STATE OF MICHIGAN

COURT OF APPEALS

BURTCHVILLE TOWNSHIP,

Plaintiff-Appellee,

v

NOEL BUCKNER, d/b/a INDIAN TRAILS NORTH,

Defendant-Appellant,

and

FORT GRATIOT TOWNSHIP,

Defendant,

and

ST. CLAIR COUNTY,

Defendant/Counterplaintiff.

UNPUBLISHED
March 10, 2000

No. 209178
St. Clair Circuit Court
LC No. 97-00014- CK

Before: White, P.J., and Hood and Jansen, JJ.

HOOD, J. (dissenting).

I respectfully dissent from the majority's conclusion that a contractual agreement was not reached between the parties.

In the present case, defendant was unable to provide a sufficient water supply to the residents of its mobile home park from wells. In order to remedy the problem, Noel Buckner and his attorney, Milton Bush, Jr., negotiated with plaintiff's representatives. While an agreement was not executed between plaintiff and defendant, plaintiff's board executed a resolution which authorized defendant to obtain water from a neighboring source. However, plaintiff asserted that the authorization was

temporary. That is, defendant agreed to connect to the water system of plaintiff upon its construction. The resolution does not unambiguously state that defendant must connect to plaintiff's system upon its completion, but rather, provides that plaintiff has the right to "cause" defendant to be included in any water supply district established by plaintiff. In *Alcona County v Freer*, 311 Mich 131, 142; 18 NW2d 399 (1945), the Supreme Court held that municipalities must keep records of their official action and the policy of the law would be defeated by allowing officials to rely on parol evidence. However, there are exceptions to the general rule. Parol evidence may be considered in disputes involving municipalities to aid the record of official action where the same is ambiguous or where entries have been omitted. *North Star Twp v Cowdry*, 212 Mich 7, 15; 179 NW 259 (1920). The ambiguity in the language of the resolution required the consideration of parol evidence. *Id.* Parol evidence is permitted when the document purporting to express the parties' intent is incomplete. *In re Skotzke Estate*, 216 Mich App 247, 252; 548 NW2d 695 (1996). The testimony of township officials does not contradict the writing, but explains the intent of the parties where the terms of the resolution are ambiguous. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998). Accordingly, I would hold that the trial court did not err in its admission and reliance upon parol evidence.

Defendant also argued that even if parol evidence was considered, the testimony of Loyall Watson, John Perry, and Noel Buckner and documentary evidence executed in order for defendant to obtain a water supply failed to establish an "agreement." I disagree. Loyall Watson served as plaintiff's legal counsel at the time of the negotiations and subsequent enactment of the resolution which allowed defendant to obtain water from an outside source. Watson specifically testified that the parties did not intend that defendant would be permitted to maintain a connection to Fort Gratiot Township once plaintiff had an operational water supply system. While defendant contends that Watson testified that he had "no independent memory of this at all," it appears that defendant has taken this statement out of context. Review of the deposition testimony reveals that Watson was referring to his recollection of who drafted two unexecuted resolutions in 1980, and not the parties' transaction as a whole.

Furthermore, defendant ignores the testimony of James Brown, which was relied upon by the trial court in concluding that defendant was compelled to tap into plaintiff's water system upon its completion. Brown, plaintiff's township supervisor in 1980, testified that the plain language of the resolution as well as his understanding of the parties' negotiations required that defendant "hook up" to plaintiff's water system once it became operational. The trial court found that this testimony was credible. This Court gives special deference to the trial court's findings where they are based on the credibility of witnesses. *In re Pott*, 234 Mich App 369, 377; 593 NW2d 685 (1999).

Defendant contends that Buckner testified that an agreement was never reached which would have required the mobile home park to join any water system created by plaintiff and that the trial court "did not make a finding that Buckner was not credible." While there was no express statement in the opinion addressing Buckner's credibility, by rejecting Buckner's version of events, essentially, the trial court concluded that he was not credible. Furthermore, at trial, Buckner was asked if Brown was a liar because of his testimony that Buckner had agreed to join plaintiff's water system upon completion. Buckner responded that Brown was a good man and a deal "may" have been reached conditioned

upon the price of connection. Furthermore, at the hearing regarding defendant's motion for a stay pending appeal, the trial court indicated that defendant had agreed to join plaintiff's water system and could no longer *avoid* the cost of the "tap-in" fee. While review of a declaratory judgment is de novo, the trial court's factual findings will not be reversed unless they are clearly erroneous. *Auto-Owners Ins v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). The trial court's factual findings were premised upon the credibility of the witnesses, and I cannot conclude that the factual findings were clearly erroneous.

While the majority concludes that the practical implications of requiring defendant to connect to plaintiff's water system is a cost of between $600,000 and $800,000, the final accounting has yet to be determined. In addition to this litigation, proceedings were filed before the Tax Tribunal. In an order denying plaintiff's motion for summary disposition, the Tax Tribunal took exclusive jurisdiction of the issue of the special assessment for water services. In that order, the Tax Tribunal noted that the apportioned amount of $598,775 to defendant consisted of $34,400 for the special assessment and $564,375 for the "tap-in" charge. The Tax Tribunal also found that the "tap-in" fee was within its exclusive jurisdiction because it was an exercise of plaintiff's power to apportion special assessment costs. At oral argument, the parties represented that the Tax Tribunal proceeding was held in abeyance pending a decision from this Court. Accordingly, it appears that while the parties have obtained a final judgment regarding the merits of any agreement to join in plaintiff's water system, the costs and propriety of joining remains outstanding. That is, at oral argument, defendant represented that if it was not included within plaintiff's water system, it would have to explore other options, including the digging of wells, in order to supply its residents with water. If the Tax Tribunal ruled in favor of defendant's challenge to the special assessment, arguably it could be cost beneficial to join plaintiff's water system as opposed to relying on wells.[1]

Furthermore, I note that while defendant's disconnection from Fort Gratiot's water supply appears to be mandated by statute, any compulsion to join in plaintiff's water system has not been adequately addressed by the parties. MCL 324.4703; MSA 13A.4703 provides that two or more municipalities, as defined by MCL 324.4701; MSA 13A.4701 to include counties and townships, may request that a water supply district be organized to function in a particular area. MCL 324.4708; MSA 13A.4708 sets forth the powers of a water district and grants water districts the broad authority to construct and operate water supply systems. Janet Kitamura of St. Clair County Road Commission testified that water districts were created by the county. She testified that in 1980, defendant was made a part of water district I extended. As a result of the creation of water district IX, which would serve plaintiff, district I extended would cease to exist. Accordingly, it appears that, contractual agreements aside, defendant was required to disconnect from Fort Gratiot's system and be *included* in the water district covering plaintiff's region. The parties failed to explore whether "inclusion" involves compelled participation in a water district. MCL 324.3104; MSA 13A.3104 provides that the Department of Environmental Quality (DEQ), MCL 324.3101; MSA 13A.3101, is to negotiate and cooperate with other governmental units regarding water quality control planning, development, and management. Whether this broad degree of authority encompasses an order of mandatory inclusion in a water district has never been litigated. However, in light of the DEQ's regulation of water, it appears that the parties

should have determined whether that regulation has any bearing on defendant's connection to any water system or the digging of wells.

I would affirm.

/s/ Harold Hood

[1] This is particularly important because defendant's prior reliance on wells failed to satisfy the water needs of its mobile home residents.