IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 07, 2015

ENSUREUS, LLC v. DOUGLAS S. OLIVER, ET AL.

Appeal from the Chancery Court for Montgomery County
No. MCCHCVCD1112 Laurence M. McMillan, Jr., Judge

No. M2014-00410-COA-R3-CV – Filed August 31, 2015

Purchaser of insurance agency sued Seller, alleging breach of contract and misrepresentation. Seller filed a counterclaim seeking amount due on Purchaser's promissory note. The trial court found Purchaser failed to prove either breach of contract or misrepresentation, and it awarded Seller the balance due on the promissory note. Purchaser appealed, and we affirm the trial court's judgment in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS and W. NEAL MCBRAYER, JJ., joined.

B. Nathan Hunt and S. Allison Winters, Clarksville, Tennessee, for the appellant, Ensureus, LLC.

Steven C. Girsky, Clarksville, Tennessee, for the appellees, Estate of Douglas S. Oliver and Insurance USA, Inc.

OPINION

BACKGROUND FACTS

This case is based on the purchase of an insurance agency, Insurance USA, Inc. (the "Agency" or "Insurance USA"), by Ensureus, LLC in February 2011. Insurance USA was

controlled by Douglas S. Oliver, and Ensureus is controlled by Michael T. Wilbanks.[1]

Mr. Wilbanks has worked in various capacities in the insurance business since 1993. Beginning in April 2010, Mr. Wilbanks worked for Allstate Insurance as an independent contractor. His responsibilities included locating independent insurance agencies that were for sale and matching them up with local Allstate agency owners interested in acquiring an independent agency. Mr. Oliver first got into the insurance business in the mid to late 1970s. In or about 1997, he bought an agency that was failing, and in 2004 he changed its name to Insurance USA, Inc. (the "Agency" or "Insurance USA").

Mr. Wilbanks learned that Mr. Oliver was interested in selling the Agency in August 2010. As part of his due diligence, Mr. Wilbanks met with Mr. Oliver numerous times, from August 2010 through the time the two men agreed on a price for the Agency, and executed an Asset Purchase Agreement (the "Agreement") in February 2011. Mr. Oliver testified that he gave Mr. Wilbanks all the information requested throughout the time the two were negotiating the deal:

> Q: What did [Mr. Wilbanks] ask for right off the bat?
>
> A: He asked for a copy of our loss runs, which gives loss ratios, volume, policies written, monies received, commissions made.
>
> Q: Okay. Did you spend a lot of time, over the course of the courting period, gathering evidence and documents for him?
>
> A: We did the whole thing three times over. We went through everything. Anything I had a record on, he received.
>
> Q: All right. Tell us how many - - and you may have just told me, but tell me what information you produced to him that he requested to review his analysis of your business.
>
> A: He wanted to know exactly what the commissions were, what the total amount of deposits were for the particular month, on a month-by-month basis what the loss ratios were. Anything particular that to - - you know, he wanted to know, we gave him the information.

[1]Mr. Oliver passed away during the appeal of this case, and his executrix is defending this case on behalf of Mr. Oliver's estate on appeal.

Q: Did he actually verify your deposits and your deposit slips?

A: Yes, he did.

Q: All right. So was he one to just take your word on things or would he clarify what you told him?

A: Oh he wanted the clarification all the way through.

In September 2009, Mr. Wilbanks went to meet with Mr. Oliver at the Agency and brought with him a one-page document entitled "Key Questions for Acquisition of An Insurance Agency." Mr. Wilbanks did not give the document to Mr. Oliver to fill out on his own time. Rather, Mr. Wilbanks asked Mr. Oliver questions and wrote down Mr. Oliver's responses. Mr. Wilbanks dated the document "9/29/10" but did not ask Mr. Oliver to sign it. Mr. Oliver testified that Mr. Wilbanks went through the questions with him "in a casual fashion." One of the questions Mr. Wilbanks asked Mr. Oliver was whether any carrier was "at risk of pulling out of the Agency." Mr. Oliver responded "no."

During their negotiations, Mr. Oliver took Mr. Wilbanks around to the different locations where he had an office. One of the locations was on Fort Campbell Boulevard. Mr. Wilbanks testified that there were three rooms that Mr. Oliver rented at that location. The landlord was willing to lease two of the three rooms to Mr. Wilbanks once he purchased the Agency. The office was set up in two of the rooms and the third room contained between 70 and 80 storage boxes that Mr. Wilbanks testified Mr. Oliver told him were "old files that need to be shredded." Mr. Oliver arranged for the removal of all of the boxes from the third room at the Fort Campbell location. He had the majority of the boxes shredded, but Mr. Oliver testified that he did not shred boxes containing policies less than seven years old because the law required policies to be maintained for seven years. Mr. Oliver testified about this as follows:

> We had, from the two different offices - - the three different offices, we had three different locations where we were storing file - - file paper. And because [Mr. Wilbanks] wanted to make sure that I destroyed everything that was not pertinent to his operation, we agreed that everything - - that was older than seven years would be shredded.
>
> . . . [W]e trucked boxes back and forth between the three different locations. So we have all of the boxes in the Fort Campbell location ready to be shredded, whereas the other ones, we vacated the ones throughout the storeroom and all of the rest of the boxes that were current within the seven

years in that storeroom together.

Mr. Oliver testified that the boxes containing policies less than seven years old were retained and put into storage at a facility on Trenton Road. Mr. Oliver explained that he paid to store the boxes for six to eight months. When asked whether Mr. Wilbanks knew about the stored boxes, Mr. Oliver indicated that he should have. According to Mr. Oliver:

> He had been told about them. In fact, we had asked for a swap. I said, if I moved a truck out, would he please take care of those boxes. And I took care of the truck, but he didn't take care of the boxes.

According to Mr. Wilbanks, he did not learn that Mr. Oliver did not have all the boxes shredded until about a year and a half after he purchased the Agency, in September 2012, when he was contacted by someone at the Trenton Road facility.

Mr. Wilbanks and Mr. Oliver executed the Agreement in early February 2011. Mr. Oliver agreed to sell, and Mr. Wilbanks agreed to buy, the Agency's assets for a total of $410,000. Mr. Wilbanks paid $1,000 earnest money prior to the execution of the Agreement and then paid $214,000 at the closing. Mr. Wilbanks signed a promissory note for the remaining $195,000, payable in equal monthly installments over the course of the following 60 months at 6% interest.

The Agreement contained a section "L." titled "Conditions Precedent to Buyer's Obligations." This section provides, in pertinent part, as follows:

> Buyer's obligation to consummate the transactions contemplated hereunder is conditioned upon satisfaction of each of the following conditions (any one or more of which may be waived, but only in writing, in whole or in part by Buyer) at or prior to the Closing . . . .
>
> . . . .
>
> e.) Seller shall shred all files in the storage room in Ft. Campbell Boulevard prior to closing.
>
> In the event any of these conditions shall not be satisfied, the Buyer shall be entitled to a return of the Earnest Money, in which event this Agreement shall be considered null and void.

The Agreement also included a representation by Insurance USA that "[t]here has been no

material change in the Business over the last six months."

When he purchased the Agency, Mr. Wilbanks changed its name to Ensureus, LLC. Mr. Wilbanks believed the Agency's relationship with Safeco Insurance "established a significant portion of the Agency's goodwill and reputation in the community." Following his purchase of the Agency in early February 2011, Mr. Wilbanks continued doing business with Safeco. At some point in July 2011, over five months after Mr. Wilbanks was operating under the name Ensureus, he was notified by Safeco that "his appointment(s) as an agent to sell, solicit, or negotiate personal lines of insurance for [Safeco] will be terminated on October 23, 2011."

PROCEDURAL BACKGROUND AND TRIAL

Mr. Wilbanks filed a verified complaint in the name of his agency, Ensureus, LLC, against Mr. Oliver and his company, Insurance USA, on September 23, 2011. The causes of action included breach of contract, intentional misrepresentation, and negligent misrepresentation. Insurance USA and Mr. Oliver (the "Defendants") filed an answer and counter-complaint seeking indemnification under the Agreement, in addition to their costs, expenses, and attorney's fees.

Ensureus voluntarily dismissed its verified complaint in March 2012 and obtained substitute counsel in July 2012. The Defendants filed an amended counter-complaint in September 2012 in which they alleged Ensureus stopped making payments on its promissory note beginning in April 2012. They sought a judgment awarding them the balance of the money due under the promissory note, which was then $149,761.20, without accounting for the interest that was due. The Defendants also sought an award of their attorney's fees and costs incurred as a result of Ensureus's default under the promissory note.

