NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5417-11T4

NEIL KAHANOVITZ, M.D.,

Plaintiff-Respondent,

v.

ELECTRO-BIOLOGY, INC., and
EBI, LLC,

Defendants-Appellants,

and

BIOMET, INC.,

Defendant.

Argued April 30, 2013 – Decided July 30, 2013

Before Judges Alvarez, Waugh and St. John.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-8-09.

E. Evans Wohlforth, Jr., argued the cause for appellant (Gibbons P.C., attorneys; Mr. Wohlforth and Jonathan D. Klein, on the briefs).

G. Martin Meyers argued the cause for respondent.

PER CURIAM

Defendants Electro-Biology, Inc. and EBI, LLC (collectively EBI)[1] appeal a jury's award of $2,687,500 in damages to plaintiff Neil Kahanovitz, M.D. EBI also appeals the denial of its motion for judgment notwithstanding the verdict (JNOV) or a new trial. We affirm.

Kahanovitz previously appealed a grant of summary judgment to EBI and prevailed. See Kahanovitz v. Electro-Biology, Inc., No. A-3635-09 (App. Div. Jan. 27, 2011) (slip op. at 25). We affirmed the dismissal of plaintiff's other claims and remanded for a "fuller exploration of the facts through discovery" on plaintiff's breach of contract claim. Id. at 23-25. Thereafter, both parties moved for summary judgment unsuccessfully, and the proceedings concluded with the trial and verdict now in dispute.

We glean the following facts from the trial record and submissions of the parties. Kahanovitz and EBI entered into a series of agreements, starting in 1992, including a "Consulting Agreement" in January 1998, and an "Amendment of Consulting Agreement" in November 1998. In 2004 the parties entered into a contract, now in dispute, titled "Assignment and Second Amendment of Consulting Agreement" (2004 Agreement)

[1] Biomet, Inc., EBI's parent company, was previously dismissed from the proceedings.

incorporating the prior agreements from 1998. EBI executives James Pastena, then CEO, and Dan Page, a former Senior Vice President of Research, negotiated the 2004 Agreement which Page then signed on behalf of EBI. Marcial Perez, then Senior Vice President of Sales Marketing and Business Development, advised Pastena on the matter. John Blumers, EBI's Vice President and Division General Counsel, drafted the 2004 Agreement.

While these agreements were in effect, Kahanovitz served as an advisor to EBI's CEO. However, Pastena left his position at EBI in 2005, at which time EBI's leadership changed hands. Thereafter, around 2006 or 2007, EBI's new management sold the company to a venture capital firm.

During the trial, portions of Page's deposition were read aloud to the jury by both parties' counsel. Pastena and Perez testified on Kahanovitz's behalf while Blumers testified for EBI. Both Pastena and Perez had filed suit against EBI after their discharges from employment in 2005 and 2006 respectively, but their claims were amicably settled. Page's employment with EBI also ended before November 30, 2008.

At trial, EBI contended that Section 4 of the 2004 Agreement, which states that "This Agreement shall terminate on November 30, 2008 unless sooner terminated," fixed the termination date.

The disputed provision of the 2004 Agreement, Section 3(a)(v), states:

> Notwithstanding the above, during the Term of this Agreement and for so long as Kahanovitz is performing Services within the Agreement Field, EBI shall guarantee Kahanovitz a minimum annual royalty payment equal to two hundred and fifty thousand dollars ($250,000.00) per fiscal year. Said minimum royalty shall be paid in four equal quarterly installments. Minimum quarterly payments will be reconciled with actual royalties earned at the end of each fiscal year.
>
> [(Emphasis added).]

The issue is whether the annual $250,000 payment was due even after the November 30, 2008 date referenced in the 2004 Agreement so long as Kahanovitz continued to practice as an orthopedic surgeon.

Section 2, entitled "Duties and Responsibilities" replaced Section 3 of the earlier Consulting Agreement with "2. Duties and Responsibilities of Kahanovitz." It delineates the following obligations:

> During the term of this Agreement, Kahanovitz shall, from time to time at the request of EBI, make himself available to provide consulting services in connection with EBI's spinal products. Services shall include, but not be limited to, the following:
>
> - Provide advice and guidance with respect to the development and expansion of EBI's

spine product line and related instrumentation;

- Evaluate new products and related instrumentation;
- Provide advice and guidance on research projects, publications and clinical studies;
- Participate in EBI's quarterly New Product Steering Committee Meetings;
- Participate in EBI's Spine Core Panel;
- Consult with Senior Management on trends in spine surgery and reimbursement; and
- Publish and present at various meetings, conferences, trade shows and journals.

The parties understand and agree that, in performing these services, Kahanovitz may be required to travel an average of three to four days each calendar month. The parties shall schedule travel so that it will not unreasonably interfere with Kahanovitz's medical practice.

