# STATE OF MICHIGAN

# COURT OF APPEALS

GUILLERMO MEDINA and LILY SELLS,

Plaintiffs-Appellants,

v

EDWARD J. DEGROAT,

Defendant-Appellee.

UNPUBLISHED
January 26, 2023

No. 360539
Saginaw Circuit Court
LC No. 20-041728-CB

Before: GLEICHER, C.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

Plaintiffs Guillermo Medina and Lily Sells appeal by right the trial court's entry of judgment in favor of defendant Edward J. DeGroat after a bench trial concerning the meaning of a partnership agreement entered into by the parties. At the center of the dispute is how the profit distributions are to be made. Finding no errors warranting reversal, we affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

In 1986, defendant and Guillermo entered into a partnership agreement (the "Partnership Agreement") with five other investors, including Guillermo's son, Marlow, to form a partnership called "Towne Center Investments" (the "Partnership"). The purpose of the Partnership was to purchase a commercial office building called the "Vanguard Building." Defendant was to be the managing partner. At the time he entered into the Partnership Agreement, Guillermo had asked Sells to invest in the Partnership as well, but she instead provided defendant with a loan for the purpose of purchasing the Vanguard Building. Marlow's interest was later assigned to Sells, Guillermo's former wife, in 2007 or 2008.

The Vanguard Building was purchased for $2,400,000, which included capital contributions totaling $526,800 from the partners. Specifically, and as relevant here, defendant contributed $207,728, and Guillermo and Marlow contributed $108,160 and $16,224 each respectively. These amounts are listed in the Partnership Agreement next to each partner's name under a column titled "Amount of Initial Contribution." Listed next to the initial contribution dollar amounts is also a percentage. Thus, next to the $207,728 credited as defendant's contribution is the number 70 1/2%, next to Guillermo's is 10%, and next to Marlow's is 1 1/2%

These percentages do not, however, equate with the proportion of the capital contribution each partner made to the Partnership. For example, defendant's contribution of $207,728 represents only approximately 39% of the total $526,800 contributed (not 70 1/2%), while Guillermo's $108,160 contribution represents 20% (not 10%).

Under the Partnership Agreement, "[i]n the event of a loss by the partnership, the Investors shall be entitled to share in such loss in the same proportion as their contributions to the partnership." In the event there is a profit "from any source other than the sale or other disposition, the Investors shall share in such profit in the same proportion as their contributions to the partnership." And with respect to profits from the sale of the Vanguard Building, "the Investors shall first receive the amounts of their capital accounts, and any profit over and above the capital accounts shall be distributed to the Investors in proportion to their capital accounts as to their percentage of ownership." It is undisputed that since the beginning of the Partnership, defendant, as the managing partner, has paid each partner profits under the Partnership Agreement according to the percentages listed and not the actual pro rata amount contributed initially by the partners.

According to plaintiffs, the dispute between the parties began after the monthly distribution checks from defendant decreased in amount in 2018. It was at this point that plaintiffs claimed they discovered the discrepancy in the manner in which distributions were being made. On January 30, 2020, Guillermo filed a five-count complaint with the trial court, which he later amended the complaint to add Sells as a party.

The matter proceeded to trial, after which the trial court entered judgment in defendant's favor, concluding that the Partnership Agreement was ambiguous and the extrinsic evidence demonstrated the parties agreed to defendant's method of profit distribution. Plaintiffs moved for reconsideration, which was denied. This appeal followed.

## II. STANDARDS OF REVIEW

Issues of contract interpretation are questions of law this Court reviews de novo. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 229; 964 NW2d 809 (2020). This Court also reviews de novo the question of whether a contractual provision is ambiguous. *Hein v Hein*, 337 Mich App 109, 115; 972 NW2d 337 (2021). "In general, a trial court's legal determinations are reviewed de novo, any underlying factual findings are reviewed for clear error, and ultimate discretionary decisions are reviewed for an abuse of that discretion." *Id*. "[A] finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, 337 Mich App 88, 98 n 5; 972 NW2d 325 (2021). A trial court abuses its discretion if it makes a decision that is "outside the range of reasonable and principled outcomes." *Komendat v Gifford*, 334 Mich App 138, 149; 964 NW2d 75 (2020). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

