COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3273 **Cir. Ct. No. 01 CV 9115**

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

AURORA HEALTH CARE VENTURES, INC. AND AURORA HEALTH CARE, INC.,

PLAINTIFFS-APPELLANTS,

V.

TOUCHPOINT HEALTH PLAN, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 WEDEMEYER, P.J. Aurora Health Care Ventures, Inc. and Aurora Health Care, Inc. appeal from an order denying their motion for a temporary injunction and summary judgment and granting Touchpoint Health Plan, Inc.'s motion for judgment on the pleadings, thereby dismissing Aurora's complaint. Aurora contends that: (1) the trial court erred when it denied its motion for

summary judgment; (2) it is entitled to a permanent injunction; and (3) the trial court erred when it granted judgment to Touchpoint. Because the contractual language was ambiguous, the trial court erred in granting judgment to Touchpoint. We reverse and remand with directions to the trial court to: (1) conduct a trial to determine the intent of the parties; and (2) conduct further proceedings necessary to resolve the issues of the alleged violation of anti-trust and insurance laws.

I. BACKGROUND

¶2 Touchpoint is a Wisconsin insurance corporation. Before the transaction which generated the appeal in this case, Touchpoint had three shareholders: (1) United Investors; (2) Aurora; and (3) United Providers.[1] Each of the shareholders was bound by a Shareholders Agreement, dated September 29, 1995, which provided that if a shareholder decided to sell its shares, Touchpoint would have the right of first refusal and the remaining shareholders would have the right of second refusal.

¶3 Touchpoint provides managed care health services in the Fox River Valley area. The Shareholders Agreement, § 5.7(c), made each shareholder a participating provider in the Touchpoint network. In 2000 and 2001, conflicts arose among the shareholders, and Aurora contemplated selling its shares. On June 29, 2001, Aurora and Blue Cross Blue Shield United of Wisconsin finalized a Stock Purchase Agreement, wherein Blue Cross agreed to buy Aurora's shares in Touchpoint. The Agreement contained the controversial paragraph 18, which is the focus of this case. Paragraph 18 provided:

[1] United Providers joined the partnership on May 1, 1999, by an amendment to the original agreement.

> **Contracting.** Seller and Purchaser agree to cooperate and exercise good faith and diligence to complete the transaction as herein provided and to obtain a waiver of the rights of refusal under the Shareholders Agreement. In addition, as an owner of Touchpoint, Purchaser agrees to exercise its authority and good faith and vote all the stock it now or in the future owns (which the parties agree is not limited to shares acquired hereunder) to include Aurora Health Care affiliated facilities (including BayCare Clinic, L.L.P.) and Aurora Health Network providers (including BayCare Clinic) (together, "Aurora") in Touchpoint's product offerings in any county in which Touchpoint's products or services are offered over a term of not less than ten years. Aurora shall, and Purchaser shall vote its stock to cause Touchpoint as far as possible to, negotiate in good faith the terms of a definitive contract to reflect such arrangement provided that until such contract is signed, the pricing shall be at a ten percent (10%) discount from charges for PPO products and at the same discount from charges for HMO products that Blue Cross receives from Aurora in its broad network agreement in the same geographic area.
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> If at any time Purchaser shall have majority ownership of Touchpoint, it agrees that Aurora facilities and providers will be offered as providers in Touchpoint's product offerings in any county in which Touchpoint's products are offered over a term of not less than ten years. Aurora shall, and Purchaser shall cause Touchpoint to negotiate in good faith the terms of a definitive contract to reflect such arrangement provided that until such contract is signed, the pricing shall be at a ten percent (10%) discount from charges for PPO products and at the same discount from charges for HMO products that Blue Cross receives from Aurora in its broad network agreement in the same geographic area.
>
> Seller shall make its facilities and providers available to Purchaser's network on terms not less favorable than those it makes available to comparable managed care entities in the same geographic area.

