COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2125

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

SCOTT A. SPURGEON,

PLAINTIFF-RESPONDENT,

V.

VISY INDUSTRIES, INC., N/K/A PRATT INDUSTRIES (U.S.A.), INC., A FOREIGN CORPORATION.

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Scott Spurgeon, a former employee of Visy Industries, sued Visy for breach of a severance agreement. The agreement provided Spurgeon protection in anticipation of a "change of control" in corporate ownership. In the event that Spurgeon left his employment under certain

circumstances, the agreement provided Spurgeon with severance payments. The agreement also included a clause regarding mitigation of damages. The circuit court concluded that under the agreement, Visy was not entitled to offset the severance payments unless Spurgeon had an obligation to mitigate. We agree with the circuit court's interpretation.[1]

¶2 We also conclude that the circuit court properly exercised its discretion in awarding Spurgeon a one-third attorney fee award based on a hybrid retainer agreement. The agreement granted Spurgeon's counsel the higher award between either an hourly rate or a one-third contingency award.

BACKGROUND

¶3 Spurgeon began working for the Menominee Paper Company in August 1996. In May 1997, Spurgeon and the company entered into a Contingent Severence Compensation Agreement, commonly known as a "golden parachute." The agreement provided certain benefits and protections to Spurgeon in anticipation of a "change of control" in the ownership of the company.

¶4 Control of the company did change when Visy acquired it in August 1997. Spurgeon resigned at the end of 1998. Visy initially refused to make the severance payments. Spurgeon subsequently obtained employment and sued to enforce the agreement. The parties eventually agreed that Spurgeon's resignation triggered the severance payments. The parties also stipulated to other matters, leaving only two issues for the circuit court to decide: (1) the effect of the

[1] We granted Visy's petition for leave to appeal the circuit court's interlocutory order. The order is interlocutory because at the time it was entered, it remained to be seen what sums Spurgeon would earn from his new employer in the several months to follow.

severance agreement's "Limited Obligation to Mitigate Damages" clause on the severance payments owed to Spurgeon, and (2) the amount of attorney fees and costs owed to Spurgeon. The circuit court decided both issues in favor of Spurgeon.

THE SEVERANCE AGREEMENT

¶5 The interpretation of a contract is a question of law that we review without deference to the circuit court. *See* ***Edwards v. Petrone***, 160 Wis. 2d 255, 258, 465 N.W.2d 847 (Ct. App. 1990). The objective in construing a contract is to ascertain the intent of the parties from the contractual language. *See* ***Waukesha Concrete Prods. Co. v. Capitol Indem. Corp.***, 127 Wis. 2d 332, 339, 379 N.W.2d 333 (Ct. App. 1985). If the terms of the contract are plain and unambiguous, it is the court's duty to construe the contract according to its plain meaning even though one of the parties may have construed it differently. *See* ***id.***

¶6 The intent of the parties is partially memorialized in the introduction of the severance agreement: "[The] Company has determined that it is appropriate to reinforce and encourage the continued attention and dedication of members of [the] Company's management, including [Spurgeon], to their assigned duties, without distraction, during potentially disturbing circumstances which may arise from the possibility of a change of control of [the] Company."

¶7 Section 4.1 of the severance agreement reads:

> *Limited Obligation to Mitigate Damages.* Following a Change of Control, if [Spurgeon] shall leave the

> employment of [Visy][2] for reasons other than death, Disability, resignation without Good Reason, or for Cause, [Spurgeon] shall be required to mitigate damages for the amount of any payment provided for under this Agreement by seeking other employment or otherwise, but only to the extent that [Spurgeon] has received a total of six (6) months of the Monthly Payment Amount (being three (3) months of guaranteed payments and three (3) months of conditional payments based on certain types of termination following a Change of Control). The amount of any severance payment provided for under *Section 3.6* shall be reduced by any compensation earned by [Spurgeon] as a result of employment by another employer for the period commencing with the seventh (7th) month following the Date of Termination and ending with the twenty-fourth (24^{th}) month following the Date of Termination. [Spurgeon] agrees to immediately advise [Visy] of the acceptance of any employment during such period and the receipt and amount of such compensation.

¶8 The terms of the contract expressly limit Spurgeon's obligation to mitigate: "*[Spurgeon] shall be required to mitigate damages* for the amount of any payment provided for under this Agreement by seeking other employment or otherwise, *but only to the extent that [Spurgeon] has received a total of six (6) months of the Monthly Payment Amount* …." (Emphasis added.) The six initial monthly payments were divided into two three-month obligations, one of which was guaranteed and the other of which was conditional. By maintaining his employment until the change in corporate control, Spurgeon qualified for the first three monthly payments. By leaving Visy under covered circumstances, Spurgeon qualified for the other three monthly payments.

[2] Although Spurgeon actually contracted with Menominee, the agreement provided that any successor company would "agree to perform this Agreement in the same manner and to the same extent that [Menominee] would be required to perform it if no such succession or assignment had taken place." For ease of discussion we refer to Visy as the party that actually contracted with Spurgeon.

¶9 Visy did not make the initial six monthly payments until July 1999. Had Visy made those payments on time, that would have triggered Spurgeon's obligation to mitigate his damages for the seventh through the twenty-fourth months. Under the clear limiting language of the mitigation clause, Spurgeon had no obligation to mitigate until Visy made the initial payments. Visy does not contest this conclusion.

¶10 The critical issue, then, is whether the agreement still provided Visy the right to offset the severance payments against the amount Spurgeon earned in subsequent employment even though he had no obligation to mitigate. The circuit court concluded that Visy's right to offset under the agreement was directly tied to Spurgeon's obligation to mitigate. Visy disagrees and argues that it had a right to offset any amount Spurgeon earned, regardless of his obligation to mitigate.

¶11 Under the terms of the agreement, we conclude that Visy had no right to offset Spurgeon's subsequent employment compensation when it failed to pay Spurgeon the initial monthly severance payments. The "Limited Obligation to Mitigate Damages" clause contains two main sentences: the mitigation sentence and right to offset sentence. The right-to-offset sentence, the second sentence of the clause, provides: "The amount of any severance payment … shall be reduced by any compensation earned by [Spurgeon] as a result of employment by another employer *for the period commencing with the seventh (7th) month following the Date of Termination and ending with the twenty-fourth (24th) month following the Date of Termination*." (Emphasis added.) Reading the first half of the sentence in conjunction with the second half provides the entire meaning of the sentence. Even without considering Spurgeon's obligation to mitigate, the second half of the sentence clearly limits Visy's right to offset. Visy's right to offset only begins on the seventh month. Therefore, even following Visy's interpretation of the

severance agreement, Spurgeon was entitled to receive severance payments in addition to income from any subsequent employment for the first six months.

¶12 Still, there are two main sentences in the "Limited Obligation to Mitigate Damages" clause. The entire meaning of the clause can only be ascertained by reading the second offset sentence with the first mitigation sentence. The reference to the seventh month in the offset sentence directly ties that sentence to the preceding mitigation sentence. The logical interplay of the two sentences demonstrates that Visy's right to offset is tied to Spurgeon's duty to mitigate.

¶13 Visy nevertheless contends that the two sentences must be read independently with Spurgeon's obligation to mitigate not affecting its right to offset. We refuse to read only portions of sentences and portions of clauses out of their natural context, however. When reading the entire clause as a whole, the plain meaning and logical interplay of the sentences demonstrates that it would be illogical for Visy to begin earning offset credit for the seventh and future monthly payments before it made the initial six payments that were expressly precluded from any offset. We must avoid illogical and unreasonable interpretations of contracts. *See* ***Estate of Ermenc v. American Family Mut. Ins. Co.***, 221 Wis. 2d 478, 484, 585 N.W.2d 679 (Ct. App. 1998).

¶14 Further, Visy's right to offset must be read with the overall purpose of the severance agreement in mind. The agreement was intended to assuage any fears Spurgeon may have had regarding his job status and income continuation "during potentially disturbing circumstances which may arise from the possibility of a change of control of [the] Company." By not making the initial payments, Visy kept Spurgeon from receiving the economic security buffer the agreement

envisioned. Without the contracted-for income continuation, Spurgeon was forced to hastily find new employment. This scenario is inconsistent with the purpose behind the agreement.

