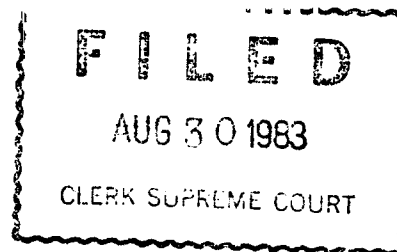


IN THE COURT OF APPEALS OF IOWA



FRED J. DOWIE, JR.,)

Plaintiff-Appellant,)

Filed August 30, 1983

vs.)

ELDON R. HOLLAND,)

Defendant-Appellee.)

3-186
 2-69145

Appeal from Polk District Court - John N. Hughes, Senior Judge.

Plaintiff sued under Iowa Code chapter 91A (1981) to recover compensation allegedly owed him in the form of commissions on renewals of policies the plaintiff had sold before his resignation. REVERSED AND REMANDED.

Larry Seckington and Thomas J. Levis of Brick, Seckington, Bower, Swartz & Gentry, Des Moines, Iowa, for plaintiff-appellant.

James P. Piazza of Piazza & Holmes, Des Moines, Iowa, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel and Hayden, JJ.

PER CURIAM

The plaintiff, who was formerly employed by the defendant to sell insurance, sued under Iowa Code chapter 91A (1981) to recover compensation allegedly owed him in the form of commissions on renewals of policies the plaintiff had sold before his resignation. The trial court held that the plaintiff had lost his contractual right to those renewal commissions because his unrelated breaches of the parties' employment contract had prompted the defendant's justifiable termination of that contract. We reverse and remand.

The plaintiff was formerly employed by the defendant to sell insurance. The employment contract had provided that the plaintiff would be compensated by commissions.

After the plaintiff resigned, a dispute arose between the parties relating to the plaintiffs' rights to compensation under the parties' contract. One of the questions was whether the contract entitled the plaintiff to commissions on renewals (occurring after his resignation) of policies the plaintiff had sold during his employment.

The plaintiff filed the present lawsuit based on the Iowa Wage Payment Collection Act, Iowa Code chapter 91A. That statute provides among other things that employees have certain rights to the payment of back wages upon termination.

By agreement of the parties, the trial of this case was limited to the question whether the plaintiff is entitled to commissions on renewals occurring after his resignation. The parties apparently contemplated that the determination of this question might resolve all of their disputes and that any issues which did remain could be tried later in a separate trial.

The trial court, acting as finder of fact, ruled in defendant's favor on the question noted above. The trial court concluded that the plaintiff had breached the parties' contract when he failed to settle the \$909.71 debit balance of his business account after demand for payment by the defendant, failed to surrender

his license, and failed to return the policyholder lists and sales information and materials. Plaintiff thereby lost his rights under the contract, including the right to commissions on renewals occurring after his resignation.

The plaintiff has appealed from this ruling. He contends the trial court erred by failing to consider the effect of chapter 91A; he asserts the commissions on renewals were wages due him under that statute. In response, the defendant-appellee argues that the plaintiff is not covered by chapter 91A because he is "a licensed person employed on a contractual basis for professional services;" such persons are excluded from the statute's definition of "employee" and therefore, from the statute's coverage. The defendant also argues that even if chapter 91A does apply to this case, the trial court was correct in concluding that the plaintiff was not entitled to renewal commissions because of his breach of the parties' contract and the defendant's consequent justifiable termination of the contract.

Since this is an action at law, our review is on assigned error only. Metropolitan Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532, 535 (Iowa Ct. App. 1982).

I. Iowa Wage Payment Collection Act. Initially we are confronted with the question of whether the defendant, an insurance agent employed by a general insurance agent pursuant to a contract as a sub-agent, is an "employee" protected by the provisions of the Iowa Wage Payment Collection Law contained in Iowa Code chapter 91A. "Employee" is defined to mean "a natural person who is employed in this state for wages by an employer." Iowa Code § 91A.2(3) (1981). Specifically excluded from that category of persons are "licensed person[s] employed on a contractual basis for professional services." Iowa Code § 91A.2(3) (1981). Where the legislature provides definitions within a statute, those definitions are binding upon us in construing and applying the provisions of that statute. Cedar Memorial Park Cemetery Association v. Personnel Associates, Inc., 178 N.W.2d 343, 346 (Iowa 1970) (the legislature is its own lexicographer).

Although the legislature has provided a definition of "employee" as a guide in the application of chapter 91A, the courts must determine on a case-by-case basis whether a vocation falls within the "professional services" exceptions provided in the definition of "employee." See Halverson v. Lincoln Commodities, Inc., 297 N.W.2d 518, 522-23 (Iowa 1980) (two part test to determine whether a particular vocation qualifies as a profession).

