[Cite as *Dawson Ins., Inc. v. Freund*, 2011-Ohio-1552.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94660

DAWSON INSURANCE, INC.

PLAINTIFF-APPELLANT

vs.

THOMAS J. FREUND

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-687900

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: March 31, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, Dawson Insurance, Inc. ("Dawson"), appeals the trial court's judgment that entered a declaratory judgment in favor of defendant-appellee, Thomas J. Freund ("Freund") on counts one and two of Dawson's complaint. The trial court certified that there was no just reason for delay. For the reasons that follow, we affirm.[1]

{¶ 2} The parties agreed in October of 2009, to the possibility of a bifurcated trial whereby the court would proceed with a trial on the

[1] We note that Freund filed a cross-appeal concerning certain interlocutory orders, however, none of them constitute final, appealable orders, which requires a dismissal of the cross-appeal.

declaratory issues only, reserving all jury issues for a later trial. On November 16, 2009, a bench trial was held on Dawson's claims for declaratory judgment and injunctive relief.[2] The parties filed and incorporated into the record transcripts from the preliminary injunction hearing held on April 30 – May 1, 2009. The parties then presented additional evidence at the November 2009 bench trial. The following facts were gleaned from that portion of the record:

{¶ 3} In July of 2002, Dawson purchased a Mansfield insurance company known as KMU Insurance Agency ("KMU"). At that time, KMU had employed Freund since 1989 and his employment consisted mainly of selling health insurance benefits. Freund was generating large profits for KMU. Witnesses testified that Freund was responsible for about fifty percent of KMU's gross annual commissions, totaling over One Million Dollars ($1,000,000.00) in the several years that preceded the sale in 2002. Freund's sales alone were enough to trigger the payment of additional commissions from Medical Mutual of Ohio at the maximum rate, which were designated as "override commissions."[3] Freund's commission structure at KMU was 40% on new sales, 30% for renewals, including override

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[2] The trial court had previously denied Dawson's motion for a preliminary injunction on October 8, 2009.

[3] The override commission is triggered by a certain volume of policies sold by an agency for a given carrier.

commissions paid to KMU for Freund's sales (hereafter referred to as "40/30, including overrides").

{¶ 4} According to representatives of Dawson, the value of KMU was derived from its book of business or accounts. Dawson reportedly paid Robert Eutzy ("Eutzy"), the sole owner of KMU, three million dollars ($3,000,000.00) to purchase KMU.[4] Freund had no ownership interest in KMU and did not receive any part of the purchase price. Freund was not bound by any non-compete or non-solicitation agreements with KMU. Consequently, if Freund had not joined Dawson's employment force, he would have been free to compete for KMU's book of business, which included his client base.

{¶ 5} According to Freund, he had several meetings with Eutzy and Terry Bork ("Bork")[5] prior to Dawson's purchase of KMU. Freund also recalled meeting with D. Michael Sherman ("Sherman"), Chief Executive Officer of the Dawson Companies. Freund testified that his decision to accept employment with Dawson and execute a non-compete agreement was based on Dawson's agreement to continue paying him the same commissions

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[4] There is some testimony that this amount was contingent upon Freund and other KMU employees agreeing to become Dawson employees and executing non-compete agreements with Dawson.

[5] Bork was the president of Dawson's division that sold health insurance.

he had been receiving at KMU for as long as he remained employed by Dawson; that being 40/30, including overrides.

{¶ 6} Sherman testified that Eutzy told him to offer Freund the same compensation package he had been receiving at KMU in order to assist in their efforts to secure Freund's employment with Dawson. Sherman said he agreed to do so because of Eutzy's request.

{¶ 7} On August 28, 2002, Freund signed a Producer Compensation Agreement and a Nondisclosure and Non-Competition Agreement with Dawson. It is alleged that every year thereafter until 2009, Freund signed new Producer Compensation Agreements ("PCA"). The record contains PCAs that Freund executed for the years 2002, 2004, 2007, and 2008.

