98 Mass.App.Ct. 1
Appeals Court of Massachusetts.

Frank SPINOSA & Another [1]
v.
Peter M. TUFTS.

No. 19-P-190
|
Argued January 7, 2020.
|
Decided July 9, 2020.

Synopsis
Background: Company and its director brought action against employee, who was purported partner, seeking harassment prevention order, and employee brought counterclaim alleging breach of contract, misrepresentation, and nonpayment of prevailing wages. After bench trial, the Superior Court Department, Middlesex County, C. William Barrett, J., found in favor of employee. Director and company appealed.

Holdings: The Appeals Court, Shin, J., held that:

[1] trial court acted within its discretion in concluding that director had unclean hands relative to his defense of judicial estoppel;

[2] trial court acted within its discretion in excluding bankruptcy attorney's testimony;

[3] employee's failure to disclose claimed partnership interest during bankruptcy proceeding did not deprive him of standing to assert that interest in current action;

[4] adequate factual basis supported award of $ 1.2 million in breach-of-contract damages for employee;

[5] employee could not recover award of misrepresentation damages because it was duplicative of the breach-of-contract damages; and

[6] evidence supported finding that employee was not actively engaged in management of company and, thus, was not owner-operator excluded from scope of the prevailing wage law.

Affirmed in part and reversed in part.

Procedural Posture(s): On Appeal; Motion for Attorney's Fees; Judgment.

West Headnotes (25)

[1] **Estoppel** Claim inconsistent with previous claim or position in general

"Judicial estoppel" is an equitable doctrine that is properly invoked whenever a party is seeking to use the judicial process in an inconsistent way that courts should not tolerate.

More cases on this issue

[2] **Estoppel** Claim inconsistent with previous claim or position in general

A successful claim of judicial estoppel generally requires the showing of two core elements: (1) the party to be estopped is asserting a position that is directly contrary to a position asserted in a prior case, and (2) that party succeeded in convincing the court to accept its prior position.

2 Cases that cite this headnote

[3] **Estoppel** Claim inconsistent with previous claim or position in general

Even if elements of a successful claim of judicial estoppel are met, a judge may decline to apply judicial estoppel where it is not appropriate to serve the doctrine's purpose, which is to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system.

2 Cases that cite this headnote

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[4] **Estoppel** Claim inconsistent with previous claim or position in general

Judges are to use their discretion, and their weighing of the equities, and apply judicial estoppel where appropriate to serve its over-all purpose.

[5] **Equity** He Who Comes into Equity Must Come with Clean Hands

The doors of equity are closed to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the other party.

[6] **Estoppel** Claim inconsistent with previous claim or position in general

Trial court acted within its discretion, in employee's breach-of-contract action against company and its director, in concluding that director of company had unclean hands and, thus, could not assert defense of judicial estoppel based on employee's failure to disclose his alleged partnership interest in the company on his bankruptcy schedules; director was involved in bankruptcy and participated in faking of schedules, director paid for bankruptcy attorney's services and attended meetings, at which he made statements suggesting that employee's partnership interest had not yet vested, and trial court could infer director's complicity from fact that he, and not just employee, stood possibly to benefit from concealing employee's interest in the company from his creditors.

More cases on this issue

[7] **Equity** He Who Comes into Equity Must Come with Clean Hands

The unclean hands doctrine allows a judge to deny equitable relief to one who has acted in bad faith.

1 Case that cites this headnote

[8] **Estoppel** Claim inconsistent with previous claim or position in general

A party cannot rely on judicial estoppel if it comes to the court with unclean hands.

[9] **Privileged Communications and Confidentiality** Waiver of privilege

Trial court acted within its discretion in excluding bankruptcy attorney's testimony about advice he gave employee, who was purported partner in company, based on attorney-client privilege, in employee's breach-of-contract action against company and director; although employee waived attorney-client privilege with respect to conversations he had with bankruptcy attorney in presence of director, attorney could not recall what was spoken as to particular meetings with director versus other meetings.

More cases on this issue

[10] **Bankruptcy** Rights of Action; Contract Rights Generally

Company employee's partnership-based claims against company were not part of employee's bankruptcy estate, and thus employee's failure to disclose his alleged partnership interest in bankruptcy proceeding did not deprive employee of standing to assert that interest in subsequent litigation, where claims had not accrued when employee filed bankruptcy petition. 11 U.S.C.A. § 541(a)(1); Mass. R. Civ. P. 17(a).

More cases on this issue

[11] **Bankruptcy** In general; standing

Where a former debtor asserts claims belonging to the bankruptcy estate, the usual remedy is to substitute as the real party in interest the trustee of the bankruptcy estate in the place and stead of the former debtor.

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[12] **Bankruptcy** Rights of Action; Contract Rights Generally

A claim is deemed to be part of a bankruptcy estate if it has accrued under State law as of the filing of the petition. 11 U.S.C.A. § 541(a)(1).

[13] **Appeal and Error** Amount of recovery or extent of relief

Company and its director did not waive appellate review of the damages awards to employee, who was purported partner in the company, by agreeing, in jury-waived trial, to waive detailed written findings of fact and instead submit to judge special questions on elements of each claim, in employee's action for breach of contract and misrepresentation; waiver of detailed findings of fact did not mean waiver of findings that provided the equivalent of jury verdict, and judge was still required to answer special questions at a level of detail comparable to special jury verdict form. Mass. R. Civ. P. 49; Mass. Superior Court Rule 20(2)(h).

5 Cases that cite this headnote

[14] **Appeal and Error** Excessive Award; Remittitur

The standard of review the Appeals Court would apply in assessing the evidence supporting a jury's award of damages is highly deferential: to overturn such an award, the Appeals Court would have to determine that it was clearly excessive in relation to what the plaintiff's evidence had demonstrated damages to be.

