FOURTH DIVISION
December 22, 2016

No. 1-15-2373

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GRAND AVENUE SURGICAL CENTER, LTD.	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 10872
	)	
HEALTH CARE SERVICES CORPORATION, a	)	
Mutual Legal Reserve Company,	)	Honorable
	)	Raymond W. Mitchell,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment for health insurer affirmed where surgical center could not show, for purposes of its promissory estoppel claim, that insurer unambiguously promised to reimburse surgical center based on specific amount.

¶ 2 Plaintiff Grand Avenue Surgical Center, Ltd. (GASC) appeals from the trial court's award of summary judgment for defendant Health Care Services Corporation (HCSC) in GASC's promissory estoppel suit. GASC sued HCSC, a health insurance company, seeking payment for surgical procedures GASC had performed on HCSC's policyholders. GASC claimed that HCSC had promised to pay GASC the "usual and customary" rate—a rate determined by the amounts charged by other healthcare providers in the geographic area—when, in actuality, it paid GASC at the rates Medicare providers charged, which were much lower. The

trial court awarded HCSC summary judgment, finding that HCSC had made no express or implied promise to pay GASC the "usual and customary" amount and that any reliance by GASC on HCSC's representations was unreasonable.

¶ 3 We affirm the trial court's judgment. Based on the evidence presented, the trial court properly found that HCSC neither expressly nor impliedly made an unambiguous promise to reimburse GASC at the rate it anticipated. To the contrary, the evidence showed that HCSC never represented that the usual and customary amount would be the basis for its reimbursement. Most frequently, HCSC representatives said that GASC would be reimbursed at a percentage of the "allowed amount," a term which no one at GASC could identify. Because any promise was based on a vague term open to interpretation, it could not, as a matter of law, have been unambiguous.

¶ 4 I. BACKGROUND

¶ 5 HCSC provides health insurance and claims administration services for various health benefit plans. In Illinois, HCSC works through its division, Blue Cross and Blue Shield of Illinois (Blue Cross).

¶ 6 The type of plan at issue in this case is a Preferred Provider Organization plan (PPO plan), pursuant to which HCSC provided different benefit levels depending on whether a healthcare provider was "in-network" or "out-of-network." In-network providers have contracts with HCSC, and HCSC reimburses them at rates set in those contracts. HCSC reimburses out-of-network providers, such as GASC, based on the terms of its members' benefits plans.

¶ 7 Between 2008 and 2012, GASC performed surgical services for numerous HCSC policyholders. In order to determine the coverage that HCSC provided for these services, GASC employees would call HCSC.

¶ 8 HCSC maintained an automated response system known as the EIVR system. A provider such as GASC would call and enter its national provider identifier number, enter the patient's subscriber number, and tell the system the type of procedure performed. EIVR read a disclaimer to the provider that "a quote of eligibility and benefits is not a guarantee of payment" and that all benefits were "subject to eligibility, medical necessity and the terms, conditions, limitations and exclusion of the patient's health benefit plan at the time the services [were] rendered." EIVR would tell the provider whether the services were covered, how much of the patient's deductible remained to be paid, and the coinsurance amount. EIVR expressed the coinsurance amount as a percentage "of the allowed amount." The EIVR system automatically generated a note to record the information transmitted during the call.

¶ 9 If a provider like GASC wanted more information, it would proceed by speaking with a live employee of HCSC, known as a "customer advocate." The customer advocates could give providers a more detailed description of the coverage provided for a specific procedure. Customer advocates took notes on the calls they received and stored them in the same system into which EIVR recorded its notes. Customer advocates were not trained to use the terms "usual and customary" or "billed charges."

¶ 10 GASC is an outpatient surgery center located in Chicago. Between 2008 and 2012, GASC performed hundreds of procedures on patients who had insurance through HCSC. Before GASC performed any procedures, one of its employees called HCSC in order to confirm that HCSC would cover at least a portion of the procedure for the patient. GASC claimed that HCSC underpaid it for 623 of these procedures because HCSC paid GASC at the amount set for the procedures under Medicare. According to GASC, the Medicare prices were substantially below the usual and customary amount for the procedures.