{¶ 8} In its records, Dawson differentiated between the accounts Freund generated prior to Dawson's purchase of KMU from the accounts he generated while employed by Dawson. The accounts that predated the KMU purchase were considered "renewal cases" or "assigned cases" for purposes of calculating Freund's commissions under the PCA. Freund's 2002 PCA specifically indicated that "with respect to Section I Production Formula, all new business will be paid at 40% and renewal business at 30%, including overrides." The 2002 PCA, under Section I Production Formula, established various commission rates to be effective during three different time periods, the last one being "Effective from 1-1-04 Forward." At least one Dawson

representative testified that none of the subsequent PCAs had any terms that would have ended the application of that production formula that was in effect from "1-1-04 Forward."

{¶ 9} Although none of the PCAs executed by Freund after 2002 specifically reference the 40/30, including override commission agreement, it is undisputed that Dawson continued to pay Freund these amounts until Sherman ordered it to stop in 2008. In fact, according to Mike Kmetz ("Kmetz"), Dawson's Chief Financial Officer,[6] Freund's post-2002 PCAs do not reflect the 30% commission rate that actually applied to Freund for the renewals on his pre-Dawson accounts. When questioned why Freund was compensated at a 30% rate as opposed to the 18% rate designated in the applicable PCAs, Kmetz explained, "It's a separate agreement with Mr. Freund, Mr. Eutzy, and Mr. Sherman at the time the acquisition was made." Kmetz confirmed that this was the same agreement whereby Freund was to participate in override credits and commissions for his production. Kmetz confirmed that this agreement dated back to 2002 and remained in place until Sherman ordered it to stop in 2008.

{¶ 10} In 2007, Dawson required its employees to execute new Nondisclosure and Non-Competition Agreements. Robert Lampus

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[6] Kmetz was responsible "for the calculation of all producers formula income, their draw, their settlement, their bonus calculation and the like * * *."

("Lampus"), the Chief Operating Officer and a producer at Dawson, explained that the purpose for the new agreement was to narrow the scope of the non-compete restrictions by redefining the term "prospect." According to Lampus, this made the non-competes "more in favor of the producer and narrowed that down to the point where their only restriction was that for businesses where they themselves had actually quoted during that prior two-year period to their leaving * * *." Freund testified that this was his recollection as well. According to Freund, he inquired if it changed any other term of his employment and was told that it did not. The record shows that Dawson continued to pay Freund the 40/30, including overrides after he signed the Nondisclosure and Non-Competition Agreement in 2007. Lampus confirmed that Freund executed a PCA on the same date he signed the new non-compete and that "the production formula that applied to Tom Freund when he signed the noncompete in 2007 was still 40/30 including overrides."

{¶ 11} Typically, Freund generated over One Million Dollars of gross commissions while employed with Dawson. [7] However, the override

[7] The Bonus/Profitability Computations contained in the record contain Freund's Bonus/Profitability Computations on the following dates: 12/31/2003 (gross commissions of $1,077,475 and gross profits for Dawson of $718,698); 12/31/2004 (gross commissions of $1,116,218 and gross profits for Dawson of $749,489); 12/31/2005 (gross commissions of $1,528,296 and gross profits for Dawson of $1,075,635); 12/31/2006 (gross commissions of $1,300,292 and gross profits for Dawson of $907,968); and 12/31/2007 (gross commissions of $930,279 and gross profits for Dawson of $575,512).

commissions he generated were included in this figure and counted towards satisfying his annual production goals. There is ample testimony in the record that this was a "special" accommodation that Dawson had made for Freund as he was the only producer who received any portion of override commissions.

{¶ 12} Beginning in December of 2007, a series of meetings took place among Dawson representatives and Freund concerning his compensation structure. Sherman testified that Freund agreed to the removal of override commissions from his yearly production credits as well as his ability to automatically receive override commissions that he had generated. Under this new formula, Freund would not receive any override commissions unless he hit his production goals and he had to do so without including credit for the override commission. On average, the override commissions comprised between $200,000.00 to $250,000.00 of Freund's annual production goal and between $60,000.00 to $75,000.00 of his annual commission.

{¶ 13} Freund insisted that he never agreed to the change in his commission structure. The record contains an email dated February 19, 2008 from Sherman to Freund and others that memorializes an agreement to this change. The email requests Freund to "confirm that [Sherman's] interpretation is correct and has been agreed upon by all parties." Freund denies ever receiving the email. There is no writing from Freund

confirming this alteration or otherwise acknowledging it in the record (although Sherman testified that he recalled receiving one). Other Dawson employees recall that Freund was upset about the proposed change; but, it was their belief that Freund ultimately agreed to it.

