

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0337-FT

Cir. Ct. No. 96-CV-720

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 COMPANY,

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, KATHLEEN A. HANNEKEN, 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 ESTATE OF FRANCINE A. CISKE,**

DEFENDANTS.

APPEAL from an order of the circuit court for Outagamie County:
DENNIS C. LUEBKE, Judge. *Affirmed in part and reversed in part.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. MCC, Inc., appeals an order interpreting a stock redemption agreement and choosing an appraiser in a declaratory judgment action by the Murphys¹ to determine the value of MCC's shares.² The order confirms that any valuation will include all of MCC's personal property and authorizes the appraisers recommended by the Murphys to utilize business enterprise valuation (BEV) to determine the value of MCC's shares. MCC argues that the agreement unambiguously requires the use of an "assets minus liabilities" approach to value the Murphys' shares in MCC. We agree and reverse that portion of the order. Also, we affirm the trial court's determination that all of MCC's personal property will be included in the valuation.³

¹ There are five branches of the Murphy family: The Robert P. Murphy family, the Arlene Gage family, the Orville Murphy family, the Francis Murphy family and the Richard Murphy family. The appellants are members of the Robert P. Murphy family. They are Robert P., William, Rick and Robert R. Murphy. We refer to them as the Murphys. The interests of the other branches of the family are represented by MCC.

² This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000).

³ The court also determined the date that would be considered the redemption date and various issues regarding advance payments to the Murphys and interest due. Neither party appeals these issues, and we therefore do not address these portions of the trial court decision.

BACKGROUND

¶2 The Murphys, along with the other four branches of the Murphy family, are shareholders in MCC, a ready-mix concrete, mining and road paving business. The shareholders prepared the stock redemption agreement to detail the process for selling their shares back to the company. In 1995, the Murphys decided to redeem their MCC shares. However, the parties disagreed on the fair market value of the Murphys' shares.

¶3 The Murphys filed a declaratory judgment action in August 1996 seeking clarification of their rights and obligations under the stock redemption agreement. After a bench trial, the court concluded that the agreement was ambiguous. It looked to extrinsic evidence to ascertain the parties' intent and to resolve the ambiguities. The court concluded that the parties intended the appraisers to use "fair market value" when valuing MCC's assets.⁴ It also determined that all of MCC's personal property must be included in the appraisal.

¶4 In an unpublished opinion, this court interpreted part of the language in paragraph four of the agreement, affirming the trial court. *Murphy v. MCC, Inc.*, No. 98-1322, unpublished slip op. (Wis. Ct. App. Feb. 2, 1999) (*Murphy I*). We agreed with the trial court that the term "value" in paragraph four was ambiguous and affirmed the trial court's definition of "value" as "fair market

⁴ Paragraph four of the stock redemption agreement sets the redemption price of shares of MCC stock at the "estimated fair market value of the shares at the time of redemptions" However, it then sets forth the manner in which "the value of the shares" shall be determined if the parties do not agree on an estimated fair market value.

MCC argued that "the value of the shares" if the parties failed to agree refers to the shares' auction value and that the trial court's construction of "the value" to mean "fair market value" improperly dictated the methodology by which the appraisers were to determine value.

value.” *Id.* at 10. We also upheld the court’s interpretation of the ambiguous phrase, “personal property,” to include “all of MCC’s personal property, including CRM stock and other intangible property.” *Id.*

¶5 The Murphys and MCC went forward with the valuation of the corporation. In accordance with paragraph four of the agreement, appraisers valued the “equipment and other personal physical assets.” Also, three appraisers valued the corporation’s real estate and averaged the three to provide the value for the real estate. The parties disagreed, however, on the overall method to be used for valuing the stock once the value of the individual assets was determined. Paragraph four of the agreement provides that 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.”

¶6 The Murphys chose an appraiser that would use BEV to determine the value of MCC. BEV is an analysis that “includes an evaluation of all personal and real property, including MCC’s tangible and intangible assets, as a continuing business.” In contrast, MCC proposed an “assets minus liability” valuation. MCC’s appraiser understood that the court interpreted “cash, contracts, and accounts receivable” to include all of MCC’s personal property and agreed to conduct its valuation in accordance with the trial court’s interpretation of the agreement.

¶7 The court issued findings of fact and conclusions of law deciding that the language of paragraph four regarding valuation was ambiguous and that it therefore had to be resolved to reflect the overall intent of the parties. The court decided that BEV conformed to the intent of the drafters and the result would be

closer to a “fair market” valuation. The court also confirmed that the valuation would include all of MCC’s personal property.

STANDARD OF REVIEW

¶8 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 (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 (Ct. App. 1987). Contractual language is ambiguous when it is reasonably or fairly susceptible to more than one construction. *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Whether a contract provision is ambiguous is a question of law. *Moran v. Shern*, 60 Wis. 2d 39, 46-47, 208 N.W.2d 348 (1973).

DISCUSSION

¶9 The trial court found, based on expert testimony, that both “assets minus liabilities” and BEV are legitimate ways to determine the fair market value of a shareholder’s interest. The court concluded, however, that the agreement is ambiguous regarding the method of valuation to be used and determined that the BEV approach conforms with the parties’ overall intent. MCC argues that the trial court erred because the agreement unambiguously requires the use of an “assets minus liabilities” approach to value the Murphys’ shares in the corporation. We agree.

¶10 We conclude that the stock redemption agreement unambiguously requires the use of the “assets minus liability” approach rather than BEV. The last part of paragraph four states that “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.” We can perceive of no clearer manner in which to express the precise method to be used in determining the value of a shareholder’s interest. The method chosen requires the value to be set by the appraised value of MCC’s assets minus its liabilities.

¶11 While we previously held that “value” was ambiguous and means “fair market value,” we did not hold that the methodology set forth in paragraph four was ambiguous. *See Murphy I*, No. 98-1322, slip op. at 8-9. Our holding that the parties intended the shares to be redeemed for fair market value based on all of the corporation’s assets did not address the issue of the particular method for determining the ultimate value of the stock. Again, paragraph four unambiguously provides the method. We therefore reverse the trial court’s order that the Murphys’ appraiser be hired to conduct a BEV to value the MCC shares.

¶12 Also, as indicated, in *Murphy I*, we said that all of the personal property must be included in the appraisal. *Id.* at 10. MCC relies on the wording of the trial court’s order in *Murphy I* to try to narrow what “all assets” means.⁵ The trial court explained on remand after *Murphy I* that it did not intend to limit the property to be included to only that listed in the corporation’s certified financial statements. Nor did we, as we believe is clear in our earlier decision. We therefore affirm the trial court’s inclusion on remand of all property, such as

⁵ The trial court’s order said, “All of MCC’s personal property must be included as part of the appraisal of plaintiffs’ interest. ‘Personal property’ is defined as encompassing all property other than real property, tangible and intangible.” It went on to say that “each category of personal property listed in MCC’s audited financial statements ... must be considered in conducting an appraisal of plaintiffs’ total interest.”

customer lists, good will and intellectual property, in the appraisal and not just that property listed on the certified financial statement.

¶13 Finally, the Murphys argue that “This appeal is a thinly-disguised attempt to re-open issues previously determined adversely to MCC and affirmed by this Court.” Yet they have not shown to our satisfaction that MCC should be estopped from arguing that paragraph four unambiguously provides the method for determining fair market value. As indicated, the issue of valuation methodology was not addressed in *Murphy I*. It is thus appropriate for us to do so here.

By the Court.—Order affirmed in part and reversed in part. No costs to either party.

This opinion will not be published. See WIS. STAT. RULE § 809.23(1)(b)5.

