

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

Factual Background

Together with her husband Rodney (who passed away in July 2016), Rose Ann Overman farmed land in Barton County beginning in 1960.¹ Although they began by purchasing an 80-acre tract, the farmland the Overmans owned grew to 1,579 acres by 2017. In 2017, all of the land was titled in the name of Overman and Son Partnership, a partnership comprised of Rose Ann; her son, Howard; Howard's wife, Tracy; and Rose Ann's grandson, Taylor.

The Overmans borrowed extensively to finance their property acquisitions and farming operations. By the end of 2016, the Overmans owed Simmons Bank \$4.3 million on a promissory note, and an additional \$500,000 on a line of credit, all secured by their farmland. They also owed \$500,000 to Deere & Company, secured by some of their farm equipment.

The Overmans wished to refinance their debt, but were unsuccessful in locating alternate financing on their own. In April 2017, they contacted Gail Murphy, President of Equity, for assistance in locating replacement financing.

Equity and the Overmans entered into two agreements in April 2017. Under the first agreement, the Overmans agreed to pay Equity an hourly rate to prepare a business plan to present to potential lenders. Pursuant to this agreement, Equity developed a plan which proposed that the Overmans refinance their existing debt with two new loans at a 5% interest rate: a twenty-year loan for \$4,680,310; and a seven-year loan for \$700,000. The Overmans paid Equity \$7,500 for development of the business plan.

The second agreement required Equity to use its best efforts to assist Overman and Son Partnership in obtaining financing. Equity was to be paid a 1%

¹ Because she shares a surname with other parties to this proceeding, we refer to Rose Ann Overman by her first name for clarity's sake. No familiarity or disrespect is intended.

commission upon closing of a new loan. The agreement contained a provision giving Equity the exclusive right to seek financing for the Overmans for one year, and specifying that the Overmans would owe Equity a commission if they independently obtained financing. The exclusivity provision stated:

APPLICANT agrees that EQUITY shall have the EXCLUSIVE right for the period of 365 days from the date of this agreement to attempt to arrange financing for APPLICANT with a bank, lender, or other financial resource upon terms and conditions suitable to the APPLICANT. . . . During this EXCLUSIVE time period, APPLICANT agrees not to attempt to arrange financing on their own without the express written consent of EQUITY. If the APPLICANT, without the assistance of EQUITY, obtains financing from a suitable bank, lender, or other financial resource during this EXCLUSIVE time period, APPLICANT agrees to compensate EQUITY as set forth [elsewhere in the agreement].

Following execution of the commission agreement, Murphy began working to secure financing for the Overmans. Murphy also communicated with the Overmans' existing lenders, Simmons Bank and Deere & Company, to forestall foreclosure on their farmland and repossession of their equipment.

Murphy was unable to secure replacement financing during 2017. In late November or early December 2017, Deere & Company repossessed some of the Overmans' equipment. Rose Ann testified at trial that Simmons Bank also advertised a foreclosure sale for the Overmans' property for January 4, 2018.

Because Equity had not secured financing, Rose Ann contacted Conterra Bank in Iowa. Conterra agreed to issue the Overmans a three-year "bridge loan" of approximately \$5.43 million, at an annual interest rate of 8.08%. Rose Ann testified that the proceeds of the Conterra loan fell approximately \$120,000 short of what the Overmans needed to respond to the existing collection efforts, which required them to sell a tractor to pay what was due to Deere & Company and regain possession of their other farm equipment. The proceeds of the Conterra loan were

disbursed on January 3, 2018 – the day before Simmons Bank’s foreclosure sale was scheduled to occur.

When Murphy heard that the Overmans had secured financing from Conterra, he demanded that they pay Equity its 1% commission on the loan amount. The Overmans refused. In February 2018, Equity filed this lawsuit in the Circuit Court of Clay County (the forum specified in the loan commission agreement), asserting claims for breach of contract and quantum meruit.

A jury trial was held in September 2019. Equity submitted only its claim of breach of contract. The jury found in Equity’s favor, and awarded it \$54,300, 1% of the principal amount of the Conterra loan. The circuit court’s judgment also awarded Equity \$26,685.84 in attorney’s fees, and pre-judgment interest in the amount of \$8,220.87.

The Overmans appeal.²

Discussion

I.

