

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP274

Cir. Ct. No. 2008CV1481

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE AWARD OF ATTORNEY FEES, ACTUAL EXPENSES AND COSTS:

VILLAGE OF ELM GROVE,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

MICHELS CORPORATION,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order and a judgment of the circuit court for Waukesha County: RALPH A. RAMIREZ, Judge. *Order affirmed; judgment reversed in part, affirmed in part and cause remanded with directions.*

Before Brown, C.J., Gundrum and Brennan, JJ.

¶1 PER CURIAM. In this breach of contract case about the construction of a municipal flood-control tunnel, the Village of Elm Grove appeals that portion of the circuit court's judgment awarding it zero dollars in attorneys' fees, and Michels Corporation cross-appeals the circuit court's denial of a new trial due to alleged jury compromise and refusal to change two of the jury's special verdict answers. The circuit court interpreted the contract to limit attorneys' fees for defective work to only those fees shown to be related to a specific defect, a sag in the tunnel, rather than all attorneys' fees attributable to the evaluation of and determination to accept defective work. The circuit court therefore awarded the Village zero dollars in attorneys' fees because the Village did not separate out attorneys' fees related to the sag. We conclude all the litigation arose out of the defective work and therefore reverse the circuit court's order awarding zero dollars in attorneys' fees. We remand with instructions to enter judgment for the total amount of proven attorneys' fees. On the cross-appeal, we conclude that Michels' claim of jury compromise is unsubstantiated and that the circuit court properly declined to change the jury's other challenged answers because the evidence supports the answers.

¶2 The Village and Michels entered into a contract for the construction of an underground tunnel. Under the contract, time was of the essence and the work had to be done according to the contract specifications. A breach of the time schedule entitled the Village to liquidated damages. If the work was defective, the Village could either accept the work as is or have it corrected or replaced. If the Village accepted the defective work, it was entitled to:

all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) attributable to

[the Village's] evaluation of and determination to accept such defective Work....

¶3 Early on in the mining of the tunnel, Michels encountered soil problems that affected the excavation. Michels left the job and notified the Village of the difficulties. The Village rejected Michels request for a change order adding time and money allotments, and Michels returned to the job, adopting a new excavation approach. The Village also hired Dennis Anderson, a tunnel construction expert, to monitor completion of the project. Michels completed the tunnel, with a certificate of substantial completion issued on September 27, 2007, more than one year after the substantial completion date in the contract. The completed tunnel had a sag in the middle.

¶4 After completion of the tunnel, the parties disagreed as to the amount due under the contract. The parties attempted mediation to resolve their disputes regarding the sag, the time allotted for completion, the money due and the site conditions, but mediation was unsuccessful. The Village filed a complaint against Michels, alleging breach of contract and of the duty of good faith, seeking both liquidated damages for the delay in completion and cost recovery for the defective work, including attorneys' fees. Michels counterclaimed for breach of contract, breach of warranty, unjust enrichment, quantum meruit and misrepresentation under WIS. STAT. § 100.18, alleging that the Village's engineering firm had misrepresented the condition of the soil, and seeking an additional \$2.8 million for extra work caused by the soil conditions.

¶5 Litigation went on for more than two years, culminating in a seven-day trial. The jury found: 1) Michels did not encounter differing site conditions and therefore was not entitled to additional time or money, 2) Michels breached the time requirements, entitling the Village to liquidated damages, 3) Michels'

defective work necessitated the cost of the Village hiring Anderson and led to the sag in the tunnel, which diminished the value of the tunnel.

¶6 The Village brought a posttrial motion asking the circuit court to award its attorneys' fees pursuant to the defective work provision in the contract. The circuit court asked the Village to separate out those fees attributable specifically to the sag, indicating that the Village was entitled to recover only those fees "attributable to what they did to determine, to investigate, to assess, to videotaping perhaps, and to litigate in this court the issues pertaining *to that sag*." (Emphasis added.) When the Village submitted all its attorneys' fees, explaining to the circuit court that the issues were so intertwined as to make itemization between the claims impossible, the circuit court awarded the Village zero dollars in attorneys' fees. The Village appealed, arguing that the entire case arose out of the defective work, and it therefore should be able to recover all of its attorneys' fees. Michels cross-appealed, arguing that the circuit court should have granted its posttrial motion for a new trial due to jury compromise and should have changed the jury's answers to special verdict questions regarding the award for engineer fees and for maintenance cost of the tunnel due to the sag.

¶7 We first examine the contract's provision regarding entitlement to attorneys' fees after acceptance of defective work. We then look at the alleged jury compromise and the jury's answers to special verdict questions. We will discuss the standard of review in each section and set forth additional facts as necessary.

Appeal: Defective Work and Attorneys' Fees

¶8 The jury found the construction work was defective. Specifically, the jury found that Michels had breached the contract by causing a sag in the

tunnel, and that the sag had diminished the value of the tunnel. In ruling on the Village's posttrial motion for attorneys' fees, the circuit court concluded that the sag comprised the entirety of the defective work, and therefore, under the contract, the Village could only recover costs attributable to the sag. That being so, the circuit court sought to award only those attorneys' fees attributable to litigation about the sag. The Village contended that it was unable to extricate such fees from the litigation in general, so the circuit court awarded zero dollars for attorneys' fees.

