

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD JELONEK, JR., D.O.,

Plaintiff/Counter-Defendant-
Appellee,

v

EMERGENCY MEDICINE SPECIALISTS, P.C.,

Defendant/Counter-Plaintiff-
Appellant,

and

ANTHONY C. SOUTHALL, JAMES M. FOX,
MARSON MA, CHADA REDDY, CHARLENE
BABCOCK IRVIN, ERIC J. GLOSS, DOUGLAS
J. WHEATON, JERE BALDWIN, and ROMAIN
MANAGEMENT INVESTMENT &
INSURANCE, INC.,

Defendants/Counter-Plaintiffs.

DUANE WISK, D.O.,

Plaintiff-Appellee,

v

EMERGENCY MEDICINE SPECIALISTS, P.C.,

Defendant-Appellant,

and

ANTHONY C. SOUTHALL, JAMES M. FOX,
MARSON MA, CHADA REDDY, CHARLENE
BABCOCK IRVIN, ERIC J. GLOSS, DOUGLAS
J. WHEATON, JERE BALDWIN, and ROMAIN
MANAGEMENT INVESTMENT &

UNPUBLISHED

March 14, 2006

No. 257974

Oakland Circuit Court

LC No. 96-530546-CK

No. 257975

Oakland Circuit Court

LC No. 96-533876-CK

INSURANCE, INC.,

Defendants.

EDWARD J. JELONEK, JR., D.O.,

Plaintiff/Counter-Defendant-
Appellant,

v

EMERGENCY MEDICINE SPECIALISTS, P.C.,

Defendant/Counter-Plaintiff-
Appellee,

and

ANTHONY C. SOUTHALL, JAMES M. FOX,
MARSON MA, CHADA REDDY, CHARLENE
BABCOCK IRVIN, ERIC J. GLOSS, DOUGLAS
J. WHEATON, JERE BALDWIN, and ROMAIN
MANAGEMENT INVESTMENT &
INSURANCE, INC.,

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DUANE WISK, D.O.,

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EMERGENCY MEDICINE SPECIALISTS, P.C.,

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BABCOCK IRVIN, ERIC J. GLOSS, DOUGLAS
J. WHEATON, JERE BALDWIN, and ROMAIN
MANAGEMENT INVESTMENT &
INSURANCE, INC.,

No. 258418
Oakland Circuit Court
LC No. 96-530546-CK

No. 258419
Oakland Circuit Court
LC No. 96-533875-CK

Defendants.

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiffs Edward Jelonek, Jr., D.O. and Duane Wisk, D.O., filed separate actions after a dispute arose among shareholders of defendant Emergency Medicine Specialists, P.C., a closely held corporation. In prior appeals, this Court affirmed the trial court's orders that granted defendants summary disposition, granted defendants a directed verdict, and invalidated a stock transfer. *Jelonek v Emergency Medicine Specialists, PC*, unpublished opinion per curiam of the Court of Appeals, issued August 28, 2001 (Docket Nos. 220244, 220245, 220246). After this Court decided the prior appeals, a dispute arose over the amount of severance compensation that was due each plaintiff. Following a hearing, the trial court awarded Jelonek severance compensation of \$278,232.61, and awarded Wisk severance compensation of \$197,345.97.

In Docket Nos. 257974 and 257975, defendant Emergency Medicine Specialists, P.C.,¹ appeals by delayed leave granted, and challenges the trial court's postjudgment orders that awarded severance compensation to Jelonek and Wisk. In Docket Nos. 258418 and 258419, Jelonek and Wisk appeal by delayed leave granted, respectively, and challenge the trial court's denial of their requests for prejudgment interest on the awards of severance compensation and the denial of their motions to set aside mediation sanctions. We affirm.

I. Docket Nos. 257975 and 259795

Defendant appeals the trial court's determination of the amount of severance compensation awarded to each plaintiff. The method for calculating severance compensation is governed by the parties' employment agreement, which provides:

If Employee's employment is terminated for any reason after two (2) years of full-time employment by Employer, he shall be entitled to severance compensation if he is then a shareholder of Employer.

