COURT OF APPEALS
DECISION
DATED AND FILED

February 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2003AP1872 **Cir. Ct. No. 2000CV1679**

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

BLACKHAWK STATE BANK, A WISCONSIN BANKING CORPORATION,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

FISERV, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Judgment affirmed in part, reversed in part and cause remanded; order vacated.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Fiserv, Inc., has appealed from a circuit court order denying its motion for attorneys' fees, expenses, and costs of $378,384.77. Fiserv sought attorneys' fees and costs on the ground that it was the prevailing party in an

action commenced against it by Blackhawk State Bank. Blackhawk has cross-appealed from the judgment dismissing its claims against Fiserv.

¶2 We reverse the portion of the judgment dismissing Blackhawk's conversion claim against Fiserv, and remand the matter for further proceedings on that claim. We affirm the portion of the judgment dismissing Blackhawk's claim for breach of contract. Because our reversal and remand of the conversion claim means that the litigation remains ongoing, the order denying Fiserv's motion for attorneys' fees and costs is vacated.

¶3 This litigation arises from a check processing agreement between Rochelle Savings and Loan Association (Rochelle) and the Federal Home Loan Bank of Chicago (FHLB), predecessors-in-interest to Blackhawk and Fiserv. Rochelle and FHLB entered into an agreement in 1981, whereby FHLB agreed to provide Rochelle with NOW processing services, which included receiving, processing, and settling negotiable orders of withdrawal drawn on Rochelle and presented to FHLB (the 1981 Agreement). Rochelle agreed to pay fees related to these services and to maintain an account with FHLB from which FHLB had authority to deduct amounts to cover items drawn on Rochelle and processed by FHLB. A similar Deposit Processing Agreement for the processing of checks and other negotiable instruments was entered by Rochelle and FHLB in 1988 (the 1988 Agreement).

¶4 FHLB sold its item processing business to Fiserv in 1991. On March 2, 1998, Fiserv caused Rochelle's Daily Investment Deposit (DID) account with FHLB to be debited in the amount of $904,554.84 for NOW checks and other negotiable instruments allegedly drawn on Rochelle. This amount included $541,106.08 that was correctly debited and $363,448.78 that should not have been

debited. The $363,448.78 debit was corrected by Fiserv on March 4, 1998, by issuance of a journal voucher crediting Rochelle's DID account.

¶5 Effective March 31, 1998, Rochelle merged with Blackhawk and became known as Blackhawk. On April 3, 1998, Fiserv issued a journal voucher causing Blackhawk's DID account to be debited in the amount of $5,180,705.44. This debit included a duplicate charge of $541,106.08 for the same transactions for which Fiserv had debited Rochelle's DID account on March 2, 1998.

¶6 The double debit of $541,106.08 is undisputed. According to the pleadings and evidence at trial, the error was not reported by Blackhawk to Fiserv until August or September 1999. Fiserv refused to reimburse Blackhawk for the money, and contended that Blackhawk failed to give it timely notice of the error. In contending that notice was untimely, Fiserv relied on a provision in the 1988 Agreement, stating:

> Members shall report to the Chicago Bank all Deposit Processing debit and credit errors that may appear in statements of account provided to the Member by the Chicago Bank within fourteen (14) calendar days after the receipt of the monthly statements. In the event the Member fails to notify the Chicago Bank of any alleged errors or defects in such statements within the aforementioned time period, Member shall be precluded from asserting any dispute or difference as to the statements so rendered and such statement shall be deemed conclusive and binding against Member.

¶7 The 1981 Agreement incorporated a similar provision, stating:

> An account holder must promptly advise us in writing of an objection to an entry in the statement of account that we provide. An account holder that fails to advise us of its objection within 30 calendar days of the date of the entry is deemed to have approved the entry, and the statement of account is deemed finally adjusted, notwithstanding any longer period for filing suit.

¶8 Blackhawk subsequently filed a complaint against Fiserv, alleging both the tort of conversion and breach of the 1981 Agreement.[1] The trial court granted summary judgment dismissing the conversion claim, concluding that it was barred by the economic loss doctrine.[2] The breach of contract claim went to trial before a jury. The special verdict presented to the jury asked whether Fiserv materially breached its contract with Blackhawk. Because the jury answered this question "no," it did not address the remaining questions of whether Fiserv's breach was a cause of the loss to Blackhawk, whether Blackhawk materially breached its contract with Fiserv, or whether Blackhawk's breach was a cause of its own loss.

