COURT OF APPEALS DECISION DATED AND FILED

October 2, 2001

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.

No. 01-0748-FT

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

SHIRLEY A. BELISLE,

PLAINTIFF-RESPONDENT,

V.

PAUL A. BELISLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County: JAMES R. ERICKSON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Paul Belisle appeals a judgment of foreclosure entered in favor of his mother, Shirley Belisle.[1] He argues that the court

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1999-2000 version unless otherwise noted.

erroneously (1) applied the statute of frauds; (2) found that he was in default in making land contract payments; and (3) failed to credit payments he made on the contract. We reject his arguments and affirm the judgment.

Background

¶2 Shirley and her late husband, Austin, had eight children and owned a large amount of land in Polk County. One of their sons, Paul, worked on the family farm and feed mill between 1978 and 1996. In 1984, Paul entered into two land contracts to purchase from his parents approximately 300 acres, including the family "home farm," the feedmill, and some additional land. The purchase price was $196,700. The contracts required only annual interest payments and a balloon payment after five years.

¶3 Shirley testified at trial that Paul never paid any real estate taxes on the property or made any land contract payments. Between 1984 and 1999, Shirley, however, paid over $16,000 in insurance on the parcels subject to the land contract. In 1998, Shirley brought this action for foreclosure of the land contracts.[2] At the time of trial, $517,499.07 was owed on one contract and $318,918.90 was owed on the other.

¶4 Two siblings, John and Teresa, had also entered into land contracts with their parents. At trial, Shirley testified that she and her late husband used the land contracts as a kind of financial planning device to avoid the land being used as collateral when they refinanced bank loans. She further testified that there were

[2] Because her husband is deceased, Shirley is the sole owner of the vendor's interest in the land contract.

no oral agreements regarding payment of the land contracts. Neither Paul, John, nor Teresa took possession of the land identified in their respective contracts. Shirley stated that after the contracts were signed, she and her husband continued to use the land and run the feedmill just as before.

¶5 At trial, Paul contended that he understood, through conversations with his father, that the land contract payments would be made by an assignment to his parents of all his interest in a government farm program, as well as in rental payments received from the property.[3] Because these payments exceeded the required annual land contract obligation, he believed the land contract had been paid in full. Paul acknowledged that this alleged payment arrangement was not in writing.

¶6 The court held that Paul's theory called for a significant modification of the contract:

> The court concludes that one person is not entitled to modify a contract without the involvement of the other person when it relates to real estate and when it relates to significant modifications. And I don't know how I could come to a conclusion that it is not a modification when we are talking about setoffs from various and sundry sources of income. And then for the parties not to keep any records whatsoever, how can they expect a court to unscramble the scrambled eggs?
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> ….
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> I can't speculate as to … what the oral agreement is let alone find that Shirley Belisle is bound by it. There has to be a mutual modification, not a one-sided modification.

[3] The trial court sustained Shirley's objection to Paul's testimony regarding conversations with his deceased father, but permitted Paul to testify as to his "understanding." *See* WIS. STAT. § 885.16.

¶7 The trial court determined the alleged oral agreement regarding payment was not valid because it did not comport with the statute of frauds. It ruled that Paul defaulted under the terms of the written contract and entered judgment of foreclosure. The court ordered a three-month redemption period and concluded that Paul was entitled to reimbursement for certain improvements he made to the properties.

Standard of Review

¶8 Paul's argument presents questions of law and fact. The first issue requires us to interpret WIS. STAT. § 706.02, presenting a question of law we review independently. ***State v. Setagord***, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997). The second issue involves contract interpretation, also a question of law. ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991). If the terms of a contract are plain and unambiguous, we construe the contract as it stands. ***Id.***

¶9 The second and third issues require that we apply the terms of the contract to the facts as determined by the court. We do not reverse a court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). We defer to the trial court's findings of weight and credibility. ***Id.***

Discussion

1. Statute of Frauds

¶10 Paul argues that the trial court erroneously ruled that the alleged payment method substantially modified the contract and therefore needed to be in

writing to comply with WIS. STAT. § 706.02.[4] He contends that the method of payment is not a substantial modification of the contract. We disagree.

