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NO. COA00-1515

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

J. ALAN MOORE,
Plaintiff

v. Mecklenburg County
No. 98 CVS 12286

DATA SYSTEMS NETWORK
CORPORATION,
Defendant

Appeal by defendant from order entered 7 June 2000 by Judge Robert P. Johnston and judgment entered 28 July 2000 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 December 2001.

Templeton & Raynor, P.A., by Kenneth R. Raynor and Erik A. Schwanz, for plaintiff-appellee.

McGuire Woods L.L.P., by Erin E. Burke and Fred M. Wood, Jr., for defendant-appellant.

CAMPBELL, Judge.

Defendant Data Systems Network Corporation ("Data Systems") appeals from the trial court's grant of partial summary judgment in favor of J. Alan Moore ("Plaintiff") on the issue of Plaintiff's entitlement to additional commissions on Data Systems' sale of the Tivoli Enterprise Licensing Agreement ("Tivoli ELA") to Branch Banking & Trust Co. ("BB&T"). Data Systems also appeals from the trial court's entry of judgment in favor of Plaintiff on his

remaining claims for commissions and unpaid expenses. By its assignments of error, Data Systems contends that the trial court erred in: (1) granting Plaintiff's motion for partial summary judgment, (2) awarding Plaintiff liquidated damages under the Wage and Hour Act in connection with the grant of partial summary judgment, (3) admitting evidence at trial concerning the grant of partial summary judgment in favor of Plaintiff, (4) instructing the jury on breach of contract and other general principles of contract law; and (5) denying Data Systems' motion for a directed verdict at the conclusion of all the evidence. We affirm.

The relevant factual and procedural history is as follows: On 28 October 1996, Plaintiff began working for Data Systems as Senior Account Manager. As Senior Account Manager, Plaintiff worked as a sales representative, responsible for selling a wide variety of computer technology products and services offered by Data Systems, including computer hardware, computer software, and customer support services. In 1997 and 1998, Plaintiff concentrated primarily on selling products offered by Unified Network Services ("UNS"), a subsidiary in which Data Systems owned seventy percent (70%) of the stock. In particular, Plaintiff focused his efforts on selling the Tivoli ELA to BB&T. The Tivoli ELA is a complex computer software network management program which was offered for sale by Data Systems through its subsidiary UNS. Plaintiff worked for Data Systems from 28 October 1996 until some point in 1998. The termination date of Plaintiff's employment with Data Systems was a principal matter of contention between the parties at trial.

Throughout his employment with Data Systems, Plaintiff was an at-will employee.

Plaintiff's compensation for 1997 and 1998 was based on salary, commissions, and stock options, as set forth in Data Systems' 1997 Sales Compensation Plan and 1998 Sales Compensation Plan (collectively, "the Sales Compensation Plans").[1] Data Systems' 1997 Sales Compensation Plan ("the 1997 Plan") provided for the payment of commissions as follows:

> Commissions will be paid thirty days after the company recognizes the revenues from the sale. The gross margin shall be the basis for the commission plan and a monthly report shall be sent to each sales person for commission verification. Commissions will be paid on the 30th of each month for the previous months commissions due. In the event an employee leaves the company, no future commissions will be paid. The company policy states. "No further compensation will be paid after an employee leaves the company."

Accordingly, commissions were not earned until the company actually received revenue from the sale. The commissions then became due and payable at the end of the following month. In the event an employee left the company, the employee would not be paid commissions on sales for which the company had not recognized revenue prior to the employee's last day of work.

Under the 1997 Plan, Plaintiff was entitled to a sixteen percent (16%) commission on the first $500,000.00 in gross margin

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[1] In its answer to Plaintiff's complaint, Data Systems admitted that Plaintiff was paid commissions pursuant to the Sales Compensation Plans.

(i.e., gross profit)[2] recognized by the company in the calendar year on sales generated by Plaintiff. For the amount of gross margin exceeding $500,000.00, Plaintiff was entitled to a nineteen percent (19%) commission. The 1997 Plan provided that commissions on the sale of services would be calculated at a forty percent (40%) gross margin rate. The 1997 Plan also set forth the manner in which gross margin was to be calculated on computer hardware transactions as follows:

> Gross margin on hardware transactions shall be calculated and determined as the sales price minus all associated costs, including freight charges, warranty costs, pre-paid maintenance charges, handling charges, staging costs, storage fees, etc.

