COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1241

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

DURAND COOPERATIVES,

PLAINTIFF-RESPONDENT,

V.

DENNIS EMMERT AND GRACE EMMERT,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for St. Croix County: C. A. RICHARDS, Judge. *Reversed.*

MYSE, J. Dennis and Grace Emmert appeal a judgment against them in the amount of $1,232.12. They claim that the judgment, based on the cost of seed received by them from Durand Cooperatives, is in error because it is based on a contract that by its terms is "null and void." Durand Cooperatives argues on appeal that the judgment should be upheld because the contract provided for rescission by agreement. Because this court concludes that a contract providing it

will be null and void upon the happening of a future event voids the contract as of its inception, this court reverses the judgment.

The facts leading up to this appeal are not disputed. Durand Cooperatives sold foundation seed to the Emmerts pursuant to a form contract drafted by Durand. Among other provisions of the contract, the Emmerts were responsible for the seed cost, and Durand was obligated to buy the crop at an agreed upon price if it met certain criteria. In the event the criteria were not met, the contract was "null and void." The crop did in fact fail to meet the criteria, and Durand did not purchase it. The Emmerts then refused to pay the balance due on the cost of the seed. This suit followed.

The case was heard in small claims court, and the court held for Durand. Specifically, the trial court held that the parties should be in the same position as if rescission occurred; that is, the same position as if there were no contract. To effectuate this, the trial court held that the Emmerts should pay the remaining obligation on the cost of the seed.

The Emmerts argument for reversal is straightforward: if the contract is "null and void," then there are no obligations remaining under the contract. Furthermore, they argue, this is not a case involving rescission by agreement, because the parties agreed not to rescission, but to void the contract. For reasons discussed below, this court agrees.

This court determines the meaning of an unambiguous contract as a question of law without deference to the trial court. ***Schlosser v. Allis-Chalmers Corp.***, 86 Wis.2d 226, 244, 271 N.W.2d 879, 887 (1978). Determining whether ambiguity exists is also a matter of law for this court. ***Moran v. Shern***, 60 Wis.2d 39, 47, 208 N.W.2d 348, 351 (1973).

Our review of the contract leads us to conclude that it unambiguously creates a null and void contract as of its inception, not a rescission by agreement. This court bases this on the clear language of the contract. Below paragraph four of the section entitled "Producer Responsibilities and Obligations" the contract states: "If the above specifications are not met, the contract is null and void." In the final paragraph, the contract states that the contract price "is only good if the contract is *valid* …." (Emphasis added.)

Because this court concludes that the contract is null and void, this court holds that the Emmerts are not liable for the cost of the seed under the agreement. "Technically, a void contract is a nullity and there is nothing to rescind." ***American Cas. Co. of Reading, Pa. v. Memorial Hosp. Ass'n***, 223 F.Supp. 539, 542 (D.C. Wis. 1963). BLACK'S LAW DICTIONARY, 1067 (6th ed. 1990), defines "null and void" as "Naught, of no validity or effect." Because the criteria established in the contract were not met, the contract cannot serve as the basis for claims by either party. It became void as of its inception.

Even if this court concluded that the contract was ambiguous, however, this court would also uphold the Emmerts' interpretation of it. "Contracts must be construed as they are written and any ambiguity is to be interpreted against the drafter." ***Hunzinger Const. Co. v. Granite Resources Corp.***, 196 Wis.2d 327, 339, 538 N.W.2d 804, 809 (Ct. App. 1995) (citations omitted). Durand drafted the form contract; therefore, this court is unwilling to accept their construction that the contract provided for rescission rather than nullification. Durand could easily have provided language stating that the Emmerts would remain liable for payment in the event the crop failed to meet the criteria, but they failed to do so.

This court does not address the issue of whether Durand could succeed under another theory not based on the contract. Alternative theories of recovery appear to have been raised at trial, but are not briefed or argued and are therefore deemed abandoned. ***Reiman Assocs. Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

This court concludes that the contract unambiguously provided that it be void from its inception on the failure of the crop to meet the criteria. Because Durand's only argument on appeal is that the contract provides for rescission based on the language of contract, the judgment is reversed.

By the Court.—Judgment reversed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.