IN THE COURT OF APPEALS OF IOWA

No. 7-943 / 07-0003
Filed February 13, 2008

FISHER CONTROLS INTERNATIONAL, L.L.C.,
Plaintiff-Appellant,

vs.

PHARMACIA CORPORATION,
Defendant-Appellee.

Appeal from the Iowa District Court for Marshall County, Dale E. Ruigh, Judge.

Plaintiff appeals from a district court ruling granting summary judgment in favor of defendant in a declaratory judgment action. **AFFIRMED.**

O. Thomas Armstrong of von Briesen & Roper, S.C., Milwaukee, Wisconsin, and James A. Brewer and Angelina M. Thomas of Newbrough, Johnston, Brewer, Maddux & Howell, L.L.P., Ames, for appellant.

Mark McCormick of Belin, Lamson, McCormick, Zumbach, Flynn, P.C., Des Moines, and Stephanie Scharf of Shoeman, Updike, Kaufman & Scharf, Chicago, Illinois, for appellee.

Heard by Huitink, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Fisher Controls International, L.L.C. appeals from a district court ruling granting summary judgment in favor of Pharmacia Corporation in a declaratory judgment action. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

The summary judgment record reveals the following undisputed facts. Fisher Governor Company (Fisher Governor) was incorporated in Iowa in the late 1800s or early 1900s. The company designed and manufactured industrial control valves at its principal place of business in Marshalltown.

On April 3, 1969, Fisher Governor entered into a "Plan and Agreement of Merger" with Monsanto Company whereby Fisher Governor would be "merged with and into Monsanto, which shall be the surviving corporation under the laws of the State of Delaware, and the separate existence of Fisher shall cease." The merger agreement further provided,

> Monsanto has caused a corporation to be organized pursuant to the laws of the State of Delaware, having the name of Fisher Controls, Company, Inc.,[1] and as soon as practicable after the consummation of the merger contemplated by the Agreement, Monsanto will transfer to Fisher Controls Company, Inc., substantially all of the assets and property of Fisher [Governor] as the same existed at the Effective Date, . . . in exchange for and in consideration of all the shares of the capital stock of Fisher Controls Company, Inc., to be outstanding and the assumption by Fisher Controls Company, Inc. of all the liabilities and obligations of Fisher [Governor] as existed at the Effective Date, except options under Fisher's Stock Option Plans.

Fisher Governor merged with Monsanto on August 12, 1969. Simultaneously with the merger, Monsanto executed a "General Instrument of

[1] Fisher Controls Company, Inc. was incorporated by Monsanto on March 21, 1969.

Transfer" with the newly formed Fisher Controls Company, Inc., now known as Fisher Controls International, L.L.C. (Fisher Controls). The transfer agreement stated,

> Monsanto . . . in furtherance of the provisions of a Plan and Agreement of Merger dated as of April 3, 1969 between Monsanto and Fisher Governor . . . and in consideration of the assumption by [Fisher Controls] of all obligations, debts, liabilities and duties, except those set forth in Exhibit A attached hereto,[2] of Fisher [Governor] *at August 12, 1969* which have been transferred to and vested in Monsanto by operation of law pursuant to the merger of Fisher [Governor] into Monsanto effective on August 12, 1969, does . . . transfer . . . to [Fisher Controls] . . . all property . . . and all debts and other obligations due on whatever account, and all other things in action, of and belonging to Fisher [Governor], *at August 12, 1969* which have been transferred to and vested in Monsanto by operation of law pursuant to said merger.

(Emphasis added.)

Following the August 12, 1969 merger, Fisher Controls became a wholly-owned subsidiary of Monsanto. For the most part, however, Fisher Controls and Monsanto maintained independent governance, management, and operational structures. Monsanto forwarded any claims against Fisher Controls it received to Fisher Controls.

