, the question of the reasonableness of Collard's reliance is one of fact. There was testimony that, absent the misrepresentations, Collard may have agreed only to act as a consultant to NTG. We find no error in the trial judge's finding that Collard reasonably relied upon the representations in making his decision to accept the position of interim CEO.

Causation

Finally, the trial court found that the material misrepresentations made by Zietz and Stewart were the proximate cause of injury to Collard because the statements "induced" Collard "to enter into the IMA and provide the services of an interim CEO for a minimum term of one month." Thus, the fees incurred by SMP and awarded by the trial judge "were those that naturally and probably flowed from the assumption of that position and the duties

carried therewith." The trial judge awarded damages to SMP only for six categories of work 1) termination of the 401(k) plans; 2) time spent in connection with Federal and State investigations; 3) filing NTG's tax returns and other government reporting; 4) pursuit of insurance claims; 5) time spent on NTG's legal matters; and 6) time spent in connection with local investigations.[10]

Zietz and Stewart contend that the trial judge erred in finding that the fees awarded were proximately caused by the misrepresentations. They point out that Collard became aware of all of the misrepresented information within days of beginning his work for NTG, yet he continued to perform and bill NTG for services with the knowledge that NTG could not compensate him. Furthermore, because the IMA provided that, after the first month, the contract could be canceled by either party on one week's notice, Collard need not have performed any services after July 31. By doing so, he assumed the risk that he would not be compensated for any work he performed beyond that date. SMP counters that Collard accepted the interim CEO position in reliance upon the misrepresentations and that all of the damages flowed from that decision. Moreover, it is immaterial whether he learned of the misrepresentations prior to incurring the fees because, as interim CEO, he had no choice but to wind up and liquidate NTG or face personal liability.

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[10]We will discuss the specific damages awarded by the trial court *infra*.

Zietz and Stewart point to this Court's decision in *Diener Enterprises, Inc. v. Miller*, 35 Md. App. 410, 413 (1977) (quoting *Lustine Chevrolet v. Cadeaux*, 19 Md. App. 30, 35 (1973)), in which we stated, in the context of an action for fraud: "[I]t is clear in Maryland . . . the plaintiff must show not only that he would not have performed the act from which the injury resulted but for the misrepresentation, but also that the fact misrepresented was the proximate cause of the injury." In *Diener*, the plaintiff purchased a parcel of real estate for the purpose of building a hotel on the property. The seller made certain representations to the purchaser during the course of negotiations, including an assurance that "no legal action" would be filed to prevent the purchaser from obtaining a building permit. In reality, litigation did ensue after the purchaser applied for the permit, but the case was eventually dismissed. Ultimately, newly enacted ordinances prevented the purchaser from building the hotel. This Court held that the plaintiff failed to prove that the seller's misrepresentations caused the injury because the plaintiff's own action in failing to comply with one of the ordinances was the proximate cause of the loss.

We disagree that *Diener* is dispositive. The plaintiff in *Diener* was found to have suffered injuries as a result of his own failure to comply with an ordinance. In the instant case, the trial judge made a finding that Collard had "duties" that flowed

from his assumption of the role of CEO and that these "duties" included work for which he incurred fees, but was not compensated. Furthermore, the trial judge found that the misrepresentations made by Zietz and Stewart induced Collard to take on the role of CEO, and thus there was a causal connection between the injury and the misrepresentations.

The trial judge's findings were supported by competent and material evidence in the record. Collard was asked why he didn't simply walk away from NTG once he learned of the fraud and he replied that he believed that

> there were a number of items [for] which I, in my mind, became personally liable[]. . . . There is the avoidance of potential lawsuits that could have come from - you know, if I didn't pursue assets in a fashion, I could have been sued, for instance, by the secured lenders. Mercantile, for instance, if we didn't recover assets, could have pursued litigation.

Even Zietz and Stewart's own witness, Thomas McShane, an expert in the field of turnaround professions, testified that some of the services performed by Collard were necessary to wind up NTG: "[i]n winding up a company you tie up [] loose ends of the company that are legal in nature. For instance, filing corporate tax returns, payroll tax returns, winding up 401[(k)] and retirement plans, and the like." The responsibilities described by the expert correspond with several of the categories of work for which the trial judge awarded damages. While the expert also opined that he did not believe the number of hours billed for each task was

justified, the trial judge was well within his discretion to credit only portions of his testimony. The trial court was not clearly erroneous in concluding that some of SMP's damages were proximately caused by Zietz and Stewart's misrepresentations.

II.