¶4 Aurora contends that the purpose of this paragraph was to ensure that after it sold its Touchpoint shares, the purchaser of the shares would take all action possible to keep Aurora as a provider in the Touchpoint network. On July 2, 2001, in compliance with the Shareholders Agreement, Aurora notified

Touchpoint of its intent to transfer all of its shares to Blue Cross. Touchpoint indicated that it intended to exercise its right of first refusal and purchase Aurora's shares. Thereafter, the record reflects a flurry of correspondence between Aurora and Touchpoint relative to paragraph 18, and Aurora's insistence that Touchpoint must agree to all of the terms and conditions to which Blue Cross had agreed. Specifically, Aurora wanted assurance that Touchpoint would "match" Blue Cross's promise to vote its shares to keep Aurora providers in the Touchpoint network.

¶5 After receiving such assurance from Touchpoint, Aurora went forward with the closing in which it transferred to Touchpoint all of its shares in Touchpoint. The closing occurred on July 31, 2001. The agreement to transfer Aurora's shares in Touchpoint explicitly incorporated all of the terms and conditions of the Stock Purchase Agreement and those terms and conditions became the purchase agreement between Aurora and Touchpoint.

¶6 On August 10, 2001, Aurora wrote to Touchpoint requesting that it honor the provisions contained in paragraph 18 of the purchase agreement. On August 28, 2001, Touchpoint responded to the request indicating that "Article 18 of the Agreement imposes no obligation upon Touchpoint." As a result, Aurora filed the underlying action against Touchpoint. Aurora filed a motion for summary judgment and sought an injunction against Touchpoint. Touchpoint responded by filing a motion for judgment on the pleadings. Aurora's position was that Touchpoint's conduct breached the agreement and constituted bad faith. Touchpoint's position was that paragraph 18 could not apply to it because the paragraph referred to the "owner" of the shares. Touchpoint argued that as the corporation itself, it could not be an "owner." The trial court agreed with Touchpoint's reasoning and granted its motion for judgment. Aurora now appeals.

II. DISCUSSION

A. Ambiguity.

¶7 The issue in this case centers on the interpretation of paragraph 18 of the Stock Purchase Agreement. Aurora contends that the agreement is ambiguous and therefore, we must turn to extrinsic evidence to determine the intent of the parties.[2] Touchpoint contends that the paragraph is not ambiguous, and clearly does not apply to Touchpoint because Touchpoint cannot be an owner of itself. We conclude that the language of paragraph 18 is ambiguous, and therefore remand the matter with directions to the trial court to conduct a trial to determine the intent of the parties.

¶8 The law in Wisconsin is that unambiguous contractual language must be enforced as it is written. ***Dykstra v. Arthur G. McKee & Co.***, 92 Wis. 2d 17, 38, 284 N.W.2d 692 (Ct. App. 1979), *aff'd*, 100 Wis. 2d 120, 301 N.W.2d 201 (1981).

> The ultimate aim of all contract interpretation is to ascertain the intent of the parties. If this intent can be determined with reasonable certainty from the face of the contract itself, there is no need to resort to extrinsic evidence. If, however, the language of the contract is ambiguous, then the court is not restricted to the face of the instrument in ascertaining intent, but may consider extrinsic evidence.

[2] In its appellate brief, Aurora argued that extrinsic evidence may be considered regarding the circumstances surrounding the contract even absent ambiguity. *See* 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.7, at 31 n.80 (rev. ed. 1998). However, during oral argument, Aurora modified this argument, instead contending that paragraph 18 is in fact ambiguous, and thus, the trial court must consider extrinsic evidence to ascertain the intent of the parties to the contract.

Patti v. Western Mach. Co., 72 Wis. 2d 348, 351, 241 N.W.2d 158 (1976) (citation omitted).