In Halverson the court noted the changing meaning of the word "profession" and adopted a two-part test with which to determine whether a particular calling is a profession.

The first test is the preparation required. A profession requires more than mere training. It presupposes special mental and other attainments, special discipline and a liberal education, or its equivalent. The second test has to do with the purpose of the calling. A profession necessarily involves public service. Such service, though incidentally providing a livelihood, primarily has to do with furnishing for others a needed faculty which they cannot provide, at least as well, for themselves. In passing either test it must be borne in mind that something more is required than would suffice for a skill or a craft.

Id. at 523. The court in Halverson left it up to the trial court to apply the test upon remand after reversal for an improvident grant of summary judgment. It is true, as the defendant contends, that the adoption of those tests was not necessary for the disposition of that case. The court, however, had adopted the tests to determine whether a vocation is a profession in its prior cases. State v. Winneshiek Co-op Burial Ass'n., 237 Iowa 556, 661, 22 N.W.2d 800, 803, 165 A.L.R. 1092, 1096 (1946).

The court in Cummings v. Pennsylvania Fire Insurance Company, 153 Iowa 579, 586-89, 134 N.W. 79, 82-83 (1912), applied these tests to a fire insurance agent to determine whether that vocation was a profession. (This determination was necessary to determine the admissibility of a writing as having been written in a "professional capacity.") These tests were not clearly articulated by the court in Cummings, but its analysis was primarily concerned with the preparation required

and the purpose of the calling. The court noted that an agent is an employee of the insurer and not of the insured, and all that is exacted of him is that he act with fidelity in negotiating as the representative of his principal with those desiring to obtain insurance. Further, "[h]is duties are to fill out the blanks, countersign and report to the company what he has done, and make memoranda thereof . . . aside from this, he may solicit business and examine the property to be insured." Id. at 586, 134 N.W. at 82. The court found that those tasks required no special skill or learning and was in no sense professional. Formerly theology, law and medicine were specifically known as the professions, but, as the application of science and learning are extended to other departments of affairs, other vocations also receive the name. U.S. v. Laws, 163 U.S. 258, 266, 16 S. Ct. 998, 1001, 41 L. Ed. 151, 155 (1896). Although the term "profession" is an expanding one, we believe the Cummings court's determination is still valid.

We recognize the increased training that many insurance agents undergo to improve their sales and administrative abilities. That training, however, does not rise to the level of a special discipline or a liberal education. Moreover, the second test in determining whether a vocation is a profession is not satisfied in this case. The calling does deal with the public, but that service is not merely incidental to a livelihood. It is the livelihood. As noted above by the Cummings court the agent is employed by the insurer rather than the insured. Cummings v. Pennsylvania Fire Insurance Company, 153 Iowa at 586, 134 N.W. at 82. The vocation of insurance agent is not a profession within the meaning of the exception contained in Iowa Code § 91A.2(3). The plaintiff is an "employee" within the meaning of that section. The Iowa Wage Payment Collection Law, therefore, applies to this action brought by the plaintiff insurance agent to collect commissions allegedly owing and due from his employer.¹ The trial court erred in

¹ It has been argued that in order for the exception in Iowa Code § 91A.2(3) to apply, the person must be licensed, engaged in the practice of a profession, and an

not considering this case an action under Iowa Code chapter 91A.

II. Breach of Contract. The defendant asserts that even assuming the remedies of Iowa Code § 91A were applicable to this case, the trial court was correct in not applying those remedies because the plaintiff was not entitled to renewal commissions under the contract. Because this issue may recur on remand we comment briefly on it.

The defendant asserted the plaintiff breached the contract under paragraph 10 of the employment contract (failure to return policyholder lists and supplies) and under paragraph 16 (failure to pay deficit in business account upon termination). The defendant argues that under the contract plaintiff's rights to renewal commissions was not a vested right but rather a contractual right which can be enforced only upon an affirmative showing by plaintiff that he has carried out the terms of the contract and has earned the renewal commissions provided for therein. McPherrin v. Sunlife Assurance Co., 219 Iowa 159, 161, 257 N.W. 316, 317 (1934). It is true that when recovery is sought on an express contract, the express contract determines the rights of the parties. It is also true that a contractual right to particular renewal commissions does not vest until the premiums are paid. Id. at 161, 257 N.W. at 317, cited in Glass v. Minnesota Protective Life Insurance Co., 314 N.W.2d 393, 397 (Iowa 1982). Not every breach of contract affords a ground for rescission. It will not be granted for a mere breach not so substantial as to defeat the object of the parties in making the contract. Maytag Company v. Alward, 253 Iowa 455, 464, 112 N.W.2d 654, 659

independent contractor. See Comment, Applying the Iowa Wage Payment Collection Law: Toward an Objective Determination of Protected "Employees", 68 Iowa L. Rev. 159, 170 (1982). This interpretation is consistent with the finding that the legislative purpose was remedial and the exception should be narrowly construed to permit broad coverage by the statute. There may be cases where a "professional" is employed full-time by an employer which warrant the application of the remedial provisions of this statute. We do not, however, find it necessary to reach that issue under the facts of this case.