Contribution

Trial Court's Ruling

The trial court found that Alvarez was never an officer, director, or member of the Board of NTG, and therefore that she had no authority to act on NTG's behalf. For this reason, she did not owe SMP a duty of care. Even if she did owe it a duty of care, the evidence did not support a finding that she breached her duty. "There has been no evidence presented indicating that Alvarez provided [SMP] with any information regarding the financial situation of the company" or that she knew that the information about NTG that was being provided to Collard by others was inaccurate or incomplete.

With respect to the contribution claim against Iloani, the trial court found that, unlike Alvarez, she was a member of the Board. However, she did not meet with Collard at any point before June 28, 2002, when the Board voted to hire SMP; and there was no evidence that Iloani presented Collard with any information about the company before Collard executed the IMA. "Simply stated, there is no evidence to suggest that Iloani made any material

misrepresentations to [SMP] at all, let alone any that were relied upon to its detriment."

On these bases, the trial court ruled against Zietz and Stewart on their claims for contribution.

Zietz and Stewart's Contentions

Zietz and Stewart admit in their brief that "Alvarez and Iloani are innocent." They do not challenge the trial court's factual findings that neither Alvarez nor Iloani made any material misrepresentations to Collard. Instead, Zietz and Stewart argue that, to the extent the trial court found them liable, Alvarez and Iloani must also be liable. They argue that Alvarez and Iloani possessed the same information as them and were equally involved in the hiring process. Therefore, Alvarez and Iloani owed the same duty of care and should be equally liable.

Discussion

In Maryland, a statutory right of contribution exists among joint tort-feasors. Md. Code (2002 Repl. Vol.), § 3-1402 of the Courts and Judicial Proceedings Article ("CJ"). The term "joint tort-feasors" is defined as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." CJ §3-1401(c).

The trial judge made a finding of fact, supported by competent and material evidence in the record, that Alvarez and Iloani did

not make any false representations to Collard and were therefore not liable for the damages suffered. Zietz and Stewart do not contest this finding of fact. Alvarez and Iloani committed no tort against SMP and cannot be held liable for contribution.

III.

Negligent Misrepresentation - Damages

Trial Court's Ruling

SMP claimed damages in the amount of $390,625 for unpaid fees. The trial court awarded damages in the amount of $59,500, stating "[w]ith regard to those amounts not [awarded], the Court has found that [SMP] has either failed to demonstrate a causal connection between the claimed amount of damages and what this Court has found to be the negligent misrepresentation of Zietz and Stewart, or has failed to meet the burden of proof by a preponderance of the evidence." The trial court did not award any damages for fees accruing prior to October 13, 2002, when Mercantile ceased funding Collard's work under the Forbearance Agreement. The damages awarded to SMP were broken down by category as follows: 1) $27,562.50 for termination of the 401(k) plans; 2) $8,000 for time spent in connection with Federal and State investigations; 3) $2,187.50 for filing NTG's tax returns and other government reporting; 4) $13,750 for pursuit of insurance claims; 5) $1,750 for time spent on NTG's legal matters; and 6) $6,250 for time spent in connection with local investigations.

SMP's Contentions

SMP argues that the trial judge erred in not awarding all of the damages requested for the approved categories of work and for not awarding any damages for entire categories of claimed unpaid fees. First, SMP disputes the trial judge's finding that Collard was compensated by Mercantile for all work performed prior to October 13, 2002. SMP argues that the Forbearance Agreement provided compensation only for three categories of work: "(i) the collection of receivables from the Account Debtors, (ii) the assembly and collection of the Collateral, and (iii) the sale of [NTG]'s assets", and, accordingly, SMP contends that fees billed for work outside of these categories prior to October 13 are chargeable to Zietz and Stewart. Second, SMP asserts that the trial judge's decision not to award fees for entire categories of work lacks a logical underpinning.

Discussion

All of the claimed errors involve questions of fact. As we have discussed, it is not our role to sit as a second trial court. We perceive no error in the trial court's decision to award partial damages. There was considerable testimony from an expert witness, McShane, that, in his opinion, Collard billed excessive time on a number of work activities and engaged in activities wholly unrelated to the task of winding down and liquidating NTG. In particular, McShane opined that "the fees that were paid to Mr.

Collard in excess of $117,000 [by Mercantile] were more than adequate to compensate Mr Collard for winding up or liquidating or winding up and liquidating a company of this size and complexity." He also offered his opinion as to the number of hours each task should have required. The trial judge clearly chose to credit some of this testimony in reaching his decision.

The findings were supported by competent and material evidence in the record and we will not disturb them on appeal.

IV.

