

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP1525

Cir. Ct. No. 2005CV77

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DONALD L. DELEBO, D.D.S.,

PLAINTIFF-APPELLANT,

V.

**COMMUNITY DENTAL, JERRY V. OVERMAN, D.D.S., STEVEN J.
HEGNA, D.D.S. AND TODD S. REICH, D.D.S.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Jackson County:
MICHAEL J. MCALPINE, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. This appeal arises out of a dispute between Community Dental, a general partnership, and Donald Delebo, D.D.S., a retired partner, over the terms under which Dr. Delebo after retirement was entitled to continue to practice dentistry in office space provided by the partnership. The

circuit court found that the partnership did not breach the partnership agreement when it required Dr. Delebo to cease seeing patients at the Community Dental clinic because Dr. Delebo had breached his duty of good faith implied in the agreement and thus relieved the partnership of its obligation to provide office space. Dr. Delebo appeals that determination, contending that there was no breach of the duty of good faith and, even if there were, the breach was not material and thus did not relieve the partnership of its obligation to provide him with office space.

¶2 We conclude that the circuit court applied the correct legal standard and there is sufficient evidence to support its determinations. We therefore affirm.

BACKGROUND

¶3 After practicing dentistry as a solo practitioner for many years, Dr. Delebo formed a partnership with Jerry Overman, D.D.S.; subsequently Steven Hegna, D.D.S., joined the partnership. In 1985, the partners executed a Dental Partnership Agreement containing the following provision:

RETIREMENT: A partner may with retire at the end of the year in which he attains age sixty (60) provided he has been a partner for not less than five (5) full years and shall retire at the end of the year in which he attains sixty-five (65); provided, however, that no partner shall be required to retire before December 31, 2000. Upon retirement, the partnership shall purchase and the retiring partner shall sell the retiring partner's interest in the partnership for an amount equal to his portion of the fair market value of the tangible assets of the date of retirement.

....

A partner retiring under the terms of this paragraph 19 shall be entitled, after his retirement, to reasonable office space where he may see as many or as few patients as he chooses. The compensation of a retired partner shall be his billings less a percentage thereof equal to the collection

loss experience of the partnership in the prior calendar year and less a percentage of such billings equal to the expense ratio in the prior calendar year.

¶4 In 1997, the partners hired a new associate, Todd Reich, D.D.S. In 1999, Dr. Delebo, whose sixty-fifth birthday was December 30, 1999, sold his partnership interest to Dr. Reich and retired from the partnership effective January 1, 1999. Dr. Delebo declined to sign the employment agreement presented to him by the partnership.

¶5 Dr. Delebo continued to practice dentistry at the Community Dental clinic. His pay was based on his gross billings less a figure representing uncollectible amounts and an expense ratio. He received W-2 forms from the partnership with FICA taken out and was included as an employee for worker's compensation and unemployment compensation purposes.

¶6 Beginning in June 2003, the partnership began requesting that Dr. Delebo cease his practice at the clinic and fully retire. In the partnership's view, conflicts between Dr. Delebo, on the one hand, and the staff and partners of Community Dental, on the other, had reached an unacceptable level. Dr. Delebo declined to stop practicing. In his view, the "reasonable office space" provision in the partnership agreement entitled him to practice dentistry at the Community Dental clinic as long as he wished to. The partnership had a conflicting view of Dr. Delebo's rights. The partnership's position was that Dr. Delebo did not retain any rights under the partnership agreement after he sold his interest to the new partner and he then became an employee-at-will. In the alternative, the partnership took the position that, even if Dr. Delebo did retain rights under the partnership agreement, the "reasonable office space" provision was intended to

allow retiring partners to continue to practice for a reasonable period of time, not indefinitely, and a reasonable time period had already passed.

¶7 By letter dated March 1, 2005, the partnership informed Dr. Delebo that if he declined to sign an agreement by June 30, 2005 stating that he would retire from practice by December 31, 2005, “there will be major changes in his work privileges as of June 30, 2005.”

¶8 Dr. Delebo filed this action in May 2005, asking for a declaration of his rights under the partnership agreement and for injunctive relief. He also sought a temporary injunction restraining the partnership from making any changes in his practice during the litigation. After a hearing, the court denied the motion. Dr. Delebo’s amended complaint asserted claims for breach of contract and intentional interference with the doctor–patient relationship and sought compensatory and punitive damages. The partnership filed a counterclaim seeking a declaration whether Dr. Delebo had any rights under the partnership agreement and, if so, what they were; in the event the court determined that Dr. Delebo did have rights under the partnership agreement after transferring his rights to Dr. Reich, the counterclaim asserted a claim for breach of contract based on allegations that Dr. Delebo had breached his duty to act in good faith while continuing to practice dentistry at the Community Dental clinic.

¶9 After a four-day trial to the court, the court issued a lengthy written decision. The court rejected the partnership’s position that the transfer of Dr. Delebo’s partnership interest to Dr. Reich meant Dr. Delebo no longer had a right to reasonable office space as provided in the partnership agreement and it rejected the partnership’s position that the “reasonable office space” provision imposed a time limit. Instead, the court concluded, the length of time Dr. Delebo

had to enjoy “reasonable office space” following his retirement from the partnership was governed “by the patients who wished to see him, his health, his desire to practice, and his good faith adherence to the business objectives of the partnership.” The circuit court next determined that Dr. Delebo had not acted in good faith as he was required to do in order to continue to enjoy “reasonable office space.” The court recounted the evidence of Dr. Delebo’s conduct toward other staff members and the partners that led the court to make this determination. Because of Dr. Delebo’s failure to act in good faith, the court determined, the partnership had not breached his rights under the partnership agreement when it required that he cease his practice at the Community Dental clinic in 2005.¹

¶10 As for the partnership’s counterclaim for damages based on a breach of the duty of good faith, the partnership’s proof at trial centered on Dr. Delebo’s charting and billing practices. The court found no breach on these grounds, and the partnership does not appeal this ruling.

DISCUSSION

¶11 On appeal, Dr. Delebo contends that the circuit court’s factual findings on his conduct toward the staff and partners do not meet the legal standard of breaching the implied duty of good faith because, he asserts, while there is evidence that he created a stressful work environment, there is no evidence that his conduct caused injury or damage to the partnership. He also contends that, even if he did breach his duty of good faith, the court erred in determining that the

¹ The circuit court also found that the partnership had underpaid Dr. Delebo by \$17,798.04; that ruling is not at issue on this appeal.

breach was a material breach that justified the partnership's termination of his office space.

¶12 The duty of good faith is implied in every contract. *Estate of Chayka v. Santini*, 47 Wis. 2d 102, 108, 176 N.W.2d 561 (1970). This duty of good faith is intended as a guaranty against “arbitrary or unreasonable conduct.” *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995) (citation omitted). The supreme court has described this duty as

an implied undertaking in every contract on the part of each party that he or she will not intentionally and purposely do anything to prevent the other party from carrying out his or her part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Ordinarily if one exacts a promise from another to perform an act, the law implies a counter-promise against arbitrary or unreasonable conduct on the part of the promisee.

Metropolitan Ventures, LLC v. GEA Associates, 2006 WI 71, ¶35, 291 Wis. 2d 393, 717 N.W.2d 58 (citation omitted).

¶13 While there is no precise or exhaustive list of what constitutes good faith in this context, the following types of behavior have been recognized in judicial decisions as a lack of good faith: “evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.” *Foseid*, 197 Wis. 2d at 797 (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981)).

¶14 Whether a party to a contract has breached its implied duty of good faith is a question of fact. *Wisconsin Natural Gas Co. v. Gabe's Constr. Co.*, 220 Wis. 2d 14, 24 n.6, 582 N.W.2d 118 (Ct. App. 1998). Where, as here, the circuit

court sits as a finder of fact, we review the record to determine whether there is any credible evidence to support the circuit court's findings on the implied duty of good faith. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, 257 Wis. 2d 421, ¶19, 651 N.W.2d 345. The circuit court is the ultimate arbiter of the witnesses and the weight to be given to the witnesses' testimony. *Id.* When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inferences drawn by the circuit court. *Id.* In addition, when the circuit court does not make express findings of fact, we assume on appeal that such findings were made implicitly in favor of the court's decision, and we affirm implicit findings if they are not clearly erroneous. *State v. Hubanks*, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992).

¶15 While a party may be liable in damages for a breach of the duty of good faith, *see Foseid*, 197 Wis. 2d at 796, in this case the circuit court did not award damages to the partnership based on a breach of this duty; rather, the court determined that the breach relieved the partnership of its obligation under the partnership agreement to continue to provide office space to Dr. Delebo. Although the circuit court did not expressly so state, it is evident, and the parties appear to agree, that the court applied the principle of law that a material breach by one party may excuse the subsequent performance by the other. *See Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996). Whether a party's breach excuses future performance of the other party is a question of fact. *Id.* at 184.

¶16 We address first Dr. Delebo's argument that his conduct did not rise to the level of a breach of the duty of good faith. Dr. Delebo appears to acknowledge that there is no basis for overturning the specific factual findings the court made, and he casts his argument as a challenge to the legal standard the court

employed. When the issue is whether the circuit court applied the correct legal standard, our review is de novo. *Gallagher v. Grant-Lafayette Elec. Coop.*, 2001 WI App 276, ¶15, 249 Wis. 2d 115, 637 N.W.2d 80.

¶17 Dr. Delebo’s challenge to the legal standard the court employed is apparently based on his assumption that a breach of the implied duty of good faith requires that his conduct cause a financial injury to the partnership, an injury to its reputation, or a dissolution of the partnership. The circuit court did not find that there were such injuries and, Dr. Delebo asserts, there is no evidence of them. Dr. Delebo relies on the wording of the jury instruction for a breach of the duty of good faith, which provides in part: “[The] duty of good faith means that each party to a contract will not do something that will have the effect of injuring or destroying the (rights) (ability) of the other party to receive the benefits of the contract.” WIS JI—CIVIL 3044.

¶18 The injury under this instruction is an injury to “the (rights) (ability) of the other party to receive the benefits of the contract.” *Id.* There is no requirement that there be a financial injury or any specific type of injury.² The proper inquiry under this instruction and under the case law is: what benefits did the partnership reasonably expect to receive under the partnership agreement and was there was an injury to the right or ability of the partnership to receive those benefits. *Id.* (“whether the duty to act in good faith has been met is determined by deciding what the contractual expectation of the parties were...”); *Metropolitan*

² Of course, when a party seeks damages for a breach of the implied duty of good faith (and we observe that this instruction by its terms applies when a party sues another for a breach of this duty), that party must prove damages. But, as we have already explained, that is not the situation here.

Ventures, 291 Wis. 2d 393, ¶35 (citation omitted) (there is a breach if “the right of the other party to receive the fruits of the contract” is injured). More specifically, the proper focus here is on what benefits the partnership reasonably expected to receive from providing office space to a retired partner.

¶19 To the extent that Dr. Delebo is suggesting that the only benefit to the partnership afforded by the “reasonable office space” provision is a financial one, we do not agree. Indeed, because the pay structure for a retiring partner who continues to practice is based on that dentist’s own billings, it appears that, as long as the retired partner can pay for his or her share of the expenses, the partnership is not affected by the amount of the retired partner’s billings. In any event, we conclude that one benefit to the partnership contemplated by the retirement provision as a whole is that at the age of sixty-five³ partners are required to retire from the partnership, leaving the management of the partnership to the younger partners. The partnership must make available to a retired partner reasonable office space so that the retired partner can continue to practice if he or she wishes, but the partnership has the right to exclude that retired partner from the management of the partnership and to expect that the retired partner will conduct himself or herself in a manner that is compatible with the partners’ management. Indeed, Dr. Delebo acknowledged in his testimony that retiring from the partnership meant retiring from the management of the practice. Thus, if Dr. Delebo’s conduct disrupted and interfered with the management of the partnership on a continuing basis, the benefit to the three younger partners of being able to manage the partnership themselves and have Dr. Delebo continue to practice in a

³ Because of the provision that no partner was required to retire before December 31, 2000, Dr. Delebo could have remained a partner until one day after he turned sixty-six.

manner compatible with their management was injured. Although not using these precise words, we are satisfied that the circuit court employed this standard.

¶20 We also conclude that the circuit court's findings and the record support the circuit court's determination that Dr. Delebo's conduct did disrupt and interfere with the management of the partnership on a continuing basis. The court found that Dr. Delebo refused to meet with the partners as a group, but would talk only to the partners individually, and caused disruptive and heated arguments that affected the staff and interfered on occasion with patient care. The court credited the testimony of staff members that Dr. Delebo would place them in uncomfortable positions with respect to others in the clinic and that the workplace was less stressful following Dr. Delebo's departure.

