[Cite as *Harris v. Noveon, Inc.*, 2010-Ohio-674.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93122

ROY HARRIS

PLAINTIFF-APPELLEE

vs.

NOVEON, INC., NKA LUBRIZOL ADVANCED

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-626060

BEFORE: McMonagle, J., Kilbane, P.J., and Boyle, J.

RELEASED: February 25, 2010

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Elizabeth A. Grove
Suzanne F. Day
The Lubrizol Corporation
29400 Lakeland Blvd.
Wickliffe, OH 44092

ATTORNEY FOR APPELLEE

Douglas A. DiPalma
Cavitch, Familo & Durkin Co., LPA
1300 East Ninth Street, 20th Floor
Cleveland, OH 44114

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Noveon, Inc., nka Lubrizol Advanced ("Lubrizol" or the "business"), appeals the trial court judgments denying its motions for a directed verdict and judgment notwithstanding the verdict. We affirm.

I. Procedural History and Facts

{¶ 2} Plaintiff-appellee Roy Harris initiated this action against Lubrizol in June 2007. Relevant to this appeal, his claims were for breach of contract, promissory estoppel, and fraud. The case was based on Harris's claim that after negotiating with Lubrizol he was promised an uncapped bonus for the years 2003 through 2006, but was not paid the bonus in 2006.

{¶ 3} The case proceeded to a jury trial after the trial court denied Lubrizol's motion for summary judgment. The court denied Lubrizol's motions for a directed verdict on the promissory estoppel and fraud claims and submitted them to the jury. The jury found in favor of Lubrizol on Harris's breach of contract claim, but in favor of Harris on his promissory estoppel and fraud claims, and awarded judgment in favor of Harris and against Lubrizol in the amount of $265,104.33 and $1 in punitive damages. The jury also awarded Harris attorney fees; the parties subsequently agreed

to settle that issue for $109,000. The court denied Lubrizol's motion for judgment notwithstanding the verdict.

{¶ 4} The trial testimony demonstrated that Harris began working for the business in 1993. He was hired as the senior marketing manager for its plumbing products segment and worked in that capacity through 1997, when he was promoted to marketing manager for the plumbing products division. In his new role, Harris worked on "special projects" and reported to Michael Vaughn.

{¶ 5} During 1998, one of the special projects Harris worked on involved the evaluation of the Latin American market for the business's plumbing products. At that time, the business had little to no sales in that market; after a year-long study, the business determined that the Latin American market was not viable for its plumbing products.

{¶ 6} However, after making his own assessment of the Latin American market, in May 1999, Harris presented the business with his own plan. The business accepted his plan, and at the end of 1999, he was given sole responsibility for developing the business's plumbing segment in Latin America. Harris basically operated the business's Latin American market on his own and, for the most part, was successful.

{¶ 7} When Harris took over development of the Latin American market, he was on Lubrizol's standard capped bonus plan. In 2002, Harris

requested that he be given his own bonus plan based solely on sales in Latin America. Vaughn prepared a plan, offered it to Harris, and Harris accepted. The plan, based on the annual sales growth, was for the years 2002 through 2004, and was capped. Harris was paid under that plan in 2002.

{¶ 8} In 2003, Lubrizol removed its previously imposed bonus cap for its U.S. sales force. Harris accordingly suggested that his cap also be removed; his request was sent to Vaughn and Andy Auvil, another Lubrizol agent, in an April 8, 2003 email. Harris, Vaughn, and Auvil met to discuss the proposal. According to Harris, at that meeting, the three agreed to the terms of a plan regarding his bonuses. In essence, the plan included a graduated, uncapped bonus based on the dollar increase in the Latin American sales from the prior year, and was to be in effect for 2003 through 2006. Harris testified that it was particularly important to him that the plan continue through 2006 because that was the year he planned to retire.

{¶ 9} Harris was paid bonuses under the plan for the years 2003 and 2004; because sales in Latin America decreased from the prior year, he did not receive a bonus under the plan in 2005. The business reinstituted a cap on bonuses effective for 2006, however. Harris testified that he was under the impression that the change did not impact him because he was on his own individual plan and no one from Lubrizol informed him otherwise.