3 Cases that cite this headnote

[15] **Appeal and Error** Damages in General

The standard of review applied to assessing the evidence supporting a jury's award of damages does not require mathematical precision; rather, so long as there was evidence that enabled the jury to arrive at a reasonably approximate estimate of damages, the award will stand on appeal.

2 Cases that cite this headnote

[16] **Partnership** Damages or amount of recovery

Adequate factual basis supported award of $1.2 million in breach-of-contract damages for employee, who was purported partner in company, in his action against company and its director arising from alleged underpayment, although there was evidence showing that company was not profitable; employee testified that, in his opinion, the company had value of around $3 million and explained his calculations, and while the evidence the employee provided was not robust, the trial judge was entitled to credit it over evidence offered by director and company.

More cases on this issue

[17] **Evidence** Breach of contract

Company employee, who was purported partner of company, was qualified to provide opinion testimony as to the company's value, for purposes of supporting breach-of-contract damages to employee in his action against director of company arising out of alleged underpayment, where employee was fully aware of contracts which company had and also fully aware of its liabilities. Mass. Guide to Evid. § 701.

More cases on this issue

[18] **Damages** Nature and theory of compensation

Fraud Effect of existence of remedy by action on contract

Misrepresentation damages awarded to employee, who was purported partner in company, were duplicative of his award for

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breach-of-contract damages, and thus employee could not recover the misrepresentation damages, in his action against company and its director arising from alleged underpayment; the misrepresentation damages represented the financial loss caused by employee's reasonable reliance on director's alleged false representation to enter into partnership with employee, and measure of damages for both the misrepresentation and breach-of-contract claims was what employee would have received had director followed through on his promise of a partnership.

More cases on this issue

[19] **Fraud** Difference between actual and represented value

The measure of damages on a misrepresentation claim is the difference between the value of what the plaintiff has received and the actual value of what he would have received if the representation had been true.

1 Case that cites this headnote

[20] **Labor and Employment** Prevailing wages

The purpose of the prevailing wages law is to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry. Mass. Gen. Laws Ann. ch. 149, § 26.

[21] **Administrative Law and Procedure** Compensation; wages and hours

Labor and Employment Scope of review

The Department of Labor Standards' interpretations of the prevailing wage law are entitled to deference unless contradicted by the test or purpose of the underlying statute. Mass. Gen. Laws Ann. ch. 149, § 26.

[22] **Labor and Employment** Public Employment; Public Works

Department of Labor Standards reasonably construed the prevailing wage law to exclude owner-operators from its scope, with the limited exception of those engaged in transport of gravel or fill; prevailing wage law used terms “employer” and “employee” throughout its text, showing that it was only employees that had to be paid the prevailing wage on public works construction projects. Mass. Gen. Laws Ann. ch. 149, §§ 26, 27.

[23] **Labor and Employment** Public Employment; Public Works

Evidence supported finding that employee, who was purported partner in company, was not actively engaged in management of company and thus, was not an owner-operator excluded from scope of the prevailing wage law, even though employee sometimes performed job functions that were typically considered to be managerial, including obtaining contracts for the company, hiring subcontractors and suppliers, and preparing and submitting bids, where there was evidence that employee primarily worked for company as laborer. Mass. Gen. Laws Ann. ch. 149, § 26 et seq.; 29 C.F.R. §§ 541.101, 541.106(a), 541.700.

More cases on this issue

[24] **Labor and Employment** Amount awarded

Evidence supported trial court's award of $45,071 in prevailing wage damages to employee, who was purported partner of company that worked on public works jobs, although director of company argued that employee's testimony on damages was inherently unbelievable and internally inconsistent; judge paid close attention to the evidence and awarded employee far less than his claimed damages of $177,000, and trial court's rejection of employee's overtime claims for jobs

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that were not prevailing wage projects did not require reduction of prevailing wage damages. Mass. Gen. Laws Ann. ch. 149, § 26 et seq.

More cases on this issue

[25] **Costs, Fees, and Sanctions** Result of Review; Prevailing or Successful Party

Employee, who was purported partner of company, was entitled as prevailing party to appellate attorney's fees that reflected time spent to defend part of judgment concerning his claim for prevailing wages, even though trial court had denied employee's motion for fees on ground that motion lacked specificity and employee did not cross-appeal from denial of that motion; lack of cross appeal did not preclude employee from seeking appellate fees. Mass. Gen. Laws Ann. ch. 149, § 27.

1 Case that cites this headnote
More cases on this issue

****896** Corporation, Ownership. Contract, Performance and breach, Misrepresentation. Damages, Breach of partnership agreement. Labor, Public works, Wages. Administrative Law, Agency's interpretation of statute. Judicial Estoppel. Bankruptcy. Practice, Civil, Standing, Findings by judge.

CIVIL ACTION commenced in the Superior Court Department on May 3, 2013.

The case was heard by C. William Barrett, J.

Attorneys and Law Firms

Edward Foye, Boston, for the plaintiffs.

India L. Minchoff (Stephen J. Kuzma, Boston, also present) for the defendant.

Present: Wolohojian, Milkey, & Shin, JJ.

Opinion

SHIN, J.

***2** This case arises out of a contentious dispute between once-close friends Frank Spinosa and Peter Tufts (Tufts) regarding an agreement they made to become equal partners in Tufts, Inc. (company), an entity they formed together. After a lengthy jury-waived trial, a Superior Court judge found in favor of Tufts on his counterclaims for breach of contract, misrepresentation, and nonpayment of prevailing wages. Spinosa and the company appealed. They raise numerous arguments, including, principally, that (1) the judge should have applied judicial estoppel to bar Tufts's breach of contract and misrepresentation claims, given Tufts's failure to disclose the partnership agreement in a prior bankruptcy proceeding, and (2) as an owner-operator of the company, Tufts was not entitled to prevailing wages.

