In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00190-CV

JAMES H. GRUBBS, Appellant

V.

THE BAPTIST HOSPITALS OF SOUTHEAST TEXAS D/B/A MEMORIAL HERMANN BAPTIST BEAUMONT HOSPITAL, Appellee

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On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. A-173,730

MEMORANDUM OPINION

James H. Grubbs, M.D. sued The Baptist Hospitals of Southeast Texas d/b/a Memorial Hermann Baptist Beaumont Hospital after the Hospital terminated its physician recruitment agreement with Grubbs. The Hospital filed a counterclaim against Grubbs. A jury found in favor of the Hospital. On appeal, Grubbs challenges: (1) the legal and factual sufficiency of the evidence to support the jury's findings that the Hospital did not breach its agreement with Grubbs and that Grubbs breached his agreement with the

Hospital; and (2) the trial court's submission of a jury question asking which party first breached the agreement. We affirm the trial court's judgment.

Background

Grubbs testified that, in November 2003, he signed a physician recruitment agreement with the Hospital. The Hospital agreed to pay Grubbs a guaranteed amount of $20,000 per month for one year. The agreement listed numerous physician obligations, including that Grubbs use his best efforts to bill and collect promptly. Grubbs testified that the agreement did not set forth a time limit or date by which he was to bill or collect a certain amount. David Parmer, the Hospital's chief executive officer, testified that Grubbs agreed to use his best efforts to bill and collect $20,000 per month. The Hospital agreed to pay the difference, if any, between the guaranteed amount less Grubbs's revenue for the previous month, as well as Grubbs's office expenses.

In January 2004, Grubbs began seeing patients at the Fannin Pavilion, the Hospital's psychiatric unit. Grubbs met with a couple of the Hospital's physicians to discuss on-call procedures. During this meeting, Grubbs learned that the physicians would bill for face-to-face meetings with patients when those meetings had not occurred. One of the physicians testified that he never told Grubbs that the physicians engaged in this practice and he denied making entries on the charts without seeing his patients or billing for care that was not provided. Grubbs testified that the physicians were not providing proper care or making proper documentation, and were producing false bills.

Grubbs testified that he observed the physicians engage in questionable care, and that he found 170 examples of improper documentation, billing, and fraud. However, one of the physicians that Grubbs accused testified that he was never cited, sanctioned, or indicted for Medicaid and Medicare fraud.

Grubbs testified that he shared his concerns with several individuals, including Renee Wood, the Fannin Pavilion's administrator, Louis Ferguson, the Hospital's chief financial officer, and Dr. George Groves. Wood told Grubbs, "Well, you certainly figured that out quickly." Groves told Grubbs that his allegations were incorrect. According to Grubbs, Ferguson stated that he hoped Grubbs "could work it out with those doctors." Ferguson testified that the Hospital has a responsibility to ensure that its billings are accurate and that he found no irregularities in the billing. Ferguson testified that he was only concerned with the billing, not allegations against the medical staff. Ferguson testified that Grubbs was the only physician who complained about fraudulent practices. Grubbs testified that he tried to talk to Parmer, but was "brushed off." Parmer testified that he would have been concerned by Grubbs's allegations in the event they were true.

Dr. Lee Stewart Anderson testified that, when he was president of the Texas Medical Board, Grubbs contacted him about the Hospital's on-call practice. Anderson testified that this practice was "improper, unethical and probably illegal." According to Anderson, a physician who bills for services not rendered could be excluded from the

Medicare and Medicaid programs and sanctioned. Anderson advised Grubbs to distance himself from the other physicians' practice. Anderson felt that Grubbs simply wanted advice and did not believe that Grubbs knew whether the physicians were committing "significant violations of patient care." Anderson testified that he had insufficient information to initiate a complaint or investigation and told Grubbs to file a formal complaint if he had serious concerns about patient care. Anderson was not aware that the Board pursued an investigation.

Grubbs admitted double billing on occasion, but testified that these were mistakes and not attempts to obtain extra money from Medicaid. Grubbs testified that the other physicians intended to submit false claims and their records showed a persistent pattern of double billing. Grubbs testified that he did not make a formal complaint to the Texas Medical Board.

