STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1197

Inver Grove Heights Market Place, LLC,
a Delaware limited liability company,
Appellant,

vs.

ANC Foods III, Inc.,
Respondent.

Filed July 1, 2008
Affirmed
Muehlberg, Judge[*]
Dissenting, Johnson, Judge

Dakota County District Court
File No. C9-07-12250

Ryan R. Dreyer, Brian M. Sund, Eric G. Nasstrom, Morrison, Fenske & Sund, P.A., 5125 County Road 101, Suite 202, Minnetonka, MN 55345 (for appellant)

Matthew D. Spohn, Thomas H. Boyd, Winthrop & Weinstine, P.A., Suite 3500, 225 South Sixth Street, Minneapolis, MN 55402 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Johnson, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

MUEHLBERG, Judge

Appellant, a commercial landlord who brought an eviction action against a commercial tenant for breaching the terms of a lease agreement, challenges following a jury verdict finding that the tenant did not breach the lease. Landlord-appellant contends that the district court erred by (1) denying appellant's pretrial motion for summary judgment and submitting the case to the jury based on its determination that the lease's exclusivity provision was ambiguous; and (2) denying appellant's posttrial motions for judgment as a matter of law or a new trial following the jury verdict in favor of tenant-respondent. We affirm.

FACTS

The facts of this case are simply stated. Appellant Inver Grove Heights Market Place, LLC (Market Place) and respondent ANC Foods III, Inc. (ANC) signed a lease agreement in May 2003 that included the following exclusivity provision:

> [Market Place] covenants and agrees that during the Lease Term it shall not enter into a lease with any tenant in the Shopping Center that operates an eat-in/take-out, delivery restaurant selling sandwiches, salads, soups, pizza, pasta, frozen desserts (yogurt, ice cream), fruit based blended drinks (smoothies), beverages, baked desserts (cookies, brownies, cakes) snack chips, sandwich sauces and other products introduced by Quizno's Classic Subs from time to time so long as [ANC] is not in default . . . .

This provision gave ANC the "right as its only remedies . . . to either reduce its Minimum Rent by fifty percent . . . or to terminate the Lease" if Market Place violated the agreement.

ANC, which operated as Quizno's in the Market Place mall, opened for business in late January 2004. By this time, Market Place had also signed a lease agreement with Old World Pizza, but that restaurant did not begin operating until late June 2005. The record does not reveal whether the parties spoke with one another before ANC determined that the lease with Old World Pizza violated the exclusivity agreement, but ANC began paying half the minimum rent on December 1, 2006. Market Place notified ANC that it was in violation of the lease and subsequently filed an eviction action in January 2007. ANC requested a jury, and the matter was set for trial on February 26, 2007.

Shortly before trial, Market Place filed a motion claiming that the language of the exclusivity provision was unambiguous and Market Place was entitled to summary judgment in its unlawful detainer action. The district court heard the summary judgment motion on February 26 and denied the motion on the record the following morning. A two-day jury trial ensued. At the close of trial, the following special-verdict-form question was submitted to the jury: "Did [ANC] violate the terms of the lease by only paying half of the rent for the months of December 2006 and January 2007?" The jury answered "no."

Market Place subsequently moved for judgment as a matter of law on the grounds that (a) the verdict was manifestly against the weight of the evidence; and (b) ANC was legally estopped from claiming that the Old World Pizza lease violated the exclusivity provision. In the alternative, Market Place moved for a new trial based on the district court's failure to instruct the jury that exclusivity provisions are restraints on trade and

must be narrowly and strictly construed. The district court denied the motions. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court erred when it ruled that the exclusivity provision was ambiguous, denied Market Place's pretrial motion for summary judgment, and submitted the question of the parties' intent to a jury.

The denial of a motion for summary judgment may be raised on appeal from the final judgment. *Reinhardt v. Milwaukee Mut. Ins. Co.*, 524 N.W.2d 531, 533 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995). "On appeal from denial of summary judgment, this court must determine whether any genuine issues of material fact exist and whether the district court erred in applying the law." *Zank v. Larson*, 552 N.W.2d 719, 721 (Minn. 1996).

