STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0078

Kyle Christensen,
Respondent,

vs.

LumiData, Inc.,
Appellant.

Filed November 24, 2014
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-11-25046

Andrew P. Muller, Muller and Muller, PLLC, Minneapolis, Minnesota (for respondent)

Scott A. Johnson, Todd M. Johnson, Hellmuth & Johnson, PLLC, Edina, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

CONNOLLY, Judge

On appeal from a judgment following a bench trial of respondent's claims against appellant for unpaid commissions, appellant argues that the district court erred by

(1) failing to enforce a provision of a 2005 employment agreement; (2) determining that respondent's misrepresentation was not material to appellant's decision to execute a commission agreement; (3) applying Minn. Stat. §§ 181.03, .14 (2012) to impose penalties; and (5) adding prejudgment interest to respondent's unliquidated claims. We affirm.

FACTS

Appellant LumiData Inc. (LumiData) is a Minnesota corporation that sells the SOLYS software program to businesses to enable them to forecast customer demand. Ransom Stafford (Stafford) is LumiData's Chief Executive Officer.

On October 10, 2005, LumiData and respondent Kyle Christensen (Christensen) entered into an employment contract entitled the "Executive Employment Agreement" (the executive agreement). Subsequently, Christensen began working for LumiData as a SOLYS salesperson. Under the executive agreement, LumiData agreed to pay Christensen a base salary and commissions for selling or renewing SOLYS licensing agreements to customers. The executive agreement did not contain any terms stating when Christensen would be deemed to have earned the commissions or when LumiData would pay the earned commissions. It also did not address the payment of commissions in the event of a resignation and did not contain a noncompete clause.

Throughout Christensen's employment, LumiData paid him a base salary and commissions. When a customer purchases SOLYS from LumiData, it enters into a licensing agreement with LumiData for one year. On SOLYS sales for which Christensen was the salesperson of record, he would receive a new sales commission. If a customer renewed the initial licensing agreement after the one-year term, Christensen would receive a renewal commission. While working for LumiData, Christensen would receive his commissions when the customer agreed to purchase the SOLYS software or when the customer renewed its licensing agreement. LumiData generally paid Christensen his commission when it received payment from the customer.

In March 2011, Christensen gave notice of his resignation to LumiData. At that time, Christensen had made sales of SOLYS for which he had not been paid commissions. On March 21, 2011, Stafford and Christensen discussed when LumiData would pay Christensen the commissions. After these discussions, Stafford created a document entitled "Kyle Christensen Final Commission Record" (the final commission record). The final commission record lists customer accounts for which Christensen had not yet received commissions. The accounts are listed in three categories based on whether the account was a new sale for which Christensen had a commission earned at 15%, a renewal sale for which Christensen had a commission earned at 5%, or a renewal sale for which Christensen had a commission earned at 4%.

On March 23, Stafford sent Christensen an e-mail with a proposed resignation checklist that he wanted Christensen to sign before leaving LumiData. The document stated that Christensen was to abide by the terms of the noncompete clause in the executive agreement. Because Christensen's executive agreement did not contain a noncompete clause, he sent Stafford a copy of the executive agreement, agreed to abide by its terms, and told Stafford that he did not intend to work for a competitor. But, Christensen had already accepted a position with Terra Technology, which sells software similar to SOLYS.[1]

On March 25, Stafford and Christensen signed the final commission agreement, which lists each customer account for which Christensen was the salesperson of record. It also outlines when LumiData would pay Christensen his commissions after his resignation. The final commission agreement states "[b]ased on compensation [schemes] established and agreed upon by both parties the following dollars and payment schedule represents the final commission due to Kyle Christensen by LumiData, Inc.," and lists several accounts with outstanding commission payments, totaling $48,202.

On the same day, the parties signed the final resignation and exit checklist. It states that Christensen reaffirms his "adherence to all the termination terms and conditions of [his] existing employment agreement," and that he will be paid any "commission due on any of the pending net new [sales] in [his] pipeline if the contract is signed within 60 days after [his] resignation date."