For purposes of this Agreement, all services offered pursuant to this Section 3 shall constitute the "Agreement Field." Kahanovitz shall devote a reasonable amount of his business, time, attention and best efforts in carrying out his obligations under this Agreement.

Kahanovitz shall keep detailed records of all services provided pursuant to this Section 3 and submit thereof to EBI at least quarterly.

[(Emphasis added).]

Section 13, a non-competition clause from the January 1998 agreement, stated the following:

> As part of the consideration for EBI's retaining Kahanovitz and in order to further protect EBI's Confidential Information, Kahanovitz shall not, during the term of this Agreement and for a period of six (6)

> months immediately following the termination of this Agreement, directly or indirectly, on his own behalf or on behalf of any person, corporation, partnership or other entity other than EBI, whether as an agent, employee, consultant or in any other capacity, engage in the design, development, within the Agreement Field. The restriction contained herein shall apply throughout the United States, Western Europe and Japan.

The January 1998 Agreement also contained a "zipper clause": "This Agreement contains the entire agreement of the parties hereto with respect to the subject matter hereof and shall be deemed to supersede all prior agreements."

In the 2004 Agreement, it was stipulated that Kahanovitz would receive one-eighth of a percent of revenues generated by sixteen products listed in Section 3(a)(i), with a bonus royalty if the sales exceeded the forecast by a certain percentage fixed in Section 3(a)(ii) and (iii). Royalty payments were plaintiff's only form of compensation. Kahanovitz took the position that as described in Section 3(a)(v), regardless of sales, he was supposed to receive a minimum of $250,000 in annual royalty payments per fiscal year.

According to Kahanovitz, in 2004 he became concerned because he had signed "[his] life's work" over to EBI. EBI owned "all of [his] intellectual property, and what that simply [meant was] that all of the research, all of [his] publications, all of the book chapters, everything that [he] had come up with

from a product development standpoint, from a research standpoint . . . [he] had to sign over exclusively to EBI." Kahanovitz owns no patent on any of the products he assisted in developing.

When Kahanovitz began with EBI their products were selling for $50 to $60 million dollars annually. By 2004, the products he assisted in developing were selling for $300 million a year. Therefore, Kahanovitz "wanted language put into this contract that [he] would continue to be compensated based on a royalty base of all the work that [he had] done in the last [twenty-five] years to allow EBI to sell 300 million dollars of product that [he] had been involved in developing, many of which would never have come to market had it not been for [his] work." Kahanovitz claimed that Pastena supported his view because Pastena "agreed that [Kahanovitz] had contributed an enormous amount to the development of products" and that he wanted both Kahanovitz and EBI to be protected.

Pastena "was the person that constructed the agreement, . . . the whole purpose of the agreement." Out of all the negotiators, Pastena had the most interaction with Kahanovitz. He negotiated the 2004 Agreement but did not draft it.

Pastena testified that the underlying purpose of the agreement encompassed a number of factors: "1) To take a leading light, a world renown figure . . . and lock him into the corporation . . . so nobody else could take advantage of his input" and 2) "because of the exclusivity" of the agreement, to "use him as an advisor" more generally. According to Pastena, "this royalty was to continue for as long as he was in the practice of medicine" and EBI "would have stated exactly if [it had] wanted it to end." In his view, that understanding was reflected in section (3)(a)(v).

Pastena also testified that Kahanovitz's consulting activities as previously defined would end on November 30, 2008, but that the royalty payments would continue so long as Kahanovitz was a practicing spine surgeon. The consulting agreement would be reviewed and modified at the end date if necessary. Pastena explained that as long as Kahanovitz "was working as a spine surgeon with his image, with his contacts, with his advice that's how long this would last."

As part of the Executive Management Team, Perez "discussed . . . strategies [as] to who[m] [EBI] would have these agreements with." Perez was "very involved in understanding what the nature of the agreement was." Because Kahanovitz was "very well respected" as a spine surgeon and also

the "President of the North American Spine Society," Perez understood EBI's "intent was to lock him into the relationship as long as [it] could and the intent was to keep it going as long as he could provide the services." The purpose of royalty payment language was to ensure that Kahanovitz received compensation "as long as [EBI was] selling the product, and as long as the person [involved] . . . c[ould] provide the service to support the sales of those products." As a result, so long as Kahanovitz continued to practice medicine, the royalty payments would continue.

Page was on the Research Committee which "approve[d] every written agreement between EBI and a consultant" and "ensure[d] that each of those contracts complied with all the governmental regulations and requirements." Page agreed in deposition that the services listed in the 2004 Agreement "Field" were the "types of services that the doctor had been performing for EBI prior to [the 2004] [A]greement." During the time Page was still at EBI and the contract not in dispute, Kahanovitz performed the services listed and was compensated pursuant to the terms of the 2004 Agreement.

Kahanovitz presented Page's deposition testimony in which he admitted he had earlier certified that the 2004 Agreement was "essentially a royalty agreement designed to provide royalty

payments . . . for the EBI products [Kahanovitz] had either developed, assisted in developing or assisted EBI in acquiring." "He would receive a minimum of $250,000 per year in royalty payments as long as he remained active in the practice of medicine as an orthopedic surgeon and made himself available to EBI to support product development and other services."

To counter Page's certification, EBI read aloud Page's deposition testimony stating that the "guarantee of one million dollars . . . cover[ed] the period '04 through '08" based on a minimum payment of $250,000 per year, but there was no guarantee of any money in 2009, 2010 or 2011. Page agreed that there was "no writing anywhere . . . that supports th[e] concept of an understanding beyond that date" and that it was "not written down" that "on a going forward basis Dr. Kahanovitz would receive a minimum of two fifty per year in royalties." He also agreed that there was no writing indicating "that these payments would continue as long as he remained active as an orthopedic surgeon." As far as Page knew, no EBI executive nor the Research Committee had approved any payments after 2008.

Blumers, who drafted the 2004 Agreement, though not the incorporated parts from the 1998 agreements, was not involved in the negotiations. He did not "interface with the doctor[]."

Blumers explained that the 2004 Agreement was titled "Assignment and Second Amendment of Consulting Agreement" because there were three parties to the agreement, Electro-Biology, Inc., EBI, and Kahanovitz; the rights and obligations of Electro-Biology were being assigned to EBI. He testified that in drafting section 3(a)(v) he tried to meet the company's compliance policies, because over the past decade, government agencies had more aggressively enforced regulations in the medical device industry.

Blumers testified that in May or June 2004, Biomet, EBI's parent company, adopted its Fraud and Abuse Compliance Policy which was in effect in December 2004, including the provision that payment be made only for services actually rendered. The policy forbids "a retainer agreement that only ensures a physician consultant's availability." He said the policy was "a factor in [his] drafting of the compensation provision." On cross-examination he admitted, however, that the words "royalties" and "royalty payments" were not in the Fraud and Abuse Policy.

Blumers explained that he meant the phrase "notwithstanding the above" in Section 3(a)(v) "to convey . . . that [it was] not enough for [the parties] to be just within the term of the agreement" but that Kahanovitz "actually [had] to be doing

something to earn the money." He believed that the language "and for so long as Kahanovitz is performing services within the agreement field . . . encompass[ed] th[e] concept that [EBI] couldn't pay him just to be available" but only "if he were performing services." Blumers intended to provide compensation only for the four-year term of the agreement. In his view, no provision in the 2004 Agreement supported royalty payments after November 2008.

William Messer, EBI's United States General Manager of Spine Technologies, testified for defendant. He was not involved in the negotiation of the 2004 Agreement. Messer's understanding was that the contract with Kahanovitz was "terminating in its entirety" in November 2008, but he informed Kahanovitz that EBI wished to enter into a new agreement because they valued his contributions. Kahanovitz's response was that he understood that EBI would continue to pay him royalties after November 2008. Messer did not remember Kahanovitz stating that "regardless of this termination of the agreement . . . [he was] still entitled to payments" or any similar assertion.

Messer explained that "the structure of the agreement would need to change" because of the compliance environment. The new compensation structure would be fee for service, an arrangement of $500 per hour. $500 per hour was the maximum amount allowed

to be paid under the Biomet Fraud and Abuse Policy. Kahanovitz asked Messer how many hours the company might need him in any given year; Messer estimated that the hours would equate to approximately $75,000 or $100,000 annually. Kahanovitz disputed this assertion, claiming Messer informed him that the compensation "would never exceed forty to fifty thousand dollars." He also informed Messer that he was not interested in an hourly arrangement.

After the November 2008 expiration of the 2004 Agreement and up to the time of trial, EBI did not ask Kahanovitz to perform any consulting services. Since November 2008, he has not consulted for any other company but continues to practice orthopedic surgery. At the time of trial Kahanovitz was sixty-two years old and planned to retire at age seventy.

Kahanovitz interpreted Section 3(a)(v) to mean that the royalty payments would occur during the term of the 2004 Agreement and anytime thereafter as long as he performed services in the 2004 Agreement field. When in November 2008, Kahanovitz stopped receiving royalty payments and was informed that EBI would not be renewing the contract, he filed suit.

EBI raises the following issues on appeal:

> THE LOWER COURT MISAPPLIED THE LAW OF NEW JERSEY REGARDING EXTRINSIC EVIDENCE OF THE MEANING OF CONTRACTUAL TERMS.

