

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1399

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GENE FREDERICKSON TRUCKING, INC.,

PLAINTIFF-APPELLANT,

V.

**FOX RIVER FIBER MANAGEMENT CORPORATION AND
WISCONSIN FIBER CORPORATION, TOGETHER D/B/A FOX
RIVER FIBER COMPANY, A WISCONSIN PARTNERSHIP,**

DEFENDANTS-RESPONDENTS,

SUPERIOR SPECIAL SERVICES, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Reversed and cause remanded with
directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

MYSE, P.J. Gene Frederickson Trucking, Inc., appeals a summary judgment dismissing its breach of contract claim against Fox River Fiber Company. Frederickson moved for summary judgment claiming that a 1993 agreement expressly provided for a term of service until August 1, 1998; that the parties understood and intended that the agreement have a term of service; and that Fox River breached that term of service by terminating the agreement prematurely. Fox River moved for summary judgment claiming that the 1993 agreement expressly provided for a continuing offer of prices, terminable at will, and that Fox River did not intend or understand that the agreement provided for a term of service. In granting Fox River's motion, the trial court concluded that the contract's unambiguous language failed to provide a term of service and was therefore terminable at will. We conclude that the contract language is ambiguous and that the summary judgment submissions raise a disputed issue of material fact as to whether the parties intended to contract for a term of service. Accordingly, we reverse the summary judgment and remand for further proceedings consistent with this opinion.

In June 1992, Frederickson entered into an agreement with Fox River to haul and dispose of the paper mill sludge Fox River produced. During negotiations, Fox River's representative wrote on the bottom of the contract that the contract was to be reviewed after one year to determine if Frederickson could satisfactorily perform its responsibilities under the contract. After performing for one year, Frederickson drafted a subsequent agreement in July 1993 incorporating most of the terms of the prior one-year agreement but with different dates. Frederickson continued to haul sludge for Fox River until March 1997 when Fox River advised Frederickson that it had contracted with Superior Special Services, Inc., to load and haul its sludge. Fox River told Frederickson that its agreement

with Superior provided that Frederickson would be able to haul sludge as a subcontractor for Superior. Frederickson now contends Fox River breached the 1993 agreement by terminating the contract prior to its term and that Fox River's breach entitles him to damages. Fox River contends that the agreement was without any specified term and therefore was terminable at will, leaving it free to contract with Superior.

We review a grant of summary judgment by applying the same methodology as the trial court. *M&I First Nat'l Bank v. Episcopal Homes Management*, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); see § 802.08(2), STATS. Because that methodology has been recited often, we do not repeat it here except to observe that summary judgment is appropriate only if there is no disputed issue of material fact that would require a trial, and the moving party is entitled to judgment as a matter of law. *M&I*, 195 Wis.2d at 496-97, 536 N.W.2d at 182.

Summary judgment is inappropriate when the contract at issue is ambiguous and the parties' intent is disputed. *Leitzke v. Magazine Marketplace*, 168 Wis.2d 668, 673, 484 N.W.2d 364, 366 (Ct. App. 1992). While construction of a contract is normally a matter of law for this court, *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis.2d 105, 115, 479 N.W.2d 557, 562 (Ct. App. 1991), when a contract is ambiguous, the question of the parties' intent is for the trier of fact. *Armstrong v. Colletti*, 88 Wis.2d 148, 153, 276 N.W.2d 364, 366 (Ct. App. 1979). Whether a contract is ambiguous in the first instance is a question of law we decide independently of the trial court. *Wausau Underwriters Ins. Co. v. Dane County*, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). Ambiguity exists if the contract is reasonably susceptible to more than one meaning. *Id.*

The relevant portion of the July 1993 agreement provides:

The trucks will haul to the Waste Management Ridgeview site for \$100/load and to the Brown County landfill sites for \$50/load. The trucks are to average 13 to 14 tons per load. Effective as of 8-1-94 there will be a 4% price increase. These rates are for 2 years with an additional two year extension with a maximum price increase of 4% for the two additional years.

Frederickson contends that these terms provide for more than a rate guarantee and create, as of August 1, 1994, a two-year term with an additional two-year renewal, during which it will haul Fox River's sludge at the agreed upon rates. Frederickson argues that if the agreement only provides for a continuing price guarantee, the use of the phrase "an additional two-year extension" is surplusage because the rates are already set forth separately. "Extension" must, therefore, refer to an extension of service which is then unnecessary for a contract only providing a continuing guarantee of price. Relying on the rules of construction that a contract should not be interpreted so as to render a portion of the contract surplus and that all parts are to be given meaning, Frederickson argues that the contract binds Fox River until August 1, 1998.

Fox River, however, claims that the contract's clear and unambiguous terms provide only for a continuing guarantee of price and do not provide for any specific term. In support of its proposition, Fox River cites the language which declares that the rates are for two years with an additional two-year extension providing a maximum price increase of 4%. Fox River argues that the clear and unambiguous meaning of this language is that the prices are guaranteed for two years at the rate specified in the contract and for an additional two years at a maximum 4% increase, but that there is no obligation to use Frederickson to haul the sludge for any specific period of time.

We conclude that the contract language in question is ambiguous. Ambiguity exists if the contract is reasonably susceptible to more than one meaning. *Wausau Underwriters*, 142 Wis.2d at 322, 417 N.W.2d at 916. One reasonable construction of the contract is the trial court's, which concluded that the period specified relates only to rates because the specific language says that the rates are for a two-year period. However, another reasonable interpretation is that the guarantee of rates for two years implies that services will be performed during that time. The use of the words "an additional two-year extension" and "the two additional years" can reasonably suggest a fixed term and not a contract terminable at will. The ultimate aim of contract interpretation is to ascertain the parties' intent. *Patti v. Western Machine Co.*, 72 Wis.2d 348, 351, 241 N.W.2d 158, 160 (1976). Whether the parties intended to contract for a term of service cannot be determined from the contract language itself because the contract language suggests two reasonable constructions. Therefore, the provision's meaning must be ascertained by using extrinsic evidence to determine the parties' intent at the time the contract was executed. *Id.*

Here, the trial court determined that the contract language itself unambiguously provided only for a continuing guarantee of price and not a specific term of service:

Finally, I've read the proposal probably fifty times before coming out here today, probably ten times during the course of this hearing, and I'm satisfied that that sentence does not constitute a duration and term for the contract. The sentence discusses rates, it sets rates for a period. I'm satisfied as long as Fox River Fiber was willing to have Frederickson haul the sludge, that those rates would have been effective for those years but that that sentence was not creating a term that granted Frederickson a right to haul the sludge product until 1998. And so I'm going to grant summary motion (sic) to the defendant, Fox River Fiber.

Because the trial court determined that the language of the agreement was unambiguous, it did not consider the other summary judgment submissions to determine the parties' intent. Our conclusion that the contract language is ambiguous, however, requires a further determination of the parties' intent by resort to extrinsic evidence.

When the contract's language is ambiguous, a court is not restricted to the face of the instrument and may consider extrinsic evidence to determine the parties' intent. *Id.* at 351, 241 N.W.2d at 160. When there is ambiguity, as here, the sense in which the parties intended the words to be used is a question of fact. *Id.* at 353, 241 N.W.2d at 161. The issue of intent, generally, is not one that properly can be decided on a summary judgment motion. Credibility with respect to subjective intent does not lend itself to determination by affidavit. *Lecus v. American Mut. Ins. Co.*, 81 Wis.2d 183, 190, 260 N.W.2d 241, 244 (1977).

The summary judgment record gives rise to a disputed issue of fact as to whether the parties intended to contract for a term of service. Frederickson contends that the intent clearly was to provide a contract for a specific term. However, Frederickson vacillates on the term that he claims the parties intended at the time the contract was executed. Fox River contends that there was no intent to bind itself to use Frederickson's services for any period of time but only to obtain a four-year price guarantee. This dispute cannot be resolved by summary judgment but must be determined at trial so that evidence of the parties' intent can be received and the factfinder can resolve the disputed evidence and credibility issues.

In summary, we conclude that the contract language is ambiguous as to whether the contract provides for a term of service. In addition, the summary

judgment record raises a disputed issue of material fact whether the parties intended the contract to provide a term of service. Because the trial court erred by concluding that the contract language unambiguously provided for a continuing offer of prices that was terminable at will, we reverse the summary judgment granted to Fox River and remand to the trial court for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

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