STATE OF MICHIGAN

COURT OF APPEALS

MCKAY CONSULTING, INC., Plaintiff-Appellee, v ST. JOHN HEALTH, Defendant-Appellant, and OAKWOOD HEALTHCARE, INC., and HENRY FORD HEALTH SYSTEM, Defendants.	UNPUBLISHED January 20, 2009 No. 273132 Wayne Circuit Court LC No. 04-411858-CK
MCKAY CONSULTING, INC., Plaintiff-Appellee, v OAKWOOD HEALTHCARE, INC., Defendant-Appellant, and HENRY FORD HEALTH SYSTEM and ST. JOHN HEALTH, Defendants.	No. 273196 Wayne Circuit Court LC No. 04-411858-CK

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendants Oakwood Healthcare, Inc. (Oakwood) and St. John Health (St. John), appeal as of right from various orders, including judgments following a jury trial, in this dispute over express contracts for advice concerning Medicare reimbursement. We affirm.

I

This case involves contingent fee contracts, whereby plaintiff agreed to "discuss the application of certain Medicare reimbursement principles (the 'Service') that may identify additional Medicare reimbursement owed" to the hospitals at issue. In turn, appellants agreed to pay plaintiff a percentage of resulting additional Medicare reimbursement from the government.

Medicare reimbursements to hospitals for inpatient services are influenced by various factors, including a wage index that is determined by a hospital's geographic classification in a particular metropolitan statistical area (MSA). Medicare rules allow hospitals to appeal their geographic wage index classification. This was part of the information provided by plaintiff to appellants. As a result, various Wayne county hospitals, with all of whom plaintiff had similar contingent fee agreements, decided to apply as a group to be redesignated from the Detroit MSA, for purposes of the wage index, to the Ann Arbor MSA, because the Ann Arbor MSA had a higher wage index.

On May 13, 2003, McKay Consulting and Oakwood entered into a written agreement. McKay agreed to provide its service, which consisted of providing confidential information, i.e., McKay agreed to "discuss the application of certain Medicare reimbursement principles . . . that may identify additional Medicare reimbursement owed to OH [Oakwood Healthcare]." In exchange for that service, Oakwood agreed to pay McKay Consulting a contingent fee "of 25% of the additional Medicare reimbursement received by OH as a result of this Service for the three Cost Report years for which the Service has effect."

The Oakwood contract states: "For the avoidance of doubt, a description of the Service has been initialed by each party and set forth as Exhibit A . . . following the execution and delivery of this Agreement . . . ." Exhibit A states: "The service provided to Oakwood Healthcare System will be limited to achieving a successful reclass, for the purpose of wages, to the Ann Arbor Metropolitan Statistical Area."

In late February or early March 2003, Bob (Robert) Brown, a principal of McKay Consulting, had a meeting with Mike Pelc, then vice president of finance of the Detroit Medical Center (DMC). Pelc said things had taken a very significant turn for the worse, and asked if Brown had any idea he could pull out of his head to help the DMC financially. Brown said he was not the one who came up with most of the original accounting ideas, but said he would talk to Mike McKay. Brown talked with three or four people at McKay about how to help the DMC, including Mike McKay and Bill (William) Nutt. There were "some really exotic" things they talked about. In a week or ten days Nutt called Brown and said he thought he had something. Nutt described to Brown the MSA. He explained that if all 18 hospitals in the Wayne county MSA met certain relatively easy to meet wage and commission data, comparing them to Washtenaw county, and if the two counties are contiguous, "there was a provision [in federal regulations] where every hospital [in Wayne county] that participates in the Medicare program could petition the government to reclass into Washtenaw County."

In other words, "Wayne County hospitals which were getting paid less for the same care as the hospitals in Ann Arbor could [petition to] reclass" to Washtenaw county's compensation rates. "We [at McKay Consulting] felt there was a good chance" of success in such a "reclass" petition.

Brown testified that in the late winter or early spring of 2003, there were rumors from health lawyers in Washington, D.C., that the standard amount criterion test (one of the requirements for a geographic reclassification) would be done away with. If that were to happen, the Wayne county hospitals would succeed. Brown testified: "If the test was not done away with, all bets were off. Something had to happen. Something had to give." Thus, Brown testified that the petition to "reclass" by Wayne county hospitals would only succeed if the standard amount criterion were eliminated.

The Medicare regulation that allowed for group wage index reclassification was 42 CFR 412.234. The heading of section 412.234 is "Criteria for all hospitals in an urban county seeking redesignation to another urban area." Subsection (c) of section 412.234 provides: "(c) Standardized amount inpatient operating costs – (1) Criteria. The urban hospitals must demonstrate that their average incurred costs are more comparable to the amount the hospitals would be paid if they were reclassified than the amount they would be paid under their current classification." Thus, section 412.234(c) provides the standardized amount criterion (SAC). Brown testified that effective January 1, 2003, Congress had eliminated differences in the standardized amount criterion for different regions of the country. Brown testified that this rendered the standardized amount criterion in § 412.234 meaningless. But the standardized amount criterion was still in place. Nutt testified that he and his legal counsel felt that the CMS policy, retaining the SAC, was weak.

In April or May of 2003, McKay Consulting asked Carin Sigel, a Washington, D.C., Medicare attorney, to write a memo on the requirements for a reclassification. "We knew that this project was going to be still risky, but we decided it was still a good thing to move forward with because we felt like there was an opportunity here, even though it was going to be a stretch." McKay Consulting got Larry Oday, a Washington, D.C., lawyer with Medicare expertise, involved, because "It was clear we were going to have to have some strategies in which we're going to have to look at the CMS agency to try to get relief. We were going to have to possibly go to Congress or even the courts."

