STATE OF MICHIGAN

COURT OF APPEALS

DONALD M. CHERRY, Plaintiff-Appellee, v AMERICAN TECHNICAL SERVICES, Defendant-Appellant.	UNPUBLISHED November 3, 2000 No. 213888 Macomb Circuit Court LC No. 95-003026-CK
DONALD M. CHERRY, Plaintiff-Appellant, v AMERICAN TECHNICAL SERVICES, Defendant-Appellee.	No. 217620 Macomb Circuit Court LC No. 95-003026-CK

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

In Docket No. 213888, defendant American Technical Services (ATS) appeals by right the trial court's entry of judgment against it following a bench trial. In Docket No. 217620, plaintiff Cherry appeals by leave granted the trial court's order denying recovery under MCL 600.2961; MSA 27A.2961, and the amount of attorney fees awarded in mediation sanctions. We affirm in part, reverse in part, and remand.

ATS' first issue on appeal is that the trial court erred in failing to apply the after-acquired evidence doctrine. We disagree. The application of the after-acquired evidence rule is a matter of law. *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 363; 575 NW2d 290 (1998).

We review on appeal a trial court's decision regarding a matter of law de novo. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 448; 571 NW2d 548 (1997).

The after-acquired evidence doctrine is applied normally to civil rights and wrongful termination cases. See *Grow v W A Thomas Co*, 236 Mich App 696; 601 NW2d 426 (1999) (a sexual harassment case); *Smith, supra* (a racial discrimination case against the township for failure to hire the plaintiff). The United States Supreme Court also addressed the after-acquired evidence rule in *McKennon v Nashville Banner Publishing Co*, 513 US 352; 115 S Ct 879; 130 L Ed 2d 852 (1995), and held that after-acquired evidence of employee wrongdoing did not bar all relief for the employee discharged in violation of the Age Discrimination in Employment Act, but rather, operated to limit the relief available. Furthermore, this Court in *Bradley v Philip Morris Inc*, 194 Mich App 44, 48; 486 NW2d 48 (1992), vacated in part on other grds 440 Mich 870; 486 NW2d 737 (1992), stated that "[e]vidence of employee misconduct occurring before termination is admissible as substantive evidence even if the former employer did not know of the misconduct until after the termination."

In this case, ATS argued that Cherry falsified his resume and misrepresented his experience in responding to requests for proposals. The trial court ruled that because Cherry only sought back pay, the after-acquired evidence doctrine was not applicable. In *Horn v Dep't of Corrections*, 216 Mich App 58, 66-69; 548 NW2d 660 (1996), this Court affirmed a trial court's application of the after-acquired evidence doctrine to dismiss the portion of the plaintiff's complaint seeking reinstatement and front pay, but reversed the trial court's ruling regarding the plaintiff's back pay. This Court determined that after-acquired evidence would generally bar reinstatement and front pay, but back pay may still be appropriate. *Id*. Here, however, Cherry never challenged ATS' right to terminate his employment or sought post-termination damages. Instead, Cherry brought a breach of contract claim that sought to recover payment for work he had already done. Therefore, the after-acquired evidence rule, which seeks to limit damages after an employer's termination of an employee, did not apply in this case.

ATS' second issue on appeal is that Cherry failed to sufficiently establish his damages. We disagree. Whether plaintiff established his damages to a reasonable certainty is a question of fact. This Court reviews a trial court's findings of fact under the clearly erroneous standard. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000); MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters, supra.* Generally, a plaintiff must prove his damages with reasonable certainty. See *Valentine v General American Credit, Inc*, 420 Mich 256, 261-263; 362 NW2d 628 (1984); *Fera v Village Plaza, Inc*, 396 Mich 639, 643; 242 NW2d 372 (1976). The measure of damages for a breach of contract is that which would place the injured party in as good a position as he would have been if the promised performance had been performed. *Body Rustproofing, Inc v Michigan Bell Telephone Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986).