The amount of severance compensation will be equal to the Employee's percentage of stock ownership in Employer multiplied by the collectible accounts receivable of Employer as of the date of termination of employment reduced by the incentive compensation then payable to all employees of Employer, and reduced further by the management fee owing to Romain Management, Investment, and Insurance, Inc. on the collection of the accounts receivable. The

¹ Because defendant Emergency Medicine Specialists, P.C., is the only defendant that is a party to these appeals, the singular term "defendant" is used to refer to Emergency Medicine Specialists, P.C.

amount of the collectible accounts receivable shall be determined solely by Romain Management, Investment, and Insurance, Inc. based on past historical data. The determination shall be binding on the parties.

Once calculated, the severance compensation shall be paid to Employee fifty percent (50%) after ninety (90) days from the date of termination of employment and the balance one hundred eighty (180) days from the date of termination of employment.

The agreement provides that incentive compensation is calculated as follows:

B. Incentive Compensation. In addition to the above [gross base compensation], incentive compensation shall be paid to Employee on a quarterly basis equal to sixty-two percent (62%) of the gross receipts of Employer attributable to Employee for the quarter reduced by the gross base compensation of Employee for the quarter. The sixty-two percent (62%) factor shall be increased by two percent (2%) per year until the percentage has reached seventy-five percent (75%) at which time this percentage shall remain fixed. In the event of the termination of employment of Employee at a time when incentive compensation is otherwise payable, the incentive compensation will be paid out quarterly as the accounts receivable are collected.

In the trial court, Jelonek and Wisk argued that this provision required Romain Management to calculate the “collectible accounts receivable” according to the historical data that existed as of the date of termination, September 30, 1996. Jelonek and Wisk submitted calculations to the trial court based on this method. Relying on Joseph Romain’s trial testimony, they asserted that the historical rate of collectible accounts receivable as of September 30, 1996, was 38 percent. They therefore claimed that their severance compensation should be calculated using 38 percent of the accounts receivable on September 30, 1996.

In contrast, defendant argued that the severance compensation should be calculated using the percentage of accounts receivable that were actually collected after Jelonek and Wisk’s termination. Defendant maintained that the employment agreement gave Romain the authority to determine collectible accounts receivable by this method. Defendant did not initially challenge Jelonek and Wisk’s assertion that Romain had testified that, in 1996, 38 percent of accounts receivable were collectible. After the trial court closed proofs, defendant submitted an affidavit in which Romain stated that the 38 percent figure applied to *billings*, which are distinct from accounts receivable. Romain stated that the percentage of collectible accounts receivable is much lower than the percentage of collectible billings. However, Romain did not submit a calculation of collectible accounts receivable based on the applicable historical percentage for 1996. The trial court accepted Jelonek and Wisk’s calculations when it determined the amounts of their severance compensation.

Defendant argues that the trial court erroneously substituted its own judgment for that of Romain, contrary to the parties’ agreement. Questions involving the proper interpretation of a contract or the legal effect of contractual language are reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

We begin our analysis by examining the contract language. To ascertain the meaning of a contract, this Court gives the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument. *Rory, supra* at 464. All rules of contract interpretation are subordinate to the cardinal rule that the Court must ascertain the parties' intent. *City of Grosse Pointe Park v Michigan Muni Liability and Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). To comply with this cardinal rule, and to effectuate the principle of freedom of contract, this Court construes clear and unambiguous contractual language according to its plain sense and meaning. *Id.* If the language is ambiguous, testimony may be taken to explain the ambiguity. *Id.*

We conclude that the trial court correctly construed the contract. The phrase "as of the date of termination" clearly and unambiguously indicates that the date of termination is to serve as the reference point to determine what portion of accounts receivable are "collectible accounts receivable." The phrase "based on past historical data," when read in conjunction with the phrase "as of the date of termination," required Romain to make his calculation based on the historical data that was available as of the termination date. This contract language enabled the parties to determine an employee's severance compensation at any time following termination, and arrive at the same amount regardless of when the determination was made. The employment agreement did not require or permit the parties to wait a period of time to determine what portion of accounts receivable would actually be collected. Further, the employment agreement does not contemplate that the parties could substitute the actual amount if there was a delay in paying the severance compensation.

Nor did the employment agreement give Romain unfettered discretion to determine the severance compensation. Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Here, the employment agreement states that severance compensation must be determined according to the amount of accounts receivable and the historic rate of collections. Giving these words effect, Romain has the authority to determine the relevant raw data, i.e., the amount of accounts receivable and the historical rate of collections, but does not have the authority to use a calculation method or formula other than that prescribed by the contract. Accordingly, Romain was not permitted to deviate from the requirement that collectible accounts receivable be calculated according to the known historical rate as of the date of termination.

Defendant also argues that the trial court erred in accepting a 38 percent figure as the historical percentage of collectible accounts receivable in 1996. This argument challenges the trial court's findings of fact, which we review for clear error. *HJ Tucker and Associates, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999). Defendant did not challenge Jelonek and Wisk's interpretation of Romain's trial testimony until after the trial court closed proofs. Defendant also failed to offer an alternative calculation of the collectible accounts receivable for 1996 using its own data as applied to the applicable percentage. Under these circumstances, we find no clear error in the trial court's decision.

Defendant further claims that the trial court erred in accepting Jelonek and Wisk's calculation of incentive compensation due the remaining physicians at the time of their termination. The employment agreement provides that incentive compensation is calculated as follows:

B. Incentive Compensation. In addition to the above [gross base compensation], incentive compensation shall be paid to Employee on a quarterly basis equal to sixty-two percent (62%) of the gross receipts of Employer attributable to Employee for the quarter reduced by the gross base compensation of Employee for the quarter. The sixty-two percent (62%) factor shall be increased by two percent (2%) per year until the percentage has reached seventy-five percent (75%) at which time this percentage shall remain fixed. In the event of the termination of employment of Employee at a time when incentive compensation is otherwise payable, the incentive compensation will be paid out quarterly as the accounts receivable are collected.

Read as a whole, the employment agreement requires the severance compensation to be adjusted by the incentive compensation payable to other employees as of the date of the terminated employee's termination. Although part B of section three requires the incentive compensation to be paid quarterly, based on the amounts actually received, section seven clearly requires the severance compensation to be reduced by the amount of incentive compensation "*then payable*." Consequently, defendant's incentive compensation amount, which was based on amounts actually received *since* Jelonek and Wisk's termination, is contrary to the contract language. Furthermore, as Jelonek and Wisk point out, defendant failed to reduce this amount by the amount of gross base compensation. Thus, defendant's calculated amount is clearly erroneous.

Defendant argues that the payroll amounts on which Jelonek and Wisk relied are irrelevant to incentive compensation, because incentive compensation is "an amount payable from the amounts to be collected, not the past collections." As previously discussed, however, section seven of the parties' agreement clearly provides that severance compensation is adjusted by the incentive compensation *then payable*. If the amounts were already paid, then they are not currently payable. If defendant did not owe its employees any incentive compensation pay as of September 30, 1996—an assertion defendant does not contradict—Jelonek and Wisk correctly conclude that the amount is zero. Jelonek and Wisk's calculation is therefore in accord with the contract. Because defendant has not shown that the trial court misconstrued the parties' contract or clearly erred in its findings of fact, we affirm the trial court's awards of severance compensation to Jelonek and Wisk.

II. Docket Nos. 258418 and 258419

Jelonek and Wisk argue that the trial court erred in denying their request for prejudgment interest on the severance compensation awards, pursuant to MCL 600.6013. We disagree.

This issue involves a question of statutory interpretation. In construing a statute, this Court examines the language of the statute to determine whether ambiguity exists. *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 538; 565 NW2d 828 (1997). If the language is unambiguous, judicial construction is precluded and the statute is enforced as written. *Id.*

MCL 600.6013 provides, in pertinent part:

(1) Interest is allowed on a *money judgment recovered in a civil action*, as provided in this section

* * *

(5) Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, *if a judgment is rendered on a written instrument*, interest is 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 . . . [Emphasis added.]

Jelonek and Wisk assert that paragraph six of the trial court's June 1999 judgment, which directs that defendants shall pay severance compensation in accordance with their employment agreement at the conclusion of the case, is a money judgment recovered in a civil action and, therefore, is subject to prejudgment interest under § 6013(5). Defendant disagrees and argues that the compensation award was only incidental to the resolution of the action, and was not based on Jelonek and Wisk's complaint.

Defendants rely on *In re Forfeiture of \$176,598*, 465 Mich 382; 633 NW2d 367 (2001), in which our Supreme Court held that the owner of illegally seized cash was not entitled to prejudgment interest. *Id.* at 386. The Supreme Court stated that "an order returning seized currency following a drug forfeiture trial is not a money judgment, but rather an order for the return of specific personal property." *Id.* The Court further held that the forfeiture proceeding did not constitute a "civil action" for purposes of MCL 600.6013. The Court stated:

[T]he language of § 6013 itself indicates that the proceeding here does not constitute a "civil action" for the purpose of that rule. Subsections (2) through (6) suggest that a complaint must be filed with the court by the person who has recovered the money judgment. Each subsection begins with the phrase, "for complaints filed," or contains other language referencing the filing of a "complaint." [The claimant] did not file any such complaint in this proceeding. Therefore, rather than being the prevailing claimant in a civil action, [the claimant] was merely the owner of property that the prosecutor unsuccessfully sought to seize in a forfeiture action initiated by the latter. The trial court's order was not an adjudication of an action for money damages, but rather one for the delivery of property that had been the subject of a forfeiture action. [*Id.* at 387-388.]

The Court therefore concluded that the order directing the return of the seized currency was not a money judgment in a civil action under § 6013.

Despite some dissimilarities between the instant case and *In re Forfeiture of \$176,598*, we find it instructive with regard to the question presented in this case. Defendant never disputed that Jelonek and Wisk were entitled to severance compensation, so the instant dispute with regard to that issue did not arise in the context of a conventional civil action for monetary damages. Indeed, Jelonek and Wisk's complaints did not assert a claim for severance compensation. The severance compensation awards instead arose from an unresolved collateral issue.

Defendant also relies on *Moore v Carney*, 84 Mich App 399; 269 NW2d 614 (1978), in which the plaintiff, a minority shareholder in a closely held corporation, brought an action

against the corporation and its directors. The plaintiff alleged that the defendants were oppressive and unjust toward the minority shareholder, and sought to dissolve the corporation and have the plaintiff's interest bought out. *Id.* at 401-402. The trial court ordered the plaintiff's interest to be bought out for \$55,000. *Id.* at 405. This Court held that the payment was not "a mere money judgment," but rather "was essentially part of an equitable remedy." *Id.* The Court noted that Black's Law Dictionary (4th ed), p 980, defined "money judgment" as "one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred." *Id.* at 404. The Court therefore concluded that the plaintiff was not entitled to interest because the award was not a money judgment under this definition, inasmuch as it was meant to restore the plaintiff to her position before the defendant's oppressive acts. *Id.* at 405-406.

Applying the principles from these cases, we conclude that Jelonek and Wisk's severance compensation is not a money judgment awarded on a civil action. Although the court's orders require payment of a sum of money, their purpose was not to compensate Jelonek and Wisk for any of the claims alleged in their complaint, but rather to proceed with the ordinary severance procedures in the employment agreement at the conclusion of the litigation. The order restored Jelonek and Wisk to the ordinary status of terminated employees. We therefore conclude that prejudgment interest was properly denied under § 6013.

In this regard, Jelonek and Wisk's reliance on *Grand Trunk W R Co v Pre-Fab Transit Co*, 46 Mich App 117; 207 NW2d 469 (1975), is misplaced. In that case, this Court held that a third-party plaintiff was entitled to prejudgment interest from the third-party defendant dating back to the original complaint, because the third-party action arose from the same controversy as the original complaint. In this case, the underlying complaints did not involve a controversy over the amount of severance compensation.

Jelonek and Wisk also contend that the trial court erred when it denied their motion for relief from a previous order that awarded defendant mediation sanctions. We review a trial court's denial of a motion for relief from judgment for an abuse of discretion. *Yee v Shiawassee County Bd of Com'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002).

Mediation sanctions are assessed against a party who rejects the mediation panel's evaluation and then fails to attain a verdict that is more favorable than the evaluation. MCR 2.403(O)(1). Jelonek and Wisk do not dispute that defendant was entitled to mediation sanctions at the time they were awarded. Rather, they argue that the order of sanctions should be set aside pursuant to MCR 2.612(C), because their "verdict" was increased by the amount of severance compensation awarded, and is now more favorable than the mediation evaluation, thus rendering sanctions inappropriate.

MCR 2.612(C)(1) provides:

On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

- (a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

Subsections (e) and (f) are the only subsections arguably applicable to the circumstances here.

Because we conclude that the severance compensation was not part of the verdict, but rather involved the resolution of an employment agreement matter that could not be settled until all the issues in the underlying litigation were resolved, it follows that Jelonek and Wisk's entitlement to severance compensation is unrelated to the issues raised in the mediation evaluation, and does not vindicate Jelonek and Wisk's decision to reject mediation. Under these circumstances, the trial court did not abuse its discretion in denying Jelonek and Wisk's motion for relief from the order of mediation sanctions.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Henry William Saad