Following Christensen's departure from LumiData, LumiData received payments from four customers listed in the final commission agreement. It paid Christensen $5,355 in commission for these accounts. In May 2011, LumiData received payments from five customers listed in the final commission agreement for which it paid Christensen $4,980 in commission. LumiData did not make any additional payments to Christensen.

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[1] The district court assumed that Terra Technology was a competitor of LumiData. Neither party challenged this finding on appeal.

On August 23, 2011, LumiData sent a letter to Christensen repudiating the final commission agreement. Specifically, the letter stated that "commission checks were inadvertently sent to you." On September 13, Christensen replied and refuted LumiData's claim that it had wrongly paid him commissions following his resignation. LumiData did not respond. It has received payment from every customer listed in the final commission agreement but has not paid Christensen commissions for six accounts, totaling $22,767.

On December 11, 2011, Christensen commenced this lawsuit and asserted causes of action for breach of contract and violations of Minn. Stat. § 181.03 and Minn. Stat. § 181.14. On January 30, 2013, the parties appeared in district court for a bench trial. On June 25, 2013, the district court issued its findings of fact, conclusions of law, and order. It concluded that LumiData breached its contract to pay Christensen commissions, violated Minn. Stat. § 181.14, subd. 2, and violated Minn. Stat. § 181.03. On August 5, 2013, the district court issued an amended order awarding Christensen $54,444, including statutory penalties. On August 26, the district court heard posttrial motions, and, on November 21, it granted Christensen's motion for attorney fees and costs under Minn. Stat. § 181.171 (2012) and prejudgment interest under Minn. Stat. § 549.09 (2012). On November 25, the district court entered its final judgment for Christensen in the amount of $110,955.82, which includes damages, penalties, costs, prejudgment interest, and attorney fees.

D E C I S I O N

"In an appeal from a bench trial, we do not reconcile conflicting evidence." *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). We give great deference to the district court's factual findings and will not set them aside unless they are clearly erroneous. *Id.* But, we need not defer to the district court's findings on purely legal issues. *Id.*

I.

LumiData first argues that "the trial court erred in its construction of the employment agreement between [Christensen] and [LumiData] by declining to enforce the requirement that respondent was to receive no post[-]resignation compensation in the event of his dishonesty." We disagree. Interpretation of a written contract is a question of law reviewed de novo. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003).

On March 23, 2011, while the parties were discussing the resignation checklist, Christensen sent an e-mail to Stafford stating, "[i]t is not my intent to go to a competitor." When he made this statement, Christensen had already accepted a position with Terra Technology. LumiData argues that when Christensen made this statement, he engaged in dishonest conduct that disqualifies him from further compensation under provision 8(G) of the executive agreement. Provision 8(G) provides:

> In the event that Executive is in breach of any material obligation owed Company in this Agreement, habitually neglects the duties to be performed under this Agreement, engages in any conduct which is dishonest, damages the reputation or standing of the Company, or is convicted of any

> criminal act or engages in any act of moral turpitude, then Company may terminate this Agreement upon five (5) days['] notice to Executive. In event of termination of the agreement pursuant to this subsection, Executive shall be paid only at the then applicable base salary rate up to and including the date of termination. Executive shall not be paid any incentive salary payments or other compensation, prorated or otherwise.

The district court determined that this provision does not apply to Christensen's resignation because LumiData did not perform the condition precedent of terminating him after giving five days' notice.

LumiData argues that "Minnesota courts in the employment context have repeatedly held that an employee's voluntary resignation constitutes a termination of the contract." *See, e.g.*, *Thomas v. Indep. Sch. Dist. No. 2142*, 639 N.W.2d 619, 620 (Minn. App. 2002) (stating that the employee terminated the contract he had with the respondent by submitting a written resignation), *review denied* (Minn. May 14, 2002). But, provision 8(G) specifically provides for situations where the employer terminates the employee. Because LumiData did not perform the condition precedent of terminating Christensen's employment after giving him five days' notice, we conclude that the district court did not err by not enforcing the dishonest conduct forfeiture provision in 8(G).