The primary purpose of interpreting a lease, as with other contracts, is to determine and enforce the intent of the parties at the time they entered into the contract. *See Karim v. Werner*, 333 N.W.2d 877, 879 (Minn. 1983). "Whether a clause in a rental agreement—a contract provision—is ambiguous is a question of law reviewed de novo." *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). The determination of whether a contract is ambiguous depends, "not upon words or phrases read in isolation, but rather upon the meaning assigned to the words or phrases in accordance with the apparent purpose of the contract as a whole." *Art Goebel, Inc. v. North Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). "A contract is

ambiguous if its language is reasonably susceptible to more than one interpretation." *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). "[W]hen a contract is unambiguous, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent." *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). However, "[s]o far as reasonably possible[,] a construction is to be avoided which would lead to absurd or unjust results. A contract is to receive a reasonable construction." *Mead v. Seaboard Sur. Co.*, 198 Minn. 476, 478, 270 N.W. 563, 565 (1936) (quotation omitted); *see also Employers Mut. Liab. Ins. Co. of Wis. v. Eagles Lodge of Hallock, Minn.*, 282 Minn. 477, 479-80, 165 N.W.2d 554, 556 (1969) ("[T]he terms of a contract must be read in the context of the entire contract, and the terms will not be so strictly construed as to lead to a harsh and absurd result.").

Here, the exclusivity provision bars Market Place from leasing space to "an eat-in/take-out, delivery restaurant selling sandwiches, salads, soups, pizza, pasta, frozen desserts (yogurt, ice cream), fruit based blended drinks (smoothies), beverages, baked desserts (cookies, brownies, cakes) snack chips, sandwich sauces *and* other products introduced by Quizno's Classic Subs from time to time." (Emphasis added.) For two reasons, we conclude that the district court did not err in ruling the exclusivity provision to be ambiguous. First, the parties presented the district court with two different interpretations of this language. Market Place argued that, because the word "and" is a conjunction that means "[t]ogether with; in addition to; as well as," *The American*

Heritage College Dictionary 52 (4th ed. 2002), the plain language of the provision only prohibited Market Place from leasing space to another restaurant selling *all* of the listed items. Because Old World Pizza only sells three of the items on the list, Market Place contends that it did not violate the exclusivity provision by entering into the second lease. Linguistically, this is at least a plausible reading of the exclusivity provision in the contract. By contrast, ANC argued that the language in the exclusivity provision was taken from the "Permitted Uses" section of the lease, which allowed ANC to use its leased space to sell *any* of the food items listed. Thus, ANC argued that the only way to harmonize the identical language in the two lease provisions was to read the exclusivity language as barring restaurants selling *any* of the enumerated items. Without more specific language in the contract or another obvious way to harmonize these provisions, this also is a plausible reading of the exclusivity provision's language. Because the district court was presented with two competing, seemingly reasonable interpretations of the language of the exclusivity provision, we conclude that the district court did not err by ruling the provision to be ambiguous, denying Market Place's motion for summary judgment, and submitting the question of the provision's meaning to the jury.

The second reason we conclude the district court did not err by ruling the exclusivity provision to be ambiguous is that, while both parties presented seemingly reasonable *linguistic* interpretations of the contract language, neither party's interpretation is *functionally* reasonable. In determining whether a contract is ambiguous, words or phrases are not read in isolation; courts consider the meaning assigned to contract language in accordance with the purpose of the agreement as a whole. *Art*

Goebel, 567 N.W.2d at 515. Market Place's reading of the exclusivity provision to bar only those restaurants selling *every* item on the list results in an exclusivity provision that provides no exclusivity at all—no vendor would be prohibited unless its menu included every item on ANC's current or future bill of fare. Thus, Market Place's interpretation creates an absurd result that neither party could have intended as the fruit of an arms-length negotiation conducted with the benefit of counsel. ANC's construction of the exclusivity provision, however, produces a similarly absurd result—under ANC's reading of the language, Market Place could not lease space to any restaurant selling any single item on ANC's current or future menu, and this reading would effectively bar almost every other food establishment from the mall. Given the peculiar circumstances of this case, the district court reasonably concluded that "in the context of the entire lease, there's at least a question as to . . . the intent of the parties."

