[Cite as *Ashtabula Cty. Med. Ctr. v. Leke*, 2009-Ohio-3408.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

ASHTABULA COUNTY MEDICAL CENTER,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-A-0061**
- vs -	:	
MICHAEL A. LEKE, M.D.,	:	
Defendant-Appellant.		

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 000861.

Judgment: Reversed and remanded.

John N. Childs and *Jeana M. Singleton*, Brennan, Manna & Diamond, L.L.C., 75 East Market Street, Akron, OH 44308 (For Plaintiff-Appellee).

Gary D. Zeid, Sternberg & Zeid Co., L.P.A., 7547 Mentor Avenue, Suite 301, Mentor, OH 44060-5466 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Michael A. Leke, M.D. ("Dr. Leke"), appeals the judgment entered by the Ashtabula County Court of Common Pleas. The trial court granted a motion for summary judgment filed by appellee, Ashtabula County Medical Center ("ACMC").

{¶2} On February 15, 2006, Dr. Leke entered into an employment contract with ACMC. Pursuant to the contract, Dr. Leke was to perform surgery on behalf of ACMC.

The employment contract was for one year; however, it was to automatically renew, unless one of the parties provided notice to the other party of its intent not to renew it. In addition, the contract provided that Dr. Leke would repay ACMC a proportionate amount of his first-year subsidy if he terminated the employment contract prior to his third-year anniversary. It is undisputed that ACMC drafted the contract.

{¶3} On March 30, 2007, Dr. Leke ended his employment relationship with ACMC. He did not repay the proportionate amount of his first-year subsidy.

{¶4} ACMC filed the instant action against Dr. Leke, advancing claims of breach of contract and unjust enrichment. ACMC claimed that Dr. Leke owed it money for the proportionate amount of the first-year subsidy that he did not repay. Dr. Leke answered ACMC's complaint. In his answer, Dr. Leke admits that he owes ACMC a debt but denies it is as much as is alleged by ACMC. ACMC filed an amended complaint. Therein, ACMC restates its previous allegations; however, it claims the amount owed by Dr. Leke is higher than previously alleged. Dr. Leke filed an answer to the amended complaint, again admitting that he owes ACMC a debt, but denying the amount.

{¶5} ACMC filed a motion for summary judgment. ACMC attached a copy of the employment contract to its motion. Dr. Leke filed a reply to ACMC's motion for summary judgment. Therein, in addition to arguing that ACMC is not entitled to summary judgment, Dr. Leke asserts that summary judgment in his favor is appropriate. Dr. Leke attached several documents to his reply, including: copies of the employment contract, correspondence from ACMC to Dr. Leke, and an "accounts receivable summary." ACMC filed a reply in support of its motion for summary judgment. Attached

to its reply was a copy of the employment contract and a damages calculation. In addition to the materials attached to the motion for summary judgment and the replies, Dr. Leke's deposition was filed for the trial court's consideration.

{¶6} The trial court granted ACMC's motion for summary judgment and denied Dr. Leke's request for summary judgment. The trial court's judgment entry did not determine damages.

{¶7} The parties agreed to a "stipulation as to damages only, and judgment entry of dismissal," which was also signed by the trial court. The parties agreed that the damages Dr. Leke would owe ACMC are $87,482.81, plus statutory interest, if the trial court's judgment should ultimately be upheld. This document certified the issue as a final, appealable order.

{¶8} Dr. Leke raises the following assignment of error:

{¶9} "The trial court erred in denying Defendant-Appellant's Motion for Summary Judgment and granting Plaintiff-Appellee's Motion for Summary Judgment."

{¶10} In order for a motion for summary judgment to be granted, the moving party must demonstrate:

{¶11} "(1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶12} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶13} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E) provides:

{¶14} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶15} Summary judgment is appropriate pursuant to Civ.R. 56(E), if the nonmoving party does not meet this burden.

{¶16} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶17} Dr. Leke claims accounts receivable generated from services rendered by him and payable to ACMC should be offset against the amount he is required to repay ACMC under the contract.

{¶18} The Supreme Court of Ohio has held that "the construction of a written contract is a question of law, which [is reviewed] de novo." *In re All Kelly & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, at ¶28. (Citations omitted.) The trial court noted that Dr. Leke, in his deposition, could not point to a specific provision in the contract that provided he was entitled to a set-off for accounts receivable. However, since interpretation of a contract is a question of law, Dr. Leke's personal understanding of the contract is not relevant. Instead, the language of the contract speaks for itself.

{¶19} "When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶11. (Citations omitted.)

{¶20} In his first year of employment, Dr. Leke was to be paid at the rate of $300,000 per annum. In addition, as a first-year physician, he was to receive a one-time incentive bonus of $20,000 and reimbursement for relocation expenses up to $10,000. This amounted to ACMC subsidizing his first year of employment.