Moreover, a different term in the executive agreement discusses employee resignation. Provision 8(F) states,

> This Agreement may be terminated by Executive at Executive's discretion by providing at least thirty (30) days prior written notice to Company. In the event of termination by Executive pursuant to this subsection, Company may

> immediately relieve Executive of all duties and immediately terminate this Agreement, provided that Company shall pay Executive at the then applicable base salary rate to the termination date included in Executive's original termination notice.

This provision covers situations where the employee resigns. LumiData did not invoke its right to immediately relieve Christensen of his duties and immediately terminate the agreement. And, because this provision does not contain a term regarding forfeiture in the event of dishonest conduct, we conclude that the district court did not err by determining that Christensen did not forfeit his right to his commissions.

II.

LumiData next argues that "fraud in the inducement was committed by [Christensen], precluding his enforcement of his claims for commissions under the [final commission agreement]," and that the district court erred by determining that respondent's misrepresentation about accepting employment with a competitor was not material to appellant's decision to execute a severance agreement. We disagree.

To prevail on a claim of fraud, the plaintiff must prove that

> (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of the reliance.

Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C., 736 N.W.2d 313, 318 (Minn. 2007) (quotation omitted).

LumiData contends that Christensen made a false representation of existing material fact when he told Stafford that he did not intend to work for a competitor despite accepting a job with Terra Technology. Christensen argues that this statement was an assertion of intent about future acts, which cannot form the basis for a fraud claim. *See, e.g.*, *Vandeputte v. Soderholm*, 298 Minn. 505, 508, 216 N.W.2d 144, 147 (1974) ("It is a well-settled rule that a representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place."). But, "[a] misrepresentation of a present intention can amount to fraud when the representer had no intention of following through on his representation at the time the representation was made." *Johnson Bldg. Co. v. River Bluff Dev. Co.*, 374 N.W.2d 187, 194 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985). Christensen testified at trial that he accepted a job with Terra Technology before he resigned from LumiData. Because he had already accepted a position with Terra Technology, we conclude that his false statement was one of existing material fact.

LumiData also argues that Christensen made the statement to induce Stafford to pay him commissions and that Stafford relied on Christensen's misrepresentation in deciding to pay him commissions. Christensen contends that he said it was not his intent to work for a competitor to "clarify that he was not subject to a non-compete agreement, and to explain why he would not sign a document obligating him to abide by a non-existent covenant against competition." Stafford first indicated his intent to pay Christensen commissions in the final commission record. This document was created five days before Christensen said that he did not intend to work for a competitor. When

Stafford sent Christensen the final resignation checklist, he attached an unsigned executive agreement that contained a noncompete clause and asked Christensen to abide by the terms in that agreement. Christensen responded to this e-mail and stated that he did not intend to work for a competitor and attached his signed executive agreement, which did not contain a noncompete agreement. Because Stafford expressed his intent to pay Christensen his outstanding commissions five days before Christensen told him that it was not his intent to work for a competitor, we conclude that the district court did not err by finding that Christensen did not intend to induce LumiData into paying him commissions.

And, the record indicates that Stafford did not rely on Christensen's statement. To establish that element, a plaintiff must prove both actual and reasonable reliance. *Hoyt Props.*, 736 N.W.2d at 320-21. This element is viewed in light of "whether the representations were of such a character and were made under such circumstances that they were reasonably calculated to deceive, not the average man, but a person of the capacity and experience of the particular individual who was the recipient of the representations." *Spiess v. Brandt*, 230 Minn. 246, 254, 41 N.W.2d 561, 567 (1950). As stated above, Stafford expressed his intent to pay Christensen commissions before Christensen stated that he did not intend to work for a competitor. After Christensen indicated that his executive agreement did not contain a noncompete clause and that he did not intend to work for a competitor, LumiData did not seek to include a noncompete clause in the final resignation agreement, indicating that the statement was not vital to the decision to pay commissions. Consequently, we conclude that the district court did not err by concluding that the final commission agreement was not induced by fraud.

III.

LumiData argues that the district court erred by applying Minn. Stat. § 181.14 to impose penalties because Christensen's commissions were not earned as of the time that he resigned. We disagree.

Under Minn. Stat. § 181.14, subd. 1(a),

> When any such employee quits or resigns employment, the wages or commissions *earned and unpaid at the time the employee quits or resigns* shall be paid in full not later than the first regularly scheduled payday following the employee's final day of employment, unless an employee is subject to a collective bargaining agreement with a different provision.

