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**David N. Kjos, Appellant, vs. American Family Insurance, Respondent.****C6-03-23****COURT OF APPEALS OF MINNESOTA****2003 Minn. App.****August 5, 2003, Filed**

**NOTICE:** [\*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

**SUBSEQUENT HISTORY:** Review denied by *Kjos v. Am. Family Ins.*, 2003 Minn. LEXIS 684 (Minn., Oct. 21, 2003)

**PRIOR HISTORY:** Cass County District Court. File No. C701661. Hon. John P. Smith.

**DISPOSITION:** Affirmed.

**COUNSEL:** Steven R. Peloquin, Peloquin & Minge, P.A., New York Mills, MN (for appellant).

David P. Jendrzejek, Gregory J. Wiley, Moss & Barnett, P.A., Minneapolis, MN (for respondent).

**JUDGES:** Considered and decided by Anderson, Presiding Judge, Shumaker, Judge, and Halbrooks, Judge.

**OPINION BY:** Halbrooks

## OPINION

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant argues that the district court erred by granting summary judgment when genuine issues of material fact remain, and holding, as a matter of law, that appellant violated section 4.i of the parties' agency agreement and was properly terminated under section 6.h. Because we conclude that there are no genuine issues of material fact and respondent is entitled to judgment as a matter of law, we affirm.

FACTS

Appellant David Kjos began working as an insurance agent for respondent American Family Insurance in Walker, Minnesota on September 1, 1984. The terms of the parties' relationship were governed by an agency agreement, which was revised from [\*2] time to time by American Family. The most recent agency agreement had an effective date of January 1, 1993, and the parties agree that the terms of the 1993 agreement govern their relationship at all times relevant to this dispute. The 1993 agreement states that Kjos is an independent contractor and not an employee of American Family.

In 1997, Kjos and his wife, Ellen, decided to buy a house in Hawaii. Initially, they rented the house out for most of the year. In October 1999, Kjos's wife moved to Hawaii and began living in the house permanently, but Kjos stayed in Minnesota. Kjos spent two weeks in Hawaii in November 1997, September 1998, October 1999, March 2000, July 2000, and about two months beginning in January 2001.

On November 25, 1998, Kjos met with American Family District Manager Michael Berneck and told Berneck about his interest in moving to Hawaii in the future. Kjos told Berneck that it was only a matter of time before he moved there permanently. Kjos also told Berneck that he had explored the possibility of doing insurance work in Hawaii, but that it had not worked out. Kjos further stated that he would give American Family notice if he decided to move.

In December [\*3] 2000, Kjos applied to be the general manager of the Lanikai Shopping Center in Hawaii. While in Hawaii in January 2001, he interviewed for the position and was offered the job. Kjos accepted the job on a trial basis and told the shopping center that he would start on March 19, 2001.

On February 27, 2001, Kjos and his wife met with Berneck in Minnesota. Kjos told Berneck that he intended to resign from American Family effective Sep-

tember 1, 2001, which would allow him to maximize his extended earnings according to the terms of the 1993 agreement. He also told Berneck that they had sold their house in Walker, he was moving to Hawaii in two weeks, he had a job opportunity in Hawaii, and he was not sure if he would be coming back to Minnesota. Kjos told Berneck that Martha Isaacson,<sup>1</sup> a member of his staff, would run his insurance office from March until September. Berneck responded that he could not approve such an arrangement, but that he would inform American Family and would need a resignation letter from Kjos.

1 Martha Isaacson started working for Kjos in 1992, and was licensed to sell life, health, property and casualty insurance. She was also Kjos's sister-in-law.

[\*4] On March 7, 2001, Kjos met with Berneck again. Berneck told Kjos that he had three choices: (1) he could stay at the office in Walker until September and maximize his extended earnings; (2) he could leave for Hawaii on March 12, 2001 and resign at that time; or (3) the contract could be terminated. Kjos did not respond and left the meeting. He called Berneck five minutes later and told him that he wanted his options in writing.

Kjos sent a letter to Berneck on March 12, 2001. The letter stated that Kjos's wife would be returning to Hawaii on March 12, 2001, but that Kjos would be staying in Minnesota. Kjos also told Berneck that he planned on being out of the office and in Hawaii from March 14, 2001 until April 27, 2001 for a "vacation/cooling off period."

Kjos left for Hawaii on March 14, 2001 and began working full-time as the manager of Lanihau Shopping Center five days later. Although Kjos had told Berneck that he would be returning to Minnesota on April 27, 2001, he did not return. Kjos acknowledged in his deposition that he made a misleading and false statement to Berneck when he told Berneck that he was going to Hawaii for a vacation. On April 30, 2001, Kjos e-mailed Berneck [\*5] and told him that he would not be returning to Minnesota as planned and that he would miss an upcoming district meeting. Kjos then remained in Hawaii, working full-time at the shopping center.

On May 5, 2001, Berneck sent an e-mail to Kjos asking when Kjos expected to return to Minnesota, whether he was currently employed in Hawaii, and, if so, in what capacity. Berneck requested a response by May 10, 2001. Kjos e-mailed Berneck on May 10 and told him that he expected to return to Minnesota on May 26. Kjos later testified that he did not respond to Berneck's questions regarding his current employment because he was reluctant to tell Berneck and he wanted to have a face-to-face discussion with him. Kjos was struggling

with whether to return to his job in Minnesota or stay with his wife in Hawaii.

Kjos did not return to Minnesota on May 26, 2001. He received a letter from American Family Sales Director David Clark dated May 29, 2001. Clark's letter told Kjos that he was to return to his office in Walker by June 11, 2001 and that a failure to return would result in the termination of his agency agreement. As a condition of returning to work on June 11, 2001, Kjos was also to submit [\*6] a letter resigning his agency as of September 1, 2001, which was the date Kjos would have maximized his extended earnings and the date he had originally said that he wanted to resign. Clark also stated that Kjos's prolonged absence was not in the best interests of the company or its customers, that many agency initiatives remained undone, and that Kjos was not able to properly serve his customers while staying in Hawaii.

By May 2001, Kjos was unhappy with his management position at the shopping center and had submitted a letter of resignation. But because another employee was on vacation, Kjos agreed to continue working for a couple of weeks to see if things improved. Kjos decided that he wanted to return to Minnesota to continue working as an insurance agent for American Family permanently, but he felt that it no longer made sense to return because the letter from Clark stated that a condition of his returning was that he had to resign his agency effective September 1, 2001. As a result, Kjos withdrew his letter of resignation for the management position at the shopping center and continued to work there. Kjos notified American Family that he would not be returning to Minnesota [\*7] by June 11, 2001. By letter dated June 8, 2001, American Family notified Kjos that his agency contract would be terminated on June 11, 2001.

Kjos sued American Family, alleging that American Family wrongfully terminated the parties' 1993 agency agreement. American Family moved for summary judgment, which the district court granted. This appeal follows.

## DECISION

On an appeal from summary judgment, we ask whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, demonstrate that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal, we must "view the evidence in the light most favorable to the party against whom summary judgment was

granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

Here, American Family relied on sections 4.i and 6.h. [\*8] 2 of the 1993 agency agreement to justify its termination of the contract with Kjos. Section 4.i of the agreement states:

#### 4. Your Agreements

You Agree:

\* \* \* \*

i. To maintain a good reputation in your community and to direct your efforts toward advancing the interests and business of [American Family] to the best of your ability, to refrain from any practices competitive with or prejudicial to [American Family] and to abide by and comply with all applicable insurance laws and regulations.

Section 6.h states:

#### 6. Mutual Agreements

It is mutually agreed that:

\* \* \* \*

h. 1) Except as provided in paragraph 2) below, this agreement may be terminated by either party with or without cause by giving written notice to the other and shall be deemed terminated as of the date specified in that notice. If both parties give notice, the earlier termination date shall control. This agreement shall automatically terminate upon your death or upon the date your license to act as an agent for [American Family] is suspended, revoked or canceled.

2) After two years from the effective date of this agreement or after the termination date of your Agent Advance Compensation Plan, whichever [\*9] is later, [American Family] will give you notice in writing of any undesirable performance which could cause termination of this agreement if not corrected. [American Family] will not terminate this agreement for those reasons for a period of six months after that written notice. In no case shall notice of undesirable performance be required prior to termination if the performance in question involves a violation of Sec. 4.i. or any other dishonest, disloyal or unlawful conduct; nor shall any notice be required in the event that [American Family] terminates substantially all agreements of this type throughout [American Family] or in a particular state or area.

### 1. Issues of Material Fact

Kjos argues that the district court erred in holding that there were no genuine issues of material fact as to

whether American Family wrongfully terminated the parties' 1993 agency agreement.

There is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons [\*10] to draw different conclusions.

*DLH*, 566 N.W.2d at 71. A genuine issue of material fact must be established by substantial evidence. *Id.* at 69-70. No genuine issue of material fact exists "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id.* at 69 (quotation omitted). Any doubt as to the existence of a genuine issue of material fact must be resolved in favor of finding that a fact issue exists. *Rathbun v. W. T. Grant Co.*, 300 Minn. 223, 219 N.W.2d 641, 646 (Minn. 1974).

First, Kjos asserts that the district court improperly weighed facts by finding that American Family received "numerous complaints" about Kjos's absence from his customers. Berneck testified that he received five or six complaints during the time that Kjos was in Hawaii. Isaacson testified that she only received one or two complaints at Kjos's office. But the testimony from Berneck and Isaacson is not contradictory and did not require the district court to determine the credibility of the witnesses or resolve an issue of fact. Because it is undisputed that Berneck received five or [\*11] six customer complaints, we conclude that the district court did not err by finding that American Family received "numerous complaints."

Second, Kjos asserts that the district court improperly weighed the facts by finding that appellant "lied" in his March 12 letter to Berneck regarding his intentions on remaining in Hawaii. The record shows that Kjos wrote Berneck on March 12 that he was going to Hawaii from March 14 until April 27 for a "vacation/cooling off period." In his deposition, Kjos admitted that the statement was "misleading" and "false." And the record shows that Kjos started working full-time as a manager of a shopping center in Hawaii. Because Kjos admitted that the statement in the letter was false and misleading, the evidence is undisputed and the district court did not improperly weigh the facts by finding that Kjos "lied" in the letter.

Third, Kjos asserts that there is no evidence to support the district court's finding that Kjos became a "permanent resident of Hawaii in mid-march 2001." Whether Kjos was technically a permanent resident of Hawaii is not material to the issue of whether American Family properly terminated the agency agreement. Because Kjos's residency [\*12] is not material, we conclude that

there is no genuine issue of material fact concerning his residency.

## 2. Agency Agreement

Kjos contends that the district court erred in holding that the language in section 4.i of the 1993 agency agreement is clear and unambiguous. He also argues that the court erred in holding, as a matter of law, that Kjos failed to direct [his] efforts toward advancing the interests and business of [American Family] to the best of [his] ability, and to refrain from any practice competitive with or prejudicial to [American Family].

Generally, interpretation of the terms of a contract is a question of law that we review de novo. *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). But if the terms of the contract are ambiguous, the determination of the parties' intent at the time they entered the contract through the use of extrinsic evidence presents a question of fact. *In re Petition of Minn. Power & Light Co.*, 435 N.W.2d 550, 563 (Minn. App. 1989), review denied (Minn. Apr. 19, 1989). Ambiguity exists where the language of a contract is subject to two or more reasonable interpretations. [\*13] *Goebel*, 567 N.W.2d at 515; *Estate of Schultz v. Schultz*, 194 Wis. 2d 799, 535 N.W.2d 116, 118 (Wis. Ct. App. 1995); see also *Columbia Propane, L.P. v. Wis. Gas Co.*, 2003 WI 38, 661 N.W.2d 776, 783, 261 Wis. 2d 70 (Wis. 2003) ("A term or provision in a contract is not ambiguous merely because it is general enough to encompass more than one interpretation; rather, we seek to ascertain its meaning by looking at the intent of the contracting parties.").<sup>2</sup> The determination of whether ambiguity exists is a question of law, which we review de novo. *Current Techs. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995).

2 The parties' 1993 agency agreements states:

This agreement shall be deemed to have been made within the State of Wisconsin and shall be interpreted and construed in accordance with the laws of the State of Wisconsin.

Individual contract provisions are not interpreted in isolation, but, rather, in the context of the [\*14] entire agreement. *Schultz*, 535 N.W.2d at 118. Our primary purpose in interpreting the language of a contract is to give effect to the intent of the contracting parties. *Dieter v. Chrysler Corp.*, 2000 WI 45, 610 N.W.2d 832, 836, 234 Wis. 2d 670 (Wis. 2000). Additionally, a contract should be interpreted in the manner that it would be understood by persons in the business to which the contract relates. *Columbia Propane*, 661 N.W.2d at 783.

In granting summary judgment, the district court held that "the plain language of the agreement is clear

and unambiguous." Kjos argues that the language in the agency agreement requiring him to "direct [his] efforts toward advancing the interests and business of [American Family] to the best of [his] ability" and "to refrain from any practices \* \* \* prejudicial to [American Family]" is ambiguous and that there is a genuine issue of material fact as to how the parties intended to define this language.

General language as used in the agency agreement does not necessarily create ambiguity. When examining the language of section 4.i of the agency agreement, we consider the language in the context [\*15] of the entire agreement and note that the contract is an agency agreement whereby Kjos agreed to act as an independent contractor/insurance agent for American Family. In that context, the language of section 4.i that is relevant to this case is not susceptible to more than one reasonable interpretation. It simply requires that Kjos direct his efforts toward soliciting new customers and policies for American Family, providing customer service for current customers, and not committing acts harmful to American Family. We will not read ambiguity into a contract where no ambiguity exists. While there may be other circumstances where similar language may be deemed ambiguous, we agree with the district court that the language of section 4.i does not create a genuine issue of material fact, because the language is clear and unambiguous.

Next, Kjos contends that the court erred as a matter of law in concluding that Kjos violated the terms of section 4.i of the agreement. The record in this case shows that Kjos spent about two months in Hawaii starting in January 2001 while he was employed with American Family. During that time, he interviewed for a full-time position as a manager of a shopping [\*16] mall, was offered and accepted the job, and agreed to start on March 19, 2001. Kjos returned to Minnesota in the end of February, but left for Hawaii again on March 14, 2001 and began working full-time five days later. While Kjos told American Family that he would return to Minnesota on April 27, 2001, he did not. Kjos also told American Family that he would return to Minnesota on May 26, 2001, and did not. When American Family advised Kjos that his contract would be terminated if he did not return to Minnesota to run his office by June 11, 2001, he still did not return. Starting in January 2001, Kjos lived in Hawaii, with the exceptions of short periods of time at the end of February and the beginning of March 2001. During that time, he had a staff member operating his agency office in Minnesota, and they talked daily.

While Kjos was in Hawaii, his agency's new-application rate was similar to what it had been over the previous five years, and there was not a substantial loss of business. But the record shows that Kjos's customers always asked for him when they called and that, while

Kjos was in Hawaii, he did not take their calls or meet with them. While staff members in Kjos's office [\*17] received one or two complaints regarding his unavailability, Kjos's supervisor received five or six. One customer took his business elsewhere as a result of Kjos's lack of availability. The record also shows that the staff member who was operating Kjos's agency sometimes referred customers to other American Family agencies because she did not feel comfortable and was not qualified to deal with certain types of commercial insurance. Kjos was qualified and could have addressed a customer's need for commercial insurance if Kjos had been available.

Kjos testified that he believed it was important for an insurance agent to live in the community that he served, to get to know the people, and to be aware of community events. He also testified that it was important for insureds to be able to talk directly with their insurance agent and that it was important for an agent to be able to meet personally with insureds or potential insureds to discuss their claims or other insurance matters. During his deposition, Kjos also testified to the following:

Q Now, when you were occupied in your duties as manager of the shopping mall, and by definition you were not engaged in activities on behalf of [\*18] American Family; right?

A No, I was not. I was in contact with my office.

\* \* \* \*

Q Well, isn't it true that you, by definition could not apply your best efforts to American Family's business if you're employed full-time as a mall manager's job in Hawaii?

A Yes.

\* \* \* \*

Q Going back to the first page, the bottom paragraph, Mr. Clark writes, "Your extended absence from the agency and subsequent employment in Hawaii is certainly prejudicial to the best interests of our customers and our company." And that's true; isn't it?

A Yes.

Q [Mr. Clark] also says, "Many agency initiatives (ITV, PIR, & APP Programs) remain undone." Is that true, too?

A Yes.

\* \* \* \*

Q [Mr. Clark] says, "While living in Hawaii you are unable to provide the service which your customers have a right to expect." And that was true too; right?

A Yes.

\* \* \* \*

Q But isn't it true that working 40 hours plus per week in your full-time position as general manager, that when you were doing that, you simply could not direct your efforts toward advancing the interests of American Family to the best of your ability; isn't that a fact?

A Yes.

By Kjos's own admissions, while working full-time in Hawaii, he [\*19] was not engaged in activities on behalf of American Family, did not apply his best efforts toward American Family's business, and did not direct his efforts toward advancing the interests of American Family to the best of his ability. Thus, we conclude that Kjos was in violation of section 4.i of the agency agreement.

The evidence also shows that while Kjos was in Hawaii working as a manager of a shopping center, instead of working as an insurance agent, he was committing acts that were harmful to American Family. There was at least one complaint to his office, and numerous complaints to the district manager regarding Kjos's lack of availability. At least one of Kjos's customers took his business elsewhere because Kjos was not available. And Kjos's office was forced to refer business to other American Family offices because Kjos was not available to address some customers' insurance needs. Kjos conceded that his extended absence from his Minnesota office was prejudicial to the interests of American Family and its customers, that there were agency initiatives that did not get done in his absence, and that he was unable to provide the service that his customers deserved. We, therefore, [\*20] conclude that Kjos also violated section 4.i of the agency agreement, which required Kjos "to refrain from any practices \* \* \* prejudicial to [American Family]." The district court did not err in holding that Kjos was not wrongfully terminated under section 6.h of the agency agreement and that American Family was entitled to judgment as a matter of law.

**Affirmed.**