

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 19, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2939

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

COUNTY OF DOOR,

Plaintiff-Respondent,

v.

KERRY DENIL
and JOYCE DENIL,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Door County:
EDWIN C. STEPHAN, Reserve Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Kerry and Joyce Denil appeal a summary judgment that awarded Door County \$21,025.84 under their cost share, pollution abatement contract. Under the contract, the County invested money in a project to abate water pollution at the Denils' dairy farm; the Denils later lost the farm in a mortgage foreclosure. The trial court made the award under a

clause requiring the Denils to return the County's investment if ownership of the real estate changed hands. The trial court correctly granted the County summary judgment if there was no dispute of material fact and the County deserved judgment as a matter of law. *Powalka v. State Mut. Life Assur. Co.*, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). The Denils submit several arguments on appeal: (1) the trial court should not have enforced what amounted to an unlawful penalty clause passing for a liquidated damages clause; (2) the mortgage foreclosure relieved them of their obligation under the cost share contract to return the County's money; (3) the trial court should have recused itself; and (4) the trial court incorrectly refused to consider their collateral attack on the foreclosure judgment. We reject these arguments and therefore affirm the judgment.

The Denils first argue that the trial court erroneously enforced a liquidated damages clause without examining whether the clause was really an unlawful penalty posing as liquidated damages. The Denils confuse liquidated damages with liquidated claims. Contracts include liquidated damages clauses whenever the contracting parties foresee problems in proving actual damages should someone breach the contract. See *Black's Law Dictionary* 353 (5th ed. 1979) ("liquidated damages"). Liquidated claims, on the other hand, represent a different state of affairs. In those instances, the contracting parties know their future liability precisely at the time they enter the contract. See *id.* at 839 ("liquidated claim"). Debt instruments are examples of liquidated claims. See *id.* at 363 ("debt"). Here, the County's repayment demand represented the latter: a liquidated claim for the money that the County had invested in the pollution abatement venture and had a right to have returned upon certain conditions, such as the transfer of real estate ownership. In this respect, the repayment provision resembled due on sale clauses in mortgage debt instruments, see *id.* at 449 ("due on sale clause"), which give mortgagees the right to cash in their investment in the event the property owner sells out. In sum, the cost share contract did not create a liquidated damages clause that the trial court needed to scrutinize as a possible unlawful penalty clause.

Next, the Denils argue that the cost share contract contained a provision expressly relieving them of liability once the bank foreclosed its mortgage. The contract excused their repayment if "a [pollution control] practice is rendered ineffective due to circumstances beyond the control of the cost share recipient." The trial court correctly rejected this position on summary judgment if the contract was unambiguous in the County's favor. See *Erickson*

v. Wightman, 183 Wis.2d 106, 115, 515 N.W.2d 293, 298 (Ct. App. 1994). Courts must read a contract's various terms together to give effect to the contract as a whole, *State ex rel. Dept. of Agric. v. Badger Dairy, Inc.*, 245 Wis. 229, 232, 14 N.W.2d 34, 36 (1944), and must give precedence to specific clauses over general ones. *Capital Inv., Inc. v. Whitehall Packing Co.*, 91 Wis.2d 178, 195, 280 N.W.2d 254, 261-62 (1979). Read with the contract's other clauses, the generically worded "beyond the control" clause did not excuse the Denils' repayment when the mortgage foreclosure prevented them from continuing pollution abatement efforts. The foreclosure was not "beyond the control" of the Denils because they could have paid the debt as agreed, and the foreclosure would not have happened. The phrase "beyond the control" refers to some outside event, such as an act of God, over which the Denils have no control. Additionally, another more specific clause expressly required repayment if the Denils transferred ownership, unless the acquirer assumed their contractual duties. Here, the bank refused to accept those duties, within its legal rights. Once the bank demurred, the more specific ownership transfer clause overrode the "beyond the control" clause and required the Denils' repayment.

The Denils next argue that the trial court should have recused itself for bias. Although trial courts must recuse themselves for actual bias, they need not if they believe they can decide the case fairly and impartially. See *State v. McBride*, 187 Wis.2d 408, 413-15, 523 N.W.2d 106, 109-10 (Ct. App. 1994). Here, we see no evidence that the trial court was incapable of making a fair and impartial decision. The record contains no indication that the trial court treated the Denils unfairly in any way. The Denils apparently think that the trial court's decision itself furnishes evidence of bias. This view has no merit. The trial court issued a correct ruling on the facts that the parties provided; the Denils have not shown that the trial court disregarded disputes of material fact or improperly determined liability as a matter of law. The trial court also did nothing to impair the Denils' ability to defend against the County's summary judgment motion. They were able to present issues that they felt were meritorious. Moreover, had the trial court issued an incorrect decision, this would not by itself demonstrate judicial bias; in that event, the trial court could have simply made an honest mistake. In sum, the Denils have no legal basis to claim bias by the trial court.

Finally, the Denils appear to argue that the trial court should have re-examined the foreclosure judgment. Although the Denils do not explain exactly how this argument invalidates the trial court's decision, they may

believe that the County would lose its right to demand repayment under the cost share agreement if the judgment that transferred the real estate lost its operative effect. The Denils apparently assume that the foreclosed real estate would then immediately revert to themselves and that this would deactivate the clause in the cost share contract permitting the County to demand repayment upon a change in ownership. This argument does not merit the summary judgment's reversal. The Denils had no right to collaterally attack the foreclosure judgment in an action involving different parties and issues; such collateral attacks are extremely rare. *See, e.g., Kriesel v. Kriesel*, 35 Wis.2d 134, 138-39, 150 N.W.2d 416, 418 (1967); *Zrimsek v. American Automobile Ins. Co.*, 8 Wis.2d 1, 3, 98 N.W.2d 383, 384-85 (1959). The Denils have not shown that they satisfy any of the extremely limited circumstances under which litigants may collaterally challenge judgments in unrelated proceedings.

By the Court. – Judgment affirmed.

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