STATE OF MICHIGAN

COURT OF APPEALS

DAVID DEPRIEST, Plaintiff-Appellee,	UNPUBLISHED March 8, 2005
v	No. 252437 Kent Circuit Court
PRINT TECHNOLOGIES & SERVICES, INC., Defendant-Appellant.	LC No. 01-006799-NO

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals by right a November 3, 2003 judgment ordering defendant to pay plaintiff $95,614.05 pursuant to a jury verdict. This amount represents unpaid commissions owed to plaintiff after the termination of his employment with defendant and, pursuant to MCL 600.2961, an additional award equal to double that amount as well as interest, costs, and attorney fees. We affirm.

I. FACTS

Defendant and plaintiff entered into an at-will employment contract in the fall of 1999. On November 7, 2000, defendant altered plaintiff's compensation plan from a draw recoverable plan to straight commissions and agreed to reduce his existing draw deficit to $5,000 after receiving 100 percent of the profit from an upcoming job.

II. DIRECTED VERDICT

Defendant first asserts that the trial court erred in denying its motion for directed verdict arguing that plaintiff's continued employment with defendant after the modification of his employment contract, while consideration for future commissions earned, was not consideration for defendant's offer to reduce plaintiff's draw deficit to $5,000. We disagree.

A. Standard of Review

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v BCBSM,* 469 Mich 124, 131; 666 NW2d 186 (2003). When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. *Meagher v*

Wayne State Univ, 222 Mich App 700, 708; 565 NW2d 401 (1997). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Cacevic v Simplematic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001).

B. Analysis

It is true that "[a]n essential element of a contract is legal consideration," *Yerkovich v AAA,* 461 Mich 732, 740; 610 NW2d 542 (2000), and that, generally, consideration cannot be the performance or promise to perform *that which one party was already required to do* under the terms of the existing agreement, *Id.* at 740-741 (emphasis added) (internal citations omitted). However, according to Michigan case law, within employment contracts, an employee's continued employment after the employer alters the terms of their agreement is consideration for the new agreement or modification. *Sniecinski, supra* at 138-139, n 9. See also, *Holland v Earl G Graves Publishing Co, Inc,* 46 F Supp.2d 681, 685-686. Plaintiff's continued employment after the November 7, 2000, agreement, constituted consideration by plaintiff for that agreement. While it is true that plaintiff had a preexisting duty to pay back his draw deficit, he did not have any obligation to continue working for defendant while doing so, nor to do so under changed renumeration conditions. Therefore, even under the language in *Yerkovich, supra* at 741 barring the modification of an existing contract where the consideration is the performance or promise to perform that which the party is already obligated to do, plaintiff provided consideration for the modification by continuing to work for defendant after defendant altered the terms of his employment. Therefore, the trial court did not err by denying defendant's motion for directed verdict on this basis.

III. JURY INSTRUCTION

Defendant next asserts that the trial court abused its discretion by refusing to read a special instruction proposed by defendant concerning consideration and, instead, combining special instructions from defendant and plaintiff on the issue. We disagree.

A. Standard of Review

The trial court's decision regarding supplemental instructions is reviewed for an abuse of discretion, *Chastain v GMC (On Remand),* 254 Mich App 576, 590; 657 NW2d 804 (2002), and will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice, *Cacevic v Simplematic Engineering Co*, 241 Mich App 717, 721; 617 NW2d 386 (2000).

B. Analysis

Jury instructions should include all the elements of the plaintiff's claim, and should not omit material issues, defenses or theories supported by the evidence. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Id.*; *Bachman v Swan Harbour Association*, 252 Mich App 400, 424; 653 NW2d 415 (2002). A supplemental instruction need not be given if it would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly and impartially. *Novi v Woodson*, 251 Mich App 614, 630-631; 651 NW2d 448 (2002). Defendant's objection to

the trial court's combination of the parties' proposed instructions concerning consideration mirrors his argument for directed verdict and fails for the same reasons. While the trial court decided not to include all of defendant's proposed instruction, the instruction as given correctly apprised the jury of the law applicable to this particular case and the trial court was within its discretion in choosing not to read defendant's entire proposed instruction to the jury.

