COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2021

Sheila T. Reiff
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. 2020AP984 **Cir. Ct. No. 2019CV291**

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

CATHERINE R. CARR AND TRAVIS CARR,

PLAINTIFFS-APPELLANTS,

V.

HEART OF THE NORTH HOME INSPECTION, INC.,

DEFENDANT-RESPONDENT,

AMTRUST INTERNATIONAL UNDERWRITERS DESIGNATED ACTIVITY COMPANY, SECURITY HEALTH PLAN OF WISCONSIN, INC., ROGER L. RIVARD, PERSONALLY AND AS TRUSTEE OF THE ROGER L. AND BERNADINE L. RIVARD LIVING TRUST, BERNADINE L. RIVARD, PERSONALLY AND AS TRUSTEE OF THE ROGER L. AND BERNADINE L. RIVARD LIVING TRUST, AND HASTINGS MUTUAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Catherine and Travis Carr (collectively, "the Carrs") appeal an order granting Heart of the North Home Inspection, Inc.'s motion to stay the underlying action and compel arbitration. The Carrs argue that their personal injury action does not arise out of a contract as required by WIS. STAT. § 788.01 (2019-20),[1] the statute governing enforceability of arbitration clauses in contracts. The Carrs further argue that any obligation to arbitrate under the contract with their home inspector does not extend to their claims against Heart of the North because it was not a party to the inspection contract. The Carrs alternatively argue that if the arbitration clause applies here, it should nevertheless be deemed void as unconscionable and against public policy. For the reasons discussed below, we reject these arguments and affirm the order.

BACKGROUND

¶2 Heart of the North is owned and operated solely by Jeffrey Martino, a registered home inspector. On May 29, 2019, Martino performed an inspection on a Rice Lake home that the Carrs intended to purchase. On the day of the inspection, the parties executed a two-page "Inspection Agreement" that included a dispute resolution clause that provided, in relevant part:

> Inspector and Client (and any other person claiming to have relied upon the inspection report) specifically agree

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

> that any controversy or claim arising out of or relating to the inspection or other services provided under this contract, or breach thereof, including any negligence, tort or other claims, against the person who performed the inspection, shall be resolved exclusively by arbitration.

¶3 The Carrs purchased the home on June 14, 2019, and approximately six weeks later, the deck on the property collapsed, injuring Catherine. The Carrs filed the underlying action against Heart of the North, alleging that Heart of the North "and/or its agents and employees" conducted a home inspection for the Carrs "and negligently failed to identify unsafe conditions of an outside deck." The Carrs further alleged that as a proximate result of the negligence, Catherine suffered personal injuries and Travis was damaged by the loss of consortium and marital property. The complaint was subsequently amended to identify Heart of the North's insurer and to add claims against the previous owners and their insurer.[2] Notably, the Carrs did not name Martino as a party to the lawsuit.

¶4 Heart of the North filed a motion to stay circuit court proceedings pursuant to WIS. STAT. § 788.02, and to compel arbitration under the dispute resolution clause of the inspection agreement. After a hearing, the circuit court stayed proceedings and ordered the Carrs and Heart of the North to arbitrate the claims between them. This appeal follows.

DISCUSSION

¶5 The Carrs argue that their personal injury action does not arise out of the inspection agreement as required by WIS. STAT. § 788.01 and, therefore, they

[2] The Carrs allege that the previous owners, Roger and Bernadine Rivard, failed to maintain and inspect the property, and they failed to warn the Carrs about the condition of the deck.

cannot be compelled to arbitrate under the terms of that agreement. Whether the Carrs' claims fall within the purview of § 788.01 presents a question of statutory interpretation that we review de novo. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315 (Ct. App. 1997). The goal of statutory interpretation is to ascertain the legislature's intent. ***City of Racine v. Waste Facility Siting Bd.***, 216 Wis. 2d 616, 621, 575 N.W.2d 712 (1998). Any effort at statutory construction must begin with the plain language of the statute itself. ***Id.*** If the statute is unambiguous on its face, generally we do not look further. ***Id.*** The statute provides, in relevant part:

> A provision in any written contract to settle by arbitration a *controversy thereafter arising out of the contract*, or out of the refusal to perform the whole or any part of the contract, or an agreement in writing between 2 or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable and enforceable except upon such grounds as exist at law or in equity for the revocation of any contract.

Sec. 788.01 (emphasis added).

¶6 The Carrs argue that their personal injury claims cannot arise out of the subject contract within the meaning of WIS. STAT. § 788.01 because "[a] party's deficient performance of a contract does not give rise to a tort claim." ***Atkinson v. Everbrite, Inc.***, 224 Wis. 2d 724, 729, 592 N.W.2d 299 (Ct. App. 1999). In ***Atkinson***, this court acknowledged that the negligent performance of a duty created by contract cannot, without more, create a separate cause of action in tort. ***Id.*** The Carrs, however, fail to recognize that "a breach of contract … may create the state of things which furnishes the occasion of a tort." ***Colton v. Foulkes***, 259 Wis. 142, 146, 47 N.W.2d 901 (1951). In ***Colton***, our supreme court explained that "where there is a general duty, even though it arises from the

relation created by, or from the terms of, a contract, and that duty is violated, either by negligent performance or negligent nonperformance, the breach of the duty may constitute actionable negligence." ***Id.*** at 146-47. Because general duties may arise from a contractual relationship, a negligence claim can be a controversy arising out of a contract, as contemplated under § 788.01.

¶7 Here, the Carrs' complaint alleged that Heart of the North negligently performed the inspection of their property and, as a proximate result of that alleged negligence, Catherine suffered personal injuries. The Carrs nevertheless contend that while their personal injury claims relate to the contract, they do not arise from the contract, as contemplated under WIS. STAT. § 788.01. We are not persuaded. Heart of the North had no duty to the Carrs to inspect the property or to provide the results of that inspection absent the inspection agreement. Therefore, if the Carrs have any claim against Heart of the North, including one based on an allegedly failed inspection, it necessarily arises out of the inspection agreement.

¶8 Moreover, as Heart of the North emphasizes, federal courts have enforced the arbitration of tort claims under the Federal Arbitration Act, 9 U.S.C. § 2 (2018), which utilizes language similar to WIS. STAT. § 788.01.[3] *See, e.g.*, ***Pickering v. Urbantus, LLC***, 827 F. Supp. 2d 1010, 1017 (S.D. Iowa 2011)

[3] Our supreme court has recognized that federal statutes on arbitration are substantively identical to the Wisconsin statutes on arbitration. *See* ***Employers Ins. of Wausau v. Jackson***, 190 Wis. 2d 597, 611 n.5, 527 N.W.2d 681 (1995). For instance, a portion of the federal arbitration act provides, in relevant part: "A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable[.]" 9 U.S.C. § 2. Thus, although our review involves only a consideration of WIS. STAT. § 788.01, we may consider federal court interpretations of the federal statutes on arbitration as an aid in the resolution of this case. *See* ***Milwaukee Police Ass'n v. City of Milwaukee***, 92 Wis. 2d 145, 164, 285 N.W.2d 119 (1979).

(enforcing arbitration clause for tort claim arising from assisted living services provided under a contract); *see also* ***Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.***, 293 F.3d 1023, 1030 (7th Cir. 2002) (recognizing that plaintiffs cannot escape contractual obligation to arbitrate by casting their claim as one arising in tort). Because the controversy regarding the Carrs' personal injury claims arises out of the inspection agreement, § 788.01 requires enforcement of the agreement's arbitration provision.

¶9 The Carrs alternatively argue that Heart of the North cannot pursue arbitration under the inspection agreement because it was not a party to the agreement. The interpretation of a written contract is a question of law that we review de novo. ***Tang v. C.A.R.S. Prot. Plus, Inc.***, 2007 WI App 134, ¶27, 301 Wis. 2d 752, 734 N.W.2d 169. Although we review questions of law independently, we benefit from the circuit court's analysis. ***Northern States Power Co. v. National Gas Co.***, 232 Wis. 2d 541, 545, 606 N.W.2d 613 (Ct. App. 1999).

¶10 "[T]he cornerstone of contract construction is to ascertain the true intentions of the parties as expressed by the contractual language." ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155 Wis. 2d 704, 711, 456 N.W.2d 359 (1990). We "determine what the parties contracted to do as evidenced by the language they saw fit to use." ***Id.*** "Contract language is considered ambiguous if it is susceptible to more than one reasonable interpretation." ***Danbeck v. American Fam. Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. "When the terms of a contract are plain and unambiguous, we will construe the contract as it stands." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. If the terms of a contract are ambiguous, we must consider extrinsic evidence to determine the parties' intent. ***Farm Credit Servs. v.***

Wysocki, 2001 WI 51, ¶12, 243 Wis. 2d 305, 627 N.W.2d 444. Moreover, background principles of state contract law apply to ascertain whether a contract between certain parties has been formed in the first instance. ***Arthur Andersen LLP v. Carlisle***, 556 U.S. 624, 630 (2009).