In November 2012, Ensureus answered the Defendants' amended counter-complaint and filed a counter-complaint of its own, which was effectively a restatement of its initial complaint. Ensureus again asserted the Defendants were liable to it for breach of contract, intentional misrepresentation, and negligent misrepresentation. Specifically, Ensureus alleged that the Agency was particularly attractive to Mr. Wilbanks because of its affiliation with Safeco, which Ensureus alleged was the Agency's largest commission insurance carrier and its second largest premium volume carrier. Ensureus alleged that it agreed to purchase the Agency's assets "[b]ased on the representation that there were no insurance carriers at risk of pulling out of the Agency." Ensureus alleged that since the time of Safeco's termination of Ensureus's authority to sell Safeco policies in July 2011, Ensureus had lost "significant monthly revenue." Ensureus also alleged that Mr. Oliver failed to disclose, prior to its purchase of the Agency, that Alfa Vision, another insurance company, had terminated

its relationship with Insurance USA.

In addition to its allegations regarding Mr. Oliver's misrepresentations, Ensureus also alleged the Defendants breached the Agreement by failing to shred "all files in the storage room in Ft. Campbell Boulevard prior to closing." Finally, Ensureus alleged that the Defendants suggested to the Agency's current or potential customers that they use Nationwide Insurance, an insurance agency owned by Mr. Oliver's wife, during the time period when Ensureus and the Agency were negotiating the terms of the sale of the Agency's assets. Ensureus alleged that Mr. Oliver failed to disclose that he was contacting or soliciting the Agency's customers away from Insurance USA and suggesting that they use Nationwide. According to Ensureus, this conduct violated the Agency's representation that there was no material change in the Agency's business in the six months prior to the closing of the deal in early February 2011.

A one-day trial took place on August 28, 2013. At trial, Mr. Wilbanks introduced a letter that was dated August 13, 2010, from Alfa Vision to the Agency. The purpose of the letter was to inform the Agency that it could no longer write insurance policies for Alfa Vision because the Agency's loss ratio was too high. When Mr. Oliver was questioned about this letter, he testified that he wrote so few policies for Alfa Vision that it had slipped his mind when he was verbally answering Mr. Wilbank's questionnaire at the end of September. Mr. Oliver was asked whether he intentionally made misrepresentations to Mr. Wilbanks about his relationship with Alfa Vision, and Mr. Oliver responded:

> A: Actually, unintentionally. We did very little volume with the Alfa companies, with the Alfa Vision. And it just sort of slipped my mind with everything else. We were only doing like 5,000, 10,000 a year production.
>
> Q: Was that a very small fish in the overall pond?
>
> A: Very definitely.
>
> Q: All right. And as far as - - as far as your relationship with them were you - - did you expect that it was going to be back on the rebound, that you would be back - -
>
> A: Oh, very definitely.
>
> Q: - - writing for them again?

A: Very definitely. I mean, this wasn't the first time that this has happened to us. I mean, in all the years we'[ve been] in business there's always a time when one of the companies or another has a problem with the claims.

With regard to Safeco, Mr. Wilbanks alleges Mr. Oliver misrepresented the Agency's relationship with Safeco and that as a result of warnings the Agency had received from Safeco regarding the level of the Agency's loss ratios, Safeco terminated its relationship with Mr. Wilbanks a few months following his purchase of the Agency. The evidence introduced at trial, however, was disputed.

One of Mr. Oliver's employees testified that she attended a meeting with Mr. Oliver in August 2010 during which a Safeco representative expressed concern over the Agency's loss ratio and asked the Agency to adjust its guidelines in order to keep Safeco's business. Another of Mr. Oliver's employees testified that Mr. Oliver had expressed concern about losing Safeco's business, but this witness could not remember in which month or year Mr. Oliver had expressed this concern. Mr. Oliver testified that the Agency's loss ratios were higher back in 2008, but that by 2010 he was not concerned about his relationship with Safeco. Mr. Oliver explained that insurance companies were always concerned about loss ratios because that determined the profitability of the business. When asked to explain what a loss ratio is, Mr. Oliver responded as follows:

A: It's a barometer [insurance companies] use to find how profitable an agency is. It varies in the criteria between the companies to a mild degree, although the - - usually the numbers come out about the same. So anything above 65 is not as profitable as it should be, below that is - - is you are making money.

Q: All right. And it varies from company to company?

A: All the time. It can go up and down within a week.

