COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP3013 **Cir. Ct. No. 2009CV1873**

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

BRANKO PRPA, M.D.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

WHEATON FRANCISCAN MEDICAL GROUP, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Wheaton Franciscan Medical Group, Inc., appeals a judgment concluding that its midyear change, retroactive to January 1, in the method used to determine compensation for Branko Prpa, M.D., breached the

parties' employment contract. Dr. Prpa cross-appeals the breach determination, the enforceability of restrictive covenants, and the attorney fee award. We affirm the circuit court in all respects.

¶2 Wheaton owns and operates All Saints – St. Mary's Medical Center, Inc. Wheaton and Dr. Prpa, an orthopedic spine surgeon, entered into an employment agreement (the Agreement) in July 2002. Wheaton provided Dr. Prpa with the equipment and resources at All Saints to develop his specialty and reputation. The parties agreed on an initial guaranteed annual salary, after which compensation would be made pursuant to a formula. The Agreement also contained a fee-shifting provision and noncompetition, nonsolicitation, and confidentiality covenants.

¶3 In 2007, Wheaton developed a new physician compensation plan (the Plan) to be implemented on January 1, 2008. Under the Plan, physicians received "draws" throughout the year, based on his or her prior-year production, against compensation calculated at year-end based on actual production. The Plan contained two compensation models, Net Collections and wRVU ("worked Relative Value Units"). Both models employed a January 1 – December 31 compensation period. The parties agreed in October 2007 that Dr. Prpa's 2008 compensation would be calculated under the Net Collections model.

¶4 Wheaton's not-for-profit, tax-exempt status requires that physician compensation remains commensurate with fair market value (FMV). Wheaton approved the Plan after a consultant, ECG, provided an opinion that the projected compensation model represented FMV. Wheaton later discovered that charity-care data it mistakenly supplied skewed the FMV calculation. ECG withdrew its opinion and Wheaton had to change its compensation model.

¶5 Wheaton notified Dr. Prpa on July 28, 2008, that it was switching to the wRVU model for the 2008 compensation period, retroactive to January 1. Dr. Prpa continued to provide surgical services. On December 31, his compensation was calculated under the wRVU model to be $1,354,346.08—over $320,000 less than the $1,675,826.56 in draws he already had received. Wheaton informed Dr. Prpa that his 2009 draws would be adjusted to recoup the alleged overpayment.

¶6 Dr. Prpa commenced this lawsuit, seeking to have the restrictive covenants declared invalid and asserting a wage and breach-of-contract claim. The trial court ordered the claims bifurcated and Dr. Prpa moved for summary judgment on the covenant issue. The court found that only the nonsolicitation covenant was unenforceable.

¶7 Wheaton and Dr. Prpa both sought summary judgment on the wage-and-contract claim. The trial court found that the terms of the Plan gave Wheaton the right to change to the wRVU model on July 28, 2008, and that the action resulted in two contracts in the 2008 compensation period. The first existed under the October 2007 terms for which Dr. Prpa provided his services from January 1 – July 28. The second, from July 28 – December 31, occurred through novation when Dr. Prpa assented to the wRVU compensation model by continuing to provide spinal surgery services under the new terms. The trial court also concluded that Wheaton breached the first contract when it retroactively applied the wRVU model to the first seven months of the year. Accordingly, it granted summary judgment in Wheaton's favor as to the July 28, 2008 amendment and its effect thereafter, but granted summary judgment to Dr. Prpa regarding the retroactive application of the change.

¶8 The court determined that Dr. Prpa's 2008 compensation was $132,962.76 less than it should have been. It declined his request pursuant to WIS. STAT. § 109.11(2)(a) (2009-10) to increase the sum by fifty percent, as the wage dispute was the result of a mistake and the underpayment did not create a financial hardship for Dr. Prpa. *See* ***Hubbard v. Messer***, 2003 WI 145, ¶40, 267 Wis. 2d 92, 673 N.W.2d 676. Finally, the court concluded that Dr. Prpa was the successful party such that the employment agreement's fee-shifting provision obligated Wheaton to pay Dr. Prpa's entire costs and attorney fees.

¶9 Wheaton moved for reconsideration, arguing that it was the successful party because two of the three restrictive covenants were upheld and Dr. Prpa recovered less than a quarter of the damages he sought. The trial court rejected Wheaton's argument but reduced Dr. Prpa's damages by one-third. Wheaton appeals; Dr. Prpa cross-appeals.

APPEAL

¶10 Wheaton first asserts that the trial court erred in granting summary judgment to Dr. Prpa because the plain terms of the Agreement allowed it to adjust his compensation for the full compensation period. We review orders for summary judgment independently, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). That methodology is well known and need not be repeated here. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). Whether a contract is ambiguous also is a question of law that we review de novo. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). Words and phrases in a contract are unambiguous unless they are fairly susceptible of more than one construction. ***Brown v. Maxey***, 124 Wis. 2d

426, 442, 369 N.W.2d 677 (1985). The main aim in contract interpretation is to give effect to the parties' intentions, which we ascertain by looking to the language of the contract itself. ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426.

¶11 The Plan obligated Wheaton to ensure that physician compensation was reasonable, representative of FMV, and in compliance with the law. Various sections of the Plan authorized Wheaton's executive committee and board to "periodically" review the Plan and, "from time to time," to revise or modify it and adjust the compensation conversion factors. Although undefined in the Plan, like the trial court we conclude that "periodically" suggests occurring at regular intervals and "from time to time" suggests addressing a matter as needed. Novation contemplates a substitution of a new contract for a previous one. ***State Med. Soc'y v. Associated Hosp. Serv., Inc.***, 23 Wis. 2d 482, 490, 128 N.W.2d 43 (1964). We agree that novation occurred here because the facts show consent by the parties and sufficient consideration to support the new obligation. *See* ***Navine v. Peltier***, 48 Wis. 2d 588, 594, 180 N.W.2d 613 (1970).

¶12 The Plan language does not similarly support retroactively adjusting Dr. Prpa's salary. He was working pursuant to an agreed-upon compensation model when Wheaton's error occasioned the review and modification. There must be a mutual mistake of fact to avoid one's contractual obligations. *See* ***Admiral Ins. Co. v. Paper Converting Mach. Co.***, 2012 WI 30, ¶57, 339 Wis. 2d 291, 811 N.W.2d 351. Thus, Wheaton was obliged to compensate Dr. Prpa from January 1 – July 28, 2008, according to the model it agreed to do. Once it gave notice to Dr. Prpa, however, that it was amending the compensation structure and he accepted the modification by continuing to provide surgery services, Wheaton was within its rights to adjust his compensation. We reject Dr. Prpa's assertion that

this construction grants Wheaton "unfettered discretion" to adjust physician compensation. Likewise, we do not accept Wheaton's argument that the "two-contract" approach requires fact-finding as to the parties' intent. When both parties move for summary judgment, it is the equivalent of a stipulation that no material facts are in dispute. *See* ***Millen v. Thomas***, 201 Wis. 2d 675, 682-83, 550 N.W.2d 134 (Ct. App. 1996).

¶13 Wheaton next contends that it is entitled to all of its attorney fees and costs as the "successful party" under the agreement's fee-shifting provision. In his cross-appeal, Dr. Prpa argues that the trial court erred in cutting his award by one-third.

¶14 The fee-shifting provision provides in relevant part:

> **Enforcement of Agreement and Waiver**. In the event that one party commences litigation, actions, proceedings or any other mechanisms ("Litigation") to enforce or to determine the enforceability of the provisions of this Agreement, the unsuccessful party in such Litigation shall pay all of the successful party's costs of Litigation including, without limitation, reasonable attorneys' fees.

¶15 The trial court here viewed the case as being equally weighted between the covenant issue and the wage-and-contract claim. Since the covenant issue had three parts, it also gave a "value" of three to the wage-and-contract claim for a total value of six. The court concluded that Dr. Prpa was the successful party on one of the three covenants and all of the other claim, or four-sixths (two-thirds) of the case, entitling Dr. Prpa to two-thirds of his attorney fees.

¶16 Wheaton contends that, under ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶23, 322 Wis. 2d 189, 776 N.W.2d 838, success is a matter of degree, and its success exceeded Dr. Prpa's on both claims. Dr. Prpa argues that

the trial court correctly found him successful but that ***Shadley*** is "anomalous" and should not override the Agreement's "pay all" language.

¶17 Shadley alleged negligence and breach of contract against a house mover. ***Id.***, ¶¶4-5. Although Shadley claimed over $100,000 in damages and rejected a $25,000 settlement offer, the trial court found the house mover liable for less than $15,000. ***Id.***, ¶¶6-7. Pursuant to a fee-shifting provision requiring the unsuccessful party to pay the successful party's attorney fees, the court awarded Shadley her full fees, nearly $44,000. ***Id.***, ¶9. We concluded that "successful party" was ambiguous in the context of the facts of the case because it seemed unlikely that the parties intended that a party only nominally successful on an excessive and largely unsubstantiated claim would be awarded the entirety of his or her fees. *See* ***id.***, ¶¶18, 20-22. We held that Shadley was entitled to recover only that proportion of attorney fees that equated to her success at trial and remanded for the trial court to calculate the percentage of her success and redetermine attorney fees. ***Id.***, ¶23.

¶18 Whether a party is a "successful party" is a question of law that we review de novo. ***Id.***, ¶12. The contract does not define the term, and both parties assert that it applies to them. We conclude that both parties were "successful" to an extent. As the contract drafter, Wheaton cannot now complain if the provisions it wrote are given a reasonable construction contrary to its contentions. *See* ***McPhee v. American Motorists Ins. Co.***, 57 Wis. 2d 669, 682, 205 N.W.2d 152 (1973).

¶19 From there, it was for the trial court to determine "reasonable attorneys' fees," which it did. An attorney fee award is committed to the trial court's sound discretion, which we will not disturb absent an erroneous exercise of

that discretion. *See* ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993). The court's conclusion that Wheaton must shoulder four-sixths of Dr. Prpa's attorney fees because Dr. Prpa was successful on four-sixths of his claims represents a proper exercise of discretion.

CROSS-APPEAL

¶20 Dr. Prpa first contends that Wheaton's prospective enforcement of its midyear compensation amendment violated the Plan, injured his expectation interests, and violated principles of equity and fair play, especially in conjunction with the noncompetition covenant. As already discussed, we disagree. The Plan made clear that Wheaton retained the right to adjust compensation conversion factors "from time to time" to keep Wheaton legally compliant. Thus, Dr. Prpa could not reasonably have expected that modifications never would occur during a compensation period.

¶21 Dr. Prpa next argues that the noncompete and confidentiality covenants are unenforceable. When the grant of summary judgment is based on an equitable right to enforce a restrictive covenant, we apply a two-tiered standard of review. ***Pietrowski v. Dufrane***, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109. "The interpretation of a restrictive covenant is a question of law." ***Id.***, ¶7. We review legal issues de novo, but the court's decision to grant equitable relief is discretionary and, therefore, will not be overturned absent an erroneous exercise of discretion. ***Id.***, ¶5. We make five distinct inquiries in evaluating the enforceability of a covenant not to compete. ***Pollack v. Calimag***, 157 Wis. 2d 222, 236, 458 N.W.2d 591 (Ct. App. 1990). The covenant must: (1) be necessary for the protection of the employer; (2) provide a reasonable time restriction; (3)

provide a reasonable territorial limit; (4) not be harsh or oppressive to the employee; and (5) not be contrary to public policy. ***Id.*** at 236-37.

¶22 The noncompete covenant forbade Dr. Prpa from providing any medical or surgical services within Racine county for eighteen months following the termination of his employment. The covenant was necessary to protect Wheaton because All Saints is Racine county's only acute-care general hospital and ninety percent of Wheaton's patients are Racine county residents. The covenant also was reasonable as to duration and territory because it was shorter than the two years Wisconsin courts have upheld and was limited to the region and patients Dr. Prpa actually serviced. *See* ***Chuck Wagon Catering, Inc. v. Raduege***, 88 Wis. 2d 740, 754, 277 N.W.2d 787 (1979). The covenant was not harsh or oppressive because Dr. Prpa still could practice general medicine or his specialty outside of Racine county during the eighteen-month limitation. The covenant also does not offend public policy because county residents continue to have access to spine surgery care through another physician.

¶23 Dr. Prpa also asserts that the confidentiality provision is not enforceable because it specifies no duration or territory. This argument is not reasonable. Referring to the noncompete provision, which was upheld, the confidentiality covenant provides that "during the Period of Noncompetition" the physician may not use, divulge or disclose the specified information to anyone "within the above-defined geographic area." A contract is "considered as a whole in order to give each of its provisions the meaning intended by the parties." ***RTE Corp. v. Maryland Cas. Co.***, 74 Wis. 2d 614, 620, 247 N.W.2d 171 (1976).

¶24 No costs to either party.

By the Court.—Judgment affirmed.

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