COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3209 **Cir. Ct. No. 2003CV3549**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STEVEN J. BIERCE AND BECKY A. BIERCE,

PLAINTIFFS-APPELLANTS,

V.

SHOREWEST REALTORS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Steven J. and Becky A. Bierce ("the Bierces") appeal from an order enforcing a mediation agreement that was modified by the trial court. The Bierces contend that the trial court erred in its construction of the mediation agreement by redrafting an unambiguous compromise formula for

determining damages into a formula that emulates a traditional measure of damages, rather than enforcing the plain meaning of the agreement as written. Because we conclude that the trial court erred in its construction of the mediation agreement, we reverse the order and remand the cause to the trial court for further proceedings consistent with this opinion.

I. BACKGROUND.

¶2 In 1997, the Bierces purchased a single-family home located at 2313 North 69th Street in the City of Wauwatosa for $65,000. Shorewest Realtors, Inc. ("Shorewest") was the real estate brokerage firm that had listed the property. At the time of the sale, Shorewest representatives told the Bierces that the property was zoned single-family residential. A few years later, the Bierces sought to sell the property. In 2001, the Bierces found a buyer, but the sale failed to close after a bank rejected the buyer's loan request due to the fact that the property was not zoned single-family residential, but rather was zoned AA-Business, and the home was categorized as a legal non-conforming use, rendering it unsuitable for residential financing. Because of the business zoning and the consequent lack of available financing, the Bierces have been unable to sell the property and have been renting it out ever since.

¶3 On April 16, 2003, the Bierces filed a suit against Shorewest, alleging strict responsibility misrepresentation, negligent misrepresentation, and breach of fiduciary duty.[1] It was undisputed that Shorewest misrepresented the

[1] Initially the Bierces' suit included the individual broker for Shorewest and the individual selling broker who had been involved in the 1997 sale. These parties were subsequently dismissed from the suit and are not parties to this appeal.

zoning of the property to the Bierces at the time of the sale, but the parties disagreed on the amount of damages. The Bierces argued that the damages should be determined by calculating the difference between the fair market value of the property if it were located in a single-family residential zone, and if it were located in the business-commercial zone and used as a rental property. Shorewest argued that the damages should be determined by calculating the difference between the fair market value of the property as it was represented to the Bierces at the time of the sale and the actual fair market value of the property at the time of the sale.

¶4 Before going to trial, the parties agreed to attempt to mediate the dispute and a mediation hearing took place on June 11, 2004. At the conclusion of the mediation, the parties reached a compromise and entered into a settlement agreement. That agreement provides in relevant part:

> 1. [The mediator] shall retain two (2) property appraisers … who shall independently determine the differential in the current fair market value of the property 2313 North 69th Street, Wauwatosa as if zoned residential and as actually zoned, business-commercial.
>
> 2. Shorewest Realty, Inc., shall pay to Steven J. Bierce [and] Becky A. Bierce … the mean (average) of the two (2) values reported by the appraisals, plus the sum of $5,000.00.

¶5 After the agreement was reached, the parties found themselves in disagreement over the proper interpretation of the agreement. They agreed that one of the appraisals should be for a hypothetical situation in which the property is valued "as if zoned residential," but disagreed about the other appraisal, "as actually zoned, business-commercial." The Bierces contacted the mediator with a request for an instruction to be given to the appraisers:

> [T]hey should be told that their first appraisal will assume that the dwelling will be marketed as a single family, owner-occupied home and is zoned "AA-Single Family

> Residence." In performing the second appraisal, they should assume that the home will be marketed as an investment or rental property and is zoned "AA-Business."

The mediator disagreed with the proposed interpretation, and explained that the mediation agreement instructs the appraisers to give two appraisals, one as if zoned AA-Business, and one as if zoned residential, but that the agreement does "not [state] that the appraisers should assume that any buyer under the present zoning will rent it to a tenant for residential use rather than use it for his own residence."

¶6 Shorewest responded with an explanation of its understanding of the agreement:

> Shorewest's understanding of the mediation Agreement is that the appraisers to be retained will independently determine the difference in the current fair market value of the property at 2313 North 69th Street as a single family residence and the fair market value of the property as a single family residence under the actual business-commercial zoning, i.e., as a legal non-conforming use under the actual zoning.
>
> ….
>
> The general measure of their alleged loss is the difference between the value of the property as represented (residential zoning) and its actual value as purchased (legal, non-conforming use as a single family residence in a business-commercial zone)….

¶7 The mediator drafted a letter to be sent to the appraisers that set forth an instruction regarding the contested language. The letter read in relevant part:

> I'm mediating a case involving a single family residence at 2313 N. 69th Street in Wauwatosa, which is zoned "AA-Business" but is used as a non-conforming residence. We have agreed that I will obtain appraisals from two MAI appraisers, defining the market value with the existing zoning and also the value if the property were zoned

> "residential", for the purpose of determining how much less the property is worth due to its non-conforming status.

¶8 The Bierces disagreed with the instruction and requested that the trial court schedule a final pretrial. Shorewest responded by filing a motion to enforce the mediation agreement in accordance with the mediator's interpretation. The Bierces then filed a motion to enforce the mediation agreement, but in accordance with an enclosed affidavit by an appraiser.

¶9 On October 11, 2004, the trial court conducted a hearing on the motions. The court acknowledged that "the final test has to be the language of the agreement," and that "the question is what the agreement says not what the law of damages is." The court then indicated that it believed the "plain meaning" of the phrase "differential in the current fair market value of the property … as if zoned residential and as actually zoned, business-commercial" "adopt[s] the rule of damages in misrepresentations," namely, "the difference between the property as is and the property as it was represented to be." This, the court concluded, meant instructing the appraisers that "as if zoned residential and as actually zoned, business-commercial" meant "owner-occupied single family residence as if zoned residential and as if zoned commercial." The Bierces objected, arguing that this interpretation misrepresented the parties' intent by adding words into the agreement and asked the court to use only the actual language of the agreement. The trial court disagreed, and felt it merely restated "the legal effect of what the parties agreed to." The court issued its order on October 26, 2004.

> **NOW, THEREFORE, IT IS HEREBY DECLARED, DECREED AND ADJUDGED** that the plain meaning and intent of paragraph 1 of the parties' written Mediation Agreement dated June 11, 2004 is to determine the current fair market value of the property located at 2313 North 69th Street, Wauwatosa, Wisconsin as an owner-occupied single-family residence as if it were located in a City of Wauwatosa "AA-single-family residence" zone, *and as it is*

> *actually zoned: a legal non-conforming use as an owner-occupied, single-family residence* in a City of Wauwatosa "AA-business/commercial" zone.
>
> **AND IT IS FURTHER ORDERED** that the mediator … shall retain two appraisers … and shall instruct each such appraiser to independently determine the current fair-market value of the property located at 2313 North 69th Street, Wauwatosa, Wisconsin as an owner-occupied, single-family residence as if it were in a City of Wauwatosa "AA-single-family residence" zone, and *as it is actually zoned: a legal, non-conforming use as an owner-occupied, single-family residence* in a City of Wauwatosa "AA-business/commercial" zone.

(Emphasis added.) The Bierces now appeal.

II. ANALYSIS.

¶10 The issue in this case is whether the trial court correctly construed the phrase of the mediation agreement that reads "shall independently determine the differential in the current fair market value of the property 2313 North 69th Street, Wauwatosa as if zoned residential and as actually zoned, business-commercial," by concluding that the plain meaning of "business-commercial" is "a legal non-conforming use as an owner-occupied, single-family residence in a City of Wauwatosa 'AA-business/commercial' zone."

¶11 Construction of the terms of a contract is a matter of law that we decide independently of the trial court. ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). Unambiguous contracts must be enforced as they are written. ***Dykstra v. Arthur G. McKee & Co.***, 92 Wis. 2d 17, 38, 284 N.W.2d 692 (Ct. App. 1979). A contract provision that is "reasonably susceptible to more than one construction" is ambiguous. ***Kohler Co. v. Wixen***, 204 Wis. 2d 327, 335, 555 N.W.2d 640 (Ct. App. 1996). In interpreting an ambiguous contract provision, a court will "select that construction which gives effect to each word or provision of

the contract" and will reject "a construction which results in surplusage." ***Id.***; *see* ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 366, 377 N.W.2d 593 (1985); ***Wausau Joint Venture v. Redevelopment Auth.***, 118 Wis. 2d 50, 58, 347 N.W.2d 604 (Ct. App. 1984). "[C]ourts cannot insert what has been omitted or rewrite a contract made by the parties." ***Levy v. Levy***, 130 Wis. 2d 523, 533-34, 388 N.W.2d 170 (1986). A court also "cannot redraft the agreement, but must adopt the construction which will result in a reasonable, fair and just contract as opposed to one that is unusual or extraordinary." ***Jenkins***, 88 Wis. 2d at 722. Further, "[w]here the acts of the parties are inconsistent, indicating different constructions, the court will look to the purpose of the contract and the circumstances surrounding its execution to determine the intent." ***Id.*** at 723.

¶12 The Bierces contend that the trial court's construction of the mediation agreement is erroneous because it ignores the compromise reached by the parties for determining damages and replaces it with a new measure of damages more favorable to Shorewest. In particular, the Bierces point to the fact that the parties agreed to only one hypothetical scenario: that under one of the appraisals, the property is valued "as if zoned residential." They maintain that, by requiring the appraisers to assume that the property is "owner-occupied," even though it is not, and thereby instructing the appraisers to ignore the fact that the property is in fact currently rented out, the trial court's order no longer reflects the "current" use of the property in its actual zone, but instead, introduces a second hypothetical based on the property's use when the Bierces purchased it in 1997. This second hypothetical they contend redrafts the agreement to pay lip service to the requirement that the valuation be "current" and thereby replaces the parties' compromise, which specifically did not adopt a traditional formula for damages. The Bierces add that it is not logical to conclude that they would first prepare for

trial, and then engage in mediation, only to agree to Shorewest's view of damages, and they note that had they agreed to the use of the traditional rule of damages, that would have been simple enough to state in the agreement.

¶13 The Bierces therefore argue that if an appraiser is to actually arrive at the "current fair market value," the appraiser must analyze the property in light of its "current" physical, legal and economic characteristics, including that it is a single-family home, that it is a rental property and has been one for several years, that it is located in an area zoned AA-Business, and that the residential use is a non-conforming use in that zone. They explain that because the agreement does not specify that any of the characteristics be included or excluded and provides simply that the appraisers determine the "current fair market value of the property … as actually zoned, business-commercial," the appraisers should consider them all and should not be instructed to ignore one or more of the characteristics, or that the property is owner-occupied when it is not.

¶14 Shorewest counters that what matters is the fact that in 1997, the Bierces purchased the property with the intent of occupying it as a single-family residence. As a result, Shorewest contends that the trial court fairly interpreted the mediation agreement, and that the trial court's interpretation yields a just and fair result, while the Bierces' interpretation yields an extraordinary result and adds terms to the agreement. Shorewest also submits that if the agreement was ambiguous when all material undisputed facts are considered in context, the trial court's interpretation is proper. We agree with the Bierces.

¶15 We begin by noting that the trial court correctly acknowledged that "the final test has to be the language of the agreement," and that "[t]he question is what the agreement says not what the law of damages is." Unfortunately, the trial

court failed to follow its own advice when it concluded that it nonetheless should revert to the "traditional rule of damages."

¶16 In the mediation agreement the parties agreed to have the current fair market value of the property appraised "as actually zoned, business-commercial." The trial court ordered the appraisers to be instructed to evaluate the "current" fair market value in the business-commercial zone by assuming that the property is now used the way it was used when the Bierces purchased it in 1997, that is, as an owner-occupied single-family home. This is not the "current" use to the property because the "current" use of property is that it is rented out, and has been for quite some time. As such, this instruction ignores the fact that but for Shorewest's misinterpretation of the zoning the Bierces would not be in a situation where they are forced to keep the property as a rental property because they are unable to sell it. Most importantly, however, this interpretation by the trial court is not what the parties agreed to at mediation: it is not what the mediation agreement says and it does not, as the trial court claims, restate "the legal effect of what the parties agreed to."

¶17 Rather, the instruction that the trial court would have given the appraisers incorrectly redrafts the parties agreement, in such a way that it no longer gives effect to the words of the contract as agreed to by the parties. *See* ***Jenkins***, 88 Wis. 2d at 722. The current fair market value, as it exists at the moment, includes the fact that the property functions as a rental property. Instructing the appraisers to ignore this fact with the phrase "owner-occupied," inserts a phrase that had been omitted by the parties. *See* ***Levy***, 130 Wis. 2d at 533-34. The phrase "owner-occupied," as it appears in the order, is thus surplusage. *See* ***Jenkins***, 88 Wis. 2d at 722.

¶18 On this basis, we disagree with the trial court's assessment and determine that the phrase "as actually zoned, business-commercial," is not in fact ambiguous and does not warrant an order that adds terms, different from those agreed to by the parties at mediation, to the agreement. *See* ***id.*** The phrase "current fair market value of the property 2313 North 69th Street, Wauwatosa as if zoned residential and as actually zoned, business-commercial," adequately clarifies to an appraiser the two scenarios for which fair market values are to be provided, and equally clearly does not instruct them to ignore aspects of the property that may be relevant. *See* ***Dykstra***, 92 Wis. 2d at 38. We agree with the Bierces that the fact that the agreement does not direct the appraisers to either include or exclude any of the current physical, legal and economic characteristics of the property, including the fact that the property is currently a rental residence, is significant. We are satisfied that it is up to each of the appraisers to determine the two current fair market values of the property, by exercising their independent judgment, in light of all of the "current" characteristics of the property, without being instructed to ignore any of them.

¶19 Moreover, because what the parties agreed to at mediation was a compromise different from the traditional rule of damages, in examining the purpose of the agreement and the circumstances surrounding its execution, we agree that it is not logical to conclude that the Bierces would have prepared for trial and agreed to attempt to mediate the dispute only to ultimately end the mediation with a settlement agreement that agrees to Shorewest's demands. *See* ***Jenkins***, 88 Wis. 2d at 722.

¶20 Because the trial court erroneously construed the mediation agreement, the trial court's order is reversed and remanded to the trial court. The trial court is instructed to inform the appraisers to evaluate the "current fair market

value" of the property "as actually zoned, business-commercial" in accordance with the wording of the mediation agreement, in light of the property's current physical, legal and economic characteristics.

By the Court.—Order reversed and cause remanded.

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