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Court of Appeals
Division III
State of Washington

No. 31445-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KEITH MILLER,

Respondent

v.

PAUL M. WOLFF CO., et al

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY
THE HONORABLE VIC L. VANDERSCHOOR

REPLY BRIEF OF APPELLANT

DAVIES PEARSON, P.C.

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I. INTRODUCTION

This appeal concerns the procuring cause doctrine, award of attorney fees to Mr. Miller pursuant to RCW 49.48.030, and denial of the Company's motion for attorney fees pursuant to MAR 7.3 and RCW 7.06.060(1). Regarding the procuring cause issue, Mr. Miller identifies the fundamental question in his brief, stating that:

The [trial] court awarded damages to [Mr. Miller] even though it concluded that the plaintiff did not complete the supposed 'fifth step.' See CP 491 (CL 15). This result unmistakably indicates that the court did not find/conclude/believe [sic] that Mr. Miller was required to personally complete all five steps in order to earn his commissions (either in full or on a pro rata basis).

Brief of Respondent 12. This is the issue before this Court; did the trial court err in granting Mr. Miller an award pursuant to the procuring cause doctrine when it had found that he did not complete the fifth step of his performance? The answer to this question is yes. The procuring cause doctrine requires an agent to complete his performance, absent bad faith by the principal.

The trial court also erred in awarding attorney fees to Mr. Miller pursuant to RCW 49.48.030 because he recovered under the equitable, procuring cause doctrine to which this statute does not apply. Finally, the trial court erred in concluding that Mr. Miller had improved his position on appeal pursuant to MAR 7.3 and RCW 7.06.060(1) by including

attorney fees in its consideration. Therefore, the Company respectfully requests that the trial court's judgment be reversed.

II. ARGUMENT

A. Mr. Miller's Arguments Regarding the Five Steps and his Abandonment of the At-Issue Projects are Unpersuasive.

Mr. Miller's assertions regarding the record for this Court's review are unpersuasive. Specifically, he misconstrues the record on two crucial issues: the five steps of Mr. Miller's performance and his abandonment of the at-issue jobs.

Regarding the five steps, Mr. Miller claims that "it is a verity that the concept of the five steps was just motivational jargon." Brief of Respondent at 12. However, the finding of fact upon which he relies provides that:

The defendants testified that there are five distinct steps to any given job which a salesperson is expected to complete. The fifth step is seeing the job through to completion. The concept of five steps is not recited in the parties' written contract, not within any other written document bearing [sic] Mr. Miller's signature. Mr. Miller testified that the concept of five steps was occasionally mentioned verbally, but only as motivational jargon.

CP at 479 (Finding of Fact No. 5) (emphasis added). As the finding of fact makes clear, it recites only what the parties testified to and what the

contract said¹, not what the trial court found regarding the five steps concept. The trial court's finding regarding the five steps concept is instead located in Conclusion of Law 15, where the trial court stated that:

the Court [sic] finds that 20% of the work on the at-issue jobs occurred after Mr. Miller's resignation *i.e.* – *step 5*.

CP at 491 (emphasis added for trial court's handwritten interlineations). This finding, mislabeled as a conclusion,² clarifies that the trial court found that there were five steps of Mr. Miller's performance.

This conclusion also explains the trial court's award. The trial court awarded Mr. Miller eighty percent of the commissions on the at-issue jobs because Mr. Miller completed only four out of five of his steps of performance. See CP 491. Therefore, as the trial court's finding and award indicate, Mr. Miller's performance included five steps; one of which he did not complete on the at-issue jobs.

The trial court's finding regarding the five steps concept is supported by substantial evidence. In addition to the defendant's testimony reflected in Finding of Fact No. 5, Mr. Miller's position description includes several duties related to the fifth step: seeing a project through to

¹ As addressed in more detail *infra*, the written contract does not address Mr. Miller's duties, performance, or compensation. CP 472 (Trial Exhibit 111).

² Findings of fact mislabeled as a conclusion of law should be treated as a finding of fact. *Ives v. Ramsden*, 142 Wn. App. 369, 395 n. 11, 174 P.3d 1231 (2008).

completion such as completing “job completion sheets,” “maintain[ing] records of all business activities within his ... territory,” and “monitoring and controlling expenses.” CP at 479, 472 (Exhibit 110).