On May 13, 2003, there was a meeting among Brown, McKay and Doug Welday, corporate controller of Oakwood Healthcare, Inc. Before the meeting, Brown sent Doug Welday a letter attaching the proposed agreement; the letter also stated, inter alia:

> If you are aware of the issues and taking appropriate steps to evaluate the problem, no fee will be due us. If you choose not to address the issue you will also owe us nothing. If you both were not aware and choose to pursue the issue then the fee will be a percentage of the increased reimbursement as a result of the service.

Also on May 13, 2003, McKay Consulting and Oakwood entered into the written agreement. McKay agreed to provide its service, which consisted of providing confidential information, i.e., McKay agreed to "discuss the application of certain Medicare reimbursement principles . . . that may identify additional Medicare reimbursement owed to OH [Oakwood Healthcare]." In exchange for that service, Oakwood agreed to pay McKay Consulting a contingent fee "of 25% of the additional Medicare reimbursement received by OH as a result of this Service for the three Cost Report years for which the Service has effect."

The Oakwood contract states: "For the avoidance of doubt, a description of the Service has been initialed by each party and set forth as Exhibit A . . . following the execution and delivery of this Agreement . . . ." Trial Exhibit 6 is the only copy of the agreement containing the Exhibit A. It states: "The service provided to Oakwood Healthcare System will be limited to achieving a successful reclass, for the purpose of wages, to the Ann Arbor Metropolitan Statistical Area." This Exhibit A is initialed by McKay and Lynn Torossian, an Oakwood executive.

There was trial testimony by Brown that if the standardized amount criterion were not eliminated by the government, the Wayne county hospitals would not be allowed to reclassify to the Ann Arbor MSA. Brown testified that at the time he met with Robert Plaskey, director of reimbursement for Oakwood Healthcare System, and Welday on May 13, 2003, the section 412 application was the only vehicle for achieving a wage index reclassification for Oakwood. The § 412 application was to be made on behalf of all Wayne county hospitals, while § 508 applications (explained below) would be made by individual hospitals.

Brown testified that at the time of the May 13, 2003, meeting, he was aware of rumors that the SAC requirement might be eliminated. Brown testified that the rumor or idea that the SAC requirement might be eliminate came from McKay Consulting's healthcare lawyers, and there was reason to believe it might go away.

On May 14, 2003, Sigel prepared a draft memorandum to Brown and Nutt regarding the hospital group application for reclassification. This memo stated: "staff members of MGCRB have reviewed a draft of a proposed regulation that would eliminate the standardized amount (cost comparison) criterion. The proposed change is included in the Medicare inpatient prospective payment system ('PPS') rule to be issued in the next week or so."[1] Sigel's memo further states: "Significantly, we have heard from MGCRB staff . . . that CMS is changing the policy requiring a group to meet the standardized amount (cost comparison) criterion." The memo also stated that the SAC "may be eliminated in the future if the proposed regulation is subsequently finalized."

Brown testified that later in May, 2003, a preliminary rule was released by CMS, but it did not waive the standard amount criterion. Brown testified that this fact made the reclass petition project much riskier. The final rule was released in August 2003. The final rule also did not eliminate the SAC. This made the reclass petition project even riskier, according to Brown.

In June 2003, McKay Consulting and its attorneys began to consider political pressure as a way to get a rule change on the SAC before the reclassification petition would be considered. By June 10, 2003, McKay Consulting was planning to push politically to get a rule change regarding the standardized amount criterion, in order to help the reclassification effort. The group application was to be filed on behalf of 18 hospitals.

[1] MGCRB stands for Medicare Geographic Classification Review Board.

In 2003 a bill was introduced in Congress known as the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (sometimes known as the DIMA), which set aside dollars for hospital geographic wage index reclassifications. This was later passed by the 108th Congress. "Section 508" was part of this legislation.

In July 2003, McKay Consulting contacted certain offices of the Michigan congressional delegation. On August 12, 2003, CMS issued its proposed rule for outpatient prospective payment system for the fiscal year 2004 in the Federal Register. In concise terms, the proposed rule required that urban hospitals requesting group reclassification both meet and apply for both the wage index, and the standard amount criterion, regardless of whether the hospitals would receive increased reimbursement for both.

Later in August 2003, McKay Consulting negotiated with St. John to obtain an agreement similar to that reached with Oakwood. On August 22, 2003, an agreement was reached between McKay Consulting and St. John in substantially the same form as the agreement between McKay Consulting and Oakwood, except that St. John agreed to pay McKay Consulting 15% of the additional Medicare reimbursement received by its hospitals as a result of the service, with a maximum of $850,000 per year:

> That SJH will pay to MC a fee of fifteen percent (15%) of the additional Medicare reimbursement received by SJH hospitals as a result of this Service for the three (3) years for which the Service has effect. However, the total fee paid to MC cannot exceed eight hundred [and] fifty thousand [dollars] ($850,000) per year for each of the three (3) years reviewed under this Agreement for SJH.

Also on August 22, 2003, there were internal discussions at St. John, and with McKay and Brown, about whether Oakland county hospitals would pursue a reclassification to the Ann Arbor or Flint MSA.

Mike McKay testified that on August 27, 2003, St. John's Oakland county hospitals orally agreed to pay McKay Consulting 15%. McKay testified that "Every hospital in Oakland County agreed to pay us 15 percent on our oral contract on August the 22nd," but then McKay agreed that it was actually on August 27th. Buckley's testimony substantially agreed.

In or around September 2003, McKay completed the group application and submitted it to the MGCRB. The application states that it is based on the Medicare regulation 412.234. Regarding the standard amount criterion (and the Wayne county hospitals' failure to meet it), the application states, inter alia:

> We . . . request that the MGCRB . . . take into account these facts, and make a decision on the application based on the Wayne Co. hospitals meeting all other criteria except the standard amount. The standard amount criteria should not be considered for approval of this application. However we have included the standard amount calculations as required by MGCRB rules, so that the application will be considered complete.

Also in or around September 2003, McKay submitted an application for group redesignation on behalf of Oakland county hospitals, for reclassification to the Flint MSA. On

September 12, 2003, Sigel sent an email to Brown and others, forwarding a position paper. The position paper concerns the hospitals' wage index reclassification effort. The position paper included several strategies for influencing federal reclassification policy.

On September 25, 2003, Nutt sent McKay an email stating: "We don't meet the std criteria and thus we are going to ask CMS or pass legislation taking away the std criteria and payment. . . ." On September 29, 2003, Brown sent an email to Wayne county hospital representatives about their next meeting to discuss, inter alia, "how to proceed both with CMS and, possibly, Congress," and to "[b]egin examining the resources available to us . . . ." On September 30, 2003, Nutt sent an email to McKay, stating that he had spoken with Medicare attorney Larry Oday about issues including a "[t]imetable for passage of the HR1 bill. . . ." The H.R. 1 bill was the bill, mentioned above, to provide funding for hospital geographic wage index reclassifications (see below). In October 2003, Connie Mack[2] sent a letter on behalf of the Wayne county hospitals to Tom Scully, administrator of the Center for Medicare & Medicaid Services (CMS), requesting a meeting.

The House conference report for the DIMA legislation, which before passage was called H.R. 1, was published in or around November 2003. The DIMA contained a provision called section 508, which appropriated $900 million for struggling hospitals like Oakwood.

On November 26, 2003, McKay Consulting, in a letter by McKay to Doug Welday, agreed to reduce its contingent fee for Oakwood from 25% to 15%. On or around November 28, 2003, the meeting between Wayne county hospital representatives and Scully occurred.

In December 2003, the hospitals' effort to influence the federal policy regarding reclassification continued. On December 2, 2003, Scully announced that he was resigning from his position, effective December 16, 2003. On December 3, 2003, Ken Trester, an Oakwood executive, sent an email to various persons indicating they would wait before moving forward with a Congressional delegation letter, until contact was made with Scully's assistant.

On December 5, 2003, the efforts to get the SAC waived intensified, given Scully's anticipated departure. By this time, the proposed legislation contained an appropriation of $900 million for hospitals' geographic reclassifications. In or around early December 2003, Congress passed the DIMA, containing § 508 and its $900 million appropriation.

As a result, in December 2003, the topic of § 508 funding arose amongst the hospitals. On December 10, 2003, there was a conference call for the Wayne county hospital group. It was noted that the advantage of using section 508 was that it appropriated new money. A St. John Hospital representative's contemporaneous notes indicate an effort to influence HHS.

Later on December 10, 2003 and December 11, 2003, drafts were exchanged of a letter to be sent to Health & Human Services secretary Tommy Thompson, asking for his assistance both

[2] Connie Mack is a former United States Senator from Florida.

in receiving a ruling on the reclassification application, and for money from the $900 million of appropriated funds.

Also on December 11, 2003, McKay forwarded to Brown a memo, to be forwarded to the hospitals, indicating that there was a possibility that the reclassification could be achieved through § 508 of the recently enacted legislation. The draft memo states: "It is our understanding that the political committee has elected to pursue both a clarification / memorandum of instruction to the existing group 412.234 application while encouraging a 508 solution." It states: "It is in everyone's best interest to push CMS for a resolution of the clarification on the existing application while not closing any doors on the 508 process . . . ." (Emphases deleted.)

On December 19, 2003, Thompson issued a notice establishing the § 508 one-time reclassification appeal process. On December 31, 2003, CMS issued an official notice indicating, in sum: "In accordance with section 508(a) of the Medicare Prescription Drug, Improvement and Modernization Act of 2003, this notice establishes a one-time appeal process by which a hospital may appeal the wage index classification otherwise applicable to the hospital."

On January 2, 2004, Nutt sent an email to Oday and Sigel exclaiming "we did it!!!", indicating that section 508 money had been granted, and raising questions about how to proceed, including how individual hospitals would apply for the money. On January 5, 2004, Trester, the Oakwood representative, sent an email to various persons summarizing the results of a government-relations group conference call, stating: "It appears the Section II provision of Section 508 opens the door for us to get reclassified to the Washtenaw index."

On January 7, 2004, attorney Sigel prepared a memo to Brown, Nutt and McKay regarding the Medicare appeal process for hospital wage index reclassification under § 508. Sometime thereafter, an application form for reclassification under § 508 was prepared.

On January 22, 2004, Sigel prepared a memo to Brown, McKay and Nutt regarding a discussion at a meeting of wage index options under § 508, and containing a draft letter to Thompson. On January 23, 2004, the draft letter was forwarded to hospital representatives.

Also on January 29, 2004, Connie Mack sent the letter to Thompson. The letter states that "Congress provided relief for communities like Wayne County by providing an alternative method for hospitals to get relief through wage index reclassifications under Section 508 . . . ." The letter asked which Ann Arbor wage index would be used, and asked for the higher of the two possible indices to be used, stating that this would result in revenue of $58 million for the hospitals.

On February 3, 2004, Brown emailed to the hospital representatives a memo stating that the Wayne county hospitals' group application had been denied because it did not meet the standardized amount criteria under 42 CFR 412.234(c). The notice offered the option to appeal the denial, but Brown's memo advised them not to appeal, "as we're preparing an appeal under another provision which we've discussed with all of you."

On February 9, 2004, St. John Oakland Hospital filed with the MGCRB its appeal under § 508 of the wage index classification. On February 12, 2004, Plaskey sent to the MGCRB its § 508 appeal on behalf of Oakwood Southshore Medical Center. Oakwood also filed § 508 appeals on behalf of Oakwood Annapolis, Oakwood Hospital & Medical Center, and Oakwood Heritage.

On April 16, 2004, the MGCRB issued its decision that Providence Hospital would be reclassified from the Detroit MSA to the Flint MSA under § 508. Also on April 16, 2004, the MGCRB issued its decision approving the redesignation of Oakwood Hospital from the Detroit MSA to the Ann Arbor MSA under § 508, and its decision approving the redesignation of Oakwood Hospital & Medical Center.

In April 2004, McKay filed its complaint in the instant action. After the close of discovery, Oakwood and St. John filed motions for summary disposition under MCR 2.116(C)(8) and (10). The trial court denied the motions vis-à-vis claims based on breach of an express contract, with respect to any implied-in-law claim seeking recovery based on the actions of McKay taken in furtherance of the defendants' applications under § 508. The trial court held that the written agreements did not restrict the contingent fee to funds received under a § 412 application. In concise terms, the trial court held that the agreement was ambiguous, because there were two reasonably plausible constructions on the issue of whether a contingent fee was owed on reimbursement received through § 508 as opposed to reimbursement received under § 412.

Plaintiff brought a motion in limine regarding lobbying, seeking to exclude evidence and argument by defendants of lobbying. In concise terms, plaintiff sought to exclude any evidence and argument related to defendants' theory that the contract was void as against public policy, as a contingent-fee contract for lobbying. The trial court granted this motion.

Later, St. John filed a motion for partial summary disposition under MCR 2.116(C)(7), arguing that the statute of frauds, MCL 566.132(1), precluded plaintiff's express oral contract claim (regarding the Oakland county hospitals), arguing that the written agreement with St. John, with its annual contingent-fee cap of $850,000, included St. John's Oakland county hospitals. However, the trial court found that McKay's performance could have been completed within one year, and denied the motion.

The jury returned a verdict in plaintiff's favor. The jury answered special interrogatories as follows. The May 13, 2003, agreement between Oakwood and McKay applied to the additional reimbursement received by Oakwood under § 508. Regarding St. John, the jury found that there were two contracts: the written one applied to St. John's Wayne county hospitals, and an oral contract that applied to St. John's Oakland county hospitals. The jury found that both the written and oral contracts with St. John applied to the reimbursement received under § 508. The jury found $2,324,897 in damages against Oakwood, and $4,693,808 in damages against St. John ($2,143,808 for its Oakland county hospitals, and $2.55 million for its Wayne county hospitals).

II

A

Oakwood first argues that that it is entitled to JNOV,[3] summary disposition, or a new trial, because the scope of the contract was limited to the success or failure of the application under 42 CFR 412.234, and it is undisputed that that application was denied. We disagree.

1

This Court reviews a ruling on a summary disposition motion de novo. *Willett v Waterford Charter Twp,* 271 Mich App 38, 45; 718 NW2d 386 (2006). A ruling on a motion for new trial is reviewed for an abuse of discretion. *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006).[4] To the extent that this dispute requires the Court to interpret the parties' contract(s), the proper interpretation of a contract is a question of law, reviewed de novo. *Archambo v Lawyers Title Ins Corp,* 466 Mich 402, 408; 646 NW2d 170 (2002).

This Court reviews de novo a trial court's ruling on a motion for JNOV. *Garg v Macomb Co Community Mental Health Services,* 472 Mich 263, 272; 696 NW2d 646 (2005). In doing so, we consider the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Reed v Yackell,* 473 Mich 520, 528; 703 NW2d 1 (2005). "A trial court should grant a motion for JNOV only when there was insufficient evidence presented to create an issue for the jury." *Attard v Citizens Ins Co of America,* 237 Mich App 311, 321; 602 NW2d 633 (1999). But "a case should not be submitted to the jury where a verdict must rest upon conjecture or guess." *Scott v Boyne City, G & A R Co,* 169 Mich 265, 272; 135 NW 110 (1912).

2

Contracts are enforced according to their terms as a corollary of the parties' liberty of contract. *Coates v Bastian Bros, Inc,* 276 Mich App 498, 503; 471 NW2d 539 (2007), citing *Rory v Continental Ins Co.,* 473 Mich 457, 468; 703 N.W.2d 23 (2005). This Court examines contractual language and gives the words their plain and ordinary meanings. *Wilkie v Auto-Owners Ins Co,* 469 Mich 41, 47; 664 NW2d 776 (2003). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law," and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 375; 666 NW2d 251 (2003). Courts may not impose an ambiguity on clear contract language. *City of Grosse Pointe Park v Michigan Muni*

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[3] JNOV stands for judgment *non obstante veredicto,* or judgment notwithstanding the verdict.

[4] The determination that a trial court abused its discretion involves far more than a difference in judicial opinion. *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 761-762, 685 N.W.2d 391 (2004). "Rather, an abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons,* 477 Mich 8, 12; 727 NW2d 132 (2007).

Liability & Prop Pool, 473 Mich 188, 198; 702 NW2d 106 (2005). A contract is ambiguous when two provisions "irreconcilably conflict with each other," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 663 NW2d 447 (2003), or "when [a term] is equally susceptible to more than a single meaning," *City of Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). Whether a contract is ambiguous is a question of law. *Wilkie, supra* at 47. Only when contractual language is ambiguous does its meaning become a question of fact. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Zurich Ins Co v CCR & Co (On Reh)*, 226 Mich App 599, 603; 576 NW2d 392 (1997) (internal quotes and citation omitted). "When the terms of a contract are unambiguous, their construction is for this Court to determine as a matter of law." *Hubbell, Roth & Clark, Inc, v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2001). A contract is read as a whole, with meaning given to all terms, and technical, constrained constructions are avoided. *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). "When the parties' intent in a . . . contract cannot be ascertained from the evidence submitted, any ambiguities should be construed against the drafter." *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417-418, 668 NW2d 199 (2003) (citations & internal quotation marks omitted). "Ambiguities in a contract generally raise questions of fact for the jury; however, if a contract must be construed according to its terms alone, it is the court's duty to interpret the language." *Id*. at 418. The Court must determine the intent of the parties "by reference to the contract language alone," and may not look to extrinsic evidence to assess intent. *Hubbell, Roth & Clark, Inc, supra*. But in "construing any contract . . . the court will ascertain the intent of the parties both from the language used and from the surrounding circumstances." *Zurich Ins Co, supra* at 607.

The terms of the agreement between plaintiff and Oakwood do not irreconcilably conflict with one another, and therefore, the contract is unambiguous. Further, the duty imposed on plaintiff (the "Service") is not reasonably susceptible to more than one interpretation. The only duty imposed on plaintiff was "to discuss the application of certain Medicare reimbursement principles . . . ." The agreement further states: "*For the avoidance of doubt*, a description of the Service has been initialed by each party and set forth as Exhibit A." (Emphasis added.) Exhibit A, initialed by both McKay and Torossian (Oakwood corporate director of revenue management), states: "The service provided to Oakwood Healthcare System will be limited to achieving a successful reclass, for the purpose of wages, to the Ann Arbor Metropolitan Statistical Area."

Oakwood's argument is, in concise form, that the contract must be interpreted as a matter of law to provide that plaintiff was only required to assist in a reclassification application under 42 CFR 412.234. This argument lacks merit. Neither the body of the agreement, nor Exhibit A thereto, mentions 42 CFR 412.234. The agreement cannot reasonably be interpreted, as a matter of law, to be limited to an application under § 412. Accordingly, the trial court did not err in denying defendants' motions for summary disposition, or in denying their motions for JNOV, and did not abuse its discretion in denying their motions for a new trial.

While Oakwood's argument, that contracts are interpreted to effectuate the intent of the parties at the time the contract was made, is supported by authority, *Sobczak v Korwicki*, 347

Mich 242, 249; 79 NW2d 471 (1956), that does not mean that Oakwood's proposed interpretation must prevail. As noted above, nothing in the plain language of the main agreement, or in Exhibit A thereto, suggests that plaintiff's work would be limited to assisting with a § 412 application. Rather, both the plain language of the agreement, and Exhibit A, state that plaintiff's service would be, broadly, to discuss the application of Medicare reimbursement principles, but that such service would be limited to achieving a successful geographic reclassification, for purposes of wages. Since the agreement is silent on the question of whether the limitation in Exhibit A would limit plaintiff's work to assisting with a § 412 application, we must rely on the broad language in the body of the agreement that describes plaintiff's duty as the duty to discuss Medicare reimbursement principles. The agreement cannot reasonably be read to limit plaintiff's duty to assisting with a § 412 application.

Oakwood argues that Torossian inadvertently initialed Exhibit A, that it is undisputed that she lacked authority to do so, and that, as initialed, it was not returned to plaintiff. But Oakwood cites no evidence that the initialing was inadvertent. In addition, it is undisputed that the main agreement was properly executed, and the language of the main agreement acknowledges that Exhibit A "has been initialed by each party . . . ." Therefore, to accept Oakwood's contention that Exhibit A was not initialed would be to contravene the plain language of the agreement.

Even assuming, *arguendo*, that Exhibit A was not properly initialed by an Okawood representative we still reject Oakwood's contention, because the language of the main agreement is not limited to pursuing an application under § 412. The trial court did not err in denying defendants' motions for summary disposition, or in denying their motions for JNOV, and did not abuse its discretion in denying their motions for a new trial.

B

Oakwood next argues that it is entitled to JNOV, summary disposition, or a new trial, because its contract with plaintiff was void *ab initio*, as a contingent-fee contract for lobbying, since such contracts are against public policy. We disagree.

In Michigan, "courts will not enforce . . . a contract which violates a statute or which is contrary to public policy." *Shapiro v Steinberg*, 176 Mich App 683, 687; 440 NW2d 9 (1989). Michigan courts "respect the freedom of individuals freely to arrange their affairs via contract by upholding . . . that unambiguous contracts are not open to judicial construction and must be enforced as written, *unless a contractual provision would violate law or public policy*." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007) (internal italics, ellipses, quotation marks, citations and brackets omitted; emphasis added).

