COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2434

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

WISCONSIN MUSIC NETWORK, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

KOHL'S FOOD STORES, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Kohl's Food Stores, Inc. (Kohl's), appeals from a judgment, following the entry of partial summary judgments and a subsequent bench trial, granting Wisconsin Music Network, Inc. (WMN), damages of

$106,079.45, plus interest, attorney fees, and costs and disbursements, for numerous breach of contract claims.[1] Kohl's presents various arguments, all essentially challenging the trial court's conclusions that it breached the contracts, and that WMN did not.

WMN cross-appeals, arguing that the trial court erred in determining the basis for computing the damages on the three contracts that contained a modified liquidated damages clause, and in determining the attorney fees.

On the appeal, we conclude that the trial court correctly determined all issues. On the cross-appeal, we conclude that the trial court correctly determined the damages. We also conclude, however, that the trial court erred in determining WMN's attorney fees. Therefore, we affirm in part and reverse in part and remand with directions.

[1] The protracted litigation in this case resulted in many non-final orders and judgments, as well as a final judgment, containing the rulings at issue: (1) the February 6, 1996 trial court order entered by the Honorable George A. Burns, Jr., concluding that Kohl's breached its contracts with WMN, and granting partial summary judgment to WMN; (2) the March 6, 1997 trial court order entered by the Honorable Christopher R. Foley, determining the basis for computing damages arising from the breach of most of the contracts, granting partial summary judgment to WMN, and ordering a trial on the remaining contracts; (3) the June 6, 1997 trial court judgment, entered by Judge Foley following a bench trial, concluding that WMN also was entitled to judgment on the remaining contracts, determining the damages, and dismissing Kohl's counterclaim; (4) the July 2, 1997 final money judgment and bill of costs entered by the judgment clerk, specifying the damages, interest, costs, and attorney fees; and (5) the July 7, 1997, amended order for judgment, entered by Judge Foley, setting WMN's attorney fees.

I. BACKGROUND

This case is a fact-intensive one involving many years and numerous contracts. As summarized in Judge George A. Burns's November 30, 1995 memorandum decision on the parties' cross-motions for summary judgment:

> This is a contract case in which each of the contracting parties have [sic] moved for summary judgment. Plaintiff, Wisconsin Music Network, Inc. (WMN), is engaged in the business of providing subscription music programming to commercial business establishments located in southeastern Wisconsin and northern Illinois. Defendant, Kohl's Food Stores (Kohl's), which is a subsidiary of Great Atlantic and Pacific Tea Company (A&P), is a well-known food store chain engaged in the retail sale of food and other products in southeastern Wisconsin. By their cross-motions, both parties agree that there are no material issues of fact going to the question of which party breached the contracts between them.
>
> ….
>
> For the most part, the essential facts giving rise to this litigation are not disputed. The parties have had a business relationship spanning nearing [sic] 40[2] years prior to the commencement of this action. During that time, a series of contracts were [sic] entered into whereby the Plaintiff agreed to supply subscription music programming to those locations of Kohl's stores as would be requested from time to time. At any time that Kohl's desired services to be provided or expanded at a specific location, a written contract or amendment was signed by the parties.
>
> ….
>
> It is undisputed that on November 1st, 1993, WMN changed the subscription music programming it provided to all of its customers, including the Defendant, Kohl's, from MUZAK to AEI music programming. In conjunction with this change of service, WMN sent a written notification to all of its customers, including each of the Kohl's store locations as well as its corporate headquarters in Milwaukee, Wisconsin….
>
> ….

[2] According to Kohl's, the parties first contracted for background music services in 1965.

> In a July 1994 letter, written over seven months after WMN first noticed Kohl's of its change in music programming services, [Kohl's] advised … WMN that, "We are initialling (sic) our ninety (90) days notice to cancel the contracts …."
>
> … It is undisputed that later in 1994, Kohl's formally terminated all of the agreements effective December 31st, 1994.

(Footnote added.) Rather than further elaborating the extensive factual background and procedural history, at this point we will simply acknowledge our review of the forty-six contracts and related documents at issue, and the numerous trial court decisions and orders. We will refer to additional factual details as necessary in our discussion of the arguments on appeal.