A. First Principles
B. Contract Integration and the Effect of an Integration Clause
C. The Hierarchy of Evidence of Meaning
D. The Necessity of Reading an Agreement
E. The 2004 Agreement
    1. The Plain Language of the Disputed Provisions
    2. The Agreement as a Whole
    3. The Extrinsic Evidence Presented at Trial

THE DAMAGES AWARD TO PLAINTIFF WAS IMPROPER.

A. The Damages Theory and Proofs Submitted Do Not Support the Award
B. The Damages Award Is Unenforceable As Unclear and Illogical.
C. The Award Violates Public Policy.
D. Plaintiff Failed to Mitigate his Alleged Damages.

THE DENIAL OF JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE REVERSED OR, IN THE ALTERNATIVE, A NEW TRIAL ORDERED.

I

A motion for JNOV is reviewed to determine whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in . . . favor" of the non-moving party. Dolson v. Anastasia, 55 N.J. 2, 5 (1969). "In each case, the court must accept as true all the evidence which supports the position of the party defending against the motion and according it the benefit of all inferences which can reasonably and legitimately be deduced therefrom, and if reasonable minds could differ, the motion must be denied."

Riley v. Keenan, 406 N.J. Super. 281, 298 (App. Div.), certif. denied, 200 N.J. 207 (2009). We apply the same standard as the trial court. Ibid. However, deference to the trial court's "feel of the case" is appropriate especially with regard to credibility. Jastram v. Kruse, 197 N.J. 216, 230 (2008). "The 'feel of the case' is not just an empty shibboleth — it is the trial judge who sees and hears the witnesses and the attorneys, and who has a first-hand opportunity to assess their believability and their effect on the jury." Ibid. Thus, we will not disturb the trial court's decision on a motion for JNOV "unless it clearly and unequivocally appears there was a manifest denial of justice under the law." Raspa v. Office of the Sheriff of Gloucester, 191 N.J. 323, 334 (2007) (quoting Dolson, supra, 55 N.J. at 8) (internal quotation mark omitted). Likewise, we will not modify or overturn a jury's award "unless it 'clearly and convincingly appears' that the award was so deficient that it constitutes a 'miscarriage of justice.'" City of Long Branch v. Liu, 203 N.J. 464, 492 (2010). Nonetheless, we review matters of law de novo, because "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Raspa, supra, 191 N.J. at 334-35 (quoting Manalapan

Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

II

EBI's basic argument on appeal — as it was at trial — is that the court should have applied the parol evidence rule and excluded the testimony of Pastena, Perez, and Page which modified or contradicted a fully integrated agreement. EBI argues that Kahanovitz's extrinsic evidence is irrelevant because his witnesses were not drafters of the agreement and such testimony was "squarely precluded by the integration clause and the parol evidence rule." According to EBI, "the essence of Plaintiff's argument is that a prior understanding between the parties must control even though their written agreement is different from what they intended — that parties who agree to one thing, but sign an agreement that says something else, will be protected."

In our earlier decision, we addressed these very same arguments. In concluding that genuine issues of material fact precluded summary judgment on the contractual claim ultimately litigated, we relied upon Conway v. 287 Corporate Center Associates, 187 N.J. 259, 269 (2006), observing that extrinsic evidence was admissible in determining the intent and meaning of the contract. Kahanovitz, supra, slip op. at 20.

In this unusual factual scenario, three of EBI's former officials, one of whom, although he later contradicted himself, actually signed the 2004 Agreement, supported Kahanovitz's interpretation of the document. Conway does not, contrary to EBI's position, mechanistically endorse application of the parol evidence rule. See Conway, supra, 187 N.J. at 269-70. And as set forth in Conway, the fact that the language of a contract appears to be free from ambiguity does not preclude admission of evidence regarding the surrounding circumstances and understandings of the parties to aid in reaching a determination of the parties' intent. Ibid.

The first step is to determine the "true agreement of the parties . . . . i.e., what they meant by what they wrote down" and "[o]nly when that is determined is one in an appropriate position to raise the bar of the parol evidence rule to prevent alteration or impugnment of the agreement." Garden State Plaza Corp. v. S.S. Kresge Co., 78 N.J. Super. 485, 496 (App. Div.), certif. denied, 40 N.J. 226 (1963). Even if the agreement is integrated and the "contract on its face is free from ambiguity," extrinsic evidence is nonetheless admissible to establish basic intent. Conway, supra, 187 N.J. at 269 (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301 (1953)).

