COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2009AP2134 **Cir. Ct. No. 2009CV54**

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

CONSERVE COMMUNITY, LLC, JULIE LEIZERMAN, PATRICIA A. LINS, LAWRENCE SUTTER, ALICE L. ACKERMAN, TIMOTHY P. ACKERMAN, JUELY K. BARTHOLOMEW, TIMOTHY J. BARTHOLOMEW, JOAN KRULL, KENNETH ALAN BUSSART, ROBERT COLME BOURGEOIS, SHARON KYLE BOURGEOIS, MARY HERMES, SARAH WEITZ KLAMMER, JOHN S. KLAMMER, THOMAS KORINEK, DAWN KORINEK, COLIN CRAWFORD, DEB CRAWFORD, MARY ELIZABETH BOSWELL, STEVE DANELSKI, MICHAEL MACY, MARGUERITE MACY, WILLIAM R. MEIER, JR., KATRINA MARIA BILLIN, JEFFREY LEE BILLIN, VERONICA FLORES, NICHOLAS FLORES, JEFF R. DOHL, ANGELA P. DOHL, CHARLES SAUTER AND DENISE SAUTER,

PLAINTIFFS,

J. B. VAN HOLLEN, IN HIS CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF WISCONSIN,

PLAINTIFF-INTERVENOR-COUNTER-DEFENDANT,

V.

CONSERVE SCHOOL TRUST, JAMES RINN AND STEFAN ANDERSON, IN HIS OFFICIAL CAPACITY AS CONSERVE SCHOOL HEADMASTER,

DEFENDANTS,

JOHN F. CALHOUN, MICHAEL J. SULLIVAN, RONALD V. KAZMAR, CHRISTOPHER RODGERS AND MICHAEL X. CRONIN,

DEFENDANTS-RESPONDENTS,

CONSERVE SCHOOL CORPORATION,

DEFENDANT-CROSS-CLAIM DEFENDANT-RESPONDENT,

THE CULVER EDUCATIONAL FOUNDATION,

DEFENDANT-INTERVENOR-CROSS-CLAIM PLAINTIFF-COUNTER CLAIMANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Culver Educational Foundation appeals a summary judgment granted to the Conserve School Corporation and its primary funding source, the Conserve School Trust and its trustees (collectively, Conserve). The circuit court concluded a trust instrument unambiguously permits Conserve to transition from a four-year preparatory boarding school to a semester-away program without triggering an alternate distribution plan under which Culver would receive most of the trust assets. We agree with the circuit court, and affirm.

BACKGROUND

¶2 On September 19, 1995, James Lowenstine, now deceased, executed a "Second Restatement of James R. Lowenstine Trust Dated August 17, 1981." The trust instrument provides for specific pre-residuary distributions upon Lowenstine's death. The residuum is held in a separate trust, known as the Conserve School Trust.

¶3 The distribution plan for the Conserve School Trust directs that the trustees establish and operate a nonsectarian school named the Conserve School on Lowenwood, a large parcel of property Lowenstine owned in Land O'Lakes, Wisconsin. The trustees have discretion to remodel or build new facilities, purchase equipment, employ a superintendent and faculty, and prescribe the school's curriculum, among other things. Before spending trust principal, "the trustees must first determine that there is a reasonable expectation that the trust principal would not be depleted to the extent that its earnings … would be insufficient to continue the operation of the Conserve school and the upkeep and maintenance of the lands and buildings …." Lowenstine directed that the Conserve School Trust qualify as a charitable organization for federal tax purposes.

¶4 The trust instrument addresses student access to the Conserve School. In Article VI, Paragraph B(10), Lowenstine provided that the trustees may "open the school for the regular enrollment of students beginning with the seventh grade, and extending, in the discretion of the trustees, through high school." Article VI, Paragraph K provides that "if, after due consideration, the trustees deem it feasible, students who are enrolled in public or other private schools may be permitted to enroll in the Conserve School to receive tutorial

instruction after such students' regular school hours or on Saturdays and school holidays, and during summer vacations."

¶5 Lowenstine provided an alternate distribution plan for the Conserve School Trust if the Internal Revenue Service denied the trust charitable status or if it became "legally impossible or otherwise impractical to operate the Conserve School …." Under the alternate distribution plan, the trustees are to pay a specified sum to Rush Medical College. The remainder of the trust assets go to Culver, which funds college preparatory boarding schools in Indiana.

¶6 After Lowenstine's death, the trustees spent $60 million to build the Conserve School. The school commenced formal instruction in September 2002 as a four-year college preparatory boarding school for students in grades nine through twelve.

