COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP849 **Cir. Ct. No. 2004CV572**

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

IN RE THE AWARD OF ATTORNEY FEES IN HAROLD M. SCHMITZ V. DOT:

HAROLD M. SCHMITZ,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

CURTIS LAW OFFICE,

RESPONDENT,

V.

BIERSDORF & ASSOCIATES, P.A.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Biersdorf & Associates, P.A., appeals and Harold M. Schmitz cross-appeals from a judgment awarding Biersdorf[1] $421,091.05 in attorney fees and costs. Schmitz contends the award is too big. Biersdorf contends the award is too small. Based on its comprehensive findings of facts and conclusions of law,[2] we conclude that the trial court got it just right. We affirm the judgment because the award reflects a proper exercise of discretion.

¶2 In 2003, Schmitz became involved in an eminent domain taking of a portion of his property by the Department of Transportation. The taking was in conjunction with the U.S. Highway 41 Freeway Conversion Project, which involved a reconfiguration of Hwy. 41 and State Highway 151. The State initially offered Schmitz $179,200. Armed with a substantially higher appraisal, Schmitz negotiated with the DOT on his own and succeeded in obtaining an offer of $311,400. The DOT made an Award of Damages for that amount and acquired nearly sixteen acres of Schmitz's property.

¶3 Unsatisfied with the $311,400 award, Schmitz retained Biersdorf in 2004 to negotiate on his behalf. Schmitz preferred a contingent fee arrangement. Biersdorf's normal contingent fee rate is one-third, with the client paying all litigation costs and expenses as they arise. Due to personal financial constraints, Schmitz could not afford to cover those items. The parties discussed how to modify the arrangement. They ultimately entered into a written Representation

[1] "Biersdorf" will refer to Attorney Dan Biersdorf, who performed all services for Schmitz in connection with the Representation Agreement.

[2] The thirty-five pages of findings of facts and conclusions of law were thorough, clear and reflected careful attention to accuracy. They were of great assistance to this court. We commend Judge Grimm on a superb job.

Agreement, drafted by Biersdorf, under which Biersdorf would advance all costs in exchange for a contingent fee rate of forty percent. Biersdorf also would be liable for the costs if the recovery did not meet the fifteen percent threshold for reimbursement by the DOT. *See* WIS. STAT. § 32.28(3)(d) (2009-10).[3]

¶4 A portion of the taken land lay adjacent to Hwy. 175 and was not needed for the Hwy. 41 project. Biersdorf suspected that the DOT was planning a Hwy. 175 overpass. Biersdorf investigated access and drainage issues that might arise should his suspicions prove correct. In June 2006, the DOT announced that a Hwy. 175 overpass would be built. The State did not condemn additional land or make a new award of damages for the Hwy. 175 overpass project.

¶5 The Hwy. 175 overpass project led to significant drainage and flooding problems on Schmitz's remainder parcel. In late 2008, Schmitz and the DOT settled all claims for $1.6 million above the $311,400 prior award. The court found that Biersdorf's expertise and reputation in eminent domain law was a significant factor in Schmitz receiving the "outstanding" offer from the State. Because the recovery exceeded the fifteen percent threshold, the $1.6 million settlement included reimbursement for Schmitz's attorney fees and costs. There was no allocation in the settlement between damages and attorney fees, however, nor did it distinguish between the Hwy. 41 and Hwy. 175 projects. The State also agreed to relocate Schmitz's driveway from the site identified in the original Award of Damages. Alan Leirness, Biersdorf's appraiser expert, testified that the driveway relocation enhanced the value of the remainder by about $825,000.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶6 Pursuant to the Representation Agreement, Biersdorf filed a fee application for $961,563—forty percent of $2,425,000 (the $1.6 million settlement plus the $825,000 "enhanced value"), less the costs Biersdorf had refused to pay. Schmitz balked. Contending that Biersdorf did no more than 100 hours of work, Schmitz put forth $25,000 as a reasonable fee. After a two-day bench trial, the court concluded that Biersdorf's proposed fee was unreasonable. It also concluded that Biersdorf materially breached the Agreement by refusing to cover about $8,400 in litigation costs and expenses,[4] that the relocated driveway did not increase the value of Schmitz's property, as Leirness had testified, and that the term "Recovery" in the Agreement was not defined to include attorney fees and costs. The court fashioned two alternative fee awards.

¶7 As its primary ruling, the court upheld the parties' demonstrated intent for a contingency fee arrangement, but at a straight one-third contingency fee. To isolate the fee and expenses due Biersdorf from the unallocated lump sum, the court adopted the calculation ("the Koehler calculation") presented by Schmitz's expert, Attorney Charles Koehler. The court started with the $1.6 million settlement, subtracted $1.2 million (the net recovery on a one-third contingency fee), for a gross attorney fee award of $400,000. The court then added in the $21,091.05 in costs and expenses Biersdorf claimed that he had incurred, for a total of $421,091.05.

¶8 For its secondary calculation, the court applied the equitable factors set forth in SCR 20:1.5(a), arriving at a reasonable-attorney-fee computation of

[4] Schmitz paid the amounts Biersdorf refused to cover. Biersdorf incurred $21,095.05 in expenses for which he did not invoice Schmitz.

$350,000. Again adding the costs and expenses Biersdorf had incurred, the alternate fees-and-expenses calculation came to $371,091.05. The court entered judgment under its primary ruling for $421,091.05 and, in the alternative, for $371,091.05. Both parties appeal.

¶9 Before addressing the merits, we first observe that the parties seem to have lost sight of the posture of the case. Our review of a trial court's determination of the value of attorney fees is limited to determining whether the trial court properly exercised its discretion, that is, that it "employ[ed] a logical rationale based on the appropriate legal principles and facts of record." ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993) (citation omitted). Furthermore, this appeal comes to us from a trial to the court, after which the court made 175 findings of fact, some of them drawn from conflicting testimony. Because the trial court acted as the fact finder, we are bound by its findings unless they are clearly erroneous, WIS. STAT. § 805.17(2), and it is the ultimate arbiter of the witnesses' credibility, ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). Seemingly bent on relitigating their cases, the parties disregard these constraints. We simply cannot.

The Appeal

¶10 The thrust of Biersdorf's argument is that the attorney fee award is too small. He contends that the "recovery" under the Agreement encompassed both the monetary award and the enhanced value he claims the relocated driveway produced. Biersdorf also argues that, with no claim that the Representation Agreement itself was unreasonable, the court's after-the-fact examination of the fee's reasonableness was neither necessary nor proper. Biersdorf is mistaken.

¶11 While there is nothing inherently improper about a contingency fee arrangement in an eminent domain case, that arrangement serves only as a guide for the court. ***Milwaukee Rescue Mission, Inc. v. Milwaukee Redev. Auth.***, 161 Wis. 2d 472, 496, 468 N.W.2d 663 (1991). The court still has the duty to determine, under all the circumstances of the case, whether the resulting contingency fee amount is just and reasonable. ***Id.*** Granted, the court here did not reject the fee application because Biersdorf inflated his fee by, for example, seeking payment for work he did not do. Rather, it deemed the fee unreasonable because it sought to recoup payment on a portion of the settlement meant to pay attorney fees—in other words, to take attorney fees on attorney fees. Still, the court had the authority to examine the resultant fee.[5]

¶12 The Representation Agreement between Biersdorf and Schmitz allowed Biersdorf to recoup a forty-percent contingency fee on Schmitz's recovery. The Agreement defines "recovery" as "all monetary award for the property taken or damaged, including interest on any amount over the initial offer, and the value of property or property interests received by Client." Biersdorf argues that includes amounts received for fees and costs. Schmitz, and the trial court, disagreed. So do we.

[5] We also reject Biersdorf's argument that a court may disregard the parties' contract only if the lawyer's representation falls below professional standards. We caution Biersdorf that citing ***Das v. State Farm Mutual Automobile Insurance Company***, No. 2007AP2917, unpublished slip op. (WI App Aug. 5, 2008), as support is in violation of the rules of appellate procedure because this unpublished decision was issued on August 5, 2008. *See* WIS. STAT. RULE 809.23(3)(a), (b). Moreover, ***Das*** does not support his proposition.

We also caution Biersdorf that the tables of contents in his appellant's and cross-respondent's briefs do not conform to WIS. STAT. RULES 809.19(1)(a), (3)(a)2. and (6)(c)2. because they do not include "headings of each section of the argument."

¶13 A contract provision is ambiguous if it is fairly susceptible of more than one construction. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). In the case of ambiguity, construction is a question for the trier of fact and this court will not disturb the finding unless it is clearly erroneous. *See* ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 379, 254 N.W.2d 463 (1977).

¶14 Here, the court properly construed the contract against Biersdorf, as the drafter. *See* ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. Moreover, Biersdorf's interpretation does not comport with the legislative purpose in awarding litigation expenses under WIS. STAT. § 32.28(3) of making the condemnee whole. *See* ***Klemm v. American Transmission Co., LLC***, 2011 WI 37, ¶44, 333 Wis. 2d 580, 798 N.W.2d 223.

¶15 Biersdorf next claims the award falls short because it ignored Leirness' testimony that the relocated driveway increased the value of Schmitz's remainder parcel by $825,000. Biersdorf complains that the trial court failed to grasp that the benefit from the relocated driveway is a property interest and, under the Representation Agreement, "[r]ecovery … includes … the value of … property interests received by Client." He asserts that, as the only witness to testify as to value of the relocated driveway, Leirness' testimony is controlling. We disagree.

¶16 Although Leirness' valuation opinion was uncontroverted, the court was not bound to accept it. *See* ***Davis v. Psychology Examining Bd.***, 146 Wis. 2d 595, 602, 431 N.W.2d 730 (Ct. App. 1988). The court found Leirness to be a "hired gun" whose demeanor and pro-Biersdorf bias diminished his credibility. The testimony of several other witnesses supported the court's findings that Schmitz gained no property interests from the Settlement Agreement, that the

drainage issues from the overpass project motivated the State to increase its offer and that relocating the driveway was incidental to the Settlement Agreement and did not increase the value of Schmitz's property. These findings are not clearly erroneous.

¶17 Biersdorf next disputes the court's conclusion that his refusal to pay $8,447 in litigation costs materially breached the contract. Before the parties signed the Representation Agreement, Biersdorf sent Schmitz a letter to clarify Schmitz's obligation for costs under the Agreement. Biersdorf explained:

> [O]ur normal contingent fee agreement calls for my firm to receive one-third of any additional moneys recovered in excess of the offer which you received from the State. Under this scenario the client advances the funds for costs and assumes all risks for costs. You indicated to me that you were unable to fund the cost for this litigation[;] therefore, *you asked me if my firm could modify our fee structure so we would assume the risks for the costs and advance the funds for them in the case. We agreed to do that by increasing our contingent fee to 40 percent of the extra money recovered in excess of the offer.* [Emphasis added.]

Biersdorf now asserts that it was within his discretion to refuse to pay costs if he deemed them unnecessary to litigation.

¶18 A breach is material if it is so serious as to destroy the essential objects of the agreement. ***Management Computer Servs., Inc.***, 206 Wis. 2d at 183. Whether a breach is material is a question of fact. ***Id.*** at 184.

¶19 The trial court found that the Representation Agreement obligated Biersdorf to assume all costs associated with litigation and that Biersdorf's agreement to assume costs was the "essential motivating factor" in persuading Schmitz to sign the Agreement at a forty percent contingency rate. The court also found that one of Biersdorf's own experts testified that not only was the contract

clear that payment of costs was Biersdorf's responsibility, but his acceptance of that duty was what made the higher contingency fee reasonable.

¶20 Based on those findings, the trial court concluded that Biersdorf's failure to cover over $8400 in costs and expenses constituted a material breach because it went to one of "the essential objects of the contract" and was one of the only reasons the parties structured the Agreement as they did. As these findings are not clearly erroneous, we reject Biersdorf's argument that his refusal to shoulder some of the costs did not materially breach the contract.

¶21 Biersdorf next argues that, if there was a breach, Schmitz waived his right to claim that the Representation Agreement was unenforceable by continuing to use Biersdorf's services. This argument, too, utterly ignores the trial court's findings and conclusions.

¶22 The court specifically found that Biersdorf admitted that he billed Schmitz for filing fees and travel expenses and that he suggested that Schmitz pay the engineering expert's bill after he refused to pay it. The court also found that Schmitz complained about the multiple invoices and that Biersdorf did not reimburse Schmitz despite having notice for more than a year. The court concluded that Biersdorf's waiver argument was unsupported by the evidence. It is, and we reject it out of hand.

¶23 Finally, Biersdorf argues that the trial court's attorney fee award unjustly enriches Schmitz because Schmitz obtained a greater award by settlement than Schmitz would have achieved at trial. Biersdorf's argument carries no water. The windfall he bemoans is premised on Leirness' discredited valuation testimony and on his report, which, the court found, ignored flooding and drainage damages and failed to account for an approximate six-acre discrepancy between the deed

and various appraisal evaluations. As already noted, the trial court did not buy Leirness' testimony. It is no more persuasive on this go-round.

Cross-Appeal

¶24 Schmitz contends that the $421,091.05 award to Biersdorf was too large. He argues that the award exceeded the scope of the Representation Agreement; the award was unreasonably large because the risk and effort required of Biersdorf were small; Biersdorf's material breach should have precluded enforcement of the Agreement; and the trial court erroneously included Biersdorf's claimed expenses $21,091.05 in the award. We reject each contention.

¶25 Schmitz first asserts that the Representation Agreement was expressly limited to the Hwy. 41 Project, and therefore could not include a fee on the damages attributable to the Hwy. 175 overpass project, "a separate project with a different project number." He also argues that the Agreement Biersdorf drafted failed to allocate settlement proceeds between the claims pertaining to the two highway projects. Therefore, he posits, awarding damages based on the whole recovery exceeded the scope of the Agreement. We disagree.

