COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1412 **Cir. Ct. No. 2010CV639**

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

VILLAGE OF WESTON,

PLAINTIFF-RESPONDENT,

V.

VILLAGE OF ROTHSCHILD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: JILL N. FALSTAD, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PETERSON, J. This case involves the interpretation of an agreement that the Village of Rothschild and the Village of Weston entered into in

1993 to settle a dispute over Rothschild's annexation of property from Weston, including the site of a power plant operated by Wisconsin Public Service (WPS).[1] Under the agreement, Rothschild agreed to pay Weston a percentage of the "power plant revenue" it received from the state each year until 2025. Rothschild argues that the term "power plant revenue" only includes revenue from the three units of the power plant that were in existence in 1993. Weston argues the term also includes revenue from a fourth unit on the same site, which WPS added in 2008. The circuit court concluded the term "power plant revenue" unambiguously encompassed revenue from all four units of the power plant, and it therefore granted summary judgment in favor of Weston. We agree with the circuit court's analysis and affirm.

BACKGROUND

¶2 In 1992, Rothschild annexed certain property from Weston, including the WPS power plant site. At that time, the power plant consisted of three electric generating units—Units 1, 2, and 3. Weston filed five lawsuits opposing the annexation. Among other things, Weston alleged that, before the annexation, it received $700,000 per year in shared revenue from the state for the power plant property—revenue that would go to Rothschild instead if the annexation were permitted.

¶3 On August 12, 1993, Rothschild and Weston entered into a settlement agreement. Under the agreement, Weston consented to the dismissal of

[1] The settlement agreement was actually between the Village of Rothschild and the *Town* of Weston, which was not incorporated as a village until 1996. It is undisputed that the Village of Weston is the successor corporation to the Town of Weston for purposes of enforcing the settlement agreement.

its lawsuits against Rothschild. In exchange, Rothschild agreed to pay Weston a percentage of the "power plant revenue" it received from the state each year until 2025. Specifically, section 3 of the agreement provided:

> **3. PAYMENTS**
>
> A. [Rothschild] shall pay to [Weston] a partial sum based on [Rothschild's] portion of State special utility shared revenues paid [to Rothschild] for the Wisconsin Public Service electric power plant located in Sections 34 and 35 of Township 28 North, Range 7 East in the Village of Rothschild (hereinafter referred to as "POWER PLANT REVENUE"). The sum paid [to Weston] shall be based upon the following schedule:
>
> (1) Thirty-five percent (35%) of POWER PLANT REVENUE for a period of twelve (12) years commencing with payments in 1993;
>
> (2) Commencing in the year 2005, twenty-five percent (25%) of POWER PLANT REVENUE for a period of ten (10) years; and
>
> (3) Commencing in the year 2015, ten percent (10%) of POWER PLANT REVENUE for a period of ten (10) years.
>
> (4) With the payment in 2025, no further POWER PLANT REVENUE shall be paid [to Weston].

Rothschild's payments to Weston were due within fifteen days after Rothschild received a payment from the state. "Any late payments [accrued] interest at a rate of one percent (1%) per month (12% A.P.R.) from the payment due date."

¶4 In 2008, WPS completed construction of a fourth electric generating unit—Unit 4—at the power plant site. In 2009, the state paid Rothschild $993,926.25 in shared revenue. Instead of paying Weston twenty-five percent of this amount, or $248,481.56, Rothschild paid Weston only $134,767.73. On April 28, 2010, Weston filed this lawsuit, alleging that Rothschild breached the settlement agreement by failing to pay Weston twenty-five percent of the "power

plant revenue" it received from the state in 2009. Weston sought the remaining balance of the twenty-five percent, or $113,713.83, plus interest on that amount computed at a rate of one percent per month. Rothschild denied that it had breached the settlement agreement and counterclaimed, alleging it had actually overpaid Weston by $5,995.20 in 2009.

¶5 Both parties moved for summary judgment. Rothschild argued it had not breached the settlement agreement because it paid Weston twenty-five percent of the shared revenue it received for Units 1, 2, and 3 of the power plant—those units that were in existence at the time the settlement agreement was executed. Rothschild argued that, because Unit 4 was not completed until fifteen years after the settlement agreement was signed, Weston was not entitled to any portion of the shared revenue attributable to Unit 4. Rothschild conceded the settlement agreement's payment provision was "arguably ambiguous" as to whether Weston was entitled to any shared revenue from Unit 4. However, Rothschild argued the facts and circumstances surrounding the agreement illustrated it was not intended to encompass revenue generated by "later improvements" to the power plant site.