In *Federoff v Ewing*, 386 Mich 474, 480-481; 192 NW2d 242 (1971), our Supreme Court stated: "We in legal Michigan are committed to the so-called broad rule; that *whether a contract or contractual provision is contrary to public policy depends upon its purpose and tendency* and not upon an actual showing of public injury." (Emphasis added.) *Federoff* extensively discussed *Mahoney v Lincoln Brick Co*, 304 Mich 694, 705-707; 8 NW2d 883 (1943), which involved a contract in which the plaintiff agreed to sell defendant brick and tile for state buildings to be constructed. The defendant agreed to pay the plaintiff "$2 per thousand on brick and six per cent

on the price of tile sold." *Id*. at 695. Our Supreme Court affirmed a circuit court decision refusing to enforce the contract against the defendant, on the grounds that the contract was against public policy. *Id*. at 705-706.

Lobbying is defined by statute in Michigan to mean "communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action." MCL 4.415(2).

In addition, for purposes of public policy, our case law only considers "lobbying" a contract that calls for the exertion of personal or political influence, as opposed to meritorious advocacy or technical expertise. In *Mahoney*, our high court stated:

> *Any contract under which the parties proposed and intended by political influence or coercion to affect the judgment and decision of such architects in the selection of materials would be contra bonos mores and void. The testimony is convincing that the parties intended that plaintiff would use or attempt to use such political influence, pressure, and means as he could to induce the purchase of defendant's brick and tile. This was clearly an attempt to exercise improper influence on State-employed architects* in respect to public business entrusted to them. The record is barren of any proof that plaintiff had the influence he claimed for himself, except by inference. However, such type of contract is against the public good and is void. [*Mahoney, supra* at 705 (emphasis added).]

Similarly, in *Hays v City of Kalamazoo*, 316 Mich 443, 462-463; 25 NW2d 787 (1947), our Supreme Court cited and discussed, favorably, a Texas decision that made this distinction:

> In *Galveston County v. Gresham*, (Tex. Civ.App.), 220 S.W. 560, 563, the court of civil appeals of Texas upheld an agreement between county authorities and an attorney for the rendition of services in connection with placing before congress the desirability of the construction of a sea wall within the county. It was held that the project was properly to be regarded as county business. In answer to the claim that the agreement contravened public policy in that it was a lobbying contract, the court referred to the conclusion reached by the lower court that there was no evidence to support such charge, and said: 'To say that the record justifies this conclusion is putting it mildly, when, by the uncontroverted testimony, 'to represent the county as its attorney before the proper committee or committees of Congress in the matter of the sea wall' was carried out by the appellee's simply appearing publicly before the river and harbors committee of Congress, explaining and urging its approval of the protective improvement, and that with no attempt at, nor thought of using his personal influence with any member of Congress. Such is not this court's conception of what it takes to make a 'lobbying' contract.'

Hays also discussed an Iowa decision:

> A similar conclusion was reached by the supreme court of Iowa in *Kemble v. Weaver*, 200 Iowa 1333, (206 N.W. 83). There a board of supervisors, acting

> on behalf of a public drainage district, employed attorneys to appear before the State legislature for the purpose of obtaining an appropriation to pay an assessment on State-owned lands. The agreement was upheld as against the contention that it violated a rule of public policy against lobbying contracts, the court pointing out that no improper influences were exerted on members of the legislature. [*Hays, supra* at 463.]

In an older case, *Beal v Polhemus*, 67 Mich 130, 132-133; 34 NW 532 (1887), our high Court stated:

> It is contended, in an able argument by the counsel for the defendant, that the contract is void as opposed to public policy. This argument is based upon the assumption that Beal, who was a prominent member and leader of the then dominant party in the nation, sold his influence with our senators, and that this contract was given in payment for such influence; that, in consideration of the payment of the sum therein mentioned, Beal stipulated to exert his personal and party influence upon an officer of the government. And it is claimed that such personal influence cannot be a matter of bargain and sale to be enforced by the courts. He cites an extract from the opinion of the United States supreme court in the case of Oscanyan v. Arms Co., 103 U.S. 261, in which it is said that "*personal influence to be exercised over an officer of the government in the procurement of contracts is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vender to collect the price of this article." We fully indorse this language*, and we agree in much that was said upon the argument as to the deplorable effect of corruption in the governmental service, and the necessity of courts refusing in any and all cases any aid to those who are seeking to recover the price of their labors as lobbyists, either before congress or any department of the government. [Emphasis added.]

Accordingly, the lobbying contract that Michigan public policy prohibits, is a contract for exerting personal influence.[5]

We find that Oakwood's contract with McKay is not void *ab initio* or against public policy, as it is not a contingent-fee contract for lobbying. By its plain and unambiguous terms, Oakwood's contract with McKay was only a contract to "discuss the application of certain Medicare reimbursement principles . . . ." There is no evidence that McKay lobbied state officials, and there is no indication in Oakwood's contract that it was contracting for McKay to exert personal influence on the federal government.[6] Therefore, the contract at issue was not a

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[5] In addition, in Michigan, "[l]obbying does not include the providing of technical information by a person other than a person defined in subsection (5) or an employee of a person as defined in subsection (5) when appearing before an officially convened legislative committee or executive department hearing panel." MCL 4.415(2).

[6] That McKay took it upon itself to engage in contacts with officials of the federal government to enhance the potential for the success of Oakwood's reimbursement application does not change
(continued…)

"lobbying contract" of the kind, the enforcement of which, is prohibited by public policy.[7] The trial court therefore did not err in denying Oakwood summary disposition and JNOV, and did not abuse its discretion in denying Oakwood a new trial.

C

Oakwood next argues that since the provision under which recovery was obtained, § 508, did not exist at the time the contract was entered into, the trial court erred in denying its motion for remittitur because the damages awarded exceeded the parties' contractual expectation interest at the time of contracting, leaving McKay with a windfall. We review a trial court's decision on a motion for remittitur for an abuse of discretion. *Coble v Green*, 271 Mich App 382, 392; 722 NW2d 898 (2006).

Oakwood's argument lacks merit. Before § 508 became an option, the parties anticipated that the § 412 applications might net millions of dollars for the hospitals. For fiscal year 2003, the wage index for the Detroit MSA was 1.006, whereas the wage index for Ann Arbor was 1.1029, and the wage index for Flint was 1.0814. Thus, it was in the interest of Wayne county hospitals to apply (and they did apply) to be reclassified to the Ann Arbor wage index. Such a reclassification would have resulted in a wage index of 1.0547, the average of the Detroit MSA wage index and the Ann Arbor MSA wage index. By such a reclassification, Wayne county hospitals stood to gain about $27 million per annum for inpatient payments. Thus, the jury's award against Oakwood, of $2,324,897, was not excessive, nor did it exceed the expectation interests of the parties. The trial court did not abuse its discretion in denying the motion for remittitur.

D

Next, St. John argues that the trial court erred in granting McKay's motion in limine regarding lobbying, precluding defendants from arguing that a contingent fee contract for lobbying is void as against public policy, and that it is entitled to JNOV or a new trial. We disagree.

This Court reviews a trial court's decision on a motion in limine for an abuse of discretion. *Bartlett v Sinai Hosp*, 149 Mich App 412, 418; 385 NW2d 801 (1986). Whether a contract violates public policy is a question of law that this Court reviews de novo. *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 721; 706 NW2d 426 (2005).

Whether a contract violates public policy is a question of law. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Juries decide questions of fact, see, e.g., *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185

(…continued)

the plain meaning of the services contracted for by Oakwood.

[7] Because we find that the contracts at issue are not lobbying contracts, it is not necessary for us to consider Oakwood's argument that the enforcement of these contracts is prohibited by the Byrd amendment, 31 USC 1352(a)(1), under federal law.

(1995), while courts decide questions of law, see, e.g., *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Thus, while the trial court could properly submit to the jury the factual question of whether there was lobbying, it would not have been proper for the trial court to allow the jury to decide, as a matter of law, whether the contracts were void *ab initio*. Therefore, the trial court did not abuse its discretion in granting plaintiff's motion in limine. To have denied plaintiff's motion in limine, would have allowed defendants to present to the jury a legal question (whether the contract was void as against public policy) that was beyond the jury's proper role.

Moreover, we have concluded above that Oakwood's contract was not a contract for lobbying. St. John's contract with McKay is substantially similar in those respects that are relevant to this issue. Therefore, St. John's contract with McKay also fails the test of being a contract for lobbying, and St. John is, as a result, not entitled to JNOV or a new trial.

E

Next, St. John argues that McKay was not entitled to contract damages in excess of the annual cap of $850,000 contained in St. John's contract with McKay, and that this contract covered St. John's Wayne county *and* Oakland county hospitals. St. John argues that the trial court erred in denying its motion for partial summary disposition, its motion for directed verdict, and its motion for partial judgment notwithstanding the verdict. This Court reviews the trial court's denial of a motion for summary disposition motion de novo. *Willett, supra*. This Court reviews rulings on a motion for directed verdict de novo. *Coates*, *supra* at 502. This Court reviews rulings on a motion for JNOV de novo. *Garg*, *supra* at 272.

Whether a contract is ambiguous is a question of law. *Wilkie*, *supra* at 47. We conclude that the trial court did not err in finding that, on this narrow question, the written agreement is ambiguous. The written agreement is between plaintiff and "St. John Health." St. John argues that, on its face, St. John Health is the equivalent of all hospitals in the St. John Health Hospital system, but it points to no evidence that validates this conclusory assertion. We agree with the trial court that absent additional evidence of the meaning of the words "St. John Health," the term is silent on the question of whether it applies only to St. John's Wayne county hospitals, or also to its Oakland county hospitals and could therefore reasonably be interpreted either way on that question. Accordingly, the trial court did not err in permitting the jury to determine whether there was one contract or two contracts between McKay and St. John Health. The jury's conclusion, that there was a separate oral contract for St. John's Oakland county hospitals, is a final finding of fact on this record.[8] An appellant cannot flatly argue "the jury's conclusion was wrong." It is axiomatic that, in Michigan law, on a question of fact, this Court will not substitute its judgment for that of the trier of fact. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court did not err in denying St. John's motion for partial summary disposition, its motion for directed verdict, and its motion for partial JNOV.

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[8] We note that St. John did not challenge the jury's finding of fact, that there was a separate oral agreement between McKay and St. John's Oakland county hospitals, as against the great weight of the evidence.

F

Next, St. John argues that "judgment as a matter of law" should be granted to it on the claim of an oral contract for its Oakland county hospitals, because, under the statute of frauds, that contract could not have been performed within one year. This Court reviews a ruling on a summary disposition motion de novo. *Willett, supra* at 45. Whether a statute of frauds bars enforcement of a contract is a question of law reviewed de novo. *Kloian v Domino's Pizza*, LLC, 273 Mich App 449, 458; 733 NW2d 766 (2006).

Michigan's principal statute of frauds, MCL 566.132, provides, in pertinent part:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) *An agreement that, by its terms, is not to be performed within 1 year* from the making of the agreement. [Emphasis added.]

Well-established principles guide our construction of statutes. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 58; ____ NW2d ____ (2007) (internal quotation marks and citations omitted). We give effect to legislative intent as expressed in the statute's terms, giving the words thereof their plan and ordinary meanings. *The Healing Place, supra* at 58-59, citing *McManamon, supra* at 135. When the statutory language poses no ambiguity, we do not look beyond its words, nor need we construe it, but we merely enforce it as written. *The Healing Place, supra* at 59 (internal quotation marks and citations omitted).

As noted, *supra*, the written contract between McKay and St. John is ambiguous as to what "St. John Health" means, and therefore, the trial court correctly permitted the jury to determine whether there was a separate oral contract covering St. John's Oakland county hospitals. The jury's finding that there was a separate oral contract for St. John's Oakland county hospitals is supported by the evidence. Therefore, we next consider whether the agreement was barred by the statute of frauds. MCL 566.132.(1)(a).

"To determine whether an agreement comes within this section, the proper inquiry is whether the contract is capable of performance within one year of the agreement." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 533; 473 NW2d 652 (1991) (opinion by Riley, J.). We have construed the one-year rule strictly:

> [I]f there is *any possibility* that an oral contract is capable of being completed within a year, it is not within the statute of frauds, even though it is clear that the parties may have intended and thought it probable that it would extend over a longer period and even though it does so extend. [*Drummey v Henry*, 115 Mich App 107, 111; 320 NW2d 309 (1982). Emphasis added.] [*Hill v Gen Motors Acceptance Corp*, 207 Mich App 504, 509-510; 525 NW2d 905 (1994) (emphasis in *Drummey*).]

Thus, "[t]he rule is that, by any possibility, it is capable of being completed within a year, it is not within the statute . . . ." *Dumas, supra* at 533 (citations omitted).

Naturally, before we can ascertain whether the oral agreement (the existence of which we must accept, since the trier of fact found it) could be performed within one year, we must ascertain its terms. St. John argues that the oral contract, by its terms, for full performance, required the service to take place, and payment of 15% of reimbursement to occur. Thus, the parties agree that the terms of the oral agreement were the same as the written agreement with St. John, except that the oral agreement lacked the annual fee cap of $850,000. In other words, the terms of the oral agreement were, concisely, as follows: St. John would pay to McKay a fee of 15 percent of the additional Medicare reimbursement received by St. John's Oakland hospitals as a result of this service for the three years for which the service has effect.

Notably, the service (discussing Medicare reimbursement principles) does not necessarily occur over three years; it merely has *effects* (and indeed, only potential effects) over three years. Thus, plaintiff could have discussed Medicare reimbursement principles with St. John within one year of the oral agreement, and that discussion (plaintiff's performance) would have been completed within one year. More notably still, it was possible that plaintiff could have completed its discussion of Medicare principles, and the St. John Oakland county hospitals could have been finally denied additional reimbursement, within one year of the oral agreement. Thus, using the strict construction of the statute of frauds required by our precedent, we find that the oral agreement was capable of being performed within one year. *Hill, supra* at 509-510. The statute of frauds, therefore, does not apply, and the trial court correctly refused to grant summary disposition, or JNOV, on this issue.

G

Next, St. John argues that it is entitled to a new trial, because the trial court's denial of its motion to sever resulted in substantial and actual prejudice to it. Although this Court reviews for an abuse of discretion a circuit court's decision on a motion to sever, the decision to sever trials should be ordered only upon the most persuasive showing that the convenience of all parties and the court requires it. *LeGendre v Monroe Co*, 234 Mich App 708, 719; 600 NW2d 78 (1999).

MCR 2.206 allows joinder of defendants where the right to relief arises out of "the same transaction, occurrence, or series of transactions or occurrences and if a question of law or fact common to all of the defendants will arise," or if the presence of several defendants "will promote the convenient administration of justice." Here, McKay approached both Oakwood and St. John to try to get them to participate in a group application for geographic reclassification from the Detroit MSA to the Ann Arbor MSA, for purposes of the wage index. Once both Oakwood and St. John, and other hospital-owning entities, signed-onto the project, they all worked together to achieve its success. Thus, the agreements with Oakwood and St. John were part of the same transaction, or series of transactions.

There were common issues of law and fact. Common issues of fact included whether and to what extent the actual performance of the agreements included activity that could be considered lobbying. Common issues of law included whether the contracts were void as against public policy, and whether they were ambiguous regarding whether they only applied to the §

412 application, or also applied to the money received via the § 508 applications. In light of the foregoing, the trial court did not abuse its discretion in denying St. John's motion to sever.

H

St. John argues, finally, that the jury's award of damages, premised on a contingent fee for reimbursements received under § 508, was excessive, because the damages awarded were note based on the parties' expectation interest, formulated in connection with the § 412 application, and were not foreseeable, requiring JNOV, a new trial, or remittitur. For the reasons set forth in section II C, *supra*, which rejects Oakwood's similar argument, this argument by St. John also lacks merit.

III

The trial court did not err in denying summary disposition and JNOV to Oakwood and St. John, and did not abuse its discretion in denying them a new trial and remittitur. The trial court did not err in granting McKay's motion in limine regarding lobbying. The trial court did not err in denying a directed verdict to St. John. Finally, the trial court did not abuse its discretion in denying St. John's motion to sever.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder