COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

NOTICE

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

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

No. 96-0788

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

R & M MARKETS, INC.,

Plaintiff-Respondent,

v.

SPATZ CENTERS, INC., and WAUKESHA ASSOCIATES LIMITED PARTNERSHIP,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Spatz Centers, Inc. and Waukesha Associates Limited Partnership (Spatz) have appealed from a judgment enjoining them from interfering with R & M Markets' (R & M) use of a pylon sign in a shopping center in which R & M is a tenant

and Spatz is the landlord. The judgment also enjoined Spatz from charging rent for R & M's use of the sign. We affirm the judgment.

R & M has operated a grocery store for more than 25 years in the shopping center currently owned by Spatz. Throughout that time it used the pylon sign to identify its store. In 1990, R & M negotiated a contract for rent of the premises from S-B-F 1983-V Associates. That contract provided that:

> Tenant shall have the right during the occupancy of the demised premises to place the name of its business and signs advertising its products on the exterior and interior of the demised premises.

R & M continued to use the pylon sign both before and after execution of this contract. In July 1991, Spatz purchased the shopping center. Prior to the sale, Robert Buboltz, the president of R & M, executed an estoppel letter providing that R & M understood that the shopping center was being sold to Spatz and that "the lease is in full force and effect and has not been amended or modified."

Approximately four years after Spatz purchased the shopping center, it attempted to charge R & M additional rent for use of the pylon sign. R & M then filed a complaint alleging breach of contract. After a trial to the court, the trial court entered judgment as described above. In doing so, it determined that the lease did not speak to the pylon sign and that it could not make a declaratory finding that the pylon sign was contemplated in the reference to exterior signs. However, based on the practice of the parties, it found that R & M had a right to continue using the sign during the duration of the lease and any extensions without paying additional rent.

The law in Wisconsin is that unambiguous contractual language must be enforced as it is written. *See* ***Dykstra v. Arthur G. McGee & Co.,*** 92 Wis.2d 17, 38, 284 N.W.2d 692, 702-03 (Ct. App. 1979), *aff'd*, 100 Wis.2d 120, 301 N.W.2d 201 (1981).

However, contractual language is ambiguous when it is reasonably susceptible of more than one construction. *See* ***Borchardt v. Wilk***, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). Construction of a contract, including the determination of whether its terms are ambiguous, is a legal question which we decide de novo. *See* ***id.***

As was implicitly found by the trial court, we conclude that the lease executed in 1990 was ambiguous as to whether the exterior of the demised premises was deemed to include the pylon sign, entitling R & M to place the name of its business on it.[1] When the language of a contract is ambiguous, the practical construction given to it by the acts of the parties is entitled to great weight, and courts ordinarily will interpret it in accordance with the meaning adopted by the parties in their course of conduct. *See* ***Jorgenson v. Northern States Power Co.,*** 60 Wis.2d 29, 35, 208 N.W.2d 323, 326 (1973).

Both before and after execution of the 1990 contract, R & M used the pylon sign to identify its grocery store. In addition, it maintained and repaired the sign. It paid no additional rent for its use and Spatz requested none until 1995, four years after Spatz bought the shopping center.

The parties' course of conduct after execution of the 1990 contract demonstrates that both Spatz and its predecessor, as well as R & M, intended the contract to permit R & M to use the pylon sign without the payment of separate and additional rent, just

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[1] Contrary to Spatz's contention, the trial court did not find that the contract was unambiguous and excluded use of the pylon sign. The trial court merely indicated that it would not make a "declaratory finding" that the pylon sign was contemplated in the contract language when it referred to the "exterior" of the demised premises. It then proceeded to consider the practices of the parties.

In any event, whether a contract is ambiguous presents a question of law which we review de novo. *See* ***Borchardt v. Wilk***, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). We conclude that the contract was ambiguous and that the practices of the parties resolve that ambiguity in favor of R & M. We may sustain the trial court's decision on this ground even if it was not the ground relied upon by the trial court in granting judgment to R & M. *See* ***State v. Holt***, 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985).

as it had pursuant to two earlier contracts containing the same language. This construction of the contract was also consistent with Buboltz's testimony that he and the representatives of Spatz's predecessor discussed the pylon sign during their negotiation of the 1990 contract, and that a representative told Buboltz that R & M had the right to use the sign under the contract, a representation memorialized by Buboltz in his notes. Because the contract was ambiguous, this testimony could be considered in resolving its meaning. *See* ***Central Auto Co. v. Reichert***, 87 Wis.2d 9, 19, 273 N.W.2d 360, 364-65 (Ct. App. 1978).

Because the contract permitted R & M to use the sign, R & M's affirmation of the contract in the estoppel letter did not accord Spatz any additional right to prevent R & M's use of the sign or to demand additional rent. We therefore need not address the parties' arguments regarding estoppel.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.