COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1885

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

HEIER'S TRUCKING, INC., A WISCONSIN CORPORATION,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

WAUPACA COUNTY SOLID WASTE MANAGEMENT BOARD,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from two orders of the circuit court for Waupaca County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Vergeront, Deininger and Nowakowski,[1] JJ.

[1] Circuit Judge Michael Nowakowski is sitting by special assignment pursuant to the Judicial Exchange Program.

NOWAKOWSKI, J. Heier's Trucking, Inc. appeals from an order[2] granting partial summary judgment to Waupaca County and the Waupaca County Solid Waste Management Board.[3] Heier's Trucking also appeals from an order following a bench trial which fully denied its claim for damages, and Waupaca County cross-appeals from the portion of that same order which fully denied its counterclaim for damages. For the reasons that follow, we affirm both orders.

BACKGROUND

Heier's Trucking and Waupaca County entered into a written contract on June 21, 1994, whereby Heier's agreed to provide equipment for and to operate a solid waste transfer facility. The term of the contract was approximately sixty-seven months. The fee to be paid Heier's was $37 per ton of refuse, but for the first year the County agreed to pay for at least 10,000 tons even if Heier's actually transferred less than that. The contract required Heier's to maintain certain liability insurance and to have Waupaca County and its employees named as insureds on the policy. Heier's maintained the required types of insurance with the proper liability limits, but it failed to have the County named as an insured. The County discovered this omission in late March of 1995, and on

[2] The circuit court issued a Decision On Summary Judgment Motions on February 24, 1997. The last paragraph of this document reads, "[p]artial summary judgment is hereby granted to defendants on the issue of their termination of the contract." No party on appeal has raised any issue concerning the form of the circuit court's action, and we will likewise assume that this is an order from which appellate relief may be sought.

[3] Heier's Trucking originally sued both Waupaca County and the Waupaca County Solid Waste Management Board. The caption on the circuit court's summary judgment decision lists both defendants, but Waupaca County is not listed in the caption of the bench trial decision or the subsequent order denying all claims. The County is likewise not included in the caption of the case on appeal, but the record contains no order dismissing Waupaca County as a party. No party raises any appellate issue regarding defendant party status, and we therefore do not address it. However, for ease of reference and because Waupaca County was the designated party to the contract at issue in this litigation, we will refer to the defendant-respondent-cross-appellant as Waupaca County.

May 5, 1995, it sent Heier's notice that the contract would be terminated as of June 10, 1995. As of the date of termination, Heier's had processed 2,308.17 tons of refuse and it was paid $37 per ton, or $85,402.29. Heier's was not paid the guaranteed minimum, however, on the basis that it had not completed the entire first year of the contract.

Heier's filed suit claiming Waupaca County had breached the contract by failing to pay the $284,597.71 balance of the first year guaranteed minimum and by terminating the contract without proper cause. In addition to seeking recovery of the first year guaranteed minimum, Heier's claimed damages in the form of lost profits for the remaining term of the contract. The defendants answered denying they had breached the contract in any way and asserting a counterclaim for the damages they allegedly had incurred in having to operate the waste transfer facility because of the breach by Heier's which caused the termination. All parties moved for summary judgment, and the circuit court partially granted the defendants' motion by concluding that the County had properly terminated the contract. The court reserved for trial the question of whether Heier's had substantially performed its contractual obligations and all damage questions. After a two day bench trial, the circuit court issued a written decision, and later an order, which denied any recovery to either party. The judge found that Heier's had not substantially performed the contract and thus was entitled to no damages. He found that Waupaca County had failed to mitigate its damages and thus was also precluded from recovering. This appeal followed.

DISCUSSION

a. Summary Judgment.

We review a decision on a motion for summary judgment using the same methodology as the trial court. *See* ***Binon v. Great Northern Ins. Co.***, 218 Wis.2d 26, 30, 580 N.W.2d 370, 372 (Ct. App. 1998). That methodology has been so often stated and is so well understood that we will not repeat it here, except to note that summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *See* ***M&I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496-97, 536 N.W.2d 175, 182 (Ct. App. 1995); *see also* § 802.08(2), STATS. While review of summary judgment presents a question of law which we consider de novo, we nevertheless value a trial court's decision on such question. *See* ***M&I First Nat'l Bank,*** 195 Wis.2d at 496-97, 536 N.W.2d at 182.

Both parties moved for summary judgment on the question of the validity of Waupaca County's termination of the contract, and neither argued that factual disputes barred the other's motion. In such a circumstance, the parties are deemed to have stipulated that all material facts are undisputed and only a question of law is presented. *See* ***Hussey v. Outagamie County***, 201 Wis.2d 14, 18, 548 N.W.2d 848, 850 (Ct. App. 1996). That is exactly the case here. It is uncontroverted that the contract of June 21, 1994 required Heier's to have Waupaca County and its employees named as insureds on certain liability insurance policies and that Heier's failed to do so until May 8, 1995. It is likewise uncontroverted that the County gave Heier's a written notice of termination at least thirty days prior to the effective date of June 10, 1995. What is controverted is whether the County had the right to do so, a question of law.

Heier's argues that Section 5 of the contract is applicable here and that the County never gave it a notice of breach with a right to cure as is required by this section. In pertinent part, Section 5 provides:

> (A) Notice of Breach, Right to Cure and Notice of Termination: If through any cause the PROVIDER shall fail to fulfill in timely and proper manner its material obligations under this AGREEMENT, or if the PROVIDER shall fail to fulfill in timely and proper manner any of the material covenants or stipulations of this AGREEMENT, the COUNTY shall give written Notice of Breach to the PROVIDER, stating the failure to fulfill in timely and proper manner the material obligation(s) and the corrective action to be taken within a reasonable specified time. If the PROVIDER fails to take such corrective action the COUNTY shall thereupon have the right to terminate this AGREEMENT by giving a thirty (30) day written Notice to the PROVIDER of such termination and specifying the effective date thereof.... There shall be no other termination or cancellation of this AGREEMENT during its term, without the prior written consent of both parties unless specifically permitted otherwise herein.

Waupaca County points to Section 11 as the operative provision and argues that in that section no notice with a right to cure is required prior to termination. In pertinent part, Section 11 provides:

> (A) Coverage: The PROVIDER agrees that, in order to protect itself and the COUNTY, its officers, boards, commissions, agencies, employees and representatives under the indemnity provisions of section 10 above, it will at all times during the term of this AGREEMENT keep in full force and effect comprehensive general liability, contractual liability, and auto liability insurance policies, issued by a company or companies authorized to do business in the State of Wisconsin and licensed by the Wisconsin Office of the Insurance Commission, with liability coverage provided for therein in the amounts of at least $1,000,000.00 CSL (Combined Single Limits). All coverages afforded shall apply as primary, with the COUNTY, its boards, commissions, agencies, officers, employees and representatives as additional named insured. Failure to keep in full force and effect the insurance coverage required herein shall constitute breach of this AGREEMENT and the COUNTY may terminate this AGREEMENT by giving PROVIDER a thirty (30) day written notice of termination specifying the effective date thereof.

Resolution of these competing contentions presents a question of contract construction. Contract construction is an endeavor aimed at ascertaining the intention of the parties. *See* ***Maas v. Ziegler***, 172 Wis.2d 70, 79, 492 N.W.2d 621, 624 (1992). The best evidence of the parties' intent is the language they have chosen to express their agreement. *See* ***Bank of Barron v. Gieseke***, 169 Wis.2d 437, 455, 485 N.W.2d 426, 432 (Ct. App. 1992). If that language is susceptible of only one reasonable meaning, the court's role is to simply give effect to the plain meaning of the contract. *See* ***Rent-A-Center, Inc. v. Hall***, 181 Wis.2d 243, 251, 510 N.W.2d 789, 793 (Ct. App. 1993).

Section 5 is the portion of the contract which deals generally with the issues of breach and termination. It expressly provides, however, that it is applicable "unless [termination is] specifically permitted otherwise herein." Section 11 is an alternative provision which permits termination in a specific situation. If the circumstances here fall within that specific situation, the procedures of Section 11 would be applicable.

The specific situation in Section 11 which permits the County to give a thirty-day written notice of termination without the right to cure is the "[f]ailure to keep in full force and effect the insurance coverage required herein." Heier's contends that this provision is inapplicable because the obligation to name the County as an insured is not part of the "coverage required herein." Its bald assertion is merely conclusory and is unsupported by citation or reliance on anything in the record. It is wholly without merit for two primary reasons.

First, Section 11 is entitled "Insurance." Subsection (A) of that section is titled "Coverage." It is within this subsection that Heier's agreed to keep in full force certain types of liability insurance with $1 million limits. It is

also within this subsection that Heier's agreed that all of the coverages shall apply as primary and that the County and others be named as additional insureds on the policies. All of these are distinct features of coverage that can be provided by an insurance policy. They are recited in the portion of the contract expressly dealing with insurance coverage. Heier's offers no reasonable basis from which to conclude that the parties intended some of these features of coverage to be part of the "coverage required herein" while others are not to be so included.

Second, the word "coverage" is defined in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993)[4] as: "The act or fact of including or treating: a thing that covers: … as a: INSURANCE: protection by insurance policy: inclusion within the scope of a protective or beneficial plan." The protection afforded by an insurance policy is, in part, measured by which persons or entities are covered, i.e. are the insureds, under that policy. That is because an insured is a party to the contract and is thereby entitled to enjoy directly the benefits of that contract. For example, a named insured may demand on their own behalf that the insurance company fulfill its duty to provide a defense and/or to indemnify the insured. Thus the description of who is to be made an insured under an insurance policy most certainly is a description of a part of the coverage of that policy. Here the contract required Heier's to have Waupaca County and others named as insureds on the policies it obtained to comply with that contract. This was unambiguously a part of the "coverage required herein."

[4] It is appropriate to look to a recognized dictionary to determine the ordinarily understood meaning of a word. *See* ***Just v. Land Reclamation, Ltd.***, 155 Wis.2d 737, 745, 456 N.W.2d 570, 573 (1990).

Heier's argues that its breach of the obligation to have Waupaca County named as an insured was not material and thus did not justify termination of the contract. It cites to the RESTATEMENT (SECOND) OF CONTRACTS § 241 and to 17A AM. JUR. 2D *Contracts* § 574 for the factors to consider in assessing whether a breach is material. These authorities are inapposite to the issue here. The parties to this contract, as they were entitled to do, expressly agreed that the breach of failing to maintain required insurance coverage was a material breach that entitled the County to terminate the contract. The authorities Heier's cites are applicable where contracting parties have failed to expressly designate what breach they consider material. It would be improper for a court, in the guise of applying factors, to ignore the plainly expressed agreement reached by Heier's and Waupaca County.[5] As the trial court noted, "[t]o interpret the insurance provision to require a notice of breach and a right to cure would essentially rewrite the contract…."

Because the contract unambiguously permitted Waupaca County to terminate the contract under the undisputed circumstances present here and in the undisputed manner that it did, partial summary judgment dismissing Heier's claim of wrongful termination was properly granted to the defendants.

b. Substantial Performance.

While the trial court had determined on summary judgment that Waupaca County validly terminated the contract, it reserved for trial the issue of

[5] Heier's and Waupaca County dispute whether the failure to name the County as an insured caused any harm. The subject of this dispute is neither genuine nor material and thus does not prevent summary judgment from being granted. The parties contracted to allow termination upon failure to maintain the "coverage required" not upon the County experiencing some unspecified harm from such failure.

whether Heier's had substantially performed so as to be entitled to damages.[6] Following the bench trial, the court concluded that Heier's had not substantially performed its obligations under the contract and denied its claim for damages.

The test for substantial performance is whether the performance met the essential purpose of the contract. *See* ***Micro-Managers, Inc. v. Gregory***, 147 Wis.2d 500, 516, 434 N.W.2d 97, 103 (Ct. App. 1988) (citing ***Plante v. Jacobs***, 10 Wis.2d 567, 570, 103 N.W.2d 296, 298 (1960)). Determinations of what Heier's did or did not do and the circumstances surrounding Heier's actions or inactions are findings of fact. We review factual questions by use of the clearly erroneous rule: we uphold the trial court's finding unless it is clearly erroneous. *See* ***Novelly Oil Co. v. Mathy Constr.***, 147 Wis.2d 613, 617-18, 433 N.W.2d 628, 630 (Ct. App. 1988). Ordinarily whether the facts satisfy a legal standard presents a question of law that we review independently. *See* ***Wassenaar v. Panos***, 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983). However, whether the facts concerning a contracting party's performance satisfy the test for substantial performance has been consistently identified as a question of fact to be reviewed accordingly, *see* ***Wm. G. Tannhaeuser Co. v. Holiday House, Inc.***, 1 Wis.2d 370, 373-74, 83 N.W.2d 880, 882-83 (1957); ***Stevens Constr. Corp. v. Carolina Corp.***, 63 Wis.2d 342, 359, 217 N.W.2d 291, 300 (1974), and Heier's has cited no case to the contrary. These decisions provide no explicit rationale for why the determination of whether a party substantially performed is to be identified as a finding of fact. It appears to be an instance where the supreme court views the conclusion of whether the performance meets the essential purpose of the contract

[6] Waupaca County makes no challenge to whether Heier's had properly pled such a claim or whether such a claim is cognizable under these circumstances, and we do not address those issues.

to be so intertwined with the factual findings that support it that great weight should be given to the trial court's decision. Thus, the trial court's finding that Heier's had not substantially performed its contractual duties will be upheld unless it is clearly erroneous.