Mr. Miller’s contention regarding the abandonment of his job is similarly flawed. He states that “it is a verity that Mr. Miller did not abandon anything.” Brief of Respondent at 8. The trial court did not find that Mr. Miller did not abandon his job. Instead, the findings of fact relevant to the cessation of Mr. Miller’s performance supports the argument that he abandoned his performance and, therefore, should not be entitled to recover pursuant to the procuring cause doctrine.

Specifically, they provide that “[v]ia an email correspondence (Trial Exhibit 109³), Mr. Miller voluntarily resigned his employment January 9, 2009.” CP at 438. Trial exhibit 108 is an email sent at 2:33 p.m., which provides that:

[w]ith regret, and appreciation...and most of all, with a lot of thought, please accept this as my letter of resignation. Having seen many come and go, I’ve concluded that traditional two weeks notices do not apply. Please consider today, my final day. ... I will spend the remainder of my day coordinating scheduled jobs, including maps, and other close out business.

CP at 472. Mr. Miller summarily quit in the midst of the at-issue jobs. See *Id.*; 480.

³ The incorrect exhibited number is referenced. The correct exhibit number is 108.

In an attempt to contrast his immediate resignation from abandonment, Mr. Miller claims that “[h]e conveyed all pertinent details about the at-issue projects [and] he offered to keep working on those projects.” Brief of Respondent at 8. Notably, Mr. Miller does not offer any citation to the record.

Contrary to this contention, the trial court found that Mr. Miller offered his “continued assistance.” CP at 480. “Continued assistance” does not equate to continued work. The court did not find that Mr. Miller offered to continue working on the at-issue projects. See CP at 479-95. Mr. Miller’s arguments regarding the fifth step of performance and his offer to continue work highlight the irreconcilable nature of his position before this Court.

B. Mr. Miller’s Arguments Regarding the Five Steps and Abandonment are Contradictory.

Mr. Miller’s position regarding completion of the at-issue projects is a contradiction. In one breath, Mr. Miller attempts to refute the five steps concept by arguing that he was not involved in the fifth step, managing the project through to completion. See Brief of Respondent at 10, 35. In another, he argues that he offered to complete the work on the at-issue projects. See Brief of Respondent at 8-10. These contentions cannot be reconciled; why would Mr. Miller offer to continue “working”

on the projects if he was generally not involved in their completion? As highlighted *supra*, neither contention is supported by the findings on appeal.

C. The Procuring Cause Doctrine Requires Completion of the Agent's Undertaking and Mr. Miller Failed to Complete his Performance.

This appeal presents two questions regarding procuring cause doctrine: (1) whether the procuring cause doctrine requires that the agent accomplish what he undertook in addition to setting a sale in motion; and, assuming that it does, (2) whether Mr. Miller accomplished what he undertook. Because an agent must complete what he undertook pursuant to the procuring cause doctrine and he did not, Mr. Miller was not entitled to recovery.

(1) *Under the Case Law and Restatement (Second) of Agency, the Agent is Required to Accomplish What he Undertook.*

Mr. Miller attempts to refute the contention that an agent must complete what he undertook under the procuring cause doctrine by citing *Syputa* and the Restatement (Second) of Agency § 452. However, neither provides support for Mr. Miller's position.

As addressed in the Brief of Appellant, *Syputa* is consistent with the requirement that an agent must complete what he undertook. The court in *Syputa* adopted its statement of the procuring cause doctrine from *Roger Crane & Assocs. v. Felice*, which recognized two critical steps

before the doctrine may be relied upon: “[t]he broker must set in motion the series of events culminating in the sale and, in doing so, accomplish what he undertook under the agreement.” 74 Wn. App. 769, 776, 875 P.2d 705 (1994).

While the court in did not address the second prong of the doctrine, it was not at issue in that case. Instead, the court there recognized that, “[f]or the purposes of summary judgment, evidence establishes [Syputa] fulfilled [his] role as a manufacturing representative by promoting the sale of the hydraulic transducers, by bringing Druck’s product to Boeing’s attention and by assisting the coordination of communications about specifications between Boeing and Druck.” *Syputa*, 90 Wn. App. at 647. Therefore, *Syputa* does not negate the second element of the procuring cause doctrine; there, the agent fulfilled his role.⁴

Mr. Miller’s reliance upon Restatement (Second) of Agency § 452 is similarly misplaced. Each party has cited sections of the Restatement (Second) of Agency in support of its position; the difference turns upon whether the agent was to be paid for his services or the accomplishment of a result. The Company cites Restatement (Second) of Agency 445, which applies where the agent is hired to accomplish a specified result; whereas

⁴ Other cases on this issue are in accord. See Brief of Appellant at 11-20.

Mr. Miller relies upon Section 452, which applies where a principal agrees to pay an agent for his efforts.

Because the Company and Mr. Miller did not apportion his services to his compensation, Section 452 of the Restatement (Second) of Agency is not applicable to this case. Section 452 provides that:

Unless otherwise agreed, if the principal has contracted to pay the agent for his services and the relation terminates without breach of contract by either party, the principal is subject to liability to pay the agent for services previously performed and which are part of the agreed exchange:

(a) the agreed compensation for services for which compensation is apportioned in the contract; and

(b) the value, not exceeding the agreed ratable compensation, of services for which the compensation is not apportioned.

(emphasis added). Mr. Miller's reliance upon this section is unwarranted for two reasons. First, Section 452 is not applicable because the parties' agreement did not apportion Mr. Miller's compensation to his services. As Section 453 makes clear: "(2) [i]f the agent's compensation is not proportioned to the extent of his efforts in successfully accomplishing the result, it is inferred that his services are not part of the agreed exchange."

Here, there is no finding or evidence that Mr. Miller's compensation was proportioned to the extent of his efforts. See CP at 476-95. The parties' contract does not address Mr. Miller's duties,

compensation, or apportion his compensation to his duties. CP at 472 (Trial Exhibit 111). Therefore, Section 452 does not apply.

Second, Section 452 is not consistent with the trial court's award because there was no agreed apportionment of Mr. Miller's service nor was there any evidence regarding the value of those services. See CP at 476-495. Mr. Miller did not offer evidence of, nor did the trial court make findings regarding, the value of his efforts. See CP at 476-495. Accordingly, Section 452 is not applicable.

In contrast, Section 445 is applicable to this case. As Mr. Miller argues, this case arises in the brokerage context. Brief of Respondent at 16-17. This Section applies to brokerage contracts. See Restatement (Second) of Agency 445: Comments *c* (addressing unilateral employment of broker), *f* (addressing bilateral broker contracts). Section 445 provides that:

[e]xcept where the revocation is in bad faith, an agent whose compensation is conditional upon the performance by him of specified services, or his accomplishment of a specific result, is not entitled to the agreed compensation unless he renders the specified services or achieves the result.

As addressed in Section 453, this is the default in the absence of an agreement apportioning the agent's compensation to his efforts. See

Restatement (Second) of Agency § 453(2). Comment *a* further clarifies that:

[i]f the principal specifies the accomplishment by the agent of a particular result as a condition precedent to payment of an agreed compensation, the agent is not entitled to such agreed compensation as such unless he accomplishes the indicated result; nor can he recover the value of his services in attempting to accomplish it....

Most applicable to this case, Comment *a* also states that:

[i]f the result is accomplished, but not until after the termination of the agent's employment, he can not recover the agreed compensation, unless the termination is by act of the principal in bad faith as stated in Section 454.

Here, Mr. Miller terminated the agency relationship voluntarily. CP at 477. There was no evidence of bad faith by the Company. See CP 476-95. Mr. Miller resigned before completing his performance on the at-issue projects. CP at 480-481. The parties' agreement did not proportion Mr. Miller's compensation to the services he performed; instead, he was paid upon completion of his projects.⁵ CP at 472 (Exhibit 111), 479. Therefore, he was not entitled to recover commissions on the projects that were not completed until after he terminated the agency relationship.

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⁵ Consistent with its practice with all of its Field Sales Representatives, the Company paid commissions to the salesperson who completed the at-issue projects after Mr. Miller resigned. CP at 480, 483.

(2) *Mr. Miller did not Complete What He Undertook.*

Mr. Miller is not entitled to recover under the procuring cause doctrine because he did not accomplish what he undertook. In arguing that he completed what he undertook, Mr. Miller relies primarily upon the parties' written contract. See Brief of Respondent at 34 (stating that "what did Mr. Miller undertake by the terms of his written employment contract?").⁶ However, the written contract addresses neither Mr. Miller's duties nor his compensation. See CP at 472 (Exhibit 111). As addressed *supra*, the trial court found that Mr. Miller's performance was divided into five steps and he completed only four of the five steps. CP 491. The trial court erred in granting him an award under the procuring cause doctrine because he did not complete the fifth step. Accordingly, this Court should reverse the trial court's award under the procuring cause doctrine.⁷

D. Mr. Miller is Not Entitled to Attorney Fees and Costs Pursuant to RCW 49.48.030.

The trial court erred in awarding Mr. Miller attorney fees pursuant to RCW 49.48.030. Mr. Miller has failed to identify a single case that supports an award of attorney fees pursuant to RCW 49.48.030 for an

⁶ Notably, the trial court rejected Mr. Miller's proposed finding that "the defendants failed to pay all wages that were legally due to [Mr. Miller] under his contract, as 'gap filled' by the procuring cause doctrine. See CP at 493.