Breach of Guaranty

As discussed, *supra*, the evidence at trial established that, on or about July 3, 2002, after Collard discovered the fraud at NTG, he approached Zietz to express his concern that his fees would not be paid. Zietz orally assured him that Abell would make sure he was paid for his work. Four days later, Collard hand-delivered a letter to Zietz memorializing their conversation. The letter stated, in pertinent part:

> [Abell] has agreed to guarantee all professional fees and the contract between [NTG] and [SMP] dated June 26, 2002, including in the event that a preference or avoidance action is brought against [SMP] or me with regard to fees received from [NTG] in this matter in the future.

Zietz signed the letter to acknowledge her agreement with the terms and returned it to Collard.

Two days later, on July 11, following the Board meeting in which the decision was made to close down NTG, Zietz sent Collard an e-mail, stating:

> I am going on the assumption that your stipend will become part of the budget that the bank is beginning to pay starting tomorrow, releasing us from the obligation sta[r]ting tomorrow. Is that correct?

Collard testified that, when his e-mail was sent, he had not yet entered into discussions with Mercantile about the Forbearance Agreement and that he had not represented to Zietz that Mercantile would compensate him in any way. Zietz testified that she and Collard spoke prior to her sending this e-mail and he told her "I think I'm going to be okay. [Mercantile is] going to pick up my fees." Collard did not reply to Zietz's e-mail, but he testified that he spoke to her later that evening and explained that Mercantile would only agree to pay part of his fees. Zietz denies that this conversation ever occurred.

On July 17, Collard and Mercantile entered into the Forbearance Agreement. The forbearance budget, prepared by Collard and approved by Mercantile, included compensation at the rate of $10,000 per week for the entire month of July. This was the same rate of pay included in the IMA.

On or about July 18, Collard executed the Amendment to the IMA, acting in his dual capacity as CEO of NTG and President of

SMP.[11] The Amendment changed the nature of the services Collard would perform, extended the term of the IMA, and changed the schedule of Collard's compensation from $10,000 per week to $250 per hour (with no maximum number of hours per week).

On July 19, Zietz met with Collard at NTG and handed him a letter,[12] which stated:

> I am writing to confirm our recent conversation in which you told me that Mercantile Bank has agreed to pay your compensation pursuant to the [IMA], . . ., whereby you started working with [NTG] on July 1, 2002 for a period of one month, renewable.
>
> I had verbally assured you that [Abell] itself would cover your fee for that month, in the event that no other party would. . . . I am taking this opportunity to thank you for all the work you have put into this project, and to let you know that [Abell] will not guarantee any compensation or expenses for you after the month ending July 31, 2002.

Zietz testified that Collard accepted the letter and placed it in a file on his desk. Collard testified that he received the letter, but informed Zietz that he did not agree to its terms.

Collard did not make any claims under the guaranty until August of 2003, when he wrote to Robert C. Embry, Jr., president of

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[11]The Amendment is dated July 11, 2002. Collard testified that he used this date because it was the date of the Board meeting at which he was directed to close down the company. Collard also testified that he did not sign the Amendment until after the Forbearance Agreement with Mercantile was executed, on July 17.

Zietz and Stewart argued in the circuit court and on appeal that Collard did not execute the Amendment until December of 2002.

[12]The copy of the letter admitted into evidence was not on letterhead and was not signed by either Zietz or Collard because it was apparently printed directly from Zietz's computer files. Collard did not produce the hard copy of the letter, although he admits receiving it.

Abell, and requested a meeting to discuss the fees Abell had purportedly guaranteed. Embry declined the meeting. Collard subsequently amended his complaint to include the claim against Abell and Zietz for breach of the guaranty.

Trial Court's Ruling

The trial court explained that the parties did not dispute that there was a guaranty, but they did dispute its scope. Abell took the position that the guaranty was continuing and revocable, on due notice, at any time. SMP took the position that the guaranty was irrevocable. The court found, based upon the language of the guaranty, that "the parties contemplated that the guaranty was for fees under the June 26, 2002 IMA that were to go on well into the future and that the amount to be guaranteed was unknown." (Footnote omitted.) The court further found that Abell properly revoked the guaranty on July 19, 2002, when Zietz delivered her letter to Collard. The court noted that Abell could not revoke the guaranty with respect to services already performed, but Collard already had been fully compensated by Mercantile for his services prior to July 19.

In a footnote, the court also provided an alternative ground for its decision not to find Abell liable under the guaranty:

> Notwithstanding the forgoing, even if this Court were to determine that the guaranty was an irrevocable continuing guaranty, a guarantor is discharged by the material alteration or modification of the underlying contract without the guarantor's consent.

The court found that the Amendment to the IMA, executed by Collard on July 11, 2002, materially altered the IMA and Abell was not liable.