{¶ 10} In the beginning of 2006, a new Lubrizol agent, Jeff Cash, began supervising Harris. According to Harris, because he had a new boss, he sent an email to Cash and Auvil with the details of his uncapped bonus plan. Auvil then sent an email to Cash disputing Harris's claim of entitlement to an uncapped bonus. Shortly thereafter, Harris was informed by Cash that his 2006 bonus would be capped. The following day, Harris sent an email to Cash and Auvil stating that his bonus plan was effective through 2006 and expressing his displeasure with the business's intent not to honor it.

{¶ 11} The following week, Harris returned to Cleveland from Mexico to meet with Cash. According to Harris, he and Cash agreed that, subject to Auvil's approval, he would be paid an uncapped bonus for 2006. Cash then summarized the meeting to Auvil; Auvil disagreed with any plan to pay Harris an uncapped bonus for 2006.

{¶ 12} In June 2006, however, Harris and Auvil met, and according to Harris, Auvil confirmed that he would be paid an uncapped bonus for 2006. By August 2006, sales in Latin America were doing very well, and according to Harris, based on Auvil's assurances to him that his bonus for 2006 would be uncapped, he worked especially hard the rest of the year to maximize the profit. Specifically, it was Harris's contention that by August 2006 he would have been entitled to the business's capped bonus, but in reliance on the promise that his bonus would be uncapped, he took "additional trips to Latin

America, exposed himself to danger, sacrificed his time, and removed himself from family and friends in order to maximize his anticipated, uncapped bonus."

{¶ 13} On December 20, 2006, Harris sent an email to Auvil discussing the last orders of the year and reminding Auvil that he expected to be compensated for his efforts. According to Harris, Auvil responded by stating that he would be "compensated as we discussed."

{¶ 14} The Latin American sales for 2006 were in excess of $26,500,000. Based on the sales and uncapped plan, Harris expected to receive a $635,000 bonus. Auvil, however, authorized a $125,000 bonus, which was paid to Harris. Harris retired in 2008.

{¶ 15} Lubrizol motioned the court for a directed verdict at both the conclusion of Harris's case and all the evidence; both motions were denied. In regard to jury instructions, Lubrizol argued that the element of detrimental reliance necessary for both the promissory estoppel and fraud claims needed to follow the legal standard set forth in *Wing v. Anchor Media Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. The court rejected Lubrizol's argument.

II. Law

{¶ 16} In its first assignment of error, Lubrizol contends that the court erred in denying its motions for a directed verdict. In its second assignment

of error, it contends that the court erred when it denied its motion for judgment notwithstanding the verdict "because the verdict was tainted by jury instructions that failed to include the controlling law."

A. Standard of Review

1. Motions for Directed Verdict and Judgment Notwithstanding the Verdict

{¶ 17} Civ.R. 50 sets forth the standard for granting a motion for a directed verdict:

{¶ 18} "When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶ 19} The same standard applies to a motion for judgment notwithstanding the verdict. *Chem. Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 207, 556 N.E.2d 490. We employ a de novo standard of review in evaluating the grant or denial of a motion for directed verdict or a motion for judgment notwithstanding the verdict. *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399.

2. Jury Instructions

{¶ 20} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *Chambers v. Admr., Ohio Bur. of Workers' Comp.*, 164 Ohio App.3d 397, 2005-Ohio-6086, 842 N.E.2d 580, ¶6. The term abuse of discretion implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 21} In *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410, 629 N.E.2d 500, the Ninth Appellate District explained:

{¶ 22} "In determining the appropriateness of jury instructions, an appellate court reviews the instructions as a whole. *Bailey v. Emilio C. Chu, M.D., Inc.* (1992), 80 Ohio App.3d 627, 631, 610 N.E.2d 531; *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7, 16, 482 N.E.2d 955. If, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. *Ohio Farmers Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, paragraph six of the syllabus; *Stonerock v. Miller Bros. Paving, Inc.* (1991), 72 Ohio App.3d 123, 1340, 594 N.E.2d 94. Moreover, misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the

instructions are so misleading that they prejudicially affect a substantial right of the complaining party. *Becker v. Lake Cty. Mem. Hosp. West* (1990), 53 Ohio St.3d 202, 208, 560 N.E.2d 165; *Stonerock*, 72 Ohio App.3d at 134, 594 N.E.2d 94."

