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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2254

Douglas Moga,
Respondent,

vs.

Shorewater Advisors, LLC,
Appellant,
Charles Marais, et al.,
Defendants.

Filed December 19, 2011
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CV076727

Karl E. Robinson, Kathleen M. Loucks, Hellmuth & Johnson, P.L.L.C., Edina, Minnesota (for respondent)

Thomas B. Hatch, Laura E. Nelson, Robins, Kaplan, Miller & Ciresi, L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

U N P U B L I S H E D   O P I N I O N

STONEBURNER, Judge

Appellant business challenges denial of its motion for judgment as a matter of law or, in the alternative, for a new trial in this breach-of-contract action, arguing that (1) the

district court erroneously determined that a letter was a settlement document inadmissible under Minn. R. Evid. 408; (2) the district court abused its discretion in other evidentiary rulings; and (3) the evidence does not support the jury's award of severance damages. We affirm.

FACTS

Appellant Shorewater Advisors, LLC (Shorewater) manages investment funds engaged in merger arbitrage, which involves investing in the stock of companies that are acquiring or being acquired by another company. Charles Marais (Marais) is the sole owner of Shorewater, but runs the business in consultation with his brother Eugene Marais who oversees their business in Australia.

In early March 2006, Shorewater advertised for a marketing director. Respondent Douglas Moga answered the advertisement and met with Marais. Marais and Moga were mutually interested in Moga working for Shorewater. In meetings, telephone conversations, and e-mails, they discussed the terms of Moga's employment. Marais also discussed Moga's employment with Eugene Marais. Marais wanted Moga to begin working with Shorewater on April 10. A March 29, 2006 e-mail, sent at 5:35 p.m. from Marais to Moga, Shorewater's attorney, Jay Simpson, and Moga's attorney, Ross Pazzoi, with a copy to Eugene Marais (Exhibit 12) summarized "some of the points" agreed to "in principle":

> 1. Both parties intend for this to be the start of a long-term business relationship.
> 2. On the first day of 'employment' (I don't know if employment is the correct word to use with a consultant), [Moga] will be paid $12,500.

> 3. For the first year of consulting, [Moga] will be paid $12,500 (pro-rated for part of a month) on the last business day of each month.
> 4. Approximately 20 days after the end of each quarter, [Moga] will be paid 24% of the net profits of [Shorewater] for the preceding quarter. If there is a loss, no profits will be distributed, and the loss will carry forward to the next quarter. All overheads and salaries paid during the quarter, as well as any bonuses paid to staff will be included in the calculations of net profit.
> 5. If [Moga] ceases his consulting relationship with [Shorewater], then he will continue to be paid a portion of the fees generated by assets raised during his tenure. These payments will be made as long as the said assets remain in the fund, but for a maximum period of three years. The rate at which [Moga] will be paid (assuming no discounting of fees) will be 10% of the management fees paid by the investor to [Shorewater] plus 20% of the performance fees.

The e-mail concludes with Marais expressing the hope that Simpson can prepare a draft of a written agreement shortly and a caution to all recipients that the e-mail was drafted "in a bit of a hurry, so if any of the recipients notes an obvious error, please reply ASAP."

On March 30, 2006, Marais e-mailed an incomplete draft agreement to Moga, and, later the same day, Marais e-mailed a spreadsheet with an example of how the profit-sharing would function. The spreadsheet demonstrates that Moga's compensation would be $12,500 per month or 24% of quarterly net profits, whichever was greater.

Moga started working without a signed agreement on April 10, 2006, with the understanding that there was a binding agreement about compensation that covered one year. Moga later stated that he also believed that there was a binding agreement about post-employment compensation set out in point 5 of Exhibit 12, but Marais took the

position that no agreement had been reached about post-employment compensation. Marais received $12,500, on his first day of employment as provided in point 2 of Exhibit 12 and was paid $12,500 per month consistent with point 3. The parties later disputed whether net profits were sufficient to trigger point 4.