SMP's Contentions

First, SMP asserts that the trial court erred in concluding that the guaranty was not supported by sufficient consideration and therefore was not irrevocable. According to SMP, the guaranty was supported by sufficient consideration in the form of Collard's promise to "clean up [the] mess" that Abell faced and help Abell avoid liability. Second, SMP contends that the trial court erred in concluding that the Amendment to the IMA materially altered the underlying contract.

Discussion

As this Court explained in *Mercy Med. Ctr., Inc., supra*, 149 Md. App. at 361:

> A contract of guarantee is a form of commercial obligation, in which the guarantor promises to perform if the principal does not. A court must construe a contract of guarantee in furtherance of its spirit, without strict technical nicety, to promote liberally the use and convenience of commercial intercourse. The words of a guaranty should receive fair and reasonable interpretation to effectuate the intention of the parties, and the circumstances accompanying the transaction may be considered in seeking the intention of the parties.

(Internal quotes and citations omitted.) Furthermore, "[b]ecause the liability of a guarantor is created entirely by his contract, it is strictly confined and limited to his contract[, and] . . . no

change can be made to the guaranty without the guarantor's consent. *Middlebrook Tech, LLC v. Moore*, 157 Md. App. 40, 59 (2004) (internal citations omitted). The beneficiary under the contract of guaranty is entitled to only one recovery; thus, if the principal performs, the guarantor is discharged from its secondary obligation to perform. *See* Richard A. Lord, 23 *Williston on Contracts* §61:11 (4th ed. 2002) ("*Williston*").

A guaranty is continuing "if it contemplates a future course of dealing during an indefinite period[.]" *See Williston, supra*, at §61:45. A continuing guaranty may be revoked on due notice to the obligee, thereby discharging the guarantor's liability as to future transactions. *See Weil v. Free State Oil Co.*, 200 Md. 62, 71 (1952); *see also Williston, supra*, at § 61:45. If full consideration for a continuing contract of guaranty is given at the outset, however, the guaranty is irrevocable because the guarantor has already received the benefit of the bargain. *See Williston, supra*, at § 61:45.

In the instant case, Abell agreed "to guarantee all professional fees and the contract between [NTG] and [SMP] dated June 26, 2002, including in the event that a preference or avoidance action is brought against [SMP] or me with regard to fees received from [NTG] in this matter in the future." The plain language of the guaranty suggests a continuing course of dealing between the parties since it references the IMA, a continuing

obligation. Hence, the guaranty was revocable on due notice to SMP unless Abell and Zietz received sufficient consideration at the outset.

SMP's claim that Abell and Zietz made the guaranty in consideration of Collard's promise to "clean up the mess" is without merit. The evidence showed that Collard came to Zietz on or about July 3, 2002 expressing his fear that he would not be paid for his work. His fear was justified as his $15,000 retainer check had recently bounced. In recognition of Collard's concern, Zietz orally guaranteed his fees on behalf of Abell. The facts suggest that Zietz's guaranty of Collard's fees was gratuitous and not, as Collard claims, based on any concern on Abell's part that they would face liability based on the collapse of the company. In fact, on that date, the decision to close down the company was still days away and the full extent of the fraud was only just coming to light.

When Zietz signed the letter guarantying SMP's fees six days later, the reality that NTG would have to be closed down had become more apparent. At that point, however, Abell had to realize that their investment in NTG would not be recovered; and Zietz, acting on behalf of Abell, was unlikely to have entered into a guaranty agreement with Collard in consideration of his promise to "clean up the mess" at NTG. Rather, Abell and Zietz were preparing to walk away from NTG at a significant loss.

SMP points to no evidence in the record to support a finding that Abell and Zietz acted in consideration of any promise made by Collard.

Finding no consideration for the guaranty, we agree with the trial judge that it was revocable on due notice. The trial judge made findings of fact that Zietz personally delivered a letter revoking the guaranty as of July 31, 2002 and that SMP was fully compensated by NTG for the month of July, 2002 pursuant to the Forbearance Budget with Mercantile.[13] We find no error in these conclusions.

As guarantors, Abell and Zietz were not liable to SMP for any fees already paid under the primary contract with NTG, the IMA. Since at the time Abell and Zietz revoked the guaranty, all fees owed under the IMA were satisfied, they were discharged from any obligation to SMP. Furthermore, Abell and Zietz cannot be held liable for fees incurred by SMP after July 31, 2002 because the guaranty had been properly revoked.[14]

JUDGMENTS AFFIRMED. COSTS TO BE PAID ONE-HALF BY THE APPELLANTS AND ONE-HALF BY THE APPELLEES.

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[13]Under the Forbearance Agreement, SMP was paid $10,000 per week for the month of July, exactly the amount he would have received under the IMA.

[14]SMP has moved to strike or disregard the oral argument presented in this Court on behalf of the Abell Foundation. We exercise our discretion to deny that motion.