COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1029 **Cir. Ct. No. 2011CV004532**

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

KENNETH P. MANNING AND MAUREEN MANNING,

PLAINTIFFS-APPELLANTS,

V.

VINTON CONSTRUCTION COMPANY, SUPER EXCAVATORS, INC., WHITEFISH BAY VILLAGE AND U.S.A.A.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Kenneth P. and Maureen Manning ("the Mannings") appeal from a judgment dismissing their complaint against Super Excavators, Inc. ("SuperEx"). The Mannings contend that we should reverse the

circuit court's decision on summary judgment and remand this case for a trial because: (1) in dismissing the Mannings' negligence claim against SuperEx, the circuit court relied on ***Showers Appraisals, LLC v. Musson Bros.***, 2012 WI App 80, 343 Wis. 2d 623, 819 N.W.2d 316 ("***Shower-Ct. App.***"), which has since been reversed by ***Showers Appraisals, LLC v. Musson Bros.***, 2013 WI 79, 350 Wis. 2d 509, 835 N.W.2d 226 ("***Showers-S. Ct.***"); and (2) in dismissing the Mannings' breach of contract claim against SuperEx, the circuit court improperly concluded that the Mannings lacked standing to bring the claim because SuperEx's contracts with the Village of Whitefish Bay ("the Village") did not consider the Mannings to be third-party beneficiaries. Because we agree with the Mannings that ***Showers-S. Ct.*** prohibits SuperEx from claiming governmental immunity from the Mannings' negligence claim, and because we conclude that SuperEx's contract with the Village is ambiguous as to whether the Mannings are third-party beneficiaries, we reverse and remand for further proceedings consistent with this decision.

BACKGROUND

¶2 In the morning of July 15, 2010, following a torrential rainstorm, the Mannings discovered approximately four feet of sewage in the basement of their home. The sewage affected every room in their basement and caused extensive damage to the Mannings' personal property.

¶3 At the time of the storm, the Village had contracted with SuperEx and Vinton Construction Company to perform improvements to the sanitary sewers and storm drains along East Fairmount Avenue ("the Project"), near the Mannings' home. The Project was divided by contractor along Fairmount Avenue

into three sections: Contract A (Vinton), Contract B (SuperEx), and Contract C (SuperEx).

¶4 Contracts B and C apply and incorporate the Temporary Sanitary Sewer Flow Control Section set forth in Contract A ("the Flow Control Section"). The Flow Control Section states, in relevant part:

> CONTRACTOR shall be responsible for the continuous control of flow in the existing interceptor sewer during construction of the proposed sanitary sewers, and shall provide adequate backup systems to achieve control. The method of control, diversion, and disposal of the sewer flow shall be whatever means are necessary and in conformance with this Section to provide satisfactory working conditions, to avoid the release of sewer flow, and to maintain progress of the Work. All flow control shall be done without damage to adjacent property or structures.

¶5 The Flow Control Section also states that it is the contractor's responsibility to ensure that sewage does not back up into any homes:

> When the sewage flow is blocked or plugged, sufficient precautions must be taken to protect the sewer lines and public health. The following occurrences will not be allowed:
>
> 1. No sewage shall be allowed to back up into any homes or buildings.
>
> ….
>
> 4. No sewage shall be discharged to streets, storm sewers, private property or surface waters.

¶6 The Flow Control Section also directs that SuperEx, rather than the Village, is solely responsible for the "means and methods" for executing the Flow Control Section:

> Do not submit detailed plans, drawings, or calculations. The specific means and methods for accomplishing diversion and bypassing are the responsibility of the CONTRACTOR. The ENGINEER and MMSD will

> review the submittal and may offer comments for the CONTRACTOR's consideration. However for this specific submittal, neither response nor lack of response by the ENGINEER shall be considered to represent approval or rejection of the CONTRACTOR's means and methods for accomplishing the flow control and bypassing. Neither the ENGINEER nor the OWNER accepts responsibility for the adequacy of the CONTRACTOR's means and methods for control of the sewage flow or for any damages to public or private property resulting there from, such responsibilities remaining with the CONTRACTOR.