¶9 We address the issues related to the breach of contract claim first. Blackhawk contends that: (1) the trial court erred in instructing the jury regarding "substantial performance" of a contract as set forth in WIS. JI—CIVIL 3052 (2005), and requiring Blackhawk to prove that Fiserv "materially" breached the contract; (2) Blackhawk should be awarded a new trial in the interest of justice under WIS. STAT. § 752.35 (2003-04)[3] based on the alleged error in the instruction; and (3) the evidence was insufficient to support the jury's finding that Fiserv did not materially breach the contract.

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[1] Blackhawk also alleged a claim for breach of implied contract. The trial court dismissed that claim on a motion for directed verdict at trial. Blackhawk has not challenged this portion of the judgment on appeal, and we address it no further.

[2] When the trial court made this decision, it did not have the benefit of the Wisconsin Supreme Court's decision in ***Insurance Co. of North America v. Cease Electric Inc.***, 2004 WI 139, 276 Wis. 2d 361, 688 N.W.2d 462, *aff'g* 2004 WI App 15, 269 Wis. 2d 286, 674 N.W.2d 886, or the underlying appellate court decision in that case.

[3] All references to the Wisconsin Statutes are to the 2003-04 version.

¶10 We conclude that Blackhawk waived any objection to the instruction and special verdict question, and that credible evidence supports the jury's finding that Fiserv did not materially breach the contract. Because we also reject Blackhawk's contention that a new trial is warranted under WIS. STAT. § 752.35, we affirm the portion of the judgment dismissing the breach of contract claim.

¶11 We address each issue separately. Blackhawk contends that the trial court erred when it instructed the jury regarding "substantial performance" based on WIS JI—CIVIL 3052, and submitted a special verdict question which inquired whether Fiserv "materially" breached the contract. Specifically, the trial court instructed the jury:

> Each party to a contract has a duty to perform his or her obligations under the contract.
>
> Evidence has been received that either or both of the parties may not have completely performed their obligations. A failure to complete performance under a contract or a defective performance does not prevent recovery if you find that there was substantial performance of the contract. You must first find that there was a good faith effort to perform. If you find that a good faith effort was made, you will then proceed to determine whether the performance was, in a legal sense, substantial.
>
> Performance may be substantial even though every detail is not in strict compliance with the terms of the contract. Something less than perfection is required. Some measure of nonperformance will be tolerated if a party has received, with relatively minor and unimportant deviations, what he or she has bargained for. But if a defect or uncompleted performance is of such extent and nature that there has been no practical fulfillment of the terms of the contract, then there has been no substantial performance.

¶12 In addition to instructing the jury regarding substantial performance, the trial court also instructed the jury concerning the effects of time limits in a

contract, and hindrance of one party's performance by the other. Specifically, it instructed:

> The importance of time in connection with the performance of a contract depends upon the nature of the contract, the terms thereof, and the circumstances appearing from the conduct of the parties. Time is not to be regarded as of vital importance or as … of the essence of the contract unless it is clear that the parties intended to make it so by their conduct or by the terms upon which they have agreed.
>
> Time is not to be regarded as of the essence of the contract merely because a definite time for performance is stated therein, in the absence of any further provision regarding the effect of nonperformance at the time stated.
>
> …
>
> If you determine that performance at the exact time agreed upon was intended to be of vital importance to the parties, you may find that time was of the essence so that failure of the party to perform on time may constitute a breach of contract.
>
> …
>
> If one person enters into a contract with another, there is an implied promise by each that each person will do nothing to hinder or obstruct performance by the other. If cooperation is necessary for the performance of the contract, there is an implied promise to give the necessary cooperation.
>
> The implied promise is as binding as if spelled out. In the doing of acts or the failure to do acts which one party knows or ought to know would hinder or prevent the other from performing his or her obligations under the contract may constitute such a breach.

¶13 Blackhawk contends that the "substantial performance" instruction and the special verdict requirement that Fiserv's breach be found to be material were erroneous. It contends that substantial performance and the materiality of a breach are at issue only when a party seeks to be relieved of further contract performance. Blackhawk contends that a contracting party may always recover

damages arising from another party's breach of contract, regardless of whether that other party has substantially performed its contractual duties.

¶14 Blackhawk has waived its objections to the jury instruction and special verdict. At the jury instruction and special verdict conference held the day before the case was submitted to the jury, Blackhawk did not object to the inclusion of the word "materially" in the special verdict question.[4] A failure to object to a verdict form at the special verdict conference constitutes waiver of objections to it. WIS. STAT. § 805.13(3). In addition, Blackhawk waived its objections to both the instruction and the special verdict by failing to challenge them in its postverdict motion. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987).

¶15 While acknowledging waiver, Blackhawk asks this court to grant a new trial in the interest of justice under WIS. STAT. § 752.35, contending that the alleged error in the instructions and special verdict prevented the real controversy from being tried. Blackhawk contends that the real controversy was whether its late notice prevented Fiserv from determining what happened to the $541,000 and correcting the error. We disagree. The real controversy to be tried was whether a breach of contract occurred, and if so, who breached the contract and did it cause the loss to Blackhawk. At trial, Blackhawk argued that Fiserv breached the 1981 Agreement when it double-debited its account. Although Fiserv conceded that it erred by double-debiting Blackhawk's account, it argued that the loss resulted not from its error, but from Blackhawk's breach of its contractual obligation to review

[4] At the jury instruction conference, Blackhawk objected to the "substantial performance" instruction. However, it did not object to the form of the special verdict.

its account statements and timely advise Fiserv of errors. Because the issues concerning the parties' respective contractual responsibilities and failures were fully presented to the jury in the evidence and special verdict, we are not persuaded that the real controversy was not fully tried.

¶16 We also reject Blackhawk's argument that the evidence was insufficient to support the jury's finding that Fiserv did not materially breach the contract. A motion challenging the sufficiency of the evidence to support a verdict may not be granted unless, considering all credible evidence and the reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to support a finding in favor of such party. ***Richards v. Mendivil***, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996). This standard applies to both this court and the trial court. ***Id.***

¶17 Blackhawk contends that Fiserv's concession that it committed a $541,000 mistake compels a determination that it failed to exercise ordinary care as required by both agreements, and is conclusive on the issue of whether it materially breached the contract. It points out that both Fiserv's counsel and its witnesses at trial conceded that Fiserv made a $541,000 error by double-debiting Blackhawk's account. It contends that this concession establishes that Fiserv breached its contractual duty to exercise ordinary care in the performance of its duties.

¶18 The issue presented to the jury was whether Fiserv "materially" breached the contract. As instructed by the trial court, some measure of nonperformance or defective performance of a contract will be tolerated if the other party received, with minor deviations, what it bargained for. WIS JI—CIVIL 3052. A breach of contract is material when it is so serious as to destroy

the essential object of the contract. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996). Whether a breach is material presents a question of fact. *See* ***Shy v. Industrial Salvage Material Co.***, 264 Wis. 118, 125, 58 N.W.2d 452 (1953).

¶19 The evidence before the jury permitted it to find that Fiserv performed the check processing services required by the contract. The evidence also permitted the jury to find that Fiserv's double-debiting error was not so substantial as to destroy the object of the contract, since the contract contemplated that Blackhawk would give timely notice of such an error, enabling Fiserv to correct it. Based upon the evidence, the jury was entitled to find that Fiserv's contractual obligations were to process checks with ordinary care and to correct errors upon timely notification, and that these obligations were interrelated. It was entitled to find that Blackhawk hindered Fiserv's performance of the contract by failing to give timely notice of the error. Most importantly, based upon the time limits for notification contained in the 1981 and 1988 Agreements and the jury instructions regarding time of performance, the jurors were entitled to find that Fiserv no longer had a contractual obligation to correct the error after Blackhawk's sixteen-month delay in giving notice of the error. The jury's determination that Fiserv did not materially breach the contract is therefore supported by sufficient evidence in the record.[5]

[5] Blackhawk contends that, under the agreements, its delay in notifying Fiserv of the error affected only the issues of causation and damages, not whether a breach occurred. However, pursuant to the trial court instructions set forth above, the jury was entitled to determine whether time was of the essence under the agreements. The jurors were therefore entitled to rely on the provisions in both agreements indicating that, absent a timely objection to the statement, the member bank was precluded from asserting a dispute and the statement of account was deemed conclusive and finally adjusted.