B. Detrimental Reliance and *Wing v. Anchor Media Ltd. of Texas*

{¶ 23} Lubrizol contends that Harris failed to prove the element of detrimental reliance required for claims of promissory estoppel and fraud. It relies on the Ohio Supreme Court case of *Wing v. Anchor Media Ltd. of Texas*, supra. Wing was hired as a television station executive and given an employee manual that stated his employment was at will; he signed a statement of confirmation indicating he understood his employment status. Wing claimed that during his tenure with the station, other executives at the station promised him he would have the opportunity to purchase equity in the station as soon as a new financing package was completed. Wing also claimed that he rejected other job offers with other stations during his tenure at the defendant station. Wing's employment with the defendant station was terminated prior to any opportunity for him to became an equity partner. He sued the station, asserting claims for breach of contract, promissory estoppel, wrongful discharge, and fraud.

{¶ 24} The Ohio Supreme Court held that, "'[s]tanding alone, praise with respect to job performance and discussion of future career development

will not modify the *employment-at-will doctrine*. * * *[.]'" (Emphasis added.) Id. at 110, quoting *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 543 N.E.2d 1212, paragraph three of the syllabus. The Court went on to state that, "Wing was never promised *job security*. Although Wing may have thought that the promise of a future opportunity to buy into the station meant job security, such a promise is not a promise of continued employment and, therefore, cannot reasonably be relied upon as such. Rather, such a promise is, at best, a promise relating to career development. Accordingly, we hold that a promise of future benefits or opportunities without a specific promise of continued employment does not support a promissory estoppel exception to the well-established doctrine of employment at will. * * * In the instant case, merely turning down other employment inquiries does not present a jury question of substantial detrimental reliance." (Emphasis added.) *Wing* at 110-11.

{¶ 25} In accordance with *Wing* and other cases following it,[1] Lubrizol contends that Harris's continued employment with the business, and his failure to seek, be offered, and turn down other employment, negates detrimental reliance. Harris, on the other hand, contends that *Wing* and its

[1]See, for example, the following cases from this court: *Stickler v. Keycorp*, Cuyahoga App. No. 80727, 2003-Ohio-283; *Onysko v. Cleveland Public Radio* (July 27, 2000), Cuyahoga App. No. 76484; *Srail v. RJF Internatl. Corp*. (1998), 126 Ohio App.3d 689, 711 N.E.2d 264; and *Eagleye v. TRW*, Inc. (Feb. 17, 1994), Cuyahoga App. No. 64662.

progeny "have meaning only when a plaintiff-employee is seeking to use promissory estoppel as an exception to the at-will doctrine in a wrongful discharge case." Harris notes that all the cases cited by Lubrizol were wrongful discharge cases in which the employer promised the employee a benefit to induce him or her to continue their employment or promised the employee a job for a specific duration. We agree with Harris that there is a distinction between wrongful discharge cases, where the alleged promise was one of job security, and cases where the alleged promise was of some benefit (e.g., a bonus or participation in a profit-sharing plan).

{¶ 26} *Rogers v. Natl. City Corp.*, Cuyahoga App. No. 91103, 2009-Ohio-2708, a recent decision from this court, considered a situation where an employee, who was not terminated, sued his employer for a bonus. In that case, when Rogers started his position at National City, he signed an offer letter wherein National City promised, among other things, that he would have the opportunity to participate in a bonus plan. The plan gave National City the authority to determine the amount of any award and the ability to amend or terminate the plan at any time. National City did not pay Rogers under the plan. After his resignation, he sued the bank alleging that he detrimentally relied on its promise of a bonus by staying with the bank instead of pursuing other employment opportunities.

{¶ 27} This court found that summary judgment was properly granted in favor of National City and against Rogers. Several factors present in that case, however, were not present here. First, there was no promise of a specific bonus amount in *Rogers*. In particular, this court found that "National City's broad representation that Rogers was '*eligible to participate* in a discrete incentive compensation plan for Loan Trading,' [fell] short of a clear and unambiguous promise giving rise to a promissory estoppel claim." (Emphasis added.) Id. at ¶22.

{¶ 28} Here, the record demonstrates that Harris negotiated a specific bonus for himself, which was based on the dollar increase in the Latin American sales from the prior year. The particulars were as follows: (1) if $800,000 more than the prior year, then the earned bonus would be $25,000, or 3.13% of the increase; (2) if $1,300,000 more than the prior year, then the earned bonus would be $40,000, or 3.08% of the increase; or (3) if $2,000,000 more than the prior year, then the earned bonus would be equal to 4.25% of the increase, with no cap. Thus, there was a clear and unambiguous promise in this case.