¶9 Words or phrases in a contract are ambiguous if they are "reasonably or fairly susceptible of more than one construction" or meaning. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Construction of a contract, including the determination of whether its terms are ambiguous, is a legal matter that we decide *de novo*. ***Id.***

¶10 In applying these standards, we conclude that paragraph 18 is ambiguous. Because of the nature of this transaction and the fact that the language of the contract was not revised when Touchpoint exercised its right of first refusal, many of the words and phrases within the controversial paragraph create difficulty in construing its meaning. The first sentence of the paragraph creates ambiguity: "Seller and Purchaser agree to cooperate and exercise good faith and diligence to complete the transaction as herein provided and to obtain a waiver of the rights of refusal under the Shareholders Agreement." This statement is ambiguous because Touchpoint, as the "Purchaser," was also the party exercising the right of first refusal. The ambiguity was created because Touchpoint exercised the right of first refusal and stepped into the shoes of the originally targeted purchaser—Blue Cross.

¶11 The ambiguity continues in the second sentence of the paragraph, which states:

> In addition, as an owner of Touchpoint, Purchaser agrees to exercise its authority and good faith and vote all the stock it now or in the future owns … to include Aurora Health Care … in Touchpoint's product offerings in any county in which Touchpoint's products or services are offered over a term of not less than ten years.

The ambiguity arises in that Touchpoint contends it cannot be an owner of itself. Aurora argues that although corporate law generally indicates that a corporation cannot be the sole owner of itself, in this instance, and under these particular facts, Touchpoint could be termed an owner for the purposes of the obligations imposed in this paragraph.

¶12 The trial court disposed of the case in reliance on Touchpoint's contention that it cannot own itself. We conclude that the trial court's interpretation was incorrect. This case presented a situation where the contract involved was intended to be an agreement between Aurora and an outside purchaser, Blue Cross. Touchpoint became involved because it exercised the right of first refusal pursuant to the 1995 Shareholders Agreement. Accordingly, the circumstances of this case present a very specific factual scenario—by exercising the right of first refusal, Touchpoint stepped into the shoes of the original purchaser, Blue Cross. Thus, Touchpoint is in essence operating under a dual role—it is the corporation *and* the purchaser/owner of the shares Aurora sold.

¶13 When the right of first refusal is exercised such that one party steps into the shoes of another in order to consummate a transaction, certain terms drop out or are replaced by those required by the participation of the substitute party. Thus, the "Touchpoint cannot own itself" analysis is hypertechnical and cannot be upheld given the facts and circumstances presented in this case.

¶14 Further, we are not persuaded by Touchpoint's related argument that because it, as the corporation, purchased the shares, the shares were no longer "outstanding shares" but rather "treasury shares," which cannot be "owned" and cannot constitute "voting shares." This court is not persuaded that Touchpoint is not the "owner" of shares simply because they are "treasury shares." According to

WIS. STAT. § 180.0631(1) (1999-2000),[3] treasury shares "shall be considered issued shares but not outstanding shares." Thus, they continue to exist and must be owned by someone. WISCONSIN STAT. § 180.0103(17m) states that "'treasury shares' means shares of a corporation that have been issued, that have been subsequently acquired by and *belong to* the corporation and that have not been canceled or restored to the status of authorized but unissued shares," (emphasis added).

¶15 Even if we assume Touchpoint's argument is technically accurate, it fails in application because Touchpoint distributed the purchased shares proportionately to the remaining two shareholders, United Providers and United Investors. The distribution was done in accord with the percentage of funding, which United Providers and United Investors provided to Touchpoint enabling it to purchase Aurora's shares. Whether Touchpoint held or redistributed the shares does not alter the fact that at the time the Stock Purchase Agreement was executed, Touchpoint was acting as the purchaser/owner in place of Blue Cross.

¶16 The dual status of Touchpoint, particularly subsequent to the transaction, certainly creates some ambiguity as to the terminology utilized in the second sentence and subsequent portions of paragraph 18. Moreover, both parties concede that paragraph 18 imposed three obligations on the purchaser of Aurora's stock: (1) it must exercise its authority to include Aurora in Touchpoint's product offerings; (2) it must exercise its good faith to include Aurora in Touchpoint's

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

product offerings; and (3) it must vote its stock that it now has, or may in the future own, to include Aurora in Touchpoint's product offerings.

