COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1178 **Cir. Ct. No. 2006CV66**

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

GUNDERSON, INC.,

PLAINTIFF-RESPONDENT,

V.

ASPIRUS WAUSAU HOSPITAL, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. This marks the parties' second appearance before this court on their breach-of-contract action. The first time, Gunderson, Inc.,

appealed from a grant of summary judgment in favor of Aspirus Wausau Hospital, Inc. We reversed and remanded, instructing the court to allow a jury to decide whether a material breach occurred. The case was assigned to a new judge. Once again, however, the court answered the question itself, this time directing the verdict in Gunderson's favor, and submitted to the jury only the damages question. Aspirus appeals from the judgment entered on the directed verdict. Because we conclude that the trial court should have given the breach-of-contract question to the jury, we once more reverse and remand with directions.

¶2 In August 2004 the parties renegotiated a contract under which Gunderson supplied Aspirus with surgical linen services on a rental basis. Soon thereafter, Aspirus began complaining of product shortages and various quality issues. By letter dated May 23, 2005, Aspirus advised Gunderson that "if nonsterile or defective surgical linens are again provided to Aspirus" the contract would be "immediately canceled." In October, Aspirus simply advised Gunderson that it would begin providing its surgical linen services internally as of January 15, 2006, and thanked Gunderson for past services. On November 22, 2005, Aspirus notified Gunderson that, due to "numerous, varied and continuous" problems, and specifying nine, it was terminating the contract effective December 31, 2005.

¶3 Gunderson responded by commencing this action, alleging breach of contract based on the October letter's "attempted cancellation … without cause." Aspirus answered that the October letter simply exercised a contractual right preserved by § 2.1 (providing, in part, that "[n]othing in this Agreement will be construed in such a way as to prevent Aspirus-WH from continuing to evaluate the costs and benefits of an in-house … services program"). Aspirus also affirmatively alleged that it had the right to terminate pursuant to § 1.2, which provides:

> 1.2 Either party shall have the right to terminate this Agreement if the other party fails in any material respect to provide services consistent with its obligations under this Agreement and/or attached Schedules. *The party claiming the right to terminate shall provide written notice to the other party, specifying the breach. The receiving party shall have thirty (30) days from the receipt of such notice to cure the breach to the satisfaction of the non-breaching party*. (Emphasis added.)

¶4 Gunderson moved for partial summary judgment and Aspirus moved for summary judgment, each arguing that the other breached the contract. The trial court denied Gunderson's motion and granted Aspirus'. It found that Gunderson materially breached the contract by chronically failing to supply the surgical linens Aspirus ordered and that, despite its long awareness of the shortages and substantial opportunity to cure them, Gunderson failed to do so.

¶5 Gunderson appealed. *See* ***Gunderson, Inc. v. Aspirus Wausau Hosp., Inc.***, No. 2007AP2623, unpublished slip op. (Wis. Ct. App. Oct. 1, 2008). This court affirmed the portion of the judgment denying Gunderson's motion for partial summary judgment but reversed the part granting Aspirus' motion for summary judgment, and remanded the matter to the trial court with instructions to submit to a jury the question of whether a material breach occurred. ***Id.***, ¶¶1, 6. Also for determination on remand was whether Aspirus provided Gunderson with notice and a right to cure as provided by the contract. ***Id.***, ¶7.

¶6 On remand, Gunderson moved at the close of evidence for a directed verdict on grounds that Aspirus failed to give ninety days' notice of termination under § 4 of the contract. That section provides:

> 4. Gunderson shall comply with the current JCAHO, Wisconsin Bureau of Quality Assurance, Center for Disease Control, OSHA and Aspirus-WH Linen Committee Standards now in effect, or as amended from time to time during the term of this Agreement. *In the event that Gunderson fails to meet the standards required of it, Aspirus-WH shall give written notice to Gunderson of the alleged failure and Gunderson shall have thirty (30) days in which to correct or remedy the condition. In the event such failure is not remedied within the time period specified, Aspirus-WH may elect to terminate this Agreement or any extension thereof, effective upon ninety (90) days written notice in advance of the termination date*. (Emphasis added.)

¶7 The trial court concluded that §§ 1.2 and 4 set forth a two-step process for contract termination: written notice of the specific failure with thirty days to cure under § 1.2 and, if not cured, ninety days' written notice under § 4. The court concluded that, as a matter of law, Aspirus' failure to give ninety days' notice violated the contract. It thus directed the verdict as to liability and submitted to the jury only the question of damages. The jury awarded Gunderson approximately $1.1 million.

¶8 Aspirus filed postverdict motions asking the trial court to reconsider the directed verdict, to change the jury's answer either to zero or to $42,824.19,[1] or to grant a new trial due to errors at trial, an excessive jury verdict, or in the interest of justice. After a hearing and additional briefing, the trial court denied Aspirus' postverdict motion, entered judgment on the verdict, plus costs and interest, in the amount of $1,150,522.64. Aspirus appeals.

¶9 Aspirus first argues that the trial court erred in granting a directed verdict to Gunderson in several respects. We agree.

[1] Aspirus argued that even if ninety days' notice was required, it should be liable only for the November letter's fifty-one-day shortfall, or $42,824.19.

¶10 On appeal of the grant of a motion for directed verdict, the test is whether the trial court was "clearly wrong" in refusing to instruct the jury on a material issue raised by the evidence. ***Leen v. Butter Co.***, 177 Wis. 2d 150, 155, 501 N.W.2d 847 (Ct. App. 1993). A trial court is "clearly wrong" when it directs the verdict despite the existence of credible evidence to the contrary. ***Haase v. Badger Mining Corp.***, 2003 WI App 192, ¶16, 266 Wis. 2d 970, 669 N.W.2d 737, *aff'd*, 2004 WI 97, 274 Wis. 2d 143, 682 N.W.2d 389.

¶11 To resolve this issue, we first must interpret the contract language, which is a question of law that we review de novo. ***Kailin v. Armstrong***, 2002 WI App 70, ¶18, 252 Wis. 2d 676, 643 N.W.2d 132. Where a contract's terms are plain and unambiguous, we will construe it as it stands. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Whether a contract is ambiguous itself is a question of law. ***Id.***

¶12 While not a model of clarity, we conclude the service contract is unambiguous. We read it to provide two discrete ways, not a single two-step process, to terminate the contract for cause. Section 1.2 addresses *either* party's right to terminate the contract upon thirty days' notice in the event of the other's material, but unspecified, failure to perform. A breach of contract is material when it is so serious as to destroy the essential object of the contract. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996).

¶13 In contrast to § 1.2's two-way street, § 4 more narrowly addresses Aspirus' right to terminate if Gunderson fails to comply with expressly identified health and safety standards. Upon Gunderson's failure to cure after thirty days' notice, Aspirus may terminate the contract with ninety days' written notice.

¶14 The two sections speak to distinct scenarios and neither invokes or cross-references the other. Further, a two-step approach makes no sense if Gunderson was the party seeking to terminate for an alleged material breach by Aspirus. It would have to give Aspirus a thirty-day notice under § 1.2 and then proceed to § 4, which, as described above, solely deals with how Aspirus is to handle Gunderson's failure to meet certain standards and gives only Aspirus the right to terminate with ninety days' notice. If the two-step process does not apply in that case, it strikes us as patently unfair that Gunderson could terminate with only thirty days' notice but Aspirus is bound to at least ninety. We reject such an illogical reading. *See* ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶62, 319 Wis. 2d 274, 767 N.W.2d 898 (stating that we interpret a contract reasonably so as to avoid absurd results, give words their plain meaning, read it as a whole and give effect where possible to every provision).

¶15 In addition, other sections address notice requirements in other particular situations, such as for termination at the end of the contract term or if Aspirus were to locate a less costly alternative and Gunderson did not meet the price. Our primary aim is to ascertain the intent of the parties. ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991). Our reading of the plain language of the contract as a whole persuades us that they intended to address particular circumstances in precise, and differing, ways. Should a breach have resulted from Gunderson's failure to meet, for instance, an OSHA standard, § 4 requires ninety days' notice to terminate. Such a failure or refusal to cure would not necessarily gut the essence of the contract, as does a material breach, however. Where a breach is material, § 1.2 provides that thirty days' notice is sufficient. This interpretation, we conclude, is more logical and better reflects the parties' intent.

¶16 As noted, the trial court directed the verdict as to liability because Aspirus failed to give ninety days' notice under § 4. On motions after verdict, it found that Aspirus did not give thirty days' notice. Having determined that §§ 1.2 and 4 are independent, those rulings are "clearly wrong" because there exists credible evidence to the contrary. It is for the jury to decide from that evidence which section of the contract was breached; whether the breach was material; which of the letters, if any, constituted proper notice; whether the alleged breach was cured; whether the non-breaching party suffered damages and, if so, in what amount. *See* ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 358, 377 N.W.2d 593 (1985) (breach); ***Management Computer Servs., Inc.***, 206 Wis. 2d at 183-84 (materiality); ***Neff v. Pierzina***, 2001 WI 95, ¶40, 245 Wis. 2d 285, 629 N.W.2d 177 (notice); ***Volvo Trucks N. Am v. DOT***, 2010 WI 15, ¶50, 323 Wis. 2d 294, 779 N.W.2d 423 (cure); and ***Ballard v. Lumbermens Mut. Cas. Co.***, 33 Wis. 2d 601, 605, 148 N.W.2d 65 (1967) (damages). Therefore, the judgment is reversed and the matter is remanded for proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

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