Affirmed and Majority and Dissenting Opinions filed March 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-01096-CV

PAMELA H. DOZIER, Appellant

V.

TEXAS EMPLOYMENT COMMISSION AND KLH MEDICAL, INC., Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 654,199

DISSENTING OPINION

The TWC and the county court at law failed to interpret Pamela H. Dozier's written contract according to established rules of law. They failed to realize the writing, providing for her personally to perform all or substantially all of the services set forth in her contract as a salesperson, controlled as a matter of law. This caused the TWC and the county court at law to apply section 201.041 of the Texas Labor Code instead of section 201.042(2).[1]

[1] The legislature added the provisions in section 201.042(2) to the unemployment compensation scheme specifically to protect salespersons like the appellant. Standing on her right to

Applying the section that controlled before the legislature changed the law deprived Pamela Dozier of the protection the legislature plainly and expressly provided. Therefore, I respectfully dissent.

I. Construing the Contract

Construction of an unambiguous contract is an issue of law, not of fact. Our factually deferential review does not mean the TWC may abandon established legal standards of contractual construction. Neither salespersons' rights nor employers' rights should depend upon *post hoc* swearing matches when applying the language of the statute to an unambiguous, written contract determines employee status as a matter of law.

The substantive law of contract construction prohibits consideration of parol evidence to contravene the intent expressed in the plain words of the written contract. *Lewis v. Adams*, 979 S.W.2d 831, 836 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (explaining that the parol evidence rule is not a rule of evidence, but a rule of substantive law). The contract is not ambiguous. The contract document is therefore conclusive evidence of what the "contract provides." The employer's subjective, oral opinions are not evidence of what the contract provides.[2]

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unemployment compensation, Pamela H. Dozier ended up liable for a total of $15,961.86, plus accruing interest. Ms. Dozier needed credit for the $5,600 KLH Medical paid her over several months to qualify for benefits.

The great bulk of the questions from the hearings officer clearly addressed section 201.041 instead of 201.042. KLH orally denied that the written contract provided for personal performance, and claimed what the agency had credited as wages were actually unearned draws. The agency reversed its decision she was entitled to benefits, and decided $4,173 it had already disbursed would be deductible from any future unemployment compensation. Similarly, the county court at law's judgment recites findings only applicable to 201.041.

[2] It would be inappropriate to find from the employers' testimony that the contract had been modified during performance, as there was no evidence it had been modified. More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995). However, circumstantial evidence from which equally plausible but opposite inferences may be drawn is not more than a scintilla because any conclusion would be speculative; thus,

The terms of Ms. Dozier's contract clearly contemplate personal performance.[3] The contract provides she was to transform relationships she personally had with clients into relationships between the clients and KLH Medical. Ms. Dozier was to provide "concepts, ideas, and strategy, and to help do the work necessary to accomplish these marketing goals." This language clearly contemplates Ms. Dozier personally providing and implementing ideas. The contract specifically states that "Pam Dozier is expected to help answer the phone and receive customer orders." KLH Medical was "responsible for providing an adequate environment in which *Pam Dozier can perform her responsibilities*" (emphasis added). The writing shows the parties' intent for her to perform all or substantially all of her contractual obligations personally.

II. Agencies may interpret the law reasonably, but may not re-write it

The agency has discretion to interpret laws reasonably, as its functions require. It may not, however, violate the plain words of the statute, "no matter how expedient for administrative purposes." *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-38 (Tex. App.—Austin 1986, writ ref'd, n.r.e.). In ascertaining legislative intent, words and phrases must "be read in context and construed according to the rules of grammar and common usage." TEX. GOV'T CODE ANN. § 311.011 (Vernon 1998).

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reasonable and fair-minded people could only reach a conclusion by surmise or suspicion. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). Harold and Henry Kings' assertions about Ms. Dozier's duties under the contract could support equally – or not at all – a surmise it had changed or a surmise they were making parol statements interpreting the writing favorably to themselves.

[3] Section 201.042(2)(A) does not use the language "expressly provide." Nor does the statute require the contract to use the magic words "personally perform." In *Bruni v. Bruni*, 924 S.W.2d 366 (Tex.1996), the statutory requirement for the contract was that the "[t]erms of the agreement . . . are not enforceable as contract terms unless *provided by the agreement*." *See Bruni*, 924 S.W.2d at 368 (interpreting section 154.124(c) of the Texas Family Code) (emphasis added). The Texas Supreme Court held that the statute did not require the agreement to use any "magic words" to "provide" it was enforceable as a contract. Instead, the statute was satisfied because the agreement *expressed the parties' intent* that the agreement be enforced as a contract. *Id.* Here, as in *Bruni*, "magic words" are unnecessary because the contract language "provides" for personal performance by expressing the parties' intent.

In *Sexton*, the Austin court of appeals explained:

> [W]e may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, and implications from any statutory passage or word are forbidden when the legislative intent may be gathered from a reasonable interpretation of the statute as it is written. Implications are permissible only when the court has first concluded that the Legislature obviously intended the agency to have the power it claims by implication.

Sexton, 720 S.W.2d at 138. The case the Austin court cited in support of this explanation involved agency interpretation of a statutory standard. *See Commonwealth of Massachusetts v. United N. & S. Dev. Co.*, 140 Tex. 417, 168 S.W.2d 226 (1942). In *Commonwealth*, a statute required two sureties to guarantee the obligor's performance. The agency in *Commonwealth* claimed having one surety guarantee the other surety's guarantee met the statutory standard. The Texas Supreme Court found this "interpretation" contrary to the language of the statute. Instead, it found, the statute required each surety to guarantee directly the primary obligor's commitment. Accordingly, the agency decision based upon an error of law could not stand.

III. Applying the Statutes

The TWC claims section 201.042(2) does not apply. Statutory construction is a question of law that we review de novo. *See Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989). In the present case, as in *Sexton* and *Commonwealth*, our factual deference does not mean we should rubber-stamp mistakes of law. Courts should construe the intended meaning of statutes from the language if that language is plain. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). "[E]very word of a statute is presumed to have been used for a purpose, and the cardinal rule of statutory construction requires that each sentence, clause, phrase and word be given effect if reasonably possible." *Reames v. Police Officers' Pension Bd. of Houston*, 928 S.W.2d 628, 632 (Tex. App.—Houston [14th Dist.] 1996, no pet.).

The TWC acknowledges that the legislature *added* the provisions now in section 201.042(2) to the services already qualifying as "employment" under 201.041. Section 201.042(2)'s separate criteria for independence support this.

Subsection (2) specifically does not add services meeting certain litmus tests of independence to the definition of "employment." Subsection (2)(A) excludes from its scope salespersons whose contracts do not provide for them personally to perform substantially all of their services. Subsection (2)(B) excludes services by salespersons who have a substantial investment in a facility used to perform. Subsection (2)(C) excludes service on only a single transaction from 201.042(2)'s augmentation of 201.041. Thus, evidence the contract did not require personal performance, of substantial capital invested in a facility used to perform, or of service for more than a single transaction would put a salesperson's services outside the scope of services 201.042(2) adds to the definition of "employment."

The TWC contends KLH Medical's testimony personal performance was not required excluded Ms. Dozier's services from 201.042. A key distinction between the measures of independence in section 201.041 and 201.042(2)(A) appears in the language controlling the scope of inquiry. Section 201.041 specifies the arrangement between the parties "*under the contract and in fact*." Section 201.042(2)(A) restricts the scope of inquiry about personal performance to what the "*contract provides*."[4] If what the "contract provides" would also encompass what the parties felt the arrangement was "in fact," the words "in fact" in section 201.041 would be superfluous. Conversely, had the drafters intended to add issues about whether Ms. Dozier was required "in fact" to perform the services personally, the legislature demonstrated in section 201.041 that it knew how to say so.

On Ms. Dozier's appeal to us, the TWC contends 201.041 applies. It contends Ms. Dozier fails all three criteria for independence under 201.042. The agency contends:

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[4] Incidentally, the second contract did not provide for personal performance, and expressly stated Ms. Dozier would be an independent salesperson.

1. Her "primary duty" was exploiting her personal contacts for KLH, but the contract did not provide for Pam Dozier personally to perform substantially all of her duties under the contract (also contrary to its other written terms).
2. Recruiting personal client relationships from her defunct business was a "substantial investment in a facility used in the performance of the service."
3 A relationship reviewable and extendable after three months is not a continuing relationship (as opposed to a single transaction).

Ignoring the provisions' clear intent for Ms. Dozier personally to perform is an abuse of discretion, a failure to follow the law. The TWC appears arbitrary and capricious in further contending her personal contacts were a "substantial investment" in a "facility." It appears even more arbitrary and capricious for the TWC to claim an indeterminate relationship, reviewable after three months, was not a continuing relationship, as opposed to a single transaction. Our record, the TWC's argument below, and the TWC's argument on appeal all indicate (1) the agency misconstrued the contract and applied the wrong law, and (2) substantial evidence did not exist when the TWC heard this case to satisfy the correct statutory provision.

B. Disposition

If the claims in this case were severable, we could reverse and remand only the unemployment compensation claim about which the appellant complains. *Otis Elevator Co. v. Bedre*, 776 S.W.2d 152, 153 (Tex. 1989) (holding a partial remand is proper only when issues are severable). Severance is proper when: (1) the controversy involves more than one cause of action; (2) the severed cause would be the proper subject of a independently asserted lawsuit; and (3) the severed causes must not be so intertwined as to involve the same facts and issues. In certain instances, courts have applied a fourth requirement that the severed causes of action cannot relate to the same subject matter. *Hayes v. Norman*, 383 S.W.2d 477 (Tex. Civ. App. 1964, writ ref'd, n.r.e.).

