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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0756

Ronald N. Zebeck,
Respondent,

vs.

Metris Companies, Inc.,
a Delaware corporation, n/k/a MTX LLC,
Appellant.

Filed May 27, 2008
Affirmed
Harten, Judge*

Hennepin County District Court
File No. 27-CV-04-000722

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Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Harten, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HARTEN, Judge

A jury found that respondent Ronald Zebeck, former CEO of appellant Metris Companies, Inc. (Metris), was entitled to a severance award; the district court found that he was entitled to the attorney fees he incurred in collecting it. Metris moved for judgment as a matter of law (JMOL) or a new trial on the basis of the jury's finding that Metris breached the parties' Change of Control Severance Agreement (COC); for JMOL on the basis that Zebeck forfeited his right to severance pay by breaching his fiduciary duties; and for remittitur or a new trial on the ground that the jury's award was excessive. The district court denied the motion. Because the jury's verdict is not perverse or palpably contrary to the evidence and because the district court did not abuse its discretion in denying JMOL on the basis of forfeiture, in denying remittitur, or in granting Zebeck's motion for attorney fees, we affirm.

FACTS

In 1998, Zebeck became CEO of Metris. Along with other Metris executives, Zebeck entered into a COC with Metris. The COC entitled executives to benefits if they were terminated either at the request of a third party who was effecting a change of control of Metris or in connection with or in anticipation of a change of control; however, executives terminated for cause were not entitled to benefits. The COC also provided that Metris would pay any attorney fees incurred in a good faith effort to collect COC benefits.

From 1998 to 2000, Metris experienced rapid growth that began to slow in 2001. Early in 2002, the federal Office of the Comptroller of the Currency investigated and sanctioned Metris; the sanctions led to various financial problems, among them maintaining Metris's liquidity. In August 2002, Zebeck informed Metris's directors of serious liquidity problems.

Metris retained two investment bankers, Goldman Sachs (GS) and Merrill Lynch (ML), to advise on its financial situation. Among the possibilities they suggested was the sale of Metris.[1] Also in September, Zebeck asked the head of Metris's human resources (HR) department to calculate what Metris would owe each executive under the COCs (the HR-COC calculation). For Zebeck, the HR-COC calculation was $33,092,064.

On 12 December, two Metris directors met Zebeck to tell him to resign or be fired. On 15 December, Zebeck received a letter terminating him and saying that Metris reserved the right to determine if his termination was for cause. Zebeck retained counsel, who informed Metris that Zebeck would demand payment of his COC benefits. Metris hired KMPG, an accounting firm, to audit Zebeck's expense records. On 26 March 2003, Metris's directors determined that Zebeck's termination had been for cause. In April, Zebeck received a second termination letter, this one notifying him that he had been terminated for cause.

Zebeck brought this action against Metris to collect his COC benefits. After a four week trial, the jury found that Zebeck had not been terminated for cause; that he had been terminated in anticipation of a change of control and was therefore entitled to COC

[1] Metris was ultimately sold in November 2005 to HSBC.

benefits; that he was entitled to $30,211,716 under the COC; that Zebeck had used Metris's money and/or property contrary to Metris's best interests; and that Metris was entitled to $236,000. Metris moved for a new trial, remittitur, JMOL, or amended findings and conclusions. Following a hearing, its motion was denied.

Zebeck retained a law firm on a contingency-fee basis. His attorney fees came to $11,563,454.33, which the district court awarded.

Metris now challenges the denial of its motion and the attorney fee award, arguing that the jury's finding that Zebeck was terminated in anticipation of a change of control is contrary to the evidence, that Zebeck's breach of fiduciary duty operated as a forfeiture of COC benefits, that the damage award was excessive, and that the attorney fee award should be limited to the hourly fees actually earned.[2]

D E C I S I O N

1. Breach of the COC

"[A] special verdict form is to be liberally construed to give effect to the intention of the jury and on appellate review it is the court's responsibility to harmonize all findings if at all possible." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999). If a jury's answer to a special verdict question "can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, the jury verdict must be sustained." *Id.* (quotation omitted). "An answer to a special verdict question should be set aside only if it is perverse and palpably contrary to the evidence, or where

[2] Metris does not challenge the jury finding that Zebeck was not terminated for cause.

the evidence is so clear as to leave no room for differences among reasonable persons." *Id.* (quotation omitted).

On its special verdict form, the jury answered, "Yes," when asked if Zebeck was "terminated on December 15, 2002 to effect or in anticipation of a change of control." Metris claims this answer should be set aside because Zebeck failed to provide evidence on three critical points: (a) that Metris was for sale when Zebeck was terminated in December 2002; (b) that the sale of Metris in 2005 was connected to the financial situation of the company in 2002; and (c) that Zebeck "was terminated for the purpose of selling [Metris] to HSBC." As to point (c), the jury did not need evidence that Zebeck was terminated "for the purpose of selling" Metris to a particular purchaser to find that Zebeck was terminated in anticipation of a change of control of Metris; as to points (a) and (b), the record shows Zebeck did provide evidence.

a. December 2002 Status of Sale of Metris

At trial, when Zebeck was asked what he thought he was doing when he signed the GS and ML engagement letters, he answered, "Selling [Metris.]" As supporting evidence, he provided engagement letters from GS and ML to himself, then CEO of Metris.

The GS letter, dated 15 August 2002, confirmed the engagement of GS to advise Metris in considering financial alternatives that "may include . . . sale of [Metris]" and stated that, in the event of a sale of all or part of Metris, GS would be engaged "as financial advisor to [Metris] in connection with the possible Sale" so GS could render an "opinion as to the fairness . . . of the financial consideration to be received by

stockholders of [Metris] in connection with the sale of 50% or more of the outstanding voting stock."

ML's letter, dated 27 September 2002, states that ML has been engaged to analyze Metris's financial condition and assist it in "evaluating, structuring, negotiating and effecting Strategic Alternatives, which may include . . . the sale of minority or majority equity stakes in [Metris] to one or more companies" and that ML would render an opinion "as to whether the consideration . . . to be paid in a proposed Sale Transaction is fair from a financial point of view to the common shareholders of [Metris]." The letter also defines "Sale Transaction" as "any transaction or series of transactions in which one or more Purchasers acquire directly or indirectly at least 50% of any of the stock, assets measured on a managed basis, revenues, income or business of [Metris] or otherwise gains control of [Metris]."

In addition to the two letters, Zebeck presented evidence that, at a meeting with Metris directors on 25 September 2002, GS made a presentation recommending "the simultaneous pursuit of two primary paths"; one path was "all viable liquidity alternatives" and the other was "a structured sale of the Company." GS also presented a summary of "Strategic Alternatives," which listed things to be done to prepare for a "Structured Sale"; they included, "[p]repare draft offering document"; "[p]repare interested strategic and financial buyer list and recommended approach"; "[r]eview buyer list and approach strategy with Committee"; and "[c]ontinue discussions . . . consistent with structured sale approach."

Thus, Zebeck did provide sufficient evidence for the jury to find that Metris was planning to be sold when Zebeck was terminated in December 2002.

b. Relationship of 2005 Sale to 2002 Situation

Metris argues that, because it was not sold until 2005, the jury could not have found that in December 2002 Zebeck was terminated "in anticipation of a change of control." But the COC did not specify any time frame for "anticipation." It defined its own "Effective Date":

> 2.9 "Effective Date" means the first date on which a Change of Control occurs during the Agreement Term. Despite anything in this Agreement to the contrary, if [Metris] terminates the Executive's employment before the date of a Change of Control, and if the Executive reasonably demonstrates that such termination of employment (a) was at the request of a third party who had taken steps reasonably calculated to effect the Change of Control or (b) otherwise arose in connection with or in anticipation of the Change of Control, then "Effective Date" shall mean the date immediately before the date of such termination of employment.

The jury heard Metris's expert testify that the COC did not include, in section 2.9 or elsewhere, a time limit for "an anticipatory termination." He also testified that such a limit could have been included and was "fairly standard"; he agreed that the absence of such a limit meant the parties to this COC did not want a time limit. Thus, the jury knew that a termination in "anticipation of a change of control" did not mean that the termination had to occur within any particular time frame relative to the change of control. Its finding that Zebeck was terminated "in anticipation of a change of control" was not dependent on a time frame.

The finding that Zebeck was terminated "to effect or in anticipation of a change of control" is not perverse and palpably contrary to the evidence, and it can be reconciled in

a reasonable manner with the evidence and its associated inferences. *See id.* The district court did not err in denying Metris's motion for JMOL or a new trial on the basis of the finding that Zebeck was terminated "to effect or in anticipation of a change of control" of Metris.

