COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1409

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

PIONEER ROOFING, INC.,

PLAINTIFF-RESPONDENT,

V.

WESTRA/CONSTRUCTION, INC. AND
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,

PATRICK CUDAHY INCORPORATED AND
SMITHFIELD FOODS, INC.,

DEFENDANTS,

FOURTH DIMENSION DESIGN, INC.,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Westra Construction, Inc. and Fidelity and Deposit Company of Maryland (collectively, Westra) appeal the trial court's award of damages to Pioneer Roofing, Inc. (Pioneer). Westra claims the trial court erred in finding that improper sealing, for which Westra was responsible, caused the roof of a building being built for Patrick Cudahy, Inc. (Cudahy) to blow off during construction. Westra further argues the trial court erred in awarding damages to Pioneer for repairing the roof under the equitable theory of *quantum meruit* because this remedy is inappropriate when the parties have a written and express contract covering the work. Westra submits that even if *quantum meruit* were an appropriate remedy, Pioneer failed to prove its damages.

¶2 Westra also contends that the trial court erred in awarding Pioneer all of its attorney fees and costs under the parties' contract provision permitting the prevailing party to be reimbursed for its attorney fees. Westra submits that Pioneer will not be the prevailing party if the *quantum meruit* damages are reversed, and, in any event, the trial court erred because even if the *quantum meruit* damages are considered, most of Pioneer's damages awarded by the trial court were not connected to a dispute arising out of the contract. Finally, Westra asserts that, if the attorney fees award is affirmed, it should be reduced proportionately.

¶3 We affirm in part and reverse in part. While ample evidence supports the trial court's finding that improper sealing caused the roof to blow off,

Westra is correct that *quantum meruit* awards are not available when, as here, a contract covers the disputed additional costs. As a result, we decline to address whether sufficient evidence was before the trial court to support its decision on *quantum meruit* damages.[1] Additionally, because of our decision, we must remand the attorney fees and costs determination to the trial court for reconsideration.

I. BACKGROUND.

¶4 Cudahy hired Westra as its general contractor for the construction of a new food processing building. Westra entered into a comprehensive written contract with Pioneer to install the roof. Specifically, Pioneer was to install a Seal Dry roofing system that required the existing concrete roof deck to be caulked and sealed before the roof was installed. The sealing, however, was not the responsibility of Pioneer, although Pioneer's employees were required to inspect the roof prior to beginning the roof installation. On March 26, 1996, during construction, the roof blew off.

¶5 Pioneer and Westra disputed both the cause of the roof accident and their roof construction job responsibilities. Without resolving their differences, Westra instructed Pioneer in writing to "repair any damage that occurred and complete the roof as soon as possible." Pioneer repaired the roof, finishing it in June 1996, but did not submit its repair costs to Westra until October 1996. Westra refused to pay for the additional costs sought by Pioneer, arguing that the

[1] Because of our decision on this first issue, it is not necessary to address the remaining arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

repair costs were abandoned when Pioneer failed to submit its claims for roof repairs "without delay."

¶6 Although the total contract price for Pioneer's work was approximately $160,800, Pioneer sued Westra, Smithfield Foods, Inc. (Smithfield), Cudahy, and Fidelity and Deposit Company of Maryland (F&D), seeking damages in excess of $728,000. Westra and F&D counterclaimed against Pioneer for breach of the subcontract and cross-claimed against Cudahy and Smithfield for contribution and/or indemnification. Cudahy then cross-claimed against Westra and F&D for breach of the original contract. Westra and F&D then brought a third-party complaint against John Rave. Later, Fourth Dimension Design, Inc. was substituted for Rave. Eventually Smithfield, Cudahy and Fourth Dimension Design settled their claims and were dismissed from the suit. Westra's counterclaim was also dismissed before trial. The trial court conducted a bench trial. After the trial was completed, but before the trial court's decision, the trial court permitted Pioneer to amend its pleadings to allege a claim under *quantum meruit*.

¶7 The trial court made the following findings: the roof blew off because the deck was improperly sealed; Westra or its other subcontractors, not Pioneer, were responsible for sealing the deck; the repairs done by Pioneer after the roof accident fell within the "disputed work" provision of the contract, and the "disputed work" contract clause between Westra and Pioneer required Pioneer to submit its claims for disputed work to Westra "without delay"; by waiting almost four months after the roof was completed before submitting its roof repair costs, Pioneer violated the contract provision requiring submission "without delay"; as a consequence, Pioneer could not recover its additional repair costs under the contract.

¶8 Despite language in the contract which states that a "failure to submit [Pioneer's] additional costs without delay would be deemed to have abandoned any claim therefor," the trial court found that under the equitable theory of *quantum meruit*, Pioneer was entitled to recover its costs for the additional repairs. Using a mathematical formula which consisted of taking the entire roof construction costs and then subtracting from them an amount representing the completed work and a percentage amount representing the work remaining before the roof accident, the trial court found, using the "reasonable certainty" standard, that the reasonable value of Pioneer's repair costs entitled Pioneer to $25,000. It also awarded Pioneer its attorney fees under a contract provision permitting the prevailing party in a dispute to recover its attorney fees and costs. As a result, the trial court awarded Pioneer $84,270 as the balance due under the subcontract between Westra and Pioneer, $7,650 for installing extra curbs, $1,971 for other approved work under the contract, and $25,000 for *quantum meruit* damages.[2] The trial court also concluded that Westra was responsible for Pioneer's attorney fees of $135,800. Westra brought a motion to reconsider which was denied and the trial court awarded an additional $2,000 to Pioneer for its attorney fees generated in defense of the motion to reconsider.

II. ANALYSIS.

¶9 Westra argues that the trial court erred in several respects. First, Westra asserts that the trial court erred in determining that improper sealing was responsible for the roof accident. Westra next contends that the use of the equitable theory of *quantum meruit* was improper because the parties had a valid

[2] Because Pioneer was unwilling to submit a final lien waiver, Westra retained certain sums due under the contract. During trial Pioneer signed the final lien waiver.

contract covering the disputed costs. Westra further argues that even if *quantum meruit* were an appropriate remedy, the record contains no reasonable basis for determining the sums Pioneer expended in repairing the roof. Finally, Westra contends that the trial court erred in awarding Pioneer its attorney fees pursuant to a provision in the contract. Westra claims that if this court reverses the trial court's *quantum meruit* award, Pioneer will not be the prevailing party under the contract and, instead, Westra would be entitled to its attorney fees. Additionally, Westra argues that Pioneer is not entitled to its attorney fees even if the *quantum meruit* claim is affirmed. Westra theorizes that since Pioneer sought over $728,000 in damages for repairing the roof, and was awarded only $9,621 plus the *quantum meruit* damages (besides the unpaid contract amount withheld because of the lien waiver dispute), the greatest amount of damages—the *quantum meruit* damages awarded to Pioneer—did not arise under the contract provision authorizing the payment of attorney fees. Westra reasons that this fact prevents Pioneer from recovering attorney fees under the contract and, alternatively, Westra argues the attorney fees should be reduced in proportion to the amount Pioneer originally sought.

A. *Evidence supports the trial court's determination regarding the cause of the roof accident.*

¶10 The trial court determined that "air infiltration under the roof membrane was the cause of the blow off." In determining what caused the air infiltration, the trial court found that the roof had been improperly sealed. Westra argues that the trial court erred in finding that the inadequate sealing caused the roof to blow off. Westra asserts that several other conditions could have caused the roof accident, and that "there is no credible evidence upon which the trial court could base a reasoned choice between possible inferences of causation."

¶11 A trial court's findings of fact will be affirmed unless they are clearly erroneous. *See* ***Sellers v. Sellers***, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996); *see also* WIS. STAT. § 805.17(2) (1997-98).

¶12 Key to the trial court's decision was evidence that Pioneer had complained to Westra before the roof accident that the sealing was unsatisfactory. The trial court found that "Pioneer personnel specifically warned Westra representatives that lack of proper sealing was causing air infiltration and resulting in 'fluttering,' which could cause a 'big problem.'" The trial court also relied upon the observations of a Pioneer employee and the Seal Dry representative who viewed the roof after the roof accident. Both witnesses determined that improper sealing caused the air infiltration which blew off the roof. The trial court concluded that "[these two witnesses] establish[ed] with reasonable certainty that the primary cause of the roof accident was the failed/improper sealing of the deck and the presence of unsealed holes in the deck which were not the responsibility of Pioneer, i.e. made by other Westra subcontractors who failed to apprise Pioneer of their existence."

¶13 The record supports the trial court's finding that improper sealing attributable to either Westra or its other subcontractors caused the roof accident. While no one testified with absolute certainty how the air infiltrated under the roof, the earlier concerns of Pioneer workers that the sealing was insufficient and would compromise the roof's ability to withstand heavy wind, coupled with the witnesses' observations after the roof accident that the deck showed signs of improper caulking and sealing, constituted sufficient evidence to meet the "reasonable certainty" standard. *See* ***Kruse v. Horlamus Indus., Inc.***, 130 Wis. 2d 357, 362-63, 387 N.W.2d 64 (1986) ("In Wisconsin the ordinary or lowest burden of proof requires that the [fact finder] must be satisfied to a reasonable certainty by

the greater weight of the credible evidence."). Although Westra suggests other conditions which may have caused the roof accident, it has offered nothing to prove that the trial court's findings were clearly erroneous. Thus, we accept the trial court's finding that improper sealing caused the roof accident and Westra was responsible for sealing the roof.

B. *The written contract precluded a quantum meruit award.*

¶14 Undisputed at trial was the fact that Westra directed Pioneer, in a letter, to complete the roof work, including the additional repairs generated by the accident. However, the parties disagreed as to which contract clause covered the additional repairs. The trial court resolved the dispute by finding, contrary to Westra's position that Pioneer's repairs fell within the "extra work" clause of the contract, that the "disputed work" clause governed Pioneer's repairs to the roof. This provision obligated Pioneer to bill Westra for the work "without delay" and it required a notice of claim within thirty days.

> Disputed work shall be performed as ordered in writing by the CONTRACTOR and the proper cost or credit breakdowns therefor shall be submitted without delay by SUBCONTRACTOR to CONTRACTOR.
>
> SUBCONTRACTOR shall give notice of claim relating to any work for which extra compensation is asserted within 30 days after such work is performed or SUBCONTRACTOR shall be deemed to have abandoned any claim therefor.

Finding that Pioneer submitted no bills until four months after the roof was completed, the trial court determined that Pioneer could no longer recover its repair costs under the contract. However, rather than applying the contract language that Pioneer "abandoned any claim therefor," the trial court resorted to

the doctrine of *quantum meruit* and determined that Pioneer was entitled to its actual additional reasonable costs.

¶15 Westra argues that the trial court erred in its *quantum meruit* ruling for three reasons. First, it maintains that case law prohibits an award under *quantum meruit* when the parties have a written contract governing the disputed work.[3] Second, it argues that in order to successfully recover under *quantum meruit*, a party must prove that not only were the services for which payment is sought accepted, but also, that the party providing the services anticipated payment. Here, Westra submits, there is ample evidence that Pioneer did not reasonably believe Westra was going to pay the additional costs beyond the contractual price. Finally, Westra contends that Pioneer failed to submit sufficient evidentiary facts to support the trial court's damage award.

¶16 In cases involving claims for money in which the party seeks to obtain damages under an equitable doctrine we will uphold the trial court's factual findings unless they are clearly erroneous. *See* ***Halverson v. River Falls Youth Hockey Assoc.***, 226 Wis. 2d 105, 115, 593 N.W.2d 895 (Ct. App. 1999). However, the application of those facts to the legal standard presents a question of law that we review *de novo*. *See* ***id.***

[3] Although no unjust enrichment claim was made by Pioneer, the doctrine of *quantum meruit* is "founded upon the principle of unjust enrichment." *See* ***Ramsey v. Ellis***, 168 Wis. 2d 779, 784-85, 484 N.W.2d 331 (1992). Unlike *quantum meruit*, which employs the legal fiction of an implied contract, "unjust enrichment" does not. The elements of unjust enrichment require that: (1) one party confers a benefit on another; (2) the receiving party knows of the benefit; and (3) it is inequitable for the receiving party to accept or retain the benefit without paying for its value. *See* ***Ramsey v. Ellis***, 163 Wis. 2d 378, 381, 471 N.W.2d 289 (Ct. App. 1991); WIS JI—CIVIL 3028. The measure of damages differs between the two doctrines. Damages in unjust enrichment claims are measured by the benefit conferred on the receiving party while damages in a *quantum meruit* claim are measured by the reasonable value of the other's services. *See* ***Ramsey***, 168 Wis. 2d at 784-85.

¶17 "Literally translated 'quantum meruit' means 'as much as he deserves.' Recovery in quantum meruit is allowed for services performed for another on the basis of a contract implied by law to pay the performer the reasonable value of the services." ***Ramsey v. Ellis***, 168 Wis. 2d 779, 784, 484 N.W.2d 331 (1992) (citation omitted). In order to recover under *quantum meruit*, "there must be sufficient competent evidence in the record which shows that the services were performed at the instance of the person to be charged and that the performer expected reasonable compensation." ***Gename v. Benson***, 36 Wis. 2d 370, 376, 153 N.W.2d 571 (1967). Further, "[t]here can be no recovery in *quantum meruit* when a claimant has in fact already been compensated." ***Id.***

¶18 Westra first argues that the trial court improperly applied the *quantum meruit* doctrine because *quantum meruit* is not an available remedy when an existing contract covers the disputed costs. We agree.

¶19 The longstanding rule states that "[w]here a valid express contract is proven no recovery can be had on an implied contract." ***Schultz v. Andrus***, 178 Wis. 358, 361, 190 N.W. 83 (1922); *see also* ***Roszina v. Nemeth***, 251 Wis. 62, 67, 27 N.W.2d 886 (1947); ***Schneider v. Allis-Chambers Mfg. Co.***, 196 Wis. 56, 62, 219 N.W. 370 (1928); ***Manning v. School Dist. No. 6 of Ft. Atkinson***, 124 Wis. 84, 102 N.W. 356 (1905). The rule was recently affirmed by implication in ***Gorton v. Hostak, Henzl & Bichler***, 217 Wis. 2d 493, 510 n.13, 577 N.W.2d 617 (1998) (holding that when an "award is governed by the contract existing between the parties, quantum meruit and implied contract arguments are inapposite").

¶20 Case law permits recovery under *quantum meruit* if services rendered were "extras" not covered by the parties' contract, *see* ***Martineau v. State Conservation Comm'n***, 54 Wis. 2d 76, 81, 194 N.W.2d 664 (1972), or when

the contract is invalid or unenforceable, *see* ***La Velle v. De Luca***, 48 Wis. 2d 464, 469-70, 180 N.W.2d 710 (1970). Here, however, Pioneer was not entitled to *quantum meruit* damages because the parties' contract was valid and enforceable. Further, the roof repair work was not outside the contract. The parties contemplated that "extra work" and "disputed work" costs would arise during the course of construction, and the contract provisions spelled out the manner in which those costs would be treated.

¶21 The trial court relied solely on ***Tri-State Home Improvement Co. v. Mansavage***, 77 Wis. 2d 648, 253 N.W.2d 474 (1977):

> Much like in Mansavage, Pioneer should not be deprived of any compensation when Westra knowingly accepted (in fact, demanded) costly repairs for which Pioneer was not responsible and which resulted in a significant windfall for Westra. If, in fact, Pioneer had complied with the provisions of par. E of the subcontract, Westra would be liable for all costs of repair, including normal overhead and profit. However, since the measure of damage in quantum meruit is the net benefit to Westra, Pioneer is limited to recovering only the actual costs of repair.

The trial court's reliance on ***Mansavage*** was misplaced. ***Mansavage*** applies only when, as happened in that case, the contract between the parties was breached. There, the home improvement firm sued the homeowners for money due under the contract. *See* ***id.*** at 654-55. It contended that it had completed the contract, but the homeowners refused to pay, asserting that the contract had not been fulfilled because additional work remained undone. *See* ***id.*** On the second day of trial, the home improvement firm attempted to amend the complaint to include a *quantum meruit* claim. *See* ***id.*** at 657. The trial court refused the request and ultimately determined that the contract had been breached, resulting in no recovery for the home improvement firm. On appeal, the supreme court stated that the trial court

"abused its discretion in refusing to allow an amendment" to include a *quantum meruit* claim. ***Id.*** at 658. ***Mansavage*** instructs that a breached contract should be treated like an invalid or unenforceable contract, thus permitting the recovery of the reasonable value of the completed work.

¶22 Such was not the case here. First, Pioneer's and Westra's contract duties were discharged. The roof was completed and, after the lien waiver was signed, Pioneer was paid the agreed amount for installing the roof. Second, the parties' contract contained clauses dealing with additional "disputed work" occurring during the construction project. Pioneer simply failed to comply with the terms of the contract by waiting four months after the roof was completed before requesting additional sums from Westra. Pioneer's situation was analogous to that found in ***Johnson v. Gudmundsson***, 35 F.3d 1104 (7th Cir. 1997):

> [T]he mere fact that work or labor has been done for another does not give rise, by itself, to a duty to compensate. For example, where preliminary services are conferred for business reasons, *without the anticipation that reimbursement will directly result*, but rather, with the expectation of obtaining a hoped-for contract and incidental to continuing negotiations related thereto, quasi-contractual relief is unwarranted.

Id. at 1114 (citation omitted). Here, the record points to Pioneer's decision to repair the roof for business purposes. Westra had indicated it was considering bringing in another firm to complete its contract and Pioneer clearly wanted to remain on the job. Consequently, Pioneer is not entitled to *quantum meruit*.

¶23 Moreover, the record establishes that one of the essential elements to *quantum meruit* recovery was not met. As noted, *quantum meruit* requires the party to expect to be paid by the other for its work. Here, Westra never agreed to compensate Pioneer for the additional work. Thus, Pioneer, at the time of

performance, had no reasonable basis for believing that Westra would pay it for the additional repairs. In fact, shortly after the roof blew off, Westra informed Pioneer that it was instructing all of its subcontractors to bill Pioneer for any additional costs resulting from the roof accident. Thus, Westra evinced no intention of paying money to Pioneer beyond the contract price. Although Tony Haddad, a Westra employee, did write that they would "sit down at the end of the project and look at additional costs," he never agreed to pay any amount of money and, soon after, he reneged on this suggestion and contended that the repairs were entirely Pioneer's problem.

¶24 Pioneer's own witness confirmed that Pioneer did not expect Westra to pay its additional repair costs. At trial, a Pioneer employee admitted that no one had compiled a list of additional costs generated by the roof accident until after consulting with a lawyer, and then the request for additional compensation was not made until October 1996. Thus, we conclude the trial court erred in granting *quantum meruit* damages because *quantum meruit* was unavailable given that an express contract governed the work and, additionally, Westra never agreed to compensate Pioneer for the additional repair costs.

C. *Attorney fees and costs must be reconsidered on remand.*

¶25 Ordinarily, Wisconsin adheres to the American Rule with respect to attorney fees; that is, each party pays its own attorney. *See* ***Wisconsin Retired Teachers Ass'n, Inc. v. Employe Trust Funds Bd.***, 207 Wis. 2d 1, 36, 558 N.W.2d 83 (1997). This rule does not apply when a contractual provision permits the recovery of attorney fees by the prevailing party. *See* ***Cedarburg Light & Water Comm'n v. Glens Falls Ins. Co.***, 42 Wis. 2d 120, 124-25, 166 N.W.2d 165 (1969).

¶26 Following its decision on the merits, the trial court found that Pioneer was the prevailing party. The trial court then invoked the contract provision authorizing the payment of attorney fees to the prevailing party. The contract reads:

> X. ATTORNEY'S FEES – In the event either CONTRACTOR or SUBCONTRACTOR institutes suit in court against the other party, or against the surety of such party, in connection with any dispute or matter arising under this Agreement, the party which prevails in that suit shall be entitled to recover from the other its attorney's fees in reasonable amount, which shall be determined by the court and included in the judgment in said suit.

After various submissions by Pioneer's lawyers, the trial court determined that Pioneer's reasonable attorney fees were $135,800.

¶27 An award of attorney fees is committed to the trial court's sound discretion, which we will not disturb absent an erroneous exercise of that discretion. *See* ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993). The trial court properly exercises its discretion when it applies the appropriate legal standard to the facts of record and, using a logical reasoning process, draws a conclusion that a reasonable judge could reach. *See* ***id.***

¶28 Westra contends that the trial court erred for several reasons in granting Pioneer all of its attorney fees and costs generated by this litigation. First, Westra contends that it should not have to pay Pioneer its attorney fees because the contract provision that permitted the recovery of attorney fees to the prevailing party was not triggered when the trial court awarded *quantum meruit* damages. Westra argues that the *quantum meruit* damages did not "aris[e] out of th[eir] agreement" and consequently Pioneer should not have to pay attorney fees related to this cause of action. Next, Westra argues that it was the prevailing party

because Pioneer sued seeking over $700,000, but it was awarded less than $100,000. Finally, Westra submits that if Pioneer is considered the prevailing party, then the attorney fees should be reduced proportionately.

¶29 Inasmuch as we have overturned the trial court's *quantum meruit* damage determination, we must remand this matter to the trial court for a reconsideration of the attorney fees issue. On remand, we instruct the trial court that 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." Further, in determining reasonable attorney fees, the trial court should be guided by ***Borchardt v. Wilk***, 156 Wis. 2d 420, 456 N.W.2d 653 (Ct. App. 1990): "So far as reasonably practicable, a contract should be given a construction which will make it a rational business instrument and will effectuate what appears to have been the intention of the parties." ***Id.*** at 427.

¶30 Accordingly, we affirm the trial court's finding concerning the cause of the roof accident, but we reverse the trial court's *quantum meruit* ruling and we remand with directions to reconsider the award of attorney fees and costs.

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.