The Overmans’ first Point argues that the verdict-directing instruction for Equity’s breach of contract claim (Instruction No. 6) failed to require the jury to decide a disputed factual issue. As submitted, Instruction No. 6 read:

Your verdict must be for plaintiff if you believe

First, plaintiff and defendants entered into an agreement whereby plaintiff agreed to use its best efforts to obtain financing for defendants and ***defendants agreed to pay plaintiff 1% of any financing obtained by defendants during the term of the contract***, and

Second, plaintiff performed its agreement, and

Third, defendants failed to perform their agreement, and

² Rose Ann Overman died in October 2020, after the filing of this appeal. Because no motion for substitution was filed within ninety days of her passing, we dismissed Rose Ann from this appeal without prejudice.

Fourth, plaintiff was thereby damaged. (Emphasis added.) The Overmans argue that the emphasized portion of paragraph “First” was erroneous because it did not require the jury to decide an essential, disputed issue: whether the financing Rose Ann obtained from Conterra was “suitable.” We agree.

The Overmans preserved the issue raised in their first Point by making a specific objection to the verdict director during the on-the-record instruction conference, and by re-asserting that objection in their timely-filed new-trial motion.

“Whether a jury was properly instructed is a question of law that this Court reviews *de novo*.” *Edgerton v. Morrison*, 280 S.W.3d 62, 65 (Mo. 2009) (citation omitted). To reverse on grounds of instructional error, the party claiming instructional error must establish (1) that the instruction at issue misdirected, mislead, or confused the jury; and (2) prejudice resulted from the instructional error. *Sorrell v. Norfolk S. Ry. Co.*, 249 S.W.3d 207, 209 (Mo. 2008).

“Where a dispute exists as to one or more of the terms of the agreement relied on by the claimant to support recovery, that issue must be hypothesized in the verdict directing instruction. Failure to do so is prejudicial error.” *Penberthy v. Nancy Transp., Inc.*, 804 S.W.2d 404, 407 (Mo. App. E.D. 1991) (citations and internal quotation marks omitted). “Because ‘[t]he purpose of the verdict[] directing instruction is to hypothesize propositions of fact to be found or rejected by the jury,’ the verdict directing instruction ‘must hypothesize the facts essential to the plaintiff’s claim.’” *Hervey v. Mo. Dep’t of Corr.*, 379 S.W.3d 156, 160 (Mo. 2012) (quoting *Lasky v. Union Elec. Co.*, 936 S.W.2d 797, 800 (Mo. 1997); first alteration added by *Hervey*).

Equity was only entitled to a commission if the Overmans independently obtained “suitable” financing. The parties’ agreement provided that Equity would endeavor to secure financing for the Overmans “upon terms and conditions suitable

to” them; the agreement also provided that the Overmans would owe Equity a commission only if they independently secured financing “from a suitable bank, lender, or other financial resource.”³

The agreement does not further define what would be deemed “suitable” loan terms, or a “suitable” lender. “To ascertain the original intent of the parties to a contract, we will give the words of the contract their natural, ordinary, and common sense meaning,” and may refer to a dictionary to supply that commonly understood meaning. *Behrick v. Konert Farms Homeowners’ Ass’n*, 601 S.W.3d 567, 573 (Mo. App. E.D. 2020) (citations and internal quotation marks omitted); *see also, e.g., TCN Invs., LLC v. Superior Detail*, 588 S.W.3d 245, 251 (Mo. App. W.D. 2019). Common dictionary definitions of the term “suitable” are: “adapted to a use or purpose,”⁴ or “such as to suit; appropriate; fitting; becoming.”⁵

The Overmans’ briefing suggests that the term “suitable” in the contract contains a latent ambiguity. We do not find the term to be ambiguous, since it has a single, commonly understood meaning. Instead, the term is general, and required the jury to make a case-specific factual determination whether the “suitability” condition was satisfied by the Conterra loan. In a similar fashion, courts have recognized that issues of “reasonableness” or “materiality” in contract disputes present factual issues for jury determination. *See, e.g., Guengerich v. Barker*, 423 S.W.3d 331, 339 (Mo. App. S.D. 2014) (“The materiality of a breach [of contract] is a

³ The commission agreement uses slightly different wording to define Equity’s obligation to locate financing for the Overmans, and the Overmans’ obligation to compensate Equity for financing they independently procured. Notwithstanding the variation in wording, Equity acknowledged in its briefing, and at argument, that it would only be entitled to a commission if the Overmans had secured “suitable” alternative financing.

