

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHAEL WHITE and DAVID WHITE TRUST,

Plaintiffs-Appellees/Cross-  
Appellants,

v

REPUBLIC SERVICES, INC., and TAY-BAN  
CORPORATION,

Defendants-Appellants/Cross-  
Appellees.

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UNPUBLISHED  
December 2, 2004

No. 247928  
Saginaw Circuit Court  
LC No. 00-034929-CK

Before: Griffin, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right a judgment deeming that they breached their contract with plaintiffs when they shifted operations and assets from two waste management companies to three different companies without paying royalties on the new companies' revenue. We affirm in part, reverse in part, and remand for an adjustment of the judgment.

This case arose out of the settlement of an earlier lawsuit. Plaintiff Michael White, together with his brother David White, sold defendant Republic Services, Inc., two businesses. The first business, Bay County Development, Inc. (BCD) was purely a startup company for a prospective landfill in Beaver Township to be called Beaver Landfill. Because it was only a startup entity, BCD's only assets were an option to buy 102 acres in Beaver Township and a construction permit. While the parties anticipated a bright future for Beaver Landfill, at the time of the first case's settlement negotiations, BCD was fighting neighbors and government agencies in several legal battles on many different fronts. The second business was defendant Tay-Ban Corporation (TBC). Its assets consisted of two landfills, Taymouth 1 and 2, as well as a hauling operation and a recycling operation. At the time of the settlement negotiations, Taymouth 1 was almost full.

The first sales agreement between the Whites and Republic ended in a lawsuit by the Whites. As a result of the suit, the parties essentially began negotiating a new deal designed to pay plaintiffs for their businesses over a period of time rather than in a lump sum. The parties decided to tie plaintiffs' payments to the purchased companies' income by paying plaintiffs 3.17 percent of the companies' gross revenues less certain fees. Defendants' obligation to pay these "royalty" payments was set to expire on June 1, 2001, for TBC and July 13, 2003, for BCD. The parties also tied a large portion of the payment to BCD's success by making a large payment of

Republic stock contingent on Beaver Landfill opening and legally accepting waste. The language called for the payment of stock “[i]f, and when, BCD obtains the necessary permits and lawfully begins to accept waste at its facility in Beaver Township, Michigan, [Republic] shall pay to the WHITES One Hundred Thousand shares (100,000) of [Republic] common stock . . . .” The Whites inserted other language ostensibly to protect them from corporate restructuring by Republic. The revenue and stock provisions held “successors” liable for payment if BCD, TBC, or Republic failed to pay, and another provision stated, “A sale or transfer of [Republic], TBC, or BCD, either in whole or in part, shall be subject to the terms and conditions of this agreement, including but not being limited to those provisions concerning gross revenue obligations.”

Tragically, David White died in a car accident before the parties reached a final agreement. Plaintiff Michael White represented his brother’s interest in the remaining negotiations, and the settlement agreement was executed on July 13, 1993.

At first, Republic continued to develop BCD, exercising its purchase option on the first 102 acres, and acquiring another option on another 98 acres. However, on March 1, 1994, the Republic-controlled BCD abandoned its litigation efforts and sold the accumulated land for \$300,000 to the neighbors who had fought the Beaver Landfill project the hardest. In 1996, the company was administratively dissolved.

TBC’s landfill and other operations continued unabated, however, until 1996, when the earnings statements Republic issued to Michael White suddenly reflected a total lack of earnings by TBC’s hauling operations. According to White, Republic changed the name of the hauling operation to Tri-County Refuse, but kept the same equipment, business address, personnel, and telephone number. In 1999, Republic acquired two landfills as part of a larger package of acquisitions from a downsizing company. One of the landfills, Whitefeather, was only 10 to 12 miles from the original prospective site for Beaver Landfill. The other, Brent Run, was only six miles away from Taymouth 2, TBC’s landfill. After the acquisition, Republic “mothballed” Taymouth 2, preserving it for later use, despite the fact that it had plenty of space left to fill. It then diverted Taymouth 2’s contracts and customers to Brent Run. It also transferred several valuable pieces of equipment from Taymouth 2 to various other landfills it owned. Republic did not credit TBC with any income for the equipment and contracts it moved out of the company but left TBC a corporate shell without any operations or revenue-generating assets.

Plaintiffs filed suit, claiming that the “transfer . . . in part” and “successor” language in the contract meant that defendants’ transfers of assets, contracts, and other operations shifted the source of revenues but did not eliminate defendants’ liability for the payment of royalties on the revenue. Specifically, plaintiffs argued that Republic’s attempt to rename TBC’s hauling operations was a “transfer . . . in part” of TBC that made defendants liable to plaintiffs for 3.17 percent of Tri-County’s gross revenues. They also argued that Republic’s “transfer” of Taymouth 2’s contracts and operations to Brent Run rendered Brent Run’s revenues subject to defendants’ royalty obligations.

Plaintiffs’ argument regarding BCD was a bit more complicated. Plaintiffs argued that Republic’s establishment of Whitefeather was essentially a “transfer” of operations from BCD, primarily pointing to its location and its occupation of office space BCD once shared in TBC’s building. Establishing Whitefeather as BCD’s “successor” in this way, plaintiffs claimed overdue royalties based on Whitefeather’s gross revenue. Plaintiffs also argued that the “if, and

when” language actually addressed concerns over litigation, and all the litigation was eventually resolved in BCD’s favor. Therefore, plaintiffs claimed that defendants were liable for the stock payment because Whitefeather accepted waste as BCD’s surrogate. Plaintiffs also claimed royalties from the revenue BCD generated when it sold its land to the antagonistic neighbors.

Defendants argued that the plain language of the “transfer” provision meant that the companies would continue to pay plaintiffs gross revenues even if defendants sold or transferred the corporate entities through a sale of stock or similar transaction. Defendants contended that they had not actually sold the companies, so they did not owe plaintiffs anything. Similarly, defendants argued that the “[i]f, and when” language clearly created a condition precedent to Republic issuing stock to plaintiffs, and that condition had clearly gone unfulfilled.

“An agreement to settle a lawsuit is a contract that is subject to the legal principles generally applied to contracts.” *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993). When presented with a contract dispute, a court must determine the terms of the parties’ agreement and enforce them. *Engle v Zurich-American Ins Group (On Remand)*, 230 Mich App 105, 107; 583 NW2d 484, app dis 586 NW2d 88 (1998). A contract should be read as a whole and meaning given to all terms. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). Courts should also construe contractual language according to its ordinary and plain meaning. *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991).

A contract is clear if it is only open to one reasonable interpretation, and it is ambiguous if, after reading the entire contract, its language can be reasonably understood in differing ways. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566-567; 596 NW2d 915 (1999). A contract provision is not made ambiguous by the existence of factual questions regarding whether it applies in a given situation. *Id.* at 570. If a contract’s language is clear, its construction is a question of law for the court. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). However, a trial court may look to extrinsic evidence to clarify a contractual ambiguity. *Stine v Continental Casualty Co*, 419 Mich 89, 112; 349 NW2d 127 (1984).

Defendants argue on appeal that the trial court erred when it held that the “transfer” language was ambiguous. We disagree. The interpretation of contractual language is an issue of law, which we review de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). In this case, each side presented a persuasive argument for their interpretation of the open-ended “transfer . . . in part” language. According to plaintiffs, it included any substantial transfer of assets or operations. Defendants conversely argued that it merely meant a sale of stock or other transfer of the companies’ ownership. Because of the breadth of the language, neither of these interpretations was plainly and exclusively applicable, so the trial court correctly found this language ambiguous. The same cannot be said of the “[i]f and when” language prefacing the stock arrangement. This language clearly conditioned Republic’s obligation to issue stock on BCD obtaining the requisite permits and operating Beaver Landfill. This condition was never fulfilled. Nevertheless, the trial court ultimately dismissed the stock claim based on the expiration of the statute of limitations, so we merely note our findings should plaintiffs later successfully challenge the trial court’s application of the statute of limitations. Because the “transfer . . . in part” language was ambiguous, the trial court did not abuse its discretion when it allowed plaintiffs to clarify the ambiguity through extrinsic

evidence, including evidence of defendants' expressed intent regarding the companies' future. *Klapp v United Insurance Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003).

Defendants argue that the trial court should have granted defendants' motion for directed verdict because plaintiffs failed to demonstrate at trial how defendants breached the terms of the agreement. We agree that plaintiffs failed to demonstrate a "transfer" of any BCD asset, operation, or other "part" that could reasonably make defendants responsible for paying plaintiffs royalties based on Whitefeather's revenues. However, we disagree with defendants' identical proposition as it relates to TBC. Plaintiffs presented sufficient evidence that TBC transferred substantial operations, contracts, and assets to Tri-County, Brent Run, and other Republic entities. According to the reasonable interpretation of the contract proposed by plaintiffs and adopted by the jury, these transfers meant that defendants owed plaintiffs royalties based on the value of the transferred assets and the new companies' revenues. We review de novo a trial court's decision on a directed verdict motion. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186, reh den 469 Mich 1224 (2003).

While plaintiffs disputed Republic's motives for selling the property that BCD held for Beaver Landfill's prospective site, plaintiffs did not dispute that the sale effectively dissolved BCD because the land and any improvements to it were essentially its only assets. Rather, plaintiffs claimed a portion of the \$300,000 sale proceeds as a royalty on BCD's gross revenues. The trial court correctly granted defendants' motion for directed verdict on this and plaintiffs' related claim for stock, because the sale of the land on March 1, 1994 occurred more than six years before plaintiffs filed suit on August 23, 2000. MCL 600.5807(8). The sale precluded the establishment of Beaver Landfill, so even presuming Republic's bad faith interference in Beaver Landfill's development, plaintiffs' claim for stock also accrued at that time. *Mehling v Evening News Ass'n*, 374 Mich 349, 352; 132 NW2d 25 (1965). Ultimately, plaintiffs failed to demonstrate what "part" of BCD was transferred to metamorphose BCD into Whitefeather for stock or revenue purposes. While Michael White testified that the contract treated Whitefeather like BCD because Republic transferred BCD's operations to Whitefeather, BCD never opened Beaver Landfill, so BCD never had any "operations" to transfer. Likewise, BCD only shared TBC's office space, so Republic never deprived plaintiffs of any income or transferred anything of BCD's to Whitefeather when it permitted Whitefeather to operate out of the abandoned space. Defendants' undisputed evidence proved that Whitefeather was purchased as a going enterprise nearly five years after BCD's land was sold and the plans for Beaver Landfill were scrapped. Therefore, Whitefeather was an independent operation from BCD, and defendants did not owe plaintiffs any portion of its revenues. Because plaintiffs failed to provide evidence from which a reasonable jury could conclude that defendants breached the contract when it failed to pay plaintiffs a portion of Whitefeather's revenues, the trial court erred when it denied defendants' motion for directed verdict on this particular claim.

However, plaintiffs did prove that the contract was designed to provide plaintiffs security from Republic changing the name of TBC's hauling operation and diverting Taymouth 2's landfill operations to Brent Run. Tri-County received a "part" of TBC under the contract when it received TBC's entire hauling operation, including its offices, personnel, phone number, and equipment. Therefore, Tri-County's operations became "subject to" the gross revenues provisions of the contract, and defendants breached the contract when they failed to pay plaintiffs royalties based on Tri-County's revenue.

Likewise, plaintiffs demonstrated how Republic shifted landfill operations from Taymouth 2 to Brent Run. Plaintiffs showed how Republic sent Taymouth 2's customers and contracts to its new Brent Run landfill while "mothballing" Taymouth 2 for later use.<sup>1</sup> Because this transfer was also "subject to" the gross revenue provision, plaintiffs presented evidence from which a reasonable jury could conclude that defendants owed plaintiffs royalties based on Brent Run's revenues. Similarly, plaintiffs demonstrated how Republic's transfer of equipment from Taymouth 2 to other Republic operations should have resulted in income to Taymouth 2 under the contract, so the trial court correctly denied defendants' motion for directed verdict on these claims.

While defendants also argue that plaintiffs failed to prove that the parties mutually intended the provisions to mean what plaintiffs claimed they meant, plaintiffs' argument is factually and legally flawed. Plaintiffs presented evidence from their negotiating attorney that both sides agreed on the purpose and form of the "transfer . . . in part" language. Plaintiffs were not required to demonstrate that both sides held the same subjective intent for placing the language in the contract. *Burkhardt v Bailey*, 260 Mich App 636, 655-656; 680 NW2d 453 (2004). Rather, they only needed to demonstrate that the parties objectively manifested their intent to provide a safeguard preventing defendants from evading royalty liability by shifting around all or portions of the companies within Republic's large corporate structure. *Id.* Plaintiffs successfully proved this objective manifestation of defendants' intent.

The trial court properly interpreted the liquidated damages provision as one that supplemented rather than replaced royalties, so defendants failed to demonstrate any error regarding the court's award of liquidated damages. See *E F Solomon v Dep't of State Highways & Transportation*, 131 Mich App 479, 483-484; 345 NW2d 717 (1984). Furthermore, the trial court did not abuse its discretion when it allowed plaintiffs to recover interest during a delay in proceedings, because defendants brought a motion for judgment notwithstanding the verdict near the end of the controversial delay, indicating that they had no intention of paying the judgment earlier.

In light of our determination that plaintiffs were not entitled to royalties or stock based on Whitefeather's operations or revenues, defendants' remaining claim and plaintiffs' cross-appeal are moot.

Affirmed in part, reversed in part, and remanded for a reduction of plaintiffs' award by the amount of the judgment attributable to royalties based on Whitefeather's revenues.

/s/ Richard Allen Griffin  
/s/ Henry William Saad  
/s/ Peter D. O'Connell

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<sup>1</sup> Of course, by preserving Taymouth 2 for use after July 2001, Republic could keep one hundred percent of the revenues generated by the remaining space in the landfill rather than pay plaintiffs royalties on those revenues.