

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 15, 1996

NOTICE

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

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

No. 95-0407

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SCOTT ZOELLICK,

Plaintiff-Appellant,

v.

**ROBERT F. UNGER and
NANCY UNGER, d/b/a
NORTHWOODS CRAFTSMAN,**

Defendants-Respondents.

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

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Scott Zoellick appeals from a judgment dismissing his complaint for royalties on the sale of limited edition prints of his original artwork. We affirm.

Zoellick sued Northwoods Craftsman to recover royalties allegedly due under a January 1989 agreement between the parties for the

publication and distribution of Zoellick's limited edition art prints. In that agreement, Northwoods agreed to bear the costs of reproducing the original art, furnish Zoellick's biography and pay for advertising and promotion. Zoellick agreed to furnish original artwork for reproduction and granted Northwoods the exclusive right to publish and distribute his limited edition art prints. The contract provided that all art prints remained the property of Northwoods until sold.¹ Northwoods agreed to pay Zoellick a royalty of 25% of the wholesale price on each art print sold.² The contract was for a twelve-month term and renewed automatically for like periods unless either party gave written notice of termination six months prior to the contract renewal date.

Zoellick gave a termination notice in January 1992, effective in January 1993. The parties were unable to resolve questions regarding disposal of Northwoods' inventory of Zoellick's prints. Ultimately, in June 1993, Northwoods sold the inventory to a third party. Zoellick sued Northwoods to recover royalties on the sold inventory. Prior to trial, the parties stipulated that the issue to be tried was whether any royalties were due Zoellick as a result of the disposal of Northwoods' inventory of Zoellick's prints.

In its ruling after a bench trial, the trial court dismissed Zoellick's complaint on the grounds that there was no meeting of the minds as to what would happen to the inventory and royalties upon termination of the contract. The court noted that although the contract stated that the inventory belonged to Northwoods, it made no provision for royalties to be paid to Zoellick after termination of the contract. The court rejected Zoellick's claim for compensation under the contract as well as his unjust enrichment claim.

Preliminarily, we address Northwoods' argument that Zoellick's claim sounded in copyright rather than contract and therefore was preempted by federal copyright law. The trial court denied Northwoods' motion to dismiss Zoellick's complaint after concluding that it alleged a cause of action for royalties due under the parties' contract.

¹ Zoellick retained ownership of the original artwork.

² Wholesale price was defined in the contract as 50% of the suggested retail price.

"[A]n action is not one 'arising under' the Copyright Act merely because it has 'an aroma of copyright.'" *Hall v. Inner City Records, et al.*, 212 U.S.P.Q. (BNA) 272, 273 (S.D.N.Y. 1980) (quoted source omitted). Zoellick sued for unpaid royalties on prints sold subsequent to the termination of the contract. He did not allege that the inventory sale occurred in violation of either the contract or his rights. He merely sought payment he believes was due him pursuant to the sale. Claims of nonpayment of royalties are not claims arising under the Copyright Act. *Malinowski v. Playboy Enters., Inc.*, 706 F. Supp. 611, 615 (N.D. Ill. 1989).

Resolution of the parties' dispute depends upon construction of their 1989 contract. While construction of a contract to ascertain the intent of the parties is normally a matter of law for this court, *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis.2d 105, 115, 479 N.W.2d 557, 562 (Ct. App. 1991), where a contract is ambiguous, the question of intent is for the trier of fact. *Armstrong v. Colletti*, 88 Wis.2d 148, 153, 276 N.W.2d 364, 366 (Ct. App. 1979). We will not disturb a trial court's findings of fact regarding intent unless they are contrary to the great weight and preponderance of the evidence, i.e., clearly erroneous. See *id.*; see also *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983) (the great weight and preponderance of the evidence standard is identical to the clearly erroneous standard). However, whether a contract is ambiguous in the first instance is a question of law which we decide independently of the trial court. *Wausau Underwriters Ins. Co. v. Dane County*, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). Ambiguity exists in a contract if it is reasonably susceptible to more than one meaning. *Id.*

We conclude that the 1989 contract is ambiguous on the question of Zoellick's entitlement to royalties after termination of the contract.³ The contract states that Northwoods retains ownership of prints of Zoellick's artwork until they are sold and that Zoellick will receive a royalty on each print sold. The contract also gave Northwoods the exclusive right to publish and distribute Zoellick's prints. The contract is reasonably susceptible to more than

³ In this respect, we differ from the trial court's analysis. The trial court concluded that the contract did not address Zoellick's entitlement to royalties upon termination; it did not conclude that the contract was ambiguous on this point. We are not bound by the trial court's analysis; we must independently construe a contract and assess its ambiguity.

one meaning on the question of Zoellick's entitlement to royalties once the contract and Northwoods' exclusive right to sell Zoellick's prints terminated.

Having concluded that the contract is ambiguous on this point, we turn to the trial court's findings regarding the parties' intent on this question. See *Armstrong*, 88 Wis.2d at 153, 276 N.W.2d at 366. We will not disturb a trial court's findings of fact regarding intent unless they are clearly erroneous. See *id.*

Here, the trial court found that the parties did not have a meeting of the minds as to entitlement to royalties upon termination. This finding is supported in the record. Zoellick testified that there was nothing in the contract which mentioned rights in existing inventory and that he understood that his right to royalties was dependent upon Northwoods' exclusive right to publish and distribute his limited edition prints. We acknowledge that Zoellick later testified that he believed he was entitled to royalties because he was involved in the process of creating the art and that his right to royalties was triggered when the prints were sold. It was the trial court's responsibility to weigh what may have been Zoellick's contradictory testimony. See *Micro-Managers, Inc. v. Gregory*, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988).

Robert Unger testified that under the contract Northwoods was in charge of remaining inventory when the contract terminated. Unger testified that at the time he entered into the contract on behalf of Northwoods, Zoellick did not have any questions about disposition of the inventory or royalties after termination of the contract. Unger further testified that it was his belief that when the contract terminated, Zoellick forfeited any right to royalties in existing inventory and Northwoods retained the inventory because it had paid for its production.

The parties to the contract testified to their differing interpretations of the contract. The evidence at trial supports the trial court's finding that the parties did not have a meeting of the minds as to Zoellick's entitlement to royalties upon termination of the contract. This finding is not clearly erroneous and we are bound by it. Given this finding, construction of the contract requires a conclusion that Zoellick was not entitled to royalty payments after he terminated the contract.

The trial court's refusal to award Zoellick damages on an unjust enrichment theory is first raised in the respondent's brief. Zoellick responds in his reply brief. However, because the unjust enrichment ruling is adverse to Zoellick, he was bound to raise it in his appellant's brief if he desired appellate review. Because we do not consider arguments raised for the first time in a reply brief, *Swartwout v. Bilsie*, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981), we decline to consider the trial court's unjust enrichment ruling. However, were we to do so, we would affirm the trial court's refusal to award damages to Zoellick on an unjust enrichment theory because the doctrine does not apply where the parties have entered into a valid, enforceable contract. *Continental Casualty v. Wisconsin Patients Comp. Fund*, 164 Wis.2d 110, 118, 473 N.W.2d 584, 587 (Ct. App. 1991).

By the Court. – Judgment affirmed.

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