¶9 On appeal, the parties disagree on the appropriate scope of the term "defective work," with Michels arguing that we adopt the circuit court's view that defective work includes only the end product and the Village arguing it also includes the construction process leading to the end product. The Village further argues that the evaluation of and determination to accept the defective work was the essence of the entire dispute. Michels responds that the Village's entitlement to jury fees was a matter for the jury to decide.

¶10 The interpretation of a contract is a question of law we review de novo. *Osborn v. Dennison*, 2009 WI 72, ¶33, 318 Wis. 2d 716, 768 N.W.2d 20. When the contract language is unambiguous, we apply the language to the facts of the case. See *Grotelueschen v. American Family Mut. Ins. Co.*, 171 Wis. 2d 437, 447, 492 N.W.2d 131, 134 (1992). The extent to which a party is entitled to attorney fees under a contract requires contract interpretation and is therefore a question of law we review de novo. See *Jos. P. Jansen Co. v. Milwaukee Area Dist. Bd. of Vocational, Technical and Adult Educ.*, 105 Wis. 2d 1, 13, 312 N.W.2d 813 (1981). The amount of the award of the attorneys' fees is typically left to the trial court's discretion, due to that court's ability to assess the quality of

services rendered and the reasonableness of the fees. *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶14, 308 Wis. 2d 103, 746 N.W.2d 762.

¶11 Under the contract, the Village is entitled to costs, including attorneys' fees, "attributable to [the Village's] evaluation of and determination to accept such [defective] Work ... and the diminished value." "Work" is defined in the contract as "[t]he entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents." Defective work is "unsatisfactory, faulty, or deficient in that it ... does not conform to the Contract Documents."

¶12 The contract terms regarding defective work are not ambiguous. Under the unambiguous terms of the contract, defective work is any part of the project, or the whole project, which does not conform to contract documents. More importantly, the contract allows recovery of various costs attributable to defective work for three reasons: 1) evaluation of the work, 2) the determination to accept such work and 3) the diminished value of the work.

¶13 The Village is entitled to recover all of its reasonable attorneys' fees. This suit was about the extent and acceptance of defective work and its effect on timely completion of the project. Once Michels notified the Village that it was encountering problems in constructing the tunnel, the Village began incurring expenses attributable to its evaluation and determination of whether to accept the work. The litigation began after Michels refused the Village's acceptance of its defective work and instead demanded \$2.8 million over and above the contract price. But for Michels' defective work, the Village would not have become embroiled in litigation, including the defense of Michels' counterclaims. Because of this, the Village's attorneys' fees are attributable to the defective work, even

though part of the ultimate damage award was for liquidated damages due to the untimely completion of the project. Even if we were to limit the defective work to the sag, the Village had to prove how the sag happened in order to show Michels' breach. As a matter of law, the circuit court misinterpreted the contract when it concluded that the Village was entitled only to those fees it could show were entirely connected to the sag. All of the attorneys' fees here are related to the Village's defective work claim and are therefore recoverable under the contract. We remand for the circuit court to exercise its discretion and award to the Village all reasonable attorneys' fees attributable to this litigation, including this appeal. *See Benkoski v. Flood*, 2001 WI App 84, ¶38, 242 Wis. 2d 652, 626 N.W.2d 851 (“[A] plaintiff who recovers attorney fees at the trial court level shall recover further attorney fees incurred on a successful defense of the award on appeal.”)

¶14 Before turning to the cross-appeal, we briefly address Michels' argument that the award of attorneys' fees was a matter for the jury. The availability of attorneys' fees in this case is a contract matter, which is a question of law. *See Jansen*, 105 Wis. 2d at 13. Furthermore, the attorneys' fees were properly sought after the jury's decision, as the attorneys' fees depended on the jury's substantive conclusions. *See Purdy v. Cap Gemini America, Inc.*, 2001 WI App 270, ¶16, 248 Wis. 2d 804, 637 N.W.2d 763. Indeed, it would be impossible for a sitting jury to determine appropriate fees for the trial unfolding before it, with the clock still running and posttrial and appellate practice pending. *See id.* (“Fees for work done during the case should be sought after decision, when ... it is possible to quantify the award.”) (quoting *Rissman v. Rissman*, 229 F.3d 586, 588 (7th Cir. 2000)). The attorneys' fees were appropriately decided via posttrial motion.

Cross-Appeal: Jury Compromise and Special Verdicts

¶15 In its cross-appeal, Michels argues that the circuit court erred in failing to grant a new trial on the grounds of jury compromise, erred in failing to change the jury’s special verdict answer regarding engineering fees, and erred in failing to change the special verdict answer awarding the Village money for tunnel maintenance. We briefly relate the facts relevant to the cross-appeal, recite the standard of review and then affirm the circuit court.