¶26 The Representation Agreement covers "a claim … for a taking of property or damage to property described as [legal description of Schmitz property] … where the taking of property or damage to property occurs in conjunction with the **US Highway 41 Freeway Conversion Project**." The trial court found that that phrase was a description of the reason for the taking, not a limitation on the scope of the Agreement; that the Representation Agreement could not have specifically referenced the Hwy. 175 overpass project because the Agreement predated the project's funding and approval; that, after the Hwy. 175 overpass project commenced, the parties continued under the previously agreed-

upon terms and conditions without objection; and that Schmitz fully utilized Biersdorf's skill, experience and expertise in negotiating the "excellent" settlement. The court concluded that there was but one taking, one overarching agreement and one global settlement that resolved all claims between the State and Schmitz, regardless of the highway designations, and that the parties' Agreement contemplated that Biersdorf's fee would be forty percent of the entire recovery. This interpretation considers the Agreement as a whole and gives the provisions the meaning the parties intended. *See* ***Pleasure Time, Inc.***, 78 Wis. 2d at 379.

¶27 Schmitz argues that the Agreement's failure to specify what proportion of the funds go to which project or to costs and fees frustrated the purpose of the agreement, which he describes as paying a forty-percent contingency fee on only the Hwy. 41 project. He contends he therefore should be excused from his performance under the Agreement. Again we disagree.

¶28 We already have discussed that the purpose of the Agreement was broader than Schmitz describes. It contemplated Biersdorf's involvement with the taking and the damages that occurred "in conjunction with" the Hwy. 41 project, thus embracing the Hwy. 175 overpass project as well. We also have explained that, to address the lack of allocation, the trial court isolated the attorney fee portion using the Koehler calculation. The absence of allocation language in the Agreement did not frustrate its purpose.

¶29 Schmitz next mounts a two-pronged attack on the size of the award itself. Looking to the alternative calculations, Schmitz first argues that if trial court determined through the SCR 20:1.5(a) computation that $350,000 was a reasonable fee, then the $400,000 award was unreasonably high. Second, he contends that even the $350,000 is unreasonably high because Biersdorf took no

risk on this "slam-dunk" case and expended "underwhelming" effort. Either amount, he asserts reflects an erroneous exercise of discretion.

¶30 Once again, Schmitz is rearguing the facts. The court made ample findings to support the award and to acknowledge that Biersdorf's expertise and professional reputation in the area of eminent domain law contributed to the "excellent" and "generous" settlement. The findings are not clearly erroneous and we discuss this argument no further.

¶31 Coming at it another way, Schmitz asserts that the trial court erred in enforcing the Agreement because Biersdorf materially breached it by failing to cover all expenses and by failing to inform him that he did not have to relocate his driveway, so as to increase the "access" damages Leirness testified to.

¶32 Taking the second first, the trial court found that Biersdorf violated his duty under SCR 20:1.4(a) to communicate to Schmitz that the DOT, per DOT engineer Michael King, was not averse to leaving Schmitz's driveway at the Award of Damages site. It concluded, however, that the breach was not material because Schmitz himself had numerous conversations with King and made his own decision to relocate the driveway and, further, that the relocation did not enhance the value of the remainder parcel. As these findings of fact are not clearly erroneous, Schmitz has no basis on which to now say that breach was material. *See* ***Management Computer Servs., Inc.***, 206 Wis. 2d at 184 (whether a breach is material is a question of fact).

¶33 Even where a breach is material, it was within the trial court's discretion whether to enforce the Agreement. *See* ***id.*** (stating that a party's material breach *may* excuse the other party's performance). Here, the court found that the failure to cover all of the costs was a material breach but was small

compared to the money involved and, further, the parties carried on as if no breach had occurred. Upholding the contingency fee arrangement the parties had bargained for therefore reflected a proper exercise of discretion.

¶34 Finally, Schmitz argues that the court erred by awarding Biersdorf the $21,091.05 in expenses after finding that the evidence supporting the claim was "devoid of credibility." Schmitz plays with the facts a bit sharply.

¶35 True, the court found that nothing in the record, except for Leirness' less-than-credible testimony, substantiated that Biersdorf actually *paid* Leirness the $16,000 billed for his appraisal and the $5,000 billed for his trial testimony. The $21,091.05 in the award, however, was for expenses *incurred*. Biersdorf presented an affidavit at trial that he incurred that amount in expenses. The court considered affidavits to be the same as testimony. The court's finding in this regard therefore is supported by the record.

¶36 No costs to either party.

By the Court.—Judgment affirmed.

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