Heier's argues that the essential purpose of the contract was merely to start up and operate a solid waste transfer facility and that it did so for 354 days. The trial court found that the essential purpose of the contract was a broader one of working in partnership with the County to develop an effective solid waste management program. It implicitly found the operation of the transfer facility to be one, but not the only, obligation Heier's had to fulfill its part in that partnership. These findings are not clearly erroneous. Two members of the Solid Waste Management Board testified directly to the purpose of contracting with a private party and the role such a contract would play in developing a cost-effective solid waste management program, and the court was free to accept their testimony. Further, the Request For Proposals form and the contract itself spoke to the cooperative effort that was envisioned.

The trial court found that Heier's had failed to fully cooperate with Waupaca County within the meaning of the contract. Again, this finding is not clearly erroneous. It is uncontroverted that Heier's gave assurances during the contract negotiations of its own intent to utilize the transfer facility for at least some of the refuse it collected in its separate, existing hauling operations. It is likewise uncontroverted that Heier's own use of the transfer facility was a key part of what would make the first year guaranteed payment economically viable. And finally it is uncontroverted that Heier's did not use the facility even once (except for a single demonstration load), but rather it operated a competing facility. The trial court was free to infer a lack of cooperation from these facts.

The trial court also found that Heier's ran the transfer facility poorly in a number of respects. Heier's does not contend that any of the specific failings found by the court was clearly erroneous. Instead, it argues that the problems were minor and were promptly addressed when brought to its attention. The trial court did not find that any one of the problems Heier's had in running the transfer facility was itself a basis for its ultimate finding of no substantial performance. It attached significance to the "total effect of the problems with the transfer facility," but also combined these problems with the previously cited lack of cooperation and the failure to obtain the required insurance coverage[7] to reach its overall finding that Heier's had not substantially performed the contract. Whether we would have reached the same conclusion is irrelevant. The weight of the evidence is a matter that rests exclusively within the province of the finder of fact. *See* ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107, 293 N.W.2d 155, 159 (1980). Both the historical facts found and the ultimate result reached by the trial court here are reasonable ones that are not contrary to the great weight and clear preponderance of the evidence. They must be sustained.

c. Counterclaim.

Waupaca County counterclaimed against Heier's seeking to recover damages it allegedly suffered as a result of Heier's breach of the contract. Those damages consisted primarily of the costs for purchasing equipment and for employing personnel to operate the transfer facility after June 10, 1995, the

[7] It was reasonable for the trial court to attach importance to the failure to obtain the required insurance coverage since the parties themselves had attached such importance to this issue by carving it out as the only one which could cause termination with no right to cure.

termination date. Following the bench trial, the court denied any recovery on the counterclaim, explaining its decision in this passage:

> The contract appears to give Waupaca County the option of running the transfer facility itself or contracting with another operator. Nevertheless, the County has the duty to mitigate its damages. Originally, when Heier's Trucking bid for the contract, it was not the lowest bidder. The County did not submit any proof to the Court as to why it did not pursue the other low bidder after the contract was terminated. The Court finds that this failure to pursue the other low bidder is a failure to mitigate damages. Therefore, the Court denies the County's counter-claim requesting compensation for running the transfer facility.

Waupaca County raises a myriad of challenges to this determination. It argues, *inter alia*, that (a) Heier's waived the failure to mitigate defense by not raising it in a reply to the counterclaim (or even filing any reply) or at trial, (b) the trial court improperly assigned the County the burden of proving it did mitigate its damages, (c) it had the express right under the contract to "self-perform" in the event of Heier's breach and termination, (d) it had no legal duty to seek or to hire the low bidder on a purchase of service contract, and (e) the unrebutted evidence in the record yields the singular conclusion that it acted reasonably. It is unnecessary to address any of these contentions, however, because the undisputed evidence together with an unambiguous provision of the contract reveal that the trial court's decision to deny Waupaca County any recovery on its counterclaim was the correct result. We will not overturn a judgment or order when the record reveals that the trial court's decision was right, although it may have been for the wrong reason. *See* ***State v. Alles***, 106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982). This is true even when the proper theory or reasoning was not presented to the lower court. *See* ***State v. Holt***, 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985) (citing ***Liberty Trucking Co. v. DILHR***, 57 Wis.2d 331, 342, 204 N.W.2d 457, 463-64 (1973)).