⁴ *Suitable*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/suitable?src=search-dict-box> (visited March 9, 2021).

⁵ *Suitable*, DICTIONARY.COM, <https://www.dictionary.com/browse/suitable?s=t> (visited March 9, 2021).

question of fact.” (citations omitted)); *G & J Holdings, LLC v. SM Props., LP*, 391 S.W.3d 895, 903 (Mo. App. E.D. 2013) (same); *Swartz v. Mann*, 160 S.W.3d 411, 414 (Mo. App. W.D. 2005) (“Whether buyers exercise reasonable diligence in obtaining financing pursuant to a contingent financing provision [in a real-estate purchase contract] is a question of fact.” (citations omitted)); *Venture Stores, Inc. v. Pac. Beach Co.*, 980 S.W.2d 176, 183 (Mo. App. W.D. 1998) (“what is [a] ‘reasonable [time] under the circumstances’ [for exercising a purchase option] is a question of fact, rather than one of law”; collecting cases).

The Overmans disputed at trial whether the Conterra financing was “suitable.” The business plan which Equity developed proposed that, for the long-term viability of the Overmans’ farming operation, they should obtain twenty-year financing with a 5% interest rate, and a smaller seven-year loan at the same interest rate. This business plan provides some evidence of the meaning the parties ascribed to “suitable” financing. During her testimony, Rose Ann testified that the Conterra loan, for three years at 8.8% interest, was “not a long-term loan,” and that the high interest rate was not economically viable:

We have until 2021 to get a bank. And right now, we're paying 8.08 percent interest on the big loan with Conterra. . . .

So we need to get a bank with a lower interest. We could make our payments if we get a lower interest and get our payments strung out, we can make it.

And my son and my grandson – my grandson is in to doing a no-till and into cover crops and to lower the input costs and spray, and he's – he can make it work, but we just got to have a bank.

Rose Ann also testified that the Conterra loan was \$120,000 short of what the Overmans needed to fully pay off their debts to Simmons Bank and Deere & Company, and that they had been forced to sell a tractor to make up the deficit.

Notably, Equity’s President, Gail Murphy, acknowledged on cross-examination that Rose Ann had merely been able to obtain “what they call a bridge

loan.” He agreed that a “suitable” loan for the Overmans “would be one that would loan them 5 million-plus on a 20-year loan.” When asked whether the Overmans had “obtain[ed] a loan from a suitable bank,” Murphy responded, “In my opinion, no.” Murphy testified that even a loan with a ten-year amortization was “not worth a darn” for purposes of financing farming operations like the Overmans’.

The Overmans’ counsel highlighted the suitability issue for the jury in his closing argument:

[I]f you look at paragraph D which says: . . . If the applicant, without the assistance of Equity obtains financing . . . from a suitable bank, lender, or other financial resource during this inclusive time period, then the applicant still owes that one percent.

Now, did Rose Ann Overman get a loan from a suitable bank lending institution?

. . . .

. . . He said: I can give you a loan close to \$5 million, 20 years, five percent. Another one, half-a-million dollars, seven years, five percent.

What did she get? She got a three-year loan. She got a bridge loan for three years. I can't remember, it's either eight or nine percent. And she's going to have to come along and try to get another loan before 2021, or she's going to be back in the same place she was.

Despite the Overmans’ evidence and arguments that the Conterra loan was not “suitable,” Equity argues that “the suitability of the financing cannot really be in dispute[,] . . . because the [Overmans] actually accepted the \$5,430,000 financing. . . . When [the Overmans] accepted the financing, they put all issues to bed as to whether or not the financing suited their needs.” Equity essentially argues that, if the Overmans obtained financing, that financing was – by definition – “suitable.” We disagree. The commission agreement only required the Overmans to compensate Equity if the Overmans independently “obtain[ed] financing from a suitable bank, lender, or other financial resource.” Equity’s argument would require the Overmans to compensate it in any case in which they “obtain[ed]

financing” – eliminating the separate requirement that the financing be “suitable.” “[C]ourts must construe a contract,” however, “so as not to render any terms meaningless.” *State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 743 (Mo. 2017) (citing *State ex rel. Riverside Pipeline Co. v. Pub. Serv. Comm’n*, 215 S.W.3d 76, 84 (Mo. 2007)). We reject Equity’s contention that the Conterra loan was necessarily “suitable” simply because the Overmans agreed to it as a stop-gap measure to avoid imminent foreclosure.

