

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

WILLIAM D. GEARHART, JR.

C.A. No. 27396

Appellant

v.

NATIONWIDE MUTUAL INS. CO., et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV2012-09-5216

Appellees

DECISION AND JOURNAL ENTRY

Dated: July 22, 2015

SCHAFFER, Judge.

{¶1} Plaintiff-Appellant William D. Gearhart, Jr. appeals from the entry granting partial summary judgment to Defendant-Appellees Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide General Insurance Company, Nationwide Property and Casualty Insurance Company, Nationwide Variable Life Insurance Company, and Colonial Insurance Company of California (collectively “Nationwide”) on a portion of Mr. Gearhart’s claims and a portion of Nationwide’s counterclaims. For the reasons set forth below, we affirm.

I.

{¶2} In 1990, Mr. Gearhart became an employee agent for Nationwide. In 1993, Mr. Gearhart signed an Agent’s Agreement which transitioned his relationship with Nationwide to that of an independent contractor agent and detailed his ongoing business relationship with Nationwide. Section 11 of that Agent’s Agreement detailed Agency Security Compensation

(“ASC”) which was divided into Deferred Compensation Incentive Credits (“DCIC”) and Extended Earnings. Mr. Gearhart understood these benefits to be a form of retirement benefits. Section 11(f) of the Agent’s Agreement provided that the duty of Nationwide to provide ASC would cease in the event any of three listed conditions occurred. Specifically, Section 11(f) stated:

Cessation of Agency Security Compensation

All liability of [Nationwide] for [ASC] provided for in paragraph 11 and its subparagraphs shall cease and terminate in the event any one or more of the following shall occur:

(1) You either directly or indirectly, by and for yourself or as an agent for another, or through others as their agent, engage in or be licensed as an agent, solicitor, representative, or broker or in anyway be connected with the fire, casualty, health, or life insurance business, within one year following cancellation within a 25 mile radius of your business location at that time; or

* * *

(3) After cancellation of this Agreement, you directly or indirectly induce, attempt to induce, or assist anyone else in inducing or attempting to induce policyholders to lapse, cancel, or replace any insurance contract in force with [Nationwide]; furnish any other person or organization with the name of any policyholder of [Nationwide] so as to facilitate the solicitation by others of any policyholder for insurance or for any other purpose.

{¶3} On December 2010, Mr. Gearhart signed a Voluntary Cancellation, Settlement, and Release Agreement (“VCIP”) which ultimately provided for the cancellation of Mr. Gearhart’s Agent’s Agreement. However, the VCIP specifically stated that, following cancellation of the Agent’s agreement, the provisions of Section 11 of that agreement “are not waived or modified” by the VCIP. The VCIP also provided, inter alia, that, prior to the cancellation of the Agent’s Agreement, Mr. Gearhart would assist Nationwide in facilitating the retention of Nationwide insurance policies that Mr. Gearhart had been servicing. As part of the VCIP, Nationwide agreed to pay Mr. Gearhart an initial \$5,000 and, then, over the course of 24

months, Nationwide would pay Mr. Gearhart an additional sum of \$165,000. The cancellation of Mr. Gearhart's Agent's Agreement was effective April 30, 2011. At the time of cancellation, Mr. Gearhart had accumulated \$349,223.34 in DCIC benefits and \$137,126.16 in Extended Earnings. Thus, his total ASC benefits were \$486,349.50. Subsequently, Mr. Gearhart began receiving payments under the VCIP and Extended Earnings payments under the Agent's Agreement.

{¶4} On January 9, 2012, a representative from Nationwide sent Mr. Gearhart a letter informing him that it had come to Nationwide's attention that, subsequent to the cancellation of the Agent's Agreement, Mr. Gearhart had been working as an insurance agent at 2036 Locust Street in Canal Fulton and that that location was within 25 miles of his prior Nationwide office location.¹ Additionally, the Nationwide representative asserted that Mr. Gearhart was soliciting Nationwide policy holders he had serviced while he was a Nationwide agent. The letter further stated that the conduct was a violation of Section 15 of the VCIP and Section 11(f) of the Agent's Agreement. The letter gave Mr. Gearhart 10 days to cure the violation of the VCIP by ceasing to work as an insurance agent in the 25 mile radius and indicated that, if Mr. Gearhart did not cure, he would be required to return payments made under the VCIP. The letter did not provide for an opportunity to cure the violation of Section 11(f) of the Agent's Agreement. In an email dated January 9, 2012, ASC payments for Mr. Gearhart were stopped.

{¶5} Mr. Gearhart responded to the letter via email on February 21, 2012, denying the allegations but asking what he needed to do to correct the situation. In March 2012, counsel from Nationwide sent a letter to Mr. Gearhart's counsel stating that Mr. Gearhart failed to cure

¹ Prior to the cancellation of the Agent's Agreement, Mr. Gearhart maintained an office in Cuyahoga Falls.

the breach of the VCIP, that Nationwide would not make any more payments, and that it was demanding return of the \$87,500 it had already paid to Mr. Gearhart.

{¶6} In September 2012, Mr. Gearhart filed a three-count complaint against Nationwide. In count one, Mr. Gearhart sought a declaratory judgment that he complied with the terms of the Agent's Agreement and VCIP and that Nationwide failed to comply with its obligations under the Agent's Agreement and VCIP. Mr. Gearhart asserted in count two that Nationwide breached the VCIP by terminating payments under it and alleged in count three that Nationwide breached the Agent's Agreement by denying him ASC.

{¶7} Nationwide answered and asserted two counterclaims. In the first, Nationwide sought a declaratory judgment that Mr. Gearhart breached the Agent's Agreement excusing Nationwide's performance under it. Nationwide alleged in its second counterclaim that Mr. Gerhardt breached the VCIP and maintained that it was entitled to the return of the \$87,500 it had paid to Mr. Gearhart under the VCIP.

{¶8} Nationwide filed a motion for summary judgment on Mr. Gearhart's claims and Nationwide's counterclaims. After briefing, the trial court granted summary judgment to Nationwide on Mr. Gearhart's claims related to the Agent's Agreement and on Nationwide's first counterclaim. In doing so, the trial court concluded that the provisions in Section 11(f) of the Agent's Agreement represented conditions subsequent, the happening of which would result in Mr. Gearhart forfeiting his ASC benefits. The trial court found the evidence undisputed that Mr. Gearhart sold insurance within the restricted 25-mile area within a year after separating from Nationwide, thereby violating Section 11(f) of the Agent's Agreement. Additionally, the trial court concluded that the right to notice and cure provision found within the VCIP did not apply to Section 11 of the Agent's Agreement. Thus, the trial court found that Mr. Gearhart

immediately forfeited his rights to the ASC benefits under the Agent's Agreement. The trial court concluded genuine issues of material fact remained with respect to the claims and counterclaim involving the VCIP. Accordingly, the trial court denied summary judgment as to those claims. Subsequently, the parties entered into a settlement agreement concerning the remaining claims and those claims were dismissed with prejudice.

{¶9} Mr. Gearhart has appealed, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF APPELLEE NATIONWIDE INSURANCE CO. ("NATIONWIDE") ON APPELLANT WILLIAM D. GEARHART'S ("GEARHART") CLAIM FOR BREACH OF CONTRACT OF THE AGENT'S AGREEMENT, ASSERTED IN [] COUNT ONE OF THE COMPLAINT.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF NATIONWIDE ON GEARHART'S CLAIM FOR DECLARATORY JUDGMENT WITH RESPECT TO THE AGENT'S AGREEMENT, ASSERTED IN COUNT THREE OF THE COMPLAINT.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF NATIONWIDE FOR DECLARATORY JUDGMENT WITH RESPECT TO THE AGENT'S AGREEMENT, AS ASSERTED IN COUNT ONE OF THE COUNTERCLAIM.

{¶10} Mr. Gearhart asserts in his three assignments of error that the trial court erred in granting summary judgment on the claims and counterclaims dealing with the Agent's Agreement. We do not agree.

{¶11} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving

any doubt in favor of the non-moving party.” *Garner v. Robart*, 9th Dist. Summit No. 25427, 2011-Ohio-1519, ¶ 8.

{¶12} Pursuant to Civ.R. 56(C), summary judgment is appropriate when:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a summary judgment motion, the movant bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent’s case. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the movant satisfies this burden, the nonmoving party “‘must set forth specific facts showing that there is a genuine issue for trial.’” *Id.* at 293, quoting Civ.R. 56(E).

{¶13} Nationwide sought summary judgment on all Mr. Gearhart’s claims and its counterclaims; however, the only claims at issue in this appeal relate to Mr. Gearhart’s ASC benefits under the Agent’s Agreement. In that respect, Mr. Gearhart asserted that Nationwide breached the Agent’s Agreement by terminating his ASC benefits, while Nationwide alleged Mr. Gearhart breached the Agent’s Agreement, thereby excusing Nationwide’s performance.

{¶14} In its motion for summary judgment Nationwide argued that Section 11(f) of the Agent’s Agreement involving Mr. Gearhart’s ASC was valid, that it represented a condition subsequent, and that Nationwide’s duties related to Mr. Gearhart’s ASC were discharged when Mr. Gearhart violated Section 11(f) of the Agent’s Agreement. Specifically, Nationwide argued that Mr. Gearhart operated as an agent within 25-miles of his former Nationwide office during

the year following cancellation of the Agent's Agreement and that Mr. Gearhart caused Nationwide policyholders to replace their Nationwide policies with other insurance policies.

{¶15} In opposition, Mr. Gearhart did not dispute the validity or enforceability of Section 11(f) of the Agent's Agreement. Instead, Mr. Gearhart argued that his breach was not material because he believed that the office at 2036 Locust Street was outside the 25-mile restricted area, as MapQuest driving directions listed a distance of 25.8 miles. Additionally, Mr. Gearhart maintained that he did not solicit his former Nationwide policyholders; rather, those individuals cancelled the policies on their own and came to him for insurance. Finally, Mr. Gearhart argued that the notice and cure provision in Section 16 of the VCIP was also applicable to the Agent's Agreement, and, thus, Nationwide was required to give him notice and an opportunity to cure the alleged violation of Section 11(f) of the Agent's Agreement.

{¶16} The trial court ultimately found that Mr. Gearhart operated as an insurance agent within the 25-mile area of his former Nationwide office location, thereby immediately discharging Nationwide of its responsibilities under Section 11 of the Agent's Agreement. The trial court rejected Mr. Gearhart's argument that the notice and cure provision of Section 16 of the VCIP applied to violations of Section 11(f) of the Agent's Agreement.

{¶17} "The cardinal principle in contract interpretation is to give effect to the intent of the parties. [W]e will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." (Internal citation and quotations omitted.) *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, ¶ 9.

{¶18} As noted above, Section 11(f) of the Agent’s Agreement provided in relevant part:

All liability of [Nationwide] for [ASC] provided for in paragraph 11 and its subparagraphs shall cease and terminate in the event any one or more of the following shall occur:

(1) You either directly or indirectly, by and for yourself or as an agent for another, or through others as their agent, engage in or be licensed as an agent, solicitor, representative, or broker or in anyway be connected with the fire, casualty, health, or life insurance business, within one year following cancellation within a 25 mile radius of your business location at that time; or

* * *

(3) After cancellation of this Agreement, you directly or indirectly induce, attempt to induce, or assist anyone else in inducing or attempting to induce policyholders to lapse, cancel, or replace any insurance contract in force with [Nationwide]; furnish any other person or organization with the name of any policyholder of [Nationwide] so as to facilitate the solicitation by others of any policyholder for insurance or for any other purpose.

{¶19} This Court and other courts have previously examined the Section 11(f) provision in Nationwide’s Agent’s Agreement. *See Plazzo v. Nationwide Mut. Ins. Co.*, 9th Dist. Summit No. 17022, 1996 WL 62110 (Feb. 14, 1996); *Carl Ralston Ins. Agency, Inc. v. Nationwide Mut. Ins. Co.*, 9th Dist. Summit No. 23336, 2007-Ohio-507; *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 5th Dist. Tuscarawas Nos. 97-CA-27, 97-CA-42, 1998 WL 518137 (Jan 14, 1998); *Hamilton Ins. Servs. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 274-275 (1999); *James H. Washington Ins. Agency v. Nationwide Mut. Ins. Co.*, 95 Ohio App.3d 577 (8th Dist.1993). In *Plazzo*, we noted that, “violations of subsections 11(f)(1) or 11(f)(3) would discharge Nationwide’s obligation to pay [ASC,]” and thus, the provision represents a condition subsequent. *Id.* at *5. A condition subsequent “is any fact the existence or occurrence of which, by agreement of the parties, operates to discharge a duty of performance after it has been absolute. It is a contingency on the happening or performance of which a liability under a

contract is divested.” (Internal citation and quotations omitted.) *Id.* at *3. In *Ralston*, we concluded that a violation of Section 11(f) by the agent would not provide Nationwide with an action sounding in breach of contract; instead, such a violation would discharge Nationwide’s duty to pay ASC. *Id.* at ¶ 12. Thus, while Mr. Gearhart would have the burden at trial of establishing that Nationwide breached the Agent’s Agreement by failing to pay him ASC, Nationwide would have the burden of establishing that its performance was discharged by the happening of a condition subsequent. *Plazzo* at *3.

{¶20} After reviewing the record and the arguments of the parties, we agree with the trial court that there is no genuine dispute of material fact that Mr. Gearhart failed to abide by Section 11(f)(1), thereby discharging Nationwide’s obligation to pay him ASC. We note that, below and on appeal, Mr. Gearhart has conceded that the provisions of Section 11(f) of the Agent’s Agreement were valid and enforceable.

{¶21} In support of its motion for summary judgment, Nationwide presented an expert report concluding that Mr. Gearhart’s last Nationwide office in Cuyahoga Falls was less than 19 miles from his office at 2036 Locust Street in Canal Fulton using a straight line approach. Section 11(f)(1) of the Agent’s Agreement provided that Nationwide would cease ASC payments if Mr. Gearhart “engage[d] in or [was] licensed as an agent, solicitor, representative, or broker or [was] in anyway be connected with the fire, casualty, health, or life insurance business, within one year following cancellation *within a 25 mile radius of [his] business location at that time[.]*” (Emphasis added.) It is well established that when the issue is whether a point is within a certain distance of a particular location and the method of calculation is not specified, the straight line or “as the crow flies” method is the appropriate approach. *See, e.g., State ex rel. O’Brien v. Messina*, 10th Dist. Franklin No. 10AP-37, 2010-Ohio-4741, ¶ 14 (collecting cases). Here, the

Agent's Agreement specified that the new location could not be within a 25-mile *radius*. The use of the word "radius" provides further support to the notion that a straight line method of calculation should be used. *See State v. Shepard*, 61 Ohio St.2d 328, 331 (1980) (noting that the use of the phrase "within three miles" in the statute contemplated a straight-line calculation; and, thus, the statute intended that the location be within a three-mile radius).

{¶22} Mr. Gearhart asserted that he complied with the 25 mile restriction because driving directions provided by MapQuest indicated that the driving distance between the two points was 25.8 miles. However, as noted above, the distance contemplated by the Agent's Agreement was a straight line distance, not a driving distance. *See Messina* at ¶ 14; *Shepard* at 331. Mr. Gearhart provided nothing to rebut Nationwide's expert's report that the straight line distance was less than 25 miles.

{¶23} Moreover, the record only supports the conclusion that Mr. Gearhart had some connection "with the fire, casualty, health, or life insurance business" within the year following the cancellation of the Agent's Agreement at the location within the 25 mile restricted area. In his deposition, Mr. Gearhart admitted that he had a business address at 2036 Locust Street following the cancellation of his Agent's Agreement. He indicated that this was the first location where he began acting as an independent agent. Moreover, Nationwide submitted Mr. Gearhart's response to interrogatories. When asked to identify all the locations from which he had "sold, solicited, and/or serviced any policy of insurance since April 30, 2011[.]" Mr. Gearhart's responses included the 2036 Locust Street Address. Additionally, Nationwide submitted a packet of insurance policy declaration forms and welcome letters from Safeco Insurance that list Mr. Gearhart as the agent at the 2036 Locust Street location. Many of the documents contain policy start dates within the year following the cancellation of the Agent's

Agreement. Several of those documents that were issued during the one-year time frame were discussed during Mr. Gearhart's deposition. Mr. Gearhart admitted to receiving commissions from Safeco for the policies that were discussed.

{¶24} Mr. Gearhart contends that the statements in his deposition that the 2036 Locust Street location was only a "mailing location" and that he did not have an office sales location there create a genuine dispute of material fact. However, even assuming that the location was just a mailing location and that he did not sell insurance from that location (despite his contradictory answer in his interrogatories), the evidence only supports the conclusion that Mr. Gearhart was connected to the insurance business at that location during the restricted time period given the Safeco Insurance documents presented by Nationwide and the related deposition testimony. Section 11(f)(1) does not require that Mr. Gearhart solicit or sell insurance, it only requires that he be in any way connected to the insurance business during the relevant time period in the restricted area. Further, Mr. Gearhart has not argued that he was not connected to the insurance business at that location during the relevant time period. Mr. Gearhart's argument is thus without merit.

{¶25} Mr. Gearhart also essentially argues that, even if he technically violated the provision, his violation should be excused because he substantially complied with Section 11(f)(1) of the Agent's Agreement. Even assuming that substantial compliance with the provision would suffice, we cannot say that the evidence could support that Mr. Gearhart substantially complied with the provision. Mr. Gearhart's 2036 Locust Street office was over 6 miles within the 25 mile restricted area. Additionally, the evidence is undisputed that he was connected to the insurance business at the location at multiple times during the one-year period. Accordingly, there was undisputed evidence of multiple and ongoing violations of Section

11(f)(1) of the Agent's Agreement. To allow Mr. Gearhart's behavior to be seen as complying with the provision would ignore its clear terms. While Mr. Gearhart has framed his argument in terms of substantial compliance and material breach, the actual core of his argument appears to be a veiled challenge to the enforceability and validity of the provision. Essentially, Mr. Gearhart asserts that the provision is unreasonable because enforcing it as written would require him to forfeit \$500,000. However, by expressly conceding that the provision was valid and enforceable below and on appeal he cannot challenge this issue now.

{¶26} Finally, Mr. Gearhart argues that he was entitled to notice of the violation and an opportunity to cure it. He maintains that notice and an opportunity to cure is required by both the VCIP and by common law.

{¶27} We note that Mr. Gearhart never asserted below that notice and an opportunity to cure was required by common law. Accordingly, Mr. Gearhart has forfeited this issue for purposes of appeal. *See Franco v. Kempel Homes, Inc.*, 9th Dist. Summit No. 21769, 2004-Ohio-2663, ¶ 29. Furthermore, Mr. Gearhart has not pointed to a single case requiring notice and an opportunity to cure under the circumstances of this type of case.