{¶ 14} Despite the December 2007 meeting and the February 2008 email, Freund continued to receive standard monthly production summaries for several months in 2008 that continued to reflect the 40/30, including overrides, commission structure. In June of 2008, Sherman and Freund met again. Sherman followed the meeting with an email dated July 8, 2008 whereby he indicated that Freund was not "hitting" his "2008 new business and total commission income objectives" and, therefore, his draw would be reduced by $45,000 for the second half of 2008 to compensate for an anticipated deficit. The deficit, however, was the direct result of a retroactive removal of the override commissions he had generated in 2008. Had the override credit not been removed, Freund would not have been in a draw deficit position. Kmetz testified that, upon Sherman's direction, Freund's credit for override commissions was retroactively removed to an effective date of January 1, 2008. Kmetz further confirmed that the effect of that retroactive removal of the override credit reduced Freund's production by almost $250,000; of which Freund would have received approximately $75,000. Kmetz implemented the change in December of 2008 and notified

Freund who made it clear that he did not agree with the termination of his credit for override commissions for his production.

{¶ 15} In 2009, Dawson presented Freund with a PCA that changed his commission structure from the previous formula of 40/30, including overrides. Freund met with Sherman and other Dawson representatives in March of 2009 and refused to sign the agreement. As a consequence, he was given the option of resigning or being terminated. Ultimately, Freund was terminated. Thereafter, this lawsuit was commenced and the parties have advanced multiple claims against each other.

{¶ 16} After presiding over both a preliminary injunction hearing and a bench trial on two counts of Dawson's declaratory judgment action, the trial court issued a comprehensive journal entry granting judgment in favor of Freund on counts one and two of Dawson's complaint. Further facts and applicable contract provisions will be discussed where relevant to the assigned errors. Dawson advances multiple assignments of error; many of which are interrelated and are addressed together for ease of discussion.

{¶ 17} In its assigned errors, Dawson asserts that the trial court erred in rendering declaratory judgment in favor of Freund by finding that the Nondisclosure and Non-Competition Agreement was unenforceable for a failure of consideration and by considering evidence outside of the Agreement.

A. Standard of Review

{¶ 18} "The granting or denying of declaratory relief is a matter for judicial discretion, and where a court determines that a controversy is so contingent that declaratory relief does not lie, this court will not reverse unless the lower court's determination is clearly unreasonable." *Bilyeu v. Motorists Mut. Ins. Co* (1973), 36 Ohio St.2d 35, 303 N.E.2d 871, syllabus; reaffirmed by, *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶14 (reaffirming "that declaratory judgment actions are to be reviewed under an abuse-of-discretion standard.")

{¶ 19} Dawson urges review under the manifest weight standard that applies to judgments in general civil cases.[8] *Mid-Am.* clearly provides that the abuse of discretion standard applies to a lower court's decision that grants or denies declaratory judgment; nonetheless even if we were to apply the different standard, the result in this case would be the same. This is because the record in this case contains competent, credible evidence that supports

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[8]"Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578. We will make every reasonable presumption in favor of the trial court's judgments. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 10 OBR 408, 461 N.E.2d 1273. Furthermore, the weight to be given the evidence and witness credibility are primarily for the factfinder. *Shore Shirley & Co. v. Kelley* (1988), 40 Ohio App.3d 10, 531 N.E.2d 333." *Rhodes v. Rhodes Indus., Inc.* (1991), 71 Ohio App.3d 797, 807, 595 N.E.2d 441.

the lower court's factual findings and the lower court did not err in its application of the law as set forth below.

B. The Agreement

{¶ 20} Dawson sought to enforce the terms of the Nondisclosure and Non-Competition Agreement that the parties executed in 2007 ("the Agreement"). Freund contends, and the trial court found, that the Agreement became unenforceable for want of consideration when Dawson ceased paying Freund certain override commissions.

a. Consideration and Integration

{¶ 21} Dawson contends that the trial court erred by not enforcing the non-competition terms of the Agreement. According to Dawson, the Agreement is an integrated, unambiguous contract, that clearly defines the consideration for it. Dawson maintains that the consideration was continued employment and "participation" in a Producer Compensation Plan. For the reasons that follow, we find that the trial court did not err by concluding that the consideration for the Agreement was unilaterally removed by Dawson in 2008 although Freund remained employed until March of 2009.