***3** We conclude that the judge did not err in declining to apply judicial estoppel, given his finding that Spinosa participated in the bankruptcy proceeding and did not have clean hands. We further conclude that, although owner-operators in certain circumstances are exempt from the prevailing wage law, G. L. c. 149, §§ 26-27H, the judge could have found that Tufts did not qualify as an owner-operator because he was not actively engaged in the management of the company. Thus, other than that portion of the judgment awarding damages on the misrepresentation claim (which, as explained infra, have been shown to be duplicative of the breach of contract damages), we affirm.

Background. We recite the facts that the judge could have found,[2] reserving some for later discussion.

****897** In 2007 Spinosa and Tufts agreed to go into business together. At the time, Spinosa owned and operated Hillside Auto Repair, a service station. Tufts owned and operated Tufts Transportation, Inc., which provided snow removal, trucking and hauling, and excavation services. Tufts Transportation, Inc., was in financial difficulty, and Spinosa suggested that he and Tufts "partner up on the snow cont[r]acts and build the snow business."

In late 2007 or 2008, Spinosa and Tufts formed the company, which acquired some of Tufts Transportation, Inc.'s equipment and other assets and took over its snow removal contracts. Spinosa was the company's sole officer, director, and shareholder, but he and Tufts orally agreed that Tufts would eventually become a fifty-percent partner. Specifically,

they agreed that the partnership would be formalized once Tufts resolved his financial issues, whereupon he would acquire his interest in the company.

In the meantime Tufts worked for the company as its "operations manager," earning a weekly salary of $1,750. He had various duties, including supervising work crews, operating equipment, and serving as a laborer. He also had managerial duties such as hiring subcontractors and suppliers, preparing and submitting bids, and disciplining employees. Tufts did not receive prevailing wages for the hours he put in on public works jobs, and other employees who worked fewer hours earned more money. But when Tufts complained, Spinosa would reply, "The owner always makes less."

In September 2009 Tufts filed a Chapter 7 bankruptcy petition ***4** in the United States Bankruptcy Court for the District of Massachusetts (bankruptcy court). Before doing so, Tufts spoke several times with a bankruptcy attorney, Jeffrey Frankel. Spinosa paid for Frankel's services and accompanied Tufts to at least two meetings with Frankel. At one meeting Tufts explained to Frankel that he would acquire an interest in the company upon resolving his financial issues. Spinosa confirmed that the financial issues were the reason that Tufts was not identified as an officer on the company website; he also stated that he and Tufts would "do [the partnership] agreement ... later on." According to Tufts, Frankel then advised, in Spinosa's presence, that because the agreement was not in writing and Tufts was not currently receiving any benefit from it, he did not need to disclose his interest in the company in the bankruptcy proceeding. Relying on Frankel's advice, Tufts did not list any such interest on his bankruptcy schedules.

The bankruptcy court granted Tufts a discharge in December 2009.[3] Thereafter, Tufts asked Spinosa to formalize the partnership agreement, but Spinosa brushed his requests aside. Eventually, in late 2012, Tufts hired an attorney to help reduce the agreement to writing. But before the attorney could meet with Spinosa, Tufts and Spinosa had an argument, which led to a physical altercation, after Tufts asked again to formalize the agreement. Spinosa fired Tufts that day.

Several months later, in May 2013, Spinosa and the company commenced this action against Tufts, seeking a harassment prevention order.[4] Tufts counterclaimed alleging, ****898** as pertinent here, that Spinosa and the company (defendants[5]) committed a breach of the partnership agreement, misrepresented that Tufts would acquire an interest in the company to induce him to further its business, and failed to pay him prevailing wages. These counterclaims proceeded to trial in July 2017.

Tufts rested his case-in-chief on the ninth day of trial. Immediately thereafter, the defendants stipulated -- now over four years into the litigation -- that Spinosa and Tufts had in fact agreed to "a 50/50 partnership" as of January 15, 2008. The defendants then for the first time raised a defense of judicial estoppel, ***5** arguing that Tufts could not assert claims based on the partnership agreement because he failed to disclose it during the bankruptcy proceeding. At this point in the trial, the parties had spent, by the judge's estimation, "[p]robably eight and a half [days] ... on the issue of partnership." As a result, the judge found that the stipulation was not "made as [a] matter of expediency or judicial economy or for the convenience of the [c]ourt"; rather, it was "a strategic decision" made solely to "set[ ] up an appealable issue." The judge also stated that he was not convinced that judicial estoppel applied because Spinosa participated in the bankruptcy and did not have clean hands.

The judge thus allowed the trial to go forward, hearing thirteen days of testimony in total. At the close of testimony, the judge found in favor of Tufts on his claims for breach of contract and misrepresentation and awarded damages of $1.2 million and $134,000 on those claims, respectively. On the claim for prevailing wages, the judge awarded Tufts $45,071 (mandatorily trebled, pursuant to G. L. c. 149, § 27, to $135,213), finding that he performed "primarily laborer functions" on public works jobs and was therefore owed prevailing wages for those hours.

Discussion. The defendants raise the following arguments on appeal, which we address in turn: (1) given Tufts's failure to disclose his interest in the company on his bankruptcy schedules, the judge abused his discretion in declining to apply judicial estoppel to Tufts's claims for breach of contract and misrepresentation; (2) given that same failure, Tufts lacks standing to pursue his breach of contract and misrepresentation claims; (3) the evidence did not support the awards for breach of contract and misrepresentation damages; (4) the judge erred as a matter of law in concluding that Tufts,

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as an owner of the company, was owed prevailing wages; and (5) if Tufts was owed prevailing wages, the evidence did not support the amount of the award.