¶17 Touchpoint contends that because it was impossible for it to "vote stock" as the corporation, paragraph 18 unambiguously cannot impose any other obligations upon it. In other words, because it cannot comply with the third requirement, it is automatically absolved of any responsibility for complying with the first two requirements or any obligations under paragraph 18. That is only one manner in which to interpret the language of this paragraph. Aurora argued during oral argument to this court that Touchpoint's inability to comply with the third requirement does not relieve it of complying with the first two. Once again, the interpretations raise two possible outcomes which render the language ambiguous.

¶18 When the language of a contract is ambiguous, a court may resort to extrinsic evidence to determine the intent of the parties. ***Patti***, 72 Wis. 2d at 351. The trial court failed to do so. Moreover, the record contains correspondence between Aurora and Touchpoint suggesting that it was Aurora's intent for Touchpoint to comply with the same requirements Blue Cross had promised. There is also a suggestion that Touchpoint represented it would exactly match the terms and conditions to which Blue Cross had committed. However, secretly, it never intended to honor this representation, based on a legal opinion that, subsequent to execution of the sale, paragraph 18 would not apply to Touchpoint. Accordingly, the intent of the parties overlaps with the claim that Touchpoint's actions breached its duty of good faith and fair dealing. Aurora argues that because Touchpoint was purchasing the shares pursuant to the 1995 Shareholders Agreement, it owed Aurora a duty of good faith and fair dealing. That is, Touchpoint could not promise to match the conditions of the Blue Cross offer

before the sale, knowing that once the sale was completed, Touchpoint intended to assert that the conditions under paragraph 18 could not apply to it.

¶19 The trial court addressed the bad faith issue separately in its opinion. It determined that "[b]oth parties were playing their cards close to the vest, if not engaging in sharp dealing." The trial court's decision was also based on its determination that the parties involved were "sophisticated" and that Touchpoint need not be its "brother's keeper." The trial court pointed out that Touchpoint "was carefully trying not to state its opinion clearly to Aurora." The reverse, however, was not true. Aurora, repeatedly and explicitly, required that for Touchpoint to exercise the right of first refusal, it had to accept the exact terms of the Blue Cross offer, including paragraph 18. Aurora refused to consent to the sale unless Touchpoint assured Aurora that it would honor all the terms and conditions to which Blue Cross had agreed. Only after Aurora received this assurance from Touchpoint was the sale consummated.

¶20 Much of this interplay was presented in the extrinsic evidence, which the trial court did not consider because of its initial determination that paragraph 18 was unambiguous. In light of our decision that paragraph 18 is ambiguous and a trial is needed to determine the intent of the parties, together with the fact that the alleged bad faith is interrelated with the intent issue, we also reverse this portion of the trial court's decision. We conclude that the trial court's determination on breach of good faith was premature and should be reconsidered after a full presentation of the evidence during the trial upon remand.

¶21 Based on the foregoing, we reverse and remand this matter to the trial court with directions to conduct a trial to ascertain the intent of the parties and to address issues related to bad faith. After the trial court has resolved the issues

of the intent of the parties and whether any breach of good faith occurred, we direct the trial court to decide any outstanding issues consistent with the results of the trial.

B. Anti-Trust.

¶22 The secondary issue presented involves an allegation that paragraph 18 violates anti-trust and insurance laws. We conclude that rendering a decision on this issue is premature. There are significant factual findings that need to be made before any determination of anti-trust law violation can be found. Similarly, determining whether insurance laws are violated by the language of paragraph 18 also requires the resolution of factual issues. It would be inappropriate for these issues to be resolved without further development of the record. Accordingly, we direct the trial court, upon remand, to conduct whatever further proceedings are necessary to resolve the anti-trust and insurance issues.

By the Court.—Order reversed and cause remanded with directions.

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