ATS argues on appeal that Cherry failed to prove his damages because he failed to ascertain the amount of profit that ATS realized on the accounts at issue. The trial court determined that Cherry was entitled to commissions on all the sales of goods and services in each accounts' licensing

agreement. Although the employment contract between ATS and Cherry indicated that Cherry was entitled to commissions based on a percentage of "gross profit" on each sale, no evidence of third-party fees and expenses was ever introduced at trial. Evidence of the total sales made to each ATS client was established. Cherry received partial commissions on sales made to Steelcase, Accordia, Hastings-Tapley Insurance, University of Missouri, and Phoenix Management Services. The evidence indicated that the amount of commission paid to Cherry was based on the total contract price of the sales and did not reflect any reductions to determine "gross profits." "Where the fact of liability is proven, difficulty in determining damages will not bar recovery." *Willis v Ed Hudson Towing, Inc*, 109 Mich App 344, 350; 311 NW2d 776 (1981). Therefore, this Court finds that the trial court did not clearly err in finding that Cherry established with reasonable certainty the amount of his damages.

ATS' third issue on appeal is that the trial court erred in awarding post-termination commissions for contracts that he did not procure. We disagree. Whether plaintiff was entitled to the commissions at issue at trial was a question of fact. This Court reviews a trial court's factual findings for clear error. *Walters*, *supra*. When a contract is silent as to a salesman's entitlement to post-termination commissions, the salesman is entitled to commissions only if he is the "procuring cause" of the contract. *Roberts Associates, Inc v Blazer Int'l Corp*, 741 F Supp 650, 652 (ED Mich, 1990); see, also, *Reed v Kurdziel*, 352 Mich 287, 294-295; 89 NW2d 479 (1958). "[W]here the agent does not participate in the negotiation of a given contract of sale with a customer, he is not the procuring cause, even though the agent may have originally introduced the customer to the principal." *Roberts Associates*, *supra* at 653.

In this case, it is undisputed that Cherry did not negotiate any contracts with ATS clients. ATS argues on appeal that because Cherry did not negotiate any of the contracts at issue, the trial court erred in determining that he procured the sales and was entitled to the related commissions. Although the employment agreement between Cherry and ATS did not specifically state the level of participation in procuring a sale that Cherry needed to earn a commission, ATS paid Cherry a commission for work he had done on Steelcase, Accordia, Hastings-Tapley, University of Missouri, and Phoenix Management Services accounts. ATS argues that for the accounts Cherry was paid a commission, he was paid at the wrong rate. ATS' payroll records demonstrated that Cherry was to earn a five percent commission on all the accounts at issue except NYNEX. Furthermore, in response to Cherry's interrogatories, Wing indicated that Cherry procured sales to Steelcase, Accordia, Hastings-Tapley, University of Missouri, and Phoenix Management Services. Therefore, we do not find that the trial court clearly erred in determining that Cherry merited a five percent commission for those accounts.

In regard to the NYNEX account, it appears that the NYNEX sale was not completed until after Cherry's termination. However, both Wing and Cherry testified that work Cherry did on the NYNEX account was generally the same as that on the other accounts. Therefore, we conclude that the trial court did not clearly err in determining that Cherry was entitled to commissions on the NYNEX account.

ATS' last issue on appeal is that the trial court erred by overstating the amount of commissions earned by Cherry. We disagree.

ATS argues that the court's inclusion of hardware sales in the calculation of commissions was wrong. The trial court found that Cherry was entitled to five percent commissions on both sales of software and hardware. The trial court based its finding on the fact that the employment agreement between ATS and Cherry did not differentiate between commissions earned on software or hardware sales. Even though Cherry testified that he was owed fifty percent commissions on profits earned from the sale of hardware, and Wing testified that no commissions were owed for any hardware sale, we find that the court's reliance on the employment agreement was not clearly erroneous. We also find that the court's determination of damages regarding the Accordia account was not erroneous.