We "permit a broad use of extrinsic evidence to achieve the ultimate goal of discovering the intent of the parties." Id. at 270. "Repeatedly have our highest courts used negotiations antecedent to integration in arriving at and effectuating the specific intent of the parties, subject only to the caution that the construction adjudicated be compatible with the contractual language." Garden State Plaza, supra, 78 N.J. Super. at 499. "The court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the 'expressed general purpose.'" Pacifico v. Pacifico, 190 N.J. 258, 266 (2007) (quoting Schwimmer, supra, 12 N.J. at 302). "[A] party to a contract 'is bound by the apparent intention he or she outwardly manifests to the other party. It is immaterial that he or she had a different, secret intention from that outwardly manifested.'" Schor v. FMS Fin. Corp., 357 N.J. Super. 185, 191 (App. Div. 2002) (quoting Domanske v. Rapid-American Corp., 330 N.J. Super. 241, 246 (App. Div. 2000)).

Hence the trial court correctly applied the principles of contract law. At the post-remand hearing, the trial court determined as a matter of law that there was "an aspect of ambiguity in the context of this case" supported by extrinsic

evidence which should be subject to "the furnace of cross-examination."

The trial court admitted extrinsic evidence during the trial to determine the intent of the parties as Conway requires. After hearing the purported intent of the parties from the witnesses presented by both sides, the jury gave credence to Kahanovitz's witnesses' testimony that the 2004 modification agreement was designed to "lock [Kahanovitz] in," thus protecting EBI's interests while simultaneously protecting Kahanovitz's interests by paying him minimum royalties for the products he helped develop.

The surrounding circumstances, the negotiations, and the language of the agreement itself demonstrate that EBI's continuing duty to pay plaintiff royalties as long as he was available to serve as a consultant for them and employed as an orthopedic surgeon was not an additional term to the 2004 Agreement. Nor was it a modification of its compensation structure, but rather a plausible interpretation of the language in light of the extrinsic evidence. Therefore, the extrinsic evidence was properly used to interpret and not to change or add terms to the 2004 Agreement.

The relevant language of the contract is "reasonably susceptible" to Kahanovitz's interpretation. Based on that

language and the extrinsic evidence supporting Kahanovitz's understanding, the jury's verdict was not against the weight of the evidence. This is not to say that EBI's reading of the document is implausible. Rather, we conclude that Kahanovitz's version is plausible, and that extrinsic evidence was properly admitted based on the "reasonably susceptible" rule.

Section 3(a)(v) states that "Notwithstanding the above, during the Term of this Agreement and for so long as Kahanovitz is performing Services within the Agreement Field, EBI shall guarantee Kahanovitz a minimum annual royalty payment." (Emphasis added). EBI argued that the language includes an "and" rather than "or," indicating that both conditions had to be fulfilled for Kahanovitz to receive payment. Kahanovitz points out that the "and" indicates that the payments continue in addition to the specified term because the "for so long as" is a time period and not a condition. Simply stated, Kahanovitz points out that if defendant wanted to express a clear condition it could have stated in the 2004 Agreement that "the payments cease on November 30, 2008."

EBI also argues that the language "Notwithstanding the above" refers only to the provisions in Section 3(a)(i-iii) and because "[n]o one has claimed that the royalty payments of Section 3(a)(i-iii) last beyond the termination of November

2008; no such claim is possible in the face of the partial fiscal year provisions of Section 3(a)(iv)." Refuting that position, Kahanovitz also points out that in the two 1998 agreements,[2] defendant specified that the payments would be only "[f]or the remaining term of this agreement, minimum payments will be reconciled at the end of each year with previously paid quarterly royalty payments" as provided in the January 1998 Agreement, or "EBI will guarantee Kahanovitz a minimum annual royalty payment for the term of this Agreement," as stated in the November 1998 Agreement.

Additionally, EBI asserts that even if Kahanovitz's reading of Section 3(a)(v) prevails, he is nonetheless not entitled to recover because of the requirement that he "perform[] Services within the Agreement Field." Nothing in Section (3)(a)(i-iii) defines it as merely continuing to work as an orthopedic surgeon, while the list "contains only activities that clearly are of direct benefit to EBI and involve [Kahanovitz] deploying his expertise on EBI's behalf." Kahanovitz responds that three items on the list do not mention EBI and could be performed for other parties; namely, "evaluate new products and related instrumentation" and "provide advice and guidance on research

[2] Note that Blumers did not draft these agreements because he began working for EBI in 2003; however, he did incorporate them into the 2004 Agreement.

projects, publications and clinical studies," and "[p]ublish and present at various meetings, conferences, trade shows, and journals."