IV. ATTORNEY FEES

Finally, defendant asserts that the trial court abused its discretion by awarding plaintiff $57,987.50 in attorney fees pursuant to MCL 600.2961. Again, we disagree.

A. Standard of Review

"A trial court's decision to award attorney fees is reviewed for an abuse of discretion." *Farmers Ins Exchange v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003). Likewise, this Court reviews the reasonableness of the fees awarded for an abuse of discretion. *46th Circuit Trial Court v Crawford County*, 261 Mich App 477, 493; 682 NW2d 519 (2004). An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling, *Auto Club Ins Ass'n v State Farm Ins,* 221 Mich App 154, 167; 561 NW2d 445 (1997), overruled in part on other grds in *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549; 640 NW2d 256 (2002), or the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Herald Co v Tax Tribunal,* 258 Mich App 78, 92; 669 NW2d 862 (2003).

B. Analysis

MCL 600.2961(6) provides, "If a sales representative brings a cause of action pursuant to this section, the court shall award to the prevailing party reasonable attorney fees and court costs." There is no precise formula for assessing the reasonableness of an attorney fee, but factors which should be considered include: (1) the professional standing and experience of the attorney, (2) the skill, time and labor involved, (3) the amount in question and the results achieved, (4) the difficulty of the case, (5) the expenses incurred, and (6) the nature and length of the professional relationship with the client. *Campbell v Sullins,* 257 Mich App 179, 199; 667 NW2d 887 (2003) (citation omitted). "The trial court need not render detailed findings on the factors considered." *Id.* In awarding plaintiff attorney fees, the trial court noted the competence of the attorneys for plaintiff, the amount of time required to organize the case and prepare for trial, and the reasonableness of the hourly rate. Therefore, the trial court considered appropriate factors in determining the reasonableness of the attorney fees to be awarded in this case. Furthermore, fees for multiple lawyers are permissible. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 328-329; 602 NW2d 633 (1999). We do not find the trial court's award so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias; therefore, the trial court did not abuse its discretion in awarding plaintiff attorney fees of $57,987.50.

Plaintiff further requests additional attorney fees incurred since entry of the judgment, citing *Haliw v City of Sterling Heights,* 257 Mich App 689, 698-700 (2003). During the pendency of this appeal, our Supreme Court has reversed this Court's decision in *Haliw v City of*

Sterling Heights, 471 Mich 700; ___NW2d ___(2005). In *Haliw*, this Court initially determined that appellate attorney fees were recoverable as part of case evaluation sanctions under MCR 2.403(O). Our Supreme Court disagreed stating, ". . . we disagree with the Court of Appeals rationale because none of the bases that the panel relied on necessitates the conclusion that appellate attorney fees and costs are recoverable under MCR 2.403(O). Rather, our reading of MCR 2.403(O) compels us to conclude that the court rule is trial-oriented. *Id.* at __.

Likewise, MCL 600.2961 does not specifically address *appellate* attorney fees but attorney fees to the prevailing party in general. Michigan follows the "American rule" with respect to the payment of attorney fees and costs. *Dessart v Burak,* 470 Mich 37, 42; 678 NW2d 615 (2004). Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award. *Id.* The American rule is codified at MCL 600.2405(6), which provides that among the items that may be taxed and awarded as costs are "[a]ny attorney fees authorized by statute or by court rule." *Citing Haliw, supra* at ___.

We find that an award of appellate attorney fees based on the language of MCL 600.2961 would be contrary to the American rule governing the payment of attorney fees. As noted, the American rule permits recovery of fees and costs where *expressly authorized.* Here MCL 600.2961 does not expressly authorize an award of appellate attorney fees and we decline to grant plaintiff's request.

Affirmed.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra