

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 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. 03-0231
STATE OF WISCONSIN**

Cir. Ct. No. 01CV002008

**IN COURT OF APPEALS
DISTRICT II**

BUD MEYER,

PLAINTIFF-APPELLANT,

V.

RACINE COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Bud Meyer appeals from the summary judgment granted against him. The issue on appeal is whether the circuit court erred when it granted summary judgment to Racine County finding that Racine County had complied with a settlement agreement as a matter of law. Because we conclude that the circuit court erred when it interpreted the settlement agreement between

Meyer and Racine County, and because there are genuine issues of material fact, we reverse and remand the matter to the circuit court.

¶2 The underlying action involved a dispute over the terms of a settlement agreement in a lawsuit brought by Meyer and others. Racine County was involved in the development of a park. Owners of property adjacent to the park, including Meyer, brought a lawsuit alleging that the development of the park had changed the topography of the land and caused flooding to their property. This suit eventually was settled. As part of the settlement, Racine County agreed to install a weir/standpipe draining a retention pond. The settlement agreement stated: “The design intent would be that the weir/standpipe would restrain a two year storm (which is defined to mean 2.7 inches of rainfall within a 24 hour period) without allowing outflow onto adjacent properties.”

¶3 Meyer alleges that after the construction of the retention pond and weir/standpipe, his property continued to be flooded, even when the rainfall did not meet the definition of a two-year storm. Meyer then sued Racine County, among others, for a violation of the settlement agreement. Meyer was deposed as part of the suit. Racine County moved for summary judgment asserting, among other things, that Meyer could not establish that flooding had damaged his property without expert testimony, and that Racine County had complied with the terms of the settlement agreement as a matter of law.

¶4 The circuit court granted the motion. The court found that the settlement agreement did not guarantee that the weir/standpipe would hold 2.7 inches of rainfall. Relying on Meyer’s deposition testimony, the court found that the parties intended that “they would attempt to have one designed” that would

hold 2.7 inches of rainfall. The court found that Meyer did not dispute that was their intent and, consequently, Racine County was entitled to judgment.

¶5 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995). That methodology is well known, and we need not repeat it here. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶6 We agree with Meyer that this is a simple breach of contract case. When a contract is "plain and unambiguous, a court will construe it as it stands without looking to extrinsic evidence to determine the intent of the parties." *Rosplock v. Rosplock*, 217 Wis. 2d 22, 31, 577 N.W.2d 32 (Ct. App. 1998). In this case, the contract provided that Racine County would build a weir/standpipe which would restrain a two-year storm. The contract defines a two-year storm as being 2.7 inches of rainfall within a twenty-four hour period. We do not accept the circuit court's finding that the County is relieved of its obligations because the contract does not contain the word "guarantee."

¶7 We conclude that the contract, read reasonably, provides that the County will build the weir/standpipe to restrain a two-year storm. The parties entered into the contract to settle a lawsuit. The purpose of the lawsuit was to correct the flooding problem on Meyer's property. The only purpose for having the description of the drainage system in this agreement was because the parties had agreed that Racine County would fix the problem by building this system. Racine County, in effect, asks the court to interpret the contract to say that the parties agreed to settle the lawsuit to get a drainage system, whether or not that

system fixed the problem which was the subject of the action settled. Such an interpretation must be rejected. The purpose of the initial underlying lawsuit was to correct the flooding problem, not to get a drainage system built. We conclude that the contract provides that Racine County would correct the flooding problem by building the drainage system described in the agreement. That is, a drainage system which will restrain a two-year storm, or 2.7 inches of rainfall in a twenty-four hour period.

¶8 Racine County also asserts that Meyer may not argue in this court that the contract is unambiguous because he did not present this argument to the circuit court. Our review in a summary judgment action, however, is *de novo*, and we may independently review the contract.

¶9 Racine County further argues that without the evidence of an expert witness, Meyer cannot establish that there are genuine issues of material fact in dispute. We conclude, however, that the affidavit of John T. McCarthy, offered by the County in support of its motion for summary judgment, suggests alternative causes for the flooding of Meyer's property and creates issues of material fact concerning the reasons for that flooding. This creates a dispute which allows Meyer to survive a motion for summary judgment. We do not, however, express an opinion on whether Meyer can prevail at trial without the testimony of an expert on the cause of the flooding.

¶10 For the reasons stated, we reverse the judgment of the circuit court and remand the matter to the circuit court.

By the Court.—Judgment reversed and cause remanded.

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