¶7 In April 2011, the Mannings filed suit against SuperEx,[1] setting forth negligence and breach of contract claims.[2] As relevant here, the Mannings made the following allegations against SuperEx:

> 22. Under the terms of the contract between the Village and Super[Ex], Super[Ex] was to prevent surface water and ground water from ponding at the project site and the surrounding area.
>
> 23. Specifically, both Vinton and Super[Ex] were to make sure that their construction activity did not obstruct existing storm sewers and the grates leading thereto.
>
> 24. In advance of and during the Rain Storm, Vinton and Super[Ex] negligently allowed sewer grates, culverts and conduits along Fairmo[u]nt Avenue to become blocked with rocks, stones and debris thus inhibiting the outflow of storm water through the storm sewer system.
>
> ….

[1] The Mannings also asserted claims against several other defendants, including the Village and Vinton. However, the Mannings settled with those defendants and the claims against them are irrelevant to the issues raised by the Mannings on appeal. As such, we do not discuss the claims against those defendants here.

[2] Before the circuit court, SuperEx alleged that the Mannings did not properly plead their breach of contract claim. The circuit court did not address the issue, dismissing the breach of contract claim on other grounds. SuperEx does not argue before this court that the Mannings failed to properly plead their breach of contract claim nor does it complain that the circuit court failed to address the issue. As such, we deem that claim abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned.").

> 29. In discharging their various obligations, the Village, Vinton and Super[Ex] were negligent and failed to meet the standard of care required by the contract and expected of similarly situated municipalities and contractors; including the failure to discharge a ministerial duty to respond to a known danger.[3]

The Mannings argued that SuperEx's actions caused the sewage to back up into their basement.

¶8 SuperEx filed a motion for summary judgment, asserting governmental immunity, pursuant to WIS. STAT. § 893.80(4) (2011-12)[4] and ***Estate of Lyons v. CNA Insurance Cos.***, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996). In response, with respect to their negligence claim, the Mannings asked the circuit court to stay ruling on the issue of immunity pending the Wisconsin Supreme Court's decision in ***Showers*** because the Mannings believed that the ***Showers*** decision could "drastically alter the governmental immunity standards relied upon by [SuperEx]." The Mannings also asserted that SuperEx was not entitled to immunity from their breach of contract claim because the Mannings believed that: (1) they are third-party beneficiaries under the Village's contracts with SuperEx; and (2) governmental immunity does not apply to breach of contract claims. In its reply brief, SuperEx continued to argue that it was entitled to immunity and further alleged that the Mannings were raising their breach of contract claim for the first time in their response brief on summary judgment.

[3] The allegations against SuperEx are taken from the Mannings' amended complaint wherein they added a defendant to the action. As previously stated, the claims against other defendants are irrelevant to this appeal and therefore we do not detail them here.

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶9 In January 2013, the circuit court heard oral argument on SuperEx's motion for summary judgment. Thereafter, in February 2013, the circuit court issued an oral ruling, granting the motion and dismissing the Mannings' claims against SuperEx. With respect to the Mannings' negligence claim, the circuit court relied heavily on our decision in ***Showers-Ct. App.***, concluding that SuperEx was entitled to governmental immunity because it was acting as the Village's agent when performing the challenged acts. With respect to the Mannings' breach of contract claim, the circuit court did not address whether the Mannings had properly pled their breach of contract claim. Instead, assuming that the Mannings had properly pled the claim, the circuit court concluded that the contract language requiring SuperEx to maintain "flow control" "without damage to adjacent property or structures" created a well-defined class of third-party beneficiaries. However, it went on to find that the Mannings were not included in that well-defined class of third-party beneficiaries and therefore did not have standing to bring their breach of contract claim against SuperEx.

¶10 In March 2013, the circuit court issued a written order granting SuperEx's motion for summary judgment, and judgment was entered accordingly. The Mannings appeal.

DISCUSSION

¶11 The Mannings argue that the circuit court erred when granting SuperEx's motion for summary judgment and thereby dismissing the Mannings' negligence and breach of contract claims. First, they contend that ***Showers-S. Ct.***, decided after the circuit court granted SuperEx's motion for summary judgment, and which reversed ***Showers-Ct. App.*** on which the circuit court relied, precludes SuperEx from claiming governmental immunity from the Mannings' negligence

claim. Second, they believe that the circuit court erred in dismissing their breach of contract claim because they assert they are third-party beneficiaries under SuperEx's contract with the Village.

¶12 Our review in cases on appeal from summary judgment is well known. We review the circuit court's summary judgment decision *de novo*, employing the same method as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶13 We now turn to each of the issues raised by the Mannings.

I. The Wisconsin Supreme Court's decision in *Showers-S. Ct.* is controlling and precludes SuperEx from claiming governmental immunity from the Mannings' negligence claim.

¶14 Citing to WIS. STAT. § 893.80(4), SuperEx argues that it is entitled to governmental immunity from the Mannings' negligence claim. Section 893.80(4) immunizes local governments and their officers, employees, or agents from liability for acts involving the exercise of discretion or judgment.[5] *See* ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶¶20–21, 253 Wis. 2d 323, 646

[5] WISCONSIN STAT. § 893.80(4) states:

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

N.W.2d 314. We extended governmental immunity to contractors acting as agents for government entities in ***Lyons***. ***Lyons*** held that a government contractor is a government agent "when: (1) the government authority approved reasonably precise specifications; (2) the contractor's actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about possible dangers associated with those specifications that were known to the contractor but not to the governmental officials." ***Id.***, 207 Wis. 2d at 457-58.

¶15 In its summary judgment brief before the circuit court, SuperEx argued that it was a government agent entitled to immunity under ***Lyons***. When doing so, SuperEx relied heavily on our analysis in ***Showers-Ct. App.***, noting that the facts in ***Showers*** were "remarkably similar to the instant action." The circuit court agreed that ***Showers-Ct. App.*** was on point, stating that "the language in [SuperEx's contract with the Village] appears similar to the contract [language] in ***Showers***." (Bolding and italics added.) Thereafter, relying on ***Showers-Ct. App.***, the circuit court concluded that SuperEx was immune from liability for negligence.

¶16 In ***Showers***, Mark Showers alleged that Musson Bros., Inc., an independent contractor hired by the State to perform sanitary and sewer main replacement in front of Showers' business offices, negligently performed its work, causing Showers' offices to flood. ***Showers-Ct. App.***, 343 Wis. 2d 623, ¶¶1, 7. The circuit court granted Musson governmental immunity under WIS. STAT. § 893.80(4). ***Showers-Ct. App.***, 343 Wis. 2d 623, ¶7.

¶17 Showers' primary argument on appeal was that the contract terms between Musson and the State were not reasonably specific under ***Lyons*** and

permitted Musson free reign to fulfill the contract as it saw fit. ***Showers-Ct. App.***, 343 Wis. 2d 623, ¶12. Showers cited to several contract provisions that he claimed prohibited a conclusion that the government had approved "reasonably precise specifications" under the ***Lyons*** test, including a "means and methods provision," which stated that: "'The contractor is solely responsible for the means, methods, techniques, sequences, and procedures of construction.'" ***Showers-Ct. App.***, 343 Wis. 2d 623, ¶13. Despite the fact that the "means and methods provision," as well as the other provisions in the contract, gave "the contractor … some discretion in how to meet a desired specification outlined in the contract," *see* ***id.***, ¶17, we held in ***Showers-Ct. App.*** that the contract provisions were reasonably precise under ***Lyons*** because the Department of Transportation retained "the power and responsibility to intervene if compliance with the contract was at issue," *see* ***Showers-Ct. App.***, 343 Wis. 2d 623, ¶20.

¶18 Here, when relying on ***Showers-Ct. App.***, the circuit court emphasized the "means and methods provision" common to both the contracts between SuperEx and the Village and the contract at issue in ***Showers***. The circuit court concluded that, while the contracts between SuperEx and the Village afforded SuperEx a certain amount of discretion, under ***Showers-Ct. App.***, SuperEx did not lose governmental immunity under ***Lyons*** simply because it has *some* discretion in how to meet a desired contract specification. *See* ***Showers-Ct. App.***, 343 Wis. 2d 623, ¶17.

¶19 However, after the circuit court dismissed the Mannings' negligence claim and entered judgment accordingly, the Wisconsin Supreme Court vacated ***Showers-Ct. App.*** *See* ***Showers-S. Ct.***, 350 Wis. 2d 509, ¶5. In doing so, the supreme court clarified the test courts should apply when determining whether a contractor is entitled to governmental immunity. To wit, "where a third party's

claim against a government contractor is based on the allegation that the contractor negligently performed its work under a contract with a governmental entity," in order to assert governmental immunity, "the … contractor must prove *both* that the contractor meets the definition of 'agent' under Wis. Stat. § 893.80(4), as set forth in ***Lyons***, *and* that the contractor's act is one for which immunity is available under § 893.80(4)." ***Showers-S. Ct.***, 350 Wis. 2d 509, ¶2 (footnote omitted; emphasis added). In other words, in order to qualify for governmental immunity, a contractor must show not only that it is a government agent, but also that it was acting in accordance with a decision the government entity made in "the exercise of a legislative, quasi-legislative, judicial or quasi-judicial function." ***Id.***, ¶34.

¶20 Applying the clarified test for showing immunity for government contractors to ***Showers***, the Wisconsin Supreme Court held that "Musson was not an agent for which immunity was available" because "Musson was not subject to 'reasonably precise specifications'" under ***Lyons***. ***Showers-S. Ct.***, 350 Wis. 2d 509, ¶48. In doing so, the supreme court concluded that "[t]he conduct for which Musson was responsible under the means and methods provision is, by definition, distinguishable from conduct for which immunity may be available for agents under [WIS. STAT.] § 893.80(4), as set forth in ***Lyons***." ***Showers-S. Ct.***, 350 Wis. 2d 509, ¶48. The court emphasized that the contract's "means and methods provision" granted Musson "independent decision-making authority in performing its tasks," stating:

> the nature of Musson's actions, taken pursuant to the means and methods provision, demonstrates that Musson had *substantial independent decision-making authority in performing its tasks*, such that Musson's relationship with the DOT for the conduct that is alleged to have resulted in harm cannot be characterized as that of a servant. Such *independent discretion is also contrary to* ***Lyons'*** *"reasonably precise specifications" requirement*, in that a contractor may not possess such control over the alleged

> injury-causing action and still be considered an agent for purposes of governmental contractor immunity under Wis. Stat. § 893.80(4). Musson thus fails to satisfy the ***Lyons*** test and is not an agent under § 893.80(4).

Showers-S. Ct., 350 Wis. 2d 509, ¶51 (internal citations omitted; emphasis added).

¶21 It is plain that after ***Showers-S. Ct.***, the circuit court's reliance on ***Showers-Ct. App.*** is inappropriate. Applying ***Showers-S. Ct.*** to the facts of this case, it is clear that SuperEx is not entitled to governmental immunity because, like the contractor in ***Showers***, SuperEx was not a government agent under ***Lyons***.

¶22 Like the contract in ***Showers***, SuperEx's contracts with the Village contained a "means and methods provision," and empowered SuperEx with discretion when determining how to maintain "the continuous control of flow in the existing interceptor sewer during construction." The contract explicitly stated that "[t]he specific means and methods for accomplishing diversion [of the sewage flow] and bypassing are the responsibility of [SuperEx]." In fact, the contract stated that SuperEx was *not* to "submit detailed plans, drawings, or calculations" to the Village and that the Village did *not* "accept[] responsibility for the adequacy of [SuperEx]'s means and methods for control of the sewage flow or for any damages to public or private property resulting there from." These contract provisions demonstrate independent discretion that is "contrary to ***Lyons***' 'reasonably precise specifications' requirement, in that a contractor may not possess such control over the alleged injury-causing action and still be considered an agent for purposes of governmental contractor immunity under Wis. Stat. § 893.80(4)." *See* ***Showers-S. Ct.***, 350 Wis. 2d 509, ¶51. Because SuperEx fails to satisfy the ***Lyons*** test and is not an agent under § 893.80(4), it is not subject to governmental immunity.

¶23 In its attempt to persuade us that it is entitled to immunity, SuperEx argues that the Mannings' negligence claim is based on only three discrete acts: (1) the removal of the entire roadway on Fairmount Avenue; (2) the placement of geotextile fabric over storm sewer grates; and (3) the execution of bypass flow control in the sewer mains. SuperEx argues that it had no discretion over any of these acts and that they were mandated by the Village, to wit, that the above acts were "reasonably precise specifications" over which SuperEx had no control and was just hired to execute. Even assuming, without deciding, that the Mannings' negligence claim is grounded solely in the execution of the above acts as they are described by SuperEx, SuperEx has failed to convince us that it is entitled to immunity. We address each act in turn.

¶24 First, SuperEx argues that the decision to remove the entire roadway on Fairmount Avenue at once was done at the behest of the Village and that SuperEx had no say in the matter. However, the burden is on SuperEx to demonstrate that it is entitled to immunity and SuperEx has not cited to any evidence in the record to support its assertion that the Village directed SuperEx to remove the entire roadbed at once. *See* ***Showers-S. Ct.***, 350 Wis. 2d 509, ¶36. As such, we are unpersuaded that SuperEx is entitled to immunity from claims based on that act.

¶25 Second, SuperEx alleges it has immunity from the Mannings' claim that their property damage resulted when storm water pooled in and around the construction site because the geotextile fabric covering the storm sewers permitted debris to collect and clog the grates, preventing the storm water from entering the sewer system. According to SuperEx, its contract with the Village specifically required SuperEx to place the geotextile fabric over the grates. But again, SuperEx cites to no evidence in the record to support that assertion as is its burden

and therefore is not entitled to immunity as to that act. *See* ***id.*** Furthermore, as the Mannings point out in their reply brief, even "[a]ssuming the Village did so specify[,] the installation of such geotextile fabric … does not absolve SuperEx of its negligence in failing to maintain the geotextile fabric to ensure that it was working properly."

¶26 Finally, SuperEx contends that "[t]he only remaining conduct which the Mannings allege was causal of their property damage concerns the Flow Control Plan." And according to SuperEx, "whether SuperEx maintained control [over the flow of sewage] is irrelevant since, pursuant to the Village's mandate in its contract specifications, SuperEx was to implement the Flow Control Plan *only when actively making sewer connections between old and new equipment*." (Emphasis added.) Because SuperEx was not actively making a sewer connection at the time of the storm, SuperEx contends it had no discretionary authority over the flow of sewage at the time the Mannings' basement flooded.

¶27 The problem with SuperEx's argument is that it relies entirely on one individual's interpretation of the contracts, namely, Jeff Cascio, SuperEx's foreman. However, Cascio's thoughts on when and under what circumstances particular contract provisions should apply are parol evidence, which we are to disregard. *See* ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis. 2d 600, 607, 288 N.W.2d 852 (1980) (The parol evidence rule dictates that "'[w]hen the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.'") (citation omitted). SuperEx has not cited to any language within the four corners of the contract that would support its assertion that it was only required to prevent sewage back ups during the short

period of time when it was physically connecting new sewer pipes together. Rather, the contracts plainly and unambiguously require SuperEx to maintain the "continuous control of flow in the existing interceptor sewer *during construction*." (Emphasis added.)

¶28 In short, SuperEx has failed to demonstrate that the Mannings' allegations are based upon the Village's poor design plan, rather than SuperEx's poor execution of that plan. Because SuperEx has failed to show that it is a contractor acting as a government agent, we must reverse and remand back to the circuit court for further proceedings.

II. The contract language is ambiguous as to whether the Mannings are third-party beneficiaries, making summary judgment on the breach of contract claim inappropriate.

¶29 In addition to their negligence claim, the Mannings asserted a breach of contract claim against SuperEx, based upon SuperEx's contract with the Village. Generally, only a party to a contract may enforce it. ***Schilling by Foy v. Employers Mut. Cas. Co.***, 212 Wis. 2d 878, 886, 569 N.W.2d 776 (Ct. App. 1997). However, an exception to the general rule exists for certain third-party beneficiaries to the contract. ***Id.*** "[A party] claiming third-party beneficiary status must show that the contracting parties entered into the agreement for the direct and primary benefit of the third party, either specifically or as a member of a class intended to benefit from the contract." ***Sussex Tool & Supply, Inc. v. Mainline Sewer & Water, Inc.***, 231 Wis. 2d 404, 409, 605 N.W.2d 620 (Ct. App. 1999). "An indirect benefit incidental to the primary purpose of the contract is insufficient to confer third-party beneficiary status." ***Id.***

¶30 The Mannings were not a direct party to the contracts between SuperEx and the Village. However, the Mannings point to the following clause in

the contracts between SuperEx and the Village to support their assertion that they are third-party beneficiaries under those contracts:

> CONTRACTOR shall be responsible for the continuous control of flow in the existing interceptor sewer during construction of the proposed sanitary sewers, and shall provide adequate backup systems to achieve control. The method of control, diversion, and disposal of the sewer flow shall be whatever means are necessary and in conformance with this Section to provide satisfactory working conditions, to avoid the release of sewer flow, and to maintain progress of the Work. *All flow control shall be done without damage to adjacent property or structures* ….