Marais sent another draft agreement to Moga on June 2, 2006, in which some terms varied from Exhibit 12. Moga and Marais met in October 2006 to discuss a written agreement, but spent most of the meeting discussing Moga's assertion that he was entitled to receive 24% of the net profits from the first quarter even though he began working for Shorewater at the beginning of the second quarter. Eventually, Moga dropped his claim for a portion of the first-quarter profits. A third draft agreement was e-mailed to Moga on November 20, with an explanation that it only covered the first 12 months of Moga's work with Shorewater. None of the written agreements contained language similar to point 5 in Exhibit 12, or any mention of post-employment compensation.

Moga, Marais, and Simpson met on November 27, 2006, at which time Moga objected to the last proposed agreement as not incorporating what the parties had actually agreed to, but Marais and Simpson were unable to get a point-by-point explanation of Moga's disagreements and were frustrated that Moga would not sign the agreement. They told Moga that his relationship with Shorewater was not being terminated, but he should stop performing any work for Shorewater, meet with his attorney, and respond with written comments about the proposed agreement. Simpson formalized this request in a letter to Moga dated November 28, 2006. Moga subsequently e-mailed Shorewater

that he was not quitting and that he and his attorney were working on the contract. Marais and Simpson later testified that they were requesting a "mark-up" of the last proposed agreement that would reflect specifically Moga's position on each term. Moga's attorney responded with a December 5, 2006 letter titled "FOR PURPOSES OF SETTLEMENT DISCUSSIONS ONLY," proposing entirely new terms for Moga's salary and also addressing provisions in the latest draft agreement. Because of the new salary proposal, Marais considered the letter a repudiation of all prior agreements, and Shorewater sent a December 19, 2006 letter to Moga terminating his relationship and enclosing a prorated paycheck for his services to that date.

In January 2007, Moga sued Shorewater, Marais and Eugene Marais asserting 12 claims: (1) breach of contract; (2) fraudulent inducement of contract; (3) fraudulent misrepresentation; (4) equitable estoppel; (5) promissory estoppel; (6) unjust enrichment; (7) quantum meruit; (8) quasi-contract; (9) declaratory relief; (10) violation of Minn. Stat. § 181.14 (2006) (requiring prompt payment of unpaid wages and commissions); (11) breach of fiduciary duty; and (12) breach of the covenant of good faith and fair dealing. Shorewater counterclaimed for repayment of some expenses.

Following discovery, Shorewater and the Marais brothers moved for summary judgment. Concluding that no employment contract existed absent a written agreement, the district court granted summary judgment to Shorewater and the Marais brothers on all 12 claims and denied Moga's request to amend his complaint. Shorewater dismissed its counterclaim without prejudice, and Moga appealed.

This court determined that lack of a written document did not preclude formation of an enforceable contract and, construing the facts in the light most favorable to Moga, noted that Exhibit 12 established essential terms of an employment contract: compensation, start date, and duration of employment. This court reversed summary judgment on Moga's contract-related claims and the claims for unjust enrichment, quasi-contract, quantum meruit and section 181.14. *Moga v. Shorewater Advisors, LLC*, 2009 WL982237 (Minn. App., Apr. 14, 2009). We affirmed summary judgment on Moga's claims of fraudulent misrepresentation, equitable estoppel, promissory estoppel, and breach of fiduciary duty, and remanded for trial to determine "the existence of a contract and its interpretation, including the precise method of calculating Moga's compensation and whether the parties had agreed to any additional terms." *Id.* at *7. In affirming dismissal of Moga's claim for breach of fiduciary duty, which was based on Moga's assertion that he had been made an equity partner in Shorewater, we held that the district court correctly determined that no evidence exists indicating that Moga was a shareholder of Shorewater. *Id.* at *9.

