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NO. COA11-803
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

ROSS A. PANOS,
Plaintiff,

v.

Guilford County
No. 06 CVS 5771

TIMCO ENGINE CENTER, INC.,
Defendant.

Appeal by Defendant from judgment entered 17 December 2010 and order entered 21 December 2010 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 17 November 2011.

Hill Evans Jordan & Beatty, PLLC, by Benjamin D. Ridings and R. Thompson Wright, for Plaintiff-Appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Bryan Starrett and Robert J. King, III, for Defendant-Appellant.

BEASLEY, Judge.

Defendant appeals from a 21 December 2010 order denying its 20 December 2010 motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, and a series of

decisions made during the trial of this case. For the foregoing reasons, we affirm.

On 18 April 2006, Ross A. Panos (Plaintiff) filed a complaint against his former employer, Timco Engine Center, Inc. (Defendant), asserting claims for breach of contract, violation of the North Carolina Wage and Hour Act, and violations of N.C. Gen. Stat. § 75-1, *et seq.* Defendant responded by filing an answer and counterclaim dated 26 June 2006, alleging breach of contract, violation of the North Carolina Trade Secrets Protection Act, and asking for injunctive relief. Plaintiff filed a reply on 1 August 2006. By order filed 6 June 2008, the Honorable Catherine C. Eagles granted summary judgment for Defendant with respect to Plaintiff's Wage and Hour Act claim and Plaintiff's N.C. Gen. Stat. § 75-1 claim, and granted summary judgment for Plaintiff on Defendant's Trade Secrets Protection Act claim and on Defendant's claim for temporary, preliminary, and permanent injunctive relief. Both parties appealed the 6 June 2008 order granting partial summary judgment, and this Court affirmed the order in *Panos v. Timco Engine Ctr., Inc.*, 197 N.C. App. 510, 677 S.E.2d 868 (2009).

After a trial on the remaining claims, a Guilford County jury found that Defendant breached the employment contract by

terminating Plaintiff without just cause, and awarded damages of \$150,000. Defendant then filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial on 20 December 2010. This motion was denied on all counts by order filed 21 December 2010. From this order, Defendant now appeals.

I.

Defendant first argues that the trial court committed reversible error in allowing Plaintiff to recover all unpaid installments of severance pay. We disagree.

Plaintiff's employment agreement with Defendant provided that if Plaintiff was fired without cause, Defendant would be required to pay Plaintiff an amount equal to the monthly portion of his salary each month for one year following his termination. When Plaintiff filed the original complaint in this case, on 18 April 2006, only the payments for January through April of that year had accrued. However, the complaint asked, *inter alia*, for damages in an amount equal to Plaintiff's entire base salary. At the close of Plaintiff's evidence at trial, Defendant moved to dismiss any claim to severance payments for the remaining months of 2006, arguing the complaint did not cover the payments for those months, and the contract did not have an acceleration

clause. Plaintiff sought to amend the complaint to seek all of the installments that would have become due, and the trial court allowed this amendment in its discretion.

Defendant contends that Plaintiff's claims for the remaining payments were barred by the statute of limitations by the time the amendment was made, and thus could only be considered if they related back to a time when the claims were ripe. Defendant further argues that (1) amendments are reserved for claims that were ripe at the time the complaint was filed and so Plaintiff's change to the complaint must be considered a supplement, and (2) supplemental pleadings are not permitted to relate back so Plaintiff's claims must be dismissed. In support of this argument, Defendant relies on our decision in *Williams v. Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971). There, we held that supplemental pleadings alleging a slander *per quod* claim did not relate back "because at the time the suits were instituted no actionable damages existed, nor did the claims alleged become actionable within the time provided by statute for the instituting of suits in slander actions." *Id.* at 392, 179 S.E.2d at 325.

Approximately a decade after *Williams* was decided, our Supreme Court addressed the question of whether supplemental

proceedings can relate back in *Burcl v. Baptist Hospital*, 306 N.C. 214, 228, 293 S.E.2d 85, 93 (1982), and held that "for relation back purposes, we shall treat supplemental pleadings filed pursuant to Rule 15(d) the same as amendments filed pursuant to other sections of Rule 15." In so holding, the Supreme Court recognized that older cases answered this question differently, and overruled the holdings of such cases. *Id.* at 216, 293 S.E.2d at 86.

Thus, the only question is whether Plaintiff's supplement to his complaint meets the requirement for relating back articulated in N.C. Gen. Stat. § 1A-1, Rule 15(c) (2011), which is that the original pleading "give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." We find that Plaintiff's original complaint gave Defendant notice that he intended to seek recovery for the entire year's worth of severance payments as Plaintiff requested damages equal to his yearly salary. Therefore the supplement relates back to the original complaint. Plaintiff's recovery is accordingly not barred by the statute of limitations, so Defendant's argument is overruled.

II.

Defendant next contends that the trial court gave an erroneous jury instruction that misstated the law and usurped the role of the jury. We disagree.

Plaintiff argues that Defendant has not properly preserved this issue for appeal by failing to state distinctly the grounds of its objection to the jury instruction at trial. See N.C. R. App. P. 10(a)(2); *Burchette v. Lynch*, 139 N.C. App. 756, 765, 535 S.E.2d 77, 83 (2000). Assuming, *arguendo*, that the objection was properly preserved we find that Defendant has not shown that if there was error, it resulted in prejudice to Defendant.