In 1992 Monsanto sold Fisher Controls to Emerson Electric Company. After the sale, multiple lawsuits were filed against Fisher Controls seeking damages for injuries allegedly sustained from exposure to asbestos fibers contained in products manufactured by Fisher Governor before its August 12, 1969 merger with Monsanto. In July 2003 Fisher Controls filed a declaratory

[2] "Exhibit A" provided Fisher Controls would not assume the "debts, liabilities and obligations arising out of, under, or pursuant to" (1) any outstanding stock options granted by Fisher Governor and (2) an agreement between Fisher Governor and the Northern Trust Company.

judgment action against Monsanto, now known as Pharmacia Corporation, requesting a determination that Pharmacia is liable for those lawsuits.

Fisher Controls filed a motion for partial summary judgment, asserting "under the unambiguous terms of the August 12, 1969" transfer agreement and the earlier merger agreement "Monsanto Company retained responsibility for any future liabilities of the former Fisher Governor Company." Fisher Controls argued the phrase "at August 12, 1969" in the transfer agreement means Monsanto "transferred only liabilities of the former Fisher Governor existing on August 12, 1969." Pharmacia resisted the motion and filed a "cross motion for summary judgment," asserting Monsanto transferred all liabilities of Fisher Governor, including "liabilities that were not yet 'known,' 'accrued,' or 'existing' on August 12" to Fisher Controls under the transfer agreement. Pharmacia argued the phrase "at August 12, 1969" in the transfer agreement "does not limit *what* was transferred, it simply marks *when* the transfer occurred."

The district court entered a ruling on December 5, 2006, granting Pharmacia's motion for summary judgment and denying the partial summary judgment motion filed by Fisher Controls. The court concluded "that, pursuant to the General Instrument of Transfer dated August 12, 1969, Fisher Controls assumed all liabilities of Fisher Governor Company, except those described in Exhibit 'A' attached to that instrument." The court thus declared, "As between the parties to this action, Fisher Controls International, L.L.C., shall have responsibility for those liabilities."

Fisher Controls appeals, claiming the district court erred in its interpretation of the August 12, 1969 transfer agreement. It argues the phrase

"at August 12, 1969" in the transfer agreement "signifies the nature and scope of the liabilities transferred, not merely the date of the transfer agreement." It argues, in the alternative, that the "use of the word 'at' in the transfer agreement renders the transfer agreement ambiguous."[3] Fisher Controls also claims the district court erred in finding the merger agreement was not incorporated by reference into the transfer agreement and in finding extrinsic evidence supported its conclusion that the transfer agreement conveyed responsibility for all of Fisher Governor's liabilities to Fisher Controls.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 873 (Iowa 2007). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007). A fact question arises if reasonable minds can differ on how the issue should be

[3] Pharmacia contends Fisher Controls did not preserve error on this argument because it was not presented to the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). We reject this contention because Fisher Controls did present the issue of contract interpretation to the district court, which necessarily involves a determination of whether the disputed phrase is ambiguous. *See Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001) (stating the first step in interpreting a contract is determining whether a disputed term is ambiguous). However, we do agree with Pharmacia that Fisher Controls did not preserve error on its claim that the transfer agreement and the merger agreement "are writings that are part of the same transaction and must therefore be interpreted together." This claim was neither presented to nor passed upon by the district court. *See Meier*, 641 N.W.2d at 537. We therefore need not and do not address this claim.

resolved. *Walderbach*, 730 N.W.2d at 199. No fact question arises if, as here, the only conflict concerns legal consequences flowing from undisputed facts. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

III. Discussion.

A. Interpretation of the Transfer Agreement.

When a merger becomes effective, "[a]ll liabilities of each corporation or other entity that is merged into the survivor [corporation] are vested in the survivor." Iowa Code § 490.1107(1)(d) (2003); *see also C. Mac Chambers Co., v. Iowa Tae Kwon Do Acad., Inc.*, 412 N.W.2d 593, 597 (Iowa 1987) (stating a successor corporation will be held liable for the debts of its predecessor when there is a consolidation or merger). Thus, Monsanto, as the surviving corporation, became responsible for the liabilities of Fisher Governor when the two corporations merged on August 12, 1969. Monsanto, however, entered into a transfer agreement with Fisher Controls on the same day of the merger whereby it transferred "all obligations, debts, liabilities and duties, except those set forth in Exhibit A . . . of Fisher [Governor] at August 12, 1969" to Fisher Controls.

Fisher Controls claims the district court erred in concluding that it assumed all liabilities of Fisher Governor pursuant to that transfer agreement. It argues the phrase "at August 12, 1969" means "the former Fisher Governor liabilities being transferred [by Monsanto to Fisher Controls] were those existing" on August 12, 1969. Thus, according to Fisher Controls, "Monsanto (Pharmacia) retained those future liabilities of the former Fisher Governor that were not yet in

existence when the merger was consummated."[4] Pharmacia, on the other hand, argues "the term 'at August 12, 1969' merely refers to the date on which the merger and transfer were consummated."

Where the dispute centers on the meaning of a contract term, as it does in this case, we engage in the process of contract interpretation. *Walsh*, 622 N.W.2d at 503. The primary goal of contract interpretation is to determine the parties' intentions at the time they executed the contract. *Id*. Interpretation involves a two-step process: (1) the court must determine what meanings are reasonably possible from the words chosen, and (2) the court must choose among possible meanings. *Id.* (citing Restatement (Second) of Contracts § 202 cmt. a, at 87 (1981)).

The first step involves determining whether a term is ambiguous. *Id.* "A term is ambiguous if, 'after all pertinent rules of interpretation have been considered,' 'a genuine uncertainty exists concerning which of two reasonable interpretations is proper.'" *Id.* (quoting *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999)). A contract is not ambiguous simply because the parties disagree over its meaning. *Hartig Drug Co.*, 602 N.W.2d at 797.

"In interpreting contracts, we give effect to the language of the entire contract according to its commonly accepted and ordinary meaning." *Id.*

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[4] Both parties seem to agree the asbestos claims that gave rise to Fisher Controls' declaratory judgment action were not in existence on August 12, 1969. Therefore, we, like the district court, will assume without deciding that the asbestos lawsuits involving allegations of injuries occurring after August 12, 1969, due to products manufactured by Fisher Governor before that date, "were unknown and did not legally 'exist' on August 12, 1969, when Fisher Governor merged into Monsanto." *See, e.g., Tice v. Wilmington Chem. Corp.*, 259 Iowa 27, 45, 141 N.W.2d 616, 628 (1966) ("[A] legal cause of action in tort can only exist or accrue when injury . . . has been suffered by a person. . . .").

Particular words and phrases are not interpreted in isolation. *Id.* at 798. Instead, they are interpreted in the context in which they are used. *Id*. Using these rules of interpretation as a guide, we conclude the district court did not err in concluding "the language within the four corners of the August 12, 1969, General Instrument of Transfer shows Fisher Controls' assumption of all of Fisher Governor's liabilities, not just the 'existing' liabilities."

When the phrase "at August 12, 1969" is viewed in the context of the transfer agreement it appears, as the district court found, "to simply constitute a reference to the date on which the merger between Fisher Governor and Monsanto was consummated." Fisher Controls, however, urges that "[a]lthough the Transfer Agreement does not expressly employ the term 'existing,' the word 'existing' is implicit in the use of the phrase 'at August 12, 1969.'" We do not agree. The word "at" is commonly used as a preposition to "indicate[ ] when something happens," and one of its synonyms is "on." Encarta World English Dictionary (N. Am. ed. 2007), http//Encarta.msn.com/dictionary_1861587427/at.html. There is nothing in the transfer agreement itself that would suggest the parties intended "at August 12, 1969" to stand for "existing at August 12, 1969" instead of its "commonly accepted and ordinary meaning" of "on August 12, 1969." *Hartig Drug*, 602 N.W.2d at 797.

Fisher Controls' interpretation would mean Monsanto intended to exclude liabilities of Fisher Governor that might arise after the merger from those liabilities being transferred to Fisher Controls. Such an interpretation is not reasonable in light of the explicit language of the transfer agreement, which provided "*all* obligations, debts, liabilities and duties, except those set forth in Exhibit A" of

Fisher Governor were being transferred to Fisher Controls. (Emphasis added.) Moreover, as the district court recognized, "Monsanto made no mention of such liabilities in Exhibit A, a document clearly intended to specify those liabilities being retained by Monsanto." We therefore conclude the district court was correct in finding that Monsanto transferred all of Fisher Governor's liabilities, not just those existing on August 12, 1969, to Fisher Controls under the unambiguous language of the transfer agreement.