2. Forfeiture of the Right to Severance Pay

The jury answered, "Yes," when asked if Zebeck "use[d Metris's] money or property for his personal benefit or for the benefit of friends or relatives in violation of [Metris's] policy, contrary to the best interests of Metris, or which in good conscience he should have paid for?" and said that $236,000 would compensate Metris. Arguing that Zebeck forfeited his right to severance pay by improper use of Metris's property, Metris moved for JMOL. The district court denied the motion.

This court reviews a district court's denial of the equitable remedy of forfeiture for an abuse of discretion. *Bolander v. Bolander*, 703 N.W.2d 529, 548 (Minn. App. 2005), *review dismissed* (Minn. 15 Nov. 2005). When the district court denies a motion for JMOL, the denial "must be affirmed, if, in the record, there is any competent evidence reasonably tending to sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotation omitted).[3] "[A]n appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence." *Id.*

To support its forfeiture argument, Metris relies on *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777 (Minn. 1989). *Stiff* holds that Minn. Stat. § 181.79, subd. 1

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[3] *Pouliot* actually pertains to motions for judgment notwithstanding the verdict (JNOV), which was replaced by JMOL without any substantive change. *See* Minn. R. Civ. P. 50.02 2006 advisory comm. cmt.

(1978), which prohibits employers from deducting a claimed indebtedness from an employee's wage unless a court has found the employee liable for the indebtedness, did not supersede the common-law doctrine of forfeiture. *Id*. at 780. But *Stiff* is distinguishable: it concerned an employee whose inability to prove the amount he was claiming in unpaid commissions was due to the employee's own misconduct in "dismantling the company's business records." *Id*. Here, the records were adequate for the jury to find how much Zebeck owed Metris. Moreover, *Stiff* did not involve a contractual provision concerning an employee's forfeiture of money owed by the employer. Here, the COC specified the condition under which Zebeck would forfeit his COC benefits: if he were terminated for cause as defined in the COC. The jury found that Zebeck was not terminated for cause, and Metris does not challenge that finding.

The jury found that: (1) Zebeck had not been fired for cause; (2) Metris owed Zebeck more than $30 million by virtue of the COC; (3) Zebeck had misused Metris's property; and (4) $236,000 would compensate Metris for Zebeck's misuse of its property. "[O]n appellate review it is the court's responsibility to harmonize all findings if at all possible." *Kelly,* 598 N.W.2d at 662. These four jury findings can be harmonized using the concept of scaled forfeiture. *See Gilchrist v. Perl*, 387 N.W.2d 412, 417 (Minn. 1986) (adopting, in the context of attorney fee forfeiture for fiduciary misconduct, the practice of scaled fee forfeiture, i.e., allowing the amount of a forfeiture to be scaled to the degree of misconduct); *see also Commercial Assocs., Inc., v. The Work Connection, Inc*., 712 N.W.2d 772, 779-81 (Minn. App. 2006) (interpreting *Gilchrist* to hold that "the

scaled-fee-forfeiture rule applies to circumstances in which the breach of fiduciary duty involves no actual fraud or bad faith and no actual harm").[4]

The district court did not abuse its discretion by adopting the jury's findings, declining to conclude that Zebeck had forfeited more than $30 million by misconduct amounting to less than .1% of that amount and denying Metris's motion for JMOL.

3. JMOL or New Trial Because of Excessive Damages; Remittitur

The jury awarded Zebeck $30,211,716. Metris moved for a new trial on the basis of excessive damages or for remittitur reducing the award to $11,781,633.[5] "The discretion to grant a new trial on the ground of excessive damages rests with the trial court, whose determination will only be overturned for abuse of that discretion." *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984). When a district court has examined the jury's verdict and outlined the reasons for its decision on a motion for remittitur, an appellate court is unlikely to tamper with that decision absent an abuse of discretion. *Sorenson v. Kruse*, 293 N.W.2d 56, 62-63 (Minn. 1980).

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[4]The district court presumably had the concept of scaled fee forfeiture in mind when it declined to instruct the jury on forfeiture because "it is not the law in Minnesota." While Metris objects to this statement in its brief, Metris does not challenge the jury instructions on appeal. We therefore do not address the issue. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (issues not raised on appeal are waived).

