

FILED

SEP 16 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 285952-III

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

FRED AND LESLIE BROWN and FAB VENTURES LLC,

Appellants

vs.

JAMES AND MICHELLE HEREFORD and WAVE VENTURES LLC,

Respondents.

APPELLANTS' REPLY BRIEF

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Appellants Brown and FAB Ventures LLC (hereinafter for the sake of clarity and consistent with Respondent's designations, the Appellants will be referred to as "FAB" and the Respondents as "WAVE") reply as follows to the argument and authorities set forth in the Brief of Respondents.

A. Response to argument that Instruction 16 correctly stated the rule of contra proferentem.

WAVE argues that Instruction 16 correctly stated the rule of contra proferentem. FAB agrees the instruction correctly stated the rule, but only in part. The rule, simply put, is that if a contract is ambiguous, the ambiguity should be resolved against the document's drafter. As a whole, however, Instruction 16 was an incorrect statement of the law because it told the jury it could find an ambiguity after reviewing the parties' context evidence. That, as discussed *infra*, is incorrect.

B. Response to argument that FAB's challenge to Instruction 16 is premised on an incorrect understanding of the record, and that the trial court made a threshold determination of ambiguity when it denied the parties' cross motions for summary judgment.

There is no indication in its summary judgment order that the trial court found any of the terms in the subject agreement to be ambiguous. Nevertheless, WAVE argues the trial court must have made a "threshold"

determination of ambiguity because it denied the parties' respective motions for summary judgment.

This contention is contrary to one of the central holdings of *Berg v. Hudsmen*, 115 Wn.2d 657, 801 P.2d 222 (1990): interpretation of an integrated agreement in light of context evidence is not limited to cases where it is determined the language used is ambiguous. 115 Wn.2d at 229. Indeed, in discussing the conflict in Washington case law regarding contract interpretation and construction, the *Berg* court observed:

There are cases in which the court examined the circumstances surrounding the execution of a writing as an aide to its interpretation and sustained the admissibility of the pertinent evidence even though the writing might on its face be unambiguous. The position taken in these cases is the one endorsed by Professors Corbin and Williston and by the Restatement of Contracts. It is the only approach which can consistently yield interpretations likely to coincide with the meanings the parties contemplated.

There are other cases in which the Court indicated that it will not look beyond the four corners of a contract writing unless what appears within those four corners is ambiguous. The reason is variously stated as an interpretation principle, or as an application of the parole evidence rule. Neither reason is persuasive.

[...]

Thus, we reject the theory that ambiguity in the meaning of contract language must exist

before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled.

115 Wn.2d at 665, 669 (emphasis added).

In light of this language from *Berg*, it is disingenuous for WAVE to argue that the trial court, because it denied the parties' motions for summary judgment, impliedly made a threshold determination of ambiguity.

C. Response to argument that FAB's challenge to Instruction 16 is premised on an incorrect understanding of the law, and that, post *Berg*, the determination of contract ambiguity is within the province of the jury

The WPI's on contracts contain 37 substantive instructions. Nowhere do the terms "ambiguity" or "ambiguous" appear therein. The term is conspicuously absent from WPI 301.5, the instruction setting forth factors the jury may consider in determining the intent of the parties. And, as far as FAB can determine, there is not a single reported Washington case which holds that whether a contract term is ambiguous can or should be determined by the jury. Nevertheless, WAVE argues that, in the wake of the Washington Supreme Court's adoption of the context rule in *Berg*, such a determination is within the jury's province. That is simply incorrect. In the wake of *Berg*, the jury's role is to determine the intent of the parties,

applying the context rule principles set forth in WPI 301.05 – it is not to determine whether a contract term is or is not ambiguous.

WAVE points to the following language that appears toward the end of the *Berg* opinion:

From the record it appears that the lease was drafted by the landlord's attorney. Depending on evidence adduced on remand, it may be proper for the Court to construe ambiguous language against the drafter's client. (citations omitted).

115 Wn.2d at 676.

WAVE argues that by referencing "the Court" the *Berg* court must have meant that a jury can determine: (1) whether a contract term is ambiguous and (2) then apply contra proferentem against the contract drafter.

Nowhere does the *Berg* court state, however, that the jury may determine whether a contract is or is not ambiguous.

Moreover, the very definition of an ambiguity cuts against WAVE's position. An ambiguity is said to exist if the contract term is fairly susceptible to more than one reasonable interpretation. *Black v. National Merit Insurance Co.*, 154 Wn.App. 674, 679, 226 P.3d 175 (2010). If a contract term is fairly susceptible to more than one reasonable meaning, it is up to the jury to decide – based on the context evidence

introduced – the probable intent of the parties. To say that part of the jury's role is, or can be, to determine whether a contract is ambiguous, completely misses the point.

