

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1322

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**ROBERT P. MURPHY, WILLIAM D. MURPHY, RICK M.
MURPHY, AND ROBERT R. MURPHY,**

PLAINTIFFS-RESPONDENTS,

V.

MCC, INC., F/K/A MURPHY CONSTRUCTION CO.,

DEFENDANT-APPELLANT,

**BLACK CREEK LIME STONE COMPANY, ARLENE A.
GAGE, LARRY R. GAGE, DAVID F. GAGE, THOMAS M.
GAGE, ORVILLE M. MURPHY, FRANCIS W. MURPHY,
JOHN P. MURPHY, JOSEPH R. MURPHY, JOYCE A.
MURPHY STEARNS, DAWN E. MURPHY, BRIAN P.
MURPHY, MICHAEL R. MURPHY, M. PATRICE
KRANZUSCH, BONNIE K. RABIDEAU, AND KATHLEEN A.
HANNEKEN,**

DEFENDANTS-CO-APPELLANTS,

**INLAND MATERIALS, INC., JACQUELINE GAGE
DERUBIO, ROBERT L. GAGE, KATHRYN A. FRANCO,
RICHARD E. MURPHY, GREGORY J. MURPHY, JAMES R.
MURPHY, PATRICK L. MURPHY, RICHARD M. MURPHY,
VINCENT R. MURPHY, AND FRANCINE A. CISKE,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover and Fine, JJ.

CANE, C.J. MCC, Inc., and Black Creek Lime Stone Company, Arlene Gage, Larry Gage, David Gage, Thomas Gage, Orville Murphy, Francis Murphy, John Murphy, Joseph Murphy, Dawn Murphy and Joyce Murphy-Sterns (MCC) appeal a judgment construing a stock redemption agreement (the agreement) between MCC and shareholders who sought to redeem their shares in MCC pursuant to the agreement. On appeal, MCC argues that: (1) the agreement unambiguously describes the personal property the auction appraiser was to appraise; (2) because the valuation methods in the agreement are unambiguous, no judicial construction was required; and (3) the trial court erred by construing the agreement's terms relating to valuation of real estate and by receiving evidence on the parties' intentions because the issue was not pled and because no motion to amend the pleadings was filed. We reject these arguments and affirm the judgment.

I. FACTS

The trial court found the following facts. In August 1996, Robert P., William, Rick, and Robert R. Murphy (the Murphys) filed a declaratory judgment action pursuant to § 806.04, STATS., seeking clarification of the parties' rights and obligations under a December 1986 stock redemption agreement. The Murphys,

along with four other branches of the Murphy family,¹ are shareholders in MCC, a ready-mix concrete, mining, and road paving business. In 1984, the second generation members of the five Murphy family branches decided to prepare a stock redemption agreement for the redemption of their MCC shares upon death. Plaintiff Robert R. Murphy and defendant Orville Murphy were primarily responsible for the agreement's language. When the parties executed the agreement, the Robert Murphy family's relationship with the other Murphy branches was "harmonious," and the parties did not intend to force shareholders to sell at a discount on redemption.

The language in paragraph four of the agreement's final version is at issue on appeal:

The redemption price or sale price of shares by a shareholder during lifetime to the corporations or other shareholders, except in meeting the offer of an outsider as provided in paragraph 2, shall be the agreed *estimated fair market value of the shares at the time of redemption*, sale or surrender; but in case of failure to agree, the *value* of the shares shall be determined by appraisal in the following manner. (Emphasis added.)

The agreement then describes the following appraisal method:

The corporation whose shares are being redeemed, surrendered or sold shall name three auction appraisers, similar to Ritchie Brothers, Miller and Miller and Laske Bros. The shareholder, or Personal Representative of a deceased shareholder, whose shares are being redeemed, surrendered or sold shall select one of such auction appraisers to appraise the value of the equipment and other personal physical assets. The real estate of the respective corporation shall be appraised by three different real estate

¹ The five branches of the Murphy family are the Robert P. Murphy family, the Arlene Gage Family, the Orville Murphy family, the Francis Murphy family, and the Richard Murphy family.

appraisers, selected by the respective corporation, with the average of such three appraisals to be the value of such real estate. If a corporation fails for six months after such appraisals are required to provide the list of appraisers for the personal property and the appraisals of the real estate, then the sellers may have single appraisals made by appraisers of his or her choice, at the respective corporation's expense, if agreed to by the corporation.

Once "such appraisals" are completed:

the value of the shares shall be determined by the value of such property as appraised, plus cash, contracts and accounts receivable and less liabilities of the respective corporations. (Emphasis added.)

There were several drafts of the agreement. The first draft, dated 1984, provided for redemption only upon the death of a signatory stockholder. Initially, "book value" would be paid for the shares, but on the death of a third shareholder, the company would be liquidated at "public auction," and the initial book value redemption price would be modified based on the auction results. The parties rejected this first draft.

Robert Murphy made several suggestions for change, including that: (1) the agreement provide for redemption of shares on death or "election of anyone to sell stock"; (2) the terms "liquidation" and "public auction" be eliminated; (3) an "auction appraiser" and "three real estate" appraisers be utilized to determine the value of the company's personal property and real estate; and (3) the appraisers determine "fair market" value.

The second draft eliminated the "liquidation" and "public auction concepts" and provided for redemption of shares upon either death or election of a shareholder during his or her lifetime. Further, this second draft provided that the

redeeming company would initially pay "book value," but that ten years after election to sell, the parties would determine "the value" of the shares pursuant to an appraisal. Robert Murphy's notes likewise reflect that "the value" was to refer to "fair market value." Robert and Orville discussed this second draft with an accountant. The accountant's memorandum of the meeting indicates that "the second 10 years payments are based on the fair market value as appraised." Significantly, Robert's notes suggest that the accountant's reference to "fair market value as appraised" referred to "the value" in the second draft.

In 1995, the Murphys tendered their MCC shares to the company and stated that they wanted to discuss the estimated fair market value of their shares. MCC accepted the tender, and its acceptance letter reflects its willingness to initiate discussions concerning the "fair market value" of the Murphys' shares. The parties failed to agree on the fair market value of the Murphys' shares. Less than one month after accepting the Murphys' tender, MCC's board held a special meeting and passed a motion to suggest implementation of the appraisal process in paragraph four of the agreement. In February 1996, MCC advised the Murphys that it had selected three potential appraisers for MCC's equipment and personal property.² Before agreeing on which of the suggested appraisers would be appropriate, the Murphys asked MCC for a list of the equipment and other personal property that would be subject to appraisal. MCC rejected the Murphys' requests.

Following a bench trial, the trial court concluded that the agreement was ambiguous in "at least three respects," two of which are applicable to this

² None of the auction appraisers MCC selected were those listed in the agreement.

appeal:³ (1) the proper evaluation method upon which the appraisal is based; and (2) the categories of assets to be included in the appraisal. To ascertain the parties' intent regarding these ambiguities, the trial court looked to extrinsic evidence. First, it found the testimony the Murphys presented more credible and concluded that by the phrase "the value," the parties intended the auction appraisers to use "fair market value," not the liquidation/auction value as MCC suggested. Second, it concluded that all MCC's personal property must be included as part of the appraisal.

II. ANALYSIS

MCC puts all its eggs in one basket and argues that extrinsic evidence should not have been admitted to ascertain the parties' intent because the contract was unambiguous and plain on its face.⁴ We agree with the trial court that the agreement was ambiguous. Accordingly, we affirm the judgment.

1. Meaning of "value"

MCC contends that by construing the phrase "the value" in paragraph four of the agreement to mean "fair market value," the trial court improperly dictated the "methodology" by which the appraisers were to determine value because the agreement delegated the choice of "methodology" to the appraisers. Thus, before addressing whether "the value" is ambiguous, MCC reasons, we must first address the "threshold question" whether valuation methods were delegated to the appraisers. In response, the Murphys claim that in

³ "[T]he date as of which [Murphys'] 20% interest in MCC must be appraised" was the other ambiguity the trial court found, but MCC does not challenge this finding.

⁴ MCC does not challenge the trial court's factual findings regarding the parties' intent.

construing the phrase "the value," the trial court was simply defining an ambiguous term in the agreement. We agree with the Murphys.

The interpretation of a contract is a question of law we review de novo. **Gunka v. Consolidated Papers, Inc.**, 179 Wis.2d 525, 531, 508 N.W.2d 426, 428 (Ct. App. 1993). When a contract's terms are unambiguous, we must give the contract its plain and ordinary meaning and construe it as it stands. **Ford Motor Co. v. Lyons**, 137 Wis.2d 397, 460, 405 N.W.2d 354, 379 (Ct. App. 1987). Contractual language is ambiguous when it is "reasonably or fairly susceptible of more than one construction." **Borchardt v. Wilk**, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). Whether a contract provision is ambiguous is a question of law. See **Moran v. Shern**, 60 Wis.2d 39, 46-47, 208 N.W.2d 348, 351 (1973). If the contract is ambiguous, extrinsic evidence may be used to discern the parties' intent. **Energy Complexes, Inc. v. Eau Claire County**, 152 Wis.2d 453, 468, 449 N.W.2d 35, 41 (1989).

MCC sets forth a number of arguments regarding why "the value" is unambiguous. It argues, for example, that silence "as to the type" of methodology is not an ambiguity, that a contract is not ambiguous because it allows a choice among various alternatives, that it is "virtually impossible ... to specify every detail of the [appraiser's] decision-making process," and that by defining value as "fair market value" the trial court rendered the language regarding the appraisal methodology superfluous. These arguments, however, are based on MCC's erroneous belief that by defining "the value," the trial court dictated the appraisal methodology. In contrast, the trial court simply defined the *type* of value to be used; it defined "the value." Defining that term does not supplant the appraisal methodology set forth in the agreement, but defines the value the appraisers are to

determine through the appraisal methodology they deem appropriate. Accordingly, we turn to whether "the value" is ambiguous.

Paragraph four of the agreement provides that the redemption or sale price of shares during a shareholder's lifetime "shall be the agreed estimated fair market value of the shares at the time of redemption, sale or surrender; but in the case of failure to agree, the value of the shares shall be determined by appraisal in the following manner." It is unclear whether subsequent references to "the value" refer to the previously mentioned "fair market value." In other words, "the value" in the sentence following "but" could refer to the "fair market value" used in the adjoining clause and therefore be defined as "fair market value." On the other hand, the agreement could also be construed in light of the manner in which "the value," which is not defined, is used in the next sentence and arguably leaves the definition of value to the appraisers if the parties cannot agree on fair market value.

Thus, the phrase "the value" is ambiguous because it is reasonably susceptible to more than one construction. See *Borchardt*, 156 Wis.2d at 427, 456 N.W.2d at 656. When a contract is ambiguous, as here, it is proper for the trial court to hear evidence regarding the circumstances surrounding the making of the agreement. See *Riley Constr. Co. v. Schillmoeller & Krofl Co.*, 70 Wis.2d 900, 907, 236 N.W.2d 195, 199 (1975). Because the parties suggested differing interpretations of the relevant provision, resort to extrinsic evidence was the only way to assign the meaning the parties intended to the contested paragraph. See *Patti v. Western Machine Co.*, 72 Wis.2d 348, 352, 241 N.W.2d 158, 160 (1976). Questions of intent are for the trier of fact. *Wausau Underwriters Ins. Co. v. Dane County*, 142 Wis.2d 315, 323, 417 N.W.2d 914, 917 (Ct. App. 1987). We

uphold a trial court's factual findings unless they are clearly erroneous. Section 805.17(2), STATS.

In this case, the trial court found that the parties intended "value" to mean "fair market value." This finding is supported by Robert's own notes as well as the accountant's memorandum prepared following his discussion with Robert and Orville. While Orville testified that he did not recall ever discussing auction or liquidation value, Robert testified that auction and liquidation value were eliminated from earlier drafts. The trial court found the testimony and corroborating facts the Murphys presented more credible than that MCC presented, which it may do. *See Plesko v. Figgie Int'l*, 190 Wis.2d 764, 775, 528 N.W.2d 446, 450 (Ct. App. 1994) (noting that the trial court is the ultimate arbiter of witness credibility). For these reasons, we affirm the trial court's finding that the appraisers are to determine the fair market value of the shares.

2. Description of "Personal Property"

MCC also argues that the agreement was not ambiguous regarding the personal property to be appraised. The trial court concluded that the phrase "equipment and other personal physical assets" defining what was to be included in the appraisal was ambiguous and found that the parties intended to refer to all the company's personal property. Under the trial court's ruling, the fair market value of the shares includes MCC's minority interest in Central Ready Mixed ("CRM"), an interest worth nearly 1.5 million dollars. MCC argues that based on the plain meaning of the phrase in context of the entire agreement, this phrase is not ambiguous, but reflects the parties' intent to exclude such assets from appraisal. We are not persuaded.

Turning to paragraph four, we agree with the trial court that the agreement is ambiguous with respect to the personal property to be appraised. The agreement first notes that the auction appraisers⁵ are to "appraise the value of the equipment and other personal physical assets." Two sentences later, the agreement uses the phrase "the personal property." The last sentence of the agreement states that "[u]pon the completion of such appraisals, the value of the shares shall be determined by the value of such property as appraised, plus cash, contracts and accounts receivable less liabilities of the respective corporations." We discern two reasonable constructions. "Personal property" and "such property" may refer to the earlier "equipment and other personal physical assets" or it may mean that all personal property is to be appraised.

Given this ambiguity, the trial court again looked to extrinsic evidence of the parties' intent and found that the parties intended the phrase "equipment and other personal physical assets" to refer to all of MCC's personal property, including the CRM stock and other intangible property. This finding of intent is not clearly erroneous. *See* § 805.17(2), STATS. There was evidence that the parties had never discussed excluding any category of MCC's assets from the appraisal. Further, the court relied on the parties' intent to base valuation on fair market value, suggesting that without considering intangibles, fair market value could not be determined.

To support its argument that the phrase "equipment and personal physical property" is unambiguous, MCC invokes various rules of statutory

⁵ The trial court found that by inserting the term "auction appraiser" in the agreement, the parties intended to refer to the appraiser's credentials and not to the valuation method to be employed on appraisal.

construction, including ejusdem generis, expresso unius est exclusio alterius, and the rule that courts should construe contracts to prevent making any word surplusage. Rules of construction are not used when a contract is unambiguous, but only when ambiguous. *See Jones v. Sears Roebuck & Co.*, 80 Wis.2d 321, 329-30, 259 N.W.2d 70, 73-74 (1977); *see also Berger v. Alan Realty Co.*, 273 Wis. 427, 431-32, 78 N.W.2d 747, 749 (1956). MCC's attempt to use rules of construction in this manner belies its contention that the agreement is unambiguous. Rather, its use of rules of construction impliedly concedes that an ambiguity exists. Essentially, MCC is resolving the ambiguity through construction rules and then concluding that no ambiguity exists. We reject MCC's contention that an agreement is unambiguous because rules of construction resolve an ambiguity.

3. Failure to Plead Valuation of Real Estate

Finally, MCC argues that the trial court should not have construed the real estate valuation language and received evidence of the parties' intent in that regard because the issue was not pled, no discovery was had, and the Murphys never amended their complaint. In this way, MCC insists that it had no notice that the valuation standard to be applied to the real estate was at issue.⁶ While a court may amend the pleadings to conform to the evidence, MCC reasons, it must balance the need for amendment against potential prejudice to the opposing party.

⁶ MCC states that the complaint recited that the parties disagreed on the interpretation of three issues: (1) the valuation method by which the "equipment and other personal physical assets" were to be appraised; (2) what property is included in "equipment and other personal physical property"; and (3) the date of valuation. MCC argues that as such, the valuation standard to be applied to the real estate was not at issue and that the trial court therefore erred by considering it.

If not, MCC asserts, the trial court has erroneously exercised its discretion. We disagree.

The trial court's application of "fair market value" to the real estate was not error because it was encompassed within the scope of the declaratory relief the Murphys sought under § 806.04, STATS. Paragraph thirty-three of the complaint states that the Murphys sought to "declare the rights, status and legal obligations of the parties arising out of a December 23, 1986 Stock Redemption Agreement" This implicates the entire agreement, including what valuation standard should be applied to the real estate.

In summary, we hold that because the stock redemption agreement is ambiguous, the trial court did not err by relying on extrinsic evidence to conclude that the parties intended the appraisers to use fair market value and to value all of MCC's personal property. Further, we conclude that the trial court did not err by applying "fair market value" to the real estate because the definition of "value" pertaining to real estate was encompassed within the Murphys' request for a declaratory judgment. Accordingly, the judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