¶11 Here, the Carrs argue that they and Martino, individually, are the only parties to the inspection agreement as: (1) Martino was the inspector referenced in the agreement; (2) Heart of the North did not sign the agreement; (3) and there was no mutual meeting of the minds to form a contract with Heart of the North. We are not persuaded. As an initial matter, the Carrs' argument in this regard appears to be inconsistent with their complaint. As noted above, the complaint alleges that Heart of the North, its agents, or its employees negligently failed to identify unsafe conditions of the deck. Yet now they claim that Heart of the North was not a party to the agreement under which the inspection was completed, nor was Heart of the North the "inspector" as contemplated by the agreement. If Heart of the North was not a party to the inspection agreement, however, it had no duty to inspect the property, and the Carrs would have no claim against it. As the circuit court recognized, the Carrs want to have their proverbial cake and eat it too.

¶12 Looking at the contract itself, just below the "Inspection Agreement" wording at the top of the first page are the words "Heart of the North Home Inspection Inc.," as well as the email address "HONinspection@gmail.com." Martino's name is not printed in the inspection agreement form, and his signature appears after the word "By," which is consistent with signing as an employee for Heart of the North. Indeed, how else could Heart of the North, a company, sign a contract? Although the Carrs emphasize that the agreement states it is "between Inspector and Client," and Martino signed the document, the circuit court

determined "that Heart of the North Home Inspections and Jeff Martino are pretty much one and the same." The court added that "it stretches common sense and reason to say that … this really wasn't between Heart of the North and the Carrs."[4] When viewing the inspection agreement as a whole, a reasonable person would interpret it as an agreement by Heart of the North to provide an inspection through the work of Martino.

¶13 The Carrs alternatively argue that if the arbitration clause applies here, it should be deemed void as unconscionable and against public policy.

> A determination of unconscionability requires a mixture of both procedural and substantive unconscionability that is analyzed on a case-by-case basis. The more substantive unconscionability present, the less procedural unconscionability is required, and vice versa. A court will weigh all the elements of unconscionability and may conclude unconscionability exists because of the combined quantum of procedural and substantive unconscionability.

Cottonwood Fin., Ltd. v. Estes, 2012 WI App 12, ¶6, 339 Wis. 2d 472, 810 N.W.2d 852 (citation omitted).

¶14 "Determining whether procedural unconscionability exists requires examining factors that bear upon the formation of the contract," including, but

> not limited to, age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract.

[4] Further, and to the extent the agreement could be construed as ambiguous, extrinsic evidence shows that the Carrs understood Heart of the North was a party to the agreement, as the check for the inspection services was made payable to "HON Inspection," not to Martino.

Id. In turn, "[s]ubstantive unconscionability addresses the fairness and reasonableness of the contract provision." ***Id.*** "Substantive unconscionability refers to whether the terms of a contract are unreasonably favorable to the more powerful party." ***Id.*** The analysis of substantive unconscionability requires looking at the contract terms and determining whether the terms are "'commercially reasonable,' that is, whether the terms lie outside the limits of what is reasonable or acceptable." ***Id.***

¶15 Both components of unconscionability are required to render a contract provision unenforceable. *See* ***Aul v. Golden Rule Ins. Co.***, 2007 WI App 165, ¶26, 304 Wis. 2d 227, 737 N.W.2d 24. Thus, if we conclude there was no substantive unconscionability, we may affirm without addressing procedural unconscionability, and vice versa. "Whether, under a given set of facts, a contract provision is unconscionable is a question of law that a reviewing court determines independently of the circuit court." ***Cottonwood Fin.***, 339 Wis. 2d 472, ¶7.

¶16 The Carrs assert the inspection agreement was so ambiguous that there was no meeting of the minds sufficient to alert the Carrs that Heart of the North had a right to arbitration. The Carrs, however, had the burden to establish facts necessary to support their assertion of procedural unconscionability, *see* ***Coady v. Cross Country Bank***, 2007 WI App 26, ¶25, 299 Wis. 2d 420, 729 N.W.2d 732, but they provided no affidavits in support of their assertion, or evidence at the motion hearing.

¶17 The circuit court nevertheless noted the "straightforward" language of the two-page contract, and while the court recognized the "time crunch" within which the Carrs sought to have the inspection completed, it noted that was not under Heart of the North's control. Thus, the inspection agreement did not result

from either "Martino or … Heart of the North squeez[ing] the Carrs into doing something in a rushed fashion or under duress." The court added that Heart of the North is not "a large, multi-national corporation that does home inspections across the country." Rather, it is a "one-man show." Therefore, the court did not deem either Heart of the North or Martino to be "a lot more sophisticated than [the Carrs]."

¶18 As noted above, the evidence suggests that the Carrs understood Heart of the North was a party to the agreement based on the language of the contract and their check payable to Heart of the North. Ultimately, the record relevant to this inquiry supports the circuit court's factual findings and its legal determination of no procedural unconscionability.

¶19 The Carrs have likewise failed to establish the substantive component of an unconscionability analysis. Citing ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2005 WI App 86, 280 Wis. 2d 823, 696 N.W.2d 214, the Carrs contend the agreement is substantively unconscionable because enforcement of the arbitration clause will require them to pursue their claims in two different forums. In other words, they will have to arbitrate their claims against Heart of the North while having to pursue their claims against the previous homeowners—the Rivards—in circuit court, thus allowing the Rivards to effectively deflect liability to Heart of the North, who will not appear in that forum. The Carrs' reliance on ***Wisconsin Auto Title*** is misplaced. There, as our supreme court recognized on review, the clause allowed the drafting party to pursue claims through arbitration or in the circuit court, but limited the nondrafting party to arbitration. ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53**,** ¶¶66, 68, 290 Wis. 2d 514, 714 N.W.2d 155. The court therefore concluded that "the overly one-sidedness of the arbitration provision at issue in the instant case render[ed] the arbitration provision

substantively unconscionable." ***Id.***, ¶68. Here, the arbitration provision does not create a one-sided benefit to Heart of the North, as the parties to the agreement are subject to the same forum.

¶20 Ultimately, we are not persuaded that the need for separate forums makes the agreement unfair or unreasonable. That the Carrs must arbitrate their claims against Heart of the North does not deprive them of any meaningful resolution of their claims against the Rivards through the civil litigation process. Further, as Heart of the North notes, Wisconsin's strong public policy favoring the enforcement of arbitration agreements, *see* ***Cirilli v. Country Ins. & Fin. Servs.***, 2009 WI App 167, ¶11, 322 Wis. 2d 238, 776 N.W.2d 272, should not be undermined by a party's decision to join a noncontracting party to the lawsuit.

¶21 The Carrs further challenge the forum in which arbitration is specified to occur pursuant to the inspection agreement. Specifically, the agreement selects arbitration in accordance with the Wisconsin Association of Home Inspectors ("WAHI"), administered by Resolute Systems, Inc. Relying on a pamphlet from the WAHI Dispute Resolution Program, the Carrs argue it is an improper forum for their claims because the program is "designed to arbitrat[e] property damage claims related to the inspection." When applied to their personal injury claims, they argue that arbitration through WAHI is grossly unfair as there is no provision for discovery and the six-hour time within which to present their case is very limited. However, nothing in the pamphlet limits the types of claims that may be made in the WAHI arbitration program. Additionally, the Carrs will have the opportunity to present their case to a panel of three arbitrators, and any time limits imposed for the inspection and arbitration process can be modified as necessary. The Carrs therefore fail to establish how the arbitration procedures prevent them from fairly obtaining relief through the WAHI arbitration program.

¶22 Finally, the Carrs argue that the arbitration clause is against public policy. As the Carrs recognize, "[p]ublic policy is 'that principle of law under which freedom of contract or private dealings is restricted by law for the good of the community.'" ***Merten v. Nathan***, 108 Wis. 2d 205, 213, 321 N.W.2d 173 (1982) (citation omitted). The Carrs add that ambiguous exculpatory contracts violate public policy when they fail to "clearly and unequivocally communicate to the signer the nature and significance of the document being signed." ***Yauger v. Skiing Enters., Inc.***, 206 Wis. 2d 76, 86-87, 557 N.W.2d 60 (1996). The Carrs contend that the arbitration forum is so unfair that the arbitration clause itself is "essentially an exculpatory contract in favor of Heart of the North" and, as such, should be ruled "void for public policy as applied to a personal injury claim." Once again, we are not persuaded.

¶23 The Carrs have no basis to claim that enforcement of the arbitration clause is contrary to public policy. As discussed above, their tort claims can be fairly handled through arbitration. Moreover, arbitration agreements are not generally against public policy. *See* ***Manu-Tronics, Inc. v. Effective Mgmt. Sys., Inc.***, 163 Wis. 2d 304, 311, 471 N.W.2d 263 (Ct. App. 1991) (arbitration is a valuable alternative to litigation). The Carrs further claim the arbitration clause is void as against public policy pursuant to WIS. STAT. § 895.447(1), which voids certain construction or repair contracts that attempt to limit or eliminate tort liability. That statute, however, applies to contracts "relating to the construction, alteration, repair, or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation." ***Id.*** Because the inspection agreement involves none of these activities, its arbitration provision is not an exculpatory clause under § 895.447(1).

¶24 Based on the foregoing, we conclude the circuit court correctly determined that the arbitration clause is enforceable by Heart of the North, and that it is neither unconscionable nor against public policy. Therefore, we affirm.

By the Court.—Order affirmed.

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