WAVE goes on to challenge a number of the cases cited by FAB for the proposition that the determination of ambiguity is a question of law for the Court. WAVE correctly observes that three of the cases cited by FAB predate *Berg*, two involve the plain meaning rule, and that two others involve no dispute of material fact that would have to be resolved by a jury. But these distinguishing points reinforce FAB's position, not WAVE's. Post *Berg*, whether a contract term is ambiguous is irrelevant once the issue of the parties intent has been submitted to the jury for determination. As discussed in more detail *infra*, allowing the jury to determine that the contract language was ambiguous, without even a definition of the term provided, permitted the jury to avoid deciding the intent of the parties, based on context principles. Instead, Instruction 16 allowed the jury to find against FAB, simply because the contract language may have been capable of more than one reasonable meaning.

D. Response to argument that, because Instruction 16 correctly stated the rule of contra proferentem, the proper standard of review is abuse of discretion

WAVE attempts to bootstrap its way into abuse of discretion as the standard of review by arguing that Instruction 16 correctly states the rule

of contra proferentem. But, as argued above, Instruction 16, taken as a whole, does not correctly state the rule of contra proferentem, and determining whether a contract term is ambiguous is not the proper role of the jury.

WAVE goes on to argue that, even in jurisdictions where ambiguity is exclusively the province of the Court, it is not considered an error in law to instruct the jury on the rule of contra proferentem.¹ But, in all of the foreign cases cited by WAVE, the trial court made a threshold finding of ambiguity. That did not happen here.

WAVE places special emphasis on *Erickson v. American Golf Corp.*, 96 P.3d 843 (Ore. App. 2004) in support of its contention that submission of the concept of contra proferentem to the jury was appropriate. A careful examination of the *Erickson* opinion, however, reveals that, if it has any bearing here, it supports FAB, not WAVE. In that case, the trial court instructed the jury, in pertinent part, as follows:

...
The parties have put forward different interpretations of the contract at issue. In interpreting the contract, you are to

¹ It is worth asking whether, if "plain meaning" rule era rules of construction such as contra proferentem are appropriate for submission to the jury, it would also be appropriate to instruct on such maxims as ejusdem generis (enumerated provisions prevail over general descriptions. *See In re: Weissenborn's Estate*, 1 Wn.App. 844, 846, 466 P.2d 536 (1970)) or that typed provisions prevail over conflicting hand-written ones. *See Green River Valley Foundation, Inc. v. Foster*, 78 Wn.2d 245, 473 P.2d 844 (1970).

determine what the parties intended by agreeing to the terms in question.

"To determine intent, you look to the language of the contract and other relevant circumstances. If the parties intent can't be determined, the term must be construed against the drafter of the contract. In this case, the drafter was the Defendant, American Golf Corporation."

96 P.3d at 846.

It is FAB's position that, post-*Berg*, the rule of contra proferentem should never be submitted to the jury because it conflicts with, or at least confuses, the burden of proof on the parties' intent. *Berg* recognizes that a contract term or provision may be unambiguous on its face, but still be susceptible to different, reasonable interpretations in light of the context evidence adduced. In such a case, the jury is effectively instructed that the plaintiff has the burden of proving, by a preponderance of the evidence, that its alleged meaning is the one intended by the parties. A contra proferentem instruction, however, permits the jury to find against the plaintiff, if the plaintiff drafted the document, even if the plaintiff met its burden of proof on the critical issue of intent.

WAVE argues that, simply because Instruction 16 was, in its estimation, a correct statement of the law, whether to give the instruction was an appropriate exercise of trial court discretion. First, WAVE cites to

no case indicating that abuse of discretion is the appropriate standard of review. On the contrary, jury instructions "are reviewed de novo"...and "jury instructions are sufficient when they allow counsel to argue the theories of the case, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied." *Lewis v. Simpson Timber Company*, 145 Wn.App. 302, 318, 189 P.3d 178 (2008). And merely because an instruction correctly states the law does not mean it is appropriate for a jury instruction. See e.g. *McClure v. Department of Labor and Industries of State of Washington*, 61 Wn.App. 185, 810 P.2d 25 (1991). The central issue here is whether it was appropriate for the trial court to submit the issue of contract ambiguity to the jury. By definition, a question that should be decided by the Court, as a matter of law, should not be submitted to the jury for determination. A proposed instruction on the business records exception to the hearsay rule might be legally correct. But obviously it would be inappropriate for the court to submit that issue to the jury.

E. Response to argument that trial court did not abuse its discretion in instructing jury on contra proferentum because substantial evidence supported the instruction.

