COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2123

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

IN RE THE MARRIAGE OF:

VIRGINIA SMITH,

PETITIONER-APPELLANT,

V.

TERRANCE A. SMITH,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] This is a review of the trial court's order denying Virginia Smith's petition for a finding of contempt against her former husband, Terrance A. Smith. Virginia notes that as part of the marital settlement agreement approved by the divorce court, she was entitled to a $25,000 equalization payment if Terrance was laid off from work by the employer named in the agreement. Virginia claims that this event occurred and that the trial court erred in finding that since Terrance continued to work for the parent company, the triggering event had not occurred. We affirm the trial court.

¶2 The issue concerns how the trial court interpreted the final judgment of divorce as it related to when a $25,000 equalization payment had to be made. More particularly, it relates to the construction of the parties' marital settlement agreement (also known as the "final stipulation"), which was approved by the court in its judgment and was, in every respect, made part of the judgment.

¶3 The final stipulation provided that Virginia would be awarded, in pertinent part, the following:

> Cash equalization payment in the amount of $25,000.00 which is due and owing on or before the respondent's termination of employment with MacWhyte. Termination is defined as the respondent leaving employment either by being fired, indefinitely laid off, voluntary termination or retirement.

The divorce judgment was filed on May 31, 1996. Virginia subsequently brought an order to show cause why Terrance should not be held in contempt for failing to make the equalization payment, claiming that the triggering event occasioning the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

necessity of payment had occurred. A hearing was conducted before a court commissioner and Virginia lost. She sought and obtained a de novo hearing before the circuit court.

¶4 At the hearing before the trial court, Terrance appeared by telephone. He testified adversely that he stopped working for the MacWhyte Company in May 1999. At that point, MacWhyte was sold to another entity and he was laid off. Virginia then rested her case and Terrance began to put in his case. His defense was that the language in the marital settlement agreement was really tied to his retirement package from the parent company, and since he was still employed by the parent company, he had no access to the retirement package. Virginia objected to this defense, arguing that it was outside the clear language of the agreement and was extrinsic evidence which should not be heard. The trial court rejected Virginia's argument, heard Terrance's defense, agreed with his side of it and denied the motion. Virginia appeals.

¶5 A court interprets a judgment of divorce in the same manner as other written instruments. ***Jacobson v. Jacobson***, 177 Wis. 2d 539, 546, 502 N.W.2d 869 (Ct. App. 1983). A judgment is interpreted under the circumstances present at the time of entry. ***Id***. at 546-47. Whether a judgment is ambiguous is a question of law to which we owe no deference. *See* ***id***. at 547. Wisconsin law requires courts to interpret the meaning of particular provisions in a contract with reference to the contract as a whole; it is not sufficient to interpret only a portion. ***Tempelis v. Aetna Cas. & Surety Co.***, 169 Wis. 2d 1, 9, 485 N.W.2d 217 (1992). Written instruments should be considered in context. *See* ***Wausau Joint Venture v. Redevelopment Auth. of City of Wausau***, 118 Wis. 2d 50, 58, 347 N.W.2d 604 (Ct. App. 1984). Ambiguity exists where the language of the written instrument is subject to two or more reasonable interpretations, either on its face or as applied to

the extrinsic facts to which it refers. ***Schultz v. Schultz***, 194 Wis. 2d 799, 805-06, 535 N.W.2d 116 (Ct. App. 1995).

¶6 Thus, this court's first task is one of law—to determine whether the pertinent part of the marital settlement agreement is ambiguous. Virginia cites ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 31, 577 N.W.2d 32 (Ct. App. 1998), for the proposition that where the marital property agreement is plain and unambiguous, the court will construe it as it stands without looking to extrinsic evidence to determine the intent of the parties. Virginia correctly reads ***Rosplock*** to say that a court may not use the mechanism of construction to review an unambiguous contract in order to relieve a party from any disadvantageous terms to which the party has agreed. ***Id.***

¶7 But ***Rosplock*** is inapplicable to our analysis here. In that case, we interpreted the trial court's action as an attempt to modify the written agreement so that it would be more equitable in light of the changed financial circumstances of the parties. We held that the trial court had used contract construction as a guise to change what the parties had originally agreed upon and that the trial court had no authority to do what it intended. This case does not represent the same circumstance. Rather, this case concerns how to read the pertinent part of the marital settlement agreement in light of the context existing at the time of its making. This case concerns whether the agreement is ambiguous when applied to the extrinsic facts to which the agreement refers. Thus, the ***Tempelis***, ***Wausau Joint Venture*** and ***Schultz*** cases govern our analysis, not ***Rosplock***.

¶8 We conclude that the contract is ambiguous when applied to the extrinsic facts of this case. The agreement does clearly state that an equalization payment of $25,000 would be triggered if Terrance was indefinitely laid off from

MacWhyte. But those two words, "MacWhyte" and "indefinitely," are ambiguous when applied to the agreement as a whole and the circumstances surrounding the triggering mechanism. First, it is undisputed that MacWhyte was, at the time of the agreement's making, a subsidiary of AMSTED Industries. Second, as part of Terrance's property award, the agreement provided that he would receive "[a]ll pension, profit sharing or retirement plans in his name." Wisconsin law requires that we look at the agreement in total and not in a vacuum. It does not take much stretch of logic to conclude that his having been awarded his pension or retirement plan was a major reason why he had to make an equalization payout to Virginia. Terrance's final financial statement listed the retirement plan as having a value at the time of the divorce of $213,177.89, far outstripping any other asset of the parties. We also point out that the financial statement listed the plan as an AMSTED ESOP. It was not a MacWhyte plan. Thus, it is reasonable to conclude that the payout was tied to Terrance's AMSTED pension or retirement plan.

¶9 Moreover, not only do we look to the context of the whole agreement, we also look at the extrinsic facts existing here which are referred to by the agreement. When we do, we find undisputed evidence that while Terrance was laid off from MacWhyte in May 1999, by at least January 2000, he had been named plant controller of Griffin Wheel. Griffin Wheel is a subsidiary of AMSTED, as was MacWhyte. Based on these facts, we conclude that it is reasonable to read the agreement to say that the triggering mechanism would take place when Terrance was no longer with the employer who held his retirement plan at the time of the divorce.

¶10 Since the agreement is ambiguous, it falls to the trial court to determine the intent of the parties. This is not a question of law; it is a question of fact. The court heard the facts. Among other things, Terrance testified that he and

his wife sat at the kitchen table and drew up a handwritten document which specifically said that the $25,000 was to come from the ESOP plan when he retired. This agreement was given to Virginia's attorney to draw up as the final document. Terrance also testified that after he was laid off from MacWhyte, he did not try to cash out his retirement because he had great hopes of coming back to work for AMSTED since it was short on controllers. This, in fact, occurred within six months. After hearing the evidence, the trial court held:

> [T]he clear meaning … was that when [Terrance] lost his employment with AMSTED, and whether they called it MacWhyte or AMSTED, he was employed by AMSTED at the time of the divorce, AMSTED sold the division that he directly worked for, but his retirement was in the AMSTED plan and, therefore, the Court finds no contempt and denies the motion.

The finding of the trial court is not clearly erroneous. This court affirms.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.