

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-0416

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**WISCONSIN BELL, INC.,
D/B/A AMERITECH WISCONSIN,**

PLAINTIFF-RESPONDENT,

v.

**SHEFFIELD SYSTEMS, INC.
AND GURPAL SINGH,**

DEFENDANTS-APPELLANTS,

BALJINDER DHAMI,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Sheffield Systems and Gurpal Singh appeal the trial court's grant of summary judgment to Wisconsin Bell on its claims that they tortiously interfered with Wisconsin Bell's contract with Pakhar Singh. Under the contract, Wisconsin Bell installed and maintained pay phones in Pakhar Singh's business, Stark Food Market, which was housed in a building owned by Pakhar Singh.

The appellants contend the trial court erred because the contract in question was not valid or enforceable when they removed Wisconsin Bell's equipment and substituted it with Sheffield Systems's as it was a revocable license, which was revoked as a matter of law when Pakhar Singh subsequently sold his business to and leased the building to Gurpal Singh. They also contend that even if the contract created an interest in the property that survived the sale and lease of the property, it is unenforceable because it violates the Statute of Frauds.¹ They also point to the lack of an assignment of the contract to Gurpal Singh; the absence of any agreement by him to be personally obligated under the contract; and the failure of the sale and lease documents to contain a provision obligating him to assume the liabilities of the store as additional reasons why summary judgment was improvidently granted by the trial court.

We affirm the trial court's decision because (1) the contract between Wisconsin Bell and Pakhar Singh was a valid and enforceable contract which created an interest in the property and survived the subsequent sale and lease;

¹ The appellants also argue that they were privileged or justified in interfering with the contract between Pakhar Singh and Wisconsin Bell; however, this issue was not raised or argued before the trial court and thus is deemed waived. *State v. Rogers*, 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995) (failure to raise a specific challenge in the trial court waives right to raise it on appeal).

(2) there was no violation of the Statute of Frauds; and (3) the lack of an assignment of the contract or any agreement to be liable under the contract or responsible for the store's debts are not valid defenses to a charge of tortious interference with a contract.

I. BACKGROUND.

On February 17, 1993, Pakhar Singh, then the owner of Stark Food Market, entered into a three-year contract with Wisconsin Bell, permitting Wisconsin Bell to install pay phones on his property in exchange for a percentage of the revenues generated by the pay phones. On May 5, 1994, Pakhar Singh leased the entire building to Gurpal Singh and sold him the business, Stark Food Market. None of the legal documents involving these transactions make any reference to the contract with Wisconsin Bell. Following the lease of the building and the sale of the business, Wisconsin Bell continued to pay revenues generated by the pay phones to Pakhar Singh.

Several months after buying the business and leasing the building, Gurpal Singh entered into a contract with Sheffield Systems for the installation of public pay phones. During the time Sheffield Systems and Gurpal Singh were negotiating their contract they asked for and received from Wisconsin Bell information which confirmed that Pakhar Singh and Wisconsin Bell had entered into a three-year contract placing phone equipment on Pakhar Singh's property. Nonetheless, the appellants demanded that Wisconsin Bell remove its phone equipment from the site, and when Wisconsin Bell failed to comply, Sheffield Systems removed Wisconsin Bell's equipment. Later, Wisconsin Bell picked up its equipment and, under protest, paid the fees demanded by Sheffield Systems.

Wisconsin Bell then commenced suit on June 30, 1995, against Gurpal Singh and Sheffield Systems, claiming, *inter alia*, in Counts II and III, that the appellants engaged in tortious interference with its contract with Singh. After the appellants filed an answer denying any wrongdoing, Wisconsin Bell filed a motion seeking summary judgment on these two counts. Following a hearing, the trial court granted Wisconsin Bell's summary judgment motion and this appeal follows.