¶15 Visy argues that common law principles require an offset. However, Visy entirely fails to explain why common law principles control when the agreement expressly governs the issue. Pursuant to a choice of law provision in the severance agreement and stipulation of the parties, Texas law governs the agreement. Although Visy cites several cases that illustrate Texas' common law governing mitigation and offset of damages in general employment contracts, this is not a general employment contract case. Neither party has identified any Texas case that discusses the duty to mitigate damages arising out of a breach of a severance agreement.[3]

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[3] Although no Texas case has addressed the duty to mitigate damages arising out of a breach of a severance agreement, Wisconsin has. *See* ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis. 2d 349, 377 N.W.2d 593 (1985). There, our supreme court stated:

> [T]he test which a court should apply in determining the validity of a stipulated damages clause "is whether the clause is reasonable under the totality of circumstances." If the clause is reasonable, then the employee's damages "should not be reduced at trial by [an] amount [the] employee did earn or could have earned." In other words, whether the employee mitigated his losses is irrelevant if the stipulated damages clause is found to be reasonable.

Id. at 361 (citing ***Wassenaar v. Panos***, 111 Wis. 2d 518, 526, 331 N.W.2d 357 (1983) (alterations in original) (citations omitted)).

Visy does not argue that the severance payments were unreasonable. Instead Visy contends that ***Koenings*** is not instructive because the severance agreement here does not contain stipulated damages. We disagree. Although some of the severance payments are subject to conditional offset, the agreement entitles Spurgeon to damages for which he would otherwise have no claim as an employee at will. Just because the payments are subject to computation and conditional offset does not prevent them from being considered stipulated damages. The payments are stipulated to because they were contracted for and subject to the terms of the severance agreement, rather than being governed by general common law principles of damages.

¶16 One possible interpretation of Visy's citation to common law is that Visy believes that the agreement's limited right to offset is unreasonable and therefore unenforceable.[4] We disagree that limiting the right to offset is unenforceable. The valid economic purpose of lowering employee attrition during a period of company uncertainty makes Visy's decision to contract for a limited right to offset reasonable. Visy provided Spurgeon contracted-for damages in an attempt to gain his loyalty during times of corporate uncertainty. Further, Visy provides no authority or persuasive reason why it could not also provide Spurgeon both a limited obligation to mitigate his employment income losses and a limited exposure to offset from his subsequently obtained employment. The limited obligation to mitigate gave Spurgeon a buffer period during which he could seek new employment without feeling an immediate adverse economic consequence. Visy's limited right to offset provided incentive for Visy to make the initial payments Spurgeon contracted for.

¶17 The parties were free to contract for damages, and we will not re-write the contract's terms. When Visy failed to pay Spurgeon the initial monthly severance payments, Spurgeon had no obligation to mitigate his damages and Visy correspondingly had no right to offset Spurgeon's subsequent employment compensation. The circuit court correctly interpreted the severance agreement.

ATTORNEY FEES

¶18 The severance agreement requires the controlling company "to pay all legal fees and expenses which [Spurgeon] may incur as a result of [Visy]

[4] Parties may contract for damages when the damages caused are uncertain and the stipulated sum is reasonable. *See* ***Mayhall v. Proskowetz***, 537 S.W.2d 320, 22 (Tex. Civ. App. 1976).

contesting the validity, enforceability, or [Spurgeon's] interpretation of, or determinations under, this Agreement." Spurgeon entered into a somewhat unique fee arrangement with his attorney. Spurgeon agreed to pay his attorney either an hourly rate or one-third the amount recovered on his behalf, whichever was greater. The circuit court awarded the greater attorney fees under the one-third contingency arrangement after determining that that amount was reasonable. Visy contends that the one-third fee award was unreasonable essentially because the hybrid fee arrangement removed the risk for Spurgeon's attorney that usually justifies a contingency arrangement.

¶19 The severance agreement states that Visy is responsible for Spurgeon's attorney fees.[5] Both parties agree, however, that we must still consider the reasonableness of the attorney fee award under Texas law. Whether attorney fees are reasonable is a matter entrusted to the fact-finder's sound discretion. *See* ***Bocquet v. Herring***, 972 S.W.2d 19, 21 (Tex. 1998). A fact-finder should consider the following eight factors in determining the reasonableness of a fee award:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;

[5] Visy maintains that we should consider the reasonableness of the attorney fee award under a contractual framework. However, Visy does not offer any explanation as to how the contract governs whether the award was reasonable. We will not further consider this undeveloped argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (citation omitted).

