COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2232 **Cir. Ct. No. 2007CV2539**

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

CHARLES D. MARKS,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AMERICAN FAMILY LIFE INSURANCE COMPANY AND AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

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

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

¶1 HIGGINBOTHAM, J. Charles Marks appeals an order granting American Family Mutual Insurance Company's motion for summary judgment

and denying his cross-motion for summary judgment in this action arising from American Family's termination of his agency agreement. Marks contends that American Family violated the terms of the agency agreement by terminating the agreement without first providing him with notice of the alleged undesirable performance, and the opportunity to correct the undesirable performance. Because we conclude, under the agency agreement's terms, that Marks' undisputed conduct constituted undesirable performance involving dishonesty justifying American Family's termination of the agreement without notice, we affirm.

BACKGROUND

¶2 The following facts are taken from the parties' summary judgment submissions, and are undisputed except where noted. Charles Marks was an agent for American Family from January 1975 to August 2007. In June 2005, Marks hired Lynn Cleppe to work in his office. Marks notified American Family of Cleppe's hire, as required by Marks' agency agreement with American Family, and American Family subsequently appointed Cleppe as an insurance sales representative.

¶3 Marks underwent surgery on his foot in August 2005. Before the surgery, Marks notified American Family's district manager, Tim Jensen, that he would be recuperating at home for approximately six months, and that Cleppe would conduct the normal business activities of the office in his absence.

¶4 In February 2006, Marks underwent brain surgery. Marks was unable to return to work in 2006 or 2007. Cleppe continued to run Marks' office until the middle of 2007 when she requested a leave of absence starting in late June 2007. Marks advised Jensen in early June of Cleppe's leave request, and

asked for his assistance in finding someone to manage the office in the meantime. Jensen provided no such assistance. Jensen emailed Marks on June 11:

> We need to know what you are planning to do in order to provide American Family Customers with appropriate service, normal office operational hours and what you plan to do in order to provide licensed staff to take care of our customer's insurance needs.

¶5 Marks contacted Don DeSautelle, a recently retired agent with American Family, and arranged to bring in DeSautelle's daughter, Darcy DeSautelle (hereinafter "DeSautelle"), to work in his office.[1] Marks then replied to Jensen's email: "The office is staffed with licensed personnel, as you requested," without providing DeSautelle's name to Jensen.

¶6 DeSautelle was licensed to sell property and casualty insurance in the State of Wisconsin at the time she was brought in to Marks' office. However, Marks never informed Jensen that DeSautelle was working in his office in the two months she was there, and DeSautelle was never appointed by American Family to be an insurance sales representative in Marks' office. Marks' decision not to inform American Family of DeSautelle's presence in his office appears to have been influenced by the fact that DeSautelle had been convicted of a felony drug charge in 1998.[2] American Family's agency staff appointment guidelines, set forth in company materials provided by American Family on summary judgment,

[1] Marks testified in deposition that Don DeSautelle also helped out in his office with Darcy DeSautelle for approximately a week and one half. Marks did not inform American Family that Don was working in his office. Because American Family's arguments focus only on the effect of Marks' failure to disclose Darcy's employment in his office, we do not address the effect of the similar failure to disclose Don's assistance in his office.

[2] Whether Marks knew of her conviction when she was employed in his office is disputed, but this factual dispute is not material to the dispositive issues on summary judgment.

effectively prohibit agents from hiring anyone with a felony conviction for jobs that require any contact with the public.

¶7 In late June 2007, American Family initiated an investigation of Marks' office after detecting some potential issues with the office's computer usage. According to the investigator's report, Jensen said that Cleppe informed him on June 21 that "a former agent and his daughter" who had not been appointed by American Family would be running the agency in Cleppe's absence. The report indicates that the compliance unit investigated the office from June 25, 2007 to August 7, 2007. It states that Jensen, while performing physical surveillance of the office, observed DeSautelle unlocking the door to the office. Jensen's observations, combined with network records of computer log-on times, established that DeSautelle was using Marks' user ID to access the information necessary to run the agency.

