COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1680 **Cir. Ct. No. 2006CV0136**

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

WILMA B. HOEM,

PLAINTIFF-APPELLANT,

V.

TOWN OF FRANKLIN AND AMERICAN ALTERNATIVE INSURANCE CORP.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

WAUSAU BUSINESS INSURANCE COMPANY, HOFFMAN CONSTRUCTION COMPANY AND SHORT-ELLIOTT-HENDRICKSON, INCORPORATED,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Jackson County: GERALD W. LAABS, Judge. *Reversed and cause remanded.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Wilma Hoem appeals from a summary judgment decision that dismissed her claims against the Town of Franklin and its insurer for breach of contract and conversion, as well as third-party claims the Town had brought against an engineering firm, a contractor, and another insurer. We reverse the trial court's decision for the reasons discussed below and remand the matter for trial.

STANDARD OF REVIEW

¶2 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23.

BACKGROUND

¶3 Consistent with our standard of review, the following factual summary views any disputed issues in the materials in the light most favorable to Hoem. The Town of Franklin decided to undertake an intersection reconstruction project that would involve leveling a hill on land belonging to Hoem. The Town entered into negotiations with Hoem to obtain an easement, rather than attempting to condemn the affected portion of her property.

¶4 Minutes from a town board meeting held on April 13, 2005, indicate that there was a lengthy discussion of the proposed easement, during which several agreements were reached. In exchange for the easement, the Town would purchase a used culvert and deliver it to Hoem's property, and would haul the excavated dirt (also variously referred to as shale, fill, or waste) from the road construction project to Hoem's property and dump it there. It would then be the sole responsibility of Hoem to find a place for all of the dirt, and to arrange for any bulldozing work she wanted done. Further discussions were to take place at a closed town board meeting.

¶5 At the closed meeting held June 7, 2005, Hoem reiterated her desire to use the excavated dirt for various projects on her properties, the first priority of which was to build up a barnyard used for her cattle on her home farm. Hoem did not specify all of her intended projects because she felt no need to itemize them, and none of the board members were concerned with what she did with the dirt. At least one board member felt that the Town's primary purpose was simply to get rid of the waste material from the road project in a location close to the construction site in order to minimize costs. At some point, however, someone mentioned that the Town would be interested in having any leftover dirt for its own future road projects. Hoem agreed that any dirt she had no use for could go to either the County or the Town. The minutes state that:

> The end settlement was that the dirt should go to the following sites in order till they have had their fill and then move to the next site in order:
>
> 1st Wilma's
>
> 2nd Jackson County (If the dirt was wanted by them)
>
> 3rd Town of Franklin (To be put behind Town Hall for future use)

Although the barnyard project was the only project Hoem had discussed in any detail at the closed meeting, the town clerk and two of the three board members agreed with Hoem's recollection that the oral agreement reached by the parties contained no limitation on how much dirt Hoem could have or what she could do with it. There was nothing in any of the minutes or deposition accounts of the town meetings to show that the parties ever discussed having multiple sites of delivery on Hoem's properties.

¶6 At the end of the meeting the parties agreed that the next step would be to finalize the easement and agreement in writing so that Hoem could make sure the wording was stated correctly. Rather than hiring lawyers, the parties agreed that someone from the project engineering firm, SEH, would draw up the easement. Daniel Gustafson of SEH relied on the minutes of the town meeting and his own recollections to draft an agreement, which was incorporated into the easement. The agreement stated in relevant part:

> 2. The excess fill material from the excavating will be deposited at a site selected by Wilma B. Hoem near her barn.
>
> 3. The excess fill material that is not required by Wilma B. Hoem can be used by the Jackson County Highway Department.
>
> 4. The excess fill material that is not required by the Jackson County Highway Department will be deposited at the Town of Franklin stockpile.
>
> ….
>
> 6. Wilma B. Hoem will be responsible for culvert and fill installation.

Thus, the written agreement specified a single site where fill was to be deposited on Hoem's property, but did not place any limitation on how much fill Hoem could have or what she could use it for. Rather, the written agreement simply

reiterated that Hoem was responsible for having the fill installed once it had been hauled to her property and deposited there. After reading the easement and incorporated agreement, Hoem signed it on June 24, 2005, without any discussion of the language relating to the deposit of the fill near her barn. She explained that she did not believe the written agreement altered the contract she had negotiated with the town board, even if she felt it did not state everything they had discussed.

¶7 After the easement and agreement had been signed, the Town bid the project out to Hoffman Construction Company. SEH again drew up the contract. The special provision section of the construction contract provided in relevant part:

> 3.02 WASTE
>
> ….
>
> B. Waste excavation and excess topsoil from the job site shall be deposited at a site near the barn at the home of Wilma B. Hoem. Wilma B. Hoem is responsible for the material grading onsite. Contractor is responsible for material dumping material [sic] at the Hoem site only.
>
> C. Excess waste material will be trucked to a site along CTH C for slope fill. Distance to dump site will not exceed 1 mile. Contact the Jackson County Highway Department for locations.
>
> D. Excess waste material that is not needed by Wilma B. Hoem and the Jackson County Highway Department will be hauled to the Town of Franklin stockpile at the Town Hall or to the Town of Franklin waste site.

¶8 Consistent with her responsibility for installing or grading the fill once it was deposited on her property, Hoem entered into a side agreement with Hoffman Construction to do the bulldozing work on her barnyard area.

¶9 On the first day of the road project, Hoffman Construction and its subcontractors installed a culvert on Hoem's property and hauled all of the excavated material from the construction site to Hoem's home farm, near her barn, without charge. Pursuant to their side agreement, Hoffman Construction also leveled the fill over Hoem's barnyard and billed her for that work. Hoem indicated that she was generally pleased with the grading work done in the barnyard.

¶10 Meanwhile, it quickly became apparent that SEH had miscalculated the amount of fill to be excavated. There turned out to be more than double the cubic yardage of dirt than had been estimated in the construction contract. Consistent with DOT regulations incorporated into the contract and standard industry procedure, Paul Hoffman and Gustafson both understood it to be the contractor's responsibility to dispose of any excess waste from the excavation site not otherwise accounted for in the contract. In anticipation of having an overrun of material, Paul Hoffman made arrangements for fill to be taken to his own property and that of two other private landowners, all of whom paid Hoffman Construction for transportation and bulldozing costs, but not the fill material itself.

¶11 On the second day of the road project, Hoem observed truckloads of fill being taken to Paul Hoffman's private property and laid out on roads, when it did not appear to her that any fill had yet been taken to the Town site. Hoem was very upset about this because she wanted a number of additional projects done on her farms, and over the next few days she questioned Hoffman Construction foreman Jeff Rubin, as well as SEH employees Gustafson and Tom Harding, about why fill was going to Paul Hoffman's property when she had not yet gotten all the fill she wanted. Rubin told Hoem that she had gotten all the fill she was entitled to once the barnyard was completed; Gustafson told her it was not in the agreement

to have the fill all piled up or stockpiled on her land, only to fill the barnyard; and Harding told her that the contractor had fulfilled her portion of the contract, and that once the Town was satisfied, the rest of the fill belonged to Hoffman Construction to dispose of as it wished.

¶12 In response to Hoem's continued requests for more fill and to have additional projects done, Hoffman Construction eventually used additional excavation material to put down a road to one of her pastures and fill in some ravine areas. However, it refused to fill in some corral and pasture areas on her second farm due to logistical concerns with getting the trucks in there. Hoffman Construction charged Hoem for the transportation costs of the extra loads, as well as for the additional work it performed, just as it did for Paul Hoffman and the other private property owners.

¶13 By the end of the construction project, there had been 374 loads of fill hauled to Hoem; 254 loads hauled to Paul Hoffman's property; 221 loads hauled to the Town; and 27 loads hauled to two other third parties. Hoem sued the Town to receive compensation for the 502 loads of fill she did not receive. The trial court dismissed the suit, reasoning that the recorded agreement was unambiguous regarding where the fill was to be placed on Hoem's land, and that the summary judgment materials demonstrated that Hoffman Construction and its contractors had satisfied the Town's obligation by filling and leveling Hoem's barnyard.

DISCUSSION

¶14 The first several issues Hoem raises on appeal relate to whether the terms of the contract are controlled by the oral agreement reached by the parties at the June 7 meeting and documented in the minutes as the "end settlement," or by

the written version of the agreement recorded with the easement on June 24. More specifically, Hoem offers several theories to challenge the provision in the written agreement that the excavated fill material was to be "deposited at a site selected by Wilma B. Hoem near her barn." She asserts that the parties' oral agreement simply required fill to be taken "to Wilma's" and did not place any explicit limitation on the location or locations at which the fill was to be deposited on her property. From there she argues that an oral agreement to the effect that the fill could be placed anywhere on her land that she directed should be integrated into the written contract through parole evidence, or that the contract should be reformed to reflect the parties' true understanding.

¶15 The "parole evidence rule" generally provides that extrinsic evidence of the negotiations or prior agreements of the parties to a written contract may be admitted only to explain any ambiguities in the final written document, and not to contradict any unambiguous terms therein. ***Marshall & Ilsley Bank v. Milwaukee Gear Co.***, 62 Wis. 2d 768, 777, 216 N.W.2d 1 (1974). This rule applies only when the parties intended the written contract to be a final integration of their entire prior agreement; if only part of the agreement was reduced to writing, the doctrine of partial integration will allow the introduction of parole evidence to establish additional parts of an agreement that do not conflict with the part that has been reduced to writing. ***Federal Deposit Ins. Corp. v. First Mortgage Investors***, 76 Wis. 2d 151, 157, 250 N.W.2d 362 (1977).

¶16 Hoem first argues that she should be allowed to present parole evidence supporting her assertion that the parties did not intend to limit the placement of fill on her property because the written agreement attached to the easement was not the only or the entire agreement between the parties. However, the notations in the June 7 minutes that the parties' agreement was still to be

"finalized" and that the final wording needed to be approved by Hoem plainly show that the parties intended the written document attached to the easement to be the final integration of their entire agreement. In other words, there were negotiations leading to a proposed agreement, leading to a final integrated written contract. The actual terms of the contract were not set until Hoem approved the language and signed the easement with the attached agreement. Thus, the oral "end settlement" reached on June 7 was neither a separate contract from the June 24 written agreement nor an additional agreement intended to supplement or be integrated into the written document. Moreover, even assuming for the sake of argument that there had been some additional parts of the oral agreement made at the meeting that did not get fully integrated into the contract, the parole evidence rule would still prohibit the admission of any evidence that actually conflicted with the written provision that the fill material was to be delivered to a site specified by Hoem near her barn.

¶17 Hoem also contends that she should be allowed to present parole evidence about the parties' intentions for placement of the fill on her property because the written agreement was ambiguous in that regard. Specifically, she reasons that the reference to a site "near her barn" was ambiguous because she had two barns on two different farms. The provision was unambiguous, however, in stating that fill was to be taken to "a site," not multiple sites. Since the agreement allowed Hoem to specify where that site was, it did not matter which barn she chose to have the fill placed near. In other words, the provision was not ambiguous; it was simply somewhat flexible with respect to what site Hoem would choose.

¶18 Assuming that the written document was in fact intended to be an integration of the parties' entire agreement and was unambiguous in limiting the

placement of fill to a single site, Hoem argues in the alternative that the written agreement should be reformed pursuant to the doctrine of mutual mistake. Reformation is an equitable remedy which is available when a written document fails to accurately express the parties' actual agreement due to a mutual mistake or mistake by one party coupled with fraud by the other. ***Russ ex rel. Schwartz v. Russ***, 2007 WI 83, ¶37, 302 Wis. 2d 264, 734 N.W.2d 874. Contrary to Hoem's assertions, however, we do not see anything in the minutes or the depositions that actually conflicts with the language of the written agreement or shows that there was an agreement for placement of the fill at multiple sites on Hoem's property. To the contrary, delivery of the fill material to a single site on Hoem's farm appears to be entirely consistent with the negotiations that Hoem would be responsible for placing and leveling the fill once it was on her land, no matter how many projects she intended to use it for, because the Town was looking for the most efficient way to dispose of the waste from the road project. If Hoem had an expectation that she could have the fill delivered to multiple sites, that would have been at most a unilateral mistake because there is simply nothing in the summary judgment materials to show that the Town shared that understanding.

¶19 Finally, Hoem argues that, even if she were limited to having fill placed at only one site on her property near her barn, there is still a material factual dispute regarding whether that agreement was breached. On this point we agree with Hoem.

¶20 The trial court focused on the undisputed evidence that Hoem had indicated satisfaction with the bulldozing work performed in her barnyard. However, Hoem's satisfaction with the grading work done in her barnyard went to her side contract with Hoffman Construction, not to her agreement with the Town to receive all of the fill that she wanted to have delivered near her barn.

¶21 Hoem testified that she had a problem with taking fill to the town hall because they had not finished at her place, and that she never told Hoffman Construction employees that the rest of the material could go to the Town. She felt she could have stockpiled it if there was no machinery available to do her other projects. She said she specifically told foreman Jeffrey Rubin that she wanted all of the material. She also questioned Gustafson and Harding from SEH as to why she was not getting all of the fill she wanted.

¶22 Rubin acknowledged that Hoem told him that she wanted more fill as well as extra projects done. He said he attempted to comply with her requests, some of which he believed were above and beyond the contract, but was unable to put material in some of the places she was asking due to logistical difficulties.

¶23 Hoffman testified that it was his understanding that Hoem was entitled to only enough material to fill in her barnyard. He also said he did not believe there was any way to get more fill into the barnyard area than was actually delivered. He said he agreed to provide additional material to Hoem above and beyond what he believed was called for in the contract due to the overrun of material. He also acknowledged that Hoem had never told him that she was satisfied with the amount of fill she had received.

¶24 Ron Overlien, the area manager for Hoffman Construction, also testified that he believed the contract required Hoem to get only enough fill for her barnyard area. When he learned there was a lot more fill than anticipated in the contract, he requested clarification as to who it belonged to and where it should go. Hoffman told him he did not believe it was Hoem's. Overlien testified that Hoem never told him personally that she was satisfied with the amount of fill she had received.

¶25 SEH employee Gustafson testified that when Hoem called him to complain about not getting enough fill, he asked her whether her culvert had been installed and barnyard had been completed. When she said yes, he told her that anything else Hoffman was doing was above and beyond what they were supposed to do. When she told him she wanted the material piled up on her land, he told her that was not in the agreement.

¶26 SEH employee Tom Harding testified that when Hoem spoke to him about getting more fill, he directed her to Paul Hoffman because he believed her portion of the contract had been fulfilled once her barnyard was completed and Hoffman Construction owned any excess material to be disposed of.

¶27 In short, there is evidence in the summary judgment materials to show that, in addition to asking to have dirt placed at multiple locations and to have additional projects performed—which she was not entitled to have done—Hoem was *also* asking to have all of the excavated dirt stockpiled at her farm and she never indicated that she was satisfied with the amount of fill she had received. There is also evidence in the summary judgment materials to suggest that everyone from both Hoffman Construction and SEH was operating under the mistaken view that Hoem was limited to receiving only enough material to fill in her barnyard and that they refused to provide more fill near her barn once the grading work had been done in the barnyard to Hoem's satisfaction.

¶28 We conclude that there are material facts in dispute regarding whether the Town allowed its contractor to refuse to provide Hoem a stockpile near her barn of all of the fill that she required. Accordingly, we reverse the summary judgment decision of the trial court and remand this matter for trial.

By the Court.—Judgment reversed and cause remanded.

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