

THE PAROL EVIDENCE RULE IN WISCONSIN: STATUS IN THE LAW OF CONTRACT, REVISITED

MICHAEL A. LAWRENCE*

This Comment surveys Wisconsin parol evidence cases decided from 1980 through mid-1991. Drawing upon a 1972 *New York University Law Review* article for its methodology, the Comment empirically examines whether it is useful to categorize Wisconsin decisions according to the business sophistication (i.e., "status") of parties to the contract. The author concludes that status *is* important in Wisconsin parol evidence cases, despite the fact that courts rarely mention it as a factor. The data indicate that the *nature* of the proffered parol evidence is important as well.

The author suggests that the results of this law-in-action survey are useful to parties, attorneys, and courts alike—to parties and attorneys by improving their odds of prevailing on parol evidence issues, and to courts by giving them additional rationale with which to circumvent or uphold the rigid application of the parol evidence rule.

I. INTRODUCTION

In 1972, Robert Childres and Stephen J. Spitz published a law review article¹ in which they tested their belief that business sophistication (i.e., "status") of the parties to the contract is a significant factor in contract litigation. By establishing a tentative system of status categorization and applying it to a group of cases dealing with the parol evidence rule,² they discovered they could predict the outcomes of most parol evidence decisions on the basis of the parties' status. They divided a sample of 149 state appellate court cases decided between 1969 and 1970³ into three categories, labelled: 1) formal contracts (transactions between parties with some expertise and business sophistication; i.e., agreements are negotiated fairly and in detail), 2) informal contracts (transactions between parties who lack business sophistication), and 3) abuse-of-bargaining-power contracts (e.g., contracts of adhesion and unconscionable contracts as well as contracts objectionable on public

* Class of 1992, University of Wisconsin Law School. I would like to thank Professor Stewart Macaulay for his helpful remarks on early drafts of this Comment. Heartfelt thanks also to Deanne Lawrence for her support and encouragement.

1. Robert Childres & Stephen J. Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1 (1972).

2. In short, the parol evidence rule states that a written contract made by the parties supersedes promises made in earlier negotiations. Joseph M. Calamari & John D. Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 334 (1967) (citing 3 ARTHUR L. CORBIN, *CONTRACTS* § 573 (rev'd ed. 1960); CHARLES TILFORD McCORMICK, *EVIDENCE* § 213 (1954)).

3. Childres & Spitz, *supra* note 1, at 7. See *infra* note 67 and accompanying text.

policy grounds).⁴ They concluded that in light of courts' varying treatment of the parol evidence rule in the different status categories, a unitary view⁵ of the rule was not valid. Rather, the study indicated that the parol evidence rule functions effectively only in cases assigned to the "formal contracts" category.⁶

This Comment's examination of fifty-nine Wisconsin appellate cases decided from 1980 through mid-1991⁷ reveals that, although the Wisconsin courts expressly state the parol evidence rule along traditional lines⁸ and rarely mention the parties' status, their decisions⁹ support the basic Childres and Spitz conclusions with striking frequency. Specifically, Wisconsin courts found parol evidence admissible in only ten of twenty formal cases,¹⁰ as compared to twenty of twenty-five informal cases¹¹ and nine of ten abuse-of-bargaining-power cases.¹²

4. *Id.* at 3.

5. Essentially, the unitary view stands for the proposition that the parol evidence rule is applicable to *all* contracts. *Id.* at 1.

6. *Id.* at 7.

7. The surveyed cases consisted of all reported decisions since 1980, as well as all unreported decisions since 1983, found by the LEXIS search "parol w/5 evidence and (date aft 1/1/80)" (States library, Wisc file). Eight cases within the parameters were not applicable (i.e., the opinions mentioned the words "parol" and "evidence", but the parol evidence rule was not at issue in the cases).

8. The traditional statement of the rule holds that when the parties intend the writing to be the final expression of their agreement, parol evidence may not be admitted except in cases of fraud, duress, or mutual mistake. *See infra* notes 57-58 and accompanying text.

9. Attempting to classify parties' status in the surveyed cases is inherently difficult. For instance, because the facts rarely make clear the details of the parties' level of business sophistication, one needs to make broad assumptions. In general, this Comment adheres to the following guidelines. First, if both parties were incorporated or appeared to be businesses larger than the "mom and pop" variety, the agreement in question was deemed formal. Second, if one or both parties did not satisfy these criteria, the agreement was deemed informal. Third, if there were allegations of fraud, misrepresentation, duress or other abuses, the agreement was classified in the abuse-of-bargaining-power category. Fourth, if one of the parties sought to exclude a *subsequent* agreement on parol evidence grounds, the case was classified as a potential misapplication. Despite the possibility that a case may have fit in two or even three of the categories, every effort was made to be consistent.

10. *See infra* notes 78-89, 96-108, 116-20, 135-38 and accompanying text. When broken down further, the results in the formal category become more interesting. Wisconsin courts held parol evidence admissible in none of the eight formal "substitution" cases, as compared to two of the three formal "variations" cases, four of the four formal "side agreements" cases, and four of the five formal "interpretation" cases.

By comparison, the courts in the Childres and Spitz survey found parol evidence admissible in 25 of 41 non-misapplication formal cases. *See infra* notes 73-77, 94-95, 111-115, 125-34 and accompanying text. Specifically, courts held it admissible in only two of the 13 substitution cases and none of the four formal variations cases, as compared to 12 of the 15 formal side agreements cases and 11 of the 12 formal interpretation cases.

11. *See infra* notes 151-68 and accompanying text. The courts in the Childres & Spitz study admitted parol evidence in 37 of the 40 informal cases. *See infra* notes 141-150 and accompanying text. *See also infra* notes 13, 165-74 and accompanying text for discussion

Another dynamic appears to be at work in Wisconsin as well. Specifically, the Wisconsin courts appear to implicitly consider the *nature* of the proffered parol evidence in their decisions. When a party attempts to directly *substitute* alleged prior understandings for the unambiguous meaning of the terms of the written agreement, Wisconsin courts generally will not allow the evidence, regardless of whether the parties are formal or informal.¹³

Finally, Wisconsin courts misapplied the parol evidence rule in two of the six cases in which one of the parties sought to exclude evidence of an agreement *subsequent* to the original written agreement.¹⁴ Appendix Table 1 summarizes the results of the Wisconsin survey.

These data have important implications for parties and attorneys litigating parol evidence issues in Wisconsin. Armed with the knowledge that the courts consider (whether consciously or unconsciously) the parties' status and the nature of the proffered parol evidence when deciding parol evidence issues, attorneys can attempt to categorize or "pigeon-hole" their clients' disputes accordingly. Generally, an attorney wishing to have the court admit parol evidence should attempt to characterize the evidence as anything but a substitution.¹⁵ Instead, the attorney should attempt to paint the client's agreement as an informal¹⁶ or abuse-of-bargaining-power contract. If it is not possible to remove the client from the formal category, the attorney should characterize the agreement as a side agreement, an ambiguous agreement, or perhaps even as a variation.¹⁷ Conversely, an attorney wishing to exclude parol

of an important distinction between the Childres & Spitz results and the Wisconsin results in the informal category.

12. See *infra* notes 187-97 and accompanying text. The courts in the Childres & Spitz survey found parol evidence admissible in 43 of the 50 abuse-of-bargaining-power cases. See *infra* notes 180-86 and accompanying text.

13. Of the 25 Wisconsin informal cases, eight involved substitutions. The courts allowed parol evidence in only three of those eight cases, as compared to allowing it in all 17 of the remaining informal cases. See *infra* notes 165-74 and accompanying text.

14. The parol evidence rule does not apply to subsequent agreements because such agreements presumably supersede the original written agreement. See *infra* note 199. The courts in the Childres & Spitz survey misapplied the rule in two of the eight cases involving subsequent agreements. See *infra* notes 202-09 and accompanying text.

15. The Wisconsin courts allowed parol evidence in only three of the 16 combined formal and informal substitution cases. See *infra* notes 78-89 and accompanying text; notes 166-68 and accompanying text.

16. The courts occasionally find justification for allowing parol evidence in informal substitution cases, but they appear to virtually never allow it in formal substitution cases. See *infra* notes 166-68 and accompanying text; notes 78-89 and accompanying text.

17. See *infra* notes 116-20 and accompanying text; notes 135-38 and accompanying text; notes 96-108 and accompanying text. Courts are much more likely to admit parol evidence, even if the contract is formal, if the evidence demonstrates the existence of side agreement or a variation on the agreement (or if the evidence clarifies an ambiguous agreement) than if the evidence merely substitutes new terms into the written agreement. Wisconsin

evidence should attempt to characterize the client's agreement as a formal substitution contract or, if that is not possible, as an informal substitution contract.

The data also carry implications for the courts. By understanding that their parol evidence decisions follow certain patterns according to the parties' status and the nature of proffered parol evidence, courts give themselves additional rationale with which to circumvent or uphold the rigid application of the parol evidence rule.¹⁸ Furthermore, if litigants, counsel and courts recognize the significance of the parties' status and nature of the proffered parol evidence, all concerned will be better able to predict prospective decisions, which would improve the efficiency and perceived fairness of the judiciary system.¹⁹

With one exception,²⁰ this Comment retains the Childres and Spitz system of status categorization as the framework for its analysis of fifty-nine Wisconsin appellate decisions. Part II investigates the parol evidence rule and discusses various commentators' opinions as to how courts should interpret and apply the rule; Part III describes the Childres & Spitz methodology and then, within each status subcategory, analyzes the Wisconsin cases; and Part IV concludes that the Childres and Spitz system of categorization is a useful model for analyzing and predicting parol evidence cases in Wisconsin.

II. THE PAROL EVIDENCE RULE

A. History

The parol evidence rule has long been a source of confusion and controversy in contract law. Professor Wigmore said the rule was "the most discouraging subject in the whole field of evidence."²¹ Professor Thayer noted that "[f]ew things are darker than this, or fuller of subtle difficulties."²² The subject is not merely an academic exercise; indeed, most reported contracts decisions involve not such traditional contracts issues as offer and acceptance but rather involve the parol evidence rule and questions of interpretation.²³

courts allowed parol evidence in ten of the twelve cases that fell into the non-substitution categories.

18. See *infra* notes 51-54 and accompanying text.

19. See *infra* note 56 and accompanying text; note 66 and accompanying text.

20. This Comment separates out "misapplication of the parol evidence rule" from the formal category. See *infra* note 198.

21. 9 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2400, at 3 (3d ed. 1940).

