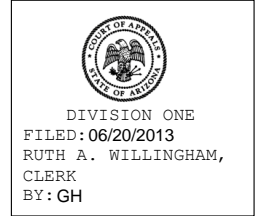


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DAVID URIBE and LISA URIBE, husband) 1 CA-CV 12-0056
and wife,)
) DEPARTMENT C
Plaintiffs/Appellants,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules
INLAND ENGINEERING AND CONSULTING,) of Civil Appellate
INC., an Arizona corporation; and) Procedure)
BRYAN and EILEEN BURGOZ, husband)
and wife,)
)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-005779

The Honorable Eileen S. Willett, Judge

AFFIRMED

Palecek & Palecek PLLC
By James J. Palecek
Attorneys for Plaintiffs/Appellants

Scottsdale

Ryley Carlock & Applewhite
By James O. Ehinger
Attorneys for Defendants/Appellees

Phoenix

B R O W N, Judge

¶1 David and Lisa Uribe appeal the superior court's
judgment in favor of Inland Engineering and Consulting, Inc.

("Inland"). They argue the court erred in granting partial summary judgment on the issue of alleged annual bonuses due to David. For the following reasons, we conclude that even if the court erred in granting partial summary judgment, the error was not prejudicial. We therefore affirm.

BACKGROUND

¶2 Inland hired David in August 1997. An unsigned document dated August 12, 1997, handwritten by Bryan Burgoz, one of Inland's principals, stated:

Dave Uribe

Agreed to the following terms of employment:

Wages \$19.00 per hour.

5% of gross revenues generated by himself payable at end of year.

10% of company shares of stock with options to buy additional shares.

¶3 From 1997 until 2003, Inland paid David hourly compensation plus five percent of gross revenues in the form of an annual bonus. In 2004, however, Inland stopped paying the 5% annual bonus based on an alleged policy change that David would receive a salary increase in lieu of the bonus. In the summer of 2009, a dispute arose regarding David's compensation arrangement and, following unsuccessful negotiations, Inland terminated David's employment on October 9, 2009.

¶14 In March 2010, the Uribes¹ sued Inland and Bryan and Eileen Burgoz. The Uribes asserted claims for, among other things, breach of David's employment agreement for failure to pay annual bonuses, breach of the Burgozes' obligation to purchase David's stock, breach of the implied covenant of good faith and fair dealing, and violation of Arizona Revised Statutes ("A.R.S.") section 23-350 (2013)² for failure to pay wages upon termination.

¶15 Shortly before trial, Inland moved for partial summary judgment on the Uribes' claim for payment of the annual bonuses due from 2005 to 2009. Inland did not dispute that when David was hired, Inland's practice was to pay its principals a five percent annual bonus based on a predetermined calculation. By 2003, Inland explained, the annual bonus arrangement had become unworkable. Inland claimed that, at a meeting in December 2003, attended by David, it was agreed that the annual bonus would be replaced with an increase in annual salary. Inland offered evidence that David's annual bonus had been approximately \$3600; beginning in 2004, he received a salary increase of \$4000 in lieu of the annual bonus. According to Inland, David received

¹ Through a second amended verified complaint, Lisa Uribe was added as a plaintiff.

² Absent material revisions after the relevant date, we cite the current statute.

the increased salary until his termination, and he never objected to the new arrangement until shortly before his termination. Inland asserted that David's acceptance of the increase in salary in lieu of the annual bonus constituted waiver and he was therefore estopped from making a claim for the bonuses. Inland further asserted that because any claim for breach of an employment contract was required to be brought within one year of the breach under A.R.S. § 12-541(3) (2013), the Uribes' claims were time-barred.

¶6 In response, the Uribes asserted Inland's failure to pay bonuses was a continuing breach, meaning that at least the claim for the 2009 bonus was properly filed within one year of when the claim accrued. The Uribes also contended that David never agreed to the change in his compensation. They argued that from 2004 to 2009 David repeatedly asserted a right to the bonuses and that Bryan Burgoz had acknowledged David was entitled to payment. The Uribes supported their response to the motion with David's affidavit avowing "[t]here was never any change in the Annual Bonus" nor any agreement for its elimination.

