

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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F. MATTHEW SMITH, M.D.,

Plaintiff/Counter-Defendant,

v

File No. 05-24879-CK  
HON. PHILIP E. RODGERS, JR.

STEVEN V. THOMAS, M.D.,

Defendant/Counter-Plaintiff.

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Gary M. Ford (P29979)  
Attorney for Plaintiff/Counter-Defendant

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Attorney for Defendant/Counter-Plaintiff

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DECISION AND ORDER REGARDING  
CROSS MOTIONS FOR PARTIAL SUMMARY DISPOSITION

Defendant Steven V. Thomas, M.D. ("Thomas") began practicing in Traverse City in 1995. In 1998, Plaintiff F. Matthew Smith, M.D. ("Smith") graduated from medical school and relocated to Traverse City to join Thomas' practice. Together they formed Great Lakes Plastic Surgery Center, P.C. ("GLPSC"), a professional service corporation, through which they provided medical services and performed plastic surgery in the Grand Traverse area. Smith and Thomas are the sole shareholders of GLPSC and each hold 1,000 shares of stock.

During the formation of the corporation, Thomas' attorney prepared a Buy/Sell Agreement and Employment Agreements. The Buy/Sell Agreement was executed on April 20, 1998. It is undisputed that the Buy/Sell Agreement was designed to protect Thomas in the event that the joint enterprise did not work out and to protect either doctor in the event the other decided to leave and the remaining doctor was saddled with overhead of a practice set up for two doctors. It is also undisputed that the Buy/Sell Agreement has never been modified and that it remains in full force and effect.

Pursuant to the Buy/Sell Agreement, if the employment of either doctor is terminated, the corporation has the option of purchasing that doctor's shares. If the corporation does not exercise this option, the other doctor has the option of purchasing the shares. The purchase price is "the Book Value per share as of the Valuation Date. The Valuation Date shall be the last day of the fiscal quarter immediately preceding the event triggering the option or obligation to purchase." "Book Value" per share is defined as follows:

. . . the difference between the Company's total assets and total liabilities as determined from the Company's balance sheet as of the close of business on the determination date, excluding, however, accounts receivable, divided by the number of shares then outstanding. If the Valuation Date is other than a fiscal year end, the balance sheet of the Company shall be computed from the last annual statement brought down to the close of business on the Valuation Date. In preparing a balance sheet as of any date that is not the end of the Company's fiscal year, all normal year-end accruals and deferrals, including profit sharing contributions, if any shall be made on a prorated basis. All balance sheets shall be prepared in accordance with generally accepted accounting principles consistently applied. If there is disagreement concerning calculation of the Book Value in determining the purchase price, the decision of the Company's independent certified public accountant as to the purchase price shall be final and binding on all parties."

Over time Smith and Thomas developed philosophical differences in office management, billing matters, and employment matters. However, the corporation was successful and their patients received a high degree of professional care. In March of 2005, Smith and Thomas began meeting with corporate counsel to try to work out their differences. They were advised that the Buy/Sell Agreement would apply in the event of a break up and that according to the Buy/Sell Agreement the valuation of the stock would not take into consideration the accounts receivable.

Thomas gave Smith a letter, dated June 19, 2005, which, in part, stated:

I believe it is in both our best interests if I make it easy for you to proceed by just leaving the practice. I don't know how long it would take for me to find new office space, but I will begin immediately. In the meantime, we should have [corporate counsel] start investigating the contract [Buy/Sell Agreement] to see how it is most smoothly carried out.

Thomas proceeded to establish a new separate medical practice. In the meantime, the parties worked with corporate counsel to determine how to handle Thomas' request to leave, review of Buy/Sell Agreement and determine the book value of Thomas' stock. Corporate counsel eventually contacted the company's CPA regarding closing out the June 2005 books with

information that would be needed to establish the book value of the stock. He advised the parties that the determination of book value would not include the accounts receivable which, in his opinion, belonged to the corporation.

On August 15, 2005, Smith notified Thomas in writing of his intention to exercise his option under the Buy/Sell Agreement to purchase Thomas' shares. Thomas then indicated in a letter to Smith that "it would be business as usual until December 2, 2005." On September 29, 2005, Thomas advised Smith that he would be remaining an employee of GLPSC "indefinitely." In the meantime, Thomas continued with his plans to construct and open a new office. On March 3, 2006, Thomas provided another notice of intent to terminate his employment with GLPSC and shortly thereafter relocated to his new office. In April 2006, Smith again notified Thomas of his intent to exercise his option to purchase Thomas' shares of GLPSC.

This lawsuit was filed by Smith to adjudicate the parties' rights under the Buy/Sell Agreement. Thomas filed a Counterclaim seeking dissolution of GLPSC. Both parties filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10).

#### I.

#### THE MOTIONS

Smith contends that the triggering event was Thomas' letter of either June 19, 2005 or March 3, 2006 and that valuation of Thomas' stock does not include accounts receivable. He relies upon the Buy/Sell Agreement which calls for calculation of book value, "excluding, however, accounts receivable" and the parties' practice under their Employment Agreements of operating separate profit centers.

Thomas, on the other hand, contends that the issue to be decided is whether the Buy/Sell Agreement is enforceable upon the facts that have been presented. If so, he asserts that the triggering event was his December 2005 notice that he was terminating his employment with GLPSC. He further contends that Smith never extended a purchase offer based upon a balance sheet prepared according to generally acceptable accounting principles as called for by the Buy/Sell Agreement. He argues that it would be inappropriate for the Court to ignore the requirement that the balance sheet be prepared according to generally acceptable accounting principles because to do so would inappropriately reform the Agreement and substitute cash basis accounting in its place. In addition, he argues that ignoring the requirement that the purchase price be determined, in the event of disagreement, by the corporation's independent CPA would

likewise inappropriately reform the contract. In lieu of enforcing the Buy/Sell Agreement as written, Thomas asks the Court to dissolve the corporation.

## II.

### GENERAL PRINCIPLES FOR INTERPRETING CONTRACTS

The construction and interpretation of a contract presents questions of law. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63, 620 NW2d 663 (2000). The Court must read the agreement as a whole and attempt to apply the plain language of the contract itself to enforce the parties' intent. *Id.*

"[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). The fact that a contract does not define a relevant term does not render the contract ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Rather, if a term is not defined in a contract, we will interpret such term in accordance with its "commonly used meaning." *Id.*; *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 113-114; 595 NW2d 832 (1999). A term of a contract can be interpreted in accordance with the commonly used meanings. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

"If the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 32 NW2d 66 (1965); see also *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement. *Henderson v State Farm Fire Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

Where the language used is clear, interpretation and enforcement are limited to that language. *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 656 NW2d 453 (2004). Parties are presumed to understand and intend what the language employed clearly states. *Id.* The courts will not create ambiguity where the terms of the contract are clear.

“It is axiomatic that if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10).” *Henderson, supra* at 353. “Conversely, if reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists.” *Id.*

Whether extrinsic evidence should be used in contract interpretation is a question of law. See *Glenwood Shopping Ctr Ltd Partnership v Kmart Corp*, 136 Mich App 90, 99; 356 NW2d 281 (1984). Generally, the decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003).

The practice of interpreting contracts on the basis of reasonable expectations rather than the plain language of the contract was repudiated. *Wilkie, supra* at 63. Thus, absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement. *Henderson, supra* at 354.

### III.

#### APPLICATION

The Buy/Sell Agreement provides that the purchase price of the shares of the doctor who leaves the practice “shall be the Book Value per share as of the Valuation Date. The Valuation Date shall be the last day of the fiscal quarter immediately preceding the event triggering the option or obligation to purchase.” “Book Value” per share is defined as follows:

...the difference between the Company’s **total assets and total liabilities as determined from the Company’s balance sheet as of the close of business on the determination date, excluding, however, accounts receivable, divided by the number of shares then outstanding.** If the Valuation Date is other than a fiscal year end, the balance sheet of the Company shall be computed from the last annual statement brought down to the close of business on the Valuation Date. In preparing a balance sheet as of any date that is not the end of the Company’s fiscal year, all normal year-end accruals and deferrals, including profit sharing contributions, if any shall be made on a prorated basis. **All balance sheets shall be prepared in accordance with generally accepted accounting principles consistently applied.** If there is disagreement concerning calculation of the Book Value in determining the purchase price, the decision of the Company’s independent certified public accountant as to the purchase price shall be final and binding on all parties.” [Emphasis added].

A.

Accounts Receivable

The parties disagree over whether the accounts receivable are to be considered in determining the value of Thomas' stock.

While it may appear at first blush as if there is an ambiguity because "book value" is defined as "the difference between the assets and liabilities as determined from the Company's balance sheet, **excluding accounts receivable**, divided by the number of shares then outstanding" but then the balance sheet is to be prepared **in accordance with generally accepted accounting principles** which may or may not include accounts receivable, the Court does not believe the contract is ambiguous.

The Buy/Sell Agreement was drafted by Thomas' attorney to protect Thomas in the event that his newly created joint enterprise with Smith did not work out and Smith decided to leave the practice. In order to protect Thomas and his already existing practice, it was necessary to exclude the accounts receivable from the calculation of the book value.

It does not matter that in the end Thomas was the one who left the practice. The Buy/Sell Agreement was never amended or modified. It means the same thing today that it meant when it was drafted. Therefore, the book value of Thomas' stock must be calculated by taking the difference between the Company's total assets and total liabilities, excluding accounts receivable, and dividing by the number of outstanding shares. The total assets and liabilities will be determined by preparing a balance sheet in accordance with generally accepted accounting principles. The balance sheet is to be computed from the last annual statement brought down to the close of business on the Valuation Date. The Valuation Date is the last day of the fiscal quarter immediately preceding the event triggering the option or obligation to purchase.

B.

Triggering Event

Therefore, it is critical to determine whether there has been a triggering event and, if so, when. Smith claims that the triggering event was Thomas' letter of June 19, 2005. Thomas claims that the triggering event was his termination letter of March 3, 2006.

It is undisputed that Thomas initially notified Smith by letter, dated June 19, 2005, that he would be "leaving the practice" as soon as he could "find new office space." On August 16, 2005, Smith informed Thomas that he was exercising his option to buy him out. On July 21, 2005,

Thomas made a \$2,500 earnest money deposit toward the purchase of a new office in the Copper Ridge Development. From that point forward, Thomas consistently pursued the purchase, construction and opening of a new office. On September 27, 2005, his attorney notified Smith that Thomas would vacate the GLPSC on December 2, 2005. On March 3, 2006, Thomas wrote Smith and advised him that "I will be maintaining separate office facilities as of March 13, 2006." On March 10, 2006, he actually began relocating to his new office and, on March 13, 2006, his new office was opened. On April 10, 2006, Smith again notified Thomas that he was exercising his option to purchase Thomas' shares.

According to the Buy/Sell Agreement, upon termination of employment, the Company had the option, exercisable for sixty (60) days, to purchase the leaving shareholder's shares. The Company could exercise this option by written notice to the terminating shareholder within the sixty (60) day option period. If the Company did not exercise the option, at the expiration of the Company's option, the remaining shareholder had the option, exercisable for sixty (60) days, to purchase the terminating shareholder's shares. The remaining shareholder could exercise the option by written notice to the terminating shareholder within the option period. The closing of a sale pursuant to the exercise of any option was to take place thirty (30) days after the exercise of the option. No closing has taken place in this case.<sup>1</sup> If neither the Company nor the remaining shareholder exercised the option, "the terminating Shareholder shall continue to own such Shares, which shall remain subject to all of the terms and conditions in this Agreement, except that the Company's obligation to purchase shall arise only upon death of the Shareholder."

"Termination of employment" occurs when either the Shareholder or the Company terminate the employment relationship. Since each of the parties was a 50% owner of the outstanding shares of stock in GLPSC, neither could terminate the employment of the other. Therefore, the question is whether Thomas terminated his employment and, if so, when.

The documentary evidence submitted by the parties establishes that Thomas continued to practice at the GLPSC location until he relocated his practice to Copper Ridge on March 13, 2006. Therefore, the triggering event was Thomas' relocating to Copper Ridge on March 13, 2006.

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<sup>1</sup>Smith has attempted to close but the dispute over the Buy/Sell Agreement prevented a closing. With the resolution of the issues concerning the Buy/Sell Agreement, the document itself has a mechanism to resolve further disputes regarding the price as it will be determined by an independent CPA.

C.

Accounting

Pursuant to the Buy/Sell Agreement, the "Valuation Date" is "the last day of the fiscal quarter immediately preceding the event triggering the option or obligation to purchase." Based on the above analysis, the valuation date is December 31, 2005. The book value of Thomas' stock is to be calculated by taking the difference between the Company's total assets and total liabilities, excluding accounts receivable, and dividing by the number of outstanding shares. The total assets and liabilities will be determined by preparing a balance sheet in accordance with generally accepted accounting principles consistently applied, except to the extent that generally accepted accounting principles would require that the accounts receivable be included in the determination of total assets and total liabilities. The balance sheet is to be computed from the last annual statement brought down to the close of business on December 31, 2005.

Further, the Buy/Sell Agreement expressly provides that the decision of the Company's independent certified public accountant as to the purchase price shall be final and binding. The parties have indicated some concern over the independence of the Company's certified public accountant. Therefore, if the parties do not wish to designate CPA Flaherty to prepare the accounting and cannot agree on another CPA to prepare the accounting, the Court will select a certified public accountant to prepare the balance sheet and determine the value of Thomas' shares. The parties will bear the expense of the accounting equally.

IV.

DISSOLUTION

As an alternative to a buy-out, Thomas filed a Counter-Claim seeking dissolution of GLPSC.

Dissolution is a last resort remedy for corporate ills, to be applied when no other will give relief. *Stott Realty Co v Orloff*, 262 Mich 375; 247 NW 698 (1933).

Here, because of pre-planning that included the execution of an enforceable Buy/Sell Agreement, dissolution of this corporation is not necessary. The corporation is profitable and pays its employees and creditors in a timely fashion. The request for dissolution is denied.



CONCLUSION

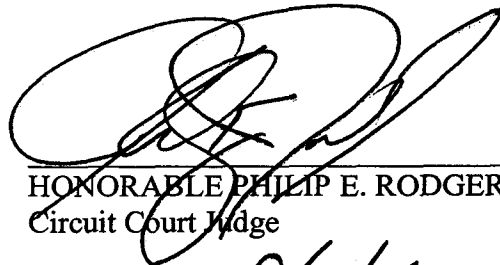
The Buy/Sell Agreement between the parties is controlling. Interpreted according to its plain language, Smith has the option to purchase Thomas' shares of GLPSC stock with the purchase price determined as of December 31, 2005 without including the accounts receivable. The parties shall have seven (7) days from the date of this order to designate Flaherty or another mutually agreed upon CPA to determine the value of Thomas' stock in GLPSC *and* notify the Court of their selection. If no selection is made by the parties, the Court shall appoint a CPA. The CPA shall have 21 days from the date of this Order to prepare the balance sheet and determine the value of Thomas' shares. The sale of the shares shall take place within 30 days of receipt of the accounting.

The Court retains jurisdiction to enforce this Order.

No valid grounds for a judicial dissolution of GLPSC have been presented. Therefore, Thomas' counterclaim for dissolution is dismissed with prejudice.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.



HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

Dated: \_\_\_\_\_

9/22/06