COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2094 **Cir. Ct. No. 2010CV705**

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

THE RENSCHLER COMPANY, INC.,

PLAINTIFF-COUNTER DEFENDANT-APPELLANT,

V.

MSA PROFESSIONAL SERVICES, INC. AND CONTINENTAL CASUALTY COMPANY,

DEFENDANTS-COUNTER CLAIMANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

COTTON MILL COMMONS, LLC AND C&M CONSTRUCTION SERVICES, LLC,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. This case involves a proposed development project in the City of Beaver Dam by The Renschler Company and other developers.[1] Renschler contracted with MSA Professional Services, Inc., for MSA to provide certain professional engineering services for the project. The proposed development did not proceed as planned, and Renschler filed this action against MSA, alleging negligence and breach of contract. After a seven-day trial, the jury found that MSA was not negligent and did not breach its contract with Renschler. Renschler appeals the judgment, arguing that: (1) the special verdict form improperly included the City of Beaver Dam as an entity to which the jury could apportion negligence; (2) the jury's verdict finding that MSA did not breach its contract with Renschler was contrary to the great weight and clear preponderance of the evidence; (3) the court erred in barring Renschler's claims for damages from lost profits and lost opportunities; and (4) under the terms of their contract, MSA is responsible for Renschler's attorneys' fees and costs. We affirm for the reasons set forth below.

BACKGROUND

¶2 The following facts were presented at trial and are not in dispute on appeal. In 2006, Renschler sought to develop certain properties in the downtown area of the City of Beaver Dam. The properties to be developed included an industrial building formerly owned by the Weyenberg Shoe Company and now

[1] The other developers (third-party defendants Cotton Mill Commons, LLC, and C&M Construction Services, LLC) assigned their rights to The Renschler Company for purposes of this litigation. Therefore, we refer to the developers collectively as Renschler in this opinion.

owned by the City (the Weyco property), two former automobile dealership properties, and a former hotel known as the Milwaukee House.

¶3 Renschler submitted an offer to purchase the Weyco property from the City, and the City agreed to sell the property "as is" for one dollar. The accepted offer to purchase agreement incorporated by reference a development agreement between the City and Renschler. Under the heading "Conditions of Property Conveyance," the development agreement stated:

> The developer will acquire title to the vacant former auto dealership properties and the former "Milwaukee House" property located across the street from the "Weyenberg Shoe Factory" property prior to or simultaneously with the closing for the Weyenburg [sic] Shoe Factory Property....
>
> ....
>
> Notwithstanding any provision in this agreement to the contrary, in the event the Developer does not acquire all of the combined acquired properties prior to ***July 31, 2007***, the parties agree that this agreement shall be null and void and Developer shall have no [taxable fair market value] guarantee obligation. (Emphasis in original.)

¶4 In May 2007, Renschler contracted with MSA, a professional engineering firm, to perform a number of services, including determining potential effects of the nearby Beaver Dam River and dam on the development of the properties. Specifically, MSA agreed to perform a Phase I Environmental Site Assessment and related services for certain properties, including the Weyco property.

¶5 In May 2007, Mike Laue, a professional engineer with MSA, went to the City of Beaver Dam's Building Inspection Services Department to retrieve "all the pertinent information" related to flood-elevation levels for the Weyco property. Laue received copies of the City's floodplain ordinance and two FEMA

(Federal Emergency Management Agency) maps referenced in the ordinance. MSA followed up with field work and created a topographic survey (mapping) that incorporated data from its own field work and the FEMA maps, to show, among other things, the flood-elevation levels for the property. On May 29, 2007, Laue e-mailed Renschler, reporting that a "preliminary review" of the topographic survey showed that the Weyco property's ground floor was above the FEMA flood-elevation levels.

¶6 On June 7, 2007, Laue sent Renschler MSA's "preliminary topography survey." In an accompanying letter, Laue wrote: "Note the location of the flood elevation as per the Federal Emergency Management Agency as it does NOT come in contact with the existing shoe factory building, but stays in the area between the building and the river's edge." Laue testified at trial that he believed that at that time MSA's services were complete, because MSA had "put together the work product" directed by Renschler.

¶7 The Renschler-City development agreement, as excerpted in paragraph three above, required that Renschler close on its purchase of the project's properties prior to July 31, 2007. Renschler requested an extension of the closing date, because it "needed additional time to complete the due diligence on the project." The City agreed to move the closing deadline to December 31, 2007.

¶8 On December 12, 2007, at the direction of Renschler, Laue forwarded to the City's Building Inspection Services Department information related to the FEMA flood-elevation levels near the Weyco property. Laue had not submitted the information previously because Renschler instructed Laue not to release any of MSA's survey information unless directed to do so by Renschler.

¶9 On December 27, 2007, Laue received a phone call from an employee of the City's Building Inspection Services Department, indicating that the department had additional information pertinent to the project. Laue immediately went to the department and was given a copy of a "dam failure analysis" performed in 1989. A dam failure analysis predicts anticipated water-elevation levels if a dam structure is washed out as a result of an extreme flooding event.

¶10 The next day, December 28, Laue met again with employees from the City's Building Inspection Services Department to determine whether the dam failure analysis predicted an effect on the properties at issue. One of the City employees indicated that, in light of the dam failure analysis, he believed that any building permits would require approval from the state Department of Natural Resources. After the meeting, Laue e-mailed Renschler about the dam failure analysis and his conversations with the City's Building Inspection Services Department, attaching an explanatory letter and other documents. Laue summarized the "critical water elevations and how they relate[d] to the [Weyco] building." Laue explained that the dam failure analysis predicts water-elevation levels approximately six-and-one-half feet higher than the FEMA elevations on which he had relied in his May and June correspondence to Renschler. Laue further explained that "it appears that building modification permits will not be issued by the local inspection department without some type of sign-off from the DNR."

¶11 Renschler attempted to close sales on the three privately-owned properties on December 28 and 31, 2007. The December 28 closing was not completed due to issues concerning subordination and a missing mortgage satisfaction. Renschler reconvened with the title company on December 31.

Immediately thereafter, Renschler met with the City Attorney to close on the Weyco property. The City Attorney testified that Renschler represented to her that it had just successfully closed on the private properties. Renschler and the City then closed on the Weyco property and executed a warranty deed.

¶12 On January 2, 2008, the City Attorney was informed by the title company that handled the attempted private property closings that Renschler had not closed on the properties. The City Attorney wrote a letter to Renschler's attorney stating that the development agreement, the sale of the Weyco property, and all other documents related to the project were null and void. In substance, the City took the position that Renschler had not met the development agreement's extended deadline of December 31, 2007, for acquiring title to the project properties.

¶13 Renschler filed a lawsuit against MSA, bringing claims for professional negligence and breach of contract. Renschler sought damages, "including but not limited to lost profits, lost opportunity costs, and attorneys' fees and costs." The circuit court granted MSA's pretrial motion in limine, barring Renschler from claiming damages from lost profits or lost opportunities. The circuit court also granted MSA's pretrial motion for declaratory judgment, ruling that MSA was not liable, under the Renschler-MSA contract, for Renschler's attorneys' fees and costs in litigating this action, if Renschler was successful.

¶14 The case proceeded to a seven-day jury trial. Renschler's trial theory was that MSA was professionally negligent and breached the contract by failing to discover the dam failure analysis until December 2007, which caused the project's termination and damages to Renschler. Conversely, MSA's trial theory was that the project failed due to Renschler's failure to acquire title to the three

properties by December 31, 2007, a contingency to the Weyco property sale under Renschler's development agreement with the City.

¶15 The circuit court prepared the special verdict form, which allowed the jury to apportion total negligence among MSA, Renschler, and the City's Building Inspection Services Department. The jury returned a verdict finding that MSA was not negligent and did not breach its contract with Renschler. The jury further found that Renschler breached its contract with MSA with respect to the payment of MSA's fees for services rendered on the project and awarded MSA $3,924.50. The circuit court subsequently denied Renschler's motion for a new trial. Renschler now appeals.