¶7 The trial court granted Inland's motion for partial summary judgment, finding that the statute of limitations, as well as waiver and estoppel, barred the Uribes' claims for unpaid bonuses from 2005 to 2009. The court subsequently held a

bench trial on the Uribes' remaining claims and on Inland's counterclaims. The court found against the Uribes on their claims and found in favor of Inland on its counterclaims. The court awarded damages to Inland in the amount of \$40,733 and awarded Inland \$98,678.50 in attorneys' fees. The Uribes timely appealed and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (2013).

DISCUSSION

¶18 Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(a).³ "We review de novo whether summary judgment was properly entered and view the evidence in the light most favorable" to the Uribes, the non-moving parties. *White v. State*, 220 Ariz. 42, 44, ¶ 5, 202 P.3d 507, 509 (App. 2008). "We will affirm if the trial court's disposition is correct for any reason." *Voland v. Farmers Ins. Co. of Ariz.*, 189 Ariz. 448, 451, 943 P.2d 808, 811 (App. 1997).

¶19 The parties agree the only issue before us is whether the Uribes are entitled to a 2009 annual bonus. The Uribes assert the superior court erred in granting partial summary

³ Effective January 1, 2013, Rule 56(c)(1) was renumbered as Rule 56(a) as part of a non-substantive reorganization of Rule 56. See Ariz. R. Civ. P. 56(h) cmt. Thus, we cite the version currently in effect. See Ariz. R. Civ. P. 81.

judgment because factual issues remain as to whether (1) David waived or is otherwise estopped from asserting his claim; (2) Inland acknowledged the debt; and (3) the statute of limitations barred his 2009 annual bonus.

¶10 Under the unique facts presented in this case, which include a bench trial, even assuming the superior court erred in granting partial summary judgment, the Uribes have failed to establish that such error was prejudicial. See Ariz. R. Civ. P. 61 ("No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."); see also *Ryan v. San Francisco Peaks Trucking Co., Inc.*, 228 Ariz. 42, 52, ¶ 39, 262 P.3d 863, 873 (App. 2011) (finding error harmless because party could not show prejudice relating to alleged erroneous admission of evidence).

¶11 The Uribes argue they were prejudiced by the ruling on the motion for summary judgment because they had additional evidence to introduce at trial to establish their claim to the 2009 bonus but that they were "bound by, [and] constrained by," the trial court's summary judgment ruling such that they were

precluded from introducing it. However, the only additional evidence the Uribes contend they would have offered was David's "understanding of the commission-based bonuses and his recorded conversations"⁴ with Bryan Burgoz about the bonuses. On the record before us, we disagree that the Uribes were precluded from introducing David's understanding of the bonus arrangement and he has therefore failed to carry his burden of establishing prejudice.

¶12 As to the 2009 bonus, the Uribes' consistent theory of the case has been that David never agreed to eliminate the bonus and that Inland did not eliminate the bonus. These arguments were presented to the superior court in defense of Inland's motion for partial summary judgment on the annual bonus issue. The court rejected the Uribes' claims and granted summary judgment in favor of Inland on the bonus issue, stating:

[I]t is undisputed that Plaintiff earned an increase in wages in lieu of bonus from 2004 to termination. By accepting an increase of \$4,000.00 per year in lieu of bonuses from 2004 until termination, Plaintiff by his actions accepted the benefits offered by

⁴ The "recorded conversations" relate to discussions David had with Bryan about a possible resolution of the annual bonus issue. Although a compact disc ("CD") of the recordings was submitted to this court, it is not part of the record on appeal and there is no evidence it was provided to the superior court. Additionally, at oral argument before this court, the parties agreed that consideration of the CD is not necessary to the resolution of the issues raised on appeal and thus we will not consider it.

