COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0482

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

MARLIN EASTTOWN, L.L.C. AND MARLIN EASTMASON, L.L.C.,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

SHOPKO STORES, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

ALDI INC.,

INTERVENING DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

¶1 PER CURIAM. Shopko Stores, Inc., appeals and Marlin Easttown Mall, L.L.C., cross-appeals from a summary judgment involving a Reciprocal Easement Agreement and a Pylon Sign Agreement. The circuit court granted summary judgment to Marlin after determining that the easement agreement restricted the placement of Shopko's lawn and garden center to one specified location in Shopko's parking lot, and that Marlin was permitted to expand the mall under the agreement without Shopko's consent. The court also granted summary judgment to Shopko after determining that Shopko's authorization allowing Aldi, Inc., to use the pylon sign did not constitute a violation of the sign agreement between Marlin and Shopko.

¶2 We reverse the circuit court's grant of summary judgment determining that Shopko's lawn and garden area is restricted to one area in the parking lot. We conclude that the terms of the easement agreement are ambiguous. Therefore, we remand for further proceedings. We affirm the circuit court's grant of summary judgment determining that Marlin is permitted to expand the mall without Shopko's consent under the easement agreement and that Shopko's authorization allowing Aldi to use the pylon sign did not violate the sign agreement.

BACKGROUND

¶3 In 1981, Center Development Venture, H.C. Prange Company, and The Kohl's Corporation were the owners of contiguous vacant real estate. The

parties entered into a Construction Operation and Reciprocal Easement Agreement for the development of the Easttown Shopping Center.[1]

¶4 In 1988, Shopko purchased a parcel of the real estate and constructed a retail store. Shopko and the other parties entered into a Reciprocal Easement Agreement. The agreement granted easement rights to the parties over certain portions of each other's property. In 1989, the same parties entered into a Pylon Sign Agreement. The parties agreed to construct and maintain a joint pylon sign advertising their businesses on Shopko's property.

¶5 In 1998, Shopko sold a portion of its land to Aldi to build a grocery store. Shopko and Aldi entered into their own sign agreement that authorized Aldi to use the pylon sign. After the sale to Aldi, Shopko relocated its lawn and garden center from an area encompassing part of the parcel sold to Aldi in an area on the southeastern portion of Shopko's parking lot to an area on the western portion of the parking lot.

¶6 In August 2000, Marlin expanded Easttown Mall, which effectively closed Ring Road. Ring Road runs between Shopko and the mall.

¶7 Marlin filed an action against Shopko alleging that: (1) Shopko violated the easement agreement by moving its lawn and garden center to an area on the western portion of its parking lot; (2) Shopko's consent was not needed for the proposed mall expansion; and (3) Marlin's ownership rights were violated when Shopko authorized Aldi to use the pylon sign.

[1] Marlin is the successor to Center Development Venture, H.C. Prange Co., and The Kohl's Corporation.

¶8 Both Marlin and Shopko moved for summary judgment. The circuit court granted summary judgment to Marlin on the relocation of Shopko's lawn and garden area and the expansion of the mall. The court determined that the easement agreement was unambiguous and that the agreement's language clearly required Shopko to keep the lawn and garden center in a specific location. The court further determined that Marlin's expansion of the mall was consistent with the agreement.

¶9 The circuit court granted summary judgment to Shopko on the sign agreement. The court determined that Shopko had not violated the agreement by authorizing Aldi to use the pylon sign. This appeal and cross-appeal followed.

STANDARD OF REVIEW

¶10 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). Where both parties move for summary judgment, the case is put in a posture where the parties waive their right to a full trial of the issues and permit the circuit court to decide the legal issue. ***Duhame v. Duhame***, 154 Wis. 2d 258, 262, 453 N.W.2d 149 (Ct. App. 1989).

¶11 Further, this case involves interpretation of a contract, which is a question of law that we review independently. ***Demerath v. Nestle Co.***, 121 Wis. 2d 194, 197, 358 N.W.2d 541 (Ct. App. 1984). We determine, as a matter of law, whether an ambiguity exists in a contract. ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998).

DISCUSSION

I. LAWN AND GARDEN CENTER

¶12 Shopko argues that the easement agreement permits it to relocate the lawn and garden area to a different location in the parking lot. Shopko contends that the agreement grants an absolute right to locate the lawn and garden center at the location specified in the agreement, and a qualified right to locate it anywhere else as long as the traffic patters and parking fields are not materially altered by the selected location.

¶13 Section 2(g)(vi) of the easement agreement provides:

> After the completion of construction of the Ring Road and the parking lot by Shopko on Shopko's Parcel described in Part IV of Exhibit A, it is agreed that neither Shopko nor Kohl's shall make any material alteration in the traffic patterns or parking fields on their respective Parcels without prior written consent of the other. Both Shopko and Kohl's agree not to unreasonably delay, deny, withhold or condition such consent. Kohl's, Prange's, and the Developer agree that the maintenance of a seasonal lawn and garden area as shown on Exhibit "B" attached hereto is permitted by Shopko. The lawn and garden area shall be used for the display and sale of seed, fertilizer, plants, trees, shrubs, outdoor furniture and fixtures, lawn and garden tools, equipment and ornaments, and decorative or ornamental materials for lawn and garden use.