¶16 On the special verdict, the jury answered “no” to whether Michels was entitled to extra time or compensation under the contract due to differing conditions. The jury answered “yes” that Michels had breached the contract by failing to complete the work on time. The jury then awarded the Village \$209,750 in liquidated damages to compensate for the failure to complete the work on time. Regarding whether the Village was entitled to additional damages for engineering services, the jury awarded the Village \$54,556.71 for Anderson’s fees. Finally, the jury found that Michels breached the contract by causing a sag in the tunnel and awarded the Village \$52,900 for the diminished value of the tunnel.

¶17 Our review of the circuit court’s decision on all three points on cross-appeal is deferential. See *Kubichek v. Kotecki*, 2011 WI App 32, ¶¶14, 29, 332 Wis. 2d 522, 796 N.W.2d 858, *review denied*, 2011 WI 89, 336 Wis. 2d 640, 804 N.W.2d 82. Regarding the motion for a new trial, “we will not disturb the circuit court’s decision absent an erroneous exercise of discretion.” *Id.* at ¶29. On a motion to change the jury’s verdict, “we view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence.” *Id.* at ¶14.

¶18 Michels' first point on cross-appeal concerns the jury's award of \$209,750, which was exactly half the Village's claimed liquidated damages. Michels, citing *Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 190 Wis. 2d 650, 529 N.W.2d 905 (1995), claims this award represents a compromise that "cannot stand," see *id.* at 675 n.34, entitling Michels to a new trial. Instead, the circuit court, relying on *Danner v. Auto-Owners Insurance*, 2001 WI 90, 245 Wis. 2d 49, 629 N.W.2d 159, and *Lagerstrom v. Myrtle Werth Hospital-Mayo Health System*, 2005 WI 124, 285 Wis. 2d 1, 700 N.W.2d 201, changed the special verdict answer to \$419,500 to conform to the evidence.

¶19 The circuit court did not err in changing the verdict to conform to the evidence rather than granting a new trial. In *Carlson*, the trial court ordered remitter on damages on the grounds that there was insufficient evidence to support the verdict. *Carlson*, 190 Wis. 2d at 670. The supreme court reversed, holding that the trial court had erred in failing to view the evidence most favorably to the verdict. *Id.* at 671. There was no new trial. *Id.* at 676. Reiterating the importance of the circuit court's examination of the verdict with respect to the evidence, *Danner* and *Lagerstrom* tell us the circuit court should change a verdict answer when it is not supported by the evidence. See *Lagerstrom*, 285 Wis. 2d 1, ¶96; *Danner*, 245 Wis. 2d 49, ¶¶76-77.

¶20 In our case, the circuit court examined the evidence to determine whether the jury's award made sense. Aside from the jury's verdict being one half of the award requested, Michels does not provide any facts to support its theory of jury compromise. The only evidence on these damages was that they totaled \$419,500, not \$209,750. The circuit court did not err in changing the answer.

¶21 Michels next argues the circuit court should have changed the special verdict answer awarding engineer fees because Dennis Anderson's work on the project was not attributable to defective work and therefore was not properly awarded under the contract. The circuit court upheld the jury's answer, indicating that there was ample evidence to support the jury's award. We agree. Anderson, a tunnel construction expert, was hired to oversee progress after Michels encountered trouble. Anderson testified that he saw several problems with the project, including those related to the grading difficulties that led to the sag. The jury could have reasonably concluded that in order to properly evaluate and determine whether to accept Michels' work, the Village had to take into account the history of the project. An essential component of that evaluation was Anderson's monitoring of the project and his advice to the Village regarding the defective work.

¶22 Finally, Michels' claims that the circuit court erred in failing to change the special verdict answer awarding the Village \$52,900 for the diminished value of the tunnel. The jury heard that the Village will need to have employees go into the tunnel, inspect it and possibly clean the below-grade portion. The Village argued to the jury that this maintenance will continue for the next fifty years.

¶23 Michels argues that tunnel maintenance costs are not a component of diminished value. We disagree. The jury was well within reason in believing the Village's figure for diminished value, including maintenance cost caused by the sag. Unexpected postconstruction maintenance will cause a shift in Village employee time that could have been used elsewhere, at a cost to the Village, which, in turn, diminishes the project's value. Such concrete evidence is welcome when struggling with a concept as hard to quantify as diminished value. *See*

Nowaczyk v. Marathon County, 205 Wis. 536, 541, 238 N.W. 383 (1931) (maintenance of required fences must be considered in determining diminution in value of farm caused by the extra fences). It is not our job, nor the circuit court's, to second guess the jury on this type of factual determination. See *Lellman v. Mott*, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996) (weight to attach to evidence is matter uniquely within the discretion of the finder of fact).

¶24 In conclusion, we reverse the circuit court's judgment awarding zero damages for attorneys' fees and remand to the circuit court for a determination of attorneys' fees in accordance with this opinion, including costs on appeal, to be awarded to the Village. We affirm on the cross-appeal.

By the Court.—Order affirmed; judgment reversed in part, affirmed in part and cause remanded with directions.

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

