STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 1427

MEDTRON SOFTWARE INTELLIGENCE CORPORATION

VERSUS

METAIRIE GASTROENTEROLOGY, APMC AND DAVID R. SILVERS

Judgment Rendered: May 31, 2019

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 2016-11538

The Honorable Richard A. Swartz, Judge Presiding

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Paul L. Carriere **New Orleans, Louisiana**	**Counsel for Defendant/Appellant** **Metairie Gastroenterology, APMC and David R. Silvers**
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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

THERIOT, J.

This appeal arises from a trial court judgment in favor of the plaintiff/defendant-in-reconvention in a breach of contract suit following a trial on the merits. For the reasons set forth herein, we affirm.

FACTS AND PROCEDURAL HISTORY

Medtron Software Intelligence Corporation ("Medtron") and Metairie Gastroenterology, APMC entered into a Remote Computing Service Agreement ("Agreement") on January 6, 2005, for the remote use of Medtron's medical practice management software in Metairie Gastroenterology's practice. The Agreement was for an initial term of three years and provided for automatic renewals for successive three-year terms unless either party provided notice of its intent not to renew ninety days prior to the expiration of the then-current term. At the time the dispute at issue herein arose, the Agreement was in its third renewal term, set to auto-renew or expire on February 28, 2017.

The applicable fees for available services under the Agreement were set forth in an exhibit to the Agreement. Each renewal term of the Agreement would be at Medtron's standard prices in effect on the date of the renewal. The fees initially set forth in the Agreement were based on use of the practice management software on ten computer workstations at Metairie Gastroenterology, with three authorized users (Dr. David R. Silvers, Dr. Nicholas J. Persich, and Roy Borchardt, P.A.C.). Use of the software on any additional computer workstations or by any additional providers was required to be authorized by Medtron in writing, and any such changes to the contract would remain in effect for the term of the Agreement.

Although the Agreement did not provide a mechanism for removal of authorized users or computer workstations from the Agreement, Medtron consented to several requests by Metairie Gastroenterology to remove authorized users or reduce the number of computer workstations, strictly as a courtesy. According to

Medtron policy, removal of authorized users from the Agreement as a courtesy could only occur upon approval of Medtron's chief executive officer, Ralph Thomas McDaniel, or chief operating officer, Rick Salter. Medtron followed an internal procedure for handling such requests. When a client requested removal of an authorized user from the Agreement, either through Medtron's telephone customer support line or by email, Medtron's staff would fill out a change request form showing the changes requested and the increase or decrease in monthly fees corresponding to the changes. This change request form would be sent by Medtron to the client for review and approval of the requested changes, and upon approval by the client, the form would be routed internally through various departments at Medtron, as well as to a Medtron executive (McDaniel or Salter) for approval. If the removal was authorized by a Medtron executive, a written amendment to the Agreement would be prepared by Medtron for signature by both parties, as required by Section 13(A) of the Agreement.[1] If the removal was not authorized by the Medtron executives, the client would be notified of the denial and the Agreement would not be amended. Jeff Hamel, a former Medtron employee responsible for preparing contract amendments during the term of Metairie Gastroenterology's Agreement, testified that Medtron's executives generally approved requests for removal of authorized users from the Agreement as a courtesy when the client represented that those users were no longer employed by the practice. In these cases where removal was granted, it was typically granted subject to a designated "collect-down period" during which the client would continue to be charged the fee associated with that user, so that the user's provider code could be used to wrap up billing and collections for that provider. In most cases, the collect-down period was six months, although there were instances where a shorter collect-down period was

[1] Section 13(A) of the Agreement provides that the Agreement may be amended only in a writing signed by both parties.

allowed, such as when a provider was only with the practice for a very short period of time.

Requests for removal of computer workstations from the Agreement were typically approved as a courtesy when the client informed Medtron that they were no longer using the particular computer workstations. Medtron would verify that the workstations were no longer being used to access the software and then would remove the workstations from the Agreement. Metairie Gastroenterology's office administrator, Dawn Pisciotta, explained that sometimes the number of computer workstations attached to the Agreement would "get out of hand" when Metairie Gastroenterology would get new computers but not remove the discarded computers from the Agreement for a while. When Pisciotta realized that there were too many computer workstations on the Medtron bill, she would contact Medtron and have the number of workstations adjusted to what was actually being used. No formal written amendments were ever prepared and signed by the parties when changes were made to the number of computer workstations billed under the Agreement.