Kahanovitz instead argues that taken as a whole, the non-compete clause calls for a broader reading of "agreement field" because Section 13 of the January 1998 Agreement, which was incorporated into the 2004 Agreement, stated that he could not "on behalf of any person, corporation, partnership or other entity other than EBI, . . . engage in [] design [or] development, within the Agreement Field." Kahanovitz's duties and responsibilities included, but were not limited to, the list of items, and more importantly, required that he "make himself available to provide consulting services in connection with EBI's spinal products." The only way he could continue to be valuable to EBI as a spinal product consultant would be to continue practicing as an orthopedic surgeon, and to continue to be exclusively available to EBI.

III

EBI contends that the court should have granted JNOV because Kahanovitz "offered no evidence that any term of the 2004 Agreement should or could be interpreted in a way that supports [Kahanovitz's] theory." However, Kahanovitz and

Pastena both identified Section 3(a)(v) as reflecting the parties' intention to provide ongoing royalties.

Moreover, Pastena and Perez, the former EBI executives who negotiated the agreement on defendant's behalf, both testified that they intended to ensure that Kahanovitz exclusively consult for EBI. Pastena knew that EBI's competitors had tried to recruit Kahanovitz in the past and said he wanted to prevent others' engagement of Kahanovitz. Both witnesses agreed during negotiations that EBI would pay royalties as long as Kahanovitz practiced orthopedic surgery and made himself exclusively available to EBI as a consultant. In order to maintain his value to EBI, Kahanovitz would have to continue to practice as an orthopedic surgeon. Both testified that he was a "leading light" in his field and a "renowned surgeon." They also testified that continued royalty payments were a common practice in the industry and are paid as long as the product is being sold.

EBI pointed out to the jury that both witnesses might be biased since EBI terminated their employment and Pastena works for one of EBI's competitors. The jury was also told their lawsuits against EBI were "resolved amicably." Regardless, the jury must have accepted the witnesses' testimony as true, and the judge in deciding the subsequent motions, had no basis to

discredit it. The possibility of bias was simply not enough for that purpose.

Finally, Page's deposition, in part supporting Kahanovitz's view, included mention of an earlier certification that the agreement was "essentially a royalty agreement designed to provide royalty payments . . . for the EBI products [Kahanovitz] had either developed, assisted in developing or assisted EBI in acquiring." Page also admitted, however, that he did not see anywhere in the Agreement language supporting Kahanovitz's interpretation. The latter was obviously not dispositive on the question.

The evidence in EBI's favor includes Blumers's testimony and the Biomet Fraud and Abuse Policy. Blumers, the drafter, testified that Section 3(a)(v) covered only the term of the 2004 Agreement. He explained that the "for so long as" was meant to protect EBI from violating federal regulations concerning kickbacks as evinced by the Biomet policy. But, as Kahanovitz points out, the Fraud and Abuse Policy does not mention royalties.

Therefore, Kahanovitz presented enough favorable evidence to the jury for them to decide the case in his favor by a preponderance of the evidence. Through the extrinsic evidence, Kahanovitz proved that the general intent of the parties was to

lock him in for as long as possible and to protect his contributions to EBI over the years. In keeping with that intent, reading the contract to mean that Kahanovitz would continue to be compensated under the minimum royalty provision as long as he continued to practice as an orthopedic surgeon is not a modification or alteration of the integrated agreement, but rather an interpretation of the contract as a whole. See Schwimmer, supra, 12 N.J. at 302. Thus the jury's finding was not against the weight of the evidence.

IV

Kahanovitz bears the burden of proving damages for breach of contract. See Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 411 (2009). EBI raises a number of arguments regarding this issue: 1) enforcing a life-time contract is against public policy under the circumstances, 2) the damages are too speculative in nature and should either be reversed or remanded for further fact-findings, 3) Kahanovitz's failure to mitigate damages should have reduced the amount of the award.

EBI asserts that the "Courts of this State have awarded damages for breach of lifetime employment agreements only when there is a clear and definitive expression contained in an agreement that the parties intend to enter into such long-range commitments." EBI quotes this particular passage:

> [I]n the absence of additional express or implied stipulations as to duration, a contract for permanent employment, for life employment . . . where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party, and therefore, discharge without cause does not constitute a breach of such contract . . . .
>
> [Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 600-01 (1952) (quoting Eilen v. Tappin's, Inc., 16 N.J. Super. 53, 55 (Law Div. 1951)).]

"[I]n order to be enforceable the terms of such a contract must be sufficiently clear and capable of judicial interpretation." Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276, 290 (1988).

EBI makes the point that the 2004 Agreement lacks the clear language Savarese requires as to contractual intent. Savarese is inapposite, however, because the 2004 Agreement is not a life-time employment contract, but rather a contract for royalty payments. Even if it were considered a life-time employment contract, Kahanovitz provided consideration in the form of his "assistance in the design and development of the sixteen EBI products listed in the Agreement, and his assignment of his intellectual property to EBI."

Savarese involved an oral contract in which the defendant, who was deceased at the time of trial, had, according to plaintiff, stated that if plaintiff became injured in the

company baseball game, he would "take care of [him]" and he would keep his position as foreman for "the rest of [his] life." Savarese, supra, 9 N.J. at 597. In that case, "no salary was agreed upon nor was provision made as to what would occur if the plaintiff became wholly or partially unable to perform his duties." Id. at 599. The court found that even "[a]ccepting at full value the plaintiff's version of the conversation which took place . . . , the terms are vague and uncertain and do not comply with the precision and clarity required by the law." Id. at 603. Additionally, the individual who made the promise to the plaintiff did not have authority to enter into the contract, which was not "ever ratified by the corporate authorities." Id. at 603. Accordingly, no enforceable agreement was found to exist.

Shebar, supra, 111 N.J. at 282, involved a sales manager, who after receiving an offer from Sony, tendered his resignation to his employer Sanyo. To prevent the plaintiff from resigning, Sanyo's president called him into his office, ripped up the resignation letter, stated that Sanyo did not fire its managers, assured him that he would be with them "for the rest of his life," and promised a raise. Ibid. The plaintiff revoked his acceptance of Sony's offer and worked four months for Sanyo before being terminated without cause by its new president. Id.

at 283. The Court held that plaintiff "gave valuable consideration" by "relinquish[ing] his new position at Sony in exchange for job security at Sanyo." Id. at 289. Therefore, the commitment was found to be enforceable.

EBI asserts the facts here are similar to those in Savarese not Shebar. EBI's argument fails, however, because inherent in the jury's verdict is the conclusion that both parties did intend to protect Kahanovitz's contributions to EBI by means of a royalty agreement as long as he practiced medicine in his field. If the 2004 Agreement is read not as an employment agreement for services yet to be performed, but as a royalty agreement that compensates Kahanovitz for work already performed on EBI's behalf without further claim on the intellectual property while ensuring that he will not aid a competitor, the 2004 Agreement is quite different from an agreement for life-time employment. Kahanovitz's contributions to EBI, his stature in the professional community, and the fact that he did not own any rights to the spinal products listed, dispel the notion that the agreement was for life-time employment. Finally, plaintiff testified that he intended to practice until he was seventy years old, which means that the agreement would only last for that limited time period.

EBI takes the further position that the "jury should never have been permitted to consider th[e] question" of future damages. "The rule relating to the uncertainty of damages applies to the uncertainty as to the fact of damage and not as to its amount, and where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery." Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 437, 454 (App. Div.) (quoting Tessmar v. Grosner, 23 N.J. 193, 203 (1957)), certif. denied, 71 N.J. 503 (1976). "If the evidence affords a basis for estimating the damages with some reasonable degree of certainty, it is sufficient." Tessmar, supra, 23 N.J. at 203. However, if "future damages cannot be determined with reasonable certainty, [a] plaintiff's efforts to obtain a judgment in the amount of future damages must fail." Cipala v. Lincoln Tech. Inst., 179 N.J. 45, 51-52 (2004).

First, EBI argues that Kahanovitz has no legal obligation to continue to practice after he receives the amount awarded. As a related matter, EBI claims that Kahanovitz must satisfy the conditions precedent of the agreement before receiving the award. Defendant cites Cipala and Stopford v. Boonton Molding Co., 56 N.J. 169 (1970), for this proposition. In the former case, the plaintiff had not satisfied the condition precedent of demonstrating a permanent disability in order to receive

insurance benefits, Cipala, supra, 179 N.J. at 51-52, while in the latter, the plaintiff had fulfilled all conditions precedent to receive pension benefits, Stopford, supra, 56 N.J. at 185.

Kahanovitz likens this situation to the line of cases regarding franchise disputes because those future royalties are usually included in damage awards. Franchise agreements usually last for a set term. See, e.g., Burger King Corp. v. Barnes, 1 F. Supp. 2d 1367, 1368 (S.D. Fla. 1998) (setting a franchise term of twenty years). When calculating the projected profits for royalty payments a franchisee would have earned had the franchisor continued to operate under the franchisor's name, courts have frequently used current profits. See, e.g., McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1275 (E.D. Mich. 1978). This, despite the fact that future profits are not guaranteed.

The Colorado Supreme Court has held that "lost royalties are often capable of being proved with a reasonable degree of certainty" and therefore, "[w]here there is sufficient reliable evidence royalties would have accrued but for defendant's breach, the jury should be permitted to assess the amount of the lost royalties from the best evidence the nature of the case allows." Acoustic Mktg. Research, Inc. v. Technics, LLC, 198 P.3d 96, 99 (Colo. 2008). Here, the main uncertainty at issue

is not the amount, but the proper duration of the royalty payments based on whether Kahanovitz will continue to practice until he is seventy years old. But the jury accepted his testimony that he would retire at the age of seventy. Also, as to EBI's claim that Kahanovitz has not satisfied the "condition precedent" required to receive payment, we observe that EBI continues to receive benefits for the products it continues to sell.