22. JAMES THAYER, A PRELIMINARY TREATISE OF EVIDENCE AT THE COMMON LAW 390 (1898).

23. Calamari & Perillo, *supra* note 2, at 333.

Legal scholars trace the rule's origins to "a primitive formalism which attached mystical and ceremonial effectiveness to the *carta* and the seal."²⁴ Courts today expect this vestigial brand of formalism to accomplish many objectives. Some courts see the rule as insisting that parties use proper form when expressing their agreements, while others see it as a method of protecting an intention to integrate a transaction into one final and complete repository.²⁵ Such courts believe that a major function of the rule is the prevention of fraud and perjury, which could result from allowing oral testimony that does not correspond precisely with the written agreement and which "may be the product of faulty memory, wishful thinking, or outright prevarication."²⁶ Other courts, doubtful of the trustworthiness of evidence concerning prior oral agreements and fearful that fact-finders will not appreciate the need for stability and certainty in commercial dealings, expect the rule to improve the quality of judicial resolution of disputes.²⁷ This is done by precluding finders of fact, especially juries, from considering evidence of prior oral agreements.²⁸ At least one commentator asserts that this "distrust of the jury as a reliable mechanism for divining the truth" is the fundamental purpose underlying the parol evidence rule.²⁹ The rationale has been that jurors may unfairly "favor underdogs" and "lack the sophistication needed to deal effectively with complex commercial transactions involving numerous alleged oral and written contract terms."³⁰ Accordingly, where the parties' last expression is in writing, the jury takes no part in determining the parties' intentions; instead, the trial judge decides.

The parol evidence rule has thus evolved over time into what one commentator calls a "maze of conflicting tests, subrules, and exceptions adversely affecting both the counseling of clients and the litigation process. Whether the rule has played a significant role in inducing contracting parties to put their entire agreement into one final writing is, at best, doubtful."³¹

B. The Rule Defined

The parol evidence rule applies to *prior* or contemporaneous expressions and does not apply to any agreements or expressions made

24. Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383, 1386 (1983) (citing McCORMICK, *supra* note 2, § 211, at 430 n.4; WIGMORE, *supra* note 21, § 2426).

25. *Id.* at 1386 (citations omitted).

26. *Id.* at 1386-87.

27. Justin Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036 (1968) (citations omitted).

28. *Id.*

29. Metzger, *supra* note 24, at 1387.

30. *Id.* at 1387-88.

31. *Id.*

subsequent to the writing.³² This writing is characterized either as a total or a partial integration:

Where the writing is intended to be *final* and *complete*, it is characterized as a total integration and may be neither contradicted nor supplemented by evidence of prior agreements or expressions. But where the writing is intended to be *final* but *incomplete*, it is said to be a partial integration; although such writing may not be *contradicted* by evidence of prior agreements or expressions, it may be *supplemented* by evidence of consistent additional terms. Thus, in approaching a writing, two questions must be asked: (1) Is it intended as a final expression? (2) Is it intended to be a complete expression?³³

The difficulties with the parol evidence rule stem from basic disagreements as to the rule's meaning and effect and goals to be achieved in interpreting the contract.³⁴ Professor Williston states the rule as follows: "[T]his rule requires, in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing."³⁵ Similarly, Professor Corbin posits that: "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing."³⁶

Williston's and Corbin's apparent agreement, however, masks an underlying fundamental disagreement. Although both agree that any relevant evidence is admissible to show the writing was not intended to be final,³⁷ they use the term "intent" in this context in strikingly dissimilar ways.³⁸ Their disagreement focuses on the concept of what comprises "total integration." Corbin means the actual expressed intentions of the parties, where total integration depends on "what the parties thereto say and do at the time they draw that instrument. . . ."³⁹ Implicit in Corbin's statement is the fact that much of what the parties

32. Calamari & Perillo, *supra* note 2, at 335 (citing, e.g., CORBIN, *supra* note 2, § 574; 4 SAMUEL WILLISTON, CONTRACTS § 632 (3d ed. Jaeger 1961).

33. *Id.* at 335 (citing WILLISTON, *supra* note 32, § 636).

34. *Id.* at 333.

35. *Id.* at 334 (citing WILLISTON, *supra* note 32, § 631).

36. *Id.* at 334 (citing CORBIN, *supra* note 2, § 573).

37. CORBIN, *supra* note 2, § 588; WILLISTON, *supra* note 32, § 633 n.13; RESTATEMENT OF CONTRACTS § 228, cmt. a (1932).

38. *Id.* at 337.

39. *Id.* at 339 (citing CORBIN, *supra* note 2, § 582).

say and do at the time they draw the instrument is *not* incorporated into the writing. Williston, on the other hand, refuses to consider outside evidence of what the intent actually was, instead relying solely upon the writing as a complete expression of the parties' intent.⁴⁰

C. The Rule Today

In short, not everyone agrees as to the proper statement and application of the parol evidence rule. The modern trend of thinking is, as Williston himself conceded, "toward increasing liberality in the admission of parol agreements."⁴¹ The *Restatement (Second) of Contracts*⁴² and the Uniform Commercial Code⁴³ "add momentum" to this view:⁴⁴ the *Restatement* by rejecting the notion that the writing itself can "prove its own completeness" and that "wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties,"⁴⁵ and the Code by suggesting that partial integration is the norm⁴⁶ and that a court will bar evidence of consistent additional terms *only* when it "finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."⁴⁷

Other commentators agree. Professor Justin Sweet suggests that even very carefully drafted contracts will occasionally inadvertently omit agreements upon which the parties have agreed.⁴⁸ In such cases, although a strict interpretation of the parol evidence would not allow

40. Williston's rationale for looking only within the "four corners" of the writing is that reliance on the existence of a collateral oral agreement to determine intent would emasculate the parol evidence rule, since the mere existence of such an oral agreement would conclusively indicate that the parties intended only a partial integration and that the only question presented would be whether they actually made the alleged collateral agreement. *Id.* at 337-38 (citing WILLISTON, *supra* note 32, § 633).

41. Metzger, *supra* note 24, at 1397 (citing WILLISTON, *supra* note 32, § 638).

42. *Id.* at 1397 (citing RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. b (1981); JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 3-3, at 111 (2d ed. 1977)).

43. *Id.* at 1396-97 (citing U.C.C. § 2-202 (1977); George I. Wallach, *The Declining "Sanctity" of Written Contracts—The Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 Mo. L. REV. 651, 666-67 (1979)).

44. *Id.* at 1397.

45. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. b (1981)).

46. *Id.* at 1396 (citing Wallach, *supra* note 43, at 665; CALAMARI & PERILLO, *supra* note 42, § 3-7).

47. *Id.* (citing U.C.C. § 2-202(b) (1977)). Furthermore, the writing is considered "complete and exclusive" only if the additional terms "if agreed upon, . . . would *certainly* have been included in the document." *Id.* (citing U.C.C. § 2-202 cmt. 3 (1977) (emphasis added)). This standard for complete integration is much narrower and more stringent than Williston's "naturally and normally" test. *Id.* (citing Wallach, *supra* note 43, at 668). Evidence of course of dealing, course of performance, and usage of trade are allowed by the Code to explain or supplement the terms included in the writing, "even when this evidence appears to contradict apparently unambiguous terms in the writing." *Id.* (citing, *inter alia*, U.C.C. § 2-202(a) (1977); Wallach, *supra* note 43, at 665-66).

48. Sweet, *supra* note 27, at 1064.

evidence of the agreement, Sweet proposes that courts should consider a number of other factors⁴⁹ in deciding whether a written document was intended as a complete and final expression of the parties' contract.

One result of the liberalization of the parol evidence rule and dissatisfaction with its rigid application is that judges have shoe-horned fact situations into categories in which the rule is inapplicable.⁵⁰ For instance, to circumvent the rule, courts have found fraud and granted contract reformation in situations in which these concepts are not ordinarily applicable.⁵¹ Moreover, they have developed whole categories of exceptions. For example, exceptions to strict application of the rule are routinely made for ambiguity⁵² and partial integration.⁵³ These various judicial manipulations are further evidence of the modern trend toward liberality in applying the parol evidence rule and of the confusion and inconsistency surrounding its application.⁵⁴

Unfortunately, because manipulation of the rule varies from judge to judge,⁵⁵ the outcome of any particular case involving parol evidence remains difficult to predict:

Although the outcome of a case is often correct because courts, as a rule, have a good sense of fairness, there are cases that simply come out wrong. There are non-result-oriented judges who mechanically follow cases phrasing the Rule in its traditional form. Other judges, believing the Rule expresses a sound judicial policy, may refuse to admit the testimony of the oral agreement even if they believe the agreement took place and was intended to stand.⁵⁶

D. The Rule in Wisconsin

Courts in Wisconsin are guided by the interpretation of the parol evidence rule set forth by the state supreme court in *Federal Deposit*

49. For instance, courts should consider, inter alia, length of the negotiation; importance and complexity of the transaction; and, as Childres and Spitz expanded upon four years later in their *NYU Law Review* article (see Childres & Spitz, *supra* note 1), the business experience of the parties. *Id.* at 1064-66. Another factor is whether the parties entered into the transaction on the advice of professionals. See *infra* note 70.

50. Calamari & Perillo, *supra* note 2, at 342.

51. *Id.*

52. See, e.g., Patti v. Western Machine Co., 241 N.W.2d 158, 160 (Wis. 1976). See *infra* notes 61, 62 and accompanying text.

Another difficult aspect of the parol evidence question is that one could argue that *all* language is inherently ambiguous, which suggests courts should *always* hold parol evidence admissible.

53. See *infra* notes 156-58 and accompanying text.

54. Metzger, *supra* note 24, at 1398.

55. Indeed, some attorneys see little pattern in the courts' behavior with respect to the parol evidence rule. The author, in a completely unscientific sampling, surveyed several Madison and Milwaukee attorneys who opined that judges sometimes appear quite arbitrary in their actions, to the point where the disposition of a parol evidence issue seems to hinge as much as anything on the judge's mood on that particular day.

56. Sweet, *supra* note 27, at 1046.

Insurance Corp. v. First Mortgage Investors,⁵⁷ which states, “[w]hen the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.”⁵⁸ As stated, the Wisconsin rule does not instruct how courts shall determine “intent.” The classic Williston/Corbin dichotomy⁵⁹ thus is not explicitly resolved. For example, several courts have held that a court must disregard parol evidence of the intention of the parties, even if it has been introduced into the record unopposed by counsel, when it directly conflicts with express provisions of the contract.⁶⁰ This decision suggests that the certainty of the written contract is valued over the true intentions of the parties, a result of which Williston would likely approve.

On the other hand, the Wisconsin Supreme Court has held parol evidence *always* “admissible to show whether the parties intended to assent to the writing as the final and complete (or partial) statement of their agreement.”⁶¹ When written terms in an instrument are ambiguous, parol evidence is admissible to help explain those terms.⁶² The only factor that would limit this policy would be the existence of an unambiguous “merger clause,” which absent claims of duress, fraud, or mutual mistake expressly negates other understandings and makes the document a complete integration;⁶³ or more narrowly, the existence of a specific clause in the writing that clearly sets out the terms in dispute.⁶⁴ When either is ambiguous, “[t]he general rule is that ambiguous contracts are to be construed against the maker or drafter;”⁶⁵ that is, parol evidence is admissible to prove the meaning of the integration clause.

E. Summary

In the end, the pervasive uncertainty about the parol evidence rule tends to undermine the perception for many that justice is being administered fairly:

57. 250 N.W.2d 362 (Wis. 1977).

58. *Id.* at 365; *see also* *Dairyland Equip. Leasing, Inc. v. Bohlen (In re Spring Valley Meats, Inc.)*, 288 N.W.2d 852, 855 (Wis. 1980).

59. *See supra* notes 37-40 and accompanying text.

60. *Morn v. Schalk*, 111 N.W.2d 80, 84 (Wis. 1961). *See also, Federal Deposit Insur. Corp.*, 250 N.W.2d at 365; *Dairyland Equip.*, 288 N.W.2d at 855; *Conrad Milwaukee Corp. v. Wasilewski*, 141 N.W.2d 240, 244 (Wis. 1966).

61. *Federal Deposit Insur. Corp.*, 250 N.W.2d at 366.

62. *O'Connor Oil Corp. v. Warber*, 141 N.W.2d 881, 883 (Wis. 1966).

63. *Dairyland Equip.*, 288 N.W.2d at 855-59 (citing, *e.g.*, *Matthew v. American Family Mutual Ins. Co.*, 195 N.W.2d 611, 614 (Wis. 1972); *CORBIN, supra* note 2, § 578, at 402-03, 411).

64. *Dairyland Equip.*, 288 N.W.2d at 855.

65. *Id.* at 856; *Bank of Sun Prairie v. Opstein*, 273 N.W.2d 279, 282 (Wis. 1979); *Garriguenc v. Love*, 226 N.W.2d 414, 417 (Wis. 1975).

The by-product of almost every parol evidence dispute is a client who is angry either because he has not been given his day in court or because the opposing party has been permitted to prove an oral agreement that the client claims was not made and which his attorney assured him could not be proven.⁶⁶

In the context of this confusion, Childres and Spitz developed their methodology of status categorization. When they applied their system to a sample of parol evidence cases to see if it had any predictive value, they found that courts in general were much less likely to allow parol evidence in cases involving formal contracts than they were in cases involving informal contracts and abuse-of-bargaining-power contracts.⁶⁷ The study indicated that the parol evidence rule functions effectively only in cases assigned to the formal contracts category.⁶⁸

III. THE CHILDRES & SPITZ STATUS METHODOLOGY: WHERE WISCONSIN FITS IN

Childres and Spitz divided contracts into three groups: formal, informal, and abuse-of-bargaining-power. Each of the three major categories were then divided into more specific subcategories. They applied their framework to the 149 cases relevant to the parol evidence rule cited in volumes ten through fifteen of West's General Digest, Fourth Series.⁶⁹

A. Formal Contracts

The surveyed decisions in the formal category—fairly negotiated contractual relations between parties with significant expertise and knowledge⁷⁰—generally rejected the Wigmore/Corbin liberalized view that courts may upset finality of the written contract. For the most part, Childres & Spitz applauded the courts' actions in these cases, stating that sound policy supported the rejection of extrinsic evidence in formal contract cases.⁷¹ They suggested, however, that in some cases the court

66. Sweet, *supra* note 27, at 1046.

67. Childres & Spitz, *supra* note 1, at 7.

68. *Id.* The parol evidence rule was rarely applied in the Childres and Spitz cases involving informal contracts, and the rule had no application at all in abuse-of-bargaining-power contracts.

69. *Id.* These volumes reported cases nationwide decided between 1969 and 1970.

70. Examples of formal contracts include complex loan agreements, transactions between merchants covered by the Uniform Commercial Code (U.C.C.), contracts between large businesses, large construction contracts, and contracts between persons who enter into transactions on the advice of professionals such as brokers, lawyers or investment counselors. *Id.* at 4.

71. *Id.* at 8. Policy reasons include the need to protect the parties reasonable reliance, the desirability of giving effect to the parties' reasonable understanding at the time of contracting, and administrative convenience. *Id.*

should allow parol evidence to alter certain formal contracts, and in order to differentiate between these various circumstances, they broke the formal contracts category into two major subcategories: 1) *contradictions*, where the extrinsic evidence in some way contradicts the written contract, and 2) *interpretation* problems, where the written contract contains ambiguous terms. Contradictions were subdivided further into three parts: a) *substitutions* (direct substitution of an alleged prior agreement in place of the reasonable, unambiguous meaning of the written contract), b) *variations* (alteration of the written contract with evidence of, for example, course of dealing or usage of trade), and c) *side agreements* (nothing in the written agreement deals with the subject matter of the extrinsic evidence). The subdivisions as such represent the full continuum of contradictions.⁷²

1. CONTRADICTIONS

a. Substitutions

Substitutions, the first of the contradiction subdivisions, occur when one of the parties attempts to substitute alleged prior understandings for the reasonable, unambiguous meaning of the written contract language. This is the one instance in which Childres and Spitz assert that courts should apply the parol evidence rule strictly and diligently in order to preserve the integrity of formal written contracts.⁷³

1972 substitution cases: In almost all of the thirteen substitution cases surveyed by Childres and Spitz, the court did not allow parties to substitute alleged prior understandings for the reasonable meaning of the contract language in question.⁷⁴ For instance, the court applied the parol evidence rule to prevent the attempted substitution when: 1) a buyer attempted to substitute a \$5,400 price term found in one of the earlier agreements for a \$5,700 term in a later one;⁷⁵ 2) a plaintiff sought to bind a defendant to an alleged prior oral promise that certain shares were in fact registered with the Securities and Exchange Commission although the contract spoke only of plans for registration;⁷⁶ and 3) a party attempted to contradict the clear terms of an assignment.⁷⁷

72. *Id.* at 8-15.

73. "[T]he parties must be held to their mutual expectations at the time of contracting" in order to "prevent the substitution of alleged prior agreements for the clear meaning of the writing." *Id.* at 9.

74. *Id.* at 9, 10. Courts in 11 of the 13 cases found parol evidence inadmissible.

75. *Id.* (citing *Brady v. Black Mountain Inv. Co.*, 459 P.2d 712 (Az. 1969)).

76. *Id.* (citing *Oglesby v. Allen*, 408 F.2d 1154 (5th Cir. 1969)).

77. *Id.* at 10 (citing *Wm. G. Wetherall, Inc. v. Kramer*, 256 A.2d 919 (D.C. Ct. App. 1969)).

Wisconsin formal substitution cases: Wisconsin courts in the 1980s and early '90s found parol evidence inadmissible in all eight of the formal substitution cases. In *Dairyland Equip. Leasing, Inc. v. Bohlen*,⁷⁸ for example, the Wisconsin Supreme Court held that even if parol evidence were permitted on the issue of integration,⁷⁹ the parol evidence rule still bars evidence that goes to the nature of the agreement in which the written agreement itself is clear and unambiguous.⁸⁰ *Dairyland Equip.* involved two corporations which had entered into a lease agreement. One of the corporations, Spring Valley Meats, subsequently declared bankruptcy, at which time Dairyland Equipment Leasing moved to recover equipment upon which Spring Valley had defaulted. At trial, the court allowed the receiver for Spring Valley, Bohlen, to introduce an affidavit to show that the written agreements entered into by the companies were intended only as a partial integration of agreement. Specifically, the affidavit stated that the written agreements were not actually leases; instead, they were lease-purchase agreements which would have allowed Spring Valley to retain ownership of the equipment.⁸¹ The Wisconsin Supreme Court reversed, stating that testimony relating to an oral agreement between the companies was received in violation of the parol evidence rule.⁸²

In one of the few opinions with explicit reference to a party's status,⁸³ the Wisconsin Court of Appeals held in *Kowalski v. Mierow Enterprises*⁸⁴ that, absent claims of duress, fraud, or mutual mistake, the presence of an integration or merger clause in a written agreement makes that document a complete integration of the parties' intent, and parol evidence of prior or contemporaneous agreements is thus inadmissible.⁸⁵ Similarly, the court of appeals in *Wisconsin Power and Light Co. v. Ciphrex*⁸⁶ stated that evidence of an alleged contemporaneous

78. 288 N.W.2d 852 (Wis. 1980).

79. See *supra* text accompanying note 61.

80. *Dairyland Equip.*, 288 N.W.2d at 856. When the contract terms are ambiguous, however, parol evidence is admissible. *Id.* See *supra* note 65 and accompanying text.

81. *Id.* at 853.

82. *Id.* at 856. See also *Univest Corp. v. General Split Corp.*, 435 N.W.2d 234 (Wis. 1989) (finding when the parties intended that the written leases embody their entire agreement, the parol evidence rule bars the consideration of evidence allegedly explaining or altering the parties' contractual obligations); *Osiris, Ltd. v. Tri-Trend Products, Inc.*, No. 86-0291 (Wis. Ct. App. Mar. 24, 1987) (LEXIS, States library, Wisc file) (finding the parol evidence rule prohibits a party from introducing evidence of a prior oral contract in order to attempt to substitute one party for another in the final written contract).

83. The court referred to the appellant as "an experienced businesswoman."

84. No. 83-714 (Wis. Ct. App. Apr. 4, 1984) (LEXIS, States library, Wisc file).

85. See also *Marohl Construction v. International House of Pancakes*, No. 85-0863, (Wis. Ct. App. May 14, 1986) (LEXIS, States library, Wisc file) (not admitting parol evidence because the presence of an unambiguous integration clause represents an agreement between the parties that the writing was the final, complete and conclusive expression of their intent).

86. No. 88-0165 (Wis. Ct. App. Feb. 8, 1990) (LEXIS, States Library, Wisc file).

oral agreement which directly contradicts the express terms of a written signed contract is not admissible under the parol evidence rule.⁸⁷ Finally, in *St. Joseph Bank and Trust Co. v. Occidental Development Ltd.*⁸⁸ the court of appeals held that when the meaning of a "due-on-sale" clause in a mortgage agreement between a developer and mortgage company is unambiguous, a party may not introduce parol evidence which modifies the clause.

