COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0594 **Cir. Ct. No. 00 CV 2993**

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

MICHAEL F. HUPY & ASSOCIATES, S.C.,

PLAINTIFF-APPELLANT,

V.

MICHAEL T. SAVAGLIO,

DEFENDANT-RESPONDENT,

ROBERT I. BRISKMAN AND ARNOLD BRISKMAN,

DEFENDANTS.

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 Hoover, JJ.

¶1 FINE, J. Michael F. Hupy & Associates, S.C., appeals from an "Order for Judgment" confirming an earlier oral decision, after a bench trial,

dismissing Hupy's complaint against Michael T. Savaglio for attorneys fees Hupy claimed that Savaglio owed it pursuant to their agreement when Savaglio left Hupy's employ. We reverse.

I.

¶2 In August of 1998, Hupy & Associates hired Savaglio to work for it as an associate attorney. The parties' August 1998 written employment agreement provided, as material to this appeal:

> If Michael T. Savaglio should leave his employment with Michael F. Hupy & Associates, S.C., clients are free to change attorneys, pursuant to the Code of Professional Responsibility and the client's right to do so, but, except as provided below, all fees derived from said cases shall be the sole property of said employer, Michael F. Hupy & Associates, S.C., whether said fees are paid or collected during or after the term of the employment of Michael T. Savaglio. All fees shall remain the property of Michael F. Hupy & Associates, S.C. in their entirety, whether the client wishes to have Michael F. Hupy & Associates, S.C., Michael T. Savaglio, or another law firm that Michael T. Savaglio may become affiliated with or is a referral source for, conclude cases after the term of employment of Michael T. Savaglio with the Law Firm of Michael F. Hupy & Associates, S.C. The only exceptions to this portion of the agreement are that the Law Firm of Michael F. Hupy & Associates, S.C., in its sole discretion, but with the client's consent, may require Michael T. Savaglio to take with him, if he leaves the employment of the Law Firm of Michael F. Hupy & Associates, S.C. certain cases which came to the firm because of Michael T. Savaglio, with each party being paid on a pro rata basis for work done during the term of employment and subsequent to the term of employment, but in no event shall the Law Firm of Michael F. Hupy & Associates, S.C. receive less than twenty-five percent (25%) of the fee.

¶3 After Savaglio started to work for Hupy & Associates, he brought with him a personal-injury case, *Rachel Hardison v. Jasper*, that was then pending in the Cook County Circuit Court and on which he had worked when he was with

the Chicago law firm of Briskman & Briskman. On September 2, 1998, Hupy and Briskman agreed that: 1) they "shall be co-counsel" in *Hardison*; 2) Briskman "shall receive sixty percent (60%) of the attorneys' fee" in *Hardison*; and 3) Hupy "shall receive forty percent (40%) of the attorneys' fee" in *Hardison*. On September 10, 1998, Hupy and Rachel Hardison's guardian *ad litem* in the *Hardison* matter executed a retainer agreement with Hupy, which incorporated by reference the September 2, 1998, agreement between Hupy and Briskman.

¶4 Savaglio stopped working for Hupy & Associates in July of 1999, and he returned to Briskman. On July 29, 1999, Michael T. Savaglio and Michael F. Hupy signed a memorandum dated July 13, 1999, that spelled out their agreement as to a division of fees for cases, including the *Hardison* matter. The memorandum recited: "Pursuant to our previous agreement with your former law firm, we would receive forty percent of the fee on the Hardison case." The "former law firm" was Briskman & Briskman; "we" was Hupy & Associates. This memorandum mirrored Savaglio's handwritten notes on a memorandum dated July 12, 1999, but also signed on July 29, 1999, that listed, among others, the personal-injury cases that were "generated" by Savaglio. Next to the *Hardison* matter, Savaglio wrote: "40% MFA"—that is, forty percent to the Hupy firm. Michael F. Hupy testified that he did not discuss with Savaglio whether Savaglio would be personally liable for Hupy's portion of any fee generated by *Hardison*. Savaglio testified that he never intended to be personally liable for Hupy's fee on the *Hardison* matter.

¶5 In mid-August, the Briskman firm was substituted for Hupy & Associates in *Hardison*. In November of 1999, *Hardison* was settled for $390,000, producing an attorneys fee of $130,000. Hupy & Associates demanded

its forty percent, which both Briskman and Savaglio refused to pay, although Briskman did pay to Hupy $25,000 pursuant to a Chicago court order.

¶6 The trial court held that the contracts between Hupy & Associates and Savaglio were ambiguous and, after a bench trial, concluded that Savaglio never intended to be personally liable for Hupy's share of the fee generated by *Hardison*.

II.

