**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

February 9, 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. 97-2352**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**ACUTE CARE ASSOCIATES, S.C.,**
**A WISCONSIN CORPORATION,**

**PLAINTIFF-APPELLANT,**

**V.**

**TRINITY MEMORIAL HOSPITAL OF CUDAHY, INC.,**
**A WISCONSIN CORPORATION,**
**ST. LUKE'S MEDICAL CENTER, INC.,**
**A WISCONSIN CORPORATION,**
**AURORA HEALTH CARE, INC., AND**
**MARK AMBROSIUS,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Reversed and cause remanded with directions.*

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

WEDEMEYER, P.J. Acute Care Associates, S.C. (Acute) appeals from a grant of summary judgment dismissing its claim against Trinity Memorial Hospital of Cudahy, Inc. (Trinity) for breach of contract, and its intentional interference of contract claims against St. Luke's Medical Center, Inc. (St. Luke's), Aurora Health Care, Inc. (Aurora), and Mark Ambrosius (Ambrosius).

Acute claims the trial court erred when it: (1) dismissed the breach of contract claim; (2) dismissed the intentional interference of contract claims; and (3) excluded expert testimony on lost future profits. Because the trial court, as a matter of law, erred in concluding that a "with cause" provision in the contractual agreement between the parties was unambiguous, we reverse the summary judgment on the breach of contract and tortious interference claims and remand for further proceedings. We decline to address the evidentiary damages issue and direct the trial court to review this issue at trial.

## I. BACKGROUND

Acute, a service corporation, provides emergency room medical services by supplying emergency room physicians to hospitals and others in the medical field. The corporation consisted of five physicians, James Sullivan, Peter Holzhauer, Carol Brown, Hafiz Yunus and Joseph Romano. Trinity, a non-profit corporation, ran a hospital that provided hospital services and facilities. Prior to 1993, Acute, by contract, provided exclusive emergency room medical services to Trinity on a one-year contractual term. On January 1, 1993, Trinity and Acute extended their relationship by executing a three-year contract, under which Trinity granted Acute the exclusive right to provide emergency room medical services to its hospital. The contract contained the following termination provisions:

> 5.3 Termination. This Agreement may be terminated as follows:
>
> 5.3-1 Termination by Agreement. In the event Hospital and Physician shall mutually agree in writing, this Agreement may be terminated on terms and date stipulated therein.
>
> 5.3-2 Termination for Specific Breaches. In the event Physician or Hospital shall fail in any substantial manner to provide the services as specified in Articles II or III hereof, this Agreement may be immediately terminated. Any termination pursuant to 5.3-2 shall be pursuant to written notice stating the reasons provided by the party claiming breach.
>
> 5.3-3 Optional Termination. In the event either party shall, with cause, at any time give to the other at least one hundred twenty (120) days advance written notice, this Agreement shall terminate on the future date specified in such notice.

The prior agreements had contained a termination "without cause" provision, which was removed from the contract at issue here.

During 1995, St. Luke's, the sole subsidiary of Aurora, desired to acquire the assets of Trinity. The purchase did not contemplate assumption of the Acute contract because St. Luke's intended to staff the facility with the emergency room physicians it had under contract. St. Luke's provided Trinity with an agreement promising indemnity to Trinity for any costs and legal fees incurred in terminating its contract with Acute. On April 8, 1995, Trinity terminated its contract with Acute, pursuant to section 5.3-3, the optional termination provision of the contract. Trinity asserted that it was terminating the Acute contract "with cause," the cause being that St. Luke's was, in essence, purchasing the facility because of Trinity's financial problems. When the purchase was complete, Trinity ceased to exist and in its place was St. Luke's south shore campus.

Acute filed claims against Trinity for: (1) violation of the Wisconsin Fair Dealership Law (WFDL); and (2) breach of contract. It also filed claims against Aurora, St. Luke's and Ambrosius for tortious interference of contract. The trial court granted summary judgment. With the exception of the decision on the WFDL claim, Acute now appeals.

## II. ANALYSIS

The issue presented in this case involves the interpretation of terms of a contract. Specifically, we must address the meaning of the term "with cause" as used in the contract between Trinity and Acute. Both sides argue that this term is unambiguous. Trinity argues that "with cause" means any valid reason under the circumstances; whereas Acute argues "with cause" means misconduct generated by the non-terminating party. The trial court ruled that the term was unambiguous and defined it as: "any justifiable, substantial, legitimate or valid reason which could rationally support a termination of agreement between reasonable people acting in good faith and with common sense."

This case arises from a grant of summary judgment. The standards for reviewing summary judgments have been often repeated and we decline to repeat them here. *See* ***Thompson v. Threshermen's Mut. Ins. Co.***, 172 Wis.2d 275, 280, 493 N.W.2d 734, 736 (Ct. App. 1992). We apply the same standards as the trial court. *See* ***id.*** Our review is *de novo*. *See* ***id.*** We will affirm the summary judgment only if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." ***Id.*** Further, this case involves interpretation of a contract, which is a question of law that we review independently. *See* ***Demerath v. Nestle Co., Inc.***, 121 Wis.2d 194, 197, 358 N.W.2d 541, 543 (Ct. App. 1984).

A term is ambiguous if it is reasonably or fairly susceptible to more than one meaning. *See* ***Borchardt v. Wilk***, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). The contract here does not contain a definition of cause. Both sides cite authority dealing with what constitutes "cause," although no case cited is directly on point. Trinity cites cases interpreting "cause" under the WFDL. These cases interpret "cause" to mean any valid reason and do not limit termination for cause to mean breaches by the non-terminating party. *See, e.g.,* ***St. Joseph Equip. v. Massey-Ferguson, Inc.***, 546 F. Supp. 1245, 1248 (W.D. Wis. 1982) (ordinary common sense suggests that when a company is losing money, it has good cause to terminate the contract). In addition, Trinity directs us to foreign case law, which suggests that cause is not dependent on misconduct by the non-terminating party, but rather is defined as any "fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." ***Quick v. Southern Churchman Co.***, 199 S.E. 489, 494-95 (Va. 1938). Although these cases offer guidance on the issue, they do not control the issue because the instant case does not involve a dealership.

Acute offers contrary authority suggesting that "with cause" allows a party to terminate a contract based only on the conduct of the non-terminating party. Acute cites a Wisconsin statute, which defines "cause" as "inefficiency, neglect of duty, official misconduct, or malfeasance in office." Section 17.16(2), STATS. Acute also suggests that in the employment context in general, the common ordinary meaning of dismissal for cause involves some sort of offensive action or conduct by the non-terminating party.

Based on the conflicting authority cited by both sides, we conclude that the term, "with cause," as used by the parties to the contract at issue here is ambiguous. Both sides present arguments as to the meaning of this term. Both

Trinity's and Acute's definition of the term are reasonable interpretations. Therefore, we must conclude that the term is reasonably or fairly susceptible to more than one meaning.

The trial court erred in deciding these issues as a matter of law because there is conflicting evidence presented in the record before us as to the parties' intent relative to the optional termination provision. Trinity presents affidavits demonstrating that "with cause" means any valid reason, and that the sale of the hospital was specifically contemplated to be included as a "cause" for termination. Trinity president, Francis J. Wiesner's affidavit specifically avers that: "It was my intention and understanding that 'cause' for termination under Section 5.3-3 included the sale, bankruptcy or financial restructuring of Trinity." Trinity also presented an affidavit from Dr. Holzhauer, who was Acute's medical director at the time the contract was executed. Dr. Holzhauer avers in his affidavit that: "It was my understanding that 'cause' for termination of the Agreement under Section 5.3-3 could include the sale, bankruptcy or financial restructuring of Trinity."

Acute directs us to review evidence demonstrating that the purpose of the revised three-year contract was to provide stability to the employment at Trinity and prevent Trinity from terminating Acute, except for misconduct. Dr. Brown testified, via deposition, that she understood the termination "with cause" provision to mean that Trinity could terminate the contract only if Acute acted "contrary to the interest of the hospital." She testified that the "termination without cause" provision, which was present in earlier contracts with Trinity, had been removed from the three-year contract at issue to give Acute a secure contract and to avoid having Trinity terminate the contract on its "whim." Dr. Sullivan testified in his deposition that he understood the language "with cause" to mean

that Trinity could only terminate the contract if the doctors failed to meet their obligations. Dr. Romano testified in his deposition that he understood that the "with cause" language was added to provide job security. Dr. Holzhauer's depositions offer some testimony that conflicts with his affidavit. Specifically, he testified: "I don't think any of us anticipated the sale of the hospital, that I can remember, in writing the contract originally."

Because the term is ambiguous, the intent of the parties at the time the contract was executed needs to be determined. *See* ***Capital Invs., Inc. v. Whitehall Packing Co., Inc.***, 91 Wis.2d 178, 190, 280 N.W.2d 254, 259 (1979). Given the state of the record presented to us, we cannot make this determination as a matter of law. If the intent of the parties was undisputed, we could decide this issue as a matter of law. However, genuine issues of material fact exist as to what the intent of the parties was relative to the term "with cause." *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis.2d 158, 178-80, 557 N.W.2d 67, 75-76 (1996) (where contract is ambiguous, and conflicting evidence exists, intent should be decided by fact finder). Because of the state of the record, the question of intent predominates and prevents disposing of this case without a trial. Which definition is employed, however, is dependent upon how the jury resolves the intent question. In essence, the jury in this case will serve two functions: (1) resolving the factual dispute as to the intent of the parties relative to the term "with cause," and (2) determining whether cause actually existed to terminate the contract.

As noted, we cannot decide, as a matter of law, the intent of the parties when placing the term "with cause" in the optional termination provision of the three-year contract. Likewise, we cannot decide as a matter of law whether the

events here constituted a "cause" to terminate the contract. These issues must be resolved by a fact finder at trial.

Based on the foregoing, we reverse the trial court's summary judgment and remand for a trial on both the breach of contract and tortious interference claims. We decline to address the evidentiary damages question as we feel this would be more appropriately determined during the course of the trial by the presiding court.

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

Not recommended for publication in the official reports.

SCHUDSON, J. *(dissenting).* The majority would have a jury "serve two functions: (1) resolving the factual dispute as to the intent of the parties relative to the term 'with cause,' and (2) whether cause actually existed to terminate the contract." [sic] Majority, slip op. at 7. As the trial court correctly concluded, however, given the undisputed facts in this case, a jury need not address either of these two related subjects.

A jury need not resolve "the factual dispute as to the intent of the parties relative to the term 'with cause'" because any such factual dispute is immaterial. After all, Acute challenges Trinity's position that "with cause" in this contract permits one party to terminate absent any wrongdoing by the other party; but Acute does not challenge the trial court's determination that if "with cause" does permit such unilateral termination, then, unquestionably, the sale of Trinity qualifies as "cause."[1]

Thus, because it is undisputed that the sale of the hospital qualifies as "cause," then exactly what else the parties might have intended "relative to the term 'with cause'" is immaterial. Therefore, once we clear the hurdle presented by Acute's legal challenge to *the concept of "cause,"* we come to *the undisputed fact that the sale of Trinity is "cause."* So a jury need not determine "whether," in

[1] Acute asserts, "Obviously, the court recognized that the parties disputed the reason Trinity terminated the contract." This is so, but as Acute clarifies, it is contending "that the only reason [Trinity] terminated the contract was because St. Luke's requested it and then promised to indemnify Trinity for any resulting damages." That "only reason," however, *according to Acute's account of the case*, was inextricably linked to the sale of Trinity and, therefore, merely returns the analysis to whether the hospital's sale constituted "cause."

the majority's words, "cause actually existed to terminate the contract," because that fact is undisputed.

We must keep in mind that the Acute - Trinity contract included three termination provisions: § 5.3-1 governing "Termination by Agreement," § 5.3-2 governing "Termination for Specific Breaches," and § 5.3-3 governing "Optional Termination" and providing "either party" the right to terminate "with cause." "Obviously, then," as Trinity cogently argues, "'cause' meant something different from breach, because the parties expressly addressed termination for breach in § 5.3-2." Trinity correctly emphasizes: "'Cause' cannot simply be redundant. Courts avoid construction of an agreement which leaves part of the language useless." Acute fails to reply to this argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted).

Clearly, the parties established three distinct termination provisions, the last of which allowed for unilateral termination "with cause" and, unlike the other two provisions, required notice of at least 120 days. The parties considered the potential risks and values of their agreement and contracted accordingly. *See* ***Stoughton Trailers, Inc. v. Henkel Corp.***, 965 F. Supp. 1227, 1230 (W.D. Wis. 1997) ("[c]ourts should assume that parties factor risk allocation into their agreements"); *see also* ***id.*** at 1233 ("[s]ophisticated parties are … capable of allocating the risk of economic loss in a contract for services"). Did this prove to be a fiscally unfortunate agreement for Acute? Apparently, but I see no basis on which we may allow a jury the chance to rescue Acute from the consequences of its contract. Accordingly, I respectfully dissent.