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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2144**

Kathryn Johnson,
Respondent,

vs.

Grand Rapids Realty, Inc.,
Appellant.

**Filed September 12, 2011
Affirmed in part and reversed in part
Larkin, Judge**

Itasca County District Court
File No. 31-CV-09-1251

Richard K. Sellman, Jaclyn Corradi Simon, Sellman Law Office, Hibbing, Minnesota (for respondent)

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Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this dispute regarding an unpaid real-estate commission, appellant real-estate company challenges the district court's award of a statutory penalty and attorney fees to

respondent, its former real-estate agent. Following a court trial, the district court awarded judgment for respondent in the amount of \$22,180, comprised of an unpaid commission of \$8,965, a statutory penalty of \$8,965, and attorney fees of \$4,250. We affirm the district court's judgment for the unpaid commission. But because the penalty and attorney fees were awarded under a statute that is inapplicable to the facts of this case, we reverse in part.

FACTS

Respondent Kathryn Johnson began working as a real-estate agent for appellant Grand Rapids Realty, Inc. (GRR) in February 2001. Ken Dagele is the owner/broker of GRR. On February 15, 2001, Johnson signed an independent-contractor agreement (ICA), which states:

When this agreement has been terminated for any reason, the [s]alesperson's regular proportionate share of [b]rokerage [f]ee on any transactions [s]alesperson has made that are not closed shall be considered his property, and upon closing of said transactions, said proportionate share of the [b]rokerage [f]ee shall be paid to him.

Johnson's customary share of brokerage fees on purchase agreements she secured and closed for GRR was 70%.

Johnson's work as an independent contractor for GRR ended in December 2007. In the months prior to her departure, Johnson negotiated a purchase agreement for a transaction with a sale price of \$570,000. The transaction closed on May 23, 2008, and GRR received a brokerage fee of \$19,950 on the date of closing. Johnson's commission on the sale was \$13,965, but GRR refused to pay her that amount because Dagele felt that

she had “short-listed” several properties (i.e., entered listing agreements with sellers for shorter-than-customary time periods). Instead, Dagele offered Johnson a check for \$5,000. Although Johnson sought more money, she accepted and eventually cashed the check. At the time, Johnson’s husband was seriously ill and his income-producing capacity was significantly compromised. Dagele knew that Johnson was the primary source of income for her household when he tendered the \$5,000 check.

By letter dated May 30, 2008, Johnson’s attorney demanded that GRR pay her the \$8,965 balance of her commission. When GRR refused, Johnson filed a complaint alleging that she was entitled to the remainder of the commission. In addition to the balance of the commission, Johnson requested a statutory penalty and reasonable attorney fees under Minn. Stat § 181.145 (2010).

The case was tried to the court, and the court received the parties’ ICA into evidence. Dagele’s testimony confirmed that he refused to pay Johnson the entire commission, in part, because she “short-listed” several properties in her last months of work with GRR. Dagele’s testimony also suggested that he felt Johnson was not entitled to the commission because the sale did not close before she left GRR and, as a result, he had to do some work to “keep the pieces” of the transaction together.

The district court found that Johnson was an independent contractor and that her relationship with GRR was governed by the ICA. The district court concluded that Johnson earned a commission on the purchase agreement “before the last day of her employment” and that Johnson “is entitled to the protections of . . . [s]ection 181.145, including the full statutory penalty . . . and reasonable attorney’s fees.” The district court

also concluded that GRR failed to prove that Johnson's acceptance of the \$5,000 check was an accord and satisfaction barring her claim. The district court entered judgment for Johnson in the amount of \$22,180, comprised of the unpaid commission in the amount of \$8,965, a statutory penalty of \$8,965, and attorney fees of \$4,250.

GRR moved for amended findings, asking the district court to find that the \$5,000 check was offered to Johnson "in full satisfaction of the commission owed." The district court denied the motion, and this appeal follows.

D E C I S I O N

We begin by identifying the issues presented for appellate review. GRR asserted, in its appellate brief, that the district court erred both in concluding that GRR failed to prove an accord and satisfaction and that Johnson was entitled to the balance of her commission. But at oral argument, GRR expressly waived its challenge to the district court's finding that GRR failed to prove an accord and satisfaction. GRR also advised this court that it agrees that Johnson is entitled to the balance of her commission under the terms of the parties' ICA. Thus, GRR's sole appellate claim is that the district court erred in awarding Johnson a penalty and attorney fees under Minn. Stat. § 181.145, subds. 3, 4. "The application of statutes . . . to undisputed facts is a legal conclusion and is reviewed de novo." *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 5 (Minn. 2008).

Section 181.145 requires prompt payment of commissions to independent contractors who are paid on a commission basis. Minn. Stat. § 181.145, subd. 2(a). When a commission salesperson resigns or is terminated, the employer "shall promptly pay . . . commissions earned through the last day of employment." *Id.* Moreover, if the

employer fails to pay the salesperson “commissions earned through the last day of employment,” on demand within the applicable statutory period, “the employer shall be liable to the salesperson, . . . for a penalty for each day, not exceeding 15 days, which the employer is late in making full payment or satisfactory settlement to the salesperson for the commissions earned through the last day of employment.” *Id.*, subd. 3. The statute also provides for an award of attorney fees when there is a dispute concerning the amount of the salesperson’s “commissions earned through the last day of employment” and it is determined that the salesperson was not promptly paid said commissions. *Id.*, subd. 4 (a), (b). “[C]ommissions earned through the last day of employment’ means commissions due for services or merchandise which have actually been delivered to and accepted by the customer by the final day of the salesperson’s employment.” *Id.*, subd. 1.

In concluding that Johnson was entitled to a statutory penalty and attorney fees under section 181.145, the district court looked to the terms of the parties’ ICA to define “commissions earned through the last day of employment.” The district court concluded that the parties’ ICA trumps section 181.145 as to the definition of earned commissions. The district court’s approach was based on this court’s decision in the unpublished case of *Evenson v. Henson*, No. A03-125, 2003 WL 22293649, at *1 (Minn. App. Oct. 7, 2003).¹ In *Evenson*, this court stated, “because the term earned is not defined by Minn. Stat. § 181.145, parties are free to define the term in their employment agreement, and that definition controls.” *Id.* at *2 (citing *Holman v. CPT Corp.*, 457 N.W.2d 740, 743

¹ The district court relied on *Evenson* as “persuasive authority.” See *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (stating that unpublished opinions are of persuasive value “[a]t best” and not precedential).

(Minn. App. 1990), *review denied* (Minn. Sept. 20, 1990)). The district court relied on *Evenson* and concluded that real estate brokers and agents “remain free to define in employment agreements when commissions are earned, and . . . such definition will control in an inquiry pursuant to . . . [s]ection 181.145.”

The district court’s reliance on this court’s unpublished opinion in *Evenson*,² and our attendant citation to *Holman*, is misplaced. Even though this court stated, in *Evenson*, that “the term earned is not defined by Minn. Stat. § 181.145,” this court recognized and applied the definition of “earned” under section 181.145. *Evenson*, 2003 WL 22293649, at *2. Moreover, *Holman* does not state that because the term earned is not defined in section 181.145, parties are free to define the term in their employment agreements, in which case, that definition controls.³ To the contrary, *Holman* recognized that the term “earned” *is* defined in section 181.145. *Holman*, 457 N.W.2d 472-73.

The relevant unpaid-commission issue in *Holman* was whether the district court erred in applying the definition of “commissions earned through the last day of employment” under section 181.145 to a case involving unpaid commissions under Minn. Stat. § 181.13 (2010). *Id.* Like section 181.145, section 181.13 provides for prompt

² “[U]npublished opinions of the court of appeals are not precedential. The danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts. Unpublished decisions should not be cited by the district courts as binding precedent.” *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (citations omitted).

³ Of course, parties to an independent-contractor relationship are free to contract for the payment of a penalty for unpaid commissions and thereby supplement the remedy provided under section 181.145. But in this case, although the parties’ ICA provides for the payment of unpaid commissions, it does not provide for any associated penalty or attorney fees.

payment of earned commissions, but section 181.13 applies when commissions are owed to an employee, as opposed to an independent contractor. *Compare* Minn. Stat. § 181.145 (entitled “Prompt Payment of Commissions to Commission Salespeople” and defining “commission salesperson” as a person “who is not covered by sections 181.13 and 181.14 because the person is an independent contractor”), *with* Minn. Stat. § 181.13 (“When any employer employing labor within this state discharges an employee, the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon demand of the employee.”).

The *Holman* court concluded that the district court erred in “superimpos[ing] the statutory provisions relating to independent contractors upon the statutory provisions relating to employees.” *Holman*, 457 N.W.2d at 743. We stated, referring to section 181.13, that “[s]ince the term ‘actually earned’ is not defined by statute [i.e., section 181.13)],” the terms of the parties’ compensation plan could be considered in determining whether commissions were actually earned. *Id.* Because *Holman* concerns application of section 181.13, which, unlike section 181.145, does not define the term “earned,” the *Holman* analysis and holding are inapplicable here. And because the parties’ ICA does not indicate that the parties intended or agreed to substitute the terms of the ICA for the statutory definition of “commissions earned through the last day of employment,” Johnson is not entitled to recover a penalty or attorney fees under section 181.145, unless the statutory definition is satisfied. We therefore turn our analysis to the statutory definition.

When we construe statutes, our goal “is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2010). We follow the directive that “[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” *Id.* When plain and unambiguous language clearly indicates the intention of the legislature, we have “neither the need nor the permission to engage in statutory interpretation.” *Mut. Serv. Cas. Ins. Co. v. League of Minn. Cities Ins. Trust*, 659 N.W.2d 755, 760 (Minn. 2003). “A statute is unambiguous if it is not reasonably susceptible to more than one interpretation.” *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227, 232 (Minn. App. 2005) (quotation omitted).

Once again, “‘commissions earned through the last day of employment’ means commissions due for services or merchandise which have actually been delivered to and accepted by the customer by the final day of the salesperson’s employment.” Minn. Stat. § 181.145, subd. 1. Neither party argues that this definition is ambiguous. And under the plain language of the statutory definition, a commission is not “earned through the last day of employment” unless it is “due.” And Johnson agrees that under the terms of the parties’ ICA, her commission was not “due” until the sale closed. The district court reached the same conclusion, reasoning that under the ICA, payment of commission is contingent on the occurrence of closing and stating, “[Johnson’s] right to *payment* . . . depends on proceeds obtained at closing.”⁴ Johnson’s commission therefore was not

⁴ The district court also reasoned that a commission becomes due when a broker procures a buyer willing, ready, and able to purchase real property on the seller’s terms, citing

“due” when she ended her independent-contractor relationship with GRR; the commission became due several months later when the transaction closed. Although we agree, as GRR concedes, that Johnson is entitled to the balance of her commission under the terms of the ICA, she is not entitled to a penalty and attorney fees under section 181.145, because her commission was not “due,” and therefore not “earned through the last day of employment,” when she ended her independent-contractor relationship with GRR.

Even though the statutory definition is not ambiguous and there is no occasion to engage in statutory construction, we observe that the canons of construction support our conclusion that a commission is not “earned through the last day of employment” under section 181.145 unless it is “due” on or before the last day of employment. For example, the requirement that unpaid commissions must be “due” to be “earned through the last day of employment” gives effect to all of the provisions of section 181.145, while preventing an absurd result. *See* Minn. Stat. §§ 645.16 (“Every law shall be construed, if possible, to give effect to all its provisions.”), .17 (2010) (stating that courts may presume

Hamlin v. Schulte, 34 Minn. 534, 536, 27 N.W. 301, 302 (1886). But the “well-established rule” that was reiterated in *Hamlin* is actually as follows:

[T]he broker is entitled to recover his compensation, where a purchaser, procured through his agency, is able, willing, and ready to complete the purchase on the terms mutually stipulated between the parties, although through the default of the seller, or his inability to fulfill the terms on his part or make a good title, no sale is finally consummated.

Thus, the rule applies when a purchase agreement fails to close because of the seller’s default or inability, which is not the case here. The *Hamlin* rule therefore is inapplicable.

that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”). Subdivision 2 of section 181.145 requires prompt payment of “commissions earned through the last day of employment” when an independent-contractor relationship terminates and defines the periods of time in which such commissions must be paid in relation to the independent contractor’s last day of work, depending on whether the salesperson was terminated, or resigned with or without giving at least five days’ written notice. Minn. Stat. § 181.145, subd. 2(a)-(c). Depending on the circumstances, commissions earned through the last day of employment must be paid, on demand, no later than three or six working days after the last day of work. *Id.* If the word “due” in the statutory definition is not given full force and effect, an independent contractor would be entitled to payment for a commission that may never become due, as would have been the case here if the transaction failed to close. We presume the legislature did not intend this absurd result. *See* Minn. Stat. § 645.17.

We further observe that section 181.145 contemplates the situation here: a sales transaction that was contracted for during the independent-contractor relationship but that did not close until after the relationship ended. The statute provides that “[n]othing in this section shall be construed to impair a commission salesperson from collecting commissions on merchandise ordered prior to the last day of employment but delivered and accepted after termination of employment. *However, the penalties prescribed in subdivision 3 apply only with respect to the payment of commissions earned through the last day of employment.*” Minn. Stat. § 181.145, subd. 5 (emphasis added). Under subdivision 5, in conjunction with the terms of the parties’ ICA, Johnson is entitled to the

balance of her commission for the purchase agreement that was executed, but not closed, prior to the termination of her independent-contractor relationship with GRR. But she is not entitled to the statutory penalty because the commission was not earned—i.e., “due”—on or before the last day of employment.

In conclusion, because the commission was not due to Johnson until the underlying sale closed and GRR received its brokerage fees, which was after termination of Johnson’s work as an independent contractor for GRR, the commission was not earned through the last day of employment. And because the statutory definition is not satisfied, Johnson is not entitled to a penalty or attorney fees under the statute. We therefore reverse that portion of the district court’s judgment awarding a penalty and attorney fees under section 181.145.

Affirmed in part and reversed in part.

Dated:

Judge Michelle A. Larkin