COURT OF APPEALS
DECISION
DATED AND RELEASED

April 10, 1996

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.

NOTICE

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No. 95-0746

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

J. MICHAEL DOYLE, D.D.S.,
KATHLEEN M. DOYLE-KELLY, D.D.S.,
and TIMOTHY MC BRIDE, D.D.S.,

Plaintiffs-Respondents,

v.

PREPAID PROFESSIONAL SERVICES, LTD.,
a Wisconsin Corporation,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Prepaid Professional Services, Ltd. (Prepaid) appeals from a judgment in favor of J. Michael Doyle, Kathleen M. Doyle-Kelly and Timothy McBride, dentists who formerly participated in Prepaid's dental insurance plan. We affirm because the trial court's finding that the parties modified the compensation scheme in the original contract is not clearly erroneous and Prepaid breached the contract as modified.

Doyle entered into a contract with Prepaid in January 1985, McBride entered into his contract in March 1987, and Doyle-Kelly entered into her contract in February 1991. The original Prepaid contract was a "capitation contract" in which the dentists agreed to treat all patients referred by Prepaid at a stated monthly fee, regardless of the dentist's usual and customary rates or the amount of services provided to each patient. The question at trial was whether the parties modified the contract by virtue of an October 1989 letter which discussed another compensation scheme.

In August 1989, Doyle and McBride advised Prepaid of their desire to leave the plan because the low capitation fee was generating insufficient revenue to the practice. During a meeting with Gary Zaskey, Prepaid's director, the parties reached an agreement which was memorialized in an October 11, 1989, letter from Zaskey to Doyle.

The letter stated that it would become part of the parties' contract. It further stated: "In consideration of the utilization you have experienced, we are agreeing to deviate from our standard capitation per month method of compensation and accelerate capitation payments to you, based on 75% of your UCR [usual and customary rates]." The dentists were instructed to submit charges for the procedures they performed and Prepaid would "adjust to the agreed discounted percentage and compensate accordingly. You understand that his [sic] method of compensation is not to be discussed with either the patient or any of the other providers, and is being agreed to only because of your unique situation." The dentists interpreted this as a wholesale departure from the capitation compensation structure, while Prepaid deemed it a method of advancing capitation fees to the dentists. In December 1991, the dentists terminated their participation in the plan and sued Prepaid under theories of breach of contract and promissory estoppel to recover amounts due. The parties stipulated that the dentists' damages were $132,819.

After a trial to the court, the court found that the parties' contract consisted of the original contract and the 1989 letter, that the 1989 letter was ambiguous, that the parties had a meeting of the minds with regard to changing

the compensation scheme from capitation to 75% of UCR and that Prepaid breached the amended contract.[1]

On appeal, Prepaid argues that the original contract and 1989 amendment unambiguously obligated it to pay on the basis of capitation, not fee-for-service based on UCR, and that Prepaid did not breach. Even if the modified contract is ambiguous, Prepaid contends that the parties' subsequent conduct makes it clear that they understood Prepaid was obligated to make capitation payments, not fee-for-service payments.

While construction of a contract to ascertain the intent of the parties is normally a matter of law for this court, *see* ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis.2d 105, 115-16, 479 N.W.2d 557, 562 (Ct. App. 1991), where a contract is ambiguous, the question of intent is for the trier of fact. ***Armstrong v. Colletti***, 88 Wis.2d 148, 153, 276 N.W.2d 364, 366 (Ct. App. 1979). We will not disturb a trial court's findings of fact regarding intent unless they are contrary to the great weight and preponderance of the evidence, *i.e.*, clearly erroneous. *See* ***id.***; *see also* ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983) (the great weight and preponderance of the evidence standard is identical to the clearly erroneous standard). However, whether a contract is ambiguous in the first instance is 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, 916 (Ct. App. 1987). Ambiguity exists in a contract if it is reasonably susceptible to more than one meaning. ***Id.***

The parties agree that their contract consisted of the original agreement and the 1989 letter.[2] However, they disagree as to whether the 1989 letter created ambiguity regarding the compensation scheme. The trial court

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[1] The trial court also found Prepaid liable on a theory of promissory estoppel. However, because we affirm the trial court's breach of contract ruling we need not address its promissory estoppel ruling.

[2] Finding of fact number 13 indicates that Prepaid intended Doyle-Kelly to be covered by the same agreement that applied to Doyle and McBride. The court found that the original contract, the 1989 letter and Prepaid's promise to pay 75% of UCR applied to Doyle-Kelly. On appeal, Prepaid does not dispute the applicability of the modified contract Doyle-Kelly.

concluded that such ambiguity existed. We agree with this legal conclusion. The letter stated that Prepaid agreed to deviate from its standard capitation per month method of compensation and accelerate capitation payments to the dentists based on 75% of their UCR. The dentists interpreted this as a wholesale departure from the capitation compensation structure, while Prepaid deemed it a method of advancing capitation fees to the dentists. The letter is reasonably susceptible to either meaning and is therefore ambiguous. *See* ***id.***

Having concluded that the October 1989 letter created an ambiguity regarding compensation, we turn to the trial court's findings of fact regarding the parties' intent. In order to determine the intent of parties to an ambiguous contract, the trial court may consider extrinsic evidence, such as the parties' words and conduct. ***Spencer v. Spencer***, 140 Wis.2d 447, 450, 410 N.W.2d 629, 631 (Ct. App. 1987). The trial court can consider the circumstances before and after the signing of the ambiguous agreement. ***Board of Regents v. Mussallem***, 94 Wis.2d 657, 671, 289 N.W.2d 801, 808 (1980). It was within the trial court's province to assess the credibility of the witnesses and the weight of the evidence. ***Micro-Managers, Inc. v. Gregory***, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). We will not overturn the trial court's findings unless they are clearly erroneous. *See* ***id***.

The trial court considered the following in assessing the parties' intent. Prior to the October 11, 1989 letter, the dentists sought to terminate their participation in the plan due to inadequate revenue. Doyle testified that a dentist's break-even point is approximately 60% to 65% of the UCR and that he and his colleagues could not profitably continue in the plan without receiving at least 75% of their UCR. The dentists testified that Zaskey promised them in a meeting and in the October 1989 letter that Prepaid would compensate them up to 75% of their UCR in order to keep them in the plan. Zaskey told the dentists they could switch back to the capitation plan at a later date. Doyle testified that as a result of the letter, he felt he was no longer operating under the capitation compensation scheme and was being compensated at 75% of UCR. The trial court acknowledged that Zaskey denied having promised compensation at 75% of UCR, that Zaskey intended the plan to pay an advance on capitation payments calculated at 75% of UCR, and that the letter was not intended to alter the basic nature of the plan from capitation to another method of compensation.

The court found that the parties' conduct subsequent to the October 1989 letter illuminated their intentions and evidenced a meeting of the minds to change the compensation scheme. Before the 1989 modification, the dentists submitted a weekly report which did not indicate the value of the services provided to patients in the plan. After October 1989, the dentists submitted their charges on a standard insurance form which listed a fee for each service provided. The court found that the form had no relation to the capitation agreement and that its use was agreed to by Prepaid. The court found that subsequent to the October 1989 agreement, Prepaid paid the dentists based on work actually performed at a rate equal to 75% of their UCR; compensation was not based upon the number of patients assigned to them. The court also noted that in light of Zaskey's promise to pay 75% of UCR, Doyle and McBride remained with the plan for two more years until 1991. The court noted the dentists' testimony that they had no reason to remain with the plan unless they were paid 75% of their UCR.

On May 30, 1990, Zaskey sent a personalized letter to Doyle and McBride expressing his concern that they may have misunderstood the compensation method under the plan. The letter stated that in some cases where dental services were exceeding the capitation fees, Prepaid had used an advanced capitation compensation formula to soften the initial burden on dentists experiencing a large influx of patients requiring significant amounts of dental work. Zaskey stated that such financial assistance did not change the basic method of compensation under the original contract. Doyle testified that he did not receive this letter. Rather, he received a form letter addressed to "Dear Dr." which prompted him to call Zaskey for an explanation of its discussion of advanced capitation payments.[3] Doyle testified that Zaskey told him the form letter was not really meant for him and McBride. On cross-examination, Zaskey acknowledged his conversation with Doyle and stated that he believed the 1989 letter was still in effect when he and Doyle spoke about the "Dear Dr." letter. Doyle testified that Zaskey told him they were still operating under the 75% of UCR compensation scheme.

Doyle and McBride sent Zaskey another termination letter in November 1990 and demanded a large payment on the arrearage under the

[3] The text of the "Dear Dr." letter is substantially identical to that of the May 30, 1990, letter addressed to Doyle and McBride.

contract based on payments at 75% of their UCR. Zaskey responded that the plan was unable to make such a large payment and that the plan had not guaranteed that the dentists would be paid 75% of UCR for services provided. However, Zaskey reiterated that they would be compensated based on 75% of their UCR.

The court found that "Zaskey knew or should have known that the dentists would interpret his [October 1989] letter as a promise to pay 75% of their usual and customary rates, because if only such a promise were paid [sic] and abided by, would the dentists remain in the plan." The court found that Zaskey was motivated to retain the dentists in the plan because he was also a sales person whose commission was based upon each new group of patients he enlisted in the plan and referred to participating dentists.

The court considered the testimony of Doyle, Nancy Schneider, the dentists' bookkeeper, and Bobbi Flood, another dental office employee, and the manner in which the dentists filed compensation requests with Prepaid. The court concluded that the parties had agreed to compensation at 75% of the dentists' UCR and that Prepaid failed to comply with the amended contract and was liable as a result of the breach.

Prepaid argues that other inferences and findings can be drawn from the evidence adduced at trial. However, we are bound by the trial court's assessment of the credibility of the witnesses and its findings and inferences because they are not clearly erroneous. ***Micro-Managers,*** 147 Wis.2d at 512, 434 N.W.2d at 102.

The dentists seek costs under RULE 809.25(3), STATS., on the grounds that this appeal is frivolous because Prepaid makes an argument on appeal which was not raised below—that the 1989 contract modification, even if agreed to, was unenforceable because Prepaid is not a traditional insurance provider and is not chartered in Wisconsin to compensate participating dentists on a fee-for-service basis. A party's presentation of an issue for the first time on appeal cannot, as a matter of law, be deemed frivolous under RULE 809.25(3). *See* ***Tomah-Mauston Broadcasting v. Eklund***, 143 Wis.2d 648, 660, 422 N.W.2d 169, 174 (Ct. App. 1988).

The dentists next argue that Prepaid has failed to cite to the record to support facts recited in its brief as required by RULE 809.19(1)(d) and (e), STATS. The appellant's brief does contain citations to the record on appeal and to the extent that some citations may be lacking, the court does not conclude that such requires the imposition of frivolous costs under RULE 809.25, STATS.

If factfinding is not required, we may make the determination of frivolousness under RULE 809.25(3), STATS., as a matter of law. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 252-53, 517 N.W.2d 658, 670 (1994). That we affirmed the trial court is not grounds, in this case, to deem the appeal frivolous. Accordingly, we deny the dentists' request for frivolous costs under RULE 809.25(3). However, costs are available to them as the prevailing parties under RULE 809.25(1).

By the Court.—Judgment affirmed.

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