B. Incorporation by Reference.

In support of its interpretation of the transfer agreement, Fisher Controls next argues the merger agreement, which provided that Fisher Controls would assume "all the liabilities and obligations of Fisher [Governor] as existed at the Effective Date" of the merger, was incorporated by reference into the transfer agreement. We reject this argument.

"When determining the meaning of a contract, we look both to the terms of the contract as well as to any documents included by reference." *Hofmeyer v. Iowa Dist. Court*, 640 N.W.2d 225, 228 (Iowa 2001). "Under the doctrine of incorporation, one document becomes part of another separate document simply by reference as if the former is fully set out in the latter." *Id.* Where a writing refers to another document, that other document is to be interpreted as a part of the writing. *Id.* The reference, however, must be "clear and specific" in order to "incorporate an extrinsic document by reference." *Id*.

In the August 12, 1969 transfer agreement, Monsanto stated it was transferring the assets and liabilities of Fisher Governor to Fisher Controls "in furtherance of the provisions of a Plan and Agreement of Merger dated as of

April 3, 1969 between Monsanto and Fisher Governor." We conclude the district court was correct in finding this general reference to the merger agreement between Monsanto and Fisher Governor in the introduction of Monsanto's subsequent transfer agreement with Fisher Controls "does not constitute the 'clear and specific' reference necessary for incorporation by reference." *See, e.g.*, *Estate of Kokjohn v. Harrington*, 531 N.W.2d 99, 101 (Iowa 1995) (concluding the doctrine of incorporation applied where a signature card provided, "The undersigned and [the bank] agree that the terms and conditions of the Time Deposit, Open Account Agreement as set forth in the passbook accompanying this account shall apply"); *Hofmeyer*, 640 N.W.2d at 229 (finding incorporation by reference where the contract provided "travel expenses 'will be paid to the extent specified by administrative rule adopted by the State Public Defender'").

"A preliminary recital, which is an explanation of the circumstances surrounding the execution of the contract, does not become a binding obligation unless so referred to in the operative portion of the instrument." *Wilson v. Wilson*, 577 N.E.2d 1323, 1329 (Ill. App. Ct. 1991); *see also Estate of Kokjohn*, 531 N.W.2d at 101 (citing with approval cases requiring evidence of an intention to make the terms and conditions of another document part of the instrument in question in order to find incorporation by reference). The lengthy thirty-page merger agreement, mentioned in the opening sentence of the transfer agreement, is neither attached to the transfer agreement nor referred to again in its operative portion. Furthermore, the merger agreement was entered into between Monsanto and Fisher Governor while the transfer agreement was

entered into by Monsanto and Fisher Controls. In light of the foregoing, we conclude the district court was correct in finding the parties did not intend to incorporate the complicated and extensive terms and conditions of Monsanto's merger agreement with Fisher Governor into Monsanto's transfer agreement with Fisher Controls.

C. Extrinsic Evidence.

Finally, we turn to Fisher Controls' argument that extrinsic evidence supports its "position that the transfer agreement transferred only Fisher Governor's existing liabilities to Fisher Controls." Fisher Controls urges the "best evidence of the parties' intent other than the words of the transfer agreement itself is the terms of the" merger agreement.[5] We do not agree.

We recognize that ambiguity is not required before we may consult extrinsic evidence. *Hofmeyer*, 640 N.W.2d at 228 ("Any determination of meaning or ambiguity must be made in light of all the circumstances. . . ."); *see also Walsh*, 622 N.W.2d at 503 ("[T]he disputed language and the parties' conduct must be interpreted 'in the light of all the circumstances' regardless of whether the language is ambiguous.") (citation omitted). Extrinsic evidence is admissible as an aid to interpretation when it sheds light on the situation of the parties, antecedent negotiations, the attendant circumstances, and the objects they were striving to obtain. *Kroblin v. RDR Motels, Inc.*, 347 N.W.2d 430, 433

[5] Fisher Controls also argues the agreement between Monsanto and Emerson Electric for the purchase of Fisher Controls in 1992 supports its interpretation of the transfer agreement. It points to a provision in the purchase agreement in which Monsanto warranted there were "no undisclosed material liabilities" of Fisher Controls. We believe the district court was correct in concluding this provision "sheds no light on the contractual intentions of Monsanto and Fisher Controls in 1969."