At the subsequent jury trial on remand, Moga successfully moved in limine to exclude the December 5, 2006 letter, as an offer to compromise, inadmissible under Minn. R. Evid. 408. The district court also limited Shorewater's questioning of Moga about his pre-employment financial situation and employment background, and the district court allowed Moga to testify extensively, over Shorewater's objection, that he was offered and accepted equity ownership in Shorewater, entitling him to a buyout if the firm were sold or his relationship terminated, despite this court's ruling that there was no

evidence in the record to support that claim. It was Moga's position at trial that although the parties never reached an agreement about a buyout, the language in point 5 of Exhibit 12 was a binding agreement about severance compensation. But Marais testified that all references to buyout in the parties' discussions referred to point 5 in Exhibit 12 on which no agreement was reached. On the second day of trial, the district court finally agreed with Shorewater's argument that the opinion of this court precluded any claim by Moga to an equity ownership in Shorewater and instructed the jury that Moga's "claim is that he was entitled to a guaranteed salary, a share of the net profits of [Shorewater], and severance. There is no claim in this case that [Shorewater] made [Moga] a legal partner or shareholder of [Shorewater]."

At trial, the parties agreed that Exhibit 12 established an enforceable contract for Moga's compensation but disputed the terms of that agreement, including whether an agreement for post-employment compensation was created by point 5 of Exhibit 12 and, if an agreement was created by point 5, how it applied. Shorewater argued that point 5 precluded payment on any discounted fees, and that, even if point 5 created an agreement, Moga was entitled to only $1,074.08, representing the rates set out in point 5 applied to nondiscounted fees. Moga asserted that no management fees were discounted after he began working at Shorewater, and, that even if any could be considered discounted, the ambiguous language about the effect of discounting should be ignored, entitling him to payment of $542,487, as calculated by his expert witness. Alternatively, Moga argued that if the fees were considered to have been discounted, he was entitled to

a rate of payment on those fees consistent with the amount of the discount.[1] Shorewater countered that even if the discounting language were ignored, Moga was entitled to no more than $297,901 under the language of point 5.

Among the issues submitted to the jury were (1) whether Moga and Shorewater formed a contract regarding Moga's compensation and, if so; (2) whether the compensation contract was (as Shorewater argued) for 24% of net profits or $12,500 per month, whichever was greater, or (as Moga argued) for 24% of net profits plus $12,500 per month; (3) whether Moga and Shorewater agreed that Moga would receive severance compensation for three years regardless of when the relationship terminated; and if so (4) did Shorewater breach the terms of that contract; (5) did Moga breach the terms of that contract; (6) what amount of money would fairly and reasonably compensate Moga for breach of contract, if any, by Shorewater for base salary, quarterly bonuses, and three-year severance payments.[2]

The jury concluded, in relevant part, that (1) Shorewater and Moga had a compensation contract for (2) 24% of net profits or $12,500 per month, whichever was greater; (3) they had an agreement that Moga would receive severance compensation for three years; (4) the agreement was breached by Shorewater; (5) not by Moga; and (6) Moga's damages for base salary were $43,125 and for severance payments were

[1] Moga also testified that Marais told him that if any fees were discounted, his compensation would be reduced consistent with the discount.
[2] The remaining special-verdict-form questions addressed issues not relevant to this appeal.

$387,827. Shorewater moved for judgment as a matter of law or, in the alternative, a new trial. The motion was denied, judgment was entered, and this appeal followed.

D E C I S I O N

I. Exclusion of the December 5 letter under Minn. R. Evid. 408 was error but does not warrant a new trial.

Shorewater argues that there was no dispute between the parties that called for settlement negotiations and that the district court erred by accepting Moga's argument that the December 5 letter represented a settlement offer merely based on its title. Shorewater asserts that the letter is evidence that Moga repudiated any agreements about compensation or severance previously reached, excusing Shorewater's performance on those agreements.

The decision to admit or exclude evidence is committed to the broad discretion of the district court, and its evidentiary rulings will not be disturbed unless they are based on an erroneous view of the law or constitute an abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45–46 (Minn. 1997). This court "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Washington Cnty. Schs.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted).

Minn. R. Evid. 408 provides, in relevant part, that evidence of conduct or statements made in compromise negotiations is not admissible. The rule does not require exclusion when the evidence is offered for another purpose. *C.J. Duffey Paper Company,*

et al. v. Reger, identifies three elements that must be present before rule 408 requires that evidence be excluded: (1) the evidence relates to "an offer to compromise a claim which was disputed as to either validity or amount"; (2) it is "offered to prove liability for or invalidity of the claim or its amount"; and (3) it "is not offered for another legitimate purpose." 588 N.W.2d 519, 524 (Minn. App. 1999) (quotations omitted).

Before trial began, Moga moved to exclude the December 5, 2006 letter as a settlement offer. The district court reserved ruling. On the fourth day of trial, the district court sustained an objection to Shorewater's questioning Moga about the letter. Shorewater made an offer of proof by questioning Moga outside of the presence of the jury, in which Moga at first agreed that the letter is not a "mark-up" of the agreement under discussion, then said the letter could be considered a "mark-up" because it responded to the proposed agreement. Moga agreed that the letter proposes new contract terms. Shorewater then offered the letter as the basis for Shorewater terminating Moga's employment, arguing that it is not a settlement offer under rule 408. The district court concluded that the letter was written at a time when the parties were in a real dispute and contains some compromises. The district court excluded the letter and any reference by Shorewater to the letter or its contents. The district court permitted Shorewater to question Moga about whether he provided a marked-up copy of the draft agreement, but permitted Moga to testify that his attorney responded in writing to the agreement.

In *C.J. Duffey Paper Co.*, we held that a letter acknowledging money owed under an employment contract but offering to compromise that amount was not a settlement proposal that required exclusion under rule 408, because the letter was not offered as

evidence of liability or damages. *Id.* at 525. Instead the letter was offered as evidence of the employer's bad faith and as an example of the employer not dealing fairly with the employee. Similarly, we conclude that the December 5 letter was not an offer to compromise an existing dispute, but rather, like the letter in *Duffey*, created a dispute about the ongoing terms of Moga's employment and, like the letter in *Duffey*, was not being offered as evidence of liability or damages. Shorewater offered the letter as evidence that Moga, by attempting to renegotiate his salary, was repudiating agreed-upon terms of compensation, excusing Shorewater's further performance under the agreement. Because the letter falls within the "other purpose" exception to rule 408, the district court erred in excluding it under that rule.

But concluding that the district court was not required to exclude the letter under rule 408 does not require a holding that the district court was required to admit the letter or that Shorewater is entitled to a new trial because the letter was excluded on an erroneous interpretation of the rule. Minn. R. Evid. 403 gives the district court discretion to exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." And "[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990). "An evidentiary error is prejudicial if the error might reasonably have changed the result of the trial." *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46, 51 (Minn. App. 1998).

We disagree with Shorewater's assertion that the letter is a clear repudiation of the existing agreement for Moga's first-year compensation. The parties were engaged in increasingly antagonistic discussions for almost eight months about the terms of Moga's employment. Moga was presented with three written drafts, the terms of which varied from draft to draft, and none of which contained the severance language in point 5 of Exhibit 12, which expressed the agreements "in principle" under which Moga went to work. The December 5 letter represented continued contract negotiations rather than an offer of settlement, but it is not, as Shorewater asserts, clear evidence of Moga's repudiation of prior agreements, excusing Shorewater's performance. Shorewater was able to argue to the jury that, by failing to follow its instructions concerning the last draft of the agreement (to provide a mark-up demonstrating his agreement or disagreement with each proposed term) and by failing to come to terms with Shorewater, Moga repudiated any prior agreements. The jury was instructed on contract formation and repudiation. On this record, we conclude that Shorewater has failed to establish that introduction of the letter or its contents might reasonably have changed the jury's verdict in this case and hold that the district court did not abuse its discretion in denying a new trial on the basis of improper exclusion of the letter based on rule 408.

II. Shorewater has not shown that any restrictions on cross-examination of Moga affected the verdict.

We have already addressed Shorewater's arguments on this issue as it pertains to the December 5 letter, but Shorewater also argues it was prejudiced by the district court's limits on questions about Moga's desperate financial situation when he sought

employment with Shorewater (to explain why he would begin working without a written agreement), and his past business failures (to impeach his credibility).

