STATE OF MICHIGAN

COURT OF APPEALS

GENE LEGER,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

IMAGE DATA SERVICES, DAVID A. WILUTIS,

Defendants/Counterplaintiffs-Appellees/Cross-Appellants

and

DAVID OISTAD,

Defendant-Counterplaintiff.

UNPUBLISHED
April 16, 2002

No. 221615
Ingham Circuit Court
LC No. 96-084224-CK

Before: Fitzgerald, P.J., and Bandstra and K.F. Kelly, JJ.

PER CURIAM.

In this contract action, plaintiff appeals as of right from the trial court's orders entering judgment in favor of plaintiff following a jury trial, but denying plaintiff's motion for a new trial as to damages or, in the alternative, additur. Defendant[1] cross appeals, challenging the trial court's orders denying his motions for summary disposition and a directed verdict. We affirm in part, reverse in part, and remand for further proceedings.

Defendant owned and operated Image Data Services (IDS), a corporation engaged in the business of providing companies with data storage and retrieval services. Plaintiff began

[1] The record indicates that defendant David Oistad was dismissed from this case before trial, after the trial court dismissed plaintiff's claim for interference with contract, a decision which is not at issue in this appeal. For that reason, and because the remaining defendants are David Wilutis and the corporation he controls, this opinion employs the singular term "defendant" to refer exclusively to Wilutis, as we see little need to distinguish between these remaining defendants for purposes of this appeal.

working for defendant as a salesperson, earning both a salary and commissions, in 1990. In time, however, relations between the two became strained and, in early 1995, defendant terminated plaintiff's employment. Defendant provided a severance package, but refused to pay plaintiff commissions on any sales that occurred after his term of employment, without regard to plaintiff's role in procuring those sales. Plaintiff filed suit, alleging breach of express and implied contracts, as well as conversion.[2] The jury found for plaintiff on the contract claims and awarded damages of $18,441.45, exclusive of costs and interest. Although the jury also concluded that defendant's actions constituted a conversion of plaintiff's property, no separate damages were awarded under that theory.

I. Procuring Cause

A. Applicability

In support of his claim for post-termination commissions, plaintiff relied on the doctrine of "procuring cause." Therefore, we first address defendant's principal argument on cross-appeal, i.e., that the trial court erred in denying his motions for summary disposition and directed verdict asserted on the ground that the procuring-cause doctrine did not apply in this case. The applicability of a legal doctrine is a question of law that is reviewed de novo. *James v Alberts*, 464 Mich 12, 14; 626 NW2d 158 (2001).

Black's Law Dictionary defines "procuring cause" as "the cause originating a series of events, which, without a break in their continuity, result in the accomplishment of the prime object." Black's Law Dictionary (6th ed, 1990), p 1208. With respect to the sale of real estate, "[a] broker will be regarded as the 'procuring cause' of a sale, so as to be entitled to commission, if his or her efforts are the foundation on which the negotiations resulting in a sale are begun." *Id*. Despite the obvious value of the doctrine as concerns real estate, the doctrine is equally applicable to other areas of sales. See *Reed v Kurdziel*, 352 Mich 287; 89 NW2d 479 (1958) (concerning sales of foundry supplies). Indeed, the doctrine exists for the purpose of "preventing a principal from unfairly taking the benefit of [an] agent's . . . services without compensation and imposing upon the principal . . . liability . . . for commissions for sales upon which the agent . . . was the procuring cause, notwithstanding the sales made have been consummated by the principal himself or some other agent." *Id.* at 294.

Application of the doctrine requires examination of the relationship between the principal and the agent:

> "The relationship between agent or broker and principal being a contractual one, it is immediately apparent that whether an agent or broker employed to sell personalty on commission is entitled to commissions on sales made or consummated by his principal or by another agent depends upon the intention of the parties and the interpretation of the contract of employment, and that, as in other cases involving interpretation, all the circumstances must be considered." [*Id.*, quoting with approval 12 ALR2d 1360, 1363.]