{¶ 22} "Failure of consideration exists when a promise has been made to support a contract, but that promise has not been performed. *Franklin v. Lick* (Apr. 19, 1979), Cuyahoga App. No. 37770, unreported. Where a failure of

consideration exists, the other party is thereby excused from further performance." *Rhodes*, 71 Ohio App.3d at 807, other citations omitted.

{¶ 23} The Agreement provides: "as a material inducement for Employer to employ Employee, and in consideration of participation in the Producer Compensation Plan, as amended and offered by Employer to Employee, the receipt and sufficiency of which is hereby acknowledged, Employee agrees to refrain from servicing or otherwise soliciting customers of Employer or otherwise competing with Employer."

{¶ 24} A later provision in the Agreement provides: "This Agreement contains the entire agreement between the parties * * * This Agreement, however, does not nor does it intend to, define any other terms or conditions of the employment of Employee, including the Producer Compensation Plan adopted and/or utilized by Employer from time to time."

{¶ 25} "[A] writing, or writings executed as part of the same transaction, will be read as a whole, and the intent of each part will be gathered from a consideration of the whole." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention* (1997), 78 Ohio St.3d 353, 361, 678 N.E.2d 519. "Where one instrument incorporates another by reference, both must be read together. * * * Courts should attempt to harmonize provisions and words so that every word is given effect." *Christe v. GMS Mgt. Co., Inc.* (1997), 124 Ohio App.3d 84, 88, 705 N.E.2d 691.

{¶ 26} When contracts contain ambiguous or conflicting terms, it is proper for a court to consider extrinsic evidence in order to determine the parties' intent. *Shifrin v. Forest City Ents., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499. "[T]he rule is well established that where there is doubt or ambiguity in the language of a contract it will be construed strictly against the party who prepared it. * * * In other words, he who speaks must speak plainly or the other party may explain to his own advantage." *McKay Mach. Co. v. Rodman* (1967), 11 Ohio St.2d 77, 80, 228 N.E.2d 304.

{¶ 27} The Agreement does not contain the relevant terms of the Producer Compensation Plan, which the evidence established included Dawson's agreement to pay Freund certain override commissions as well as include them as part of his annual production goals. The evidence further reflects that Dawson continued to credit and pay Freund with the commission overrides until 2008. Until about July of 2008, Dawson continued to provide Freund with monthly documentation that reflected his entitlement to the 40/30, including the commission formula that had historically been paid to Freund from the inception of his employment with Dawson in 2002. However, upon instructions from Sherman, the credits for override commissions were retroactively removed from Freund's production for the entire year of 2008. Dawson fired Freund in March of 2009 when he refused to sign a new PCA.

{¶ 28} The trial court did not improperly look outside the terms of the Agreement when it determined that the consideration included Dawson's promise to credit and pay Freund commission overrides. "Ohio law has long provided that the parol evidence rule does not exclude oral testimony with respect to proof of consideration on a written instrument." *Trout v. Parker* (1991), 72 Ohio App.3d 720, 725, 595 N.E.2d 1015, citing, *Monnett v. Monnett* (1888), 46 Ohio St. 30, 17 N.E. 659. Moreover, the terms of the Agreement itself make it impossible to ascertain the consideration for the Agreement without considering evidence outside of it. The Agreement specifically referred to Freund's Producer Compensation Plan as being a "material inducement" and at the same time the Agreement provided that it did not intend to define the terms of the Producer Compensation Plan. Therefore, the trial court properly considered evidence outside the Agreement to ascertain what the terms of Freund's Producer Compensation Plan were and, in turn, Freund's consideration for executing the non-competition Agreement. This was not an improper inquiry into the adequacy of the consideration, but rather an examination of what the consideration was in the first place. This is not a case where Freund agreed to execute a non-compete agreement in exchange for continued employment; a fact that is established by the terms of the Agreement itself.

{¶ 29} To conclude that Freund's mere continuation of employment constituted the consideration for the Agreement ignores the plain terms of the Agreement, specifically the referenced "material inducement" that was provided in exchange for Freund's agreement to refrain from soliciting customers or competing with Dawson.

