COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1793 **Cir. Ct. No. 2006CV2289**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MARC J. ACKERMAN,

PLAINTIFF-RESPONDENT,

V.

MALCOLM K. HATFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. This case arose on cross-motions for summary judgment after psychologist Marc Ackerman claimed Malcolm Hatfield, M.D., violated the parties' arbitration agreement. Dr. Hatfield appeals the judgment

granting Dr. Ackerman's motion and denying his, in which the circuit court concluded that Dr. Hatfield discussed the subject matter of the arbitration when he caused comments about Dr. Ackerman to be posted online.[1] The court ordered Dr. Hatfield to pay Dr. Ackerman $100,000 per the liquidated damages provision of the parties' arbitration agreement. We affirm.

¶2 Dr. Hatfield and Dr. Ackerman are into their second decade of wrangling. As the circuit court suggested on this last go-round, the duration of their feuding, if not the vitriol, brings to mind that of the infamous Hatfields and McCoys. The bad blood started when Dr. Ackerman, as a court-appointed psychologist in Dr. Hatfield's 1993 divorce action and custody dispute, opined that Dr. Hatfield suffered from a personality disorder and paranoid schizophrenia and engaged in sexually inappropriate behavior with his minor daughter. Dr. Hatfield then embarked on a retaliatory campaign, assailing Dr. Ackerman's professional competence and ethics, including filing a professional malpractice suit and an official complaint with the Wisconsin Department of Regulation and Licensing (DRL). The DRL complaint alleged that Dr. Ackerman committed malpractice when he issued his report in the Hatfield divorce.

¶3 Dr. Ackerman sued Dr. Hatfield in 2001 (***Ackerman I***) for, among other things, libel, slander and malicious prosecution. The parties settled the lawsuit by Dr. Hatfield paying Dr. Ackerman $90,000 in exchange for a release of all claims. Dr. Hatfield then wrote a letter to the attorney who had been the guardian ad litem for his young daughter during the divorce action, disputing

[1] Some discussion was had at Dr. Hatfield's deposition as to whether "posted" or "published" is the precise term. We will use "post" for simplicity, not as a term of art.

certain GAL fees. The letter, copied to the circuit court judge, the family court commissioner and a state assemblyperson, asserted that Dr. Ackerman "dropped" his defamation claim because he knew he committed malpractice.

¶4 Dr. Ackerman sued Dr. Hatfield again in 2003 (***Ackerman II***) for defamation based on the letter and abuse of process and malicious prosecution based on the DRL complaint. *See* ***Ackerman v. Hatfield***, 2004 WI App 236, ¶8, 277 Wis. 2d 858, 691 N.W.2d 396. ***Ackerman II*** went to arbitration. The arbitrator concluded that Dr. Hatfield had engaged in abuse of process, malicious prosecution and libel, and awarded Dr. Ackerman almost $360,000 in actual and punitive damages. The arbitration agreement the parties negotiated contained a "no discussion" clause and a liquidated damages provision. That portion of the agreement, paragraph 9, provides:

> 9. The parties agree that they shall not discuss this subject matter of this arbitration for any reason or purpose other than with their spouse or legal counsel unless compelled to by legal process, until January 26, 2007. Upon violation of this agreement, the party not doing the violating shall be entitled to Judgment against the violating party in the amount of $100,000 upon application to this Court and proof of the violation and shall not thereafter be bound by the terms of this agreement.

¶5 Then in November 2006, an attorney weighing whether to retain Dr. Ackerman as an expert alerted him that an Internet search revealed some "bad stuff" about him. Dr. Ackerman investigated and found a March 25, 2006, Internet posting on www.AKidsRight.org, an interactive message board that promotes fathers' rights and encourages feedback among its members and readers. The item at issue, beneath Dr. Hatfield's name and e-mail address, stated:

> Imagine all that plus having to pay a court[-]appointed supervisor $50 per hour to see your kid. Imagine that plus

> your mother having to pay an attorney to represent her to obtain court[-]appointed supervised visitation. Imagine that plus a criminal investigation that turns up nothing. Imagine a so[-]called "expert" who diagnoses you with "personality disorder" and "paranoid schizophrenia." Imagine being ordered to pay that expert.

A link not placed by Dr. Hatfield invited readers to "see details of Dr. Hatfield's story at our Hall of Shame page" immediately followed. Dr. Ackerman sued, claiming that Dr. Hatfield breached paragraph 9, the no-discussion provision of the arbitration agreement, and demanded $100,000.

¶6 Both parties moved for summary judgment. The circuit court concluded there could be no dispute of material fact because "paragraph nine says what paragraph nine says." It also determined that the only reasonable inferences to be drawn from it were that Dr. Hatfield was referring to Dr. Ackerman in the posting and, given Dr. Hatfield's acknowledged familiarity with the Website, Dr. Hatfield "discussed" the subject matter of the arbitration through the posting of the e-mail. The circuit court granted Dr. Ackerman's motion and denied Dr. Hatfield's, and awarded Dr. Ackerman $100,000. Dr. Hatfield appeals.

¶7 Dr. Hatfield first asserts that summary judgment was wrongly granted to Dr. Ackerman because the "imagine" e-mail did not constitute discussion of the "subject matter of this arbitration." Summary judgment methodology is well-known. We review a grant of summary judgment de novo, applying the same standards and methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987), *see also* WIS. STAT. § 802.08 (2005-06).[2] Where both parties move for summary

[2] All references to the Wisconsin Statutes are to the 2005-06 version.

judgment, the methodology remains the same, but it generally becomes the equivalent of a stipulation of facts permitting the circuit court to decide the case on the legal issues. ***Millen v. Thomas***, 201 Wis. 2d 675, 682-83 and n.2, 550 N.W.2d 134 (Ct. App. 1996).

¶8 Dr. Hatfield first argues that summary judgment was wrongly granted in Dr. Ackerman's favor because paragraph 9 prohibits discussion only of the subject matter of the arbitration. Dr. Hatfield notes the Web posting did not mention Dr. Ackerman by name, the arbitrator, the arbitration, the claims in the arbitration, the arbitration agreement or the defamation and malicious prosecution/abuse of process claims. Instead, he contends, the e-mail hails back to the divorce and custody matters. The circuit court's conclusion, Dr. Hatfield posits, is to treat paragraph 9 as if it were a "total muzzle," an approach the parties discussed but ultimately abandoned. One early proposal, for example, would have forbidden the parties to discuss "the elements of this case, the arbitration, the results or each other in the future ever again."

¶9 We disagree that paragraph 9 mandated so broad a ban as to be a "total muzzle." The agreed-upon language not only was narrower, it also was time-limited, running from May 13, 2005 to January 26, 2007. Moreover, Dr. Ackerman asserted in his motion for summary judgment that Dr. Hatfield published a letter to the editor of a local newspaper regarding legislation concerning custody issues, posted a letter on www.AKidsRight.org complaining about his divorce and custody issues, and freely discussed his divorce and loss of custody with "virtually anyone." The circuit court correctly observed that the no-discussion provision does not govern comments or writings of that nature. The subject matter of the arbitration was whether the GAL letter defamed Dr. Ackerman and whether the DRL prosecution was malicious. Both the letter and

the DRL claim necessarily embrace earlier events because they contained allegations and accusations that Dr. Ackerman committed malpractice in his investigation and conclusions at Dr. Hatfield's divorce and custody proceedings.

¶10 Dr. Hatfield strains to create a fact issue. He admits in his deposition that the subject matter of the arbitration's breadth was "why I didn't want to agree to it in the first place, because one can argue that my whole life is part of that arbitration." Yet here he asserts that the phrase "subject matter of this arbitration" is strictly limited to what went on in the arbitration itself. If the latter is how he understood the phrase, he could have filed an affidavit in that regard but, having chosen not to, he should not now claim circuit court error. *See* ***Nettesheim v. S.G. New Age Prods., Inc.***, 2005 WI App 169, ¶24, 285 Wis. 2d 663, 702 N.W.2d 449 (a party that chooses not to submit an affidavit or otherwise contest the facts cannot later claim circuit court erred by granting summary judgment); *see also* WIS. STAT. § 802.08(3).

¶11 We agree that the subject matter of this arbitration was not, as the circuit court said, "the divorce and … all that other stuff." The arbitration arose from Dr. Ackerman's claim that Dr. Hatfield had defamed him in the GAL letter and maliciously prosecuted him with the DRL complaint. Both of those are direct outgrowths of the parties' ongoing relationship arising from the role Dr. Ackerman played in Dr. Hatfield's divorce. As the circuit court concluded, in the context of the ongoing dispute, the only reasonable inferences to be drawn are that the phrase "so-called 'expert'" reasonably could have referred only to Dr. Ackerman; talking about an "'expert' who made a diagnosis of personality disorder and paranoid schizophrenia" is talking about the subject matter of the arbitration; posting an e-mail on a Website that invites feedback constitutes "discussion," and the subject matter of the arbitration included the parties' relationship and Dr. Ackerman's role

in Dr. Hatfield's divorce and custody matters, not solely the DRL complaint or GAL letter themselves. Paragraph 9 plainly was not a total muzzle because other of Dr. Hatfield's public complaints about his divorce and custody problems were held not to violate the arbitration agreement. We conclude that the March 25, 2006 Internet posting violated the no-discussion clause.

¶12 We next examine whether the liquidated damages clause is an enforceable liquidated damages clause or, as Dr. Hatfield contends, an unenforceable penalty provision. The following facts relating to the liquidated damages issue are undisputed:

> (1) Dr. Hatfield's insurer paid $90,000 to Dr. Ackerman in ***Ackerman I*** as liquidated damages for defamation;
>
> (2) In ***Ackerman II***, the arbitrator found that Dr. Hatfield engaged in defamation, abuse of process and malicious prosecution and awarded Dr. Ackerman $100,000 compensatory and $250,000 punitive damages; and
>
> (3) A $300,000 liquidated damages figure first was proposed; the parties later agreed upon $100,000.

¶13 The review of a liquidated damages provision is a mixed question of law and fact. *See* ***Westhaven Assocs., Inc. v. C.C. of Madison, Inc.***, 2002 WI App 230, ¶16, 257 Wis. 2d 789, 652 N.W.2d 819. Normally, the circuit court's legal conclusion as to the reasonableness of the clause is so intertwined with the factual findings supporting that conclusion that we should give some, albeit not controlling, weight to the circuit court's decision. ***Id.*** Where the parties have stipulated to the facts, however, the circuit court makes no factual findings, leaving only legal issues which we review de novo. ***Id.***

¶14 The overall single test of validity is whether the clause is reasonable under the totality of circumstances. ***Rainbow Country Rentals and Retail, Inc. v.***

Ameritech Publ'g, Inc., 2005 WI 153, ¶28, 286 Wis. 2d 170, 706 N.W.2d 95. We consider: (1) whether the parties intended to provide for damages or for a penalty; (2) the difficulty of accurately estimating potential damages at the time of entering into the contract; and (3) whether the stipulated damages are a reasonable forecast of anticipated damages. ***Id.*** The factors are not meant to be mechanically applied. ***Id.*** The facts of the particular case dictate the weight to be given the various factors. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 533, 331 N.W.2d 357 (1983).

¶15 We need not tarry long on the first factor, the parties' intent. Here, in particular, where acrimony has reigned for years, it is not surprising that both parties say they intended to provide for a penalty. Subjective intent has little bearing on whether the clause is objectively reasonable, however. ***Id.*** at 530. That they ultimately arrived at a damages clause in an amount very close to past awards at least hints at its reasonableness.

¶16 The next two factors, ease of ascertainment and reasonable forecast of anticipated damages, are intertwined and use a combined prospective-retrospective approach. ***Id.*** at 530-31. The greater the difficulty in estimating or proving actual damages, the more likely the stipulated damages clause will appear reasonable. ***Id.*** Where stipulated and actual damages are grossly disproportionate, however, courts usually conclude that the parties' original expectations were unreasonable. ***Id.*** at 532.

¶17 Dr. Hatfield contends the liquidated damages clause plainly is grossly disproportionate to actual damages because Dr. Ackerman produced no evidence of damage. A liquidated damages clause is unenforceable when no harm results. ***Fields Found., Ltd. v. Christensen***, 103 Wis. 2d 465, 476, 309 N.W.2d 125 (Ct. App. 1981). The circuit court disagreed, as do we. Although

Dr. Ackerman did not claim identifiable financial harm to his business, he did testify that an attorney speaking to him about a case referral informed him that an Internet search revealed "some bad stuff" about him. Dr. Ackerman testified that he learns of attorneys hesitant to engage him for this reason once or twice a year. The record does not support Dr. Hatfield's assertion that Dr. Ackerman suffered no harm. Moreover, reputational damage is one type of harm for which liquidated damages provisions are well-suited. *See* ***Wassenaar***, 111 Wis. 2d at 535-36.

¶18 The parties have been through this before, including Dr. Hatfield twice paying Dr. Ackerman similar amounts on defamation claims. Two comparable awards strongly suggest that the stipulated damages bears a reasonable relationship to the actual damages. The parties should have come to the arbitration agreement armed with a good sense of what a court might deem reasonable.

¶19 The material presented on the motions for summary judgment is subject to only one reasonable interpretation, and that is that Dr. Hatfield breached the arbitration agreement. We also conclude that the liquidated damages provision was reasonable and enforceable. Dr. Hatfield will not be heard now to complain about something he agreed to before the breach. We affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).