

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 98-1552-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

GENTEK BUILDING PRODUCTS, INC.,

PLAINTIFF-RESPONDENT,

v.

ARNOLD CHECK,

DEFENDANT-APPELLANT,

RICHARDS BUILDING SUPPLY COMPANY,

GARNISHEE-DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Arnold Check appeals from a grant of summary judgment to Gentek Building Products, Inc. (Gentek). The circuit court's

judgment held that Check's commissions, that arose from the Sales Agent Agreement (the agreement) between Check and Richards Building Supply Company (Richards), were subject to a non-earnings garnishment. *See* §§ 812.01-.04, STATS. Because Check failed to establish that he had an employer-employee relationship with Richards or that his commissions from Richards were compensation for personal services, we affirm the circuit court's judgment.¹

BACKGROUND

On October 6, 1996, Gentek won a money judgment in the amount of \$362,287.68 against Check personally. The judgment arose out of Check's obligations to Gentek based on his personal guarantee of the obligations of his former business, Consolidated, Inc. Check failed to pay Gentek any amounts against the balance of the judgment. On June 4, 1997, Gentek filed a non-earnings garnishment claim against Check; Gentek's claim named Richards garnishee-defendant. Check moved the trial court for summary judgment, contending that his commissions held by Richards were earnings within the meaning of § 812.30(7), STATS., and therefore, not subject to non-earnings garnishment. After reviewing the agreement governing Check's relationship with Richards, the court concluded that Check was an independent contractor and therefore, the commissions held by Richards were not earnings within the meaning of § 812.30(7). The trial court denied Check's motion and awarded judgment to Gentek. The trial court subsequently denied Check's motion for reconsideration. This appeal followed.

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

DISCUSSION

The standard of review for summary judgment proceedings has been stated previously by this court: “In reviewing a grant of summary judgment, this court applies the same standards as the trial court. A motion for summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Thompson v. Threshermen’s Mut. Ins. Co.*, 172 Wis.2d 275, 280, 493 N.W.2d 734, 736 (Ct. App. 1992).

The facts in this case are undisputed. The issues raised require this court to interpret a written contract and to apply § 812.30(7), STATS., to the undisputed facts. These issues present questions of law. *See Demerath v. Nestle Co.*, 121 Wis.2d 194, 197, 358 N.W.2d 541, 543 (Ct. App. 1984) (construction of a contract presents a question of law); *Dungan v. County of Pierce*, 170 Wis.2d 89, 93, 486 N.W.2d 579, 581 (Ct. App. 1992) (“[A]pplication of a statute to undisputed facts ... is reviewed as a question of law.”). We review issues of law without deference to the conclusions of the trial court. *See Old Republic Sur. Co. v. Erlien*, 190 Wis.2d 400, 410, 527 N.W.2d 389, 392 (Ct. App. 1994).

We begin by noting that garnishments are divided into two categories, non-earnings or earnings. Earnings garnishment is governed by §§ 812.30-.44, STATS. Section 812.30(7), STATS., defines earnings as “compensation paid or payable by the garnishee for personal services, whether designated as wages, salary, commission, bonus or otherwise, and includes periodic payments under a pension or retirement program.” This definition, adopted by the Wisconsin legislature in 1993, mirrors the definition contained in

its federal counterpart in The Consumer Credit Protection Act.² The federal definition of “earnings” was closely examined in *John O. Melby & Co. Bank v. Anderson*, 88 Wis.2d 252, 276 N.W.2d 274 (1979). Melby determined that “[t]he term, ‘earnings,’ ... specifically refers to compensation for personal services.” *Id.* at 258, 276 N.W.2d at 277. *Melby* further determined that the Act’s “intent was to protect the employment relationship.” *Id.* at 256, 276 N.W.2d at 276. The court observed that “[i]t could not be clearer that the Congress was concerned with the protection of earnings in the ordinary payroll process.” *Id.* at 258, 276 N.W.2d at 277.

The relationship between Check and Richards was memorialized in the agreement. Our objective in construing the agreement is to ascertain the intent of the parties from the agreement’s language. *See Waukesha Concrete Prods. Co. v. Capitol Indem. Corp.*, 127 Wis.2d 332, 339, 379 N.W.2d 333, 336 (Ct. App. 1985). If the terms of the agreement are plain and unambiguous, it is the court’s duty to construe the agreement according to its plain meaning even though the parties may have construed it differently. *See id.*

The agreement begins with a definitions section:

- 1.1. “Owner” is identified as Richards Building Supply Company.
- 1.2. “Agent” is identified as Arnold Check.
- 1.3. “Independent Contractor” Means the Agent covered by this Agreement. Agent is not considered an employee of Owner.

² 15 U.S.C. § 1672(a) (1993) provides: “The term ‘earnings’ means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.”

The agreement also states that its purpose “is to allow Agent to sell products sold by Owner at the business. Agent is entitled to a commission for the sales obtained by him in his capacity as sales representative.” With respect to compensation, the agreement states: “In consideration for the Agent’s efforts, Owner agrees to pay to Agent a commission of the net sale proceeds paid for the sale of products offered by Owner.” The agreement limits such commissions to “invoiced or shipped orders.” The agreement also allows Check to share in the owner’s profits under certain conditions.

We conclude that the terms of the agreement relevant to the instant controversy are clear and unambiguous. The agreement expressly identifies Check as an independent contractor and not an employee of Richards. Richards’ contractual duty to pay Check commissions is consistent with his status as an independent contractor and not an employee. Under the agreement’s terms, Richards must pay Check certain commissions only upon Check’s submission of invoiced or shipped orders of products offered by Richards. The commissions are not payable for the personal services Check renders on behalf of Richards to secure the sale of Richards’ products. It follows that the commissions that Check earned were not derived from an employment relationship with Richards but, rather, only became due and payable upon Check’s successful sale of a Richards’ product as evidenced by its invoiced or shipped order. We conclude, therefore, that the commissions that Richards owed Check pursuant to the agreement were not earnings. It follows that Gentek properly brought a non-earnings garnishment action against Check and Richards to satisfy its money judgment previously entered against Check.

In light of the foregoing discussion, we hold that the trial court did not err when it granted Gentek summary judgment.

By the Court.—Judgment affirmed.

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