{¶ 30} There is no dispute the 40/30, including override commission structure, applied to Freund at the commencement of his employment with Dawson in 2002. This is documented in his initial PCA, that provided it would continue from "1/1/04 Forward." While later PCAs did not specifically mention the "special" arrangement, it is clear that Dawson paid Freund according to it. Kmetz explained that this was due to the oral agreement made amongst Sherman, Freund, and Eutzy at the time Dawson acquired KMU.

{¶ 31} The Agreement further provides that it could "be changed only by a written agreement signed by the party against whom enforcement of any waiver, change, modification, or discharge is sought." Freund denies ever agreeing to a change in his commission structure and there is no writing from him to contradict his position. Dawson places much emphasis on the fact that the Agreement provides that the material inducement included Freund's "participation in the Producer Compensation Plan, as amended." Dawson argues this language entitled it to "amend" the terms of the compensation

plan at any time. However, that is not supported by the language when considered in context. The Agreement provides that consideration includes participation in "the Producer Compensation Plan, as amended and offered by Employer to Employee, the receipt and sufficiency of which is hereby acknowledged." The extent of Freund's "participation," therefore, was established by a PCA that was received and accepted. Alternatively, the language is ambiguous, particularly given that there were new PCAs every year.

{¶ 32} "Parol evidence which is not contradictory to the terms of a contract is admissible 'to illuminate the circumstances under which the contract was executed, and to explain the intent of the parties as reflected in the contract.'" *Rhodes*, 71 Ohio App.3d at 804, quoting, *Fodor v. First Natl. Supermarkets* (July 5, 1990), Cuyahoga App. No. 58587, affirmed (1992), 63 Ohio St.3d 489, 589 N.E.2d 17, other citations omitted.

{¶ 33} Dawson's records reflect that at the time Freund executed the Agreement, the 40/30, including the override commissions compensation structure, applied to Freund. The testimony of Lampus and Kmetz as well as Freund corroborated Dawson's records that reflected that the 40/30, including override commission structure, applied to Freund when he signed the Agreement and after. The trial court was required to look outside the Agreement to determine the consideration for the Agreement. Moreover, the

terms of the Agreement, as drafted by Dawson, standing alone were unclear, further justifying evidence of Freund's understanding of them. For all these reasons, the trial court properly concluded that Dawson breached its promise to pay Freund pursuant to the 40/30, including the override commission structure that was a material inducement, and consideration for, the Agreement. The trial court did not err by rendering declaratory judgment in favor of Freund on counts one and two of Dawson's complaint and did not err by considering evidence outside of the terms of the Agreement. Assignments of error 1-10 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.

JAMES J. SWEENEY, JUDGE

MARY J. BOYLE, J., CONCURS;
MELODY J. STEWART, P.J., DISSENTS. (SEE ATTACHED DISSENTING OPINION.)

MELODY J. STEWART, P.J., DISSENTING:

{¶ 34} I respectfully dissent from the decision reached by the majority. The goal of construing contract language is to effectuate the parties' intent. *In re Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, 821 N.E.2d 159. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 509 N.E.2d 411, paragraph one of the syllabus. Additionally, when the parties' agreement is integrated into an unambiguous, written contract, courts should give effect to the plain meaning of the parties' expressed intentions. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920, syllabus.

{¶ 35} Where contract terms are clear and unambiguous, the court cannot, in effect, create a new contract by finding an intent not expressed in the clear language employed by the parties. *Brandon/Wiant Co. v. Teamor* (1998), 125 Ohio App.3d 442, 447, 708 N.E.2d 1024. "A court will resort to extrinsic evidence in its effort to give effect to the parties' intentions only where the language is unclear or ambiguous, or where the circumstances

surrounding the agreement invest the language of the contract with a special meaning." *Kelly* at 132, 509 N.E.2d 411. If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. *Inland Refuse Transfer Co. v. Browning-Ferris Ind. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271.

