COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP601 **Cir. Ct. No. 2015CV324**

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

MIDWEST NEUROSCIENCES ASSOCIATES, LLC AND NEUROSURGERY AND ENDOVASCULAR ASSOCIATES, S.C.,

PLAINTIFFS-APPELLANTS,

V.

GREAT LAKES NEUROSURGICAL ASSOCIATES, LLC AND YASHDIP PANNU, M.D.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Reversed and cause remanded with directions*.

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

¶1 HAGEDORN, J. This is a case about who determines whether an arbitration provision applies. Should the question be submitted to arbitration, or

should the court decide? The dispute in this litigation arises out of the operating agreement (Operating Agreement) of Midwest Neurosciences Associates, LLC (Midwest). The agreement established a partnership of medical practitioners. Among its terms was a noncompete provision and a clause requiring that any and all disputes be resolved through arbitration. Midwest brought suit against Great Lakes Neurosurgical Associates, LLC (Great Lakes)—one of its former members—and Great Lakes' President Yashdip Pannu[1] for alleged violations of the noncompete provision. Midwest sought to compel arbitration per the Operating Agreement. The circuit court, however, denied the request and granted Great Lakes' motion for a declaratory judgment. Midwest appeals and argues that the circuit court should have granted its motion to compel arbitration.

¶2 The heart of this dispute is whether the arbitration clause in the Operating Agreement still applies. Great Lakes maintains that the clause was superseded by a subsequent agreement and is therefore inoperative, or alternatively, that this is a question for the court to decide as the circuit court did here. We hold that the question of whether the arbitration clause was superseded should have been submitted to arbitration, and we therefore reverse the circuit court's order.

BACKGROUND

¶3 In 2005, Pannu, a medical doctor, signed the Operating Agreement on behalf of Great Lakes to become a member of Midwest. Midwest was a joint venture designed to "assist the Members in the operation of their medical

[1] Great Lakes makes no argument that Pannu's obligations are any different from those of Great Lakes. For ease of reading, we will refer to the respondents collectively as Great Lakes.

practices." The Operating Agreement contained multiple provisions relevant to this litigation.

¶4 The Operating Agreement contained a noncompete clause that provided in relevant part:

> During the period of a Member's association with the Company and for a period of two (2) years following the date of a Member's dissociation as a member of the Company, such Member will not engage in the specialty of neurosurgery or perform any other medical procedures or services of the type which it or any of its owners or physician-employees performed at any time during the two (2) years preceding the Member's dissociation as a member in the Company ….

The Operating Agreement required all physician employees of the members to sign an ancillary noncompete agreement with substantively identical terms. Pannu personally agreed to one of these ancillary restrictive covenants.

¶5 In addition, the Operating Agreement restricted its own ability to be amended. Section 13.1 of the Operating Agreement provided, "No amendment or modification of this Operating Agreement shall be valid unless in writing and signed by all of the Members."

¶6 Section 13.7 contained the arbitration clause. It provided that—with one exception not at issue here—"the parties hereto agree to resolve any and all disputes arising with respect to the terms and conditions of this Operating Agreement hereby by arbitration." The provision also specified that "arbitration shall be governed by the laws of the State of Wisconsin, this Operating Agreement and the JAMS' Arbitration Rules[], to the extent not inconsistent with the foregoing." Of note here, JAMS' Arbitration Rule 11(b) provides the following:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or

> scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.[2]

¶7 In September 2015, Midwest brought suit against Great Lakes alleging that Pannu had violated the noncompete provision. Midwest's complaint also requested that the circuit court compel Great Lakes to submit to binding arbitration pursuant to the Operating Agreement. Great Lakes responded with an answer and counterclaims seeking a declaratory judgment that alleged, among other things, that Pannu had entered into a separate "Redemption Agreement" with Midwest that superseded the noncompete provision in the Operating Agreement. The Redemption Agreement also contained no arbitration clause. Although the parties agree that the Redemption Agreement was not signed by all members of Midwest, they hotly dispute whether the alleged agreement was a valid contract and what, if any, effect it had upon the Operating Agreement. The circuit court declined to order arbitration and instead granted Great Lake's motion on the grounds that the Redemption Agreement was a valid contract that superseded the Operating Agreement. Midwest sought leave to appeal the circuit court's order granting declaratory/summary judgment, which we granted.