¶ 11 GASC sued HCSC under a theory of promissory estoppel. GASC alleged that HCSC's "agents made an unambiguous promise to pay [GASC] either the applicable percentage of 'charges' or the 'usual and customary' charges for the procedure in the Metropolitan Chicago service area less applicable co-pay, deductible and co-insurance amounts." GASC claimed that it provided services to HCSC's policyholders based on HCSC's "benefit coverage representations." And, according to the complaint, despite HCSC's promises to pay GASC "on the basis of either 'charges' or 'usual and customary' prices for the procedure[s], HCSC made payments *** based on various fee schedules that significantly underpaid [GASC]."[1]

¶ 12 The parties filed cross motions for summary judgment. They submitted numerous attachments, including the following depositions and documents.

¶ 13 GASC submitted an affidavit from Javad Jafari, GASC's administrator, to its motion. Jafari said GASC developed its fee schedule in 2007 and 2008 with "data from the National Ambulatory Surgery Center Association ("ASCA") and the Illinois Department of Public health" and the fees charged by "GASC's peers." According to Jafari, by using that data, GASC's fees represented the usual, customary, and reasonable charges for the surgical procedures it performed.

¶ 14 Jafari's affidavit also indicated that GASC did not have access to its patients' insurance plans through HCSC and, consequently, GASC had to rely on confirmation calls placed to HCSC to determine its patients' coverage. Jafari attested that, "[g]enerally, the HCSC agent identifies

[1] The relevant complaint for purposes of this appeal was GASC's second amended complaint. That complaint also included a claim of unjust enrichment that had been dismissed and is not at issue here.

that GASC will be paid at a specific percentage of covered services, but under some circumstances states that GASC will be paid a percentage of an 'allowable amount.' "

¶ 15 Jafari's affidavit included the following paragraphs on "usual and customary" charges:

> "13. Based upon industry practice, when the metric for determining an 'allowable amount' or 'covered services' is not specifically identified, the only payment metric an [out-of-network] provider can rely upon is the usual and customary rate for the applicable geographic region ("UCR").
>
> 14. Unless otherwise stated by HCSC's agent during the confirmation of benefits call, covered services are paid at a percentage of UCR."

¶ 16 Jafari's affidavit also stated that, to his knowledge, no calls with HCSC ever involved "the term 'Medicare' *** as the level of payment." He added, "Since I began working as an administrator in 2008, it has been my understanding that when a call center employee quotes 'covered services,' 'allowable,' or some other benchmark, that absent identifying specific restrictions, the cited level of payment was to be made at [the usual and customary rate]."

¶ 17 Jafari attested that he believed the usual and customary rate was the same thing as the "allowed amount" because of two systems that HCSC used to "transmit[ ] information about anticipated payments to medical providers": eCare and Availty. Jafari said that these two systems offered providers a document called a "Claim Detail," which "regular[ly] use[d] *** the term 'usual and customary.' " Jafari said that "GASC relied upon the information from [eCare] and Availity [*sic*] *** as if it were directly provided by HCSC."

¶ 18 The parties also submitted Jafari's deposition. With respect to GASC's fees, Jafari reiterated that they were developed using ACSA data and other surgical centers' fees. But Jafari could not produce any documents or specifics regarding his calculation of GASC's fees.

¶ 19 Jafari said that, before GASC performed any procedure on a patient with insurance through HCSC, one of his employees called the verification system in order to determine the patient's coverage and benefits. The employee would prepare a document known as a "Benefit Rundown," which he would review before approving any surgical procedure.

¶ 20 Jafari testified that, as an out-of-network provider, GASC had to rely on the calls placed to HCSC in order to verify a patient's benefits and coverage. Jafari said, "[T]he only information we have to go upon is what the agent at [HCSC] represents to us." He noted that HCSC did not make patients' policies available to GASC.

¶ 21 Jafari said that, in order to ensure a patient's benefits and coverage, GASC employees always spoke to HCSC customer advocates over the phone. Jafari acknowledged that he did not give his employees any instructions to ask what the term "allowed amount" meant. He also never spoke to his employees about the meaning of the term "allowed amount." He testified, "[I]t's one of the terms that we've heard, but unfortunately, we can't give it any merit because it has never been defined for us." He acknowledged that, when an employee of HCSC used the term, "allowed amount," GASC had "no earthly idea" what that term meant.

¶ 22 Jafari testified that the calls that he was on between 2008 and 2012, he more often heard the term "percent of covered services" used, not "allowed amount" or "usual and customary." He said that "covered services" was "typical standard industry language."

¶ 23 Jafari opined that HCSC's reimbursement numbers were "completely fictitious and made up." While he acknowledged that he could not determine whether the numbers aligned with the policies, he said that GASC had "been in business long enough and *** had enough experience with BlueCross [to see] that *** so many seemingly similar plans that have same deductibles [and] same levels of coverage *** pay wildly different amounts in reimbursement." He based his

knowledge of what were "similar plans" on the information provided during the verification calls.

¶ 24 Several GASC employees testified in depositions about the verification calls they made to HCSC. Erica Gallegos testified that, when she called into the EIVR system, she heard the disclaimer saying "this is not a guarantee of payment." Gallegos testified that she remembered HCSC customer advocates using the terms " 'usual and customary' or 'reasonable and customary allowed amount.' " But Gallegos could not specify which of the 623 verification calls involved in the case involved those phrases. She acknowledged that the Benefit Rundowns she prepared did not specify whether the customer advocate used the words "usual and customary" or "allowed amount." Gallegos said that her understanding of the phrase "usual and customary" was that it was the amount that the insurance company "think[s] is reasonable and customary or usual or allowed." Gallegos never asked any customer advocates what the phrase "allowed amount" meant.

¶ 25 Fanny Clark said that the customer advocates never gave a specific dollar amount when reciting a patient's benefits; they stated the benefits as a percentage. Clark also recalled the recorded disclaimer at the beginning of the EIVR system. Clark acknowledged that her Benefit Rundowns were not verbatim recordings of the verifications calls.

¶ 26 Elizabeth Lara also testified that HCSC never provided a specific dollar amount when indicating the benefits for a particular patient. She acknowledged that her Benefit Rundowns did not include the words "allowed amount."

¶ 27 Examples of Benefit Rundowns submitted with the parties' motions for summary judgment showed that GASC employees did not specify whether HCSC would cover a percentage of the "usual and customary" amount or some other amount. Instead, they simply

listed a number on a line labeled, "Services covered at what %"; for example, "Out of Network 50%," or "In Network 90% Out of Network 50%."

¶ 28 In transcripts of 134 recorded verification calls between GASC employees and HCSC customer advocates, the customer advocates most often stated the coinsurance amount as a percentage of the "allowed amount." On certain occasions, they also used the terms, "the allowed," "the allowable," "the allowance," "the amount," and the "plan's allowance." In a few circumstances, the customer advocate would simply say the percentage; for example, "Benefits for out-of-network will cover only at 50 percent," or, "Coverage would be at 50 percent." Those transcripts do not show that HCSC ever explained what the "allowed amount" was or that GASC employees ever asked for further explanation of the allowed amount. Nor did they show that a HCSC employee used the phrase "usual and customary."

¶ 29 GASC also submitted examples of the Claim Detail documents generated by eCare and Availty. They listed procedures for which HCSC paid less than the billed amount. Under the date for each procedure, the Claim Detail stated, "Charge exceeds Usual and Customary."

¶ 30 Along with its motion for summary judgment, GASC filed a supplemental disclosure under Illinois Supreme Court Rule 213(f) (eff. Jan. 1, 2007), disclosing witnesses that GASC might call at trial. GASC disclosed that "Jafari's testimony may cover his experience *** in negotiating UCR (usual, customary and reasonable) as the measure of payment and instances when billed charges are paid as reimbursement for services when payment amounts are inconsistent with the stated coverages in the confirmation of benefits call." Under the heading, "Lay Witnesses," GASC listed Jafari and said that he would testify to his management of GASC's business operations and "claims resolution *** when payments from insurers are in amounts far below UCR."

¶ 31 Based on the above evidence, GASC argued:

> "(i) [that] prior to performing each procedure GASC staff called HCSC and confirmed that HCSC would pay GASC for the required medical procedures and services for each patient at a specified percentage of covered services which GASC understood to be usual, customary, and reasonable charges ***; (ii) that in reliance upon the statement [*sic*] of HCSC's agents, GASC provided the required medical facility services; (iii) [that] this practice of confirming that payment will be made for the services is the standard practice within the industry, which makes GASC's reliance thereupon both reasonable and foreseeable; and (iv) [that], as a result of HCSC's non-payment and/or underpayment, GASC has suffered a material monetary detriment."

HCSC argued that it "made clear it would pay only an 'allowed' amount and [GASC] knew for years that HCSC was not paying claims as [GASC] alleged it was promised." Thus, HCSC argued, GASC could neither prove "the unambiguous 'promises' alleged in its complaint or that it reasonably relied on the alleged 'promises.' "

¶ 32 HCSC also moved to strike paragraphs 13 and 14 of Jafari's affidavit because he lacked sufficient knowledge to opine on industry practice. HCSC noted that Jafari had "no formal training in health care ***, no experience working for health plans or insurers, and no experience working in the health care field prior to working at [GASC]." And, HCSC claimed, the affidavit contained no foundational information on which Jafari could base that opinion. Finally, HCSC argued that GASC had failed to disclose Jafari as an expert in its Rule 213(f) disclosures and, therefore, could not call on Jafari to offer opinion testimony.

¶ 33 GASC responded that Jafari was qualified to offer his opinion as a lay witness because of his experience working with GASC. GASC argued that, in light of Jafari's "familiarity with

[GASC's] type of practice," he could testify about common practice among other surgical centers in same area.

¶ 34 The trial court granted HCSC's motion for summary judgment. The court found that there was "no evidence from which a trier of fact could have reasonably concluded that HCSC made unambiguous promises to pay [GASC] the amount it seeks." The court noted that there was no evidence "proving that HCSC representatives used the phrase 'usual and customary' or expressed the amount of reimbursement as a percentage of [GASC's] charges." The court noted that the transcripts did not show that customer advocates used that term, the Benefit Rundowns did not show that GASC employees recorded that term during any calls, and none of GASC's employees "could *** specifically recall HCSC representatives expressing reimbursement in the manner [GASC] claims during any particular call."

¶ 35 The court also rejected the notion that an unambiguous promise could be inferred from HCSC's "words or conduct during benefit confirmation calls." The court cited the recorded disclaimer played during the calls and the fact that no GASC employees could define what "allowed amount" meant. The court, quoting *Chatham Surgicore, Ltd. v. Health Care Service Corp.*, 356 Ill. App. 3d 795, 802 (2005), wrote, "For a promise to be unambiguous it need not be express, but 'the parties must have a distinct intention common to both and without doubt or difference.' " The court stated that, absent specification, Jafari's assumption that HCSC would pay at the usual and customary rate was insufficient to show an unambiguous promise.

¶ 36 The court further found that, even if an unambiguous promise could be shown, GASC could not show that its reliance was reasonable. The court noted that GASC "knew as early as 2009 that it was not being compensated by HCSC at the expected amount" but continued to accept HCSC patients.

¶ 37 Finally, the court granted HCSC's motion to strike paragraphs 13 and 14 of Jafari's affidavit, finding that GASC had failed to disclose Jafari's opinion in its Rule 213(f) disclosures and that Jafari could not offer opinion testimony because he had not been qualified as an expert witness. GASC filed this appeal.

¶ 38 II. ANALYSIS

¶ 39 GASC challenges the trial court's grant of summary judgment for HCSC. We review *de novo* a circuit court's rulings on a motion for summary judgment. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 65. Summary judgment is proper only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. *Id*. In order to survive a motion for summary judgment, a plaintiff need not prove its case, but the plaintiff must present some evidence that would arguably entitle it to a judgment. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Where parties file "cross-motions" for judgment on the pleadings and summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago*, 2016 IL 119618, ¶ 26. But we are not bound by this invitation; if we find that disputed questions of material fact remain or that neither side is entitled to judgment as a matter of law, we are not obligated to affirm summary judgment in either party's favor. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28.

¶ 40 GASC's claim for reimbursement at a higher rate than it was paid by HCSC was premised on a promissory estoppel theory. Promissory estoppel is a common-law doctrine designed to permit the enforcement of promises that are unsupported by the consideration necessary to form a contract, "such as gratuitous promises, charitable subscriptions, and certain

intrafamily promises." *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 91. The doctrine places "contractual stature" on a promise that is not supported by consideration and "provide[s] a remedy to the party who detrimentally relies on that promise." *Id.* ¶ 93. To establish a claim of promissory estoppel, the plaintiff must prove that: (1) the defendant made an unambiguous promise to the plaintiff, (2) the plaintiff relied on the promise, (3) the plaintiff's reliance was expected and foreseeable by the defendant, and (4) the plaintiff relied on the promise to its detriment. *Id.* ¶ 95; *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009).

¶ 41 GASC first claims that the trial court erred in overlooking the "flexible, broad-ranging nature" of promissory estoppel and the fact that promissory estoppel is an equitable remedy. And GASC faults the trial court for finding "superficial deficiencies in the justifiability of GASC's reliance."

¶ 42 To the extent that GASC claims that it did not have to meet the four elements of a promissory estoppel claim because the overall unfairness of the case could have entitled it to judgment, we reject that argument. Our supreme court has made clear that these elements are essential to a claim of promissory estoppel, not mere factors guiding the trial court's overarching notions of fairness or equity. See *Matthews*, 2016 IL 117638, ¶ 95 ("To establish a claim based on promissory estoppel, the plaintiff *must* allege and prove [the four elements]." (Emphasis added.)); *Newton Tractor Sales*, 233 Ill. 2d at 51 ("To establish a [promissory estoppel] claim, the plaintiff *must* prove [the four elements]." (Emphasis added.)).

¶ 43 GASC concedes that it lacked evidence showing any explicit promise by HCSC's employees that it would reimburse GASC at a certain percentage of the usual and customary

charges. But GASC argues that HCSC implicitly promised that it would reimburse GASC at the usual and customary rate.

¶ 44 We agree that a promise need not be explicit for purposes of a promissory estoppel claim; it need only be unambiguous. *Chatham Surgicore*, 356 Ill. App. 3d at 802. The problem with GASC's promissory estoppel claim is that it never presented any evidence that HCSC *unambiguously* conveyed the notion that it would reimburse GASC for usual and customary charges. To the contrary, the record is replete with ambiguity about the basis for HCSC's reimbursement rates.

¶ 45 Most frequently, HCSC customer advocates told GASC that it would reimburse GASC at a percentage of the "allowed amount." They used various other terms, each of which was a variant of the phrase "allowed amount," such as "the allowable," "the allowed," "the allowance," "the amount," or the "plan's allowance." Nowhere in any of the transcripts did customer advocates use the phrase "usual and customary" or any variation of that phrase. We see no way in which any words of HCSC's employees could have conveyed the impression that HCSC would reimburse GASC at the "usual and customary" amount.

¶ 46 Moreover, in his deposition, Jafari testified that he had no idea what the "allowed amount" was. While GASC notes that HCSC left it in the dark about what the "allowed amount" was, that lack of information cuts *against* GASC's argument: how could HCSC's promise be unambiguous when it promised to pay a percentage of an amount that was unclear?

¶ 47 Nor do we find HCSC's use of the words "usual and customary" in the Claim Detail sheets sufficient to create a question of fact. Nothing in those documents conveyed the notion that the "allowed amount" was the same as the "usual and customary" amount. Nor did they promise, in any way, that HCSC would pay GASC the usual and customary amount. They

simply said that certain payments had been denied because they exceeded the usual and customary charges for a procedure. In light of the fact that HCSC employees had used an entirely different set of terminology in describing the coverage to GASC employees, we cannot say that a denial of payment beyond a usual and customary amount constitutes an unambiguous promise to pay the usual and customary amount.

¶ 48 We recognize that Gallegos testified that she heard HCSC customer advocates use "usual and customary" as a benchmark for reimbursment. But none of the 134 transcripts of calls with GASC employees showed that the customer advocates used that phrase. Nor could Gallegos recall when, specifically, or even how often she heard the customer advocate say, "usual and customary." And the Benefit Rundowns prepared by GASC employees offered no support for this testimony, as they simply recorded the percentage recited by the customer advocates. This evidence is insufficient to create a genuine issue of material fact on the issue of HCSC's promise. *Centro Medico Panamericano, Ltd. v. Benefits Management Group, Inc.* (*Benefits Management*), 2016 IL App (1st) 151081, ¶¶ 28-29 (testimony of surgical center's insurance coordinator that administrator's employees promised to pay percentage of billed amount on verification calls insufficient to defeat summary judgment where her testimony was "not substantiated by the [contemporaneous] notes she took [of the calls]").

¶ 49 Our recent decision in *Benefits Management*, 2016 IL App (1st) 151081, is instructive. In *Benefits Management*, like this case, an outpatient surgery facility sued the administrator of its patients' insurer under a promissory estoppel theory, alleging that the administrator had promised to reimburse the surgery facility at " 'a percentage of the [facility's] billed charges.' " *Id.* ¶ 2. The administrator alleged that it had only agreed to pay a percentage of the " 'usual, customary, and reasonable' charges." *Id.* ¶ 3. In their depositions, several employees of the

surgery facility recognized that usual, customary, and reasonable did not have a set definition, and that reasonable people could disagree on what is usual, customary, and reasonable. *Id.* ¶¶ 12-13.

¶ 50 This court affirmed the trial court's award of summary judgment for the administrator because the surgery facility could not show that the administrator "made a clear and unambiguous promise regarding the reimbursement amount." *Id.* ¶ 3. The court found that, by its very terms, the promise to pay a certain percentage alone was ambiguous because "[u]sing a percentage number without establishing the basis for a computation does not inform the parties who are left wondering, 60% of what?" *Id.* ¶ 33. And even if both parties "understood the charges would be 'usual, customary, and reasonable' " (*id.*), that promise was likewise ambiguous, since there could be differing interpretations of what amount was usual, customary, and reasonable. *Id.* ¶ 26.

¶ 51 This case, like *Benefits Management*, involves two parties' differing interpretations of the basis on which a percentage of coverage would be determined. And like the administrator in *Benefits Management*, HCSC never made an unambiguous promise as to what that basis would be. At most, HCSC used varying terms to describe their reimbursements, most often the phrase "allowed amount." And like the staff of the surgical center in *Benefits Management*, GASC's employees acknowledged that they did not know what the "allowed amount" was, meaning that phrase was open to interpretation.

¶ 52 The mere fact that Jafari assumed that the "allowed amount" would reflect usual and customary charges—which, coincidentally, he believed to be his own fee schedule—does not establish an unambiguous promise. Nor does the fact that HCSC did nothing to dispel that assumption. See, *e.g.*, *Centro Medico Panamericano, Ltd. v. Laborers' Welfare Fund of Health*

& Welfare Department of the Construction & General Laborers' District Council (*Laborers' Welfare*), 2015 IL App (1st) 141690, ¶¶ 14-15 (surgical center's assumption that its own charges were usual and customary, and fact that insurer did not dispel that assumption, could not establish unambiguous promise).

¶ 53 GASC cites *Chatham Surgicore*, 356 Ill. App. 3d 795, in support of its claim that HCSC's promise was unambiguous, but *Chatham Surgicore* is distinguishable. *Chatham Surgicore*, like this case, involved an insurer's alleged promise to reimburse a surgical center for procedures it performed on the insurer's policyholders during verification calls. *Id.* at 798. But the key difference between this case and *Chatham Surgicore* is that, in *Chatham Surgicore*, the insurer allegedly "*refused altogether* to pay *** for the treatment." (Emphasis added.) *Id.* In this case, HCSC did not *entirely* refuse to pay for the services. Rather, the dispute in this case centers on how to calculate the ultimate payment—whether HCSC promised to pay a percentage of the usual and customary charges or a percentage of the allowed amount as defined in the patients' policies.

¶ 54 That distinction is important because of the nature of the promises. Had HCSC entirely refused to reimburse GASC, then GASC could assert a claim of promissory estoppel, as HCSC clearly promised to pay GASC *something*. But GASC cannot show that HCSC promised to pay the specific, usual-and-customary amount that GASC wanted it to pay.

¶ 55 GASC also contends that the trial court erred in requiring that, in order for an unambiguous promise to be made, "the parties *** have a distinct intention common to both and without doubt or difference." The trial court cited *Chatham Surgicore*, 356 Ill. App. 3d at 802, for that proposition. GASC contends that that proposition is incorrect because it conflates the requirements for establishing an enforceable contract—specifically, a meeting of the parties'

minds—with the elements of promissory estoppel. GASC notes that a promissory estoppel claim should not have to prove a common intention of the parties, since promissory estoppel, by its very definition, cannot be established when a contract exists. See *Newton Tractor Sales*, 233 Ill. 2d at 55 ("Promissory estoppel is an offensive theory of recovery *** providing a remedy for those who rely to their detriment *** on promises, despite the absence of any mutual agreement by the parties on all the essential terms of a contract." (Internal quotation marks omitted.)).

¶ 56 GASC is incorrect. The passage in *Chatham Surgicore* cited by the trial court discussed the necessity that a promise be unambiguous. *Chatham Surgicore*, 356 Ill. App. 3d at 802. By definition, a promise is ambiguous when it could be reasonably interpreted in different ways. In other words, in order to be sufficient to support promissory estoppel, a promise must be capable of only one reasonable interpretation. That principle is what the court in *Chatham Surgicore* was referencing when it said that the parties in a promissory estoppel case " 'must have a distinct intention common to both and without doubt or difference.' " *Id.* (quoting *Bank Computer Network Corp. v. Continental Illinois National Bank & Trust Co.*, 110 Ill. App. 3d 492, 497 (1982)). While the parties need not form a binding contract, the promise involved must be unambiguous such that both parties would reasonably know what was being promised.

¶ 57 GASC also claims that the trial court erred in striking two paragraphs from Jafari's affidavit that dealt with the industry's use of the term "usual and customary." GASC argues that the trial court incorrectly found that it had not disclosed Jafari's opinion testimony pursuant to Rule 213(f). We decline to consider whether the trial court erred in striking the paragraphs of the affidavit under Rule 213(f) because, even if it did, those paragraphs would not have been sufficient to defeat HCSC's motion for summary judgment, making any error harmless. See *Pogge v. Hale*, 253 Ill. App. 3d 904, 919 (1993) ("[A]ny errors made by the trial court in striking

the affidavits *** were harmless, because neither affidavit was sufficient to overcome [defendant's] motion for summary judgment.").

¶ 58 The first of the two stricken paragraphs said that, "when the metric for determining an 'allowable amount' or 'covered services' is not specifically identified, the only payment metric an [out-of-network] provider can rely upon is the usual and customary rate for the applicable geographic region." It may be true that the only payment metric GASC could rely on was the usual and customary rate. But that does not mean that HCSC unambiguously promised to pay that amount. To the contrary, HCSC representatives frequently told GASC that it would be paying something *other* than the usual and customary amount—the "allowed amount" or some variation of that term. And Jafari admitted that he had no idea what the "allowed amount" was. Thus, even if GASC could only rely on one formulation of a charge, that fact does not show that HCSC *represented* that it would pay that charge.

¶ 59 The second of the two stricken paragraphs said, "Unless otherwise stated by HCSC's agent during the confirmation of benefits calls, covered services are paid at a percentage of [the usual, customary, and reasonable rate]." But the fact that HCSC reimbursed some services at the usual and customary rate does not show that HCSC promised, in all instances, to reimburse GASC at that level. In fact, this paragraph does not even disclose whether GASC was paid at the usual and customary rate in the past; it simply said that covered services "are paid" at that rate. Jafari's vague assertion that such claims "are paid" at a certain rate, with no specification about what that rate is, when HCSC paid for a procedure at that rate, or whether GASC ever received payment at the usual and customary rate in the past, is insufficient to establish an unambiguous promise by HCSC.

¶ 60 In sum, the evidence showed that HCSC promised to pay GASC a percentage of the cost of GASC's surgical procedures. But what sum that percentage would be based on remained unclear. Consequently, GASC has failed to show that there is a genuine issue of material fact regarding the existence of an unambiguous promise by HCSC. And because GASC cannot establish that critical element of its promissory estoppel claim, the trial court correctly granted summary judgment for HCSC.

¶ 61 III. CONCLUSION

¶ 62 For the reasons stated, we affirm the trial court's award of summary judgment for HCSC.

¶ 63 Affirmed.