From our painstaking review of the voluminous record in this case, we conclude that Shorewater is not able to demonstrate that any of the complained of evidentiary rulings affected the verdict in this case. Shorewater was able to establish that Moga's "cash was low" at the time he sought work with Shorewater; that he had been fired from his position at Piper Jaffray; that there were inconsistencies in his resume; and that he failed to close any deals between 2002 and 2006. Even if any of the district court's rulings could be said to have been an abuse of discretion, Shorewater has not established that additional or more detailed evidence on these issues would have affected the verdict, and the district court did not abuse its discretion by denying a new trial based on these challenged evidentiary rulings.

III. Shorewater has not demonstrated that Moga's testimony about equity partnership affected the verdict.

Shorewater correctly argued to the district court that Moga should have been precluded from asserting an equity ownership in Shorewater based on the law of the case. Law of the case is a discretionary doctrine developed to effectuate finality of appellate decisions and applies where an appellate court has ruled on an issue and remanded. *Loo v. Loo*, 520 N.W.2d 740, 744 n. 1 (Minn. 1994). That principle was not initially allowed by the district court here. Only after Moga had made extensive reference to having been offered an equity interest in Shorewater did the district court instruct the jury that Moga was not making any claim based on ownership. On appeal, Shorewater asserts that the

district court's instruction exacerbated the problem by making Moga "more credible." But the district court sought input from counsel prior to giving the instruction, and Shorewater did not propose a different instruction or object to the instruction given. Generally we will not consider matters not argued to and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

The jury was informed by the district court's instruction and Moga's subsequent testimony that Moga was not making any claim to an equity ownership. On this record, we conclude that Shorewater has failed to demonstrate that any abuse of discretion for failing to more promptly limit this testimony affected the verdict.

IV. The district court did not abuse its discretion by denying judgment as a matter of law on the issue of a severance agreement and severance damages.

Shorewater argues that even if this court does not set aside the jury's special verdict on the issue of whether a severance agreement had been reached based on the foregoing arguments, "the severance award must nevertheless be set aside" because the language describing severance payments in Exhibit 12 "plainly states that severance payments will be paid only on non-discounted fees." And Shorewater argues that the jury's damages award for severance "is so far in excess of the maximum amount that could be owed . . . that the jury's award cannot 'be reconciled in any reasonable manner consistent with the evidence and its fair inferences,'" quoting *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999).

The jury heard testimony about what constitutes discounting of fees, whether substantial fees paid by Shorewater's major investor after Moga began work were

discounted, and how severance damages should be calculated under the language of point 5 of Exhibit 12, providing that "[t]he rate at which [Moga] will be paid (assuming no discounting of fees) will be 10% of the management fees . . . plus 20% of the performance fees."

Marais testified that the majority of fees were discounted and asserted that the language of point 5 plainly stated that, if fees were discounted, Moga would be paid nothing. Marais testified that there was only one non-discounted management fee paid after Moga began work, and calculated the amount owed on that fee for three years to be $1,074.08, based on the language in point 5. Shorewater also presented a spreadsheet calculating severance damages as $297,901, if the "discounting" language was ignored.

Moga's expert calculated severance damages as $542,487 and described in detail the manner in which he arrived at this figure. When asked about discounting, he responded that he did not know what "assuming no discounting of fees" meant in point 5, and stated, "I saw nothing that would look like a discounting of fees in the information that I saw." Moga testified that the language in point 5 meant that the percentage to be applied to discounted fees would be comparable to any discounting of fees. The jury rejected the calculations of each party and arrived at its own calculation that falls within the range of the parties' calculations. "It is elementary that a [fact-finder] need not adopt the exact figures of any witness in determining . . . damages . . . , and as long as its finding is within the mathematical limitations established by the various witnesses and is otherwise reasonably supported by the evidence as a whole, such finding must be sustained." *Carroll v. Pratt*, 247 Minn. 198, 202, 76 N.W. 2d 693, 697 (Minn. 1956).

Although we cannot ascertain precisely how the jury arrived at the amount of the damages, its findings are within the range of calculations presented to it and must be sustained. Shorewater has not demonstrated that it was entitled to judgment as a matter of law on the issue of severance damages, and the district court did not abuse its discretion by denying Shorewater's motion for judgment as a matter of law or a new trial on this issue.

Affirmed.