{¶28} Mr. Gearhart additionally maintains that the notice and cure provision found in the VCIP is also applicable to Section 11(f)(1) of the Agent's Agreement. We do not agree.

{¶29} The sections of the VCIP at issue include, Sections 3, 16, 28, and 29. Mr. Gearhart asserts that taken together, they evidence an intent to incorporate the notice and cure provision of Section 16 of the VCIP into Section 11 of the Agent's Agreement. Section 3 of the VCIP begins by detailing the cancellation date of the Agent's Agreement. It goes on to provide in pertinent part that, "Agent acknowledges that the provisions of Section 11 of the Agent's Agreement * * * signed by the parties, which provides for the continuation of certain duties by

Agent after cancellation of that agreement, are not waived or modified * * *.” Section 16 of the VCIP indicates that “[e]ither party may terminate this Agreement upon written Notice to the other party if such other party commits a material breach of this Agreement and does not cure such breach within ten (10) days following its receipt of Notice thereof from the terminating party.” Section 28 of the VCIP states that “[t]he terms and conditions contained in this Agreement supersede all prior oral or written understanding between Agent and Nationwide and constitute the entire agreement between them concerning the subject matter of this Agreement.” Finally, Section 29 of the VCIP provides that “[s]hould any of the provisions of this Agreement be found to be in conflict with any provisions of any other agent agreement(s) currently in effect between Nationwide and Agent, the provisions set forth in the Agreement shall control.”

{¶30} Notably, the VCIP continually refers to the VCIP and the Agent’s Agreement separately and as separate agreements. Moreover, there is no language in the VCIP specifically stating that Section 11 of the Agent’s Agreement is incorporated into the VCIP. If this Court were to conclude that the notice and right to cure provision in Section 16 of the VCIP were part of Section 11 of the Agent’s Agreement, doing so would inherently modify Section 11 of the Agent’s Agreement as it would add a mutual requirement that was not previously present. Section 3 of the VCIP expressly states that the provisions of Section 11 of the Agent’s Agreement are not modified.

{¶31} Notwithstanding, Mr. Gearhart argues that, because the language of Section 28 of the VCIP provides that the VCIP supersedes all prior agreements and constitutes the entire Agreement, Section 11 of the Agent’s Agreement must be incorporated into the VCIP in order for it to survive. However, Section 28 of the VCIP goes on to state that it supersedes prior agreements “concerning the subject matter of the [VCIP].” It is difficult to conclude that Section

11 of the Agent's Agreement concerns the same subject matter as the VCIP. Section 11 of the Agent's Agreement is focused solely on ASC. ASC is not discussed in the VCIP.

{¶32} Finally, Mr. Gearhart contends that there is a conflict between the VCIP and Section 11 of the Agent's Agreement because the VCIP provides for notice and an opportunity to cure breaches, but Section 11 of the Agent's Agreement does not and both agreements prohibit similar conduct. While it is possible one act could violate the non-compete provisions of the VCIP and Section 11(f) of the Agent's Agreement, the provisions in the two agreements do contain slightly different restrictions. Additionally, the agreements address different subject matters. Section 11 of the Agent's Agreement relates to ASC benefits and the VCIP addresses the winding up Mr. Gearhart's relationship with Nationwide and compensation for assisting Nationwide in transitioning his business. Moreover, the non-compete provisions in the VCIP state that Mr. Gearhart will not engage in certain conduct, whereas the provision in Section 11(f) of the Agent's Agreement provides for forfeiture of ASC benefits if Mr. Gearhart engages in certain conduct, but it does not require Mr. Gearhart to promise not to engage in that conduct. Overall, Mr. Gearhart essentially again seems to challenge the overall reasonableness of Section 11 of the Agent's Agreement given its lack of notice and cure provision; however, such an argument would seem to be a challenge to its validity and enforceability, arguments Mr. Gearhart has already conceded.

