COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1997

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. 97-0825-FT

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

EVERSOLE MOTORS, INC.,

PLAINTIFF-RESPONDENT,

V.

BERGSTROM OF LA CROSSE, WI, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Bergstrom of La Crosse, WI, Inc. appeals from a summary judgment granting $29,000 in damages to Eversole Motors, Inc. on its breach of contract claim.[1] The dispositive issue on appeal is whether the trial

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

court properly granted summary judgment or whether material questions of fact remain in dispute. We conclude that material questions of fact are unresolved, and therefore reverse.

Eversole and Bergstrom signed a sub-license agreement to share a computer system. The agreement contained a confidentiality clause providing for separate confidential passwords for each party and further providing, "the parties further covenant and agree that they will not under any circumstances attempt to gain access to the computer files or any other records of the other party. Any breach of this confidentiality provision shall be deemed to be grounds for immediate termination of this agreement." The central computer was on Eversole's business premises and the contract also provided that Eversole would provide maintenance to ensure Bergstrom's access, perform data purging to ensure adequate storage capacity for Bergstrom, and install software updates from the manufacturer.

Several months later, while on Eversole premises, a Bergstrom employee, Rob Santos, observed an Eversole employee use Bergstrom's password to enter Bergstrom's system. His purpose in doing so was to show Santos how to place customer messages on auto repair orders. He did, in fact, place a sample message on several orders. It is disputed whether he did this at Santos's request; however, it is undisputed that he knew and used Bergstrom's password.

Following an investigation, Bergstrom concluded that other Eversole employees had access to its files and records, and it terminated the contract for breach of the confidentiality clause. This lawsuit by Eversole resulted.

Summary judgment is appropriate only if material facts are undisputed, only one reasonable inference is available from those facts, and that

inference requires judgment for a party as a matter of law. ***Wagner v. Dissing***, 141 Wis.2d 931, 939-40, 416 N.W.2d 655, 658 (Ct. App. 1987). We independently decide this issue without deference to the trial court. ***Schaller v. Marine Nat'l Bank of Neenah***, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986). Whether a contract is ambiguous is also a question of law, which we decide without deference to the trial court. ***Waukesha Concrete Prod. Co., Inc. v. Capitol Indemnity***, 127 Wis.2d 332, 339, 379 N.W.2d 333, 336 (Ct. App. 1985). If the words in a contract are reasonably susceptible of more than one meaning, and therefore ambiguous, a fact-finder must determine the parties' intent by extrinsic evidence. *See* ***Patti v. Western Machine Co.***, 72 Wis.2d 348, 351, 241 N.W.2d 158, 160 (1976).

The intended meaning of the parties' contract between Bergstrom and Eversole remains unresolved. It is undisputed that Eversole employees frequently accessed the Bergstrom computer system. Those employees have testified and averred, however, that they only accessed "setup screens," rather than "files" and "records," and did so in each case with consent or in compliance with provisions of the sub-licensing agreement. We conclude that whether the parties intended "files" and "records" to include or exclude "setup screens" is an unresolved ambiguity in the contract. Both "files" and "records" are reasonably susceptible to more than one meaning, and one or the other could reasonably include "setup screens."

Additionally, whether Eversole's admittedly frequent accessing of the Bergstrom system was in all cases limited to set-up screens, and done either with consent or for necessary contractual functions, are essentially questions of the credibility of the accessing individuals. That question cannot be resolved on summary judgment. ***Hardscabble Ski Area, Inc. v. First Nat'l Bank of Rice***

Lake, 42 Wis.2d 334, 342, 166 N.W.2d 191, 195 (1969). Bergstrom is entitled to a fact-finder's determination whether Eversole's access to its system was limited in the manner claimed, and for the purposes claimed.

By the Court.—Judgment reversed and cause remanded.

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