

IN THE COURT OF APPEALS OF IOWA

No. 0-380 / 98-2067
Filed January 10, 2001

**ROBERT K. SULLIVAN AND
WILLIAM WILKIE,
Plaintiffs-Appellees,**

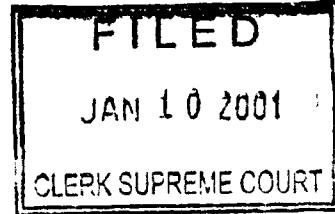
vs.

**MICHAEL W. PHARES,
Defendant-Appellant.**

**MICHAEL W. PHARES,
Cross-Petitioner/Appellant,**

vs.

**AUTO-TECH, INC.,
an Iowa Corporation,
Defendant to Cross-Claim/Appellee.**



Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

The defendant appeals from an adverse judgment in a breach of contract action. He argues the district court erred in holding the stock purchase agreement had been extended and was in effect when he sold his stock to the plaintiffs. He alternatively argues that if the agreement was in effect it was the parties' intent that the trade payables remain debts of the company. The defendant requests a judgment be entered in his favor for the consulting fees he is entitled to under the employment agreement as well as attorneys' fees and expenses. **AFFIRMED.**

Eric W. Johnson of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellant.

Kevin R. Rogers and Robert L. Ford of Swisher & Cohrt, P.L.C., Waterloo, for appellees.

Heard by Vogel, P.J., and Miller and Hecht, JJ.

MILLER, J.

Defendant Michael W. Phares appeals from the adverse judgment, following bench trial, in a breach of contract action. He argues the district court erred in holding that a stock purchase agreement had been extended and was in effect when he sold his stock to the plaintiffs, Robert K. Sullivan and William Wilkie. In the alternative, Phares argues that if the agreement was in effect it was the parties' intent that certain obligations remain as debts of the company. Phares requests the judgment in favor of the plaintiffs be reversed and judgment be entered in his favor for consulting fees he was to be paid under an employment agreement, as well as attorneys' fees and expenses. We affirm.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

Phares started his company, Auto-Tech Inc., in 1984. Auto-Tech is a specialty machine fabricator that designs and builds machines primarily used in automatic assemblies. Sullivan was a business acquaintance of Phares but he had no prior dealings with Auto-Tech. Wilkie had been employed at Auto-Tech since April of 1993 and worked with clients in developing concepts and proposals. Phares was approached by Wilkie and Sullivan regarding the sale of the stock of Auto-Tech to them, and an initial purchase price of \$465,000 was orally agreed upon. The parties then executed a written stock purchase agreement on September 22, 1994. The agreement was contingent upon Sullivan and Wilkie obtaining adequate financing as well as the execution of an employment agreement and a covenant not to compete. Paragraph five of the agreement specified that it would be null and void if these contingencies were not satisfied by the October 1, 1994 closing date.

Sullivan and Wilkie were not able to secure financing by October 1, however they did obtain financing later on October 18, 1994. They notified Phares of the approval of their financing and the parties executed an employment agreement and covenant not to compete as well as a personal guaranty on October 20, 1994, and closed the sale of Phares' stock on that date. In addition to the purchase price of \$465,000, under the employment agreement Phares was to be paid \$2750 per month for two years as a consulting fee.

Approximately three months after the sale was completed, a dispute arose as to who was responsible for the payment of certain obligations incurred by Auto-Tech prior to the closing date. Sullivan and Wilkie contended Phares was liable for the debts based on the provisions of paragraph 7(e) of the purchase agreement. Phares claimed the provision did not apply because the sale had not been completed by October 1, 1994 and thus the purchase agreement was null and void. After September 1, 1995 Sullivan and Wilkie withheld their monthly consulting fee payments to Phares and escrowed the funds.

Sullivan and Wilkie filed suit alleging Phares had breached the stock purchase agreement by failing to pay certain obligations, referred to by the parties as "trade payables." Trial was to the court. The district court, in its ruling issued October 20, 1998, found that when read together the stock purchase agreement, the employment agreement and covenant not to compete, and the guaranty presented a fully integrated document. The court held that pursuant to the clear and unequivocal language of the stock purchase agreement Phares was liable for the outstanding invoiced obligations of Auto-Tech which he knew of at the time of the closing. The court entered judgment in favor of Sullivan and

Wilkie in the amount of \$87,730.18 plus interest of \$34,226.80, as well as attorney fees and expenses. The court allowed Phares a setoff for the money which had been paid into the escrow account for the consultation fees in the amount of \$29,305.74.

Phares appeals arguing the district court erred in holding the stock purchase agreement had been extended and was in effect when the other agreements were executed on October 20, 1994. Alternatively, he argues that even if the agreement was in effect, it was the parties' intent that the trade payables remain debts of Auto-Tech and the court was incorrect in holding him liable for such debts. Phares requests judgment be entered in his favor for the consulting fees he is entitled to under the employment agreement as well as attorney fees and expenses. Other relevant facts and specific provisions of the stock purchase agreement will be set forth below as necessary.

II. STANDARD OF REVIEW

Our scope of review is determined by the nature of the trial proceedings. *Meyers v. Delaney*, 529 N.W.2d 288, 289 (Iowa 1995); *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 862 (Iowa 1991). As this case was filed and tried to the district court as a law action our review is limited to correction of legal error. Iowa R. App. P. 4. The trial court's factual findings carry the force of a special verdict and are binding on us if supported by substantial evidence. *Meyers*, 529 N.W.2d at 289-90; Iowa R. App. P. 14(f)(1). If the findings are ambiguous, they will be construed to uphold, not defeat, the judgment. *Byers v. Contemporary Industries Midwest Inc.*, 419 N.W.2d 396, 397 (Iowa 1988).

Evidence is substantial if a reasonable mind would accept it as adequate to reach the same findings. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995). Evidence viewed for its substantiality is to be viewed in the light most favorable to the judgment. *Id.*; see also *Blunt, Ellis & Loewi, Inc. v. Igram*, 319 N.W.2d 189, 192 (Iowa 1982). We are not bound, however, by the trial court's application of legal principles or its conclusions of law. *Iowa Fuel*, 471 N.W.2d at 862. "When the trial court has applied erroneous rules of law which materially affected its decision, we will reverse." *Falczynski*, 533 N.W.2d at 230.

III. MERITS

As stated above, the issues on appeal here are two-fold. First, we must determine whether the district court erred in holding that the stock purchase agreement was in effect when Phares sold his stock to Sullivan and Wilkie on October 20, 1994. Secondly, if we determine the district court did not err in so holding, we then must decide whether the district court erred in holding that the stock purchase agreement required that certain trade payables be paid prior to sale.¹ Encompassed within this second determination is the issue of whether the trial court was correct in sustaining objections to extrinsic evidence concerning the meaning of a contractual provision on the ground there was no ambiguity in the provision. We will deal with each of these issues separately.

A. Was the Stock Purchase Agreement Still in Effect at Closing

¹We note there were two categories of trade payables in dispute at trial, those that were invoiced at the time of closing and those that were uninvoiced at closing. The court found the uninvoiced payables were obligations incurred in the regular course of business and thus did not have to be paid. However, the court determined the invoiced trade payables, in the amount of \$87,730.18, were an obligation of the seller. This is the amount in dispute here.

Phares contends that the stock purchase agreement was not in effect when the sale of stock was closed, because the contingencies in the agreement were not met. The agreement provided for two contingencies which were to be met prior to the October 1, 1994 closing date set forth in the agreement. First, an employment agreement and covenant not to compete, with compensation for Phares of \$3200 per month for twenty-four months, was to be executed. Secondly, Sullivan and Wilkie were to obtain the financing for the project. The agreement provided:

In the event that either of the above contingencies is not satisfied on or before the Closing Date, this Agreement shall become null and void and all monies paid under the Agreement shall be returned to the paying party.

Phares argues, based on this language, that because neither of these contingencies was met by October 1, 1994, the agreement was null and void after that date.

The district court disagreed with this argument and determined that nothing in the parties' dealings or behavior between when the stock purchase agreement was signed on September 22, 1994 and when the deal was closed and Phares was paid on October 20, 1994, could have been interpreted as an abrogation of the stock purchase agreement. The court found that the three documents, the stock purchase agreement, the employment agreement, and the guaranty, constituted a fully integrated document and complied with the

requirements of Iowa Code section 554.8319 (1993)², which was in effect at the time of the transaction. The court found that the stock purchase agreement was extended and completed by the execution of the employment agreement and the personal guaranty, and proceeding with closing on October 20, 1994. Substantial evidence supports the trial court's findings, and its conclusion logically follows.

As the district court pointed out, in the time between October 1, 1994 and October 20, 1994, the parties continued to communicate about the completion of the financing and carried on as though the deal would still be closed as soon as Sullivan and Wilkie's financing came through. In addition, both the employment agreement and the guaranty made by Sullivan and Wilkie were executed on October 20, 1994. Both of these documents refer to a stock purchase agreement, and the September 22, 1994 stock purchase agreement is the only one executed by the parties. The stock purchase agreement in turn refers to the execution of an employment agreement and a covenant not to compete.

Phares is correct in pointing out there are certain inconsistencies between these documents. For example, both the employment agreement and the guaranty refer to a monthly payment to Phares of \$2750 whereas the stock purchase agreement was never changed to this renegotiated amount and still had the original \$3200 amount stated. Additionally, so as to avoid delaying the sale any further by waiting for another draft, the parties used a prior draft of a

² Section 554.8319 provides in part:

A contract for sale of securities is not enforceable by way of action or defense unless:

a. there is some writing signed by the party against whom enforcement is sought . . . sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price

guaranty Sullivan had with him which referred to a stock purchase agreement dated October 7, 1994. The date on the stock purchase agreement the parties executed here was September 22, 1994. Phares argues these inconsistencies prove the later executed documents did not extend the prior stock purchase agreement and they do not present a fully integrated document.

The district court stated in its findings that Phares had acknowledged the re-computing and changing of the monthly payment he would receive. Further, the court acknowledged the inconsistencies presented by Phares but found Sullivan and Wilkie had presented substantial credible evidence and had carried their burden. We are bound by the fact-findings of the district court if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1); *Meyers*, 529 N.W.2d at 289-90. Evidence is substantial if a reasonable mind would accept it as adequate to reach the same findings. *Falczynski*, 533 N.W.2d at 230. Evidence viewed for its substantiality is to be viewed in the light most favorable to the judgment. *Id.* We find the evidence in the record is adequate for us to reach the same conclusion and there is substantial evidence to support the trial court's findings of fact regarding the inconsistencies. Such inconsistencies do not necessarily prove these were separate documents, nor do they prevent a determination that the stock purchase agreement was in fact extended and closed on October 20, 1994.

We conclude the trial court did not commit legal error in finding the stock purchase agreement was extended and closed by the execution of the employment agreement and covenant not to compete, the guaranty, and the payment to Phares, on October 20, 1994. We next consider whether the trial

court erred in holding that the stock purchase agreement required that outstanding, invoiced trade payables of Auto-Tech be paid by the seller.

B. The Terms of the Stock Purchase Agreement and Extrinsic Evidence

A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or part of the contract. *Molo Oil Co. v. River City Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). Well-established principles guide us in the construction and interpretation of contracts. Contract construction deals with the process of determining the legal effect of a document whereas interpretation involves ascertaining the meaning of the contractual words. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins.*, 568 N.W.2d 815, 817 (Iowa 1997); *Berryhill v. Hatt*, 428 N.W.2d 647, 652 (Iowa 1988). The issue here deals with the interpretation of the stock purchase agreement. Interpretation is an issue for the court unless it is dependent upon extrinsic evidence or upon a choice among reasonable inferences from the extrinsic evidence. *Molo*, 578 N.W.2d at 225.

In construing written contracts the cardinal principle is the parties' intent must control and except in cases of ambiguity, this is determined by what the contract itself says. Iowa R. App. P. 14(f)(14). The intent of the parties may be determined from the terms of the agreement, what is necessarily implied from the terms, and the circumstances surrounding the formation and execution of the agreement. *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997).

In interpreting a contract, we give effect to language of the entire contract in accordance with its *commonly accepted and ordinary meaning*. Because we give effect to the language of the entire contract, it is assumed that no part of it is superfluous and an

interpretation that gives a reasonable meaning to all terms is preferred to one that leaves a term superfluous or of no effect.

Id. (emphasis added and citations omitted).

If the language of the contract is found to be ambiguous, extraneous evidence is admissible as an aid to interpretation. *Id.* When a contract is not ambiguous, it will be enforced as written. *Iowa Fuel*, 471 N.W.2d 859 at 862-63. "An ambiguity exists when, after application of the pertinent rules of interpretation to the contract language, a genuine uncertainty exists as to which of two reasonable constructions is proper." *Thornton v. Hubill, Inc.*, 571 N.W.2d 30, 33 (Iowa App. 1997) (citing *Berryhill*, 428 N.W.2d at 654); see also *Storage Tank Fund Bd.*, 568 N.W.2d at 818. "The test for ambiguity is an objective one: 'Is the language fairly susceptible to two interpretations?'" *Iowa Fuel*, 471 N.W.2d at 863 (quoting *Central Bearings Co. v. Wolverine Ins. Co.*, 179 N.W.2d 443, 445 (Iowa 1970)). Where there are ambiguities they are strictly construed against the drafter. *Id.* However, an ambiguity does not exist simply because the parties disagree on the meaning of a phrase. *Thornton*, 571 N.W.2d at 33. Generally contracts are to be construed as a whole, giving the words used their ordinary, not technical meaning, to achieve a practical and fair interpretation. *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 99 (Iowa 1995). Courts will not give a strained or unnatural reading to the words of the contract to create ambiguity where there is none. *Id.*

As set forth above, the intent of the parties must control. The issue for the trial court then was whether the trade payables were intended by the parties to be included within paragraph 7(e) of the stock purchase agreement. The intent of the parties is determined by the language of the contract itself, except in cases

of ambiguity. Therefore, the ultimate question became whether there were any ambiguities in the relevant portions of the stock purchase agreement. The relevant provisions are found in paragraph seven, which provides in relevant part:

7. SELLER'S REPRESENTATIONS AND WARRANTIES.

Seller hereby warrants and represents to all other parties to this Agreement that:

e. At the time of Closing, the only obligation of Auto-Tech to any creditor will be the balance of principal and interest on Auto-Tech's two mortgage notes in amounts equal to the balances as reflected on the amortization schedules for each as of the Closing Date, which amortization schedules have been furnished to Sullivan and Wilkie.

f. Seller will cause Auto-Tech to continue to conduct its business in the ordinary course through the Closing Date so that the only changes from the information provided on Auto-Tech's income statements and balance sheets as of August 31, 1994, with the exception of the following items, will be those changes occurring in the ordinary course of business. The exceptions to the foregoing are the contemplated distribution to the Seller by Auto-Tech of all life insurance policies on Seller's life and the motor home owned by Auto-Tech. Seller warrants that no change in the compensation package reflected on Auto-Tech's books as of August 31, 1994 will occur prior to and including the Closing Date.

The district noted that Phares held a unique position in negotiating and closing the sale of Auto-Tech because he founded the company, directed its inner workings, and had a superior knowledge of work in progress and business forecasts. It found the language of paragraph 7(e), that at the time of closing "the only obligation of Auto-Tech to *any* creditor will be the balance . . . on Auto-Tech's two mortgage notes" (emphasis added), to be clear and unequivocal. It held that the language of paragraph 7(e) required all accounts payable (all "trade payables" except those that had not yet been invoiced to Auto-Tech) be paid by

the seller, and that the failure to do so was a breach of the stock purchase agreement. We agree with the trial court's rationale and conclusion.

We believe the only reasonable interpretation of the words "the only obligation to *any creditor*" found in paragraph 7(e) is that Auto-Tech would be free and clear of *all* debt obligations to *all* creditors, except for those specifically listed as obligations Auto-Tech would still owe, namely the debt on the two mortgage notes. Construing the stock purchase agreement as a whole and giving the words used their ordinary meaning to achieve a practical and fair interpretation, the language in dispute is not fairly susceptible to two interpretations. See *Morgan*, 534 N.W.2d at 99; *Iowa Fuel*, 471 N.W.2d at 863. Thus, we find no ambiguity in paragraph 7(e) and the contract must be enforced as written. *Thornton*, 571 N.W.2d at 33 (citing *Spilman v. Board of Directors*, 253 N.W.2d 593, 596 (Iowa 1977)).

Phares appears to argue an ambiguity is created simply because the parties disagree as to the meaning of paragraphs 7(e) and 7(f). However, as stated above, an ambiguity does not exist simply because the parties disagree on the meaning of a phrase or phrases. *Thornton*, 571 N.W.2d at 33. We will not give a strained or unnatural reading to the words of the contract to create ambiguity where there is none. *Morgan*, 534 N.W.2d at 99.

Another principle of contract construction states that when a contract contains both general and specific provisions on a particular issue, the specific provisions are controlling. *Iowa Fuel*, 471 N.W.2d at 863. Phares contends the invoiced trade payables represent obligations incurred in the ordinary course of business and thus under paragraph 7(f) he should not have had to pay them.

Paragraph 7(e) is more specific as to the particular obligations of Auto-Tech at the time of closing. Paragraph 7(f) more generally states that the only changes on Auto-Tech's income statements and balance sheets from August 31, 1994 until closing will be those occurring in the ordinary course of business, specifically excepts two assets that will be distributed to Phares, and makes no reference to "obligation[s]" or "creditor[s]" as does paragraph 7(e). Thus, the specific provisions of paragraph 7(e) must control over the more general provisions of paragraph 7(f), as concerns "obligation[s]" and "creditor[s]."

Phares urges that extrinsic evidence shows that Sullivan and Wilkie knew that the disputed "trade payables" stayed with the company. He first relies on certain cash flow projections that were prepared at the request of potential lenders. Those projections appear to include certain "trade payables." However, it is unclear who prepared those projections. It may have been Phares who did so rather than Sullivan and Wilkie, or it may have been Phares, Sullivan and Wilkie together. Further, evidence concerning those projections was before the trial court, which resolved the trade payables issue against Phares. We cannot say that the evidence concerning the cash flow projections was so strong and overwhelming that a determination contrary to the trial court's is compelled as a matter of law.

Phares also argues that under Iowa Code section 554.2202 other extrinsic or parol evidence was admissible and should have been considered by the court. He points to evidence presented in a written offer of proof nine days after trial, the parties and trial court having apparently agreed to an offer of proof being made after trial.

The trial court had, during trial, sustained objections to questions posed to Phares by defense counsel concerning a conversation Phares purportedly had with Wilkie, before the signing of the stock purchase agreement, about the meaning of the agreement and concerns regarding some of the language in it. However, the offer of proof consisted not only of proposed testimony of Phares, but also included a first draft of the stock purchase agreement and a handwritten note from Phares to his accountant. The proposed testimony was that within a few days prior to the stock purchase agreement Phares and Wilkie had agreed that Phares would be paying only those trade payables which were due and payable before October 1, not those coming due after that date, because such "future payables" were not covered by paragraph 7(e) of the stock purchase agreement.

Neither party points out any trial court ruling that admits or rejects the evidence contained in the offer of proof. It thus appears that no error was preserved on any claim that the trial court should have, but did not, admit the evidence contained in the offer of proof. Further, if the trial court did admit and consider such evidence, given its clearly self-serving nature and its direct conflict with the specific and unambiguous terms of paragraph 7(e), we cannot say that such evidence, alone or in combination with the other evidence before the trial court, was so overwhelming that a determination that the trade payables were to remain with the company is compelled as a matter of law.

IV. ATTORNEY FEES AND EXPENSES

In addition to awarding Sullivan and Wilkie damages for the invoiced obligations of Auto-Tech to creditors, the court awarded them attorney fees and

expenses pursuant to paragraph 18 of the stock purchase agreement.

Paragraph 18 provides:

18. **GENERAL INDEMNIFICATION.** Each party to this Agreement agrees to indemnify each other party, and hold it harmless, for, from, and against all claims, damages, costs, and expenses (including reasonable attorneys' fees) attributable, directly or indirectly, to the breach by such indemnifying party of any obligation hereunder.

The district court held that Phares was entitled to a setoff against the judgment in the amount of \$29,305.74, which had been paid to the clerk of court by previous order. This represents the amount Sullivan and Wilkie had paid into an escrow account in lieu of paying Phares the monthly amount he was to be paid as consulting fees under the employment agreement.

From the fact the district court allowed Phares this setoff it is clear that the court decided Phares was entitled to this balance of consulting fees. The setoff was based on a judgment for Phares, even if not so stated. Thus the court must have found, although it did not explicitly state, that Sullivan and Wilkie were in breach of the employment agreement by failing to make these payments to Phares.

Phares urges that he was entitled to an award of attorney fees and expenses because of the plaintiffs' breach of the employment agreement. However, issues must ordinarily be not only presented to but also passed on by the trial court before they may be raised and adjudicated on appeal. *Beenavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). No issue concerning attorney fees and expenses for Phares was addressed in the trial court's October 20, 1998 ruling and judgment. A motion pursuant to Iowa Rule of Civil Procedure 179(b) seeking enlarged or amended findings and conclusions is

essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. *State Farm Mut. Automobile Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984). Phares did not file such a motion and thus error was not preserved on this issue or claim.

V. CONCLUSION AND DISPOSITION

We conclude that the trial court did not commit legal error in holding that the stock purchase agreement was still in effect when the parties closed the stock sale and that the terms of the agreement were clear and unambiguous concerning obligations to creditors. We conclude that such extrinsic evidence as the trial court may have properly considered was insufficient to overcome the express language of the stock purchase agreement concerning obligations to creditors. We further conclude that error was not preserved concerning Phares' request for an award of attorney fees and expenses. We affirm the trial court's judgment.

AFFIRMED.