COURT OF APPEALS DECISION DATED AND FILED

April 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2015AP2627

Cir. Ct. No. 2014CV1624

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

MARK MCNALLY,

PLAINTIFF-RESPONDENT,

V.

CAPITAL CARTAGE, INC. D/B/A CAPITAL CARTAGE MOVING & STORAGE,

DEFENDANT-APPELLANT,

MARY R. HERMANSON,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 LUNDSTEN, J. This case addresses whether an offer to purchase, procured by a real estate broker, contains substantial variances from the seller's terms in the listing contract between the broker and the seller. This "substantial variances" issue affects whether the broker is entitled to a commission, even though the seller rejected the offer.

¶2 The listing contract here, between the broker and the seller, was a standard form in statewide use. The form provides, in pertinent part: "Seller shall pay Broker's commission, which shall be earned if, during the term of this Listing: ... [a]n offer to purchase is procured for the Business ... on substantially the terms set forth in this Listing ...." There is no dispute that the phrase "on substantially the terms" means that the broker must procure an offer that does not have a "substantial variance" from the terms in the listing contract. Accordingly, in this opinion we generally use "substantial variance" language, rather than the more cumbersome phrase "on substantially the terms."

¶3 We are asked to decide whether three terms in the offer at issue here are, as a matter of law, substantial variances from the listing contract. We conclude that this question is resolved by the holding in ***Libowitz v. Lake Nursing Home, Inc.***, 35 Wis. 2d 74, 150 N.W.2d 439 (1967), that a substantial variance in this context is limited to variances in offers that directly conflict with express terms in the corresponding listing contract. Our reading of ***Libowitz*** supports the circuit court's rulings and, therefore, we affirm.

Background

¶4 Because resolution of the dispute in this case hinges on a narrow legal issue, we present a barebones recitation of facts.

¶5 Mary and Rolyn Hermanson have owned Capital Cartage, Inc., doing business as Capital Cartage Moving & Storage, for over 40 years. Mary is the company president, and Mary and Rolyn are the sole shareholders. Mary entered into a listing contract with real estate broker Mark McNally to sell Capital Cartage. The price in the listing contract was $1.2 million.

¶6 McNally procured an offer to purchase at the $1.2 million listing price. The prospective buyer's offer included three terms that matter for purposes of this appeal:

- Lender charges, including the cost of an appraisal, estimated at $7,500, would be split between the buyer and Capital Cartage, with Capital Cartage recovering its half if the sale went through.
- Mary and Rolyn Hermanson would enter into a covenant not to compete.
- Mary Hermanson would stay on full time without pay for a period "outlined" in a referenced document.

These terms do not conflict with any express terms in the listing contract. Hereafter, we refer to these three items as the "three offer terms" or the "three terms."

¶7 After the offer was delivered to Mary Hermanson, Mary and Rolyn met to discuss the offer. They rejected the offer by letter, stating in part: "Capital Cartage has decided not to sell its business at this time." The letter provided no other reason for rejecting the offer. Apart from the letter, neither Mary Hermanson nor any other representative of Capital Cartage objected to any terms in the offer except the price, which, as noted, matched the $1.2 million price in the listing contract.

¶8 McNally sued Capital Cartage, alleging that he was owed a $72,000 commission pursuant to the listing contract. McNally took the position that he had procured an offer in compliance with the conditions in the listing contract. Pertinent here, he alleged, in the words of the listing contract, that he procured an offer "at the price and on substantially the terms set forth in this Listing."[1]

¶9 After filing an answer, Capital Cartage moved for judgment on the pleadings arguing, in essence, that Capital Cartage did not, as a matter of law, owe the commission because the three terms were substantial variances from the listing contract. Capital Cartage argued, for example, that the offer contained the substantial requirement, not addressed in the listing contract, that Mary Hermanson work without pay after the sale. The circuit court denied the motion.

