IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 16, 2022 Session

KEITH COUSINS V. HUTTON CONSTRUCTION, INC. ET AL.

Appeal from the Chancery Court for Hamilton County
No. 17-0556 Jeffrey M. Atherton, Chancellor

No. E2021-01251-COA-R3-CV

This is an employment contract dispute involving the interplay of a paid sick leave provision and a bonus compensation provision. The appellant, Keith Cousins ("Cousins"), was hired by a real estate business in 2017. He signed a two-year contract which included provisions for salary, bonuses, and paid sick leave. After being with the defendant company for only a few weeks, Cousins suffered a major heart attack and, ultimately, never returned to work. A dispute regarding his compensation arose and in July of 2017, Cousins filed suit against his former employer for, *inter alia*, breach of contract. The trial court determined that the company breached Cousins' contract and awarded him some damages, but not the full balance of the two-year contract as Cousins requested. Both Cousins and the company appeal. We affirm in part, reverse in part, and vacate in part. The case is remanded for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in part, Reversed in part; Vacated in part; Remanded

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and THOMAS R. FRIERSON, II, J., joined.

John P. Konvalinka, Katherine H. Lentz, and Lawson Konvalinka, Chattanooga, Tennessee, for the appellant, Keith Cousins.

John R. Bode and Jessica Malloy-Thorpe, Chattanooga, Tennessee, for the appellees, Karen J. Hutton, Hutton Real Estate Ventures I, LLC, Hutton Construction, Inc., Hutton Growth One, LLC, Hutton Development, LLC, Hutton Growth OFP, LLC, and Hutton Growth, LLC.

OPINION

BACKGROUND

This appeal arises from an employment contract dispute between Keith Cousins and Karen Hutton. Ms. Hutton is the founder and CEO of several closely affiliated real estate businesses based in Chattanooga. The parties refer to Ms. Hutton's related real estate businesses collectively as "Hutton." On January 30, 2017, Cousins and Ms. Hutton, signing as CEO of Hutton, executed an employment contract (the "Agreement"). Under the Agreement, Cousins assumed the position of executive vice president for real estate for a term of two years. The Agreement also provided:

> Reporting: This position will report to Karen Hutton, CEO
>
> Salary: $275,000 per year.
>
> * * *
>
> Profit Sharing: Employee will receive a minimum annual bonus of Two Hundred Seventy-Five Thousand dollars ($275,000) per year. Additional bonus opportunity earned, of which initial $275k minimum will be netted against an additional bonus based on Single and Multi-Tenant developments and future types of growth as the department expands its development platform. Employee will earn 2.5% of each dollar of net profits after departmental company overhead, total project cost annually. Earnings from bonus above the One Million Dollars ($1,000,000) annually will be paid out over the following three-year period, 1/3, 1/3, 1/3.
>
> Bonus compensation is earned and paid while employed at Hutton as outlined and also paid if not employed by Hutton under the following conditions, as long as employee does not voluntarily terminate employment with Hutton and employment is not terminated due to proven cause. **Employee will continue to be compensated as outlined above if employee becomes unable to work due to illness or unable to work due to immediate family illness**.

(Emphasis added).[1] A different portion of the Agreement provided paid sick leave:

> Sick, Personal, Vacation, 30 days per year as needed. Notice of time away from office is all that is needed for internal planning purposes, limit vacation times to not more than two weeks at any one time without our mutual consent so we could plan accordingly.

[1] The bolded provision is referred to by the parties as the "illness clause." For ease, we adopt this name.

The parties executed the Agreement on January 30, 2017 after sending several drafts back and forth. The "illness clause," bolded above, was added after Cousins raised concerns that he might forego earned compensation based on "timing." In a redline draft sent to Ms. Hutton on January 26, 2017, Cousins inserted a revision just after the phrase "[b]onus compensation is earned and paid while employed at Hutton." Cousins commented as follows: "This would be ok if I were to leave for another job or terminated for proven cause but if I am sick, dead or unable to work due to an unforeseen practical reason such as a family member gravely ill god forbid – don't ya think my estate or I should get what we worked to achieve not forego based on timing?" Ms. Hutton agreed with Cousins' suggested change and thus the "illness clause" was inserted in the final draft of the Agreement.

Cousins assumed the position of executive vice president for real estate in late February of 2017. Cousins attended a work event in Texas on March 8, 2017, during which he experienced chest pain. By March 17, 2017, Cousins determined that he was having or had had a heart attack. Cousins eventually underwent a double by-pass surgery on March 22, 2017, at the University of Alabama Birmingham hospital. Following his initial recovery, Cousins entered a twelve-week cardiac rehabilitation program beginning on April 27, 2017. Cousins and Ms. Hutton kept in contact early in this rehabilitation period. Mr. Cousins maintained that he worked some remotely, but the record does not show that he did anything significant or with regularity. Several Hutton employees testified that Mr. Cousins did not fulfill any job duties following his heart attack aside from forwarding emails and voicemails.[2]

Hutton paid Cousins his full salary through May 18, 2017. After he realized that a paycheck had been missed, Cousins reached out to Ms. Hutton through a text message: "5/18 was the last paycheck I received, did not get a 6/2 deposit. Is that what you wanted to do?" Ms. Hutton responded that she had not intended to stop paying Cousins and that it was a mistake triggered by Hutton's payroll office. While Ms. Hutton admitted that stopping Cousins' pay was a mistake, she also maintained that Cousins had exhausted his thirty days of paid sick leave provided by the Agreement. In an email on June 7, 2017, Ms. Hutton outlined a plan under which Cousins could collect an advance on his salary while in recovery:

> Keith this is what I propose. Take a look and let's discuss. Hope you had a good day yesterday. Any movement on the ad for the real estate vp or director[?]
>
> Revised to show signing bonus and 15 days PTO.[3]

[2] Cousins lives in Alabama. The Agreement contemplated remote work and periodic travel to Chattanooga and elsewhere.

[3] It is undisputed that "15" was meant to be thirty in reference to the paid sick leave provision of

> Attached is the excel sheet showing Keith's pay for the balance of 2017. After the payment of the missed 6/2 payroll, [Keith] will be paid $4,713 every two weeks starting 6/16/17. These payments and the amount already paid to Keith this year, will equal his 6.5 month salary amount.

Attached to the email was a spread sheet breaking down Ms. Hutton's proposal. The proposal included the $10,000.00 signing bonus and six and a half months of salary. Under Ms. Hutton's proposal, Cousins' total compensation for 2017 would have been $158,958.00. It was unclear at this juncture when Cousins would be able to return to work because he was still in the rehabilitation program, and his doctors had not cleared him to work.

Cousins responded in an email on June 9, 2017, explaining that he disagreed with Ms. Hutton's interpretation of the Agreement:

> Karen, with a lot of reflection and as honestly and candidly as I can, I am following up on our brief phone conversation of Sunday the 4th of June and your email sent on the 7th of June. You have indicated to me in multiple emails, texts, phone calls and your visit since open heart surgery on March 22nd that you need me to return to full working capacity ASAP. In the latest of our communications above and in conjunction with the unexpected stoppage of my paycheck to have been paid on the 2nd of June (that surprised me because it happened without discussion or notice), you proposed to negatively change our January 30, 2017 agreement regarding my compensation. I suggest and recommend that this does not change. We are bound by our agreement that was negotiated and executed in good faith and I am to be compensated without offset based on the terms of our agreement. Our agreement contemplated fully and clearly the outcome in the event an illness were to make me unable to fulfill my job responsibilities. This outcome is unfortunate, but nevertheless it has triggered a provision that we negotiated and included in the agreement. The last sentence of the first page is explicit and captures Hutton's requirement and obligation therein.

Cousins went on to say that while his doctors had not cleared him to work full-time, he was willing to meet with Ms. Hutton and discuss how he could fulfill "sub elements" of the job in the interim.

On June 11, 2017, the parties exchanged text messages regarding the need to discuss compensation. Among other things, Cousins told Ms. Hutton that he hoped she "[was] able to or will pull to review our agreement and recall our discussions and that it

---

the Agreement.

does require continued payment under the circumstances." Ms. Hutton responded, as relevant:

> I've pulled the agreement and want to get with you regarding when you are feeling better. Let me know. . . . I interpreted the Agreement differently from you and I also wanted to go over how I recalled our conversations leading into the insertion and placement of the illness clause.

Communication between the parties broke down following this exchange. Through June of 2017, Ms. Hutton and Hutton employees reached out to Cousins regarding a short-term compensation plan while he remained in recovery. Following the above exchange, however, Cousins never responded directly to Ms. Hutton or any other Hutton employee. By June 20, 2017, Cousins communicated only with his counsel who in turn communicated with Hutton's counsel. On June 22, 2017, Cousins communicated through counsel that he would return to work when his doctor gave him clearance to do so and that in the interim, Ms. Hutton had agreed to pay him "if he became disabled."

On July 28, 2017, Cousins filed suit in the Chancery Court for Hamilton County (the "trial court") against the Hutton entities claiming breach of contract, negligent misrepresentation, and fraudulent and/or reckless inducement to contract. Hutton filed an answer and counterclaim asserting fraud, breach of duty of loyalty, breach of contract, and unjust enrichment. Cousins later filed an Amended Complaint adding Ms. Hutton as a defendant.

Through the summer and into the fall of 2017, Cousins maintained through his counsel that Hutton was obligated to keep paying Cousins' full salary. At some point, Ms. Hutton realized that Cousins had removed his affiliation with Hutton from his LinkedIn profile. The profile reflected that Cousins worked for Retail Specialists, which Ms. Hutton testified is a competitor of Hutton. On August 21, 2017, Ms. Hutton sent Cousins the following letter:

> Dear Keith,
>
> I recently received a copy of the complaint filed by your attorneys in state court. In that complaint, it was asserted that on April 27, 2017, you entered a 12-week rehabilitation program. By my calculations, that rehabilitation ended on or about July 20. Moreover, when we last spoke in June, you indicated that you expected to return to work by August 1. That date has also now passed. Succinctly, do you have any update on your return date? As previously indicated to your attorneys, we still consider you to be an employee of Hutton, and look forward to your return to work at Hutton.

> That said, do you still consider yourself to be an employee of Hutton and do you still wish to return to work at Hutton? I ask only because we have recently received some conflicting, and rather troubling, information about your work for one of Hutton's direct competitors, Retail Specialists, LLC — employment that may date back to March of 2017. Before drawing any conclusions with respect to this information, however, I want to give you the opportunity to address the same. Please be so kind to respond by Monday, August 28.
>
> Sincerely,
> Karen J. Hutton
>
> P.S. In light of your continuing absence, please be advised that your participation in Hutton's medical plan will end on August 30, 2017. You may, however, be eligible to continue that participation under COBRA, and your rights in that regard will be communicated to you under separate cover. Upon your return to work at Hutton, you will also be eligible to re-enroll.

There is no indication Cousins or his counsel responded to this letter. On August 30, 2017, Cousins received a COBRA letter providing that his insurance coverage through Hutton was ending. On September 7, 2017, Cousins' doctors cleared him to return to work full-time. Cousins never communicated this to Hutton and never returned to Hutton, however. On October 14, 2017, Cousins sent the following email to Robert Jolley, the CEO of Retail Specialists:

> Howdy gents, good news, TN attorney gave me a thumbs up mid-week to pursue new (or more specifically non-Hutton) work. On the case, my attorney sent a response to the court re: Hutton's countersuit a month ago. That countersuit falsely alleged that I was employed by Retail Specialists while working for Hutton. Oddly that came a week or so after we last met in Birmingham to chat about life, family and friendship...long after Hutton did not follow through on their bargain. Funny stuff, but I am glad that we always choose the high road on things and I am glad we agreed to hold off on any business until the employment situation with Hutton and their intentions were clear. Their letter to me and the countersuit were puzzling but entertaining I guess to read. Not sure where or why they derived/concocted that story other than to cause more delays on doing the right thing. I did not want to distract you guys either with it, so I have just been waiting on the all clear. Whatever the case, my TN attorney now advises me that I am free to pursue work and I will just need to be clear on the day of it starting. 😊 So, on that note, I know that next week will be a busy one with the ICSC in Atlanta (betting you will likely be wrapped up busy nestled next to Hutton's booth – ha!) but I want us to get back together ASAP in Birmingham (as long

> as you guys are ready to mush ahead). When is a good day? Also, I did not register for ICSC because I needed an all clear but I am thinking of coming over at least for Wednesday.

Despite the foregoing, however, Cousins maintains that he did not start formally working for Retail Specialists until 2018. The parties proceeded with discovery and on January 22, 2019, Hutton moved for summary judgment, which the trial court denied. Although the case was referred to mediation, the parties did not reach an agreement, and the case proceeded to trial.

The case was tried over four days in January of 2020. Cousins, Ms. Hutton, and various Hutton employees testified. The proof at trial centered on the negotiations of the Agreement and the eventual inclusion of the illness clause, as well as the parties' communications about compensation following Cousins' heart surgery. Cousins' position at trial was that the "illness clause" obligated Hutton to pay Cousins' full salary, as well as the $275,000 base bonus, despite Cousins' extended absence. Ms. Hutton's position was that the "illness clause" applied to earned bonus compensation and that Hutton was only obligated to pay Cousins thirty days of sick leave, which Hutton had honored.

On July 14, 2021, the trial court filed a memorandum opinion and order, holding as relevant, that

> [i]t was not until such time that [Cousins] was able to return to work and did not that [Ms. Hutton] had justification under the Agreement to stop paying [Cousins'] salary.
>
> The Court finds there was good cause for [Hutton] to terminate the Agreement when [Cousins] failed to return to work after he was medically cleared. As such, [Cousins] cannot recover to his full salary for two years under the terms of the Agreement. Instead, [Cousins] is only entitled to his salary during the time he was employed at Hutton, namely from February 21, 2017, through September 7, 2017. To hold otherwise would unjustly enrich [Cousins] when he failed to return to work at Hutton to mitigate his damages.
>
> * * *
>
> The Agreement provides that [Cousins] would receive a "minimum annual bonus of Two Hundred Seventy Five Thousand Dollars ($275,000) per year. Additional bonus opportunity earned, of which initial $275k minimum will be netted against an additional bonus. . ." The Agreement further provides that "[b]onus compensation is earned and paid while employed at Hutton as outlined and also paid if not employed by Hutton under the following conditions, as long as employee does not voluntarily terminate employment

> with Hutton and employment is not terminated due to proven cause. Employee will continue to be compensated as outlined above if employee becomes unable to work due to illness or unable to work due to immediate family illness." As discussed above, the Court finds the last sentence of this provision references solely the bonus compensation portion of the Agreement.
>
> As written, the Agreement provides that the minimum annual bonus was essentially automatic once [Cousins] started working for Hutton. There was no dispute that [Cousins] did indeed complete some work for Hutton before taking his medical leave in 2017. There was also no testimony with respect to any work completed by [Cousins] in 2018 for Hutton. Further, under the terms of the Agreement, there was no proof that [Cousins] voluntarily terminated his employment (other than simply not returning nor otherwise performing services) and Ms. Hutton specifically testified that she never terminated [Cousins]. . . . As such, the Court finds [Cousins] is entitled to the minimum annual bonus of $275,000 solely for the year 2017.

The trial court concluded that Cousins was not entitled to any additional earned bonus compensation because there was no proof of additional earned monies on top of the base bonus. Accordingly, Cousins was awarded his salary, prorated from February 21, 2017 through September 7, 2017, which came to $149,177.16. Cousins was also awarded $275,000 in base bonus compensation for 2017, as well as $10,000.00 for his signing bonus. The trial court offset this total by the amount Cousins was paid by Hutton, $67,692.00. Cousins' total awarded damages came to $366,485.16. The trial court determined that Hutton's counterclaims were without merit.

On August 13, 2021, Cousins filed a motion to alter or amend, asserting that he was entitled to $1,042,308.00 in damages to account for the full two-year term of the Agreement. Cousins maintained that Hutton was the first to materially breach the Agreement and that Cousins was therefore never obligated to return to work. The trial court denied Cousins' motion and he timely appealed to this Court.

ISSUES ON APPEAL

Cousins raises the following issues, which we restate slightly:

1. Whether the trial court erred in determining that Hutton's failure to compensate Cousins was not a material breach.
2. Whether the trial court erred in determining that Cousins was obligated to return to work following Hutton stopping his pay.
3. Whether the trial court erred in determining that the illness clause applies only to bonus compensation, as opposed to bonus compensation and salary.

4. Whether the trial court erred in failing to award Cousins the full balance of the two-year Agreement.

In their posture as appellees, Ms. Hutton and her companies (hereinafter referred to collectively as "Hutton" or "Appellees") raise the following issues on appeal, which have been restated and consolidated:

1. Whether the trial court erred in determining that Hutton owed Cousins any compensation beyond thirty days of paid sick leave, insofar as Cousins voluntarily terminated his employment with Hutton.
2. Whether Cousins materially breached the Agreement.

STANDARD OF REVIEW

This case was decided by bench trial. Therefore, we review it pursuant to the standard found at Tenn. R. App. P. 13(d). *Cross v. City of Memphis*, 20 S.W.3d 642, 645 (Tenn. 2000). Pursuant to Rule 13, "review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). Questions of law, such as interpretation of written agreements, are reviewed "de novo with no presumption of correctness or deference to the legal conclusions made by the lower courts." *Creech v. Addington*, 281 S.W.3d 363, 372 (Tenn. 2009) (citing *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008)); *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006).

DISCUSSION

Most, if not all, of the issues in this case stem from the parties' disagreement over interpretation of the illness clause. Our Supreme Court recently explained:

> The common thread in all Tennessee contract cases—the cardinal rule upon which all other rules hinge—is that courts must interpret contracts so as to ascertain and give effect to the intent of the contracting parties consistent with legal principles. *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886, 899 (Tenn. 2016); *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 659 (Tenn. 2013) ("*Dick Broadcasting*"); *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 441 (Tenn. 2012); *Allmand v. Pavletic*, 292 S.W.3d 618, 630 (Tenn. 2009); *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006); *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999) (quoting *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975)); *see also Colonial Pipeline Co. v. Nashville & E. R.R. Corp.*, 253 S.W.3d 616, 621 (Tenn. Ct. App. 2007).

> Also foundational to our jurisprudence is the principle that the rules used for contract interpretation "have for their sole object 'to do justice between the parties, by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time it was made.'" *McNairy v. Thompson*, 33 Tenn. 141, 149 (1853) (quoting *Chitty on Con.* 73); *see also Nunnelly v. Warner Iron Co.*, 94 Tenn. 282, 29 S.W. 124, 127 (1895); *Mills v. Wm. Faris & Co.*, 59 Tenn. 451, 457 (1873); *Nashville & Nw. R.R. Co. v. Jones*, 42 Tenn. 574, 583 (1865). "Common sense must be applied to each case, rather than any technical rules of construction." *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354, 47 S.W. 498, 499 (1898) (summarizing *Leonard v. Dyer*, 26 Conn. 172, 176-77 (1857)).

Indiv. Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc., 566 S.W.3d 671, 688 (Tenn. 2019).

Our initial task is determining whether the language at issue, primarily the illness clause, is unambiguous or of "uncertain meaning and [fairly] understood in more ways than one." *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006) (quoting *Farmers–Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975)). When a contract is unambiguous, "the literal meaning controls the outcome of the dispute." *Allstate*, 195 S.W.3d at 611 (citing *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 889–90 (Tenn. 2002)). If the contract language is ambiguous, however, a "court is permitted to use parol evidence, including the contracting parties' conduct and statements regarding the disputed provision, to guide the court in construing" it. *Id.* (citing *Memphis Housing Auth. v. Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001)); *see also Indiv. Healthcare Specialists*, 566 S.W.3d at 697 (quoting *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 765 (Tex. 2018) ("The parol evidence rule does not ... prohibit courts from considering extrinsic evidence of the facts and circumstances surrounding the contract's execution as an aid in the construction of the contract's language, but the evidence may only give the words of a contract a meaning consistent with that to which they are reasonably susceptible, i.e., to interpret contractual terms. This is true even if doing so reveals a latent ambiguity in a contract's terms.")).

While both parties raise several issues on appeal, the issues boil down to two questions. First, whether the illness clause applies to Cousins' compensation as a whole, including salary, base bonus, and additional bonus. If the clause so applies, Cousins argues that Hutton owed Cousins all of the foregoing while he was in recovery and that Hutton breached the Agreement by not paying Cousins. The second dispositive question is whether Hutton terminated Cousins' employment or Cousins left Hutton voluntarily. Regardless of what compensation it applies to, the illness clause applies only "as long as employee does not voluntarily terminate employment" or be terminated for cause. Consequently, whatever compensation the illness clause applies to is forfeited if Cousins left Hutton voluntarily. Although Cousins and Hutton both urge that the other party

materially breached the Agreement first, thus excusing the other party's obligations, the question of first material breach is most easily answered through analysis of the two foregoing questions.

We turn first to whether the illness clause applies only to bonus compensation, or to salary as well as bonuses. The trial court first determined that the illness clause was ambiguous and then determined that the illness clause applied only to bonus compensation. Although we disagree that the illness clause is ambiguous, we agree with the trial court's ultimate conclusion that the illness clause applies only to bonus compensation and not salary.

A contractual provision is ambiguous when it is "susceptible to more than one reasonable interpretation[.]" *Planters Gin Co.*, 78 S.W.3d at 890 (citing *Memphis Housing Auth.*, 38 S.W.3d at 512). When considering ambiguity, we do not read the illness clause in isolation, but rather in conjunction with other portions of the Agreement to give effect to the document as a whole. *Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 704 (Tenn. 2008).

To recap, the Agreement provides as pertinent:

Salary: $275,000 per year.

* * *

Profit Sharing: Employee will receive a minimum annual bonus of Two Hundred Seventy-Five Thousand dollars ($275,000) per year. Additional bonus opportunity earned, of which initial $275k minimum will be netted against an additional bonus based on Single and Multi-Tenant developments and future types of growth as the department expands its development platform. Employee will earn 2.5% of each dollar of net profits after departmental company overhead, total project cost annually. Earnings from bonus above the One Million Dollars ($1,000,000) annually will be paid out over the following three-year period, 1/3, 1/3, 1/3.

Bonus compensation is earned and paid while employed at Hutton as outlined and also paid if not employed by Hutton under the following conditions, as long as employee does not voluntarily terminate employment with Hutton and employment is not terminated due to proven cause. Employee will continue to be compensated as outlined above if employee becomes unable to work due to illness or unable to work due to immediate family illness.

* * *

> Sick, Personal, Vacation, 30 days per year as needed. Notice of time away from office is all that is needed for internal planning purposes[.]

Both parties maintain on appeal that the illness clause is unambiguous, but they disagree about the meaning. Insofar as the illness clause applies to "compensat[ion] as outlined above[,]" Cousins urges that "above" refers to everything above the illness clause. This includes salary. On the other hand, Hutton submits that the illness clause must be read in conjunction with the separate paid sick leave provision, and that doing so establishes, unambiguously, that the illness clause applies only to bonus compensation.

We agree with Hutton and conclude, as the trial court did, that the illness clause applies only to bonus compensation. While the Agreement is certainly not a model of draftsmanship, the lack of clarity does not render it ambiguous. *See Campbell v. KLIL, Inc.*, No. M2021-00947-COA-R3-CV, 2022 WL 3715055, at *6 (Tenn. Ct. App. Aug. 29, 2022) ("[N]on-specificity is not a synonym for ambiguity."). Nor does the fact that the parties disagree about its meaning. *Fisher v. Revell*, 343 S.W.3d 776, 779 (Tenn. Ct. App. 2009) (citing *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc.*, 884 S.W.2d 458, 462 (Tenn. Ct. App. 1994)). Rather, a contractual term is ambiguous "only when it is susceptible to two or more *reasonable* constructions." *Campbell*, 2022 WL 3715055, at *6.

Under these circumstances, Cousins does not offer a reasonable construction of the illness clause because his interpretation ignores the thirty days paid sick leave provision. This Court has previously expounded on the pitfalls of this type of isolated, piecemeal contract interpretation:

> A word or expression in the contract may, standing alone, be capable of two meanings and yet the contract may be unambiguous. Thus, in determining whether or not there is such an ambiguity as calls for interpretation, the whole instrument must be considered, and not an isolated part, such as a single sentence or paragraph. The language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.

Fisher, 776 S.W.3d at 780 (quoting 77 C.J.S. *Contracts* § 304). In *Fisher*, which involved an insurance policy,[4] we determined that the provision at issue was unambiguous because the construction offered by the insureds was not a reasonable one. *Id.* at 781. The insureds'

[4] Construction of an insurance policy differs from the Agreement at issue here inasmuch as "[w]hen an ambiguity is found in an insurance policy, it must be construed strongly against the insurer and in favor of the insured." *Fisher*, 343 S.W.3d at 780 (quotation omitted). We nonetheless find *Fisher* relevant because it deals with the threshold determination of ambiguity, and "there must be two reasonable constructions of the language before the Court can find ambiguity and construe the policy toward the insured." *Id.*

construction was unreasonable because it 1) read the provision at issue in isolation and nullified a different provision, and 2) "produc[ed] an anomalous result" requiring a "strained" reading. *Id.*

The same can be said for Cousins' construction of the illness clause. While Cousins maintains that the illness clause provides him unlimited paid sick leave, this construction directly conflicts with the more specific paid sick leave provision. *See id.* at 780–781 (quoting *Pitt v. Tyree Org. Ltd.*, 90 S.W.3d 244, 253 (Tenn. Ct. App. 2002) ("[T]o properly construe an agreement, we are not allowed to take words in isolation, but must construe the instrument as a whole.")). Cousins offers no reasonable explanation as to what the thirty days paid sick leave provision means if the illness clause is also understood as providing unlimited paid sick leave. Accordingly, the paid sick leave provision is subsumed and rendered superfluous by the illness clause. And "principles of contract interpretation 'militate[ ] against interpreting a contract in a way that renders a provision superfluous.'" *Campbell*, 2022 WL 3715055, at *5 (quoting *Lovett v. Cole*, 584 S.W.3d 840, 861 (Tenn. Ct. App. 2019)).

Hutton's construction, on the other hand, allows a harmonious reading of both the illness clause and the paid sick leave provision. *See id.*; *see also Teter v. Repub. Parking Sys., Inc.*, 181 S.W.3d 330, 342 (Tenn. 2005) (quoting *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999) ("'[A]ll provisions in the contract should be construed in harmony with each other, if possible, to promote consistency and to avoid repugnancy between the various provisions of a single contract.'")). Specifically, Hutton urges that the illness clause applies to bonus compensation earned while employed at Hutton, even if at the time that bonus is paid out, the employee is absent due to illness. This construction not only harmonizes the illness clause with the paid sick leave provision, but also with the portion explaining how bonus compensation is paid. Because the bonus structure is such that bonus pay over a certain amount is paid out in subsequent years, a strained reading does not result from Hutton's construction of the illness clause. Stated differently, construing the "Profit Sharing" section as a whole, it makes sense that bonus compensation earned, for example, in 2017, but not due to be paid until 2018 or 2019, must still be paid to the employee or the employee's estate if the employee has fallen ill or is deceased. Not only does this construction harmonize all portions of the Agreement, but it is also contextualized by the nature of the parties' business, which undisputedly involves real estate deals that are sometimes completed or closed well before the profit therefrom is realized.

We are also unconvinced that the placement of the illness clause itself is unimportant. Indeed, the clause falls under the heading titled "Profit Sharing," while Cousins' salary is listed under the separate "Salary" heading. The salary provision contains no illness clause. While not dispositive, we have previously considered contract headings in the absence of a provision within the contract prohibiting same. *See, e.g.*, *Advanced Banking Servs., Inc. v. Zones, Inc.*, No. E2017-02095-COA-R3-CV, 2018 WL 4775642, at *5 (Tenn. Ct. App. Oct. 3, 2018) ("We are not persuaded [by the] argument that the

sentence contained in this section should be read without consideration of the section title or the paragraph headings that give context to its meaning."); *see also Fisher*, 343 S.W.3d at 780 ("[T]he language in a contract must be construed in the context of that instrument as a whole[.]").

Accordingly, only Hutton proffers a construction of the illness clause allowing for a harmonious reading of the Agreement as a whole. Because the illness clause is not susceptible to two or more *reasonable* constructions, it is unambiguous and applies only to bonus compensation. Accordingly, Hutton did not breach the Agreement by stopping Cousins' full salary in June of 2017, as Hutton had no obligation to pay sick leave beyond thirty days. The trial court erred in concluding otherwise.

Although Hutton was not obligated to pay Cousins any salary beyond the first thirty days Cousins was absent from work, under the illness clause the question remains whether Cousins is entitled to any bonus compensation. Again, the illness clause provides that "[b]onus compensation is earned and paid while employed at Hutton as outlined and also paid if not employed by Hutton under the following conditions**, as long as employee does not voluntarily terminate employment with Hutton and employment is not terminated due to proven cause**." (Emphasis added). Accordingly, even if the illness clause applies to bonus compensation earned prior to absence caused by illness, the clause contains a clear caveat that bonus compensation is forfeited if the employee voluntarily terminates employment. In order to determine whether Cousins is entitled to any bonus pay, we must therefore resolve the parties' dispute over whether Cousins was constructively terminated from Hutton or left voluntarily.[5]

The trial court's findings on this topic are somewhat confusing. As relevant, the trial court found in its July 14, 2021 order:

[5] Hutton argues on appeal that the trial court properly determined this argument waived, claiming that Cousins belatedly raised constructive discharge in his Rule 59 motion to alter or amend. Hutton correctly notes that a Rule 59 motion "should not be used to raise or present new, previously untried or unasserted theories or legal arguments." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005) (citing *Local Union 760 of Intern. Broth. of Elec. Workers v. City of Harriman*, No. E2000-00367-COA-R3-CV, 2000 WL 1801856, at *4 (Tenn. Ct. App. Dec. 8, 2000)). Nonetheless, Cousins maintained throughout this case that Hutton failed to honor its obligations to Cousins and that this led Cousins to ultimately seek employment elsewhere. Regarding questions of waiver, we do not "exalt form over substance." *Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 511 (Tenn. 2010). Moreover, "the doctrine of waiver generally exists to prevent litigants from raising issues to which their opponents have no opportunity to respond." *Jackson v. Burrell*, No. W2018-00057-COA-R3-CV, 2019 WL 237347, at *7 (Tenn. Ct. App. Jan. 16, 2019) (Stafford, J., dissenting), *rev'd on other grounds by Jackson v. Burrell*, 602 S.W.3d 340 (Tenn. 2020). Insofar as the circumstances of Cousins' departure from Hutton have always been centrally at issue, Hutton was not deprived of the opportunity to argue that Cousins left Hutton voluntarily. Indeed, Hutton has always maintained the same. Accordingly, we disagree that this issue should be waived and we proceed to consider it. *See Powell*, 312 S.W.3d at 511 ("The fact that the party phrased the question or issue in the trial court in a different way than it does on appeal does not amount to a waiver of the issue." (citing *Fahrner v. SW Mfg., Inc.*, 48 S.W.3d 141, 143 n. 1 (Tenn. 2001))).

> The Court finds there was good cause for [Hutton] to terminate the Agreement when [Cousins] failed to return to work after he was medically cleared. As such, [Cousins] cannot recover to his full salary for two years under the terms of the Agreement. Instead, [Cousins] is only entitled to his salary during the time he was employed at Hutton, namely from February 21, 2017, through September 7, 2017. To hold otherwise would unjustly enrich [Cousins] when he failed to return to work at Hutton to mitigate his damages. Further, the Court does not find the email from [Cousins'] counsel concerning his alleged willingness to return to work (see Ex. 20) persuasive or consistent with his actions/inactions in actually returning to work.
>
> * * *
>
> As written, the Agreement provides that the minimum annual bonus was essentially automatic once [Cousins] started working for Hutton. There was no dispute that [Cousins] did indeed complete some work for Hutton before taking his medical leave in 2017. There was also no testimony with respect to any work completed by [Cousins] in 2018 for Hutton. Further, under the terms of the Agreement, there was no proof that [Cousins] voluntarily terminated his employment (**other than simply not returning nor otherwise performing services**) and Ms. Hutton specifically testified that she never terminated [Cousins]. Ms. Hutton clearly wanted [Cousins] to work at Hutton, given her zealous efforts to recruit [Cousins] and her repeated contact with [Cousins] both socially and professionally before and after [Cousins] began working for Hutton. As such, the Court finds [Cousins] is entitled to the minimum annual bonus of $275,000 solely for the year 2017.

While the trial court found that Hutton breached the Agreement by stopping Cousins' pay, it also determined that this was not a material breach excusing Cousins' performance. According to the trial court, Cousins should have returned to work following medical clearance from his doctors on September 7, 2017. In his motion to alter or amend the trial court's order, Cousins urged that this conclusion was error because Hutton had materially breached the Agreement and/or constructively discharged Cousins. In ruling on Cousins' motion, the trial court expounded on this as follows:

> The assertion in [Cousins'] Motion that the Court clearly erred, as a matter of law, by finding that [Cousins] had failed to mitigate his damages by not returning to work with [Hutton] upon his medical release in September of 2017 because Plaintiff had been "constructively discharge[d]" by [Hutton] in June of 2017, is also rejected. Rule 59.04 motions may not be used to raise new, previously unasserted theories or legal arguments, and the claim of constructive discharge in [Cousins'] Motion is such a theory or legal argument. Moreover, the Court reiterates that any claim that [Cousins']

> employment had been "effectively terminated" by [Hutton] in June of 2017, is inconsistent with the evidence presented at trial, including [Cousins'] own allegation that he had continued to perform work for [Hutton] into July of 2017. **It was [Cousins] who chose not to return to work with [Hutton].**
>
> The assertion in [Cousins'] Motion that [the] Court clearly erred, as a matter of law, by finding that [Cousins] had failed to mitigate his damages by not returning to work with [Hutton] upon his medical release in September of 2017 because [Hutton] had discontinued the payment of his salary in June of 2017, is also rejected. While the Court reiterates that the discontinuance of those payments was a breach of the parties' employment agreement, the fact that one party has breached a contract is not sufficient to relieve the non-breaching party of its own contractual obligations unless the initial breach was "material."

(Emphasis added).

On one hand, the trial court acknowledged that Cousins voluntarily decided not to return to Hutton despite Hutton's overtures. Nonetheless, this was not dispositive in the trial court's analysis because, according to the trial court, Hutton first breached the contract by stopping Cousins' salary. The trial court's finding that Hutton first breached the Agreement is confusing in light of the trial court's other finding that the illness clause applied only to bonus compensation and not salary. In any event, the record supports and we agree with the trial court's observation that Cousins was the party who ultimately decided not to return to Hutton. Because we have already determined that the Agreement did not require Hutton to pay Cousins his salary beyond thirty days of agreed upon paid sick leave, and because Cousins maintained that he would not return to work unless he was paid essentially unlimited sick leave, we conclude that Cousins voluntarily terminated his employment as contemplated by the illness clause. Because Cousins voluntarily terminated his employment, he is not entitled to any bonus compensation.

Cousins argues on appeal that he did not voluntarily terminate his employment and that Hutton terminated him through its failure to pay him extended sick leave and other actions. As Cousins puts it, he was "constructively discharged."

This Court has recognized that "[t]erminating an employee triggers potentially significant legal consequences[.]" *Walker v. City of Cookeville*, No. M2002-01441-COA-R3-CV, 2003 WL 21918625, at *7 (Tenn. Ct. App. Aug. 12, 2003). As such, "employers may, on occasion, attempt an 'end run' around these consequences by engaging in conduct calculated to induce an employee to quit." *Id.* (quoting *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1025 (Cal. 1994)). Constructive discharge thus "disregards form and recognizes that some resignations, in substance, are actually terminations." *Id.* (citing *Beye v. Bureau of Nat'l Affairs*, 477 A.2d 1197, 1201 (Md. App. 1984)).

One type of constructive termination entails "demotion of executive employees who have a position-specific contract." *Id.*[6] Our Supreme Court acknowledged this type of constructive termination in *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88 (Tenn. 1999). In that case, the plaintiff entered into a three-year employment contract with the defendant, Cleo, Inc., ("Cleo") under which the plaintiff was to be Cleo's vice president of marketing. *Id.* at 92. The parties' agreement provided that if the plaintiff voluntarily terminated his position, his "right to all compensation hereunder shall cease as of the date of termination[.]" *Id.* at 93. Following changes in leadership, the plaintiff's relationships with his superiors deteriorated. *Id.* Approximately one year before his contract would have expired, the plaintiff's superiors informed him that he remained an employee of Cleo but was relieved of his duties as vice president of marketing. *Id.* The plaintiff was also informed that he had no authority to "bind, represent or speak" on behalf of Cleo and that all future work assignments would be sent to the plaintiff at his home. *Id.* Additionally, the plaintiff's work credit cards were revoked, and he was informed that the office would no longer take phone calls for him. *Id.*

The plaintiff later sued Cleo for the balance of his contract, claiming that he was constructively terminated. Our Supreme Court agreed:

> Here, we are not dealing exclusively with a change or restriction of appellant's work responsibilities. The facts are undisputed that Cleo not only demoted the appellant from his position as Vice President of Marketing, but also ordered him to stay at his home and wait for any future assignments. During the three months that the appellant stayed at home, he received no work assignments and apparently did not perform any functions on behalf of the company. In addition, Cleo reclaimed appellant's company credit cards and informed him that the company would no longer answer telephone calls for him. All business contacts for Cleo and authority to act on behalf of the company were taken away from the appellant. The undisputed facts in this case support the lower courts' holding that the appellant was constructively terminated from his employment.

Id. at 96.

The Court reached a similar conclusion in *Teter v. Repub. Parking Sys., Inc.*, 181 S.W.3d 330 (Tenn. 2005). In *Teter*, the employment contract at issue provided that if the plaintiff-employee was "discharged for any reason other than gross misconduct, fraud, embezzlement, theft or voluntary termination, [the employee] will be entitled to severance pay[.]" *Id.* at 334. During the term of the employee's contract, the defendant company

[6] This type of constructive termination is "distinguishable from cases where an at-will employee claims constructive discharge based upon a hostile work environment, discrimination, or some non-feasance on the part of the employer." *Guiliano v. Cleo*, 995 S.W.2d 88, 94 (Tenn. 1999).

gained a new president and chief operating officer ("COO"). *Id.* The new COO attempted to re-negotiate the employee's contract such that the bonus structure was less favorable to the employee and did not contain a severance pay provision. *Id.* at 335. The employee rejected the request to re-negotiate the contract, and his relationship with the new COO deteriorated. *Id.* Soon thereafter, the COO changed the locks to the plaintiff's office and sent the plaintiff a memo providing that the parties should part ways and "get on with life." *Id.* This memo also offered the plaintiff six months of severance pay. *Id.* In the course of wrapping up his office, it was discovered that the plaintiff had been using his company computer to view pornography. *Id.* After this discovery, the COO sent the plaintiff a second memo explaining that the plaintiff would have been terminated immediately had the COO known about the pornography and that the previous memo offering six months of severance pay was revoked. *Id.* at 336.

The plaintiff filed suit against the company for breach of contract. *Id.* The trial court concluded that the plaintiff did not resign voluntarily and awarded him three times his annual salary and bonuses as damages, per the parties' original contract. *Id.* This Court affirmed the trial court's decision. *Id.* On appeal, our Supreme Court agreed that the plaintiff did not voluntarily terminate his employment:

> [W]e agree with the Court of Appeals that Mr. Teter's employment with RPS was involuntarily terminated, thus triggering the severance pay provision. Mr. Teter signed an employment contract with RPS effective January 1, 1997. This contract did not have an expiration date, but was for an indefinite period of time. On August 10, 2001, [the COO] presented Mr. Teter with a proposed new employment contract. The reason for the new contract was not due to the expiration of the prior contract, but was due to the company's desire to restructure the division in which Mr. Teter worked. Thus, during the time that RPS was attempting to renegotiate Mr. Teter's contract, Mr. Teter was still working under the 1997 contract, which remained in effect. RPS and Mr. Teter were unable to reach an agreement regarding a new contract because all the proposals contained terms less favorable to Mr. Teter.
>
> * * *
>
> The evidence is unequivocal that if Mr. Teter did not agree to a new, modified contract, he would be terminated. The evidence is also clear that Mr. Teter did not agree to a new contract.
>
> > Modification of an existing contract cannot be accomplished by the unilateral action of one of the parties. There must be the same mutuality of assent and meeting of minds as required to make a contract. New

> negotiations cannot affect a completed contract unless they result in a new agreement.
>
> *Balderacchi v. Ruth*, 36 Tenn. App. 421, 256 S.W.2d 390, 391 (1952) (citing *Neilson & Kittle Canning Co. v. F.G. Lowe & Co.*, 149 Tenn. 561, 260 S.W. 142, 143 (1924)); *see also Harber v. Leader Fed. Bank for Sav.*, 159 S.W.3d 545, 552 (Tenn. Ct. App. 2004). Therefore, because Mr. Teter did not agree to modify his existing contract and RPS would not continue to employ him under the old contract, RPS terminated Mr. Teter's employment, and Mr. Teter did not voluntarily resign his position.

Id. at 337–38.

The foregoing cases establish that voluntary versus constructive termination is a fact-specific inquiry that depends upon the totality of the circumstances. In the present case, few if any of the salient factors addressed above are present. It is undisputed that Hutton never told Cousins he was fired, nor did it attempt to re-negotiate Cousins' contract as he now argues. As addressed at length above, the Agreement at issue provided Cousins with thirty days of paid sick leave, which Hutton honored. Any paid sick leave beyond thirty days was a situation not contemplated by the Agreement. Consequently, Hutton's attempts to offer Cousins an advance on his salary once those thirty days passed cannot be fairly characterized as an attempt to re-negotiate the Agreement or the illness clause. As Ms. Hutton testified, it was merely Hutton's attempt to assist Cousins while he remained unable to work. Nor did Hutton tell Cousins that if he did "not agree to a new, modified contract, he would be terminated." *Teter*, 181 S.W.3d at 337. On the contrary, Ms. Hutton rather doggedly communicated that she needed Cousins to return to work as soon as possible and invited his feedback on her proposal for a salary advance. Cousins never provided feedback on Hutton's proposal other than to reject it outright. Cousins instead communicated through counsel his expectation that he would receive his full salary.

Hutton continued to reach out to Cousins throughout the summer of 2017 to discern if and when Cousins planned to return to work. Even after Cousins filed suit against Hutton and removed Hutton from his LinkedIn profile, Ms. Hutton continued to inquire about Cousins' return. While Cousins' counsel exchanged a few emails with Hutton's counsel, Cousins did not communicate with Hutton after the early days of June 2017. Moreover, Cousins' counsel's emails reflect the position that Cousins would not return to work unless Hutton agreed to pay Cousins his full salary for the time he had been absent from work. The Agreement, however, did not provide for what Cousins was demanding.

Simply put, Cousins refused to return to work or communicate about returning to work, even after receiving medical clearance from his doctors, unless Hutton agreed to pay Cousins money he was not contractually entitled to. In this sense, Cousins was the party attempting to re-negotiate the terms of the Agreement. Moreover, Cousins' email to Mr.

Jolley on October 14, 2017, clearly establishes that Cousins had no intention of returning to Hutton and had only been waiting on approval from his counsel to start working for Retail Specialists.

On appeal, Cousins notes that eventually, Hutton asked for Cousins' laptop to be returned and cancelled Cousins' health insurance. This is true. However, these circumstances are distinguishable from those addressed in *Guiliano* and *Teter*. Hutton reached out, through counsel, on July 18, 2017, regarding whether Cousins would be in Chattanooga anytime soon, as Hutton needed access to software that was only on Cousins' computer. Ms. Hutton testified that this was expensive software specifically requested by Cousins and that Ms. Hutton needed access to it because Cousins was not performing any work duties. Cousins' counsel responded as follows:

> Mr. Cousins is still in rehab and recover[y]. There was no definitive time set for his recovery. He does not plan to be in the area anytime soon. Insofar as Mr. Cousins is concerned Hutton has breached its agreement with him.

On July 24, 2017, Hutton again reached out regarding Cousins' email access, which Hutton explained had to be disconnected due to a recent cyber-attack. The email sent by Hutton's counsel provided, however, that Cousins could re-access his email if needed and to "just advise." It is unclear whether Cousins responded to this or sought further access to Hutton's system. None of these communications by Hutton indicated that Cousins could not return to work, was not wanted at work, could not access his office, or had been demoted in some way.

Cousins also points to the cancellation of his health insurance. We concede that this action would generally buttress a constructive discharge argument. Considering the cancellation in the totality of all of the circumstances, however, it is not dispositive in this particular case. When Ms. Hutton reached out to Cousins via letter on August 21, 2017, it had been more than two months since Cousins had spoken with her. Cousins had filed suit against Hutton, and Cousins' counsel had communicated that Cousins considered Hutton to be in breach of the Agreement and expected full payment of his salary. Cousins had also removed his affiliation with Hutton from his LinkedIn profile, which by that time reflected Cousins as being employed by Retail Specialists. Even so, Ms. Hutton maintained that she still desired Cousins to return to work. She also communicated her understanding that Cousins' rehabilitation program was completed and asked him to advise. While she did write that Cousins' health insurance would be terminated, she also stated that he could re-enroll if he wanted to. Ms. Hutton also gave Cousins the opportunity to respond to this letter prior to the cancellation of his health insurance policy. Indeed, Ms. Hutton gave Cousins a week from the date of the letter to respond to her.

Ultimately, Cousins chose not to return to Hutton due to his belief that he was owed unlimited paid sick leave. Having determined that he was not so owed, logic dictates that

Cousins' choice was voluntary. Under all of the circumstances, Cousins voluntarily terminated his employment with Hutton. Consequently, Cousins is not entitled to any bonus compensation, pursuant to the plain language of the Agreement, that might have been earned by Cousins during his short tenure with Hutton, base or otherwise.[7]

Finally, Hutton asserts on appeal that Cousins "committed the first and only material breach[,]" and that "[a]s a result, Hutton has been damaged." Hutton claims that it "lost almost two years' worth of work and leadership by Cousins[,]" and that Hutton should be relieved of its contractual obligations to pay Cousins further. It is unclear whether Hutton is arguing that the trial court erred in dismissing its breach of contract claim. If so, its argument is woefully underdeveloped, and there is no proof of actual damages caused by Cousins' voluntary termination. To the extent that Hutton is simply arguing that Cousins terminated his employment and is not entitled to all of the damages awarded by the trial court, we agree, as addressed at length above. Hutton also asserts that the trial court erred in awarding Cousins the $10,000.00 signing bonus, which Hutton claims has already been paid.[8] As there seems to be disagreement as to whether the signing bonus was paid already, we vacate that portion of the trial court's order and remand for further proceedings. To the extent that the signing bonus has not yet been paid, we affirm the trial court's award of the signing bonus to Cousins. The Agreement provides that the signing bonus was "Ten Thousand Dollars ($10,000) to be received with first pay period." Per the Agreement, this was supposed to be paid upon Cousins joining Hutton, which he undisputedly did, and was unrelated to salary, profit sharing, or any other provision.

To conclude, we affirm the trial court's decision that the illness clause applied only to base bonus compensation of $275,000.00 per year and additional earned bonus compensation based on performance. The illness clause does not apply to Cousins' salary. Accordingly, Hutton committed no breach of contract in stopping Cousins' salary, and the trial court erred in concluding otherwise. In that vein, the trial court erred in awarding Cousins prorated salary through September 7, 2017 as damages. While Cousins' base bonus of $275,000.00 per year was covered by the illness clause, he forfeited the base bonus by voluntarily terminating his employment with Hutton. The same is also true for additional earned performance bonus, and even if it were not, there is no proof of what Cousins' additional performance bonus would be. Accordingly, the trial court's award of damages to Cousins for $275,000.00 as his base bonus for 2017 is also reversed. The trial court's award of the $10,000.00 signing bonus is vacated for further proceedings regarding whether this has already been paid.

[7] Even if we determined that Cousins was entitled to additional bonus compensation above the base, which he is not, there was no evidence at trial regarding what this amount would be given Cousins' short tenure at Hutton.

[8] Cousins' signing bonus was also mentioned in the proposal sent by Ms. Hutton on June 7, 2017. That document seems to indicate that the signing bonus was already paid.

CONCLUSION

The ruling of the Chancery Court for Hamilton County is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. Costs on appeal are assessed to the appellant, Keith Cousins.

_____

KRISTI M. DAVIS, JUDGE