COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1250 **Cir. Ct. No. 99-CV-418**

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

JANE A. BENTZ, D.D.S., S.C.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

MICHAEL MOSLING, D.D.S.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Reversed and cause remanded.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 DEININGER, J. Michael Mosling appeals a judgment dismissing his counterclaim against Jane Bentz for her alleged misrepresentation in the sale of

a dental practice. Mosling claims that during the parties' negotiation over the purchase price, Bentz misrepresented the number of prepaid patients to whom he would be rendering uncompensated services following the closing. The circuit court, relying on the "sham affidavit" rule, dismissed Mosling's claim on summary judgment. We conclude, however, that the circuit court erred in its application of the "sham affidavit" rule, and that material issues of fact exist regarding Bentz's alleged misrepresentation. Accordingly, we reverse the dismissal of Mosling's counterclaim and remand for further proceedings on the claim.

¶2 Bentz cross-appeals the judgment insofar as it disallows a recovery by her of payments for unbilled "work done before the date of closing," to which she claims entitlement under the parties' agreement. The circuit court concluded that the contract obligated Mosling to forward to Bentz payments received for "accounts receivable," but not for any work performed prior to closing beyond that included in the "accounts receivable." We conclude, however, that the relevant contract language is ambiguous, and that genuine issues of material fact exist regarding the parties' intent concerning unbilled work as of the date of closing. Thus, we also reverse the judgment insofar as it denies Bentz's claim for unbilled "work performed," and we remand that claim as well for further proceedings in the circuit court.

BACKGROUND

¶3 The following background facts are taken from the parties' pleadings and submissions on summary judgment. Bentz owned an orthodontic practice and employed Mosling to provide dental and orthodontic services to her patients. In the spring of 1998, the parties began negotiations for the sale of a portion of

Bentz's practice to Mosling. The negotiations culminated in an "Agreement of Purchase and Sale." Section 4.A. of the agreement provided as follows:

> 4. Items Not Included in Sale to BUYER.
>
> A. SELLER shall retain all accounts receivable for professional services provided by the parties prior to the date of closing. BUYER will cooperate with SELLER in collection of outstanding accounts receivable as of the day of closing. If BUYER receives payments for work done before the date of closing, he shall forward those payments to Seller and shall turn over said receipts to SELLER within three business days of receipt of the payment. BUYER will be provided promptly after closing, a print out of all accounts with a balance owing for work performed prior to closing.…

¶4 Shortly before the closing on the sale, Bentz's bookkeeper notified Bentz that she would be quitting her employment with Bentz to work for Mosling. Concerned that some patients were receiving treatment for which they were not yet billed, Bentz requested the bookkeeper to bill them. The bookkeeper left two weeks early, however, and according to Bentz, some patients were not billed until after the closing for treatment provided prior to closing. Bentz alleged that Mosling did not timely remit payments on outstanding accounts receivable and did not forward any payments for work done but unbilled prior to closing, which Bentz claimed were due her under the parties' agreement.

¶5 Bentz and Mosling exchanged correspondence through counsel regarding the disputed payments. Mosling objected to the method used by Bentz in calculating what he owed her. He also contended that the contract's reference to "accounts receivable" and "payments for work done" were synonymous, and, thus, that he was not obligated to pay Bentz for unbilled work performed prior to closing. Mosling stated that he would continue to forward to Bentz payments for "accounts receivable," but would "not pay any other amounts to [Bentz]."

¶6 Bentz filed suit against Mosling for breach of contract and breach of an implied duty of good faith. In her complaint, Bentz alleged that Mosling breached the terms of the agreement by receiving payments for "'work done before the date of closing', but failing to forward those payments to Bentz as required by the Agreement." Mosling answered, denying Bentz's allegations and counterclaiming for a misrepresentation Bentz allegedly made regarding the extent of prepaid treatment that Mosling would have to perform without compensation post-closing.

¶7 According to Mosling, during his negotiations with Bentz regarding the proposed sale, an issue arose as to how prepayments Bentz had received prior to closing for work to be done after closing were to be handled. Mosling had not considered this, and he did not know how many patient accounts were "prepaid." He asked Bentz what would be done with these prepaid accounts, and Bentz allegedly told him that "only a couple" accounts were prepaid and she was not willing to pay him for these patients. Mosling would thus be providing treatment for these patients following the closing without compensation. Mosling asserted that he nonetheless went ahead with the closing "[u]nder the assumption there was only a couple" prepaid accounts. Bentz denied making the statement in question.

¶8 Mosling claims he discovered after the closing that approximately thirty patient accounts were prepaid, as opposed to "a couple" as Bentz had told him. Mosling filed a counterclaim against Bentz for misrepresentation, alleging that he was fraudulently induced into purchasing the practice based on Bentz's representation that "only a couple" patient accounts were prepaid. He asserts that "[h]ad [he] known the true extent of the number of patients that he would have to treat without compensation he would not have paid the amount that he agreed to pay under the agreement of purchase and sale."

¶9 The circuit court granted both parties' motions for summary judgment and dismissed their claims against each other.[1] Both parties appeal. We present additional facts relating to the appealed issues in the analysis which follows.

ANALYSIS

¶10 We review a circuit court's grant or denial of summary judgment de novo, owing no deference to the trial court's decision. ***Waters v. United States Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc***., 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995); WIS. STAT. § 802.08(2) (1999-2000).[2] We will reverse a decision granting summary judgment if either (1) the trial court incorrectly decided legal issues, or (2) material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co***., 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

¶11 We first consider whether the trial court erred in dismissing Mosling's counterclaim on summary judgment. Mosling testified at a deposition that during negotiations over the terms of the sale of the practice, Bentz approached him to discuss the prepaid accounts and told him "there is only a

[1] The court actually entered a judgment in favor of Bentz for $1,438.08, plus interest and costs, which represented the undisputed amount of "accounts receivable" Mosling had not remitted to Bentz, he having retained the same as a prospective "offset" to his counterclaim. Mosling does not challenge the amount awarded to Bentz in the judgment.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

couple of those[,] [w]e don't need to worry about that." According to Mosling, Bentz made the statement before the parties signed the sale agreement. He also testified that he did not feel a need to make an independent inquiry as he felt Bentz "had an obligation to tell [him] the truth."

¶12 Mosling was also asked at his deposition how he arrived at the purchase price in his counteroffer to Bentz. He replied that he did research on the valuation of the practice by consulting a professional journal and obtaining a formula for calculating the value of a dental practice. The formula was largely based on the previous year's net income. In response to the question, "when you came up with your counteroffer, you didn't … take into account how many patients had prepaid or not prepaid, you just looked at a previous year and what kind of income was generated by the business, is that correct?", Mosling replied "Yes." Later, in an affidavit submitted in opposition to Bentz's summary judgment motion, Mosling averred:

> I would not have been willing to pay the amount that I did for the practice had I known that there were approximately 30 patients who had prepaid and that I would be required to render more than $35,000 in orthodontic services to patients after the closing for which Dr. Bentz had received payments prior to closing.

¶13 The trial court granted Bentz's motion and dismissed Mosling's counterclaim for misrepresentation. In doing so, the court applied the "sham affidavit" rule, concluding that Mosling's averment that he would not have paid the price he did if he had known there were thirty prepaid patients as opposed to "a couple," contradicted his earlier deposition testimony that his counteroffer to purchase the practice was *not* based on the number of prepaid patients. Mosling claims the trial court erred in its application of the "sham affidavit" rule. We agree.

¶14 The "sham affidavit" rule precludes a party from creating genuine issues of material fact on summary judgment "by the submission of an affidavit that directly contradicts earlier deposition testimony." ***Yahnke v. Carson***, 2000 WI 74, ¶15, 236 Wis. 2d 257, 613 N.W.2d 102. The plaintiff's medical expert in ***Yahnke*** testified during a deposition that he was not "able to state that any of the defendants had breached the standard of care owed to Yahnke." ***Id***. at ¶4. When asked "'is it accurate to say that you do not have any criticism of the standard of care utilized by [the defendant surgeon] in his care and treatment of the patient,'" the expert answered affirmatively. ***Id***.

¶15 The defendants moved for summary judgment on the grounds that Yahnke's experts failed to establish negligence. ***Id***. at ¶5. Yahnke subsequently changed counsel and procured an affidavit from the same expert stating that Yahnke's injuries were caused by the surgery, and that the injury would not normally occur "if the surgeon performed his work within the ordinary standard of care." ***Id***. at ¶6. The supreme court concluded that "the plaintiffs' expert witness affidavit directly contradicted the expert's deposition testimony without adequate explanation …." Adopting the federal "sham affidavit" rule, the court affirmed the trial court's dismissal of the plaintiff's claim. ***Id***. at ¶23.[3]

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[3] The supreme court explained the policy underlying the "sham affidavit" rule as follows:

> The rule is based in part on the proposition that testimony given in depositions, in which witnesses speak for themselves, subject to the give and take of examination and the opportunity for cross-examination, is more trustworthy than testimony by affidavit, which is almost always prepared by attorneys.
>
> The rule is also rooted in the very mission of the summary judgment procedure:

(continued)

¶16 Unlike the expert's testimony and affidavit in ***Yahnke***, however, Mosling's affidavit does not "directly contradict" his deposition testimony. His testimony that he used an income-based formula in arriving at his counteroffer price, without factoring in prepaid patients, does not mean that if he had known the true number of prepaid accounts he would not or could not have changed his offered price prior to signing the agreement. Mosling testified at his deposition that he signed the agreement "[u]nder the assumption there was only a couple [prepaid patients]." In responding to an interrogatory prior to his deposition, Mosling had stated:

> Had I known of the true extent of the amount of prepayments I would have insisted on such a provision or an adjustment in the purchase price. I was paying what I felt was a premium price for the practice and assets, and a reduction of approximately $25,000 from my future income, due to treatment without compensation, would have been more than a 10% factor in the price and would have been more than I was willing to pay. Based on [Bentz's] misrepresentation that there were "only a couple" prepaid patients that factor would have been only 1% or 2%, and would have been an acceptable amount to absorb.

¶17 We conclude that Mosling's averment in his affidavit is consistent with his pre-deposition interrogatory response, and neither is "directly contradicted" by his deposition testimony. The circuit court, therefore, should not have dismissed Mosling's complaint on the basis of the "sham affidavit" rule.

> "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."

Yahnke v. Carson, 2000 WI 74, ¶¶15-16, 236 Wis. 2d 257, 613 N.W.2d 102 (citations omitted).

Bentz also contends, however, that even if the trial court erred in its application of the rule, summary judgment was proper because Mosling could not reasonably rely on Bentz's "vague" statement that there were "only a couple" prepaid accounts. She contends that, had Mosling been "truly concerned" about the number of prepaid accounts, he would have made his own inquiry by reviewing patient accounts prior to closing.

¶18 We cannot conclude on the basis of the summary judgment record, however, that Mosling's reliance on the statement was not justifiable. The record contains evidence from which a jury could conclude that it was. *See* ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 512, 383 N.W.2d 916, 918 (Ct. App. 1986) (When considering a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party.). The record contains Mosling's assertions that he had only "restricted access to the computer system, and had limited knowledge of how the system was operated," and that he "would not have been able to access information on patient accounts." The extent of Mosling's access to and knowledge of the patient accounts, and whether he justifiably relied on Bentz's alleged misrepresentation, are thus disputed issues of fact to be resolved by the trier of fact. *See* ***Henning v. Ahearn***, 230 Wis. 2d 149, 170, 601 N.W.2d 14 (Ct. App. 1999) ("The question of whether claimed reliance is justifiable may be decided as a matter of law, but only if the pertinent facts are undisputed.").[4]

[4] We note that Bentz also argued in the trial court that Mosling's counterclaim for misrepresentation was barred by the "economic loss doctrine." She does not renew that argument on appeal. *See* ***Douglas-Hanson Co., Inc. v. BF Goodrich Co.***, 229 Wis. 2d 132, 144-45, 598 N.W.2d 262 (Ct. App. 1999) ("[U]nder Wisconsin law, a material misrepresentation of fact may render a contract void or voidable.… The economic loss doctrine does not apply to fraudulently induced contracts….").

¶19 We next address Bentz's cross-appeal. The issue is whether the parties' agreement obligated Mosling to forward only payments for "accounts receivable," or whether Bentz was also entitled to receive payments for work done but unbilled as of the closing. The interpretation and construction of a contract is a question of law which we decide de novo. ***Zimmerman v. DHSS***, 169 Wis. 2d 498, 507, 485 N.W.2d 290 (Ct. App. 1992). Our goal is to determine and give effect to the parties' intentions. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co***., 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276. When the language of a contract is unambiguous, we apply its literal meaning. ***Id***. However, if we determine that a contract provision is ambiguous, we will look to extrinsic evidence to discern the contract's meaning. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co***., 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996).

¶20 Whether a contract is ambiguous also presents a question of law, which we decide independently of the trial court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). A contract is ambiguous if its terms are susceptible to more than one reasonable interpretation. ***Wilke v. First Fed. Sav. & Loan Ass'n***, 108 Wis. 2d 650, 654, 323 N.W.2d 179 (Ct. App. 1982). If a contract is ambiguous, the determination of the parties' intent at the time of making the contract from extrinsic evidence of that intent becomes a question of fact. ***Patti v. Western Mach. Co***., 72 Wis. 2d 348, 353, 241 N.W.2d 158 (1976). Thus, if we conclude the contract at issue is ambiguous, summary judgment would only be appropriate if no material facts are in dispute that bear on the parties' intent when entering into their agreement.

¶21 Bentz claims that the reference to "outstanding accounts receivable as of the date of closing" in the second sentence of Section 4.A.,[5] and to "payments for work done before the date of closing" in the third sentence, establish two separate categories of payments which Mosling was obligated to forward to her after closing. She argues that the third sentence ("If BUYER receives payments for work done before the date of closing, he shall forward those payments to seller") would not have been necessary if "payments for work done" had the same meaning as "accounts receivable," because the previous two sentences already provide for Bentz's retention of "accounts receivable" and Mosling's cooperation in their collection.

¶22 We agree with Bentz that Section 4.A. can reasonably be interpreted to obligate Mosling to forward to Bentz two categories of payments received after closing. The reference in the second sentence to "*outstanding* accounts receivable as of the day of closing" (emphasis added), suggests that "accounts receivable" refers only to previously billed accounts which remained unpaid as of the closing date. "[P]ayments for work done before the date of closing" in the next sentence, on the other hand, seems to encompass work performed but remaining unbilled at the time of closing. This interpretation finds support in the fourth sentence of the section which requires Bentz to provide Mosling "promptly after closing, a print out of *all accounts with a balance owing for work performed prior to closing*" (emphasis added), suggesting that such a print out could only be prepared after the closing date when unbilled work through that date could be ascertained. If Mosling was obligated to remit only payments for "accounts receivable," he would

[5] See ¶3 above.

have needed to receive instead a print out of "outstanding accounts receivable as of the day of closing," which would arguably have been available that day.

¶23 We next consider Mosling's interpretation to determine whether it is also reasonable. Mosling contends that "payments for work done" and "accounts receivable" are synonymous, and that the parties intended that Bentz would receive payments for only "accounts receivable" that were outstanding and unpaid as of the date of closing. Mosling points to three "accounts receivable aging reports" which Bentz sent to him after the closing. He claims that he accepted the aging reports as establishing what he owed Bentz under their agreement. The circuit court agreed with Mosling, citing the fourth sentence ("BUYER will be provided promptly after closing, a printout for work performed prior to closing") in concluding that the aging reports established the extent of Mosling's obligation to Bentz intended by the agreement:

> Dr. Mosling was provided with an accounts receivable aging report, as per the contract, as the basis for determining which patients had "work done" before the date of close. If [Mosling] received any money from patients who had work done before the date of close (and who were, or should have been, on the accounts receivable aging report) then Dr. Mosling had three business days to remit payment to Dr. Bentz. By the terms of the contract, the accounts receivable aging report was to govern ….
>
> In fact, Dr. Bentz gave Dr. Mosling three separate aging reports, which leads this Court to believe that Dr. Bentz was well aware that the aging reports would govern. Because Dr. Bentz provided Dr. Mosling with the accounts receivable aging reports, she had direct knowledge of the payments she would be entitled to under the contract. Had there been additional patients that would be billed … for work done prior to close, Dr. Bentz should have given Dr. Mosling an accounts receivable aging report … to cover all payments by patients that she would be entitled to as contemplated by the parties at the time the contract was signed. However, she did not do this, therefore, the final aging report … was to govern.

¶24 We note first that Mosling's proffered interpretation, which the circuit court adopted, relies on extrinsic evidence of the parties' intent (the "aging reports"), and thus Mosling tacitly concedes that the contract language itself is ambiguous. We nonetheless conclude that the language of Section 4.A. is reasonably susceptible to Mosling's interpretation because the provision does not plainly differentiate between "accounts receivable" and "payments for work done before the date of closing." It is not unreasonable for Mosling to argue that the terms are used interchangeably in Section 4.A. and are thus meant to be synonymous. For example, the section does not explicitly refer to *unbilled* work, nor does it call on Bentz to provide Mosling with printouts for both "accounts receivable" and of "work performed prior to closing." In short, Mosling's interpretation is also reasonable.

¶25 Because both parties' proffered interpretations of the Agreement are reasonable, the contract is ambiguous, and we must look to extrinsic evidence to determine the parties' intent. ***Patti***, 72 Wis. 2d at 351-52. We have already noted that Mosling relies, as did the trial court, on the accounts receivable "aging reports" to support the contention that the parties intended only accounts receivable, and not any work unbilled as of closing, to be subject to the payment provisions of Section 4.A. Bentz argues, however, that the aging reports represent an incomplete record of the payments the parties intended to be made for work done prior to closing, and that Mosling had notice prior to closing that the aging list did not contain all of the payments due to her for work done prior to closing.

¶26 She points to an affidavit in which Mosling states, "I asked [Bentz] what she meant by accounts receivable and she gave me a Post-it note stating 'Accounts receivable does not mean monthly payments due now and in the future. It refers to past due amounts and accounts turned over to collection.'" Bentz also

cites an affidavit submitted by her former bookkeeper in support of Mosling's motion for summary judgment. In that affidavit, the bookkeeper states that certain of the accounts for which Bentz contended payments were due her were not "in default or late in their payments as of the date of closing[,] and for that reason[,] [they] would not have been included in the accounts receivable aging reports furnished to Dr. Mosling at and after the time of closing." In Bentz's view, this shows that Mosling (and the bookkeeper) understood that the aging reports represented only "outstanding accounts," and thus that "payments for work done before the date of closing" were something separate and additional for which Bentz was to be compensated.

¶27 Because Mosling is the party seeking summary judgment on this issue, "doubts as to the existence of a genuine issue of material fact should be resolved against" him. ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). The submissions raise such doubts, and accordingly, we conclude that what payments the parties intended to be governed by Section 4.A. is a factual question that is genuinely in dispute on the present record. The issue is thus inappropriate for disposition on summary judgment. *See* ***Muchow v. Goding***, 198 Wis. 2d 609, 629, 544 N.W.2d 218 (Ct. App. 1995) ("Intent is a fact seldom determinable on summary judgment.").

¶28 Finally, we note that Bentz also alleges that Mosling and the bookkeeper breached certain duties they owed to Bentz, who employed both of them prior to closing, by waiting until after the closing to bill certain patients for work previously done. Bentz thus argues that, even if "accounts receivable" and "payments for work done before the date of closing" were meant to be synonymous, had the bookkeeper billed all patients prior to closing as Bentz allegedly requested, the amount due for "accounts receivable" would have been

greater. The trial court concluded, however, that because Bentz furnished the aging reports to Mosling, she "would have known, or should have known, exactly which patients she would receive money from after the closing date," and if she suspected any "foul play" she could have added those names to the aging lists even if they had not yet been billed. Because this issue is intertwined with that of the proper interpretation of the contract, and because its resolution also depends on certain disputed facts, we conclude Bentz's alternative theory of recovery also survives Mosling's motion for summary judgment.

CONCLUSION

¶29 On the record before us, the claims of each party against the other involve genuine issues of material fact, and neither party is entitled to summary judgment. We therefore reverse the appealed judgment and remand to the circuit court for further proceedings on both parties' claims.

By the Court.—Judgment reversed and cause remanded.

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