¶10 The matter proceeded to trial. Among the disputed issues at trial was whether the three offer terms were substantial variances from the listing contract. During the jury instructions conference, after hearing argument, and over the objection of Capital Cartage, the circuit court concluded, as a matter of law, that the three terms were not substantial variances from the listing contract because those three terms did not conflict with any demand made by the seller in the listing contract. Accordingly, the circuit court informed the jury as follows:

[1] The language in the listing contract between the seller, Capital Cartage, and the broker, McNally, comes from standard forms that were, at that time, approved by the Wisconsin Department of Regulation and Licensing. *See* WIS. ADMIN. CODE § RL 16.03 & Note (Oct. 2008). The agency now charged with approving standard forms used in the course of listing and selling property is the Real Estate Examining Board. *See* WIS. ADMIN. CODE § REEB 16.03 & Note (through March 2017). The forms are available from the Wisconsin Department of Safety and Professional Services. *See* http://dsps.wi.gov (approved forms accessible for printing and downloading). The current form language is somewhat different; as pertinent here, it adds the modifier "same" before the word "term." The current language reads: "on substantially the same terms set forth in this Listing."

"The court has determined that as a matter of law that the [three terms] in the offer to purchase ... are not substantial variances." The jury resolved other disputes in favor of McNally, with the result being that Capital Cartage was required to pay McNally the commission.

Discussion

¶11 There is no dispute that the three offer terms at issue here vary from the terms in the listing contract. The three terms are arguably substantial variances if we simply look at the common meaning of the word "substantial." The first offer term involved over $3,000 that Capital Cartage might forfeit if the sale did not go through, the second was a non-compete clause, and the third would have required Mary Hermanson, post-sale, to work for the buyer without pay.

¶12 Capital Cartage, however, does not argue about the common meaning of "substantial." More to the point, Capital Cartage does not make a typical contract interpretation argument. That is, Capital Cartage does not look directly to the listing language and argue that reasonable people, under the circumstances, would think, for example, that an offer requiring Hermanson to work post-sale without pay is not, in the words of the listing contract, an offer "on substantially the terms set forth in this Listing." *See* ***MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust***, 2015 WI 49, ¶37, 362 Wis. 2d 258, 864 N.W.2d 83 ("Contract language is construed according to its plain or ordinary meaning, ... consistent with what a reasonable person would understand the words to mean under the circumstances." (internal quotation marks and quoted source omitted)).

¶13 Rather, Capital Cartage, and McNally for that matter, focus on the meaning of "substantial variance" as defined in case law. This approach is in keeping with the three primary cases that the parties discuss at length: ***Libowitz***, 35 Wis. 2d 74; ***Kleven v. Cities Service Oil Co.***, 22 Wis. 2d 437, 126 N.W.2d 64 (1964); and ***Moss v. Warns***, 245 Wis. 587, 15 N.W.2d 786 (1944). Neither ***Kleven*** nor ***Moss*** even quote the pertinent listing contract language defining the offer that the broker must procure. The ***Libowitz*** court does quote the underlying contract language, but only in passing. *See* ***Libowitz***, 35 Wis. 2d at 80. Like ***Moss*** and ***Kleven*** before it, the ***Libowitz*** decision does not include a discussion of what a reasonable party to the listing contract would have understood the particular contract language to mean.

¶14 We follow the parties' lead and address the present dispute by looking to case law. As we shall see, the dispute here centers on ***Libowitz***. Capital Cartage admitted before the circuit court and in its briefing on appeal that ***Libowitz*** can be read as restricting the meaning of "substantial variances" to variances that are in direct conflict with express terms in a listing contract. But Capital Cartage attempts to persuade us that this possible reading is a misreading of ***Libowitz***.