For similar reasons, we determine that the district court did not err by concluding that the language of the exclusivity provision was ambiguous and submitting the question of the parties' intent to a jury. While we acknowledge that unambiguous contract language should be enforced even if the result is harsh, *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999), we note that a harsh result is different from an absurd result. Here, both parties' linguistically plausible readings of the exclusivity provision appear to produce absurd results. Therefore, we conclude that the district court did not err by denying Market Place's pretrial motion for summary judgment.

II.

The second issue is whether the district court erred by denying Market Place's posttrial motion for judgment as a matter of law because (a) ANC's signature on a September 2004 estoppel certificate (stating that Market Place was not in breach of the parties' lease) estopped ANC from later claiming that Market Place was in breach of the exclusivity provision; and (b) the jury's verdict that ANC did not violate the lease provision was manifestly against the weight of the evidence.

Where judgment as a matter of law has been denied by the trial court, on appellate review the denial "must be affirmed, if, in the record, there is any competent evidence reasonably tending to sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotation omitted). "Unless the evidence is practically conclusive against the verdict, this court will not set the verdict aside." *Id*. "The evidence must be considered in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of evidence." *Id*.

A. Whether Market Place Was Entitled to the Protection of Equitable Estoppel

Market Place claims that it was entitled to judgment as a matter of law under the doctrine of equitable estoppel because ANC signed a Tenant Estoppel Certificate (certificate) representing to Market Place's lender that no current or apparent future defaults existed under the lease. Accordingly, Market Place argues that ANC cannot later claim a breach of the exclusivity provision.

"The application of equitable estoppel presents a question of law." *State v. Ramirez*, 597 N.W.2d 575, 577 (Minn. App. 1999).

> The doctrine of estoppel in pais [equitable estoppel] is founded in justice and good conscience, and is a favorite of the law. It arises when one, by his acts or representations, or by his silence when he ought to speak, intentionally, or through culpable negligence, induces another to believe certain facts to exist, and such other rightfully acts on the belief so induced in such manner that if the former is permitted to deny the existence of such facts, it will prejudice the latter.

In re Estate of Peterson, 203 Minn. 337, 343, 281 N.W. 275, 278 (1938). Thus, our supreme court has stated that:

> The doctrine of equitable estoppel may be asserted to bar a litigant from denying the truth of representations of fact previously made where the following requirements are met:
>
> (1) [t]here must be a misrepresentation of a material fact;
>
> (2) [t]he party to be estopped must be shown to have known that the representation was false;
>
> (3) [t]he party to be estopped must have intended that the representation be acted upon;
>
> (4) [t]he party asserting the estoppel must not have had knowledge of the true facts; and
>
> (5) [t]he party asserting the estoppel must have relied upon the misrepresentation to his detriment.

Transamerica Ins. Group v. Paul, 267 N.W.2d 180, 183 (Minn. 1978).

Market Place introduced evidence at trial that the owner of ANC signed and returned the certificate to Market Place's lender on September 13, 2004. Market Place also introduced evidence that a site plan was attached to the certificate showing where "Pizza Factory" (later named Old World Pizza) would be located when it opened for business. Market Place was in the process of securing a loan, and the certificate included a provision stating that "[n]o uncured default, event of default, or breach by Landlord exists under the Lease, no facts or circumstances exist that, with the passage of time, will

or could constitute a default, event of default or breach under the Lease. Tenant [ANC] has made no claim against Landlord alleging Landlord's default under the Lease." Market Place argues that, along with its lender, it relied on ANC's representation that there were no existing or apparent future defaults under the lease.

However, the owner of ANC testified that he was unaware that Market Place had leased space to Old World Pizza before he signed the certificate. The record indicates that the certificate was signed in September 2004, and Old World Pizza did not open until June 2005. Market Place later attempted to impeach the owner's testimony by trying to get him to acknowledge that, given the amount of work required to turn an empty mall space into a restaurant, he must have known that Old World Pizza would be opening when he signed the certificate. However, the district court sustained an objection to the questioning on the ground that it was impeachment of a collateral matter, and Market Place has not challenged that decision. Market Place continued its cross-examination, but was unable to elicit testimony that ANC's owner knew Old World Pizza would be opening before he signed the estoppel certificate.

As noted above, Market Place needed to show that ANC made a knowingly false representation by signing the certificate with an intent that Market Place would rely on the representation. *See Transamerica Ins. Group*, 267 N.W.2d at 183. The record reveals that Market Place was unable to show that ANC knew Market Place had signed a lease with Old World Pizza before ANC signed the estoppel certificate, so Market Place failed to establish a key element necessary to claim the protection of the doctrine of equitable estoppel.

Accordingly, we conclude that the district court did not err by denying Market Place's posttrial motion for judgment as a matter of law on this ground.

B. Whether the Jury's Verdict Was Manifestly Against the Weight of the Evidence

Market Place asserts that the jury's verdict was manifestly against the weight of the evidence introduced at trial, claiming that the jury ignored testimony that neither party intended to exclude restaurants such as Old World Pizza when drafting the exclusivity provision and the verdict renders the exclusivity provision without effect.

As noted above, "[u]nless the evidence is practically conclusive against the verdict, this court will not set the verdict aside." *Pouliot*, 582 N.W.2d at 224. Moreover, "a special verdict form is to be liberally construed to give effect to the intention of the jury and on appellate review it is the court's responsibility to harmonize all findings if at all possible." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999). If the jury's answer to the special verdict question "can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, the jury verdict must be sustained." *Id*. (quotation omitted). "An answer to a special verdict question should be set aside only if it is perverse and palpably contrary to the evidence, or where the evidence is so clear as to leave no room for differences among reasonable persons." *Id*. (quotation omitted).

We first note that Market Place did not object to the abbreviated special-verdict form, which asked only whether ANC violated the terms of the lease by paying half rent starting in December 2006. The parties did not ask the jury to answer any special verdict questions directly related to the parties' intent in drafting the exclusivity provision. Accordingly, as a result of the parties' own special-verdict form, we are left to assume

that the jury found that Market Place breached the exclusivity provision by leasing to Old World Pizza, and ANC was within its right to pay half rent as its remedy for breach under the terms of the lease.

With this in mind, we note that ANC introduced evidence at trial that reasonably tended to support the jury's verdict. Although the jury heard conflicting evidence regarding the parties' intent, the owner of ANC clearly testified that he "didn't want to compete against a business similar to ours, and that would include the pizza and pasta." ANC's counsel asked, "[s]o was it your understanding that the exclusivity language . . . would cover a restaurant that sold any of those items or all of those items?" The owner replied that "[i]t would be any of those items from my perspective."

By contrast, Market Place failed to offer evidence of its intent with regard to the exclusivity provision. Market Place introduced testimony by the employee of the mall's property management company, but that employee was not present during the negotiation of the lease. Market Place also offered the testimony of the attorney who represented the mall during the lease negotiation, but the attorney was properly barred from offering hearsay as evidence of his client's intent in drafting the provision.

Accordingly, on this record, we conclude that the jury's verdict is not perverse or palpably contrary to the evidence introduced at trial, and the district court did not err by denying Market Place's motion for judgment as a matter of law.

III.

The third issue is whether Market Place is entitled to a new trial because the district court denied its request for an additional jury instruction stating that exclusivity

provisions are restraints on trade and, accordingly, must be strictly and narrowly construed.