Over the course of the initial and renewal terms of the Agreement, the parties executed a number of written amendments, each coterminous with the Agreement, to add or remove authorized users and adjust the monthly fees accordingly. On May 10, 2007, the parties executed a written amendment to add Dennis Lockler, N.P. as an authorized user for a monthly fee of $200.00 and to remove Kimberly Poche, P.A.[2] as an authorized user for a monthly credit of $200.00. In a July 5, 2007 amendment, Lockler was removed as an authorized user, for a monthly credit of $200.00. Vernon J. Carriere, Jr., M.D. was added by a July 9, 2012 amendment for a fee of $375.00 per month. On November 4, 2014, the Agreement was again

[2] Poche replaced Borchardt as an authorized user in November 2005. There is no amendment in the record for this change, and it is unclear whether such a document existed.

amended to add Barry Sartin, M.D. and Kelly Mizell, M.D. as authorized users for a monthly fee of $325.00 each.

On December 22, 2014, Metairie Gastroenterology requested the removal of Drs. Sartin, Mizell, Carriere, and Persich from the Agreement. If approved, this amendment would leave only Dr. Silvers as an authorized user under the Agreement. According to Hamel, Medtron was informed that Drs. Sartin and Mizell were leaving the practice,[3] and they approved Metairie Gastroenterology's request to remove Drs. Sartin and Mizell, including a shorter collect-down period, as a courtesy because the doctors had been employed by the practice for such a short period of time.[4] However, Medtron declined to extend the courtesy policy to remove Drs. Carriere and Persich from the Agreement because those doctors had been with the practice for a long time and were not planning to leave the practice. Medtron also declined to remove Dr. Silvers, when the practice requested his removal in March 2015, for the same reasons. Pisciotta acknowledged that none of these doctors were planning to leave the practice. Rather, she had requested the removal of all remaining users under the Agreement simply because Metairie Gastroenterology did not intend to use Medtron's services anymore since their new electronic medical record company also provided those services, but Medtron insisted on enforcing the contract for the duration of the term.

Pisciotta emailed Medtron's accounting and customer support departments multiple times between April and August 2015 to request the removal of charges associated with Drs. Carriere and Persich from Metairie Gastroenterology's bill at the end of their collect-down period. Each time, Pisciotta claimed that Drs. Sartin, Mizell, Carriere, and Persich had all been removed from the Agreement, as requested

[3] Pisciotta denied that she was asked whether the doctors were leaving the practice and testified that they were still employed there at the time of trial.

[4] There is no signed, written amendment removing Drs. Sartin and Mizell from the Agreement, and Hamel could not recall at trial whether such a document existed.

by Metairie Gastroenterology on December 22, 2014. Hamel replied to Pisciotta's emails, explaining repeatedly that Medtron had only agreed to remove the two recently-hired doctors (Sartin and Mizell), and to offer a shortened collect-down period for those doctors, as a courtesy. He further explained that removal of authorized users subject to a collect-down period was not a term of the contract, but simply a courtesy extended under certain circumstances by Medtron. Pisciotta disagreed, insisting that although Hamel had informed them that the removal of Drs. Carriere and Persich was not approved, this occurred after Metairie Gastroenterology signed and returned the change request form prepared by Medtron. Pisciotta alleged that the change request form, once signed, accomplished the removal of the users from the Agreement.

On September 22, 2015, Metairie Gastroenterology's legal counsel sent a notice of cancellation to Medtron, stating that it was canceling the Agreement at the end of October 2015, without citing any authority for the early termination. The notice of cancellation enclosed a check for Medtron's August invoice and stated that the practice would pay Medtron's invoices submitted in September and October, but that "October will be the last month [Metairie Gastroenterology] will need Medtron's services." After paying the September and October invoices, Metairie Gastroenterology allegedly considered the Agreement terminated and stopped paying Medtron's monthly fees according to the Agreement; however, they continued to remotely access Medtron's software through June 29, 2016.[5]

In February 2016, Medtron put Metairie Gastroenterology in default in accordance with the terms of the Agreement[6] and subsequently exercised its option

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[5] Section 11(D) of the Agreement provides that, upon termination of the Agreement, the client must "cease all use of the Software and Services . . . and shall return to MEDTRON any materials furnished by MEDTRON." Although Metairie Gastroenterology stated in its notice of cancellation that it did not have any "physical equipment" on hand, and thus would not be returning anything to Medtron on termination of the Agreement, Metairie Gastroenterology was also obligated under Section 11(D) of the Agreement to cease all use of the software.

