IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FRED A. BROWN and LESLIE H. BROWN, and FAB VENTURES, LLC, Appellants, v. JAMES R. HEREFORD and MICHELLE HEREFORD, husband and wife; and WAVE VENTURES, LLC, a Washington limited liability company, Respondents.	No. 41589-5-II UNPUBLISHED OPINION

Armstrong, J. — Fred Brown and James Hereford entered into an investment contract to develop property, agreeing to split equally the "net profit." Although the profit from the project was only $1,312, Hereford claimed $345,000 in management fees. Brown sued Hereford for breach of contract, claiming that the management fee was prohibited under the terms of the contract, that Hereford misused the line of credit for other investment purposes, and that he failed to properly report the accounting of the project. A jury found that Hereford had not breached his contract with Brown. Brown appeals, arguing that the court improperly instructed the jury on the rule of *contra proferentem*—that a jury should construe a contract against the party who drafted it. Because the instruction was a sufficiently accurate statement of law, we affirm.

FACTS

In 2003, Brown hired Hereford to work for him at Next IT Corporation, a computer software company. Shortly thereafter, Hereford presented Brown with an investment opportunity to develop property in the Black Rock neighborhood outside of Coeur d'Alene.

Hereford needed Brown's investment to secure a line of credit, enabling him to pay for the construction of a home on the property. He had already paid for half of the lot and retained an experienced contractor, Kevin Gunder, who agreed to complete the project without a fee for a share in the profits. Hereford proposed that in exchange for Brown's financial backing, they split the remaining profit equally. According to Hereford, he discussed with Brown his role in managing the project, including his management fee of 10 percent of the project's cost. Brown maintains that Hereford never disclosed to him, nor did he consent to, any such management fee.

Brown directed Hereford to contact his personal attorney, Daniel Cadagan, to put the agreement into writing. Hereford initiated contact with Cadagan, explaining the details of his agreement with Brown. Hereford admitted at trial that he did not discuss his management fee with Cadagan. Cadagan drafted a contract based on similar deals he had previously worked on for Brown. Brown approved the initial draft, and Cadagan then sent the draft to Hereford, who made minor edits. Cadagan billed Brown for drafting the contract.

Brown and Hereford signed the investment management contract as members of their respective limited liability companies.[1] The contract expressly provides that FAB Ventures, LLC will guarantee up to a $1,000,000 line of credit and that the parties will each get 50 percent of the net profits from the home sale. The contract also requires a detailed accounting of the process, limits the use of funds to the agreed investment without the consent of the other party,

[1] FAB Ventures, LLC is owned by Brown and his wife. Wave Ventures, LLC is owned by Hereford and his wife.

and prohibits additional investment fees.[2] The contract makes no mention of Hereford's purported "management fee." Br. of Resp't, Ex. 56.

After signing the contract, Hereford claims that Brown asked him to invest in Next IT by purchasing stock. According to Hereford, he told Brown he could do so only by taking an advance on his management fee and that this would mean drawing from the line of credit. On December 1, 2003 and March 25, 2004, Hereford used funds from the line of credit to purchase Next IT stock.

Although the original loan budget for the project was $1,000,000, Brown signed an unlimited guarantee for the project. The project budget increased dramatically over the course of construction, and the line of credit ultimately rose to $2,300,000. Then, in March 2007, the completed home sold for $3,720,000. Hereford reported a net profit of $1,312, but he did not distribute the profit. Hereford calculated his management fee to be $345,000.

Brown sued Hereford for conversion, breach of fiduciary duties, breach of contract, violations of the Securities Act of Washington, chapter 21.20 RCW, and fraud. Specifically,

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[2] The relevant contract provisions are as follows:

> II. **Receipt**. By authorized initials thereby on the attached Exhibit "A," included herein by reference, WAVE shall acknowledge receipt from the Bank, FAB or others, of each and every amount so received (the "Receipts") of WAVE for purposes of this Investment.
> III. **Investment Management.** WAVE shall not make other investments of the funds received under this Agreement without the advance, written consent of FAB. WAVE shall provide periodic reports . . ., such as is shown on attached Exhibit B, incorporated herein by reference.
> . . . .
> V. **Fees.** In as much as WAVE benefits from having FAB join WAVE in the Investment noted here, WAVE shall not charge FAB any fees for providing the vehicle through which the Investment here noted is made.

Br. of Resp't, Ex. 56.

Brown alleged that Hereford breached the contract by extracting an unauthorized management fee, by using the line of credit to purchase Next IT stock, and by failing to periodically report the status of the investment. Both parties moved for partial summary judgment on the contract claim. The trial court denied the motions, finding that genuine issues of material fact existed.

At the trial's conclusion, the parties submitted proposed jury instructions. Instruction 16 stated:

> If, after applying the forgoing principles of interpretation, you find that the contract is ambiguous, then the doubt created by the ambiguity should be resolved against the party who prepared, or whose attorney prepared, the contract.

Clerk's Papers (CP) at 2036. Brown objected to the instruction, arguing,

> [Instruction] 16, which is an attempt for the—to define the principles of interpretation of a contract to determine if the contract in this particular case is ambiguous. That is a question of law for this Court. That is in our trial brief and I believe in our motions in limine and I won't cite the particular cases again, but we have made it clear that we feel that that's a question of law for the Court. I think that's—that's what our Supreme Court has said, and I don't believe that question should go to the jury by determining whether this contract is ambiguous.

Report of Proceedings at 821. The court gave the instruction over Brown's objection.

The jury awarded Brown damages on the fiduciary claim, but it found by special verdict that Hereford did not commit fraud nor did he breach the contract.

ANALYSIS

Brown assigns error to jury instruction 16. He argues that the instruction improperly delegated the determination of whether a contract contains ambiguities to the jury.[3] Brown

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[3] Brown also assigns error to instruction 16 on the grounds that (1) its application of the rule of *contra proferentem*—construing an ambiguity in a written document against the drafter—was inappropriate because both parties participated in the document's creation, and (2) it was an erroneous statement of the law because it directed the jury to create rather than resolve an ambiguity. An appellate court may refuse to review any claim of error which was not raised in the

maintains that whether an ambiguity exists is a question of law for the court.

Hereford responds that the trial court made the threshold determination that the contract contained ambiguities when it denied summary judgment. Moreover, according to Hereford, Washington law expressly allows the jury to consider whether the contract in question is ambiguous, except where the material facts are undisputed and summary judgment is warranted as a matter of law. *See Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990).

We review jury instructions de novo, and an instruction that contains an erroneous statement of law is reversible where it prejudices a party. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 318, 189 P.3d 178 (2008) (even if an instruction is misleading, a court should not reverse unless prejudice is shown). A clear misstatement of law is presumed to be prejudicial. *Lewis*, 145 Wn. App. at 318. Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

Ambiguity exists in a contract where two or more reasonable interpretations are possible. *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493-94, 116 P.3d 409 (2005). Whether a contract is ambiguous and the legal effect of a contract are, in general, questions of law. *Syrovy v. Alpine Res., Inc.*, 68 Wn. App. 35, 39, 841 P.2d 1279 (1992). Thus, summary judgment can be appropriate if a court finds that the interpretation of the contract does not depend on extrinsic

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trial court. RAP 2.5(a). At trial, Brown's sole objection to the instruction was that it improperly delegated the task of finding an ambiguity to the jury. We decline to address Brown's arguments raised for the first time on appeal.

evidence or if only one reasonable inference can be drawn from the extrinsic evidence. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006); *see also Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003).

Where summary judgment is denied, the jury must discern the parties' intent in order to interpret the contract. *Wm. Dickson Co.*, 128 Wn. App. at 493 (as a general rule, the parties' intent is a question of fact); *see also Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) ("The touchstone of contract interpretation is the parties' intent."). Under the "context rule," the fact finder determines the contracting parties' intent by "'viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993) (quoting *Berg*, 115 Wn.2d at 663, 667). If, after viewing the contract in this manner, the fact finder cannot determine the parties' intent, it may construe the remaining ambiguities against the drafter. *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965); *Forest Mktg. Enter., Inc. v. Dep't of Natural Res.*, 125 Wn. App. 126, 132-33, 104 P.3d 40 (2005).

In submitting summary judgment motions to the trial court, both parties argued that they were entitled to a judgment as a matter of law on the contract claim. Although the parties disputed whether Hereford disclosed his management fee to Brown, the interpretation issues relating to the contract claim were based on undisputed facts: (1) whether the 10 percent

management fee was an unauthorized "fee" under the terms of the agreement, or a legitimate cost of construction to be taken into consideration in determining "net profits;" (2) whether drawing against the credit line to purchase stock constituted a permissible advance on the "management fee," or a misuse of the credit line taken without advance, written consent; and (3) whether the contract mandated the use of specific forms for accounting reports, or whether it allowed for less formal reports. CP at 796-829. Had only one interpretation of the contract been reasonable, the court would have been required to grant summary judgment. *See Dice*, 131 Wn. App. at 684. In denying both parties' summary judgment, the trial court necessarily found the contract ambiguous.[4] The court then had no alternative but to submit the issue of what the parties intended to the fact finder—here the jury. *See Berg*, 115 Wn.2d at 668.

The trial court properly instructed the jury on the "context rule" so that it could determine the parties' intent.[5] In *Berg*, 115 Wn.2d at 669, our Supreme Court expressly rejected the theory

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[4] Brown does not challenge the trial court's summary judgment ruling, an issue it could raise only by arguing the evidence is insufficient to support the jury's verdict. *See Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993).

[5] Brown does not contest instruction 15, which reads as follows:

> A contract is to be interpreted to give effect to the intent of the parties at the time they entered the contract.
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> You are to take into consideration all the language used in the contract, giving to the words their ordinary meaning, unless the parties intended a different meaning.
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> You are to determine the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties.

CP at 2035.

that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. The interpretation of a contract is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from the extrinsic evidence. *Berg*, 115 Wn.2d at 668 (citing Restatement (Second) of Contracts § 212(2)). The court further explained:

> [a]ny determination of meaning or ambiguity should only be made in light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.

Berg, 115 Wn.2d at 668 (quoting Restatement (Second) of Contracts § 212, cmt. *b*). Where, as here, the court was unable to determine as a matter of law that the contract had only one reasonable interpretation, the court, consistent with *Berg*, instructed the jury to consider extrinsic evidence in resolving the ambiguities in the contact.

And instruction 16 properly advised the jury when it could apply the *contra proferentem* rule. *See Kappelman v. Lutz*, 167 Wn.2d 1, 9, 217 P.3d 286 (2009) (jury instructions must be considered in their entirety); *see Forest Mktg. Enter., Inc.*, 125 Wn. App. at 132-33 (ambiguous contracts should not be construed against the drafter if the intent of the parties can be determined by reviewing extrinsic evidence). Taking the instructions in their entirety, it is clear that instruction 16 did not send the jury on a mission to find ambiguity. Rather, this instruction simply instructed the jury that if, after applying the context rules set out in instruction 15, it still found the contract ambiguous, it could apply the *contra proferentem* rule to resolve the ambiguities. Accordingly, the trial court did not impermissibly delegate the task of finding the contract ambiguous; it properly instructed the jury to determine the parties' intent according to contract

interpretation principles.

ATTORNEY FEES

Finally, Brown requests that the trial court's award of costs and attorney fees to Hereford on the breach of contract claim be vacated. But because Brown's argument fails on appeal, his request for costs and attorney fees likewise fails. Hereford requests attorney fees and expenses on appeal under RAP 18.1(a). Under the investment contract, a party who substantially prevails in any legal claim to interpret a provision of the contract is entitled to recover costs and fees from the other party. Because Hereford substantially prevailed on appeal, he is entitled to appellate fees and costs under the contract. *See Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003) (party may recover reasonable attorney fees on appeal if allowed by statute, rule, or contract and the party makes a request under RAP 18.1(a)).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Penoyar, C.J.

Johanson, J.