COURT OF APPEALS DECISION DATED AND FILED

December 11, 2003

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. 02-1745

Cir. Ct. No. 98-CV-53

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

PATRICK MCMAHON,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

TERRY W. RYAN, KARILYN J. RYAN AND AMERICAN FAMILY,

DEFENDANTS,

BRIAN PARROTT,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

Before Deininger, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Brian Parrott appeals from a judgment in favor of Patrick McMahon, who had alleged that Parrott destroyed property belonging to him. McMahon cross-appeals. We affirm.

¶2 McMahon's complaint alleged that Parrott destroyed his property on land owned by Terry Ryan and Karilyn Ryan. The complaint alleged a plethora of legal theories, but the case was ultimately tried to a jury on destruction or conversion of property and trespass. The property in question consisted of pheasant pens and a duck blind. The court answered the trespass question in plaintiff's favor, and the jury found destruction or conversion of property and total damages of $8,400. The court granted Parrott's motion for remittitur and reduced the damages by $3,700.

¶3 Parrott argues that the circuit court should have granted his motion for summary judgment on the conversion claim. He argues that McMahon did not have a legally enforceable property interest in the pen. He contends that the transfer failed to comply with the statute of frauds, WIS. STAT. § 706.02(1)(c) (2001-02)[1] because no such right was recorded in the warranty deed that transferred the property from McMahon to the Ryans. McMahon argues that we should not consider this issue because Parrot did not raise it in circuit court, which Parrott appears to concede. We ordinarily do not review issues raised for the first time on appeal, ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), and therefore we decline to discuss this one in any detail. However, we do note that Parrott appears to misunderstand the remedy for noncompliance with that

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

statute. Noncompliance renders the *entire* transaction invalid, not just the alleged reservation. *See* § 706.02(1). Therefore, if the warranty deed failed to comply, that would return the property back to McMahon's ownership, which is precisely the opposite result Parrott seeks.

¶4 Parrott also contends that McMahon did not have a property interest in the pens because the contract documents from the land sale unambiguously do not provide such a right. We conclude that the contract documents, as applied to the pens, are ambiguous as to the nature, scope, and duration of McMahon's retained interest. It is unclear whether the contract amendment's five-year right-to-"use" buildings on the property was intended to include and expand the original agreement's one-year right-to-"leave" pheasant cages on the property. Therefore, the trial court properly denied summary judgment.

¶5 Parrott also argues that the court should have granted summary judgment or judgment notwithstanding the verdict on the conversion claim because McMahon submitted a false and perjurious affidavit to oppose Parrott's summary judgment motion. Parrott provides no authority for the proposition that trial testimony inconsistent with an earlier affidavit warrants reversing summary judgment or granting judgment after trial. Parrott's brief also fails to establish that the trial court found the affidavit perjurious; we do not find facts. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980).

¶6 Parrott next argues that the trial court should have granted his motion to change the verdict answer due to insufficient evidence. He argues that the evidence was insufficient to support a finding that the parties intended McMahon's interest in the pens to continue for five years after the land sale. He also argues that the evidence did not support a finding that the parties had a

meeting of the minds as to the duration of McMahon's rights in the pheasant pens. We consider all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made to sustain a finding in favor of such party. WIS. STAT. § 805.14(1). We conclude that the verdict is sufficiently supported by the language and circumstances of the contract, and by McMahon's testimony that he believed the five-year provision about "buildings" included the pens.

¶7 Finally, Parrott argues that we must construe the contract ambiguity against the drafter. *See, e.g.*, ***Wis. Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶24, 233 Wis. 2d 314, 607 N.W.2d 276. This is a "default rule" of contract construction and default rules apply "only in the event of an unresolvable ambiguity—a tie—and only at the end of the process after extrinsic evidence has failed to clear up the question." ***Roth v. City of Glendale***, 2000 WI 100, ¶51, 237 Wis. 2d 173, 614 N.W.2d 467 (Sykes, J., concurring). We do not construe ambiguities against the drafter, however, when the result would be inconsistent with the evidence of the parties' intentions. ***Wilke v. First Fed. Sav. & Loan Assoc.***, 108 Wis. 2d 650, 655, 323 N.W.2d 179 (Ct. App. 1982). Here, the jury resolved the ambiguity to its satisfaction based on extrinsic evidence at trial.

¶8 In his cross-appeal, McMahon argues that the court erred by reducing damages from $7,400 to $3,700 for the pheasant pens. The trial court reduced the amount pursuant to WIS. STAT. § 805.15(6). We uphold the trial court's determination that the damages are excessive unless we find a misuse of discretion. ***Wester v. Bruggink***, 190 Wis. 2d 308, 326-27, 527 N.W.2d 373 (Ct. App. 1994). We will not find a misuse of discretion if a reasonable basis for the

trial court's determination exists after resolving any direct conflicts in the testimony in favor of the party seeking to avoid remittitur. ***Id.***

¶9 The trial court concluded that McMahon's testimony that materials cost $3,700 was the only specific evidence of damages to the pens. The court stated that any additional amount would be speculation by the jury. Although the jury instructions permitted the jury to award damages for loss of use, the court said there was virtually no testimony showing financial loss into the future. On appeal, McMahon continues to do nothing more than speculate about damages beyond $3,700. He argues that the jury could have properly added an additional sum for "time and work," but he does not provide evidence of any specific dollar amount to support such an award or an award for impairment of his ability to pursue his hobby.

¶10 No costs to either party.

By the Court.—Judgment affirmed.

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