⁷ This conclusion is consistent with the equities in this case. The trial court concluded that there was a bona fide dispute regarding whether the commissions were owed to Mr. Miller negating the trial court's finding that the withholding was willful, and supporting the trial court's denial of double damages pursuant to Chapter 49.52 RCW. CP at 492-93.

award under the procuring cause doctrine. Instead, he offers the general contention that “if the employee gets the money on account of having been employed, then the money is wages in the sense of ‘compensation by reason of employment.’” Brief of Respondent at 23 (citing *McGinnity v. AutoNation*, 149 Wn. App. 277, 284, 202 P.3d 1009, 1013 (2009)). However, this proclamation is narrower than Mr. Miller suggests.

In full the quote states that “[t]hese cases support the rule that if the employee gets the money on account of having been employed, then the money is wages in the sense of “compensation by reason of employment.” *Id.* None of the cases referred to relate to an award pursuant to an equitable doctrine or the procuring cause doctrine in particular. See *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wash.2d 426, 428, 815 P.2d 1362 (1991) (breach of employment contract); *Hanson v. City of Tacoma*, 105 Wash.2d 864, 866, 719 P.2d 104 (1986) (appeal from violation of public entity’s personnel rule); *Naches Valley Sch. Dist. No. JT3 v. Cruzen*, 54 Wash.App. 388, 389-90, 775 P.2d 960 (1989) (interpretation of collective bargaining agreement). *Dautel* is similarly inapplicable.

Dautel concerned the application of the exception to RCW 49.48.030, rather than the issue before this Court. See 89 Wn. App. 148, 948 P.2d 397 (1997). It is, therefore, not applicable to this case. And while the court in *Dautel* did not identify the basis for recovery of the unpaid

wages and commissions there, they were presumably awarded pursuant to the Minimum Wage Act and breach of contract claims, statutory and common law claims not equitable claims like the one at issue in this case. See *Dautel v. Heritage Home Ctr., Inc.*, 89 Wash.App. 148, 948 P.2d 397 (stating that “Dautel was paid an hourly wage that fell short of the state minimum wage.”). Accordingly, there is no case law supporting an award of attorney fees and costs pursuant to the equitable, procuring cause doctrine.

E. Under the Compare the Comparables Approach, Mr. Miller did not Improve his Position.

The trial court erred in finding that he had improved his position on trial de novo pursuant to MAR 7.3 and RCW 7.06.060. Mr. Miller recovered fewer damages on trial de novo than at arbitration. CP at 476, 497-98. Comparing his damages awards, Mr. Miller did not improve his position. As addressed *supra*, attorney fees were improperly awarded pursuant to RCW 49.48.030. The trial court also erred by including these attorney fees in its evaluation of whether Mr. Miller improved his position on appeal.⁸

Mr. Miller has not identified a single case where attorney fees were including in determining whether a party improved its position on trial de

⁸ This is true even if this Court upholds the award of fees to Mr. Miller pursuant to RCW 49.48.030.

novo. See Brief of Respondent *generally*. On the contrary, there is ample support for the exclusion of attorney fees from this inquiry. See Appellant's Brief at 23-27. Exclusion of attorney fees is consistent with the purpose of MAR 7.3.

In an attempt to avoid this conclusion, Mr. Miller cites the *Cromar, Ltd v. Sauro* decision. *Cromar* concerns pre-judgment interest, not attorney fees, and adopts a test and conclusion that are inconsistent with the purpose of MAR 7.3. In *Cromar*, the court affirmed an award of fees pursuant to MAR 7.3 where the party that requested trial de novo recovered a greater judgment on trial de novo because it recovered more pre-judgment interest, while the recovery of damages was lower. 60 Wn. App. 622, 623, 806 P.2d 253 (1991).

