COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3430 **Cir. Ct. No. 00CV8941**

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

ROGER D. JOHNSON AND BARBARA A. JOHNSON,

PLAINTIFFS-APPELLANTS,

V.

ABC INSURANCE COMPANY AND
WARREN & SWEAT MANUFACTURING COMPANY,

DEFENDANTS,

RELIANCE NATIONAL INDEMNITY COMPANY
AND GANDER MOUNTAIN, L.L.C.,

DEFENDANTS-RESPONDENTS,

WISCONSIN HEALTH FUND,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Reversed and cause remanded with directions*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Roger and Barbara Johnson appeal from a judgment of the trial court granting the motion for summary judgment brought on behalf of the defendants, Gander Mountain, L.L.C. and Reliance National Indemnity Company. The Johnsons contend that, under the language of a purchase agreement in which Gander Mountain, L.L.C. (Gander Mountain II) purchased all the retail stores and assets of Gander Mountain, Inc. (Gander Mountain I) as part of Gander Mountain I's Chapter 11 bankruptcy reorganization plan, Gander Mountain II agreed to assume the liability for all the torts of Gander Mountain I that occurred subsequent to the filing of Gander Mountain I's bankruptcy petition, including Johnson's product liability and negligence claims. Because the relevant contractual language in § 3.1.1 of the purchase agreement is ambiguous, we conclude that the trial court erred in granting summary judgment.[1] Accordingly, we reverse and remand with directions for the trial court to conduct a hearing to determine the intent of the parties regarding § 3.1.1 of the purchase agreement.

I. BACKGROUND.

¶2 In 1993, Roger Johnson purchased a tree stand from Gander Mountain I, located in Brookfield, Wisconsin. The tree stand was designed and manufactured by Warren & Sweat Manufacturing Company. On November 1, 1997, Johnson was hunting when the tree stand unhooked from a tree and he fell

[1] Although both parties argue that the language in question is unambiguous, the agreement of the parties on a question of law does not bind this court. *See* ***State v. Olson***, 127 Wis. 2d 412, 419, 380 N.W.2d 375 (Ct. App. 1985) ("The agreement of the parties on questions of law does not generally bind an appellate court."). Accordingly, we consider the ambiguity of the contractual language in order to decide the matter on the narrowest possible ground. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground….").

several feet to the ground. As a result, he was injured. On October 24, 2000, Johnson and his wife, Barbara Johnson, filed a summons and complaint alleging claims of strict products liability and common law negligence against Gander Mountain II, Warren & Sweat Manufacturing Company, and Reliance National Indemnity Company, the liability insurer of Gander Mountain II.

¶3 In August 1996, approximately fifteen months before Johnson was injured, Gander Mountain I filed for Chapter 11 bankruptcy. After filing for bankruptcy, Gander Mountain I entered into a reorganization plan with Gander Mountain II.[2] Under the plan, as set forth in the purchase agreement, Gander Mountain II purchased all of Gander Mountain I's retail stores and all related assets. On January 31, 1997, approximately nine months before Johnson's injury, the purchase agreement was approved by the United States Bankruptcy Court for the Eastern District of Wisconsin.

¶4 On August 31, 2001, in response to Johnson's complaint, Gander Mountain II moved for summary judgment on the grounds that it did not assume any post-confirmation liability upon the purchase of Gander Mountain I. On October 23, 2001, the trial court granted the motion for summary judgment concluding that the language of the purchase agreement clearly and unambiguously demonstrated that the parties did not intend Gander Mountain II to assume any post-confirmation liability.

[2] At the time of the reorganization, Gander Mountain II was called Holiday Stationstores, Inc. Shortly after the bankruptcy court's approval of the purchase agreement, Holiday Stationstores, Inc. assigned its purchasing rights to an entity named Gander Acquiring, L.L.C. which later changed its name to Gander Mountain, L.L.C. For the purposes of this appeal, Holiday Stationstores, Inc., Gander Acquiring, L.L.C., and Gander Mountain, L.L.C. are collectively referred to as Gander Mountain II.

II. ANALYSIS.

¶5 This appeal involves issues decided pursuant to summary judgment. Our review of the circuit court's decision to grant summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Our methodology is the same as the trial court's. *See* ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Summary judgment must only be granted if the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. RULE 802.08(2). Therefore, we will reverse a grant of summary judgment if a review of the record reveals that disputed material facts exist or undisputed material facts exist from which reasonable alternative inferences may be drawn. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

¶6 Additionally, with respect to the construction of a contract, we apply the following standard:

> The interpretation of a contract is a question of law which we review *de novo.* Where the terms of a contract are plain and unambiguous, we will construe it as it stands. However, a contract is ambiguous when its terms are reasonably or fairly susceptible of more than one construction. Whether a contract is ambiguous is itself a question of law.

Borchardt v. Wilk, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990) (citations omitted).

¶7 The contractual language in question, § 3.1.1 of the purchase agreement, states:

> Holiday will pay all allowed priority claims against Gander Mountain, as provided in 11 U.S.C. § 507, all allowed

> administrative expense claims against Gander Mountain, as provided in 11 U.S.C. § 503 (including The CIT Group/Business Credit, Inc. Debtor-in-Possession Loan Facility), and *all reasonable post-petition liabilities or obligations of Gander Mountain*, and/or the trust to be established to pay claims and interests of the Debtors including reasonable post-confirmation expenses (including reasonable professional and paraprofessional fees and expenses incurred by the Trust to be established to hold and distribute the proceeds of this Agreement).

(Emphasis added.)

¶8 "As a general rule, a corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation." ***Fish v. Amsted Indus., Inc.***, 126 Wis. 2d 293, 298, 376 N.W.2d 820 (1985) (citation omitted). However, "[t]here are four well recognized exceptions to this general rule: (1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) when the purchaser corporation is merely a continuation of the seller corporation; or (4) when the transaction is entered into fraudulently to escape liability for such obligations." ***Id.*** (citation omitted).

¶9 Johnson relies on the first exception in combination with § 3.1.1 of the purchase agreement in concluding that Gander Mountain II agreed to assume all of Gander Mountain I's tort liabilities that arose after the bankruptcy petition was filed in August of 1996. Johnson maintains that by using the terminology "post-petition liabilities," Gander Mountain II intended to assume all of the liability of Gander Mountain I from the date of the filing of the bankruptcy petition *ad infinitum*. Gander Mountain II responds that "post-petition liabilities" is a term of art used in bankruptcy proceedings referring exclusively to liabilities arising between the filing of the bankruptcy petition to the closing of the

bankruptcy proceedings, i.e., post-petition but not post-confirmation. Gander Mountain II also contends that this term of art refers exclusively to costs, fees, and expenses that are normally included in the purchase price but are excluded from the definition of claims and administrative expenses as outlined in 11 U.S.C. §§ 507 and 503. In support of this conclusion, Gander Mountain II points out that the term "post-petition liabilities" appears in § 3.1.1, which deals exclusively with the purchase price.

¶10 We conclude that the term "post-petition liabilities" is reasonably susceptible to more than one meaning. *See* ***Borchardt***, 156 Wis. 2d at 427. First, as asserted by Johnson, the term "liabilities" as used in § 3.1.1 of the purchase agreement is broad enough to include liabilities for tort claims. *See* ***Columbia Propane, L.P. v. Wisconsin Gas Co.***, 2002 WI App 9, ¶19, 250 Wis. 2d 582, 640 N.W.2d 819. Second, in interpreting "post-petition" in relation to "liabilities," we agree with Johnson that although the term "post-petition" is not defined in the agreement, it can reasonably be inferred that Gander Mountain II agreed to assume the liabilities of Gander Mountain that occurred after the filing of the bankruptcy petition in August of 1996. Furthermore, while Gander Mountain II argues that the term "post-petition" refers only to the "gap period"; i.e., the period between filing the bankruptcy petition and the date of confirmation, there is nothing in the language of the contract limiting the liabilities referred to by the term "post-petition liabilities" to this gap period.[3] Therefore, we could reasonably

[3] During oral argument, appellate counsel for both Johnson and Gander Mountain II were unable to provide this court with any case citation, statutory section, or other reference materials that specifically define the term "post-petition liabilities" in the context of a Chapter 11 bankruptcy.

conclude that Gander Mountain II assumed liability for Johnson's claims under the terms of the purchase agreement.

¶11 However, this is not the only reasonable interpretation. As argued by Gander Mountain II, reading § 11.1 of the purchase agreement in conjunction with § 3.1.1 indicates that the parties were more than capable of drafting clear and unambiguous language extending Gander Mountain II's legal responsibilities to the period after the date of confirmation, where such liability was intended. Section 11.1 of the purchase agreement, which deals with the duty to insure, states:

> The duty to insure the Assets and all risks, liability and responsibility for all loss or damage to the Assets, and the duty to defend, indemnify and hold the other party harmless against such claims (except for the claims based on the other party's active negligence, wrongdoing or misconduct) *shall be [Gander Mountain I's] with respect to events occurring before the Closing Date and shall be [Gander Mountain II's] with respect to events occurring from and after the Closing Date*.

(Emphasis added.) Section 11.1, unlike § 3.1.1, makes it clear that the duty to insure the assets as well as the duty to defend or indemnify claims arising out of the use or ownership of the assets would be assumed by one party during the gap period and another after the date of confirmation. Gander Mountain II argues that if the parties intended to transfer tort liability to the party carrying on the transferred business, the parties would have used language similar to § 11.1 in § 3.1.1.

¶12 Gander Mountain II also persuasively points out that in light of the presumption against successor liability, *see* ***Fish***, 126 Wis. 2d at 298, there is no clear intent in § 3.1.1 to assume any tort liabilities. In support of this argument, Gander Mountain II makes four points: (1) section 3.1.1 is part of a broader

section concerning the purchase price; (2) section 3.1.1 deals exclusively with incidental costs accrued by the parties during the gap period that are necessarily included in the purchase price; (3) had the parties intended to transfer Gander Mountain I's tort liability, the parties would have included a separate tort liability section arranging for a set-aside of monies to pay future liability claims as the parties did in ***In re Piper Aircraft Corp.***, 162 B.R. 619 (Bankr. S.D. Fla. 1994); and (4) had the parties intended Gander Mountain II to assume all post-confirmation liabilities and obligations, they would have used the term "post-confirmation" as they did in the latter part of § 3.1.1.

¶13 We also find these arguments persuasive. First, from the context of § 3.1.1, one could reasonably conclude that the term "post-petition liabilities or obligations" is a catch-all phrase intended to encompass any claims, administrative costs, fees, or expenses that did not fall within the grasp of either 11 U.S.C. §§ 507 or 503. Second, we conclude that in light of the presumption against successor liability, had the parties intended to assign future tort liability, they probably would have included a separate section thoroughly dealing with the issue and appointing some type of administrator to assess the future liability and possibly establish a fund to pay future claimants from the monies generated by the sale of Gander Mountain I and its assets. Third, and finally, it is reasonable to conclude that had the parties intended Gander Mountain II to assume all post-confirmation tort liabilities, the parties would have indicated such intent by using language similar to § 11.1 or by using the term "post-confirmation tort liabilities."

¶14 Thus, based on the language of the contract alone, the intent of the parties is unclear. Furthermore, because the record is scant with information regarding the transaction, we are unable to infer what was negotiated between the parties. Thus, an ambiguity exists because the contract is capable of being

understood by reasonably well-informed persons in either of two senses. *See* ***Wilke v. First Fed. Sav. & Loan Ass'n of Eau Claire***, 108 Wis. 2d 650, 654, 323 N.W.2d 179 (Ct. App. 1982).

¶15 Moreover, during the summary judgment hearing, both Johnson and Gander Mountain II nearly admitted that this language is ambiguous. In order to establish "post-petition liabilities" as a term of art, Gander Mountain II referred to a number of sections of the Bankruptcy Code and the United States Code, texts beyond the four corners of the contract. In response to its use of these extrinsic sources to interpret this alleged clear and unambiguous language, counsel for Gander Mountain II stated:

> First of all, none of the sections jump [sic] out at you as saying Gander II is assuming liabilities here. *At best, you look at some of them and you scratch your head and say, what are you getting at here*. And so then you go the Bankruptcy Code and the United States Code and you find out what they are getting at.

(Emphasis added.) In response to this argument, counsel for Johnson stated:

> *So I'm not saying it's improper to look at an outside document, but the fact of doing so shows ambiguity and vagueness*, whereas, in this arm's length agreement, Gander Mountain II has chosen to define many other terms, but I guess one would have to say chose at its peril not to define some other very key terms in the purchasing clause and in the insuring clause.

(Emphasis added.)

¶16 Thus, our conclusion is supported by the fact that Gander Mountain II relied on extrinsic evidence in attempting to prove the contract's alleged clarity. *See* ***Patti v. Western Mach. Co.***, 72 Wis. 2d 348, 351, 241 N.W.2d 158 (1976) (stating that if the intent of the parties can be determined with reasonable certainty

from the face of the contract itself, there is no need to resort to extrinsic evidence). If there were no ambiguity, such reliance on extrinsic aids would have been unnecessary, as the contract would have spoken for itself. *See* ***Marshall & Ilsley Bank v. Milwaukee Gear Co.***, 62 Wis. 2d 768, 777, 216 N.W.2d 1 (1974) (stating that if there is no ambiguity in a contract, the contract must speak for itself entirely unaided by extrinsic matters).

¶17 In its decision, the trial court concluded:

> The paragraph 3.1.1, the purchase price, it appears to be aimed at a gap between the filing of the bankruptcy and the confirmation of the reorganization….
>
> ….
>
> The specific language that[] has been referred to and argued in this particular case, the 3.1.1, the purchase price, relates to and, again, it's taking this in the context of where this transaction was taking place, [] in Bankruptcy Court – relates to paying priority claims and administrative expenses that arise directly out of the bankruptcy proceedings, not to tort claims.

¶18 Although the trial court may have ultimately reached the correct conclusion, we do not agree that one could reasonably glean all of this information solely from the language contained within the four corners of the document. Rather, after independent review of the purchase agreement, we conclude that the term "post-petition liabilities" is susceptible to more than one reasonable meaning.

¶19 Accordingly, because the contract language is ambiguous and resolution of the ambiguity involves a disputed issue of fact, summary judgment was inappropriate. *See* ***Columbia Propane***, 2002 WI App 9 at ¶2. Therefore, the matter is remanded for a trial on the issue of whether the parties to the purchase agreement intended Gander Mountain II to assume liability for the torts of Gander Mountain I subsequent to the confirmation of the bankruptcy proceedings.

By the Court.—Judgment reversed and cause remanded with directions.

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