STATE OF MINNESOTA
IN COURT OF APPEALS
A10-525

Mel Bohnenkamp,
d/b/a MoPar Mel's Classic Restorations,
Respondent,

vs.

Gerry Turbes,
Appellant.

Filed December 14, 2010
Reversed and remanded
Johnson, Chief Judge
Dissenting, Ross, Judge

Polk County District Court
File No. 60-CV-09-1002

Michael L. Jorgenson, Charlson & Jorgenson, P.A., Thief River Falls, Minnesota (for respondent)

Scott D. Jensen, Camrud, Maddock, Olson & Larson, Ltd., Grand Forks, North Dakota (for appellant)

Considered and decided by Johnson, Chief Judge; Minge, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Chief Judge

This breach-of-contract case concerns a dispute over the customized restoration of an antique automobile. Mel Bohnenkamp agreed to restore a 1959 Plymouth Sport Fury

for Gerry Turbes. After the restoration was completed and the car was delivered, Turbes became dissatisfied with the quality of Bohnenkamp's restoration work and refused to make the final payment for Bohnenkamp's services. Bohnenkamp sued Turbes to recover full payment, and Turbes counterclaimed. The Polk County District Court granted Bohnenkamp's motion for summary judgment and ordered Turbes to make full payment. We conclude, however, that the parties' written agreement is ambiguous, that the district court should have considered parol evidence of the parties' prior oral agreements, and that there is a genuine issue of material fact as to whether Bohnenkamp breached the agreement. Therefore, we reverse and remand.

FACTS

In July 2008, Turbes wished to buy a restored 1959 Plymouth Sport Fury automobile. Turbes contacted Bohnenkamp, who operates Mopar Mel's Classic Restorations, to ask whether Bohnenkamp had such a car in his inventory. Bohnenkamp responded that he did not have that particular model but that he had a Plymouth Belvedere, which he could restore and convert into a Plymouth Sport Fury by installing certain trim features.

Later that month, Turbes drove from his home in the city of Worthington to Bohnenkamp's shop in the city of Fertile. Turbes saw a car in Bohnenkamp's shop that he had restored, and Bohnenkamp also showed Turbes photographs of other cars that he had restored. Bohnenkamp indicated to Turbes that he could restore the Plymouth Belvedere in a manner similar to the restoration of the car in Bohnenkamp's shop and the

cars in the photographs. Bohnenkamp also told Turbes that the car would be restored to "like new" or "close to new" condition. According to Bohnenkamp, he generally tells his customers that he does not warrant his work but that the restoration will be done to his own satisfaction. In an affidavit, Bohnenkamp stated that he does not restore cars to "show" quality but, rather, to a 7 on a 10-point scale. Before leaving Bohnenkamp's shop, Turbes told Bohnenkamp to begin work on the restoration.

Bohnenkamp originally estimated that the cost of the restoration work would be somewhere between $35,000 and $45,000. As Bohnenkamp's work progressed, Turbes selected optional features for the car, which caused the cost to increase. On August 18, 2008, Turbes sent an e-mail message to Bohnenkamp in which he expressed concern that the cost exceeded $50,000 and instructed Bohnenkamp to "discontinue all work and cancel anything that was ordered." After the two men exchanged additional messages, Turbes authorized Bohnenkamp to continue work on the restoration.

On August 27, 2008, Turbes asked Bohnenkamp to prepare a written agreement to document the restoration work on the car. Bohnenkamp prepared an agreement and sent it to Turbes on September 7, 2008. Bohnenkamp and Turbes signed the agreement on September 15, 2008. The agreement states a base price of $38,300 and lists the options that Turbes had selected, with a corresponding price for each option. The total cost was $57,625. After entering into the written agreement, Turbes requested additional options, which increased the cost to $62,000. During Bohnenkamp's restoration work, Turbes made payments totaling $55,000, leaving a $7,000 balance.

For purposes of this appeal, the most significant part of the written agreement is the following sentence:

> It is understood by both seller and purchaser that . . . due to the age of the vehicle and the high performance engine, that there are no warranties on said vehicle, and that the vehicle when completed by the seller, will be restored to the sellers perfection point and will be sold in as is condition.

It is apparent from the format and language of the written agreement that it was not prepared by an attorney.

On December 13, 2008, Turbes and his two sons drove to Bohnenkamp's shop to take delivery of the restored car. In an affidavit, Turbes stated that he inspected the car hastily because of an impending snowstorm, which made it necessary to quickly begin the five-and-one-half-hour drive back to Worthington. Turbes gave Bohnenkamp a $7,000 check and left with the restored car. Two days later, however, Turbes sent Bohnenkamp an e-mail message in which he instructed Bohnenkamp not to cash the $7,000 check because he was dissatisfied with the restoration. Turbes also stopped payment on the check.

In April 2009, Bohnenkamp commenced this action in the Polk County District Court. Bohnenkamp alleged a breach of contract based on Turbes's failure to make the final payment of $7,000. Turbes alleged a counterclaim of breach of contract based on his assertion that Bohnenkamp failed to restore the car to the level of quality to which Bohnenkamp and Turbes had agreed.

In December 2009, Bohnenkamp moved for summary judgment on both his claim and Turbes's counterclaim. Bohnenkamp argued that Turbes cannot prevail on his breach-of-contract claim because the parties' written agreement expressly disclaimed the existence of a warranty. The district court agreed, reasoning that the language stating that "there are no warranties on said vehicle" unambiguously means that there is no warranty on Bohnenkamp's restoration of the car. The district court granted the motion and entered judgment in favor of Bohnenkamp in the amount of $7,000. Turbes appeals.

D E C I S I O N

Turbes argues that the district court erred by granting summary judgment to Bohnenkamp. A district court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We apply a *de novo* standard of review to a grant of summary judgment, and we view the evidence in the light most favorable to the non-moving party. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

We construe Turbes's brief to raise three sequential issues. First, he contends that the district court erred because the written contract is ambiguous as to whether a warranty

exists and, furthermore, ambiguous as to the terms of the alleged warranty. Specifically, Turbes relies on the clause stating that the car "will be restored to the seller's perfection point."[1] Second, Turbes contends that this clause is an express warranty, whose meaning may be established by the parties' prior oral agreements. Third, Turbes contends that there is a genuine issue of material fact as to whether Bohnenkamp's performance satisfied the warranty.

A.

Turbes's argument requires us to interpret the contract. In doing so, our primary goal "is to ascertain and enforce the intent of the parties." *Valspar Refinish, Inc.*, 764 N.W.2d at 364. "The plain and ordinary meaning of the contract language controls, unless the language is ambiguous." *Business Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). Contractual language is ambiguous "if, judged by its language alone and without resort to parol evidence, it is reasonably susceptible of more than one meaning." *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 351, 205 N.W.2d 121, 123 (1973).

The parties' contract presents a rather unusual issue of contract interpretation because the contract is internally inconsistent. In one clause, the contract states that "there are no warranties on said vehicle." But in the next clause, the contract states that the vehicle "will be restored to the seller's perfection point." These two statements are in conflict with each other. The first clause purports to disclaim any warranties on the

[1]In the parties' agreement, the word "sellers" was used without a possessive apostrophe. We will use an apostrophe to aid the reader.

restoration work, but the second clause essentially states a warranty. The district court relied on the first clause in concluding that the contract unambiguously states that no warranty applies, and Bohnenkamp contends that this is the proper interpretation of the contract. Turbes relies on the second clause and contends that, when the first clause and second clause are read together, the contract is ambiguous.

Our research has identified only one prior opinion that presents a similar issue. In *Wenner v. Gulf Oil Corp.*, 264 N.W.2d 374 (Minn. 1978), a farmer sued a herbicide manufacturer for property damage to the farmer's wheat field. *Id.* at 376-77. On appeal, the supreme court considered whether the defendant had disclaimed all express and implied warranties. *Id.* at 383. The supreme court rejected the defendant's disclaimer argument, noting that the defendant had "attempted both to warrant its product and to disclaim any warranties." *Id.* at 384. The supreme court reasoned that the defendant's two statements concerning warranties "cannot be reasonably reconciled with one another." *Id.*[2] The same thing is true of the two clauses at issue in this case. The first

[2]In *Wenner*, the supreme court reasoned that the two irreconcilable statements required the district court to apply the terms of the express warranty. 264 N.W.2d at 384. That conclusion was compelled by the Uniform Commercial Code (UCC), which provided that "negation or limitation [of an express warranty] is inoperative to the extent that such construction is unreasonable." *Id.* (quoting Minn. Stat. § 336.2-316(1) (2008)). Whether the UCC should have been applied to this case is unclear; a full discussion of that question would require us to apply the "predominant factor test," which considers whether the transaction is primarily one for goods or for services. *See Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 386 (Minn. App. 2004). But neither Bohnenkamp nor Turbes contends that the UCC applies. Rather, both parties have presented the case to us based on the assumption that the UCC does not apply. Thus, for purposes of this case, we will accept the parties' assumption and apply common-law principles.

clause expressly states that no warranty exists; the second clause states a warranty. The district court's interpretation of the contract ignores the second clause. Because these two clauses cannot be reconciled with each other, the contract between Bohnenkamp and Turbes "is reasonably susceptible of more than one meaning." *Metro Office Parks Co.*, 295 Minn. at 351, 205 N.W.2d at 123. Thus, the contract is ambiguous as to whether a warranty exists.[3]

B.

The next step in our analysis is to determine the terms of the warranty that Turbes seeks to establish. To obtain reversal of the district court's summary judgment, Turbes must show that there is a genuine issue of material fact concerning the parties' intent as to the standard of performance imposed by the alleged warranty. *See Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 917 (Minn. 1990) ("Whether an express warranty has arisen . . . and whether such warranties have been breached, are jury questions.").

As stated above, Turbes bases his breach-of-contract claim on the clause stating that Bohnenkamp would restore the car to the "seller's perfection point." Turbes

[3]Because the contract is ambiguous due to the conflict between the first and second clauses identified above, we need not consider the parties' arguments concerning a third clause, which states that the car "will be sold in as is condition." The phrase "as is" typically is used to refer to the condition of an item at the time of the contract. *See, e.g.*, *Bruggeman v. Jerry's Enters., Inc.*, 591 N.W.2d 705 (Minn. 1999). But that construction would make no sense in an agreement to restore an antique car. Even if we were to accept Bohnenkamp's argument that the contract used the phrase "as is" to mean "as it will be" after the restoration, that meaning would be contradicted by Turbes's alternative interpretation of the phrase "seller's perfection point." As a result, the contract still would be ambiguous. Ultimately, the meaning of the "as is" clause is a question of fact.

contends that this term should be interpreted with reference to the parties' oral communications, which, he contends, "defined the level of restoration required." In an affidavit submitted to the district court, Turbes stated that Bohnenkamp made oral promises that the car would be restored to "like new" condition, to a level similar to the car in Bohnenkamp's shop when Turbes visited in July 2008, and to a level similar to cars shown in photographs of Bohnenkamp's prior restorations. Turbes also relies on deposition testimony in which Bohnenkamp admitted that he made representations to Turbes regarding the quality of the restoration. In response, Bohnenkamp concedes that the term "seller's perfection point" "sets a standard" but contends that "the standard is merely that as is expressed in the contract: to seller's perfection point." Bohnenkamp's argument suggests that he is the only person who can determine whether he complied with his contractual obligations.

This part of Turbes's argument depends on his proffer of parol evidence of the parties' prior oral agreements, which the district court refused to consider. Turbes contends that the district court erred by not considering parol evidence of the meaning of the term "seller's perfection point." As a general rule, the parol evidence rule "'prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing.'" *Alpha Real Estate Co. v. Delta Dental Plan*, 664 N.W.2d 303, 311 (Minn. 2003) (quoting Richard A. Lord, *Williston on Contracts* § 33:1 at 541 (4th ed. 1999)). But the parol evidence rule does not exclude

such evidence if the written agreement is "ambiguous or incomplete"; in such a case, "'evidence of oral agreements tending to establish the intent of the parties is admissible.'" *Gutierrez v. Red River Distrib., Inc.*, 523 N.W.2d 907, 908 (Minn. 1994) (quoting *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 17 (Minn. 1982)). In other words, if it appears from the circumstances that "the parties did not intend the document to be a complete and final statement of the whole of the transaction between them," a district court may admit parol evidence concerning "the existence of any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms." *Bussard v. College of St. Thomas, Inc.*, 294 Minn. 215, 224, 200 N.W.2d 155, 161 (1972) (internal quotation omitted).

The term "seller's perfection point" does not, by itself, clearly communicate a particular standard of performance. The standard conceivably could be a high standard or a low standard, depending on Bohnenkamp's own concept of perfection. For these reasons, the term "seller's perfection point" is ambiguous. *See Metro Office Parks Co.*, 295 Minn. at 351, 205 N.W.2d at 123 (defining ambiguous contract language as "reasonably susceptible of more than one meaning"). Accordingly, the district court should have considered parol evidence of Bohnenkamp's oral representations to Turbes about the required quality of his restoration work. And if Turbes's parol evidence is considered, the meaning of the term "seller's perfection point" becomes a question of fact. *See Hydra-Mac, Inc.*, 450 N.W.2d at 917.

C.

The final step in our analysis is to determine whether there are any genuine issues of material fact as to whether Bohnenkamp committed a breach of contract. To obtain reversal of the district court's summary judgment, Turbes must show that the evidence is in dispute as to whether Bohnenkamp satisfied the standard of performance allegedly established by the alleged warranty. *See id.*

Bohnenkamp contends in his brief that his perfection point "was reached." But in his deposition testimony, he stated that his standards of workmanship would not tolerate holes in the floor of a trunk, paint overspray, and dents in a fender. That testimony is relevant because Turbes introduced evidence that Bohnenkamp's restoration work suffers from those and other defects. In light of our conclusions that the contract is ambiguous as to whether a warranty exists and as to the meaning of the term "seller's perfection point," and Bohnenkamp's testimony, there is a genuine issue of material fact regarding whether he restored the car to a point that is consistent with his prior oral representations. A jury must decide these questions of fact. *See id.*

In sum, the district court erred by granting summary judgment to Bohnenkamp on both his claim and on Turbes's counterclaim. Therefore, we reverse and remand to the district court for further proceedings.

Reversed and remanded.

ROSS, Judge (dissenting)

I do not see the ambiguity that the majority sees in the parties' "Contract For Auto Restoration." And so I respectfully dissent. I think we have a duty to give effect to the express and unambiguous declaration that "there are no warranties on said vehicle."

This simple agreement contains three relevant warranty-related phrases. We are bound to read each of them so as not to ignore any other, while assuming that the parties meant for every part of their agreement to have meaning and to be given full effect. *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525–26 (Minn. 1990) ("We construe a contract as a whole and attempt to harmonize all clauses of the contract. . . . Because of the presumption that the parties intended the language used to have effect, we will attempt to avoid an interpretation of the contract that would render a provision meaningless." (citation omitted)). So construed, the contract unambiguously sets out a sale that includes no warranties.

The controlling language is a single sentence with clear enough meaning to bind the parties. That single sentence tells us that Gerry Turbes (the purchaser) agreed that he would buy the 1959 Plymouth Belvedere that Mel Bohnenkamp (the seller) would restore using Bohnenkamp's unrestrained professional discretion in decisions regarding parts replacement and the ultimate standard of restoration quality:

> It is understood by both seller and purchaser that the seller shall inspect and replace any . . . worn parts, and use any used parts he sees fit to be in good condition, also that due to the age of the vehicle and the high performance engine, that there are no warranties on said vehicle, and that the vehicle when completed by the seller, will be restored to the seller's perfection point and will be sold in as is condition.

This sentence is not the model of clarity, but that weakness does not render the meaning unclear. Bohnenkamp will restore the car; Bohnenkamp will use his own judgment about which replacement parts to include; and Bohnenkamp will present the car for Turbes's purchase with "no warranties" and "as is" at a quality level based on Bohnenkamp's rather than Turbes's discretion. True, the word "perfection" shows up in the sentence. But in context, no reasonable factfinder could think that "the seller's perfection point" suggests anything other than that the seller alone determines when the restoration work is complete. Contract terms generally have ordinary meaning. *See Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) ("In interpreting a contract, the language is to be given its plain and ordinary meaning."). The common meaning of "perfect" confirms my impression from the face of the contract's no-warranty sentence: "Complete; finished; executed; enforceable; without defect; merchantable; marketable." *Black's Law Dictionary* 1137 (6th ed. 1990); *see also The American Heritage Dictionary* 1344 (3rd ed. 1992) ("Lacking nothing essential to the whole; complete of its nature or kind."). I think the contracting parties inartfully but unambiguously state that the seller gets to choose when to deem the restoration project to be complete, at which point the car will be sold as is and without warranty. The only way to infer a different meaning of "perfection" is to ignore every other express and implied qualification in the sentence. I cannot reasonably read into this obviously

warranty-disclaiming sentence a "perfection" requirement that, in turn, ignites an ambiguity about whether it is really a warranty-disclaiming sentence.