In August 2004, Grubbs received a letter from Ferguson requesting an audit of Grubbs's books to "understand why expenses and collections in [Grubbs's] practice are not as expected." Grubbs refused based on the Health Insurance Portability and Accountability Act ("HIPAA"). In September, Grubbs received a letter from the Hospital's attorney advising Grubbs that his refusal was unfounded, but further advising that the Hospital would obtain a HIPAA business associate agreement from the auditing firm, and also advising Grubbs that he was in material breach of the agreement. That same month, Grubbs received a second letter stating that he had breached the agreement

by failing to use his best efforts to bill and collect and failing to make his books and records available for review. The letter gave Grubbs thirty days to cure the breach.

Grubbs testified that the Hospital's letter failed to provide any particulars of the breach, although no one had to tell him how to bill promptly. Grubbs testified that he had completed several tasks by September 2004, such as applying for his Medicaid and Medicare numbers, providing medical care to patients, acquiring billing forms, designing "Superbills," buying stamps and envelopes, arranging credit card vendors and connections, determining a fee schedule, developing encounter forms, obtaining and activating billing software, obtaining computers, determining account receivable policies, signing contracts with payors for electronic billing, hiring accountants, setting up accounting reports, and developing marketing contacts. Other tasks, such as applying for participation in individual insurance provider panels, applying for participation in PPO networks, establishing electronic claim payor connections, sending paper and electronic claims to payors, following up on unpaid claims, sending balance notices to patients, depositing payments, entering payments on the accounting records, and resubmitting lost Medicaid claims, were ongoing.

Grubbs testified that he did not use funds allocated by the Hospital for marketing and did not hire an outside billing service. Grubbs testified that he asked Ferguson for the particulars regarding the Hospital's expectations if he was not using his best efforts to

bill and collect. According to Grubbs, the Hospital never provided any particulars regarding which tasks he should have performed.

Ferguson testified that the agreement required the Hospital to provide written notice to Grubbs specifying the particulars of the complaint. When asked why Grubbs was not given the particulars, Ferguson testified that Grubbs was required to make his best efforts to bill and collect, but only collected $1,700 in eight months. Ferguson questioned what other particulars one would need other than the statement "bill and collect promptly." Parmer testified that the letter did not tell Grubbs what he should do to cure the breach. Grubbs received an additional twenty days to cure the alleged breach. However, Ferguson testified that, as of this extension, he did not believe Grubbs could satisfy section 3.09.

Grubbs testified that he has done his own billing since 1979 and that he promptly billed and collected per his agreement with the Hospital. Ferguson testified that the Hospital provided funds for billing services, but Grubbs did not utilize this resource. Because he had conducted his own billing and had formerly run a billing service, Grubbs testified that he did not hire an outside billing service. Grubbs admitted that the Hospital referred him to Madeline Bunch, a practice development consultant, and paid for Bunch's services, but Grubbs did not use Bunch "extensively" because he was capable of performing many tasks himself, including the billing.

Bunch testified that the Hospital encouraged physicians to use consultants. She talked to Grubbs about obtaining a Medicaid number. Grubbs testified that he applied for his Medicaid and Medicare numbers in November 2003 and received the numbers in April and June, respectively. In an email, Grubbs stated that he applied for these numbers in January 2004. In January, Grubbs received a letter stating that his application for a Medicare number had been received. Grubbs testified that he could not submit bills until he received these numbers and that he experienced computer difficulties that prevented him from printing claims. Without the numbers, Grubbs could not bill until June. Had he known the numbers had been issued and had he not experienced computer problems, Grubbs testified he could have billed before June. Grubbs further testified that Medicaid lost some of his claims and the claims were resubmitted.

Bunch testified that she was paid for several months, even though she rendered no services. Bunch told Grubbs that she was uncomfortable with the arrangement, but Grubbs stated that he would probably need her services. Bunch testified that Grubbs did not follow her advice to allow Bunch or one of her associates to seek the Medicare and Medicaid credentialing. Bunch testified that Grubbs contacted her to determine why some Medicaid claims were rejected. Bunch found that the claims were rejected for various reasons, such as inaccurate patient information or filing outside the deadline. Bunch believed that Grubbs needed assistance with submitting claims electronically and billing Medicaid directly. Bunch testified that Grubbs wanted to submit claims

electronically, but Grubbs initially had trouble with his software and had to submit claims manually, which is a longer process. Bunch believed that she could have helped Grubbs receive his Medicaid number more quickly and helped better train Grubbs's staff to handle claims.

