STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MORAN,

Plaintiff-Appellant,

v

DENNIS RISSER and MANISTEE-BENZIE COMMUNITY MENTAL HEALTH BOARD,

Defendants-Appellees.

UNPUBLISHED
December 19, 2013

No. 304281
Manistee Circuit Court
LC No. 07-012845-CZ

Before: RIORDAN, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order finding no cause of action on plaintiff's claim under the Open Meetings Act (OMA), MCL 15.261 *et seq.*, and denying plaintiff's motion for a new trial or judgment notwithstanding the verdict as to plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Plaintiff also challenges the trial court's earlier order directing a verdict for defendant Manistee-Benzie Community Mental Health Board (MBCMH), regarding plaintiff's claim for wrongful termination of his employment contract. We affirm.[1]

I. OVERVIEW

Plaintiff is the former executive director of the MBCMH, a position he held for 18 years. On June 14, 2007, the MBCMH board voted seven to five to immediately terminate his employment. Defendant Risser was a member of the MBCMH board.

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[1] We find no merit to defendants' contention that this Court lacks jurisdiction to consider the trial court's order directing a verdict on the wrongful discharge contract claim. Plaintiff timely filed this appeal of the trial court's May 9, 2011, final order of no cause of action on the OMA claim and denying plaintiff's motion for a new trial on the wrongful discharge claim. A party who claims an appeal from a final order may raise issues related to prior orders in the case. *Dean v Tucker,* 182 Mich App 27, 31; 451 NW2d 571 (1990).

In this action, plaintiff alleged that he worked under a "just cause" employment contract but was terminated without just cause, in violation of MBCMH's required progressive discipline policy. Plaintiff's employment contract included provisions concerning termination for "just cause," in which case no severance would be provided, and termination "at will," which included severance pay. When the MBCMH board terminated the contract, it invoked the "at will" provision and paid plaintiff a severance. The case proceeded to trial, and the court ultimately directed a verdict in favor of MBCMH on that count.

Plaintiff's complaint also alleged violations of the OMA based on communications between some board members before the June 14, 2007, meeting at which the board voted to terminate plaintiff's employment. Plaintiff alleged that the decision to terminate his employment was made in violation of §§ 3(1) and (3) of the OMA, MCL 15.263(1) and (3), and that the June 14, 2007, board meeting where the resolution to terminate his contract was passed "was a sham that simply rubber stamped a previous illegal agreement by a quorum of the MBCMH[.]" Ultimately, the trial court, sitting as the finder of fact, found no cause of action on that count.

Lastly, plaintiff's complaint also included a claim that his termination was in violation of the WPA. In support of this claim, plaintiff relied on a letter dated April 18, 2007, in which he purported to notify the board of his intention to report to authorities (1) the counties purported non-compliance with funding obligations and (2) misconduct by board member Risser who plaintiff claimed had a conflict of interest and tried to influence agency contracts. Plaintiff alleged that his threatened "report of 'no matching funds' to State officials" was protected activity and a material reason for the decision to terminate his employment. In addition, he alleged that his threatened report of Risser's "*ex parte* contract manipulations and subsequent retaliation" was well known and was a material reason for the termination of his employment. The defense attempted to show that plaintiff did not have a good-faith belief regarding these claims and that plaintiff made the threat to report only when he realized that his continued employment was in jeopardy. At trial, the defense challenged whether the April 18 letter was actually created later and back-dated or modified to fabricate the WPA claim. Ultimately, the jury found no cause of action on the WPA claim. Plaintiff later filed a motion for a new trial. He contended that new evidence involving the computer files on defendant's system would have discredited the defense theory concerning possible modification of the April 18 letter. After allowing additional discovery on that issue, the trial court denied the motion for a new trial.

II. BREACH OF EMPLOYMENT CONTRACT CLAIM

Plaintiff argues that the trial court erred in directing a verdict on the breach of contract claim and should have allowed the jury to decide whether he was a "just cause" or "at will" employee and whether the procedural protections in defendant's personnel manual applied.

This Court reviews de novo a trial court's decision to direct a verdict. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). The reviewing court considers the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id*. A motion for a directed verdict should only be granted where the evidence, viewed in this light, fails to establish a claim as a matter of law. *Id*. The determination whether contract language is ambiguous and its proper interpretation are questions of law, which this Court reviews de novo. *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 463; 663 NW2d 447 (2003).