{¶ 36} Under Ohio law, consideration for a contract consists of either a benefit to the promisor or a detriment to the promisee. *Carlisle v. T & R Excavating, Inc.* (1997), 123 Ohio App.3d 277, 283, 704 N.E.2d 39. "A benefit may consist of some right, interest, or profit accruing to the promisor, while a detriment may consist of some forbearance, loss, or responsibility given, suffered, or undertaken by the promisee." *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, 804 N.E.2d 27, at ¶16. "[F]orbearance on the part of an at-will employer from discharging an at-will employee serves as consideration to support a noncompetition agreement." Id. at ¶15. The Ohio Supreme Court has held that, "consideration exists to support a noncompetition agreement when, in exchange for the assent of an at-will employee to a proffered noncompetition agreement, the employer continues an at-will employment relationship that could legally be terminated without cause." Id. at ¶20.

{¶ 37} The noncompetition agreement signed by Freund in 2007 provides, in pertinent part:

{¶ 38} "WHEREAS, Employee desires to * * * remain employed by the Employer as an employee-at-will in a position where income is variable based on production.

{¶ 39} "* * *

{¶ 40} "WHEREAS, as a material inducement for Employer to employ or retain Employee, and in consideration of participation in the Producer Compensation Plan, as amended and offered by Employer to Employee, the receipt and sufficiency of which is hereby acknowledged, Employee agrees to refrain from servicing or otherwise soliciting customers of Employer or otherwise competing with Employer.

{¶ 41} "NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties agree as follows:

{¶ 42} "* * *

{¶ 43} "4. **Non-Competition.** As a material inducement for Employer to employ or continue to Employee [sic] as an employee-at-will, and for other valuable consideration, Employee hereby covenants and agrees that, during the term of his or her employment and for a period of two (2) years thereafter, neither Employee nor any corporation or other business controlled by him or her will, * * * accept, contract, solicit, service, or offer to service any Account or Prospect to which Employer has provided or offered to provide services or products."

{¶ 44} Under the express terms of the agreement, Dawson agreed to continue Freund's at-will employment in exchange for his promise not to compete when that employment ended. In deciding that Freund is not bound by the terms of the non-compete agreement, the trial court looked outside of the express written terms of the agreement and relied instead upon Freund's testimony that Dawson orally promised to pay him override commissions for as long as he continued to work for Dawson in exchange for his signing the non-compete agreement in 2002.

{¶ 45} However, such parol evidence is not appropriately considered in this case. "The parol evidence rule prohibits the admission of testimony regarding prior or contemporaneous oral agreements which contradict or vary the terms of written agreements. However, where there is ambiguity in a contract, parol evidence may be admitted to explain such ambiguities. The main issue in cases involving the parol evidence rule is whether the parties intended that a written agreement constitute the final and complete expression of the agreement and, if so, the parol evidence rule would apply." *Children's House Early Learning Ctr., Inc. v. McNamara*, 8th Dist. No. 83300, 2004-Ohio-1904, at ¶9. (Internal citations omitted.)

{¶ 46} Here, there is no issue about whether the parties intended the Non-Competition Agreement to be the final and complete expression of their agreement on that subject. Paragraph 10 the agreement provides that "[t]his

Agreement contains the entire agreement between the parties concerning the subject matter hereof * * *. This agreement, however, does not, nor does it intend to, define any other terms or conditions of the employment of Employee, *including the Producer Compensation Plan adopted and/or utilized by Employer from time to time*." (Emphasis added.)

{¶ 47} This integration clause expressly provided that the agreement was the entire agreement between Dawson and Freund relating to the post-employment competition or solicitation of Dawson's customers by Freund. "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Ed Schory & Sons v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 440, 662 N.E.2d 1074, quoting 3 Corbin, Corbin on Contracts (1960) 357, Section 573.

{¶ 48} The language of the agreement is clear and unambiguous. In exchange for continued employment and participation in the Producer Compensation Plan, Freund agreed not to solicit business from Dawson's clients or prospects for a period of two years after the end of his employment. This is the same agreement all of Dawson's producers, not just Freund, are asked to sign in return for continued employment and participation in the

compensation plan. Although the terms of each producer's compensation plan differ as to production goals and actual compensation, the requirement that producers refrain from competing for two years after they leave is the same for all. Thus, while extrinsic evidence of oral agreements allegedly made in 2002 relating to the terms of Freund's compensation and Dawson's continuing to pay Freund overrides may bear on his claims for monetary damages, such evidence is not admissible to contradict the clear language of the written non-competition agreement signed by Freund in 2007. Accordingly, I believe the trial court erred in finding that Freund was not bound by the agreement due to a want of consideration.