The only possibility of meaningful relief on the unemployment claim is reversal of the entire trial court judgment. The contract recovery involves a different theory, but is inextricably intertwined with the facts of the unemployment compensation claim. Both claims depend upon whether the draws Ms. Dozier received were earned wages or simply a debt. *See generally,Twyman v. Twyman*, 859 S.W.2d 619, 623-624 (Tex.1993).[5]

Here, as in *Twyman*, there was no court precedent in the relevant area to guide the parties or the court below. If the TWC considered this case under the correct standard, and the appellant won, the result would be inconsistent with the contract recovery. If Ms. Dozier owes the draws back to KLH Medical, they were not earned wages. Whatever was wages, she does not owe. As a result, if the appellant succeeded on her unemployment compensation claim, she would be relieved of her debt to the TWC because the draws were *not* a debt, and owe a similar amount to KLH Medical because the same draws *were* a debt. The conflicting findings would thus cancel out any meaningful relief on her unemployment compensation claim.

As a result of legal errors, the court did not deduct the commissions from draws to

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[5] In *Twyman*, the wife in a divorce proceeding recovered for her husband's negligent infliction of emotional distress under established Texas Supreme Court precedent. The trial court had incorporated the judgment on the negligent infliction claim into a divorce decree. Between trial and the Texas Supreme Court's consideration, negligent infliction was abolished. The Texas Supreme Court reversed, but it officially recognized and set standards for intentional infliction of emotional distress.

The divorce decree had taken the husband's same cruel behavior into account in awarding the wife a disproportionate share of the community estate. The Texas Supreme Court found that allowing recovery of both a disproportionate share of the marital estate for cruelty and allowing separate recovery for intentional infliction of emotional distress would constitute a double recovery. Allowing recovery upon the intentional infliction claim would be inconsistent with the unappealed, disproportionate division of the marital estate.

The court could have left the unappealed division in place, and reversed and rendered the negligent infliction claim. Instead, the court found the interest of justice required it to allow the plaintiff an opportunity to try the emotional distress claim under the correct theory. *See also Edinburg Hosp. Authority v. Trevino,* 941 S.W.2d 76, 79 (Tex. 1997) (remanding in the interest of justice when the case was tried on the wrong legal theory); *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex.1992) (same). Since the issues were intertwined, it remanded both the emotional distress issues and the inconsistent property division for trial.

arrive at either *substantial* evidence of the amount of wages at the time of the TWC proceeding or a *preponderance* of evidence showing the amount of KLH's contractual claim. The trial court erred in construing both contracts presented to it. The judgment indicates the trial court thought (1) parol evidence supported the TWC's interpretation of the first contract, and (2) the second contract cut off the appellant's right under the first contract to commissions for six months after termination. The second contract terminated the first, but did not cut off Ms. Dozier's right to the commissions.[6] Further, the trial court considered whether a preponderance of the evidence showed the draws were a debt based upon evidence in existence at the time of the TWC hearing. KLH Medical did not produce evidence of the commissions because its contract theory was repugnant to them. Because it misconstrued the contracts, the court made its contract decision without crucial evidence.

If the erroneous breach of contract judgment is allowed to stand, Ms. Dozier will likely have to overcome possible conflicting findings, collateral estoppel, or the law of the case doctrine. If she is allowed to contest the issue of how much of the draws were commissions, and wins, her rights will still be frustrated. The debt that the TWC will only collect from future unemployment compensation will be cancelled, but she will face KLH's executable judgment for the same draws the TWC found were earned wages. In the interest of justice, and to avoid inconsistent results, we should reverse and remand the entire case to the trial court for retrial under the correct principles of law.

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[6] Ms. Dozier was entitled to accrue commissions on her accounts for six months after the employment contract terminated. KLH Medical counterclaimed below that a post-termination contract extinguished her right to those commissions, leaving her indebted for $4,268.99 in draws she had received against future commissions.

In fact, the second contract specifically provided for KLH to pay out the full commission on accounts Ms. Dozier brought to KLH before the first contract terminated. If she failed to contact those customers for a three month period, it specified percentages of payouts KLH could *apply to the draws*. Without evidence of commissions that would have accrued during the six months, however, the second contract cannot support a claim the $5,600 paid to her was not all wages. The court affirmed the TWC decision, "reimbursed" $4,268.99 KLH had not proven she owed, and awarded $7,519.87 in attorney's fees for recovering the draws. The appellant does not directly challenge the contractual recovery.

Conclusion

This case illustrates the need for judicial review to remedy quasi-judicial executive error. Pamela Dozier earned unemployment protection by working under a written contract providing for services that clearly required personal performance. To add protection for commissioned sales employees, section 201.042(2) added her work to the definition of "employment." Section 201.042(2)(A) says the provisions of the contract are an indicator whether she qualified for this protection. Determining whether she was obligated "in fact" to perform personally would improperly apply 201.041's scope of inquiry. There is no evidence she failed to meet any condition in 210.042(2) necessary to negate independence. The trial court abused its discretion by failing to properly analyze the law and apply it to the facts. Therefore, I respectfully dissent.

/s/ Eric Andell
Justice

Judgment rendered and Majority and Dissenting Opinions filed March 8, 2001.
Panel consists of Justices Sears, Lee, and Andell.[7]
Publish—Tex. R. App. P. 47.3(b).

[7] Senior Justices Ross A. Sears, Norman Lee, and Eric Andell sitting by assignment.