

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 4, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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

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

**Appeal No. 2008AP1564**

**Cir. Ct. No. 2007CV1618**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**RALPH RUSTEMEYER,**

**PLAINTIFF-APPELLANT,**

**v.**

**CNH CAPITAL CORPORATION, A/K/A CNH CAPITAL  
INSURANCE AGENCY, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Racine County:  
STEPHEN A. SIMANEK, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 DYKMAN, J. Ralph Rustemeyer appeals from an order granting summary judgment to his former employer, CNH Capital Corporation, in Rustemeyer's action for breach of contract based on CNH's calculation of Rustemeyer's annual incentive compensation for 2006. Rustemeyer contends that

the trial court erred in granting summary judgment to CNH rather than to him because the undisputed facts establish that CNH breached its employment contract with Rustemeyer by arbitrarily adjusting the figures it used under its stated formula in calculating his 2006 compensation. CNH argues that it validly reserved discretion to calculate Rustemeyer's incentive compensation under a contract provision stating that CNH is "the sole and final arbitrator" in interpreting and applying its compensation plan, and that it properly exercised that discretion in determining the figures to use in the formula to determine Rustemeyer's 2006 incentive compensation. We conclude that (1) the "sole and final arbitrator" provision did not reserve discretion to CNH in determining Rustemeyer's incentive compensation, but rather allowed CNH to select between competing reasonable interpretations of the formula it set forth; and (2) CNH's interpretation and application of its incentive compensation formula was not reasonable, because it was contrary to the plain language of the formula.<sup>1</sup> Accordingly, we reverse and remand for the court to deny CNH's motion for summary judgment, and to grant Rustemeyer's motion for summary judgment.

### *Background*

¶2 The following facts are taken from the parties' summary judgment submissions. In March 2006, CNH sent Rustemeyer an offer of employment for the position of Insurance Sales Manager. The March 2006 offer of employment detailed Rustemeyer's base salary and company-paid relocation expenses, as well

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<sup>1</sup> Because we conclude that CNH's interpretation and application of its Incentive Compensation Plan was not reasonable, we need not reach Rustemeyer's argument that summary judgment for CNH is improper because there is a material factual dispute over the figures CNH used in calculating his compensation under its interpretation of the formula.

as his eligibility for benefits, a bonus, and incentive compensation. Rustemeyer began working for CNH pursuant to the offer of employment later that month.

¶3 CNH's Sales Incentive Plan states that Rustemeyer's incentive compensation was targeted at \$40,000 for 2006. The plan also states:

**Part 6: Annual Bonus related to Insurance Agency Sales Results vs. Goal**

Manager will participate in meeting the overall Insurance Agency Sales goals. Full payout of \$4250 if 100% of the target is met. At 110% level, payout is \$6375. At 120% level, payout is \$8500. Reduced payout of \$2500 if performance results 80-99% of agency sales goal. Payment is annual.

**Part 7: Annual Bonus related to Insurance Agency PBT Results vs. Goal**

Manager will participate in meeting the overall Insurance Agency PBT goals. Full payout of \$4250 if the target is met. Payout doubles to \$8500 if performance results hit 120% level. For achievement of each incremental additional 10% PBT result greater than 120% level, an additional \$1500 is paid. (Example: 150% level results in payment of \$13,000). Payment is annual.

Paragraph sixteen under "Additional Conditions and Criteria" states: "The Company will be the sole and final arbitrator with respect to interpretations and application of all aspects of this Plan including, but not limited to the amount of commission and/or bonus due any plan participant."

¶4 CNH paid Rustemeyer \$54,775 under its Incentive Compensation Plan for 2006. Rustemeyer then filed this action against CNH for breach of contract, alleging that CNH calculated his compensation under the Incentive Compensation Plan by arbitrarily adjusting figures to arrive at a lesser compensation amount. CNH answered, denying the allegations. Rustemeyer moved for summary judgment, arguing that the undisputed facts established that

CNH had breached its employment contract with Rustemeyer by failing to compensate him according to the terms of its Incentive Compensation Plan when it adjusted the figures used to calculate his incentive compensation. He requested damages as set forth in his affidavit, or a hearing to determine damages. CNH filed a cross-motion for summary judgment, arguing that the undisputed facts showed that Rustemeyer was eligible for, but not entitled to, payments under CNH's Incentive Compensation Plan. CNH argued that it explicitly retained the right to determine the figures to use in calculating Rustemeyer's incentive compensation under the Plan, and that it properly exercised that right in determining Rustemeyer's payments for 2006.

¶5 Randy Haaff, CNH's Vice President of Insurance Card and Consumer Products, averred in an affidavit in support of CNH's motion for summary judgment that he calculated Rustemeyer's incentive compensation amount under the Incentive Compensation Plan to reflect the revenues which Rustemeyer's unit actually played a part in generating. Haaff stated that he adjusted the figures under Part 6 by subtracting \$9,930,000 from the total insurance agency sales results, which represented sales made by a unit other than Rustemeyer's. Haaff also stated that he adjusted the overall insurance agency profitability under Part 7 by subtracting \$2,340,000 for sales unrelated to Rustemeyer's unit, and \$1,070,000 of profit sharing payments that Rustemeyer's unit played no role in generating.

¶6 The trial court denied Rustemeyer's motion for summary judgment, and granted summary judgment to CNH. Rustemeyer appeals.

*Standard of Review*

¶7 We review summary judgments do novo, using the same methodology as the trial court. *Young v. West Bend Mut. Ins. Co.*, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196. “Summary judgment is appropriate if the pleadings and evidentiary submissions of the parties show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Id.* (citation omitted).

¶8 Here, we must construe the employment contract between CNH and Rustemeyer to determine whether summary judgment is appropriate. We construe a contract de novo, without deference to the trial court. *Johnson v. Heritage Mut. Ins. Co.*, 188 Wis. 2d 261, 265, 525 N.W.2d 85 (Ct. App. 1994).

*Discussion*

¶9 Rustemeyer argues that the trial court erred in granting summary judgment to CNH because the undisputed facts establish that CNH breached its employment contract with Rustemeyer when it adjusted the figures it used to calculate his incentive compensation contrary to the language of their contract. He therefore argues that he, rather than CNH, is entitled to summary judgment on the issue of CNH’s breach of his employment contract. CNH responds that the undisputed facts establish that it validly reserved discretion to calculate Rustemeyer’s incentive compensation, and therefore its adjustment of figures under the plan was not a breach.

¶10 The parties agree that the following facts are undisputed: (1) Rustemeyer and CNH entered into an employment contract, which included CNH’s Incentive Compensation Plan; (2) CNH calculated Rustemeyer’s 2006

incentive compensation using the formula set forth in Parts 6 and 7 of its Incentive Compensation Plan; and (3) in calculating Rustemeyer's 2006 incentive compensation under the Plan, CNH reduced the insurance agency sales under Part 6 and the insurance agency profits before taxes under Part 7 to reflect the performance of Rustemeyer's unit rather than the overall performance of the insurance agency, resulting in a lesser compensation for Rustemeyer. The parties dispute whether CNH's adjusting the figures to reflect the performance of Rustemeyer's unit, as opposed to the performance of the agency as a whole, breached Rustemeyer's employment contract.

¶11 The crux of the dispute between the parties is the interaction of Parts 6 and 7 of the Incentive Compensation Plan, setting forth the formula to determine Rustemeyer's incentive compensation, and paragraph sixteen of the Plan's additional criteria, which states that CNH "will be the sole and final arbitrator with respect to interpretations and application of all aspects of this Plan including, but not limited to the amount of commission and/or bonus due any Plan participant." Rustemeyer contends that CNH's interpretation of paragraph sixteen as allowing CNH to adjust the figures under Parts 6 and 7 to reflect only his unit's performance is unreasonable. He argues first that doing so renders Parts 6 and 7 meaningless since they are written in terms of CNH's overall performance, and thus that construction must be avoided. *See Arnold v. Shawano County Agricultural Society*, 106 Wis. 2d 464, 473-74, 317 N.W.2d 161 (Ct. App. 1982) (contracts are to be construed to give reasonable meaning to each of their provisions). He also argues Wisconsin law does not allow an employer to reserve absolute discretion in calculating a bonus after setting forth a specific formula,

although he concedes there is no Wisconsin law on point.<sup>2</sup> He cites *Thomson v. Saatchi Holdings, Inc.*, 958 F. Supp. 808 (W.D.N.Y. 1997), and *In re National Energy & Gas Transmission, Inc.*, 351 B.R. 323 (Md. 2006), as persuasive authority for the principle that an employer is bound by the specific formula it has set forth to calculate an employee's bonus, even if it claims to retain discretion to calculate that bonus.

¶12 CNH responds that to give effect to the entire contract, Parts 6 and 7 must be interpreted as setting forth the method to calculate Rustemeyer's incentive compensation, and paragraph sixteen reserves discretion to CNH to determine what counts towards the figures used in that calculation. CNH agrees that there is no Wisconsin law on point, but cites *Bessemer Trust Co. v. Branin*, 498 F. Supp. 2d 632 (S.D.N.Y. 2007), as persuasive authority for the principle that courts will not disturb an employer's discretion in awarding a bonus where the employer has reserved sole discretion to determine the bonus amount.

¶13 The problem with both parties' arguments is that they rely on case law dealing with an employer's purportedly reserving discretion—either absolute or limited—to determine the amount of an employee's bonus. See *Thomson*, 958 F. Supp. at 825-26 (language in contract stating that the employee “shall receive such Salary increases and bonuses, if any, as may, from time to time, be approved

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<sup>2</sup> Specifically, Rustemeyer argues in his brief-in-chief that the trial court erred in “reason[ing] that Paragraph 16 of Rustemeyer's contract with CNH provided the company with the sole and final discretion with respect to interpretations and applications of all aspects of the Plan, including but not limited to the amount of commission and/or bonus due any plan participant” based on federal case law declining to intervene in an employer's discretionary bonus determination. Rustemeyer argued that “[c]ontrary to the trial court's conclusion, this is not the law in the State of Wisconsin,” and he cited what he deemed “persuasive authority for exactly the opposite conclusion tha[n] the trial court drew in Rustemeyer's case.”

by the management” competed with other language and created issue as to whether employer retained discretion in issuing bonus); *National Energy*, 351 B.R. at 335-36 (repeated use of term “discretion” in reference to employer’s awarding bonuses together with evidence setting forth formula for bonuses provided basis for fact finder to infer that employer’s discretion was limited rather than absolute, thus precluding summary judgment); *Bessemer*, 498 F. Supp. 2d at 634-39 (employment contract provided that bonus was to be paid “at the discretion of the Salary Committee,” in a range of “0% to 250% of base pay,” and thus “defendant’s offer letter contain[ed] the ‘magic words’ providing absolute discretion to the employer” (citation omitted)). This case presents a different issue.

¶14 Here, the issue is the meaning of particular contract language providing that CNH is the “sole and final arbitrator with respect to interpretations and applications” of the compensation plan. This language does not convey general discretion, limited or absolute, to determine a bonus amount. Rather, it states that if a dispute arises over the meaning of an agreed upon formula, CNH will be the final arbitrator of that dispute. Interpreting and applying an agreed upon formula connotes resolving ambiguous terms. See *Folkman v. Quamme*, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857. Thus, we conclude that the only reasonable reading of the “sole and final arbitrator” clause is that the parties have agreed that CNH will resolve any ambiguities that arise in the course of interpreting the contract and, in resolving such ambiguities, CNH must choose from reasonable alternative “interpretations and applications” of the compensation plan. See *Tang v. C.A.R.S. Protection Plus, Inc.*, 2007 WI App 134, ¶28, 301 Wis. 2d 752, 734 N.W.2d 169 (“Contract language is considered ambiguous if it is susceptible to more than one *reasonable* interpretation.” (citation omitted and



emphasis added)). If CNH can do anything it wants, without regard to contract language, it is not resolving the meaning of disputed language, it is imposing its unfettered will. We turn, then, to whether CNH has advanced a reasonable interpretation of the incentive compensation formula.

¶15 In the material it submitted on summary judgment, CNH established that it adjusted the figures it used under its Incentive Compensation Plan to reflect the performance of Rustemeyer's unit rather than the performance of the agency as a whole. Part 6 of the Plan, however, states that Rustemeyer must "participate in meeting the overall Insurance Agency Sales goals," with "Full payout of \$4250 if 100% of the target is met. At 110% level, payout is \$6375. At 120% level, payout is \$8500. Reduced payout of \$2500 if performance results 80-99% of agency sales goal." Similarly, Part 7 states that Rustemeyer "will participate in meeting the overall Insurance Agency PBT [profit before tax] goals. Full payout of \$4250 if the target is met. Payout doubles to \$8500 if performance results hit 120% level. For achievement of each incremental additional 10% PBT result greater than 120% level, an additional \$1500 is paid." Thus, the language of the Incentive Compensation Plan plainly states that Rustemeyer must participate in meeting the overall agency goals, and if those targets are met or exceeded, he will be compensated according to a specific schedule.

¶16 We conclude that CNH's decision to calculate Rustemeyer's incentive compensation under the Plan with figures reflecting the performance of Rustemeyer's unit rather than the performance of the overall agency is not a reasonable interpretation of the Incentive Compensation Plan. Parts 6 and 7 clearly state that Rustemeyer must participate in meeting overall agency goals, and if those targets are met, he will be compensated accordingly. The word "target" follows directly from the term "overall agency" goals in both parts of the Plan.

¶17 CNH does not dispute that this is what the contract says, instead arguing that it is more reasonable to tie Rustemeyer's compensation to the performance of his unit. This may or may not be more reasonable in general, but the issue here is whether this is a reasonable reading of the contract. It is not. There is no reasonable way to read the requirement that Rustemeyer must participate in "meeting the overall Insurance Agency" goals and that he will receive certain payouts if the "target is met" as meaning that Rustemeyer's bonus will be paid based solely on the performance of his unit. The Plan says nothing of Rustemeyer's unit. The "sole and final arbitrator" clause does not permit CNH to read language into a contract that does not exist. *Cf. Columbia Propane, L.P. v. Wisconsin Gas Co.*, 2003 WI 38, ¶12, 261 Wis. 2d 70, 661 N.W.2d 776. Thus, we conclude that Rustemeyer, not CNH, is entitled to summary judgment on the issue of CNH's breach of the employment contract.

¶18 In his motion for summary judgment, Rustemeyer requested damages as set forth in his affidavit.<sup>3</sup> Rustemeyer's affidavit states that he is entitled to \$4,250 under Part 6 of the Plan, based on CNH's sales goal of \$60.48 million and actual sales of \$62.5 million. It states that he is entitled to \$41,500 under Part 7 based on CNH's profit before tax goal of \$1.7 million and actual profit before tax of \$5.87 million, and that he has only been paid \$11,500, leaving a balance due of \$30,000. CNH does not dispute Rustemeyer's figures or calculations in its summary judgment pleadings or submissions, or on appeal. Instead, CNH argues only that it properly used the figures tied to Rustemeyer's

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<sup>3</sup> In his complaint, Rustemeyer also requests attorney fees. CNH denies liability for his fees. However, the summary judgment submissions do not address whether and what amount of attorney fees are awardable. Thus, this issue remains.

unit rather than the figures for the overall agency in determining Rustemeyer's incentive compensation. Thus, there is no dispute as to the figures that should have been used under our interpretation of the employment contract. Accordingly, we reverse and remand with directions to deny CNH's motion for summary judgment and to grant Rustemeyer's motion for summary judgment.

*By the Court.*—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

