

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2007

A. John Voelker
Acting 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. 2006AP1638

Cir. Ct. No. 2005CV730

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

A.C.E. CAPITAL GROUP, LLC,

PLAINTIFF-RESPONDENT,

V.

NASH FINCH COMPANY,

DEFENDANT,

THRIFTY DRUG STORES, INC. D/B/A THRIFTY WHITE DRUG,

DEFENDANT-APPELLANT,

PAUL J. HOFFMAN CORPORATION F/K/A HOFFMAN CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Reversed and caused remanded.*

Before Lundsten, P.J., Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Thrifty Drug Stores, Inc., appeals a judgment in favor of A.C.E. Capital Group, LLC. The issue is whether the trial court erred by declaring a restrictive covenant unenforceable. We conclude the trial court erroneously construed the covenant and under any reasonable interpretation it remains enforceable. We therefore reverse the summary judgment and the injunctive relief in favor of A.C.E. and remand for further proceedings.

¶2 Paul J. Hoffman Corporation developed a shopping center in Beaver Dam. In 1995, the Nash Finch Company purchased a lot from Hoffmann, constructed a supermarket building on it, and leased the building to Rechek's Food Mart. Finch's purchase agreement with Hoffman provided that Hoffman would not allow any other pharmacies to operate in its development if Finch's supermarket tenant operated a pharmacy in its store. Under the agreement this non-compete covenant would expire on the first to occur of three contingencies: (1) the passage of thirty years; (2) when the premises were no longer used as a supermarket; or (3) when the supermarket either ceased operating a pharmacy or reduced its size to less than 400 square feet of floor space.

¶3 Rechek's opened its store in 1996 and operated without a pharmacy in the store until 2004. Meanwhile, Thrifty opened and operated a pharmacy elsewhere in the shopping center. In 2004, Thrifty moved its store into Rechek's premises. A.C.E. subsequently agreed to purchase lots from Hoffman to open a competing pharmacy in the center. After learning of the restrictive covenant potentially barring its operation, A.C.E. commenced this action for a judgment declaring the covenant null and void. The trial court concluded that the covenant was ambiguous, and therefore unenforceable. See *Pertzsch v. Upper*

Oconomowoc Lake Ass'n., 2001 WI App 232, ¶17, 248 Wis. 2d 219, 635 N.W.2d 829 (enforceable deed restriction must be expressed in clear, unambiguous and preemptory terms). Thrifty appeals that determination.

¶4 Thrifty contends that the covenant clearly and unambiguously bars the operation of any other pharmacy in the shopping center while a pharmacy operates in the supermarket. In its view, no other interpretation is reasonably available. In response, A.C.E. contends that under its plain and unambiguous terms, the covenant expired when Reчек's opened its store and operated without a pharmacy for eight years. A.C.E. describes the covenant as an unambiguous "use it or lose it" provision. Alternatively, A.C.E. contends that the covenant is, at the very least, ambiguous and therefore unenforceable for that reason.

¶5 The interpretation of a restrictive covenant and whether it is ambiguous are questions of law we review independently. *See Zinda v. Krause*, 191 Wis. 2d 154, 165, 528 N.W.2d 55 (Ct. App. 1995). A covenant is enforceable only if its intent can be clearly ascertained from its language. *See id.* at 166. "By intent we do not mean the subject intent of the drafter, but the scope and purpose of the covenant as manifest by the language used." *Id.*

¶6 The restrictive covenant here is enforceable because its intent can be clearly ascertained from the language used. It unequivocally provides that Hoffmann "will not allow any use of [its development property] for ... pharmacy sales if Buyer's Tenant has a pharmacy in its Supermarket." Once Thrifty moved into the Reчек's store, the development was closed to all other pharmacies. No other interpretation of the quoted language is reasonably available. The restriction is clearly stated.

¶7 A.C.E. contends that one could nevertheless reasonably interpret the covenant as expired, under the expiration contingencies, because Rehek’s opened and operated its supermarket for eight years without a pharmacy. However, under A.C.E.’s interpretation, we would have to construe “no longer actively involved in providing any [pharmacy] goods and services” to mean “never began to be actively involved” in such activity. But a circumstance has to first exist before it can “no longer” exist. All other interpretations of “no longer” defy the plain meaning and common usage of the term, and we therefore reject them. *See Keller v. Keller*, 214 Wis. 2d 32, 37, 571 N.W.2d 182 (Ct. App. 1997) (we give words in a contract their common and ordinary meaning).

¶8 Because we conclude that the covenant in the Hoffmann-Finch contract restricting pharmacy operations is enforceable, we reverse the summary judgment and the injunctive relief in favor of A.C.E. and remand to the trial court for further proceedings.

By the Court.—Judgment reversed and cause remanded.

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