¶7 As noted, the trial court held that the agreements between Hupy & Associates and Savaglio were ambiguous, and thus took testimony in order to ascertain the parties' intent. Although a trial court's findings of fact are almost immune from appellate second-guessing, WIS. STAT. RULE 805.17(2) (trial court's findings of fact may not be set aside unless they are "clearly erroneous"), construction of contracts, including the determination of whether their terms are ambiguous, are legal matters that we decide *de novo*, ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990).

¶8 It is black-letter law that unambiguous contractual language must be enforced as it is written "even though the parties may have placed a different construction on it." ***Cernohorsky v. Northern Liquid Gas Co.***, 268 Wis. 586, 593, 68 N.W.2d 429, 433 (1955); *see also* ***Dykstra v. Arthur G. McKee & Co.***, 92 Wis. 2d 17, 38, 284 N.W.2d 692, 702–703 (Ct. App. 1979), *aff'd*, 100 Wis. 2d 120, 301 N.W.2d 201 (1981). Thus, unless the agreement between Hupy and Savaglio is ambiguous on its face, it is not material what their respective intent was.

¶9 Contract language is ambiguous only when it is "reasonably or fairly susceptible of more than one construction." ***Borchardt***, 156 Wis. 2d at 427, 456 N.W.2d at 656. In determining what a contract means and whether it is ambiguous we must give meaning to all of its provisions. ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 366, 377 N.W.2d 593, 602 (1985) ("agreement should be given a reasonable meaning so that no part of the contract is surplusage"); ***Heritage Mut. Ins. Co. v. Truck Ins. Exch.***, 184 Wis. 2d 247, 258, 516 N.W.2d 8, 12 (Ct. App. 1994) (should interpret contract to give "reasonable meaning to all provisions").

¶10 There are two possible interpretations of Savaglio's promise to Hupy & Associates that Hupy was to "receive forty percent of the fee on the Hardison case," but only one interpretation does not make that promise mere surplusage. First, it could be interpreted as Hupy contends, that Savaglio—who, everyone concedes, was primarily responsible for the *Hardison* matter—was to ensure that Hupy received what Savaglio promised that Hupy would receive, even if that meant paying it himself. Second, it could be read as the trial court read it, namely that Savaglio was expressing his mere hope or prediction that Hupy would receive the forty percent from Briskman.

¶11 There is nothing in the record that supports even an inference that Savaglio controlled whether Briskman would pay Hupy's fee. Indeed, the trial court found that Savaglio could not "guarantee that Briskman and Briskman will pay the 40 percent." Moreover, Savaglio's promise that Hupy would "receive forty percent of the fee on the Hardison case" was not conditioned on Savaglio returning to Briskman, with whom Hupy had the co-counsel agreement. Indeed, as Hupy points out, Savaglio could have either gone with another firm or become

a solo practitioner and still could have settled the *Hardison* matter. As the trial court found, Savaglio was "the only one really working on" the *Hardison* case.

¶12 An interpretation of Savaglio's promise to be anything other than his commitment to ensure that Hupy receive the fee that he promised it would receive would transmute his contractual promise that Hupy was to "receive forty percent of the fee on the Hardison case" into words without meaning, especially because under Savaglio's August 1998 employment contract with Hupy, Hupy has the right to keep *Hardison*, subject, of course, to the client's approval. Thus, Savaglio was giving up forty percent of the fees generated by it because Hupy had the contractual right to them all. Accordingly, the *only* interpretation that gives meaning to Savaglio's promise is that he would be responsible for its effectuation even if that meant paying it from his own pocket. There being no other reasonable interpretation, the promise is not ambiguous.

¶13 Hupy & Associates is entitled from Savaglio the fee that Savaglio agreed Hupy would get. Forty percent of $130,000 is $52,000. Hupy has already received $25,000; he is thus entitled to $27,000. Accordingly, we reverse the "Order for Judgment" and remand to the trial court with directions that it enter judgment in favor of Hupy for $27,000, plus whatever costs and disbursements to which Hupy is entitled.

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

Publication in the official reports is not recommended.

¶14 HOOVER, J. (*dissenting*). I respectfully dissent. I agree with the circuit court that the "contract," the July 13, 1999, document entitled "Memorandum," is ambiguous. Specifically, the passage "*Pursuant to* our previous agreement with your former law firm [i.e., the September 2, 1998 Co-Counsel Agreement between Hupy and Briskman regarding the ***Hardison*** personal injury case]" is ambiguous. It does not clearly resolve the issue whether Savaglio was to be *personally* liable for forty percent of the fee in a case where the attorney fees would go to the Briskman firm or whether this was merely an acknowledgement of the September 2, 1998, Co-Counsel Agreement between Hupy and Briskman. Indeed, in his brief Savaglio makes reference to two occasions where Hupy's trial counsel conceded at least some ambiguity.[1]

¶15 There is no disagreement between the majority and the dissent concerning the applicable legal principles. The purpose of contract interpretation is to ascertain the parties' intent. ***Columbia Propane, L.P. v. Wisconsin Gas Co.,*** 2002 Wis. App. 9 ¶15, 250 Wis. 2d 582, 640 N.W.2d 819. While construction of a contract to determine the parties' intent is normally a matter of law for this court, where a contract is ambiguous the question of intent is for the trier of fact. ***Id.*** Whether a contract is ambiguous in the first instance is a question of law that appellate courts decide independently of the trial court. ***Id.*** A contract is

[1] For example, during closing argument, Hupy's attorney stated: "When you have a contract like that – when there's a dispute, there is some ambiguity, you look at intent and you look at performance."

ambiguous when it is reasonably susceptible to more than one meaning. ***Id.*** In interpreting contract language, the entire agreement is considered, and we attempt to give a reasonable meaning to all parts so that no part is useless or inexplicable. ***Id.*** Once, however, a contract is deemed ambiguous, it is the court's duty to determine the parties' intent at the time the agreement was entered into. ***Capital Invests. v. Whitehall Packing Co.***, 91 Wis. 2d 178, 190, 280 N.W.2d 254 (1979).

¶16 The majority perceives two possible interpretations of the memo. Under the one the majority deems reasonable, Savaglio personally ensured that Hupy would receive forty percent of the ***Hardison*** attorney fee. The second interpretation is that "Savaglio was expressing his mere hope or prediction that Hupy would receive the forty percent from Briskman."[2] The majority views this alternative as surplusage, and thus an interpretation to be avoided.

¶17 The majority reasons that Savaglio's words, if not a promise to ensure that Hupy got its fee, would be meaningless, especially because under Savaglio's August 1998 contract, Hupy had the right to keep ***Hardison***, subject to the client's approval. To arrive at this conclusion, however, the majority relies not strictly on the language of the July 13, 1999, memo, but resorts to what is *not* in the record. *See* majority opinion, ¶11 (no record support that Savaglio controlled Briskman's decision to pay Hupy and Savaglio's promise not conditioned on Savaglio returning to Briskman). I respectfully observe that the record establishes

[2] The trial court issued a written decision in which the alternative interpretation was characterized as a "memorialization" of the Co-Counsel Agreement between Hupy and Briskman. This represents a third interpretation that I view as reasonable, as discussed below. I do not believe that converting the concept of "memorialization" into the phrase, "expressing his mere hope or prediction" fairly captures the meaning the trial court placed on the word it chose to characterize the alternative interpretation.

beyond doubt that all concerned contemplated Savaglio and ***Hardison*** departing hand in hand for an immediate return to the Briskman firm. Savaglio and Rachel Hardison's legal guardian signed a document substituting Briskman for Hupy on July 29, 1999; Hupy signed it on August 2. In an August 5 letter addressed to Savaglio *at the Briskman firm*, Hupy notes that Savaglio would be concluding the ***Hardison*** case. Most telling in this regard are, of course, the July 12 and 13, 1999, memos that implicitly acknowledge that ***Hardison*** would be leaving with Savaglio who, as indicated, was returning to Briskman. So while the majority's analysis is cogent, I believe it is at odds with the record.

¶18 More to the fine point, I suggest that the trial court's second interpretation, that the memo constitutes a memorialization, is a reasonable, consequential interpretation. The July 13, 1999, memo may be interpreted as Savaglio memorializing his understanding that Hupy, not Savaglio, was entitled to the agreed fee, notwithstanding Savaglio's intimate connection with a case that was subject to a contract other than the Hupy-Savaglio employment agreement. As the majority notes, everyone concedes that Savaglio was primarily responsible for ***Hardison***, a case that was subject to an independent contract between only the Hupy and Briskman firms. This I view as a reasonable alternative regardless whether Savaglio could control Briskman's decision to pay the agreed fee percentage.[3]

[3] I again note that the majority bolsters its surplusage analysis by observing that nothing in the record suggests Savaglio controlled this decision whether to pay Hupy its ***Hardison*** fee. It also noted that Savaglio's promise that Hupy would receive forty percent of the ***Hardison*** fee was not conditioned on Savaglio returning to Briskman. As indicated above, however, I respectfully submit that the only reasonable inference to be drawn from the record is that everyone knew Savaglio and ***Hardison*** were returning to Briskman.

¶19 After concluding that the contract was ambiguous, the trial court found that Savaglio did not intend to personally guarantee Hupy's share of the ***Hardison*** attorney fee. Hupy makes no attempt to demonstrate that this finding was clearly erroneous. In fact, Hupy testified that neither he nor Savaglio at the signing of any document contemplated that Savaglio would be personally liable for forty percent of the ***Hardison*** fee. Accordingly, I would affirm the circuit court.