COURT OF APPEALS
DECISION
DATED AND RELEASED

August 21, 1996

NOTICE

No. 95-1428

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

A.B. SCHMITZ AGENCY, INC.,

Plaintiff-Respondent,

v.

EDWARD WENDEL, d/b/a
BEAR INSURANCE AGENCY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed in part and reversed in part*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Edward Wendel appeals from a judgment in favor of A.B. Schmitz Agency, Inc. (hereinafter, Schmitz) for rent due under a contract and prejudgment interest. He argues that the trial court misapplied the parol evidence rule, that the trial court erroneously exercised its discretion in limiting his redirect testimony, that prejudgment interest should not have been awarded, and that he was entitled to funds put into trust while the action was pending. Except for the award of prejudgment interest, we affirm the judgment.

Wendel and Schmitz, both insurance agents, entered into an office-sharing arrangement whereby Schmitz would provide Wendel with office space and support staff services. The parties agreed to "cross-licensing," which permitted each party to sell insurance policies for carriers represented by the other party. Wendel was to pay rent "based on Four (4%) of the Annual Gross written Property and Casualty Premium as registered as of December 31, 1984, and subsequent years, Written by ED WENDEL and BEAR INSURANCE AGENCY only, per the year end reports of FIREMEN's FUND, BADGER STATE MUTUAL, MIDWESTERN NATIONAL INSURANCE, CRUM & FORESTER PERSONAL INSURANCE, CRUM & FORESTER INSURANCE, and REPUBLIC-VANGUARD INSURANCE COMPANIE[S]."

During the term of the contract, Wendel made monthly payments equal to one-twelfth of the applicable percentage of the annual gross written property and casualty premiums he wrote for the calendar year ending December 31, 1984. Wendel failed to provide Schmitz with an updated accounting of gross premiums. Schmitz brought this action for an accounting and determination of the amount of underpaid rent. Wendel counterclaimed for sums Schmitz owed him for unpaid commissions Schmitz collected on business Wendel brokered through carriers represented by Schmitz (direct-billed commissions). The matter was tried to the court. Judgment was entered for $46,510.19, including prejudgment interest of $4472.60.

The issue is whether Wendel's rent formula was to be applied to the gross premiums from only the six companies enumerated in the rental clause or to the gross premiums on all property and casualty policies sold by Wendel. The trial court found that the contract was ambiguous and that rent was not limited to the six companies. Wendel argues that the trial court erred in considering parol evidence.

The parol evidence rule is that when the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be contradicted or varied by proof of prior written or oral agreements. ***Federal Deposit Ins. Corp. v. First Mortgage Investors***, 76 Wis.2d 151, 156, 250 N.W.2d 362, 365 (1977). It is a rule of substantive law and not a rule of evidence. ***Id.***

The trial court found that the contract was not the final and complete expression of the parties' agreement. The trial court's finding that the contract is not integrated is not clearly erroneous. Section 805.17(2), STATS. The contract did not have a clause indicating that it was the final and only agreement of the parties or that all other agreements had been "merged" into the contract. The contract provided that it could be changed or added to by mutual agreement. The parties acknowledged their understanding that the accounting services to be provided under the contract was a future event. Wendel acknowledged that he agreed to utilize office systems used by Schmitz and that his agreement to do so was not included in the contract. Moreover, Wendel acknowledged that the parties intended to "add to the list" in the rental clause any company he added or replaced. Thus, the requisite finding—that the parties intended the contract to be a final expression—does not exist so as to bar evidence of prior written or oral agreements between the parties. *See* ***Kramer v. Alpine Valley Resort***, 108 Wis.2d 417, 425, 321 N.W.2d 293, 297 (1982).

Parol evidence was also permissible because of the contract's ambiguity. The trial court focused on the cross-licensing clause to conclude that the contract was ambiguous. That clause provides:

> ED WENDEL and BEAR INSURANCE AGENCY will be licensed with ALL Companies represented by A.B. SCHMITZ AGENCY, INC. All Licensed Producers with A.B. SCHMITZ AGENCY, INC. will be licensed with those Companies represented by ED WENDEL and BEAR INSURANCE AGENCY. ... Except for LIFE and HEALTH Commission Business, All Property and Casualty Commissions will NOT be split as the Writing Agency/or Agent will earn Full Commission.

Whether ambiguity exists in a contract is a question of law which we decide independent of the trial court. ***Spencer v. Spencer***, 140 Wis.2d 447, 450, 410 N.W.2d 629, 630 (Ct. App. 1987). "A document is ambiguous when its words and phrases are reasonably susceptible to more than one construction." ***Id.*** We conclude that the phrase "Writing Agency/or Agent" is susceptible to more than one interpretation. We reject Wendel's contention that because the parties agreed that the phrase referred to the agent who sold the policies, no

ambiguity exists. Extrinsic evidence of the parties' intent or that it is not misunderstood between them may be considered only after ambiguity is found. We look at the contract itself to determine ambiguity.

In respect to both ambiguity and integration, Wendel argues severability. He contends that because the ambiguous cross-licensing clause has nothing to do with the rental clause, the ambiguity does infect the entire contract. He also asserts that the lack of integration in the rental clause due to his acknowledgement that the list of carriers changes as he drops or adds other carriers should not have been used to permit parol evidence on portions of the contract which were integrated.

We conclude that the contract cannot be cut up into little pieces. First, the contract did not include a clause that its provisions are severable. In the absence of such a clause, we are not persuaded that each provision of the contract is to be applied in isolation. Second, accounting for the commissions earned under the cross-licensing arrangement may ultimately affect the rental formula. That formula is based on property and casualty premiums generated by Wendel. Because the cross-licensing clause determines the scope of Wendel's business, the provisions are not severable. Wendel fails to accept that the one-page poorly drafted contract does not provide him the escape hatch he seeks.

We conclude that the trial court properly looked to extrinsic evidence of the parties' intent under the contract. Wendel does not challenge the trial court's finding that the parties intended the rental formula to be applied to all gross premiums for property and casualty sales regardless of whether the company is listed in the contract.

Wendel's next claim pertains to the damages determination. After the close of Schmitz's case, Wendel took the witness stand in support of his counterclaim for direct-billed commissions. Wendel testified that he did not have access to ledger cards Schmitz used to calculate off-sets for cancellations or refunded premiums on direct-billed business sold by Wendel. He admitted that he could neither confirm nor deny the testimony Schmitz presented on adjustments to claimed direct-billed commissions. On cross-examination, Wendel indicated that the only documents he had to determine if adjustments

were necessary due to cancellations or modifications to insurance coverage were the ledger sheets he maintained.

Wendel's redirect examination started on the next day of trial, which was really seven days later. In the intervening period, Wendel had reviewed the exhibits presented by Schmitz regarding commissions due. Over objection, the trial court permitted Wendel to testify to discrepancies he discovered between his records and the exhibits produced by Schmitz relating to adjustments for cancellations and refunded premiums. Wendel indicated that he had compared the Schmitz exhibits with the individual declaration and endorsements sheets he received contemporaneously with each change in coverage for policies he sold. When Wendel was asked what was his "recalculated" figure for commissions due, Schmitz objected on the ground that Wendel was offering new evidence that went beyond the scope of cross-examination. The trial court prevented Wendel from testifying to a recalculation of his claim. It reasoned that Wendel was attempting to offer new evidence.

The trial court has broad discretion with respect to the scope of redirect examination. ***State v. Cydzik***, 60 Wis.2d 683, 690, 211 N.W.2d 421, 426 (1973).

> The court, in the exercise of its discretion ... may permit the reexamination to go beyond the scope of the cross-examination, even though the testimony should have been brought out on direct examination. It is not an abuse of discretion to allow a party, on redirect examination, to supply testimony omitted by oversight, or to clarify testimony given on direct examination, or, where the facts thus developed are not inconsistent with his previous answers, to ask a witness to expand his testimony.

Id. n.10 (quoted source omitted).

Here, the trial court determined that the testimony Wendel sought to give on redirect examination contradicted his previous testimony and that it constituted new evidence. Wendel's recalculated figure was based on his review of declaration and endorsements sheets for the policies identified in the Schmitz exhibits. His reliance on the additional documents was contrary to his testimony on cross-examination that he only had his ledger sheets to determine sums due him.

