

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 15, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0512-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**DAVID E. MEIERS, D/B/A FIRST COMMERCE BUSINESS
GROUP,**

PLAINTIFF-RESPONDENT,

V.

FREDERICK W. BENNETT,

DEFENDANT-APPELLANT,

**F & J PROPERTIES AND DE PERE AUTO PARTS &
PAINT, INC.,**

DEFENDANTS,

APPEAL from a judgment of the circuit court for Brown County:
SUSAN E. BISCHER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Frederick Bennett appeals a judgment awarding David Meiers full commission on a real estate transaction and prejudgment interest on the undisputed portion of the commission.¹ The trial court ruled that an amended contract was invalid under § 240.10(1), STATS., and enforced the original contract. Bennett argues that the trial court should have integrated the two agreements. Because the outcome is the same even if the agreements are integrated and the trial court properly granted prejudgment interest on the undisputed amount owed, we affirm the judgment.

Bennett retained Meiers' services to find a business suitable for purchase. They executed an Exclusive Buyer Agency Contract that entitled Meiers to a sliding scale commission on the purchase of the business. The contract entitled Meiers to 9.35% of the purchase price of the business Bennett eventually bought. Immediately after they executed this contract, Bennett and Meiers executed an amendment to the contract in which Meiers identified a specific property and the parties agreed to modify Meiers' commission if this transaction occurred and if the seller agreed to pay a 4% commission. If the seller agreed to pay 4%, Bennett would only be required to pay a 5% commission. The seller never signed the amended commission contract and refused to pay any commission. Bennett eventually bought the business for \$575,000 and now contends that he is not obligated to pay the commission called for in the original contract.

The single, integrated agreement required Bennett to pay full commission unless the seller agreed to pay 4%. Construction of a contract is a

¹ This is an expedited appeal under RULE 809.17, STATS.

question of law that we review *de novo*. *Kozich v. Employee Trust Funds Bd.*, 203 Wis.2d 363, 377, 553 N.W.2d 830, 836 (Ct. App. 1986). We construe the contracts (or single integrated contract) to set a commission totaling 9.35% of the \$575,000 purchase price and to revise the commission only if certain precise circumstances occur. If a particular business was sold to Bennett and if the seller agreed to pay 4% commission, Bennett's commission would be reduced to 5%. When these circumstances did not occur because the seller refused to agree to pay the 4% commission, the original commission remained in effect. While the trial court focused on the absence of the seller's signature on a contract that would have obligated him to pay a commission, we focus on the parties' failure to meet a condition of the amended contract. When the condition was not met, the amended contract created no modification of the commission called for in the initial contract.

That result is the same regardless of whether we view the documents as two contracts or one integrated contract. The single, integrated contract is not rendered void by the absence of the seller's signature because the contract, on its face, does not require the seller to pay any commission unless he agrees to do so. When he did not agree to pay any commission, the absence of his signature did not constitute a violation of § 240.10(1), STATS., which requires the signature of a person agreeing to pay a commission. Construed as a single, integrated contract, the agreement calls for Bennett to pay the full commission unless the seller agreed to pay 4%.

The trial court properly awarded prejudgment interest on that portion of the commission representing 5% of the purchase price. Prejudgment interest is appropriate where damages are either fixed or measurable against a reasonably certain standard. *Loehrke v. Wanta Builders, Inc.*, 151 Wis.2d 695, 706, 445

N.W.2d 717, 722 (Ct. App. 1989). While there was a genuine dispute concerning the total amount of damages, Bennett conceded that he owed the 5% commission. The minimum amount he owed was easily determinable and the trial court properly awarded prejudgment interest on that amount. *See Klug & Smith v. Sommer*, 83 Wis.2d 378, 384, 265 N.W.2d 269, 272 (1978).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