The 1997 Plan was silent as to the calculation of gross margin on computer software transactions, such as the sale of the Tivoli ELA to BB&T.

The 1997 Plan further provided the following guidelines for expense reimbursements:

> It is the policy of Data Systems Network Corporation to reimburse all reasonable documented expenses, consistent with the published guidelines. It is the obligation of each employee to submit timely expense reimbursement forms for payment. Expenses that exceed a ninety (90) day period may be subject for non-compliance and therefore may not be paid without special approval [from] the VP of sales.

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[2] According to the deposition testimony of Tracy Behar, Eastern Region Vice President of Sales for Data Systems, the terms "gross margin" and "gross profit" had the same meaning for purposes of calculating commissions under Data Systems' Sales Compensation Plans.

Finally, the 1997 Plan contained the following provisions regarding modification of the Plan and termination of employment:

> Data Systems Network Corporation reserves the right to modify this plan and may elect to make changes[,] and will do so, *only in written notice*[,] and any and all changes will be thirty (30) days prior to the changes becoming effective. This plan supersedes any and all previous plans either written or communicated verbally relating to sales compensation for Sales Representatives.
>
> Data Systems Networks expressly reserves the right to terminate any sales representative['s] employment or participation [in] this plan at any time, and for any reason whatsoever and without cause . . . . (Emphasis added).

Data Systems' 1998 Sales Compensation Plan ("the 1998 Plan") was similar in most respects to the 1997 Plan. The 1998 Plan again based all commissions on gross margin, set a forty percent (40%) gross margin rate for commissions on the sale of new services, and carried forward the definition of gross margin on computer hardware transactions contained in the 1997 Plan. The 1998 Plan was again silent on how to calculate gross margin on computer software transactions and retained the provision that no future commissions would be paid after an employee left the company.

However, there were some important differences between the 1998 Plan and the 1997 Plan. The 1998 Plan added the following provision concerning the payment of commissions:

> It is also the policy of the company to reserve the right to reduce 50% of commissions owed in the event the sales person involved in the transaction does not assist with the collection effort of the aging receivables. This 50% reduction of commissions will occur if payment for the transaction extends beyond

> 90 days for commercial accounts and 120 days for local and state government accounts . . . It shall be at the VP of Sales[‘] discretion to determine that the effort was not in line with the policy for DSNC to collect receivables in a timely and efficient manner.

In addition, the 1998 Plan increased the amount at which commissions would be paid at a rate of nineteen percent (19%) of gross margin from $500,000.00 to $600,000.00. Thus, the 1998 Plan was less generous to the employee and more protective of the employer. The 1998 Plan also added the following provision concerning the payment of commissions for the sale of workshops:

> All revenues for selling one of the qualified workshops offered from the Strategic areas of the company will pay a bonus for delivering and invoicing these workshops. If the workshop does not result in additional business the revenue will be treated as regular service business paid at the standard rate that applies. If the workshop produces the desired result of additional business then a bonus amount of $5,000 of the $15,000 workshop price shall be paid instead of the standard commission rate of 16% of the 40% Gross Margin or $960. The maximum bonus to be paid on any workshop will be $5,000. All transactions for bonus must be submitted by the sales person and must be approved by your sales manager and the Vice President of Sales before payment is paid.

Finally, the 1998 Plan reduced the time period in which employees were required to submit expense reimbursement forms in order to avoid being subject to non-compliance from ninety (90) days to sixty (60) days.

In March 1997, Plaintiff began focusing his efforts on selling the Tivoli ELA to BB&T. On 4 November 1997, Data Systems received a commitment from BB&T to purchase support services to assist in

the implementation of the Tivoli ELA software network management program. The parties agreed that the total cost of these support services would not exceed $2,960,000.00. In late December 1997, BB&T's purchase of the Tivoli ELA program was finalized, and, on or about 29 January 1998, BB&T paid Data Systems $6,637,500.00 for the Tivoli ELA.