The parties in these substitution cases all possessed a certain level of business expertise. This sophistication arguably carries with it the awareness that a contract is not a revocable expression of intent; rather, the contract indicates a solemn intent to be bound by its terms.⁸⁹ The Childres and Spitz article and Wisconsin cases demonstrate that sophisticated parties who sign written agreements will generally not succeed in substituting parol evidence contradicting the language of the written agreement. Instead, the parties will be bound by the terms of the written agreement *regardless* of what their true intentions may have been.

b. Variations

Variations, the next subdivision under contradictions, differ somewhat from substitutions. Variations cases often involve the additional question of whether contract language was meant to be a *complete* statement of rights and obligations of the parties.⁹⁰ Childres and Spitz assert that, as in substitution cases, courts should generally not admit parol evidence in variations cases. Because contracting parties sometimes make certain assumptions based on course of performance, course of dealing, and usage of trade,⁹¹ and fail to make certain terms

87. Both parties in Wisconsin Power and Light were corporations, sophisticated in contractual matters, but the defendant had only one shareholder—its president. Insofar as the defendant might be considered not sophisticated in such matters, the fact that he entered into complex negotiations and agreements with the assistance (presumably) of attorneys bumps his corporation into the sophisticated (i.e., formal) category for purposes of this analysis. See *supra* note 70.

Similarly, although the husband and wife defendants in Merit Holstein Joint Venture v. Rosemarie Conklin, No. 90-0137 (Wis. Ct. App. Nov. 1, 1990) (LEXIS, States library, Wisc file) were likely unsophisticated, the disputed written agreement (a transfer of interest) appears to have been drafted fairly and in detail, presumably by an attorney. The case thus belongs in the formal category, and because the defendants attempted to substitute contradictory terms for the unambiguous terms in the writing, the court found the parol evidence inadmissible. See *supra* note 70.

88. No. 83-1214 (Wis. Ct. App. Aug. 8, 1984) (LEXIS, States library, Wisc file).

89. Childres & Spitz, *supra* note 1, at 10.

90. *Id.* at 11.

91. See also U.C.C. § 1-205 (defining course of dealing and usage of trade); § 2-202(a) (stating a final writing may be explained or supplemented by course of dealing or usage of trade); § 2-208(1) (stating course of performance accepted or acquiesced in without objection shall be relevant in determining the meaning of the agreement).

explicit in the contract, courts should not enforce the parol evidence rule as strictly as in substitution cases.⁹² If a party can prove reliance on course of dealing or usages of trade, the court should admit the parol evidence and allow the finder of fact to resolve the question of completeness.⁹³

1972 variations cases: In each of the four variations cases in the Childres and Spitz survey, the court applied the parol evidence rule strictly, forbidding extrinsic evidence to vary the contract language. In one case, for example, because the defendant was a sophisticated party to a deliberately prepared and negotiated contract, the Washington Supreme Court did not allow a defendant subcontractor to assert that a risk of loss clause was understood by the parties to include certain requirements not stated in the contract.⁹⁴ In none of these variations cases were the parties able to convince the courts that they relied on usages of trade or courses of dealing. To the extent they may have had legitimate arguments, Childres and Spitz suggest the courts in these variations cases came close to abusing the parol evidence rule by not allowing the parties to present their evidence.⁹⁵

Wisconsin variations cases: There were only three variations cases in the Wisconsin survey, and of those, the court found parol evidence admissible in two.⁹⁶ The Wisconsin Court of Appeals denied the admission of parol evidence in *Milwaukee Valve Co. v. Mishawaka Brass Mfg.*,⁹⁷ a case in which a party selling copper ingots adamantly asserted that the parties had agreed orally to normal delivery terms (as understood in the trade) or, alternatively, that both parties had presumed normal delivery terms.⁹⁸ Because the trial court determined that the attempted variation contradicted delivery terms specified in the purchase order accepted by both parties,⁹⁹ it did not allow the parol evidence. Again, to the extent that the seller may have had a legitimate argument about usage of trade, the court arguably should have allowed parol evidence in order to understand the true intentions of the parties.

92. Childres & Spitz, *supra* note 1, at 11.

93. *Id.* at 12.

94. *Id.* at 11 (citing *Grant County Constructors v. E.V. Lane Corp.*, 459 P.2d 947 (Wash. 1969)). Similarly, the Arizona Court of Appeals refused to allow a bonding company to insert a fifteen-day limitation into a criminal bond, *id.* at 12 (citing *State v. Hervey*, 456 P.2d 953 (Ariz. Ct. App. 1969)), and a Michigan court refused to allow successors to a ninety-nine year lease to vary the clear meaning of a lease provision which would adjust rental payments in the event of a devaluation of the dollar. *Id.* (citing *Avery v. J.L. Hudson Co.*, 169 N.W.2d 666 (Mich. Ct. App. 1969)).

95. Childres & Spitz, *supra* note 1, at 12.

96. The Wisconsin results in this category diverge from the Childres and Spitz results, in which courts admitted parol evidence in none of the four variations cases. See *supra* notes 94-95 and accompanying text.

97. 319 N.W.2d 885 (Wis. Ct. App. 1982).

98. *Id.* at 888.

99. *Id.*

The same court, however, allowed parol evidence in what could be considered a customary usage of trade case,¹⁰⁰ *Cobb State Bank v. Nelson*.¹⁰¹ The *Cobb* court allowed testimony from a bank officer explaining the customary practice in the banking industry regarding the renewal of bank notes. The testimony also corroborated evidence from bank records as to a debtor's outstanding debt.¹⁰² Insofar as the testimony did not directly contradict explicit terms in the agreement, but instead merely explained the terms, the court's allowance of parol evidence in this case was arguably correct.¹⁰³

Similarly, in *Coveau v. Durand*,¹⁰⁴ the appellate court allowed the signer of a check, who was acting on behalf of an organization¹⁰⁵ whose name was on the check, to present parol evidence to prove the parties understood the signer would not be personally liable.¹⁰⁶ The *Coveau* court, after considering facts on the record that indicated the corporation named on the check had purchased logs from the other party on at least fifty prior occasions, implied that the corporation was foreclosed from looking to the individual signer because it had presumably looked to the corporate entity, not the individual, on those prior occasions.¹⁰⁷

The Wisconsin courts thus appear more willing to consider usage of trade and course of dealing arguments as grounds for admitting parol evidence than were the courts in the Childres and Spitz survey. Insofar as the evidence aids the finder of fact in ascertaining the true intentions of the parties, this would appear to comport with the approved modern trend.¹⁰⁸

c. Side agreements

Side agreements, the third subdivision under formal contradictions, involve the situation where nothing in the written contract deals

100. This also could be considered an informal case (i.e., one of the parties was unsophisticated), so the court's decision in allowing parol evidence to prove the terms of the agreement in the absence of a merger clause was still correct. See *infra* notes 160-61 and accompanying text.

101. 413 N.W.2d 644 (Wis. Ct. App. 1987).

102. *Id.* at 645.

103. See *supra* notes 41-49 and accompanying text.

104. 432 N.W.2d 662 (Wis. Ct. App. 1988).

105. The court did not cite the RESTATEMENT, but RESTATEMENT (SECOND) OF AGENCY § 320 (195 Supp. 1990-91) suggests that an individual acting with actual or apparent authority would not be personally liable: ". . . a person making or purporting to make a contract with another as agent for a disclosed principal does not become a party to the contract."

106. *Coveau*, 432 N.W.2d at 662.

107. *Id.* The court also found that the check itself was ambiguous, so the parol evidence was also justified on grounds of ambiguity. See *supra* note 65 and accompanying text.

108. See *supra* notes 41-49.

with the subject covered by the extrinsic evidence.¹⁰⁹ Childres and Spitz assert that in such cases the court should assume the contract is not complete and allow parol evidence except in those cases in which the contract itself explicitly specifies that it is the complete agreement between the parties (i.e., the contract contains a merger clause).¹¹⁰

1972 side agreements cases: The courts in twelve of the fifteen Childres and Spitz side agreements cases¹¹¹ allowed parol evidence. For example, in *Reports Corp. v. Technical Publishing Co.*,¹¹² the Seventh Circuit upheld the trial court's finding that the parties to a contract for the sale of the plaintiff's publishing company had intentionally omitted an oral agreement concerning the plaintiff's obligation to a previous owner.¹¹³ Parol evidence was thus admissible to show the parties did not intend the writing to be complete and to help prove "essential particulars" not included in the written contract.¹¹⁴ Childres and Spitz point out that this and other similar holdings in the side agreements subdivision were consistent with the proposition that "[t]he existence of a writing does not warrant the assumption that the agreement incorporates the full understanding of the parties"—after all, "[b]usiness[people] should be free to choose between writing complete agreements and agreements which are not complete."¹¹⁵

Wisconsin side agreements cases: In Wisconsin, the court allowed parol evidence in all four of the surveyed side agreements cases, lending support to the Childres and Spitz proposition that the parol evidence rule does not (and should not) apply in such instances. For instance, in *Midwest Business Brokers, Inc. v. Knispel*,¹¹⁶ the Wisconsin Court of Appeals found there was a disputed material issue of fact as to whether the parties, a couple seeking to sell their business and a real estate brokerage,¹¹⁷ had entered into a contemporaneous oral agreement allowing them to rescind the written contract. The court held that parol evidence of this side agreement was admissible to show whether the contract was intended to be the complete and final expression of the parties' intent.¹¹⁸

Similarly, the court in *Gordon v. Maddux Properties*¹¹⁹ found parol evidence admissible to prove the existence of an oral agreement about

109. Childres & Spitz, *supra* note 1, at 12.

110. *Id.*

111. *Id.* at 13-14 n.47-56.

112. 411 F.2d 168 (7th Cir. 1969).

113. *Id.* at 173.

114. Childres & Spitz *supra* note 1, at 13 (citing *Reports Corp.*, 411 F.2d at 172).

115. *Id.*

116. No. 88-1977 (Wis. Ct. App. May 2, 1989) (LEXIS, States library, Wisc file).

117. The contract in *Knispel* is close to being informal, but it is placed in the formal category because the defendants operated through their attorney in their dealings with the brokerage. See also *supra* note 70.

118. See also *Kohlenberg v. American Plumbing Supply Co.*, 263 N.W.2d 496, 501 (Wis. 1978).

119. No. 88-1112 (Wis. Ct. App. Apr. 4, 1989) (LEXIS, States library, Wisc file).

an occupancy date under a lease when the written lease contained language dealing only with a building's *completion* date. The court found that the absence of such language was evidence that the written lease was only a partial integration.¹²⁰

In sum, in those instances where nothing in the contract deals with the subject covered by the outside evidence, the Wisconsin courts (like the courts in the Childres and Spitz survey before them) refuse to apply the parol evidence rule strictly. The courts' allowance of parol evidence in such side agreements cases, as it was in variations cases,¹²¹ is in keeping with the modern trend of seeking to understand the true intentions of the parties.¹²²

2. INTERPRETATION

The second formal contract subcategory concerns the *interpretation* of contract terms. Some commentators suggest that courts as a matter of course should first ascertain the *meaning* of the writing before invoking the parol evidence rule to exclude evidence, because it is impossible to determine whether evidence contradicts, as opposed to supplements, a writing until one knows what the writing means.¹²³ Stated simply, these commentators argue that parol evidence is admissible whenever necessary to interpret ambiguous contract language.¹²⁴

1972 interpretation cases: Courts in eleven of the twelve Childres and Spitz cases falling within this category allowed parol evidence.¹²⁵ One group involved the interpretation of contracts lacking relevant language dealing with the disputed issue. Another group involved the interpretation of ambiguous contract terms. In the former group, *LaSalle and Koch Co. v. Doyle*¹²⁶ involved a dispute about the duration of a contract, but the contract itself said nothing about its duration.¹²⁷ Childres & Spitz assert that in such a case a court should hear parol evidence to determine what the time term was and, if there was none,

120. *Id.* at *4 (citing *Dairyland Equip.*, 288 N.W.2d at 855). See also *Heritage Bank v. Recom*, No. 87-1047 (Wis. Ct. App. Mar. 23, 1988) (LEXIS States library, Wisc file) (admitting parol evidence to show the written documents were not intended as a full and final expression of the agreement); *Liturgical Publications, Inc. v. Continental Leasing, Inc.*, No. 83-1346 (Wis. Ct. App. May 25, 1984) (LEXIS, States library, Wisc file) (admitting parol evidence when there is ample evidence that a written lease agreement does not contain all of the terms and conditions of the agreements among the parties).

121. See *supra* notes 96-108.

122. See *supra* notes 41-49.

123. Calamari & Perillo, *supra* note 23, at 352.

124. Childres & Spitz, *supra* note 1, at 14; CORBIN, *supra* note 2, § 542.

125. Childres & Spitz, *supra* note 1, at 14-16 n.58-66.

126. 413 F.2d 345 (6th Cir. 1969), *cert. denied*, 396 U.S. 1039 (1970).

127. *Id.* at 14 (citing *LaSalle & Koch Co.*, 413 F.2d at 346).

what a reasonable time would be.¹²⁸ Courts generally follow this position today.¹²⁹ In the latter group, the *Jones v. Fireman's Fund Ins. Co.*¹³⁰ court allowed parol evidence to help interpret the meaning of "customer,"¹³¹ and the *United States v. Jacobs*¹³² court allowed it to interpret the term "beneficiary."¹³³ Insofar as courts seek to enforce the true intentions of the parties,¹³⁴ these holdings were proper.

Wisconsin interpretation cases: Wisconsin courts in the 1980s and 1990s have allowed parol evidence to prove the terms of ambiguous contracts in four of the five formal interpretation cases. In *Karstaedt's Garage Inc. v. G.E.M. Contracting, Inc.*,¹³⁵ for instance, the Wisconsin Court of Appeals allowed parol evidence to clarify the terms of a formal lease-purchase agreement because the writings were ambiguous and contained contradictory terms.¹³⁶

In *City of Oconto Falls v. Selmer Construction*,¹³⁷ however, the same court implied that the trial court erred in admitting parol evidence¹³⁸ to resolve an ambiguity in a formal contract. The court concluded that the error did not affect the verdict and allowed it to stand. Although the outcome in *Selmer Construction* was proper, the reasoning was flawed because the appeals court implied that the trial court may have erred in admitting parol evidence to clarify an ambiguity.

In sum, Wisconsin courts almost always allow parol evidence in formal cases, with the significant exception of formal substitution cases. This would suggest that, in Wisconsin, the importance of the distinction between formal and informal contracts is matched by the importance of the distinction between substitution and non-substitution cases. The results of the survey involving the following Wisconsin *informal* contracts cases further supports this assertion.

128. *Id.*

129. *Id.* (citing e.g., CORBIN, *supra* note 2, § 579).

130. 76 Cal. Rptr. 97 (Cal. Ct. App. 1969).

131. Childres & Spitz, *supra* note 1, at 15 (citing *Jones*, 270 Cal. App. 2d at 786).

132. 304 F.Supp. 613 (S.D.N.Y. 1969).

133. *Id.*

134. See *supra* notes 41-49 and accompanying text.

135. No. 88-1151 (Wis. Ct. App. Mar. 28, 1989) (LEXIS, States library, Wisc file).

136. See also *Siva Truck Leasing, Inc. v. Hennes Trucking Co., Inc.*, No. 84-2546 (Wis. Ct. App. Jan. 28, 1986) (LEXIS, States library, Wisc file) (finding that if the court finds language of the writing to be ambiguous, the trier of fact may examine parol evidence to determine the intent of the parties); *Schmitz v. Grudzinski*, 416 N.W.2d 639, 641 (Wis. 1987) (inferring parol evidence is admissible to prove intent in the case of ambiguous terms); *Martinson v. Hanson*, No. 82-647 (Wis. Ct. App. Jan. 26, 1984) (LEXIS, States library, Wisc file) (finding the term "excavate basement to grade" in a construction contract sufficiently ambiguous to warrant consideration of parol evidence).

137. No. 90-0530 (Wis. Ct. App. Sep. 18, 1990) (LEXIS, States library, Wisc file).

138. The parol evidence consisted of a standard form agreement between a building owner and a contractor.

B. Informal Contracts

The second major category in the Childres and Spitz hierarchy addresses informal contracts, or contracts where one or both parties lack business sophistication. Forty cases in their sample (approximately 27%) fell into this category.¹³⁹ Childres and Spitz assert that due to the parties' lack of sophistication in such transactions, courts can determine the parties' true intentions and expectations at the time they entered the agreement only by shaping the parol evidence rule to an informal model, not by forcing the informal contract to conform to a rule designed for keenly negotiated, formal transactions.¹⁴⁰ In other words, they suggest that courts should ignore the parol evidence rule in informal contracts cases, and allow extrinsic evidence to help determine what the parties' intent was at the time of contracting.

1972 informal cases: The cases surveyed in 1972 overwhelmingly supported the position that courts should ignore the parol evidence rule in informal contract cases.¹⁴¹ Childres and Spitz assert, in fact, that the most significant finding of their entire study was the marked inconsistency between decisions in the area of informal contracts and those in the formal contracts category.¹⁴² Indeed, when deciding informal cases, courts ignored some of the very factors they regarded as decisive in excluding alleged oral agreements in formal contracts.¹⁴³ For instance, at least five of the informal contract cases¹⁴⁴ involved contradictions in the strict sense—that is, substitutions. Whereas substitutions in the formal context merited courts' strict application of the parol evidence rule,¹⁴⁵ in each of the five informal contract cases the courts held the parol evidence rule inapplicable.¹⁴⁶ In seven of the forty Childres and

139. Childres & Spitz, *supra* note 1, at 17.

140. *Id.*

141. Courts in only three of the forty informal cases found parol evidence inadmissible. *Id.* at 23, 24 n.98-104. (See *Mason v. Blayton*, 166 S.E.2d 601 (Ga. Ct. App. 1969) (not allowing parol evidence to prove a personal check was intended by both parties to be a sham); *Ehrlich v. American Moninger Greenhouse Mfg. Co.*, 298 N.Y.S.2d 601 (1st Dep't 1969) (mem.) (finding parol evidence inadmissible to prove that a note and guaranty were intended by both parties to be shams); *LaVoie v. Celli*, 304 N.Y.S.2d 671 (Sup. Ct. 1969) (finding parol evidence inadmissible to prove the parties had orally agreed that a note would not become due for a certain designated time)). Childres and Spitz suggest the courts' usage of the parol evidence rule in these three decisions was clearly wrong, because they did not allow disputed factual issues to go to the finder of fact. Childres & Spitz, *supra* note 1, at 23.

142. *Id.* at 17. For example, none of the forty decisions assumed that a contract was a complete, total integration of the parties' intentions. *Id.* at 19 n.80 (citing *e.g.*, *Schnug v. Schnug*, 454 P.2d 474 (Kan. 1969); *Thomson v. Parrish*, 221 So. 2d 770 (Fla. Dist. Ct. App. 1969)). The authors concluded these results provide convincing evidence of the inapplicability of the formal model to informal transactions. *Id.* at 19.

143. *Id.* at 17.

144. See Childres & Spitz, *supra* note 1, at 17, 18 n.72-75.

145. See *supra* notes 70-77 and accompanying text.

146. Childres & Spitz, *supra* note 1, at 18. See *infra* notes 165-78 and accompanying

Spitz informal cases¹⁴⁷ the courts invoked the ambiguity exception¹⁴⁸ as their rationale for admitting parol evidence. Childres and Spitz imply that in these cases the ambiguity rationale was merely a means for the courts to come to the "right" decision, since none of the seven contracts were ambiguous to the point of controversy.¹⁴⁹ The significance of these cases is that courts in certain cases seem use the ambiguity exception as a tool to circumvent the strict application of the parol evidence rule.¹⁵⁰

Wisconsin informal cases: The courts in the Wisconsin survey found parol evidence admissible in twenty of the twenty-five informal contract cases,¹⁵¹ lending credence to the Childres and Spitz conclusion that courts will almost always find a way to admit parol evidence in informal cases.¹⁵² Of those twenty-five cases, seven involved the ambiguity exception. In *Duhamel v. Duhamel*,¹⁵³ for example, the Wisconsin Court of Appeals allowed parol evidence to prove that a husband and wife intended to provide in their divorce settlement for their minor children in the event of the husband's death. The court justified its decision in part by finding that several stipulations in the settlement, regarding, among other things, the naming of beneficiaries, were ambiguous.¹⁵⁴ Implicit in the court's rationale was the recognition that

text for discussion of the Wisconsin courts' very different handling of informal substitution cases.

147. *Id.* at 19 n. 81.

148. *See supra* notes 62-65 and accompanying text.

149. *Id.* at 19. That is, none of the contracts contained terms which were susceptible to two or more discrete meanings. *See, e.g., Estrada v. Darling-Croce Machine Co.*, 80 Cal. Rptr. 266 (Cal. Ct. App. 1969) (finding the term "sale" in this informal contract was ambiguous, when in fact the agreement's language was unmistakable); *Davies v. Courtney*, 463 P.2d 554 (Ariz. Ct. App. 1970) (finding a promise to pay a "former note of \$1,600" to be ambiguous). Childres & Spitz, *supra* note 1 at 19, 20 n.82, 83.

150. Childres and Spitz would suggest the "certain instances" are those in which one or both of the parties to the contract are unsophisticated in the ways of business (i.e., the contract is informal). *Id.* at 17.

151. The five cases that did not allow parol evidence involved attempted *substitutions*. *See infra* note 168 and accompanying text.

152. Childres & Spitz, *supra* note 1, at 24.

153. 453 N.W. 2d 149 (Wis. Ct. App. 1989).

154. *Id.* at 152. *See supra* note 62 and accompanying text. *See also* *Conley v. Polk County*, No. 87-1934 (Wis. Ct. App. June 7, 1988) (LEXIS, States library, Wisc file) (admitting parol evidence to prove intent when the terms of an employment contract are ambiguous); *Lind v. Simma*, No. 85-1488 (Wis. Ct. App. July 15, 1986) (LEXIS, States library, Wisc file) (admitting parol evidence to interpret ambiguous terms such as "valuable consideration"); *Dickfoss v. Pfrang*, No. 03-1363 (Wis. Ct. App. Mar. 27, 1984) (LEXIS, States library, Wisc file) (finding that when the language of a written instrument is ambiguous, a court is not restricted to the language on the instrument); *Polk County Bank v. Bauer*, No. 83-600 (Wis. Ct. App. Mar. 10, 1984) (LEXIS, States library, Wisc file) (finding the term "financing arrangement" in a contract ambiguous because it is not defined or explained in the contract); *Hoffman v. Intertactor America Corp.* No. 86-2214 (Wis. Ct. App. Feb. 24, 1988) (LEXIS, States library, Wisc file) (allowing parol evidence to prove the nature of an ambiguous employment agreement; i.e., whether the agreement is a term contract or an open-ended, employment-at-will contract).

the parties to a divorce may be unsophisticated in legal matters, and that courts should relax the parol evidence rule in such cases.¹⁵⁵

Courts in several informal contract cases allowed parol evidence on the grounds that the written contract was only a partial integration of the parties' intent.¹⁵⁶ The court of appeals in *Boe v. Edgewood, Inc.*,¹⁵⁷ for example, found the parol evidence rule did not bar the court's consideration of evidence outside of the four corners of a teacher's written, single-page contract. The plaintiff teacher, an unsophisticated party for the purposes of this analysis, sought to include the employment handbook as evidence. By assuming that the single-page contract was not the total integration of the parties' intent and concluding that the handbook *was* part of the contract and admissible as evidence,¹⁵⁸ the court strengthened the proposition that the parol evidence rule generally lacks clout in Wisconsin informal contracts cases and that courts will use various justifications in order to circumvent the rule.¹⁵⁹

155. "A stipulation (in the divorce settlement or judgment) is in the nature of a contract and the trial court must seek a construction which will effectuate what appears to have been the intention of the parties." *Duhame*, 453 N.W.2d at 151 (citing *Richards v. Richards*, 206 N.W.2d 134, 136 (Wis. 1973)).

The court in *Webb v. Webb*, 434 N.W.2d 856 (Wis. 1988) similarly upheld the trial court's allowance of parol evidence to aid in the interpretation of an ambiguous written antenuptial agreement.

156. See *Federal Deposit Insur. Corp. v. First Mortgage Investors*, 250 N.W.2d 362 (Wis. 1977) for the general statement of this principle in Wisconsin.

157. No. 87-0595 (Wis. Ct. App. Apr. 21, 1988) (LEXIS, States library, Wisc file). See also *Teubert v. Wisconsin Department of Revenue*, No. 84-1156 (Wis. Ct. App. Jan. 28, 1986) (LEXIS, States library, Wisc file) (admitting parol evidence to prove whether the writing was intended to be the total integration of the parties' agreement); *Christopher v. Williamson*, No. 85-0568 (Wis. Ct. App. Jan. 10, 1986) (LEXIS, States library, Wisc file) (admitting parol evidence to prove whether a written land contract was intended as the parties' final agreement); *Schultis v. Safro*, No. 84-1845 (Wis. Ct. App. Oct. 23, 1985) (LEXIS, States library, Wisc file) (admitting parol evidence to prove whether a promissory note was only a partial integration of the parties' agreement).

158. *Boe* (Wis. Ct. App. LEXIS 336 at *5).

159. See e.g., *Champion v. Lillegren*, No. 86-0334 (Wis. Ct. App. June 4, 1987) (LEXIS, States library, Wisc file) (admitting parol evidence to show whether the parties intended for promissory notes to create a binding obligation); *Bauman v. Rondou, Wolfgang and St. Croix Boatworks*, No. 84-1790 (Wis. Ct. App. Feb. 18, 1986) (LEXIS, States library, Wisc file) (admitting parol evidence to prove misrepresentation on the part of one of the parties); *Kelleher v. Hanson*, No. 84-2544 (Wis. Ct. App. Feb. 4, 1986) (LEXIS, States library, Wisc file) (admitting parol evidence to show whether a contract is indeed a mortgage); *Kerner v. Milwaukee Malleable & Grey Iron Works*, No. 85-1583 (Wis. Ct. App. July 9, 1986) (LEXIS, States library, Wisc file) (admitting parol evidence to show whether the parties truly intended to contract, or instead intended the writing as a mere sham); *Nutter v. Young*, No. 89-0313 (Wis. Ct. App. Nov. 27, 1989) (LEXIS, States library, Wisc file) (allowing parol evidence when the underlying contract is not properly admitted into evidence); *Keller v. Milbauer*, No. 83-1312 (Wis. Ct. App. Dec. 11, 1984) (LEXIS, States library, Wisc file) (admitting parol evidence to show that a deed, though absolute in form, was intended by the parties as security); *Kaiser v. Sampson*, No. 83-1465 (Wis. Ct. App. June 13, 1984) (LEXIS, States library, Wisc file) (same); *Conry v. Coutts*, No. 82-1767 (Wis. Ct. App. Jan. 10, 1984) (LEXIS, States

Ironically, the liberal allowance of parol evidence can, on occasion, work *against* the unsophisticated party in informal contract cases. In *Cobb State Bank v. Nelson*,¹⁶⁰ the Wisconsin Court of Appeals reversed the lower court's strict application of the parol evidence rule and held that a bank may introduce parol evidence to prove the terms of a note issued to a private individual.¹⁶¹ The court cited *Dairyland Equipment*¹⁶² extensively, stating that parol evidence is admissible to prove the parties' intent, and the parol evidence rule is not applicable unless the writing is a total integration.¹⁶³ The liberal allowance of parol evidence in informal cases thus does not always work against the interests of the sophisticated party—occasionally the facts are such that the admission of the evidence disadvantages the unsophisticated party, a result which seems only equitable.¹⁶⁴

In informal *substitution*¹⁶⁵ cases Wisconsin courts appear to deviate significantly from the Childres and Spitz conclusion that courts will virtually always allow parol evidence in informal cases. In the seminal *Federal Deposit Insur. Corp. v. First Mortgage Investors*¹⁶⁶ case, for example, the Wisconsin Supreme Court held that parol evidence is admissible to establish the full agreement of the parties, with the limitation that the parol evidence *must not conflict* with the part of the agreement that has been integrated in writing.¹⁶⁷ The court does not suggest or imply that this standard should be applied any differently for sophisticated parties than for unsophisticated parties, a fact which suggests that the courts will apply the parol evidence rule equally stringently in both informal and formal substitution cases.¹⁶⁸

library, Wisc file) (admitting parol evidence to establish mutual mistake in a reformation action).

160. 413 N.W.2d 644 (Wis. Ct. App. 1987).

161. Even if the private individual in *Nelson* is considered a sophisticated party (the facts in the opinion do not elaborate on the circumstances), the court's decision in allowing parol evidence is arguably correct, because the parol evidence dealt in part with a *variation* (see *supra* notes 100-03 and accompanying text) which hinged on customary practice within the banking trade. *Id.* at 645.

162. *Dairyland Equip. Leasing, Inc. v. Bohlen (In re Spring Valley Meats, Inc.)*, 288 N.W.2d 852 (Wis. 1960). See *supra* notes 78-82 and accompanying text.

163. *Cobb State Bank*, 413 N.W.2d at 646.

164. See also *Hoffman v. Intertractor America Corp.*, No. 86-2214 (Wis. Ct. App. Feb. 24, 1988) (LEXIS, States library, Wisc file) (admitting parol evidence to clarify an ambiguity concerning terms of employment). See *supra* note 154.

165. See *supra* notes 74-89 and accompanying text for the courts' treatment of formal substitutions in both the Childres & Spitz and the Wisconsin surveys.

166. 250 N.W.2d 362 (Wis. 1977).

167. *Id.* at 366. See also, *Dairyland Equip.*, 288 N.W.2d at 855 (finding parol evidence admissibility subject to the limitation that the parol evidence received may not conflict with the part of the agreement that has been integrated in writing).

168. In the relatively rare instances when Wisconsin courts do not allow parol evidence in informal cases, the facts involve a party who is trying to *substitute* contradictory evidence for the clear meaning of the written agreement. See, e.g., *Rock County Savings & Trust, Co. v. Ramsey*, No. 84-1895 (Wis. Ct. App. May 15, 1986) (LEXIS, States library,

From a policy standpoint, the advisability of this position is subject to debate. On one hand, Childres and Spitz would argue the courts should soften their stance in informal substitution cases by allowing parol evidence of the parties' intent and then deciding the issue on the basis of credibility.¹⁶⁹ If, as Corbin and other commentators suggest, the courts' primary goal should be to ascertain the true intentions of the parties,¹⁷⁰ the Wisconsin position as articulated in *Federal Deposit Insurance Co.* and *Dairyland Equipment* is exceedingly "hard-line." If, on the other hand, the courts' goal should be to preserve the integrity of the written contract, even in the face of evidence showing that the parties had some other intention, as Williston and Corbin suggest,¹⁷¹ the Wisconsin court's position is appropriate.¹⁷²

The Wisconsin position is arguably preferable to the Childres and Spitz position on the issue of admissibility of parol evidence in informal substitution cases. Substitution refers to a party's attempt to *directly replace* the reasonable meaning of the contract language with some other meaning.¹⁷³ Even a relatively unsophisticated party presumably understands that an explicit statement in a written contract does not implicitly mean the converse or something totally inconsistent with that statement. Even if the unsophisticated party signs the agreement on the basis of an agent's false assurances, the Wisconsin position does not unfairly discriminate against that party. If the unsophisticated party does *not* understand the written contract, or in some way feels misled by the other party, the allegation of abuse-of-bargaining-power¹⁷⁴ is

Wisc file) (citing *Dairyland Equip.* 288 N.W.2d at 856) (finding inadmissible parol evidence of an oral agreement which conflicts with a written agreement, even if offered to disprove integration); *Marks v. Saltness, American Family Mutual Insur. Co.*, No. 84-1045 (Wis. Ct. App. June 4, 1985) (LEXIS, States library, Wisc file) (finding in the absence of sufficient grounds (e.g., allegation of duress) for setting aside an unambiguous signed damage release, an injured party may not offer parol evidence to attempt to contradict the release); *Symes v. Symes*, No. 89-0712-FT (Wis. Ct. App. Nov. 7, 1989) (LEXIS, States library, Wisc file) (finding inadmissible parol evidence contradicting a signed, written divorce stipulation regarding child support payments if the stipulation is unambiguous); *Waukesha State Bank v. Bell*, No. 84-1393 (Wis. Ct. App. May 15, 1985) (LEXIS, States library, Wisc file) (finding when terms of a mortgage are clear on its face, parol evidence is not admissible to vary the terms); *Michels Fin. Corp. v. Link*, No. 83-1814 (Wis. Ct. App. May 16, 1985) (LEXIS, States library, Wisc file) (finding inadmissible parol evidence modifying the terms of a lease if that lease contains a clear integration clause).