(Emphasis added). The statute also provides,

> Wages or commissions not paid within the required time period shall become immediately payable upon the demand of the employee. If the employee's earned wages or commissions are not paid within 24 hours after the demand, the employer shall be liable to the employee for a penalty equal to the amount of the employee's average daily earnings at the employee's regular rate of pay or the rate required by law, whichever rate is greater, for every day, not exceeding 15 days in all, until such payment or other settlement satisfactory to the employee is made.

Id., subd. 2.

LumiData argues that the district court erred because Minn. Stat. § 181.14 does not apply to this case because Christensen had not "earned" the commissions at issue when he resigned. We disagree. The final commission agreement lists customer accounts for which Christensen had not yet received commissions and states, "[b]ased on composition [schemes] established and agreed upon by both parties the following dollars and payment schedule represents the final commissions due to Kyle Christensen by LumiData, Inc." The final resignation and exit checklist states that Christensen will be paid any "commission due on any of the pending net new [sales] in your pipeline if the contract is signed within 60 days after your resignation date." The plain language of the agreements indicates that LumiData agreed to pay Christensen the commissions listed therein. *See Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 298 Minn. 428, 433, 215 N.W.2d 473, 476 (1974) ("[W]here the words of a written contract are plain and unambiguous, its meaning should be determined in accordance with its plainly expressed intent.").

LumiData relies heavily on our unpublished decision, *Johnson v. Grand Rapids Realty, Inc.*, No. A10-2144, 2011 WL 4008279 (Minn. App. Sept. 12, 2011), to argue that Christensen had not yet earned his commissions when he resigned. Unpublished opinions are of limited value in deciding an appeal. *See* Minn. Stat. § 480A.08, subd. 3(c) (2012) (stating that "[u]npublished opinions of the Court of Appeals are not precedential"); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 n.2 (Minn. 2009) (stating that "the unpublished Minnesota court of appeals decision does not constitute precedent" (citing *In re Collier*, 726 N.W.2d 799, 806 (Minn. 2007))).

In *Johnson*, the appellant real-estate company challenged the district court's award of statutory penalties and attorney fees to respondent, a former real estate agent, under Minn. Stat. § 181.145 (2010). 2011 WL 4008279, at *2. Section 181.145 applies to a "commission salesperson," which is statutorily defined as "a person who is paid on the basis of commissions for sales and who is not covered by sections 181.13 and 181.14 because the person is an independent contractor." Minn. Stat. § 181.145, subd. 1 (2012). Minn. Stat. § 181.145 provides that "penalties prescribed . . . apply only with respect to the payment of commissions earned through the last day of employment." *Id.*, subd. 5 (2012). But, Minn. Stat. § 181.14 does not contain a similar directive.

Instead, the preexisting terms of the final commission agreement defined when Christensen earned his commissions and when they became due to him. Unlike *Johnson*, the final commission agreement in this case defined when Christensen's commissions were due and earned. Under the final commission agreement, Christensen had earned the listed commissions, and these commissions became due to him when the customer paid LumiData. LumiData has received full payment on all of the accounts in the final commission agreement but has not paid Christensen $22,767. Because LumiData did not pay Christensen his earned commissions within 24 hours of the demand, we conclude that the district court did not err by concluding that LumiData violated Minn. Stat. § 181.14. We do note that this case may very well have been decided differently if the parties had not entered into the final commission agreement or if LumiData had not received payment from the customers listed in the final commission agreement.[2]

IV.

LumiData also argues that the district court erred by applying Minn. Stat. § 181.03 to this case because it "provides that certain employer practices relating to commissions

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[2] Had that been the case, the commissions would not be due to Christensen under the final commission agreement.

which were earned prior to the departure of the employee are prohibited." Again, we disagree.

Minn. Stat. § 181.03 states,

> [A]n employer or a person, firm, corporation, or association may not alter the method of payment, timing of payment, or procedures for payment of commissions *earned* through the last day of employment after the employee has resigned or been terminated if the result is to delay or reduce the amount of payment.