In an e-mail from Mr. Oliver to Mr. Wilbanks in December 2010, over a month before Mr. Wilbanks' purchase of the Agency, Mr. Oliver informed Mr. Wilbanks that he had recently spoken with the Safeco representative, and their loss ratio "just went down to 59%, so we're back in good stead with them and will be eligible for profit sharing with them next year." Mr. Wilbanks acknowledged receiving this e-mail. He provided no explanation for why he did not ask for additional information in response to Mr. Oliver's statement that "we're back in good stead with them."

Mr. Oliver testified at trial that he had concerns about Mr. Wilbanks' methods of maintaining business with current customers and/or obtaining new business. Mr. Wilbanks employed Mr. Oliver for 90 days after Mr. Wilbanks purchased the Agency, and during this time Mr. Oliver was able to observe Mr. Wilbanks' day-to-day activities in the office. Mr. Oliver testified that he regularly passed out pendents, magnets, and calendars, visited car lots and realtors, and was physically present in the office during working hours. Mr. Wilbanks testified that he did not continue the same practices as Mr. Oliver and solicited business primarily through direct mailings. Mr. Oliver took out a large advertisement in the Yellow Pages each year, and Mr. Wilbanks testified that he advertised in some books, but not to the same extent as Mr. Oliver. According to Mr. Oliver, Mr. Wilbanks did not staff his office appropriately. Mr. Oliver testified that customer service is an important component of the insurance business and that Mr. Wilbanks did not understand this aspect of the business:

> One day I dropped by just to say hello and there was only one person on the front floor and all four lines were lit up on the phones and [Mr. Wilbanks] was in the back room talking on his cell phone to something entirely different. And I quickly grabbed some of the lines to help the girl out because, I mean - - and then the call I picked up, the first one, he was calling because he was PO'ed because nobody had gotten back to him on a phone call from several hours before.

TRIAL COURT'S JUDGMENT

Following the presentation of evidence, the trial court took the case under advisement and issued a memorandum opinion on December 11, 2013. The trial court made the following findings of fact, *inter alia*:

> The testimony at trial showed that Oliver and Wilbanks had an open line of communication through which all information requested by Mr. Wilbanks was provided by Mr. Oliver. Trial Exhibit No. 9 is an email from Wilbanks to Oliver dated December 28, 2010, that reads in part as follows:
>
> While I have been advised to do my due diligence in the purchase of any business, I feel we have gone through all aspects of your agency. There are two items that I need to feel confident about:
>
> first, the current "written premium" of the Agency by company (as you know we were unsuccessful in finding this information on the Company web-sites) and second, third party verification of revenue in 2010 for the Agency. This could be either

"Commission Statements" or Bank "Deposit Statements."

Mr. Oliver responded to Mr. Wilbanks's email as follows:

> Might I suggest that we now just wait to the year's end and then order individual company reports again, as we did before? This way you will have original reports from all of the companies to mull over. Good news. Just before we left for [Oregon], I spoke to our Safeco rep, and our L/R [loss ratio] with them just went down to 59%, so we're back in good stead with them and will be eligible for profit sharing with them next year, as well as for Progressive (who doesn't care about the L/R's).

Mr. Wilbanks responded to Mr. Oliver as follows: "Waiting for yearend reports sounds good to me. Please let me know when you receive them. Great news on the Safeco L/R!"

Mr. Wilbanks freely admitted that he was never denied any information that he requested, and that he and Mr. Oliver had at least ten face to face meetings.

Having determined that he had completed the necessary due diligence, Wilbanks decided to purchase the agency from Oliver and on February 1, 2011, the parties entered into an Asset Purchase Agreement. . . .

As required by the Asset Purchase Agreement, Mr. Oliver worked for Mr. Wilbanks for a period of 90 days to help transition the business. During this transition period, Mr. Oliver introduced Wilbanks to most of the insurance company representatives, but [Mr. Oliver] did not attend the meeting with the Safeco Representative, Mr. Doug Hart, who came to the agency in February 2011.

During the transition period, Mr. Oliver and Mr. Wilbanks had several discussions about Wilbanks' business practices, and Oliver offered his concerns that Wilbanks was not actively soliciting business from the owners of car lots as well as other sources Oliver had developed over the years. In addition, Wilbanks had cancelled the agency's yellow pages advertising which Oliver believed not to be a wise decision.

