COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP342 **Cir. Ct. No. 2005CV1991**

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

J. THOMAS HALEY,

PLAINTIFF-APPELLANT,

V.

THOMAS K. GUELZOW,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. J. Thomas Haley appeals an order for summary judgment dismissing his claim against Thomas Guelzow. This is a fee-splitting dispute between two attorneys. Haley sued to collect a share of the contingency fee Guelzow received for his representation in a personal injury case. The issues

are whether the circuit court committed reversible error by converting Guelzow's motion to dismiss the complaint into a motion for summary judgment, and whether Guelzow was entitled to summary judgment on the evidence presented. We affirm.

¶2 The facts are not in dispute. Jan McEathron suffered injuries in an automobile accident. Shortly thereafter, she received a letter from Haley offering to answer legal questions without charge, and to help her find an attorney to represent her on a personal injury claim. The letter identified Haley as an attorney associated with Attorney Referral Services, S.C. Paul McEathron, Jan's husband, subsequently contacted Haley about a referral, and Haley contacted Guelzow and asked Guelzow to meet with the McEathrons. Within a week, the McEathrons retained Guelzow under a contingency fee arrangement. Guelzow then wrote Haley concerning his representation of the McEathrons. In relevant part, Guelzow's letter stated:

> I would also confirm that we have agreed to co-counsel the case. We recognize our obligations under the Canons of Ethics in accordance therewith. Simply stated, compensation shall be based upon, in layman's terms, blood, sweat and tears. We have agreed to proceed in a co-counsel capacity, with an expectation that you will be working in this matter and would be reimbursed subject to our continued review in accordance with our Canons, on the basis of one-third of our one-third.

¶3 Guelzow commenced suit on the McEathrons' behalf and obtained a damages award of $585,000, resulting in a contingency fee of $195,000 under the McEathrons' retainer agreement with Guelzow. The McEathrons' only contacts with Haley were the initial unsolicited letter he sent them, Paul McEathron's telephone call in response to the letter, and the letter Haley sent referring them to Guelzow. During his representation of the McEathrons, Guelzow had no contact

from Haley and, by the time Haley contacted him after resolution of the lawsuit, Guelzow no longer remembered who Haley was. Nevertheless, Haley claimed a one-third interest in Guelzow's contingency fee, and commenced this action when Guelzow refused to pay it.

¶4 Guelzow's response to Haley's complaint was a motion to dismiss with attached affidavits setting forth the facts recited above. Haley filed a brief opposing the motion with a supporting affidavit that neither added to nor disputed any of the facts in Guelzow's affidavits. The circuit court issued a written memorandum decision converting the motion to dismiss into a motion for summary judgment, and granted it. Haley appealed. Haley also moved for reconsideration arguing, among other things, that the circuit court erred by converting the matter into a summary judgment proceeding without giving him notice or the opportunity to present additional evidence. Haley also filed an affidavit setting forth additional evidence he wanted the court to consider, including the McEathrons' fee agreement with Guelzow. After considering the additional evidence Haley presented, the circuit court denied reconsideration.

¶5 We review summary judgments *de novo*, using the same methods as the trial court and without deference to its decision. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate where, as here, no material facts are in dispute, and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2003-04).[1] The construction of a written contract is also a question of law that we

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

review without deference. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987). A contract is unambiguous, and enforced as it stands, if it is reasonably susceptible to only one meaning. *See* ***Gottsacker v. Monnier***, 2005 WI 69, ¶22, 281 Wis. 2d 361, 697 N.W.2d 436.

¶6 WISCONSIN STAT. § 802.06(2)(b) directs that, upon converting a motion to dismiss a complaint into a motion for summary judgment, the court shall give all parties reasonable opportunity to present supporting or opposing evidence by the means set forth in WIS. STAT. § 802.08. Even if we assume that, as Haley argues, the circuit court failed to provide him a reasonable opportunity to present evidence, the error was cured and the issue rendered moot when Haley offered additional evidence by motion for reconsideration, and the court considered that information in its decision on reconsideration.[2] Haley thus received his remedy for the alleged error—the opportunity to present evidence and a circuit court decision on the evidence presented.

¶7 The circuit court properly granted summary judgment on the undisputed evidence before it. The only evidence of a fee agreement between Guelzow and Haley is Guelzow's March 11, 2004 letter to Haley. Haley contends that the letter is ambiguous because it does not spell out the precise terms or conditions under which Haley would receive compensation. Consequently, summary judgment is improper, he contends, without considering extrinsic evidence of the parties' intent. However, the letter is clear and unambiguous on one key point—payment under the agreement required that Haley perform at least

[2] Whether the circuit court erred by denying reconsideration despite Haley's additional evidence is not before this court. Haley did not appeal the order on reconsideration, and we ruled in a prior order that this appeal is confined to review of the circuit court's initial order.

some work. The statements that "[w]e have agreed to proceed in a co-counsel capacity, with an expectation that you will be working in this matter and would be reimbursed subject to our continued review," and "compensation shall be based upon … blood, sweat and tears," can have no other meaning. To enforce a contract, a party must substantially perform its own obligations under the contract. *See* ***Klug & Smith Co. v. Sommer***, 83 Wis. 2d 378, 386, 265 N.W.2d 269 (1978); WIS JI—CIVIL 3052. To substantially perform, a party must meet the essential purpose of the contract. ***Plante v. Jacobs***, 10 Wis. 2d 567, 570, 103 N.W.2d 296 (1960). The essential purpose of this fee-sharing contract was to compensate Haley for work he performed. Because he did no work, he did not meet this purpose.

By the Court.—Order affirmed.

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