

No. 1-12-0324

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ADRIANA BAZYDLO-MARCHANT, individually, and)	Appeal from the Circuit Court
as Executrix of the Estate of James Marchant, deceased,)	of Cook County
)	
Plaintiff-Appellant,)	
)	
v.)	09 L 13390
)	
MAXUM SPORTS BAR & GRILL, LTD., and VALLEY)	
INN, INC.,)	
)	
Defendants)	Honorable
)	James E. Sullivan,
)	Judge Presiding.
(CHRISTOPHER MARCHANT and CHAD)	
MARCHANT,)	
)	
Intervenors-Appellees).)	

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 HELD: The trial court did not err in finding the existence of an agreement to distribute funds recovered on behalf of the decedent's estate.

¶ 2 Plaintiff Adriana Marchant, individually, and as executrix of the Estate of James

Marchant, deceased, and intervenors Christopher and Chad Marchant are the heirs of decedent

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James Marchant. Various causes of action were brought on behalf of the decedent's estate and settled with the funds to be distributed among the heirs. Plaintiff filed a motion to set a distribution hearing, asking the trial court to conduct an evidentiary hearing to determine the percentage of distribution for the settlement funds for the heirs. The trial court held that the parties had agreed to distribute the money: 50% to plaintiff and 25% to each of the intervenors; and ordered the distribution of the settlement funds.

¶ 3 Plaintiff appeals, arguing that the trial court erred in finding that the parties entered into an enforceable agreement that all funds recovered would be distributed with 50% to plaintiff and 25% to each of the intervenors.

¶ 4 In November 2009, plaintiff filed a wrongful death complaint against defendants Maxum Sports Bar & Grill, Ltd., and Valley Inn, Inc., alleging dram shop liability for serving William Rogge on or about November 22, 2008. Rogge became intoxicated and attempted to drive home. Rogge lost control of his vehicle and struck the decedent's vehicle. The decedent sustained serious injuries and subsequently died. In January 2010, plaintiff filed a stipulation to dismiss indicating that the matters in controversy had been settled. Plaintiff later filed a petition to modify the dismissal order in which she requested that the trial court retain limited jurisdiction to approve the wrongful death settlement and adjudicate outstanding liens. The trial court granted this motion.

¶ 5 In November 2010, plaintiff filed a petition to settle the wrongful death cause of action. The petition stated that plaintiff received \$100,000 from Rogge's insurance carrier. Plaintiff also received \$400,000 from an auto insurance policy carried by the decedent and plaintiff, which was

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the policy limit for underinsurance benefits. The dram shop defendants settled for an aggregate amount of \$116,000. The total recovery was \$616,000. Plaintiff later filed an amended petition to settle in December 2010, but the amount of recovery remained the same. In December 2010, intervenors filed their petition to intervene in the case and the petition to settle. The petition alleged that the decedent died in car accident in November 2008, shortly after marrying plaintiff. Intervenors are the adult children of the decedent. They asserted that they had a right to intervene because of their direct interest in the funds sought to be distributed pursuant to the petition to settle. The intervenors filed an amended petition to intervene in January 2011.

¶ 6 In their petition, the intervenors contended that in February 2009, they agreed to be represented, along with plaintiff, by the Margolis Law Firm (Margolis). The intervenors asserted that Margolis brokered an agreement between plaintiff and the intervenors to share the net recovery from all claims on behalf of decedent's estate in the following percentages: 50% to plaintiff and 25% to each of the intervenors (50/25/25 Agreement). The intervenors stated that Margolis failed to honor the agreement and their interest would be affected by any settlement order. The intervenors attached several exhibits to the petition.