Minn. Stat. § 181.03, subd. 2 (emphasis added). LumiData contends that this statute does not apply because Christensen had not yet earned his commissions. As stated above, we conclude that Christensen had earned the commissions at issue.

LumiData also argues that "there are no facts to suggest that [LumiData] ever 'altered the method of payment, the timing of payment or procedures for payment.'" The record indicates that LumiData had a standard practice of paying Christensen after the customers paid LumiData. In an e-mail sent from Stafford to Christensen on March 18, 2011, Stafford wrote, "I've prepared what appears to be your final commission statement . . . . I want you to examine it and perhaps consider developing several payment scenarios as a point of departure from our standard 'pay after customers pay' policy." Similarly, in a March 21 e-mail, Stafford stated, "[Y]ou could take the option that you are accustomed to and that is you get paid when the customer pays. If you wait, I suspect you will be paid the full commission on everything you have sold by the end of April." And, the final commission agreement lists 13 commissions that are either "due end of month after customer payment," or "due month end after customer payment received." The record shows that LumiData's standard method of compensating Christensen was to pay him his commissions in the month following customer payment.

The record also indicates that LumiData altered this method of payment by withholding Christensen's commissions despite being paid by his customers. All of the customers listed in the final commission agreement have paid LumiData for accounts that Christensen was the salesperson of record. LumiData has not paid Christensen on sales he made to six clients, totaling $22,767. Because LumiData has not paid Christensen on these accounts, we conclude that it deviated from its standard "pay after customers pay" policy. Consequently, the district court did not err by concluding that LumiData violated Minn. Stat. § 181.03 and imposing the requisite penalties.

V.

LumiData argues that attorney fees should not have been assessed because the penalty statutes do not apply to breaches of severance agreements. We disagree. "We review the district court's award of attorney fees or costs for abuse of discretion." *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008). "Whether the district court erred in its interpretation of the statute authorizing the award of costs and disbursements to [respondent], however, is a legal question that we review de novo." *Dukowitz v. Hannon Sec. Servs*., 841 N.W.2d 147, 155 (Minn. 2014).

Under Minn. Stat. § 181.171, subd. 3, "[i]n an action brought under subdivision 1 [which includes sections 181.03 and 181.14], the court shall order an employer who is found to have committed a violation to pay the aggrieved party reasonable costs, disbursements, witness fees, and attorney fees." Because we conclude that the district court did not err by finding that LumiData violated sections 181.03 and 181.14, we conclude that the district court correctly awarded Christensen attorney fees.

VI.

LumiData also contends that the district court erred by assessing prejudgment interest to the claims in this case because prejudgment interest is only permitted when the amount demanded can be readily ascertained without dispute.

"When a judgment or award is for the recovery of money . . . interest from the time of the verdict, award, or report until judgment is finally entered shall be computed by the court administrator or arbitrator as provided in paragraph (c) and added to the judgment or award." Minn. Stat. § 549.09, subd. 1(a). The availability of prejudgment interest is a legal issue reviewed de novo. *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 390 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004).

The district court concluded that LumiData breached its contract with Christensen by failing to pay him $22,767 in commissions that he earned during his employment. LumiData argues that the amount of the unpaid commissions is not ascertainable because it was highly disputed at trial. But, this court has stated,

> the question was not whether the parties agreed on the amount of damages *but whether [the defendant] could have determined the amount of its potential liability from a generally recognized objective standard of measurement.* . . . Mere difference of opinion as to the exact amount of damages was not sufficient to excuse [the defendant] from compensating [the plaintiff] for loss of the use of its money.

Solid Gold Realty, Inc. v. Mondry, 399 N.W.2d 681, 684 (Minn. App. 1987) (quoting *ICC Leasing Corp. v. Midwestern Machinery Co.*, 257 N.W.2d 551, 556 (Minn. 1977)). The amount of unpaid commissions can be determined from the record. The final commission agreement lists specific accounts for which LumiData owed Christensen commissions and states the commission amounts. LumiData complied with this agreement on two occasions when it paid Christensen $5,355 and $4,980 in commissions before it repudiated the agreement. We conclude that the district court did not err in awarding prejudgment interest.

Affirmed.