¶8 The report further states that the investigator reviewed the files of some of the new business policies that had been written during this period. According to the report, the investigator discovered that, in three cases, the name "Lynn Cleppe" was signed on the Agent's Signature line. The report states that Cleppe was shown copies of the documents, which she denied signing.[3]

¶9 On August 21, 2007, Jensen requested a meeting with Marks. Marks and his wife, Sandy Marks, met Jensen in his office later that day. Jensen informed the Markses during the meeting that DeSautelle had forged Cleppe's name on insurance applications, and that Charles' agency agreement was being

[3] Whether DeSautelle actually forged Cleppe's signature on these documents is a disputed fact, but it is not a fact that is material to the dispositive issues on summary judgment.

terminated as a result. It is undisputed that DeSautelle's alleged forgeries were the only reason Jensen gave Marks for the termination. Jensen said he would not terminate Marks' agreement if Marks resigned his appointment by the end of the day. Marks informed Jensen via email the following morning that he would not resign. On August 23, American Family shut down Marks' computer system. The following day, Marks received a letter dated August 23 stating that his agency agreement was "being terminated because of a violation of Company policy and Wisconsin Insurance Law."

¶10 Marks sued American Family, alleging that the termination of his agency agreement without notice violated the terms of the agreement. The parties each moved for summary judgment. The trial court granted American Family's motion and denied Marks' cross-motion, holding, in essence, that Marks' failure to disclose the hiring of DeSautelle to American Family constituted grounds for termination without notice or the opportunity to correct by the terms of the agency agreement. Marks appeals.

DISCUSSION

¶11 We review an order granting or denying summary judgment de novo, applying the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when no material facts are in dispute and that party is entitled to judgment as a matter of law. ***Id.*** at 315. In examining the parties' summary judgment submissions, we view them in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party. ***Metropolitan Ventures, LLC v. GEA Assoc.***, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58.

¶12 This case requires us to interpret the agency agreement between American Family and Marks. We review a circuit court's interpretation of a contract de novo. ***Raasch v. City of Milwaukee***, 2008 WI App 54, ¶6, 310 Wis. 2d 230, 750 N.W.2d 492.

> In interpreting contracts, we must attempt to ascertain the intent of the parties. Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms. However, when the contractual terms are reasonably susceptible to more than one construction, the contract is ambiguous. In such instances, any ambiguity is to be interpreted against the drafter. This is particularly true where a substantial disparity of bargaining power exists between the parties or a standard form is supplied by the drafting party.

Gorton v. Hostak, Henzl & Bichler, S.C., 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998) (citations and quotations omitted).

¶13 Section 6.h.2) of American Family's agency agreement provides that American Family may not, as a general rule, terminate the agreement for "undesirable performance" that might otherwise give cause for termination without first providing notice to the agent of the undesirable performance and the opportunity to correct the undesirable performance.[4] However, the section further

[4] Section 6.h.2) of the agency agreement reads in full:

> After two years from the effective date of this agreement or after the termination date of your Agent Advance Compensation Plan, whichever is later, the Company will give you notice in writing of any undesirable performance which could cause termination of this agreement if not corrected. The Company will not terminate this agreement for those reasons for a period of six months after that written notice. In no case shall notice of undesirable performance be required prior to termination if the performance in question involves a violation of Sec. 4.i. or any other dishonest, disloyal or unlawful conduct; nor shall any notice be required in the event that the

(continued)

states that American Family may terminate the agreement without notice for undesirable performance involving dishonest, disloyal or unlawful conduct, or practices competitive with or prejudicial to American Family. This portion of Section 6.h.2) reads as follows: "In no case shall notice of undesirable performance be required prior to termination if the performance in question involves a violation of Sec. 4.i. or any other dishonest, disloyal or unlawful conduct." Under the aforementioned Section 4.i., the agent agrees to

> maintain a good reputation in your community and to direct your efforts toward advancing the interests and business of the Company to the best of your ability, to refrain from any practices competitive with or prejudicial to the Company and to abide by and comply with all applicable insurance laws and regulations.

¶14 Further, Section 6.b. of the agreement provides that the agent "shall not appoint or employ any solicitor, broker or other licensed individual to act for or on behalf of the Company without the written consent of the Company."

¶15 Marks contends that his agreement was terminated for DeSautelle's unlawful conduct, and contends that whether the agreement may be terminated for DeSautelle's conduct turns on the question of whether the term "performance" in Section 6.h.2) of the agreement includes the performance of his employees, or whether it refers only to his own performance. Noting that we concluded in ***Dan Samp Agency, Inc. v. American Family Mutual Ins. Co.***, No. 2005AP1918, unpublished slip op. (WI App Aug. 30, 2007), *review denied* (WI Nov. 5, 2007), that the meaning of the term "performance" in Section 6.h.2) was ambiguous,

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> Company terminates substantially all agreements of this type throughout the Company or in a particular state or area.

