

RENDERED: June 30, 2000; 2:00 p.m.
NOT TO BE PUBLISHED
MODIFIED: July 14, 2000; 2:00 p.m.

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001176-MR

FIFTH THIRD BANK OF KENTUCKY, INC.
AND FIFTH THIRD BANCORP

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN RYAN, JUDGE
ACTION NO. 95-CI-006745

KENNETH D. PARROT

APPELLEE

AND: 1999-CA-001246-MR

KENNETH D. PARROT

CROSS-APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN RYAN, JUDGE
ACTION NO. 95-CI-006745

FIFTH THIRD BANK OF KENTUCKY, INC.
AND FIFTH THIRD BANCORP

CROSS-APPELLEES

OPINION
AFFIRMING ON APPEAL AND
AFFIRMING ON CROSS-APPEAL

*** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

MILLER, JUDGE: Fifth Third Bank of Kentucky, Inc. (Fifth Third) and Fifth Third Bancorp (Bancorp) bring this appeal from a judgment of the Jefferson Circuit Court entered without jury on April 21, 1999. Kenneth D. Parrot files a cross-appeal. We affirm on appeal and on cross-appeal.

Bancorp is a multi-bank holding company located in Ohio. Fifth Third is a wholly owned subsidiary of Bancorp. In 1993, Bancorp embarked upon a plan to merge Cumberland Federal Bancorporation (Cumberland) of Kentucky into Fifth Third. At the time, Parrot, a ten-year employee of Cumberland, was serving as senior vice-president and marketing director of Cumberland at a salary of over \$80,000.00 per year. In the spring of 1994, Parrot was advised that his job was to be abolished. In May, 1994, he was offered a job as regional sales manager with Fifth Third Securities, a wholly owned subsidiary of Fifth Third. He accepted the position although his income was reduced by half. The job, however, did not work out and he resigned on February 24, 1995. Parrot claimed severance benefits under an "Affiliation Agreement" executed by Fifth Third and Cumberland on January 10, 1994. The agreement provided for severance benefits to those employees who left Fifth Third's employment within six months after the date of August 31, 1994. Specifically, the provision provided as follows:

Fifth Third shall use its best efforts but shall not be under any obligation to continue the employment at Fifth Third or at a Fifth Third subsidiary or affiliate each of the employees of Cumberland and Thrift Subsidiary. Any Cumberland or Thrift Subsidiary employee who continues his employment with Fifth Third after the

Effective Time shall receive the standard package of employee benefits that are provided holding company-wide Such employees shall receive credit for their period of service to Cumberland and/or Thrift Subsidiary for purposes of determining participation and vesting in all Fifth Third employee plans (but not the Fifth Third Bancorp Master Retirement Plan and Fifth Third Bancorp Master Profit Sharing Plan), but not for purposes of determining the benefits accrued thereunder. In addition, employees of Cumberland or Thrift Subsidiary who continue as employees of Fifth Third or a Fifth Third affiliate or subsidiary as at the Effective Time shall be given credit for years of service with Cumberland or Thrift Subsidiary at the rate of twelve (12) days for each credited year of service to be applied towards their Fifth Third accumulated sick day balance, not to exceed one hundred thirty (130) days. Any employee whose employment is terminated by Fifth Third other than for cause or who voluntarily resigns after being notified by Fifth Third that, as a condition of employment, such employee must work at a location more than 30 highway miles from such employee's former location of employment or that such employee's salary will be decreased by 10% or more, in any case only within six months after the Effective Time, shall be entitled to severance pay equal to, in the case of a salaried employee other than an officer, one week's pay for each year of service up to a maximum of twelve (12) week's pay, in the case of an officer, one week's pay for each year of service up to a maximum of twenty four (24) week's pay and, in the case of an hourly employee, one week's pay for each year of service up to a maximum of six (6) week's pay, plus applicable COBRA benefits. Nothing contained in this Paragraph VII.B.2 shall be construed or interpreted to limit or modify in any way Fifth Third's at will employment policy. (Emphasis added.)

The effective time set forth in the foregoing provision was six months after August 31, 1994. Parrot's last employment was within this time period. Nevertheless, severance benefits were denied.

On December 4, 1995, Parrot filed suit against Bancorp and Fifth Third alleging breach of contract as well as the tort of fraud and outrageous conduct as a basis for recovering damages. On January 20, 1999, Parrot was granted summary judgment on his contract claim. On April 9, 1999, Bancorp and Fifth Third were granted judgment dismissing Parrot's claim of fraud and outrageous conduct. This appeal and cross-appeal ensued.

Bancorp and Fifth Third claim that Parrot was not entitled to summary judgment on his contract claim and that, in fact, they were entitled to summary judgment. They further claim that if Parrot was entitled to judgment the computation of pre-judgment and post-judgment interest was incorrect.

On cross-appeal, Parrot claims that the circuit court erred in dismissing his tort claim of fraud and outrageous conduct.

We first address the issues presented on the direct appeal. As we view this matter, it is a question of law involving interpretation of the severance provision in the Affiliation Agreement entered into between Fifth Third and Cumberland. The matter presents no factual issue, thus it is one of law for the court. The construction as well as the meaning and legal affect of written instruments are matters of law for the court. See Morganfield National Bank v. Damien Elder & Sons, Ky., 836 S.W.2d 893 (1992). Our review is *de novo*. See Louisville Edible Oil Products, Inc. v. Revenue Cabinet, Commonwealth of Kentucky, Ky. App., 957 S.W.2d 272 (1997).

The plain wording of the severance provision mandates that Parrot receive severance pay. He met the three requirements provided therein. Parrot voluntarily resigned after his pay had been lowered by Fifth Third's subsidiary to a level demonstrating more than a ten percent reduction in salary. His resignation came within six months after the effective date of August 31, 1994. We, therefore, concur with the circuit court's interpretation of severance benefit provision. As a matter of law, Parrot was entitled to severance benefits.

Next, Fifth Third and Bancorp complain about pre-judgment and post-judgment interest. The trial judge determined that Parrot was entitled to pre-judgment interest. We think this determination was appropriate. See Nucorp. v. General Electric Company, Ky., 812 S.W.2d 136 (1991).

Parrot terminated his employment on February 24, 1995. The trial judge determined that pre-judgment interest would begin running four days later, or on February 28, 1995. We agree with this determination.

As to post-judgment interest, the trial judge commenced accrual as of January 20, 1999, the date that Parrot was granted summary judgment. Appellant argues that the post-judgment interest should not have began running until the date of the final appealable judgment or April 21, 1999. We will not consider any error assigned to this disparity under the rule of *de minimis non curat lex*. See Bryan v. Security Trust Co., 296 Ky. 95, 176 S.W.2d 104 (1943).

We now turn to Parrot's cross-appeal claiming he was entitled to have his claim of fraud and outrageous conduct submitted to the jury. We perceive no merit whatsoever in this contention. The record is void of any evidence supporting action on behalf of either Fifth Third or Bancorp that could be characterized as outrageous or extreme. See Humana of Kentucky, Inc. v. Seitz, Ky, 796 S.W.2d 1 (1990). In fact, we think there was a just basis for dispute and that the conduct of Fifth Third and Bancorp cannot be classified other than mere inappropriateness. Cf. Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997) (correctly addressing Kentucky law). For these reasons, we think failure to submit the tort claims to the jury was not error.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed on appeal and cross-appeal.

ALL CONCUR.

BRIEFS FOR APPELLANTS/CROSS-
APPELLEES:

Kenneth S. Handmaker
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-
APPELLANT:

Kathryn A. Quesenberry
Louisville, Kentucky