COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 24, 1995

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.

NOTICE

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

No. 95-1519-FT

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

TOWN OF KRONENWETTER, A WISCONSIN GOVERNMENTAL BODY,

Plaintiff-Appellant,

v.

CITY OF MOSINEE, A WISCONSIN GOVERNMENTAL BODY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The Town of Kronenwetter appeals a summary judgment dismissing its claims against the City of Mosinee.[1] Kronenwetter raises two issues. It argues that the trial court erroneously entered summary

[1] This is an expedited appeal under RULE 809.17, STATS.

judgment because (1) the parties' agreement did not contain a release of all claims; and (2) the mutual mistake of fact doctrine applies. Because we conclude that the plain language of the agreement governs and the mutual mistake doctrine does not apply, we affirm the judgment.

The following facts are undisputed. In 1986, Mosinee annexed 11.4 square miles of the Town of Kronenwetter, about 12.36% of Kronenwetter's property, based upon valuation. Pursuant to § 66.03(8), STATS., Mosinee filed suit seeking apportionment of Kronenwetter's assets and liabilities. The parties settled their suit by means of an agreement, executed in January 1989.

In July 1989, Kronenwetter discovered a chemical spill. A fifty-five gallon drum of herbicide leaked on a portion of Kronenwetter property that was not annexed. The Town's garage had a dirt floor and, due to a pinhole leak, the barrel's contents infiltrated the soil to a depth of three to four feet. Costs to clean up the spill will approximately exceed $620,000. In light of the additional liability occasioned by the spill, Kronenwetter seeks to void its agreement with Mosinee and renegotiate the apportionment of liabilities or obtain a judgment against Mosinee for 12.36% of the clean-up expense.

The agreement provides that "in full and complete settlement of the dispute over the amount of assets and liabilities due and owing to the City, the Town of Kronenwetter agrees to pay One Hundred and Thirty Thousand Dollars ($130,000) to the City of Mosinee as payment for the apportionment of assets and liabilities of the Town due to the annexation of property by the City." It further provided that the

> City of Mosinee shall be responsible for the payment of any potential costs or liabilities assessed or voluntarily paid by the Town of Kronenwetter, including litigation costs and expenses, directly associated with the naming of the Town of Kronenwetter, as a Potential Responsible Party under state and federal laws involving the landfill cleanup for the Gorski Landfill, Mosinee Landfill, Holtz-Krause Landfill, and Mid-State Landfill .... Payment by the City of Mosinee shall be limited to 6.18% of any costs or

> expenses assessed or voluntarily paid by the Town of Kronenwetter for landfill cleanup costs for the four listed landfills arising out of use of those landfills by the Town of Kronenwetter as a private party occurring on or before November 17, 1986.

The agreement also stated that it "constitutes the entire agreement" between the parties and shall not be construed as "an agreement for the payment of any further or additional liabilities by the City of Mosinee involving any other matter or claim that may arise against Town of Kronenwetter whatsoever." It further states:

> [T]he city of Mosinee shall not be subject to any further or additional claims, liabilities, expenses or costs resulting from the conduct or actions of the Town of Kronenwetter arising at any time prior to or after November 17, 1986, except for those items specifically referenced in this Agreement.

Both parties moved for summary judgment. The trial court entered judgment for Mosinee and dismissed Kronenwetter's action.

When reviewing summary judgment, our review is de novo. We review the record according to the standards set out in § 802.08(2), STATS. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment is appropriate when the pleadings and record fail to uncover a material factual dispute and the moving party is entitled to judgment as a matter of law. ***Radlein v. Industrial Fire & Cas. Ins. Co.,*** 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984). We may affirm on a basis other than that relied upon by the trial court. *See* ***Liberty Trucking Co. v. DILHR,*** 57 Wis.2d 331, 342, 204 N.W.2d 457, 463-64 (1973).

Kronenwetter argues that the trial court erroneously dismissed its complaint because the agreement contains no release of all claims. The construction of a contract is a question of law that we review independently on appeal. ***Continental Cas. Co. v. Patients Comp. Fund,*** 164 Wis.2d 110, 116, 473 N.W.2d 584, 586 (Ct. App. 1991). Absent an ambiguity, the plain language

governs. ***Id.*** "It is our duty to construe the contract as it stands." ***Id.*** at 116-17, 473 N.W.2d at 586. We have no right to reinterpret a contract to relieve a party of a disadvantageous result. ***Id.*** at 117, 473 N.W.2d at 586. "[A] contract voluntarily made ... is valid and enforceable unless it violates a statute, rule of law, or public policy." ***Id.***

Here, we agree with Kronenwetter to the extent that the plain language of the contract does not purport to contain a release of all claims. It does, however, expressly encompass the parties' entire agreement concerning the apportionment of assets and liabilities arising out of the annexation. Consequently, any claim arising out of the apportionment resulting from the annexation is covered by the agreement's plain terms.

Here, Kronenwetter's complaint characterizes its claim against Mosinee as one arising out of the apportionment agreement.[2] Because the apportionment agreement spells out Mosinee's obligations to Kronenwetter arising out of the annexation, and because the chemical spill at the Kronenwetter garage is not one of Mosinee's obligations set forth in the agreement, Mosinee bears no liability.

Next, Kronenwetter argues that the agreement is not binding and should be set aside under the doctrine of mutual mistake of fact. A mutual mistake of fact is a recognized ground for rescinding a contract. ***Miller v. Stanich,*** 202 Wis. 539, 233 N.W. 753 (1930). The rule is stated as follows:

> (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party ....

[2] Kronenwetter does not allege any basis for Mosinee's liability outside the annexation settlement agreement. For example, if Kronenwetter had claimed that a Mosinee employee had carelessly caused the spill, its claim would arise out of negligence, not out of the annexation settlement.

RESTATEMENT (SECOND) OF CONTRACTS § 152 at 385 (1981). The Restatement defines a mistake as a belief that is not in accord with the facts. ***Id.*** § 151 at 383.

Generally, whether the contract resulted from a mutual mistake presents a question of fact. *See* ***Liles v. Employers Mut. Ins.,*** 126 Wis.2d 492, 496, 377 N.W.2d 214, 216 (Ct. App. 1985). This means that the parties may look outside the language of the agreement and examine the circumstances surrounding the agreement to determine whether at the time they entered into the contract, the parties were laboring under a mutual mistake. ***Ahnapee & Western Ry. v. Challoner,*** 34 Wis.2d 134, 140, 148 N.W.2d 646, 649 (1967); *see also* RESTATEMENT, *supra*, § 214(d).[3] A mutual mistake is one common and reciprocal to both parties. ***Continental Cas.,*** 164 Wis.2d at 117, 473 N.W.2d at 587.

Kronenwetter contends that because both parties were unaware of the chemical spill, because the spill existed at the time of the agreement and because Kronenwetter's liability for the spill has a material effect on its performance, it is entitled to rescind the contract. We disagree.

Here, the undisputed circumstances fail to support the conclusion that the mistake was mutual. Although Kronenwetter carefully counted its assets and liabilities, despite its careful measures the pinhole leak in the barrel went undetected. Consequently, at the time it entered into the annexation settlement agreement, Kronenwetter was mistaken with respect to its identification of its liabilities.

Nevertheless, the facts do not disclose a mistake on the part of Mosinee. Although Mosinee was unaware of the leak, the record shows that Mosinee contemplated that Kronenwetter may have unidentified liabilities lurking at the time of the contract. This contemplation on the part of Mosinee is

[3] The briefs reveal confusion concerning the extent to which parol evidence is admissible. Parol evidence is not admissible on the first issue, that is the interpretation of the plain meaning of the unambiguous agreement. ***Marshall & Ilsley Bank v. Milwaukee Gear Co.,*** 62 Wis.2d 768, 776-77, 216 N.W.2d 1, 5-6 (1974). Parol evidence is admissible on the second issue, that is whether the parties were laboring under a mutual mistake at the time they entered into the contract. ***Ahnapee & Western Ry. v. Challoner,*** 34 Wis.2d 134, 140, 148 N.W.2d 646, 649 (1967).

evidenced by the agreement's clause stating, "Mosinee shall not be subject to any further or additional claims, liabilities, expenses or costs resulting from *the conduct or actions of the Town of Kronenwetter arising at any time prior to or after November 17, 1986, except for those items specifically referenced in this agreement.*" (Emphasis added.)

If the underlying facts are undisputed, the question is one of law. ***State v. Williams,*** 104 Wis.2d 15, 21-22, 310 N.W.2d 601, 604-05 (1981). Here, Kronenwetter believed it had identified all its liabilities, but Mosinee had reason to believe it may not have. Thus, the agreement demonstrates a conscious uncertainty on the part of Mosinee with respect to the existence of Kronenwetter's "claims, liabilities, expenses or costs." A purpose of the annexation settlement agreement was to resolve Mosinee's obligations with respect to such uncertainty. *See* ***Grand Trunk Western R.R. v. Lahiff,*** 218 Wis. 457, 463, 261 N.W. 11, 13 (1935) ("the mistake must not relate to one of the uncertainties of which the parties were conscious and which it was the purpose of the contract to resolve"). The leaking barrel was such an uncertainty. The settlement agreement was designed to resolve such uncertainties as to the identification of Kronenwetter's liabilities and expenses arising out of its actions before and after the date of the contract.[4]

Kronenwetter relies on ***Liles***, a case that is distinguished on its facts. In ***Liles,*** a release was set aside after it was learned that the plaintiff suffered not from whiplash but from cervical disc disease. The trial court found as a factual matter that the mistake had been mutual, as evidenced by the testimony of the claims adjuster, the medical reports and the inadequate consideration. ***Id.*** at 498-99, 377 N.W.2d at 217-18. A mistake on Kronenwetter's part as to the extent of its liabilities is not common and reciprocal to Mosinee and does not provide grounds for rescission of the contract.[5]

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[4] Mosinee states that "the possibility of future liability on the part of the Town of Kronenwetter was a future fact resting in conjecture." We disagree with Mosinee's characterization because it fails to take into account the undisputed proof that the chemical spill existed at the time the parties entered into their agreement.

[5] Kronenwetter does not raise the issue of when the mistake of one party makes a contract voidable, *see* RESTATEMENT (SECOND) OF CONTRACTS § 153 at 394 (1981), so we do not address

By the Court.—Judgment affirmed.

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

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