[2] Defendant counterclaimed, but the trial court dismissed each of those claims, and that decision is not challenged within this appeal.

Thus, the procuring-cause doctrine is but a subset of contract law, acting as a default rule for interpreting a contract that is silent regarding the intent of the parties with respect to commissions on sales generated by a salesperson before, but consummated after, termination of the relationship between the salesperson and the principal. Because applicability of the doctrine is a function of the agreement between the parties, one who procures a customer is not automatically entitled to perpetual commissions from all sales to the customer procured. Instead, the doctrine establishes a basis upon which a terminated employee may lay claim to certain commissions on sales that the employee caused to happen, but that were consummated by others after the employee was terminated. See *Butterfield v Metal Flow Corp*, 185 Mich App 630, 635-636; 462 NW2d 815 (1990), citing *Reed*, *supra* at 293-295.

Here, the parties agree that the written agreements between them were silent on the question of post-termination commissions. Plaintiff, however, testified that in some instances he worked long and hard to land certain large accounts in anticipation of receiving commissions on the resulting sales, whether or not those sales occurred after his term of employment. Defendant testified, on the other hand, that he had never envisioned paying post-termination commissions, that the parties never discussed such a thing before the present litigation, and that plaintiff's base salary was intended to compensate plaintiff for his efforts in bringing new customers to the table.

Generally, "oral evidence of prior or contemporaneous understandings is inadmissible to vary or contradict an unambiguous writing which is intended to memorialize the complete agreement between the parties." *Roberts Associates, Inc v Blazer Int'l Corp*, 741 F Supp 650, 654 (ED Mich, 1990), citing *NAG Enterprises, Inc v All State Industries, Inc*, 407 Mich 407, 409; 285 NW2d 770 (1979). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." *Haywood v Fowler*, 190 Mich App 253, 258; 475 NW2d 458 (1991). Moreover, to ascertain such intent, the various parts of a contract should be read together. See, e.g., *First Baptist Church v Solner*, 341 Mich 209, 215; 67 NW2d 252 (1954), and *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 170; 600 NW2d 617 (1999).

Here, the employment agreement between the parties unambiguously provides for at-will employment, and affords defendant great flexibility in deciding how to compensate plaintiff. The agreement additionally declares that its four corners constitute the entire agreement of the parties, and that the contract may not be changed orally, "but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension, or discharge is sought."

The separate compensation agreement, executed on the same day as the employment contract, provides that plaintiff will receive "A 7% COMMISSION ON ALL ACCOUNTS SOLD BY EMPLOYEE . . . BASED ON 7% OF NET INVOICE OF CUSTOMERS [sic] BILLINGS." (Capitalization in original). The agreement additionally provides plaintiff with a base salary of $22,500, which was to decrease to $18,000 after six months, in obvious contemplation that commissions would account for an increasingly greater portion of plaintiff's income.[3]

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[3] The evidence, however, indicates that plaintiff's salary was never reduced in accordance with
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A subsequent compensation plan, signed in May 1994, provides for a salary of $25,500, and specifies that plaintiff would receive varying percentages for work done "inhouse," for work "out-sourced" to other companies, and for equipment sales. The plan further includes a provision for commissions calculated from the "Net invoice" on "selected Michigan House Accounts," and sets forth specific provisions stemming from certain customers, including the City of Toledo. This latter agreement further provides, however, that IDS would retain the right to modify the compensation plan at any time.

Neither compensation plan expressly provides for any bonus for bringing in an account, or any perpetual entitlement to commissions regardless of who is responsible for generating continuing sales. The closest that any contractual language comes to suggesting that commissions are owed to plaintiff simply from his having brought the customer to the table in the first place, is the provision in the first compensation agreement indicating that plaintiff would receive a percentage "ON ALL ACCOUNTS SOLD BY EMPLOYEE." (Capitalization in original). Still, it would be a strained reading of this language to conclude it to mean "all future sales to any customer originally procured by employee." We think it more reasonable to regard this language as indicating that commissions were to be paid on sales *specifically generated by the salesperson*.