When interpreting the meaning of contractual language, the goal is to ascertain the intent of the parties as expressed in the language in the agreement. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). Contractual language that is clear and unambiguous should be given full effect according to its plain meaning unless it violates the law or is in contravention of public policy. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). An ambiguity exists only when two provisions irreconcilably contradict each other, or when the contract language is equally susceptible to more than one meaning. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010).

The pertinent section of plaintiff's employment contract, labeled "Termination," has three subsections that set forth the basis for early termination of the agreement. Employment. Subsection A concerns "Resignation" and sets forth plaintiff's obligation to provide 60 days' written notice. Subsection B is labeled "Termination For Cause" and states in part that "[t]he Board may *terminate* this agreement at any time *for reason of 'just cause'*." Subsection C under "Termination" labeled "At Will Termination" provides:

> The Board may terminate this agreement and the CEO's compensation for any other reasons not specified in section B (above), including but not limited to, the reason that the Board, in its sole discretion, deems to be in the best interest of the Board or in the event that the DCH/CMH contract is no longer continued under the primary arrangement to provide local mental health services under the Mental Health Code. Under this "at will" sub paragraph, at the end of employment, the Board shall provide the CEO with severance pay at a rate equal to one month gross current salary for each year the CEO has served the Board in that capacity up to a limit of twelve (12) months. The severance pay shall be in addition to any accrued but unused benefits.

The board's resolution terminating plaintiff's employment indicates that the board invoked the "at will" provision, and plaintiff was given severance pay in accordance with that provision.

Plaintiff argues that the trial court overlooked that the employment contract under the heading "Compensation" incorporates by reference the personnel manual by stating:

> The Board agrees to compensate the CEO based on the agency Compensation Plan that went into effect January 1, 2001. The CEO shall be compensated within this plan under the same terms and conditions as all other management and supervisory employees.

Plaintiff notes that the "terms and conditions" in the personnel manual "allow non-probationary employees to keep their jobs unless fired for cause through a formal process culminating in arbitration." Plaintiff also argues that even under the "At Will" provision, the firing "for any other reason" means that a reason is necessary—firing for no reason is not allowed.

The trial court did not err in granting defendants' motion for a directed verdict on plaintiff's wrongful discharge claim. Although the contract refers to the board's discretion to terminate the agreement for just cause as one basis for early termination of the agreement, the contract also provides the board with discretion to terminate the contract "for any other reason

not specified" in the "just cause" paragraph. The MBCMH board clearly did not promise plaintiff that the contract was terminable only for "just cause." The provision concerning "Compensation" does not create ambiguity regarding the specific provisions that govern termination of the agreement. The provision that allowed the board to terminate the employment contract "for any other reason not specified" in the just cause section does not require that the board announce the reason. Further, plaintiff did not allege in his complaint that defendant breached the contract by failing to set forth its reason. Rather, the complaint alleges only wrongful discharge of his "just cause" employment and "violation of the progressive discipline policies[.]" Viewed in a light most favorable to plaintiff, we conclude that the evidence failed to establish this claim as a matter of law.

III. OPEN MEETINGS ACT

Plaintiff next challenges the trial court's verdict for defendants on his claim under the OMA. This Court reviews the trial court's findings of fact for clear error and reviews its conclusions of law de novo. MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

MCL 15.263 states, in pertinent part:

> (1) All meetings of a public body shall be open to the public and shall be held in a place available to the general public. . . .
>
> (2) All decisions of a public body shall be made at a meeting open to the public.
>
> (3) All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public except as provided in this section and sections 7 and 8.

On appeal, plaintiff does not contend that a "decision[]" on the resolution to terminate his employment was made before the June 14 meeting.[2] Plaintiff also does not contend that an actual quorum deliberated. Rather, he contends that defendants violated the OMA because a majority of the board "secretly discussed Plaintiff's firing and formulated a firing resolution" before the public meeting.

Deliberation by a "constructive quorum" is addressed in *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 472-473; 425 NW2d 695 (1988). This Court's decision in *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 192 Mich App 574, 581; 481 NW2d 778 (1992), rev'd in part on other grounds 444 Mich 211 (1993), also holds that

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[2] The trial court essentially concluded that no "decision" concerning plaintiff's employment was made until the June 14, 2007, meeting. The trial court explained that even the board members who were aware that the resolution to terminate plaintiff's employment would be proposed did not know whether the resolution would pass.

deliberation by a "constructive quorum" violates the OMA and that a constructive quorum will be found where subgroups are intentionally created to avoid the OMA.

This Court's decision in *Ryant v Cleveland Twp*, 239 Mich App 430; 608 NW2d 101 (2000), provides guidance on the meaning of "deliberating" for purposes of the OMA. In that case, the township supervisor (who was also a member of the township board) addressed the planning commission. Three members of the planning commission who were present were also members of the township board, which was a quorum of the five-member township board. This Court looked to the dictionary meaning of "deliberating" and noted that the term referred to "discussion," which was defined as "exchanging views," and "debate," which was defined as "a discussion, as of a public question in an assembly, involving opposing viewpoints." *Id*. at 434. This Court reversed an order granting summary disposition in favor of the plaintiff because the record did not show that the township board members deliberated. This Court explained:

> We conclude that the trial court erred in finding that the township supervisor's comments before the planning commission rose to the level of "deliberating toward or rendering a decision on" the proposed zoning amendment. The record does not show that any of the other township board members present exchanged any affirmative or opposing views, debated the proposed amendment, or engaged in any discussion regarding the statements made by the township supervisor. Except for [Mark] Kalena, who was a township board member of the planning commission and had every right to comment at the properly noticed public commission meetings, the other township board members present where there essentially as "observers." As long as the township board members did not engage in deliberations or render decisions, the subject meetings did not need to be noticed as meetings of the township board. There is no evidence that the proposed zoning amendment, a matter of public policy, was discussed by the members with each other at the subject meetings.
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> Because we conclude that there was no "deliberating toward" or rendering of any decisions by the quorum of the township board present at the planning commission meetings, the notice requirements of the OMA were not violated and the trial court erred in ruling otherwise. [*Id*. at 435-436 (Citations omitted).]

Thus, deliberating involves discussion and exchange of views. *Id.* at 434-435. Deliberation does not turn on whether there was a commitment of votes.

Here, the trial court found that "[t]he only conversation Risser had with [Peter] Barnes was about possible administrative leave for [plaintiff], not termination, and he did not talk to anyone about how he might vote." The court further found that Barnes and Terry Pechacek called James Wisniski "and asked basically how he felt about Plaintiff Moran. No resolution was ever discussed with him. . . . [A]lthough he had been asked about his opinions on Moran, no one asked him his opinion on termination." Thus, there were "deliberations" or an exchange of views and discussion. But a violation based on deliberations by a constructive quorum still requires that the deliberations involved a quorum. Here, unless both Wisniski and Risser deliberated on the termination resolution, the trial court did not err in determining that there was no violation of the OMA since a constructive quorum did not deliberate.

Plaintiff's brief alludes to the possibility of other violations of the OMA, including "the July 12, 2007 rubber stamp re-firing" but explains that "[s]ince the trial court did not reach these issues and since the pre-June 14th violation under MCL 15.263(3) is the most clear and had already occurred, the Brief focuses on that violation." Plaintiff's choice not to present any argument regarding other purported violations obviates the need for this Court to consider them. "[W]here a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Finally, plaintiff contends that his contract provided him with the expectation of continued employment and as a public employee that expectation is a property right that cannot be taken away without due process, which at a minimum is notice and an opportunity to be heard. He contends that if the OMA "allowed this, it would violate the United States Constitution, and the trial court erred in construing the OMA in a fashion that permits a Fourteenth Amendment violation." But an at-will employee has no property interest in continued employment, so a public employer may terminate that employment without complying with procedural due process. *Manning v City of Hazel Park*, 202 Mich App 685, 694; 509 NW2d 874 (1993). Here, plaintiff's contract provided that his employment could be terminated at will, and the board relied on that provision as its basis for terminating plaintiff's employment. Therefore, we conclude procedural due process concerns are not implicated by the termination of plaintiff's employment, and these concerns have no bearing on the resolution of plaintiff's claim for violation of the OMA.

IV. THE WPA ACTION

Plaintiff contends that the trial court abused its discretion by denying him the right to depose Fred Feiger, network administrator for MBCMH, when he was belatedly endorsed as a defense witness. Plaintiff's argument concerning deposing Feiger is not properly before this Court because the trial court did not definitively rule on the issue. Plaintiff cites the trial court's ruling, "Well, I'm not ready to order a deposition." At the end of the same discussion, however, the following colloquy occurred between the trial court and plaintiff's counsel (Mr. Parsons):

> *THE COURT.* And I'll still give consideration to a deposition of Mr. Feiger.
>
> *MR. PARSONS.* Thank you, your Honor.
>
> *THE COURT.* I'm not excluding that at this point. And I'm not saying yes either at this point.
>
> *MR. PARSONS.* Right now – Mr. Feiger, as we understand it, does not have a deposition, or affidavit, or anything, we don't know what he's going to say whatsoever. So I appreciate the court thinking about it.

This discussion occurred on May 27, 2009. Feiger was not called as a defense witness until June 17, 2009. Plaintiff did not follow up on his request to depose Feiger. When defense counsel informed the court, outside the presence of the jury, that Feiger was the next witness, the trial court asked, "All set?" Plaintiff's counsel responded affirmatively.

In short, the trial court deferred ruling on plaintiff's request to depose Feiger, and plaintiff declined to pursue the matter. Having failed to bring the matter to the trial court's attention again, plaintiff did not obtain a ruling that he can challenge on appeal. "As a general rule, appellate review is limited to issues decided by the trial court." *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996).

Plaintiff also contends that the trial court abused its discretion in denying his motion for a new trial under MCR 2.611(A)(1)(b) (misconduct of the jury or of the prevailing party) and MCR 2.611(A)(1)(f) (newly discovered material evidence). This Court reviews for a clear abuse of discretion a trial court's decision on a motion for a new trial. *Kroll v Crest Plastics*, *Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985). "An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Roa*, 491 Mich 271, 279; 815 NW2d 105 (2012).

To obtain a new trial on the basis of newly discovered evidence, a party must show "(1) the evidence is newly discovered, not merely its materiality; (2) the evidence is not merely cumulative; (3) it is likely to change the result; and (4) the moving party could not have produced it at trial with reasonable diligence." *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000). A motion for new trial on the basis of newly discovered evidence is viewed with disfavor. *Roa*, 491 Mich at 279-280; *Kroll*, 142 Mich App at 291. This is because parties are expected to use due diligence and be vigilant in securing and presenting evidence at a trial. *Roa*, 491 Mich at 280.

Part of the defense strategy in regard to the WPA claim involved casting doubt on when plaintiff actually created the letter dated April 18. In opening statements, defense counsel argued that the letter that the board members received after voting against the proposal to extend plaintiff's contract on May 10, 2007, was "back-dated" to appear that it had been generated before the meeting. He contended that evidence from plaintiff's laptop computer would show that a document created on April 18, 2007, was modified on May 10, 2007, and that efforts to find the "actual April 18 letter" were thwarted because two months after the defense requested the laptop, someone downloaded 7.7 gigabytes of music onto the hard drive to override data and thereby destroy evidence.

On May 14, 2009, the second day of trial, plaintiff's counsel requested that the court order Feiger to see whether he could find the April 18, 2007, letter on the agency's network. Feiger informed the court that at the request of defense counsel's office, he had searched the network for that file "quite awhile ago, and came up with nothing." Feiger agreed to search again. In the next several days after the conversation on May 14, 2009, he broadened his search by using different criteria and expanding the areas on the drive to search. He found three files in different places on the network. He spoke to defense counsel about his findings at least once for about 30 to 45 minutes and also for a few minutes before testifying on June 17, 2009. Feiger told defense counsel that he had "a copy of files" on a flash drive in his pocket when he appeared at trial. Feiger revealed the results of his search to plaintiff and the court during his testimony, but he did not disclose that he had a copy of the files available.

On June 26, 2009, one week after the jury's verdict, but before the trial court had decided the OMA claim, plaintiff subpoenaed Feiger to produce the documents that he had located in his

search. Feiger testified before the court on October 15, 2009, but brought a different flash drive to that hearing. He explained that between the verdict and the subpoena he received on June 26, 2009, he had already used the flash drive for other work, so he created another one. At that time, one of the three files, which was present when Feiger searched the network during the several days after May 14, 2009, hearing, no longer existed in the location that it had previously.

In a motion to enjoin further post-trial discovery, defendants argued that "[t]he properties of the PDF files contained on Mr. Feiger's thumb drive contain only one date: the same modified date of 5/10/07." Plaintiff disputed that claim with the affidavit of an expert, Brandon Fannon.