## III. ANALYSIS

On appeal, plaintiffs contend that the trial court erred because the Partnership Agreement was not ambiguous. According to plaintiffs, the Partnership Agreement set forth two different methods for distributing profits on the basis of what the source of the profit was. Thus, if the profit

came from the sale of the Vanguard Building, the Partnership Agreement allowed for profits to be distributed on the basis of the percentages in the document. If, however, the profit is from any other source, plaintiffs contend the Partnership Agreement unambiguously required defendant to distribute profits on the basis of each partner's pro rata share of the Partnership. While we agree with plaintiffs that this is a reasonable interpretation of the Partnership Agreement, it is not the only reasonable interpretation. Thus, it is evident that the Partnership Agreement is ambiguous, and the trial court did not err when it examined extrinsic evidence to determine the parties' intent.

"[T]he main goal in the interpretation of contracts is to honor the intent of the parties." *Mahnick v Bell Co*, 256 Mich App 154, 158-159; 662 NW2d 830 (2003). Words in a contract are given "their plain and ordinary meanings." *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009). "An unambiguous contract must be enforced according to its terms." *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). However, "[i]f a contract is subject to two interpretations, factual development is necessary to determine the intent of the parties . . . ." *Mahnick*, 256 Mich App at 159. "Whether a contract is ambiguous is a question of law, while determining the meaning of ambiguous contract language becomes a question of fact." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019).

The interplay of two contractual provisions of the Partnership Agreement are at issue in this case. Under § 5.01 of the Partnership Agreement, the "initial contributions" of each partner were listed in dollar form under a column titled "Amount of Initial Contribution." Next to each dollar figure is a percentage which does not relate to the proportion of initial contribution to the total contributed. In other words, under the column "Amount of Initial Contribution," there are two numbers that do not mathematically relate to one another but are yet grouped under one heading.

The second relevant section of the Partnership Agreement is § 6, which states:

> In the event of a loss by the partnership, the Investors shall be entitled to share in such loss in the same proportion as their contributions to the partnership. In the event of any profit earned by the partnership from any source other than the sale or other disposition, the Investors shall share in such profit in the same proportion as their contributions to the partnership. In the event of any profit realized from the sale or disposition of the office building the Investors shall first receive the amounts of their capital accounts, and any profit over and above the capital accounts shall be distributed to the Investors in proportion to their capital accounts as to their percentage of ownership.

Thus, the Partnership Agreement contemplates that there are three scenarios under which profits and losses are accounted for. Under two scenarios, a financial loss or a profit not related to the sale of the Vanguard Building, the profits or losses are shared "in the same proportion as their contributions to the partnership." In the other scenario, a profit from the sale of the Vanguard Building, each partner is to first receive their capital account and, if there is any remaining profit, it is shared "in proportion to their capital accounts as to their percentage of ownership."

The question, therefore, is what numbers are supposed to be used from § 5.01 when determining a partner's "contributions to the partnership" or "percentage of ownership." None of

these terms are defined in the Partnership Agreement. It is unclear whether defendant was supposed to use the same number or different numbers when determining "contributions to the partnership" and "percentage of ownership." And, if it is the same number that is to be used, it is also unclear which number is to be used; the dollar amount or the percentage. While it is true the term "percentage" appears in the part concerning the sale of the Vanguard Building—which would suggest using the percentages in that calculation—it does not necessarily follow that the percentages in § 5.01 refer to "percentage of ownership," since that term is not defined.

Contrary to plaintiffs' argument, therefore, a finding that the Partnership Agreement is ambiguous does not render parts of the Agreement nugatory or meaningless. Rather, it is simply unclear to this Court what meaning is to be applied to each term, and reference to common ordinary meanings of the terms will not be useful because § 5.01 is fatally ambiguous as it defines two, unrelated numbers as the "Amount of Initial Contribution," a term which, unhelpfully, does not even appear in § 6. The Partnership Agreement is ambiguous because it is subject to multiple, reasonable interpretations. Thus, the trial court was entitled to examine extrinsic evidence in order to determine the parties' intent when agreeing to the Partnership Agreement. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469-470; 663 NW2d 447 (2003) ("The law is clear that where the language of the contract is ambiguous, the court can look to such extrinsic evidence as the parties' conduct, the statements of its representatives, and past practice to aid in interpretation.") (quotation marks and citation omitted).[1]

Next, plaintiffs argue the trial court erred because, even if the Partnership Agreement is ambiguous with respect to profit distribution, it was wrong for the court to rely on defendant's self-serving testimony about the parties' course of dealing. According to plaintiffs, this was error because the trial court was not permitted to rely only on the conduct of one party, and there was no other extrinsic evidence to demonstrate plaintiffs intended such a result. We disagree.

The Partnership Agreement was signed in 1986, 32 years before plaintiffs claim they first became aware there may be an issue with profit distributions. During these 32 years, defendant stated he always paid the other partners on the basis of the percentages listed in the Partnership Agreement. Defendant also testified that, around the time the Partnership Agreement was signed, he explained to plaintiffs the methodology he used to calculate profit checks. While plaintiffs could not recall defendant providing such explanation, they did not deny he did. And plaintiffs admit they never questioned the amounts on the checks from defendant for those three decades.

[1] Plaintiffs also contend that the trial court deprived them of due process when it concluded the Partnership Agreement was ambiguous because both parties claimed the Agreement was unambiguous, albeit under different interpretations. Plaintiffs' argument is abandoned on appeal because plaintiffs merely state their position and do not support it with any analysis. See *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005) (considering argument abandoned where the litigant "offer[ed] no meaningful argument on th[e] issue."). Even if not abandoned, the argument is not persuasive, given the fact the parties each had differing interpretations of the same provision. Plaintiffs cannot reasonably argue they had no notice of the ambiguity issue when they themselves could not agree with defendant what the Partnership Agreement meant.

Citing *Gaydos v White Motor Corp*, 54 Mich App 143; 220 NW2d 697 (1974), plaintiffs argue the trial court erred because it relied only on defendant's testimony when determining that the parties' course of conduct over the three decades was evidence of their intent to agree to the profit distribution provision of the Partnership Agreement. In *Gaydos*, this Court explained that the "meaning of the contract cannot be established by the construction placed on it by one of the parties, or by only some of the parties, unless such interpretation has been made to and relied on by the other party or parties, or has been known to, and acquiesced in, by the other party or parties, or, according to some authorities, it is against the interest of the party making it." *Gaydos*, 54 Mich App at 149. On the one hand, what plaintiffs seek from the trial court is exactly what they claim to be error—they wanted their "self-serving" interpretation of the Partnership Agreement to be accepted. And on the other hand, and perhaps most importantly, the trial court did not simply rely on defendant's testimony, as plaintiffs contend. Thus, the trial court did not err when concluding that the parties' course of conduct demonstrated their having agreed to the defendant's interpretation. The court examined all parties' conduct, including plaintiffs' decision to accept the profit distributions for three decades before purporting to discover the discrepancy.

Plaintiffs also argue that because Sells was not a partner until 2008, she would not have engaged in the same course of dealing with defendant as Guillermo had. Thus, under *Gaydos*, plaintiffs contend the trial court erred by examining extrinsic evidence that was not applicable to Sells's time as a partner. This argument, however, overlooks the fact that Sells's status when she obtained her partnership interest was that of an assignee. And as an assignee, Sells stands in the shoes of the assignor—Marlow—and therefore "acquir[ed] the same rights and [was] subject to the same defenses as the assignor." See *Wells Fargo Bank, NA v SBC IV REO, LLC*, 318 Mich App 72, 107; 896 NW2d 821 (2016) (quotation marks and citation omitted). Thus, because Marlow's course of dealing would have been nearly identical to that of Guillermo's, when Sells obtained her interest, she also obtained all defenses that could have been asserted against Marlow.

Affirmed. Defendant, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Anica Letica