¶20 Although we affirm the portion of the judgment dismissing Blackhawk's breach of contract claim, we reverse the portion of the judgment dismissing its conversion claim.[6] In its conversion claim, Blackhawk alleged that Fiserv wrongfully withdrew $541,106.08 from Blackhawk's FHLB account without its consent and without authority. It alleged that Fiserv wrongfully and intentionally converted the $541,106.08 by retaining it or by transferring it to another party in violation of Blackhawk's ownership interest. It alleged that Fiserv had no right to take, retain, divert, or fail to return the money. It alleged that Fiserv wrongfully and intentionally continued to refuse to return or replace the money.

¶21 The trial court dismissed the conversion claim on summary judgment on the ground that it was barred by the economic loss doctrine. With some exceptions, the economic loss doctrine prevents a party to a contract from employing tort remedies to compensate the party for purely economic losses arising from the contract. ***Grams v. Milk Prods., Inc.***, 2005 WI 112, ¶2, 283 Wis. 2d 511, 699 N.W.2d 167. Under the doctrine, a purchaser of a product cannot recover from a manufacturer on a tort theory for damages that are solely economic. ***Linden v. Cascade Stone Co.***, 2005 WI 113, ¶6, 283 Wis. 2d 606, 699 N.W.2d 189. However, after the entry of judgment in this case, the Wisconsin Supreme Court held that the economic loss doctrine does not apply to contracts for

[6] In connection with this issue, we have considered the letters discussing supplemental authorities submitted by the parties. We deny Blackhawk's motion to strike the letter submitted by Fiserv. Pursuant to WIS. STAT. RULE 809.19(10), a party may submit a letter citing to supplemental authority that was decided after briefing and is pertinent to the appeal. In addition, the party may briefly discuss the proposition the authority supports. The opposing party may respond to the letter. RULE 809.19(11). The materials filed by the parties discussing the supreme court's decision in ***Cease Electric*** were permissible under these provisions.

services. ***Insurance Co. of N. Am. v. Cease Elec. Inc.***, 2004 WI 139, ¶2, 276 Wis. 2d 361, 688 N.W.2d 462.

¶22 The contract between Blackhawk and Fiserv was for services, a fact conceded by Fiserv on appeal. Based upon ***Cease Electric***, Blackhawk's conversion claim is not barred by the economic loss doctrine. The award of summary judgment must therefore be reversed, and the matter is remanded for further proceedings on Blackhawk's conversion claim.[7]

[7] We have considered the argument made by Fiserv in its statement of supplemental authorities. Fiserv contends that the ***Cease Electric*** court held that the economic loss doctrine is inapplicable to service contracts based on its presumption that, unlike contracts for the sale of goods, the Uniform Commercial Code (UCC) is inapplicable to service contracts. It contends that the UCC applies to its contract with Blackhawk, and that the economic loss doctrine therefore bars the conversion claim.

We recognize that the Wisconsin Supreme Court has stated that central to its decision in ***Cease Electric*** was the underlying conclusion that no body of law similar to the UCC applies to contracts for services. ***Grams v. Milk Prods., Inc.***, 2005 WI 112, ¶15, 283 Wis. 2d 511, 699 N.W.2d 167. However, the UCC provisions that provided the rationale for the decision in ***Cease Electric*** related to warranty and other rights and remedies applicable to the sale of goods and defective products. ***Cease Elec.***, 276 Wis. 2d 361, ¶¶28-32. The court cited WIS. STAT. § 402.102 for the proposition that the UCC does not apply to service contracts. ***Cease Elec.***, 276 Wis. 2d 361, ¶35. That statute is part of WIS. STAT. ch. 402, titled "UNIFORM COMMERICAL CODE— SALES." It states that ch. 402 applies to transactions in goods. WIS. STAT. § 402.102.

The parties agree that the UCC provisions applicable to this case are those set forth in Article 4 of the UCC as adopted by Wisconsin in WIS. STAT. ch. 404, which is titled "UNIFORM COMMERICAL CODE—BANK DEPOSITS AND COLLECTIONS." Thus, the UCC provisions applicable to this service contract case are different from the UCC provisions relied upon by the ***Cease Electric*** court in concluding that the economic loss doctrine applies to contracts for the sale of goods, but not to contracts for services.

In any event, the ***Cease Electric*** court did not state that its holding was limited to service contracts to which no UCC rights or remedies applied. Instead, it stated that it was creating a bright line rule that the economic loss doctrine was inapplicable to contracts for services. ***Id.***, ¶¶52-53. Based upon that holding, we conclude that Blackhawk's conversion claim is not barred by the economic loss doctrine, and we reverse the trial court's summary judgment dismissal of the claim. To the extent Fiserv has any defenses to the conversion claim based upon UCC provisions, it is, of course, free to raise them in the trial court on remand.

¶23 In reversing the trial court's award of summary judgment, we reject Fiserv's argument that the conversion claim was properly dismissed even if the economic loss doctrine does not bar it. Fiserv contends that Blackhawk's conversion claim is based on allegations that Fiserv negligently lost and misused the $541,106.08. Fiserv contends that conversion requires more than an allegation of negligence, and that negligent interference with property does not constitute conversion.

¶24 Fiserv's argument ignores that Blackhawk alleged that Fiserv wrongfully and intentionally took the money without authority or consent, and that it wrongfully and intentionally converted it by retaining it or transferring it to another party in violation of Blackhawk's ownership interest. Blackhawk's complaint thus alleges conversion, not mere negligent interference with property. *See* WIS JI—CIVIL 2200 (2005).

¶25 Fiserv also contends that Blackhawk cannot prevail on a conversion claim because, as discussed in WIS JI—CIVIL 2200.1, a party who lawfully came into possession of property may refuse to return property if it has a legitimate reason for doing so. It contends that it had a legitimate reason for refusing to return the money because Blackhawk's notification of the error was untimely. In addition, it contends that "dispossession conversion" as described in WIS JI—CIVIL 2200 requires that it have actual control or possession of Blackhawk's funds. It contends that the undisputed evidence shows that its processing services did not involve actual access to accounts and funds, and that it therefore never possessed or retained Blackhawk's money.

¶26 None of these arguments provide a basis for upholding the trial court's grant of summary judgment. Although they were raised in Fiserv's motion

for summary judgment, the trial court never addressed them and dismissed the conversion claim based solely on the economic loss doctrine. In addition, the special verdict dealt only with the breach of contract issues, and the jury answered only the first special verdict question. The jury was never required to determine whether Fiserv lawfully came into possession of Blackhawk's property and whether it was justified in refusing to return or credit the sum back to Blackhawk. The jury was not required to determine whether Fiserv received a benefit from crediting the erroneously deducted sum in its class 512 ledger account, or whether it benefited by some other means from the double-debiting of the funds.

¶27 These and any other issues underlying Blackhawk's claim and Fiserv's defenses remain to be determined in the trial court. Because Blackhawk was foreclosed from pursuing the conversion claim based on the summary judgment application of the economic loss doctrine, it is entitled to pursue that claim now. The portion of the judgment dismissing the conversion claim is reversed, the claim is reinstated, and the matter is remanded for further proceedings consistent with this decision.

¶28 Based upon the disposition of the cross-appeal, we vacate the order denying Fiserv's motion for attorneys' fees, expenses and costs. Fiserv sought $378,384.77 in attorneys' fees, expenses and costs on the ground that it was the prevailing party in the trial court. It relied on language in the 1981 Agreement stating:

> If any litigation is commenced between the parties regarding its performance of this Agreement, the prevailing party shall be entitled, in addition to such other relief as may be granted, to a reasonable sum for its attorneys' fees in such litigation and for the expenses and costs of such litigation.

¶29 Because the portion of the judgment dismissing Blackhawk's conversion claim is reversed and the matter is remanded for further trial court proceedings on that claim, Fiserv is no longer the prevailing party in the trial court litigation. The question of who is the prevailing party in this litigation will not be determined until the litigation is resolved in its entirety. The order denying attorneys' fees, expenses and costs is therefore vacated.[8]

¶30 Because the judgment is affirmed in part and reversed in part and the order is vacated, costs on appeal and cross-appeal are denied to both parties. It follows that Fiserv's motion for attorneys' fees on appeal is also denied.

By the Court.—Judgment affirmed in part, reversed in part and cause remanded; order vacated.

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

[8] In vacating the trial court's order, we recognize that the attorneys' fees provision in the 1981 Agreement refers to litigation regarding "performance of this Agreement," and that the parties dispute the scope of this provision. We also recognize that the tort claim of conversion is separate and distinct from the breach of contract claim. However, Fiserv's alleged tort was committed within the context of, and as a result of, its contractual relationship with Blackhawk. Consequently, we vacate the order. The attorneys' fees issue may be re-addressed in the trial court after the prevailing party in the trial court litigation has been finally determined. At that time, the parties may raise any arguments they choose regarding the scope of the attorneys' fees provision.