{¶33} In light of the foregoing, we agree that Nationwide met its burden. From the evidence, one could only conclude that Mr. Gearhart violated Section 11(f)(1) of the Agent's Agreement, thereby forfeiting his right to ASC benefits and discharging Nationwide's performance under Section 11 of the Agent's Agreement. Mr. Gearhart's three assignments of error are overruled.

III.

{¶34} The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JULIE A. SCHAFER
FOR THE COURT

WHITMORE, J.
CONCURS.

CARR, P. J.
DISSENTING.

{¶35} I respectfully dissent.

{¶36} The majority relies on this Court’s prior precedent holding that Section 11(f) in Nationwide’s Agent’s Agreement constitutes a condition subsequent, a violation of which by the agent would not give rise to a claim for breach of contract by Nationwide, but rather simply discharges Nationwide’s duty to pay any Agency Security Compensation. *See Plazzo v. Nationwide Mut. Ins. Co.*, 9th Dist. Summit No. 17022, 1996 WL 62110, *5 (Feb. 14, 1996), and *Carl Ralston Ins. Agency, Inc. v. Nationwide Mut. Ins. Co.*, 9th Dist. Summit No. 23336, 2007-Ohio-507, ¶ 12. These cases, and the majority’s approach, construe Section 11(f) as a forfeiture provision.

{¶37} I would conclude that those cases were wrongfully decided and that the better rationale is that adopted by the Supreme Court of Connecticut in *Deming v. Nationwide Mut. Ins. Co.*, 279 Conn. 745 (2006). The *Deming* court construed Section 11(f) as a covenant not to compete as it effectively acts as a restraint on the employee’s freedom to compete. *Id.* at 767.

That court reasoned that

[T]he provision in the present case, requiring that an agent forfeit his or her interest in the plan for competing with [Nationwide] is, for all intents and purposes, a restraint against competition to which the reasonable standard applies. Although paragraph 11(f) is not a *direct* restraint of trade in that the plaintiffs are not precluded from engaging in their chosen profession, we are persuaded that the consequences of forfeiture, at the very least, enkindle a restraining influence, albeit in a subtle fashion. Indeed, when, as in the present case, engaging in any one of the myriad proscribed acts under paragraph eleven triggered the forfeiture of substantial sums of money that the plaintiffs accumulated over the course of their careers, although such a restraint may be indirect, its effect hardly can be deemed subtle.

(Emphasis in original; internal quotations and citations omitted.) *Id.* at 768.

{¶38} I am further persuaded by the *Deming* court’s reasoning that “a covenant not to compete and a forfeiture upon competing are but alternative approaches to accomplish the same practical result. Therefore, we would not substitute the reasoning of the pure logician for the

realities of the business world and embark on a separate course of treatment for covenants not to compete and forfeiture provisions.” (Internal citations omitted.) *Id.* at 768-769. Moreover, the Ohio Supreme Court has reviewed the application of the same provision, addressing the restrictions as a covenant not to compete and analyzing the matter within the context of a breach of contract rather than a condition subsequent. *See Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 274-275 (1999). Accordingly, I would analyze this matter pursuant to contract law to determine whether Mr. Gearhart breached the parties’ agreement and, if so, whether his actions constituted a material breach which therefore deprived him of the benefit of his bargain to receive Agency Security Compensation.

{¶39} I disagree with this Court’s prior precedent and the majority opinion which instead adopt an approach which bypasses the issue of the agent’s breach, thereby resulting in the automatic forfeiture of almost \$500,000. I, therefore, dissent and would remand the matter to the trial court to determine whether Mr. Gearhart’s sale of insurance within the restricted 25-mile area within one year after separating from Nationwide constituted a material breach of the agreement.

APPEARANCES:

ANDREW S. GOLDWASSER and J. MATTHEW LINEHAN, Attorneys at Law, for Appellant.

QUINTIN F. LINDSMITH and JAMES P. SCHUCK, Attorneys at Law, for Appellee.