II. ANALYSIS.

The standards governing our review of summary judgment have been repeated often and, therefore, we need not do so here. See *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis.2d 281, 289, 507 N.W.2d 136, 139 (Ct. App. 1993). Our review is *de novo*. See *Smith v. Katz*, 218 Wis.2d 442, 447-48, 578 N.W.2d 202, 204 (1998).

As found in *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506 (7th Cir. 1994), the claim of tortious interference with a contract requires a finding of five elements: “(1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere.” *Id.* at 509.

The appellants' first claim is that the trial court erred because the plaintiffs failed to establish one of the elements of the tort: that the plaintiff had a contract or prospective contractual relationship with a third party. Next they argue that even if the contract between Singh and Wisconsin Bell was not a revocable license and survived the sale of the business and lease to Gurpal Singh, the

contract was unenforceable because it violated the Statute of Frauds. Finally, they raise other objections to the trial court's decision arguing that they did not tortiously interfere with the contract between Pakhar Singh and Wisconsin Bell because Gurpal Singh was never assigned the contract; never personally obligated himself to perform under the terms of this earlier contract; and the conditions of the sale of the business did not require Gurpal Singh to be responsible for any of Stark Food Market's liabilities.

A. There was a valid enforceable contract.

The appellants concede that Pakhar Singh and Wisconsin Bell entered into an agreement. They assert, however, that this agreement did not bind Gurpal Singh when he bought the business and leased the building because the agreement between Pakhar Singh and Wisconsin Bell constituted a personal services contract, which under the law is treated as a revocable license, as it is simply a limited grant of access to the real estate, a grant that was revoked as a matter of law when the business was sold and the building was leased. Accordingly, since no valid contract existed between Pakhar Singh and Wisconsin Bell at the time the appellants contracted for the installation of Sheffield Systems's phone equipment, the appellants conclude the first element of tortious interference with a contract has not been met. The respondent disputes the characterization of the agreement as a license but asserts that regardless of what it is labeled, the contract created an irrevocable interest in Pakhar Singh's property for three years. We agree.

The appellants argue that the agreement between Pakhar Singh and Wisconsin Bell exhibits all the characteristics of a revocable license. The appellants rely on cases from other jurisdictions which have held that contracts

similar to this one are revoked as a matter of law when the property is conveyed to another. See *Ulan v. Vend-A-Coin*, 558 P.2d 741 (Ariz. Ct. App. 1976); *American Coin-Meter of Colorado Springs, Inc. v. Poole*, 503 P.2d 626 (Colo. Ct. App. 1972); *Union Travel Assocs., Inc. v. International Assocs., Inc.*, 401 A.2d 105 (D.C. 1979). There is, however, no Wisconsin law on point.

Thus, to resolve this issue, a survey of Wisconsin law is necessary. The appellants assert this contract is actually a license because licenses usually permit access to real property for a limited purpose such as servicing vending machines and when granting a license the parties ordinarily do not intend to create an interest in the land. Grappling with the related issue of whether a contract conveying hunting and fishing privileges is a revocable license or a contract establishing an “‘estate or interest in lands’ or ‘real property,’” the supreme court in *Van Camp v. Menominee Enterprises, Inc.*, 68 Wis.2d 332, 341-43, 228 N.W.2d 664, 669-70 (1975), concluded that hunting and fishing rights can constitute an interest in land. “We conclude, therefore, that the hunting and fishing rights do constitute an interest in land” *Id.* at 344, 228 N.W.2d at 670. Borrowing from a handbook on property rights, the court said: “[A] grant of a right to take and kill game on land or waters belonging to the grantor is a grant of an interest in the land itself within the Statute of Frauds.” *Id.* at 343, 228 N.W.2d at 670 (quoting 1 THOMPSON, REAL PROPERTY, § 135, at 513 (1964 Replacement)) (ellipses omitted). In ruling in favor of the appellants, however, the supreme court noted that summary judgment was inappropriate because the original grantor failed to reduce the contract to writing. Thus, the holding in this case clarifies that in Wisconsin it is possible for contracts which allow limited access to property, similar to what licenses often do, to create an interest in property, but they must be written.