[6] Section 11(A) of the Agreement provides, in pertinent part:

to accelerate the balance due on the contract. On February 25, 2016, counsel for Medtron sent a demand letter to Metairie Gastroenterology and its guarantor, Dr. Silvers,[7] for the entire contractual monetary obligation and all other unpaid charges, including interest, as well as attorney fees and all costs of collection of the debt.

Medtron subsequently filed suit on April 12, 2016, against Metairie Gastroenterology and Dr. Silvers, in solido, for the outstanding amount due on the contract, $33,865.97, plus costs and attorney fees as provided in the contract, plus judicial interest from the date of demand. Metairie Gastroenterology and Dr. Silvers denied having breached the Agreement or having any unpaid obligations under the Agreement, and also filed a reconventional demand, alleging that Medtron had overcharged Metairie Gastroenterology for an unknown period of time for an excessive number of computer workstations and for authorized users who had been removed from the Agreement. The basis for the reconventional demand was Metairie Gastroenterology's contention that Medtron had been erroneously charging it for extra computer workstations, possibly for several years, and that Medtron continued to charge them for Drs. Carriere, Persich, and Silvers long after they should have been removed from the Agreement and after the applicable collect-down periods ended.

A bench trial on the merits of Medtron's claim and the reconventional demand was held on March 14, 2018. Thereafter, the trial court found that the Agreement

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> Should the Customer at any time violate any of the conditions of this Agreement [or] fail to pay all sums when due . . . and should such violation continue for a period of ten (10) days after written notice has been given Customer, then, at the option of MEDTRON, all sums for the whole unexpired term of this Agreement shall at once become due and [exigible]; and MEDTRON shall have the further option to at once demand the entire sum for the whole term . . . without putting Customer in default, Customer to remain responsible for all damages or losses suffered by MEDTRON, Customer hereby assenting thereto and expressly waiving any legal notices to discontinue the use of the Software and Services. This accelerated amount represents the parties' best estimates of MEDTRON's damages from Customer's default.

On February 2, 2016, Medtron sent written notice to Metairie Gastroenterology that the November 2015, December 2015, and January 2016 invoices were past due, in violation of the Agreement, and that if the violation continued for ten days after the notice, Medtron would have the option under Section 11(A) of the Agreement to pursue payment from Metairie Gastroenterology and its guarantor, Dr. Silvers, for "all sums for the whole unexpired term of the Agreement."

[7] Dr. Silvers signed a personal guaranty of Metairie Gastroenterology's obligations under the Agreement.

had not been terminated, because Medtron never agreed to an early termination, and that all remaining users and computer workstations had not been removed from the Agreement, as Metairie Gastroenterology and Dr. Silvers alleged. The trial court also found that Metairie Gastroenterology and Dr. Silvers failed to carry their burden of proof that they were overcharged. The trial court rendered judgment in favor of Medtron and against Metairie Gastroenterology and Dr. Silvers, in solido, in the amount of $33,865.97, with judicial interest from the date of demand, attorney fees of $8,466.49, and all costs. The reconventional demand was dismissed with prejudice.

Metairie Gastroenterology and Dr. Silvers filed a suspensive appeal, arguing that the trial court erred in determining the procedures for adding and removing authorized users and computer workstations to and from the Agreement, in concluding that Medtron did not overcharge Metairie Gastroenterology, and in determining that the notice of cancellation did not effectively terminate the Agreement.

DISCUSSION

Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith. La. C.C. art. 1983. The burden of proof in an action for breach of contract is on the party claiming rights under the contract. *Hornbeck Offshore Operators, LLC v. Cross Group, Inc.*, 2016-0174, p. 6 (La.App. 1 Cir. 10/31/16), 207 So.3d 1141, 1146, *writ denied*, 2016-2095 (La. 1/9/17), 214 So.3d 872. The role of the judiciary in interpreting contracts is to ascertain the common intent of the parties as reflected by the words in the agreement. See La. C.C. art. 2045. The reasonable intention of the parties to a contract is to be sought by examining the words of the contract itself, and is not to be assumed. *Lobell v. Rosenberg*, 2015-0247, p. 8 (La. 10/14/15), 186 So.3d 83, 89. When the words of a

contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. Common intent is determined in accordance with the general, ordinary, plain and popular meaning of the words used in the contract. *Lobell*, 2015-0247 at p. 8, 186 So.3d at 89. Accordingly, when a clause in a contract is clear and unambiguous, the letter of that clause should not be disregarded under the pretext of pursuing its spirit, as it is not the duty of the courts to bend the meaning of the words of a contract into harmony with a supposed reasonable intention of the parties. However, even when the language of the contract is clear, courts should refrain from construing the contract in such a manner as to lead to absurd consequences. *Id.* Most importantly, a contract must be interpreted in a common-sense fashion, according to the words of the contract, given their generally prevailing meaning. *Id.* Moreover, a contract provision that is susceptible to different meanings must be interpreted with a meaning that renders the provision effective, and not with one that renders it ineffective. La. C.C. art. 2049. Each provision in a contract must be interpreted in light of the other provisions, so that each is given the meaning suggested by the contract as a whole. La. C.C. art. 2050.

In their first assignment of error, Metairie Gastroenterology and Dr. Silvers argue that the trial court erred in finding that the change request forms, prepared by Wana Smith, Medtron's Customer Support Representative, and signed by Dr. Silvers on behalf of Metairie Gastroenterology and Smith on behalf of Medtron, were insufficient to amend the Agreement to remove all remaining doctors. As previously noted above, the Agreement contains no provision for removing users. Thus, these changes may only be made by amending the Agreement, which requires a writing signed by both parties. Although the Agreement may have been amended on one or two occasions to add or remove users without the execution of a written amendment, this does not eliminate the requirement for a written amendment. Section 12 of the

Agreement states that any failure of Medtron to enforce any of the provisions of the Agreement shall not be considered as a waiver of the right to enforce such provisions, unless the waiver is in writing and signed by an authorized executive officer of Medtron.

The trial court heard testimony from representatives of both Medtron and Metairie Gastroenterology about the procedure used when a request to add or remove users to or from the Agreement was received from a client. The testimony of Medtron representatives Hamel and Smith characterized the change request form as merely a documentation of the details of the requested change and a checklist to be used in processing the request. According to this procedure, the change request form did not go to an executive for approval until after the customer reviewed and approved the form. Their testimony was clear that any change request must be approved by a Medtron executive and that a written amendment must be prepared for both parties' signature in order for the Agreement to be amended. Pisciotta's testimony, on the other hand, was that the change request form prepared by Medtron was a quote for the fees and collect-down period associated with the requested change, and once the quote was accepted and signed by Dr. Silvers on behalf of the practice and returned to Medtron, the requested change was implemented. After considering the evidence, the trial court found that the change request forms were not an amendment of the Agreement.

When the trial court's findings are based on determinations regarding the credibility of witnesses, the manifest error-clearly wrong standard demands great deference be given to the trier-of-fact's findings. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). The manifest error-clearly wrong standard of review is applied not only due to the trial court's better capacity to evaluate live witnesses, as compared with the appellate court's access to only a cold record, but also upon the proper allocation of trial and appellate functions between the respective courts. Therefore,

where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Henderson v. Nissan Motor Corporation*, 03-606, p. 10 (La. 2/6/04), 869 So.2d 62, 69. Based on our review, we cannot say the trial court was manifestly erroneous or clearly wrong in crediting the testimony of the Medtron employees regarding the process for amending the Agreement and finding that the client-approved change request form was not the parties' amendment. This assignment of error lacks merit.

Metairie Gastroenterology and Dr. Silvers also argue that the trial court erred in finding that their September 22, 2015 notice of cancellation was insufficient to remove all remaining computer workstations from the Agreement and effectively terminate the Agreement. They base their argument that the notice of cancellation was sufficient to amend the Agreement on the trial court's finding that Medtron had waived the writing requirement for amendments related to the number of computer workstations. We disagree. Although the trial court stated in its reasons for judgment that the evidence established that Medtron "waived" the writing requirement for amendments related to computer workstations during the term of the Agreement, this choice of words was misleading, and a thorough reading of the trial court's reasons for judgment reveals that the trial court was actually referring to a *failure to enforce* the writing requirement, not a *waiver*. As previously discussed, Medtron's failure to enforce the writing requirement would not constitute a waiver of its right to enforce the writing requirement in the future, unless that right to enforce was waived in a writing signed by an authorized executive officer of Medtron. There has been no allegation that Medtron waived the right to enforce the writing requirement in this way. Furthermore, even if Medtron had waived the writing requirement with regard to amendments for computer workstations, this would not mean that Medtron did not have to consent to any such amendments. Metairie Gastroenterology's and Dr. Silvers' position, that they had the right to make

unilateral changes to the provisions regarding computer workstations, including removing all workstations and effectively terminating the Agreement, simply because Medtron had waived the right to enforce the writing requirement, is an interpretation that would lead to absurd consequences. As noted above, we must refrain from interpreting the contract in such a way as to lead to absurd consequences. *Prejean v. Guillory*, 2010-0740, p. 7 (La. 7/2/10), 38 So.3d 274, 279. The trial court did not err in finding that the September 22, 2015 notice of cancellation did not effectively amend the Agreement to remove all remaining computer workstations. This assignment of error lacks merit.

Finally, Metairie Gastroenterology and Dr. Silvers argue that the trial court erred in finding that Medtron did not overcharge them. They allege that Medtron charged them for users who had been removed and were outside of their collect-down period and that Medtron charged a higher monthly fee for Dr. Carriere than was listed in the signed amendment adding him to the Agreement.

With regard to charges for users who had been removed and were outside of their collect-down period, Metairie Gastroenterology and Dr. Silvers are referring to Drs. Carriere, Persich, and Silvers. Because we have concluded that they were never removed from the Agreement, the trial court did not err in finding that there was no "overcharge" related to Drs. Carriere, Persich, and Silvers.

With regard to the fees charged for Dr. Carriere, Metairie Gastroenterology and Dr. Silvers argue that although the amendment adding Dr. Carriere in 2012 stated that his monthly fee would be $375.00, a breakdown of Medtron's fees provided at Metairie Gastroenterology's request in 2014 listed the fee associated with each doctor as $650.00. Salter testified at trial that the change in the fee associated with Dr. Carriere (and each of the other users) resulted from a change in Medtron's pricing structure. In the initial term of the Agreement, Medtron's pricing structure included a base fee for the client as a whole, plus a charge per user. The

pricing structure was later changed to eliminate the base fee and simply charge a higher fee per user.[8] The Agreement provides that each renewal of the Agreement will be at Medtron's standard prices in effect at the time of renewal. Salter testified that this change in Medtron's pricing structure would have gone into effect for Metairie Gastroenterology at the time of their next renewal after the pricing structure changed. Metairie Gastroenterology and Dr. Silvers assert that they were overcharged for Dr. Carriere from the time he was added to the Agreement, prior to the renewal in 2014. However, they did not offer any evidence to support their allegation of overcharging. Although the invoices are all in evidence, there is no breakdown of the fees charged, and it is impossible to determine what portion of the invoice was associated with Dr. Carriere. For this reason, we cannot say that the trial court erred in finding that Metairie Gastroenterology and Dr. Silvers failed to carry their burden of proof that they were overcharged for Dr. Carriere. This assignment of error lacks merit.

CONCLUSION

For the reasons set forth herein, the judgment of the trial court in favor of Medtron Software Intelligence Corporation and against Metairie Gastroenterology, APMC and David R. Silvers, in solido, is affirmed. Costs of this appeal are assessed to Metairie Gastroenterology, APMC and David R. Silvers.

AFFIRMED.

[8] The invoices also include a fee for each computer workstation and other miscellaneous charges, but those are not at issue in this assignment of error.