

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1882-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**GRENIER & MOORE
PRODUCTIONS, INC.,**

Plaintiff-Respondent,

v.

**CHIPPEWA VALLEY
COUNTRY FESTIVAL, INC.,**

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Chippewa Valley Country Festival (CVCF) appeals a judgment awarding Grenier & Moore Productions, Inc., damages based on a contract.¹ CVCF defended on the contract action and counterclaimed against Grenier & Moore alleging that Grenier & Moore and its

¹ This is an expedited appeal under RULE 809.17, STATS.

employee, Mike Lesperance, breached the contract or breached fiduciary duties created by the contract. Because the record supports the trial court's findings that CVCF failed to prove the breach of duties created by any contract, we affirm the judgment.

CVCF sponsored three music festivals in 1994. It hired Grenier & Moore to act as a talent buyer for the festivals. Under the terms of the written contract, Grenier & Moore acted "only as the entertainment negotiator." All contracts with the entertainers had to be signed by a representative of CVCF. The terms of the contracts with the entertainers were specifically set out in the written contract between Grenier & Moore and CVCF.

CVCF eventually sought to change the provisions of the contracts between it and the entertainers. It requested Lesperance to take care of it and Lesperance agreed to do so. He called agents and sent an addendum to the contract to the various performers seeking their agreement regarding T-shirt concessions and other items CVCF wanted in the performers' contracts that were not specified in its written contract with Grenier & Moore. When several performers refused to sign the addendum, CVCF was required to cut off sales of the T-shirts.

CVCF also alleges that Lesperance agreed to include the "Black Velvet Tour" provisions for Tanya Tucker. Lesperance testified that he did not agree to the Black Velvet Tour, but rather forwarded Tucker's request to CVCF. CVCF was ultimately required to give Tucker seventy-five free one-day tickets in order to get her to perform. CVCF contends that Lesperance's agreement to take care of the additional demands of CVCF contained in the addendum to the entertainers' contracts constituted an oral agreement modifying its written contract and that Lesperance breached the contract when he failed to secure the entertainers' agreement to the terms stated in the addendum and when he negotiated the Black Velvet Tour provisions with Tucker. It also argues that Lesperance breached his fiduciary duties to CVCF by his "agreeing to Black Velvet Tour conditions" and by "failing to get contracts negotiated."

The record supports the trial court's finding that the written agreement between the parties was not modified by a subsequent oral agreement. The initial agreement made Grenier & Moore "negotiators" for

CVCF and CVCF presented no evidence that this status was changed by subsequent oral agreement. While the details of the contract CVCF sought with the entertainers may have been changed, nothing in the alleged oral agreement made Grenier & Moore or Lesperance a guarantor of CVCF's success in the negotiations. CVCF concedes that Lesperance presented the entertainers with the provisions CVCF wanted in the contracts. CVCF did not present evidence of an oral agreement to do more. Because Lesperance had no authority to agree to the "Black Velvet Tour" provisions, it appears that he negotiated the best terms Tucker would accept and presented the result to CVCF for its approval. If the terms did not meet CVCF's requirements, it was free to reject the contract. Lesperance did nothing inconsistent with his duties as a negotiator under these circumstances.

CVCF also describes Lesperance's conduct as a breach of fiduciary duties as its agent. This argument fails for three reasons. First, the duties of the agent are created by the contract. When an agent is hired as a negotiator, his duty is to negotiate, not to guarantee the results of a negotiation. Second, any breach of Lesperance's duties is actionable in contract, not in tort. To sue in tort, there must be a duty existing independently of the performance of the contract. *Landwehr v. Citizens Trust Co.*, 110 Wis.2d 716, 723, 329 N.W.2d 411, 414 (1983). There is no tort liability for misperformance of a contract unless there would be liability for a gratuitous performance without the contract. *Id.* Third, mere negligence or unskillfulness is not sufficient to indicate a breach of a fiduciary duty. There must be gross mismanagement, gross misconduct, gross unskillfulness or unfaithfulness before a party forfeits a commission based on breach of a fiduciary duty. *Arthur Koenig Co. v. Graham Glass Co.*, 170 Wis. 472, 473, 175 N.W. 814, 815 (1920); *see also* 12 C.J.S. *Brokers* § 69 (1938). CVCF has not met its burden of proving grounds for forfeiture of the commission.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.