¶15 We understand Capital Cartage to be making two distinct arguments directed at ***Libowitz***. First, that ***Libowitz*** does not modify what appears to be a more seller-friendly definition of "substantial variance" found in ***Kleven***. Second, that even if ***Libowitz*** does modify ***Kleven***, such that "substantial variances" are limited to variances that directly conflict with listing contracts, such direct conflicts may arise from conflicts with listing contract terms that are not expressed, but rather implied. In the sections that follow, we reject both arguments.

¶16 Before proceeding to the merits, however, we pause to clarify that, although Capital Cartage attacks two circuit court decisions, both attacks rise or fall based on our resolution of the same underlying issue.

¶17 In its briefing on appeal, Capital Cartage argues that:

1. The circuit court erred when it denied Capital Cartage's pretrial motion for judgment on the pleadings.

2. The circuit court erred when it instructed the jury that three of the terms in the offer were not substantial variances from the listing contract, thereby taking the dispute over those terms away from the jury.

However, at oral argument the attorney for Capital Cartage clarified under questioning that the resolution of both of these issues hinges on the same legal question: Does the 1967 ***Libowitz*** decision hold that a "substantial" variance in this context is *limited* to an offer provision that directly conflicts with an express term in the listing contract? If we answer this question yes, then Capital Cartage agrees that it loses on appeal. Accordingly, we do not separately address Capital Cartage's pretrial motion for judgment on the pleadings and Capital Cartage's complaint about the jury instruction.

*A. Whether **Libowitz** Modifies The More Seller-Friendly Definition Of "Substantial Variance" Found In **Kleven***

¶18 Capital Cartage contends that the ***Libowitz*** decision does not hold that a "substantial variance" is limited to an offer provision that directly conflicts with a term in the listing contract. We disagree based on our reading of ***Libowitz***. Because ***Libowitz*** is best understood in the context of the two cases that came before it, ***Moss*** and ***Kleven***, we chronologically address all three cases below.

1. The 1944 ***Moss*** *Decision*

¶19 As relevant here, ***Moss*** involved sellers who entered into a listing contract with a broker and then rejected an offer, procured by the broker, without specifying a reason for the rejection beyond the statement: "We decided not to sell. [A co-owner] would not consent to it." ***Moss***, 245 Wis. at 588-89. After the broker brought suit asserting his right to a commission under the listing contract, the sellers raised as a defense discrepancies between terms in the offer and terms in the listing contract. ***Id.*** at 590-91.

¶20 After reciting the facts, the ***Moss*** court turned its attention to the broker's argument that the sellers had waived reliance on the alleged discrepancies between the offer and the listing. ***Id.*** at 591. At the broker's urging, the ***Moss*** court applied a broad waiver rule found in a treatise:

> "Regardless of whether the [seller], at the time of his refusal to consummate the transaction, states some grounds or no grounds for such refusal, a particular ground not specified by him at that time is waived and cannot be urged by him when sued [by a broker] for a commission...." 12 C.J.S. p. 224, sec. 95.

Id. The ***Moss*** court adopted and applied this broad waiver rule to the facts before it, holding: "[E]ven if there were discrepancies of such nature as to be substantially at variance with terms in the listing agreement, they must be considered waived because [the sellers'] refusal to consider the offer was based on solely another ground." ***Id.*** at 592.[2]

[2] Capital Cartage's briefing on appeal, citing cases such as ***Grinde v. Chipman***, 175 Wis. 376, 377, 185 N.W. 288 (1921), sometimes seems to suggest that there is an old and still controlling rule to the effect that brokers are not entitled to commissions unless they procure an offer "upon the terms specified by the owner" in the listing contract. Capital Cartage seems to suggest that, under this long-established rule, any non-minor variance from the terms in a listing
(continued)

2. The 1964 ***Kleven*** *Decision*

¶21 The ***Kleven*** court walked back the broad waiver rule adopted in ***Moss***. In contrast with the ***Moss*** holding that a seller could not later rely on *any* variance not specified by the seller at the time the seller rejected an offer, the ***Kleven*** court held that sellers could later rely on "substantial" variances, even if the seller had not pointed to such a variance when rejecting the offer. *See* ***Kleven***, 22 Wis. 2d at 442-44. The court reasoned that brokers are "chargeable" with knowledge of substantial variances, thus relieving sellers of the obligation to point those variances out. ***Id.*** at 444. Thus, the ***Kleven*** court held: "[T]he [waiver] rule of ***Moss v. Warns*** ... should be confined to variances which are not substantial ...." ***Id.*** at 445.

¶22 The application of the new "substantial variances" holding to the facts in ***Kleven*** was simple because the ***Kleven*** court assumed without deciding that the particular asserted variances in that case were "substantial." More specifically, the ***Kleven*** court equated the terms "material" and "substantial," and explained that the court was accepting, without examining, the circuit court's unchallenged "finding of fact that there were material variations between the listing contract and the offer to purchase." ***Id.*** at 441. Accordingly, even though the seller in ***Kleven*** had given no reason for rejecting the offer, apart from the desire not to sell, the broker was not entitled to his commission because the

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contract defeats a broker's claim to a commission, even if the seller failed to point to the non-minor variance when rejecting an offer. It is sufficient to say that, regardless what the rule was before ***Moss v. Warns***, 245 Wis. 587, 15 N.W.2d 786 (1944), the topic at issue here was taken on in ***Moss***, ***Kleven v. Cities Service Oil Co.***, 22 Wis. 2d 437, 126 N.W.2d 64 (1964), and ***Libowitz v. Lake Nursing Home, Inc.***, 35 Wis. 2d 74, 150 N.W.2d 439 (1967), and each, in turn, imposed a more specific rule.

Kleven court took it as accepted fact in the case before it that there were substantial variances between the offer and the listing contract. *See* ***id.*** at 439-40, 441, 444-45.

¶23 Although the ***Kleven*** court did not discuss whether the particular asserted variances in that case met some "substantial variance" standard, the court did generally discuss the difference between non-substantial and substantial variances. It is this discussion that plants the seed of the dispute in this case.

¶24 The ***Kleven*** court, looking to a treatise annotation discussing ***Moss*** and to case law from other states, gave examples of non-substantial variances, such as those addressing the timing of common closing activities. ***Kleven***, 22 Wis. 2d at 443-44. The ***Kleven*** court explained that sellers must bring objections to non-substantial variances to the broker's attention, or lose the right to rely on them later as a reason not to pay the broker a commission. *See* ***id.*** at 444.

¶25 More significantly for our purposes, the ***Kleven*** court briefly discussed the sort of substantial variance that sellers need not specify when rejecting an offer. The ***Kleven*** court wrote:

> However, where the variance is a substantial one, such as one that is directly in conflict with a material provision of the listing contract, there has been no substantial performance by the broker which would entitle him to his commission, absent acceptance of the offer by the owner.

Id. The ***Kleven*** court's use of "such as" in the quote above indicated that there are variances that are substantial that do not involve a direct conflict between an offer and the listing contract. If the ***Kleven*** court had intended substantial variances to be limited to offer terms in direct conflict with listing terms, the sentence would read: "where the variance is a substantial one, *that is*, one that is directly in conflict ...."

¶26 This brings us to ***Libowitz***. As we shall see, the supreme court in ***Libowitz*** modified the ***Kleven*** substantial variance language by replacing "such as" with "i.e.," thus, in our view, doing what ***Kleven*** did not do. That is, ***Libowitz*** limited "substantial variances" to those involving a direct conflict between the terms of the offer and the terms of the listing contract.

3. The 1967 ***Libowitz*** *Decision*

¶27 ***Libowitz*** involved the sale of a nursing home. It is not an easy read. The facts of the case are complicated, the court's discussion of authority is sometimes unclear, and there are several intertwined issues. Nonetheless, ***Libowitz*** is clear with respect to the issue before us here.

¶28 In the context of affirming a circuit court's decision rejecting the nursing home seller's motion to dismiss a broker's suit for his commission, the ***Libowitz*** court addressed the meaning of "substantial variance" between an offer and a listing contract. Notably, the court used "i.e." when explaining the meaning of "substantial variations":

> Summarizing these rules as they apply to the case at hand, the complaint would be [subject to dismissal for] failing to state a cause of action if, in spite of liberal construction principles, [the complaint] alleged variations between the terms of the listing contract and the offer that were: 1. Substantial variations, *i.e.*, "directly in conflict with a material provision of the listing contract;" 2. insubstantial, but called to the attention of the broker; or, 3. insubstantial, but of such a nature that they could not have been remedied by the broker anyway.

Libowitz, 35 Wis. 2d at 82-83. Although the ***Libowitz*** court had earlier quoted the "such as one that is directly in conflict" language from ***Kleven***, *see* ***Libowitz***, 35 Wis. 2d at 82, the ***Libowitz*** court's three-rules summary above changed "such as" to "i.e." And, as we now explain, the remainder of the ***Libowitz*** court's substantial variance analysis shows that the court meant "i.e.," not "such as."

¶29 After providing the three-rules summary we quote above, the ***Libowitz*** court applied the "[s]ubstantial variations" rule to the facts alleged in the broker's complaint, which apparently incorporated the listing contract and the offer. *See* ***id.*** at 83-85. The court addressed whether seven terms in the offer were, as the seller contended, substantial variances from the listing contract. ***Id.*** As to each, the ***Libowitz*** court explained why the term was not in direct conflict with the listing contract. ***Id.*** Indeed, the ***Libowitz*** court's substantial variance analysis of six of the seven terms consisted *solely* of discerning whether the term was in conflict with the listing contract.[3] For example, a term in the offer apportioned the purchase price to the component parts of the sale (i.e., good will, real estate, etc.) in a manner that allegedly had adverse tax consequences for the seller, but the ***Libowitz*** court did not examine how substantial the tax consequences were. Rather, the court limited its discussion to the fact that the listing contract was silent as to apportionment and, therefore, the offer term did not conflict with the listing. ***Id.*** at 83.

[3] The only exception appears to be item 5, a term requiring the seller to provide "'plans and specifications for expansion of the building which Seller previously had prepared and ... have been paid for in full.'" ***Libowitz***, 35 Wis. 2d at 84. After stating that this provision "does not conflict with any terms found in the listing contract," the ***Libowitz*** court went on to note that the plans were "of no value to the owner once the building was sold," apparently suggesting that the term was not, in any event, substantial. *See* ***id.***

¶30 After examining each of the seven offer terms, the ***Libowitz*** court, tracking its summary of the three rules, albeit in reverse order, explained that all seven terms were capable of correction, that the seller failed to point to variances when rejecting the offer, and, key here, that none of the offer terms were "directly in conflict with the material provisions of the listing contract." ***Id.*** at 85. Speaking even more clearly about the limited meaning of substantial variance, the ***Libowitz*** court wrote: "[U]nless the variations [at issue] directly conflict with the material provisions of the listing contract, their allegation is not fatal to the statement of a good cause of action [by the broker]." ***Id.***

¶31 As should be clear from the discussion above, we must reject the proposition that ***Libowitz*** left in place the broader meaning of "substantial variance" found in ***Kleven***. We further conclude that the only reasonable reading of ***Libowitz*** is that it limited the meaning of "substantial" variances to offer terms that are in direct conflict with listing contract terms.[4]

¶32 Before moving on, we comment on one of McNally's arguments. McNally suggests in his briefing that evidence regarding Capital Cartage's

[4] The parties also discuss ***Peter M. Chalik & Associates v. Hermes***, 56 Wis. 2d 151, 201 N.W.2d 514 (1972). Indeed, during the instruction conference before the circuit court, the attorney for Capital Cartage seemed to admit that ***Libowitz*** has the meaning we give it in this opinion but argued, in effect, that ***Libowitz*** was overruled by ***Chalik*** on this topic. ***Chalik***, however, plainly did not modify or overrule ***Libowitz***. Most of the discussion in ***Chalik*** addressed the plaintiff-broker's confused legal theory and issues related to whether the broker procured an offer from a buyer who was "ready, able and willing to perform." *See* ***Chalik***, 56 Wis. 2d at 154-63. To the extent the ***Chalik*** court discussed whether the offer in that case contained a substantial variance from the listing contract, the discussion was cursory. The court identified three offer terms, two of which were clearly in conflict with terms in the listing contract, and the ***Chalik*** court expressly identified one of those as a "substantial variance ... between the listing contract and the offer." ***Id.*** at 154-55. The ***Chalik*** court cited to both ***Kleven*** and ***Libowitz***, but evinced no recognition of any tension between the two cases and, for that matter, had no reason to address whether a "substantial variance" is limited to a variance that is in direct conflict with a term in a listing contract.

motivation in rejecting the offer matters. McNally points to evidence indicating that Mary Hermanson admitted that she rejected the offer because of the price, even though it was the price in the listing contract. However, we fail to understand why a seller's motivation for rejecting an offer matters under the analysis dictated by ***Libowitz***. It is true that the ***Libowitz*** court mentioned the allegation that the seller in that case rejected the offer because the seller had received a "'cash offer from a third party,'" ***Libowitz***, 35 Wis. 2d at 79, but that alleged reason for rejecting the offer played no role in the ***Libowitz*** court's analysis as to whether the broker met the conditions for earning his commission, *see* ***id.*** at 80.

B. Whether ***Libowitz*** *Held That Offer Terms Can Be Compared With Unexpressed But Implied Terms In A Listing Contract*

¶33 Capital Cartage argues that even if ***Libowitz*** did modify ***Kleven***, such that "substantial variances" are limited to variances that directly conflict with listing contracts, such direct conflicts may arise from conflicts with unexpressed but implied terms in a listing contract. We are not persuaded. Capital Cartage relies on language in ***Libowitz*** that is both confusing and inconsistent with the thrust of the court's analysis. We first describe the relevant parts of ***Libowitz*** and more specifically summarize Capital Cartage's arguments. We then address the confusion and the inconsistency separately.

¶34 Although the ***Libowitz*** court twice spoke as if the question is whether an offer term conflicts with an "express" term in the listing contract, ***Libowitz***, 35 Wis. 2d at 83-84 (items 3 and 4), and although the ***Libowitz*** court explained, while discussing one offer term, that because the "listing contract was silent on this subject [damage to the premises prior to closing] ... the [offer] terms are not in conflict with any of [the listing contract] provisions," ***id.*** at 84 (item 6), the court, as we explain in the next paragraph, seemingly suggested at one point that it is significant that one of the offer terms does not conflict with an implied listing term. *See* ***id.*** at 83-84 (item 3).

¶35 The ***Libowitz*** court addressed the offer term that made the sale contingent on the buyer obtaining permits and licenses that would allow the buyer to operate the business as a nursing home. ***Id.*** After explaining that this offer term did not conflict with "any express term" in the listing contract, ***id.*** at 83, the ***Libowitz*** court went on to add something more. The court stated that the permits-and-licensing contingency also did not "conflict with any obvious material, but yet, unexpressed, term of the listing contract." ***Id.*** at 84. At oral argument, Capital Cartage's attorney pointed to this language to support the proposition that an offer term can be a substantial variance from a listing contract if the offer term conflicts with an unexpressed but implied listing term. Applied here, so Capital Cartage's attorney argued, the listing contract impliedly contains the term that Capital Cartage was "only willing to sell exactly what [Capital Cartage specified it was offering for sale] in the listing contract and nothing more," meaning, for example, that there was an implied listing term that Mary Hermanson's post-sale services were excluded from the sale price. We reject Capital Cartage's reading of this part of ***Libowitz***. The two sentences in question are confusing and, as interpreted by Capital Cartage, inconsistent with the remainder of the court's analysis of the offer terms.

¶36 **Confusing.** In this part of ***Libowitz***, the court was addressing whether a particular contingency in the offer was in conflict with the listing contract. The term made the sale contingent on the buyer obtaining all needed permits and licenses to operate the business as a nursing home. ***Id.*** at 83-84. The ***Libowitz*** court rejected the proposition that there was a conflict, explaining that the contingency "in no way conflicts with any express term contained in the listing contract." ***Id.*** at 83. The ***Libowitz*** court next posited in a single sentence that "liberal construction" of the listing contract led to the conclusion that the contract did *not* contain "the implied term that a prospective purchaser must agree to buy the operating nursing home regardless of whether or not he could legally operate it." ***Id.*** at 83-84. The ***Libowitz*** court then concluded with the comment that the permit-and-licensing contingency in the offer did not "conflict with any obvious material, but yet, unexpressed, term of the listing contract." ***Id.*** at 84. This is confusing because the prior sentence did not establish that the listing contained an implied and unexpressed term. To the contrary, the court stated that the listing contract did not contain a requirement that the "prospective purchaser must agree to buy the operating nursing home regardless of whether or not he could legally operate it." ***Id.***

¶37 This lack of clarity supports our rejection of Capital Cartage's reading of ***Libowitz***. But we make a more salient point next: that Capital Cartage's proposed reading of this one part of the analysis of a single term is inconsistent with the ***Libowitz*** court's approach to every other term.

¶38 **Inconsistent.** At least four of the seven offer terms examined in ***Libowitz*** involved topics on which the listing contract was completely silent.[5]

[5] The listing contract was silent as to offer terms identified in ***Libowitz*** with the numbers 1, 2, 5, and 6. *See* ***Libowitz***, 35 Wis. 2d at 83-85. As to other items, it seems to us that the court merely added make-weight observations to the effect that the terms may actually be consistent with something express in the listing contract. For example, regarding the term identified as "4," it is difficult to understand how the ***Libowitz*** court came to the conclusion that an offer term prohibiting the seller from employing its present nursing home administrator for one year following the sale was covered by a liberal construction of the listing term indicating that "good will" was part of the sale. *See* ***id.*** at 84. Regardless, we think it is clear that the ***Libowitz*** court would have found no conflict even in the absence of some arguable consistency with an express term.

Under Capital Cartage's implied-term approach, the analysis of these terms in ***Libowitz*** would have proceeded differently. Given silence in the listing, there would be only two options: (1) the offer term would be non-substantial, thus requiring the seller to bring the variance to the broker's attention when rejecting the offer, or (2) the offer term would be substantial, thus alleviating the seller of the obligation to bring the variance to the broker's attention. That is, under Capital Cartage's implied-term approach, there would have been a need to analyze the four offer terms—on which the listing was silent—to determine their significance. But ***Libowitz*** did not engage in that sort of analysis.

¶39 More fundamentally, under Capital Cartage's approach, the touchstone is the significance of the variance in the offer, that is, whether the variance is substantial enough to be considered a "substantial variance." But the ***Libowitz*** court did not analyze the offer terms through that lens. Rather, aside from a single apparent suggestion that one offer term was not, in any event, significant, the ***Libowitz*** court's sole focus was on whether any of the seven offer terms conflicted with something in the listing contract.

¶40 Accordingly, we reject Capital Cartage's argument that, even if ***Libowitz*** did modify ***Kleven***, such that "substantial variances" are limited to variances that directly conflict with listing contracts, such conflicts may arise from conflicts with unexpressed but implied terms in a listing contract.

C. Application Of **Libowitz** *To The Facts Here*

¶41 Both in the context of its motion for judgment on the pleadings and in the context of its objection to a jury instruction, Capital Cartage argues that the three terms in the offer to purchase are, as a matter of law, substantial variances from the listing contract. For this reason, so says Capital Cartage, it did not have to point to these variances when rejecting the offer in order to preserve its right to later rely on the variances in defending against McNally's suit seeking his commission. The starting place for this argument is Capital Cartage's assertion that ***Libowitz*** does not hold that a "substantial variance" is limited to an offer provision that directly conflicts with an express term in the listing contract. Having rejected that argument, we reject Capital Cartage's attack on the circuit court's decisions to deny Capital Cartage's pretrial motion for judgment on the pleadings and to instruct the jury that the three offer terms were not substantial variances from the listing contract.

D. The Pattern Jury Instruction

¶42 Before concluding, we comment on the pattern jury instruction used in this case to explain to the jury the conditions under which a real estate broker is entitled to a commission. The instruction, WIS JI—CIVIL 3086 (1993), was read to the jury for purposes apart from the three offer terms we address in this opinion. We note here that the pattern instruction conflicts with our reading of ***Libowitz***.

¶43 A portion of the pattern jury instruction tracks language, first found in ***Kleven***, indicating that a direct conflict with the listing contract is just one way a variance can be a "substantial variance." The pattern instruction does this by using the "such as" language from ***Kleven*** that we discussed above. As is pertinent here, the pattern instruction reads:

> Before a real estate broker is entitled to any commission under a real estate listing contract, the broker must procure a purchaser who is ready, willing, and able to meet the express terms of the listing contract. (A seller has the right to reject an offer that does not conform to the terms specified in the listing contract. When a seller refuses to accept an offer which is substantially in accordance with the listing contract, but which contains variances from the terms of the listing contract, the seller to

> relieve himself or herself from liability for the broker's commission must, when rejecting the offer, point out the variances to the broker so that the broker may be afforded an opportunity to obtain an offer that does comply. *However, where the variance is a substantial one, such as one that is directly in conflict with a material provision in the listing contract,* then there has been no substantial performance by the broker which would entitle the broker to the commission and *the owner is under no obligation to specify the reasons for rejection.*)

WIS JI—CIVIL 3086 (1993) (emphasis added).

¶44 As we have explained, ***Libowitz*** changed the "such as" part of this formulation to "i.e.," thereby limiting the meaning of "substantial variances" to variances that are in direct conflict with the listing contract. It follows, in our view, that the current jury instruction conflicts with controlling case law.

¶45 At the same time, and as should be clear by now, it is curious to us that ***Moss***, ***Kleven***, and ***Libowitz*** look to treatises and legal pronouncements in case law to determine the meaning of language in contracts between parties, rather than applying the normal approach to contract interpretation that inquires into what "a reasonable person would understand the words to mean under the circumstances." *See* ***MS Real Estate Holdings***, 362 Wis. 2d 258, ¶37 (internal quotation marks and quoted source omitted). However, Capital Cartage did not proceed under this standard approach to contract disputes and, perhaps, could not have in light of the case law.

¶46 We make one final observation. In briefing and during oral argument, the attorneys for Capital Cartage have asserted that it was unfair to put Capital Cartage in the position of having to either (1) accept the offer requiring, among other things, that Mary Hermanson work for the buyer without pay or (2) be penalized in the form of having to pay McNally the $72,000 commission without a sale. However, as the case law makes clear, these were not the only options. Capital Cartage could have pointed to the three terms when rejecting the offer, thereby preserving its right to rely on them as justifiable reasons for rejecting the offer. The question of whether Capital Cartage would have or should have known of its obligation to point to the terms or forfeit the right to rely on them later is a question that we do not address. That question might arise under a typical contract interpretation approach to this topic, but it does not seem to matter if we follow the parties' lead in framing the issue, which we have noted is consistent with the approach used in Wisconsin case law.

Conclusion

¶47 For the reasons above, we affirm the circuit court.

By the Court.—Judgment affirmed.

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