¶7 In 2009, the global economic downturn forced the trustees to reconsider the school's model. On January 30, 2009, the trustees and the headmaster of the Conserve School notified students and parents that beginning the following academic year, the school would transition from a four-year format to a semester school model. Under the semester model, the Conserve School would operate as a semester-away program primarily for high school juniors from other institutions, but with enough flexibility to accommodate advanced sophomores, seniors, and postgraduate students. The trustees anticipated the student population at Conserve School would drop from one-hundred fifty students to approximately thirty to forty-five students under the semester-away program.

¶8 A group of Conserve parents formed Conserve Community, LLC and filed suit to stop the school's transition to the semester-away program. The

circuit court concluded the parents lacked standing and dismissed their claims. The court, however, permitted Culver to intervene as a designated contingent beneficiary under the trust instrument. Culver then filed an Amended Cross-Claim and Counterclaim for Declaratory Relief and Damages against Conserve, alleging the trustees' adoption of the semester-away program violated the trust instrument and triggered the alternate distribution plan.

¶9 Seeking evidence of Lowenstine's intent, Culver moved to compel production of the drafting law firm's estate planning files. The circuit court denied Culver's motion, noting that the meaning of a trust instrument is ordinarily discerned from the document itself. The court reserved the right to revisit the ruling if it determined the trust instrument was ambiguous.

¶10 The parties then filed cross-motions for summary judgment. During a hearing on the motions, Culver and Conserve agreed that the central issue was Lowenstine's intent, as reflected in the language of the trust instrument. Culver argued the instrument required the Conserve School to be operated, if at all, as a traditional four-year boarding school with exclusive enrollment. Conserve argued that adopting the semester model was an appropriate exercise of the trustees' discretion and consistent with Paragraph B(10)'s "regular enrollment" requirement.

¶11 The circuit court agreed with Conserve. It interpreted the phrase "regular enrollment" to include the semester model adopted by the school:

> So now we fall into this question of what does regular enrollment of students mean within [Paragraph B(10)]. [Conserve's attorney] argues that that is a term of legal art. And it may very well be, because as I have indicated, the draftsman of this document could hardly have been expected to sit down and write it without having cracked the Internal Revenue Code, and taken at least a peek at

> Section 170, which defines an educational organization as a place that maintains a regular faculty and curriculum, and normally has a regularly enrolled body of pupils. So it would be natural to derive from that the term "regular enrollment."
>
> ….
>
> And so regular, would seem to me to mean usual, and enrollment would mean that the people who come to class every day are those who have been admitted and are on a list constituting the class. That's the way we would use that term in any of the alternative type of schools that the IRS has already recognized under the tax exemption rulings.

¶12 The circuit court next addressed the significance of Paragraph K. It determined the language of Paragraph K "is clearly not mandatory, it's precatory if you will, wishful, that … his Trustees, … if they deem it feasible, [may permit] students who are enrolled somewhere else … to come to Conserve [during specified times] …." The circuit court did not read Paragraph K as the exclusive means by which students from other institutions may attend Conserve School, concluding that the trust instrument does not prohibit "dual enrollment."[1] Accordingly, the circuit court granted Conserve summary judgment. Culver now appeals.

DISCUSSION

¶13 We review a summary judgment ruling de novo, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment

[1] The circuit court questioned whether the semester-away program could be characterized as "dual enrollment," noting that students would regularly attend classes at Conserve School, while their sending schools merely held their places.

when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶14 The primary issue in this appeal is whether the trust instrument permits the trustees to establish the semester-away program. Culver contends the semester-away program contravenes Paragraph B(10)'s "regular enrollment" requirement because "the Conserve School is no longer the primary or regular school of any students, and because it now gives no students a full 'grade' of education." Culver asserts its interpretation is consistent with the rest of the trust instrument, and specifically Paragraph K, which it argues "draws a distinction between those students who are regularly enrolled in the Conserve School and those who are regularly enrolled in public or other private schools."

¶15 Culver's argument requires interpretation of the trust instrument. We interpret the trust in accordance with the rules of construction of the state designated in the instrument. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268(1), 277(1) (1971). The trust provides, and the parties agree, that Illinois law governs the trust's interpretation.

¶16 Trusts in Illinois are construed according to the same principles as wills. ***Citizens Nat'l Bank of Paris v. Kids Hope United, Inc.***, 922 N.E.2d 1093, 1097 (Ill. 2009). "[T]he goal is to determine the settlor's intent, which the court will effectuate if it is not contrary to law or public policy." ***Id.*** In determining intent, we consider the plain and ordinary meaning of the words used, and analyze the document as a whole. ***Id.*** If the trust instrument's language is unambiguous and clear, the settlor's intent must be ascertained from that language. ***Altenheim German Home v. Bank of Am.***, 875 N.E.2d 1172, 1177 (Ill. App. Ct. 2007).

Extrinsic evidence may be used as an interpretive aid only if the document is ambiguous. ***Id.***

¶17 The circuit court read "regular enrollment" to mean that the trustees may establish a school at which students regularly attend class. The circuit court's interpretation was based on its reading of the instrument's plain language and section 170 of the Internal Revenue Code, which is cited in Article VI, Paragraph L of the trust instrument. Paragraph L expresses Lowenstine's intention that the trust comply with various Code provisions governing charitable organizations, including section 170 "and the rulings and regulations thereunder."

¶18 Section 170 allows, as a general rule, a deduction for charitable contributions. 26 U.S.C. § 170(a)(1) (1994). Charitable contributions include those to "an educational organization which normally maintains a regular faculty and cirriculum and normally has a regularly enrolled body of pupils or students …." 26 U.S.C. § 170(b)(1)(A)(ii). The IRS has further clarified the meaning of section 170(b)(1)(A)(ii) in a treasury regulation tracking the language of the statute, *see* Treas. Reg. § 1.170A-9(c)(1) (1973), and a series of Revenue Rulings. Those Revenue Rulings are consistent with the circuit court's interpretation of "regular enrollment." For example, the IRS has determined that nonregistered participants were not "regularly enrolled" in yoga classes open to the public, but that registered students in an eight-week course were, Rev. Rul. 79-130, 1979-1 C.B. 332; that students who were admitted for an initial three-month probationary period, and thereafter indefinitely, were "regularly enrolled" in martial arts classes, Rev. Rul. 78-309, 1978-2 C.B. 123; and that a group of scholars and government officials invited to attend conferences did not constitute a "regularly enrolled" body of students, Rev. Rul. 64-128, 1964-1 C.B. 191.

¶19 We agree with the circuit court that Paragraph B(10)'s "regular enrollment" requirement adopts the meaning of the similar phrase "regularly enrolled" under the Internal Revenue Code. The trust instrument indicates that Lowenstine intended to establish a tax-exempt charitable trust which would, in turn, establish a conservation school. The two designated events triggering the alternative distribution plan—denial of charitable trust status or impracticality of operating the Conserve School—evince these dual goals. Accordingly, it is not surprising that the provision governing access to the Conserve School would adopt language nearly identical to that used in the Internal Revenue Code. "Technical terms with established meanings are presumed to be used according to their technical meanings unless they are otherwise explained." ***Martin v. Laas***, 480 N.E.2d 1183, 1186 (Ill. App. Ct. 1985).

¶20 The meaning of "regularly enrolled" under the Internal Revenue Code is also consistent with the plain meaning of "regular enrollment" outside the taxation context. Again, we agree with the circuit court's analysis: "And so regular, would seem to me to mean usual, and enrollment would mean that people who come to class every day are those who have been admitted and are on a list constituting the class." Culver's interpretation—that "regular enrollment" means Conserve School must be the primary school for the student population—is strained and unreasonable because it does not reflect the plain meaning of the phrase. "Regular" does not mean "primary." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1913 (Unabr. 1993). And even if it did, Conserve School will be the students' primary school because they will not attend classes elsewhere while enrolled.

¶21 Culver also asserts the semester-away program violates Paragraph B(10)'s requirement that Conserve School provide a full grade of education.

Again, that paragraph provides that the trustees may open a school "beginning with the seventh grade, and extending, in the discretion of the trustees, through high school." We are skeptical that Paragraph B(10) imposes a full grade requirement in light of the substantial discretion the provision, and the trust instrument as a whole, vests in the trustees.[2]

¶22 Assuming, however, that Paragraph B(10) incorporates a full grade requirement, we conclude the semester-away program satisfies it. Although the school's new program is undisputedly semester-based, the program provides a full academic year of instruction. According to a January 14, 2008 memorandum by Conserve's headmaster, the academic year is broken into two semesters. Students take six regular courses each semester, including three core courses, two "progression" courses that allow students to keep up with courses at their sending schools, and one of eight different elective courses. The core courses include English, science, and history, and students may choose one of two courses satisfying the English and science requirements. The "progressive" courses feature an advancement scheme common of schools teaching multiple grades; for example, the Conserve School will teach algebra II, trigonometry, precalculus, and calculus. We conclude the school's curriculum, which must be flexible enough to accommodate high-school sophomores, juniors, seniors, and postgraduate students, is consistent with a school providing a full "grade" of education.

[2] Although the trustees' decision arguably conflicts with Paragraph B(10)'s direction that instruction begin in the seventh grade, the parties appear to agree that this requirement gives the trustees discretion to begin instruction at later grade levels. In its reply brief, Culver contends, apparently for the first time, that the inclusion of postgraduate students in the semester-away program violates Paragraph B(10). We generally do not address arguments first raised in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

¶23 Culver also claims the semester-away program violates Paragraph K, which it contends is the exclusive method by which a secondary population of students from other institutions may attend Conserve School. Paragraph K states that "if, after due consideration, the trustees deem it feasible, students who are enrolled in public or other private schools may be permitted to enroll in the Conserve School to receive tutorial instruction after such students' regular school hours or on Saturdays and school holidays, and during summer vacations." Essentially, Culver invokes the maxim expressio unius est exclusio alterius, which is a "canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 629 (8th ed. 2004).

¶24 Paragraph K does not implicitly prohibit the semester-away program adopted by the trustees. Expressio unius "is a rule of common sense." ***Gekas v. Williamson***, 912 N.E.2d 347, 359 (Ill. Ct. App. 2009). "The force of the inference from silence depends on whether, under the circumstances, some further expression would have been expected." ***Id.*** If Lowenstine intended to confine the circumstances under which the trustees could admit students from other institutions to Paragraph K, one would expect a statement to that effect somewhere in the trust instrument. However, no language, in Paragraph K or elsewhere, suggests such intent. Instead, the instrument indicates the trustees have substantial discretion to define the composition of the student body. Culver attempts to manufacture a different meaning by repeatedly inserting the word "only" in its recitation of Paragraph K, but "only" does not appear anywhere in the pertinent language.

¶25 Paragraph K does not expressly prohibit the semester-away program either. Paragraph K gives the trustees discretion to admit a secondary group of

students who may attend the school during specified times. This group does not include students attending Conserve School as part of the semester-away program, who are not "enrolled" at their sending institution because they do not attend classes there. In addition, students from outside institutions have no regular school hours at those institutions while attending Conserve School. Therefore, any instruction they receive necessarily occurs outside of those students' regular school hours, which is permissible under Paragraph K.

¶26 Culver contends the trial court's interpretation renders Paragraph K mere surplusage, contrary to Illinois law. *See* ***Harris Trust & Sav. Bank v. Donovan***, 582 N.E.2d 120, 123 (Ill. 1991). But Paragraph K does still serve a purpose by permitting the trustees to provide tutorial instruction to students who are enrolled, or have regular school hours at, another institution.

¶27 In the alternative, Culver argues the circuit court should have determined that the trust instrument is ambiguous. "Whether a trust provision is ambiguous is a question of law to be determined by the court, and ambiguity can be found only if the language is reasonably or fairly susceptible to more than one interpretation." ***Espevik v. Kaye***, 660 N.E.2d 1309, 1313 (Ill. App. Ct. 1996). We have already concluded Culver's reading of the phrase "regular enrollment" is unreasonable. In addition, we have concluded that any full grade requirement is satisfied even if we accept Culver's interpretation. The trust instrument unambiguously permits the semester-away program adopted by the trustees.

¶28 Culver nonetheless argues the circuit court should have permitted discovery of the drafting law firm's estate planning files. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the action. WIS. STAT. § 804.01(2)(a). We review a circuit

court's decision to prohibit discovery for an erroneous exercise of discretion. *See* ***Vincent & Vincent, Inc. v. Spacek***, 102 Wis. 2d 266, 270-71, 306 N.W.2d 85 (Ct. App. 1981). Because the trust instrument is unambiguous, the circuit court properly exercised its discretion to exclude irrelevant material. *See* ***Altenheim German Home***, 875 N.E.2d at 1177 (extrinsic evidence may be used only if the document is ambiguous).[3]

¶29 Finally, Culver claims the trustees' adoption of the semester-away program reflects a finding that it is impractical to operate the Conserve School as Lowenstine intended and therefore triggered the alternate distribution plan. Although the trustees' new program is a significant departure from the way the school previously operated, it does not reflect a finding of legal impossibility or impracticality. To the contrary, it reflects the trustees' desire to operate the school in a manner best suited to current economic realities within the boundaries of the trust instrument.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] For this reason, we refuse to consider various statements individual trustees made to newspapers and other media outlets as evidence of the trust instrument's meaning.