Bunch testified that Grubbs did not follow some of her recommendations and did not utilize all the services she had to offer. Bunch testified that Grubbs appeared competent to complete the tasks she discussed with him and appeared interested in making his new practice a success. Bunch testified that she was not concerned that Grubbs was unable to handle the tasks for which she normally provides services, but she was concerned that those tasks were not being done. Bunch testified that she sometimes sensed a lack of urgency to solve problems, but Grubbs was trying to resolve the problems. Bunch testified that she once described Grubbs as a "total waste" because she felt that she was not involved enough and that Grubbs did not handle some tasks aggressively enough. She testified that she felt Grubbs's business did not meet its potential because of her lack of involvement. However, Bunch never formed the opinion that Grubbs was not using his best efforts or did not want to use his best efforts.

Grubbs testified that he did not believe that his billing and collecting would have been any faster had he used Bunch's services. Grubbs did not agree that "bill promptly" means bill within a twenty-four-hour time frame, but agreed that he was capable of doing so. Grubbs testified that, as of August, he was billing at the time of service. Grubbs

testified that he had zero collections for March through June, $971 for July, $765 for August, and $1564 for September. Grubbs testified that items billed at the time of service were collected within two to three weeks, and that he billed $61,770 by the end of August.

Parmer testified that the Hospital was concerned about whether Grubbs would succeed because, after several months, Grubbs had no collections or income. He testified that most patients pay a co-pay, but Grubbs did not collect a co-pay for six months. Ferguson testified that Grubbs collected $1,600 after the first six months of his practice. Parmer testified that he has never seen a recruited physician be unable to collect money for several months.

In November, after Grubbs agreed to the audit of his records, Grubbs received a letter from Ferguson, in which the Hospital alleged that Grubbs breached the agreement by failing to use his best efforts to bill and collect promptly. The letter cited numerous problems: (1) Grubbs opened his office in February 2004, but the first electronic claims were filed in September, (2) by September, no Medicare and Medicaid payments had been received, (3) Grubbs's staff was three months behind on processing manual Medicaid claims, (4) the average length of time between services and payment was 100 days, (5) Grubbs's staff failed to record thirty-three "clinical encounters," (6) a co-pay was not collected on the same day as seven "clinical encounter[s]," (7) five instances of lack of documentation or incorrect insurance information were found, (8) fifteen

payments were not properly recorded and collections were not reported, and (9) two insurance payments were not properly recorded or reported. The letter stated that the issues that resulted in breach were "timely electronic billing, follow-up collection efforts with payors, accurate billing for professional services provided[,] and accurate recording of payments." Grubbs again requested the particulars of the alleged breach.

Shortly thereafter, Grubbs received a letter terminating his agreement with the Hospital and stating that he owed $261,218 to the Hospital. Ferguson and Parmer testified that the Hospital terminated Grubbs for failing to use his best efforts to bill and collect. Ferguson was not aware that a recruitment agreement had ever been terminated before the termination of the Hospital's agreement with Grubbs. Parmer testified that Grubbs's termination did not violate the agreement.

Grubbs testified that he was not paid for the rest of 2004, but continued to bill and collect. By the end of the year, Grubbs testified that he billed $113,530 and collected $46,000. Grubbs resigned in 2005, moved his office to a different location, and closed his Beaumont office in April 2006.

Grubbs sued the Hospital for breach of contract, tortious interference with prospective business relations, and retaliation. The jury found that the Hospital did not breach the agreement, that Grubbs did breach the agreement, that Grubbs made a good faith report of a violation of the law, and that the Hospital did not retaliate against Grubbs for reporting a violation. The jury awarded $156,081 in damages to the Hospital. The

trial court granted the Hospital's motion to disregard the jury's damages finding and awarded $261,217.49 to the Hospital.

Legal and Factual Sufficiency

In issues one and two, Grubbs challenges the legal and factual sufficiency of the evidence to support the jury's findings that the Hospital did not breach the agreement and that Grubbs did breach the agreement. He contends that the trial court improperly submitted jury questions on breach, improperly denied his motion for directed verdict, and improperly denied his motion for new trial.