[1] **[2]** **[3]** **[4]** 1. Judicial estoppel. Judicial estoppel is an equitable doctrine that "is properly invoked whenever a 'party is seeking to use the judicial process in an inconsistent way that courts should not tolerate.' " Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640, 824 N.E.2d 23 (2005), quoting East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623, 664 N.E.2d 446 (1996). A successful claim of judicial estoppel generally requires the showing of two core elements: (1) the party to be estopped is asserting a position that is "directly contrary" to a position asserted in a prior case, and (2) that party "succeeded in convincing the court to accept its prior position." ***6** Otis, supra at 641, 824 N.E.2d 23. But even if these elements are met, a judge may decline to apply judicial estoppel where it is not appropriate to ****899** serve the doctrine's purpose, which is "to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the judicial system." Id. at 642, 824 N.E.2d 23, quoting Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 33 (1st Cir. 2004). In this regard the doctrine is not susceptible of "an exhaustive formula for determining [its] applicability," Otis, supra at 640, 824 N.E.2d 23, quoting New Hampshire v. Maine, 532 U.S. 742, 751, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), and the Supreme Judicial Court has "decline[d] to construct a categorical list of requirements or to delineate each and every possible exception." Otis, supra at 642, 824 N.E.2d 23. Instead, judges are to "use their discretion, and their weighing of the equities, and apply judicial estoppel where appropriate to serve its over-all purpose." Id.

Our review on appeal is for abuse of discretion, see Otis, 443 Mass. at 640, 824 N.E.2d 23, which occurs when a judge makes a "clear error of judgment in weighing the factors relevant to the decision ... such that the decision falls outside the range of reasonable alternatives" (quotation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014). Here, it is apparent that the judge found, or at least presumed, that the defendants established the two core elements of judicial estoppel. [6] The issue before us is whether the judge abused his discretion in nonetheless declining to apply the doctrine on the ground that Spinosa had unclean hands. [7] We conclude that the judge was within his discretion.

[5] The judge properly invoked the maxim that one "who comes into equity must come with clean hands." Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814, 65 S.Ct. 993, 89 L.Ed. 1381 (1945). The doors of equity are thus closed "to one tainted with inequitableness or bad faith relative to the matter in which ***7** he seeks relief, however improper may have been the behavior of the [other party]." Id. Accord Fidelity Mgt. & Research Co. v. Ostrander, 40 Mass. App. Ct. 195, 200, 662 N.E.2d 699 (1996). "This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant." Precision Instrument Mfg. Co., supra at 815, 65 S.Ct. 993. Accord Fales v. Glass, 9 Mass. App. Ct. 570, 575, 402 N.E.2d 1100 (1980).

[6] Based on the evidence at trial, the judge was warranted in concluding that Spinosa had unclean hands relative to his defense of judicial estoppel. As the judge found, Spinosa was involved in the bankruptcy and participated in the "fudging of the schedules." Contrary to the defendants' assertion, this finding was supported by the evidence -- in particular, Tufts's testimony that Spinosa paid for ****900** Frankel's services and attended meetings, at which he made statements suggesting that Tufts's partnership interest had not yet vested. In addition, Tufts testified directly that Spinosa "knew the schedule" and "knew exactly what was going on." The judge could also have inferred Spinosa's complicity from the fact that he, and not just Tufts, stood possibly to benefit from concealing Tufts's interest in the company from his creditors because, prior to the bankruptcy, Tufts transferred to the defendants valuable hard assets that might otherwise have been subject to claims by the creditors. [8]

[7] **[8]** The defendants argue in the alternative that, even if Spinosa acted in bad faith, the unclean hands doctrine cannot be applied in the judicial estoppel context as a matter of law. This is so, they say, because "the only exceptions justifying the exercise of discretion not to [apply judicial estoppel] turn on the innocence of the [party to be estopped]," rather than the blameworthiness of the party seeking to invoke estoppel. Again, however, the Supreme Judicial Court has declined to construct a categorical list of exceptions to the application of judicial estoppel. See Otis, 443 Mass. at 642, 824 N.E.2d 23. And we see no reason why unclean hands could not be an exception. The unclean hands doctrine allows a judge

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to ***8** deny equitable relief to one who has acted in bad faith. Judicial estoppel has its underpinnings in equity. It thus follows that "[a] party cannot rely on judicial estoppel if it comes to the court with unclean hands." Galaz v. Katona, 841 F.3d 316, 326 (5th Cir. 2016). See Mason v. Lowe, U.S. Bankr. Ct., No. 11-10251, slip op. at 21, 2012 WL 733834 (Bankr. E.D. Tenn. Mar. 6, 2012) ("Courts have refused to apply the doctrine of judicial estoppel where there is a question regarding whether the party seeking to benefit from the application of the doctrine is guilty of 'unclean hands' "). Cf. Fidelity Mgt. & Research Co., 40 Mass. App. Ct. at 200-201, 662 N.E.2d 699 (equitable defenses of acquiescence and ratification unavailable to party with unclean hands).

[9] The defendants further argue that the judge abused his discretion by excluding certain evidence -- the transcript of the creditors' meeting, see 11 U.S.C. § 341(a), and Frankel's testimony about the advice he gave Tufts -- which they say was relevant to judicial estoppel. But the judge excluded the transcript partly on the ground that the defendants' request to admit it was untimely, and the defendants fail to explain why this was error. As for Frankel's testimony, the judge found that Tufts waived attorney-client privilege only with respect to conversations he had with Frankel in Spinosa's presence; Frankel, however, stated that he could not recall "what may have been spoken at those particular meetings [that Spinosa attended] versus other meetings." The judge thus properly found that Frankel would not "be able to offer ... evidence ... that will be helpful ... and also that will not impose on the attorney/client privilege."

In any event, the defendants suffered no prejudice from either evidentiary ruling. The defendants sought to admit the evidence to show that Tufts's failure to disclose his partnership interest was not in ****901** good faith or inadvertent. But it is clear that the judge declined to apply judicial estoppel because of Spinosa's unclean hands -- in other words, because Spinosa acted in bad faith, not because Tufts acted in good faith. As the proffered evidence was not relevant to that issue, the defendants fail to show that they were prejudiced.

[10] 2. Standing. For the first time on appeal, the defendants contend that Tufts's failure to disclose his partnership interest deprives him of standing to pursue his breach of contract and misrepresentation claims. As their argument goes, "[b]ecause the asset was never listed on [the] schedules, it could not have been abandoned by the bankruptcy trustee, and because it was never ***9** abandoned, it never revested in ... Tufts"; thus, they argue, Tufts does not "own[ ]" his claims "as the trustee's continuing ownership ... occurred by operation of law." We disagree.

[11] As an initial matter, the defendants cite no authority that supports their assertion that the issue is one of nonwaivable subject matter jurisdiction. See Zora v. State Ethics Comm'n, 415 Mass. 640, 642 n.3, 615 N.E.2d 180 (1993) ("bald assertions" with no supporting authority are waived). The defendants do not address the general rule that, where a former debtor asserts claims belonging to the bankruptcy estate, the "usual remedy is to substitute as the real party in interest the trustee of the bankruptcy estate in the place and stead of the former debtor." Holland v. Kantrovitz & Kantrovitz LLP, 92 Mass. App. Ct. 66, 73, 81 N.E.3d 774 (2017), quoting Rousseau v. Diemer, 24 F. Supp. 2d 137, 143 (D. Mass. 1998). Nor do they address the applicability of Mass. R. Civ. P. 17 (a), 461 Mass. 1401 (2011), which provides that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest."

[12] Even assuming the argument is properly before us, the defendants have not shown that Tufts lacked standing to assert his claims. A claim is deemed to be part of a bankruptcy estate if it has accrued under State law as of the filing of the petition. See 11 U.S.C. § 541(a)(1); White v. Gaffney, 603 B.R. 247, 252 (Bankr. D. Mass. 2019); Holland, 92 Mass. App. Ct. at 70-71, 81 N.E.3d 774. The defendants do not, and could not reasonably, argue that Tufts's claims had accrued when he filed his bankruptcy petition. See Hendrickson v. Sears, 365 Mass. 83, 89, 310 N.E.2d 131 (1974) (in general, claim "accrues on the happening of an event likely to put the plaintiff on notice"). Tufts therefore had standing to pursue his claims in this action. See Holland, supra at 71, 81 N.E.3d 774. [9]

[13] 3. Breach of contract and misrepresentation damages. Turning to the challenges to the damages awards, we must first address Tufts's assertion that the defendants waived these challenges by ***10** electing to proceed under Rule 20 (2) (h) of the Rules of the Superior Court, which ****902** became

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effective on January 1, 2017. This rule, together with Superior Court Standing Order 1-17, [10] allows parties in jury-waived civil trials to waive "detailed written findings of fact and rulings of law" and instead submit to the judge "special questions on the elements of each claim." Tufts argues that, because the defendants agreed to this procedure, they are now precluded from challenging the evidence supporting the damages awards -- an issue that he says depends on the existence of detailed written findings of fact from the judge.

We conclude, to the contrary, that the defendants did not waive appellate review. As Standing Order 1-17 states, "the phrase 'waiver of detailed written findings of fact' means waiver of written judicial findings with the level of detail required by Mass. R. Civ. P. 52(a). It does not mean waiver of findings that provide the equivalent of a jury verdict within the meaning of Mass. R. Civ. P. 49." As a result, when parties elect to proceed under Superior Court Rule 20 (2) (h), the judge must still "at a minimum, answer special questions on the elements of each claim, at a level of detail comparable to a special jury verdict form pursuant to Mass. R. Civ. P. 49(a), unless the parties explicitly choose, or the judge expressly orders, findings in the form provided by Mass. R. Civ. P. 49(b) (a general verdict accompanied by answer to interrogatories)." Superior Court Standing Order 1-17 (2)(a). Absent agreement otherwise, the parties can then obtain "appellate review of the court's decision and of the judgment entered ... according to the standard of review that would apply to a verdict by a jury in a case tried to a jury and to the judgment entered thereon." Superior Court Standing Order 1-17(2)(b).

[14] **[15]** Here, the standard of review we would apply in assessing the evidence supporting a jury's award of damages is highly deferential: to overturn such an award, we would have to determine that it was "clearly excessive in relation to what the plaintiff's evidence ha[d] demonstrated damages to be." Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367, 404, 822 N.E.2d 667, cert. denied sub nom. Globe Newspaper Co. v. Ayash, 546 U.S. 927, 126 S.Ct. 397, 163 L.Ed.2d 275 (2005). This standard does not require "mathematical precision." Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 609, 864 N.E.2d 518 (2007). Rather, so long as there was "[e]vidence ***11** that enable[d] the jury to arrive at a reasonably approximate estimate of damages," the award will stand on appeal. Id.

[16] Viewing the evidence through this deferential lens, we conclude that there was an adequate factual basis to support the award of $1.2 million in breach of contract damages. Tufts testified that, in his opinion, the company had a value of around $3 million as of February 2013. He explained that he calculated that value from a revenue report showing annual snow-removal and construction-related revenues for the years 2008 through 2012. Because overhead on snow-removal services was minimal, Tufts determined that the profit margin for those jobs was seventy-five percent, whereas for construction jobs the profit margin was at least twenty-five percent. Multiplying those respective percentages by the revenues shown on the report, Tufts estimated that the company made an annual profit of around $1 million. Based on that number, Tufts determined that the company was worth $3 million, even accepting Spinosa's claim that it had ****903** $1.4 million in debt and assigning no value to equipment that was encumbered.

[17] The defendants assert that the judge could not rely on this testimony because Tufts was not sufficiently familiar with the company's financial affairs. We disagree. The judge found Tufts qualified to give an opinion about the company's value because, as "an owner of a small business," he was "fully aware of the contracts that the business had" and "fully aware of [its] liabilities." The defendants have not shown this to be an abuse of discretion. See Fed. R. Evid. 701, Advisory Committee Notes to 2000 Amendments ("most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business ... because of the particularized knowledge that the witness has by virtue of his or her position in the business"); Mass. G. Evid. § 701 note ("This section [addressing opinion testimony by lay witnesses], which is taken nearly verbatim from Fed. R. Evid. 701, reflects Massachusetts practice").