WAVE, again, misstates the standard of review. It is de novo, not abuse of discretion. *Lewis v. Simpson Timber Company*, 145 Wn.App. 302, 318, 189 P.3d 178 (2008).

Citing *Husel v. James*, 141 Wn.App. 748, 758, 172 P.3d 712 (2007), WAVE contends it was appropriate to instruct the jury on contra proferentum because there was substantial evidence to support the instruction. But, again, that is not the test. Moreover, *Husel* is inapposite because that case involved the propriety of an "error in judgment" instruction in a medical malpractice case.²

WAVE next discusses the evidence on the respective role of the parties in creating the document, arguing that substantial evidence supported submission of contra proferentum to the jury.

Again, FAB's fundamental objection is that the concepts of ambiguity and contra proferentum should not have been submitted to the jury in the first instance.

WAVE claims FAB did not preserve its relative role of the parties' objection because it did not raise this issue at the trial court jury instruction conference. While FAB may not have specifically made this argument at the instruction conference, here the parties relative roles in the creating of the document illustrates why the issue of ambiguity is for the court, not the jury. The trial court is in a better position to apply legal maxims of contract construction, when appropriate. *See e.g., Dwelluy v.*

² In *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986) the Washington Supreme Court held that, whether to give an "error in judgment" supplemental standard of care instruction in a medical malpractice case is a matter of trial court discretion.

Chesterfield, 88 Wn.2d 331, 560 P.2d 353 (1977). Certainly, the trial court is in a much better position than the jury to consider the relationship between contra proferentum and the concept of an adhesion contract, as addressed by FAB in its opening brief.

WAVE goes on to argue that Instruction No. 16 was appropriate, despite both parties' participation in the creation of the document, because Instruction 16 did not tell the jury which party prepared, or whose attorney prepared, the contract. But that is not the problem. One party, or one party's attorney, may have actually acted as scrivener, even though both sides participated in its drafting, or at least had an opportunity to provide input regarding the language used in the document. In such a situation, application of contra proferentum is inappropriate. If WAVE's argument were correct, contra proferentum would apply against the party who reduced words to writing, even if the parties collaborated on the language to be recorded.

F. Response to argument that trial court did not abuse its discretion in the wording of the contra proferentum instruction, especially when the instruction is read in light of the other contract-related instructions given to the jury.

Again, WAVE incorrectly identifies the standard of review as abuse of discretion.

Next, WAVE argues that Instruction 16 was not misleading, and properly informed the trier of fact of the applicable law, because Instruction 16 did not direct the jury to find an ambiguity. That is true. But it allowed the jury to find or create an ambiguity after considering extrinsic evidence. That is inappropriate. *Washington Fish and Oyster Company v. GP Halfert & Company*, 44 Wn.2d 646, 659, 269 P.2d 806 (1954).

WAVE goes on to argue that Instruction 16 was "linked" to other jury instructions, and that it told the jury to apply the rule of contra proferentum only after considering whether it could resolve ambiguity by other means. This argument misses the point. Instruction 16 allowed the jury to find the contract language ambiguous, and decide the case against WAVE, based on contra proferentum, merely because the document may have been susceptible to two reasonable, competing interpretations.

G. Response to argument that any error in instructing the jury on the rule of contra proferentum was harmless in light of the substantial evidence establishing the meaning of the contract and the absence of any breach.

WAVE ignores the obvious impact of Instruction 16. In effect, the instruction allowed the jury to avoid deciding the intent of the parties and resolve the case against FAB, simply because the language used within the

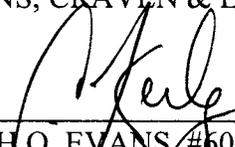
four corners of the document may have been susceptible to two reasonable, competing interpretations. That is not harmless error.

H. Conclusion

In this breach of contract case, the pivotal issue was what the parties intended in terms of fees Hereford could pay himself, and the uses to which the Washington Trust line of credit could be put. In keeping with its summary judgment ruling and the nature of the evidence, the trial court appropriately gave WPI 301.05, the "context rule" instruction based on *Berg*. But the court then, over FAB's objection, tilted the table in favor of WAVE. By giving Instruction 16 the court told the jury that, if they simply found the language of the document ambiguous, they could construe the contract against the party who wrote it. That was prejudicial error. Accordingly, FAB respectfully requests that this matter be remanded for a new trial, on appropriate jury instructions.

Respectfully submitted this 15 day of September, 2010.

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By  _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of September, 2010, pursuant to RAP 5.4(b), a true and correct copy of APPELLANTS' REPLY BRIEF was delivered in the manner indicated below to the following:

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VIA REGULAR MAIL
VIA CERTIFIED MAIL []
VIA FACSIMILE []
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