DISCUSSION

¶16 On appeal, Renschler argues that: (1) the court erred by improperly permitting jurors to consider whether the City was negligent when the court included the City on the special verdict form; (2) the jury's verdict finding that MSA did not breach its contract with Renschler was contrary to the great weight and clear preponderance of evidence presented at the trial; (3) the court abused its discretion when it barred evidence as to Renschler's damages from lost profits and lost opportunities; and (4) the contract between Renschler and MSA required that MSA pay all of Renschler's attorneys' fees and costs. We affirm the circuit court on all issues and will address each argument in turn.

A. Special Verdict Form

¶17 Renschler alleges that the circuit court improperly included the City on the special verdict form as an entity to which negligence could be apportioned. A circuit court has wide discretion in determining the words and form of a special

verdict. ***Gumz v. Northern States Power Co.***, 2007 WI 135, ¶23, 305 Wis. 2d 263, 742 N.W.2d 271. We will not disturb a circuit court's determination unless the court has erroneously exercised its discretion. ***Id.*** Whether a special verdict reflects an accurate statement of the law applicable to the issues of fact in a given case presents a question of law that we review de novo. ***Id.***, ¶24.

¶18 Renschler argues that the court erred by including the City on the special verdict form, because the City cannot be found negligent as a matter of law. According to Renschler, "no one is entitled to rely on representations about [a] municipal zoning ordinance made by municipal employees or agents." In support of this theory, Renschler cites the legal principle that "erroneous acts or representations of municipal officers do not afford a basis to estop a municipality from enforcing zoning ordinances enacted pursuant to the police power." ***Willow Creek Ranch, L.L.C. v. Town of Shelby***, 2000 WI 56, ¶49, 235 Wis. 2d 409, 611 N.W.2d 693. It follows, according to Renschler, that "[b]ecause a city cannot be estopped as to such statements, as a matter of law, there can be no reasonable reliance [by Laue on behalf of MSA] on any such zoning ordinance interpretations," and thus MSA could not claim negligent misrepresentation against the City because reasonable reliance is an element of that tort.

¶19 The supreme court has stated the following with regard to a trial court's inclusion of entities on special verdict forms in negligence cases:

> Only one question must be affirmatively answered by the trial judge before submitting a negligence question to the jury: Is there evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person or other legal entity inquired about.
>
> At the requested special-verdict-stage of a lawsuit, it is immaterial that the entity is not a party or is immune from further liability. As pointed out in *Pierringer v. Hoger* (1963), 21 Wis. 2d 182, 124 N. W. 2d 106, and

> *Payne v. Bilco Co.* (1972), 54 Wis. 2d 424, 195 N. W. 2d 641, the apportionment must include all whose negligence may have contributed to the arising of the cause of action.

Connar v. West Shore Equip. of Milwaukee, Inc., 68 Wis. 2d 42, 45, 227 N.W.2d 660 (1975); *see* ***Heldt v. Nicholson Mfg. Co.***, 72 Wis. 2d 110, 115-16, 240 N.W.2d 154 (1976) (quoting ***Connar***, 68 Wis. 2d at 45) (concluding that the record was "replete with evidence" of the employer's negligence and thus it would have been error for the judgment to have failed to include the non-party, immune employer in the negligence portion of the verdict).

¶20 We recognize that, in the above-cited line of cases, the employer was released from liability to the employee by virtue of the applicable worker's compensation statute. While this case originates in a different context, we find the cited cases' legal principles – that "it is immaterial that the entity is not a party or is immune from further liability" and that "the apportionment must include all whose negligence may have contributed to the arising of the cause of action" – applicable here. *See* ***Connar***, 68 Wis. 2d at 45.

¶21 In light of the principles set forth in ***Heldt***, ***Connar***, and the precedent on which those cases rely, Renschler's estoppel argument is too attenuated to have merit. While a municipality is not estopped from enforcing its ordinance because of representations made by its employees, Renschler fails to establish that the absence of such estoppel nullifies any relevant duty by City officials to avoid contributing to the risk of harm in a context like this. We have not found, and Renschler does not identify, any Wisconsin case that has characterized or extended the estoppel cases on which Renschler relies to bar a municipality's alleged negligence from being considered for apportionment

purposes on a special verdict form. We reject Renschler's argument as unsupported by Wisconsin law.

B. Jury's Verdict

¶22 Renschler argues that the jury's finding that MSA did not breach its contract with Renschler was contrary to the great weight and clear preponderance of the evidence, and that a new trial is required in the interest of justice.[2] A court may overturn a jury's factual determination only if there is "no credible evidence" to sustain the determination. WIS. STAT. § 805.14(1) (2011-12).[3] "Appellate courts overturn only a clearly erroneous denial of a motion challenging the sufficiency of the evidence. In assessing the sufficiency of the evidence, circuit courts are accorded substantial deference because they are in a better position to decide the weight and relevancy of the evidence presented." ***K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶29, 301 Wis. 2d 109, 732 N.W.2d 792 (quoted sources omitted).

¶23 Renschler argues that Laue's unrebutted testimony demonstrated MSA's breach of contract, specifically provisions requiring that MSA "apply present professional, engineering and/or scientific judgment, and use a level of effort consistent with current professional standards." Renschler cites to Laue's

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[2] In its brief-in-chief, Renschler devotes a part of one sentence to the assertion that "a new trial is needed in the interest of justice." This argument is undeveloped and without citation to legal authority. Therefore, we will not address it, as this court does not address undeveloped and unsupported arguments. ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶27, 318 Wis. 2d 488, 770 N.W.2d 727.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

trial testimony that he did not engage in his own professional analysis before transmitting the dam failure analysis to Renschler in December, that he relied on the information given to him without applying his own professional judgment, and that he did not professionally analyze his use of the term "critical" in his December 28 letter to Renschler.

¶24 Our review of the record shows that credible evidence existed to support the jury's finding that Laue, on behalf of MSA, did not breach the contract term identified by Renschler, which is essentially a contractual provision requiring that MSA provide a professional standard of care. MSA's expert witness opined that it was not necessary for Laue, given the ordinance and the history of the dam failure analysis, to do anything with regard to the dam failure analysis when providing his opinions and surveys to Renschler. MSA's expert also testified that MSA followed the standard of care on this project. Moreover, Laue testified that he believed MSA's services were complete in June after having "put together the work product" requested by Renschler, and so the jury could have accepted this as evidence that MSA had already fulfilled the contract's terms by the time of the December 28 letter.

¶25 When ruling on Renschler's post-trial motion, the circuit court concluded that there was credible evidence to support the jury's verdict. We will not upset the circuit court's determination, because the record contains sufficient evidence to support the jury's conclusion that MSA did not breach the contract term requiring that MSA apply professional judgment consistent with current professional standards. *See* ***Weber v. White***, 2004 WI 63, ¶17, 272 Wis. 2d 121, 681 N.W.2d 137 (a verdict that survives post-trial motions should not be upset unless "'there is such a complete failure of proof that the verdict must be based on

speculation'") (quoting ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979)).

C. Evidence of Lost Profits and Lost Opportunities

¶26 Renschler asserts that the circuit court erred in granting MSA's motion in limine, which precluded Renschler from seeking damages for lost profits and lost opportunities. A motion in limine is reviewed under a discretionary standard and will not be reversed if the circuit court made a reasonable decision based on the pertinent facts and applicable law. ***F.R. v. T.B.***, 225 Wis. 2d 628, 649, 593 N.W.2d 840 (Ct. App. 1999).

1. Lost Profits

¶27 First, Renschler argues that the court erred in precluding it from seeking damages for lost profits based on anticipated testimony by its owners not supported by expert testimony. A plaintiff may recover for loss of profits if the plaintiff can show with reasonable certainty the anticipation of profit. ***State v. Johnson***, 2005 WI App 201, ¶17, 287 Wis. 2d 381, 704 N.W.2d 625 (citing ***Krueger v. Steffen***, 30 Wis. 2d 445, 450, 141 N.W.2d 200 (1966); THE LAW OF DAMAGES IN WISCONSIN § 26.14 (3d ed. 2000)). "[W]here a new business has no previous profit history ... the party seeking lost profits must 'present credible comparable evidence or business history and business experience sufficient to allow a fact finder to reasonably ascertain future lost profits.'" ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶38, 281 Wis. 2d 448, 699 N.W.2d 54 (quoting ***T & HW Enters. v. Kenosha Assocs.***, 206 Wis. 2d 591, 605 n.6, 557 N.W.2d 480 (Ct. App. 1996)).

¶28 Here, Renschler claimed over seven million dollars in damages for lost profits, but its expert witness list identified only one witness, a liability expert, and did not identify an expert on damages. The court found that expert testimony was necessary, "given the economic climate at the time that these contracts could have been pursued" and that the two owners' anticipated testimony as to projected lost profits, as non-expert witnesses, was insufficient for Renschler to put forward a case for lost profits. While the court acknowledged the general rule that a non-expert owner may testify concerning the *existing* value of the owner's property, it concluded that an expert was needed to testify as to *projected future* profits. We conclude that the court properly exercised its discretion in concluding that Renschler would not, at trial, be able to "'present credible comparable evidence or business history and business experience sufficient to allow a fact finder to reasonably ascertain future lost profits.'" ***Mrozek***, 281 Wis. 2d 448, ¶38 (quoting ***T & HW Enters.***, 206 Wis. 2d at 605 n.6).

2. Lost Opportunities

¶29 Second, Renschler argues that the court erred in precluding it from seeking damages for lost opportunities "despite the long standing case support in favor of a broad view of damages in tort actions," and cites to ***Koehler v. Waukesha Milk Company***, 190 Wis. 52, 60, 208 N.W. 901 (1926), for its statement that a "wrongdoer is liable for all injuries resulting directly from the wrongful act whether they could or could not have been foreseen by him." Assuming the truth of this general proposition, a plaintiff must still "prove by credible evidence to a reasonable certainty that damages were suffered and ... establish at least to a reasonable probability the amount of these damages." ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977).

¶30 Relying on a federal case applying Wisconsin law, the circuit court found that Renschler failed to show a specific lost business opportunity or that it was likely that a contract would have been entered into but for Renschler's contract with MSA. *See* ***Designer Direct, Inc. v. DeForest Redevelopment Auth.***, 368 F.3d 751, 752 (7th Cir. 2004) (noting that while the plaintiff did show that there was some interest from other potential clients, it failed to name them or show that, but for the contract the plaintiff actually entered into with the defendant, the plaintiff was likely to have entered into an alternative contract). Specifically, the circuit court found that Renschler failed to provide evidence of a particular project or identifiable prospective client that Renschler did not pursue because of its time devoted to the project in this case. We conclude that the court did not abuse its discretion in excluding evidence of lost opportunities based on its finding that Renschler failed to show evidence in support of such damages with reasonable certainty.

D. Attorneys' Fees and Costs

¶31 Finally, Renschler argues that the circuit court erred in granting MSA's motion for declaratory judgment, finding that the contract does not clearly provide for first-party indemnification. We affirm but on different grounds. *See* ***State v. Earl***, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 ("On appeal, we may affirm on different grounds than those relied on by the trial court"). The plain language of Renschler's contract with MSA does not require that MSA pay Renschler's attorneys' fees and costs.

¶32 The interpretation of a contract is a question of law which we review de novo. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). We construe contract language according to its plain or ordinary meaning.

Town Bank v. City Real Estate Dev., LLC, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476. If attorneys' fees are sought pursuant to a contractual provision, courts will not construe the provision to permit recovery unless the provision is clear and unambiguous. ***Westhaven Assocs., Ltd. v. C.C. of Madison, Inc.***, 2002 WI App 230, ¶13, 257 Wis. 2d 789, 652 N.W.2d 819.

¶33 The agreement between Renschler and MSA states the following in relevant part:

> To the fullest extent permitted by law, MSA shall indemnify and hold harmless [Renschler] ... from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of MSA or MSA's officers, directors, partners, employees, and MSA's Consultants in the performance and furnishing of MSA's services under this Agreement.

¶34 Looking at the plain language of this contract provision, we conclude that Renschler's request for fees has no merit. The jury found no negligence on the part of MSA and we affirm that verdict in this opinion. In the absence of any negligence by MSA, Renschler has not incurred any costs, losses, or damages "caused solely by the negligent acts or omissions of MSA." Renschler's argument fails under the plain, unambiguous language of the contract.

CONCLUSION

¶35 For the reasons set forth, we affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

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