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[4] WISCONSIN STAT. § 706.02 provides:

> **(1)** Transactions under s. 706.001(1) shall not be valid unless evidenced by a conveyance that satisfies all of the following:
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> (a) Identifies the parties; and
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> (b) Identifies the land; and
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> (c) Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
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> (d) Is signed by or on behalf of each of the grantors; and
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> (e) Is signed by or on behalf of all parties, if a lease or contract to convey; and
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> (f) Is signed, or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead under s. 706.01(7) except conveyances between spouses, but on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage; and
>
> (g) Is delivered. Except under s. 706.09, a conveyance delivered upon a parol limitation or condition shall be subject thereto only if the issue arises in an action or proceeding commenced with 5 years following the date of such conditional delivery; however, when death or survival of a grantor is made such a limiting or conditioning circumstance, the conveyance shall be subject thereto only if the issue arises in an action or proceeding commenced within such 5-year period and commenced prior to such death.
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> **(2)** A conveyance may satisfy any of the foregoing requirements of this section:
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> (a) By specific reference, in a writing signed as required, to extrinsic writings in existence when the conveyance is executed; or

(continued)

¶11 A land contract conveys an interest in land and is not valid unless in writing. WIS. STAT. §§ 706.01(1) and 706.02(1). Generally, a modification to the payment terms of a land contract likewise falls within the statute of frauds and should be in writing. ***Bunbury v. Krauss***, 41 Wis. 2d 522, 531-32, 164 N.W.2d 473 (1969). An oral modification is not enforceable unless there exist extraneous factors that have the effect of satisfying the statute of frauds or of making its provisions inapplicable. ***Id.*** For example, "a memorandum in writing expressing the consideration, subscribed by the party to whom the sale is made, satisfies the statute." ***Id.*** at 532.

¶12 In an analogous context, our supreme court observed:

> [I]t is claimed that a contract within the statute of frauds can by an oral agreement be validly changed as to a material condition therein. This is not the law. … If that could be done it would practically nullify the statute of frauds, for if you had any contract in writing you could make an entirely different one by parol, using the written one as a basis of the change. The result would be that oral contracts preceded by a written one would be valid though quite different therefrom, while wholly oral contracts would be void.

Borkin v. Alexander, 26 Wis. 2d 432, 436, 132 N.W.2d 587 (1965) (citation omitted).

> (b) By physical annexation of several writings to one another, with the mutual consent of the parties; or
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> (c) By several writings which show expressly on their faces that they refer to the same transaction, and which the parties have mutually acknowledged by conduct or agreement as evidences of the transaction.

¶13 We agree with the trial court's conclusion that Paul's theory called for a significant modification of the land contracts. The contracts plainly call for annual interest payments with the entire remaining balance to be paid in a balloon payment at the end of five years. Paul's "understanding" of the gradual decline in balance through the accumulation of government program payments and rents is at odds with the contract's plain language. Equally inconsistent is his "understanding" that he would not be responsible for real estate taxes.[5] Because Paul's alleged oral agreement would have modified significant elements of the contract, the trial court correctly applied the statute of frauds.

¶14 Relying on ***Hopfensperger v. Bruehl***, 174 Wis. 426, 183 N.W. 171 (1921), however, Paul asserts that provisions related to payment need not be in writing to satisfy the statute of frauds. We conclude that Paul reads ***Hopfensperger*** too broadly. In that case, the parties entered into a written contract for the sale of a farm, its stock and tools. However, "the time for payment of the unpaid purchase money and the interest it should bear were not inserted." ***Id.*** at 430. The court allowed parol evidence of the time of payment and interest, holding: "It is manifest that the [oral] agreements … do not contradict or vary the

[5] Also, an oral agreement modifying a land contract by providing for procuring a loan from a third person and for payments on the loan in lieu of payments stipulated to in the contract was held void under the statute of frauds requiring performance within one year. ***Vaudreuil Lumber Co. v. Culbert***, 220 Wis. 267, 263 N.W. 637 (1935). Courts have taken the position that oral agreements to extend the time of payment provided for in contracts, if not to be performed within a year, are void under the section of the statute of frauds covering contracts not to be performed within that period. ***Id.*** Under WIS. STAT. § 241.02, "every agreement that by its terms is not to be performed within one year from the making thereof" is "void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith." This statute would render void the oral modification of the land contract Paul alleges here. The alleged oral agreement covering the amounts and times of payments on the land contract was not to be performed within one year. *See* ***Vaudreuil***. Paul does not address how to surmount this obstacle and our disposition renders it unnecessary to address.

agreements of the writing ….” It further emphasized that the parties' oral agreements "are in no way contradictory" to the written agreement. ***Id.*** This is the critical distinction.

¶15 Here, the written land contract contained provisions relating to the nature and time of payment. Paul's alleged oral modification contradicted the land contract's written terms concerning these elements. Paul's theory would allow a party to a written contract to make what amounts to an entirely different one by parol. Under the circumstances presented here, to hold that the oral agreement overrode the written one "would practically nullify the statute of frauds." ***Borkin***, 26 Wis. 2d at 436. As a result, we reject Paul's argument.

¶16 Paul also contends that to the extent the payment method is ambiguous, extrinsic evidence in the form of his testimony and exhibits is admissible to demonstrate the parties' intent. Whether a contract is ambiguous is a question of law. *See* ***Garriguenc v. Love***, 67 Wis. 2d 130, 133, 226 N.W.2d 414 (1975). A contract is ambiguous when it is fairly susceptible to more than one construction. ***Id.*** at 134-35. Here, the written contract's language is plain and unambiguous with respect to payment and, as a result, extrinsic evidence was unnecessary. In any event, it is evident that the court believed Shirley's testimony and, consequently, Paul's theory of recovery must be rejected.

¶17 Paul contends, nonetheless, that the parties' course of conduct evinces only one potential interpretation: that his parents accepted without objection the rental and government program payments in lieu of land contract payments. We are unpersuaded. Because the contract is unambiguous, it would be erroneous to look at the parties' conduct to determine intent. ***Marshall & Ilsley Bank v. Milwaukee Gear Co.***, 62 Wis. 2d 768, 777, 216 N.W.2d 1 (1974) (If there

is no ambiguity in contract, either in a literal sense or when applied to subject thereof, contract must speak for itself entirely unaided by extrinsic matters.).

2. Default of Payment

¶18 Next, Paul argues that he complied with all the terms of the land contracts and that the court erroneously found default. He contends that the contract does not require that payments be made in the form of check or cash. He claims that because he assigned to his parents the rights to government programs and rents, and allowed them to use his land and feedmill, he made contract payments. Paul points to a 1996 financial statement signed by his deceased father that indicated a declining land contract balance.

¶19 We are unpersuaded. There is no dispute that the contracts provide that the purchaser agreed "to pay" to the vendor a specified sum. Paul relies on ***Oneida County v. Tibbetts***, 125 Wis. 9, 12, 102 N.W. 897 (1905), for the proposition that the phrase "to pay" means to "transfer or deliver money or other agreed medium from the debtor to the creditor." He also cites ***Smith v. Wisconsin Dept. of Taxation***, 264 Wis. 389, 392, 59 N.W.2d 479 (1953), for its holding that "payment" means "giving something of value and its acceptance in satisfaction." Based on these holdings, he argues that because his parents accepted the assigned rights to government programs and rent payments, the court erred by finding that Paul defaulted.

¶20 While Paul correctly cites applicable legal authority, his argument neglects an important consideration. The court's findings with respect to his parents' acceptance of payment presents a factual issue. Shirley testified that she considered the government program payments and rentals as belonging to her and her husband, and that she and her husband never accepted these payments in lieu

of land contract payments. It is the trial court's function, not this court's, to resolve conflicts in the testimony and make credibility determinations. WIS. STAT. § 805.17(2).

¶21 Based upon the trial court's judgment, it is evident the court found Shirley's testimony more persuasive. The trial court's credibility assessment will not be overturned on appeal unless it is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Because the trial court, as the ultimate arbiter of credibility, is entitled to believe Shirley, its implicit finding that she and her husband did not accept government program and rental payments in lieu of land contract payments is sustained on appeal.

3. Credit for Payment

¶22 Finally, Paul argues that the trial court erred when it failed to reduce the balance owed under the land contract by the payments he made and failed to make other necessary findings. Here, Paul summarily combines three arguments: (1) the court failed to credit him for the amounts his parents received from Paul since 1984; (2) the court failed to rule on his "argument during summary judgment proceedings" that he is entitled to equitable relief under WIS. STAT. § 706.04; and (3) he is entitled to a new trial because justice has miscarried "for the numerous reasons discussed."

¶23 We summarily reject these arguments. First, the record establishes the court believed Shirley's testimony that Paul made no payments under the land contract and that the government program payments and rents were not accepted in lieu of land contract payments. Accordingly, the court's finding is not clearly erroneous. WIS. STAT. § 805.17(2).

¶24 As to Paul's second argument, we acknowledge that there may be "part performance" that will take the contract out of the statute of frauds. ***Bunbury***, 41 Wis. 2d at 532. A court may enforce a contract that does not comply with the statute if there has been part performance of the contract, or estoppel. ***Id.***; *see also* WIS. STAT. § 706.04.[6]

¶25 Paul's argument concedes, however, that he raised the WIS. STAT. § 706.04 argument during summary judgment proceedings, and did not renew it at trial. Our supreme court has consistently held that no error of the trial court is reviewable as a matter of right on appeal "without having given the trial court an opportunity to be apprized [sic] of and correct the error." ***Herkert v. Stauber***, 106 Wis. 2d 545, 560, 317 N.W.2d 834 (1982). "It is a fundamental principle of

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[6] WISCONSIN STAT.§ 706.04, providing for equitable relief, reads:

> A transaction which does not satisfy one or more of the requirements of s. 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the elements of the transaction are clearly and satisfactorily proved and, in addition:
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> ….
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> **(3)** The party against whom enforcement is sought is equitably estopped from asserting the deficiency. A party may be so estopped whenever, pursuant to the transaction and in good faith reliance thereon, the party claiming estoppel has changed his or her position to the party's substantial detriment under circumstances such that the detriment so incurred may not be effectively recovered otherwise than by enforcement of the transaction, and either:
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> (a) The grantee has been admitted into substantial possession or use of the premises or has been permitted to retain such possession or use after termination of a prior right thereto; or
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> (b) The detriment so incurred was incurred with the prior knowing consent or approval of the party sought to be estopped.

appellate review that issues must be preserved at the circuit court." ***State v. Huebner***, 2000 WI 59, 235 Wis. 2d 486, ¶10, 611 N.W.2d 727. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***Id.*** We conclude that bringing an issue before the court on a motion for summary judgment, but failing to raise the issue at trial, amounts to abandonment of the issue. Therefore, Paul has failed to preserve this argument for appellate review.[7]

¶26 Finally, we are unpersuaded that justice has miscarried. Based on Shirley's testimony, the court could perceive Paul's argument as essentially that he signed the land contract form and, therefore, is entitled to a large portion of his parents' estate without paying any money out of pocket. He conceded at trial that he himself made no payments to them. He offered no proof that his services were worth more than what he was paid for them. The record fails to support a new trial in the interest of justice.

By the Court.—Judgment affirmed.

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

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[7] In any case, Shirley's testimony illuminates why an equitable estoppel argument would not prevail. Shirley explained that after Paul dropped out of college, he moved back home where he received free room and board. Although he helped out on the farm and at the feedmill, she paid him a generous monthly salary for his labor. In addition, her husband allowed him to keep cattle free of charge, and retain the profits when he sold them. The court could infer that Paul was adequately compensated for his labor, incurred no detriment, and was not in possession of the premises, thereby failing to satisfy WIS. STAT. § 706.04.