Equity concedes that, to establish its right to a commission on the Conterra loan, it was required to prove that the Conterra loan was “suitable.” Although this issue was central to Equity’s cause of action, and was disputed by the Overmans at trial, the verdict director did not require the jury to determine whether the Overmans independently obtained “suitable” financing. The fact that the Overmans’ counsel was able to argue the issue in closing is no substitute for language in the verdict director which would have required the jury to *find* that the Conterra loan was “suitable” before returning a verdict in Equity’s favor.

Argument by counsel is no substitute for proper direction from the trial court. Irrespective of any comments made during closing arguments (which are by definition argumentative), the jurors are required to follow only the directions and instructions given to them by the court. Reasonable jurors could obviously reject statements made *by counsel* when those statements were not supported by the verdict director given to them *by the court*. Therefore, . . . “[w]hile [counsel’s] closing argument . . . would have been helpful to the jury in understanding the applicable rule of law . . . it was not sufficient . . . to allow the jury to render an informed verdict.”

Agri Process Innovations, Inc. v. Envirotrol, Inc., 338 S.W.3d 381, 389-90 (Mo. App. W.D. 2011) (citing and quoting *Rice v. Bol*, 116 S.W.3d 599, 611 (Mo. App. W.D. 2003)); *see also Miller v. Norfolk S. Ry. Co.*, 591 S.W.3d 29, 41 (Mo. App. W.D. 2019) (admission of governing statute into evidence, and discussion of governing law in

counsel's closing argument, were "[in]sufficient to cure the prejudice from" the court's instructional error).

Because it failed to require the jury to find that the Conterra loan was "suitable," the verdict directed on Equity's breach of contract claim was prejudicially erroneous, and requires reversal and remand for a new trial.

II.

In their second Point, the Overmans argue that the circuit court abused its discretion in refusing to submit an affirmative defense instruction which they tendered. The Overmans' proposed instruction asked the jury to find that there had been a failure of consideration preventing enforcement of the commission agreement. Although what we have said in § I above mandates reversal, we address the Overmans' second Point because the issue may recur on remand.

The Overmans' proffered failure-of-consideration instruction (Instruction A) read:

Your verdict must be for Defendants if you believe:

First, Gail Murphy knew that Defendants were indebted to Simmons Bank and John Deere Company and that if the Defendants were unable to obtain a loan through the services of Plaintiff, that Simmons Bank would foreclose Defendants' property and John Deere Company would seize Defendant's farm equipment covered by its lien, and

Second, Plaintiff was unable to obtain financing for Defendants which would have prevented the foreclosure of the Simmons Bank loan and the seizure of Defendant's farm equipment by John Deere Corporation, and

Third, Defendants were forced to obtain a loan from other sources to prevent the foreclosure of the Simmons Bank loan and the seizure of Defendant's farm equipment by John Deere Corporation, and

Fourth, Plaintiff's failure to obtain financing to prevent foreclosure of Defendant's property by Simmons Bank and failure to obtain financing to pay off John Deere Corporation resulted in a failure of consideration to pay any money to Plaintiff in the event that

Defendant's obtained financing from another source without the assistance of Plaintiff.

The word "consideration" as used in this instruction means a benefit to the defendant, or a loss or detriment to the plaintiff.

“When a party claims that the trial court erroneously refused to submit an instruction to which she claims she was entitled, we review the trial court's refusal to submit the instruction for abuse of discretion.” *McCullough v. Commerce Bank*, 349 S.W.3d 389, 396 (Mo. App. W.D. 2011) (citations and internal quotation marks omitted). “The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.” *Dodson v. Ferrara*, 491 S.W.3d 542, 552 (Mo. 2016) (citation omitted).

The circuit court did not abuse its discretion in refusing to submit Instruction A to the jury. The facts hypothesized in the Overmans’ proposed instruction did not establish a failure of consideration, but instead would have established only that Equity had failed to perform its contractual obligations – an issue which was already addressed in the verdict director on Equity’s breach of contract claim.