[5] This amount was the sum of $2,145,633 and $9,636,000. The first number is Zebeck's annual bonus for 2002, $2,244,000, less $98,367 because he was terminated 16 days before the end of 2002 ($2,244,000 - $98,367 = $2,145,633; the second number is three times the sum of Zebeck's annual bonus, $2,244,000, and his base pay, $968,000 ($2,244,000 + $968,000 = $3,212,000; 3 x $3,212,000 = $9,636,000). In its appellate brief, Metris omits the deduction for the last 16 days of 2002 and says Zebeck is entitled to $11,880,000.

The district court outlined the reasons for its decision:

> The evidence supports the jury's damage award. The evidence included an internal Metris document calculating the value of Zebeck's [COC benefits] in 2002 to be $33,092,064.00 [the HR-COC calculation]; [Zebeck's successor's] payout; plaintiff's damages expert['s] testimony about the value of the [COC benefits]; and [COC] Section 1.5(c) which related to the vesting of deferred pension plans. . . . The evidence viewed in the light most favorable to the decision reached by the jury is reasonable and understandable.

The "internal Metris document" was the HR-COC calculation that Zebeck, as CEO, had directed Metris's HR department to prepare in September 2002 to show Metris's potential liability under all the COC's. Zebeck's HR-COC calculation provides that, under COC §§ 5.1(a) –(e), he would receive $23,186,000; that under COC § 5.1(f), he would receive $144,700; and that under COC § 5.6 he would receive $9,761,364: a total of $33,092,064. The jury subtracted from this amount $2,880,348 in "other restricted stock grants" listed as part of the amount due under COC § 5.1(a) and arrived at its award: $30,211,716.

Metris first challenges the district court's description of the HR-COC calculation for Zebeck as an "internal Metris document" on the ground that Zebeck (then CEO of Metris) had it prepared "to advance his self interest, not the interests of Metris." But the jury heard Zebeck testify that, on 26 September 2002, after engaging GS and ML, he asked Metris's HR department "to put together a binder of all of the—basically all the plans and all of the costs associated with the [COCs] . . . so that . . . the compensation committee and the board would have access to all that information" and "the bankers and the board [would] be reminded that all these programs were in place." Zebeck's testimony was unopposed; it was rather confirmed by the testimony of a Metris witness,

the former director of Metris's HR department. He answered, "That's correct," when asked, "[Y]ou not only did an analysis of [COC benefits] like this for Mr. Zebeck, but you did an analysis for anybody that was covered by a [COC], correct?" Thus, the district court's description of Zebeck's HR-COC calculation as an "internal Metris document" was accurate. The district court did not abuse its discretion in finding that the jury's reliance on the HR-COC calculation to determine Zebeck's damages was reasonable.

Metris challenges three specific items on Zebeck's HR-COC calculation. First, it argues that $5,808,000 for a restricted stock grant was improperly included in the calculation for COC § 5.1(d), which provided an amount equal to three times the sum of Zebeck's guaranteed base salary and his highest annual bonus over the previous two years. But the jury heard the former head of Metris's HR department answer, "Yes," when asked if, "as part of his compensation [Zebeck] was promised that he would get a certain amount of restricted stock each year, wasn't he?" and, "Yes," when asked if this was to avoid tax consequences that Metris would incur if it paid its CEO more than $1 million in salary. The jury could have concluded that, because COC § 5.1(d) pertained to a multiple of Zebeck's base salary and annual bonus, the restricted stock Zebeck received in lieu of salary was properly included in his HR-COC calculation.

Second, Metris challenges the $9,761,364 that was included under COC § 5.6, which provides a "gross-up" payment to offset tax due on the COC benefits. Zebeck has not yet received an award under the COC, so his tax liability on it is unknown. The jury was instructed that, if it found Metris breached the COC, it would need to decide what

amount would put Zebeck in the position he would have been in if the breach had not occurred, i.e., his contract damages. *See Frank v. Jansen*, 303 Minn. 86, 95, 226 N.W.2d 739, 745 (1975). The jury properly used the HR-COC calculation estimate of Zebeck's COC tax liabilities.[6]

Third, Metris challenges the $4,656,500 included for Zebeck's Supplemental Executive Retirement Plan (SERP) because the SERP provides for payments only to those 55 or older who have five years of service and Zebeck was not yet 55 and did not have five years of service when he was terminated. But COC § 5.1(c) provides for payment of "all amounts previously deferred by . . . any . . . pension plan." The SERP deferred payment. The jury heard the former head of Metris's HR department answer, "Yes," when asked, "[I]f there is a change of control, SERP benefits vest, don't they?" and answer, "That's correct," when asked, "Even if you're not age 55 or you haven't been there for five years, they automatically vest, don't they?" The jury properly awarded the HR-COC calculation amount of Zebeck's SERP benefit.