(Emphasis added.)

¶31 When considering whether the Mannings were third-party beneficiaries, the circuit court found that a well-defined and limited class of third-party beneficiaries existed in SuperEx's contracts with the Village, based upon the clause in the contracts stating that "[a]ll flow control shall be done without damage to adjacent property or structures." However, the circuit court concluded that the Mannings were not part of the well-defined and limited class of third-party beneficiaries because the Mannings' property did not "direct[ly] abut[] Fairmo[u]nt Avenue" where the Project was underway. Based on that finding, the circuit court concluded that the Mannings did not have standing to bring their breach of contract claim against SuperEx.

¶32 The Mannings believe that the circuit court correctly held that SuperEx's contracts with the Village create a well-defined class of third-party beneficiaries. However, the Mannings argue: that the circuit court erred in limiting its definition of "adjacent" to only properties "direct[ly] abutting Fairmo[u]nt Avenue"; that they are adjacent property owners under SuperEx's contract with the Village and are therefore third-party beneficiaries with standing

to sue for breach of contract; and that, at the very least, the term "adjacent" is ambiguous and its meaning should be determined by a jury with access to extrinsic evidence.

¶33 When interpreting a contract clause, we begin with the plain language of the clause. ***J.G. Wentworth S.S.C. Ltd. P'ship v. Callahan***, 2002 WI App 183, ¶11, 256 Wis. 2d 807, 649 N.W.2d 694. "If the terms of a contract are plain and unambiguous, we construe the contract as it stands and apply its literal meaning. However, if we determine that a contract provision is ambiguous, we will look to extrinsic evidence to discern the contract's meaning." ***Id.*** (internal citation omitted). It is well settled that when a contract or a contractual term is ambiguous, "the contract's interpretation presents a question of fact for the jury." ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶32, 330 Wis. 2d 340, 793 N.W.2d 476. A contract or a contract term is ambiguous if "it is susceptible to more than one reasonable interpretation." ***Id.***, ¶33.

SuperEx's contracts with the Village create a well-defined class of third-party beneficiaries.

¶34 The circuit court concluded that the clause directing that "[a]ll flow control shall be done without damage to adjacent property or structures" plainly shows that SuperEx and the Village intended the contracts to benefit "adjacent" property owners. We agree. By including language specifically referencing "adjacent property or structures," SuperEx and the Village expressly stated that they wished to provide special protection to those property owners who were "adjacent" to the Project.

¶35 Relying largely on ***Sussex***, SuperEx argues that it did not enter into an agreement with the Village for the direct benefit of third-party beneficiaries.

See ***id.***, 231 Wis. 2d 404. Rather, SuperEx argues that any benefits claimed by "adjacent" property owners are indirect benefits that arise out of most public works contracts. *See* ***id.*** at 409 ("An indirect benefit incidental to the primary purpose of the contract is insufficient to confer third-party beneficiary status."). We disagree and find ***Sussex*** distinguishable.

¶36 In ***Sussex***, "[t]he Village of Lannon hired Mainline Sewer and Water, Inc. (Mainline) to install a sewer and water system. Mainline promised to: 'provide vehicular access at all times to the properties affected by [the] project.'" ***Id.*** at 407. Sussex Tool, a business bordering the construction project, sued Mainline, alleging that it failed to uphold this promise and that Sussex Tool suffered economic loss as a result. ***Id.*** at 407-08. We rejected Sussex Tool's third-party beneficiary claim, holding it was merely an indirect beneficiary of the public works contract. ***Id.*** at 416. We noted that "[w]hile [the contract language] does circumscribe the number of possible third-party beneficiaries, albeit somewhat vaguely, it does not have the specificity required for the court to infer an intent to assume liability for damages." ***Id.***

¶37 Here, SuperEx's contract with the Village is much more specific regarding its duties to the third-party beneficiaries, distinguishing them from the public at large. SuperEx promised this limited class that it would not "damage adjacent property or structures," and that "[n]o sewage shall be allowed to back up into any homes or buildings" and "[n]o sewage shall be discharged to … private property." As such, we conclude, based upon the plain language in the contracts, that adjacent property owners are more than mere "indirect beneficiaries" under the contracts and were in fact intended to be third-party beneficiaries.

The ordinary usage of the word "adjacent" has been defined by case law.

¶38 When looking at the contracts between SuperEx and the Village, the circuit court narrowly defined "adjacent" to include only "those properties direct[ly] abutting Fairmo[u]nt Avenue." However, the Wisconsin Supreme Court, when considering the legislature's use of the word "adjacent" in a state statute, held that "[t]he word 'adjacent' in its ordinary usage means 'near to' or 'close to,' *but does not imply actual physical contact* as do the words 'adjoining' and abutting.'" ***Superior Steel Prods. Corp. v. Zbytoniewski***, 270 Wis. 245, 247, 70 N.W.2d 671 (1955) (emphasis added). Black's Law Dictionary also defines "adjacent" as "[l]ying near or close to, *but not necessarily touching*." BLACK'S LAW DICTIONARY 49 (10th ed. 2014) (emphasis added).

¶39 The circuit court relied exclusively on a dictionary definition of the word "adjacent" to conclude that the contracts between SuperEx and the Village only intended to provide protection to "those properties direct[ly] abutting Fairmo[u]nt Avenue." According to the circuit court:

> The dictionary, Webster's -- Merriam Webster[']s dictionary defines adjacent as, first, not distant or nearby. And then next to that it states that the city and adjacent suburbs. The next definition is having a common endpoint or border, as in adjacent lots. Third, is immediately preceding or following. And then there's another definition that has to do with math, stating of two angles, having the vertex and one side in common. Synonym discussion following definitions of adjacent shed further clarity on the word's meaning, adjacent may or may not imply contact but always implies absence of anything of the same kind in between. Such as a house or an adjacent garage.
>
> ….
>
> In the present case, adjacent, means those properties direct[ly] abutting Fairmo[u]nt Avenue. This is [the] plain and unambiguous meaning from Webster's definition.

¶40 The circuit court's reliance on its dictionary raises several problems. First, in relying on its dictionary to define the term "adjacent," the circuit court skipped the first definition defining "adjacent" as meaning "not distant or nearby" and ignored those other portions of the dictionary definition that contradicted its conclusion that "adjacent" requires "abutting." For instance, the circuit court noted that "[s]ynonyn discussion following definitions of adjacent shed further clarity on the word's meaning, *adjacent may or may not imply contact*." (Emphasis added.) Second, the definition relied on by the circuit court is contrary to case law. And third, there is nothing in the record to suggest that SuperEx and the Village intended to adopt the definition set forth in the circuit court's dictionary instead of the "ordinary usage" of the word as set forth in case law.

¶41 In sum, the word "adjacent" has a commonly understood meaning that is set forth in our case law, and that meaning does not mandate actual physical contact as the circuit court required. Rather, "[t]he word 'adjacent' in its ordinary usage means 'near to' or 'close to,' *but does not imply actual physical contact* as do the words 'adjoining' and abutting.'" ***Superior Steel***, 270 Wis. at 247.

The contracts are ambiguous as to whether the Mannings' property is "adjacent" to the Project.

¶42 Having determined that the plain and ordinary meaning of the term "adjacent" in the parties' contracts means "'near to' or 'close to,'" the question becomes whether the Mannings' property was "'near to' or 'close to'" the Project. *See* ***id.*** Answering that question requires looking at SuperEx's and the Village's intent when drafting the contracts. However, that intent cannot be deciphered based on the language of the contracts alone. As the Mannings point out, it is at least arguable, in light of the contracts' requirement that SuperEx not allow sewage to back up into homes or private property, that the term "adjacent" refers

to all private properties that contain sewer lines that are connected to the Fairmount Interceptor or to properties that are nearby or in close proximity to Fairmount Avenue, the Fairmount Interceptor, or both.

¶43 Consequently, we reverse and remand this case to the circuit court so that a factfinder can attempt to ascertain who SuperEx and the Village were referring to when referencing "adjacent property and structures," consistent with the ordinary definition of the term "adjacent." *See* ***Town Bank***, 330 Wis. 2d 340, ¶32 (a "contract's interpretation presents a question of fact for the jury").

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.