Another Wisconsin case lending support to the conclusion that the contract is not a revocable license is *Wisconsin Public Service Corp. v. Marathon County*, 75 Wis.2d 442, 249 N.W.2d 543 (1977). This is a case with a similar issue that was litigated for different reasons. The disputed issue in *Marathon County* was whether the utility had a sufficient interest in land where it maintained overhead power lines to require compensation when the authorities ordered the power lines removed.

The supreme court, in discussing the subtle differences between a conveyance granting an easement and a contract granting a license, recited portions of two earlier cases for its determination that the Wisconsin Public Service Corporation had an interest in the land:

“An easement ... is a permanent interest in the land of another, with the right to enjoy it fully and without obstruction for the period of the easement. A license or contract right is a privilege to do one or more acts on the land of another without possessing an actual land interest.”

Id. at 446, 249 N.W.2d at 545 (quoting *Schwartz v. Evangelical Deaconess Soc’y*, 46 Wis.2d 432, 438-39, 175 N.W.2d 225, 228 (1970)). “If anything more than a revocable license is created it is an easement *or interest in the land ...*” *Van Camp*, 68 Wis.2d at 344, 228 N.W.2d at 670 (internal quotation marks omitted; citation omitted) (emphasis added). Thus, in Wisconsin, any contract which creates something beyond a revocable license has effectively created an interest in land.

The appellants contend that this contract was a revocable license and they rely on the definition of a license found in *Schwartz v. Evangelical Deaconess Soc’y*, 46 Wis.2d 432, 175 N.W.2d 225 (1970):

A license in real property is defined as a personal, revocable and unassignable privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein. Indeed, the distinguishing characteristics of a license in land are that it gives no interest in the land and that it may rest in parol.

Id. at 438, 175 N.W.2d at 227-28 (internal quotation marks omitted; citation omitted). They concede that the contract in question is written, but they argue that the agreement between Wisconsin Bell and Pakhar Singh meets all the other requirements because it is personal in nature, permitting only Wisconsin Bell to enter the property for the exclusive purpose of installing or maintaining the property and because it is not actually assignable as the contract is so restrictive that an assignment can only be made to a Wisconsin Bell affiliate. We disagree.

Two of the characteristics of a contract creating an interest in another's real estate are present here. The contract is written and despite the appellants' contentions to the contrary, it is assignable. In *Marathon County*, 75 Wis.2d at 446, 249 N.W.2d at 544, the court reaffirmed the holding in *Schwartz* that the ability to assign the rights to another is a significant difference between a license and a contract creating an interest in the property. "A license is unassignable." *Id.* (citing *Schwartz*, 46 Wis.2d at 438-39, 175 N.W.2d at 227). "Assignability is a characteristic of rights in or connected with property." *Id.* According to the appellants' interpretation, the contract is unassignable because it permits an assignment only to be made to a Wisconsin Bell affiliate which is the legal equivalent of Wisconsin Bell. We are not persuaded. The pertinent contract language reads:

SUCCESSORS, ASSIGNS AND APPOINTMENT OF AGENTS - Wisconsin Bell may, at any time, assign this Agreement or any portion hereof, to any affiliate of Wisconsin Bell. This Agreement shall benefit and/or be binding upon the successors, assigns, lessees or beneficiaries of Space

Provider [Pakhar Singh]. However, in no event may Space Provider [Pakhar Singh] assign this Agreement, or otherwise transfer its rights and obligations hereunder, without the express consent of Wisconsin Bell. Additionally, in no event shall Space Provider [Pakhar Singh] appoint an agent for the purpose of acting as Wisconsin Bell's sole and exclusive Space Provider [Pakhar Singh] contact for negotiating with Wisconsin Bell or receiving payments hereunder without the expressed consent of Wisconsin Bell. In the event Space Provider [Pakhar Singh] enters into such an agency agreement, without Wisconsin Bell's consent, its terms of agency shall be null and void with respect to Wisconsin Bell. At all times during the term or any Renewal Term of this Agreement, Wisconsin Bell shall retain the right to directly negotiate with and directly pay any commissions hereunder to Space Provider [Pakhar Singh].

The contract language supports the assignability of the contract. The fact that Wisconsin Bell contracted to restrict its power to assign the contract to its own affiliates does not alter the fact that the contract is assignable. The contract also permits Pakhar Singh to assign his interest to another, as long as Wisconsin Bell consents.

Further, had the parties intended to create only a revocable license, revocable by law when the building changed hands, there would be no reason to regulate the rights of "successors, assigns, lessees, or beneficiaries" in the contract. The inclusion of the rights of these parties in the contract confirms that the parties intended something more than a revocable license. As noted, a contract that purports to grant anything more than a revocable license is a contract which creates an interest in the land of another. Here, the parties have created a contract which grants more than a revocable license.

Consequently, we conclude that the contract created an interest in Pakhar Singh's land and the trial court correctly found that the contract was valid and enforceable at the time the appellants removed Wisconsin Bell's phone

equipment. Having established that the contract was one which established an interest in property, we decline to address the arguments raised by the parties as to whether certain written leases are irrevocable in Wisconsin.

B. There is no Statute of Frauds violation.

The appellants next argue that even if the contract between Wisconsin Bell and Pakhar Singh is interpreted to create an interest in the land which would survive the sale of the business and the lease of the building, it is unenforceable because it violates the Statute of Frauds. The appellants' argument is premised upon Chapter 706, STATS., which regulates conveyances of real property including leases of property which extend for more than one year. Their contention is two-fold. They claim that the contract is invalid because it fails to meet the formal requisites embodied in § 706.02, STATS., requiring the conveyance to identify the land and the interest being conveyed; and it violates § 706.03(2), STATS., because it was not executed by an officer of Wisconsin Bell. Although the respondents assert the appellants have no standing to attack the contract as they are not parties to it, we decline to address that issue because we conclude the appellants have misconstrued the statutes.

Chapter 706, STATS., governs all interests in land (other than some exclusions which are not relevant to this discussion), including limited rights in land such as that which was conveyed to Wisconsin Bell. Two of the requirements of § 706.02² are that the conveyance identify the land and the interest

² Section 706.02(1), STATS., provides:

Formal requisites. (1) Transactions under s. 706.01 (1) shall not be valid unless evidenced by a conveyance which:

- (a) Identifies the parties; and

(continued)

being conveyed. Here the contract language states that Pakhar Singh “hereby grants Wisconsin Bell permission to install, maintain, and collect public telephone service on the Space Provider’s premises for a period of three years” Further, the contract contains the address of the store and identifies the owner as Pakhar Singh. Thus, the land and the interest being conveyed have been accurately identified.

With respect to appellants’ argument that the contract is invalid because it is not “executed by an officer of Wisconsin Bell pursuant to 706.03(2).”³ we note that the appellants fail to acknowledge other subsections

(b) Identifies the land; and

(c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and

(d) Is signed by or on behalf of each of the grantors; and

(e) Is signed by or on behalf of all parties, if a lease or contract to convey; and

(f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01 (7) except conveyances between spouses, but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage; and

(g) Is delivered. Except under s. 706.09, a conveyance delivered upon a parcel limitation or condition shall be subject thereto only if the issue arises in an action or proceeding commenced within 5 years following the date of such conditional delivery; however, when death or survival of a grantor is made such a limiting or conditioning circumstance, the conveyance shall be subject thereto only if the issue arises in an action or proceeding commenced within such 5-year period and commenced prior to such death.