In reaching this conclusion, *Cromar* adopted a test that was inconsistent with the purpose of MAR 7.3. Court rules are to be interpreted by reference to the principles of statutory construction, approached as if they had been drafted by the legislature. *State v. Gilman*, 105 Wn. App. 366, 368, 19 P.3d 1116 (2001). The court in *Cromar* must have determined that the MAR 7.3 was ambiguous because no definition of the word "position" was provided. See 60 Wn. App. 622, 623, 806 P.2d

253 (1991) (considering drafter's intent⁹). The court in *Cromar* "conclude[d] that the rule was meant to be understood by ordinary people who, if asked whether their position had been improved following a trial de novo, would certainly answer 'no' in the face of a Superior Court judgment against them for more than the arbitrator awarded."¹⁰ *Id.* It adopted this test after not finding any rule making history or cases that would reveal the drafter's intent. *Id.*

However, the Washington State Supreme Court has recognized that the purpose of MAR 7.3 is "to encourage settlement and discourage meritless appeals." *Niccum v. Enquist*, 175 Wn.2d 441, 451, 286 P.3d 966 (2012). Court rules and statutes should be "interpreted to further, not frustrate, their intended purposes." *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007).

As addressed in more detail in Brief of Appellant, including attorney fees and costs, like pre-judgment interest, in evaluating whether a

⁹ Which a court is only permitted to evaluate when a statute is ambiguous. See *State v. Gilman*, 105 Wn. App. at 368 (stating that "[w]hen a statute is clear on its face, it is not subject to judicial interpretation However, judicial interpretation is permitted when a statute is ambiguous. . . . The court should interpret a statute so as to give effect to the legislative intent.")

¹⁰ This test has been called into question by many of the Justices on the Washington State Supreme Court because whether a party has improved its position does not lend itself to such a simplistic approach. See *Niccum v. Enquist*, 175 Wash. 2d at 453-54 (Justice Tom Chambers dissenting joined by Justices Charles W. Johnson, Debra L. Stephens, and Charles K. Wiggins) (stating that "[s]imply looking at the dollar amount awarded by an arbitrator may be deceiving because some damages, such as accrued interest, will continue to accumulate.").

party improved his position on trial de novo undermines the purpose of MAR 7.3:

the court deciding if a party improved its position in comparison to the arbitration result for purposes of MAR 7.3 should compare the award of damages, *exclusive* of costs and attorney fees. Failing this, any party appealing the arbitrator's award and recovering the identical award of compensatory damages would *always* improve its position because it would recover additional interest and more attorney fees would be incurred. This would be inconsistent with the purpose of MAR 7.3 which is to *discourage* appeals from arbitrator decisions.

Haley v. Highland, 142 Wn.2d 135, 159, 12 P.3d 119 (2000) (J. Talmage concurring). Consistent with the purpose of MAR 7.3, attorney fees should be excluded from consideration.

Accordingly, the trial court improperly concluded that Mr. Miller improved his position on trial de novo and erred in denying the Company's motion for attorney fees pursuant to MAR 7.3 and RCW 7.06.060.

III. CONCLUSION

The case law and Restatement (Second) of Agency are consistent regarding the procuring cause doctrine: the agent must set a sale in motion and complete his performance under the parties' agreement. The trial court concluded that Mr. Miller met satisfied the first requirement, but found that he did not complete his performance on the at-issue jobs.

Accordingly, the trial court erred in granting Mr. Miller an award under the procuring cause doctrine.

The trial court also erred in awarding Mr. Miller attorney fees and costs pursuant to RCW 49.48.030 and in denying the Company's motion for attorney fees pursuant to MAR 7.3.

RESPECTFULLY SUBMITTED this 19th day of July, 2013.

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PAUL M. WOLFF, et al

Appellant

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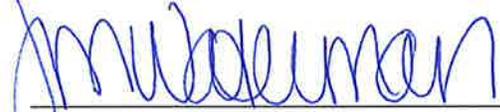
I, Jody M. Waterman, legal assistant to counsel for Defendants/Appellants Paul Wolff Co. declare that on July 22, 2013, I served the following documents on D.R. Rob Case, attorney for Respondent, via facsimile (509) 457-1027 and email rob@lbplaw.com:

1. Reply Brief of Appellant.

I further declare that on this date a hard copy of the same was also placed in the U.S. (First Class) Mail by 5:00 P.M. (PST).

DATED: 7/22 2013

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