DISCUSSION

¶8 Although Midwest raises multiple issues on appeal, the determinative question is whether the circuit court erred by not ordering the parties

[2] *JAMS Comprehensive Arbitration Rules & Procedures*, Rule 11(b), 14 (July 1, 2014), *available at* https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf.

to submit their dispute to arbitration. Because we conclude the circuit court erred, we need not reach other contested issues.

¶9 Midwest maintains that the Operating Agreement's arbitration clause and its incorporation of Rule 11(b) of the JAMS' Arbitration Rules required this dispute—including the allegation that the Redemption Agreement superseded provisions of the Operating Agreement—to be submitted to arbitration. Great Lakes responds that the Redemption Agreement was valid and superseded the provisions of the Operating Agreement applicable to Great Lakes, including the arbitration clause and noncompete provisions. Thus, because the Redemption Agreement did not contain an arbitration clause, Great Lakes argues that it was not bound to arbitrate this dispute. Great Lakes further maintains that the question of whether the Redemption Agreement superseded the Operating Agreement is a question that must be resolved by the courts, not an arbitrator. Great Lakes does not, however, claim that the Operating Agreement was invalid for any other reason; it only alleges that the Redemption Agreement superseded certain of its provisions.

¶10 Whether a dispute must be arbitrated involves issues of contract interpretation and a judicial determination of substantive arbitrability, questions of law we review de novo. ***Cirilli v. Country Ins. & Fin. Servs.***, 2009 WI App 167, ¶10, 322 Wis. 2d 238, 776 N.W.2d 272. Arbitration is governed by WIS. STAT. ch. 788, which reflects the "sensible policy … to promote arbitration as a viable and valuable form of alternative dispute resolution." ***Manu-Tronics, Inc. v. Effective Mgmt. Sys., Inc.***, 163 Wis. 2d 304, 311, 471 N.W.2d 263 (Ct. App. 1991); *see also* ***Mortimore v. Merge Techs. Inc.***, 2012 WI App 109, ¶14, 344 Wis. 2d 459,

824 N.W.2d 155. Accordingly, WIS. STAT. § 788.02 (2015-16)[3] provides the following:

> If any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

¶11 In determining whether the circuit court should have ordered arbitration, several principles guide our analysis. Arbitration is a matter of contract. We will not force a party to arbitrate a dispute when it has not agreed to do so; but we will force a party to arbitrate a dispute when it has agreed to do so. ***Cirilli***, 322 Wis. 2d 238, ¶12. Whether a dispute must be arbitrated is ordinarily a question for the court. *See* ***id.*** However, parties may agree through contract to arbitrate arbitrability. *See* ***AT&T Techs., Inc. v. Communications Workers***, 475 U.S. 643, 649 (1986); ***Mortimore***, 344 Wis. 2d 459, ¶15. When we determine whether the parties have agreed to submit a particular dispute to arbitration, we do not consider the merits of the dispute, even if the dispute appears to be frivolous; we merely determine whether the parties have agreed to submit a particular dispute to arbitration. ***Cirilli***, 322 Wis. 2d 238, ¶13. If the parties have so agreed, then we will enforce that agreement. *See* ***id***. If a contract contains an arbitration clause, it carries a strong presumption that a dispute under that contract should be submitted to arbitration, and any doubts as to whether a dispute is arbitrable are

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

"resolved in favor of arbitration coverage." ***Id.***, ¶14. This approach to arbitration is not an abdication of the judicial role. Rather, it is consistent with the judicial obligation to enforce arbitration clauses in contracts and to prefer those in accordance with WIS. STAT. § 788.02.

¶12 Thus, the judicial role is a limited one. We determine whether "(1) there is a construction of the arbitration clause that would cover the grievance on its face and (2) whether any other provision of the contract specifically excludes it." ***Cirilli***, 322 Wis. 2d 238, ¶14. If the arbitration clause covers the grievance and is not otherwise excluded, the dispute must be submitted to arbitration. *See* ***id.***, ¶¶14, 16. Midwest's claim is based on the Operating Agreement's noncompete provision, and thus it falls squarely within the language of the arbitration clause ("any and all disputes arising with respect to the terms and conditions of this Operating Agreement").[4] Moreover, no provision of the Operating Agreement specifically excludes a dispute over the applicability of the

[4] Great Lakes argues that, even assuming the Operating Agreement and arbitration clause are still valid, this dispute falls outside the scope of the arbitration clause. It maintains that the dispute arises out of the Redemption Agreement, not the Operating Agreement, and therefore, the arbitration clause does not apply. This is plainly wrong. The arbitration clause applies to any and all claims "arising with respect to the terms and conditions of this Operating Agreement." The noncompete clause is most definitely a "term" of the Operating Agreement and the conceded genesis of the dispute. It is hard to think of a better example of a dispute "arising" out of the Operating Agreement than the one presented here: Midwest seeks to enforce the noncompete provision in the Operating Agreement. Thus, the plain language of the provision requires this dispute to be arbitrated.

noncompete clause from the arbitration clause.[5] Thus, the dispute is subject to arbitration under our well-settled principles.