In the February 2011 meeting between Wilbanks and Doug Hart from Safeco Insurance Company, Mr. Hart expressed to Wilbanks that Safeco had "concerns" with regard to a continuing relationship with the agency. When Wilbanks informed Oliver of Mr. Hart's statements, Oliver replied, "that is why we changed the underwriting guidelines."

In February 2011, Hart did not tell Wilbanks that Safeco intended to terminate its relationship with the agency. However, in July 2011, Safeco Insurance Company did terminate the relationship with the agency.

. . . .

Oliver's agency was not under restrictions from Safeco at the time of the closing.

Ensureus, LLC has also made a claim against Oliver for breach of contract arising out of the referral of several of the existing customers by Oliver to a competing agency operated by Oliver's wife that represents Nationwide Insurance Company.

. . . .

Rebecca Fields and Heather Clark, both former employees of Oliver, testified that they routinely "ran renewals" to see if existing customers would qualify for Nationwide's underwriting guidelines, and consequently receive lower premiums from Nationwide. Conversely, both employees testified that Oliver's wife's agency would routinely refer customers who had failed to meet Nationwide's underwriting guidelines to Oliver's agency for placement.

Wilbanks also admitted that he had referred existing customers to an Allstate agency in an attempt to save his clients money. In addition, Ms. Annette Moreford, the Allstate agent who introduced Wilbanks to Oliver, testified that she would refer some of her more "high risk" customers to Oliver's agency when she could not place them with Allstate.

The court finds that the practice of referring customers among insurance agencies by their agents of record in an attempt to save their clients money or to place "high risk" insureds was a widespread practice which did not constitute breach of the Purchase and Sale Agreement. . . .

The court further finds that Oliver's Insurance USA, Inc. operated an insurance agency that catered to more "high risk" individuals.

Ensureus, LLC further claims that Oliver breached the Purchase and Sale Agreement for failing to shred all of the file boxes containing closed files that were once located at the Winner's Circle Motel. Oliver testified that 2.31 tons of old files were shredded, but that all boxes that were less than seven years old were removed from the Ft. Campbell Blvd. address and moved to a storage facility on Trenton Road.

The trial court's findings of fact included the following:

The court finds that the failure by Oliver to shred all old files was not a material breach of the Purchase and Sale Agreement because the boxes that were not destroyed were within seven years old and were required to be maintained under state law. See T.C.A. § 56-6-404.

The court finds that the original plaintiff, Ensureus, LLC has failed to carry its burden of proof against the original defendants Insurance USA, Inc. and Douglas Oliver on the claims of breach of contract, intentional misrepresentation, fraud in the inducement, and negligent misrepresentation. The court further declines to declare, pursuant to T.C.A. § 29-14-102, that the Purchase and Sale Agreement is null and void, or in the alternative, that the original plaintiff is entitled to a "set off" from the funds owed by it to Douglas Oliver.

The court finds that the original defendant, Douglas Oliver, is entitled to a judgment against Ensureus, LLC in an amount equal to the unpaid payments on the promissory note through November 2013, together with prejudgment interest.

The court further finds that Douglas Oliver is entitled to accelerate all future payments due under the note, and that amount shall also constitute a judgment in favor of Mr. Oliver against Ensureus, LLC.

. . . .

Pursuant to the promissory note, Douglas Oliver shall be entitled to the attorney's fees incurred by him in the prosecution of this action. . . .

ANALYSIS

On appeal, Ensureus argues the trial court erred when it found (1) Mr. Oliver's failure to shred all the file boxes did not constitute a breach of the Agreement; and (2) Mr. Oliver did not misrepresent the value of the Agency. We review the trial court's factual findings de novo, with a presumption of correctness, unless the evidence preponderates otherwise. TENN. R. APP. P. 13(d). Questions of law are reviewed de novo with no presumption of correctness. *State v. Meeks*, 262 S.W.3d 710, 722 (Tenn. 2008).