Second, EBI points out that there is no guarantee that Kahanovitz will be able to keep practicing as an orthopedic surgeon until age seventy. The contract "would be infected with so many unknowns to preclude a determination with reasonable probability of future damages." Defendant cites Savarese in support of its assertion, because the Savarese parties had not agreed upon a salary or stipulated what the effect of disability would be. In Savarese, the focus was not uncertainty of damages, but rather the indefiniteness of the terms of the purported life-time contract which militated against its terms. Savarese, supra, 9 N.J. at 599-600.

Kahanovitz's testimony was the only evidence presented at trial concerning how long he would continue as an orthopedic surgeon. EBI did not present any evidence except to ask, "And you plan to work until you're age 70 God willing, correct?"

Kahanovitz responded "God willing." Defendant argues that the "God willing" rendered his response insufficient evidence for the calculation of damages because his answer acknowledged that he might become either disabled or deceased. The jury nonetheless decided by the weight of the evidence that plaintiff would practice until he was seventy.

Third, EBI contends that the terms of the judgment are uncertain because the meaning of practicing orthopedic surgery is unclear. Kahanovitz has been practicing orthopedic surgery since the 1980s while working on defendant's behalf the majority of that time. EBI argues that "the occupational parameters of a 'practicing orthopedic surgeon,' are not inherently clear," based on Lasser v. Reliance Std. Life Ins. Co., 146 F. Supp. 2d 619, 633 (D.N.J. 2001), aff'd, 344 F.3d 381 (3d Cir. 2003), cert. denied, 541 U.S. 1063, 124 S. Ct. 2390, 158 L. Ed. 2d 963 (2004). EBI quotes Lasser as stating that "[t]he phrase 'practice in th[is] field' [of orthopedic surgery] only muddies the water further." Ibid. But the case does not stand for that proposition. The Lasser court was determining whether the phrasing employed in a survey, upon which a vocational expert relied, supported the insurer's claim that the plaintiff could continue practicing as an orthopedic surgeon despite his heart

problems. Id. at 632-33. In this situation, the meaning is self-evident.

V

EBI, the party accused of breaching the contract, bears the burden of proving plaintiff did not mitigate damages. Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335, 362 n.7 (App. Div. 2012). EBI argues that it demonstrated that plaintiff failed to mitigate damages when he rejected Messer's offer and when he failed to find alternative employment opportunities. However, EBI's defense is inapplicable given the fact that the jury favored Kahanovitz's interpretation of Section 3(a)(v) as setting forth royalty payments.

"It is well-settled that parties injured by a breach of contract have a common law obligation to take reasonable steps to mitigate their damages." State v. Ernst & Young, L.L.P., 386 N.J. Super. 600, 617 (App. Div. 2006). "It is often reasonable to refuse to mitigate by agreeing to a substitute contract with the breaching party." 11 Corbin on Contracts § 57.11 (Perillo rev. 2005). "One need not commit a wrong, as by breaching other contracts, in order to minimize damages . . . ." Ibid.

At trial, Messer testified and Kahanovitz admitted that Messer asked plaintiff to consult on a $500 per hour fee for services basis to comply with anti-kickback statutes. The

parties disagreed on the estimated amount of annual payment that would result from such an arrangement. Kahanovitz called EBI's new president twice and received no response. Kahanovitz's counsel argues that such an offer was not an opportunity for mitigation. Given that Kahanovitz testified that when Messer approached him with the offer, he explained that it was his understanding that EBI was going to continue to pay him royalties, Messer's offer cannot be fairly construed as an opportunity for Kahanovitz to mitigate damages. Again, because the jury accepted Kahanovitz's interpretation of the contract, EBI was supposed to pay plaintiff for making himself exclusively available for consulting services as an orthopedic surgeon as part of the royalty agreement into which the parties entered.

With respect to "alternate employment opportunities," Kahanovitz would have breached the agreement with EBI, had he secured a consulting position with another company. Accepting the jury's interpretation of the contract, Kahanovitz was obligated to make himself exclusively available to EBI. Kahanovitz also testified that at some time in 2008, another company approached but then rejected him because they viewed him as EBI's man. Therefore, the jury had sufficient evidence, that even if Kahanovitz attempted to breach the contract and seek another arrangement, he faced difficulty in doing so. In sum,

it would be unreasonable to expect Kahanovitz to mitigate damages either by altering the terms of his agreement with EBI or breaching the agreement under which he is claiming damages.

Affirmed.