COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0321

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

MEGAL LAUNDROMAT, INC., A WISCONSIN CORPORATION,

PLAINTIFF-RESPONDENT,

V.

SUDS-R-US, INC., A WISCONSIN CLOSE CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Reversed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Suds-R-Us, Inc., appeals from the nonfinal order precluding it from introducing evidence of Megal Laundromat, Inc.'s, failure to

mitigate damages.[1] Suds contends that the circuit court order, relying on the "mend-the-hold" doctrine, "is plainly contrary to sound, relevant legal authority, including Wisconsin Supreme [Court] cases enforcing Plaintiff's duty to mitigate damages when the issue of breach of contract is contested at trial." We agree and reverse.

BACKGROUND

¶2 Megal and Suds entered into a contract under which Suds was to manage a newly constructed coin-operated laundry owned by Megal from February 1, 1995, until June 30, 2000, unless the contract was otherwise terminated or extended. Among its obligations under the contract, Suds was to provide "[n]ot less than the weekly and as necessary collection, deposit and accounting per machine group and size of all revenue" at the laundry. The contract prohibited anyone other than Chuck Holzman, Suds' president, from fulfilling these specific obligations. Also under the contract, Megal had "the right at any time upon giving written notice to [Suds] to collect and deposit the revenue from any or all the machines at the [laundry] for any period of time." Additionally, the contract specified that if Suds failed to deposit all laundry receipts in Megal's account "immediately after collection," Megal had the right to terminate the contract without notice.

¶3 By the fall of 1995, reported revenues from the laundry were consistently and substantially diminishing in spite of water usage remaining stable. Megal terminated the contract on April 28, 1997, and filed a complaint against

[1] We granted permission for this interlocutory appeal pursuant to WIS. STAT. § 808.03(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Suds on May 15, 1997, alleging that Suds breached the contract, "converted for its own purposes and uses substantial amounts" of the laundry revenue, and failed to account to Megal for all revenue at the laundry. Megal claimed damages, accrued prior to termination of the contract, exceeding $200,000. Suds denied any breach of contract or conversion.[2]

¶4 The jury trial began on October 14, 1998. Holzman, called adversely as the first witness, testified that Suds "duly performed all the conditions and obligations" under the contract and that Megal terminated the contract "without proper grounds or cause." Subsequent to this testimony, Megal's attorney advised defense counsel and the court that Megal intended to object to all evidence suggesting that it failed to mitigate damages. Megal perceived Suds as simultaneously asserting two factually inconsistent propositions: (1) that Suds did not breach the contract; and (2) that if Suds did breach the contract, the breach was so obvious that Megal should have discovered it and acted to mitigate damages. Megal claimed that Suds' strategy was prohibited both by common sense and by the "mend-the-hold" doctrine. The circuit court declared a mistrial and ordered the parties to brief the "mend-the-hold" issue.

¶5 Megal then moved for an order barring Suds from introducing any failure-to-mitigate-damages evidence; Suds opposed the motion. Granting the motion, the circuit court concluded that the "mend-the-hold" doctrine applied and precluded Suds from introducing such mitigation evidence. Pursuant to WIS. STAT. § 809.50, Suds petitioned this court for leave to appeal from the nonfinal

[2] Suds also counterclaimed, alleging that Megal breached the contract and converted Suds' personal property for its own use. On October 13, 1998, counsel for Megal and Suds stipulated to the dismissal of the counterclaim without prejudice and without costs.

order and moved to stay proceedings in the circuit court pending the disposition of the petition; Megal did not object. By an order dated February 18, 1999, we granted the petition for leave to appeal and stayed the circuit court trial pending this appeal.

DISCUSSION

¶6 On appeal, we will not overturn a circuit court's discretionary decision to exclude evidence if it has "a reasonable basis," *see* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983), and was made "in accordance with accepted legal standards and in accordance with the facts of record," *see* ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). Suds contends that the circuit court's decision precluding it from introducing evidence of Megal's failure to mitigate damages was not in accordance with accepted legal standards and, therefore, that our review of the decision "should not be for an erroneous exercise of discretion." Megal does not comment on this standard-of-review argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted). As Suds points out, the circuit court's determination that the "mend-the-hold" doctrine is applicable to this case is a conclusion of law. We review conclusions of law independently, giving no deference to the circuit court's decision. *See* ***Gloudeman v. City of St. Francis***, 143 Wis. 2d 780, 784, 422 N.W.2d 864 (Ct. App. 1988).

¶7 The "mend-the-hold" doctrine, characterized by the Seventh Circuit of the United States Court of Appeals as "a common law doctrine that limits the right of a party to a contract suit to change his litigating position," *see* ***Harbor Ins. Co. v. Continental Bank Corp.***, 922 F.2d 357, 362 (7th Cir. 1990), was first

articulated by the United States Supreme Court many years ago. In ***Ohio & Mississippi Railway Co. v. McCarthy***, 96 U.S. 258, 267-68 (1878), the Court explained: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold."

¶8 Suds contends that the doctrine is not supported by Wisconsin law and that it is inapplicable to this case. As Suds points out, *in its answer to Megal's complaint* it denied any breach of contract and affirmatively alleged that "to the extent [Megal] has sustained any damages, the same being specifically denied, [Megal] may have failed to mitigate such damages." In short, Suds took this position from the start; it did not change its position after litigation began.

