IN THE COURT OF APPEALS OF IOWA

No. 0-649 / 00-254
Filed January 10, 2001

DAVIS INSURANCE AGENCY, INC.,
Plaintiff-Appellant,

vs.

ROBERT J. BARNES,
Defendant-Appellee.

FILED
JAN 10 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, James W. Brown, Judge.

Plaintiff insurance agency appeals from the district court ruling awarding the defendant agent damages on his counterclaim alleging agency breached his employment agreement. **AFFIRMED; REMANDED.**

William B. Serangeli and Jason C. Palmer of Smith, Schneider, Stiles & Serangeli, P.C., Des Moines, for appellant.

Mark McCormick of Belin, Lamson, McCormick, Zumbach, and Flynn, P.C., Des Moines, for appellee.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

ZIMMER, P.J.

Plaintiff Davis Insurance Agency, Inc. appeals from the district court ruling awarding the defendant agent, Robert Barnes, damages on his counterclaim alleging the agency breached his employment agreement. The agency contends the district court erred in ruling that certain insureds were excluded from the computation of Barnes's severance payments provided in his employment agreement. It also argues there was not substantial evidence to support the district court's award of future damages to Barnes. Barnes seeks post-trial and appellate attorney fees. We affirm and remand for a determination of the attorney fee issue.

The trial court found the following facts. The Davis Insurance Agency is an independent insurance agency located in Des Moines, Iowa. It deals in property and casualty insurance. In the early 1990s, Robert Barnes became associated with the Davis agency; he was considered an independent contractor, not an employee. He did not maintain an office at the agency and did not rely on Davis for clerical help or other services. The purpose of Barnes's affiliation with Davis was to utilize the agency's contracts with various insurance carriers to underwrite insurance for his clients. The Davis agency in turn received a percentage of Barnes's commissions.

In 1993, Barnes became interested in a proposal by the Maryland Insurance Group for underwriting property and casualty insurance. Davis declined to become involved but Barnes elected to proceed. The agency permitted him to proceed although it would not receive a commission on any insurance underwritten by MIG.

In August of 1994, Barnes moved his office to the Davis agency and agreed to pay $200 per month in rent and other costs. He continued to write business through MIG and retained all commission income derived from those clients. Around March of 1995, certain potential legal problems with the independent contractor relationship arose and all of Davis's sales people were requested to become employees and sign an employment contract. Barnes signed the agreement.

In 1997, MIG withdrew from the property and casualty business in Iowa. This withdrawal meant that Barnes had to seek other insurers for the MIG clients. The parties agree that, at that time, Barnes owned the MIG 'book of business' and was free to place those clients with any underwriter. In the insurance industry, a "book of business" is basically a list of insureds, their insurance policies and expiration dates. It is considered a valuable asset. The value of the book includes the salesperson's relationship with the clients and the recognized tendency of clients to renew existing policies on their expiration, thus creating a future stream of commission income for the owner of that book of business. Barnes chose to place the "Maryland book of business" with companies represented by Davis, so the agency commenced receiving commissions on that business. As a result, Barnes was no longer required to pay rent and other costs.

On February 26, 1998, Barnes gave his written resignation to Davis. His resignation included his election to purchase his book of business from the agency, as provided in paragraph 17 of his employment agreement. This lawsuit arose from the parties' inability to agree on the appropriate purchase price for the

book of business under the formula contained in the contract. Barnes contended the Maryland book of business is excluded from the calculation of the purchase price. Davis insists that it should be included, increasing the amount Barnes would have to pay. Davis filed suit against Barnes on June 9, 1999, alleging he violated the terms and conditions of a restrictive covenant in his employment agreement by soliciting its clients to transfer their business to a competitor agency with which Barnes was newly affiliated. Barnes subsequently counterclaimed, alleging Davis breached the employment agreement and he suffered damages.

On July 28, 1998, the district court granted Davis a preliminary injunction preventing Barnes from soliciting Davis clients. Trial commenced on August 23, 1999, and the case was submitted to the court the next day. On October 27, 1999, the court entered its findings and judgment. It awarded Barnes damages in the amount of $71,326, of which $49,409 represented future loss of income. The court also ordered Davis to sell Barnes's book of business to him for $41,590.59. Thus Barnes received a net award of $29,735.41. The district court dismissed Davis's claims. Davis now appeals. It argues the district court erred in ruling that the MIG insureds were excluded from the computation of Barnes's severance payments (the cost of his book of business) under the contract. It also contends there was not substantial evidence in the record to support the trial court's award of future damages to Barnes. Barnes requests post-trial and appellate attorney fees.