Marks argues that ***Dan Samp***'s construction of "performance" should apply here under the doctrine of issue preclusion.

¶16 American Family responds that, by failing to inform American Family that he had put DeSautelle in charge of his office, Marks engaged in dishonest conduct that provided American Family with a basis to terminate the agency agreement without notice.[5] With regard to the applicability of ***Dan Samp***, American Family argues that issue preclusion does not apply because, while ***Dan Samp*** involved interpretation of the same section of the agency agreement, the issue in ***Dan Samp***—whether an agent's criminal conduct outside the scope of his employment constituted "performance" within the meaning of the contract—differs from the issue presented here.[6] Alternatively, American Family argues that if issue preclusion applies, ***Dan Samp*** was wrongly decided, and therefore

[5] American Family argues further that Marks was legally responsible for the actions of his employees under the doctrine of *respondeat superior*, and thus DeSautelle's forgeries provided a basis for American Family to terminate Marks' agency agreement. We need not address this issue because we conclude American Family properly terminated Marks' agency on other grounds related to Marks' own actions.

[6] American Family also argues that, by focusing in his brief-in-chief on whether DeSautelle's alleged forgeries provide a basis for summary judgment against him, Marks concedes that summary judgment may be entered against him based on his own conduct. American Family also appears to argue that Marks' failure to make this argument constitutes a failure of proof on summary judgment, citing WIS. STAT. § 802.08(3) for the well-established proposition that summary judgment "shall be entered against" the nonmoving party if said party does not "by affidavits or as otherwise provided in this section … set forth specific facts showing that there is a genuine issue for trial." These arguments fall well short of the mark. Courts examine the affidavits and other submissions, not the briefs, to determine whether issues of material fact preclude judgment, and whether either party is entitled to judgment as a matter of law. Briefs are not affidavits or other admissible evidence, and thus the failure to make an argument in a brief opposing a summary judgment motion does not constitute a failure of proof. Of course, a party may forfeit an issue by not arguing it in a brief. But we fail to see how Marks, by arguing that DeSautelle's alleged forgeries did not provide a basis for American Family to terminate the agreement, conceded that his own conduct provided a basis for summary judgment to be entered against him.

"circumstances would render the application of issue preclusion fundamentally unfair" in this case, citing ***Mrozek v. Intra Financial Corp.***, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54.

¶17 We disagree with Marks' assertion that this case turns on whether the term "performance" in Section 6.h.2) includes the performance of an agent's employees. Rather, we agree with American Family that Marks' own, undisputed conduct of which American Family was aware at the time the agreement was terminated provides a basis for termination under the agreement.[7]

¶18 Contrary to Section 6.b. of the agency agreement, Marks failed to disclose to American Family that DeSautelle was working in his office. Marks testified in deposition that he was aware that he was required to disclose DeSautelle's employment, but nonetheless declined to provide DeSautelle's name to American Family. As a result of Marks' decision to withhold DeSautelle's name from American Family, DeSautelle, who it is undisputed had regular contact with the public, was never appointed as an insurance sales representative, a requirement under American Family policy for agency staff having contact with the public. Accordingly, we conclude that Marks' intentional failure to provide DeSautelle's name to American Family was undesirable performance involving dishonest conduct within the meaning of the agreement, and thus provides a basis for termination of the agency agreement without prior notice.

[7] Because we do not address whether the performance of an agent's employee may provide a basis for termination of the agency agreement, we likewise do not address Marks' argument that American Family's decision not to terminate without notice the agency agreement of one Agent Scott Owens in similar circumstances (an employee of Owens forged signatures on several company checks) shows that American Family did not view DeSautelle's alleged conduct to be grounds for terminating the agency agreement.

¶19 Marks suggests that his failure to disclose DeSautelle's name to the company cannot be used to justify the termination of the agreement because Jensen of American Family, who knew that DeSautelle was working in Marks' office from the start, consented to her employment by waiting for two months before terminating the agreement. However, the record shows that Jensen and American Family did not consent to DeSautelle's employment in Marks' office; they investigated it, and took action to terminate the agreement shortly after completing the investigation. Immediately after DeSautelle began in Marks' office, the company initiated an investigation of the office, focusing on DeSautelle's role in it. This investigation continued until August 7, and Marks' agency agreement was terminated approximately two weeks later.

¶20 In his reply brief, Marks raises a second claim of issue preclusion with regard to ***Dan Samp***. Noting that we concluded in ***Dan Samp*** that evidence acquired after the termination of Samp's agency agreement did not justify the termination, ***Dan Samp***, No. 2005AP1918, unpublished slip op. at ¶¶28-31, Marks argues that this conclusion should apply here. We do not, as a general rule, address issues raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n. 7, 292 Wis. 2d 212, 713 N.W.2d 661. Nevertheless, we choose to address this issue.

¶21 "The doctrine of issue preclusion forecloses relitigation of an issue that was litigated in a previous proceeding involving the same parties or their privies." ***Masko v. City of Madison***, 2003 WI App 124, ¶4, 265 Wis. 2d 442, 665 N.W.2d 391. Issue preclusion is appropriate only when the issue was actually litigated in the prior proceeding and the application of the doctrine would be consistent with fundamental fairness. ***Id.*** The party invoking issue preclusion bears the burden of demonstrating the doctrine should be applied. ***Id.***

¶22 We conclude that issue preclusion is inappropriate here because the issue presented in this case is substantially different from the issue decided in ***Dan Samp***.[8] In the prior case, American Family terminated Samp for allegedly unlawful conduct committed outside of his capacity as an insurance agent. ***Dan Samp***, No. 2005AP1918, unpublished slip op. at ¶¶3-11. Following the termination, American Family conducted an investigation and discovered work-related misconduct meriting termination. ***Id.*** at ¶11. Construing the agreement's terms, we concluded that American Family could not rely on the after-acquired evidence to terminate the agency agreement. ***Id.*** at ¶28-31.

¶23 Unlike the after-acquired evidence in ***Dan Samp***, the evidence on which American Family relies in justifying its termination of Marks' agency agreement was acquired before the termination. In fact, the evidence that a person whose name was not disclosed to American Family was running Marks' office was obtained during the investigation that led to the termination of the agreement. Thus, the issue presented in this case—namely, whether, to justify the termination of an agreement, American Family could rely on a reason for the termination not provided to the agent but acquired during the course of an investigation that ultimately resulted in the termination of the agreement—was not "actually litigated" in ***Dan Samp***, and therefore application of issue preclusion is inappropriate here.

¶24 Marks argues that, if the doctrine of issue preclusion does not apply, the rationale provided in ***Dan Samp*** for our conclusion that after-acquired

[8] We also need not address American Family's argument that ***Dan Samp*** does not apply, because there, the agent's conduct fell outside of his duties to American Family. Here, the conduct which American Family complains of is undisputedly connected to Marks' agency.

evidence could not serve as a basis for termination of the agency agreement nonetheless applies to this case. However, Marks' entire argument on this point consists of a general reference to ***Dan Samp***, an unpublished opinion which has no precedential effect and therefore may not be cited for a point of law in Wisconsin courts. *See* WIS. STAT. RULE 809.23(3) (2007-08) (amended by S. Ct. Order 08-02, §§ 1 to 3, eff. July 1, 2009) (unpublished opinions released before July 1, 2009, have no precedential value and may not be cited in any court except to support a claim of claim preclusion, issue preclusion or law of the case). If Marks' view is that American Family may not justify the termination of an agency agreement based on a reason not provided to the agent but acquired during the course of an investigation that ultimately resulted in the termination of the agency agreement, he must develop this argument. He has not, and we decline to develop it for him. *See* ***Kristi L.M. v. Dennis E.M.***, 2007 WI 85, ¶20 n. 7, 302 Wis. 2d 185, 734 N.W.2d 375 (undeveloped arguments need not be addressed).

CONCLUSION

¶25 In sum, we conclude that Marks' intentional failure to disclose to American Family DeSautelle's employment in his office constituted undesirable performance involving dishonesty under Section 6.h.2) of the agency agreement, and, thus, justified American Family's termination of the agreement. We conclude that application of ***Dan Samp*** to the present case on issue preclusion grounds is inappropriate here because the issue presented in this case was not "actually litigated" in ***Dan Samp***. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.