¶9 Megal admits that it is unable to identify any Wisconsin case "expressly adopting" the "mend-the-hold" doctrine, but claims that Wisconsin "has just not addressed the subject in these words." Megal argues that "[w]hether the label applied be 'mend the hold' or 'judicial estoppel' or 'common sense[,'] a party to a contract action may not assert inconsistent factual premises or statements at trial."

¶10 In its trial court brief in support of its motion to preclude Suds from introducing mitigation evidence, Megal relied on ***Byrnes v. Metz***, 53 Wis. 2d 627, 193 N.W.2d 675 (1972), where the supreme court explained that "the duty to mitigate damages is imposed only to the extent that it is reasonable to do so." ***Id.*** at 632. Megal argued: "Here it would be unreasonable to impose a duty of mitigation where the party seeking to impose the duty contends that it never breached the agreement[;] Suds' own testimony of nonbreach precludes a factual

determination by anyone that it would be reasonable for Megal to attempt to mitigate damages."[3] Essentially, Megal renews this argument on appeal.

¶11 Megal's argument is flawed. As Suds correctly noted in its trial court brief in opposition to Megal's motion:

> If the argument advanced by the Plaintiff is accepted by [the circuit court], before a mitigation defense could be asserted in a breach of contract action a defendant would have to admit a breach of contract and further admit that damages were incurred by the plaintiff. Imposing an obligation to make such concessions before an affirmative defense can be asserted is supported by neither logic nor the relevant case law.

And, as Suds notes in its reply brief to this court: "Both of Suds' averments, in denying breach and affirmatively alleging [Megal's] failure to mitigate damages, serve to decrease damages. Therefore the averments are not legally inconsistent or contrary to common sense." *See* 22 AM. JUR. 2D *Damages* § 492 (1988).[4] Suds further explains:

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[3] Megal also argued that application of the "mend-the-hold" doctrine to this case would be consistent with WIS JI—CIVIL 1731 (1999), under which Suds would have the burden of proof to satisfy the jury "to a reasonable certainty by the greater weight of the credible evidence" that Megal should have taken steps to mitigate its damages and failed to do so. The comment following WIS JI—CIVIL 1731 states, in relevant part:

> Although the duty to mitigate damages rests with the aggrieved party, the burden of proof is upon the defaulting party to establish that the aggrieved party failed to do all that was reasonable to mitigate his damages. The failure to mitigate damages is an affirmative defense which must be raised by answer or be deemed waived.

(Citations omitted.)

[4] Regarding "mitigation of damages," 22 AM. JUR. 2D *Damages* § 492 (1988) states, in relevant part:

> In a broad sense, every fact which tends to decrease damages is a fact in mitigation of damages. Thus, anything which tends to show (1) that the plaintiff has no cause of action, (2) that the claimed damage is not as large as the plaintiff asserts, or (3) that all or a part of the plaintiff's damage should reasonably have

(continued)

> Megal's complaint alleges that Suds breached the agreement by failing to collect, account for, and deposit all of the laundromat's revenues. It is Suds' position that all revenues taken from the machines were in fact collected, deposited and accounted for. Daniel Naumann was hired by Megal in February of 1997 to review the utilities and revenue data and to inspect all the machines. During his inspection Naumann observed tampering on the washers and dryers, which he believed would function to allow the machines to be used without putting money into them. This evidence indicates that Suds may have collected and accounted for all the revenue taken in by the machines, and at the same time explains the laundromat's decreasing revenues.
>
> Whether Suds breached the contract and is responsible for the decreasing revenue is a question of fact for the jury. However, *Suds' denial of the alleged breach in no way conflicts with its affirmative defense that Megal failed to mitigate its damages*. This is because, *if the decrease in the laundromat's revenues is found to be a breach of contract, then the breach must have occurred prior to the termination date*.
>
> The law is well established that a plaintiff must do all that is reasonable to minimize damages after a breach of contract has occurred. There is substantial evidence that Megal was aware of the decreasing revenues prior to the termination date of the contract. Naumann's report put Megal on notice in February of 1997 that there was reason to believe that theft was occurring. Furthermore, in Mid-1996 Megal's accountant and bookkeeper specifically brought to the attention of Megal that the laundromat's revenues were decreasing. Because Suds' denial of the alleged breach does not contradict the evidence establishing Megal's knowledge of the laundromat's decreasing revenues prior to the termination date, Suds cannot be attacked on the ground that it is attempting to prove inconsistent factual positions at trial.

(Record references and citations omitted; emphases added.)

> been avoided by the plaintiff is a fact which could be described as being "in mitigation of damages."

(Footnotes omitted.)

¶12 Megal concedes that parties are allowed to "assert inconsistent and alternative pleadings." Megal claims, however, that because Suds' president "testified at trial that [Suds] duly performed all of the conditions of the agreement and that Megal was without proper grounds to terminate the agreement," "it would be nonsense to allow [Suds] to concurrently claim that Megal should have mitigated its damages earlier." Megal concludes that the circuit court's order should be affirmed because it precludes Suds "from advocating mutually inconsistent arguments and facts at trial." Megal misses the point; Suds is not attempting to "advocat[e] mutually inconsistent arguments and facts at trial." Moreover, allowing a party to assert alternative theories at the pleadings stage would be meaningless if the party would then be precluded from pursuing those theories at trial.

By the Court.—Order reversed.

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