District courts are allowed considerable latitude in selecting the language in jury instructions, and appellate courts will not reverse a district court's decision unless the instructions constituted an abuse of discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Where instructions fairly and correctly state the applicable law, an appellate court will not grant a new trial. *Alevizos v. Metro. Airports Comm'n*, 452 N.W.2d 492, 501 (Minn. App. 1990), *review denied* (Minn. May 11, 1990). Furthermore, the harmless-error rule found in Minn. R. Civ. P. 61 applies to jury instructions. *Hahn v. Tri-Line Farmers Co-op*, 478 N.W.2d 515, 524 (Minn. App. 1991), *review denied* (Minn. Jan. 27, 1992), *overruled on other grounds by Conwed Corp. v. Union Carbide Chems. & Plastics Co.*, 634 N.W.2d 401, 414 (Minn. 2001). Error in a jury instruction is likely to be considered fundamental if the error destroys the substantial correctness of the entire jury charge, results in a miscarriage of justice, or leads to substantial prejudice of a party. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

Market Place appeals from the district court's decision not to include the following instruction: "The Exclusivity Provision is a 'restraint on trade' and a 'restrictive covenant.' Accordingly, you must construe the Exclusivity Provision narrowly, strictly and against a broad restraint on trade." Market Place contends that the district court's refusal to include this instruction left the jury "blind to Minnesota's clear preference for open competition and unrestricted use of property."

Market Place is correct that "public policy dictates that restrictive covenants, being restraints of trade[,] be strictly construed." *Snyder's Drug Stores, Inc. v. Sheehy Props., Inc.*, 266 N.W.2d 882, 885 (Minn. 1978). However, this does not lead us to conclude that the district court unfairly or incorrectly stated the law relevant to contract interpretation. The district court instructed the jury to consider what both parties intended in drafting the provision, to interpret the contract as a whole, and if the jury was able to determine the principal purpose of the parties, to give that purpose great weight. The district court stated that the terms of a contract must be read in the context of the entire agreement and should not be so strictly construed as to lead to a harsh and absurd result. The district court further noted that an interpretation that gives a reasonable, lawful, and effective meaning to all the terms in a contract is preferred to an interpretation that leaves a part unreasonable or of no effect.

The district court noted its concern that Market Place's proposed instruction would distract the jury from determining the original intent of the parties when drafting the exclusivity provision. Following Market Place's posttrial motion for a new trial based on the failure to include the additional instruction, the district court ruled that "[t]he jury instructions, as a whole, did not result in substantial prejudice to [Market Place]. The additional instruction requested . . . would have erroneously instructed the jury to disregard the intent of the parties when executing the . . . [a]greement and [e]stoppel [c]ertificate."

On this record, we conclude that the district court did not abuse its wide discretion by denying Market Place's request to include the additional instruction. Review of the

jury instructions reveals that the district court fairly and accurately stated the law, and we therefore decide that the district court did not err by denying Market Place's request for a new trial on this ground.

Affirmed.

JOHNSON, Judge (dissenting)

I respectfully dissent from the opinion of the court. Contrary to part I of the majority opinion, I would conclude that the parties' lease agreement is unambiguous and not absurd and, thus, that the district court erred by denying the motion for summary judgment filed by Inver Grove Heights Market Place, LLC (Market Place).

ANC Foods III, Inc. (ANC) argued to the district court that the word "and," as used in the exclusivity provision of the parties' lease agreement, is ambiguous because it could be, and should be, interpreted to mean "or." Despite the plain meaning of the word "and," the district court agreed with ANC by denying Market Place's summary judgment motion and allowing a jury to determine the parties' intent. The supreme court, however, repeatedly has stated that a contract is ambiguous only "if it is susceptible to more than one interpretation based on its language alone." *Housing & Redev. Auth. v. Norman*, 696 N.W.2d 329, 337 (Minn. 2005); *see also Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003); *Metropolitan Sports Facilities Comm'n v. General Mills, Inc.*, 470 N.W.2d 118, 123 (Minn. 1991); *Lamb Plumbing & Heating Co. v. Kraus-Anderson, Inc.*, 296 N.W.2d 859, 862 (Minn. 1980); *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 351, 205 N.W.2d 121, 123 (1973); *Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 294, 135 N.W.2d 681, 686 (1965) ("We have said time and time again that in the interpretation of written agreements construction lies only in the field of ambiguity."). In addition, the supreme court has "consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267,

271 (Minn. 2004). Rather, if a contract is unambiguous, the contract "'must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh.'" *Denelsbeck*, 666 N.W.2d at 347 (quoting *Minneapolis Pub. Hous. Auth. v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999)). The district court's decision is inconsistent with this body of supreme court precedent.

On appeal, ANC argues that the plain meaning of the lease agreement is "absurd." The majority has adopted this reasoning. I respectfully disagree, for three reasons. First, it is, at best, an open question whether a court may inquire whether a contract is absurd without first determining that the contract is ambiguous. *See Norman*, 696 N.W.2d at 337 (stating that courts should "first look to the language of the contract and examine extrinsic evidence of intent only if the contract is ambiguous on its face"); *Burnett v. Hopwood*, 187 Minn. 7, 7, 244 N.W. 254, 254 (1932) ("If the language is susceptible of different constructions, as far as reasonably possible a construction is to be avoided which would lead to unjust or absurd results.").

Second, the caselaw on which the majority relies is distinguishable. In those cases, the supreme court affirmed the district court's enforcement of the plain meaning of an unambiguous contract and rejected an absurd interpretation that would have been *contrary to* the plain meaning of the contract. *See Employers Mut. Liab. Ins. Co. v. Eagles Lodge*, 282 Minn. 477, 479-80, 165 N.W.2d 554, 556 (1969); *Mead v. Seaboard Sur. Co.*, 198 Minn. 476, 479, 270 N.W. 563, 565 (1936).

Third, the majority's standard for absurdity is too low. The lay definition of the word suggests a rigorous requirement: "[r]idiculously incongruous or unreasonable,"

"manifesting the view that there is no order or value in the universe," or "the condition in which humans exist in a meaningless, irrational universe." *American Heritage College Dictionary* 6 (4th ed. 2002). At the time of the supreme court's opinion in *Employers Mutual*, the leading legal dictionary defined the word in a similar manner: "so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion," "obviously and flatly opposed to the manifest truth; inconsistent with the plain dictates of common sense; logically contradictory; nonsensical; ridiculous." *Black's Law Dictionary* 24 (4th ed. 1968); *cf. Black's Law Dictionary* 10 (8th ed. 2004). Furthermore, the record of the subsequent trial demonstrates that the exclusivity provision would not be meaningless if its plain meaning were upheld. ANC's principal did not deny that at least one other brand of restaurant (Old Country Buffet) sells all of the generic items listed in the exclusivity provision. Market Place tried to elicit admissions that four other brands (Perkins, Champps, Ruby Tuesday, and Applebee's) also do so, but the district court prevented further examination on the subject.

It should be noted that, if the word "and" had been inserted into the exclusivity provision by mistake, the common law would be flexible enough to allow a meaningful remedy. A party may obtain rescission or reformation of a contract formed by unilateral mistake if "enforcement would impose an oppressive burden on the one seeking rescission, and when rescission would impose no substantial hardship on the one seeking enforcement." *Gethsemane Lutheran Church v. Zacho*, 258 Minn. 438, 445, 104 N.W.2d 645, 649 (1960). ANC, however, did not attempt to prove mistake. ANC's principal

testified that he agreed to the exclusivity provision while believing that it would exclude a restaurant that sold *any* of the listed items, regardless whether the restaurant sold *all* of the listed items, even though the listed items were joined with the conjunctive "and." But that interpretation of the exclusivity provision cannot be reconciled with its unambiguous language. In light of the parties' arguments, this court should enforce the contract the parties signed, not the contract we believe they should have signed.

For these reasons, I would reverse the district court's denial of Market Place's motion for summary judgment.