¶13 Great Lakes presses for a different outcome, however. It argues that the Redemption Agreement supersedes the arbitration clause, and therefore the courts should decide whether the Redemption Agreement is valid and whether it has changed the relevant provisions of the Operating Agreement. We disagree for two reasons. First, holding that the Redemption Agreement superseded the arbitration clause would be a determination on the merits of the dispute, and we do not address the merits of a dispute in determining whether it is arbitrable. Second, the parties expressly agreed to submit all "disputes over the formation, existence, validity, interpretation or scope of the" Operating Agreement to an arbitrator by adopting the JAMS' Arbitration Rules.

¶14 Two relatively recent Wisconsin cases address these precise issues and are on point. In ***Cirilli***, the plaintiffs' insurance agents argued that the defendant violated a settlement agreement by refusing to pay the plaintiffs as required by their respective agent agreements. ***Id.***, ¶15. The settlement agreement did not contain an arbitration clause, but the agent agreements did. ***Id.***, ¶¶8, 15. The arbitration clause in the agent agreements provided that any claims arising out of the agency relationship, the agreements, or the termination of those

[5] Section 5.5 of the Operating Agreement deals with the Midwest president's authority to take certain actions unilaterally, and exempts such actions from adjudication under the arbitration clause. In an effort to avoid arbitration, Great Lakes attempts, somewhat half-heartedly, to recast the Redemption Agreement as unilateral action of Midwest's president under this provision. Other than its conclusory assertion, Great Lakes makes no meaningful attempt to explain how a Redemption Agreement—which Great Lakes argues was validly entered into among multiple parties—falls under Section 5.5's grant of authority to Midwest's president. This argument is undeveloped, and we will not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

agreements "shall be resolved exclusively by binding arbitration." ***Id.***, ¶15. The circuit court declined to compel arbitration of this dispute based on the theory that the settlement agreement had superseded the agent agreements, thus eliminating the arbitration clause. We reversed. ***Id.***, ¶¶1, 8.

¶15 We first noted that the plaintiffs did not challenge the validity of the agent agreements and the arbitration clauses. ***Id.***, ¶10. Thus, we reasoned, the only question was whether the claims fell within the arbitration clauses. ***Id.*** We concluded they did because the claims arose out of the agency relationship, the agency agreement, and the termination of the agency agreement. ***Id.*** Furthermore, we held that whether the settlement agreement superseded the arbitration clauses in the agent agreements went to the merits—an issue we do not address when determining whether a dispute is arbitrable.[6] ***Id.***, ¶17.

¶16 We reached a similar conclusion in ***Mortimore***, 344 Wis. 2d 459, ¶18, where an employee raised a nearly identical argument to the one Great Lakes brings here. The employee argued that his original 2004 employment contract (which contained an arbitration clause) had been superseded by an oral employment agreement with no arbitration requirement. ***Id***., ¶10. Because the original employment contract and its arbitration clause had been superseded, the

[6] Similarly, the United States Supreme Court has held under the Federal Arbitration Act that a challenge to the validity of the contract as a whole—as opposed to a challenge that the arbitration clause itself was never validly entered into—is a question that must go to the arbitrator. The Court clarified that "an arbitration provision is severable from the remainder of the contract." ***Buckeye Check Cashing, Inc. v. Cardegna***, 546 U.S. 440, 445 (2006). "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." ***Id.*** at 445-46. Therefore, the court held that "because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract," and "[t]he challenge should … be considered by an arbitrator, not a court." ***Id.*** at 446.

employee reasoned, the dispute was not subject to arbitration. ***Id.*** In other words, he argued that there was no agreement to arbitrate the dispute because the original contract had been replaced by a new one. ***Id.***, ¶13. Relying on our previous decision in ***Cirilli***, we rejected that argument, reasoning that whether the arbitration clause had been superseded went to the merits; it was not a question for the court. ***Mortimore***, 344 Wis. 2d 459, ¶19. We explained:

> The 2004 contract contemplated that amendments or modifications, such as those negotiated between Mortimore and Merge, would be enforceable and binding only if made in writing. Thus, any dispute pertaining to the amendment or modification of the 2004 contract necessarily arises out of the 2004 contract, thereby maintaining the arbitration clause. By not challenging the validity of the 2004 contract, Mortimore implicitly agrees that if the 2004 contract controls, arbitration is required. Any determination that an alleged oral agreement superseded the 2004 contract and eliminated the requirement to arbitrate Mortimore's breach of contract claims is a determination on the merits of Mortimore's claim. As stated, we do not make determinations on the merits.

Id.

¶17 The court also found a second, independent ground to reach the same conclusion. The parties expressly agreed to submit questions of arbitrability to the arbitrator by invoking the American Arbitration Association's (AAA) rules. ***Id.***, ¶20. The AAA rules provided that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objection with respect to the existence, scope or validity of the arbitration agreement." ***Id.*** We reasoned as follows:

> The act of incorporating the AAA rules suggests that the parties' intended to leave the question of arbitrability of Mortimore's claims to an arbitrator. Many other jurisdictions that have considered this issue agree "that an arbitration provision's incorporation of the AAA Rules—or other rules giving arbitrators the authority to determine

> their own jurisdiction—is a clear and unmistakable expression of the parties' intent to reserve the question of arbitrability for the arbitrator and not the court." Given Wisconsin's strong policy promoting arbitration, we conclude, like many other jurisdictions, that the parties' adoption of the AAA Rules in the 2004 contract required arbitration of the question of whether an oral agreement superseded the 2004 contract.

Id. (citations omitted).

¶18 The present case is substantively identical to ***Mortimore*** and ***Cirilli***. Great Lakes maintains that a subsequent agreement superseded the Operating Agreement and arbitration clause. But per ***Mortimore*** and ***Cirilli***, alleging a subsequent agreement is not a ticket to avoiding arbitration where the original agreement clearly demands it; both courts concluded that such an argument went to the merits of the dispute and was not a proper question for the court. In this case, in order to conclude that the arbitration clause does not apply, we would have to hold that the Redemption Agreement modified the Operating Agreement and was consistent with its modification provisions. Thus, accepting Great Lakes' invitation to rule that the Redemption Agreement was a valid termination of Great Lakes' obligations under certain provisions of the Operating Agreement would be to decide the case on the merits, which we cannot do.

¶19 Furthermore, the parties have explicitly agreed to arbitrate arbitrability by virtue of the express invocation of the JAMS' Arbitration Rules—nearly identical to the AAA rules incorporated by reference in ***Mortimore***. The JAMS' rules explicitly and unmistakably give the arbitrator "the authority to determine jurisdiction and arbitrability issues as a preliminary matter," and this includes "disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought." This language includes the precise argument raised by Great Lakes. Whether the Redemption Agreement

superseded the Operating Agreement in any way necessarily requires a determination as to the "existence, validity, interpretation or scope" of the Operating Agreement. This question of substantive arbitrability is, under the Operating Agreement, to be determined by the arbitrator "as a preliminary matter."

¶20 Great Lakes valiantly attempts to get around ***Mortimore*** on multiple grounds. It first argues that ***Mortimore*** was erroneously decided, and urges that we follow the Tenth Circuit's approach in ***Riley Mfg. Co. v. Anchor Glass Container Corp.***, 157 F.3d 775 (10th Cir. 1998). Even if we were so inclined, we are bound to follow ***Mortimore***. Such arguments are properly addressed to the Wisconsin Supreme Court.

¶21 Second, Great Lakes insists that ***Mortimore*** has been "abrogated" by ***State ex rel. Universal Processing Servs. of Wisconsin, LLC v. Circuit Court of Milwaukee Cty.***, 2017 WI 26, ¶5, 374 Wis. 2d 26, 892 N.W.2d 267. This is incorrect. ***Universal Processing*** dealt with whether a circuit court had unconstitutionally delegated its judicial power to a referee. ***Id.*** It did not address ***Mortimore*** or what types of disputes may be subject to arbitration. Unlike the court in ***Universal Processing***, we are not delegating our judicial authority; we are exercising it by enforcing the parties' agreement to arbitrate this dispute consistent with our statutory policy favoring arbitration.

¶22 Finally, Great Lakes endeavors to distinguish ***Mortimore*** because the Redemption Agreement here contained a merger clause. The merger clause provided that the "Agreement constitutes the entire agreement between the parties pertaining to its subject matter and supersedes all prior agreements." In other words, Great Lakes thinks it has a stronger case that the Redemption Agreement

superseded the Operating Agreement and arbitration clause than was presented in ***Mortimore***. This does not change the analysis. The issue in ***Mortimore*** was whether the court should decide a general challenge to a contract's validity. Thus, the decision's reasoning and application are equally persuasive here. ***Mortimore*** concluded that whether the oral agreement superseded the employment contract "necessarily arises out of the 2004 contract" because it required us to interpret the modification provisions in the employment contract. ***Mortimore***, 344 Wis. 2d 459, ¶19. Our case presents the same scenario: Great Lakes claims to have a contract that supersedes the Operating Agreement, which contains a clause specifying how the agreement may be modified. And even if Great Lakes could distinguish ***Mortimore*** (which it cannot), the decision was based on ***Cirilli*** and our longstanding arbitration jurisprudence, all of which would point us to the same conclusion.

¶23 The principles announced in ***Mortimore*** and ***Cirilli*** control the outcome in this case. Midwest and Great Lakes agreed to submit their dispute to arbitration under the well-settled principles governing the applicability of arbitration clauses in Wisconsin and under the parties' explicit agreement to arbitrate arbitrability by incorporating the JAMS' Arbitration Rules. Accordingly, we reverse the circuit court's order and remand with instructions to grant Midwest's motion to compel arbitration.

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

Not recommended for publication in the official reports.

¶24 REILLY, P.J. (*concurring*). I am in full agreement with the majority's conclusion that ***Cirilli v. Country Ins. & Fin. Servs.***, 2009 WI App 167, 322 Wis. 2d 238, 776 N.W.2d 272, and ***Mortimore v. Merge Techs., Inc.***, 2012 WI App 109, 344 Wis. 2d 459, 824 N.W.2d 155, are binding precedent based on the facts of this case. Under ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), we are bound to "speak with a unified voice," however, we may also signal where we "believe[] a prior case was wrongly decided." I concur to express my concern that ***Cirilli*** and ***Mortimore*** are eroding the freedom to contract.

¶25 I am in full agreement that a court determines whether a dispute must be arbitrated and that people have the freedom to contractually agree to "arbitrate arbitrability." Majority, ¶11. I am troubled, however, by the conclusion that those same parties may not enter into a subsequent contract, which expressly negates the prior contract, and changes the forum for dispute resolution back to the court system.[1] *See* majority, ¶18. It is my opinion that parties always have the freedom to change their minds and enter into an entirely new contract with new terms that do not mandate arbitration. The undertone of ***Cirilli*** and ***Mortimore*** is

[1] I would argue that the Redemption Agreement was a valid, enforceable contract between Midwest and Great Lakes. The final correspondence Great Lakes received from Midwest's counsel was that the Redemption Agreement was the "final agreement." Great Lakes signed the agreement and subsequently delivered a check to cover the retirement plan funding, which was cashed by Midwest.

that once parties contractually agree to "arbitrate arbitrability," they may never undo that form of dispute resolution in a subsequent contract.

¶26 The Redemption Agreement provides in Sections 10.2 and 10.3 that it is "the entire agreement between the parties … and supersedes all prior agreements" and that "[a]ll questions concerning the construction, validity and interpretation of this Agreement and the performance of the obligations imposed by this Agreement shall be governed by the internal law, not the law of conflicts, of the State of Wisconsin."[2] The parties have some of the finest lawyers in this state representing them, and they freely contracted out of the Operating Agreement by entering into an entirely new contract, the Redemption Agreement. They expressly agreed to have the validity and interpretation of the agreement construed solely under Wisconsin common law, rather than the laws of any other state. The parties freely chose to eliminate arbitration in the Redemption Agreement, and that agreement should be honored by our courts.

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[2] By agreeing to apply only the "internal law," the parties expressly indicated their desire to apply only the common law of Wisconsin and not the law of any other state or the law of an arbitrator.

> When a choice-of-law clause stipulates that it will be governed by the "law" or "laws" of a particular U.S. state, it is ambiguous whether the parties intended for the contract to be governed by the whole law of the state or by the internal law of the state. The whole law of the state includes the state's conflict-of-laws rules. The internal law of the state does not. The distinction is significant because the application of the whole law of state—including its conflict-of-laws rules—may result in the application of the law of a state other than the one named in the choice-of-law clause.

John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 643 (2017).