Finally, Metris argues that, because its motion for a new trial was brought under Minn. R. Civ. P. 59.01(g), providing that a new trial may be granted if "[t]he verdict . . . is not justified by the evidence . . . ." without reference to whether passion or prejudice influenced the jury, the district court erred in basing its denial in part on Metris's failure

[6] Metris also argues that, because COC § 5.6 provides that reimbursement payments shall be calculated by Metris's accounting firm after Metris is notified of a tax payment, the jury award of those payments was "inappropriate." But the jury's question was what amount would put Zebeck in the position he would have been in if Metris had not breached the COC, not how to provide specific performance of the COC. Under COC § 5.6, Zebeck would have received a gross-up payment to offset his tax liability for COC benefits.

to show "in facts, the conduct of the trial or verdict that the damages were excessive or a product of passion or prejudice influenc[ing] the jury." But the finding that Metris had not shown "that the damages were excessive" would by itself support the denial of a motion for a new trial under either Minn. R. Civ. P. 59.01(g) (requiring a verdict not justified by the evidence) or Minn. R. Civ. P. 59.01(e) (requiring "[e]xcessive or insufficient damages, appearing to have been given under the influence of passion or prejudice"). The district court's reference to "a product of passion or prejudice" is not a basis for overturning its denial of the motion for a new trial.

The district court did not abuse its discretion in denying the motion for remittitur or for a new trial on the basis of excessive damages.

4. Attorney Fees

This court will not reverse a district court's award of attorney fees absent an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

The COC provides at § 7.1 that, if an individual "incurs legal fees or other expenses in a good faith effort to obtain benefits" under the COC, Metris "shall reimburse" the individual "on a current basis for such fees and expenses . . . ." and that "[r]eimbursement . . . shall be made monthly upon the written submission of a request for reimbursement together with evidence that such fees and expenses are due and payable or were paid . . . ."

Zebeck retained a law firm on a contingency-fee basis. The legality of contingency fees is established. *See, e.g., S.B. Foot Tanning Co. v. Piotrowski*, 554

N.W.2d 413, 419-20 (Minn. App. 1996), *review denied* (Minn. 17 Dec. 1996); *see also* Minn. R. Prof. Conduct 1.5(c). The contingency fee agreement provided for a fee of 20% of the first million Zebeck recovered and 22.5% of any additional recovery. These percentages are not unconscionable. *See, e.g., Continental Cas. Co. v. Knowlton*, 305 Minn. 201, 214, 232 N.W.2d 789, 797 (1975) (concluding that contingency attorney fee of 40% was not unconscionable); *Courtney v. Babel*, 293 Minn. 328, 333-34, 198 N.W.2d 566, 570 (1972) (concluding that contingency attorney fee of 33.3% was not unconscionable). Therefore, Zebeck has incurred, in a good faith effort to receive his COC benefits, fees amounting to 20% of the first million recovered and 22.5 % of the remaining recovery. Under the COC, Metris is liable for those fees.

Metris argues that the words "on a current basis" and "monthly" indicate that reimbursement was to be restricted to fees incurred hourly. But as the district court noted, the COC could have specified hourly-rate fees or excluded contingency fees; it did neither. The COC provides only that, in any month when Zebeck notifies Metris of attorney fees he has incurred to enforce the COC, Metris is obligated to pay them on a "current" basis.

Metris also argues that the fee is contrary to law because Minnesota has adopted another method of calculating attorney fees: a reasonable number of hours multiplied by a reasonable hourly rate. *See Northfield Care Center, Inc., v. Anderson*, 707 N.W.2d 731, 736 (Minn. App. 2006). On that basis, Zebeck's attorney fees would be $1,538,271, which is the number of hours worked by his attorneys multiplied by their hourly rate. But Zebeck did not agree to compensate the attorneys by an hourly rate; he agreed to a

contingency fee, and his attorneys ran the risk of not being compensated if his lawsuit was not successful. While Minnesota law provides an alternative method of calculating attorney fees, it does not prohibit contingency fees.[7]

The district court did not abuse its discretion in requiring Metris to pay the attorney fees Zebeck incurred in a good faith effort to recover his COC benefits.

Affirmed.

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[7] Metris implicitly if not explicitly states that Minnesota should prohibit contingency fees when fees are contractually shifted, but provides no legal support for that view.