In the May 1994 compensation agreement, both the provisions for commissions on house accounts, as well as those concerning accounts plaintiff himself procured, are tied to continuing production or sales. This suggests that there is no unstated distinction between the terms under which plaintiff was entitled to commissions for sales generated from accounts that he serviced, but did not procure, and those that plaintiff initially brought into the business relationship with defendant. In other words, the wording of these provisions envisions commissions paid on continuing sales as they are generated, not as a prize for bringing the customers to IDS in the first place. Just as it would be peculiar to read the provision for commissions on house accounts as stemming from anything other than plaintiff's continuing involvement with those accounts, it would be peculiar to read the provisions for commissions on other accounts and sales as guaranteeing plaintiff a perpetual claim on commissions on those continuing sales regardless of who is responsible for generating the additional patronage. Thus, under the terms of the May 1994 compensation plan, plaintiff's accounts became house accounts when plaintiff ceased his active involvement with them on defendant's behalf.

It is apparent that in this kind of work, sales and service often merge. Once an account is procured, it does not remain static as first brought in, but instead, the specific services and volumes of business will change over time. Initial procurement is but one objective of the salesperson; servicing the account – which will typically involve additional sales work – is another. Not only might an existing account, through the efforts of the salesperson servicing the account, come to include new services or increased volumes of business not on the table with the initial procurement of the account, but simply retaining an account under the original terms will itself often involve a significant measure of continuing salesmanship.

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this provision.

The written agreements between the parties in this case do not clearly indicate that plaintiff was to receive no commissions on any further sales as of the moment of termination (or, even further, sales that were generated primarily by plaintiff while still working for defendant). Thus, the procuring-cause doctrine applies to this case at least insofar as the doctrine bars such an interpretation of those agreements. What then remains is the simple question whether defendant compensated plaintiff fully for sales for which plaintiff, both during and presumably shortly after his term of employment, was in fact responsible. In that regard, the evidence in this case shows a dispute concerning at least some of the sales that took place during plaintiff's term of employment,[4] and, of course, the parties differ concerning the extent of plaintiff's responsibility for sales taking place after he was terminated. Because these were factual questions for jury resolution, the trial court properly denied the motions for summary disposition and directed verdict on the procuring-cause issue. *Kitchen v Kitchen*, 239 Mich App 190, 193; 607 NW2d 425 (1999); *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1995).

B. Plaintiff's Issues Relating to Procuring Cause

Plaintiff argues that the trial court abused its discretion in instructing the jury not to award future damages, and in denying a post-trial motion for new trial or additur. We disagree in both instances.

The trial court ruled that the evidence did not support a claim of future damages, and so instructed the jury. We agree. Plaintiff's claim of entitlement to future damages rests not so much on the terms of the written compensation agreements as it does an overly expansive application of the procuring-cause doctrine. As we concluded above, the trial court correctly held that the procuring-cause doctrine was of *limited* applicability to the facts in this case. The court's ruling against future damages was properly in furtherance of that limitation.

Evidence presented at trial established that continuing sales to existing customers was largely a function of continuous "servicing" of those accounts by others currently in defendant's employ. Beyond having simply brought those customers into a business relationship with defendant in the first place, plaintiff has put forth no basis for receiving commissions on such continued efforts for any significant period of time after his active salesmanship for defendant ended. As discussed above, neither the written compensation agreements nor the limited applicability of the procuring-cause doctrine permits such an invasion by plaintiff of future sales. Indeed, the written agreements between the parties emphasized the procurement of sales, not of customers, and set forth an at-will employment relationship in which defendant maintained the right to modify the terms of compensation freely. Accordingly, we find that the court's instruction that the doctrine of procuring cause could establish an entitlement to commissions on post-termination sales only for a "reasonable period" appropriately reflected the evidence and applicable law.

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[4] Most notably those to Standard Federal Bank, which mainly involved another salesperson, and over which the parties disagree on the extent of plaintiff's role and entitlement to compensation.

Nor did the trial court err in denying plaintiff's motions for new trial or additur. Plaintiff argues that he was clearly entitled to damages of $152,933 (plus future damages), and not just the $18,441 awarded him by the jury. We agree with the trial court that the jury had a reasonable evidentiary basis for limiting its award as it did.

A trial court has the discretion to grant a new trial restricted to the issue of damages if it finds that the award of damages was clearly inadequate or against the great weight of the evidence. MCR 2.611(A)(1)(d) and (e). However, appellate courts disfavor such partial new trials because "liability and damage issues are commonly interwoven." *Dooms v Stewart Bolling & Co*, 68 Mich App 5, 22-23; 241 NW2d 738 (1976). See also *Garrigan v LaSalle Coca-Cola Bottling Co*, 373 Mich 485, 489; 129 NW2d 897 (1964) (despite their authorization within the court rules, partial new trials limited to the question of damages are disfavored).

An alternative to new trial in such a case is the device of additur. MCR 2.611(E)(1) provides as follows:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

"The proper consideration when reviewing a grant or denial of additur is whether the jury award is supported by the evidence." *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997). A jury is free to accept or reject a plaintiff's testimony regarding damages, and need not award any damages even if it finds liability. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172-173; 568 NW2d 365 (1997). However, a verdict is inadequate if the jury ignored uncontroverted damages. *Burtka v Allied Integrated Diagnostic Services, Inc*, 175 Mich App 777, 780; 438 NW2d 342 (1989). In this area, a trial court is entitled to considerable deference on appeal; having had the opportunity to evaluate the jury's reaction to the witnesses and other proofs, the trial court stands in the best position to consider the merits of a motion to adjust the jury's award of damages. See *Palenkas v Beaumont Hospital*, 432 Mich 527, 533-534; 443 NW2d 354 (1989) (concerning remittitur).[5]

Plaintiff argues that because the jury found liability under the procuring-cause theory, the jury should have awarded damages reflecting plaintiff's very liberal sense of how that doctrine should apply. However, as discussed above, the doctrine had but limited applicability in this instance, and the trial court tailored the jury's use of that doctrine accordingly. Thus, we do not conclude that the trial court abused its discretion in declining to grant plaintiff's motion for additur or new trial on this ground.

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[5] Because remittitur differs from additur only in that the former is a remedy for excessive damages while the latter is a remedy for inadequate damages, the two devices may be regarded as different manifestations of a single judicial mechanism for correcting erroneous jury awards, as reflected by the simultaneous presentation of both remedies within the court rules, MCR 2.611(E)(1). Thus we have no hesitation in citing a case dealing with remittitur for a principle applicable also to additur.

We similarly reject plaintiff's claim that the documents presented at trial, including defendant's own business records, established uncontroverted damages to which he was entitled, but was not awarded by the jury. Even if plaintiff's figures with respect to damages were not controverted, his legal and factual theories of entitlement – mainly an expansive interpretation of procuring cause – were very much challenged. Moreover, as our conclusions above indicate, plaintiff was obliged to do more than prove that certain customers brought into the business relationship by him conducted specific amounts of business with defendant. Rather, plaintiff was required to prove that he was the specific procuring cause of each sale. Plaintiff, however, has failed to detail his claims in this regard in his brief on appeal, and has thus failed to properly present those issues for this Court's review. See *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992) (a party may not merely state a position and leave it to this Court discover and rationalize the basis for the claim). Accordingly, plaintiff is entitled to no relief on this claimed error.

II. Conversion

Plaintiff sought to prevail on the conversion theory in order to take advantage of the provisions for treble damages, costs, and attorney's fees found in MCL 600.2919a. The trial court initially reserved judgment on the applicability of this theory and allowed the conversion question to go to the jury. It later concluded that the theory was not applicable under the facts of this case, and refused to entertain the question of enhancing the judgment pursuant to MCL 600.2919a.[6] We find no error in the trial court's conclusion.

In making his case for conversion, plaintiff argues as if to suggest that any time one party is found to have owed another some money following a protracted dispute, the first has converted the amount owed. Such a scenario, however, is far too broad to be encompassed by the tort of conversion. An action for conversion of money cannot be maintained unless there is an obligation on the part of the defendant to "return" specific monies "entrusted" to his care. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). Here, plaintiff's position at trial was simply that he had a contractual right to more money than that paid to him by defendant. Thus, even if plaintiff succeeded in proving that defendant was obliged to pay him certain sums in contract damages, plaintiff never suggested, let alone proved, that defendant had any obligation to "return" to plaintiff monies that plaintiff had "entrusted" to defendant's care. This was a contract case, not a tort case, and the trial court properly recognized that distinction.

For this same reason, we find that the court did not abuse its discretion in sustaining an objection to plaintiff's eliciting from defendant information on his income. Plaintiff argues that comparison of defendant's income before and after terminating plaintiff would have revealed that increases in defendant's income closely correlated to amounts that plaintiff insisted were wrongfully withheld from him. However, this reasoning is but an extension of plaintiff's failed attempt to equate money owed with money converted. Because this was not a conversion case,

[6] On cross-appeal, defendants argue that MCL 600.2919a does not provide a remedy to a victim of conversion against the actual tortfeasor. Because we agree with the trial court that the evidence in this case did not support a finding of conversion, we need not address the statutory question.

defendant's income – even if it did reflect increases corresponding with amounts plaintiff proved were wrongfully withheld from him – was not relevant.

III. Judgment Interest

Plaintiff argues that the trial court erred in failing to apply the rate of prejudgment interest statutorily prescribed for damages on written instruments. We agree.

MCL 600.6013(5) provides in relevant part that:

> if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, ...

MCL 600.6013(6), in turn, provides in relevant part:

> Except as otherwise provided in subsection (5) . . . , interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July and January 1, as certified by the state treasurer, and compounded annually pursuant to this section. Interest under this subsection shall be calculated on the entire amount of the money judgment, including attorney fees and other costs.

Not in dispute is that, in this instance, the interest provision in subsection (5) is greater than that of subsection (6).

The prejudgment-interest statute is remedial in nature and therefore must be construed liberally in favor of the prevailing party. *McKelvie v Auto Club Ins Ass'n*, 203 Mich App 331, 339; 512 NW2d 74 (1994). Moreover, a "written contract" is a "written instrument" for purposes of applying MCL 600.6013(5). See *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346-347; 578 NW2d 274 (1998).

In response to plaintiff's request for application of the higher rate of interest afforded under MCL 600.6013(5), the trial court ruled:

> [T]his was not a damage on a written instrument because there was an express contract and the jury so found, but the jury also found that that express contract did not address the issue of post-termination commissions. The jury found some other kind of contract for post-termination commissions. Since that is their express finding, I don't see how I can rule that this was an action successfully brought on a written instrument.

The trial court's characterization of the damages award as stemming from "some other kind of contract" than the written agreements is problematic. As discussed above, the procuring-cause doctrine exists as a contractual default rule to govern the interpretation of certain sales contracts. Operation of the doctrine does not bring into existence an implied contract, but rather,

fleshes out an existing contract – in this case, the written employment agreement and the two written compensation agreements.

In light of the imperative to interpret remedial statutes broadly so as to advance the legislative remedy, *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988), we hold that the damages awarded under the procuring-cause doctrine stemmed, at least in part, from the written contracts. Thus, the more generous interest rate that MCL 600.6013(5) provides for judgments on written instruments applies.

However, because the jury found both express and implied contracts, but awarded damages under both theories without differentiating between them, the trial court must endeavor on remand to parse the award to distinguish between damages stemming from written and implied contracts. The rate of interest provided by MCL 600.6013(5) should be applied only to those damages found to stem from the written contracts.

We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly