**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

June 21, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 00-2031**

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

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**NEKOOSA PAPERS, INC.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MAGNUM TIMBER CORPORATION, JOHNSON TIMBER CORPORATION, AND BAYSIDE TIMBER CORPORATION,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Jackson County: ROBERT W. RADCLIFFE, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Deininger and Lundsten, JJ.

¶1 DYKMAN, P.J. This is an appeal from a declaratory judgment in which the trial court determined that an agreement between Nekoosa Papers, Inc.,

and Johnson Timber Corporation, Bayside Timber Corporation, and Magnum Timber Corporation (hereinafter "Johnson Timber") was unambiguous, permitting the agreement to expire at the end of three years. Johnson Timber argues that the plain terms of the contract support its own interpretation, which would require a minimum of four years' duration for the contract. Johnson Timber also argues that if we conclude the contract is ambiguous, we must remand the case to the trial court so that extrinsic evidence of the parties' intent can be considered. We agree with the second argument and conclude that the agreement is ambiguous and that the trial court may consider extrinsic evidence of the parties' intent. We therefore reverse and remand for further proceedings consistent with this decision.

## I. Background

¶2 Nekoosa Papers and Johnson Timber entered into a pulpwood purchase and processing agreement, effective October 1, 1997. Under the terms of the agreement, Nekoosa Papers purchased pulpwood from Johnson Timber, and Johnson Timber stored and aged the wood, then processed it into chips for Nekoosa Papers. Nekoosa Papers then bought the chips for a price in addition to what it already paid for the pulpwood.[1]

¶3 The paragraph in the processing agreement controlling the termination of the agreement provides:

> The parties mutually agree that this Agreement shall have an initial term of three (3) years commencing on the 1st day of October, 1997, and shall self renew for successive one (1) year terms, provided that following the initial term either party may terminate this Agreement, at

[1] It appears from the agreement that, in fact, Johnson Timber would buy back the pulpwood from Nekoosa Papers sometime prior to processing the wood into chips.

> any time, without liability for breach upon 365 days written notice.

¶4 Nekoosa Papers and Johnson Timber also entered into a lease related to the processing agreement, presumably because after Nekoosa Papers purchased the pulpwood, Johnson Timber continued to store the wood for Nekoosa Papers while the wood aged.

¶5 On September 30, 1999, Nekoosa Papers sent Johnson Timber a letter in which it advised Johnson Timber that it would not renew the processing agreement. In the letter, Nekoosa Papers explained that its obligation to buy pulpwood from Johnson Timber would end as of September 30, 2000, and its obligation to buy aged chips would end as of September 30, 2001. Johnson Timber wrote back to Nekoosa Papers, indicating its position that under the processing agreement, Nekoosa Papers was required to purchase wood through September 30, 2001, and to purchase aged chips through September 30, 2002.

¶6 Nekoosa Papers commenced an action for declaratory judgment, maintaining that its interpretation of the agreement was the correct one. Johnson Timber moved for judgment on the pleadings, arguing that the processing agreement unambiguously bound the parties until at least September 30, 2001. Nekoosa Papers moved for summary judgment, asking the trial court to rule that the processing agreement obligated Nekoosa Papers to purchase pulpwood from Johnson Timber only through September 30, 2000, and to purchase chips through September 30, 2001.

¶7 At a hearing on the parties' motions, the parties agreed that the trial court could treat Nekoosa Papers' motion for summary judgment as a motion for judgment on the pleadings. The trial court interpreted the language of the

processing agreement on its face, and ruled in favor of Nekoosa Papers. The court entered judgment declaring that Nekoosa Papers had "effectively terminated the Agreement as of the end of the initial three-year term," thus obligating Nekoosa Papers to purchase pulpwood from Johnson Timber only through September 30, 2000, and to purchase wood chips from Johnson Timber through September 30, 2001. Johnson Timber appeals.

## II. Analysis

¶8 Johnson Timber argues that the processing agreement "provides a minimum of four years worth of contractual obligations." Nekoosa Papers asserts that "the agreement unambiguously permits Nekoosa to terminate its obligations to purchase wood on September 30, 2000." Nekoosa Papers states that the parties do not dispute that, whatever the minimum term of the agreement, its obligation to purchase chips extends one year beyond its obligation to purchase pulpwood. Johnson Timber does not expressly acknowledge that it agrees with Nekoosa Papers on this point. However, Johnson Timber does not state in its reply brief that it disputes that interpretation, and the correspondence between the parties before Nekoosa Papers commenced suit indicated that both parties assumed the one-year difference between pulpwood and chip purchasing. Therefore, we construe the parties' dispute on appeal as focused on whether the minimum term of Nekoosa Papers' obligation to purchase pulpwood from Johnson Timber extended to September 30, 2000, or September 30, 2001. Nekoosa Papers has conceded that its obligation to purchase chips extends for one year after its obligation to purchase pulpwood.

¶9 Whether a judgment on the pleadings should be granted is a question of law that we review de novo. ***Freedom from Religion Found., Inc. v.***

***Thompson***, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991). The interpretation and construction of a contract is also a question of law that we review without deference to the trial court. ***Zimmerman v. DHSS***, 169 Wis. 2d 498, 507, 485 N.W.2d 290 (Ct. App. 1992). Our goal in contract interpretation is to determine and give effect to the parties' intentions. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276. When the language of a contract is unambiguous, we apply its literal meaning. ***Id.*** However, if we determine that a contract provision is ambiguous, we will look to extrinsic evidence to discern the contract's meaning. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). A contract is ambiguous where its terms are reasonably susceptible to more than one interpretation. ***Id.***

¶10 Upon one reasonable interpretation of the termination clause in the aged chip agreement, "terminate" refers to the action of providing notice in order to cause the contract to end at a later time. Under this interpretation, notice may be given only "following the initial term" of three years, in effect making the minimum term of the contract four years. This is the interpretation Johnson Timber gives to the agreement. However, under another reasonable interpretation of the termination clause, "terminate" refers to one party bringing the contract to an end "following the initial term" by giving the required notice 365 days before the end of the initial term. This is the interpretation favored by Nekoosa Papers, and it would bind the parties for a minimum of three years. Because we conclude that both of these interpretations are reasonable, the agreement is ambiguous.

¶11 Johnson Timber argues that its interpretation is the only reasonable one because it is clear from the grammatical structure of the termination clause that "terminate" is an active verb with "either party" as its subject. Johnson

Timber argues that Nekoosa Papers' interpretation of the contract makes "terminate" a passive verb, which cannot be correct given the plain language of the agreement. When Johnson Timber refers to "active verbs" and "passive verbs," what Johnson Timber means is that the agreement utilizes "terminate" in its transitive (to bring to an end) rather than its intransitive (to come to an end) form. We agree that the agreement uses terminate in its transitive form, but that does not resolve the ambiguity. The ambiguity revolves around the intrinsic meaning of the word "terminate" as used in this agreement. As we have already explained, a party's decision to "terminate" the contract could refer to the act of giving notice or it could refer to the act of causing the agreement to end on the last day of the initial three-year term. In either sense, the verb "terminate" is transitive, or "active," as Johnson Timber would have it.

¶12 Nekoosa Papers argues that an interpretation contrary to the one it supports would make particular words in the contract meaningless or surplusage, thus violating a basic rule of construction of contracts. *See* ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 123, 403 N.W.2d 747 (1987). In particular, Nekoosa Papers argues that Johnson Timber's interpretation renders meaningless the concept of an initial three-year term. We disagree. Under Johnson Timber's favored interpretation, the phrase "initial term of three (3) years" functions to define the earliest time of notice rather than the earliest time of expiration of the contract.

¶13 Nekoosa Papers also supports its interpretation of the processing agreement by arguing that the "last antecedent rule" requires that the clause "upon 365 days notice" modifies "may terminate," not "following the initial term." However, as Johnson Timber points out, the last antecedent rule is a general rule of grammar that does not always apply. *See* ***Peterson v. Sinclair Ref. Co.***, 20

Wis. 2d 576, 589, 123 N.W.2d 479 (1963); ***Georgiades v. Glickman***, 272 Wis. 257, 263-64, 75 N.W.2d 573 (1956).[2] A rule of grammar that applies sometimes but not others is unlikely to resolve a facial ambiguity, particularly where, as here, the uncertainty of whether the rule applies is inextricably linked to the ambiguity of the language at issue. Thus, a conclusion that the contract is unambiguous either because the last antecedent rule does apply or does not apply would be circular.

¶14 Finally, both parties refer to their lease agreement in advancing their respective positions as to the meaning of the processing agreement. The lease agreement states in part:

> The term of the lease shall begin on the 1st day of October, 1997, and continuing thereafter in full force and effect during the term, of and for a period of one year following the expiration or termination of the initial term and any renewal terms of the AGED CHIP PROCESSING

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[2] Both parties also refer us to ***Hunt v. Stinson***, 101 Wis. 556, 77 N.W. 901 (1899), as authority on whether a rule of grammar definitively controls the construction of a contract. In ***Hunt***, the supreme court explained:

> It is one of the most familiar doctrines in the construction of written instruments, that courts will not adopt a construction which will do violence to the rules of language or of law; but that does not mean that rules of grammar cannot be violated, otherwise it would be impossible, in many cases, for courts to give effect to the manifest intention of parties, shown by the language used by them. The maxim that rules of language cannot be violated, even to carry out the manifest intention of the parties, means merely that words cannot be said to convey a meaning other than one which can be reasonably attributed to them.

***Id.*** at 558. But, we read ***Hunt*** to reinforce the well-established rule that a contract is ambiguous where its language is reasonably susceptible to more than one interpretation. And of course, the rules of grammar will play a leading role in determining which interpretations of language are reasonable.

> AGREEMENT dated the 1st day of October, 1997, by and between [Johnson Timber] and [Nekoosa Papers] (R1:29).

However, we are not convinced that the lease agreement makes the termination provision of the processing agreement any less ambiguous. On the one hand, the use of "expiration or termination" in the lease agreement suggests that the "expiration" of the initial term of the processing agreement is different than the "termination" of the initial term. This supports Johnson Timber's definition of the word "terminate" in the processing agreement, which is essentially that "terminate" means "to give notice of termination." On the other hand, the use of the word "any" before "renewal terms" suggests that the parties contemplated that there might or might not be a renewal term, thus supporting Nekoosa Papers' position that the parties intended the initial term of three years to be the minimum period of contractual obligation.

¶15 Having determined that the processing agreement is ambiguous, we may look to extrinsic evidence to discern the contract's meaning. *See* ***Management Computer***, 206 Wis. 2d at 177. But the construction of an ambiguous contract, with reference to extrinsic evidence, is normally a question of fact, ***Voigt v. Riesterer***, 187 Wis. 2d 459, 465, 523 N.W.2d 133 (Ct. App. 1994), and this case comes to us from a judgment on the pleadings, so there is little extrinsic evidence of the parties' intent in the present record. We therefore remand to the trial court to examine extrinsic evidence and determine the parties' intent.

¶16 At oral argument, Nekoosa Papers asserted that we could not remand for the trial court to consider extrinsic evidence, even if we concluded, as we now have, that the processing agreement was ambiguous. Nekoosa Papers contends that Johnson Timber waived the right to rely on extrinsic evidence because it

consistently alleged and argued below that the processing agreement was unambiguous. Nekoosa Papers also argues that Johnson Timber waived its right to present extrinsic evidence by agreeing to a judgment on the pleadings. We disagree.

¶17 Whether a party has adequately preserved an issue for appeal is a question of law for our independent determination. *See* ***State v. Madlock***, 230 Wis. 2d 324, 328, 602 N.W.2d 104 (Ct. App. 1999). In a letter brief to the trial court, Johnson Timber stated: "Johnson Timber has not taken the position that extrinsic evidence can never be admissible in this case. It has always recognized that, in the unlikely event the court determines that Nekoosa has proffered a reasonable interpretation of the Agreement at issue, extrinsic evidence will certainly be required." This is sufficient to raise and preserve the issue, and we disagree with Nekoosa Papers' assertion that Johnson Timber somehow waived arguments regarding extrinsic evidence by making an alternative assertion that the agreement was unambiguous and agreeing that the trial court could decide that question on the pleadings.

¶18 Finally, Nekoosa Papers argues that a merger clause in the processing agreement prevents Johnson Timber from offering extrinsic evidence of the parties' intent. The clause states: "The terms and provisions of this Agreement constitute the entire agreement between the parties and supersede all previous communications, negotiations, proposals, representations, conditions, warranties, or agreements …."

¶19 Nekoosa Papers misperceives the purposes of merger clauses, also known as integration clauses. An integration clause, in conjunction with the parole evidence rule, bars the introduction of extrinsic evidence to "vary or

contradict" the terms of a writing. ***Ziegler Co. v. Rexnord, Inc.***, 139 Wis. 2d 593, 608-09 n.11, 407 N.W.2d 873 (1987). But when those terms are ambiguous on their face, courts must be able to turn to aids outside the plain language of the contract in order to resolve that ambiguity and determine the intent of the parties. *See* ***Energy Complexes, Inc. v. Eau Claire County***, 152 Wis. 2d 453, 468, 449 N.W.2d 35 (1989). We therefore conclude that the merger clause does not prevent the trial court from considering extrinsic evidence on remand.

*By the Court.*—Judgement reversed and cause remanded with directions.

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