¶6 In contrast, Weston argued the settlement agreement was clear on its face. Weston pointed out that the agreement required Rothschild to pay Weston a percentage of Rothschild's "power plant revenue," which the agreement defined as "[Rothschild's] portion of State special utility shared revenues … for *the Wisconsin Public Service electric power plant* located in Sections 34 and 35 of Township 28 North, Range 7 East[.]" (Emphasis added.) Weston argued that, using this definition, the term "power plant revenue" unambiguously included the shared revenue generated by the entire power plant facility, not just the three units that existed in 1993.

¶7 The circuit court agreed with Weston, concluding the settlement agreement was unambiguous and "could only have referred to the entire facility, and not its individual units, when it said 'the [Wisconsin Public Service electric] power plant.'" The court reasoned that the agreement's use of the singular term "power plant" indicated the parties intended to refer to the entire power plant facility, not specific units within that facility. The court concluded, "[T]he intention of the parties, as memorialized in the settlement agreement, was that Rothschild would pay Weston a percentage of the revenue it received for the power plant facility as a whole." The court therefore granted summary judgment in favor of Weston.

DISCUSSION

¶8 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Novell v. Migliaccio***, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. 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. WIS. STAT. § 802.08(2).[2] The summary judgment in this case turns on the interpretation of the settlement agreement, which Rothschild alleges is ambiguous. "Contract interpretation and whether a contract is ambiguous are both questions of law we review de novo." ***Huml v. Vlazny***, 2006 WI 87, ¶13, 293 Wis. 2d 169, 716 N.W.2d 807.

¶9 Rothschild contends the circuit court erred by granting summary judgment in favor of Weston because: (1) the settlement agreement is ambiguous

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

and does not clearly require Rothschild to pay Weston any shared revenue generated by Unit 4; (2) the parties never formed a contract regarding future improvements to the power plant site; and (3) the court improperly dismissed Rothschild's counterclaim. We address and reject these arguments in turn.

I. The circuit court properly concluded section 3 was unambiguous.

¶10 Rothschild first contends the settlement agreement is ambiguous with respect to whether the term "power plant revenue" includes revenue from Unit 4. When we interpret a contract, our primary goal is to give effect to the parties' intentions. ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476. "[T]he best indication of the parties' intent is the language of the contract itself[.]" ***Id.*** Thus, we construe contract language according to its plain or ordinary meaning, and "[i]f the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence." ***Huml***, 293 Wis. 2d 169, ¶52. A contract is ambiguous if it is susceptible to more than one reasonable interpretation. ***Town Bank***, 330 Wis. 2d 340, ¶33.

¶11 Here, the only reasonable interpretation of the agreement is that it requires Rothschild to pay Weston a portion of the shared revenue Rothschild receives for the entire power plant facility, not just for Units 1, 2, and 3. The agreement states that Rothschild must pay Weston a percentage of Rothschild's "power plant revenue." The term "power plant revenue" is defined as "[Rothschild's] portion of State special utility shared revenues paid [to Rothschild] for *the Wisconsin Public Service electric power plant* located in Sections 34 and 35 of Township 28 North, Range 7 East[.]" (Emphasis added.) We agree with the circuit court that, by using the singular term "the … power plant," the agreement

unambiguously refers to the entire power plant facility, rather than specific generating units within that facility.

¶12 Nowhere in the settlement agreement is the number of generating units mentioned or identified. While Rothschild argues on appeal that the agreement only applies to shared revenue generated by "the original units," the term "original units" does not appear in the settlement agreement. In fact, looking at the settlement agreement alone, one would have no idea how many units existed in 1993. The agreement merely states, without limitation, that Rothschild must pay Weston a percentage of the shared revenue generated by "the Wisconsin Public Service electric power plant[.]" Rothschild's attempt to limit this broad language to certain generating units on the property is not a reasonable interpretation of the contract. It is of no import that Unit 4 did not exist in 1993 when the parties executed the settlement agreement. As the circuit court noted, by referring broadly to "the … power plant," the agreement "referred to something that was then in existence: the facility as a whole. It existed then and it still does—it has simply grown." Thus, under the settlement agreement's plain language, Rothschild's "power plant revenue" includes the shared revenue Rothschild receives from the state for the entire power plant facility, not just the units that existed in 1993.

¶13 Rothschild's interpretation—that the term "power plant revenue" only includes revenue generated by Units 1, 2, and 3—would lead to an absurd result. Under Rothschild's interpretation, if WPS were to close Unit 1 during the contract term, the facility as a whole would produce less revenue, Rothschild would receive less money from the state, and, in turn, Rothschild would owe Weston less. However, the converse is not true under Rothschild's interpretation. That is, if WPS added a new unit, the facility as a whole would produce more

revenue, and Rothschild would receive more money from the state, but there would be no corresponding increase in Weston's payment. It makes no sense to construe the settlement agreement to permit a decrease in Weston's payment if WPS closes an existing unit but to disallow an increase if WPS opens a new unit. We must interpret contracts reasonably, so as to avoid absurd results. *See* ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶62, 319 Wis. 2d 274, 767 N.W.2d 898.

¶14 Additionally, Rothschild concedes that, "if Unit 3 gains a new piece of technology and subsequently produces more revenue," Weston will be entitled to additional revenue under the settlement agreement. Rothschild does not articulate a persuasive reason to treat revenue-increasing improvements to Unit 3 differently from the construction of Unit 4, which also increased the power plant's overall revenue. Rothschild argues the distinction between improvements to Unit 3 and the construction of Unit 4 is justified because "Weston contracted to receive shared revenue from Unit 3" but "did not contract to receive shared revenue from Unit 4." However, as we have already explained, based on the plain language of the settlement agreement, Weston contracted to receive shared revenue from the entire power plant facility, not from specific generating units. *See supra*, ¶¶11-12.

¶15 Rothschild's interpretation is also unreasonable because it would require an additional calculation not contemplated by the settlement agreement. The agreement anticipates that Rothschild will receive two "power plant revenue" payments from the state each year, the first in July and the second in November. The agreement provides that, during the years 2005 through 2014, Rothschild must pay Weston twenty-five percent of the "power plant revenue" it receives. Thus, the agreement simply requires Rothschild to calculate twenty-five percent of each "power plant revenue" payment and to pay that amount to Weston.

However, under Rothschild's interpretation, Rothschild would also have to calculate how much of each payment from the state was attributable to Unit 4, so that it could subtract that amount from the total amount it received. This additional calculation is inconsistent with the simple, percentage-based payment scheme outlined in the settlement agreement.

¶16 In support of its interpretation, Rothschild argues that, if the parties had intended the settlement agreement to encompass revenue generated by "future improvements" to the power plant site, the agreement would have mentioned "future improvements." We disagree. The agreement required Rothschild to pay Weston a percentage of the "power plant revenue" generated by "the … power plant." The term "the … power plant" clearly refers to the entire power plant facility, whether that facility consists of three units or four. The agreement did not need to refer specifically to "future improvements."

¶17 Rothschild also suggests that, even if the settlement agreement is clear on its face, an extrinsic ambiguity exists. While an intrinsic ambiguity "'is present when from just reading the contract it is apparent that the contract is unclear,'" an extrinsic ambiguity exists when "'although the contract is clear at the semantic or literal level, anyone who knew something about the subject matter would realize that the contract probably did not mean what it said.'" ***Mews v. Beaster***, 2005 WI App 53, ¶9, 279 Wis. 2d 507, 694 N.W.2d 476 (quoting ***United States v. National Steel Corp.***, 75 F.3d 1146, 1149 (7th Cir. 1996)).

¶18 Rothschild does not clearly identify any extrinsic ambiguity with respect to the settlement agreement. As far as we can discern, Rothschild suggests an extrinsic ambiguity exists because the agreement refers to "the … power plant," but in 1993 the power plant only contained three units, not four. Thus, Rothschild

argues the parties could not possibly have intended the agreement to encompass revenue generated by Unit 4. However, as we have already explained, the number of units that existed in 1993 is irrelevant, given that the agreement clearly defined "power plant revenue" as including the revenue generated by the entire power plant facility. Moreover, the agreement provided for Rothschild to make payments over the course of thirty-two years. The parties must have anticipated that the power plant's capacity would change during the contract's thirty-two-year term, and any belief to the contrary would have been unreasonable. This was not a contract for the year 1993 alone—it was a thirty-two-year contract. That the facility now contains one more unit than it did in 1993 does not constitute an extrinsic ambiguity.

¶19 Rothschild next contends that, when interpreting the settlement agreement, the circuit court failed to distinguish between "extrinsic evidence, which cannot be admitted absent ambiguity, and objective circumstances surrounding the formation of [the] contract, which must be considered to make sense out of any contract." However, the circuit court concluded the objective circumstances surrounding the settlement agreement's formation were consistent with the agreement's plain language, stating:

> Tying the payments to the revenue of the power plant facility as a whole makes sense because the settlement agreement resolved Weston's attack on the annexation of the power plant property. If Weston had pursued that challenge and succeeded, it would now be collecting all of the State shared revenue—for the entire facility, not just the portions that existed in 1993. At the time of the agreement, Weston unit 3 was about 12 years old; it was not unreasonable to expect that at least one more unit might be added sometime during the 32-year lifespan of the payment provision. Tying the payment calculation to the revenue generated by the facility as a whole was a more accurate reflection of what Weston was giving up by compromising its claim.

> Moreover, tying the payments to the revenue from the facility as a whole removes the need to create an extra-contractual means of calculating how much of the shared revenue payment from the State was attributable to units 1-3 and how much was attributable to unit 4. The plain terms of the contract simply call for a percentage of the utility shared revenue payment paid to Rothschild for the Weston Power Plant facility; no other calculations are necessary.

Thus, the circuit court did not err by failing to consider the objective circumstances surrounding the settlement agreement's formation. Instead, the court considered both the contract language and the objective circumstances and properly determined that the agreement was unambiguous.

II. The settlement agreement is an enforceable contract regarding "future improvements" to the power plant site.

¶20 Rothschild next argues that the settlement agreement does not constitute an enforceable contract on the subject of "future improvements" to the power plant site because: (1) the parties did not manifest "mutual assent" that the agreement would apply to future improvements; (2) Weston did not bargain for the inclusion of future improvements; and (3) the agreement's treatment of future improvements is too indefinite to be enforceable. However, as Weston points out, Rothschild did not raise these arguments in the circuit court.[3] Accordingly, Weston argues Rothschild has forfeited these arguments. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for first time on appeal generally deemed forfeited). Rothschild fails to respond to Weston's forfeiture argument, and we therefore deem the point conceded. *See* ***Charolais***

[3] Our review of Rothschild's summary judgment briefs confirms Rothschild did not ask the circuit court to strike down the agreement as unenforceable because of a lack of mutual assent, the absence of a bargained-for exchange, or indefiniteness.

Breeding Ranches, Ltd. v. FPC Secs. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶21 Moreover, we agree with Weston that Rothschild's arguments fail based on the plain language of the settlement agreement. Rothschild contends that, because Unit 4 did not exist in 1993, the parties could not possibly have agreed to share the revenue generated by Unit 4. Rothschild asks, "[W]hen did Rothschild manifest an intention to share revenues resulting from future improvements like Unit 4?" We agree with Weston that Rothschild manifested this intention when it consented to pay Weston a yearly share of the "power plant revenue" generated by "the … power plant," which clearly refers to the entire power plant facility, not specific units within that facility. In other words, the plain language of the agreement indicates that Weston bargained for—and received—Rothschild's agreement to share revenue generated by the facility as a whole, not just the units that existed in 1993. Furthermore, we are not persuaded that the agreement's treatment of future improvements is too indefinite to be enforceable. Rothschild clearly agreed to pay Weston a percentage of the total power plant revenue, regardless of whether that revenue was generated by three units or four. Consequently, we reject Rothschild's argument that the settlement agreement is not an enforceable contract regarding "future improvements" to the power plant site.

III. The circuit court properly dismissed Rothschild's counterclaim.

¶22 Rothschild next argues the circuit court erred by dismissing its counterclaim against Weston. The counterclaim alleged that Rothschild used a "book value formula" to calculate Weston's share of the power plant revenue in 2009, but it actually should have used a "capacity formula." Rothschild alleges

that, because it used the wrong formula, it overpaid Weston by $5,995.20. Because the circuit court failed to take this alleged overpayment into consideration when it entered judgment in favor of Weston, Rothschild contends the court erred.

¶23 However, Rothschild does not explain why either a "book value formula" or a "capacity formula" is relevant to the calculation of Weston's share of the power plant revenue. The settlement agreement set forth a simple, percentage-based calculation, under which Rothschild was required to pay Weston twenty-five percent of the "power plant revenue" it received from the state in 2009. As the circuit court noted, Rothschild did not dispute that the state paid it $993,926.25 in 2009. Accordingly, the court concluded the settlement agreement required Rothschild to pay Weston twenty-five percent of that amount, or $248,481.56. Because Rothschild had already paid Weston $134,767.73, the court determined Rothschild still owed Weston $113,713.83, plus interest. The court's calculations comport with the terms of the settlement agreement, and the court properly dismissed Rothschild's counterclaim.

By the Court.—Judgment affirmed.

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