Jury instructions must be considered and reviewed in their entirety; the instructions will not be dissected and examined in fragments. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Robinson v. Seaboard System Railroad, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987) (internal citation omitted).

Defendant argued that Plaintiff breached his employment agreement when seeking other employment opportunities by contacting Defendant's customers, competitors, and suppliers. According to Defendant, these contacts occurred during business

hours, originated from Plaintiff's company-issued computer, and revealed confidential personnel and financial information about Defendant. In regard to this issue, the trial court instructed the jury as follows:

[T]he mere fact that an employee applies for a job with another business or otherwise makes inquiries about going to work with other businesses is not, by itself, a basis for terminating the employee for cause. That fact could, however, be a relevant circumstance, and, when taken in combination with other facts and circumstances . . . be sufficient to show cause. . . .

The trial court did not instruct the jury that soliciting employment could *never* be cause for termination, as Defendant asserts. The trial court only stated that soliciting employment alone is not enough to constitute cause, but it could be enough when combined with other factors. Here, Defendant's entire argument was not only that Plaintiff sought other employment, but that he did so using a company-issued computer during business hours, and that in doing so, he revealed Defendant's confidential personnel and financial information. Based on the trial court's instruction, the jury certainly could have found that the combined circumstances constituted just cause for terminating Plaintiff. Thus, assuming the instruction was erroneous, Defendant did not suffer any prejudice. The decision

as to whether Plaintiff's actions amounted to just cause for his termination remained within the jury's province. This argument is overruled.

III.

Defendant's third argument on appeal is that the trial court improperly prevented cross-examination of the Plaintiff regarding certain corporate income tax records admitted into evidence. We disagree.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 (2011), otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court's decision on whether to exclude evidence under Rule 403 "will not be grounds for relief on appeal unless it is 'manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.'" *State v. Love*, 152 N.C. App. 608, 614-15, 568 S.E.2d 320, 325 (2002) (quoting *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993)). In order to establish prejudice arising from an evidentiary ruling under Rule 403, Defendant must show that "a different outcome

likely would have been reached" had the trial court admitted the contested evidence. *Id.* at 615, 568 S.E.2d at 325 (citations omitted).

In the case *sub judice*, the trial court limited the cross-examination of certain matters related to Plaintiff's tax returns, on the basis that questions about the information in tax returns is often confusing to the jury. The trial court did allow a number of questions about the tax returns, as they related to Plaintiff's work for other businesses. Defendant does not specifically argue that prejudice resulted from this limitation, nor does its argument establish prejudice on its face. The jury was able to hear information regarding Plaintiff's tax returns, but the scope of questions on that information allowed during cross-examination was limited. The trial court did not abuse its discretion in precluding some questioning about Plaintiff's tax information.

IV.

Finally, Defendant argues the trial court erred in denying its motion for attorney's fees pursuant to the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.22(d). We disagree.

N.C. Gen. Stat. § 95-25.22(d) (2011) provides, in relevant part, that "[t]he court may order costs and fees of [the Wage

and Hour Act] action and reasonable attorneys' fees to be paid by the plaintiff if the court determines that the action was frivolous." This Court has stated that "[t]his language shows that the decision whether to award the fees is discretionary with the trial court if it finds the action to be frivolous." *Rice v. Danas, Inc.* 132 N.C App. 736, 742, 515 S.E.2d 97, 101 (1999).

Defendant's argument that Plaintiff's claim was frivolous is premised on Plaintiff's continued pursuit of his claim even after our 2008 decision in *Sawyer v. Market Am., Inc.*, 190 N.C. App. 791, 797, 661 S.E.2d 750, 754 (2008), where we held that "the North Carolina Wage and Hour Act does not provide a private cause of action for a nonresident who neither lived nor worked in North Carolina." Plaintiff asserts that his case was distinguishable because he worked in North Carolina part of the year and participated in almost daily conference calls with Defendant's North Carolina-based management. This Court rejected this argument in *Panos v. Timco Engine Ctr., Inc.*, 197 N.C. App. at 517-18, 677 S.E.2d at 874, which arose from an earlier appeal in this case, and found that Plaintiff's daily conference calls did not bring him within the purview of our Wage and Hour Act. When Plaintiff filed his complaint in 2006,

alleging Defendant violated the North Carolina Wage and Hour Act by failing to pay the severance due under the employment agreement, *Sawyer* had not been decided. Moreover, although the Court in *Panos* ultimately ruled that *Sawyer* controlled, the Court in *Panos* did recognize the "distinguishing fact" that "Plaintiff [in *Panos*] participated in almost daily conference calls with Defendant's Greensboro, North Carolina office[.]" Based on the foregoing, and regardless of the outcome of Plaintiff's appeal in *Panos*, we do not believe the trial court abused its discretion in determining that Plaintiff's attempt to distinguish *Sawyer* was not frivolous.

Defendant then sought attorney's fees as part of the relief requested in the 20 December 2010 post-trial motion. The trial court denied this request which was within its discretion.

Affirmed.

Judges ERVIN and THIGPEN, JR. concur.

Report per Rule 30(e).