Exhibit B to the agreement shows a lawn and garden area abutting the Shopko store where Aldi is currently located.

¶14 According to Shopko, when taking the paragraph as a whole, it is clear that the parties' intent was to allow Shopko to relocate its lawn and garden area to any location within its parking lot, provided traffic patterns and parking fields were not materially altered. Otherwise, the language "any material

alteration in the traffic patterns or parking fields on their respective Parcel …" would not make sense except within the context of moving this area within Shopko's parking lot.

¶15 Under Shopko's interpretation, § 2(g)(vi) first sets forth a general rule related to the alteration of traffic patterns and parking fields. The rule is that neither party can make material alterations without the written consent of the other party. The paragraph then sets forth one exception to that rule: Shopko is permitted to have a lawn and garden area at a certain location within its parking lot regardless whether traffic patterns or parking fields have been materially altered. If Shopko decides to place the lawn and garden center in a different location, it can place it anywhere on its property as long as the new location does not materially alter traffic patterns or parking fields.

¶16 Marlin argues that the easement agreement expressly limits Shopko's lawn and garden center to the location detailed on Exhibit B and excludes the relocation of the garden center to any other area. Marlin contends that Shopko contravened the agreement by relocating the lawn and garden center to the southwest portion of the parking lot and that Shopko acknowledged the movement of the lawn and garden area violated the agreement by requesting Marlin to approve the move through the proposed amendment.

¶17 In this case, the litigants have advanced two reasonable interpretations regarding Shopko's placement of its lawn and garden area. A contract with two reasonable interpretations is ambiguous. ***Central Auto Co. v. Reichert***, 87 Wis. 2d 9, 19, 273 N.W.2d 360 (Ct. App. 1978). Therefore, we conclude that the easement agreement is ambiguous.

¶18 If a contract is ambiguous, the circuit court's duty is to determine the parties' intent at the time of making the contract. ***Patti v. Western Mach. Co.***, 72 Wis. 2d 348, 353, 241 N.W.2d 158 (1976). To determine the parties' intent, the court may look beyond the face of the contract and consider extrinsic evidence. ***Capital Invs., Inc. v. Whitehall Packing Co.***, 91 Wis. 2d 178, 190, 280 N.W.2d 254 (1979). The circuit court, not the appellate court, must make the factual determination and resolve the ambiguity. ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987).

¶19 Here, the trial court did not take testimony regarding the parties' intent because it determined that the agreement was unambiguous. Because the agreement is ambiguous, we reverse and remand to the trial court with instructions to take evidence and to resolve the contract's ambiguity through extrinsic evidence.

II. MALL EXPANSION

¶20 Shopko argues that the mall expansion and the closing of Ring Road without Shopko's consent violates the easement agreement. Shopko contends that summary judgment was improper because the circuit court relied only on para. 2(a) of the agreement and ignored § 2(e)(i).

¶21 Paragraph 2(a) of the easement agreement specifically grants an easement for use of Ring Road. It further states that a "portion of the Ring Road lying between the Kohl's Parcel and the Shopko Parcel hereof shall be maintained until such time as Developer … expands the mall as contemplated under the REA."

¶22 However, despite para. 2(a), Shopko argues that § 2(e)(i) requires that Marlin must acquire Shopko's consent before expanding the mall. Paragraph 2(e)(i) states:

> e) Notwithstanding anything to the contrary in this agreement contained:
>
> (i) no Person shall have the right, without the consent of the owner(s) of all other Parcels which are benefited by the easements applicable to the Ring Road and the Access Roads, to relocate any juncture point of the Ring Road on its Parcel, with any Access Road or with the Ring Road on any other benefited Parcel; or narrow the Ring Road or any Access Roads on its Parcel; or change, other than insubstantially, the grade of the Ring Road or any Access Roads on its Parcel ….

Shopko contends that the language "Notwithstanding anything contrary in this agreement," is a clear indication that Marlin cannot close Ring Road without Shopko's consent.

¶23 Based upon a plain reading of the paragraph, we conclude that Ring Road would be maintained until Marlin expanded the mall. Further, any future expansion of the mall would require the closure of Ring Road. Ring Road was specifically excluded from the grant of a perpetual easement in Shopko's favor. In other words, Ring Road was to be maintained until the contingency of mall expansion occurred.

¶24 Shopko urges us to read the contract as a whole so as to give each of the provisions the meaning intended by the parties. Admittedly, that is a rule of construction. A court must interpret a contract so that no part of the contract is rendered meaningless. ***Hortman v. Otis Erecting Co.***, 108 Wis. 2d 456, 461, 322 N.W.2d 482 (Ct. App. 1982).

¶25 However, Shopko does not explain the relationship between para. 2(a) and § 2(e)(i). If we accept Shopko's argument that § 2(e)(i) requires Shopko's consent before Marlin can expand the mall, then the last sentence in para. 2(a) is rendered meaningless.

¶26 We are unpersuaded by Shopko's argument. Paragraph 2(a) clearly permits the closure of the portion of Ring Road lying between Shopko and the mall without Shopko's consent for the purpose of expanding the mall. Until the mall is expanded, § 2(e)(i) applies and prevents any changes to Ring Road without the consent of the owners. Therefore, Marlin may expand the mall consistent with the terms of the easement agreement without Shopko's consent.

III. PYLON SIGN AGREEMENT

¶27 Last, Marlin argues that the Pylon Sign Agreement creates a shared ownership interest between Shopko and Marlin in the pylon sign. Marlin contends that Shopko's authorization allowing Aldi to use the pylon sign violates Marlin's ownership rights in the sign. Marlin asserts that: (1) the sign agreement does not permit Marlin to seek reimbursement from Aldi for any repairs made to the sign; (2) there is an unauthorized cost shifting in Shopko's agreement with Aldi; and (3) Aldi did not pay any construction costs of the sign.

¶28 The sign agreement contains an assignment clause which provides: "Each party shall have the right to assign this Agreement and any or all of the rights or obligations hereunder without obtaining the prior written consent of the other party." The agreement also contains a clause that states: "The Agreement may not be modified or amended unless such modification or amendment is set forth in writing and executed by all parties hereto." Marlin asserts that Shopko modified the contract.

¶29 The sign agreement sets forth the proportional share of each party for the construction and maintenance of the sign. The agreement also states that each party was to maintain its individual portion of the sign. In the event of damage, Shopko would repair it and each party would reimburse Shopko.

¶30 Shopko argues that it owns the sign and that Marlin's rights under the sign agreement are not affected by Shopko's agreement with Aldi. Shopko contends that nothing in the agreement operates to convey any property to Marlin. It claims that its separate agreement with Aldi does not violate Marlin's rights.

¶31 Here, the pylon sign is located on Shopko's property and is a fixture. As a fixture, the pylon sign is part of Shopko's real property. "Fixtures are realty. … The principal significance of the determination that an object is a fixture is that it is thereafter treated as part and parcel of the land and may not be removed therefrom except by the owner of the realty or other person holding paramount rights in the fee …." ***Premonstratensian Fathers v. Badger Mut. Ins. Co.***, 46 Wis. 2d 362, 366 n.1, 175 N.W.2d 237 (1970) (citations omitted).

¶32 Nothing in the sign agreement conveys any ownership interest in the sign to Marlin. As a result, Shopko is the owner of the sign. Marlin's only basis for arguing ownership in the pylon sign is contained in a "whereas" clause that refers to the pylon sign as a "joint pylon sign." However, merely labeling property as "joint property" does not amount to a conveyance. *See* ***Traeger v. Traeger***, 35 Wis. 2d 708, 151 N.W.2d 681 (1967).

¶33 In ***Traeger***, the plaintiff and defendant owned neighboring properties. ***Id.*** at 711. Both parties obtained their parcels from the same grantor. ***Id.*** The plaintiffs obtained their land, which included a drainage ditch wholly within their parcel, by a deed that included an easement requiring that the drainage

ditch be used for flowage purposes. ***Id.*** at 711-12. The grantor's deed to the defendant made reference to the ditch located on the plaintiff's property. The deed stated, "[t]his [ditch] is reserved to joint ownership of both the grantors and grantees." ***Id.*** at 714.

¶34 The ***Traeger*** court held the defendants did not own the ditch because if conveyance to the defendants had been desired, the grantors would have used appropriate and clear words of conveyance. ***Id.*** at 715. Here, the pylon sign is located completely within Shopko's property. If a conveyance of the sign had been desired, then the sign agreement would have been required to use "appropriate and clear words of conveyance." ***Id.*** Merely labeling property as joint property is insufficient.

¶35 Marlin still possesses rights under the sign agreement and still has a reimbursement right against Shopko. If Marlin makes any repairs to the sign, it need only charge Shopko. Aldi would then reimburse Shopko. Further, the shift in cost sharing only transfers a portion of Shopko's responsibility to Aldi. Marlin's interest in the sign is unaffected. Last, when the sign was constructed, Shopko paid its portion of the costs. Aldi is not now required to reimburse Marlin for construction costs simply because Shopko has transferred a portion of its share to Aldi.

¶36 As owner of the pylon sign, Shopko may take any action with respect to the pylon sign as long as it respects the rights granted to Marlin in the sign agreement. Under § 7(f) of the agreement, Shopko may assign its rights to any party "without obtaining the prior written consent of the other party." Nothing in the agreement limits this right or prohibits a partial assignment of Shopko's

interest. By permitting Aldi to place a sign on the pylon, Shopko merely exercised the privileges of ownership, and the assignment right granted by § 7(f).

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded. No costs awarded.

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