IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 23, 2006 Session

GREG DENNEY v. TOM LOVETT, ET AL.

Appeal from the Chancery Court for Sumner County
No. 2002C-75 Tom E. Gray, Judge

No. M2004-03020-COA-R3-CV - Filed on July 11, 2006

This is an employment dispute wherein the trial court found the employer wrongfully terminated the employee six months into a two-year term of employment. The trial court awarded the employee his contractual damages, which included lost wages, insurance benefits, utilities and pre-judgment interest for the balance of the term. The employer appeals contending he is not liable for damages because the employee voluntarily quit following an argument between them. The pivotal issue in this employment dispute is whether the employer fired the employee or whether the employee quit. The employer also presents two evidentiary issues, one regarding the admission of evidence as to the employee's damages. We affirm the trial court's finding that the employer wrongfully terminated the employment contract and that the employee is entitled to recover his contractual damages for the balance of the term of employment; however, we find the award of damages must be reduced because the trial court erred by admitting evidence of the employee's net earnings which the employee was obligated to disclose but failed to disclose in discovery.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Louis W. Oliver, III, Hendersonville, Tennessee, for the appellant, Tom Lovett.

Dennis W. Powers, Gallatin, Tennessee, for the appellee, Greg Denney.

OPINION

Tom Lovett, a multi-faceted businessman, owns an insurance claims company and a horse farm located in Sumner County, Tennessee, known as Kenlawn Farms. In April of 2001, Lovett was in need of an experienced horse trainer to train cutting horses at Kenlawn Farms.[1] Greg Denney, a horse trainer by trade, was working in Texas in April of 2001 when he entered into discussion with

[1] Cutting horses are those trained to separate a calf and/or cow from the herd.

Lovett about training horses for Lovett at Kenlawn Farms. Following negotiations, the parties entered into a two-year employment contract on April 12, 2001,[2] pursuant to which Denney was to move to Sumner County to provide all services and other responsibilities of a trainer of a cutting horse operation, including maintenance of the barn where the horses were housed. The written employment contract provided for two years of employment, beginning May 2001, with a base salary of $2,500 per month, housing, utilities, medical and dental insurance, and relocation expenses.[3]

Denney moved to Kenlawn Farms and began working for Lovett as agreed. The parties started off on good terms but things changed rather quickly as their relationship deteriorated. According to trial testimony, Lovett engaged in several "heated discussions" with Denney and another employee, Keith McGhee, concerning their job performance. The incident giving rise to this dispute occurred on November 21, 2002, the Wednesday before Thanksgiving. Lovett, who was at the farm that day for other business, noticed a broken pipe, a flat tire on a piece of farm equipment, and a horse-chewed fencepost. Lovett immediately met with Denney and McGhee in the barn to discuss the deficiencies. In his trial testimony, Lovett explained that he told Denney and McGhee, "If this is the best they can do then Greg (Denney) could go back to Texas and Keith (McGhee) could go back to Nashville." McGhee testified explaining that he interpreted Lovett's statement as conditional in nature. Denney, however, disagreed claiming Lovett's statement was not conditional, but rather the unconditional termination of Denney's employment.

Both Denney and McGhee finished out the work day of November 21. Then, two days later, on Friday, November 23, Denney prepared a handwritten termination notice and took it to Lovett requesting that Lovett sign it to confirm the termination of Denney's employment. The one-sentence termination notice read:

Termination Notice

Greg Denney is terminated of employment by Tom Lovett as of 23 November 2001.

/s/ Tom Lovett

Lovett signed the notice and Denney left to seek other employment. Four days later, Denney secured new employment in Kentucky at "J Bar E Ranch," for which he was to receive a salary of $2,500 per month. Denney's new employment, however, did not provide for utilities or insurance as covered under his previous employment contract with Lovett.

[2] Both parties agree the contract was signed April 12, 2001, but the contract is dated March 13, 2001.

[3] The dental insurance required under the employment contract was provided through Lovett's insurance claims company, American Group Administrators, Inc.

Subsequently, Denney filed suit against Lovett for breach of the employment contract.[4] Lovett answered and counter-claimed against Denney, contending Denney breached the contract by quitting with eighteen months remaining on the contract. Following discovery, a bench trial was held. The trial court dismissed Lovett's counter-claim and ruled in favor of Denney, finding that Lovett wrongfully terminated Denney's employment, and Denney was entitled to damages for the balance of the term of the contract. The trial court awarded Denney damages of $39,088.32 for lost wages, $5,729.00 for health insurance payments, $1,700.00 for utilities, and $4,807.74 in prejudgment interest, for a total judgment of $51,325.06.

Lovett presents three issues on appeal. One, he contends the trial court erred by granting Denney's motion in limine to exclude Lovett from explaining the circumstances surrounding the signing of the termination notice. Two, Lovett contends the trial court erred by finding Lovett wrongfully terminated Denney's employment. Three, he claims the trial court erred by allowing Denney to present financial evidence that Denney failed to disclose in discovery.

STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

TERMINATION OF THE EMPLOYMENT CONTRACT

Lovett contends the trial court erred by finding that Lovett terminated Denny's employment. He also contends the trial court erred by excluding evidence regarding the circumstances in existence at the time Lovett signed the Termination Notice. To preserve the excluded evidence, Lovett made an offer of proof, which is included in the record on appeal. Having considered both issues, we find the trial court erred by excluding the evidence; however, the error was harmless because the evidence, including the offer of proof, does not preponderate against the trial court's finding that Lovett unilaterally terminated Denny's employment in breach of the contract.

[4]Denney also named Lovett's insurance claims company, American Group Administrators, Inc., as a party defendant. That claim was dismissed and is not a subject of this appeal.

Circumstances Regarding the Termination Notice

Lovett contends the trial court erred by excluding evidence regarding the circumstances in existence at the time he signed the Termination Notice. Denny contends the evidence was properly excluded, arguing, inter alia, the termination notice constituted a contract and the evidence in Lovett's offer of proof violates the parol evidence rule. We find Lovett has the better argument on this issue.

Denney filed a pre-trial Motion in Limine to exclude the evidence. The trial court granted the motion, ruling that any attempt by Lovett to contradict the plain and unambiguous terms of the written Termination Notice violated the parol evidence rule.

The parol evidence rule generally precludes the use of extrinsic evidence to vary or contradict the terms of an unambiguous and integrated contract – a writing the parties have adopted as the expression of their final agreement. *Stamp v. Honest Abe Log Homes, Inc.*, 804 S.W.2d 455, 457 (Tenn.Ct. App. 1990); 29A AM. JUR. 2D *Evidence* §1092 (2005). It is a rule of substantive law intended to protect the integrity of written contracts. *Maddox v. Webb Constr. Co.*, 562 S.W.2d 198, 201 (Tenn.1978). Since courts should not look beyond a written contract when its terms are clear, *Newark Ins. Co. v. Seyfert*, 392 S.W.2d 336, 348 (Tenn. 1964), the parol evidence rule provides that contracting parties cannot use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract. *Jones v. Brooks*, 696 S.W.2d 885, 886 (Tenn.1985); *Clayton v. Haury*, 452 S.W.2d 865, 867 (Tenn. 1970). Before the parol evidence rule may be applied to preclude extrinsic evidence that will vary or contradict the stipulations of a writing alleged to be a contract between the parties, the writing must be shown to be the parties' contract. 29A AM. JUR. 2D *Evidence* § 1101 (2005).

Although the search for the parties' intentions begins with the written agreement, *Elliott v. Elliott*, 149 S.W.3d 77, 84 (Tenn. Ct. App. 2004), that search is not always limited to the writing. The parol evidence rule does not necessarily preclude our consideration of the circumstances in existence at the time the contract was formed. As the Tennessee Supreme Court explained a century ago:

> courts . . . look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so as to judge of the meaning of the words and of the correct application of the language to the things described.

Staub v. Hampton, 101 S.W. 776, 785 (1907) (quoting *Nash v. Towne*, 72 U.S. (5 Wall.) 689, 699, 18 L.Ed. 527, 529 (1867)).[5]

Subject to certain limitations imposed by the parol evidence rule, we may be permitted to consider extrinsic evidence regarding the circumstances surrounding the formation of a contract even in the absence of facial ambiguity. RESTATEMENT (SECOND) OF CONTRACTS § 202(1) cmt. a (1981); 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE: CONTRACT LAW AND PRACTICE §§ 8:16-8:18, at 886-893 (2006). When the parties have adopted a writing as the final expression of their agreement, our interpretation of their writing is directed to the meaning of the writing in light of the circumstances. RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. b.

All the written termination notice tells us is that "Greg Denney is terminated of employment by Tom Lovett as of 23 November 2001." As Lovett's offer of proof reveals, the evidence he desired to introduce pertained to the circumstances and his "assumptions" at the time he signed the notice. The offer of proof reads:

> Myself and a Hispanic fellow that worked at the farm and, I think, one other individual were working on the arena. We were finishing up on the boards, putting the boards up at the arena that we had talked about earlier.
>
> And Greg came up, drove up, and walked up to me and had the piece of paper there and told me that, you know, that if I would sign this, that he would like to be able to – I want to make sure I get this right – if I would sign this, it would help him to draw unemployment if he needed to draw unemployment.
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> And I don't recall him ever saying anything about, "If you sign this, I'm gone." I assumed, based on the fact he brought that up, that he was quitting. I'm assuming.

The evidence Lovett desired to introduce did not contradict the termination notice. It merely described the circumstances in existence at the time Lovett signed the termination notice. We therefore conclude this evidence does not violate the parol evidence rule and it should have been admitted.

There is another reason the proferred evidence does not violate the parol evidence rule. That is because the Termination Notice is neither a contract nor an amendment to the contract between Lovett and Denney. A contract results from a meeting of the minds. *See Johnson v. Central National Insurance Co. of Omaha*, 356 S.W.2d 277, 281 (Tenn. 1962). The unilateral action of one party to a contract does not amount to mutual assent or a meeting of the minds. *See Batson v. Pleasant View*

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[5]The courts continue to apply this principle today to contracts in general. *See Dunn v. Duncan*, No. M2004-02216-COA-R3-CV, 2006 WL 1233046, *2-3 (Tenn. Ct. App. May 8, 2006) (citing *Higgins v. Oil, Chem. & Atomic Workers Int'l Union Local*, 3-677, 811 S.W.2d 875, 879 (Tenn. 1991); *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 334 (Tenn. 1983)).

Util. Dist., 592 S.W.2d 578, 582 (Tenn.Ct. App.1979). Having concluded the Termination Notice was not a contract or an amendment to a contract, but a unilateral action by Lovett, evidence regarding the circumstances leading up to the execution of the termination notice would not violate the parol evidence rule.

We, therefore, find the trial court should have admitted and considered the proferred evidence. We will therefore consider the proferred evidence, along with all other evidence, as we examine the next issue.

Who Terminated Denney's Employment?

Lovett contends the trial court erred by finding that Lovett prematurely terminated the employment relationship. We find this argument to be without merit.

The cornerstone of Lovett's argument is that Denney, along with all of Lovett's employees, knew or should have known that he was a hot-head, he often lost his temper, he would "blow up" and say things he did not mean. In essence, Lovett wanted the trial court to believe, and now this court, that Denney knew Lovett did not mean what he said and Lovett would be remorseful the following day. Thus, Lovett contends Denney "should have known" he was not terminated even though Lovett said he was terminated.

Lovett relied on his testimony and that of Keith McGhee, another employee of Lovett, in his attempt to prove he doesn't mean what he says when he gets angry. The trial court, however, noted that Denney was employed by Lovett for a shorter period of time than McGhee and, therefore, it was reasonable for Denney to take Lovett at his word without attempting to interpret an unambiguous declaration of termination. The trial court further considered the parties' meeting on November 23 when Lovett signed the termination notice without attempting to change Denney's mind. As the court explained:

> Mr. Lovett says that he's remorseful, but there was never the statement made by Mr. Lovett which said, "Now, wait I [sic] a minute. If you are leaving over what occurred on Wednesday, I didn't mean that you were terminated or you were fired. What I meant was what I said, 'If you can't do better, go back to Texas' and 'I want you to do these kind of things.'"
>
> That's not it. He signs that. It's a termination. The Court finds that he [Denney] didn't voluntarily quit.

Implicit in the trial court's judgment are determinations of the credibility of the witnesses. *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). As a general rule, this Court does not pass on the credibility of witnesses. *Union Planters Nat'l Bank v. Island Mgmt. Auth., Inc.*, 43 S.W.3d 498, 502 (Tenn. Ct. App. 2000). The trial court, having seen and heard the witnesses testify, is in the best position to determine their credibility. *Id.* Since the trial court is in the best position

to observe the witnesses and to assess their demeanor, we will not reevaluate the trial court's assessment of witnesses' credibility in the absence of clear and convincing evidence to the contrary. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn.1999).

Considering the evidence in the record, including the circumstances in existence at the time Lovett signed the termination notice, the evidence does not preponderate against the trial court's finding that Lovett terminated Denney's employment during the heated argument at the barn. We therefore affirm the trial court's ruling that Lovett breached the two-year employment contract by terminating Denney after six months and is liable to Denney for the damages that proximately flowed therefrom.

DAMAGES

During cross examination, Denney attempted to introduce his 2003 Federal Income Tax Return into evidence to establish that his "net income" for the year following the termination of his employment was only $2,702. Lovett objected when Denney attempted to introduce the income tax return, contending it was inadmissible for two reasons. One, it had not been disclosed in response to a request for production of documents. Two, the financial information therein conflicted with testimony provided by Denney in his pre-trial deposition. The trial court overruled Lovett's objection, stating "I see it as rebuttal" and it was responsive to a question by Lovett concerning what Denney was earning.

In his deposition, Denney testified that he earned – "I keep" as he described it – an average of $2,500 per month from his new employment in Kentucky.[6] That amount, $2,500 a month, was the salary Lovett was contractually obligated to pay Denney, excluding benefits, such as insurance and utilities. Accordingly, if Denney earned the same compensation during the final eighteen months of his contract with Lovett, then Denney had mitigated his damages, at least for the loss of his salary from Lovett.[7] At trial, however, Denney contended he had sustained $39,088.32 in damages,[8] excluding utilities and insurance.

Lovett contends the trial court should have excluded the tax return because Denney's salary was a material issue, the income tax return directly conflicted with Denney's deposition testimony, and Denney had an affirmative, continuing duty to supplement his responses to discovery. Lovett also contended it was inadmissible because Lovett had propounded a request for production of documents to Denney requesting "documents and other tangible items, in your possession and

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[6] Denney's deposition was taken June 12, 2003. In that deposition he was asked about his income from his new job. "How much have you made there?" Denney answered: "Well, I keep – I'd say an average of 2,500 a month over the year."

[7] Denney, however, is entitled to recover other economic damages, including utilities and insurance pursuant to the contract of employment with Lovett.

[8] In the Complaint, Denney contended he sustained damages of $42,500.

control, which you contend support the claims set forth in the Plaintiff's pleadings." The tax return was not provided. The only documents provided in response to the request were the employment contract, the termination notice, a pay stub from Lovett and six pages of handwritten notes regarding the horses Denney cared for at Lovett's farm.

The purpose behind pre-trial discovery is to eliminate surprise and enable the parties to discern what is at issue in preparation for trial. *Wright v. United Services Auto Association,* 789 S.W.2d 911, 915 (Tenn. Ct. App. 1990); *Strickland v. Strickland,* 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981). The Tennessee Rules of Civil Procedure provide:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, *except as follows*:
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> ***
>
> (2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which the party (A) knows that the response was incorrect when made; or (B) knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Tenn. R. Civ. P. 26.05. (emphasis added) The 2001 Advisory Commission Comments further clarifies the duty by stating, "The Commission is of the opinion that a party has a duty under the criteria in Rule 26.05(2) to supplement responses made during a deposition."

Tenn. R. Civ. P. 34 requires a party to serve a written response to a request for production of documents and unless an objection is made, to produce those documents requested. *See* Tenn. R. Civ. P. 34.02. Unless an appropriate written objection is made, as the 1984 Advisory Commission Comment to the rule explains, "A party responding to a request for production obviously must produce documents." The record before us contains no objection to the request for production of documents propounded by Lovett to Denney. To the contrary, Denney provided documents in response to the request, but not his 2003 tax return.

The Federal Rules of Civil Procedure, which are substantially similar to the Tennessee Rules of Civil Procedure in many respects, prescribe a sanction for a party that, without substantial justification, fails to disclose information required by Rule 26(a) or 26(e)(1) or, as we have here, fails to amend a prior response to discovery as required by Rule 26(e)(2). Under the Federal Rules, unless the court finds that sanction to be harmless, the sanction is to exclude the evidence at trial.[9] Fed. R. Civ. P. 37(c)(1). Rule 37 of the Tennessee Rules of Civil Procedure, however, does not prescribe

[9]The exclusion of undisclosed evidence "is automatic and mandatory under [Federal] Rule 37(c)(1) unless non-disclosure was justified or harmless." *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn*., P.C., 388 F.3d 976, 983 (6th Cir. 2004) (quoting *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004)).

a sanction. To the contrary, the Tennessee rules are silent on the subject of sanctions for failing to supplement discovery.

The Tennessee Rules of Civil Procedure also provide a sanction for failing to supplement or amend responses to discovery. That sanction, however, appears in a most recent amendment to Rule 37. The amendment, which became effective July 1, 2006, reads:

> A party who without substantial justification fails to supplement or amend responses to discovery requests as required by Rule 26.05 is not permitted unless such failure is harmless, to use as evidence at trial . . . any witness or information not so disclosed.

Tenn. R. Civ. P. 37.03. Since the amendment did not become effective until July 1, 2006, it is inapplicable to the issues at hand.

Prior to the 2006 amendment to Tenn. R. Civ. P. 37, Tennessee did not specifically provide a sanction for failing to supplement a discovery response. Nevertheless, our courts have often recognized that "the inherent power of trial judges permits the trial judge to take appropriate corrective action against a party for discovery abuse." *Lyle v. Exxon Corp*., 746 S.W.2d 694 (Tenn. 1988) (citing *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981)). Moreover, in *Ammons v. Bonilla*, 886 S.W.2d 239, 243 (Tenn. Ct. App. 1994), this Court reasoned that excluding the testimony of an expert witness may be an appropriate sanction for failure to name the witness.

> The purpose of pre-trial discovery is to eliminate the "surprise" element and enable the parties to discern what is at issue prior to trial. (citations omitted) When a party fails to reveal the name of an expert in response to pre-trial discovery, the court is given broad discretion or authority to punish these abuses and to impose sanctions. *Wright*, 789 S.W.2d at 915; Strickland, 618 S.W.2d at 500-01; T.R.C.P. 37.

Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 263 (Tenn. Ct. App. 1991). The trial court in *Strickland v. Strickland*, 618 S.W.2d 496 (Tenn. Ct. App. 1981), excluded the testimony of a witness whose name had not been disclosed for discovery. *Id* at 501. This court affirmed the trial court's decision reasoning "the trial court must have wide discretion in these matters." *Id*. (citing *Gormley v. Vartian*, 403 A.2d 256 (R.I.1979); *Dempski v. Dempski*, 27 Ill.2d 69, 187 N.E.2d 734 (1963); *Halverson v. Campbell Soup Co.*, 374 F.2d 810 (7th Cir.1967); *Mengel Properties v. City of Louisville*, 400 S.W.2d 690 (Ky. 1965)). "The decision of the trial court in discovery matters will not be reversed on appeal unless a clear abuse of discretion is demonstrated." *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992).

Exclusion of the testimony may be an appropriate sanction. *See Estate of Brock ex rel. Yadon v. Rist*, 63 S.W.3d 729, 732 (Tenn. Ct. App. 2001) (citing *Lyle v. Exxon Corp*., 746 S.W.2d at 699 (holding the exclusion of an expert witness may be appropriate, especially where the failure to name

the expert witness is knowing and deliberate)). In *Lyle*, the Court recognized that excluding the testimony of an expert witness may be an appropriate sanction, and listed four factors that the trial court should consider in determining the appropriate sanction. *Lyle,* 746 S.W.2d at 699. These factors are (1) the explanation given for the failure to name the witness; (2) the importance of the testimony of the witness, (3) the need for time to prepare to meet the testimony; and (4) the possibility of a continuance. *Id.*

The *Lyle* factors were considered and applied in the matter of *Mercer v. Vanderbilt Univ., Inc*., 134 S.W.3d 121 (Tenn. 2004), wherein Vanderbilt contended the trial court committed reversible error by excluding the testimony of one of the plaintiff's treating physicians, and a biomedical engineer who was employed by Vanderbilt. *Id*. at 132. The trial court excluded the evidence due to Vanderbilt's failure to supplement its answers to interrogatories pursuant to Tenn. R. Civ. P. 26.05(1). The trial court found that the plaintiff would have needed an additional three to six weeks to retain additional experts and prepare for these "surprise witnesses." *Id.* at 133. Therefore, the trial court concluded exclusion of the witness was the appropriate sanction for Vanderbilt's discovery abuse. *Id*. As the Supreme Court explained:

> Trial courts have wide discretion to determine the appropriate sanction to be imposed. *Strickland*, 618 S.W.2d at 501. Such a discretionary decision will be set aside on appeal only when "the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999) (citing *Overstreet v. Shoney's, Inc*., 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)). Appellate courts should allow discretionary decisions to stand even though reasonable judicial minds can differ concerning their soundness. *White*, 21 S.W.3d at 223; *Overstreet*, 4 S.W.3d at 709.

Mercer, 134 S.W.3d at 133. After acknowledging that the trial court considered the *Lyle* factors and determined the plaintiff would need an additional three to six weeks to meet the challenged evidence and that a continuance was not a reasonable option, the Supreme Court concluded the trial court acted within its discretion by excluding the testimony of these witnesses. *Id*. at 134.

Admissibility of evidence is within the sound discretion of the trial judge. *See Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442-443 (Tenn. 1992); *see also Davis v. Hall*, 920 S.W.2d 213, 217 (Tenn. Ct. App. 1995). Although we will not disturb an evidentiary decision of the trial court or a decision regarding a discovery dispute merely because we might have chosen another alternative, we may and should set aside a discretionary decision if it does not rest on an adequate evidentiary foundation or if it is contrary to the governing law. *Zakour v. UT Medical Group, Inc.*, No. W2003-01193-COA-R3-CV, 2005 WL 2860237, at *9 (Tenn. Ct. App. Oct. 31, 2005). *See Williams v. Baptist Mem. Hosp.*, 2006 WL 1007253, at *4, ___ S.W.3d ___, (Tenn. April 19, 2006) (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (holding a trial court abuses its discretion when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining)).

Denney had an affirmative duty to reasonably endeavor to mitigate his damages by attempting to obtain other employment. *See Carolyn B. Beasley Cotton Co. v. Ralph*, 59 S.W.3d 110, 115 (Tenn. Ct. App. 2000) (holding the party injured by the wrongful act of another has a legal duty to exercise reasonable and ordinary care under these circumstances to diminish the damages). However, Denny was not required to make extraordinary efforts. *Id.*; *see also ACG, Inc. v. Southeast Elevator, Inc*., 912 S.W.2d 163, 169 (Tenn. Ct. App. 1995) (citing *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29, 58 S.W. 278 (1900)).

Within four days of receiving the termination notice from Lovett, Denney started working at the "J Bar E Ranch" in Franklin, Kentucky. Accordingly, what Denney made or did not make in compensation for his services or benefits during the remaining eighteen months of his employment contract with Lovett was material. Lovett took Denney's deposition and in that deposition Denney was asked "How much money did you make there since you left [Lovett]?" When Denney asked for clarification of the question, Lovett asked "As far as performing any kind of work, . . . how much have you made there?" Denney replied, "Well, I keep – I'd say an average of 2,500 a month over the year." Lovett went on to ask if Denney kept records and "Do you file income taxes on the money you make?" Denney stated he did file income taxes and that he had already filed in 2002. Near the conclusion of the deposition, Lovett asked Denney,

> Q: If by chance you decide either during the deposition or after the deposition that the answer you gave is incorrect or incomplete, I'm going to ask that you supplement your answer, either today as we're in this proceeding or if later you tell Mr. Powers, and Mr. Powers will inform me.
> A: Okay.
> Q: Will you agree to those rules?
> A: Yes.

Denney did not supplement any of the answers provided in his deposition. Moreover, Denney did not provide the income tax return in response to the request for production of documents.

Lovett was entitled to rely on the facts as sworn to by Denney, one of which was Denney made approximately $2,500 a month, on the average, while working at the "J Bar E Ranch" in Franklin, Kentucky. Moreover, Denney should have been precluded from introducing into evidence his 2003 income tax return for two reasons: he failed to produce it in response to discovery, and the evidence he sought to rely on in the tax return contradicted his deposition testimony and was material to the issue being tried. Having reviewed the record, we have concluded that the trial court failed to consider Denney's pre-trial obligations to submit to discovery and, thus, based its discretionary decision on an incorrect evidentiary basis. Accordingly, we hold that the 2003 income tax return and the fact Denney made a "net income" of $2,702 that year should have been excluded.

With the exclusion of the 2003 income tax return the evidence established that Denney made the same compensation he would have received from Lovett had his employment not been wrongfully terminated. Thus, Denney was not entitled to receive his salary, or the mitigated

difference, as part of his compensatory damages. Denney, however, was entitled to recover the value of the insurance and utilities he was entitled to receive under the contract of employment with Lovett since he was not able to mitigate those damages with his new employment.

We therefore vacate that portion of the damages awarded to Denney for lost wages. We, however, affirm the judgment of the trial court in all other respects, including specifically the award of damages for utilities and insurance, plus prejudgment interest on the modified award, and costs.

This matter is remanded to the trial court for computation of prejudgment interest on the award of damages, as modified, and for the entry of judgment consistent with this opinion. Costs of appeal are assessed against the parties equally.

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FRANK G. CLEMENT, JR., JUDGE