COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1490

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

RANDALL LEMKE,

PLAINTIFF-APPELLANT,

V.

GEORGE ARROWOOD D/B/A M&G TRUCKING, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Eich and Vergeront, JJ.

¶1 PER CURIAM. Randall Lemke appeals from an order dismissing his contract action against George Arrowood. He claims the circuit court erred when it determined that the contract was unconscionable, and therefore unenforceable. We agree. We further conclude that the record was sufficient to

establish damages in Lemke's favor, and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 Lemke owned a trucking business which went bankrupt. Arrowood subsequently approached Lemke for assistance in starting his own trucking business, M&G Trucking. Lemke agreed to help, with the understanding that he would receive half of M&G Trucking's profits for three years. Lemke contacted a number of his former customers and asked them to hire M&G Trucking. He contacted his former employees and asked them to work for Arrowood's company. He acquired the necessary licenses, permits and insurance for M&G Trucking. He set up a computer system for Arrowood's company, which included a data base of 300 to 500 potential customers, negotiated rates which Lemke had spent five years developing, and trained Arrowood to use the system. Lemke also leased Arrowood computers, software, a phone system, a copy machine, and office furniture from his old business for $200 a month.

¶3 On May 18, 1992, after Lemke had already spent approximately five weeks on the project, Lemke and Arrowood entered into a written contract "to clarify and document" their agreement. The contract provided in relevant part:

> 1. [Lemke] shall provide assistance in the form of "start up labor" to M&G Trucking Ltd., for a period of 5 weeks without pay, commencing on April 9, 1992 and extending through May 15, 1992.
> 2. [Lemke] shall be paid in the amount of $8.00/hour for each hour of work put in for [M&G Trucking] following the start up period.
> 3. [Lemke] shall be paid an additional amount equal to ½ of the net profits arising out of the trucking operation known as M&G Trucking Ltd. Net profits shall be defined as operating income, less actual expenses

incurred such as wages, utilities, permits, etc., but shall not include depreciation expense, estimated corporate income tax liability, or any payment to shareholders or relatives of shareholders. Payment based on net profits shall be paid at least yearly within one month of the end of the year; however, net profits shall never be less than $400.00 per month to [Lemke] under this provision for use of the equipment set forth in paragraph 6.

4. The effective date of this agreement shall be April 9, 1992.

5. This agreement shall be effective initially for a period of three years starting from the effective date. This agreement shall automatically renew on identical terms of compensation for a similar period unless specifically revoked by either [Lemke] or [Arrowhead] within 6 months, but not less than 60 days, from the end of the agreement.

6. [Lemke] shall lease to [Arrowood], as part of this contract, the computer equipment and software, office furnishings, and phone system currently located at 1220 Depot St., Manawa, WI. For income tax purposes, the payment of ½ the profits to [Lemke] shall be designated as rental payments for the use of the above mentioned equipment. [Arrowood] is not authorized to copy any of the software or programs, without the consent of [Lemke].

7. This agreement may be voided at any time by the mutual consent, in writing of both [Arrowood] and [Lemke].

¶4 Both parties testified that they considered their agreement to have two components: the monthly rental payment for the office equipment, plus the greater of half of the profits or some guaranteed minimum amount for a renewable term of three years in exchange for Lemke's start-up assistance. In his deposition testimony, which was entered into evidence, Lemke clarified that the minimum $400 per month payment specified in the contract included the separately negotiated $200 monthly rent for the office equipment. The parties further agreed that Lemke had already completed the start-up assistance at the time the contract was signed, and that Lemke was thereafter paid $8 an hour (considerably lower

than the $35 an hour rate he testified he would normally charge for doing computer work) for some additional computer assistance.

¶5 In September of 1992, Lemke asked Arrowood to buy the equipment M&G Trucking was leasing. There was an unresolved dispute in the testimony about whether Lemke seized the equipment at the time he made the request. In any event, Arrowood paid Lemke $5,200 to purchase all of the equipment except the computers, which Lemke repossessed. Arrowood either told Lemke that he believed the purchase of the equipment terminated their contract, or asked whether it would do so. Lemke told Arrowood that purchase of the equipment voided the rental portion of the agreement, but that he still expected to be paid half of the profits for three years in exchange for his start-up assistance. Arrowood never paid Lemke any portion of the profits of M&G Trucking, or any other compensation for Lemke's start-up assistance, and neither party ever terminated the contract or the renewal clause in writing.

¶6 Lemke filed suit in 1996, seeking to recover either $200 per month or half of M&G's profits for the six years following the signing of the parties' contract. Arrowood raised affirmative defenses of accord and satisfaction, compromise and settlement, oral modification of the contract, and rescission of the contract. At trial, Arrowood also argued that Lemke had breached the contract by seizing the office equipment. The trial court dismissed the action immediately after the hearing, finding that the contract was unconscionable, and that there was no evidentiary basis on which to calculate damages. The court further found that there was no bilateral consideration, because the contract did not require Lemke to do anything.

STANDARD OF REVIEW

¶7 We will review the trial court's findings of fact under the clearly erroneous standard. *See* § 805.17(2), STATS. However, the construction of a written contract presents a question of law that we review de novo. *See* ***Ondrasek v. Tenneson***, 158 Wis.2d 690, 694, 462 N.W.2d 915, 917 (Ct. App. 1990). We will also independently determine whether the settled facts establish any affirmative defenses, such as unconscionability, or accord and satisfaction. *See, e.g.,* ***Zubek v. Edland***, 228 Wis.2d 783, 788, 598 N.W.2d 273, 276 (Ct. App. 1999); ***Leasefirst v. Hartford Rexall Drugs, Inc.***, 168 Wis.2d 83, 89, 483 N.W.2d 585, 587 (Ct. App. 1992).

ANALYSIS

¶8 It is well settled that a contract must include an offer, acceptance and consideration to be valid. *See* ***Gustafson v. Physicians Ins. Co. of Wisconsin***, 223 Wis.2d 164, 173, 588 N.W.2d 363, 367 (Ct. App. 1998). The offer and acceptance require mutual expressions of assent. *See* ***id***. Consideration exists when an intent to be bound to the contract is evident. *See* ***id***. Consideration may be either executory (that is, yet to be given or performed), or executed (already given or performed) at the time the contract is formed. *See* 17 C.J.S. *Contracts* § 92 (1999). In ***Hooper v. O.M. Corwin Co.***, the supreme court stated:

> Where one voluntarily accepts and avails himself of the benefit of services when he has the option to accept or reject them, a promise to pay for them may be inferred; and standing by and seeing services performed which will accrue to one's benefit, knowing that they are performed in expectation that they will be paid for at a given rate, may fairly be treated as evidence of an agreement to pay for them at that rate.

Hooper v. O.M. Corwin Co., 199 Wis. 139, 144-45, 225 N.W. 822, 824 (1929); *see also* ***Silverthorn v. Wylie***, 96 Wis. 69, 71 N.W. 107 (1897) (holding that services previously performed constitute good consideration for a promise to pay for those services).

¶9 Here, the evidence was undisputed that Arrowood approached Lemke and promised to pay him one-half of the profits of his new trucking business in exchange for Lemke's assistance in getting the business started. Lemke orally consented and performed his part of the bargain. Thus, Arrowood's contention that the plain language of the contract required Arrowood to perform start-up services for free is disingenuous at best. Rather, we conclude that at the time the parties entered into the written contract, Arrowood's promise to pay Lemke $400 a month (including a $200 rental payment), or half of the profits for a renewable term of three years, was supported by the executed consideration already given by Lemke. The provision in the contract that Lemke would perform the start-up services "without pay" meant no more than that he would not be paid an hourly wage for those services. Instead, he was to receive one-half of the profits of M&G Trucking, or at least $400 per month including rental payments for three years, as specified in paragraph three in the contract.

¶10 We next consider whether this agreement was so unfair to Arrowood as to be unenforceable. An otherwise valid contract is not enforceable if it is unconscionable. A contract is "unconscionable when no decent, fair-minded person would view the result of its enforcement without being possessed of a profound sense of injustice." ***Foursquare Properties Joint Venture I v. Johnny's Loaf & Stein, Ltd.***, 116 Wis.2d 679, 681, 343 N.W.2d 126, 127 (Ct. App. 1983). In order to find unconscionability, a court must find both substantive and procedural unconscionability. *See* ***Leasefirst***, 168 Wis.2d at 89-90, 483 N.W.2d at

587-88. Substantive unconscionability means the terms of the contract unreasonably favor one of the parties. *See* ***Discount Fabric House of Racine, Inc. v. Wisconsin Tel. Co.***, 117 Wis.2d 587, 602, 345 N.W.2d 417, 425 (1984). Procedural unconscionability results from inequalities between the parties as to age, intelligence, business acumen and relative bargaining power. *See* ***id***.

