This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0606

CreditLink Technologies, Inc., et al.,
Respondents,

Chris Keppel, Respondent,

vs.

Walser Automotive Group, et al.,
Appellants.

Filed May 12, 2009
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CV-06-3920

Richard E. Bosse, Law Offices of Richard E. Bosse, Chartered, 303 Douglas Avenue, P.O Box 315, Henning, MN 56551 (for respondents CreditLink Technologies, Inc. and Chris Keppel)

Samuel L. Hanson, Diane B. Bratvold, Daniel J. Supalla, Briggs and Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2157 (for appellants)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

This appeal is from the district court's denial of posttrial motions following a jury determination that the Walser dealerships breached their service contracts with CreditLink Technologies, Inc., directly causing $400,000 in damages. Because we conclude that the district court properly denied the Walser dealerships' motion for judgment as a matter of law to limit damages under the contract and that the district court properly denied the Walser dealerships' motion for a new trial based on alleged errors in the jury instructions, we affirm.

F A C T S

CreditLink Technologies, Inc. entered into contracts effective November 1, 2001, with nine automobile dealerships that are managed by the Walser Automotive Group. Under the contracts, CreditLink agreed to provide software and services to help the Walser dealerships (collectively Walser) attract customers in need of special financing and match the customers with appropriate inventory and financing.

The contracts extend for a twelve-month term with an option to renew. Included among the contracts' numbered provisions is one that allows termination under specific conditions and one that lists obligations on termination. The termination provision, identified as paragraph five, allows termination in two circumstances:

> **5. Termination**
>
> This affiliation may be terminated either by unanimous agreement of both parties, or by CLT [CreditLink], if dealer fails to perform its material obligations.

The provision that lists obligations on termination, identified as paragraph nine, coordinates with the contracts' "flat per deal fee" and limits termination obligations to amounts for "un-funded deals" that are later funded:

> **9. Obligations on Termination**
>
> On termination of this Agreement, Dealer shall abide by the following:
>
> a. All amounts due to CLT [CreditLink] for un-funded deals shall be considered payables, and once funded, fees shall be paid immediately to CLT [CreditLink].
>
> b. Neither party shall be liable to the other because of such termination for compensation, reimbursement or damages on account of the loss of prospective profits or anticipated sales, or on account of expenditures, investments, lease or commitments in connection with the business or good will of CLT [CreditLink] or Dealer or for any other reason whatsoever growing out of such termination.

In May 2002, seven months into the contract term, Paul Walser and Andrew Walser met with CreditLink to discuss the possibility of ending Walser's contractual relationship. The details of what took place during this meeting are disputed. Walser claimed that the contracts were mutually terminated; CreditLink claimed that Walser unilaterally declared its unwillingness to perform. In any event, both Walser and CreditLink agree that the May 2002 meeting marked a change in the working relationship.

CreditLink and CreditLink's principals—Chris Keppel and Michael Miller—sued Walser in April 2005, alleging breach of contract and ten other claims. Walser counterclaimed for breach of contract and fraud against CreditLink and CreditLink's

principals, and for deceptive trade practices against Miller. The only claims that are relevant to this appeal are CreditLink's breach-of-contract claims against Walser and Walser's breach-of-contract counterclaims against CreditLink.

The case was tried to a jury in July 2007. At the end of the trial, the district court instructed the jury and provided a special verdict form with eight questions directed to the breach-of-contract claims. The four questions that addressed CreditLink's breach-of-contract claims asked whether the contracts existed; whether Walser had breached the contracts; if so, did the breach directly cause damages; and, if it did, the amount of those damages. The four questions addressing Walser's breach-of-contract counterclaims asked parallel questions of CreditLink's actions. The jury found that the contracts existed between Walser and CreditLink, that Walser breached the contracts with CreditLink, that CreditLink did not breach the contracts with Walser, and that CreditLink's damages caused by the breach amounted to $400,000.

Walser filed posttrial motions for judgment as a matter of law (JMOL) and for a new trial. The motion for JMOL sought to apply, as a matter of law, the contracts' paragraph-nine limitations of damages on termination. Walser primarily argued that the limitations on damages applied to any termination of the contracts, not just to the two circumstances described under the heading "**Termination"** in paragraph five of the contracts. The motion for a new trial alleged error in the jury instruction on abandonment of contract. The district court denied both of Walser's posttrial motions, and Walser appeals.

D E C I S I O N

I

Walser maintains that the district court erred by failing to grant its JMOL motion to limit damages under paragraph nine of the contract. We review de novo a district court's decision on a JMOL motion. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). Consistent with Minn. R. Civ. P. 50.01, JMOL should be granted "only in those unequivocal cases" in which, taking the evidence as a whole, a contrary verdict would be unsustainable as manifestly against the evidence or when a contrary verdict could not be maintained under the controlling law. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (applying Minn. R. Civ. P. 50.01).

At trial, Walser's primary argument was that the contract had been terminated by mutual consent under the "**Termination**" provision in paragraph five and that liability was therefore limited under paragraph nine's "**Obligations on Termination.**" Walser acknowledges that the jury rejected that theory in its answers to the special-verdict interrogatories.

Walser based its posttrial motion for JMOL primarily on an argument that the word "termination" in paragraph nine is ambiguous; that the ambiguity must be construed against CreditLink as the drafter; and that, therefore, paragraph nine's limitations on liability should be interpreted to apply to *any* termination of the contracts not just the terminations allowed under paragraph five. Walser alluded to ambiguity only twice during trial—in a motion in limine on evidence about damages and in a motion for JMOL

at the close of CreditLink's case. Walser requested and received a jury instruction that "if ambiguities exist in a contract, all ambiguities must be construed against the drafter." Despite this instruction, Walser presented no extrinsic evidence and made no offer of proof of any intent other than that reflected in the language of the contracts. Thus, the question of whether the district court erred by denying Walser's JMOL motion turns on the application of controlling law to the language of the contracts.

The rules governing the construction of contracts are well settled. Unless an ambiguity exists, the language of a contract must be given its plain meaning, and its construction and effect present a question of law. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Contract terms must be read in the context of the entire contract. *Id.* A term within the contract is ambiguous when it is reasonably susceptible of more than one interpretation. *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). Because a word may have more than one meaning, however, does not establish that it is ambiguous; only if more than one reasonable interpretation of its meaning applies within the context in which it is used does ambiguity arise. *Bd. of Regents v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 892 (Minn. 1994). Finally, a contract must be interpreted in a way that gives all of its provisions meaning, and, if a provision is ambiguous, the ambiguity is construed against its drafter. *Current Tech. Concepts, Inc.*, 530 N.W.2d at 543.

Applying these rules, we conclude that the word "termination" in paragraph nine is not ambiguous as a matter of law. To "terminate" generally means "to bring to an end or halt." *American Heritage Dictionary* 1785 (4th ed. 2000) (defining "terminate").

Contractual relationships end in many different ways and these endings may all, in a broad sense, be within the meaning of "termination." *See Roberts v. Baumgartner*, 391 N.W.2d 545, 548 (Minn. App. 1986) (recognizing that dictionary definition of "termination" may encompass different types of contractual endings). But a contract's use of the word "termination" to refer to specific and limited actions by the parties rather than a general conclusion of a contractual relationship does not give rise to an ambiguity if the agreement itself assigns a narrower reference to the term. *See id*. (concluding as matter of law that contract using "termination" to refer to more narrow type of ending of contractual relationship did not create ambiguity if agreement itself assigns narrower reference).

The contracts between Walser and CreditLink specifically limit the definition of "termination" in paragraph five, entitled "**Termination**," and define the two ways that termination may occur: "either by unanimous agreement of both parties, or by CLT [CreditLink], if dealer fails to perform its material obligations." Paragraph nine's provision for "**Obligations on Termination**" unambiguously refers back to paragraph five. Thus, paragraph nine is not ambiguous and cannot support JMOL for Walser because the controlling law supports rather than contravenes the jury's verdict.

We recognize that the district court's instruction to the jury that "if ambiguities exist in a contract, all ambiguities must be construed against the drafter," indicates that the contract construction issue was erroneously submitted to the jury. But when the construction of a contract is erroneously left to the jury for determination, and the jury's determination of the issue is the determination the court itself ought to have made, no

harm results, and the error is without prejudice. *Cement, Sand & Gravel Co. v. Agric. Ins. Co.*, 225 Minn. 211, 222, 30 N.W.2d 341, 348-49 (1947).

In its in limine motion on damages and in its JMOL motions, Walser also contended, as a matter of law, that termination of the contract fits the description of termination in paragraph five and, therefore, paragraph nine applies to limit damages. Under their paragraph-five argument, Walser now acknowledges that the jury verdict precludes a claim under the first clause—unanimous agreement by both parties—but claims that a finding of breach satisfies the definition under the second clause because it means Walser failed to perform its material obligations.

The operative language of the second clause states "[t]his affiliation may be terminated . . . by CLT [CreditLink], if dealer fails to perform its material obligations." The word "may" in paragraph five denotes that, in the event of a dealership's breach, CreditLink has a choice of whether to terminate the contract. Because paragraph five provides *CreditLink* the *option* to terminate in the event of Walser's breach, the plain language does not support Walser's claim that its dealerships' breach would result in automatic termination that triggers the paragraph-nine liability limitations. *See Miller v. O. B. McClintock Co.*, 210 Minn. 152, 160, 297 N.W. 724, 729 (1941) (interpreting clauses in contract that give party option to terminate upon breach as conferring option on nonbreaching party); *Busch v. Model Corp.*, 708 N.W.2d 546, 551 (Minn. App. 2006) (stating general rule that "[w]hen a material breach of contract occurs, the nonbreaching party *may elect* to either affirm or rescind the contract" (emphasis added)). To accept Walser's argument would essentially read out the words "by CLT [CreditLink]" and

allow termination by either party whenever Walser fails to perform its material obligations. Setting aside the unlikelihood of a provision that would allow Walser to use to its advantage its own failure to perform, reviewing courts must avoid a construction that would result in making a provision meaningless. *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525-26 (Minn. 1990) (recognizing presumption that contracting parties intend chosen language to have effect).

Under either argument, Walser has failed to show that the verdict is contrary to controlling law. *Jerry's Enters., Inc*., 711 N.W.2d at 816. The district court did not err in denying Walser's motion for JMOL.

II

Walser also argues that it is entitled to a new trial because the district court erroneously instructed the jury on the law that applies to abandonment of contract. "District courts are allowed considerable latitude in selecting language used in the jury charge and determining the propriety of a specific instruction." *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002). To amount to reversible error that warrants a new trial, the jury instruction must both misstate the law and prejudice the outcome of the trial. *Rowe v. Munye*, 702 N.W.2d 729, 743 (Minn. 2005). "In determining whether erroneous instructions resulted in prejudice, we must construe the instructions as a whole from the standpoint of the total impact on the jury." *Id.* If the "instructions overall fairly and correctly state the applicable law," a new trial will not be granted. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002).

Walser argues that the jury instruction on abandonment was erroneous and prejudicial for two reasons: first, it mischaracterized the contract-termination issue that the jury was required to decide, and second, it misstated the burden of proof. Neither argument withstands analysis.

Walser's first argument—that the abandonment instruction mischaracterized the issue—fails because, when viewed as a whole, the instructions "fairly and correctly state the applicable law." *Id.* at 147. The instructions described the burden of proof generally as "[t]he greater weight of the evidence" and stated that the evidence "must lead you to believe that the claim is more likely true than not true." The instructions then informed the jury about contract modifications:

> If a party modifies the terms of a contract and the other party agrees by either express agreement or through its actions, the modifications do not represent a breach of contract. A party may agree to a modification through its actions by accepting performance under the contract with the modifications or by not initiating any disagreement with the modification.

And, later in the instruction the district court explained abandonment of contract:

> Mutual abandonment of a contract must be clearly expressed and the acts and conduct of the parties must be positive, unequivocal and inconsistent with the existence of a contract. A party seeking to prove the abandonment of a contract must present clear and convincing evidence of both parties' intentions to abandon their rights. . . .

Although Walser objected to the mutual-abandonment instruction, it did not object to the contract-modification instruction or propose a different instruction that would better represent its theory of the case.

Contrary to Walser's suggestion, the instructions did not prevent the jury from finding, based on a preponderance of the evidence, that the parties agreed to terminate the

contract at the May 2002 meeting. The contract-modification instruction allowed for a finding, under a preponderance standard, that the parties modified the contract's termination date and agreed to limit damages. The jury could also have found, by a preponderance of evidence, an agreement to terminate independent of the contract-modification instruction. The mutual-abandonment instruction only informed the jury of a third possible theory of the case, based on evidence Walser presented during trial, that CreditLink's actions after the May 2002 meeting demonstrated that it considered the contract to be terminated. Under these circumstances, the district court's inclusion of the mutual-abandonment instruction does not provide a basis for reversal.

Walser's second argument—that the district court misstated the burden of proof on the abandonment-of-contract instruction—fails because the district court accurately stated the burden of proof. The jury instruction accurately repeated the Minnesota Supreme Court's summary of the burden in *Republic Nat'l Life Ins. Co. v. Marquette Bank & Trust Co. of Rochester*: "We have stated that the party seeking to prove abandonment of a contract must present clear and convincing evidence of an intention by the other party to abandon its rights." 295 N.W.2d 89, 93 (Minn. 1980). Walser is not entitled to a new trial because the instructions overall fairly and correctly state the applicable law.

Affirmed.