¶ 7 One exhibit consisted of copies of several emails between the intervenors and Charles Candiano, the attorney handling the case at Margolis. The first email, dated February 6, 2009, was written by Christopher's wife and sent to Candiano. The email stated, "Also, I spoke to Chris and he spoke to Chad and they are both in agreement of Audrey [*sic.*] getting 50% and Chris and Chad both getting 25%. What do we need to do make this official?" The second email, dated April 27, 2009, was written by Candiano and sent to Christopher's email, but

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addressed to Christopher's wife. The email included the following statement:

"Any action prosecuted on behalf of the estate would become an asset of the estate to which Chad, Chris, and Adriana would all have legitimate claims. It has already been agreed that if any such action is prosecuted, Chad, Chris, and Adriana would share the net proceeds in the following distribution:

Adriana - 50%

Chad - 25%

Chris - 25%"

¶ 8 The third email, dated June 4, 2009, was also prepared by Candiano and sent to Christopher's email address and was addressed to Christopher and his wife. The email discussed the distribution as follows.

"As I indicated above, Adriana Marchant has a separate claim to these funds under a theory of Loss of Consortium. We intend to propose that this claim be valued at 20% of the net recovery. Using the figure of \$200,000.00, this would result in Adriana receiving \$40,000.00 for that claim. We intend to propose to the Judge that the remaining funds be distributed pursuant to our prior agreement whereby Adriana Marchant would receive 50% of the remaining funds, Christopher Marchant would receive 25% of the remaining funds, and Chad Marchant would receive 25% of the

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remaining funds. As you may recall, the agreement also requires that the attorneys fees and expenses be apportioned using these percentages. Graphically, it looks like this:

Adriana Marcant (loss of consortium)	\$40,000.00
Adriana Marchant (bodily injury claim)	\$80,000.00
Christopher Marchant	\$40,000.00
Chad Marchant	\$40,000.00"

¶ 9 Another exhibit to the petition included the letter outlining the representation by Margolis, the attorney/client agreement and a power of attorney. The letter was prepared by Candiano, dated August 3, 2009, and was addressed to Christopher. The letter stated:

"Please allow this to confirm our agreement that the net proceeds of all existing litigation surrounding James Marchant's death shall be distributed as follows:

Adriana Marchant	50%
Chad Marchant	25%
Chris Marchant	25%"

The intervenors also attached the correspondence between their new counsel and Margolis regarding the distribution and the heirs' agreement. In January 2011, the trial court approved the settlement of \$616,000, and granted the intervenors' petition for "all matters or issues related to distribution."

¶ 10 In March 2011, plaintiff filed a petition to schedule a distribution hearing. Plaintiff asserted that she had reached an agreement with the intervenors, but the intervenors had "expressly rescinded their agreement in August 2010." Plaintiff requested the trial court to hear testimony to determine the appropriate distribution because the decedent's heirs were unable to

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agree. In May 2011, the intervenors filed their response to plaintiff's petition to schedule a distribution hearing. They responded that they never rescinded their agreement to the distribution and maintained that the 50/25/25 Agreement was the agreement of the heirs. The intervenors again attached as exhibits the correspondence discussing the parties' agreement with Margolis. The intervenors asked the trial court, under its authority to enter declaratory judgments under section 2-701 of the Code of Civil Procedure (735 ILCS 5/2-701 (West 2010)), to find that the 50/25/25 Agreement governed distribution of all amounts recovered and find the need for a distribution hearing moot.

¶ 11 In June 2011, plaintiff filed her reply to the petition to schedule a distribution hearing. In her reply, plaintiff contended that the parties never reached an agreement and "a signed agreement [was] never consummated." Plaintiff then argued that "the agreement [was] clearly and unambiguously memorialized by an email dated June 4, 2009" that was prepared by Candiano. Plaintiff also asserted that the intervenors admitted that "they sought to impose a distribution scheme of 50/25/25 on ALL net proceeds recovered, thereby effecting rescission of the original agreement." Plaintiff maintained that the 50/25/25 Agreement applied only to the dram shop action.

¶ 12 In June 2011, the intervenors filed a motion to disqualify Margolis as counsel for plaintiff and for the estate because Margolis represented both the intervenors and plaintiff in the underlying lawsuit and a dispute had arisen as to the terms of the distribution agreement. The intervenors attached affidavits from Christopher and Chad to the motion.

¶ 13 The affidavits stated that plaintiff informed them that she had retained Margolis to

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represent her and the estate for any wrongful death claims. In February 2009, they approached Margolis about their interest in the wrongful death claims. They entered into an agreement with Margolis that it would represent their interests as well as plaintiff's interests in any wrongful death claims and any amounts received from those claims. In August 2009, they each signed attorney-client agreements as well as power of attorneys in favor of Margolis for the wrongful death claims. They stated that Margolis, through Candiano, advised the intervenors to forego certain claims after their father's death. Margolis advised them to join plaintiff so one law firm could represent all of the heirs. As part of their representation, Margolis brokered an agreement between the heirs to share the net amounts recovered in any wrongful death claims with 50% to plaintiff and the remaining 50% to be divided equally between the intervenors. After brokering the 50/25/25 Agreement, Margolis failed to communicate with the intervenors as to developments in the case. Margolis "failed to confirm the amounts recovered for wrongful death claims, to regularly report expenses incurred and the fees charged by the Margolis firm, and to provide a full accounting" as requested by the intervenors. After becoming frustrated with the lack of communication from Margolis and concern that Margolis might change the agreement to their detriment, the intervenors retained additional counsel.

¶ 14 In July 2011, plaintiff filed her response to the intervenors' motion to disqualify Margolis as counsel. In the response, plaintiff asserted that the duties of Margolis were substantially completed in January 2010 when the trial court approved the settlement of all matters in the amount of \$616,000, and dismissed the case. The response maintained that Margolis had no interest in the distribution, but needed the court's direction and guidance to distribute the funds.

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The record does not indicate that the trial court ruled on the motion to disqualify, but an appearance was filed by new counsel to represent plaintiff.

¶ 15 In October 2011, plaintiff, through her new counsel, filed a supplemental brief in reply to her petition to schedule a distribution hearing. In her brief, plaintiff made similar assertions that there was no meeting of the minds between the parties and if there had been an agreement, the intervenors' conduct indicated that they had abandoned or rescinded the agreement. In November 2011, the intervenors filed a response to the supplemental brief. They responded that the supplemental brief did not add anything to plaintiff's previous motion and reply. The intervenors maintained that the 50/25/25 Agreement was established in emails and correspondence and they never rescinded the agreement. They attached their prior affidavits as support.

¶ 16 In November 2011, the parties filed their objections related to distribution. The intervenors objected to the liens and payments as set forth in the draft statement of settlement. The intervenors asserted that plaintiff, as executrix of the estate, should not be permitted to pay any portion of the intervenors' settlement to pay creditors of the estate. Plaintiff objected to any monies being distributed to the heirs that were recovered through: the underinsurance claim, the dram shop action as related to property damage, and loss of consortium claim. Plaintiff also objected to "payment or apportionment lessening the recovery of Adriana Marchant for the payment of Intervenor's attorney fees" and to any distribution to intervenors without a *pro rata* apportionment of all medical liens and subrogation interests. Plaintiff also filed a response to the intervenors' objection and asserted that the settlement money was recovered under separate causes of action and that the intervenors should not receive any monies related to a survival

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action or loss of consortium claim.

¶ 17 In November 2011, the trial court entered its written order on plaintiff's petition to schedule distribution hearing and the parties' objections. The court found that:

"That Adriana Marchant, Christopher Marchant, and Chad Marchant, entered into a valid and enforceable agreement to share the amounts recovered from any claims and/or litigation arising from the injuries and death of JAMES MARCHANT, after deduction of attorneys' fees, appropriate expenses and liens, in the following percentages: 50% to Adriana Marchant, 25% to Chris Marchant, and 25% to Chad Marchant."

¶ 18 The court further ordered the distribution of the proceeds of the \$616,000.00 recovered for the claims arising from the injuries and death of decedent, including \$158,852.44 to plaintiff and \$79,426.23 to each of the intervenors.

¶ 19 In December 2011, plaintiff filed a motion to reconsider or in the alternative to reopen the proofs. Plaintiff argued that the trial court "erred in determining whether the distribution was controlled by the alleged contract without taking evidence on the existence of a contract and without conducting an evidentiary hearing as Plaintiff had requested." The trial court denied plaintiff's motion in January 2012.

¶ 20 This appeal followed.

¶ 21 On appeal, plaintiff argues that the trial court erred in finding that the parties entered into an enforceable agreement that all monies recovered would be distributed with 50% to plaintiff

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and 25% to each of the intervenors. Plaintiff asserts that there only two possible findings: (1) the heirs agreed on the distribution set forth in the email, dated June 4, 2009, or (2) there was no meeting of the minds. Essentially, plaintiff concedes that if an agreement was made between the parties, then no evidentiary hearing is necessary. The intervenors maintain that there was no genuine issue of material fact and the trial court properly concluded that the parties entered into an unambiguous contract as to the distribution of all recovered monies pursuant to the 50/25/25 Agreement.

¶ 22 Thus, the question on appeal is whether the parties entered into an agreement as to the distribution of monies recovered on behalf of the decedent's estate. "The interpretation of a contract, similar to the grant of summary judgment, is a question of law to which this court applies a *de novo* standard of review." *Smith v. West Suburban Medical Center*, 397 Ill. App. 3d 995, 999 (2010). "Whether a contract is ambiguous is a matter of law for the court to determine." *Guerrant v. Roth*, 334 Ill. App. 3d 259, 264 (2002).

¶ 23 "The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008). "As a general rule, the parties' intentions are determined from their final agreement." *Kehoe v. Commonwealth Edison Co.*, 296 Ill. App. 3d 584, 590 (1998). Illinois follows the "four corners rule" for contract interpretation, in that, "[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed

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by extrinsic evidence.'" *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999), quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962). "If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence." *Air Safety, Inc.*, 185 Ill. 2d at 462 (citing *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991)). If, however, a contract is capable of being understood in more than one way, then the contract is ambiguous and only then may a court consider parol evidence to aid in resolving the ambiguity. *Air Safety, Inc.*, 185 Ill. 2d at 462.

¶ 24 Moreover, a court must not rewrite a contract to suit one of the parties and must enforce the contract as written. *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 417 (2003). A contract will not be rendered ambiguous simply because the parties disagree on its meaning and the court will not strain to find an ambiguity where none exists. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 372 (2007). Further, any ambiguity in the agreement is construed against the drafter. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 479 (1998).

¶ 25 The record in this case sets forth several emails and documents involving the intervenors' negotiations with Margolis, on plaintiff's behalf, to reach an agreement as to the distribution of any recovered monies on behalf of the decedent's estate. The initial email, dated February 6, 2009, written by Christopher's wife and sent to Candiano, indicated that the parties had discussed the 50/25/25 Agreement and the intervenors had agreed to this distribution. The next email, dated April 27, 2009, written by Candiano and sent to Christopher's email address and addressed to Christopher's wife, confirmed that for "any action prosecuted on behalf of the estate," the heirs

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would "share the net proceeds" under the 50/25/25 Agreement.

¶ 26 The email, dated June 4, 2009, written by Candiano and sent to Christopher and his wife, changed the terms of the agreement. Candiano stated that the firm "recently reevaluated the case in consideration of James Marchant's passing." Candiano outlined plaintiff's new claim for loss of consortium and proposed that this claim would be valued at 20% of the net recovery and he intended "to propose to the Judge that the remaining funds be distributed pursuant to our prior agreement whereby Adriana Marchant would receive 50% of the remaining funds, Christopher Marchant would receive 25% of the remaining funds, and Chad Marchant would receive 25% of the remaining funds." This language establishes that the parties had previously agreed to the 50/25/25 distribution, but plaintiff, through Candiano, was suggesting a change. The email indicated that this proposed distribution was approved by plaintiff, but the email asked for the intervenors to "[p]lease confirm that you agree with the above-described distribution." There is no evidence in the record showing that the intervenors agreed to this proposed change to the distribution agreement.

¶ 27 Rather, the record demonstrates a return to the previously agreed upon distribution terms. The last document involving the parties' agreement on the distribution is a letter, dated August 3, 2009. The letter, prepared by Candiano, was a confirmation of the intervenors' representation by Margolis and was accompanied by an attorney/client agreement and power of attorney documents. This letter also described the agreement as to the distribution. Candiano wrote,

"Please allow this to confirm our agreement that the net proceeds
of all existing litigation surrounding James Marchant's death shall

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be distributed as follows:

Adriana Marchant	50%
Chad Marchant	25%
Chris Marchant	25%"

¶ 28 These documents outline the intervenors' discussion with Margolis and plaintiff to reach an agreement as to the settlement distribution. Other than the June 4 email, relied on by plaintiff, all the documents confirm the existence of the 50/25/25 Agreement. The 50/25/25 Agreement was mentioned in the initial email by Christopher's wife and confirmed in the April 27 email by Candiano. The June 4 email was an attempt to change the terms by adding the new loss of consortium claim with an additional 20% to plaintiff. The language of this email evidences a renegotiation of the agreement after Margolis "reevaluated" the case. The email clarifies that the additional 20% to plaintiff for loss of consortium was separate from the "prior agreement" to distribute 50/25/25. However, these new terms were not included in the confirmation of the agreement as drafted by Candiano in the Margolis retention letter.

¶ 29 We find that the retention letter was the final agreement of the parties and "confirmed" the 50/25/25 Agreement to distribute "the net proceeds of all existing litigation surrounding James Marchant's death." The letter does not include an additional 20% for loss of consortium nor does it limit the recovery of the intervenors to the dram shop claims. The letter clearly stated that the agreement included "all existing litigation." This language is facially clear, unambiguous and the terms of the agreement are complete, so no extrinsic evidence is necessary to ascertain the parties' intent. See *Air Safety, Inc.*, 185 Ill. 2d at 462. Nor will we read in additional limitations that are not included in the agreement to find an ambiguity. The August 3 letter

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establishes that the parties agreed to share the proceeds of "all existing litigation" with 50% to plaintiff and 25% to each of the intervenors. We further observe that this letter was prepared by Candiano, the Margolis attorney who had been negotiating this agreement from the outset. If the agreement included the loss of consortium or any other limitation to the intervenors' share, then the confirmation of the agreement should have included such terms.

¶ 30 Additionally, both of the intervenors included affidavits confirming that they signed the attorney/client agreement. Plaintiff has failed to provide any documents to dispute or alter the August 3 letter confirming the agreement. Plaintiff asserts that the agreement in the retention letter was limited to the dram shop actions because all other litigation was settled. However, the language of the letter was "all existing litigation," not all pending or open litigation, because settled litigation still "exists." We also note that the letter later confirms that Margolis would represent the intervenors for "both the Personal Injury Claim and the Dram Shop claims," but the power of attorney only applied to the personal injury action. This language contradicts plaintiff's contention that the agreement only pertained to the dram shop action.

¶ 31 Here, the intervenors presented the documentation of the parties' agreement to divide the net proceeds as 50/25/25 and there is no genuine issue of material fact in the record that created any ambiguity in the 50/25/25 Agreement, as confirmed in the retention letter drafted by plaintiff's attorney. Accordingly, we conclude based upon our *de novo* review that the trial court did not err in holding that the parties entered into the 50/25/25 Agreement and we affirm the order distributing the proceeds from the litigation on behalf of the decedent's estate.

¶ 32 The decision of the circuit court of Cook County is affirmed.

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¶ 33 Affirmed.