On 5 March 1998, Plaintiff was paid a $50,000.00 finder's fee on the sale of the Tivoli ELA to BB&T. According to the affidavit of Michael Grieves, President and CEO of Data Systems ("the President"), Plaintiff had previously agreed to this finder's fee as his commission for the Tivoli ELA sale due to the unique nature of the transaction and the high associated costs related to the sale. However, Plaintiff wrote the President on 31 March 1998 requesting full payment of commissions for the sale of the Tivoli ELA under the 1998 Plan. According to Plaintiff's calculations, the gross margin on the sale of the Tivoli ELA was $846,281.00, of which Plaintiff was entitled to $146,146.19. Having already received the $50,000.00 finder's fee, Plaintiff claimed he was owed $96,146.19. According to Plaintiff, he never received a response to this letter.

Throughout 1998, Plaintiff continued working with BB&T on implementation of the Tivoli ELA program. In March 1998, Plaintiff secured a purchase order from BB&T in the amount of $521,035.00 for additional computer hardware. In addition, on 26 March 1998, Plaintiff secured a purchase order from BB&T in the amount of $450,000.00 for implementation services. These implementation

services were in addition to the $2,960,000.00 worth of implementation services purchased by BB&T in November 1997. Plaintiff also continued to work with BB&T on the implementation services purchased in November 1997. Plaintiff expected his commissions from the $2,960,000.00 sale of services to total $206,000.00. However, as of 15 June 1998, he had only received $68,000.00 in commissions from that sale of implementation services.

On or about 1 June 1998, a group of UNS minority shareholders exercised their option to purchase the shares of UNS owned by Data Systems. As part of the transaction, UNS assumed certain assets and liabilities belonging to Data Systems, including some of the assets and liabilities related to the Tivoli ELA product and its sale to BB&T. On 30 June 1998, Plaintiff received his last paycheck from Data Systems. Plaintiff also received a letter dated 30 June 1998 informing him that his insurance coverage was being terminated as of that date, but that he could continue coverage for eighteen months by taking the steps set forth in the letter. On 15 July 1998, Plaintiff began receiving a paycheck from UNS. As a result, Data Systems contends that Plaintiff's last day of employment with Data Systems was 30 June 1998, and, thus, pursuant to the 1998 Sales Compensation Plan, he is not entitled to commissions on sales for which revenue was received by Data Systems after 30 June 1998.

Plaintiff admits that he was made aware in June 1998 that Data Systems and UNS were restructuring their relationship and that

afterwards he would be working for UNS. However, Plaintiff contends that he was never given the specifics of the new relationship, he never received an employment agreement from UNS, nor did UNS ever hire him following the purchase of the outstanding shares of UNS from Data Systems. Accordingly, although he had received the letter informing him of the termination of his insurance coverage and he had begun receiving paychecks from UNS, Plaintiff was under the impression that he was still working for Data Systems. Plaintiff continued working with BB&T on implementation of the Tivoli ELA program in the same capacity in which he had worked prior to Data Systems' sale of its interest in UNS. Plaintiff contends that he worked for Data Systems until 10 September 1998, when he resigned because he had not been paid the commissions due him nor had he been reimbursed for the expenses he had incurred on behalf of Data Systems.

On 27 August 1998, prior to his resignation, Plaintiff filed the complaint in the instant action. In Count One, Plaintiff alleged that Data Systems had failed to pay him $103,812.16 in commissions on sales for which Data Systems had received payment. In Count Two, Plaintiff alleged that Data Systems' failure to pay these commissions was a violation of the Wage and Hour Act entitling him to liquidated damages in the amount of $103,812.16. In Count Three, Plaintiff asserted a claim for reimbursement of expenses in the amount of $2,685.91. In Count Four, Plaintiff alleged that Data Systems had breached its employment agreement with him by selling its interest in UNS and wrongfully assigning

to UNS the sales generated by Plaintiff in connection with the Tivoli ELA program, thereby preventing Plaintiff from receiving the commissions from those sales. Plaintiff's prayer for relief on Count Four was for $13,308.36.

On 31 March 2000, Plaintiff filed a motion for summary judgment on all issues raised in his complaint. In response, Data Systems filed a motion for partial summary judgment on the issue of commissions due Plaintiff from the November 1997 sale of approximately $2.9 million in implementation services to BB&T. At the hearing on the parties' cross-motions, Plaintiff acknowledged that the affidavit filed by Data Systems in response to Plaintiff's motion for summary judgment rendered Plaintiff's motion moot as to all issues other than Plaintiff's entitlement to commissions from the November 1997 sale of support services. Following the hearing, the trial court denied the parties' cross-motions for partial summary judgment on the issue of commissions due from the November 1997 sale. In its order, the trial court also allowed Plaintiff's motion to amend his complaint to increase the amount of recovery prayed for in Count Four to $148,515.00.