{¶21} In the event Dr. Leke left employment prior to three years, paragraph 5.1.1 of the employment contract required Dr. Leke to repay his first-year subsidy to ACMC:

{¶22} "Should Physician leave the medical staff with ACMC prior to the end of his third year anniversary, *estimated to be March 31, 2009*, then Physician will be responsible for repaying a proportionate amount of his first year subsidy defined as his

first year expenses (all compensation, incentive bonuses, benefits and office related expenses per standard compensation model) less his first year cash collections. The proportion will be defined as the numerator being thirty-six less the number of months practicing in Ashtabula and the denominator being thirty-six (36) months."

{¶23} Dr. Leke argues that this paragraph simply does not address accounts receivable and that the following provision at Section E on p. 31 of the contract should apply. In that section, there is an additional provision applicable to all "physicians who terminate prior to completing eight years of service." Dr. Leke argues this section entitles him to have the repayment obligation offset by his accounts receivable:

{¶24} "*Compensation After Termination*: For physicians who terminate after completing over eight (8) years of service with ACMC, including prior service credit with The Ashtabula Clinic, such physician will receive a longevity bonus, equivalent to the cash received (excluding Community Service Credit and less billing expenses) from that physician's accounts receivable during the first 60 days subsequent to termination. ACMC shall employ consistent collection processes during this sixty (60) day period. Such amount will be paid to terminated physician within three months of termination date.

{¶25} "For physicians who terminate prior to completing eight (8) years of service with ACMC, including prior service credit with The Ashtabula Clinic, such physician will not receive a longevity bonus. Any monies received from that physician's accounts receivable will be retained by ACMC in order to cover initial subsidies for that physician as well as recruiting costs for that physician's replacement."

{¶26} ACMC argues at page 3 of its brief that "Section E on page 31 of the Agreement is the only place where the Agreement discusses payment related to [Dr. Leke's] accounts receivable. In this section, accounts receivable are discussed solely in connection with the payment of a longevity bonus after termination. [Dr. Leke] was not eligible for such longevity bonus under the terms of this Section because he terminated his employment prior to completion of eight (8) years of service."

{¶27} The contention that Section E discusses accounts receivable "solely in connection with payment of a longevity bonus" is incorrect. It is true with respect to the first paragraph of Section E. There, it allows for *payment* to the physician of a portion of accounts receivable after eight years of service. But, in the second paragraph, accounts receivable is also mentioned. There, it states clearly there will be no "longevity bonus" paid to physicians who leave prior to eight years. It specifically states that accounts receivable "will be retained by ACMC in order to cover initial subsidies for that physician as well as recruiting costs for that physician's replacement." ACMC, in its brief, acknowledges that this paragraph applies to Dr. Leke. In addition to the above language from page 3 of the brief, at page 5, ACMC states: "[Dr. Leke] was not eligible for the longevity bonus, because he left [ACMC's] employment prior to completion of eight (8) years of service with [ACMC]."

{¶28} ACMC then argues, at page 6 and 7 of its brief, that this paragraph "prevents *credit* for accounts receivable prior to completion of eight (8) years of service with [ACMC]" and "Section E on p. 31 of the Agreement clearly states that [Dr. Leke] would not receive accounts receivable *credit* before that date." (Emphasis added.) ACMC's insertion of the word "credit" in this analysis is giving new meaning to the plain

language. Clearly, Dr. Leke is not entitled to a *payment*. However, if ACMC, in drafting the contract, intended to deny a "credit" to the physician, it could have clearly stated this fact. To the contrary, it appears that a "credit" to the physician was contemplated by stating it would be "retained by ACMC *in order to cover initial subsidies* for that Physician." Under ACMC's argument, ACMC should be entitled to get a judgment against Dr. Leke and keep all cash collections, with no credit whatsoever to the physician for this amount. This belies a fair reading of the plain language of the contract. If that is what ACMC intended, instead of remaining silent on the issue, the contract could have, and should have, so stated.

{¶29} ACMC claims Section 5.1.1 is clear and unambiguous. This language states that Dr. Leke is required to repay a proportionate amount of his first-year subsidy. "[F]irst year subsidy [is] defined as his first year expenses (all compensation, incentive bonuses, benefits and office related expenses per standard compensation model) less his first year cash collections."

{¶30} Later in the contract, the term "cash collections" is defined as follows:

{¶31} "(a) *Professional Services Cash Collections* – All compensation received for professional services will be allocated to the individual Physician performing the service. This includes but is not limited to collections from patient services, medical directorships, legal letters, and honoraria. Any compensation received for Designated Health Services shall be excluded from this item (a)."

{¶32} Accordingly, Dr. Leke was entitled to have contributions related to his work offset against the first-year expenses. There is one main issue with regard to the term "first year cash collections." Is it to mean cash collected up to the date of severance of

employment, or is it to mean cash actually collected as a result of Dr. Leke's first year of employment? ACMC argues that applying accounts receivable to this section is equivalent to rewriting the contract and, if the parties intended to include "accounts receivable," the provision would merely state "collections." However, the opposite is also true. It simply says nothing about accounts receivable. Once again, if ACMC intended no credit whatsoever to the physician for cash collections from accounts receivable, the contract could have, and more importantly should have, simply stated such. Inherently, in the medical field, there is typically a delay of weeks or even months between the time service is performed on a patient and the time when payments are actually received for that service from the patient, his or her insurance company, or other sources. The amount of cash collected from receivables after termination of employment could be significant.