¶11 The record does not establish the contract was substantively unconscionable. First of all, Lemke performed approximately 200 unpaid hours of work for Arrowood. At his usual rate of $35 an hour, that time would be worth $7,000. But Lemke gave Arrowood more than the benefit of his time. He also gave him the benefit of his expertise and his prior business contacts. In addition, the arrangement allowed Arrowood to get up and running without an outlay of capital which he apparently did not have. In exchange, Arrowood promised to pay at least $400 a month (including $200 per month toward the lease of office equipment), or $14,400 over a period of three years. This was not so unreasonable as to be viewed as profoundly unjust.

¶12 Furthermore, the incentive of shared profits could well have encouraged Lemke to provide Arrowood with advice and computer services at the reduced rate of $8 an hour throughout the first three-year term of the contract, and thus might have justified extending the contract. The fact that Lemke provided only limited services after the execution of the contract does not make the automatic extension provision unconscionable, because either party could cancel the extension within six months but not less than sixty days from the end of the first three-year term, and the parties could mutually agree to terminate the contract at any time. The fact that Arrowood may have failed to exercise his right to cancel the extension after it became clear that Lemke was providing no further benefit to him does not make the contract itself unconscionable. Because we conclude the

contract was not substantively unconscionable, we need not consider whether there was any procedural unconscionability in the parties' positions.

¶13 Having determined the existence of a valid contract, we turn to the question of whether the record supports any of Arrowood's affirmative defenses. We first note that the only defense to the contract argued in the response brief is accord and satisfaction. This is also the only defense which was fully developed before the trial court, although others were mentioned in the answer to the complaint. We therefore deem any other affirmative defenses to have been abandoned. *See* ***Cynthia E. v. La Crosse County Human Services Dept.***, 172 Wis.2d 218, 232-33, 493 N.W.2d 56, 63 (1992) (Holding that the proper way for a respondent to raise an issue which would support a lower court decision, but which was not addressed by the lower court because it found another issue dispositive, is to assert and fully discuss the issue in the appellate brief. Otherwise the reviewing court has discretion to address the issue, deem it waived, or remand it to the lower court.); ***Goossen v. Estate of Standaert***, 189 Wis.2d 237, 252, 525 N.W.2d 314, 320 (Ct. App. 1994) (holding that we need not address arguments which are not developed on appeal).

¶14 An agreement between parties to discharge an existing disputed claim is termed accord and satisfaction. *See* ***Flambeau Prods. Corp. v. Honeywell Info. Sys. Inc.***, 116 Wis.2d 95, 112, 341 N.W.2d 655, 664 (1984). Like other contracts, it requires an offer, an acceptance and consideration. *See* ***id.*** The rule of accord and satisfaction provides that if a creditor cashes a check from a debtor which has been offered as full payment for a disputed claim, the creditor is deemed to have accepted the debtor's conditional offer of full payment for the entire claim notwithstanding any reservations by the creditor. *See* ***id.*** at 101, 341 N.W.2d at 658. Thus, a creditor's act of cashing the check discharges the entire

debt, even if the creditor objects to the amount either verbally or in writing. *See* ***Butler v. Kocisko***, 166 Wis.2d 212, 219, 479 N.W.2d 208, 211-12 (Ct. App. 1991).

¶15 In order for a court to find a valid accord and satisfaction: (1) there must be a good faith dispute about a debt; and (2) the creditor must have reasonable notice that the tendered payment is intended to be in full satisfaction of the debt. *See* ***Flambeau***, 116 Wis.2d at 111, 341 N.W.2d at 663. "The debtor's mere refusal to pay the full claim does not make it a disputed claim … [because] a part payment furnishes no consideration for relinquishing the balance of the debt." ***Id***. at 113-114, 341 N.W.2d at 664.

¶16 Here, there was a factual dispute, unresolved by the trial court, as to whether Arrowood told Lemke that he considered the $5,200 payment as satisfying all obligations, or only asked him whether it would do so. However, there was no dispute that $5,200 was the fair value of the equipment which Lemke transferred to Arrowood upon receipt of the payment. Nor was there any testimony that the amount of the profits to be divided was in doubt at the time the payment was tendered. Arrowood himself testified that he wished to be relieved of his obligations under the contract because he was "financially strapped," not because he disputed the amount owed. Thus, we see no factual basis for Arrowood to argue that Lemke had a good-faith dispute as to the amount of Arrowood's obligation, and we see no consideration for Lemke to release Arrowood from the profits agreement. We therefore conclude that Arrowood failed to establish accord and satisfaction.

