

RENDERED: February 18, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2003-CA-002676-MR

DISCOVERY MANAGEMENT SERVICES, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 01-CI-000791

FRANCES F. FACKLER

APPELLEE

OPINION  
AFFIRMING IN PART AND  
REVERSING IN PART AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a civil judgment on a contract claim against Kentuckiana Radiology Services, Inc.

("Kentuckiana") awarding appellant \$8,000 less than the damages sought, and from an order finding that the president of

Kentuckiana had no individual liability on the claim. Since the issue regarding the amount of damages was not listed in

appellant's prehearing statement, the issue is precluded from our review pursuant to CR 76.03(8), and thus we affirm in part. However, we reverse the court's order adjudging that appellee had no personal liability on the contract, and thus remand the matter for further proceedings consistent with this opinion.

In November 1996, Discovery Management Services, Inc. ("Discovery") entered into a contract with Kentuckiana whereby Discovery agreed to do the Medicare billing for the radiology services that Kentuckiana provided to nursing home patients. In addition, Discovery agreed to provide marketing, consulting and advisory services to Kentuckiana. In exchange for these services, Kentuckiana agreed to pay Discovery a commission on the Medicare claims processed by Discovery. On January 31, 2001, Kentuckiana filed suit against Discovery alleging that Discovery had breached the contract by failing to timely and efficiently process the Medicare claims and by failing to provide the marketing, consulting and advisory services required under the agreement. Discovery filed a counterclaim alleging that Kentuckiana failed to pay \$33,035 in fees owed to it under the contract. Discovery also filed a third-party complaint against Francis Fackler, president of Kentuckiana, alleging individual liability under the contract. A trial on all the claims began on September 3, 2003. At the close of the evidence, Fackler moved for a directed verdict, maintaining that

she was not individually liable under the agreement. The court granted the directed verdict in favor of Fackler individually. The jury ultimately entered a verdict in favor of Discovery on its counterclaim, awarding it \$25,000 of the \$33,035 sought. Discovery now appeals the directed verdict for Fackler and the award of \$25,000 in damages.

Discovery first argues that the court erred in adjudging that Fackler was not individually liable on the contract. The first paragraph of the contract provided:

This Agreement ("Agreement") is entered into as of 1<sup>st</sup> day of November, 1996, (the "Effective Date") by and between Discovery Management Services, Inc. located at 15928 Overbrook, Stanley, KS 66224 ("Discovery"); and Kentuckiana Radiology Services, Inc., located at 421 Spring Street, Jeffersonville, Indiana, 47130 ("Company"), and Frances F. Fackler, R.T.(R), a principal owner of the Company ("Individual"), joint and severalty ("Company" and "individual" are collectively called "Owner").

At the end of contract, there were three signature lines: one entitled "Company" signed by Frances F. Fackler, with her "Title" listed as "President"; one entitled "Discovery" signed by Jon Schwarz, with his "Title" listed as President; and one entitled "Individual" signed Frances F. Fackler, with no "Title" line.

Discovery argues that because Fackler the "Individual" was stated to be a party to the contract and because Fackler

signed the contract as an "Individual", she was personally liable under the contract. Fackler argues that the contract was clearly ambiguous relative to whether she signed the contract individually or only as an agent of the company. Fackler points to the fact that "Individual" is defined at the beginning of the contract as Frances Fackler, principal owner of the company, and "Company" is defined as "Kentuckiana Radiology Services, Inc.". Fackler contends, therefore, that when she signed as "Individual" at the end of the contract, she believed she was signing as owner of the company.

Interpretation of a contract is a matter of law for court determination, subject to *de novo* review on appeal. Cantrell Supply, Inc. v. Liberty Mutual Insurance Co., 94 S.W.3d 381 (Ky. App. 2002). The trial court ruled in favor of Fackler, citing Simpson v. Heath & Co., 580 S.W.2d 505 (Ky. App. 1979). In Simpson, the president of the company signed his name followed by "Pres." to a guaranty provision in a lease agreement. This Court adjudged that the fact that he signed the agreement as president created an ambiguity as to whether the parties intended that he would be bound individually on the agreement. And since there were no affidavits tending to establish this intent, the Court adjudged that there were material issues of fact precluding the summary judgment entered against the president individually.

Discovery argues that Simpson can be distinguished from the instant case by the fact that Fackler, the individual, was an actual party to the contract and that Fackler clearly signed the contract as an individual. Discovery also notes that the contract contained the language "jointly and severalty (sic)" after Fackler's name in the contract, a further indication that Fackler was obligating herself personally on the contract.

We agree that Simpson is clearly distinguishable from the case at hand. In the instant case, there was a separate signature line entitled "Individual" which Fackler signed without a notation that she was signing as an agent of the company. More significantly, the contract specifically states that Fackler, the "Individual", was a party to the contract along with Kentuckiana. The fact that Fackler is also referred to as a "principal owner" in that section and that the company and the individual are collectively referred to as the owner in the contract is immaterial in our view. Fackler can be the owner of the company and nevertheless assume personal responsibility under the contract if she is also signing in an individual capacity.

In the absence of an ambiguity, courts will interpret contracts by assigning language its ordinary meaning. Frear v. P.T.A. Industries, Inc., 103 S.W.3d 99 (Ky. 2003). We believe the agreement was unambiguous relative to Fackler's personal liability

under the contract. Fackler, the "Individual", was a party to and signed the contract. "Individual" is defined as "relating to or characteristic of a single person . . . ." Webster's New World Dictionary 717 (2d college ed. 1978). From the language of the contract, we believe it is clear that the parties intended that Fackler would be personally bound under the agreement. Accordingly, the order granting the directed verdict in favor of Fackler is reversed.

Discovery next argues that it was error for the court not to award the full amount it alleged it was owed under the contract, \$33,035. It is Discovery's position that once the jury decided that the contract had been breached, it was obligated to award the full amount owed. Fackler maintains that this issue was not preserved for appellate review because it was not included in Discovery's prehearing statement as required by CR 76.03(8).

CR 76.03(8) states, "A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." The only issue listed by Discovery in its prehearing statement was the question of Fackler's individual liability on the contract, and Discovery did not move to supplement the prehearing statement as allowed under the rule. Unlike Capital Holding Corp. v. Bailey, 873 S.W.2d 187

(Ky. 1994), Discovery did not list any issue in the prehearing statement even remotely related to the damages issue and Fackler did not wait until a motion for rehearing to challenge the prehearing statement. Accordingly, the issue of damages is precluded from our review. Osborne v. Payne, 31 S.W.3d 911 (Ky. 2000).

For the reasons stated above, we affirm the Jefferson Circuit Court in part on the issue of the amount of damages, and reverse in part as to the order adjudging that Fackler had no personal liability on the contract, and remand the matter for further proceedings.

ALL CONCUR.

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