I. Scope of Review. We review the decision of the district court after a bench trial for errors of law. *See Collins Trust v. Allamakee County Bd. of*

Sup'rs., 599 N.W.2d 460, 463 (Iowa 1999). We are bound by the trial court's findings of fact if they are supported by substantial evidence. *Id.* (citation omitted). We are not bound, however, by the trial court's application of legal principles or conclusions of law. *Id.* More particularly, in contract cases, we generally review the construction and interpretation of a contract as a matter of law. *Hartig Drug Co. v. Hartig,* 602 N.W.2d 794, 797 (Iowa 1999). Thus, we are not bound by the construction or interpretation made by the trial court. *Id.* However, if the interpretation was predicated upon extrinsic evidence, the findings of the trial court are binding on appeal if supported by substantial evidence. *Id.* (citations omitted). We conclude the interpretation of the contract here was a question of fact.

II. Cost of "Maryland Book of Business." The district court found that Barnes was at all times the owner of what is referred to as the "Maryland book of business," or the clients who were formerly insureds of MIG that Barnes transferred to Davis insurers in 1997. It also determined Davis's erroneous inclusion of the Maryland book of business in its demand for payment from Barnes was a breach of the employment agreement. Paragraph 3 of the contract provides "that Barnes may continue his representation of Maryland Insurance Group, and that this business is the exclusive property of Barnes and shall be excluded from the computation of 'Severance Payments' provided for herein." On appeal, the agency contends that once the "Maryland Insurance Group" ceased to exist and those insureds became a part of Davis Insurance, this provision had no legal effect thereafter.

The trial court correctly concluded Barnes retained ownership of the

Maryland book of business. It is uncontroverted Barnes owned the Maryland book of business when he entered the employment agreement. Paragraph 3 of the agreement recognizes this fact. The ownership would not have been affected if in 1997, Barnes had chosen to renew the MIG business with a different agency. Unless something in the contract took ownership of the MIG book from Barnes and gave it to Davis, expert testimony indicated that the custom in the Iowa insurance industry is that Barnes retains ownership of the MIG book of business, even when he placed it with other companies through Davis. We find nothing in the contract which could be construed to take this ownership away.

We disagree with Davis's contention that the Maryland book of business lost its character as a group once MIG ceased to do business in Iowa and thus performance was essentially 'impossible.' First of all, it appears only that MIG ceased to do business in Iowa. There is no evidence it ceased to exist as a company. Second, the Maryland Insurance Group itself was not a subject of the employment agreement, except as it is used to refer to a particular group of insureds. A book of business contains the insureds' names and policy information. While those individuals were no longer insured through MIG, they could be traced and thus they retain their character as a group. It is known which individuals were insured through MIG. The subject matter of the agreement has not really ceased to exist, as it did in cases cited by Davis in its brief. *See, e.g., Lorillard v. Clyde,* 37 N.E. 489 (N.Y. 1894). We affirm on this issue.

III. Future Damages. The district court concluded that Barnes, as a result of the breach and issuance of the temporary injunction, would lose future

commissions and would not acquire any additional part of the book of business that he was denied because of the injunction. The court projected this loss for five years. Davis contends this award was error. It asserts that the standard of damages for wrongful discharge applies and that damages for future loss of income are only permitted if an employee's new job provides less pay than the job from which he was discharged.

We find this standard inapplicable. The correct rule for contract damages is characterized as 'benefit of the bargain,' or placing the damaged party in as good a position as he would have occupied had there been no breach. *See Midland Mut. Life Ins. Co. v. Mercy Clinic, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998). Barnes demonstrated that he lost $17,534 in commission income per year because of Davis's refusal to convey the book of business and Davis's procurement of the temporary injunction. In the interim, a substantial number of Barnes's former clients took their business to other agencies and some stayed with Davis. Crediting Davis with the full purchase price of the book of business did not compensate Barnes for the loss of those clients. It appears doubtful whether Barnes can recover any of this business.

Barnes provided a reasonable basis from which the amount of future damages could be approximated. From June 1, 1997, to June 1, 1998, Barnes earned commission income of $26,760. His commission income for the following twelve-month period was $9,226. The difference between these two amounts is $17,534. The trial court then projected this loss for five years, evidenced by past lost income, fragmentation of the book of business, and uncertainty whether Barnes would be able to retrieve any of the lost commission stream from his

book of business. We conclude the award was supported by substantial evidence. We affirm on this issue.

IV. Attorney Fees. The district court awarded Barnes attorney fees and costs through October 29, 1999, the date of its ruling. Barnes contends he is entitled to post-trial and appellate attorney fees. We remand to the district court to determine the award of attorney fees, if any, for Barnes's post-trial and appellate attorney fees.

AFFIRMED; REMANDED.