

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP2819

Cir. Ct. No. 2003CV2908

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DIETRICH SCHNAPPUP, ROSWITHA SCHNAPPUP AND DIETER CORP.,

PLAINTIFFS-APPELLANTS,

V.

**SCOTT J. YAUCK, GINA L. YAUCK, DIRK J. SMITH, MICHELLE R.
SMITH, CUSTOM METAL PRODUCTS, LLC, AND SDS D&R
ACQUISITION, LLC,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK L. SNYDER, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Dietrich and Roswitha Schnappup, and Dieter Corp. (collectively the Schnappups) appeal from a judgment dismissing their

action to enforce a settlement agreement with Scott and Gina Yauck, Dirk and Michelle Smith, Custom Metal Products, LLC, and SDS D&R Acquisition, LLC (collectively Yauck). The issue is whether the agreement requires Yauck to continuously maintain a letter of credit guaranteeing payments under the agreement. We conclude that it does and reverse the judgment of dismissal. The matter is remanded to the circuit court for further proceedings to enforce the agreement and for a determination of the attorney fees that the Schnappups are entitled to recover under the agreement.

¶2 These parties were involved in a lawsuit arising out of the sale of the assets of the Schnappups' business to Yauck. Right before trial the parties settled the lawsuit. On May 29, 2002, the parties entered into a settlement agreement whereby Yauck was required to pay the Schnappups \$540,000 by monthly payments of \$4,500 for ten years. Paragraph 1.(D.) of the agreement provides in part:

The payments to be made by **YAUCK** pursuant to Subparagraph C of this Paragraph 1 (that is, the 120 monthly payments of \$4,500.00 each starting on July 15, 2002) shall be secured by and guaranteed by an Irrevocable Letter of Credit to be obtained by **YAUCK** no later than 5:00 p.m. on Wednesday, May 29, 2002. The bank that **YAUCK** selects to issue the Irrevocable Letter of Credit is subject to the **SCHNAPPUPS'** approval. Such approval cannot be unreasonably withheld by the **SCHNAPPUPS**. The terms of the Irrevocable Letter of Credit are also subject to the **SCHNAPPUPS'** approval. The terms of the Irrevocable Letter of Credit must be unconditional and unequivocal as to the obligation of **YAUCK** to make the payments secured by and guaranteed by the Irrevocable Letter of Credit. The terms of the Irrevocable Letter of Credit must be clear that **YAUCK** is not permitted to withhold or delay payments to the **SCHNAPPUPS** for any reason whatsoever. By the terms of this Agreement, **YAUCK** agrees that **YAUCK'S** obligation to make the payments described in Subparagraph C of this Paragraph 1 is unconditional and unequivocal and that **YAUCK** is not permitted to withhold or delay payments for any reason

whatsoever. The **SCHNAPPUPS** will be entitled to draw on the Irrevocable Letter of Credit for the full amount of any payment due under Subparagraph C of this Paragraph 1 in the event any monthly payment of \$4,500.00 (as described in Subparagraph C) is not made by the 20th day of the month in which the payment is due.... The payments secured by and guaranteed by the Irrevocable Letter of Credit may, at the request of the **SCHNAPPUPS** or their counsel, be made payable to the **SCHNAPPUPS'** heirs and/or assigns. **YAUCK** shall be responsible for paying all costs and expenses associated with obtaining and maintaining the Irrevocable Letter of Credit. If the Irrevocable Letter of Credit – issued by a bank approved by the **SCHNAPPUPS** and with terms approved by the **SCHNAPPUPS** and consistent with this Agreement – is not in place by 5:00 p.m. on May 29, 2002, the **SCHNAPPUPS** will be entitled to have the Court in the Lawsuit immediately enter judgment against Scott J. Yauck and Custom Metal Products, jointly and severally, in the amount of \$637,000.00, less any payments made by **YAUCK** at the time judgment is entered.

The **SCHNAPPUPS** and **YAUCK** acknowledge that an acceptable Irrevocable Letter of Credit is in place as of 5:00 p.m. on May 29, 2002. The Irrevocable Letter of Credit is dated May 28, 2002, and entitled “Revised Standby Irrevocable Letter of Credit No. I 1020.”

¶3 The Investors Bank issued the irrevocable letter of credit referenced in the settlement agreement. The letter of credit was for the sum of \$362,200 (the then-present value of the string of payments) and indicated it expired May 20, 2003. A portion of the letter was to be completed by the Schnappups in the event they made a demand for payment for an unpaid monthly installment. The letter also allowed the Schnappups to demand payment based on the following:

Fewer than thirty (30) business days remain prior to the current expiry date of Irrevocable Letter of Credit No. I1020; Dietrich & Roswitha Schnappup have not received either a replacement of that Irrevocable Letter of Credit having a term of at least 360 days, in a stated amount at least equal to the present value of all remaining payments under a settlement agreement between Beneficiary and Account Party (discounted using an annual rate of 8.50%), and otherwise having the same terms as such Irrevocable Letter of Credit, or an extension of the expiry date of such

Irrevocable Letter of Credit, in a stated amount at least equal to the present value of all remaining payments under a settlement agreement between Beneficiary and Account Party (discounted using an annual rate of 8.50%), on the same terms for a period of at least 360 days following such current expiry date. The Beneficiary is entitled to payment in the amount of \$_____, representing the present value of the remaining payments due under a settlement agreement between Beneficiary and Account Party (discounted using an annual rate of 8.5%).

¶4 The letter of credit expired. Yauck did not renew, extend or replace the letter of credit. At the time this action was commenced in November 2003, Yauck was current on all payments due under the settlement agreement. The Schnappups' complaint demanded that Yauck be required to specifically perform the obligation under the settlement agreement to secure the payments by an irrevocable letter of credit or that damages in the amount of \$540,000 less monthly payments received be awarded. The Schnappups also sought an award of attorney fees. In defense, Yauck asserted that by the terms of the accepted letter of credit, the parties contemplated Yauck's option not to renew the letter of credit and, in the event renewal did not occur thirty business days prior to the letter of credit's expiry date, the Schnappups were entitled to draw the full amount on the letter of credit but chose not to do so.

¶5 Both parties moved for summary judgment. Both asserted that the settlement agreement is unambiguous. The circuit court found that Yauck was required to guarantee all payments with a letter of credit approved by the Schnappups, that the Schnappups approved a letter of credit which expired in a year but permitted recovery of a lump sum if not timely renewed, that the Schnappups elected not to accept a lump sum and agreed to continue to receive monthly payments, and that Yauck has and is meeting the terms of the settlement agreement in full. The court concluded that "based upon the plaintiffs' approval

and elections, the defendants are not required to furnish a letter of credit to guarantee all remaining payments.” The Schnappups’ complaint was dismissed.

¶6 We review the circuit court’s grant of summary judgment using the same methodology as the circuit court. *City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *Id.*; WIS. STAT. § 802.08(2) (2003-04).¹ Here, only a question of law is presented—the construction of an unambiguous contract. *See Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987). “When the terms of a contract are plain and unambiguous, we will construe the contract as it stands.” *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 115, 479 N.W.2d 557 (Ct. App. 1991).

¶7 The settlement agreement provides that “[t]he payments to be made by Yauck ... (that is, the 120 monthly payments of \$4,500.00 each starting on July 15, 2002) shall be secured and guaranteed by an Irrevocable Letter of Credit to be obtained by Yauck no later than 5:00 p.m. on Wednesday, May 29, 2002.” It also provides that the Schnappups “will be entitled to draw on the Irrevocable Letter of Credit for the full amount of any payment ... in the event any monthly payment of \$4,500.00 ... is not made by the 20th day of the month in which the payment is due.” These two provisions require each payment to be guaranteed by a letter of credit. The agreement requires payments for ten years. Without a letter

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

of credit in place, there is nothing for the Schnappups to draw against if payments 12-120 are not made by the 20th day of the month in which the payment is due.

¶8 Yauck argues that because the letter of credit issued by Investors Bank actually guaranteed the payments by permitting the Schnappups to withdraw the present value of all remaining payments if Yauck did not renew the letter, the condition requiring that all payments be guaranteed by a letter of credit was fulfilled. We cannot agree. The condition was fulfilled for only one year. The condition was not fulfilled as to payments 12-120, which the Schnappups are entitled to receive on a monthly basis. The acknowledgement in the settlement agreement that the Investors Bank letter of credit was approved by the Schnappups was merely an acknowledgement that the letter was in place by the required 5:00 p.m. May 29, 2002 deadline.

¶9 Only by reference to the letter of credit can Yauck assert that there is full compliance with the settlement agreement. However, the provision in the letter of credit giving the Schnappups a thirty-day window of opportunity to demand the present value of remaining payments cannot alter the terms and conditions of the settlement agreement. The letter of credit itself is not a contract between the Schnappups and Yauck. Indeed, the Schnappups do not even become signatories to the letter of credit until such time that a demand is made under its terms. It is disingenuous of Yauck to contend that the settlement agreement gave Yauck the right not to renew the letter of credit and that the parties wrote into their agreement that if Yauck did not renew the letter of credit, the Schnappups could

choose the remedy set forth in the letter of credit.² Mere acknowledgement in the settlement agreement that the approved letter of credit was in place did not serve to amend the terms of the settlement agreement.

¶10 Yauck argues that the Schnappups are not entitled to attorney fees because this is not a dispute that arises under the irrevocable letter of credit. The settlement agreement provides:

YAUCK shall pay to the **SCHNAPPUPS** all reasonable attorney's fees and costs incurred by the **SCHNAPPUPS** if a dispute arises under the Irrevocable Letter of Credit, regardless of the nature of the dispute and regardless of whether or not the **SCHNAPPUPS** prevail in whole or in part. The only limitation on the **SCHNAPPUPS**' recovery of reasonable attorney's fees and costs is in the event of an innocent mistake made by the bank making payments to the **SCHNAPPUPS** on behalf of **YAUCK**. As one example, the **SCHNAPPUPS** will be entitled to recover reasonable attorney's fees and costs from **YAUCK** in the event the **SCHNAPPUPS**' counsel must contact the bank making payments on behalf of **YAUCK** because a payment is not timely received by the **SCHNAPPUPS**, unless the reason the payment is not timely received by the **SCHNAPPUPS** is an innocent mistake by the bank making payments on behalf of **YAUCK**.

¶11 Yauck contends this action is nothing more than a dispute regarding the terms of the settlement agreement and is not a dispute arising under the letter of credit because the letter of credit in fact expired. Again, we cannot agree. First, this litigation tests Yauck's assertion that the letter of credit, expired or not, fulfilled Yauck's contractual obligation to guarantee all payments. Second, the settlement agreement allows attorney fees for anything connected to the required

² Later in the respondents' brief, Yauck asserts that "the Letter of Credit has absolutely no effect at this time—it is an irrelevant piece of paper that imposes absolutely no obligations on anyone."

letter of credit, “regardless of the nature of the dispute.” The only limitation on attorney fees is if an innocent mistake by the bank causes the Schnappups to incur attorney fees. That limitation does come into play in this litigation. Litigation over the required but nonexistent letter of credit is a dispute under the letter of credit. The Schnappups are entitled to recover all reasonable attorney fees.

¶12 In conclusion, the agreement requires a letter of credit to secure all the payments. Yauck is not in compliance with that requirement. Summary judgment should have been granted in favor of the Schnappups.³ We reverse summary judgment in favor of Yauck and remand the matter to the circuit court for further proceedings, including a determination of the Schnappups’ reasonable attorney fees.

By the Court.—Judgment reversed and cause remanded.

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

³ The Schnappups request that we reverse and remand to the circuit court for entry of an order requiring Yauck to specifically perform the settlement agreement by procuring a letter of credit guaranteeing all remaining monthly payments. We need not decide what form of relief the Schnappups are entitled to.