{¶ 29} The second factor that distinguishes *Rogers* from this case is that National City expressly stated that it had discretion to administer and modify its plan. Moreover, Rogers signed the employee handbook forms, thereby acknowledging that National City had the right to modify all its employment

policies and practices. This court held that, "[g]iven these disclaimers, we fail to see how Rogers could have reasonably believed that National City was forever precluded from modifying its administration of incentive compensation plans." (Citations omitted.) Id. at ¶23. In this case, there were no such disclaimers.

{¶ 30} The final distinction between *Rogers* and this case relates to detrimental reliance. Rogers's sole claim of detrimental reliance was that he gave up other opportunities and stayed at National City only because of its promise that he would be compensated under the bonus plan. Quoting *Wing*, this court held that "Ohio courts consistently recognize that a plaintiff's 'bare assertion that he gave up opportunities for other employment' is insufficient to establish detrimental reliance." (Citations omitted.) *Rogers* at ¶24. Under Lubrizol's theory, the *only* way an employee can demonstrate detrimental reliance in the employment context is to show that he was offered, and turned down, another employment opportunity. We disagree.

{¶ 31} In rejecting Lubrizol's contention, we note that neither *Wing* nor *Rogers* hold that being offered and turning down the offer are the *only* way that detrimental reliance in the employment context can be established. Rather, forebearance of other employment opportunities was the *sole* ground on which the employees in *Wing* and *Rogers* based their alleged detrimental reliance and, thus, the ground addressed by the Ohio Supreme Court and this

court. We disagree that the only way Harris could have shown detrimental reliance was to show that he was offered, and turned down, another employment opportunity.

{¶ 32} We further find that the trial court did not abuse its discretion in its instructions to the jury. The instructions on promissory estoppel were as follows:

{¶ 33} "A, Lubrizol Advanced Materials, Incorporated promised to Mr. Harris that he would be paid an uncapped bonus that depended on his sales growth numbers for the years 2003 through 2006 in exchange for his working and growing sales of Lubrizol Advanced Materials, Incorporated's products in Latin America and

{¶ 34} "B, Lubrizol Advanced Material Incorporated should reasonably have expected Mr. Harris to rely on the promise by sacrificing time, family, enjoyment and other opportunities as well as placing himself in danger while traveling to Latin America to sell Lubrizol Advanced Material, Incorporated's products and

{¶ 35} "C, Mr. Harris did reasonably sacrifice his time, family enjoyment and other opportunities as well as place himself in danger while traveling to Latin America to sell Lubrizol Advanced Materials, Incorporated's products in reliance upon the promise."

{¶ 36} The court instructed the jury on fraud as follows:

{¶ 37} "Fraud is a civil wrong. It is a deception practiced with a view to gaining an unlawful or unfair advantage.

{¶ 38} "Elements of fraud. Mr. Harris must prove by the greater weight of the evidence each of the following elements:

{¶ 39} "A, a false representation of fact was made with knowledge of its falsity or with utter disregard and recklessness about its falsity that knowledge may be found.

{¶ 40} "B, the representation was material to the transaction.

{¶ 41} "C, the representation was made with the intent of misleading Mr. Harris into relying upon it.

{¶ 42} "D, Mr. Harris was justified in relying on the representation and did, in fact, so rely.

{¶ 43} "E, Mr. Harris was injured and the injury was proximately caused by his reliance on the representation."

{¶ 44} The trial court defined justifiable reliance as follows: "Justifiable reliance. There is justifiable reliance in a representation when a person of ordinary care would rely on it under the same or similar circumstances."

{¶ 45} Black's Law Dictionary (5th Ed.Rev.1979) 1093, defines promissory estoppel as follows: "That which arises when there is a promise which promisor should reasonably expect to induce action or forebearance of a

definite and substantial character on part of promisee, and which does induce such action or forebearance, and such promise is binding if injustice can be avoided only by enforcement of the promise." The elements of fraud include: "[a] false representation of a present or past fact made by defendant, action in reliance thereupon by plaintiff, and damage resulting to plaintiff from such misrepresentation." Id. at 594.

{¶ 46} Upon review, "the instructions fairly and correctly state[d] the law applicable to the evidence presented at trial." *Wozniak* at 410. Accordingly, the court did not err by denying Lubrizol's motions for a directed verdict and judgment notwithstanding the verdict. Accordingly, Lubrizol's two assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and

MARY J. BOYLE, J., CONCUR