STATE OF MICHIGAN

COURT OF APPEALS

BETH C. MATTER, Plaintiff-Appellee,	UNPUBLISHED January 20, 2011
v	No. 293421 Oakland Circuit Court Family Division
RICHARD C. MATTER, Defendant-Appellant.	LC No. 2005-708339-DO

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order modifying the amount of spousal support defendant must pay plaintiff. We reverse.

I. BASIC FACTS AND PROCEEDINGS

The trial court entered the parties' judgment of divorce in April 2006. They had been married for 36 years and have two adult children. Defendant is a physician who, at the time of negotiation of the divorce settlement, worked for William Beaumont Hospital (Beaumont). The judgment directed defendant's payment of spousal support to plaintiff in a monthly amount to be calculated as follows:

> The total amount of Defendant Husband's gross earnings from all employment sources [excluding passive interest or investment income (except as to Premier Radiation Oncology Services, P.C.), and expressly excluding income from Premier Radiation Oncology Services, P.C. and his income from his employment at William Beaumont Hospital—including departmental incentive amounts and any bonus amounts—or any subsequent employment) as shown on the his [sic] annual earnings statement (or its equivalent), LESS the sum of [$19,200] per year as mandatory deferred compensation plan contribution, shall be multiplied by .333 and then that result divided by [12].

In June 2006, defendant resigned from Beaumont and relocated to Kentucky to work for United Surgical Associates, P.S.C. (USA).[1] In June 2007, defendant entered into a shareholder agreement with USA, paying $20,000 for his share. This agreement required him to acquire a membership interest in Radiation Oncology Associates, P.L.L.C. (ROA). Through this, he has one share of USA and two shares of profit from ROA. He paid $165,000 for his two shares in ROA. USA is an umbrella organization for four divisions, and defendant is assigned to its United Radiation Oncology Division (URO), which provides professional services to cancer patients. USA's two treatment centers lease equipment from ROA. Defendant admits that in 2007, he received $374,805 in salary from URO. However, defendant's 2007 W-2 reported his income as $466,174.

Based on the amount shown on defendant's 2007 W-2, plaintiff filed a motion to increase spousal support. In response, defendant claimed that his 2007 gross income from his employment was only $374,805, and that remainder of his W-2 income was from investments in USA and ROA, which were reported on a K-1 form and a 1099 form, respectively. Plaintiff on the other hand, claimed that defendant's income from USA on a K-1 was integral to his employment and clearly stemmed from an employment source.

The trial court held an evidentiary hearing and summarized its findings in an opinion and order. The court found that defendant's income was "more properly characterized as gross earnings from all employment sources." The trial court opined that defendant made his investments "in order to attempt to shield a portion of his income from spousal support consideration." The court reasoned:

> The income at issue may be passive or interest income for tax purposes, but it was realized by Defendant solely as a result of his employment with USA. . . . [T]he income reported on Defendant's 1099 and K1s would not have been available to him if he were not affiliated with USA and are therefore properly considered as gross earnings from his employment.

The court also considered that spousal support is equitable in nature, and that defendant's actions in "seeking new employment almost immediately after the parties were divorced [caused] plaintiff to lose her [and his] interest in his [retirement] at Beaumont and possibly thousands of dollars of spousal support." The court calculated defendant's spousal support obligation based on his 2007 W-2 and ordered defendant to accordingly pay plaintiff monthly spousal support.

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[1] The judgment of divorce awarded the parties half of any of defendant's interest in his Beaumont Supplemental Employee Retirement Plan (SERP). To receive benefits under the SERP, defendant would have had to remain working for Beaumont until the age of 65. However, defendant resigned from Beaumont presumably before the age of 65. Defendant claims that he had intended before the divorce was filed to resign from Beaumont. Plaintiff claims that defendant represented he would maintain employment with Beaumont. Plaintiff admits there is no documented evidence of this promise by defendant.

II. APPLICABLE STANDARDS OF REVIEW

Judgments entered pursuant to the agreement of parties are contractual in nature. *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008). More specifically, a divorce judgment "entered upon the settlement of the parties . . . represents a contract, which, if unambiguous, is to be interpreted as a question of law." *In re Estate of Lobaina*, 267 Mich App 415, 417-418; 705 NW2d 34 (2005). If the contract language is clear and unambiguous, contract interpretation is a question of law, subject to de novo review. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). However, "[w]here the contract language is unclear or susceptible to multiple meanings**,** interpretation becomes a question of fact." *Id*. Questions of fact are reviewed for clear error. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). Whether a contract is ambiguous is reviewed de novo. *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003). Additionally, the trial court's decision to grant equitable relief is reviewed de novo, but the trial court's judgment will not be reversed or modified unless this Court is convinced that it would have reached a different result had it occupied the position of the trial court. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 394; 729 NW2d 277 (2006).

III. MODIFICATION OF SPOUSAL SUPPORT

Defendant argues on appeal that the trial court erred in modifying the term of the parties' settlement agreement. We agree.

The primary goal of contract interpretation, including a settlement agreement, is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement. *Dobbelaere v Auto Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007); *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written, because an unambiguous contract reflects the parties' intent as a matter of law." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). Thus, absent a showing of fraud, duress, or similar factors, courts act properly when they enforce such agreements. *Lobaina*, 267 Mich App at 417-418. "A contract is ambiguous when two provisions 'irreconcilably conflict with each other,' or 'when [a term] is *equally* susceptible to more than a single meaning.'" *Dancey v Travelers Prop Cas Co Of America*, 288 Mich App 1, 4; ___ NW 2d ___ (2010) (internal citations omitted; emphasis in original). "However, if a contract, even an inartfully worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear." *Id*., citing *Mich Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998).

The following disputed portion of the settlement agreement relates to how "[t]he monthly amount of the Defendant Husband's spousal support payments shall be calculated . . . :

> The total amount of the Defendant Husband's gross earnings from all employment sources [excluding passive interest or investment income (except as to Premier Radiation Oncology Services, P.C.)], and expressly including income from Premier Radiation Oncology Services, P.C. and his income from his employment at William Beaumont Hospital—including departmental incentive amounts and any bonus amounts—or any subsequent employment as shown on

> the his [sic] annual earnings statement (or its equivalent), LESS the sum of Nineteen Thousand Two Hundred ($19,200.00) Dollars per year as a mandatory deferred compensation plan contribution, shall be multiplied by .333 and then that result divided by twelve (12). The Nineteen Thousand Two Hundred ($19,200.00) Dollar mandatory deferred compensation plan contribution amount shall not be subject to increase even if the required contribution amount goes up.

We find that the terms of the settlement agreement are plain and unambiguous. The agreement clearly states that plaintiff is entitled to a percentage of defendant's gross income, less his "passive interest and investment income." The parties agree that "passive interest" and "investment income" are separate terms, both of which are excluded from defendant's "gross earnings from all employment sources." A contractual term can be interpreted in accordance with the commonly used meanings, *Sherman-Nadiv v Farm Bureau Gen Ins Co of Mich*, 282 Mich App 75, 78; 761 NW2d 872 (2008), and this Court may refer to a lay dictionary to interpret the plain meaning of a word or phrase in a contract, *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). "Investment" is commonly defined as "the investing of money or capital for profitable returns," and "income" is defined as "the monetary payment received for goods or services, or from other sources, such as rent or investment; revenue; receipts." *Random House Webster's College Dictionary* (1991). The term "investment income" plainly refers to monetary payment resulting in potentially profitable returns.

These terms are not open to more than one reasonable interpretation. Regardless whether the trial court properly characterized defendant's USA and ROA profits as "passive interest," defendant invested his own money into USA and ROA, and that investment produced income. This financial investment is excluded as income by the terms of the parties' settlement agreement.

That defendant was first employed by USA and earns a wage in addition to his invested income from USA does not change this analysis. This conclusion is supported by the maxim "expressio unius est exclusio alterius," the expression of one thing is the exclusion of another. See *AFSCME Council 25 v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005). The settlement agreement expressly excludes as "investment income" and expressly includes as employment income a financial investment in medical equipment, i.e., Premier Radiation Oncology Services, P.C (PROS). Here, the application of the above maxim is clear and supports defendant's claim that investments similar to PROS, i.e., medical equipment, were not intended to be included as income for spousal support purposes. Plaintiff could have readily insisted that defendant's future similar investments in medical equipment be afforded in the same treatment as PROS. Accordingly, we conclude that only defendant's 2007 USA W-2 gross earned wage of $374,805 is properly used for the calculation of spousal support.

We also conclude that the trial court erred in modifying the parties' settlement agreement based on the implied covenant of good faith and fair dealing. The trial court found that the timing of the settlement agreement and defendant's departure from Beaumont, which eliminated plaintiff's one-half share of SERP benefits and her one-third share of income from PROS, highlighted a lack of good faith and fair dealing on the part of defendant.

"[T]he covenant of good faith and fair dealing is an implied promise contained in every contract that 'neither party shall do anything which will have the effect of destroying or injuring

the right of the other party to receive the fruits of the contract.'" *Hammond v United of Oakland, Inc*, 193 Mich App 146, 152; 483 NW2d 652 (1992), quoting *Fortune v Nat'l Cash Register Co*, 373 Mass 96, 104; 364 NE2d 1251 (1977). When a party to the contract makes the manner of its performance a matter of its discretion, this implied covenant requires the party to exercise its discretion honestly and in good faith. *Ferrell v Vic Tanny Int'l, Inc*, 137 Mich App 238, 243; 357 NW2d 669 (1984); *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975).

We conclude that the trial court erred in modifying the parties' settlement agreement because the terms of the agreement were plain. The settlement agreement provided that if SERP benefits were available, each party was to receive one-half of the payment. The agreement also provided that plaintiff receive one-third share of income from PROS. The settlement agreement does not require that defendant remain employed at Beaumont. Rather, the settlement agreement states that the parties are free to engage in any employment. Further, the agreement does not address the termination of PROS, but only the distribution of assets it realized. Thus, defendant did not breach the implied covenant of good faith and fair dealing. See *Ferrell*, 137 Mich App at 243.

Furthermore, plaintiff failed to provide any evidence suggesting that fraud, duress, or similar factors occurred during the parties' settlement negotiations. See *Lobaina*, 267 Mich App at 417-418. To the contrary, plaintiff testified that she understood the SERP benefits were contingent on defendant remaining at Beaumont until he was 65 years old and there was a risk defendant could leave Beaumont. Although defendant's decision to leave Beaumont for USA terminated plaintiff's interest in SERP benefits and PROS profits, his decision also terminated his one-half interest in SERP benefits and two-thirds interest in PROS profits. Therefore, defendant did not break the implied covenant of good faith or fair dealing in the settlement agreement when he subsequently decided to leave Beaumont for new opportunities with USA.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra