COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP210 **Cir. Ct. No. 2015CV1626**

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

MARK D. ADAMS, M.D.,

PLAINTIFF-APPELLANT,

V.

ANESTHESIOLOGY ASSOCIATES OF WISCONSIN, S.C.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Anesthesiologist Mark D. Adams, M.D., alleged that his employer, Anesthesiology Associates of Wisconsin, S.C. (AAW), breached his employment contract, forcing him to resign. The circuit court saw it differently and granted summary judgment in favor of AAW. Adams appeals from that order. We agree with the circuit court and affirm.

¶2 AAW provides anesthesiology services to various Milwaukee-area hospitals, including Aurora St. Luke's. Adams, an AAW shareholder, entered into an employment contract with AAW in 1994. Around 2010, Adams began exhibiting out-of-character behavior at work. He intimidated staff with rude, demeaning outbursts, shouted vulgarities, and refused to acknowledge or speak to one of his partners. He caused surgical delays: he refused to work with a certain physician and, if assigned, tried to trade cases just before surgery; without explanation, he at times arrived late for cases or left between them, returning late; he ordered last-minute tests of questionable need, often on more complex cases—a tactic, some thought, to shift the cases to other anesthesiologists. Besides difficulties with scheduling, several surgeons refused to work with him.

¶3 The episodes escalated. On his own, Adams disclosed that he was receiving treatment from a clinical psychologist for personal stress-related issues. AAW's president wondered if a medical condition might lie beneath the behavior. The Board of Directors believed Adams' conduct violated AAW's "Disruptive

Physician's Policy"[1] and potentially jeopardized patient and staff safety. Adams' contract with AAW provided that, if a concern arose that a physician "suffered a physical or psychiatric disability or dependency which might seriously impair" his or her ability to render "competent anesthesia care" to patients, the physician would be required to submit to a medical evaluation. The contract comprehensively set forth the evaluation procedure.

¶4 AAW referred Adams to its Performance Improvement Plan Committee, AAW's first-response mechanism with the authority to issue employment discipline and recommend evaluations for physical or mental conditions. The Committee told Adams it had a concern about his ability to render competent anesthesia care. It unanimously recommended that the Board require that he provide a report from a physician addressing his physical and mental status and impairments, if any, that could hamper his professional competence.

¶5 AAW proposed that Adams be seen at its expense at a facility Aurora uses for such referrals. Refusing to comply with AAW's recommendation or to provide a report from a physician of his own choosing, Adams resigned. He then filed suit alleging that AAW breached the contract by demanding on threat of termination that he submit to an extensive mental and physical examination without a legitimate concern that he suffered a disability or dependence seriously

[1] The policy, incorporated into AAW's rules and regulations, referenced a 2008 report of the Joint Commission on the Accreditation of Healthcare Organizations. Entitled "Behaviors that Undermine a Culture of Safety," the report discussed the risks "disruptive physicians" pose to patient care. AAW's policy referenced a second article that identified behavioral characteristics of a disruptive physician, which included intimidation, abusive language, oppositionality, shaming or humiliating others, making disparaging remarks, public displays of temper, and passive-aggressive actions.

impairing his medical competence.[2] The circuit court granted AAW's motion for summary judgment. Adams appeals.

¶6 A breach-of-contract claim requires proof of an enforceable contract; a breach; and damages. ***Brew City Redev. Grp., LLC v. Ferchill Grp.***, 2006 WI App 39, ¶11, 289 Wis. 2d 795, 714 N.W.2d 582, *aff'd*, 2006 WI 128, 297 Wis. 2d 606, 724 N.W.2d 879. The parties dispute only breach and damages.

¶7 Contract interpretation presents a question of law that we review de novo. ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶14, 342 Wis. 2d 29, 816 N.W.2d 853. We seek to determine and give effect to the parties' intentions. ***Id.*** at ¶21. Where contract language is unambiguous, we presume the parties' intent is evidenced by the words they chose and apply the contract language as written. ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751.

¶8 We review the grant of a summary judgment de novo, employing the oft-repeated methodology just as the circuit court does. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Suffice it to say that summary judgment must be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

[2] Adams also alleged that AAW violated the Health Care Worker Protection Act, WIS. STAT. § 146.997 (2015-16), claiming AAW discharged him in retaliation for some, in our words, "whistle-blowing" activity related to Medicare. Adams does not pursue that issue on appeal. All references to the Wisconsin Statutes are to the 2015-16 version unless noted.

¶9 The gist of Adams' claim is that there exists a genuine dispute of material fact as to whether his behavior, to which he admitted and for which he apologized, provided AAW a good-faith basis to compel him to undergo a comprehensive medical examination. A reasonable juror, he argues, could infer that his conduct, even if disruptive, was not sufficient to raise a legitimate concern that his ability to render competent anesthesia care was substantially impaired. AAW was mining for a reason to terminate him, he contends, out of animosity and retribution—it wanted to oust him to dodge paying fair value for his financial interest in the corporation and future lost earnings. He claims he was forced to resign to avoid the negative professional and reputational impact of termination.

¶10 We are not persuaded. St. Luke's is a heart hospital. The safety of anesthetized patients depends on harmony within the surgical team. Physicians and staff reported the negative impact of Adams' conduct on collegiality. His contract plainly provided that AAW could require him—or any contracting anesthesiologist—to undergo a medical examination if a "concern" arose that a physical/ psychiatric disability or dependency "might" seriously impair the ability to render competent anesthesia care to patients. Adams' increasingly troubling behaviors, coupled with his acknowledged seeking of personal psychological counseling, provided AAW with a good-faith "concern" that some type of medical or psychiatric disability or dependency "might" underlie his conduct.

¶11 As the circuit court noted and AAW similarly asserts, a "concern" that a disability "might" exist is far less than a probable-cause standard. We agree. It lays a low threshold that Adams' conduct indisputably met. No reasonable juror could infer that AAW lacked a sufficient basis for concern. AAW acted reasonably, responsibly, in good faith, and within its contractual right to invoke the medical-evaluation provision.

¶12 Adams also contends AAW materially breached the employment contract because it wrongly claimed *he* breached *his* contractual duty by refusing to comply with an order AAW had no legal or contractual right to demand. He asserts that this "material breach" freed him from honoring the agreement and allowed him to resign. No.

¶13 As discussed above, AAW had a contractual right to order Adams to be examined by a mutually agreed-upon physician. Indeed, the contract provided and AAW's president advised him that he could submit an evaluation report from a physician of his own choosing. He opted not to. Enforcing the contract on his refusal to comply in no way comprised a breach, let alone a material one.

¶14 We reject Adams' additional argument that summary judgment was wrongly granted because it was supported by incompetent evidence. The circuit court fully explained, as does AAW in its brief, why he is mistaken. We adopt that rationale without reiterating it here. We likewise reject out of hand his claim that he was constructively discharged, further disposing of his damages claim.

¶15 We need not consider Adams' final claim, first raised in his reply brief, that AAW failed to follow essential steps before ordering him to an examination. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981). As we also have been unable to locate any place in the record where Adams made this claim in the circuit court, we deem the issue waived. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

By the Court.—Order affirmed.

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