COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP906 **Cir. Ct. No. 2015CV2419**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MCCANN'S ROOTER SEWER & DRAIN CLEANING SERVICE, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JUAN A. COLAS, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. The State brought this prevailing wage enforcement action against McCann's Rooter Sewer & Drain Cleaning Service,

Inc., seeking unpaid wages owed to sixteen McCann's employees for work performed on nine municipal and state sewer projects that had been determined to be prevailing wage projects. The circuit court granted the State's motion for summary judgment and awarded the State $484,211.80 for the unpaid wages owed to the employees. McCann's appeals, arguing that: (1) the circuit court erred in concluding that McCann's was required to exhaust its remedies in order to challenge whether the prevailing wage determinations encompass the work performed by its employees on the projects; and (2) certain of the unpaid wage claims were untimely. McCann's makes three separate arguments in challenging the court's ruling on exhaustion of remedies and two separate arguments in challenging the court's ruling on timeliness. As explained below, we conclude that McCann's has forfeited all but one of its arguments raised on appeal, and that the argument not forfeited has no merit. Accordingly, we affirm.[1]

BACKGROUND

¶2 This case involves a dispute over the wages McCann's paid to its employees for work performed on various municipal and state projects subject to the then-existing prevailing wage laws in WIS. STAT. §§ 66.0903 and 103.49

[1] We note that the State argues that the general approach to this topic taken by McCann's is flawed because it would allow a contractor or subcontractor to bid on a project that a municipality deems subject to the prevailing wage law without challenging that determination, and then pay wages below prevailing wages and argue later, if necessary, that the wage law does not apply. According to the State, such a view would distort the bidding process. We need not weigh in on this argument because we reject the arguments raised by McCann's for other reasons.

(2013-14).[2] McCann's performs sewer inspections, and cleans and relines sewer pipes. Specifically at issue in this case are the wages McCann's paid to sixteen of its employees for work performed on sewer lining projects in nine municipalities.

¶3 The municipalities awarded contracts to perform the sewer work after a process of open bidding.[3] Before municipalities are able to solicit bids for work, municipalities are required to apply to the Department of Workforce Development (DWD) "to determine the prevailing wage rate for each trade or occupation required in the work contemplated" and DWD "shall issue its determination within 30 days." WIS. STAT. § 66.0903(3)(am). Generally, during the bidding process, municipalities inform bidders that the projects are subject to DWD's prevailing wage rate determinations and those prevailing wage rate determinations will be incorporated into the contracts with the bidders ultimately awarded the project. WIS. STAT. § 66.0903(3)(dm). Bidders that are ultimately awarded a project subject to the prevailing wage rate determinations are required to certify compliance with the prevailing wage requirements. WIS. STAT. § 66.0903(9)(c).

[2] The municipal prevailing wage subsections in WIS. STAT. § 66.0903 (2013-2014) were repealed by 2015 Wis. Act 55. The same Act repealed in part and renumbered in part the State prevailing wage law, WIS. STAT. § 103.49 (2013-2014) (renumbered, in part, as WIS. STAT. § 16.856 (2015-2016)).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] The contract to perform sewer work in the Village of Union Grove was awarded by the Wisconsin Department of Administration. However, the process of bidding on state projects subject to the prevailing wage mirrors the process for municipal projects. *See* WIS. STAT. § 103.49 *et seq.* For ease of discussion, we will refer to the municipalities and the Department of Administration collectively as "the municipalities."

¶4 Here, the municipalities informed the bidders, including McCann's, of the prevailing wage rate determinations for the sewer projects.[4] McCann's submitted a bid to each municipality as a contractor, or to the successful bidder as a subcontractor, and was ultimately awarded the contract or subcontract for each of the sewer projects. McCann's performed the work for each of the municipalities and certified compliance with the prevailing wage requirements.

¶5 On September 26, 2013, DWD received a claim from McCann's employee David Black, alleging that McCann's failed to pay the prevailing wage rate for work that Black performed while working for McCann's on certain of the prevailing wage projects. In October 2014, DWD issued an Initial Decision finding that McCann's did not pay the correct wage rates for the work performed by Black, in violation of WIS. STAT. § 66.0903.[5] DWD affirmed this decision in August 2015.

¶6 On November 24, 2014, a second McCann's employee, Daniel Seamonson, filed a claim similarly alleging that McCann's failed to pay him the prevailing wage for work performed for McCann's on certain of the prevailing wage projects. In December 2015, DWD issued its Initial & Final Decision,

[4] One of the nine projects was determined to be a prevailing wage project after bidding. In that situation the contractor "shall be compensated for any increases in wages." The municipality informed McCann's of the requirement to pay the prevailing wages. The parties do not contend that the obligations of McCann's to its employees were any different for this ninth project than for the other eight projects determined to be prevailing wage projects before bidding. That is, the difference in timing of the prevailing wage determination is not relevant to the issues on appeal.

[5] This October 6, 2014, "Initial Decision" corrected an accounting error and superseded the original "Initial Decision" dated September 29, 2014.

finding that McCann's did not pay Seamonson the correct wages for work he performed on the projects, in violation of WIS. STAT. § 66.0903.

¶7 On September 18, 2015, the State commenced this action against McCann's to recover unpaid wages owed to its employees. The State filed a series of three complaints in the circuit court, each of which added projects and employees affected by the failure of McCann's to pay the prevailing wage for projects subject to it. The initial complaint identified Black, the amended complaint added Seamonson, and the second amended complaint added fourteen other employees who had been underpaid in the same manner as Black and Seamonson. These additional fourteen employees had not filed wage claims with DWD; rather, their claims were added in the second amended complaint after DWD reviewed payroll records obtained from McCann's in discovery and pursuant to DWD's investigation into Black's and Seamonson's wage claims.

¶8 The State moved for summary judgment. McCann's did not contest that it had failed to pay the prevailing wage to its employees. Instead, McCann's disputed whether the prevailing wage law applied to any of the work performed by its employees and whether certain of the State's claims were timely. Specifically, McCann's, in its brief in opposition to the State's motion for summary judgment, argued that the following issues precluded summary judgment as a matter of law: (1) "whether TV or video inspection of municipal sewer lines is covered work under the prevailing wage laws"; (2) "whether the work performed by the employees on these projects is properly excluded from the prevailing wage law because it meets the definition of 'minor service or maintenance work' under the statutes"; and (3) under WIS. STAT. § 109.09, "what the appropriate statute of limitations is for employees who have not filed separate wage complaints and where the Department has done no investigation."

¶9 The circuit court granted the State's motion for summary judgment and ordered McCann's to pay the State $484,211.80 for the unpaid wages owed to the employees. The circuit court determined the following: that the State presented a prima facie case that McCann's did not pay the prevailing wages to the employees; that McCann's did not contest that prima facie case; and, that there were no genuine issues of material fact:

> McCann['s] does not contest the factual basis of the plaintiff's claims, i.e. that they were the contractor on the named projects, that the projects and work on them had been determined to be subject to the prevailing wage law, … and that wages paid were less than what the prevailing wage law would require if the work were subject to the law.

¶10 The circuit court rejected the arguments by McCann's as to whether the work was subject to the prevailing wage law as "not properly before the court" in this enforcement action because McCann's failed to exhaust its remedies. Finally, the court concluded that all of the claims in the complaint were timely.

DISCUSSION

¶11 McCann's appeals the circuit court's grant of summary judgment to the State. We review a circuit court's grant of summary judgment de novo. ***Chapman v. B.C. Ziegler and Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425.

¶12 McCann's did not contest below, nor does it contest on appeal, that it did not pay the prevailing wage rates to its employees as required by the prevailing wage determinations. Rather, on appeal, McCann's argues that it was not required to exhaust its remedies in order to challenge whether the prevailing wage rate determinations encompass the work performed by its employees on the projects subject to those determinations, and that certain of the employees' claims

were untimely. As stated, McCann's makes three separate arguments in challenging the court's ruling on exhaustion of remedies and two separate arguments in challenging the court's ruling on timeliness. The State responds that all but one of the arguments that McCann's advances are raised for the first time on appeal and are, therefore, forfeited. As we explain, we conclude that McCann's has forfeited the arguments that it did not preserve in the circuit court, and that the one argument it did preserve has no merit.

The Arguments Forfeited by McCann's

¶13 "Arguments raised for the first time on appeal are generally deemed forfeited." ***State Farm Mut. Auto. Ins. Co. v. Hunt***, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (quoted source omitted). "The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." ***State v. Ndina***, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612

¶14 The State takes the position that four arguments advanced by McCann's are raised for the first time on appeal and are, therefore, forfeited, and that we should not address these forfeited arguments. The following are the new arguments: (1) McCann's was not required to exhaust its remedies in order to challenge the prevailing wage determinations because those determinations concerned only wage rates, not "coverage issues under the statute, exclusions, or any exceptions"; (2) McCann's was not required to exhaust its remedies in order to challenge DWD's decisions as to employees Black and Seamonson because the decisions by DWD did not make "findings of fact or conclusions of law" or, alternatively, such a challenge "would have been duplicative"; (3) McCann's was not required to exhaust its remedies in order to challenge "the application of the

prevailing wage law to employees who did not file independent claims with [DWD] and for whom no administrative determination was made"; and (4) the wage claims concerning the fourteen additional employees were untimely under WIS. STAT. § 893.44(2).