II. THE APPEAL

A. Breach

Kohl's first argues that providing MUZAK was a material term of its contracts with WMN and, therefore, that WMN materially breached the contracts when it substituted AEI for MUZAK.[3] The trial court, however, granting partial summary judgment, concluded that "the essential purpose of all of the contracts … was to provide background music programming services[,] … not to provide 'MUZAK service[,]'" and "that the music provided by WMN through AEI was comparable in quality and performance to WMN's previous service in providing MUZAK." The trial court also concluded that, even assuming the provision of MUZAK was a material term of the contracts, Kohl's accepted contractual modification by receiving notice of the switch to AEI and by continuing to receive

[3] Kohl's maintained that forty-one of the contracts explicitly provided for "MUZAK service," and that three others implicitly did so by providing for "directed music service" on the contract page displaying the MUZAK logo. Kohl's sought summary judgment on these forty-four contracts.

the AEI programming for more than seven months before acting to terminate WMN's services.

"Upon review of a summary judgment decision, we apply the standards set forth in [§ 802.08(2), STATS.], in the same manner as the trial court." ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475, 507 N.W.2d 163, 165 (Ct. App. 1993). Although our standard of review is *de novo*, "we value a trial court's decision on such questions" particularly when, as here, the trial court has carefully considered the submissions and "provided a thorough and well-reasoned decision." ***Id.*** at 475-76, 507 N.W.2d at 165.

"In order to establish a breach of contract sufficient to constitute repudiation of the entire agreement[,] the nonperformance must be substantial and the breach so serious as to destroy the essential objects of the contract." ***Seidling v. Unichem, Inc.***, 52 Wis.2d 552, 554, 191 N.W.2d 205, 207 (1971). "A party has substantially performed if he [or she] has met the essential purpose of the contract." ***Marshall & Ilsley Bank v. Pump***, 88 Wis.2d 323, 333, 276 N.W.2d 295, 299 (1979). In determining whether a party "has substantially performed," courts should consider "the character of the promised performance, the purposes it was expected to serve and the extent to which nonperformance has defeated those purposes." ***Id.*** We conclude that the trial court correctly concluded that WMN's substitution of AEI for MUZAK did not constitute a material breach.

Kohl's argues that the specification of "MUZAK" on almost all the contracts, either in the contract terms or in the logo at the top of the contracts, established that the provision of MUZAK was a material term of the contracts. In response, WMN points out that the contracts after July 27, 1977 explicitly required that it provide not MUZAK, but rather, "its Directed Music Service and/or Hold-

Line service," and that "MUZAK" was merely one of several logos on the contracts "simply advertis[ing] one of the products [WMN] sold."

We conclude that, by providing AEI, WMN continued to meet "the essential purpose[s] of the contract[s]." *See* ***id.*** As Kohl's concedes in its brief to this court, "[t]he music provided by AEI and MUZAK is indistinguishable to the listener." Further, as WMN points out, "Kohl's executed the last contract at issue in this case … nearly five months after the change in the music programming service" and, months later, in the letter providing notice that it would be canceling the contracts, still "did not identify the switch from 'Muzak' service as the reason for its cancellation."

Kohl's argues that, despite the indistinguishable nature of the music services, the switch from MUZAK to AEI constituted a material breach because, as a result of the switch, it was unable to gain various advantages available under national contractual agreements between A & P and MUZAK. As the trial court correctly concluded, however, this argument is "entirely beside the mark when considering what transpired between the contracting parties." Regardless of whether it lost some subsequent opportunity to share in its parent company's relationship with MUZAK, Kohl's simply does not dispute WMN's assertion that "[t]here was no diminution in the value or quality of the service [WMN] was contractually obligated to provide to Kohl's." Accordingly, we agree with the trial court's conclusions regarding breach of contract.[4]

[4] Resolving the central issue on this basis obviates the need to address whether, even assuming that the switch from MUZAK to AEI was material, Kohl's acceptance of the change constituted contract modification. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed). We would note, however, that Kohl's conduct accepting AEI provides further support for the trial court's conclusion that the switch did not, in the words of ***Seidling v. Unichem, Inc.***, 52 Wis.2d 552, 554, 191 N.W.2d 205, 207 (1971), (continued)

B. Damages

Kohl's next argues that "the letter amendment to the pre-1970 contracts was unambiguous and [it] was entitled to summary judgment as to the proper termination of the pre-1970 contracts." Kohl's explains: "WMN's interpretation of the letter amendment," which, the trial court concluded, extended the renewal periods of the pre-1970 contracts from one year to ten, "substantially enhances the damages to which WMN is arguably entitled." As Kohl's elaborates:

> WMN's interpretation would require Kohl's, after the termination of the agreement, to pay the monthly charge of each contract to the end of the ten year term (most of which are in 2000 or 2001) rather than to the end of the one year renewal term provided for in many of the original contracts.

Judge Christopher R. Foley concluded that the letter amendment's reference to "existing standard agreements" encompassed two agreements executed on the same day and prior to the letter amendment, establishing successive ten-year renewal periods. We conclude that the trial court was correct.

The facts are undisputed. The pre-1970 contracts provided for one-year renewal periods.[5] On July 23, 1970, however, WMN and Kohl's agreed to

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"constitute" a "breach so serious as to destroy the essential objects of the contract." Indeed, Kohl's conduct also may have constituted waiver of any right to rescind the contracts. *See* ***Thompson v. Village of Hales Corners***, 115 Wis.2d 289, 319, 340 N.W.2d 704, 718 (1983) (party's "failure to assert his rights for more than six months together with his affirmance of the lease as evidenced by [a subsequent] document constitute a waiver of any right to rescind").

[5] As summarized by Kohl's:

> Each of these [thirty-two] contracts [entered into between the parties before July 23, 1970] was a printed form provided by WMN. A key provision of the contracts was the provision regarding the initial term and renewal term of each contract. From 1965 to June 1970, that provision in most of the contracts read as follows:

(continued)

the "letter amendment" providing "that effective January 1, 1971, that existing agreements to provide Music by MUZAK service to all of Kohl's various enterprises is [sic] hereby extended and renewed for a period of ten (10) years under the same terms and conditions as evidenced by the various existing standard agreements." The "existing standard agreements" included two new contracts, for two additional Kohl's stores, also executed, in Judge Foley's words, "virtually simultaneously with" and "prior to" the letter amendment.

The two new contracts provided for "ten continuous years from the date of the commencement of the service," and each further stated that "[t]his agreement shall extend for further like periods under the same terms and conditions." Judge Foley concluded that, because these two contracts had been executed at about the same time and prior to the letter amendment, they were among the "existing standard agreements" encompassed by the amendment. He

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> The Subscriber hereby purchases from the Network its MUZAK service for a period of five continuous years from the date of (date inserted). This [A]greement shall extend for further one year periods under the same terms and conditions without further notice unless either party shall give notice by registered mail of its intention to terminate at least ninety (90) days before the end of the then current [A]greement period. (emphasis added)
>
> The renewal provision in one contract was slightly different and read that the "agreement shall extend for further like periods…" Two other contracts had renewal provisions which read "the agreement shall extend year to year…" The agreements provided that in the event the agreement is breached, the breaching party must pay as liquidated damages "all monthly payments due and to become due up to the expiration of this Agreement," or until the end of the current renewal term.

(Citations omitted.)

further concluded that the agreements, considered together, were ambiguous on the length of the renewal period. Therefore, Judge Foley conducted a bench trial to determine the intent of the parties, and he concluded that they intended successive ten-year renewal periods for all their contracts.

Kohl's argued, and maintains on appeal:

> [T]he language of the letter amendment is unambiguous and implemented a one-time only extension of ten years, [after which] the contracts affected by the letter amendment would revert back to their original provision regarding renewal (that generally the contracts would renew on an annual basis and be terminable at the end of the annual contract term).

WMN contended, and the trial court ultimately agreed, that the letter amendment was ambiguous, but that the parties intended to provide for successive ten-year renewal periods.

As we have explained:

> The interpretation of a contract [presents] a question of law which we review *de novo*. Where the terms of a contract are plain and unambiguous, we will construe it as it stands. However, a contract is ambiguous when its terms are reasonably or fairly susceptible of more than one construction. Whether a contract is ambiguous is itself a question of law.

Borchardt v. Wilk, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990) (citations omitted). "A word or term in a contract to be ambiguous must have some stretch in it — some capacity to connote more than one meaning — before parol evidence is admissible." ***Conrad Milwaukee Corp. v. Wasilewski***, 30 Wis.2d 481, 487, 141 N.W.2d 240, 244 (1966).

Kohl's argues that "[t]he term 'a period of ten (10) years' does not have any stretch to it and is susceptible to only one meaning — that the existing

agreements are to be extended for a one-time only period of ten years." In making this argument, however, Kohl's seems to conveniently ignore the language immediately following those terms: "under the same terms and conditions as evidenced by the various existing standard agreements." Two of those standard agreements were the two new contracts providing for an initial ten-year period and renewals for "further like periods."[6] Examining the contracts, old and new, and the letter amendment, we, like the trial court, are unable to determine whether the parties agreed to a single ten-year renewal period, or successive ten-year renewals. The agreements, taken together, have considerable "stretch" and, therefore, the trial court correctly denied summary judgment and conducted a trial on the parties' intentions.