On 3 May 2000, Plaintiff filed a motion for partial summary judgment on the issue of commissions allegedly due him on the sale of the Tivoli ELA to BB&T. On 7 July 2000, Judge Johnston entered an order granting plaintiff's motion for partial summary judgment on this issue. Judge Johnston found that Data Systems owed Plaintiff commissions in the amount of $146,146.19 for the sale of the Tivoli ELA to BB&T and that Plaintiff had only received

$50,000.00. Thus, the court ordered Data Systems to pay Plaintiff $96,146.19 plus interest. The court further ordered Data Systems to pay Plaintiff an additional $96,146.19 in liquidated damages under the Wage and Hour Act.

The case then went to trial on the remaining issues raised by Plaintiff's amended complaint. Following trial, the jury returned as its verdict the following answers to the issues submitted by the trial court:

> 1. Did Data Systems Network Corporation breach its agreement to pay to the Plaintiff, Alan Moore, commissions and expenses?
>
> ANSWER: Yes.
>
> 2. What amount of money damages is the Plaintiff, Alan Moore, entitled to recover?
>
> ANSWER: $190,088.19.

The trial court entered judgment consistent with the jury's verdict. The trial court further found that Data Systems was liable for liquidated damages under the Wage and Hour Act equal to the amount of damages found by the jury. Finally, the trial court taxed the costs of the action, including a reasonable attorneys' fee of $26,000.00, against Data Systems.

Data Systems filed timely notice of appeal to both the trial court's 7 June 2000 order granting partial summary judgment in favor of Plaintiff and the trial court's 28 July 2000 judgment.

I. Pre-Trial Issues

Data Systems first contends that the trial court erred in awarding partial summary judgment in favor of Plaintiff on the issue of additional commissions on the sale of the Tivoli ELA.

Data Systems argues that a genuine issue of material fact existed as to (1) whether Plaintiff was entitled to additional commissions on the sale of the Tivoli ELA, and (2) if so, in what amount.

It is well settled that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (1999). "The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP,* 350 N.C. 214, 220, 513 S.E.2d 320, 324 (1999). In ruling on a motion for summary judgment, the evidence of record must be considered in the light most favorable to the party opposing the motion. *Id.* "'[A]ll inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.'" *Page v. Sloan,* 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972) (citation omitted). The Supreme Court reiterated the strict standards by which the propriety of summary judgment is to be determined in *Creech v. Melnik,* 347 N.C. 520, 495 S.E.2d 907 (1998), stating:

> Before summary judgment may be entered, it must be clearly established by the record before the trial court that there is a lack of any triable issue of fact. In making this determination, the evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party to benefit from summary judgment must be carefully scrutinized. Further, any doubt as to the

> existence of an issue of triable fact must be resolved in favor of the party against whom summary judgment is contemplated.

Id. at 526, 495 S.E.2d at 911 (citations omitted).

In arguing that a genuine issue of material fact existed as to Plaintiff's entitlement to additional commissions on the sale of the Tivoli ELA, Data Systems contends that the trial court failed to account for the associated costs related to the sale of the Tivoli ELA in determining the additional commissions to which Plaintiff was entitled. Data Systems maintains that the 1998 Sales Compensation Plan required that associated costs be deducted in calculating the gross margin on the sale of the Tivoli ELA. We disagree.

As previously noted, the 1998 Plan provided in pertinent part:

> Gross margin on hardware transactions shall be calculated and determined as the sales price minus all associated costs, including freight charges, warranty costs, pre-paid maintenance charges, handling charges, staging costs, storage fees, etc.

However, this provision of the 1998 Plan only applied to hardware transactions. The 1998 Plan is silent as to the manner in which gross margin was to be calculated for software transactions. Thus, we look to other evidence in the record to determine how gross margin was to be calculated on software transactions in determining Plaintiff's commissions.