169. "A litigant should have the chance—in informal contracts cases—to present his evidence before a judge assesses credibility." Childres & Spitz, *supra* note 1, at 24.

170. See *supra* notes 41-49 and accompanying text.

171. See *supra* note 35-36 and accompanying text.

172. The policy of protecting commercial writings might be traced to several factors. The policy, inter alia, enforces the "home office's" control and command of agreements made by field personnel (i.e., promises made by salespeople beyond their authority will not be honored); reflects judicial distaste for "secret agreements" because of their propensity to do harm to the public or to third parties; and allows simple expediency (i.e., the policy provides a means for courts to avoid complicated questions). Sweet, *supra* note 27, at 1050-51.

173. Childres & Spitz, *supra* note 1, at 9.

174. See *infra* notes 179-97 and accompanying text for full discussion of abuse-of-

always available. This reasoning depends, of course, on the court's adherence to a Childres and Spitz-like scheme—i.e., parol evidence should *always* be admitted in cases involving legitimate allegations of abuse-of-bargaining-power or fraud.

In sum, courts in the Childres and Spitz 1972 survey and this Comment's Wisconsin survey almost always circumvented the parol evidence rule in informal contracts cases, whether by claiming ambiguity, partial integration or some other justification.¹⁷⁵ When the courts in the Childres and Spitz survey did not circumvent the rule, their decisions were based not so much upon the admissibility of the extrinsic evidence as on the *credibility* of the particular parties.¹⁷⁶ Although credibility is occasionally cited by Wisconsin courts as a factor in their decisions not to circumvent the rule in informal cases,¹⁷⁷ the decisions are more often predicated on the fact that a party was attempting to *substitute* contradictory terms for the presumably unambiguous terms of a written contract.¹⁷⁸

C. Abuse-of-Bargaining-Power Contracts

The third major category in the classification scheme addresses contracts involving abuse of the bargaining process.¹⁷⁹ Fifty cases, or 33.5% of the total 1972 survey, fell within this category.¹⁸⁰ According to Childres and Spitz¹⁸¹ and other authorities, including the Wisconsin Supreme Court,¹⁸² the parol evidence rule does not apply in situations

bargaining-power contracts. The court should always admit parol evidence when a party legitimately alleges abuse-of-bargaining-power. (See *supra* note 58 and accompanying text).

175. See *supra* notes 154, 156-57 and accompanying text.

176. Childres and Spitz assert that courts that allow summary judgment on the basis of credibility under the guise of the parol evidence rule disserve the system because such holdings confuse and corrupt contract litigation. They further assert that judges have a time and place to rule on credibility, but that time and place is not the motion stage of the trial. Childres & Spitz, *supra* note 1, at 24.

177. See e.g., *Michels Fin. Corp. v. Link*, No. 83-1814 (Wis. Ct. App. May 16, 1985) (LEXIS, States library, Wisc file) (viewing evidence of an integration clause together with other factors and deciding that the party seeking to introduce parol evidence to prove the existence of a supplemental clause in a lease was not credible); *Christopher v. Williamson*, No. 85-0568 (Wis. Ct. App. Jan. 10, 1986) (LEXIS, States Library, Wisc file) (finding the party alleging that a written land contract constituted only a partial integration of the parties' agreement "was the more credible witness"). See *supra* notes 168 and 157, respectively.

178. See *supra* note 165-68 and accompanying text.

179. This category includes adhesion contracts, "unconscionable" contracts, contracts objectionable on other public policy grounds and contracts involving misrepresentation and duress. Childres & Spitz, *supra* note 1, at 5.

180. *Id.* at 25-30 n.108-46.

181. *Id.* at 24 (see *Grande v. General Motors Corp.*, 444 F.2d 1022, 1027 (7th Cir. 1971)).

182. *Federal Deposit Insur. Corp. v. First Mortgage Investors*, 250 N.W.2d 362 (Wis. 1977). See *supra* note 58 and accompanying text (i.e., terms of the writing may not be varied or contradicted unless there is allegation of fraud or duress).

involving a disparity in the bargaining position or expertise of the parties. The party who alleges inferior bargaining position or an abuse of discretion usually gets his or her evidence to the judge or jury.¹⁸³

1972 abuse-of-bargaining-power cases: Courts refused to allow the parol evidence rule to prevent the parties from producing evidence of unfair treatment in all but seven of the fifty abuse-of-bargaining-power cases surveyed by Childres and Spitz.¹⁸⁴ In one of the seven cases in which courts did *not* allow parol evidence, *Lakeshore, Inc. v. Sarafyan*,¹⁸⁵ the court enforced a cancellation term that it acknowledged was contrary to the expressed understanding of *both* parties, saying that because a lessor had gone so far as to seek and receive written modification of one clause of his apartment lease, the *oral* modification of another clause could not be explained by parol evidence.¹⁸⁶ In other words, the unsophisticated lessee lost on his bid to introduce parol evidence simply because he had previously modified a written clause in his lease.

Wisconsin abuse-of-bargaining-power cases: Wisconsin courts virtually always allow parol evidence when a party alleges abuse-of-bargaining-power, regardless of the parties' status.¹⁸⁷ The Wisconsin Supreme Court allowed parol evidence in a 1990 case, *Bank of Sun Prairie v. Esser*,¹⁸⁸ in which an unsophisticated party who had not read the fine print of a guaranty agreement alleged fraudulent misrepresentation on the part of a bank. The court held that in such cases parol evidence is admissible, and the determination of whether the unsophisticated party justifiably relied on the bank's representations is properly a question of fact for the jury.¹⁸⁹

Similarly, the Wisconsin Court of Appeals in *H & M Italian Food Corp. v. General Growth Development Corp.*¹⁹⁰ held oral parol evidence

183. Childres & Spitz, *supra* note 1, at 24. "This is true even when the parties have attributes which would place them in our formal category." *Id.* n.106 (citing *Hester v. New Amsterdam Cas. Co.*, 412 F.2d 505 (4th Cir. 1969); *Briskman v. Del Monte Mortgage Co.*, 458 P.2d 130 (Ariz. Ct. App. 1969); *Abbott v. Abbott*, 174 N.W.2d 335 (Neb. 1970)).

184. *Id.* at 25. *See, e.g.*, *Sherman Car Wash Equip. Co. v. Maxwell*, 297 F. Supp 712, 715 (E.D.Pa. 1969) (asserting that when there is evidence of a party's unscrupulous conduct, the Court is required "to examine all of the circumstances attending the execution of the agreement").

185. 225 So. 2d 15 (La. Ct. App. 1969).

186. Childres & Spitz, *supra* note 1, at 28 (citing *Lakeshore*, 225 So. 2d at 19).

187. The Wisconsin courts in this Comment's survey allowed parol evidence in nine of ten such cases. *See Federal Deposit Insur. Corp.*, 250 N.W.2d at 365, for the general statement of the Wisconsin Supreme Court's position on abuse-of-bargaining-power (e.g., fraud, duress) contracts.

188. 456 N.W.2d 585 (Wis. 1990).

189. *Id.* at 588-89. The court implied that the party's status was a consideration in its decision, stating that "all the circumstances must be considered, including the intelligence and experience of the . . . individual." *Id.* at 589.

190. No. 88-1257 (Wis. Ct. App. Mar. 21, 1989) (LEXIS, States library, Wisc file).

admissible in a case of alleged intentional deceit even though the evidence was in direct conflict with a formal written real estate lease governed by the statute of frauds. The court rationalized "equity will not permit the statute designed to prevent fraud to be used as an instrument of fraud."¹⁹¹ By so holding, the court further reinforced the tendency in Wisconsin for courts to allow parol evidence in almost any instance in which there is a legitimate allegation of fraud, misrepresentation or other abuse.¹⁹²

Circumstances do exist, however, in which the court will *not* admit parol evidence when a party alleges misrepresentation. In *Ritchie v. Clappier*,¹⁹³ for example, the Wisconsin Court of Appeals, under the theory of negligent reliance,¹⁹⁴ barred a licensed real estate broker who failed to read a contract from making a claim of misrepresentation. In *Ritchie* the court stated that it must consider all the circumstances, including the intelligence and experience of the misled individual and the relationship between the parties, when determining whether the individual acted reasonably in relying upon the misrepresentation.¹⁹⁵ After considering the facts, the court essentially determined that a real estate broker, presumably sophisticated in the ways of business, should have known to have read the contract carefully.¹⁹⁶

In sum, Wisconsin courts, like the courts surveyed in 1972 by Childres and Spitz, will almost always allow parol evidence in cases where one of the parties alleges abuse-of-bargaining-power on the part of the other.¹⁹⁷

191. *Id.* at *5 (citing *Estate of Rogers*, 140 N.W.2d 273, 275 (Wis. 1966)).

192. *See also* *First Nat. Bank of Wis. Rapids v. Dickinson*, 308 N.W.2d 910, 914 (Wis. Ct. App. 1981) (admitting parol evidence to prove a bank charged a usurious rate of interest on a loan, even though the writing itself did not indicate usury); *Hamman Constr. Co. v. Noller & Sons*, No. 86-0702 (Ct. App. Wis. Mar 4, 1987) (LEXIS, States library, Wisc file) (allowing parol evidence to prove the existence of misrepresentation in the terms of a construction contract); *Pentler and Rubnitz v. Hahn*, No. 85-0180 (Ct. App. Wis. Oct. 15, 1986) (LEXIS, States library, Wisc file) (finding an allegation of fraudulent misrepresentation on the part of one of the parties to a real estate deed is grounds for the court's admission of parol evidence); *Bauman v. Rondou*, No. 84-1790 (Ct. App. Wis. Feb. 18, 1986) (LEXIS, States library, Wisc file) (refusing to apply parol evidence rule to exclude evidence of negligent misrepresentation); *Barribeau v. Hansen Auto Sales*, No. 84-2225 (Ct. App. Wis. Jan 14, 1986) (LEXIS, States library, Wisc file) (not applying the parol evidence rule in cases in which tortious misrepresentation is alleged); *Paulson v. Gonnering*, No. 83-1912 (Ct. App. Wis. Aug. 28, 1984) (LEXIS, States library, Wisc file) (admitting parol evidence to prove verbal misrepresentation); *Polk County Bank v. Bauer*, No. 83-600 (Ct. App. Wis. Mar. 10, 1984) (LEXIS, States library, Wisc file) (finding fraudulent inducement is appropriate grounds for a court's admission of parol evidence).

193. 326 N.W.2d 131 (Wis. Ct. App. 1982).

194. "Negligent reliance" in such cases involves the proposition that a person who fails to read a written contract is precluded from defending against liability by claiming misrepresentation. *Bank of Sun Prairie*, 456 N.W.2d at 589 n.2.

195. *Ritchie*, 326 N.W.2d at 134.

196. *Id.* Failure to read the writing is a vexing problem and "no simple pattern emerges from the cases." E. ALLAN FARNSWORTH, *CONTRACTS* § 4.14, at 248 (1990).

197. *See supra* text accompanying notes 179-96.

D. Misapplication of the Parol Evidence Rule

A group of cases that Childres and Spitz placed in the formal category dealt with the courts' misapplication of the parol evidence rule.¹⁹⁸ Since the parol evidence rule does not apply to subsequent changes,¹⁹⁹ any reference to the rule as justification in such cases is blatant error.²⁰⁰ Another misapplication occurs when the rule is used as a device to defeat contract claims when the alleged contradiction is immaterial to those claims.²⁰¹

1972 misapplication cases: Eight of the fifty-nine formal cases surveyed by Childres and Spitz involved *subsequent* modifications of written documents. In two of those eight cases, the court incorrectly excluded the proffered evidence on grounds that the parol evidence rule prohibited admission of the evidence.²⁰² The court in the other six cases correctly recognized that the parol evidence rule does not apply to subsequent modifications.

Wisconsin misapplication cases: Wisconsin courts misapplied the parol evidence rule in two cases.²⁰³ In one of those two, *FPC Securities Corp. v. Hemmings*,²⁰⁴ the court considered whether the rule should bar the admission of the defendant's affidavit which spoke of a *subsequent* agreement at the plaintiff's board meeting that the defendant was to be released from a contract.²⁰⁵ The affidavit contradicted the minutes of the board meeting, which did not indicate any action by the board to release the defendant from the contract.²⁰⁶ Although the court correctly found the lower court's granting of summary judgment for the plaintiff was in error because the affidavit raised disputed items of material fact,²⁰⁷ it improperly applied a parol evidence rule analysis to the question of whether the evidence in the affidavit was admissible

198. This Comment places the misapplication subcategory in a section unto itself instead of in the formal category because a court's characterization of *subsequent* agreements as inadmissible under the parol evidence rule is inappropriate regardless of the parties' status.

199. "[I]t is unanimously agreed that the parol evidence rule applies to *prior* expressions, and has no application to an agreement made *subsequent* to the writing. . . ." Calamari & Perillo, *supra* note 23, at 335 (citing *e.g.*, CORBIN, *supra* note 2, § 574; WILLISTON, *supra* note 32, § 632). See also *supra* note 14.

200. Childres & Spitz, *supra* note 1, at 16.

201. *Id.* at 16.

202. Childres & Spitz, *supra* note 1, at 16 n.67 (citing *Kopelman v. Sigel*, 297 N.Y.S.2d 793 (1st Dep't 1969), *aff'd* 260 N.E.2d 550 (1970); *C & N Trading Co. v. Johnston Fur Dressing Corp.*, 304 N.Y.S.2d 405 (Sup. Ct. 1969)).

203. The Wisconsin courts misapplied the parol evidence rule in two of the six formal and informal cases in which a party invoked the rule to exclude evidence of an agreement *subsequent* to the original agreement. See *supra* notes 199-200 and accompanying text.

204. No. 87-0862 (Wis. Ct. App. Mar 17, 1988) (LEXIS, States library, Wisc file).

205. *Id.* at *1.

206. *Id.*

207. *Id.* at *2.

to impeach the minutes of the board meeting.²⁰⁸ Because the alleged agreement was subsequent to the original contract, the commentators would suggest the parol evidence rule does not apply.²⁰⁹ The Wisconsin courts in the remaining four cases correctly held the parol evidence rule forbids the use of only prior or contemporaneous, not subsequent, agreements.²¹⁰

IV. CONCLUSION

The Childres and Spitz conclusion that parties' status influences courts' parol evidence decisions is generally viable in Wisconsin today. Of the fifty-nine Wisconsin appellate cases decided since 1980 that considered the parol evidence rule, the courts found parol evidence admissible in just ten of the twenty that involved "formal" contracts.²¹¹ Of the ten formal cases in which the courts found parol evidence not admissible, eight were "substitution" cases (i.e., the proffered parol evidence directly contradicted the unambiguous language of the written agreement). In no instance did a court allow parol evidence in a formal substitution case.

By contrast, Wisconsin courts found parol evidence admissible in twenty of the twenty-five informal cases,²¹² nine of the ten abuse-of-bargaining-power cases,²¹³ and two of the six misapplication cases.²¹⁴ Significantly, all five of the informal cases in which courts did not allow parol evidence were substitution cases.²¹⁵ These results suggest something of a departure from the Childres and Spitz conclusions. Specifically, the fact that Wisconsin courts found parol evidence inadmissible in a majority of combined formal *and* informal substitution cases suggests that the distinction between substitution and non-substitution cases is as important in Wisconsin as the distinction between formal and informal cases. That is, the *nature* of the proffered parol evidence is a significant factor in courts' analysis of the parol evidence rule.

208. See also *Lange Drywall, Inc. v. Skyline Builders, Inc.*, No. 84-442 (Wis. Ct. App. Nov. 5, 1984) (LEXIS, States library, Wisc file) (excluding evidence of alleged subsequent changes to the original unambiguous contract on parol evidence grounds).

209. See *supra* note 199-200 and accompanying text.

210. *Weber v. Bastogne Sausage*, No. 83-1144 (Wis. Ct. App. Mar. 26, 1985) (LEXIS, States library, Wisc file); *Ellickson v. American Family Mut. Ins. Co.*, No. 83-1104 (Wis. Ct. App. Sep. 25, 1984) (LEXIS, States library, Wisc file); *Eagle River State Bank v. Guardian State Bank*, No. 83-2042 (Wis. Ct. App. July 3, 1984) (LEXIS, States library, Wisc file); *Kowalski v. Mierow Enters.*, No. 83-714 (Wis. Ct. App. Apr. 4, 1984) (LEXIS, States library, Wisc file).

211. See *supra* notes 78-89; 96-108; 116-20 and accompanying text.

212. See *supra* notes 151-68 and accompanying text.

213. See *supra* notes 187-97 and accompanying text.

214. See *supra* notes 203-10 and accompanying text.

215. Overall, the courts found parol evidence admissible in only three of the eight informal substitution cases. See *supra* notes 165-69 and accompanying text.

The empirical results of the survey are striking, when one considers the courts rarely make any mention of status in their decisions. The data as a whole carry implications for parties and attorneys litigating and courts deciding parol evidence issues in Wisconsin. By understanding that Wisconsin parol evidence decisions follow the patterns set forth in this Comment, attorneys can better prepare for litigation by attempting to characterize their clients' status and parol evidence according to whether they wish to have the court admit parol evidence. An attorney seeking to have a Wisconsin court admit parol evidence, for instance, should characterize the client as unsophisticated in the ways of business (i.e., the contract is informal) and the parol evidence as anything (e.g., a variation, side agreement, abuse-of-bargaining-power) but a substitution. By understanding that their parol evidence decisions follow certain patterns, courts give themselves additional rationale to circumvent or uphold the rigid application of the parol evidence rule.

Courts could assure a more just, rational result if they would accept the proposition that no single unitary parol evidence rule can be expected to operate across all status lines. Parol evidence, which is properly excluded in formal substitution cases such as *Dairyland Equip.*²¹⁶ and informal substitution cases such as *Marks*²¹⁷ is properly admitted in informal cases such as *Boe*²¹⁸ and abuse-of-bargaining-process cases such as *Bank of Sun Prairie*.²¹⁹ Such acknowledgement by the courts would accomplish two worthy objectives: 1) it would allow more accurate prediction of prospective decisions, and 2) it would clear the way for more rational, just decisionmaking in all the categories.²²⁰

216. *Dairyland Equip. Leasing, Inc. v. Bohlen (In re Spring Valley Meats, Inc.)*, 288 N.W.2d 852 (Wis. 1980). See *supra* notes 78-82 and accompanying text.

217. *Marks v. Saltness*, No. 84-1045 (Wis. Ct. App. June 4, 1985) (LEXIS, States library, Wisc file). See *supra* note 168 and accompanying text.

218. *Boe v. Edgewood, Inc.*, No. 87-0595 (Wis. Ct. App. Apr. 21, 1988) (LEXIS, States library, Wisc file). See *supra* notes 156-59 and accompanying text.

219. *Bank of Sun Prairie v. Esser*, 456 N.W.2d 585 (Wis. 1990). See *supra* notes 187-89 and accompanying text.

220. *Childres & Spitz*, *supra* note 1, at 31.

**APPENDIX
TABLE 1**

**SUMMARY OF WISCONSIN
PAROL EVIDENCE DECISIONS
1980—1991**

Category	Number of Cases	Number admitting parol evidence	Percentage admitting parol evidence
FORMAL			
Substitution	8	0	0%
Variation	3	2	57%
Side Agreement	4	4	100%
Interpretation (ambiguity)	<u>5</u>	<u>4</u>	<u>80%</u>
Total	20	10	50%
INFORMAL			
Substitution	8	3	37%
Non-substitution	<u>17</u>	<u>17</u>	<u>100%</u>
Total	25	20	80%
ABUSE OF BARGAINING POWER	10	9	90%
POTENTIAL MISAPPLICATION	6	4	67%