In ***Patti v. Western Machine Co.***, 72 Wis.2d 348, 241 N.W.2d 158 (1976), the supreme court explained:

> Although the construction of an unambiguous contract is a matter of law, when there is ambiguity … the sense in which the parties intended the words to be used is a question of fact. The finding of the trial court regarding the intended meaning of the word must therefore be upheld unless it is contrary to the great weight and clear preponderance of the evidence.

[6] Kohl's contends that it was improper for the trial court to include the two new contracts in its analysis because (1) despite being "executed contemporaneously to the letter amendment," they were not "part of the same transaction," *see* ***Conrad Milwaukee Corp. v. Wasilewski***, 30 Wis.2d 481, 487, 141 N.W.2d 240, 243 (1966) ("contemporaneous documents" not construed together where court "find[s] no intention of the parties that the [two documents] constitute the agreement of the parties because there is no express internal connection or reference of incorporation between the contemporaneous documents"); and (2) in the absence of ambiguity, parol evidence should not be considered, *see* ***Schmitz v. Grudzinski***, 141 Wis.2d 867, 872, 416 N.W.2d 639, 641 (Ct. App. 1987) ("Parol evidence is inadmissible to vary or explain unambiguous written terms."). Here, however, there is "express internal connection" by virtue of the letter amendment's reference to "the same terms and conditions as evidenced by the various existing standard agreements." The two new agreements were among those "existing standard agreements," having been executed at the time of the letter amendment.

Id. at 353, 241 N.W.2d at 161 (footnote omitted). In the instant case, after hearing from the witnesses and reviewing the documentary evidence, Judge Foley found "that both parties intended the letter amendment to incorporate the '10/10' scheme in the pre-existing contracts." He explained:

> Rules of construction suggest that separate contracts executed at the same time, by the same parties, for the same purpose and in the course of the same transaction should be construed consistently. It is an acknowledged fact that the parties executed two contracts incorporating the "10/10" scheme immediately prior to the execution of the letter amendment. This rule of construction supports the conclusion that it was the intention of the parties to incorporate those terms into the pre-existing contracts by way of the letter amendment.
>
> More importantly, it is also an acknowledged fact that all contracts (except one) for the same or similar services at different locations executed by the parties subsequent to the [sic] July 23, 1970, until the date of the breach, incorporated the "10/10" terms. A logical inference therefrom is that WMN and Kohl's viewed those terms as customary; there [sic] "standard agreement", if you will, governing their business relationship at all the defendant's stores. Whether one characterizes this as the "practical construction" or "course of dealings" of the parties, they are "highly probative" of a mutual understanding that the letter amendment extended and renewed the pre-existing contracts under the "10/10" terms. As noted above, this is the inference that I draw and it is determinative of the dispute.

(Citations omitted.) We conclude that this finding is not clearly erroneous.

Although Kohl's challenges Judge Foley's use of the two new contracts, it does not directly challenge his analysis once those contracts are considered. Instead, Kohl's argues: (1) that WMN waived its right to rely on the ten-year provision in the letter amendment; (2) that the trial court improperly failed to construe the letter amendment against WMN, the drafter, *see* ***Jones v. Jenkins***, 88 Wis.2d 712, 725, 277 N.W.2d 815, 820 (1979); (3) that the trial court

failed to apply the principle that a contract of long-term duration should be interpreted to continue indefinitely only if such intent is clearly stated, *see* ***William B. Tanner Co. v. Sparta-Tomah Broad. Co.***, 716 F.2d 1155, 1159 (7th Cir. 1983); (4) that "[t]he course of performance of these agreements demonstrates that the parties intended the 1970 agreement to be a one-time only arrangement"; (5) that "WMN failed to assert the ten year renewal period before suit"; (6) that WMN's conduct in not enforcing contractual penalty provisions for contract termination in the case of Kohl's stores that closed prior to July 1994 further supports its "course of performance" theory; and (7) that WMN's inconsistent provision of an annual $3,500 discount which, Kohl's maintains, was given in consideration for the extension to ten-year renewal periods, "tends to support the argument that the parties did not understand the 1970 agreement to be in effect when the annual discount was discontinued."

In support of these seven contentions, Kohl's presents relatively little authority and argument. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" argument); *see also* RULE 809.19(1)(e), STATS. In each argument, while Kohl's seems to be offering a plausible position, Kohl's fails to explain why we should reject the trial court's findings, which were supported by the evidentiary record and were at least equally plausible.[7] In short, Kohl's has

[7] In addition, we note that the trial court accepted and considered the legal principles Kohl's now advances. For articulated reasons, however, the court rejected the conclusions Kohl's proposed. For example, the trial court commented:

> The pre-eminent rule of contract construction would support the interpretation argued by the defendant. I acknowledge that a reasonable view of the evidence would warrant a conclusion that the ambiguity, being a product of the drafting efforts of WMN's agent, should be construed against [WMN]. The simplicity of this rationale is attractive; however, I

(continued)

failed to offer argument establishing anything clearly erroneous in the trial court's findings:

> That it was the intention of the parties to incorporate the renewal terms of the contracts executed contemporaneously with the Letter Amendment of the [sic] July 23, 1970, in all of the pre-existing contracts as that was then established as the standard agreement.
>
> That all of the contracts executed prior to July 23, 1970, were amended to commence a [sic] new terms on January 1, 1971, and to renew for successive ten year periods with the current term to have terminated on December 31, 2000.

Accordingly, we affirm the trial court's findings and conclusions, following the bench trial, establishing the contract periods for the computation of WMN's damages.

III. CROSS-APPEAL

A. Damages

WMN first argues that the trial court erred in concluding that three of the contracts foreclosed its common law right to recover actual damages for Kohl's breach. We disagree.

All the WMN/Kohl's contracts included a liquidated damages provision. In all but three, that provision, in relevant part, stated:

> view it as overly-simplistic. The other factors cited [in the trial court's decision] are, in my view, overwhelmingly supportive of the proposition that both parties intended the letter amendment to incorporate the "10/10" scheme in the pre-existing contracts. The "static-albeit sometimes useful-canon" that the ambiguity be construed against the drafter should not be applied to distort, rather than clarify, the parties' intention.

(Citations omitted.)

> Upon the discontinuation of the service by reason of … breach of any of the covenants herein contained, … [WMN] … shall be entitled to recover from [Kohl's] … all monthly payments then due; *[WMN] shall also be entitled to recover from [Kohl's] three-quarters of all payments still to become due up to the expiration of this Agreement*, including court costs, reasonable attorney fees, and interest at prime rate after default as and for liquidated damages; ….

In the three contracts at issue, the italicized language was crossed out. Therefore, these three contracts explicitly provided for recovery of "all monthly payments then due," but not for the additional recovery of "three-quarters of all payments still to become due." Thus, Judge Foley concluded that, on these three contracts, WMN could recover damages limited to "all monthly payments then due."

WMN contends "that the contracts were not intentionally drafted with that reading in mind," and that such an interpretation "leads to an absurd result." WMN concedes, however, that the "boilerplate language was deleted by agreement of the parties," and that "no evidence in the record," beyond the contracts themselves, established "what the parties intended." Nevertheless, WMN, citing ***Fields Foundation, Ltd. v. Christensen***, 103 Wis.2d 465, 309 N.W.2d 125 (Ct. App. 1981), maintains that "the deletion of or the unenforceability of a specific liquidated damages provision … should not bar recovery for actual damages flowing from the breach of a contract."

In writing of "the deletion of *or* the unenforceability of a specific liquidated damages provision" (emphasis added), WMN strolls all too casually through ***Fields***. ***Fields*** did not discuss a "deleted" liquidated damages provision. Rather, it stated, "The unenforceability of a liquidated damages clause does not affect the damages recoverable for breach of the contract in which it appears." ***Id.*** at 478, 309 N.W.2d at 132. In the three contracts at issue, however, we do not

have unenforceable liquidated damage clauses. The damage clauses are fully enforceable; they simply are not as expansive as those in the other contracts.

Still, these contract provisions are explicit and unambiguous. Although WMN cites authorities for well-settled principles establishing a party's common law right to recover actual damages for breach of contract, it offers no additional authority suggesting that such a common law right supersedes the contractual right explicitly selected by the parties. Thus, we conclude that the trial court correctly enforced these contractual damage provisions as written.

B. Attorney Fees

WMN next argues that "[t]he trial court erroneously exercised its discretion by formalistically deciding the amount of the attorney fees to be awarded." We agree.

Five of the forty-six contracts provided for recovery of "reasonable attorney fees" as an element of WMN's damages. Although Kohl's did not challenge the amount of attorney fees WMN submitted for the trial court's consideration, the court awarded only 5/46th of the amount, reasoning that because WMN could only recover attorney fees on five of the forty-six contracts that had been breached, its attorney fees should be limited proportionately.

Generally, attorney fees are recoverable only when a statute or contract provides for them. *See* ***Elliott v. Donahue***, 169 Wis.2d 310, 323, 485 N.W.2d 403, 408 (1992). "[A]ppellate review of an attorney fee award is limited to whether the trial court properly exercised its discretion." ***Chmill v. Friendly Ford-Mercury***, 154 Wis.2d 407, 412, 453 N.W. 2d 197, 199 (Ct. App. 1990). "A trial court properly exercises its discretion if it employs a logical rationale based

on the appropriate legal principles and facts of record." ***Id.*** Here, although at first glance the trial court's proportional approach seems logical, upon closer analysis it emerges as formalistic and, quite possibly, at odds with the facts of record. As WMN argues in its cross-appeal brief-in-chief:

> This case involved forty[-]six causes of action. The great majority of the legal work done on [WMN]'s behalf throughout this case from its inception related jointly to all of [WMN]'s claims. For example, attorney fees relating to [WMN]'s successful disqualification of Kohl's first attorneys, defense of Kohl's summary judgment motion, [WMN]'s first and second summary judgment motions, and all of the ancillary activity thereto, would have been incurred even if there had been only one cause of action rather than forty[-]six causes of action, because the claim made under each cause of action arose out of a common core of facts. The only rational distinction that can be made between the contracts that expressly provide for attorney fees and those that do not, relates to the trial in this matter. The trial and the final pre-trial preparation related almost exclusively to contracts that did not expressly provide for fees. The record is uncontroverted that $3,837.50 in attorney fees were attributable to the preparation and the trial. Therefore, based upon this distinction, the only deduction in attorney's fees that is arguably appropriate is the $3,837.50 representing attorney fees incurred in the trial and final pre-trial preparation. The remaining $29,084.61 in attorney fees would have been incurred even if only one contract providing for reasonable attorney fees had been at issue.

And in its cross-appeal reply brief, WMN adds that if only the five contracts had been at issue, it still would have had to file and serve a summons and complaint, appear at a scheduling conference, handle statutory pretrial matters, file the first summary judgment motion, supporting affidavits and documentation, orally argue the motion, attend mediation, and file the second summary judgment motion.

Kohl's disputes WMN's estimate of the extent of its legal efforts attributable to the five contracts but, significantly, acknowledges that "[t]he complexity of the contract issues before the court precludes a straight application

of the attorney fees provision." Moreover, Kohl's notes that "the litigation encompassed decades of contractual relations and a significant amount of time was expended on the issue of the interpretation of the July 23, 1970 letter amendment and the renewal periods for the pre-1970 contracts." Kohl's argues, however, that the trial court's "review of the contract language which governs the parties' relationship, *coupled with the extent of the legal issues presented by the various contracts*, produced a well[-]reasoned decision which recognizes the intricacies presented by this contract case." (Emphasis added.)

If, in fact, the trial court's determination of attorney fees was based not only on the 5/46th proportion, but also on that proportion "coupled with" an analysis of the legal issues and the extent to which their litigation was necessitated in relation to the five contracts at issue, we would defer to the trial court's conclusion. The trial court decision, however, does not reflect such analysis, and it merely concludes: "[T]he vast majority of contracts do not provide for recovery of attorneys fees and allowing such would clearly violate the American rule. Therefore, Wisconsin Music Network is awarded 5/46th of the concededly reasonable attorneys fees totalling $32,922.11."

Where a party's claims "arise out of a common core of facts," a "losing party is not entitled to a reduction in attorney's fees for time spent on unsuccessful claims, if the winning party achieved substantial success and the unsuccessful claims were brought and pursued in good faith." ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis.2d 534, 550, 472 N.W.2d 790, 797 (Ct. App. 1991). *See also* ***Hensley v. Eckerhart***, 461 U.S. 424, 435-36 (1983). Logically, therefore, it would seem to follow that a losing party is not entitled to a reduction for time spent on *successful* claims for which attorney fees were not recoverable, if the

legal work on those claims was necessitated by other claims for which such fees were recoverable.

Although the number and proportion of claims for which attorney fees were recoverable may indeed relate to the trial court's ultimate determination, that number and proportion, standing alone, provide only a tenuous starting point in the analysis. Accordingly, we remand the case for the trial court's determination of the proper award of WMN's attorney fees, consistent with this decision.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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