Fannon's affidavit stated that his examination of the files that Feiger had copied from the MBCMH server to the flash drive revealed additional metadata showing a document creation date of April 18, 2007. Moreover, Fannon contended the text of the letter was unchanged after April 18, 2007. Fannon further opined that the defense did not use standard and reliable forensic tools in examining the flash drive and the files it contained, and he disputed the defense claim that the properties of the files contained only the modified date of May 10, 2007. In a second affidavit, Fannon opined that the April 18, 2007, origination date of the files on the MBCMH server "would have been obvious to a person accessing the agency computer system" in the manner depicted a trial exhibit. Fannon further opined that the file was accessed by someone on November 14, 2008, and that examination of the MBCMH server potentially could allow Fannon to determine who accessed it. Ultimately, the file that was accessed on November 14, 2008, could not be located. Fannon's second affidavit states that he asked for access to the agency's back-up system but was told that the back-up tapes for that date have been destroyed by degaussing, which "permanently erases information stored on magnetic media."

In its ruling, the trial court referred to Feiger's revelation during cross-examination at trial of the existence of the PDF file of the April 18, 2007 letter on the MBCMH computer system, and that Feiger testified he believed the file could be opened but that had not done so. The trial court observed that plaintiff's counsel could have asked Feiger to open the file and examined it, but counsel did not do so. The trial court then stated:

> I said it before and I'll say it again. Mr. Parsons, you danced right up to it and you danced away. . . . But I allowed this – I allowed this to – this post-trial discovery, to go on, as it were, because there was perhaps going to be a clear-cut answer that was going to emerge on this critical, at least what the litigants at some point considered critical, I'm not sure I ever did, issue of when was the April 18th, 2007 letter created, and that perhaps what were its contents at that time.
>
> But at any rate, and it seemed as if we go through – we go through one door and we're almost on it, then we're not there. We haven't found that clear-cut answer, so then we go to another door, and we go to another door. And this went on. And I'm not going to go into detail in terms of this matter got delayed by some health issues and here we are.
>
> I allowed it because I want a full – I wanted to give plaintiff the opportunity for a full record. I think I have done that. I don't find that there is anything that has been revealed during this post trial discovery that wasn't

> available before the trial closed. I think that when we have a jury trial, courts are – and there are rules for it – but courts are very reluctant to overturn a jury verdict. And it's a high standard indeed that has to be met for the Court to overturn a jury verdict. And we just don't have that here.

We conclude that the record fails to establish a clear abuse of discretion by the trial court in denying plaintiff's motion for a new trial. *Kroll*, 142 Mich App at 291. The recovered PDF files of the April 18, 2007 letter and its content do not qualify as newly discovered evidence: plaintiff could have produced the evidence at trial with reasonable diligence. *South Macomb Disposal Auth*, 243 Mich App at 655. It is axiomatic that evidence cannot be newly discovered if a party or the party's counsel was aware of the evidence at the time of trial. *Roa*, 491 Mich at 281. "Michigan courts have held that a [party's] awareness of the evidence at the time of trial precludes a finding that the evidence is newly discovered, even if the evidence is claimed to have been "unavailable" at the time of trial." *Id*. at 282.

Here, the trial court did not clearly err by concluding that everything uncovered in the post-trial proceedings was reasonably available before the trial closed. As noted already, plaintiff's counsel failed to follow through on deposing Feiger before he testified at trial. And, during Feiger's testimony at trial, the existence of the PDF files was revealed. Counsel could have simply asked Feiger a few more questions to determine what the PDF files contained. While a trial lawyer will often avoid asking a witness a question when the lawyer does not know what the witness will say in response, counsel in this case could have easily asked the trial court for a continuance to examine the PDF files off the record. In sum, the content of the PDF files does not qualify as newly discovered evidence because counsel could with reasonable diligence have presented the evidence at trial. Consequently, the trial court did not abuse its discretion by denying plaintiff's motion for a new trial. *Roa*, 491 Mich at 281-282; *Kroll*, 142 Mich App at 291.

V. CONCLUSION

In sum, we affirm the trial court's decision granting defendant MBCMH a directed verdict on the breach of contract claim and we also affirm the trial court's verdict in favor of defendants with respect to the OMA claim. We also affirm the trial court's denial of plaintiff's motion for a new trial with respect to the WPA claim.

We affirm. Defendants may tax costs pursuant to MCR 7.219 as the prevailing party.

/s/ Michael J. Riordan
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly