COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0603

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

MEWS COMPANIES, INC.,

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

v.

CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Mews Companies, Inc. appeals, and the City of Milwaukee cross-appeals, from the judgment entered following a jury trial on all

issues surviving summary judgment in a breach-of-contract action.[1] We affirm in part, reverse in part, and remand with directions.

I. BACKGROUND

¶2 In 1993, Mews, as the lowest qualified bidder on a City project, contracted with the City to conduct environmental testing and construct a roadway in the area of 27th Street and North Avenue in Milwaukee. Mews completed most of the work, for which it received some payments from the City. Mews and the City, however, came to disagree over various aspects of the work. Ultimately, Mews sued the City, alleging that the City breached the contract in several ways.[2] The City counterclaimed for breach of contract.

¶3 During pretrial proceedings, the trial court (Judge Connors) granted partial summary judgment to the City on one of Mews's claims and, during the jury trial, the trial court (Judge Sykes) dismissed another of Mews's claims. The jury found for Mews on one of its claims, but found for the City on another of Mews's claims, as well as on the City's counterclaim.

¶4 On motions after verdict, the trial court approved the jury's verdicts, denied interest to Mews under WIS. STAT. § 66.285, and ruled that each party was responsible for its own costs. Mews appeals from the partial summary judgment

[1] The appeal and cross-appeal also bring before this court the March 6, 1997 order in which Judge Arlene D. Connors denied Mews's motion for partial summary judgment and granted partial summary judgment to the City, as well as the November 17, 1998 order for judgment issued by Judge Sykes. *See* WIS. STAT. §§ 808.03(1), 809.10(4) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The complaint does not segment the breach-of-contract cause of action into separate claims, but does set forth separate theories related to different aspects of the project. On appeal, the parties refer to these distinct theories as Mews's separate "claims." In this decision, we will do so, too.

granted to the City, and from the jury's verdicts in favor of the City. The City cross-appeals from the trial court's ruling regarding one of Mews's claims, and from the jury's verdict relating to that same claim. Additional background information will be provided in our discussion of each issue.

II. MEWS'S APPEAL

A. Gravel Fill / Partial Summary Judgment

¶5 During the course of the work on the roadway, the City's survey crew realized that an additional 2000 to 3000 cubic yards of fill, beyond that provided for in the contract, would be needed. Subsequently, Mews faxed a letter to the City on October 21, 1993, advising that it "d[id] not have a bid item for borrowed fill" in the contract, but that "there is a bid item #70500 for gravel filling," and faxed a second letter to the City on October 25, 1993, asking the City to "advise promptly as to what fill we will use between the subgrade and gravel base course." When it did not receive a response to the letters, Mews wrote a third letter, dated October 26, 1993, stating:

> In regards to our letters of October 21, 1993 and October 25, 1993. We have not received any directions.
>
> Kindly be advised that we will proceed with the work and we will demand payment for all gravel fill in excess of the required quantity of gravel for the three inch lift, bid item #70203, to be paid for under bid item #70500 gravel filling at $10.50 per ton.
>
> Due to the time of the year, time is of the essence. Any further delays could cause the project not to be completed before winter.

Months later, in a letter dated January 27, 1994, the City responded that it would only pay the unit price bid for roadway fill, $4.25 per cubic yard, for the 3,092.96 tons of gravel "used and required due to a thicker than anticipated existing pavement."

¶6 Mews moved for summary judgment on its claim seeking payment for the additional fill at the rate of $10.50 per ton, rather than $4.25 per cubic yard. The trial court rejected Mews's claim and, concluding that $4.25 per cubic yard was the proper price under the contract, granted partial summary judgment to the City. The court stated: "The contract provisions seem clear that: 'Any additional sub[]grade material required due to a thicker than anticipated existing pavement shall be paid as roadway fill.' Section 401.3.2 of the Street Construction Specifications."

¶7 Applying the well-known methodology that need not be repeated here, this court reviews *de novo* a trial court's summary judgment determination. *See* ***Park Bancorporation, Inc. v. Sletteland***, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994). Because the contract established the terms for payment for the additional fill, and because the City paid Mews according to those terms, we conclude that the trial court was correct in granting partial summary judgment to the City.

¶8 Mews argues that the trial court erred in granting partial summary judgment because "[t]he issue of price remains a genuine issue of material fact." Central to Mews's theory is its contention, as expressed in Mews's trial court brief in support of its motion for partial summary judgment, that "there was no item on the contract about fill." Therefore, Mews maintains, the City, by failing to respond to its letters, accepted the $10.50 per ton price proposed in the October 26 letter. Thus, Mews concludes, the City was estopped "by silence or inaction" from disputing its proposed price and, accordingly, the trial court should have granted it (Mews) partial summary judgment.

¶9 In response, the City explains that Mews chose to use "gravel fill" rather than "roadway fill" for some of the roadway area, and that the contract clearly controls the price for gravel used for roadway fill. The City is correct. Section 401.3.2 of the City's street construction specifications, incorporated by reference into the contract, provides, in relevant part:

> Material used for filling shall consist of granular or clay soils, gravel or mixtures thereof …. Material used for roadway filling shall be granular material where the existing pavement area is granular in nature. *Any additional subgrade material required due to a thicker than anticipated existing pavement shall be paid as roadway fill*.

(Emphasis added.)

¶10 In reply, Mews fails to offer any argument refuting the City's reliance on these unambiguous contractual terms. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted). Instead, Mews simply reiterates its estoppel argument. Interestingly enough, however, the very authority Mews invokes counters its theory.

¶11 Mews quotes ***Mortgage Associates, Inc. v. Monona Shores, Inc.***, 47 Wis. 2d 171, 185, 177 N.W.2d 340 (1970) for the proposition: "To give rise to an estoppel by silence or inaction, there must be a right and an opportunity to speak and an obligation or duty to do so." Here, however, the City had no obligation to speak. The contract specifies that the payment price for additional fill used in the roadway is the unit price for roadway fill. Mews does not dispute that this additional gravel was fill used in the roadway, or that $4.25 per cubic yard was the contractual price for roadway fill. While Mews, understandably, may be miffed by the City's failure to respond to its letters, Mews offers no authority establishing that the City had any "obligation or duty to do so." The City was entitled to rely

on the contract. The City paid according to the contract price and, therefore, the trial court correctly granted partial summary judgment to the City.

B. Pavement Removal

¶12 Mews claims it was due additional compensation because the pavement it had to remove proved to be thicker than anticipated. The City conceded that some thickness was unanticipated and agreed to pay $0.78 per square yard, above the contract price, for the additional work. Midway through Mews's presentation of its case in chief to the jury, however, the trial court dismissed Mews's claim for additional compensation due to Mews's failure to provide evidence showing "any meeting of the minds on oral or written modification to the existing contract as to how much [Mews] will be paid for the removal of the roadbed."

¶13 Mews argues that the trial court "clearly abused its discretion to dismiss [the] pavement removal claim when it failed to give the parties notice of its intent to dismiss the claim midway through plaintiff's case in chief." Mews fails to explain, however, how any additional notice would have enabled it to present anything more that would have altered the trial court's decision. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" argument).

¶14 Mews also argues that the dismissal was wrong because it ignored testimony confirming the City's concession that additional compensation was due for removal of pavement that was thicker than anticipated. The City first responds that Mews waived this argument by failing to present it in postverdict motions. We need not resolve the parties' debate on this procedural point, however, because

the City also argues, correctly, that the contract clearly controlled this issue as well.

¶15 A trial court has discretion to dismiss a claim at any point in the trial proceedings when it becomes clear that the evidence, and reasonable inferences from it, viewed most favorably to the party against whom dismissal is ordered, fails to establish a *prima facie* case. *See* ***Christianson v. Downs***, 90 Wis. 2d 332, 334-35, 279 N.W.2d 918 (1979); WIS. STAT. § 805.14. We will uphold a trial court's discretionary decision absent an erroneous exercise of discretion. *See* ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). In other words, "[a] discretionary decision will be sustained if the [trial] court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). In the instant case, based on the contract, we conclude that the trial court correctly ordered dismissal of Mews's pavement removal claim.

¶16 The pavement removal bid item of the contract specified that Mews would remove pavement for $2.35 per square yard. Further, undisputed testimony established that the pavement to be removed was eight inches of concrete base topped by three inches of sheet asphalt, and approximately two to six additional inches of asphalt added during two resurfacing projects. Section 2.5.7 of the general instructions to bidders, incorporated by reference into the contract, provided: "All work to be done under the contract documents from the commencement until the final acceptance of such work shall be done entirely at the Contractor's risk. No partial payment for, or partial acceptance of, any part of the work shall absolve the Contractor from such risk." Thus, as the City contends, if the pavement to be removed turned out to be thicker than estimated, "[t]he risk

was clearly on the contractor." And as the City also points out, "If the thickness had in fact been thinner than the City estimated, it is unlikely that the contractor would be giving the City a credit."

¶17 Mews emphasizes that, because of the unanticipated thickness, the City did pay more than the contract price, and that the trial court ignored this fact in dismissing its claim. The City explains that it paid Mews more than the contract price "[i]n order to accommodate the contractor and to keep a good working relationship." The City goes on to argue:

> The City is not asking for this money back. But Mews wanted, and still wants, even more—it wants *double* its bid price, an amount picked out of thin air.
>
> It became clear during the course of the appellant's case that there was no written contract provision, nor any arguable oral modification to support this demand. After a while, the judge asked for an offer of proof. Mews's attorney admitted he could not show a meeting of the minds on this issue. The claim was dismissed.

¶18 In reply, Mews refers to § 206.3 of the contract's street construction specifications and maintains that it "provides a specific method of determining payment when additional work is included." Mews then contends that "the trial court would not acknowledge that the City's specifications would allow for subsequent price determination."

¶19 Mews's reply misses the mark. Section 206.3 refers only to the basis of payment or credit for "altered work." The removal of the unanticipated additional thickness of pavement, however, did not qualify as "altered work" under the contract. Section 206.2 of the contract's street construction specifications provides:

> No alteration in the work under the contract shall be made without a written order from the Commissioner. No verbal suggestion or order of any employee of the

> Department of Public Works, or of any other person shall be construed as authorizing any claims on the part of the contractor for extra compensation for labor, materials or other items pertaining to such work, or for damages or any other expense because of the contractor's compliance therewith.
>
> Verbal orders and suggestions as to the performance of the work may be given from time to time by representatives of the Commissioner, but when, in the opinion of the contractor, such orders or suggestions involve extra work for which added compensation should be received, a written order from the Commissioner authorizing such work shall be requested. In the event of any disagreement as to the amount of work involved under any authorized order for extra work, it is specifically agreed by all parties that the decision of the Commissioner shall be binding and conclusive.

Clearly, the removal of unanticipated pavement was not "altered work" under these terms, and Mews has offered nothing to suggest otherwise.

¶20 Thus, once again, Mews's argument is defeated by the terms of the contract. The contract specified the payment price for pavement removal. The fact that the City chose to pay more did not impose any additional obligation on the City. Accordingly, the trial court correctly concluded that Mews had offered nothing, and could offer nothing more, to support its claim.[3]

C. 27th Street Problems / $4,000 Retainage

¶21 Mews argues that the trial court erred "when its special verdict did not ask whether the City breached its contract when it improperly retained $4,000 of Mews'[s] money as a bargaining tool," and "when it did not change the jury's

[3] In a footnote, Mews also argues that the trial court erred in denying its motion to amend its pleadings to add a claim of unjust enrichment. Mews, however, raises this argument for the first time in its reply brief. Therefore, we will not address it. *See* ***Webb v. Ocularra Holding, Inc.***, 2000 WI App 25, ¶10 n.4, 232 Wis. 2d 495, 606 N.W.2d 552 ("We will not entertain arguments raised for the first time in a reply brief."), *review denied*, 2000 WI ___, ___ Wis. 2d ___, 612 N.W.2d 734.

verdict regarding $4,000 of monies retained by the City in violation of the contract." Even if Mews is correct, however, the issue is moot.

¶22 After Mews poured the concrete for a part of 27th Street, it was discovered that the new road had a slight concavity in certain areas. Mews immediately removed and replaced fifteen problem sections of the road. The City, however, demanded removal and replacement of additional sections. Mews refused. As a result, the City, in its own words, "withheld the $33,000 attributable to the North 27th Street pour, as well as the $4,000 retainage normally held until all work is completed."

¶23 Mews's argument is, at best, an academic one. Mews asserts that the City "acknowledged that it had no right in contract or in equity to retain any portion of the $4,000," but also concedes that the City, in its motions after verdict, "offered to immediately pay the $4,000 back to Mews." (Record references omitted.) Indeed, as the City responds:

> It is perplexing that Mews still raises the issue of the $4000 retainage. The contract clearly allowed the City to hold a retainage if the work was not completed properly. It was not, as is shown by the jury's verdict. The City has stipulated that it will now release the $4000, inasmuch as the jury has ruled that the street must be replaced or the contract proceeds can be retained. The trial court ordered this in its judgment, and the City has not appealed from that portion of the order. This is no longer an issue.

(Record reference omitted.) Mews offers no reply. *See* ***Charolais***, 90 Wis. 2d at 109 (unrefuted argument deemed admitted). The issue is moot. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy. In other words, a moot question is one which circumstances have rendered purely academic.") (citation omitted).

D. 27th Street Problems / Special Verdict Questions and Jury Instructions

¶24 Mews also argues that, with respect to the 27th Street problems, "the special verdict was defective and the jury was denied the opportunity to determine whether or not Mews had substantially completed the contract and thus [would] be entitled to recover the contract price less any set[]offs." In related arguments, Mews further contends that the trial court erred in failing to submit special verdict questions on "substantial performance" and "diminution in value damages." In its reply brief to this court, Mews elaborates:

> While the trial court did give the instructions on substantial performance, it was [sic] inappropriately followed by instructions on recision and material breach excusing performance. Unfortunately, the companion instructions on Cost to Correct Defects and Diminution in Value came substantially later in the trial court's instruction presentation. These complicated, and now **separated** instructions, did not allow the jury to understand that Mews could be paid for its substantial performance less the set[]offs claimed by the City. These disjointed instructions clearly misled the jury.

(Record reference omitted.)

¶25 The City contends that "[t]he jury was properly and clearly instructed about substantial performance and its meaning, and was told by the court that Mews would be entitled to some payment if the jury found substantial performance." The City is correct. The court instructed the jury, in part:

> Each party to a contract has a duty to perform his or her obligations under the contract.
>
> Evidence has been received that both 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 the parties received, with relatively minor and unimportant deviations, what they bargained for. But if the 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.

Further, the City points out, counsel for each party addressed the issue of substantial performance in closing arguments to the jury.

¶26 Although Mews argues that the trial court's jury instructions and special verdict questions were confusing and misleading and created an "absurd result," it fails to point to any specific objection it made to the instructions or verdict questions.[4] Moreover, Mews cites no authority requiring the court to submit a specific verdict question on substantial performance, as separate and distinct from the questions it did submit on breach of contract. Additionally, the record reveals that Mews's proposed jury instructions and special verdict questions did not address "substantial performance."

[4] The only portion of the record Mews cites in support of its argument indicates that the instructions/verdict conference was conducted in chambers, off the record. The only on-the-record discussion of this subject occurred after the jury reached its verdicts, but just before the trial court received them. Even at that point, however, Mews's counsel failed to offer a specific objection and did not explain how the trial court's instructions on substantial performance denied the accomplishment of exactly what Mews desired. Counsel stated, in relevant part:

> Your Honor, we thought the question that needed to be asked first was a factual question, and that was whether the Mews Company had substantially performed its work relative to the concrete installation. We thought that was a factual determination that the jury needed to make. Once a factual determination was made as to substantial performance, there was no question as to the nonpayment and the payment flow.
>
> The issue that remained then … would be the issue of damages.

¶27 Mews maintains that "[w]ithout questions determining substantial performance or diminution in value damages, Mews has provided the City with a **free** useable roadway which substantially meets contract specifications," and that the evidence established its substantial performance. The City responds, however, that "there was evidence in the record to show that the defect was significant, and that the road held water." The record supports the City's position.

¶28 "The form of a special verdict is within a trial court's discretion and an appellate court will not interfere with it if the material issues of fact are encompassed within the question asked and appropriate instructions are given." ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 465, 405 N.W.2d 354 (Ct. App. 1987). Mews has failed to establish that the instructions were inaccurate or incomplete, or that the special verdict questions were inadequate or erroneous in any way.

E. Environmental Report

¶29 Under the contract, Mews was to provide an environmental report to the City. Mews, however, refused to provide the report to the City because it believed the City had materially breached the contract by failing to pay the contract price for completed test pit excavation work. As a result, the City counterclaimed for the "damages incurred by retaining another contractor to perform said work." The jury found that Mews breached the contract in this regard and awarded the City $6800.

¶30 Mews maintains that when the time came to draft the special verdict questions, it "insisted that the jury be given an opportunity to determine whether or not the City had materially breached its contract [by] not paying Mews, thereby relieving Mews of [its obligation to provide the report]." Mews contends that the

trial court "refused [its] request and fashioned the verdict so that the jury merely determined whether or not Mews had breached the contract."[5] Thus, Mews argues that the trial court erred in refusing to allow the jury to specifically decide whether the City had breached the contract regarding this issue.

¶31 The City responds that "[t]he jury was instructed that it could only find for the City on its counterclaim if the City was not in material breach of the contract." Mews offers no reply. *See* ***Charolais***, 90 Wis. 2d at 109 (unrefuted argument deemed admitted). Thus, once again, Mews has failed to establish that different instructions or distinct verdict questions were required. We are satisfied that the instructions and verdict questions accurately and adequately framed the issues for the jury. *See* ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 345, 564 N.W.2d 788 (Ct. App. 1997) (court of appeals reviews jury instructions "in their totality to determine whether they properly state the law to be applied"); ***Z.E. v. State***, 163 Wis. 2d 270, 276, 471 N.W.2d 519 (Ct. App. 1991) ("We will not interfere with the form of a special verdict unless the question, taken with the applicable instruction, does not fairly present the material issues of fact to the jury for determination.").

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[5] Once again, however, Mews points to no specific objection or submission. *See* ¶26 n.4, *supra.* Just before the verdicts were received, Mews's counsel merely stated:

> In this section, the counterclaim, we think the first issue that needs to be identified is in fact whether or not there was a material breach by the City of Milwaukee. We think it's important to segregate that out. If there is not a material breach by the City of Milwaukee, then I think what would necessarily flow is based upon the facts[:] is there a breach by the Mews Company[?] And if there was, then we would have a damage question, but I think to expect the jury to follow the labyrinth of jury instructions through the actual verdict is expecting too much in my experience, and I think the law supports that when possible, the jury verdict should be narrowed as much as possible to avoid confusion and making sure that we don't have any bleeding over from one concept to another that may be beyond the understanding of normal jurors.

F. Interest

¶32 Mews, relying on WIS. STAT. § 66.285(2), challenges the trial court's denial of interest on the damages it was awarded. Although we conclude that Mews's statutory reliance is misplaced, we agree that, under the contract, Mews was entitled to preverdict interest on its award.

¶33 As we will discuss at length in our consideration of the City's cross-appeal, the jury found that the City agreed to pay Mews $100 per cubic yard for environmental test pit excavation. Based on this finding, the trial court ordered the City to pay Mews $66,200 in damages. The court, however, denied Mews's request for approximately five years of preverdict interest on that amount.[6]

¶34 Mews argues that interest was required under WIS. STAT. § 66.285(2), which provides that municipalities failing to "pay timely the amount due on an order or contract shall pay interest" at the rate specified by statute. In

[6] The record, in this regard, is somewhat unclear. The trial court's comments, at the hearing on postverdict motions, were brief and confusing:

> I am basing this on the exception sighted [sic] in Section (4) (e) to 66.285 of the Wisconsin Statutes. I clearly think in this case payment was made pursuant to the contract early on and the dispute was covered until later at the point that the dispute was discovered at the notice and the requirements of that statute. So, there is interest that can be claimed on the entirety of the judgment that the plaintiff is entitled to pursuant to the first section of the verdict in this case. At least pursuant to that statute, there is some post[]verdict interest that can be awarded from the time of the verdict until the time of judgment, but that is taxed by the clerk at the time the judgment is entered.

The order for judgment states that "[t]he Plaintiff is not entitled to interest pursuant to Sec. 66.285, Wis. Stats. under the exception provided in Sec. 66.285(4)(e), Wis. Stats." The judgment itself provides, in relevant part, that Mews recover from the City interest on the verdict in the sum of $3,438.92 "through February 8, 1999, with a per diem thereafter of Twenty Three and 08/100 Dollars." We will assume that the trial court denied preverdict interest on the damages, under the exception in WIS. STAT. § 66.285(4)(e), but granted interest, under WIS. STAT. § 814.04(4), on the award from the time of the verdict until the date of judgment.

denying Mews's request for interest, however, the trial court relied on § 66.285(4)(e), the statutory exception that would exempt the City from paying interest on late payments where it has provided "before the date on which payment is not timely, notice of [a 'good faith] dispute.[']" Mews argues that the trial court's reliance on § 66.285(4)(e) was misplaced because "[t]he City presented no evidence (and none exists) that a 'notice of [the] dispute' was sent 'before the date on which payment' was due." We agree that the trial court erred in relying on § 66.285(4)(e). But, as we will explain, because § 66.285(4)(e) is inapplicable, we need not address whether, under that statute, the City provided timely notice of the dispute.

¶35 The City's provision for interest on late payments in construction contracts, included in the City's invitation to bid, and incorporated by reference into the Mews contract, explicitly modifies the deadlines set forth in WIS. STAT. § 66.285(2).[7] Therefore, under § 66.285(4)(d),[8] § 66.285(2) does not apply to the contract. The exceptions under § 66.285(4) delineate the circumstances under which § 66.285(2) "does not apply." *See* WIS. STAT. § 66.285(4). Obviously,

[7] The City's provision for interest on late payments in construction contracts provides:

> Payment to the Contractor will be deemed timely if the payment is mailed, delivered, or transferred within 60 calendar days after receipt of a properly completed invoice or receipt and acceptance of the property or service, or the date of final completion as determined by the City when all corrective measures are complete on punch list items under the order or contract, whichever is later. *If the City does not make payment by the 60th calendar day, the City shall pay simple interest beginning with the 31st calendar day at the rate of one percent per month.*

(Emphasis added.)

[8] WISCONSIN STAT. § 66.285(4)(d) states that § 66.285(2) does not apply to a "contract which provides for the time of payment and the consequences of nontimely payment, if any deviation from the deadlines established in [§ 66.285(2)] appears in the original bid or proposal."

therefore, if, as in this case, § 66.285(2) is inapplicable, the exception under § 66.285(4)(e), on which the trial court relied, simply does not come into play.

¶36 Thus, in this case, the contract, not the statutes to which the parties refer, controls. The contract clearly provides the terms governing interest on late payments. We therefore reverse the trial court's denial of interest on the damages awarded to Mews, and remand for computation and entry of preverdict interest.

G. Costs

¶37 Mews also argues that because it was the prevailing party by virtue of its damages award of over $66,000, the trial court erred in denying its request for reimbursement of litigation costs, totaling $6,614.05, under WIS. STAT. § 814.01.[9] The City responds that Mews was not the prevailing party because one of Mews's claims was dismissed on summary judgment, another claim was dismissed before submission to the jury, and Mews prevailed on only one of its two remaining claims. Thus, the City maintains, the trial court had a number of options regarding the allowance of costs, including apportioning the costs according to the percentage of recovery or ordering each side to cover its own costs. Mews offers no reply.

¶38 The City is correct. Indeed, Mews's premise that it was the "prevailing party" is dubious. 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

[9] WISCONSIN STAT. § 814.01(1), provides: "Except as otherwise provided in this chapter, costs shall be allowed of course to the plaintiff upon a recovery."

contention."[10] In this case, therefore, one could conclude that the prevailing party was Mews, or the City, or that they shared the "prevailing party" status. The order for judgment provided that "[n]either party shall be entitled to recover statutory costs from the other, and no costs shall be taxed." Although correctly arguing that it prevailed on one of its claims, Mews offers no authority that would have required the trial court to award costs based on that recovery, given that the City prevailed on other claims.

III. CITY'S CROSS-APPEAL—THE TEST PITS

¶39 The City cross-appeals, arguing that the trial court erred: (1) in determining that the contract provision relating to test pit payments was ambiguous; and (2) in denying its motion for judgment notwithstanding the verdict, or for a new trial, because (a) no credible evidence established that the City agreed to pay Mews $66,000 to dig twenty-one test holes, and (b) a price of $66,000 for twenty-one holes is so unreasonable that judgment notwithstanding the verdict or a new trial is required. We conclude that the trial court correctly considered the contract provision to be ambiguous and correctly denied the City's motion.

¶40 In addition to the paving work, the bidding process and contract called for environmental assessment work in order to prepare the area for a North Avenue development project. Thus, the City sought bids not only for the paving work, but also for the digging of six "test pits" for environmental monitoring. Mews's bid document provided for "6 test pits each to 10-12 ft. deep at $100 per

[10] 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). Here, however, we refer to the definition in existence at the times relevant to this case.

cubic yard" and a "TOTAL AMOUNT" of $100 for that line item; the contract document prepared by the City, however, changed the "TOTAL AMOUNT" to $600. Ultimately, the City required Mews to dig twenty-one test pits.

¶41 Mews consistently billed for $100 per cubic yard. In December 1993, the City paid Mews $47,430—at the rate of $100 per cubic yard—as a partial payment for test pits. The payment was approved by Walter Graetz, a construction supervisor for the City. Two of Graetz's superiors, Thomas Rach and Donald Janke, approved the unit price of $100 per cubic yard by signing their names below this statement: "CERTIFIED CORRECT AS TO QUANTITIES COSTS AND CONSTRUCTION."

¶42 In a February 1994 letter to the accounting firm used by Mews, the City stated: "The unit price of $100.00 per cubic yard was supposed to be $100.00 per test pit. This item is under discussion, and a resolution between Mews Companies, Inc. and the City will be forthcoming." The City did not send a copy of this letter to Mews. In fact, the City first notified Mews, in writing, that the test pit price was in dispute in a letter dated March 11, 1994, which states:

> The test pits will be paid at $100 for 6 test pits or $16.66 each. A copy of your bid page showing the $100 total for 6 test pits is attached. Since there were 21 test pits the total amount for this bid item will be 21 ($16.66) or $350.00. In estimate no. 4, Mews Companies was mistakenly paid $100 per cu. yard for this bid item. This will be adjusted to reflect the actual bid price.

Thus, the City had paid or proposed three different prices: $100 per cubic yard; $100 per pit; and $16.66 per pit. The jury found that the City had agreed to pay Mews $100 per cubic yard for test pit excavation.

¶43 The City first argues that the trial court (Judge Connors) erred in concluding that the contract was ambiguous and, thus, in denying its motion for

summary judgment. Relying on ***Wilke v. First Federal Savings & Loan Ass'n of Eau Claire***, 108 Wis. 2d 650, 654, 323 N.W.2d 179 (Ct. App. 1982), the City notes that "[a] contract is only ambiguous when it is susceptible to more than one *reasonable* interpretation," and maintains that this contract is susceptible to only one *reasonable* interpretation.

¶44 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.

Borchardt v. Wilk, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990) (citations omitted). Any ambiguity in a contract must be construed against the drafter—in this case, the City. *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 acknowledged, "In interpreting an ambiguous contract provision, we must reject a construction resulting in unfair or unreasonable results." ***Borchardt***, 156 Wis. 2d at 428.

¶45 The internal discrepancy of the bid document, and the discrepancy between the bid document and the contract, rendered considerable confusion and produced an ambiguity calling for at least some explanation. Indeed, the City can hardly suggest otherwise, given that, at one time or another, it has posited *three* different prices that, it maintained, were due Mews for test pit excavation under the contract. Thus, we agree with the trial court's conclusion that the contract was ambiguous.

¶46 The City also argues that no credible evidence established a meeting of the minds that would require the City to pay "the absurd amount of $66,000" for twenty-one test holes and, therefore, that the trial court erred in denying its motion for judgment notwithstanding the verdict. The City points out that the two other bidders had entered $10 and $15 as their "per cubic yard" prices for the test pits and argues that "if the City had increased the contract amount [to $100 per cubic yard] as Mews ultimately demanded, a disappointed bidder or taxpayer could have sued the City for failing to award the contract to the lowest bidder." The City fails to acknowledge, however, that the three bidders also submitted drastically different bids on other line items, and that the lowest bidder was determined on the basis of the bids for the project in its entirety, not on the basis of the bids for individual line items.

¶47 Additionally, we note that although the City has offered plausible arguments that certainly could have led the jury to adopt its theory, it has ignored testimony that could have led the jury to conclude that Mews bid $100 per cubic yard for test pit excavation, and that the bid was reasonable. For example, Troy Mews, the son of Mews's president, testified that he "overs[aw] the test pit digging and the excavation of the contaminated soil." He explained that test pit excavation differs significantly from other types of excavation done by Mews:

> A: Regular excavation of a road or a mass excavation of a hole is high productivity. You're loading trucks, you're moving material as far as possible. And the test pits is the process … you take a bucket of soil and … once that comes out of the hole the environmental consultants will test the soil. Then you have to wait, physically stop, everything stops until the environmental person comes back with a reading from their little meter to tell you if it is a bad contaminant or if it's clean. If it is clean you put it in the clean pile and if it is dirty it goes in the truck and we move it over to another lot, cover it with plastic every night.

Q: And as part of the test pit work you did, what else was included in the test pit work that you were doing? Digging, obviously there was the man that was there. Can you describe to the jury the process of the piles and the fencing and the plastic and all of that?

A: It was myself, the operator, piece of equipment, dump truck driver, the environmental person. Like I was saying, every time the material was found either to be dirty or clean[] it had to be put in place to negate [sic] the clean from the dirty. And the dirty material went to an area which we placed on plastic on the ground, covered it up, pushed it up. Covered it up with plastic every night so the rain wouldn't disburse the petroleum to different sites.

Q: Now, you understood originally … there would be six areas … done for test pits, is that right, six test pits … originally contemplated?

A: Right.

Q: And you were asked, the Mews Company was asked to dig more?

A: Right.

Q: You understood 21 of the holes were actually dug?

A: Correct.

Q: How would you compare or how would you describe for the jury the difference in sizes, the range of size between these pits? Were they uniform or were they different?

A: They may have differed for the test pits specifically.

Q: Right, the size of the test pits.

A: They might have varied a little bit, but they were basically trying to find the extent of the contamination.

Q: And then when you found the contamination were there city inspectors on the site keeping track of the yardage that you were excavating?

A: That's correct.

Q: And how did they do that?

A: They conferred with the environmental person. They measure the hole. They compared notes as far as dimension of the hole, the depth of the hole. Every day at the end of the day they for sure compared notes and possibly during the middle of the day they talked and quite honestly I don't know if they talked about

the size out there in the middle of the day but every afternoon they would compare notes and actually copy drawings.

Q: Now, at some point you were involved in assisting the Mews Company in putting together numbers to try to get this project; is that correct?

A: Correct.

Q: On the test pit issue you and your father separately work on pricing for that work; is that correct?

A: Correct.

Q: And what was the amount that was ultimately bid for test pit work?

A: $100 per cubic yard.

Q: And do you recall when you made your calculations what calculation or what range you came up with?

A: I was considerably higher, I believe $132, $140 a cubic yard.

Q: And what were you basing that, what were you including in your equation as the type of items that were part of your cubic yards calculation?

A: The necessary equipment, manpower to perform this in being that it is very slow, it is very time consuming.

Q: As compared to regular excavation?

A: Correct.

Q: Now, during your years of experience have you also prepared bids, other bids for the Mews Company?

A: Portions of the projects, correct.

Q: Have you ever prepared an excavation bid, bids that included excavation in the past?

A: Pavement removal, excavation of dirt. I have done that, yes.

Q: And has it been your experience that excavation is always by the cubic yard or is there some other method?

A: It's primarily by the cubic yard.

Unquestionably, based on this testimony, the jury could have concluded that Mews bid the test pit excavation on a $100-per-cubic-yard basis, that the City

accepted and initially paid on that basis, and that $100 per cubic yard was reasonable given the special circumstances surrounding test pit excavation.

¶48 Additionally, Mews maintains that the City, by paying the $47,430 bill, and by failing to advise it (Mews) of the perceived error until after all test pits were completed, provided the evidence that the parties had agreed to $100 per cubic yard. Further, Mews points out, the City's bid documents, incorporated by reference into the contract, state:

> In case of discrepancy between the total indicated in the proposal and that obtained by adding the products of the quantities of work and the unit prices, the unit prices shall govern. Any errors found in the total indicated shall be corrected, and the contract award shall be made to the lowest responsible bidder based on the corrected total.
>
> IF DOUBT EXISTS AS TO WHAT IS BID, THE BID WILL BE REJECTED.

¶49 The trial court's instructions to the jury included the following:

> The court has determined that the contract language relating to payment for environmental test pit work … is ambiguous.… The general rule is that if there is an ambiguous agreement, it must be more strongly construed against the party who drafted it. If a written contract is ambiguous, you must determine the intent of the parties, if you can, by considering the facts and circumstances surrounding the making of the contract and the words and actions of the parties afterwards.
>
> ….
>
> You are the sole judges of the credibility of the witnesses and [of] the weight to be given to their testimony.

¶50 As our supreme court has explained: "Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659

(citations omitted). If evidence in the record "gives rise to more than one reasonable inference," even if that evidence is weaker and less convincing than contradictory evidence, we must "accept the particular inference reached by the jury." *See* ***id.*** at ¶39. Because credible evidence supported the jury's finding that the City contracted to pay Mews $100 per cubic yard for test pit excavation, we affirm the trial court's denial of the City's motion challenging that aspect of the verdict.

IV. CONCLUSION

¶51 Accordingly, we affirm in all respects except on the issue of whether Mews was entitled to preverdict interest. On that matter, we remand for the computation and entry of preverdict interest on Mews's award, consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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