Defendants' and now seeks to repudiate his position. Defendants relied to their detriment on Plaintiff's acceptance of the salary increase in lieu of bonus for six years. As a matter of law, Plaintiff has waived his right to the bonuses and is estopped from claiming them now. His actions were inconsistent with this intent to assert his alleged right. He allowed defendants to increase his wage, he knew the bonus was replaced with the increased salary, and he could have filed a claim as early as 2005. Nor does a settlement proposal serve to revive a barred claim. The letter does not constitute an acknowledgment.

¶13 At trial, apparently because of the court's partial summary judgment ruling, the Uribes adopted a new trial strategy. They argued an entitlement to an annual \$4000 "pyramiding" salary increase for five years, in lieu of the 5% annual bonus.

¶14 Proceeding on this new theory, David testified at trial about his history with the company and the agreement he entered into with Inland for the annual salary. Responding to his counsel's question about giving up bonuses, David simply replied that "I never agreed to give up any of my bonuses." Without objection, Inland's counsel explored the annual bonus issue in more depth on cross-examination:

Q: Is it your recollection at the end of 2003, in fact, what you received was a 10 percent increase in salary, plus a \$4,000 increase in your base pay, representing the change from what had been that five percent bonus?

A: No.

Minutes later, without objection, the discussion continued:

Q: [A]m I correct that at the end of 2003, in December 2003, you received a \$10,000 increase from Inland, which consisted of a \$6,000 increase in your pay and a \$4,000 increase in your base salary to reflect the discontinuance of the five percent bonus program?

A: No, you are not correct.

Q: And if, say, for example, Eileen Burgoz were to get up and testify that's, indeed, what happened in 2003, would you say she's incorrect?

A: What I'm saying is I - that did not happen. So, I did not - what you stated, that is not correct.

Q: So if someone else was to testify that's indeed what happened, they were making up a story?

A: I'm saying that didn't happen. I would have known if it would have.

¶15 On redirect, the Uribes' counsel sought clarification on David's understanding of these questions to highlight David's argument that there was never a change to his annual bonus:

Q: Is your disagreement with the characterization in the question, that you received \$4,000 to discontinue your annual bonus?

A: I don't agree with that.

Q: Its [sic] true, isn't it, that you did receive an increase in your salary in 2003, just you were disagreeing with [Inland's

counsel's] characterization of what that increase was for; correct?

A: Yes.

¶16 After the Uribes rested in their case-in-chief, Inland presented testimony from Eileen Burgoz, Inland's treasurer and bookkeeper. Without objection, Eileen testified extensively about a meeting wherein Inland "revamped" its compensation structure and, specifically, that "[Inland] did not go with the 5 percent" bonus anymore after that meeting because it changed its policy regarding the bonus plan. As relevant here, Eileen testified that Uribe was at the meeting, that she "went over [the change] with him," showed him what his new check would be, and that he had no negative reaction. She further testified that for 2004, the first year the new structure was in effect, David received a salary raise of \$4000 in lieu of the 5% annual bonus and an additional pay raise of \$6000 for a total increase of \$10,000. She also testified that although David received bonuses after 2003, those bonuses were no longer calculated based on the 5% formula because that formula had been terminated.

¶17 On cross-examination, the Uribes' counsel, trying to emphasize David's understanding of the bonus plan, asked Eileen:

Q: The beginning of your testimony you talked with [Inland's counsel] about the 5 percent bonus issue. Do you recall that general subject?

A: Yes, I do.

. . . .

Q: Okay. But it is your testimony that for [years 2005, 2006, 2007, and 2008], if there were profits and if there was a determination to allocate bonuses, Mr. Uribe would have been entitled to receive some bonus, some share of those profits?

A: Yes.

Q: So Mr. Uribe never agreed to give up bonuses in lieu of an increase in salary, did he?

A: He agreed to give up the 5 percent formula to calculate.

Q: Can you tell me if you paid Mr. Uribe any bonuses between 2005 and 2009?

A: I'm sure we did. Do I have an exact number? No.