1. Shredding of File Boxes

To prevail on a breach of contract action, Ensureus must prove '"(1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of contract.'" *BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W.3d 223, 227 (Tenn. Ct. App. 2006) (quoting *Custom Built Homes v. G.S. Hinsen Co., Inc.*, No. 01A01-9511-CV-00513, 1998 WL 960287, at *3 (Tenn. Ct. App. Feb. 6, 1998)); *accord ARC LifeMed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005). The law surrounding conditions precedent can be described as follows:

> A contractual duty subject to a condition precedent is not required to be performed until the condition occurs or its nonoccurrence is excused. *Covington v. Robinson*, 723 S.W.2d 643, 645 (Tenn. Ct. App. 1986); *Strickland v. City of Lawrenceburg*, 611 S.W.2d 832, 837 (Tenn. Ct. App. 1980); RESTATEMENT (SECOND) OF CONTRACTS § 225(1) (1981). The existence of a condition precedent depends upon the parties' intention, which courts may discern from the contractual language and the circumstances surrounding the contract's execution. *Miller v. Resha*, 820 S.W.2d 357, 360 (Tenn. 1991); *Harlan v. Hardaway*, 796 S.W.2d 953, 957-58 (Tenn. Ct. App. 1990). Courts do not favor conditions precedent and will construe doubtful language to impose a duty rather than create a condition precedent. *Koch v. Construction Tech., Inc.*, 924 S.W.2d 68, 71 (Tenn. 1996); *Harlan v. Hardaway*, 796 S.W.2d at 958; RESTATEMENT (SECOND) OF CONTRACTS § 227(3) (1981); 3A Arthur L. Corbin, CORBIN ON CONTRACTS § 635 (1960).

Holland v. Holland, Jr., No. M1999-02791-COA-R3-CV, 2001 WL 585107, at *3 (Tenn. Ct. App. June 1, 2001).

Ensureus is correct that according to the Agreement, a "condition precedent" to Ensureus's obligation to "consummate the transactions" of the Agreement was the Agency's obligation to "shred all files in the storage room in Ft. Campbell Boulevard prior to closing."

Ensureus does not allege it suffered any harm as a result of Mr. Oliver's failure to shred all the boxes; it simply asserts that the failure to shred each and every box is sufficient to render the Agreement "null and void."

When one party alleges another party has breached a contract, a court will consider whether the alleged breach was "material" before considering whether the non-breaching party should be relieved of its contractual obligations. *DePasquale v. Chamberlain*, 282 S.W.3d 47, 53 (Tenn. Ct. App. 2008). Moreover, when determining whether an alleged breach of a condition precedent should nullify an agreement, '"the law looks to the spirit of the contract and not the letter of it, and . . . the question therefore is not whether a party has literally complied with it, but whether he has substantially done so.'" *Big Fork Mining Co., Inc. v. Ky. Cent. Ins. Co.*, 888 S.W.2d 434, 437 (Tenn. Ct. App. 1994) (quoting 17A AM. JUR.2D *Contracts* § 631). Tennessee courts do not favor conditions precedent. *Harlan v. Hardaway*, 796 S.W.2d 953, 958 (Tenn. Ct. App. 1990). In *Big Fork Mining*, the plaintiff mining company was unable to perform the condition precedent, but the defendant insurance company was put in the position it had been promised, and that it would have occupied had the condition precedent been performed as the parties anticipated. *Big Fork Mining*, 888 S.W.2d at 436-37. Thus, the Court of Appeals found that "[e]very consideration of justice and equity demands that defendant pay the agreed price of the benefit" to the plaintiff, as contemplated by the parties' contract. *Id.* at 437.

In *DePasquale v. Chamberlain*, the Court of Appeals considered whether an employee was entitled to receive severance pay when he failed to comply with all of the terms and conditions of the parties' settlement agreement. 282 S.W.3d at 51. The trial court found the employee was not entitled to the severance pay, in part, because he had taken some items from the office that did not belong to him and he failed to pay his cellphone bill. *Id.* at 52. The Court of Appeals reversed, pointing out that for a breach to be actionable, the breach must be "material." *Id*. at 53. The Court explained that courts in Tennessee have adopted the criteria set forth in the Restatement (Second) of Contracts to determine whether a breach is material. *Id*. These factors include the following:

> (1) The extent to which the injured party will be deprived of the expected benefit of his contract;
>
> (2) The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (3) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;

> (4) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
>
> (5) The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. (quoting RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)).