We likewise reject the defendants' assertion that the award must be vacated because there was evidence showing that the company was not profitable. While the evidence that Tufts offered on damages was certainly far from robust, the judge was entitled to credit it over the defendants' evidence. Indeed, at a posttrial hearing, the judge stated that "Tufts gave a value of the partnership and the other parties gave a value of their partnership and the [c]ourt found one more credible than the other" with "some deductions perhaps." In the end we conclude that Tufts's testimony "provided ***12** a sufficiently

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(if minimally) rational basis" to prove his breach of contract damages. Brewster Wallcovering Co., 68 Mass. App. Ct. at 611, 864 N.E.2d 518.

[18] **[19]** We reach a different conclusion, however, with regard to the $134,000 award for misrepresentation damages. The measure of damages on a misrepresentation claim is "the difference between the value of what [the plaintiff] has received and the actual value of what he would have received if the representations had been true." Rice v. Price, 340 Mass. 502, 507, 164 N.E.2d 891 (1960). The false representation here, the judge found, was Spinosa's "promise to enter into a partnership with ... Tufts, without intending to do so, for the purpose of inducing ... Tufts to solicit business for the benefit of [the company] to ... Tufts's detriment." The judge then quantified damages as the "financial loss caused by [Tufts's] reasonable reliance on the aforesaid false representation." We agree with the defendants that these damages are duplicative of the breach of contract damages. For both claims the measure of damages was what Tufts would have received had Spinosa followed through on his promise of a partnership. See Productora e Importadora de Papel, S.A. de C.V. v. Fleming, 376 Mass. 826, 838, 383 N.E.2d 1129 (1978) (plaintiff's "recovery would be the same whether [defendant] were liable on a deceit or on a contract theory: in either case, damages would be measured by the difference in value between the performance promised to [plaintiff] and that actually rendered").[11] As recovery of ****904** duplicative damages is not permitted, see Szalla v. Locke, 421 Mass. 448, 453, 657 N.E.2d 1267 (1995), this portion of the judgment must be reversed.

[20] 4. Entitlement to prevailing wages. We turn next to the defendants' argument that the judge erred as a matter of law in determining that Tufts, a coowner of the company, was owed prevailing ***13** wages. The purpose of the prevailing wage law, G. L. c. 149, §§ 26-27H, is "to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry." Mullally v. Waste Mgt. of Mass., Inc., 452 Mass. 526, 532, 895 N.E.2d 1277 (2008). To that end "[t]he prevailing wage law requires that contractors and subcontractors on every public works construction project pay the 'mechanics and apprentices, teamsters, chauffeurs and laborers' working on the project at the prevailing wage rate assigned to the various job classifications performing the work." Lighthouse Masonry, Inc. v. Division of Admin. Law Appeals, 466 Mass. 692, 697, 1 N.E.3d 752 (2013), quoting G. L. c. 149, § 26.

On March 10, 2000, the Department of Labor Standards (department), through its predecessor agency the Division of Occupational Safety, issued an opinion letter[12] addressing whether the prevailing wage law applies to an owner-operator of a company. The department concluded that "legitimate owner-operators" are not required "to pay themselves the prevailing wage for public works construction in which they engage," save for one exception, discussed further infra, applicable to transporting gravel or fill to or from a public works site.[13] The department reaffirmed this conclusion in an opinion letter issued on May 8, 2013,[14] while announcing that prospectively it would "adopt the [F]ederal test, under the Davis Bacon Act [40 U.S.C. § 3142] to establish a bright line to determine whether an individual qualifies as a legitimate 'owner/operator' under the [p]revailing [w]age [l]aw." See Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 170, 732 N.E.2d 289 (2000) (in interpreting State statutes, courts "may look to interpretations of analogous Federal statutes for guidance"). That test defines "a bona fide executive" to include "any employee who owns at least a bona fide [twenty]-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management." 29 C.F.R. § 541.101. Any person meeting this definition, the department determined, is an owner-operator "not subject to the prevailing wage requirements."

***14** **[21]** **[22]** As the parties agree, the department's interpretations of the prevailing wage law are entitled to deference unless "contradicted by the text or purpose ****905** of the underlying statute." Sullivan v. Sleepy's LLC, 482 Mass. 227, 238, 121 N.E.3d 1210 (2019). See Niles v. Huntington Controls, Inc., 92 Mass. App. Ct. 15, 21-22, 81 N.E.3d 805 (2017). Here, we defer to the department's March 10, 2000, opinion letter, which reasonably construed the prevailing wage law to exclude owner-operators from its scope (with the limited exception of those engaged in the transport of gravel or fill). As the department observed, the prevailing wage law uses the terms "employer" and "employee" throughout its text, showing that it was meant to apply in "the context of the employment relationship."[15] The statute's text and purpose therefore support the department's

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conclusion that, with the aforementioned exception, "it is only employees that must be paid the prevailing wage on public works construction projects." Cf. O'Connor v. Kadrmas, 96 Mass. App. Ct. 273, 288, 135 N.E.3d 226 (2019) (distributions made under stock agreement not "wages" within meaning of Wage Act because "[m]ost fundamentally, they are not compensation from an employer to an employee, but rather profit distributions to shareholders to which they are entitled because of their ownership interest in the corporation, not because of their employment").

The department's reading is also consistent with the statute's treatment of owner-operators engaged in the particular work of transporting gravel or fill. Specifically, G. L. c. 149, § 27, first par., provides that prevailing wages must be paid to "all persons engaged in transporting gravel or fill to the site of ... public works or removing gravel or fill from such site, regardless of whether such persons are employed by a contractor or subcontractor or are independent contractors or owner-operators" (emphasis added). The express inclusion of owner-operators engaged in gravel or fill transport supports reading the statute to exclude ***15** owner-operators engaged in other types of work. See Skawski v. Greenfield Investors Prop. Dev. LLC, 473 Mass. 580, 588, 45 N.E.3d 561 (2016) ("the expression of one thing in a statute is an implied exclusion of other things not included in the statute" [citation omitted]). While we acknowledge that this maxim of statutory construction is to be applied "with caution," it is still a useful aid where, as here, it "furthers the legislative purpose" and "corroborates a reasonable interpretation." Phillips v. Equity Residential Mgt., L.L.C., 478 Mass. 251, 259 n.19, 85 N.E.3d 12 (2017).