¶17 The trial court determined that there was no evidentiary basis on which to award damages. However, the contract provided for a minimum $400

monthly payment, out of which the parties agreed $200 was actually designated for equipment rental. It was undisputed that Arrowood did not pay any amount, aside from the lease payments and for computer services performed after the start-up period, and that neither party cancelled the automatic extension within the specified period. Therefore, we have no difficulty concluding, as a matter of law, that Lemke has at least proven damages in the amount of $200 per month for six years.

¶18 Lemke argues that he is entitled to considerably more under the alternate measure of damages in the contract, based upon his calculations of M&G Trucking's profits during the six years following the effective date of the contract. His calculations, however, include a number of questionable items. Because there is no factual dispute in the record as to the amount involved in each category Lemke claimed should be included in the profit calculation, we will consider, as a matter of law, which of the categories should properly be used to measure damages under the contract.

¶19 First, Lemke would add the profits from a spin-off brokerage company, M&G Logistics, to those of M&G Trucking. We see nothing in the contract which would require or permit that. The contract entitles Lemke to an amount calculated upon the profits, plus certain non-allowed expenses, of M&G Trucking alone.

¶20 Next, Lemke claims that the trailer lease payments should be added back into the profits calculation, based on his belief that M&G Trucking had options to buy the equipment. However, Lemke did not offer any of M&G Trucking's actual lease agreements into evidence to support his theory, and Arrowood testified that M&G Trucking did not have any options to most of the

trailers. Lemke has not specified the amount of the single lease which may have included a purchase option. Thus, there is nothing in the record to support including the full amount of the trailer lease payments in the profit calculations.

¶21 Lemke contends that certain capital gains should be added back into the profit calculation for the years 1993 and 1996. However, there was no testimony to explain the source of these capital gains. Therefore, no reasonable fact finder could conclude with reasonable certainty that the capital gains should have been added to the profits.

¶22 Lemke also appears to argue that amounts deducted from M&G Trucking's gains in 1992 and 1994 for equipment purchases should have been claimed as depreciation deductions under § 179 of the Internal Revenue Code, and should thus be added back into the profit calculation as depreciation. However, it does not appear that the purchase amounts were actually claimed as depreciation deductions, and the person who prepared the tax returns for M&G Trucking did not testify. Therefore, no reasonable fact finder could conclude with reasonable certainty that equipment purchase amounts should have been included in the profit calculations.

¶23 The only categories which clearly should have been included in the profit calculations according to the contract were M&G Trucking's annual income, its annual depreciation deductions, and the wages and other amounts paid directly to or for the benefit of Arrowood family members.

¶24 In 1992, M&G Trucking showed a net operating loss of $11,487 on its tax returns. Adding back in $6,530 which M&G Trucking claimed in depreciation, the company still had no profit. Therefore, Lemke was entitled to

the amount of $200 per month for the seven-and-a-half-month period between May 18, 1992 and December 31, 1992, or $1,500.

¶25 Following an audit, M&G Trucking's 1993 tax returns showed income of $2,229. Adding $5,382.50 which M&G Trucking paid in wages to Arrowood's wife, and $600 for Arrowood's rent, Lemke was entitled to half of $8,211.50, or $4,105.75 for 1993.

¶26 In 1994, M&G Trucking showed a net operating loss of $3,211. Adding $21,530 paid in wages to Arrowood family members, $2,541 in interest paid to Arrowood, and $7,200 for Arrowood's rent, Lemke was entitled to half of $28,060, or $14,030 for 1994.

¶27 In 1995, M&G Trucking showed income of $5,066. In addition, M&G Trucking paid $39,184.60 in wages to Arrowood family members, $4,598 in interest to Arrowood, and $7,200 for Arrowood's rent. Lemke was therefore entitled to $10,509.11 for the first four-and-a-half months of 1995. That totals $30,144.86 for the first three years of the contract.

¶28 Lemke's half of the profits amounted to $17,515.19 for the last seven-and-a-half months of 1995. In 1996, M&G Trucking showed income in the amount of $5,321. In addition, M&G Trucking paid Arrowood family members $39,184.60 in wages, and paid Arrowood $399 in interest and $8,100 for rent. Lemke was therefore entitled to $26,502.30 for 1996.

¶29 Lemke offered no basis on which to calculate the profits for 1997 or 1998 with reasonable certainty. Therefore, he did not prove he was entitled to more than $200 per month for 1997 and the first four-and-a-half months of 1998,

or $3,300. That adds up to $47,317.49 for the second three-year period, and total damages in the amount of $77,462.35.

¶30 The trial court is directed to enter judgment for that amount, plus the appropriate costs, to Lemke upon remand.

By the Court.—Order reversed and cause remanded with directions.

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