(1962) (an action in equity to rescind). Similarly, in order to cancel a contract as a result of a breach by the other party, the breach must be material. See Pillsbury Company v. Ward, 250 N.W.2d 35, 41 (Iowa 1977); Nova Springs Cooperative Company v. Brandan, 247 N.W.2d 744, 749 (Iowa 1976) (requirement for material breach in order to repudiate the contract under the Iowa Uniform Commercial Code).

The plaintiff destroyed the customer lists and supplies when he terminated his employment relationship with the defendant. This was the same method by which he had, without objection, disposed of these materials after the termination of a previous period of employment with the defendant under an identical contract. The trial court found this to be a breach of contract. Findings of fact by the trial court have the effect of a special verdict and if supported by substantial evidence they are binding on us and will not be disturbed. Iowa R. App. P. 14(f)(1). However, we are not bound by trial court determinations of law. Nora Springs Cooperative Company v. Brandau, 247 N.W.2d at 747. Upon the facts presented at trial as found by the trial court, the alleged breach of contract in destroying the customer lists and supplies was not a material breach which would allow the defendant to cancel the contract. Under these facts the proper remedy was to seek damages for any alleged breach.

Defendant also asserted that the plaintiff's failure to pay his business account deficit upon termination of his employment constituted a breach of contract of the employment contract. Because of the delay in the accounting system, the plaintiff's account had not been credited with renewal premium commissions from renewal premiums received in the three month period prior to the plaintiff's resignation. (See McPherrin v. Sun Life Assurance Company, 219 Iowa at 162, 257 N.W. at 317 (right to renewal premium commissions vest upon payment by the insured to the company)). The defendant testified that the plaintiff's business account would have been credited with those renewal premium

commissions at the end of February had the plaintiff continued as an employee of the defendant. On April 28, 1981, the defendant sent a letter to the plaintiff requesting him to make arrangements to pay the deficit business account balance that was owing on the date plaintiff terminated his employment.

The trial court found that plaintiff had breached the terms of the contract in failing to repay the deficit in his business account under paragraph 16. Paragraph 16 provides: "16. In the event of termination of this agreement by either party the AGENT [the plaintiff in this case] agrees that he will immediately reimburse the GENERAL AGENT for any money due the GENERAL AGENT [the defendant in this case]." The determination of the amount owed took a considerable amount of time. Neither party was aware of the amount owed at the time of termination of employment by the plaintiff in February. After computation of the amount owed, the defendant sent the plaintiff the letter requesting that arrangements be made for payment. In early May, when plaintiff failed to respond, the defendant treated the contract as terminated (as to the payment of renewal commissions) under paragraphs 13 and 14 of the contract as of the date the plaintiff had terminated his employment in February.

Prior to the plaintiff's failure to repay the deficit of his business account, however, the defendant failed to pay the plaintiff or credit the plaintiff's business account with the renewal premium commissions owed for the three-month period prior to plaintiff's voluntary termination of employment. See Iowa Code § 91A.4 (wages actually earned on commission basis must be paid not more than thirty days after termination). The trial court's decision, therefore, necessarily included a finding under the provisions of the contract, that plaintiff's failure to make arrangements to pay the deficit in his business account in response to the defendant's request in April constituted a breach of the contract on the date plaintiff terminated the employment relationship in February.

When the question is simply one of construction of a written instrument, unaided by evidence, the question is one of law and not of fact, and the appellate

court is not bound by a reasonable construction of the instrument if it believes another construction should be applied. Allen v. Highway Equipment Company, 239 N.W.2d 135, 139 (Iowa 1976). In the construction of written contracts, the cardinal principle is that the intent of the parties must control; and except in cases of ambiguity, this is determined by what the contract itself says. Iowa R. App. P. 14(f)(14). Under paragraph sixteen the plaintiff was obligated in the event of termination of the agreement by either party to immediately reimburse the defendant for any money due. Each party, in this case, purported to terminate the agreement at different times. Without deciding which termination would trigger this provision, we hold that in any event a breach of paragraph sixteen could not have occurred until the amount owing, if any, was determined by the defendant. Under this construction it is apparent that plaintiff's alleged breach in failing to repay the deficit balance in his business account did not occur until at least late April. It is undisputed that the defendant did not credit plaintiff's account or pay the plaintiff the amount of premium renewal commissions due for the three month period prior to the plaintiff's termination of employment.²

"Not only is the party guilty of the first breach of an entire and indivisible contract containing dependent covenants and promises precluded from recovering on the contract . . . but he must answer in some appropriate manner for the loss or injury resulting from such breach to the opposite party The party who commits the first breach is also deprived of the right to complain of a subsequent breach by the opposite party." 17A C.J.S. Contracts § 458 (1963). Here it is clear that the alleged breach by the plaintiff occurred in early May, while the failure by defendant to pay plaintiff the renewal premium commissions occurred in late February. Under our construction of the provisions of the contract, the trial

² We do not determine on this appeal the proper manner of payment under the provisions of the Iowa Wage Payment Collections Law in Iowa Code chapter 91A.

court's determination that the plaintiff breached the contract is not supported by substantial evidence. See City of Davenport v. Pub. Emp. Rel. Bd., 264 N.W.2d 307, 311 (Iowa 1978) (evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion). At the time plaintiff's rights vested in the renewal premium commissions, he had materially complied with the terms of the contract.

We remand the case to the trial court for further consideration in conformity with our decision.

REVERSED AND REMANDED.

All judges concur except Donielson and Hayden, JJ., who dissent.

DONIELSON, J. (dissenting)

I believe the trial court was justified in not applying the provisions of Iowa Code ch. 91A because I believe plaintiff, as an insurance agent, was "a licensed person employed on a contractual basis for professional services" and as such is excluded from the definition of "employee" under Iowa Code § 91A.2(3). Accordingly, I dissent.

The majority concludes that an insurance agent is not engaged in a "profession" as that term is referred to in § 91A.2(3). I agree that insurance agents historically have not been considered as professionals; see, e.g., Recht v. Graves, 257 App. Div. 889, 12 N.Y.S.2d 158 (1939), leave to appeal denied 281 N.Y. 886, 22 N.E.2d 767. It is also true, however, that the notion of "profession" has been expanded beyond the traditional "learned professions" of theology, medicine and law. As noted in 72 C.J.S. Profession p. 1219 (1951): "[t]he term 'profession' is now generally applicable to accountants, architects, chemists, editors, electricians, engineers, journalists, landscape architects, and pharmacists when engaged in the practice of their vocations (footnotes omitted)." It cannot be contended, of course, that everyone remotely connected with any of the above occupations is automatically a professional. For example, the fact that a bookkeeper and a certified public accountant may at times do similar work does not make the former a professional in the sense that an accountant is. In like manner, a part-time cub reporter and the managing editor of a major metropolitan newspaper, although both involved in journalism, cannot be said to have the same status as professionals. In other words, I do not believe it is enough to simply categorize a particular occupation (for example, the insurance industry) as either wholly professional or wholly nonprofessional. Rather, I would examine various factors to determine whether someone in a particular field in a broad occupational group should be deemed a professional. These factors would include the extent of one's

education and any advanced degree or professional designations (for example, in the insurance industry, CLU or CPCU), the scope and nature of one's duties and responsibilities, and one's contractual arrangements. These factors are generally comparable to and should be used in conjunction with those employed by the supreme court in Halverson, 297 N.W.2d at 523.

The majority fails to recognize the increasing expertise involved in insurance education today; for example, training in estate planning, tax consequences, probate matters, the rapidly-expanding field of pension plans, employer-employee contracts, and other highly specialized and technical areas of the insurance business. Applying these factors and considering the expanded licensing and continuing education requirements and the modern trend to increase the applicability of the "professional" designation to various occupations, I believe that an insurance agent may indeed be a professional and that plaintiff agent in this case actually is a professional. Plaintiff here had two years of college education as well as other training geared more specifically to insurance agency. Although this is admittedly a somewhat marginal set of circumstances, I believe it is enough to meet the Halverson elements. The majority does not really dispute that plaintiff's calling passes the "preparation" requirement although I cannot accept its apparent conclusion that a profession necessarily entails "a special discipline or a liberal education." Moreover, I believe insurance agency involves public service. In providing financial protection for people and businesses against a variety of unforeseen circumstances, insurance agency "primarily has to do with furnishing for others a needed faculty which they cannot provide, at least as well, for themselves." Halverson, 297 N.W.2d at 523.

I would affirm the trial court.

Hayden, J., joins this dissent.