[23] The question remains whether Tufts qualifies as a "legitimate owner-operator" under the test adopted in the department's May 8, 2013, opinion letter. According to Tufts he does not so qualify because he was not "actively engaged in [the] management" of the company as required by the second part of the test. 29 C.F.R. § 541.101. He points out in this regard that the judge found on the special questions and findings form that Tufts performed "primarily laborer functions," not "executive functions," on the "prevailing wage jobs that ... Tufts worked for ****906** [the company]." We agree with the defendants that this finding is not dispositive of the issue, however, because the owner-operator test looks not to a person's role on any particular job, but to whether that person is actively engaged in the management of the over-all "enterprise in which [he] is employed." Thus, that a person may sometimes perform nonexecutive functions does not necessarily take him outside the scope of the owner-operator exemption. See 29 C.F.R. § 541.106(a) ("Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption ...").

That said, the defendants have failed to show that there was no evidence on which the judge could have found in favor of Tufts on the issue. Again, we review the judge's decision under the same standard "that would apply to a verdict by a jury in a case tried to a jury and to the judgment entered thereon." Superior Court Standing Order 1-17(2)(b). That standard requires us to "evaluate whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be made in favor of the' " party who prevailed at trial. O'Brien v. Pearson, 449 Mass. 377, 383, 868 N.E.2d 118 (2007), quoting Turnpike Motors, Inc. v. Newbury Group, Inc., 413 Mass. 119, 121, 596 N.E.2d 989 (1992). Cf. Motsis v. Ming's Supermkt., Inc., 96 Mass. App. Ct. 371, 379-380 & n.20, 134 N.E.3d 610 (2019).

Viewed favorably to Tufts, the evidence supported a finding that he was not "actively engaged in [the] management" of the ***16** company under the second part of the owner-operator test. In their principal brief, the defendants do not even mention this part of the test, let alone explain why the evidence did not justify a finding in Tufts's favor. They address the issue for the first time in their reply brief and, for this reason alone, have failed to show that the judge erred. See Commonwealth v. Stewart, 460 Mass. 817, 831, 957 N.E.2d 712 (2011) (argument raised for first time in reply brief is waived).

Despite the waiver, we have reviewed the arguments in the defendants' reply brief and conclude that they do not warrant reversal. The defendants correctly observe that there was evidence that Tufts performed job functions that are typically considered to be managerial: for instance, he was involved in obtaining contracts for the company, hiring subcontractors and suppliers, preparing and submitting bids, and disciplining employees. [16] But it does not automatically follow, as the defendants argue, that he was therefore "undoubtedly actively engaged in management of the enterprise." This is because

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the evidence showed (and the judge found on the special questions form) that Tufts also worked for the company as a laborer.

In this situation it was the defendants' burden to show that Tufts's "primary **907 duty" was "the performance of exempt work." [17] 29 C.F.R. § 541.700. Cf. Goodrow, 432 Mass. at 170-172, 732 N.E.2d 289 (borrowing from Federal regulation to determine whether defendant met burden of showing that plaintiff fell within "bona fide executive" exemption to overtime statute). The judge could have found that the defendants did not meet this burden, given the evidence that Tufts spent a considerable portion of his time working *17 as a laborer. Cf. id. at 172, 732 N.E.2d 289 (despite "temporary assumption of managerial duties," plaintiff not "bona fide executive" because "[a]s a rule of thumb, for tasks to constitute an employee's primary duty, the employee must devote more than fifty percent of [his or her] time to these duties" [quotation and citation omitted]). [18] To the extent the defendants argue that the basis of the judge's finding is unclear, that argument is waived. See Superior Court Standing Order 1-17(2)(b) ("The parties waive all arguments ... on appeal that require or depend upon the existence of detailed written findings of fact"). [19]

[24] 5. Prevailing wage damages. We reach the defendants' last argument that the evidence did not support the award on prevailing wage damages. The defendants assert that, because the judge found on the special questions form that Tufts was not entitled to overtime pay, the judge was required "to exclude wage claims above [forty] hours per week from the damages award" (emphasis omitted). But the premise of this argument is incorrect; what the judge found was that Tufts was not owed overtime "on jobs that were not prevailing wage projects." Thus, because the overtime claim did not encompass hours that Tufts worked on prevailing wage jobs, the judge's rejection of that claim did not require a corresponding reduction of the prevailing wage damages.

The defendants also assert that for various reasons Tufts's testimony on damages was "inherently unbelievable" and "internally inconsistent," requiring vacatur of the entire award. These arguments require little discussion. It is clear that the judge paid close attention to the evidence, and he awarded Tufts far less than his claimed damages of $177,000. In the end the defendants have not shown either that the judge abused his discretion in crediting Tufts's testimony or that the award was "clearly excessive" relative *18 to the evidence. Ayash, 443 Mass. at 404, 822 N.E.2d 667.

[25] 6. Attorney's fees. Tufts has requested appellate attorney's fees under G. L. c. 149, § 27, which provides that a plaintiff who prevails in an action to recover prevailing wages "shall ... be awarded the costs of the litigation and reasonable attorneys' fees." This provision entitles **908 Tufts to appellate fees. See Lowell v. Massachusetts Comm'n Against Discrimination, 65 Mass. App. Ct. 356, 357, 840 N.E.2d 553 (2006) (statutory entitlement to fees "extends to appellate fees"). Contending otherwise, the defendants note that the judge denied Tufts's motion for fees (on the ground that the motion lacked specificity), and Tufts did not cross-appeal from the denial of that motion. But we see no reason why the lack of a cross appeal precludes Tufts from seeking appellate fees. As Tufts does not seek to overturn the judge's order denying fees, no cross appeal was necessary.

Tufts is therefore entitled to a reasonable fee that reflects the time spent to defend that part of the judgment concerning the claim for prevailing wages. [20] Tufts may submit an application for such fees and for costs, with supporting documentation, to this court within fourteen days of the issuance of the rescript. See Fabre v. Walton, 441 Mass. 9, 10-11, 802 N.E.2d 1030 (2004). The defendants shall have fourteen days to respond.

Conclusion. So much of the judgment as awards damages on count IV of the counterclaim (fraud/deceit and misrepresentation) is reversed. The judgment is otherwise affirmed.

So ordered.

All Citations

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Footnotes

1 Tufts, Inc.

2 After the first day of trial, the parties agreed, pursuant to Rule 20 (2) (h) of the Rules of the Superior Court, to waive detailed written findings of fact and rulings of law in favor of special questions to be submitted to the judge.

3 Tufts Transportation, Inc., which had also filed for bankruptcy, received a discharge in May 2010.

4 Spinosa and the company voluntarily dismissed their complaint prior to trial.

5 For convenience, we will hereafter refer to Spinosa and the company, the defendants in counterclaim, as the defendants.

6 The judge specifically noted that Tufts's current claim that he had a partnership interest in the company was inconsistent with the position he took during the bankruptcy proceeding. In addition, Tufts did not dispute that he succeeded in convincing the bankruptcy court to accept his prior position. See Guay v. Burack, 677 F.3d 10, 18 (1st Cir. 2012) ("A bankruptcy court 'accepts' a position taken in the form of omissions from bankruptcy schedules when it grants the debtor relief, such as discharge, on the basis of those filings").

7 We reject Tufts's contention that the defendants waived judicial estoppel by failing to raise it as a defense in their answer to the counterclaims. Tufts did not argue waiver at trial, and the judge addressed the defense on the merits. We thus consider the defense to be properly asserted. See Larson v. Larson, 30 Mass. App. Ct. 418, 426 n.11, 569 N.E.2d 406 (1991).

8 The judge suggested several times at trial that both Spinosa and Tufts had unclean hands, at one point stating, "[T]hese two don't make it easy to make any decision based on their testimony, [be]cause ... they've shown they're willing to do anything, as long as it benefits themselves and it benefits ... their interests. They'll sign anything. Whether ... it's a bankruptcy petition, whatever." At another point the judge stated, "[T]he evidence isn't getting better for either party. ... I don't know what's real and what's not real. ... Neither did the bankruptcy court."

9 This is not to say that the bankruptcy trustee has no interest in the judgment that Tufts recovered. Had Tufts disclosed the partnership agreement in the bankruptcy proceeding, the trustee might well have had an interest in pursuing Tufts's current claims on behalf of the estate and its creditors. Cf. Holland, 92 Mass. App. Ct. at 72-73, 81 N.E.3d 774. Thus, to ensure that the trustee is on notice of the judgment, the clerk of this court is directed to provide a copy of this opinion, within fourteen days of its issuance, to the trustee and to the bankruptcy court.

10 Standing Order 1-17 was in effect at the time of trial. It has since been superseded by Rule 20 (8) of the Rules of the Superior Court (2018), which is substantially identical.

11 Indeed, in his brief, Tufts fails to respond to the substance of the defendants' argument in any meaningful way. While Tufts does assert that the defendants waived the argument by not raising it in a motion for a new trial, he cites no authority holding that such a motion is required when a case is tried jury-waived. See Mass. R. Civ. P. 52 (b), as amended, 423 Mass. 1402 (1996) ("When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or

has made a motion to amend them or a motion for judgment”). Cf. Shafir v. Steele, 431 Mass. 365, 371, 727 N.E.2d 1140 (2000), quoting Pridgen v. Boston Hous. Auth., 364 Mass. 696, 715, 308 N.E.2d 467 (1974) (in cases tried by jury, “[q]uestions concerning inadequate or excessive damages are initially within the discretion of the trial judge and should ordinarily be raised by bringing a motion for a new trial”).

12 Opinion letters regarding prevailing wage claims dating back to 1960 are posted on the department's official website. See https://www.mass.gov/service-details/prevailing-wage-opinion-letters [https://perma.cc/LK56-VNNX] .

13 In its letter of March 10, 2000, the department noted that it has “historically interpreted” the statute in this way.

14 Both opinion letters were before the judge.

15 The examples are numerous. See, e.g., G. L. c. 149, § 27, first par. (department required to establish prevailing wage rate schedules for “the jobs upon which mechanics and apprentices, teamsters, chauffeurs and laborers are to be employed,” and those schedules “shall continue to be the minimum rate or rates of wages for said employees during the life of the [public works] contract”; schedules “shall include payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans,” and “[a]ny employer engaged in the construction of [public] works who does not make payments to” such plans “shall pay the amount of said payments directly to each employee”); G. L. c. 149, § 27, fourth par. (“employee claiming to be aggrieved by a violation of this section may” file civil action).

16 See 29 C.F.R. § 541.102 (“Generally, ‘management’ includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures”).

17 The defendants acknowledged at trial that, because Tufts wore “multiple hats,” the judge had to look at his duties “as a whole” and determine “what his primary responsibility was.”

18 See also 29 C.F.R. § 541.700(a) (“Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee”).

19 The defendants have also waived any argument that the judge's resolution of the prevailing wage claim was inconsistent with his finding that Tufts was qualified to testify to business valuation as an “owner.” We note in any event that the judge's determination that Tufts had sufficient knowledge of the company's “contracts” and “liabilities” to give a lay opinion about value did not require the judge to conclude that Tufts devoted a primary portion of his time to managerial duties.

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20 As the defendants' appeal was not frivolous, we decline to exercise our discretion to award additional fees on that basis.

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