¶15 McCann's acknowledges that these arguments were not presented to the circuit court. We reject its contention that we should not treat its new arguments as forfeited as follows.

¶16 As to the three exhaustion of remedies arguments, McCann's contends that we should not treat those new arguments as forfeited because they "are raised in response to the Circuit Court's decision which raised the issue as the basis for not addressing the remaining issues raised by McCann[']s in response to the State's motion for summary judgment. They are new arguments only to the extent they are in response to the Circuit Court's reasoning." Relying on ***Townsend v. Massey***, 2011 WI App 160, 338 Wis. 2d 114, 808 N.W.2d 155, McCann's contends that its three arguments relating to exhaustion of remedies should not be deemed forfeited because the traditional concerns of the forfeiture rule, giving parties notice of the issues and not sandbagging opposing counsel, are not present in this case "as the Circuit Court raised the issue on its own, or perhaps in response to the State's passing reference to WIS. STAT. § 227.52 in its reply brief." McCann's contends that "it is the State who could be accused of sandbagging as it did not raise the issue of administrative exhaustion in its initial brief on summary judgment."

¶17 Contrary to these assertions by McCann's, the State properly raised the issues relating to the failure of McCann's to exhaust its remedies in the State's brief in support of its motion for summary judgment, but McCann's did not

respond to these issues in its opposition brief. Consistent with the State's unrefuted arguments, the circuit court stated that "McCann's arguments challenging the determination that the projects and work were subject to the prevailing wage law and to the classification of work are not properly before the court." Only now for the first time on appeal does McCann's argue that it was not required to exhaust its remedies in order to challenge the prevailing wage determination itself, the administrative decisions and findings regarding Black and Seamonson, and the claims relating to the additional fourteen employees. However, as stated, a failure to make a specific argument in the circuit court forfeits the right to make that challenge on appeal, ***State v. Rogers***, 196 Wis. 2d 817, 826-29, 539 N.W.2d 897 (Ct. App. 1995), and McCann's fails to give us reason to depart from this general rule here. *See also* ***Townsend***, 338 Wis. 2d 114, ¶25 ("[T]he forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court.").

¶18 As to the fourth new argument that McCann's advances on appeal, that certain of the claims were untimely under WIS. STAT. § 893.44(2), McCann's cites ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 331 N.W.2d 320 (1983), and argues that its new statute of limitations argument under § 893.44(2) "is merely an additional argument regarding the limitations issue argued regarding WIS. STAT. § 109.09…. Both arguments seek to cut off the date of potential liability. This was not blindsiding opposing counsel." However, McCann's does not explain how the situation here is like that in ***Holland Plastics***, where the specific statute of limitations considered on appeal was also presented to the circuit court. *See* 111 Wis. 2d at 505 (noting that the application of the same six-year statute of limitations was presented both in the circuit court and on appeal). Unlike in ***Holland Plastics***, as indicated in the language McCann's itself uses as quoted

above, McCann's made in the circuit court one statute of limitations argument under WIS. STAT. § 109.09, and makes on appeal a different statute of limitations argument under WIS. STAT. § 893.44(2).

¶19 The articulation by McCann's in the circuit court of a statute of limitations argument based on one statute does not preserve its right to argue on appeal that another statute of limitations operates "to cut off the date of potential liability." "[C]ountless" opinions "after ***Holland Plastics*** have reaffirmed that the forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." ***Townsend***, 338 Wis. 2d 114, ¶25 (citing ***Rogers***, 196 Wis. 2d at 827) (forfeiture rule requires that parties must "make all of their arguments to the [circuit] court" to preserve the arguments). Here, the record is clear that McCann's advanced before the circuit court a statute of limitations argument only under WIS. STAT. § 109.09(1). We therefore reject its statute of limitations argument under WIS. STAT. § 893.44(2) as forfeited.

¶20 In sum, we conclude that all of the new arguments that McCann's raises on appeal have been forfeited because they were not preserved before the circuit court and McCann's fails to give us reason to depart from the general forfeiture rule that requires all parties "to make all of their arguments to the [circuit] court." ***Rogers***, 196 Wis. 2d at 827.

The Argument Preserved by McCann's as to Timeliness

¶21 In the circuit court, McCann's objected to the State's assertion of claims on behalf of the fourteen additional employees reaching back to September 2011, two years before the date that Black filed his claim with DWD. On appeal, McCann's renews its argument that under WIS. STAT. § 109.09(1), the State is

"limited to a two year statute of limitations [before] the date of the Second Amended Complaint [September 15, 2016] because no individual complaints were previously filed or investigated on behalf of those [additional fourteen] employees." This argument calls for the interpretation and application of the statute to the undisputed facts of record, which is a question of law that we review de novo. ***Barritt v. Lowe***, 2003 WI App 185, ¶6, 266 Wis. 2d 863, 669 N.W.2d 189.

¶22 The legislature charged DWD with administering municipal and state prevailing wage laws. WIS. STAT. § 66.0903(1)(b); WIS. STAT. § 103.49. As part of that administration, the "department shall investigate and attempt equitably to adjust controversies between employers and employees as to alleged wage claims." WIS. STAT. § 109.09(1). The statute further provided:

> The department may receive and investigate any wage claim which is filed with the department … no later than 2 years after the date the wages are due. The department may, after receiving a wage claim, investigate *any wages due* from the employer against whom the claim is filed *to any employee during the period commencing 2 years before the date the claim is filed*. The department shall enforce ... 66.0903 .... In pursuance of this duty, the department may sue the employer on behalf of the employee to collect any wage claim or wage deficiency .... *Any number of wage claims or wage deficiencies against the same employer may be joined in a single proceeding*, but the court may order separate trials or hearings.

(Emphasis added.)

¶23 McCann's makes four arguments as to why, under this statute, the State could not assert claims on behalf of the fourteen additional employees reaching back to September 2011, two years before the date that Black filed his claim with DWD. We address and reject each of McCann's arguments as follows.

¶24 First, McCann's argues that under WIS. STAT. § 109.09(1), the State is "limited to a two year statute of limitations [before] the date of the Second Amended Complaint." However, there is no reference in § 109.09(1) to the date the *complaint* is filed in a lawsuit brought by the State under that statute. Rather, the statute ties its two-year limitation to the filing of a "claim" with DWD. Therefore, this first argument, that DWD may only sue to collect unpaid wages owed an employee no more than two years before the date of the filing in circuit court of the complaint naming that employee, has no foundation in the statute.

¶25 Second, McCann's argues that WIS. STAT. § 109.09(1) requires that each of the employees file individual claims with DWD. This argument fails because it disregards the language in the statute that authorizes DWD, after receiving a claim from one employee, to "investigate *any wages due* from the employer against whom the claim is filed *to any employee during the period commencing 2 years before the date the claim is filed*" and to join "*[a]ny number of*' claims for unpaid wages against the same employer in one lawsuit. WIS. STAT. § 109.09(1) (emphasis added). That is, the plain language of the statute explains that a claim filed by one employee permits DWD to investigate and sue for unpaid wages on behalf of any employee, including those who have not filed individual claims with DWD.

¶26 Third, McCann's argues that WIS. STAT. § 109.09(1) requires that DWD conduct individualized investigations on behalf of each employee it names in a prevailing wage complaint. This argument also fails because it is inconsistent with the plain language of the statute quoted above. To repeat that language, DWD "shall investigate and attempt equitably to adjust controversies between employers and employees as to alleged wage claims," and "*may, after receiving a wage claim, investigate any wages* due from the employer against whom the claim

is filed *to any employee during the period commencing 2 years before the date the claim is filed.*" WIS. STAT. § 109.09(1) (emphasis added). That is, the statute reasonably provides that DWD conduct an investigation before it files suit, and there is a reasonable inference from the record that DWD did conduct an investigation to support its addition of the fourteen employees to this lawsuit. The record shows that after Black filed his claim with DWD, DWD obtained the payroll records from McCann's for all of its prevailing wage projects, and those records revealed that McCann's had not paid prevailing wages for the fourteen additional employees. McCann's does not explain how DWD's obtaining and reviewing the payroll records is not an investigation of the wages due those fourteen employees. In sum, nothing in the plain language of the statute requires DWD to have conducted separate and distinct investigations for each of the fourteen additional employees, as McCann's suggests, and we will not insert such a requirement into the statute where none exists. *See* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2009 WI 27, ¶14, 316 Wis. 2d 47, 762 N.W.2d 652.

¶27 Fourth, McCann's argues that allowing DWD to seek unpaid wages owed to the fourteen other employees without those employees' having filed individual wage claims with DWD is "inconsistent" with DWD's practice and the statutory scheme pursuant to which DWD in the course of processing formal wage claims provides the employer with the "opportunity to investigate complaints and self-correct" so as to avoid or limit liquidated damages. *See, e.g.*, WIS. STAT. § 109.11(1)(b). While this argument might be reasonable in the abstract, it is contrary to the plain language of the statute which expressly authorizes DWD to investigate wages due *"any employee* during the period commencing 2 years before the date the claim is filed." WIS. STAT. § 109.09(1) (emphasis added). It also disregards the fact that, as noted by the State, McCann's had notice of Black's

original wage claim and, upon review of its payroll records for all of the prevailing wage claim projects in response to that claim, would have had notice of the unpaid wages owed to the other employees as well.

CONCLUSION

¶28 For the reasons set forth above, we affirm.

By the Court.—Judgment affirmed.

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