In this case, Mr. Wilbanks does not suggest that any damages he allegedly suffered were a result of the Defendants' failure to shred any of the file boxes. *See Town of Pegram v. Cornerstone Dev., LLC*, No. M2011-01536-COA-R3-CV, 2012 WL 2127231, at *5 (Tenn. Ct. App. June 12, 2012) (explaining that even when contract contains condition precedent, defendant's failure to comply with one specification does not entitle plaintiff to recover damages or void contract where no damages result from breach); *see also Metro. Gov't of Nashville & Davidson Cnty. v. Cigna Healthcare of Tenn., Inc.*, 195 S.W.3d 28, 35 (Tenn. Ct. App. 2005) ("The mere fact a party breaches a contract does not entitle the other party to an award of damages.") (citing *Great Amer. Music Mach., Inc. v. Mid-South Record Pressing Co*., 393 F.Supp. 877, 885 (M.D. Tenn. 1975)). Moreover, Mr. Wilbanks fails to point to *any* negative consequence he suffered as a result of Mr. Oliver's failure to have all the file boxes shredded. Instead, he appears to be relying on a "hypertechnical" interpretation of the Agreement in an effort to avoid his outstanding obligations to the Defendants. *See Big Fork Mining*, 888 S.W.2d at 437 (noting courts do not favor "hypertechnical" interpretation of contracts).

The evidence presented at trial suggests that the purpose of requiring Mr. Oliver to shred the file boxes at the Fort Campbell office location was that they were in a room that the landlord was not willing to rent to Mr. Wilbanks once he took over the Agency. Mr. Oliver testified that he removed all the boxes from the Fort Campbell office and that he had the majority of them shredded — 2.31 tons of paper. He paid to store the remaining boxes containing files less than seven years old elsewhere, believing that he was required by law to maintain these more recent files. The evidence was disputed whether Mr. Wilbanks was aware of the remaining boxes prior to the closing. The trial court concluded that Mr. Oliver's failure to shred all of the old files was not a material breach of the Agreement.

We find the evidence does not preponderate against the trial court's factual findings with regard to this issue. We agree with the trial court's ruling that the Defendants' failure to have all of the file boxes shredded did not constitute a material breach of the Agreement and that Ensureus did not suffer damages as a result of the Defendants' decision to store, rather than shred, the files that were less than seven years old. Consequently, we affirm the trial

court's judgment that Ensureus has failed to carry its burden of proving that the Defendants breached the Agreement.

2. Misrepresentations of Agency's Value

Ensureus contends that Mr. Oliver misrepresented the value of the Agency, either intentionally or negligently. To prove intentional misrepresentation, Ensureus must prove the following:

> (1) that the defendant made a representation of a present or past fact; (2) that the representation was false when it was made; (3) that the representation involved a material fact; (4) that the defendant either knew that the representation was false or did not believe it to be true or that the defendant made the representation recklessly without knowing whether it was true or false; (5) that the plaintiff did not know that the representation was false when made and was justified in relying on the truth of the representation; and (6) that the plaintiff sustained damages as a result of the representation.

Hodge v. Craig, 382 S.W.3d 325, 343 (Tenn. 2012) (citing *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2008) (itself quoting *Metro. Gov't of Nashville & Davidson Cnty. v. McKinney*, 852 S.W.2d 233, 237 (Tenn. Ct. App. 1992))). Negligent misrepresentation involves the negligent supply, by a business or professional individual, of '"false information for the guidance of others in their business transactions.'" *Hodge*, 382 S.W.3d at 345 (quoting *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 433 (Tenn. 1991)). Negligent misrepresentation has been described thusly:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Ritter v. Custom Chemicides, Inc., 912 S.W.2d 128, 130 (Tenn. 1995) (quoting *John Martin Co.*, 819 S.W.2d at 431 (itself quoting RESTATEMENT (SECOND) OF TORTS § 552 (1965))). As with a claim for intentional misrepresentation, a plaintiff seeking to recover for another's alleged negligent misrepresentation must prove he or she was justified in relying on the information negligently provided. *Ritter*, 912 S.W.2d at 130; RESTATEMENT (SECOND) OF TORTS § 552 (1965).

For its misrepresentation claims, Ensureus alleges Mr. Oliver misrepresented that certain insurance companies were not at risk of terminating their relationship with the Agency when, in fact, they were. We do not believe the evidence presented at trial supports Ensureus's claims of misrepresentation. Both Mr. Wilbanks and Mr. Oliver agreed that Mr. Oliver provided Mr. Wilbanks with any information that was requested during the time Mr. Wilbanks was engaging in his due diligence and deciding whether or not to purchase the Agency. Mr. Oliver testified that when he was orally responding to Mr. Wilbanks' questions at the end of September 2010, he answered truthfully and to the best of his ability. He did not intentionally mislead Mr. Wilbanks regarding the Agency's relationship with any particular insurance company. Given the informal process Mr. Wilbanks followed in asking Mr. Oliver the questions in September 2009 about the insurance companies with which the Agency did business, we do not believe Mr. Wilbanks was justified in putting such a high degree of reliance on Mr. Oliver's responses. Mr. Oliver was not provided the opportunity to review the document, think over his answers, or to sign it; Mr. Wilbanks simply posed questions to Mr. Oliver orally and recorded Mr. Oliver's responses.