Cherry's first issue on appeal is that the trial court erred when it determined that MCL 600.2961; MSA 27A.2961 did not apply to commissions earned outside of Michigan. We agree. Because this issue involves statutory interpretation, this Court considers this issue de novo on appeal. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Cherry's complaint alleged that ATS violated MCL 600.2961; MSA 27A.2961 by intentionally failing to pay Cherry commissions that he had earned. Cherry sought damages of twice the amount of commissions owed to him pursuant to MCL 600.2961(5)(b); MSA 27A.2961(5)(b). The trial court determined that the language of the statute, particularly the language of the definition of "principal" in MCL 600.2961(1)(d); MSA 27A.2961(1)(d), expressly limits awarding of damages under MCL 600.2961(5); MSA 27A.2961(5) to those sales representatives that earned commissions in Michigan. Consequently, because the court determined that Cherry only earned commissions in Michigan on the Steelcase account and that ATS overpaid Cherry's commission on that account, it held that the statute did not apply.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The Legislature is presumed to have intended the meaning it plainly expressed in the statute. *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). If the plain and ordinary meaning of the language of the statute is clear, judicial construction is neither necessary or permitted. *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 163; 577 NW2d 206 (1998). If reasonable minds can differ regarding its meaning, then judicial construction is appropriate. *Adrian School Dist v Michigan Public School Employees' Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998).

In this case, we do not find that the language of the statute requires judicial construction. The statute requires that "*[a]ll* commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination." MCL 600.2961(4); MSA 27A.2961(4) (emphasis added). We believe that by virtue of the fact that the statute references all commissions, the statute requires that all commissions, no matter where earned, be paid to a sales representative by a principal. MCL 600.2961(1)(d); MSA 27A.2961(1)(d) defines a "principal" as a person or entity that: (1) "[m]anufactures, produces, imports, sells, or distributes a product in [Michigan]," or, (2) "[c]ontracts with a sales representative to solicit orders for or sell a product in [Michigan]." The trial court misread this language to mean that the statute was only

applicable to commissions earned in Michigan. The correct reading of the definition of "principal" is to only identify those persons who are subject to the statute's provisions. After a person is determined to be a principal within the meaning of the statute, then all commissions earned by a sales representative may be recovered under the statute. Therefore, we remand this case to the trial court for determination of whether ATS is a principal under the statute, whether ATS intentionally failed to pay commissions earned by Cherry within the required statutory time limit, and the amount of any attorney fees that may be due under MCL 600.2961(6); MSA 27A.2961(6).

Cherry's last issue on appeal is whether the trial court abused its discretion when it awarded attorney fees of $4,250 for mediation sanctions to Cherry. We conclude that the trial court did not abuse its discretion. Determination of the costs to include in a sanction is in the trial court's discretion, *Put v FKI Industries, Inc,* 222 Mich App 565, 572; 564 NW2d 184 (1997), and this Court will uphold an award of attorney fees absent an abuse of discretion, *Beach v State Farm Mutual Automobile Ins Co,* 216 Mich App 612, 625-626; 550 NW2d 580 (1996). An abuse of discretion occurs only if the trial court's decision was grossly violative of fact and logic. *Michigan Basic Property Ins Ass'n v Hackert Furniture Dist Co, Inc*, 194 Mich App 230, 234; 486 NW2d 68 (1992).

Following the trial court's entry of its opinion and order, Cherry moved for mediation sanctions, seeking $19,103.25 in attorney fees. Because all agree that it was appropriate for the trial court to award mediation sanctions, we will confine our decision to the amount of attorney fees awarded. The trial court was required to award mediation sanctions for actual costs. MCR 2.403(O)(1). Actual costs include a "reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation." MCR 2.403(O)(6)(b). Factors to be considered in determining the amount of attorney fees that should be awarded include: (1) the professional standing and experience of the lawyer; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Temple v Kelel Distributing Co, Inc,* 183 Mich App 326, 333; 454 NW2d 610 (1990). Reasonable attorney fees are not equivalent to actual fees charged. *Cleary v The Turning Point*, 203 Mich App 208, 212; 512 NW2d 9 (1993).

In this case, although the trial court did not make detailed findings as to the reasonableness of the $19,103.25 Cherry sought in attorney fees, the court did state that it considered the above mentioned factors in making its determination. The purpose of the mediation rule is to expedite and simplify final settlement of cases by placing the burden of litigation costs on the party who insists on trial by rejecting the mediation evaluation. *Neal v Neal*, 219 Mich App 490, 493; 557 NW2d 133 (1996). We do not find that the trial court's determination of reasonable attorney fees thwarted the purpose of mediation sanctions or that it was an abuse of discretion.

We affirm in part, reverse in part, and remand. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Jeffrey G. Collins