Section 11 of the contract, which Heier's breached and which formed the basis for the termination without a right to cure, also provides "[i]n the event of termination, the COUNTY shall be entitled to recover its damages, including those damages specifically set forth in Schedule 'A', paragraph IX." Paragraph IX of Schedule A provides:

> A. Breach and Termination
>
> Upon receipt of Notice of Termination for failure of the PROVIDER to comply with this AGREEMENT or failure of the PROVIDER to fulfill it's [sic] transfer facility obligations under this AGREEMENT, the PROVIDER shall pay the COUNTY actual damages in the amount of:
>
> 1) The COUNTY'S cost of receiving, sorting, processing and transporting of waste material delivered by Users, minus the fixed and variable fees that would otherwise have been paid by the COUNTY to the PROVIDER under this AGREEMENT for the same services;
>
> 2) Either the COUNTY'S costs of obtaining a successor contract with another provider (including the cost of developing specifications, bidding, publishing bids, etc.), and
>
> 3) The excess of the COUNTY'S costs under a successor contract with another provider over the COUNTY'S cost under this AGREEMENT. In the event the COUNTY elects to operate the transfer facility the PROVIDER shall pay the COUNTY the excess of the COUNTY'S cost of operating the transfer facility over the COUNTY'S fixed and variable fees under this Agreement.

Waupaca County grounded its counterclaim on these two parts of the contract, and we agree that they govern the measure of its damages.

It is undisputed that Waupaca County chose to operate the transfer facility itself but to contract out the transporting of solid waste from the facility to a landfill. It itemized the resulting costs of this choice on Exhibit 11 received in evidence at trial. Its claim totaled $252,819.44. This exhibit figure was explained

at trial by Roger Holman, the County's solid waste director. The additional equipment, personnel cost and legal fees portion of the claim were calculated as out-of-pocket expenses, with personnel costs projected over the remaining term of the contract. The only other element of damage claimed was a "tipping fee differential" calculated by taking the difference between the $37 tonnage fee to have been paid Heier's under the contract and the tonnage fee paid to the company hired to transport the waste from the transfer facility to the landfill, and then applying this to the actual tons of waste transported through 1996 and to the projected tonnages for the balance of the contract term.

It is also undisputed that Heier's processed 2,308.17 tons of refuse from June 21, 1994, through June 10, 1995, and was paid $85,402.29 for doing so. Had Heier's completed the full first year of the contract, all parties concede it would have been entitled to the guaranteed minimum payment of $370,000 less such amounts as it had already been paid. As the quoted language from paragraph IX(A)(3) notes, if the County chooses to operate the transfer facility after termination, its damages are "the excess of the County's cost of operating the transfer facility over the County's fixed and variable fees under this Agreement." The "fixed and variable fees under this agreement" include the balance of the first year guaranteed minimum, or $284,597.71. Even if all of the costs listed on Exhibit 11 were properly included as attributable to operating the transfer facility, the total is not in excess of the fixed and variable contractual fees that the County

was not required to pay Heier's because the contract was terminated.[8] There being no "excess," there are no damages; and the trial court reached the correct result when it denied any recovery to the County on its counterclaim.

To the extent the County seeks to rely on the language of paragraph IX(A)(1) rather than IX(A)(3) to define its damages, it fares no better. Under this subsection, the amount of actual damages begins with the costs shown on Exhibit 11 but is then "minus the fixed and variable fees that would otherwise have been paid by the County to the Provider under this agreement for the same services." The fees that would otherwise, but for the termination, have been paid to Heier's for the services of running the transfer facility from June 10 to June 21 include the balance of the first year guaranteed minimum. Since this amount is greater than the total of Waupaca County's costs, there are no damages; and the trial court properly denied recovery.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

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[8] It is true that some amount of refuse was processed through and transported from the transfer facility from June 10, 1995, to June 21, 1995. The trial court made no finding as to the actual tonnage during this period, and as an appellate court we do not find facts. However, we are not required to ignore unrefuted mathematical evidence in the record which shows that the actual amount was much less than 850 tons. According to the County's documentation attached to Exhibit 11, Heier's processed 1,264.488 tons from January 1 to June 10 and the replacement hauler transported 2,001.75 tons from June 10 to December 31. 43% of the refuse was most assuredly not transported on 5% of the days of operation. This seemingly self-evident truism is absolutely confirmed in paragraph I(B) of Schedule A which notes that the transfer facility was designed to process up to 23,000 tons of refuse per year. At the maximum rate of operation, the facility could handle only sixty-three tons per day, or 693 tons over the eleven days.

The difference between the balance of the guaranteed minimum and the costs claimed on Exhibit 11 is $31,778.27. Before that amount would have been spent on $37 tonnage fees so as to reduce the balance of the guaranteed minimum below the costs on Exhibit 11, 858.87 tons would have to have been processed. It is clear this did not happen in those eleven days.