{¶33} "Contractual language is ambiguous where its meaning cannot be derived from the four corners of the agreement or where the language is susceptible to differing interpretations." *Gabriel Performance Prods., LLC v. Cognis Corp.*, 11th Dist. No. 2006-A-0071, 2007-Ohio-2307, at ¶28, citing *Westbrock v. W. Ohio Health Care Corp.* (2000), 137 Ohio App.3d 304, 311. The term "first year cash collections" could be interpreted to mean cash actually collected during Dr. Leke's first year, but not cash collected after the first year of service. Alternatively, the term could mean any cash collected for any service that was performed in the first year of the contract, regardless of whether the cash was actually collected before or after the first year of service. Since this term is susceptible to two completely opposite, but equally reasonable, interpretations, the term is ambiguous. Id.

{¶34} In addition, the remaining terms of the contract do not completely resolve the ambiguity. For example, the definition of "cash collections" does not resolve this ambiguity, as it does not clarify when the cash actually needs to be collected.

{¶35} In this matter, we conclude the term "first year cash collections" is ambiguous. "It is generally the role of a finder of fact to resolve ambiguity. *** However, where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafter." *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, at ¶13. (Internal citations omitted.) Thus, any language that is unclear or ambiguous is to be construed against the party who drafted it, since that party is in the best position to clarify its meaning. See *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, at ¶32, citing *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211.

{¶36} Construing the language for the benefit of Dr. Leke, we believe it was the intent of the parties to have collections received after Dr. Leke's employment ended apply to this offset, provided they were for services performed during the first year of the contract. It appears the language in Section 5.1.1 of the contract is intended to lessen ACMC's losses sustained in its initial investment in new physicians. Accordingly, any "cash collections" generated by that physician should be offset against the sums ACMC invested in that physician. It would be unfair to apply expenses accrued by Dr. Leke through the end of March 2007 to the first-year subsidy, yet not apply cash collections that were earned by Dr. Leke prior to the end of March 2007.

{¶37} The language on page 31 of the contract can be referenced as an indication of the parties' intent. Again, this provision clearly pertains to all physicians

who terminate their relationship with ACMC prior to eight years of service, and provides "[a]ny monies received from that physician's accounts receivable will be retained by ACMC in order to cover initial subsidies for that physician as well as recruiting costs for that physician's replacement." This language suggests the parties intended ACMC to recoup any expenditures paid to that physician's initial subsidies by retaining cash received after that physician has terminated his or her employment.

{¶38} As recognized by ACMC's counsel at oral argument, if only the cash collections actually received by ACMC during Dr. Leke's first year are considered in the offset, the possibility exists for ACMC to receive a "windfall." Dr. Leke would be required to pay that money to ACMC as part of his severance penalty. Then, ACMC could receive the same amount of money from his patients after the fact. In essence, ACMC could collect these sums twice.

{¶39} In conclusion, we construe the term "first year cash collections" in Section 5.1.1 of the contract to mean all cash collections received as a result of services performed by Dr. Leke in his first year of service. We believe such an interpretation reflects the parties' intent and is consistent with the long-standing legal principle of construing ambiguous contract terms against the drafter of the contract.

{¶40} We note, however, that "cash collections" only applies to amounts actually collected; it does not apply to billed amounts that ACMC was unable to collect upon. While we have referenced language in the contract regarding accounts receivable, Section 5.1.1 specifically references "cash collections." Accordingly, Dr. Leke is only entitled to an offset, as provided in Section 5.1.1, of cash collected by ACMC as a result of his efforts when making the computation under that paragraph.

{¶41} Attached to Dr. Leke's reply to ACMC's motion for summary judgment is an "accounts receivable summary." However, this document is not supported by an accompanying affidavit, as is required by Civ.R. 56(C). Further, there is nothing in the record to demonstrate who prepared the summary. Thus, we will not consider this document for purposes of summary judgment. See *Diakakis v. W. Res. Veterinary Hosp.*, 11th Dist. No. 2004-T-0151, 2006-Ohio-201, at ¶22.

{¶42} We have held that Dr. Leke is entitled to an offset for cash collections for services rendered by him prior to the end of March 2007 against his expenses for the purpose of calculating his first-year subsidy. Thus, the trial court erred in granting ACMC's motion for summary judgment. However, there is not sufficient evidence in the record for this court to calculate the actual amount of the first-year subsidy. Accordingly, at this point, neither Dr. Leke nor ACMC is entitled to judgment as a matter of law. Upon remand, there is a genuine issue of material fact as to the amount of cash collections that should be offset against Dr. Leke's expenses for the purpose of calculating his first-year subsidy.

{¶43} Dr. Leke's assignment of error has merit to the extent indicated.

{¶44} The judgment of the Ashtabula County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.