In his deposition testimony, Tracy Behar, Eastern Region Vice President of Sales, stated that the sale of the Tivoli ELA to BB&T was a software transaction. Behar further testified that, under Data Systems' Sales Compensation Plans, the gross margin on all

software transactions was calculated without deducting the associated costs. According to Behar's testimony, the gross margin on software transactions was calculated by simply deducting the cost of the product sold from the revenue generated by the sale. Behar further testified that, based on the spirit of Data Systems' Sales Compensation Plans, Plaintiff was entitled to much more than the $50,000.00 finder's fee paid by the company. In fact, Behar testified that he had expressed this opinion to the President, who responded by stating that the amount of commission called for by the Sales Compensation Plan was simply too much for Plaintiff to make on the Tivoli ELA transaction.

The only evidence presented by Data Systems tending to refute the testimony of Tracy Behar was the affidavit of Michael Grieves, the President of the company. Data Systems contends that the President's affidavit raised a genuine issue of material fact as to the amount of commissions to which Plaintiff was entitled. In his affidavit, the President states that he had a conversation with Plaintiff in late 1997, in which he explained that the sale of the Tivoli ELA was not covered by the Sales Compensation Plan due to its unique nature and the unusually high amount of associated costs expected to be incurred in relation to the sale. The President's affidavit further states that he spoke to Plaintiff about the $50,000.00 finder's fee and Plaintiff agreed that it was a fair and reasonable commission.

However, the Wage and Hour Act ("the Act") does not allow an employer to orally reduce the wages or commissions due an employee.

The Act defines the term "wage" to include such wage-related benefits as "sick pay, vacation pay, severance pay, *commissions*, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments." N.C. Gen. Stat. § 95-25.2(16) (1999) (emphasis added). Once an employer has chosen the wages and benefits for its employees, the employer is required to notify the employees, orally or in writing, at the time of hiring, of the promised wages, the day and place for payment, and the policies on commissions and other wage-related benefits. N.C. Gen. Stat. § 95-25.13; *Narron v. Hardee's Food Systems, Inc.*, 75 N.C. App. 579, 582-83, 331 S.E.2d 205, 207 (1985). An employer may change the wages and benefits offered at any time, so long as the employer notifies its employees, in *writing or through a posted notice* maintained in a place accessible to its employees, of such changes in promised wages prior to the time of such changes. N.C.G.S. § 95-25.13(3); *Narron*, 75 N.C. App. at 583, 331 S.E.2d at 207.

In the instant case, Data Systems' policy on commissions was set forth in the 1997 and 1998 Sales Compensation Plans. The Sales Compensation Plans were silent as to the manner in which gross margin was to be calculated on software transactions. The testimony of Tracy Behar reveals that the gross margin on software transactions was to be calculated without regard to associated costs. Further, there is nothing in the Sales Compensation Plans indicating that sales of certain products, like the Tivoli ELA, are not covered by its terms. Once Plaintiff was notified of the

manner in which commissions would be paid, the Wage and Hour Act prevented Data Systems from changing its policies on payment of commissions unless Plaintiff was notified of such changes in *writing or through a posted notice.* The affidavit of the President of Data Systems indicates that the discussions he had with Plaintiff and the agreements they reached concerning the finder's fee were all done orally. Such oral reductions in promised wages and commissions is prohibited by the Wage and Hour Act. Accordingly, the President's affidavit does not raise a genuine issue of material fact as to Plaintiff's entitlement to additional commissions on the sale of the Tivoli ELA.

Viewed in the light most favorable to Data Systems, we conclude that the evidence shows that the 1998 Sales Compensation Plan, under which Plaintiff's commissions on the Tivoli ELA transaction were to be calculated, did not require that associated costs be deducted in determining the gross margin on a software transaction. In addition, any attempt on behalf of Data Systems to reduce the commissions to which Plaintiff was entitled under the 1998 Sales Compensation Plan necessarily had to be in writing to conform with the Wage and Hour Act. There is no evidence in the record of such written reduction. Thus, we hold that the trial court did not err in granting partial summary judgment in favor of Plaintiff. Accordingly, Data Systems' first and second assignments of error are overruled.

Data Systems' next two assignments of error relate to the trial court's imposition of liquidated damages in connection with

its entry of partial summary judgment in favor of Plaintiff. In its order granting Plaintiff's motion for partial summary judgment, the trial court made the following determination:

> 8. The Defendant owes to the Plaintiff an additional sum of $96,146.19 for commissions due on the sale of the Tivoli Enterprise Licensing Agreement to BB&T, and the Defendant has failed to show that its failure to pay said commission was made in good faith or that it had reasonable ground for believing the failure to pay the commission for this sale was not a violation of the Wage and Hour Act.

Accordingly, the trial court ordered that Plaintiff recover $96,146.19 in liquidated damages pursuant to N.C. Gen. Stat. § 95-22.22(a1).

Data Systems first contends that the trial court erred in awarding liquidated damages because Data Systems did not violate the Wage and Hour Act. However, based on our resolution of Data Systems' first two assignments of error, we summarily overrule this contention and move to Data Systems' argument that the imposition of liquidated damages was improper because the company acted with a good faith belief that its manner of compensating Plaintiff for the sale of the Tivoli ELA was not in violation of the Wage and Hour Act.

N.C.G.S. § 95-25.22, which addresses the recovery of unpaid wages, provides:

> (a) Any employer who violates the provisions of . . . G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of . . . their unpaid amounts due under G.S. 95-25.6 through 95-25.12, as the case may be, plus interest at the legal rate set forth in G.S.

> 24-1, from the date each amount first came due.
>
> (a1) In addition to the amounts awarded pursuant to subsection (a) of this section, the court *shall* award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court *may, in its discretion,* award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

N.C.G.S. § 95-25.22 (emphasis added); *see also Hamilton v. Memorex Telex Corp.,* 118 N.C. App. 1, 14-15, 454 S.E.2d 278, 285 (1995).

In *Hamilton,* this Court interpreted N.C.G.S. § 95-25.22(a1) as follows:

> [T]he employer bears the burden of demonstrating that liquidated damages should not be imposed. However, even if an employer shows that it acted in good faith, and with the belief that its action did not constitute a violation of the Act, the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages. When the employer cannot make such a showing, the trial court has no discretion and must award liquidated damages.

Id. at 15, 454 S.E.2d at 285.

Data Systems contends that it acted in good faith and with the reasonable belief that its payment to Plaintiff of the $50,000.00 finder's fee for the sale of the Tivoli ELA was not a violation of the Wage and Hour Act. Assuming, *arguendo,* that Data Systems met its burden of showing that it acted in good faith and with a

reasonable belief that it was not violating the Wage and Hour Act, the trial court still maintained the discretion to impose liquidated damages equal to the amount found due under N.C.G.S. § 95-22.2(a). *See Id.* A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Having reviewed the record in the instant case, we cannot conclude that the trial court's decision to impose liquidated damages on Data Systems was so arbitrary that it could not have been the result of a reasoned decision. Thus, Data Systems' third and fourth assignments of error are overruled.

II. Trial Issues

Data Systems contends that the trial court committed reversible error in instructing the jury on breach of contract and other general contract law principles because the instructions given by the trial court contradicted those provisions of the Wage and Hour Act that controlled the issues to be determined by the jury in the instant case. We disagree.

Although the trial court is not required to explain the application of the law to the evidence, "it remains the duty of the court to instruct the jury upon the law with respect to every substantial feature of the case." *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 445, 361 S.E.2d 608, 612 (1987); N.C. R. Civ. P. 51(a) (2001). The trial court has wide discretion in presenting the issues to the jury and no abuse of discretion

will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause. *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988). Further, it is well established in this jurisdiction "that in reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Id.* at 497, 364 S.E.2d at 395.

At the jury charge conference, Data Systems requested that the trial court limit its instructions to the jury to the pertinent provisions of the Wage and Hour Act, specifically N.C. Gen. Stat. § 95-25.7, which permits "[w]ages based on bonuses, commissions or other forms of calculation" to be forfeited by an employee if "the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture." N.C.G.S. § 95-25.7 (1999). N.C.G.S. § 95-25.13 requires every employer to make available to its employees, in writing, all employment practices and policies with regard to promised wages. According to Data Systems, all of Plaintiff's claims for recovery were covered by either the 1997 Plan or the 1998 Plan, both of which notified Plaintiff of the conditions for forfeiture of earned wages in accord with N.C.G.S. § 95-25.7. Accordingly, Data Systems requested that the first issue submitted to the jury be:

> [D]id defendant notify Alan Moore of conditions for loss or forfeiture of future commissions in advance of the time that Alan Moore was terminated?

In addition, Data Systems requested that the jury not be instructed on certain basic principles of contract law, including the

definition of a contract, what constitutes a breach of contract, and the duty of good faith and fair dealing between parties to a contract.

Despite Data Systems' objections, the trial court submitted the first issue to the jury as follows:

> Did Data Systems Network Corporation breach its agreement to pay to the plaintiff, Alan Moore, commissions and expenses?

The trial court also instructed the jury as to what constitutes a contract, what constitutes a breach of contract, and the duty of good faith and fair dealing between parties to a contract. In addition, the trial court gave the following instruction related to N.C.G.S. § 95-25.7:

> With respect to commissions an employer can cause a loss or forfeiture of such pay if he has notified the employee of the conditions for the loss or forfeiture in advance of the time when the pay is earned.

On appeal, Data Systems maintains that the trial court's instructions on the duty of good faith and fair dealing allowed the jury to rule in favor of Plaintiff in contravention of the express provisions of the Wage and Hour Act. Data Systems contends that the only criteria for withholding earned wages under the Wage and Hour Act is proper notice under N.C.G.S. § 95-25.7, that the duty of good faith and fair dealing does not apply to the performance of an employment agreement which meets the notice requirements set forth in N.C.G.S. §§ 95-25.7 and 95-25.13, and, that in instructing the jury on this duty, the trial court "allowed the jury to simply point to a violation of some amorphous and undefined standard of

good faith and fair dealing and undo what the Wage and Hour Act specifically allows employers to do, though perhaps some results may appear to be harsh."

Having reviewed the trial court's instructions in their entirety, we conclude that the trial court did not abuse its discretion in presenting the issues to the jury in the manner in which it did. The record reveals that the trial court instructed the jury on N.C.G.S. § 95-25.7 in a manner nearly identical to that requested by Data Systems. In addition, we do not find that the trial court's instructions on the duty of good faith and fair dealing confused the jury about the meaning and application of N.C.G.S. § 95-25.7, or led the jury to return a verdict that was inconsistent with the intent and purpose behind the Wage and Hour Act. Thus, this assignment of error is overruled.

By its next assignment of error, Data Systems contends that the trial court erred in allowing Plaintiff to introduce evidence regarding the trial court's pre-trial award of partial summary judgment in favor of Plaintiff. We disagree.

The record reveals that prior to the introduction of any evidence regarding the dispute between the parties over the amount of commissions due Plaintiff for the sale of the Tivoli ELA, the trial court ruled that evidence related to the Tivoli ELA sale would be limited to the fact that there was a dispute and that Plaintiff claimed a larger commission for the sale than the one he received from Data Systems. In addition, the trial court ruled that no evidence would be allowed as to whether the dispute

concerning the commissions on the Tivoli ELA sale had been judicially determined.

Afterward, Plaintiff was allowed to testify that he was not paid a commission for the Tivoli ELA sale within the time prescribed under the 1998 Plan. Plaintiff was also allowed to testify that, after he made a written inquiry into his commission for the sale of the Tivoli ELA, he received a "special check that was cut for approximately a third of what was calculated to be due to [him] according to the compensation plan." In addition, Plaintiff was allowed to testify that there were high risks involved with the Tivoli ELA sale, and that it required a large amount of work on his part.

The trial court did not admit any evidence concerning whether the parties' dispute over the commissions for the Tivoli ELA sale had been judicially determined. In fact, Plaintiff expressly testified that the amount of commissions and expenses he was seeking to recover at trial did not include any commission from the sale of the Tivoli ELA. We conclude that the evidence that was in fact admitted concerning the parties' dispute over the Tivoli ELA commission was relevant background information that in no way prejudiced Data Systems or confused the jury.

By its final assignment of error, Data Systems contends that the trial court erred in denying its motion for a directed verdict. We disagree.

Upon a motion for a directed verdict pursuant to N.C. R. Civ. P. 50(a), "the evidence must be considered in the light most

favorable to the non-moving party, resolving all conflicts in his favor, and giving him the benefit of all reasonable inferences flowing from the evidence in his favor." *United Laboratories, Inc. v. Kuykendall,* 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). The question presented by a motion for a directed verdict is whether the evidence is sufficient to entitle the non-movant to have a jury decide the issue in question. *Id.* A directed verdict motion by a defendant may be granted only if the evidence is insufficient, as a matter of law, to justify a verdict for plaintiff. *Population Planning Assoc. v. Mews,* 65 N.C. App. 96, 98, 308 S.E.2d 739, 741 (1983) (citing *Arnold v. Sharpe,* 296 N.C. 533, 251 S.E.2d 452 (1979)). "A motion for a directed verdict shall state the specific grounds therefor[,]" and grounds not asserted in the trial court may not be asserted on appeal. *Broyhill v. Coppage,* 79 N.C. App. 221, 339 S.E.2d 32 (1986). The purpose of the rule that specific grounds for a motion for directed verdict be stated is to apprise the court and the adverse parties of the grounds for the motion, and to allow the adverse party to attempt to meet the defects in its proof in order to avoid a judgment notwithstanding the verdict at the close of the trial. *Feibus & Co. v. Construction Co.,* 301 N.C. 294, 271 S.E.2d 385 (1980). Thus, the question before this Court is whether the evidence, when taken in the light most favorable to Plaintiff, was sufficient to allow the jury to decide the issues in question. In reviewing the trial court's denial of Data Systems' motion for directed verdict, we limit our review to

those grounds specifically asserted at trial in support of Data Systems' directed verdict motion.

At the close of Plaintiff's evidence, Data Systems moved for a directed verdict on (1) Plaintiff's claim for a commission on the 20 March 1997 workshop, (2) Plaintiff's claim for commissions owed on invoice 27845, (3) Plaintiff's claim for commissions on the purchase order for hardware in March 1998, and (4) Plaintiff's claim for commissions on the purchase order for services on 26 March 1998. In addition, Data Systems moved for directed verdict on the issue of whether the Sales Compensation Plans met the requirements of the Wage and Hour Act "as far as providing notice to the employee of those circumstances when future commissions or claimed commissions can be forfeited." In making its motion to the trial court, Data Systems conceded that it was not entitled to directed verdict on the primary issue in contention between the parties--the date on which Plaintiff's employment with Data Systems terminated, 30 June 1998 or 10 September 1998. At the close of all the evidence, Data Systems renewed its motion for a directed verdict.

On appeal, Data Systems argues that it was entitled to a directed verdict on the issue of Plaintiff's entitlement to reimbursement for certain expenses incurred after his termination and/or for which Plaintiff failed to submit timely expense reimbursement forms. Having failed to raise this issue as a ground in support of its directed verdict motion at trial, Data Systems is precluded from raising it on appeal.

Data Systems also argues on appeal that the trial court erred in denying its motion for a directed verdict on (1) Plaintiff's claim for additional commissions for the 4 November 1997 sale of implementation services, and (2) Plaintiff's claims for commissions on the two purchase orders secured in March 1998, one for services and the other for hardware. However, Data Systems' sole argument on appeal as to these claims is that Plaintiff's employment with Data Systems was terminated on 30 June 1998. Having conceded at trial that it was not entitled to a directed verdict on the issue of Plaintiff's termination date, Data Systems cannot raise this issue in support of its contentions on appeal.

Accordingly, we are left to determine whether Data Systems was entitled to directed verdict as to (1) the additional commissions for invoice 27845, (2) and the commission for the 1997 workshop. As to invoice 27845, Data Systems contends that it was entitled to a directed verdict because the invoice was paid more than ninety (90) days following the transaction and the 1998 Sales Compensation Plan allowed the company to reduce by fifty percent (50%) any commission arising from a transaction that was not paid within ninety (90) days. However, Plaintiff testified at trial that the delay in payment was due to an internal billing error. Plaintiff further introduced into evidence a copy of an electronic mail message indicating that Plaintiff's direct supervisor, Doug Brooks, had considered the situation and determined that Plaintiff was not responsible for the delay in payment and was entitled to the remainder of the commission on the invoice. We conclude that

Plaintiff presented sufficient evidence to entitle the jury to consider the issue of additional commissions on invoice 27845.

Finally, Data Systems contends that it was entitled to a directed verdict on the issue of Plaintiff's entitlement to a $5,000.00 commission on the workshop performed in 1997 because the 1997 Sales Compensation Plan did not provide for commissions for workshops. However, Data Systems' sole witness at trial testified that Plaintiff was in fact paid a $5,000.00 commission for other workshops conducted in 1997. Therefore, we conclude that Data Systems was not entitled to a directed verdict on that issue.

In conclusion, we affirm the trial court's grant of partial summary judgment in favor of Plaintiff, and we affirm the trial court's subsequent entry of final judgment in favor of Plaintiff.

Affirmed.

Judges GREENE and McCULLOUGH concur.

Report per Rule 30(e).