Jury questions must be supported by the pleadings and the evidence. Tex. R. Civ. P. 278. We review a trial court's denial of a motion for directed verdict under a legal sufficiency standard. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). Denial of a motion for new trial is reviewed for abuse of discretion. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010). Under an abuse of discretion standard, legal and factual sufficiency of the evidence are relevant factors in assessing whether the trial court abused its discretion. *Lesikar v. Moon*, 237 S.W.3d 361, 375 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991)); *see Carlin v. Carlin*, 92 S.W.3d 902, 905 (Tex. App.—Beaumont 2002, no pet.).

Under a legal sufficiency review, we consider "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of*

Keller, 168 S.W.3d at 827. "We must view the evidence in the light most favorable to the verdict and 'must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.'" *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010) (quoting *City of Keller*, 168 S.W.3d at 822, 827). Regarding an issue on which the appellant had the burden of proof, the appellant must show "that the evidence establishes, as a matter of law, all vital facts in support of the issue." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). Regarding an issue on which the appellant did not have the burden of proof, the appellant must show that no evidence supports the adverse finding. *Royce Homes, L.P. v. Humphrey*, 244 S.W.3d 570, 574 (Tex. App.—Beaumont 2008, pet. denied).

Under factual sufficiency review, we "must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Dow Chem. Co.*, 46 S.W.3d at 242. Regarding an issue on which the appellant had the burden of proof, the appellant must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *Id.* Regarding an issue on which the appellant did not have the burden of proof, the appellant must demonstrate that the evidence to support the adverse finding is so weak as to make the finding clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

The elements of breach of contract include: (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) damages sustained as a result of the breach. *Winchek v. Am. Express Travel Related Servs. Co.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In this case, the Hospital claimed that Grubbs breached the agreement by failing to comply with section 3.09 of the agreement, which states, "Physician shall use Physician's best efforts to bill and collect promptly for Physician's professional medical services." According to section 5.02 of the agreement, the Hospital may terminate the agreement upon "[a] material breach of any of the terms of [the] Agreement by Physician and his failure to cure the breach within thirty (30) days after written notice from Hospital specifying the particulars thereof." Grubbs contends that section 3.09 is vague and "unworkable" without section 5.02, and that section 5.02 required the Hospital to identify the specific steps that he was required to take to comply with section 3.09 and which steps he failed to complete. He argues that the Hospital therefore breached section 5.02 by failing to provide the particulars of the alleged breach. Grubbs contends that the Hospital acted in retaliation for his complaints regarding fraud, ignored the requirements of section 5.02, and convinced the jury to ignore section 5.02, resulting in jury nullification, as evidenced by the jury's findings and damages award.

We strive to give meaning to each provision in construing a contract. *Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996). Terms in a written

contract are given "their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense." *Heritage Res., Inc. v. Nationsbank*, 939 S.W.2d 118, 121 (Tex. 1996). "'If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law.'" *Enter. Leasing Co. of Houston v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004) (quoting *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). "An ambiguity does not arise simply because the parties advance conflicting interpretations of the contract; for an ambiguity to exist, both interpretations must be reasonable." *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 728 (Tex. 2001).

We do not believe that section 5.02 is susceptible to two reasonable interpretations. The agreement lists a number of physician obligations, including section 3.09's obligation that the physician use his best efforts to bill and collect promptly. By its plain language, section 5.02 requires the Hospital to identify the particulars of the breach itself, *i.e.*, what contractual term Grubbs failed to comply with in breach of the agreement. *See generally Karen Corp. v. Burlington N. & Santa Fe Ry. Co.*, 107 S.W.3d 118, 122 (Tex. App.—Fort Worth 2003, pet. denied) ("It is a basic rule of contract law that when a court is called upon to interpret a contract, the court will give plain meaning to the words used in the writing."). The Hospital notified Grubbs that he breached the agreement by failing to comply with section 3.09's requirement that he use his best

efforts to bill and collect promptly. This notification satisfied the plain meaning of section 5.02. *See id.*; *see also Heritage Res.*, 939 S.W.2d at 121.

Regarding whether Grubbs breached section 3.09, Grubbs testified that the agreement did not state a time frame for billing and collecting a particular amount. Grubbs further testified that he billed and collected promptly in compliance with the agreement. The jury heard evidence that Grubbs collected $61,770 by the end of August, billed $113,530 by the end of 2004, and collected $46,000 by the end of 2004. The jury also heard evidence that Grubbs had completed multiple tasks for the development of his practice and that other tasks were ongoing. Bunch testified that she could not say Grubbs was not using his best efforts.

However, Parmer testified that Grubbs agreed to use his best efforts to bill and collect $20,000 per month. The record shows that Grubbs's collections fell below what the Hospital expected. The jury heard evidence that Grubbs failed to collect for the first several months of his practice and thereafter collected amounts well below $20,000 per month. Parmer and Ferguson testified that having zero collections in several months was unprecedented. Bunch testified that Grubbs did not exhibit the "urgency needed to get his billings started, to get it going." Bunch believed that Grubbs needed assistance with his billing. In fact, the jury heard evidence of the problems and inaccuracies involving Grubbs's billing. Nevertheless, Grubbs failed to utilize the billing resources provided by the Hospital.

As the sole judge of the weight and credibility of the evidence, the jury was entitled to resolve any conflicts in the evidence and choose which testimony to believe. *See City of Keller*, 168 S.W.3d at 819; *see also Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). In doing so, the jury could reasonably conclude that Grubbs failed to use his best efforts to bill and collect promptly, that the Hospital gave Grubbs written notice identifying the particulars of the breach, that Grubbs failed to cure the breach, that the Hospital terminated Grubbs for failing to bill and collect promptly, and that Grubbs, not the Hospital, breached the agreement. *See Del Lago Partners*, 307 S.W.3d at 770; *see also City of Keller*, 168 S.W.3d at 822, 827. The evidence is not so weak, nor so against the great weight and preponderance of the evidence, as to render the verdict clearly wrong and unjust. *See Dow Chem. Co.*, 46 S.W.3d at 242. Because the evidence is legally and factually sufficient to support the jury's findings, we overrule issues one and two.

The Jury Charge

In issue three, Grubbs contends that the trial court improperly submitted a jury question asking which party first breached the agreement. Grubbs contends that this question confused the jury and misled the jury into believing that the issue of who breached first was determinative.

We review alleged charge error for abuse of discretion. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). "Submission of an improper jury

question can be harmless error if the jury's answers to other questions render the improper question immaterial." *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995). "A jury question is considered immaterial when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict." *Id.* "Submission of an immaterial issue is not harmful error unless the submission confused or misled the jury." *Id.* "When determining whether a particular question could have confused or misled the jury, we 'consider its probable effect on the minds of the jury in the light of the charge as a whole.'" *Id.* (quoting *Tex. Employers Ins. Ass'n v. McKay*, 146 Tex. 569, 210 S.W.2d 147, 149 (1948)). We will not reverse unless an error of law probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to the court of appeals. Tex. R. App. P. 44.1(a).

Question 1 of the charge asked the jury to determine whether the Hospital breached the agreement. Question 2 asked the jury to determine whether Grubbs breached the agreement. Question 3 of the charge stated:

> If you answered "yes" to both Question 1 and Question 2, then answer this Question 3. Otherwise do not answer this question.
>
> Who failed to comply with the agreement first?
>
> Answer "The Hospital" or "Dr. Grubbs."

Grubbs objected on grounds that question 3 was improper under the facts and evidence, and was potentially prejudicial because it would be confusing and misleading to ask the

jury who breached the agreement first. The jury answered "no" to question 1, "yes" to question 2, and did not answer question 3.

Assuming without deciding that the trial court abused its discretion by submitting question 3 to the jury, we conclude that any error is harmless. Once the jury determined that Grubbs, not the Hospital, breached the agreement, question 3 would not have altered the effect of the jury's verdict and, thus, became immaterial. *See Alvarado*, 897 S.W.2d at 752. Considering the probable effect on the minds of the jury in the light of the entire jury charge, we further conclude that question 3 did not confuse the jury or mislead the jury into believing that who breached first was the determining factor. *See id.* Accordingly, we cannot say that the error probably caused the rendition of an improper judgment or prevented appellant from properly presenting his case on appeal. *See* Tex. R. App. P. 44.1(a). We overrule issue three. Having overruled Grubbs's three issues, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on June 15, 2011
Opinion Delivered July 14, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.