Moreover, contrary to Ensureus's argument, the evidence does not support Ensureus's claim that the Agency was at risk of losing Safeco's business before the deal was closed in February 2011. Mr. Oliver testified that he was always changing the guidelines under which his Agency sold policies based on the Agency's loss ratios and the various insurance companies' particular requirements. Mr. Wilbanks was on notice no later than December 2010, when he received an email from Mr. Oliver, that the Agency's loss ratio with Safeco had gone down to 59%, and that the Agency was "back in good stead with them and will be eligible for profit sharing with them next year." Ensureus had not closed the deal when Mr. Wilbanks received this information from Mr. Oliver, and we believe this email put Mr. Wilbanks on notice that the Agency may have had some issues with Safeco in the past. The evidence showed that the Agency sold higher risk policies, which means the Agency had higher loss ratios than agencies selling lower risk policies. We find the evidence does not preponderate against the trial court's conclusion that Ensureus failed to show that Mr. Oliver misrepresented any facts regarding Safeco, either intentionally or negligently.

With regard to Alfa Vision, Ensureus relies on a letter from Alfa Vision dated August 13, 2010, to show Mr. Oliver misrepresented the Agency's relationship with that insurer. Mr. Oliver admitted he did not tell Mr. Wilbanks about that letter, explaining that he just forgot about it when answering Mr. Wilbanks' questions in September 2010 because the Agency did not do much business with Alfa Vision. A document prepared by Mr. Wilbanks shows that the Agency sold policies on behalf of twenty-nine different insurance companies in 2010. Alfa Vision made up only 2% of the Agency's annual commissions for the 2010 year; 3.75% of its annual commissions for the 2009 year; and 3.4% of its annual commissions for the 2008 year. In a document Ensureus introduced detailing the damages it allegedly suffered,

Ensureus did not include Alfa Vision as a source of lost revenue. We conclude that Ensureus has failed to prove all the elements of either intentional or negligent misrepresentation with regard to the Agency's relationship with Alfa Vision.

Finally, Ensureus argues that Mr. Oliver failed to inform him that Alfa Alliance had terminated its relationship with the Agency in August 2010, which Ensureus alleges constitutes negligent or intentional misrepresentation. However, Mr. Oliver testified that he had not written a policy for Alfa Insurance in over a year, which is outside the six-month representation by the Agency that Ensureus relies on in the Agreement. Mr. Oliver had no recollection of receiving the letter dated April 12, 2010, which was introduced at trial, in which Alfa Alliance canceled the Agency's authority to issue new policies as of April 12, 2010, and canceled the Agency's authority to renew existing policies as of August 1, 2010. Again, Ensureus makes no claim that it suffered damages as a result of Alfa Alliance's termination of its relationship with the Agency. We conclude that Ensureus has failed to prove the Defendants' liability for either intentional or negligent misrepresentation with regard to Alfa Alliance.

3. The Defendants' Counterclaim

The parties do not dispute the amount of money Ensureus has paid the Defendants on the promissory note. In light of our conclusion that the trial court's judgment should be affirmed with regard to Ensureus's causes of action, we further affirm that portion of the trial court's ruling that Mr. Oliver's estate is entitled to a judgment against Ensureus in an amount equal to the unpaid payments on the promissory note, together with prejudgment interest, and that Mr. Oliver's estate is entitled to accelerate the payments due under the note. We further affirm the trial court's ruling that Mr. Oliver's estate is entitled to the attorney's fees incurred in the prosecution of this action, which shall include the reasonable fees incurred on appeal.

CONCLUSION

The trial court's judgment is affirmed in all respects. The case is remanded for a determination of (1) the judgment amount, including prejudgment interest, and (2) the reasonable attorney's fees incurred by Mr. Oliver's estate at trial and on appeal. Costs of this appeal shall be taxed to the appellant, Ensureus, LLC, for which execution shall issue, if necessary.

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ANDY D. BENNETT, JUDGE