(Iowa 1984). However, after the agreement has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention. *Hofmeyer*, 640 N.W.2d at 228.

Although the merger agreement between Monsanto and Fisher Governor provided Fisher Controls would assume "all the liabilities and obligations of Fisher [Governor] *as existed at the Effective Date*" of the merger, that same language is not found in the subsequent transfer agreement between Monsanto and Fisher Controls. (Emphasis added.) In addition, other circumstances surrounding the formation of the transfer agreement support the district court's conclusion that Monsanto did not intend to limit the liabilities transferred to Fisher Controls to those "existing at August 12, 1969."

In a May 9, 1969 proxy statement sent by Monsanto to its stockholders for approval of its merger with Fisher Governor, Monsanto stated, "After the effective date of the merger, substantially all of the assets and business of Fisher [Governor] will be transferred to" Fisher Controls. Fisher Governor likewise informed its stockholders before the merger that Monsanto would "transfer substantially all of the assets and business of Fisher [Governor]" to Fisher Controls in consideration for Fisher Controls' assumption of "all the obligations and liabilities of Fisher [Governor]." In a memorandum outlining the terms of the merger, Fisher Governor and Monsanto reflected their understanding that "Fisher Controls would be responsible for all liabilities and obligations of [Fisher Governor]." Finally, the minutes of a Fisher Controls board of directors meeting, which took place shortly before the merger, indicates the board approved the transfer agreement and Fisher Controls' assumption of "substantially all debts,

liabilities and obligations of Fisher Governor Company at the effective date of that merger."

Richard Duesenberg, a former attorney for Monsanto who was in charge of the August 12, 1969 merger, confirmed in his deposition testimony that the purpose of the transfer agreement was to transfer "[a]bsolutely everything. All assets and liabilities" of Fisher Governor, whether "known or unknown, . . . existing or not" "were transferred, dropped down to the Fisher Controls Company." Duesenberg testified "that is clearly the intent of the [transfer agreement], because it talks about 'all liabilities, debts and obligations,'" and "[a]ll meant all."[6] We believe the district court was correct in finding the foregoing undisputed extrinsic evidence "bolstered" its conclusion that the parties "intended to transfer the entirety of Fisher Governor's business to Fisher Controls" pursuant to the unambiguous language of the transfer agreement.

IV. Conclusion.

We conclude the district court did not err in determining that Monsanto transferred all of Fisher Governor's liabilities, not just those existing on August 12, 1969, to Fisher Controls under the unambiguous language of the transfer agreement between Monsanto and Fisher Controls and in light of all the

[6] Fisher Controls argues Duesenberg's "subjective understanding of the terms" of the agreement is inadmissible under *M-Z Enterprises v. Hawkeye-Security Insurance Co.*, 318 N.W.2d 408, 413-14 (Iowa 1982). That case is inapposite to the facts presented in this case. *See id.* (stating a jury instruction as to the effect of each party's subjective understanding of a contract term is appropriate where the terms of the contract are ambiguous and the party's subjective understanding of the disputed term is communicated to the other party). Duesenberg's deposition testimony in this case was properly offered to show what was meant by the language used in the transfer agreement. *See Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 276 (Iowa 1982) (stating extrinsic evidence offered to show "'what was meant by what [the parties] said'" instead of "'what the parties meant to say'" is admissible) (citation omitted).

circumstances surrounding the formation of that agreement. We further conclude the court was also correct in concluding the transfer agreement did not incorporate the merger agreement between Monsanto and Fisher Governor by reference. The judgment of the district court denying Fisher Controls' motion for partial summary judgment and granting the summary judgment motion filed by Pharmacia is accordingly affirmed.

AFFIRMED.