³ Section 706.03(2) & (3), STATS., provides:

(continued)

which give corporate agents the ability to bind their principals in contracts conveying interests in property. Specifically, § 706.03(1m) refutes the appellants' claim that the document can only be signed by a corporate agent who meets the qualifications of § 706.03(2), and the document must be in recordable form pursuant to § 706.03(3). Section 706.03(1m) reads:

A conveyance signed by one purporting to act as agent for another shall be ineffective as against the purported principal unless such agent was expressly authorized, and unless the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgment. The burden of proving the authority of any such agent shall be upon the person asserting the same.

The contract contains the name of the purported principal, Wisconsin Bell, and the contract is signed on behalf of Wisconsin Bell by "Ann Affeldt" who identifies herself as a manager for Wisconsin Bell. Additional authority for the legality of Ann Affeldt's signature can be found in *R.C.R. Corp. v. Bank of Middleton*, 58 B.R. 291, 294 (Bankr. W.D. Wis. 1986), where the court found that an attack on a contract based upon the fact that the contract was not

(2) Unless a different authorization is recorded under sub. (3) or is contained in the corporation's articles of incorporation, any one officer of a private corporation is authorized to sign conveyances in the corporate name. The absence of a corporate seal shall not invalidate any corporate conveyance. Public corporations shall authorize and execute conveyances as provided by law.

(3) Any private corporation may, by resolution of its governing board, duly adopted, certified and recorded in the office of the register of deeds of the county in which a conveyance executed by such corporation is to be recorded, authorize by name or title one or more persons, whether or not officers of such corporation, to execute conveyances, either generally or with specified limitation, in the name and on behalf of such corporation. After adoption and recording of such resolution and until recording of a resolution amending or revoking the same, conveyances may be executed on behalf of such corporation only in accordance with the terms thereof.

properly executed by a corporate officer pursuant to § 706.03(2) was meritless because agency authority is contained in § 706.03(1m). Section 706.03(2) merely “provides a method for meeting the burden of proof as to agency authority contained in section 706.03([1m]).” *Id.* (footnote omitted). The court further noted that: “Section 706.03(2) may not be used by the parties to a transaction or their successors in interest to attack an admittedly authorized conveyance.” *Id.* Obviously the inference from the holding is that third parties may not attack the validity on this basis, either. Significant to the issue here is the fact that there is no challenge to Affeldt’s authority by Wisconsin Bell or Pakhar Singh. Thus the appellants’ attack on the validity of the contract for its alleged failure to be signed by a corporate officer or an authorized agent recorded with the register of deeds is meritless.

C. The failure to assume responsibility for the debt and the lack of an assignment either personally or by the terms of the sale are not legal defenses to the tort of interference with a contract.

Finally, the appellants argue that they could not have tortiously interfered with the contract because: Gurpal Singh did not assume Stark Food Market’s liabilities when the business was sold to him; he never personally agreed to perform under the contract between Wisconsin Bell and Pakhar Singh; and there was no assignment of this contract to him. The appellants cloud the defense of tortious interference with a contract with the defenses available to defend against a charge of a breach of contract. Although the listed defenses may well be legal defenses to a breach of contract claim, they are not defenses to the claim of tortious interference with a contract. Wisconsin Bell has never claimed that Gurpal Singh was assigned the contract, nor that Gurpal Singh assumed the debts of Stark Food Market when purchasing the business. Further, Wisconsin Bell does not argue that Gurpal Singh personally obligated himself to perform under the

contract. What Wisconsin Bell does claim is that the five-element test set forth in *Duct-O-Wire*, 31 F.3d at 509, has been met in this case. We agree. Wisconsin Bell and Pakhar Singh had a contract, the appellants intentionally interfered with it, the interference was a direct cause of the damages sought by Wisconsin Bell, and the appellants had no justification or privilege for their actions. Their other arguments are irrelevant.

By the Court.—Judgment and order affirmed.

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