“‘Failure’ of consideration implies that consideration, once existing and sufficient, had become worthless or ceased to exist, which distinguishes it from ‘lack’ of consideration.” *Mobley v. Baker*, 72 S.W.3d 251, 257 (Mo. App. W.D. 2002) (citation omitted). Where, as here, the contracting parties exchange promises as consideration for a contract, there is no “failure of consideration” simply because one of the parties fails to provide the promised performance. In these circumstances, the contracting party’s “promises, and not the performance thereof, constituted the consideration for the [contract], and [the other party]’s remedy for [the contracting party]’s alleged failure to perform its promises was an action for breach of the agreement” – not cancellation of the agreement on the basis of “failure

of consideration.” *Shelton v. M & A Elec. Power Co-op.*, 451 S.W.2d 375, 379 (Mo. App. 1970) (citations omitted).

Missouri courts have consistently rejected “failure of consideration” arguments like the one made by the Overmans here. In *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660 (Mo. 2010), parents of children in the City of St. Louis Transitional School District chose to send their children to school in the Clayton School District. *Id.* at 663. Because they lived outside the boundaries of the Clayton district, the parents executed contracts agreeing to pay tuition for their children to attend Clayton schools. *Id.* After the parents executed these agreements, the St. Louis school district lost its state accreditation, and under § 167.131.1, RSMo 2000, it thereby became liable to pay the tuition required to send the children to the Clayton schools. *Id.* “The parents argue[d] that the tuition agreements should be terminated for lack of consideration and contend[ed] that they ha[d] a right to restitution because they [were] now paying tuition for an education their children should have received for free under § 167.131.” *Id.* at 669.

The Supreme Court explained that the change in circumstances did not result in a “failure of consideration”:

“[C]onsideration must be measured at the time the parties enter into their contract and [] the diminished value of the economic benefit conferred, or even a complete lack of value, does not result in a failure of consideration.” Here, the parents received the benefit of their bargain – the education of their children by the Clayton school district – and, therefore, cannot claim lack of consideration.

Id. at 670 (quoting *Weinstein v. KLT Telecom, Inc.*, 225 S.W.3d 413, 415-16 (Mo. 2007); alterations added by *Turner*; other citation omitted).

Weinstein involved a “put option” agreement, under which one of the contracting parties agreed to sell, and the other agreed to buy, shares of corporate stock on a future date at an agreed price. The Supreme Court held that there was no “failure of consideration” even though the stock became worthless prior to the

option date, and the stock purchaser had thereby “suffer[ed] a disappointment in his bargain.” 225 S.W.3d at 416 (citation omitted).

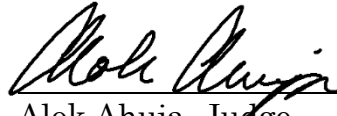
Similarly, in *Hunt v. Dallmeyer*, 517 S.W.2d 720 (Mo. App. 1974), the purchaser of an insurance business agreed to pay the seller \$7,500 per year for ten years, so long as the purchaser remained an agent of a specified insurance company. *Id.* at 721. The purchaser was later terminated as an agent for the relevant company, and therefore had no obligation to continue making the \$7,500 annual payments. *Id.* at 722. Although the business seller would no longer receive the \$7,500 annual payments, the Court held that no failure of consideration had occurred: “It is well settled that simply because one suffers a disappointment in his bargain, a failure of consideration does not occur.” *Id.* at 723 (citation omitted).

The Overmans’ “failure of consideration” argument is, in reality, simply a claim that Equity *failed to perform* its contractual obligations, and that the Overmans did not receive all of the benefit they expected from the commission agreement. Equity’s performance did not become *impossible*, and the subject matter of the contract did not *cease to exist*, when Simmons Bank scheduled a foreclosure sale and Deere & Company repossessed some of the Overmans’ farm equipment. To the contrary, it was still possible for the Overmans to retain ownership of their land and equipment by securing alternate financing – as Rose Ann did by securing the Conterra loan. Failure of consideration may have been an available defense if the Overmans had lost all rights to their property through foreclosure and repossession, and therefore had no ongoing need for financing (and no ability to qualify for it). But that is not what happened.

Point II is denied.

Conclusion

The circuit court's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion. Given our reversal of the judgment, we deny Equity's motion for attorney's fees on appeal, which was taken with the case.

A handwritten signature in black ink, appearing to read 'Alok Ahuja', written over a horizontal line.

Alok Ahuja, Judge

All concur.