¶18 On redirect, Eileen again testified about eliminating the 5% annual bonus and that, after the change in compensation structure, David was no longer entitled to any particular bonus. Inland then rested and the Uribes did not offer any rebuttal testimony or otherwise challenge any of the testimony presented regarding Inland's treatment of the annual bonus.

¶19 After the close of evidence and hearing closing arguments at this bench trial, the superior court found in favor of Inland on all claims. As to the annual bonuses, the court explained:

[T]he 5% bonus per year agreement reached in 1997 between Inland and Plaintiff . . . terminated in 2004. In 2004, Inland calculated an average of prior 5% bonuses earned by Plaintiff to date to be \$4,000.00. Plaintiff's base salary was increased by the calculated average of the 5% bonuses received in years past. Plaintiff's base salary was \$70,000.00 from 2004 forward. Any additional pay raises Plaintiff received from 2004 forward were discretionary with Inland. Any bonuses distributed subsequent to 2004 were profit based and discretionary with Inland. Plaintiff has no legal entitlement to bonuses or salary increases after 2003. Nor is Plaintiff entitled to a \$4,000.00 each year raise in his base pay attributable to the former 5% bonus calculation.

Thus, after the trial, the superior court considered and rejected Uribe's annual bonus claim. And the Uribes have not raised any arguments on appeal challenging the superior court's ruling following the bench trial.

¶20 The Uribes argue nonetheless that, absent the ruling on the motion for partial summary judgment, they would have offered different evidence at trial. The Uribes also argue the trial evidence they did offer regarding their understanding of the annual bonuses was necessary to support a new theory they necessarily pursued only after entry of partial summary judgment—that “[if David's] increase in salary had replaced the bonus system, he should have received a ‘pyramiding’ increase in base salary such that his base salary would have increased by \$4,000 each year.”

¶21 Although evidence of Inland's agreement to increase David's salary by \$4,000 was pertinent to the Uribes' new theory and therefore some evidence relevant to that agreement would be necessary, the issue at trial was whether Inland was obligated to give David additional salary increases each year. Evidence as to how and when the 5% annual bonus was eliminated was irrelevant to that issue. Nevertheless, as previously noted, David did not limit his testimony to a pyramiding scheme or even to an increase in salary; rather, he testified repeatedly that he never gave up his 5% percent bonus and that it was never discontinued. The Uribes did not object to cross-examination exploring these issues or to Eileen's testimony regarding the annual bonus. Without objection, the evidence presented at trial went well beyond what was necessary for the Uribes to attempt to establish their new theory. The superior court then considered that evidence and still rejected Uribe's annual bonus claim. The Uribes have failed to specify, either in the superior court or on appeal, what additional evidence they would have provided to the superior court in support of David's claim that he was entitled to the 2009 annual bonus.

¶22 On this record, we conclude the Uribes had a fair and reasonable opportunity at trial to present their version of the events surrounding the 2009 annual bonus, which the superior

court then rejected.⁵ Accordingly, the Uribes have failed to carry their burden of demonstrating prejudice. See Ariz. Const. art. 6, § 27 ("No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done."); Ariz. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

¶23 Inland requests an award of attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2013), which authorizes an award of attorneys' fees to the successful party in a contested action arising out of a contract. In our discretion, we deny Inland's fee request but we award costs to Inland upon its compliance with Rule 21(a), Arizona Rules of Civil Appellate Procedure.

⁵ In response to an objection by Inland's counsel on grounds that the partial summary judgment ruling rendered certain testimony inadmissible on relevancy grounds, the court stated:

Both sides have a standing argument with regard to the Court's ruling on bonus. . . . At this point I'm going to allow it in. The Court will give anything the Court allows in whatever relevance is appropriate at the time the Court issues final rulings.

Thus, despite the Uribes' contention that they were constrained by the partial summary judgment ruling, the court allowed the Uribes significant leeway in presenting their evidence, which included the testimony outlined above regarding David's understanding of the annual bonus.

CONCLUSION

¶24 For the foregoing reasons, we affirm the superior court's judgment.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Presiding Judge

_____/s/_____
DIANE M. JOHNSEN, Judge