¶20 The circuit court considered each of the ***Arthur Andersen*** factors and concluded that the one-third contingency award was reasonable. The court relied most heavily on the first, third, fourth and seventh factors. With regard to the first factor, the court noted that plaintiff's counsel put substantial time into this litigation, and that it involved difficult issues. With regard to the third factor, the court explained that a one-third contingency award is a customary and ordinary fee under local arrangements. Regarding the fourth factor, the court stated that the amount involved was substantial and that plaintiff's counsel obtained a maximum judgment. Finally, with regard to the seventh factor, the court noted that plaintiff's counsel "enjoys an excellent reputation in this community and that he is respected as an excellent trial attorney with substantial experience."

¶21 Visy argues that the circuit court erred by concluding that the one-third award was reasonable despite the fact that "the most crucial factor—whether the fee was contingent on results, or uncertain to be collected—weighed in favor of awarding a straight hourly fee." Visy contends that the hybrid fee arrangement removed the risky nature of counsel's representation that normally justifies a

contingent fee award. However, although the court agreed that Spurgeon's counsel did not risk the entire amount of attorney fees, the court noted that counsel faced the inherently risky prospect of collecting substantial attorney fees from an individual. The court stated:

> I recognize there is an uncertainty or a difficulty in collecting legal fees of this amount from an individual. Clearly, this Plaintiff would have difficulty in paying the legal fees in a reasonable time, and may have required extended payments over months, and perhaps years, to satisfy his legal obligation and pay the Plaintiff's attorney.

¶22 The circuit court's analysis suggests that the final factor did not weigh particularly heavily in either party's favor. The factor was not even cited by the court as influencing its decision. Assigning weight to the various factors is an exercise particularly within the province of the circuit court's discretionary authority. *See* ***Arthur Andersen***, 945 S.W.2d at 818.

¶23 Further, Spurgeon notes that Visy presented numerous other issues in the earlier stages of litigation, one of which involved Visy's claim that it was not a party to and had no responsibilities under the agreement. That claim threatened dismissal of Spurgeon's suit against Visy. Had Visy prevailed on that issue, it would not have been liable for Spurgeon's attorney fees. This effectively counters Visy's argument that the severance agreement removed all the risk from counsel's representation. Although most of the issues were resolved in the later stages of litigation by the parties, including the motion for dismissal, Spurgeon's attorney did not know that when he agreed to represent Spurgeon.

¶24 The circuit court weighed the appropriate factors and properly exercised its discretion in concluding that a one-third attorney fee award was reasonable. Therefore, we affirm the order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶25 CANE, C.J. *(dissenting).* I respectfully dissent. This is a very simple contract case involving Scott Spurgeon's action to enforce his severance agreement with Visy Industries. The contract is uncomplicated and contains two independent clauses. One is the mitigation clause that protects Spurgeon and the other is the reduction clause that protects Visy. Importantly, the operation of the mitigation clause is irrelevant to the issue of whether Visy is contractually entitled to reduce the severance payments due to Spurgeon by his income earned from subsequent employment.

¶26 Here, it is undisputed that Spurgeon obtained other employment soon after leaving Visy. Consequently, the issue of his duty to mitigate is not in dispute and the mitigation clause became inapplicable. Had Spurgeon not found other employment, thus triggering application of the mitigation clause, he would have had no obligation to mitigate until Visy made the six regular monthly payments. This fact notwithstanding, the mitigation clause has absolutely nothing to do with the separate and independent reduction clause.

¶27 By making Visy's right to reduction or offset dependent on operation of the mitigation clause, the majority has effectively engrafted a provision to the contract that does not exist. It is not the function of this court to rewrite Spurgeon's contract for him.

¶28 The reduction clause of the severance agreement provides:

> The amount of any severance payment provided for under *Section 3.6*[6] shall be reduced by any compensation earned

[6] The parties agree that the correct reference should be § 3.7.

> by Executive as a result of employment by another employer for the period commencing with the seventh (7^{th}) month following the Date of Termination and ending with the twenty-fourth (24^{th}) month following the Date of Termination. (Emphasis in original.)

¶29 I would conclude that the language of the reduction clause is unequivocally mandatory and not in any way tied to the mitigation clause. Consequently, I would reverse and remand the matter to the trial court to determine the correct amount of money owing to Spurgeon under the terms of the severance agreement allowing for the required offset of his income from other employment.