COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-2867

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

SANFELIPPO ENVIRONMENTAL CONSTRUCTION, LLC,

PLAINTIFF-RESPONDENT,

V.

MEWS COMPANIES, INC. AND HERITAGE MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Mews Companies, Inc., and Heritage Mutual Insurance Company appeal from the judgment granting Sanfelippo Environmental

Construction, LLC, $1,162.23 in damages and $23,261.20 in costs and attorneys' fees. The appellants contend that the trial court: (1) erred in determining that Sanfelippo was the "prevailing party" and, therefore, was entitled to attorneys' fees pursuant to the subcontract; (2) failed to properly exercise discretion to disallow most or all of Sanfelippo's attorneys' fees "due to Sanfelippo's actions in presenting incredible and conflicting evidence"; and (3) erroneously exercised discretion by awarding Sanfelippo its attorneys' fees while "failing to properly consider the amount involved and the results obtained." Additionally, the appellants argue that their success in limiting their liability to 20% of Sanfelippo's claim entitles them to recover reasonable attorneys' fees under: (1) the subcontract; (2) WIS. STAT. § 802.05(1)(a);[1] or (3) WIS. STAT. § 814.025(3).[2] We reverse the award of attorneys' fees to Sanfelippo and remand to the trial court for further proceedings consistent with this decision.

BACKGROUND

¶2 Mews Companies, Inc., contracted with the Wisconsin Department of Transportation to act as prime contractor on a Milwaukee County highway project. Heritage Mutual Insurance Company, as surety, executed a performance and payment bond on Mews' behalf. On June 12, 1995, Mews subcontracted with

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. § 802.05(1)(a) provides, in part:

> If the court determines that an attorney or party failed to read or make the determinations required under this subsection [regarding the requirement that pleadings be made in "good faith"] before signing any petition, motion or other paper, the court may … impose an appropriate sanction …. The sanction may include an order to pay … reasonable attorney fees.

[2] WISCONSIN STAT. § 814.025(3) provides the bases on which a court may conclude that an action is frivolous, allowing for the award of reasonable attorney fees.

J.J. Sanfelippo Companies, Inc. (JJS), for landscaping, including work related to topsoil, seeding, and sodding. The subcontract agreement was Mews' standard form contract, and the attachments to the subcontract also were prepared by Mews. The subcontract was not a "time and materials" contract; rather, the topsoil line item was to include labor, materials, equipment, and services.

¶3 For disputed reasons that are irrelevant to the issue on appeal, JJS did not perform some of the work under the subcontract. As a result, in October 1995, Mews performed the majority of the topsoil work to prepare the site for winter; JJS did not object. In early 1996, JJS went out of business due to financial problems. JJS's owner then asked Mews to transfer the subcontract to Sanfelippo Environmental Construction, LLC (Sanfelippo), and on May 8, 1996, Mews and Sanfelippo executed a new subcontract.

¶4 The highway project was completed in August 1996. Mews refused to pay the topsoil line item of Sanfelippo's bill, mistakenly claiming that the topsoil line item had been crossed out on the attachment to the May 8, 1996 subcontract, but also contending that Sanfelippo had failed to perform. Nevertheless, on December 18, 1996, based on information provided by Ryan Luck, the Department of Transportation engineer for the highway project, Mews paid Sanfelippo $400 for topsoil and $500 for equipment rental charges related to the topsoil work.

¶5 On December 30, 1996, Sanfelippo filed an action, for what it claimed was the money due for topsoil work, against Mews and its insurer, Heritage. Sanfelippo alleged breach of contract, unjust enrichment, and breach of the performance and payment bond. Mews and Heritage counterclaimed, alleging

that Sanfelippo "and its predeceasor [sic] company failed to timely and properly perform its subcontract."

¶6 The case was tried to the court in February 1998. Mews' owner estimated that his company completed 95% of the topsoil work on the project. Luck, called as a witness for Sanfelippo, estimated that Mews did about 80% of the project's topsoil work, by volume. In its oral decision, the trial court characterized Sanfelippo's business records as sloppy and found that some of them were impeached by Luck's diary. Viewing Luck as "the only truly disinterested witness" in the case, the trial court gave great weight to Luck's testimony. Thus, despite commenting that Sanfelippo had not met its burden of proof, the trial court found Mews in breach of the subcontract and awarded Sanfelippo 20% of the topsoil line item ($1,162.23 after crediting Mews for the $900 already paid), and statutory costs. The trial court dismissed Mews' counterclaim.

¶7 Additionally, the trial court awarded Sanfelippo $23,261.20 in attorneys' fees and costs pursuant to paragraph eight of the subcontract. Paragraph eight stated:

> Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interests in any manner arising under this Subcontract, or to recover on a surety bond furnished by a party to this Subcontract, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs, charges, and expenses expended or incurred therein.

¶8 Mews and Heritage moved for reconsideration of the award of attorneys' fees and costs, contending that neither side had clearly prevailed. They argued that "[a]n award of attorneys' fees and costs to the plaintiff rewards the plaintiff for utilizing false documents to prove its case, failing in 80 percent of its claim and for rejecting a settlement for the exact amount of the verdict before

trial." After a hearing, the trial court denied the motion. Mews and Heritage subsequently moved for elimination or reduction of the award of attorneys' fees, challenging the reasonableness of the claimed amount. After a hearing, the trial court denied the motion, ordering that "the plaintiff's attorneys' fees and disbursements in the amount of $23,261.20 are deemed reasonable." Finally, on August 20, 1998, the trial court entered a judgment stating that Sanfelippo "shall recover against the defendants, jointly and severally, the aggregate amount of $24,423.43." From this judgment, Mews and Heritage appeal.[3]

DISCUSSION

¶9 The appellants argue that the trial court erred in determining that Sanfelippo was entitled to recover attorneys' fees and costs as the "prevailing party" under paragraph eight of the subcontract. They contend that, under the subcontract, "prevailing party" is ambiguous. They contend that both parties prevailed—Sanfelippo "to the extent it recovered a small percentage of the amount it was seeking" and themselves "to the extent [they] were successful in limiting [Sanfelippo's] recovery."

¶10 The appellants maintain that the subcontract provision is ambiguous because "[r]easonable persons could differ, and the subcontract is silent, as to [which party] is the 'prevailing party' under these circumstances." They insist that awarding attorneys' fees to Sanfelippo "is neither rational nor consistent with the parties' intent"—that "[s]uch an interpretation of the parties' subcontract not only unreasonably rewards Sanfelippo … for bringing an excessive and unsubstantiated claim, but also unreasonably penalizes [the appellants] for successfully asserting a

[3] We note that Mews and Heritage do not appeal the dismissal of their counterclaim or the $1,162.23 awarded to Sanfelippo in damages; they contest only the attorneys' fees award.

good faith defense to the claim." The appellants claim that a more reasonable interpretation of the attorneys' fees provision of the subcontract would support an award of attorneys' fees to them as the prevailing party for successfully defending against Sanfelippo's "frivolous claim for 100% of the topsoil line item."

¶11 Under Wisconsin law, attorneys' fees are recoverable only when "expressly allowed by contract or statute." ***Borchardt v. Wilk***, 156 Wis. 2d 420, 426, 456 N.W.2d 653 (Ct. App. 1990). In the instant case, attorneys' fees and costs were awarded to Sanfelippo as the "prevailing party" *under the subcontract*. As we have explained:

> The interpretation of a contract is a question of law which we review *de novo*. Where the terms of a contract are plain and unambiguous, we will construe it as it stands. However, a contract is ambiguous when its terms are reasonably or fairly susceptible of more than one construction. Whether a contract is ambiguous is itself a question of law.

Id. at 427 (citations omitted). Any ambiguity in a contract must be construed against the drafter—in this case, Mews. *See* ***Hunzinger Constr. Co. v. Granite Resources Corp.***, 196 Wis. 2d 327, 339, 538 N.W.2d 804 (Ct. App. 1995). But as we also have declared, "In interpreting an ambiguous contract provision, we must reject a construction resulting in unfair or unreasonable results." ***Borchardt***, 156 Wis. 2d at 428.

¶12 The subcontract fails to define "prevailing party." Sanfelippo, quoting ***Kitsemble v. Department of Health & Social Services***, 143 Wis. 2d 863, 867, 422 N.W.2d 896 (Ct. App. 1988), contends that "[i]n order for a plaintiff to be a 'prevailing party' in Wisconsin, it must 'receive at least some of the relief he or she requests in order to prevail.'" Sanfelippo fails to mention, however, that in ***Kitsemble*** we were interpreting a statute, not a contract, and we were defining

"prevailing party" only within the context of judicial review of a decision of a state agency under WIS. STAT. § 814.245(3). *See* ***id.***; WIS. STAT. § 814.245(3).

¶13 Moreover, even if we look to case law determining the "prevailing party" under a statute, the case that is far more instructive is ***Footville State Bank v. Harvell***, 146 Wis. 2d 524, 432 N.W.2d 122 (Ct. App. 1988), where we explained:

> [T]o be a prevailing party under the [Wisconsin Consumer Act], it is not necessary that one must either obtain an affirmative judgment in his or her favor or win the lawsuit in all respects. It is implicit in the definition, however, that the consumer who succeeds on some but not all issues recovers attorney's fees only as to the successfully litigated issues.
>
> Although [the defendant] did not succeed on every litigated issue, he succeeded in substantially reducing his preverdict interest liability. This was a significant issue in litigation, and he achieved the benefit by asserting a defense under the WCA. He is a prevailing party for purposes of [WIS. STAT. § 425.308(1)] and entitled to attorney's fees incurred in presenting that defense.
>
> We therefore reverse the denial of attorney's fees under the WCA and remand for the trial court to determine the amount of the fees allowable to [the defendant] in connection with his successful defense, applying the [WIS. STAT. § 425.308(1)] factors. The fees allowable to [the defendant] include an appropriate portion of his fees on appeal.

Id. at 540 (citation omitted).

¶14 BLACK'S LAW DICTIONARY 1188 (6th ed. 1990) defines "prevailing party," in pertinent part, as "[t]he party to a suit who successfully prosecutes the action *or successfully defends against it*, prevailing on the main issue, *even though not necessarily to the extent of his original contention*." (Emphases added.)[4]

[4] We note, however, that the most recent edition of BLACK'S LAW DICTIONARY defines "prevailing party" differently. *See* BLACK'S LAW DICTIONARY 1145 (7th ed. 1999). In this case, however, we apply the definition that existed at the time the parties entered into their subcontract.

Applying this definition, there was no single "prevailing party"—Sanfelippo was 20% successful in prosecuting the action and the appellants were 80% successful in defending against it.

¶15 Although we generally construe any ambiguity in a contract against the drafter, *see* ***Hunzinger***, 196 Wis. 2d at 339, to construe "prevailing party" in the instant case to apply only to Sanfelippo would be to award Sanfelippo 100% of its reasonable attorneys' fees and costs despite the fact that, according to the trial court, Sanfelippo's claim, at most, was 20% valid. Such a conclusion inevitably would encourage frivolous claims and deter legitimate defenses, and would produce "unfair or unreasonable results." *See* ***Borchardt***, 156 Wis. 2d at 428.

¶16 Construing the subcontract in a way that "will make it a rational business instrument and will effectuate what appears to have been the intention of the parties," *see* ***id.*** at 427, we conclude that Sanfelippo and the appellants share the status of "prevailing party"—Sanfelippo at 20% and the appellants at 80%. Accordingly, we reverse the $23,261.20 award of attorneys' fees and costs to Sanfelippo and remand the matter to the trial court with directions to: (1) allow the parties to file updated statements regarding attorneys' fees and costs; (2) determine and award to each party applicable statutory costs; and (3) determine and award reasonable attorneys' fees and costs to Sanfelippo and the appellants utilizing the 20/80 breakdown.[5]

[5] Resolving the appeal on this basis obviates the need to address the appellants' other arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.").

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

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