¶21 There was ample evidence to support the circuit court's findings. There was evidence that Dr. Delebo regularly argued with the partners when he did not agree with their decisions, and these arguments would be heated, involve slamming of doors and yelling on his part, and would disrupt the clinic. When he disagreed with the partners he would at times confront the staff, who were carrying out the partners' directions, and cause them to cry. When he did not agree with the partners' decision to put his assistant in a supervisory role and hire a new assistant for him, he did petty things to interfere with the new assistant's performance of her duties. He did not cooperate with the partnership in his scheduling of his patients, which caused difficulties in staffing. He would involve himself on a regular basis in details concerning the staff that the partners viewed as not part of his role. Dr. Overman and Dr. Hegna agreed that Dr. Delebo undermined the management of the dental practice after January 1999, and Dr. Hegna testified that the partners spent "many, many" hours in meetings discussing how to deal with Dr. Delebo's conduct and in trying to resolve the conflicts

between him and the staff. The testimony that Dr. Delebo created disturbances with the staff came not only from the other partners and staff, but from the partnership's accountant. Dr. Overman and Dr. Hegna testified that Dr. Delebo refused to meet with all the partners together to resolve these issues and Dr. Delebo agreed that that was true; he would meet with them only as individuals.

¶22 The court also discussed an incident in which Dr. Delebo confronted a staff person, whom he believed had played a practical joke on him, in a small supply room with a closed door, reduced her to tears, and would not leave when Dr. Reich asked him to. Because Dr. Reich took Dr. Delebo's arm to escort him from the room, Dr. Delebo later suggested that assault and battery charges could be brought against Dr. Reich and, although he apologized to the staff person because he came to believe she was not responsible for the practical joke, he said in a note to one of the partners that if the person responsible did not come forward and apologize "another confrontation will likely occur." The court also noted the evidence of cartoons Dr. Delebo left in the clinic or hanging on the walls that made jokes out of his conflicts with the staff and the partners. These incidents are essentially undisputed by Dr. Delebo, although in his testimony he faulted the partnership's response to the practical joke and defended his conduct, and he insisted that the cartoons were meant as humor. Nonetheless, the court could reasonably consider his conduct concerning the practical joke as evidence of his interference with the partnership's right to manage personnel issues and the cartoons as evidence of his refusal to acknowledge that he had no right to interfere with the partners' management.

¶23 Dr. Delebo also argues that he did not breach the implied duty of good faith because there was no evidence that he was dishonest or disloyal or took unfair advantage of the other partners. However, while such conduct has been

recognized as constituting a breach of the duty, the case law is clear that a broader range of conduct may constitute a breach. See *Foseid* 197 Wis. 2d at 796-97; see also *Metropolitan Ventures*, 291 Wis. 2d 393, ¶35.

¶24 We conclude the circuit court applied the correct legal standard and that its determination that Dr. Delebo breached the implied duty of good faith is supported by the record.

¶25 We next address Dr. Delebo's argument that, even if he did breach the duty of good faith, his breach was not material and thus did not entitle the partnership to cease performance of its obligation to provide him with reasonable office space. A material breach in this context means the breach must be "so serious ... as to destroy the essential objects of the contract." *Management Computer Services*, 206 Wis. 2d at 183 (citation omitted). Factors a court should consider in deciding if a breach is material include whether "the injured party will be deprived of the benefit that he or she reasonably expected and the extent to which the injured party can be adequately compensated for his or her loss." *Id.* at 184. Because the determination of whether a breach is material and thereby excuses future performance of the non-breaching party is a question of fact, *id.*, we apply the deferential standard of review we have described *supra* in paragraph 14.

¶26 We conclude the record supports the court's implicit finding that Dr. Delebo's breach of the implied duty of good faith was material. The record supports a finding that his interference with and disruption of the management of the partnership was not sporadic, but was ongoing and serious and made impossible an essential object of the retirement provision: that a retired partner choosing to continue to see patients would leave the management of the firm to the younger partners and would conduct himself or herself in a way that was

compatible with their management. In addition, as we have already concluded, the record supports a finding that Dr. Delebo's conduct deprived the partnership of a benefit it reasonably expected. Finally, the record supports a finding that compensating the partnership for the breach is not an adequate remedy.

CONCLUSION

¶27 Because the circuit court applied the correct legal standard and there is sufficient evidence to support its determinations, we affirm its decision that Dr. Delebo breached the duty of good faith implied in the partnership agreement and that breach relieved the partnership from its obligation to provide Dr. Delebo with office space.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