Wendel claims that the trial court felt constrained to limit redirect examination because through pretrial discovery Wendel could have had access to the documents from which the Schmitz exhibits were created. However, we do not read the trial court's determination to be driven by discovery concerns as much as it was based on fairness. The trial court noted that the redirect examination was being used for "offensive" purposes. It noted that Wendel had a week to work with the data presented by Schmitz. It remarked:

> When you're using it [redirect examination] as he did a little bit ago in order to show the inaccuracy of the document that they brought in, okay, he had no advance warning of that. He has a right to rebut it and I have permitted that. Now you're saying that something he [Wendel] could have prepared before the trial he should be allowed to bring in now, which is contrary to what he submitted the last time he was here. This information was all available to him before the trial. This is no surprise. Every bit of the information that he now seeks to offer as a compilation was in existence before the trial began. He could have accumulated this evidence and could have presented it last time. And the problem is if I allow him to produce it now on the last day of trial, how do I know that these people aren't being cut off from their right to respond to what may turn out to be inaccuracies in what he has presented today?

In essence, the trial court's decision was that Schmitz was surprised by Wendel's retraction of his testimony on direct examination about the sums allegedly due. The trial court acted within its discretion in limiting the

scope of Wendel's redirect examination. *See* ***Lease Am. Corp. v. Insurance Co. of N. Am.***, 88 Wis.2d 395, 400, 276 N.W.2d 767, 769 (1979) (testimony which results in surprise may be excluded if the surprise would require a continuance causing undue delay or if it is coupled with danger of prejudice).

We next address the award of prejudgment interest. Prejudgment interest may be awarded only where there is a reasonably certain standard of measurement from which one can ascertain the amount owed. ***D'Huyvetter v. A.O. Smith Harvestore***, 164 Wis.2d 306, 324, 475 N.W.2d 587, 593-94 (Ct. App. 1991). The cross-licensing clause was found to be ambiguous with respect to which party would be entitled to commissions. In addition, the rental clause itself was not integrated as to the commissions to which the percentage would be applied. There was no clear standard of measurement of the amount owed. Schmitz was not entitled to recover prejudgment interest and we reverse that part of the judgment.

The final issue is whether Wendel was entitled to the $1791 paid into trust by Schmitz during the pendency of this action. The sum represents direct-billed commissions on policies sold by Wendel which Schmitz collected after the termination of the parties' relationship. The trial court ruled that Wendel failed to produce any evidence of entitlement to the money.

Wendel argues that because the contract was silent on how posttermination commissions would be split, it was not his burden of proof to show an entitlement to the trust money. Wendel made a counterclaim for an accounting of all direct-billed insurance premiums resulting from work he wrote from January 1, 1985 through August 7, 1992. He then sought judgment for the underpayment of commissions due "pursuant to said accounting and the terms and conditions of the agreement between the parties." Wendel had the burden of proof on his counterclaim. If Wendel feels he was entitled to the money that came in after the termination of the contract when the contract was silent on that point, it was his burden to prove that the subsequent renewals would be credited to him.

Wendel suggests that the trial court was obligated to fashion a remedy where the contract was otherwise silent. He cites ***Stahl v. Sentry Ins.***, 180 Wis.2d 299, 306, 509 N.W.2d 320, 322-23 (Ct. App. 1993), "[w]here parties to

a contract fail to foresee a situation that later arises and thus have no expectations with respect to that situation, the court may determine the parties' respective rights and duties under the contract." Nothing here suggests that termination of the contract was an unforeseen occurrence or that the parties were completely devoid of any idea how posttermination commissions would be handled. In the absence of such proof, the trial court was not compelled to fashion a remedy. Moreover, if the trial court should have so acted, it was reasonable to deny Wendel the posttermination commissions in accordance with the rule that a contract is to be construed against the drafter. Wendel, as the drafter of the contract, should bear the consequences of the failure to account for posttermination commissions.

No costs to either party.

By the Court.—Judgment affirmed in part and reversed in part.

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